To Be Argued By:
Michael Radine
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CTQ-2023-00002

Court of Appeals

STATE OF NEW YORK

ESTER LELCHOOK, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID MARTIN LELCHOOK, MICHAEL LELCHOOK, YAEL LELCHOOK, ALEXANDER LELCHOOK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DORIS LELCHOOK, MALKA KUMER, CHANA LIBA KUMER, MIRIAM ALMACKIES, CHAIM KAPLAN, RIVKA KAPLAN, BRIAN ERDSTEIN, KARENE ERDSTEIN, MA'AYAN ERDSTEIN, CHAYIM KUMER, NECHAMA KUMER, LAURIE RAPPEPPORT, MARGALIT RAPPEPORT, THEODORE (TED) GREENBERG, MOREEN GREENBERG, JARED SAUTER, DVORA CHANA KASZEMACHER, CHAYA KASZEMACHER ALKAREIF, AVISHAI REUVANE, ELISHEVA ARON, YAIR MOR, MIKIMI STEINBERG,

Plaintiffs-Appellants,

and

DORIS LELCHOOK,

Plaintiff,

(Caption Continued on the Reverse)

On Questions Certified by the United States Court of Appeals for the Second Circuit (USCOA Docket No. 21-975-cv)

BRIEF FOR PLAINTIFFS-APPELLANTS

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v.

FRANSABANK SAL, MIDDLE EAST AFRICA BANK SAL, BLOM BANK SAL, BYBLOS BANK SAL, BANK AUDI SAL, BANK OF BEIRUT SAL, LEBANON AND GULF BANK SAL, BANQUE LIBANO-FRANCAISE SAL, BANK OF BEIRUT AND THE ARAB COUNTRIES SAL, JAMMAL TRUST BANK SAL, JOHN DOES 1-50,

Defendants,

and

SOCIETE GENERALE DE BANQUE AU LIBAN SAL,

Defendants-Appellees.

STATEMENT OF RELATED LITIGATION

The following three litigations are related as of the date of this filing (in addition to the appeal pending in the United States Court of Appeals for the Second Circuit, *Lelchook v. Société Générale de Banque au Liban S.A.L.*, No. 21-975):

1. *Kaplan v. Lebanese Canadian Bank SAL*, No. 08-cv-7253 (GBD) (KHP) (S.D.N.Y.) (ongoing)

2. *Lelchook v. Lebanese Canadian Bank SAL*, No. 18-cv-12401 (GBD) (KHP) (S.D.N.Y.) (ongoing)

3. *Licci v. Lebanese Canadian Bank, SAL*, Index No. 505931/15 (Sup. Ct. Kings County) (dismissed)

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PRELIMINARY STATEMENT

This certified question case asks this Court to determine whether, and under what circumstances, a corporation that "acquires the other's assets *and, expressly, all of its liabilities*," also inherits the other's jurisdictional status in New York (a doctrine called "successor jurisdiction"). A428 (emphasis in original), A439. The district court held that successor jurisdiction is limited to mergers, not the acquisition of all assets and liabilities. On appeal, the Second Circuit found that the rule the district court applied misread the available case law on the issue and created the potential for "serious abuse" if corporations can evade their liabilities in New York simply by transferring their assets and liabilities to entities out of the reach of New York courts. A429 & n.18, A437. As Plaintiffs-Appellants ("Plaintiffs") show below, the Circuit's concerns are correct and the case law in New York and elsewhere strongly support finding successor jurisdiction here.

This case stems from a terror campaign Hezbollah[1]—a U.S.-designated Foreign Terrorist Organization ("FTO")—waged against civilians in Israel. From July 12 until August 14, 2006, Hezbollah fired thousands of rockets and missiles at Israeli civilian population centers. One of these Hezbollah rockets struck and killed David Martin Lelchook, an American citizen, while he was riding a bicycle on a

[1] "Hezbollah" and "Hizballah" are both spellings of the same terrorist organization.

kibbutz in northern Israel. Many other U.S. citizens were physically injured or otherwise harmed by these rocket attacks. The Plaintiffs herein are the widow, daughters, and other family members of decedent David Martin Lelchook (and his estate), and 21 other American citizens who were harmed as a result of Hezbollah's 2006 rocket attacks. A20-21; A32-39.

In 2008, Plaintiffs sued Lebanese Canadian Bank, SAL ("LCB") under the Anti-Terrorism Act, 18 U.S.C. § 2333 ("ATA"), alleging that the bank was liable for the attacks because it knowingly provided financial services (including money laundering) for Hezbollah, much of it through correspondent bank accounts in New York. In 2011, the United States designated LCB a "financial institution of primary money laundering concern," in large part because of the financial services it provided to Hezbollah (the designation is commonly referred to as a "PATRIOT Act § 311 Designation"). Shortly after that designation, Appellee Société Générale de Banque au Liban S.A.L. ("SGBL") acquired LCB's business, including LCB's billions of dollars in assets, accounts and customer relationships, and other capital. It also expressly assumed all of LCB's liabilities—including those arising from LCB's years of supporting Hezbollah. However, SGBL had no intention of answering for those liabilities.

Because LCB claimed that it had been rendered "defunct, insolvent, and unable to pay any judgment rendered against it," Plaintiffs brought this action against

SGBL as the successor in liability to LCB. SGBL argued to the district court that, although the court had personal jurisdiction over LCB for claims arising from its years of money laundering for Hezbollah (including through New York correspondent bank accounts), it had no jurisdiction over SGBL. The district court agreed, and Plaintiffs appealed. As indicated above, the Second Circuit did not agree with the district court's reading of the law but found that this Court had not addressed the issue before. Because the Circuit could not "predict with confidence how this Court would resolve the issue," it certified to this Court the two questions presented below. A410.

The district court's holding is indeed incorrect. That court (adopting reasoning from another, similar case, *Bartlett v. Société Générale de Banque au Liban SAL*, No. 19-cv-7 (CBA) (VMS), 2020 WL 7089448 (E.D.N.Y. Nov. 25, 2020), erred in reading case law to hold that successor jurisdiction is limited to cases of merger. As the Second Circuit observed in *Lelchook*, the case law did *not* limit successor jurisdiction to mergers. Indeed, the "great weight of persuasive authority" in numerous jurisdictions holds that successor jurisdiction is premised on the assumption of liabilities. In fact, the reason that mergers result in successor jurisdiction is *because* the merged entity is "subject to all the liabilities of the absorbed corporation." *Lelchook*, A437 (quoting *U.S. Bank Nat'l Ass'n v. Bank of Am. N.A.*, 916 F.3d 143, 156 (2d Cir. 2019)). Here, SGBL has *expressly* assumed all

of LCB's liabilities, leaving it unable to pay any judgments. Thus, the same result should obtain: SGBL inherits LCB's jurisdictional status.

QUESTIONS PRESENTED FOR REVIEW

1. Under New York law, does an entity that acquires all of another entity's liabilities and assets, but does not merge with that entity, inherit the acquired entity's status for purposes of specific personal jurisdiction?

2. In what circumstances will the acquiring entity be subject to specific personal jurisdiction in New York?

JURISDICTIONAL STATEMENT

The Second Circuit certified two questions in this case to this Court, *see* A436-40, which this Court accepted, *see* A441-42. This Court has jurisdiction over the certified questions pursuant to 22 N.Y.C.R.R. § 500.27(a).

STATEMENT OF THE CASE

I. Background

A. Hezbollah and the 2006 Rocket Attacks

Hezbollah is one of the most lethal terrorist groups in the world, and has been a U.S.-designated FTO since 1997. As the U.S. State Department explained in 2010 testimony before a Senate subcommittee:

> Hizballah remains the most technically-capable terrorist group in the world and a continued security threat to the United States. Hizballah is responsible for some of the deadliest terrorist attacks against Americans in history …. Hizballah remains today one of the best armed and most dangerous militias in the world. Its capabilities exceed those of the

> legitimate Lebanese security services and the United Nations Interim Force in Lebanon (UNIFIL).

