# 21-975

IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

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 Appeal from the United States District Court*
*for the Eastern District of New York*

## BRIEF FOR DEFENDANT-APPELLEE

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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*

SOCIÉTÉ GÉNÉRALE DE BANQUE AU LIBAN S.A.L.

*Defendant-Appellee.*

## DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Fed. R. App. P. 26.1, Defendant-Appellee SOCIÉTÉ GÉNÉRALE DE BANQUE AU LIBAN S.A.L. ("SGBL") hereby states:

1. SGBL does not have a parent corporation; and

2. Société Générale S.A. (France) is a publicly held corporation that owns 10% or more of SGBL's stock.

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## *Introduction*[1]

Defendant-Appellee Société Générale de Banque au Liban S.A.L. ("SGBL") abhors terrorism in all its forms, and the alleged events in this Anti-Terrorism Act of 1990 ("ATA") case, *see* 18 U.S.C. §§ 2331(1), 2333(a), concerning a series of attacks carried out by Hezbollah in 2006 that killed or injured United States citizens abroad are tragic. Plaintiffs-Appellants—the estate and family members of David Martin Lelchook who was killed, and other American citizens who were harmed—do not allege SGBL committed or played any role in those heinous attacks or had any contacts with New York to permit this Court to exercise personal jurisdiction. Instead, Plaintiffs base liability solely on SGBL's purchase of the assets and liabilities of another bank, Lebanese Canadian Bank ("LCB"), in Lebanon in 2011, and base personal jurisdiction solely on the theory that SGBL inherited LCB's jurisdictional status.

Throughout this litigation—filed for the first time in 2019—SGBL consistently has denied being the successor in interest to LCB's liability for the alleged attacks.[2] SGBL asserted only a facial challenge to personal jurisdiction

[1] "A" refers to the Appendix filed jointly by the parties; "SA" refers to the Special Appendix; "Op." refers to the decision on appeal (set forth at SA1); "FAC" refers to the operative complaint (found at A19); "Lelchook Br." refers to the Brief for Plaintiffs-Appellants; and "Dkt." refers to the District Court docket (S.D.N.Y. Case 1:19-cv-00033-RJD-SJB).

[2] Although Plaintiffs state that "[t]here is no question . . . SGBL expressly assumed all of LCB's liabilities, including LCB's liability to the Plaintiffs herein," Lelchook Br. at 14, the record shows

below because, as the District Court correctly ruled, Plaintiffs' "inherited successor personal jurisdiction" theory does not apply to the circumstances of this case: it does not confer jurisdiction over SGBL, an asset and liability purchaser in an all-cash transaction from which LCB received $580,000,000.00 from SGBL and both LCB and SGBL continue to survive. *See* A20, ¶ 4 (SGBL "purchased all of LCB's assets, and contractually assumed all of LCB's liabilities"). Of course, should it become necessary, SGBL continues to reserve its right to argue as a factual matter that it is not the successor to LCB's alleged liabilities in this case for purposes of either exercising personal jurisdiction or imposing substantive liability.

## PRELIMINARY STATEMENT

There is no personal jurisdiction over SGBL, a foreign asset and liability purchaser with no suit-related contacts with the forum and no culpability for the alleged wrongs. Plaintiffs' sole jurisdictional argument below was that SGBL was subject to personal jurisdiction in New York because its alleged predecessor, LCB, was subject to personal jurisdiction under New York law in a related ATA case. A23, ¶ 16 ("SGBL assumed and bears successor liability for LCB's conduct described herein and so is also subject to personal jurisdiction in New York.").

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that Plaintiffs attach and rely upon but a single substantive page of what this Court may reasonably infer is a lengthy and complex confidential agreement between LCB and SGBL. A60–62.

Joining another federal district court recently presented with the identical issue, the District Court rejected Plaintiffs' successor inherited personal jurisdiction theory. Both courts ruled that the theory does not apply to SGBL because there was no allegation "that the two companies have merged such that SGBL is merely a continuation of LCB." Op. at 5; *see Bartlett v. Société Générale De Banque Au Liban SAL*, No. 19-cv-00007 (CBA) (VMS), 2020 WL 7089448, at *17 (E.D.N.Y. Nov. 25, 2020) ("Because SGBL purchased LCB's assets for cash as the result of a bidding process and did not merge with or otherwise 'merely continue' LCB's ownership, SGBL did not inherit LCB's jurisdictional status in this forum."). The District Court here recognized that "[j]urisdiction and liability are of course two distinct considerations," and "[w]hatever the arrangement is between the two banks where the alleged wrongdoer continues to exist as a going concern, the nonculpable purchaser of assets and liabilities does not fall within the court's jurisdiction merely by virtue of that transaction." Op. at 5.