A230.

Hezbollah not only targets Americans but also has as a defining goal the destruction of the State of Israel and its Jewish population. *See* A23-24. Hezbollah has carried out countless attacks against Israeli and Jewish civilians in Israel and abroad. *See* A25-26 (listing representative attacks on U.S. and Israeli interests). Among these attacks was a month-long campaign—between July 12 and August 14, 2006—when Hezbollah fired *thousands* of rockets and missiles at civilians in northern Israel. A32.

On August 2, 2006, estate Plaintiff David Martin Lelchook, a 52-year-old American citizen, was killed by one of these rockets while he was riding his bicycle in Kibbutz Saar in the north of Israel. A33. Other Plaintiffs were physically and psychologically harmed by the month-long barrage of rockets. A34-80.

As a sophisticated and complex terrorist organization, Hezbollah relies on generating a consistent flow of revenue through various, mostly illicit channels. A great deal of it comes from its patron, the U.S.-designated State Sponsor of Terrorism Iran; however, Hezbollah has also generated vast amounts of revenue itself through narcotics trafficking, diamond smuggling, money laundering, and other criminal activities. A231, 236-38. As explained below, LCB played a critical role in laundering those ill-gotten revenues for Hezbollah.

B. LCB and Its Role as a Primary Hezbollah Bank

Before its PATRIOT Act § 311 Designation, LCB was Lebanon's eighth-largest bank. A237. It maintained approximately 35 branches throughout Lebanon. *Id.* As of late 2010, LCB's total assets were worth nearly $6 billion. A64. *See also* A237 (reporting 2009 assets of over $5 billion). It held controlling interests in a number of subsidiaries, including other Lebanese financial institutions and Prime Bank Limited of Gambia. *Id.*

LCB was also a key bank for Hezbollah. It held many of Hezbollah's most significant accounts and knowingly provided illegal assistance to Hezbollah's narcotics trafficking, diamond smuggling, and money laundering schemes. A237-38. As a result of that conduct, the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") issued a proposed ruling on February 10, 2011, with the effect of designating LCB "a financial institution of primary money laundering concern"—*i.e.*, a PATRIOT Act § 311 Designation. A215-16. *See also* A297 (reporting that FinCEN found that LCB "helped launder up to $200 million a month for a Lebanese-based drug smuggling organization with ties to Hezbollah").

According to the Department of Justice, LCB "knowingly conducted business with Hizballah-controlled entities and individuals and entities linked to, among other things, African diamond smuggling, money laundering, and narcotics trafficking." A237-38. It maintained banking relationships with two entities the U.S. Treasury

Department called "Hizballah's unofficial treasury, holding and investing its assets and serving as intermediaries between the terrorist group and mainstream banks." A238. It also maintained relationships with Lebanese exchange houses central to Hezbollah's money laundering operations, "despite substantial violations of LCB's anti-money laundering and compliance policies," including acting as one exchange house's primary source of U.S. dollars. A244-45.

LCB was the "favored bank" for Hezbollah narcotics kingpin Ayman Joumaa, "particularly for illicit banking activity," moving 94% of the tens of millions of dollars Joumaa originated from 2006-2011. A244. It did the same for Nazem Ahmad, a Hezbollah financier accused of money laundering and diamond smuggling in a 2002 U.N. Security Council report on the plundering of the natural resources of the Democratic Republic of the Congo. A241.[2] LCB saw the report, and "stated that 'we consider such allegation as part of the propaganda and war launched by the Jewish state against Lebanon,' and authorized an increase in credit limits for Ahmad." *Id.* LCB also moved approximately $230 million for another one of Hezbollah's principal money laundering schemes. A246. Much of this money laundering activity

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[2] Ahmad was later designated a Specially Designated Global Terrorist. *See* Press Release, U.S. Dep't of the Treasury, *Treasury Designates Prominent Lebanon and DRC-Based Hizballah Money Launderers* (Dec. 13, 2019), *available at* https://home.treasury.gov/news/press-releases/sm856.

for Hezbollah was conducted through correspondent accounts at financial institutions in New York. *See, e.g.*, A213, ¶ 1; A217, ¶ 9; A250, ¶ 64; A252 ¶ 68.

The bank also granted Hezbollah entities and individuals exemptions from cash transaction reporting requirements. A241-42. These exemptions permitted Hezbollah members to move hundreds of thousands of dollars *per day* undetected straight from the airport, where LCB maintained a branch. A242. For all of these activities, according to the U.S. government, LCB knew the funds were "the proceeds of illegal activities," structured "to conceal and disguise the true source, nature, ownership, and control of those proceeds," and "that this money laundering scheme benefitted Hizballah." A246.

C. SGBL's Acquisition of LCB

LCB's PATRIOT Act § 311 Designation, which prohibited U.S. financial institutions from maintaining correspondent accounts for LCB, threatened to severely impair its business, leading to its sale to SGBL. In September 2011, SGBL completed its acquisition of LCB, for a purchase price of $580 million.[3] A140. Pursuant to the Sale and Purchase Agreement, SGBL acquired LCB's entire business—meaning, all assets and all liabilities, defined as broadly as possible. The assets included, "*inter alia*":

> any and all rights, titles and interests of [LCB] in and to the Properties, assets, and rights of every nature, kind and description, tangible and

[3] Unless otherwise stated, all money amounts are in U.S. dollars.

> intangible whether real, personal or mixed, whether accrued or unaccrued, absolute or contingent, disputed or undisputed, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, vested or unvested, determined, determinable or otherwise as at the Completion Date, to the extent they relate to [LCB]'s Business, including without limitation: Advances, Commitments, Assumed Contracts, Disclosure Documents, Securities, Leases, Owned Properties, IT System, Equipment, Supplier Contracts, Books, good will, shares held by [LCB] in its Subsidiaries, profits for the fiscal years 2010 and 2011 and all rights in connection with the Business, all as at the Completion Date.

A61, ¶ 2.2.

SGBL's assumption of LCB's liabilities was likewise sweeping and all inclusive, encompassing, "*inter alia*":

> any and all of [LCB]'s liabilities and/or obligations and/or debts of any kind, character or description, absolute or contingent, accrued or unaccrued, disputed or undisputed, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, vested or unvested, determined, determinable or otherwise, to the extent they relate to [LCB]'s Business, all as at the Completion Date.

Id., ¶ 2.3.

In late 2011, the United States brought a civil forfeiture action against LCB in the U.S. District Court for the Southern District of New York ("SDNY"), asserting that LCB was liable to the government for the $230 million LCB processed through New York for a Hezbollah money laundering scheme. *United States v. Lebanese Canadian Bank SAL*, No. 11-cv-09186 (S.D.N.Y. filed Dec. 15, 2011) ("*LCB Forfeiture Action*"), ECF No. 1 & 1-1. These were "[f]unds that were wired to [LCB]

and then further wired to correspondent bank accounts in the United States, including in the Southern District of New York." A250, ¶ 64; A282, ¶ 120.

In August 2012, the United States seized $150 million of SGBL's purchase payment to LCB. That money had been placed in an escrow account at a third bank in Lebanon, and the United States seized the equivalent amount from the escrow bank's New York correspondent accounts as traceable to the assets of LCB pursuant to 18 U.S.C. § 981(k). A246-47.

On March 4, 2013, SGBL filed a claim in that SDNY action seeking to recover a portion of the escrow funds. *LCB Forfeiture Action*, ECF Nos. 436 (original claim, for $72 million plus interest), 442 (first amended claim, for $90 million plus interest). SGBL also filed a verified answer to the United States' verified amended complaint, asking the SDNY court "to protect its interest and claim to funds in a certain escrow account pursuant to a Sale and Purchase Agreement … with Defendant Lebanese Canadian Bank," and "demand[ing] trial by jury with respect to each and every claim or claims asserted against the Defendants' properties." ECF No. 453 at 1, 14. The United States, LCB's liquidators, and SGBL eventually settled the case, pursuant to which the United States seized $102 million. A146.

SGBL's acquisition of LCB evidently benefited SGBL tremendously. According to a SGBL press release, the acquisition "further cement[ed] [SGBL's] position as one of the leading banks in the region." A295. It announced that, as a

result of the acquisition, SGBL increased its total assets to $11 billion, its total deposits to $8.6 billion, its total loans to $3 billion, and its physical network to 101 branches and 135 ATMs. *Id.* The LCB branches it acquired were rebranded under SGBL's signage, colors, and branding. *Id.* And Riad Salameh, the governor of the Central Bank of Lebanon, announced that SGBL "has pledged to keep all LCB employees." A298.

But whatever remaining portion of the purchase price that LCB received was evidently gone by early 2017 (at the latest), when LCB represented to the United States Supreme Court that it had been rendered "defunct, insolvent, and unable to pay any judgment rendered against it." A54, ¶ 129 (quoting LCB's Brief in Opposition to Certiorari in *Licci v. Lebanese Canadian Bank*, No. 16-778, 2017 WL 712025, at *4 (U.S., filed Feb. 17, 2017)). Thus, Plaintiffs—more than a decade into their legal battle against LCB—brought this suit against SGBL in 2019 to attempt to find redress for their injuries.

II. Relevant Proceedings

A. Plaintiffs' Suits Against LCB and SGBL

In 2008, dozens of victims of Hezbollah's rocket attacks, including 18 of the Plaintiffs here, filed suit against LCB and its New York correspondent bank, American Express Bank ("Amex Bank"), in New York County Supreme Court, asserting non-federal claims under Israeli law. *Licci, et al. v. American Express Bank*

Ltd., et al., Index No. 109548/08 (N.Y. County). Amex Bank then removed the action to federal court. *Licci, et al. v. American Express Bank Ltd., et al.*, No. 08-cv-7253 (GBD) (S.D.N.Y.) ("*Licci*"). After removal, the *Licci* plaintiffs filed an amended complaint, asserting claims against LCB under the ATA and various non-federal causes of action.[4]

Both LCB and Amex Bank moved to dismiss for failure to state a claim, and LCB also contested personal jurisdiction. On March 31, 2010, the district court dismissed the *Licci* action against Amex Bank for failure to state a claim and dismissed the action against LCB for lack of personal jurisdiction. *Licci v. Am. Exp. Bank Ltd.*, 704 F. Supp. 2d 403, 408 (S.D.N.Y. 2010).

On appeal, the Second Circuit certified the question of personal jurisdiction over LCB to this Court. *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50 (2d Cir. 2012). This Court found that the New York long arm statute, N.Y. C.P.L.R. § 302(a)(1), reached LCB due to LCB's purposeful availment of New York correspondent accounts to process transfers on behalf of Hezbollah. *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327, 339-41 (2012). The Second Circuit then found that exercise of personal jurisdiction over LCB comported with due

[4] The original plaintiffs in *Licci* also included several dozen Israeli and Canadian citizens who had been harmed in the 2006 Hezbollah rocket attacks. Their claims were ultimately dismissed in 2016 for reasons not relevant here. *Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 219 (2d Cir. 2016).

process, and reversed the dismissal of LCB and remanded the case. *Licci v. Lebanese Canadian Bank*, *SAL*, 732 F.3d 161, 165 (2d Cir. 2013).

On January 2, 2019, Plaintiffs filed this action against SGBL as LCB's successor and other banks in the U.S. District Court for the Eastern District of New York. SGBL moved to dismiss for lack of personal jurisdiction and failure to state a claim. The district court granted the motion to dismiss on personal jurisdiction grounds, reasoning that successor jurisdiction occurred *only* in cases of merger, which had not occurred here. A402-03.[5] Plaintiffs timely appealed to the Second Circuit Court of Appeals. A404.

B. The Second Circuit's Decision

On appeal, the Circuit found that the district court misread the case law it relied on in dismissing Plaintiffs' complaint on personal jurisdiction grounds. The Circuit explained that "the relevant New York cases do not hold that successor jurisdiction lies 'only' when there is a merger." *Lelchook*, A429-30. It also determined that "SGBL relies (as did the district court) on decisions of the New York appellate courts and federal courts that do not address the particular theory that Plaintiffs advance." A419.

[5] Plaintiffs voluntarily dismissed the other Defendants; SGBL is the only remaining Defendant in this case.

Instead, the Circuit explained the general rule that mergers precipitate successor jurisdiction because they involve the transfer of liabilities, whereas "a corporation that purchases the assets of another corporation is generally not liable for the seller's liabilities." A418 (quoting *New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 209 (2d Cir. 2006) (Sotomayor, J.)). However, it noted that New York law recognizes four exceptions to that rule:

> a buyer of a corporation's assets will be liable as its successor if: (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations.

Id. (quoting *Nat'l Serv. Indus.*, 460 F.3d at 209). SGBL's express acquisition of "all" of LCB's liabilities would satisfy the first exception. The question for the Circuit then was whether New York law recognized that exception as a basis for finding successor jurisdiction.

The Circuit found that the case law cited by the parties did not definitively answer the question. However, the Circuit identified New York cases and federal cases applying New York law supporting successor jurisdiction for three of the exceptions and no cases suggesting that New York would not apply successor jurisdiction for the express assumption of liabilities exception.

The Circuit first noted that the Third Department in *Semenetz v. Sherling & Walden, Inc.*, "'recognize[d] that in certain circumstances a successor corporation

"may inherit its predecessor's jurisdictional status,"'" and cited four cases in support of that proposition. A420 (quoting *Sementez*, 21 A.D.3d 1138, 1140–41 (3d Dep't 2005)). In the first, an SDNY district court held that "a successor may inherit its predecessor's jurisdictional status in several situations: for example, if there was a *de facto* merger or consolidation of the two entities or if the successor is a mere continuation of the predecessor." *Lelchook*, A421 (quoting *Société Generale v. Fla. Health Scis. Ctr., Inc.*, No. 03-cv-5615 (MGC), 2003 WL 22852656, at *4 (S.D.N.Y. Dec. 1, 2003)). The Circuit observed that these "two examples correspond to the second and third exceptions providing for successor liability," but leaving explicit assumption of liabilities unaddressed. *Id.* Two of the other cases were similarly inconclusive. *See* A421-22 (determining that *Applied Hydro-Pneumatics, Inc. v. Bauer Mfg.*, 68 A.D.2d 42 (2d Dep't 1979) found successor jurisdiction where the successor elected to complete its predecessor's contracts, and that *Abbacor, Inc. v. Miller*, No. 01-cv-0803 (JSM), 2001 WL 1006051 (S.D.N.Y. Aug. 31, 2001) found successor jurisdiction where the successor was an alter ego of its predecessor).

The fourth case, *Schenin v. Micro Copper Corp.*, 272 F. Supp. 523, 526 (S.D.N.Y. 1967), added another of the exceptions, "fraud." *Lelchook*, A423. The Circuit noted that it also provided some facial support for the express assumption of liabilities theory, but ultimately remained as inconclusive as the other cases. In *Schenin*, the SDNY court observed that, "because there had been 'no statutory

merger between Micro and Vanura,' the plaintiff's argument 'must rest on an assumption of Vanura's liabilities by Micro.'" *Id.* (quoting *Schenin*, 272 F. Supp. at 526). But no such assumption of liabilities occurred in that case, so even to the extent *Schenin* "might be read to suggest that an assumption of liabilities would have supported … a successor-jurisdiction theory," it ultimately "sheds no more light on the validity of" Plaintiffs' theory than the cases described above. *Id.*[6] In any event, the Second Circuit concluded that "*Schenin* is not a New York state court decision" and in fact "appears to take a stricter view than do more recent decisions of when under New York law a corporation may be a successor for jurisdictional purposes." A423-24.