This Court should affirm the judgment dismissing Plaintiffs' complaint for lack of personal jurisdiction. Plaintiffs' jurisdictional theory has been rejected by three New York appellate courts and multiple federal courts in New York, including this Court, albeit in *dicta*. *See U.S. Bank Nat'l Ass'n v. Bank of America N.A.*, 916 F.3d 143, 155–57 (2d Cir. 2019) ("*U.S. Bank*"). The state cases show that New York law does not permit the exercise of personal jurisdiction over a non-domiciliary

corporation based on successor principles except in limited cases, such as where there has been a merger. And, in *U.S. Bank*, this Court endorsed the rule that "successor liability based on acquisition of a predecessor's assets does not necessarily make the defendant also amenable to jurisdiction where the predecessor's actions would have made the predecessor subject to specific jurisdiction" and noted the exception that "the rule is different where the successor liability of the defendant derives from a merger with the predecessor." *Id.* at 156. This Court explained that the reason the sole corporate entity that survives the merger may inherit the personal jurisdictional status of its predecessor is "[b]ecause a successor by merger is deemed by operation of law to be both the surviving corporation and the absorbed corporation." *Id.*

Plaintiffs do not allege the SGBL-LCB transaction was anything but an asset and liability purchase. *See* Op. at 4 ("Tellingly, the term 'merger' does not appear anywhere in plaintiffs' 41-page complaint."). Plaintiffs also acknowledge LCB survived the all-cash transaction, has no ownership interest in SGBL, and continues to defend itself in ongoing litigation to this day. *See* Op. at 5 ("LCB is even defending itself in nearly identical ATA suits in other New York courts, as plaintiffs admit") (citations omitted); *see also New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 211–12 (2d Cir. 2006) ("continuity of ownership is the essence of a merger")

("*Nat'l Serv. II*"). Under the undisputed facts of this case, therefore, Plaintiffs' jurisdictional inheritance theory does not confer personal jurisdiction over SGBL.

On appeal, in addition to arguing that the District Court misunderstood the law concerning inherited jurisdiction, Plaintiffs belatedly argue that personal jurisdiction may be exercised over SGBL under Fed. R. Civ. P. 4(k)(2). Plaintiffs did not mention this rule in the FAC or make this argument before the District Court and it is forfeited. This Court consistently has rejected attempts to raise new theories of personal jurisdiction for the first time on appeal. *See Spiegel v. Schulmann*, 604 F.3d 72, 76–77, 77 n.1 (2d Cir. 2010) ("Plaintiffs did not raise this [personal jurisdiction] argument before the district court and, thus, it is waived.")). Nor is there a compelling reason why this Court should consider this newly asserted theory, as Plaintiffs offer no explanation for why they did not assert this purported basis of jurisdiction despite multiple opportunities to do so.

In any event, none of Plaintiffs' jurisdictional arguments pass muster under the United States Constitution. Subjecting SGBL to personal jurisdiction in New York for these claims, based on an entirely foreign sale and purchase agreement ("SPA"), on a theory that relies on the jurisdictional contacts of a third party, and where SGBL has no suit-related conduct, conflicts with U.S. Supreme Court decisions recalibrating both general and specific jurisdiction, recent jurisdictional opinions in this Circuit, and this Court's reasoning in *U.S. Bank* on this very issue.

*See Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cty.*, 137 S. Ct. 1773, 1783 (2017) ("*BMS*") (limiting specific jurisdiction ); *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014) (limiting general jurisdiction); *Waldman v. Palestine Liberation Organization*, 835 F.3d 317, 335 (2d Cir. 2016) (for purposes of specific jurisdiction, the relationship "must arise out of contacts that the 'defendant *himself*' creates with the forum") (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)) (emphasis in original); *U.S. Bank*, 916 F.3d at 156 (observing in *dicta* that it would not be improper to subject an entity that survives a merger to personal jurisdiction because it "is deemed by operation of law to be both the surviving corporation and the absorbed corporation").

Plaintiffs finally argue that this Court should apply a federal "substantial continuity test" to find personal jurisdiction over SGBL. When courts have found this judicially created standard to apply at all, the test applies to impose federal substantive tort liability on a defendant, not to exercise personal jurisdiction. Even so, this Circuit explicitly has declined to extend this special federal rule beyond very limited contexts, finding "the substantial continuity doctrine is not a part of general federal common law." *New York v. Nat'l Serv. Indus., Inc.*, 352 F.3d 682, 687 (2d Cir. 2003) ("*Nat'l Serv. I*"). There is no basis to do so here.