The Second Circuit also reviewed two other New York cases raised by the parties and found them unhelpful either way. In *BRG Corp. v. Chevron U.S.A., Inc.*, the plaintiffs did not contest the limited reach of *Semenetz*, and the Fourth Department simply concluded the issue was "novel and unsettled." *BRG Corp.*, 163 A.D.3d 1495, 1496 (4th Dep't 2018). *See Lelchook*, A424-25.

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[6] In its brief to the Second Circuit, SGBL appears to have read *Schenin* to mean that even if Micro had assumed Vanura's liabilities, the plaintiff "could sue Micro only where it could be found." *Schenin*, 272 F. Supp. at 526. SGBL misreads the case—the *Schenin* court explained that where "plaintiff could sue Micro *directly*—for example, on a third party beneficiary theory," it would have to do so where Micro could be found. *Id.* (emphasis added). It goes without saying that successor jurisdiction is not limited to jurisdictions where a defendant is found.

The last and most recent of these cases, *Matter of Gronich & Co. v. Simon Prop. Grp., Inc.*, distinguished for successor jurisdiction purposes mergers from "where the 'successor' has merely *acquired the assets* of the predecessor company." 180 A.D.3d 541 (1st Dep't 2020) (emphasis added). But, as the Second Circuit explained, "SGBL did not acquire merely LCB's assets; it also acquired all of its liabilities. Accordingly, in our view, *Gronich* does not directly support the position of either party in this case." A426.

After a review of the New York case law, the Second Circuit concluded that "New York courts have not squarely addressed a situation in which a successor acquires all of a predecessor's assets and liabilities, but does not do so through either a statutory merger or a transaction that meets established standards for a *de facto* merger [or mere continuation or fraud]." A427.

The Circuit also reviewed the federal cases the parties raised. Only two cases squarely addressed New York law, but neither was definitive. In *U.S. Bank*, the Second Circuit analyzed New York law on successor jurisdiction (in dicta) but did not address the situation here:

> As with the New York precedents it discusses, the *U.S. Bank* majority distinguishes between asset acquisitions and mergers, but does not address the cloudy middle ground, where the two entities do not formally *merge*, but the one acquires the other's assets *and, expressly, all of its liabilities,* and the other continues as a corporate entity with assets from its sale.

Lelchook, A428 (emphasis original).

In *Bartlett*, other victims of Hezbollah's terrorism brought ATA claims against 13 Lebanese banks, including SGBL, which the plaintiffs sued both for its own conduct and for its assumption of LCB's liabilities. The district court rejected the plaintiffs' successor jurisdiction arguments because "the plaintiffs did not allege that a merger occurred, nor did they allege an essential element of a merger, 'continuity of ownership,'" which it held was necessary to establish successor jurisdiction under New York law. *Lelchook*, A429 (discussing *Bartlett*). "Crucially, relying on the dicta in *U.S. Bank*, the [*Bartlett*] court reasoned that it was *only* because a successor by merger is deemed by operation of law to be both the surviving corporation and the absorbed corporation that the successor would incur the predecessor's jurisdictional status." *Id.* (quotation marks omitted).

However, the Circuit explained that the *Bartlett* court erred because "*U.S. Bank* and the relevant New York cases do not hold that successor jurisdiction lies 'only' when there is a merger." A429-30. The error is particularly noteworthy here because the *Lelchook* district court "followed *Bartlett* and adopted the same reasoning." A429 n.18. *See also id.* n.16 (acknowledging that the lower courts could not certify questions to this Court, and thus "we do not fault either [the *Bartlett* or *Lelchook*] district court for fulfilling its duty by attempting to predict how New York would resolve the ambiguities of this 'novel and unsettled' area of law.") (quoting *BRG Corp.*, 163 A.D.3d at 1496).

In sum, the Circuit's review of "New York precedents" showed that they tended to find successor jurisdiction in cases of mergers but not where the successor acquires the predecessors' assets *alone* (although cases do support finding successor jurisdiction in cases of de facto mergers, mere continuations, and fraud). They do not clearly address "the cloudy middle ground where the two entities do not formally *merge*, but the one acquires the other's assets *and, expressly, all of its liabilities,* and the other continues as a corporate entity with assets from its sale." A428 (emphasis in original). Thus, the Circuit certified to this Court the two questions presented for review here. A439.

SUMMARY OF ARGUMENT

Successor jurisdiction is appropriate where a buyer has expressly assumed all of the seller's liabilities because successor jurisdiction is premised on the assumption of liabilities. The reason mergers and de facto mergers result in the inheritance of an acquired corporation's jurisdictional status—but asset acquisitions alone do not—is because in a merger or de facto merger the acquiring corporation "automatically" assumes the seller's liabilities. *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 44–45 (2d Cir. 2003). Conversely, "the purchaser of a corporation's assets does not, as a result of the purchase, ordinarily become liable for the seller's debts." *Id.* at 45. Here, however, SGBL has "expressly … assumed the predecessor's tort liability," in addition to all of its assets. *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 245

(1983). The acquisition of all assets *and all liabilities* is thus functionally the same as a de facto merger for the purposes of determining successor jurisdiction.

The *Lelchook* district court erroneously held that the relevant distinction between a merger/de facto merger and an asset acquisition is that both the seller and buyer are deemed by operation of law to "survive" in the merged entity, whereas the seller and buyer continue to exist separately in an asset acquisition. A401-03. *See also Bartlett*, 2020 WL 7089448, *16. But the "survival" of the merged entity is not *itself* the basis for inheriting jurisdiction—that "survival" only provides the basis for inferring the successor's assumption of the predecessor's liabilities: "Upon a merger between two (or more) corporations, each of the merger partners is deemed to survive in the merged entity, *and the surviving entity is therefore liable for the liabilities of the corporations that joined in the merger*." *U.S. Bank*, 916 F.3d at 155–56 (emphasis added). And as the Second Circuit explained in *Lelchook*, the *Bartlett* court erred in reading *U.S. Bank* as limiting successor jurisdiction to mergers/de facto mergers.

Moreover, permitting the express assumption of all liabilities without inheriting jurisdictional status is "pregnant with the same possibility for abuse that we identified [in discussing mergers] in *U.S. Bank*," as the Second Circuit explained in *Lelchook*. A438. In ordinary asset purchases, the seller pays to the buyer the cash value of the buyer's assets, which the buyer's creditors can seek out: "the amount

paid for the assets would ordinarily be available to satisfy those debts, at least in part." *Cargo Partner*, 352 F.3d at 45. But where a buyer acquires *liabilities*, it generally sets off the purchase price by the cost of those liabilities. The seller thus presumably receives less than the full value of the assets it sold because the buyer is assuming liabilities as well. Unless jurisdiction travels with the liabilities assumed, buyers could effectively acquire assets at a discount while evading liabilities, and creditors would be left with diminished recourse.

ARGUMENT

I. This Court Should Hold that a Successor Inherits the Jurisdictional Status of Its Predecessor Where It Acquires All of Its Assets and Liabilities

A. Jurisdictional Status Is Inherited in Cases of Merger/de Facto Merger Because Those Doctrines Provide for Assumption of All Liabilities

The basis of successor jurisdiction is the successor's assumption of all of the predecessor's liabilities. Mergers/de facto mergers result in successor jurisdiction because the merged entity automatically inherits the predecessors' liabilities by operation of law. Conversely, a successor in an asset (or stock) acquisition does not automatically assume the predecessor's liabilities. Therefore, it stands to reason that when a corporation "acquires the other's assets *and, expressly, all of its liabilities*," *Lelchook*, A428 (emphasis in original), it inherits the other's jurisdictional status.

Thus, the Second Circuit, applying New York law, explained that a merger is a basis for inheriting personal jurisdiction because, "each of the merger partners is deemed to survive in the merged entity, *and the surviving entity is therefore liable for the liabilities of the corporations that joined in the merger*." *U.S. Bank*, 916 F.3d at 155 (emphasis added). The basis for the inheritance of jurisdictional status, "therefore," is the assumption of the predecessor's liabilities. *Id.* As the *U.S. Bank* court further explained:

> According to James D. Cox & Thomas Lee Hazen, 4 Treatise of the Law of Corporations § 22:8, "A distinguishing feature of a business combination carried out as a merger or consolidation is that by operation of law the surviving corporation is subject to *all the liabilities* of the acquired companies." "In contrast," the treatise explains, "when the combination is structured as an asset or stock purchase-sale, absent special circumstances, the acquiring company is subject only to those liabilities it has agreed to assume." *Id.*

Id. at 155-56 (emphasis added). It is because the successor corporation is "subject to all the liabilities of the absorbed corporation" that the Circuit could "see no reason to doubt that" the successor would be subject to suit for that liability in a forum where the predecessor was. *Id.* at 156.

Acquiring assets alone is not a basis for inheriting jurisdiction because liabilities do not *automatically* come with assets. Of the three primary ways "in which a corporation can acquire the business of another"—buying the seller's capital stock, buying the seller's assets, or merging with the seller to form a single corporation—"[o]nly in the third case, when two corporations merge to become a

single entity, is the successor corporation automatically liable for the debts of both predecessors; it *is* both predecessors." *Cargo Partner*, 352 F.3d at 44–45. Conversely, "the purchaser of a corporation's assets does not, as a result of the purchase, ordinarily become liable for the seller's debts." *Id.* at 45 (citing *Schumacher,* 59 N.Y.2d at 244–45). (A buyer of capital stock "does not become liable for the seller's debts unless the stringent requirements for piercing the corporate veil are met." *Id.*)

Thus, the relevant distinction between a merger and the acquisition of assets is the (automatic) assumption of liabilities. However, "New York recognizes four common-law exceptions to the rule that an asset purchaser is not liable for the seller's debts." *Id.* These are:

> (1) a buyer who formally assumes a seller's debts; (2) transactions undertaken to defraud creditors; (3) a buyer who de facto merged with a seller; and (4) a buyer that is a mere continuation of a seller.

Id. (citing *Schumacher*, 59 N.Y.2d at 245). *See also Lelchook*, A420 n.10 (characterizing these as the "four traditional exceptions that create successor liability."). Where these exceptions occur, an asset purchaser assumes the predecessor's liabilities—and thus its jurisdictional status.

For example, the *Lelchook* court observed that the de facto merger exception "would be sufficient to subject a successor to personal jurisdiction" under recent New York case law. A424 n.13. And, to be clear, de facto merger is predicated on

ensuring that certain acquirers cannot escape the assumption of liabilities: "The concept upon which [the de facto merger] doctrine is based is 'that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased.'" *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 575 (1st Dep't 2001) (quoting *Grant-Howard Assoc. v. General Housewares Corp.*, 63 N.Y.2d 291, 296 (1984)).[7]

The same is true for the "mere continuation" exception. The First Department—citing *Schumacher*—affirmed a decision finding that a mere continuation of a defendant corporation "may be subject to successor jurisdiction." *In re New York City Asbestos Litig.*, 112 A.D.3d 529, 530 (1st Dep't 2013) (citing *Schumacher*, 59 N.Y.2d at 244-245). *See also Lelchook*, A421 (noting that "mere continuation" was a basis for successor jurisdiction identified in *Fla. Health Scis. Ctr.*, 2003 WL 22852656, at *4). In the affirmed decision, the Supreme Court of New

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[7] As described above, SGBL made claims in the SDNY district court over funds relating to its acquisition of LCB. That is to say, SGBL has used the forum jurisdiction to recover funds payable to LCB but will not answer for LCB's liabilities here. *See Cole v. Caterpillar Mach. Corp.*, 562 F. Supp. 179, 180 (M.D. La. 1983) ("Since Americas could have availed itself of the benefits of the forum in order to sue for monies owed its corporate predecessor, it seems only fair that Americas, deriving benefits from the forum, should also be expected to answer for liabilities incurred by the alleged negligent actions of its predecessor."); *Jeffrey v. Rapid Am. Corp.*, 529 N.W.2d 644, 655 (Mich. 1995) ("It seems only fair that once this state's courts were opened to Glen Alden by virtue of old Carey's business in this state that they remain open for the victims of old Carey's alleged negligent acts.").

York County reviewed case law on successor jurisdiction and concluded that "[t]hese cases confirm that so-called successor jurisdiction may be imputed where a corporation is a 'mere continuation' of another company or where there is a de facto merger between two entities." *Herlihy v. A.F. Supply Corp.*, 2013 N.Y. Misc. LEXIS 35, *10-11 (Sup. Ct. N.Y. County, Jan. 7, 2013).

And, finally, the same is also true for the fraudulent transfer exception. The First and Second Departments have held that New York courts have jurisdiction over a foreign corporation due to transactions a domestic corporation conducted in order to "fraudulently place [its] assets beyond its creditors' reach." *Ed Moore Advert. Agency, Inc. v. I.H.R., Inc.*, 114 A.D.2d 484, 486 (2d Dep't 1985). *See also Corpuel v. Galasso*, 268 A.D.2d 202, 202 (1st Dep't 2000) (same); *WCVAWCK-Doe v. Boys & Girls Club of Greenwich, Inc.*, 216 A.D.3d 1, 11 (2d Dep't 2023) (analyzing *Ed Moore Advert. Agency* with approval).

The result should be no different for the exception at issue here, where an asset purchaser "expressly … assumed the predecessor's tort liability." *Schumacher*, 59 N.Y.2d at 245. As the Second Circuit noted, "*U.S. Bank* and the relevant New York cases" only suggest that "asset acquisitions, *on their own*, are not sufficient to implicate successor jurisdiction." *Lelchook*, A429-30 (emphasis added). When accompanied by the express assumption of all liabilities, an asset acquisition should be sufficient, just as the other exceptions to non-liability are.

As another treatise, discussing "the matter of imputing the contacts of a predecessor to a successor corporation," explains:

> The basic test seems to gear the jurisdiction question to whether, as a substantive matter, the successor corporation may be liable for the obligations of the predecessor. The mere fact that a corporation acquires all the assets of another does not necessarily mean it will be liable for the obligations of its predecessor. If it is liable for the predecessor's obligations, however, it will be subject to personal jurisdiction in a suit to enforce the obligation if the predecessor would have been subject to such jurisdiction.

2 Jurisdiction in Civil Actions § 7.03 (2022). *See id.* at n.43 (citing cases).

Here, of course, SGBL "expressly assumed" *all* of LCB's liabilities, including tort liabilities. And it did so as broadly as possible, acquiring, "*inter alia* … any and all of [LCB]'s liabilities and/or obligations and/or debts of any kind, character or description, absolute or contingent, accrued or unaccrued, disputed or undisputed, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, vested or unvested, determined, determinable or otherwise." A61, ¶ 2.3.

B. Successor Jurisdiction Is Not Premised on the Predecessor's "Survival" in the Merged Entity

The alternative view articulated by the district courts in *Lelchook* and *Bartlett* and urged by SGBL in its arguments to the Second Circuit would be that merger results in successor jurisdiction simply because the predecessor entity "survived" in the merged entity, rather than because of the concomitant assumption of liabilities. Under this theory, the assumption of assets—even along with *all* liabilities, as

occurred here—would never result in successor jurisdiction because two separate entities still technically exist post-acquisition.