## COUNTERSTATEMENT OF THE ISSUES

1. Whether a foreign asset and liability purchaser inherits the jurisdictional status of its predecessor and may be subject to personal jurisdiction in New York where Plaintiffs do not allege that the successor merged or otherwise continued the ownership of the predecessor, do not allege the successor is substantively responsible for its predecessor's allegedly tortious conduct, do not allege the successor has any connection with the forum (or the United States), and concede that the predecessor survived the all-cash transaction and continues to defend similar litigation today?

2. Whether a plaintiff-appellant has forfeited a theory of personal jurisdiction over the defendant-appellee where it failed to raise that theory below and offers no explanation for such failure?

3. To the extent this Court needs to reach this issue, whether this Court may constitutionally exercise personal jurisdiction over a foreign corporation that is neither "at home" in the forum, nor has suit-related conduct in the forum, based on an asset and liability transaction that has no connection to the United States and a jurisdictional theory that imputes the contacts of a third party?

4. Whether this Court should first adopt a special federal substantive rule of successor liability where this Circuit has declined to "create" and apply this test

in the past beyond very limited contexts, and then rely upon it for personal jurisdictional purposes where neither this Court, nor any court, has done so before?

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND & PROCEDURAL HISTORY

#### A. Plaintiffs-Appellants

Plaintiffs are U.S. nationals who claim they were injured by rocket attacks carried out by Hezbollah between July 12, 2006, and August 14, 2006, against northern Israel during a 34-day conflict known as the Second Lebanon War. A32, ¶ 59. Four of the Plaintiffs are the estate and family members of David Martin Lelchook, who was killed in the rocket attacks. A20, ¶ 2; *see also* A33, ¶¶ 61–66. The remaining Plaintiffs allege they suffered psychological, physical, and/or emotional injuries as a result of the attacks or their proximity to the rocket attacks. A34–A39, ¶¶ 67–80.

#### B. Defendant-Appellee SGBL

SGBL is a Lebanese joint stock company incorporated in 1953 and headquartered in Lebanon. A21, ¶¶ 10–11. It offers a wide array of banking, insurance, and financial services to individuals and corporations in Lebanon and the region. *Id.* at ¶ 11. SGBL is part of the international network of Société Générale, S.A., one of the largest European financial services groups. Dkt. 51 (Rule 7.1

Corporate Disclosure Statement by SGBL (filed 04/19/2019)). Plaintiffs do not allege that SGBL had anything to do with or played any role in the attacks.

**C. Lebanese Canadian Bank**

LCB is a corporation organized under the laws of Lebanon and headquartered in Beirut, Lebanon. A20, ¶ 3. In 2011, the U.S. Department of the Treasury designated LCB as a financial institution of "primary money laundering concern." A51, ¶ 117. Following (contested) allegations lodged against it by the U.S. Government in an asset forfeiture proceeding—none of which pertain to the events of the Second Lebanon War—LCB made a commercial decision to sell its assets in 2011. *Id*.

**D. SGBL Purchases LCB's Assets and Liabilities in 2011**

After LCB's designation, Lebanon's Central Bank proceeded with a competitive sale of LCB's assets and liabilities pursuant to Lebanese law in 2011.[3] SGBL was deemed the highest bidder and agreed to purchase LCB's assets and liabilities for $580,000,000.00 cash subject to the final valuation adjustments, review, and approval of the Central Bank. A52, ¶ 121; *see also* Dkt. 1, ¶ 638. SGBL

[3] Asset sales differ in nature from mergers and stock acquisitions. An asset sale is neither the acquisition of a business entity, nor a merger of the seller and buyer. Instead, it is a transfer of property, tangible or intangible. That is, "the nature of an asset sale [is] that the seller's ownership interest in the entity is given up in exchange for consideration." *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 47 (2d Cir. 2003). SGBL's subsequent no-stock, all-cash transaction therefore cannot be characterized as a corporate reorganization, continuation of a business, stock acquisition, or a merger (statutory or otherwise).

and LCB entered into the SPA in Lebanon, of which Plaintiffs include but a single substantive page. A52, ¶ 122; A61. Plaintiffs rely on a SPA paragraph to contend that SGBL assumed all LCB's assets and liabilities without reservation and to form the basis for personal jurisdiction.[4]

### E. U.S. Officials Seek Civil Forfeiture of Certain LCB's Assets and Recognize SGBL Has No Successor Liability Based on the Transaction

While the SGBL-LCB transaction was pending, the U.S. Department of Justice filed a civil forfeiture action and seized $150,000,000.00 of what the Government believed to be LCB assets that were being held in the interbank account of a third-party escrow agent in the United States in connection with the asset purchase by SGBL. A50, ¶ 116; *see also U.S. v. Lebanese Canadian Bank SAL*, Case No. 1:11-cv-09186-PAE (U.S. Dist. Ct., S.D.N.Y.). SGBL filed a claim as an innocent, lawful owner of a portion of the escrow funds in March 2013. A132–A135.