To reach that conclusion, the district court in *Bartlett* erroneously read *U.S. Bank* to limit successor jurisdiction to mergers and de facto mergers to the exclusion of the other business combinations where both seller and buyer survive as separate entities, at least nominally. In doing so, the *Bartlett* court erroneously read *U.S. Bank* to mean that that it was "*only* 'because a successor by merger is deemed by operation of law to be both the surviving corporation and the absorbed corporation' that the successor would incur the predecessor's jurisdictional status." *Lelchook*, A429 (quoting *Bartlett*, 2020 WL 7089448, at *16) (emphasis supplied in *Lelchook*).

The Second Circuit explained, however, that "*U.S. Bank* and the relevant New York cases do *not* hold that successor jurisdiction lies 'only' when there is a merger." A429-30 (emphasis added). Thus, "survival" of the predecessor in the merged entity is not the sole basis for successor jurisdiction. Instead, those New York cases only "suggest that (1) merger is an *example* of a situation where successor jurisdiction is available, and (2) asset acquisitions, *on their own*"—i.e., without assuming liabilities—"are not sufficient to implicate successor jurisdiction." A430 (emphasis added).

In fact, as explained above, *U.S. Bank* is clear that the reason mergers result in successor jurisdiction is because merged entities assume the predecessors'

liabilities. The predecessors' survival in the merged entity is simply the legal mechanism through which a merged entity assumes those liabilities as a matter of law: "Upon a merger between two (or more) corporations, each of the merger partners is deemed to survive in the merged entity, *and the surviving entity is therefore liable for the liabilities of the corporations that joined in the merger*." *U.S. Bank*, 916 F.3d at 155 (emphasis added). Survival mandates an assumption of liabilities as a matter of law, and *that* is the basis for successor jurisdiction.

The *Bartlett* court similarly erred in "[f]ocusing on continuity of ownership" in assessing de facto merger. *Lelchook*, A430. Continuity of ownership is an element for establishing de facto merger, but it is not itself necessary to establish successor jurisdiction. As explained above, de facto merger is simply one of the four "exceptions to the rule that an asset purchaser is not liable for the seller's debts." *Cargo Partner*, 352 F.3d at 45. That is, establishing a de facto merger is only necessary where a buyer is *denying* the assumption of the seller's liabilities.

For example, the plaintiff in *In re New York City Asbestos Litigation* raised de facto merger *because* the plaintiff there could not allege the "purchaser's express or implied assumption of the seller's tort liabilities." *In re New York City Asbestos Litig.*, 15 A.D.3d 254, 256 n.3 (1st Dep't 2005). The purchaser "denie[d] that any such successor liability can be imposed on it," necessitating the de facto merger theory "so as to cause [purchaser] to succeed to [seller's] tort liabilities." *Id.* at 255.

Where a buyer expressly assumes those liabilities, as here, there is no need to show a de facto merger, and thus no reason to show continuity of ownership.

The *Bartlett* court likewise erred by holding that "continuity of ownership is essential" to successor jurisdiction "even if the buyer assumed the seller's liabilities." 2020 WL 7089448, at *16. It derived this conclusion from the First Department's observation in *In re New York City Asbestos Litigation* that the "assumption of liabilities necessary for uninterrupted business operations" (not tort liabilities) would be insufficient to show a de facto merger. But the *Bartlett* court has flipped the analysis—again, de facto merger is not the only means of establishing successor jurisdiction. The assumption of liabilities may not be sufficient to establish de facto merger, but it *can* be sufficient to establish successor jurisdiction. Again, the issue in *In re New York City Asbestos Litigation* was establishing successor jurisdiction where the buyer did *not* make an "express … assumption of the seller's tort liabilities," 15 A.D.3d at 256 n.3.

Moreover, the *Bartlett* and *Lelchook* district courts' reasoning that successor jurisdiction simply reflects the predecessor's survival is overly reductive—it goes without saying that a party cannot evade jurisdiction simply by going by an assumed name, whether legitimately, as in the case of a merger, or less so, such as by operating under an alter ego. *See, e.g.*, *Harvardsky Prumyslovy Holding, A.S.-V Likvidaci v. Kozeny*, 166 A.D.3d 494, 494 (1st Dep't 2018) (waiver of personal jurisdiction

defense applies to alter ego); *Transfield ER Cape Ltd. v. Indus. Carriers, Inc.*, 571 F.3d 221, 224 (2d Cir. 2009) (collecting cases under New York law that service on and personal jurisdiction over a party applies to its alter egos).

Many other courts reviewing both law in other jurisdictions and general common law have likewise found that successor jurisdiction is premised on successor liability: "The great weight of persuasive authority permits imputation of a predecessor's actions upon its successor" for personal jurisdiction purposes "*whenever* forum law would hold the successor liable for its predecessor's actions." *City of Richmond, Va. v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 454 (4th Cir. 1990) (quoting *Simmers v. American Cyanamid Corp.*, 576 A.2d 376, 385 (Pa. Super. Ct. 1990)) (emphasis in *Simmers*). *See also Jeffrey*, 529 N.W.2d at 653 (noting, even nearly 30 years ago, "the current national trend equating personal jurisdiction with liability"). Indeed, the Supreme Court of Michigan's *Jeffrey* decision is instructive, holding after extensive analysis that "the jurisdictional contacts of a predecessor can be imputed to a successor when the successor expressly assumes all liabilities of the predecessor" under both statutory and due process tests. *Id.* at 658.

Numerous courts and jurisdictions agree. *See, e.g.*, *Williams v. Bowman Livestock Equip. Co.*, 927 F.2d 1128, 1132 (10th Cir. 1991) ("A corporation's contacts with a forum may be imputed to its successor if forum law would hold the successor liable for the actions of its predecessor."); *Select Creations, Inc. v.*

Paliafito Am., Inc., 852 F. Supp. 740, 765 (E.D. Wis. 1994) ("If a court has personal jurisdiction over the predecessor in interest, once successor liability is established, personal jurisdiction over the successor in interest necessarily exists."); *Crawford Harbor Assocs. v. Blake Const. Co.*, 661 F. Supp. 880, 883 (E.D. Va. 1987) ("the practical feature of any theory of corporate successor liability … is that the consequences of the predecessor's acts are visited upon the successor," "including personal jurisdiction…."); *68th St. Site Work Grp. v. Airgas, Inc.*, No. 20-cv-3385 (SAG), 2021 WL 4255030, at *8 (D. Md. Sept. 16, 2021) ("[F]or personal jurisdiction to be exercised over Defendants …, Plaintiff must first have adequately pleaded a theory of successor liability."); *Synergy Ins. Co. v. Unique Pers. Consultants, Inc.*, No. 16-cv-611 (GCM), 2017 WL 5474058, at *2 (W.D.N.C. Nov. 14, 2017) (finding successor jurisdiction where buyer had "successor liability" buying "all of [seller's] assets").[8] *See also U.S. Bank*, 916 F.3d 158–59 (discussing the Seventh Circuit's position in *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 785 (7th Cir. 2003)).

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[8] Some of these cases involve mergers, but most list the same, well-established bases for assuming a predecessor's liabilities, including express assumption of liabilities, as happened here.

C. Premising Successor Jurisdiction on Assumption of All Liabilities Is Necessary to Prevent the "Serious Abuse" Identified in *Lelchook*

As the *U.S. Bank* court explained, the merger rule is important to prevent "serious abuse: a corporation liable to suit in a state in which it does not wish to be sued could simply arrange a merger with a dummy corporation and thus avoid being subject to an undesired jurisdiction in the state where its actions incurred the liability." 916 F.3d at 156. But as the Circuit explained in *Lelchook*, the potential for that same "serious abuse" also arises whenever a foreign corporation has acquired all of the assets and liabilities of one subject to jurisdiction here:

> The same warning [as in *U.S. Bank*] seems apt here. LCB's existence may offer scant promise to the hopeful tort claimant notwithstanding LCB's status as a defendant in a lawsuit pending in New York. *See Kaplan v. LCB []*, 999 F.3d [842,] 866–67 [2d Cir. 2021]. A fact-based rule that would allow LCB effectively to decouple its assets from its enforceable liabilities, for value, and SGBL to acquire "all assets and liabilities" but escape jurisdiction for claims asserting LCB's liabilities seems anomalous and pregnant with the same possibility for abuse that we identified in *U.S. Bank*, especially when significant aspects of the acquisition are not known.

A437-38.

The potential for "serious abuse" indeed exists in a purchase of all assets and *all liabilities*. Where a buyer purchases the assets but *not* liabilities for cash, "[t]he amount paid for the assets would ordinarily be available to satisfy those debts, at least in part." *Cargo Partner*, 352 F.3d at 45. As the *Cargo Partner* court explained:

> So long as the buyer pays a bona fide, arms-length price for the assets, there is no unfairness to creditors in thus limiting recovery to the

> proceeds of the sale—cash or other consideration roughly equal to the value of the purchased assets would take the place of the purchased assets as a resource for satisfying the seller's debts.

Id.

But where a buyer acquires assets *and* liabilities, the cash amount is diminished by the negative value of the liabilities. The seller receives less cash with which to pay creditors. To give a simplified example, if a seller's assets and liabilities netted to $0, a buyer could acquire the seller's business without paying any cash at all. In that scenario, a creditor or plaintiff would have no recourse from the seller, which has nothing left "as a resource for satisfying the seller's debts." *Id.* If the creditors or plaintiffs cannot reach the buyer—such as if it is in a faraway jurisdiction with laws that may nullify those debts and liabilities—then the buyer has achieved a double benefit: it purchased the seller's business at a discount without having to answer for the accompanying debts and liabilities. In the Second Circuit's terms, it has "decouple[d] its assets from its enforceable liabilities." A438.

And, of course, the creditors and plaintiffs are harmed. The seriousness of the abuse is compounded by the circumstances present here, as the Second Circuit explained:

> Further, *U.S. Bank* arose in the context of a contract claim against a successor corporation, with sophisticated business entities on each side of the transaction. Here, where the claimants allege grave personal injury for which LCB may bear responsibility, the concern that an abuse of form (if any there be) could allow avoidance of liability seems even more compelling. In these circumstances, New York might choose to

> give even closer scrutiny to the facts of the combination than in cases past, and less weight to the label affixed by the parties, so as to avoid allowing the seller to shed its liabilities while shielding the acquirer from "being subject to an undesired jurisdiction in the state where [the seller's] actions incurred the liability." *See U.S. Bank*, 916 F.3d at 156.

Id.

New York law protects plaintiffs and creditors from this sort of double dealing. For example, plaintiffs may sue both seller and buyer in New York, rather than attempt to decipher corporate acquisitions. "A sale of assets does not vitiate the original company's liability (see Business Corporation Law, § 1006); it may allow an injured plaintiff to proceed against a successor corporation…. In short, the injured party can elect to proceed against the defunct corporation, the successor corporation, or both." *Grant-Howard Assocs.*, 63 N.Y.2d at 297 (also citing *Schumacher*, 59 N.Y.2d at 245). *See* N.Y. Bus. Corp. Law § 1006 (stating that even a dissolved corporation can be sued for "any liability incurred before such dissolution").

Nor should Plaintiffs have to chase SGBL to Lebanon. First of all, as the *Bartlett* plaintiffs explained, pursuing SGBL to Lebanon for claims relating to Hezbollah "would be inadequate because Lebanon is a jurisdiction controlled by Hezbollah"; or, as the court described the argument, it is "the proverbial fox guarding the henhouse." *Bartlett v. Société Générale de Banque au Liban SAL*, No. 19-cv-7 (CBA) (VMS), 2021 WL 3706909, at *11 n.6 (E.D.N.Y. Aug. 6, 2021). Indeed, although the *Bartlett* court had initially suggested that "Plaintiffs may sue SGBL

where it is subject to general jurisdiction," 2020 WL 7089448, at *17 n.18, it later acknowledged that another defunct Lebanese bank ("JTB") and its liquidator "do not contend that Plaintiffs would be able to pursue their ATA claims against JTB in Lebanon" or that any Lebanese law "offers Plaintiffs the ability to assert claims against JTB for having aided and abetted terrorist attacks." *Bartlett*, 2021 WL 3706909, at *10.

And, unsurprisingly, the Second Circuit's concern for serious abuse appears to have materialized here. Far from retaining "the amount paid for the assets … to satisfy those debts, at least in part," *Cargo Partner*, 352 F.3d at 45, LCB professes to be broke. SGBL paid a purchase price of $580 million for LCB's assets and liabilities—an amount SGBL repeatedly referenced in its briefs to the Second Circuit, presumably to give the impression that LCB is very much a going concern that could, for example, pay a large judgment to Plaintiffs. But LCB itself represented to the United States Supreme Court that it had been rendered "defunct, insolvent, and unable to pay any judgment rendered against it." *See supra* at 11 (quoting A54, ¶ 129).[9]

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[9] In its brief to the Second Circuit, SGBL sneered that "Plaintiffs themselves created this circumstance and any purported injustice … by failing to pursue the $580,000,000.00 paid by SGBL to LCB," No. 21-975 (2d Cir. Nov. 8, 2021), ECF No. 50, at 37, as if the acquisition were not structured to avoid these very Plaintiffs. It similarly argued that Plaintiffs should have attempted to attach the funds the U.S. seized in the *LCB Forfeiture Action*. *See id.* at 41. But Plaintiffs had no judgment at the time, much less the legal right to attach funds the United States seized pursuant

SGBL's purchase price was far too low to cover LCB's liabilities, including both to its sundry creditors[10] *and* its foreseeable liabilities for its role as "a financial institution of primary money laundering concern," which was due to its extensive involvement with and support for Hezbollah. A51, ¶ 117 (quoting 76 Fed. Reg. 9403, Feb. 17, 2011). Indeed, a significant part of the purchase price was almost immediately sought by the United States government. The United States claimed LCB was "liable to the Government" *alone* for at least "$229,872,953," A282, and seized $150 million of the purchase price from a third-party correspondent account, settling ultimately for $102 million, A141, 146. SGBL not only knew of these liabilities, but it also filed a claim on the seized funds *in New York court* and was a party to the settlement. A141.

Nor should the scope of LCB's liabilities have been unforeseeable to SGBL in structuring the acquisition. LCB's profound misconduct was clear from its designation—and earlier. As of 2008, LCB already faced a case brought by the Plaintiffs here, premised on their injuries from the Hezbollah terrorist attacks. *See*

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to 18 U.S.C § 981(k). These misleading arguments only underscore the need to provide successor jurisdiction.

[10] For example, JTB, the similarly defunct Lebanese bank in *Bartlett*, claimed that its "liquidator must prioritize JTB's depositors in disbursing its assets" and "there will be no surplus" with which to pay any judgment because "they expect JTB's assets to pay about 90% of depositors, with the remainder to be paid by the Lebanese Government." *Bartlett*, 2021 WL 3706909, at *1.

Licci, et al. v. American Express Ltd., et al., Index No. 109548/08 (N.Y. County, filed 2008), *removed to federal court*, No. 08-cv-7253 (GBD) (S.D.N.Y.). The cases against LCB (and SGBL) that followed were just as entirely foreseeable, given that Hezbollah is one of the world's most lethal terrorist organizations (a fact known well in SGBL's home country of Lebanon, which is in large part dominated by Hezbollah). *See, e.g.*, A228 ("Hizballah is responsible for some of the deadliest terrorist attacks against the United States"). LCB now faces well over a thousand claims in this case and *Bartlett*, and many of those are likely assessable for millions of dollars *each*—*before* statutory trebling under the ATA. *See* 18 U.S.C. § 2333(a).

Moreover, the risk for serious abuse is not purely theoretical. In Plaintiffs' ongoing case against LCB, LCB has informed Plaintiffs (in a signed, so-ordered stipulation) that "all LCB account and transaction records were transferred to the custody of its successor [SGBL], and LCB did not retain copies…." Stipulation and Order Staying Discovery, *Kaplan v. LCB*, No. 08-cv-7253, ECF No. 233 at 2 (GBD)(KHP) (S.D.N.Y. ordered July 14, 2023), entered in *Lelchook v. LCB*, No. 18-cv-12401 (GBD) (KHP) (S.D.N.Y.) on July 17, 2023. According to LCB's counsel in that same signed stipulation, the SGBL "representatives" stated that "it would not provide LCB with copies of customer-specific records because such records are protected by Lebanese bank secrecy." *Id.* Thus, evidence of LCB's wrongdoing is purportedly solely in the possession of SGBL (which LCB calls its "successor") at

the same time SGBL asserts that New York courts lack personal jurisdiction over it (or as a third-party subpoena recipient). This Court need not decide whether this state of affairs was engineered by design. It is sufficient to note that the transfer of "customer-specific records" out of the reach of New York courts further frustrates "the hopeful tort claimant notwithstanding LCB's status as a defendant in a lawsuit pending in New York."

In sum, SGBL's acquisition of LCB's sizeable and very well-known liabilities was integral to the structure and valuation of its purchase, but SGBL nevertheless seeks to skirt the reach of New York's courts so it can evade its liability to Hezbollah's American victims.

D. Permitting Successors of Liability to Evade Successor Jurisdiction Does Not Serve New York's "Policies and Values"

The Circuit acknowledged that this Court must consider whether there are any countervailing state interests that justify distinguishing a merger or de facto merger (or mere continuation or fraud) from the express assumption of all liabilities for the purposes of inheriting jurisdictional status:

> To be sure, New York serves important state interests when it facilitates various forms of business combinations within its borders and adopts rules of liability and jurisdiction whose clarity makes them easy to follow and their results easy to predict. It may be that, when both the acquiring and acquired entities continue to exist as a formal matter, New York's long-arm statute was not intended to or simply does not permit—consistent with New York's policies and values—the exercise of jurisdiction over a nondomiciliary successor corporation.

Lelchook, A438.

New York's facilitation of various forms of business combinations (and their formal separateness) does not counsel a different result. As an initial matter, it is never in New York's interest to tolerate "serious abuse," as "a different rule would allow" here. *Lelchook*, A437. And as the Circuit noted, it is the rule SGBL urges that raised a "compelling" concern of "an abuse of form." A438. In fact, the Circuit noted that "[i]n these circumstances, New York might choose to give even closer scrutiny to the facts of the combination than in cases past, and less weight to the label affixed by the parties, so as to avoid allowing the seller to shed its liabilities while shielding the acquirer from 'being subject to an undesired jurisdiction in the state where [the seller's] actions incurred the liability.'" *Id.* (citing *U.S. Bank*, 916 F.3d at 156). And New York law already disregards the corporate form as necessary in finding de facto mergers, despite the nominal separate existence of buyer and seller.

But finding successor jurisdiction here would not ask the Court to disregard any corporate forms—it simply acknowledges SGBL's *counseled choice* to acquire all of LCB's liabilities. It is an express election akin to choosing to assume a contractual obligation containing a forum selection clause, which confers jurisdiction under New York law. *See Fla. Health Scis. Ctr., Inc.*, 2003 WL 22852656, *4. As the Supreme Court of Michigan noted, "[w]hen a successor corporation assumes the liabilities of its corporate predecessors, the successor in

effect consents to be held liable in the same locations where its predecessor would have been exposed, i.e., consents to the same jurisdictional qualities of its predecessor." *Jeffrey*, 529 N.W.2d at 653 (quoting *Simmers*, 576 A.2d at 390).

Nor are these New York's only interests, of course. Pertinent here, for example, is "New York's interest in monitoring banks and banking activity to ensure that its system is not used as an instrument in support of terrorism, money laundering, or other nefarious ends." *Licci*, 732 F.3d at 174. *See also Spetner v. Palestine Inv. Bank*, 70 F.4th 632, 646 (2d Cir. 2023) (same). Under SGBL's urged theory, LCB's assets are now effectively immunized from its victims, including a number of New Yorkers, by operation of its acquisition by SGBL. New York should not tolerate such an easy evasion of the consequences attendant to its bank monitoring functions.

II. The Successor Jurisdiction Rule Can Still Protect Corporations' Legitimate Expectations.

The Second Circuit's second question certified to this Court was:

> In what circumstances will the acquiring entity be subject to specific personal jurisdiction in New York?

A439.

The circumstances in which a seller should inherit the jurisdictional status of the buyer are limited to where the seller *chose* to assume all of the liabilities of the buyer, whether expressly, impliedly, or as an operation of law or conduct.

As shown above, a buyer can choose to acquire the liabilities of a seller in several ways: by choosing to merge with it, choosing to expressly assume its liabilities, undertaking transactions to defraud creditors, effectively merging with it (*i.e.*, a de facto merger), and existing as a mere continuation of the seller. Only when one of these circumstances materializes would the buyer inherit the seller's jurisdictional status.

In an asset acquisition, a successor only inherits the predecessor's jurisdictional status for the liabilities it chooses to acquire. A successor can limit its risk by identifying specific liabilities it is willing to acquire (presumptively factored into the purchase price). For example, the successor in *In re New York City Asbestos Litigation* appears to have assumed the predecessor's "liabilities necessary for uninterrupted business operations" but not its "tort liabilities." 15 A.D.3d at 259.

Here, however, SGBL consciously and deliberately acquired essentially the broadest possible set of LCB's liabilities, constituting "*inter alia* … any and all of [LCB]'s liabilities and/or obligations and/or debts of any kind, character or description, absolute or contingent, accrued or unaccrued, disputed or undisputed, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, vested or unvested, determined, determinable or otherwise." A61, ¶ 2.3. It is hard to imagine what liabilities are excluded from that definition, but that is a choice SGBL made.

The Court may in other circumstances not present here—such as where the buyer did not acquire *all* of the liabilities of the seller—also consider whether the acquisition has left the predecessor in an adequate position to pay its liabilities and debts. Where a buyer has minimal liabilities compared to its assets, the purchase price may largely reflect the value of its assets without much diminishment.[11] Or the seller may be otherwise indemnified—say, by a parent company or insurer—in a way that would actually protects creditors and plaintiffs.

The Court may also consider whether the buyer can be reasonably sued in another jurisdiction without loss of rights to plaintiffs. For example, the same "serious abuse" would occur if the buyer could force plaintiffs into a jurisdiction where their claims are invalid or have expired.

CONCLUSION

For the reasons stated above, this Court should answer the first certified question in the affirmative and answer the second certified question by limiting successor jurisdiction to circumstances where the buyer has chosen to acquire the seller's relevant liabilities and the risk of unduly prejudicing plaintiffs and creditors arises.

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[11] Here, the certified questions are limited to situations where a buyer acquired *all* the assets and liabilities of a seller. In other situations, a buyer could acquire only some of the assets and liabilities of a seller, which could affect whether the seller retains sufficient assets or the cash value of assets to satisfy its debts and liabilities in-forum.

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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