The Government, LCB, and SGBL reached an agreement as to the disposition of the seized funds in June 2013. A138–A154 (Stipulation and Order of Settlement

[4] SGBL notes here that by its terms, the assumed liabilities are limited to those that "relate to the Seller's Business," A61, ¶ 2.3, and public reports also show SGBL declined to assume certain LCB's customers and accounts based in large measure upon a compliance process undertaken by independent international compliance experts and a parallel auditing proceeding implemented by SGBL that utilized a scoring methodology to screen LCB's accounts, customers, and operations for potential money laundering and the financing of terrorist organizations. A83–A84 (discussing *NY Times* article). Based on SGBL's commitment and due diligence, the United States supported the purchase and considered SGBL a "responsible owner." A84.

("Stipulation")).[5] Despite the well-publicized nature of both the asset and liability purchase transaction and the civil forfeiture proceeding, and being on notice of same, Plaintiffs made no attempt to attach LCB's seized funds or any of SGBL's all-cash purchase money paid to and held by LCB.[6]

**F. LCB Continues to Defend Itself from ATA Claims**

In 2008, Plaintiffs' counsel here first asserted claims against LCB under the ATA for injuries from the 2006 rocket attacks based upon LCB's provision of banking services to five alleged Hezbollah-related customers. *See Licci v. American Express Bank Ltd.*, 704 F. Supp. 2d 403, 408 (S.D.N.Y. 2010) ("*Licci I*") (dismissing negligence claims against American Express for failure to state a claim; and dismissing claims against LCB for lack of personal jurisdiction).

In 2013, this Court found that LCB could be subjected to personal jurisdiction in New York based on its conduct. *See Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 66 (2d Cir. 2012) ("*Licci II*") (certifying personal-jurisdiction questions of New York law to the New York Court of Appeals, including whether "a foreign bank's maintenance of a correspondent bank account at a financial institution in New

[5] In Stipulation, the Government agreed that it "shall not bring any claim against SGBL . . . arising out of the lawful acquisition of LCB's assets and liabilities pursuant to the Sale and Purchase Agreement, . . . under a theory of successor liability." A145, ¶ 10.

[6] For this reason, Plaintiffs' repeated contentions that LCB "was rendered insolvent by the liability-and-asset transfer to SGBL," that "SGBL stripped it of its assets," and "but for SGBL's purchase of LCB's assets and assumption of its liabilities, LCB would easily have been able to satisfy a judgment against it in favor of the Plaintiffs," is false and not supported by the record. Lelchook Br. at 2, 11, 12.

York, and use of that account to effect 'dozens' of wire transfers on behalf of a foreign client, constitute a 'transact[ion]' of business in New York within the meaning of N.Y. C.P.L.R. § 302(a)(1)"); *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327, 341 (2012) ("*Licci III*") (answering the above *Licci II*-certified question in the affirmative); *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 167–174 (2d Cir. 2013) ("*Licci IV*") (noting the *Licci III* ruling as to New York law; holding that the exercise of personal jurisdiction over LCB in New York comported with federal due process; and vacating so much of *Licci I* as dismissed the claims against LCB for lack of personal jurisdiction and remanding for further proceedings).

The *Licci v. LCB* case became *Kaplan v. LCB* after the plaintiffs filed a second amended complaint, adding aiding-and-abetting claims under the Justice Against Sponsors of Terrorism Act ("JASTA"), *see* 18 U.S.C. § 2333(d)(2). After several years of additional litigation, this Court recently concluded that plaintiffs stated a claim against LCB for JASTA aiding and abetting liability. *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 867 (2d Cir. 2021).[7]

**G. Plaintiffs' Counsel Files This Lawsuit in 2019**

In January 2019, on the eve of the expiration of the statute of limitations, Plaintiffs' counsel filed this lawsuit. Dkt. 1. The 200+ page complaint named eleven

[7] All 18 of the plaintiffs in *Kaplan* are plaintiffs in this case.

financial institutions in Lebanon, including SGBL, as defendants. Plaintiffs alleged that these banks—together accounting for approximately 80% of the total assets in the Lebanese banking sector—held accounts for commercial entities and individuals that have or had a connection to Hezbollah, and therefore were liable under the ATA and JASTA for the deaths and injuries in the 2006 rocket attacks. Dkt. 1, ¶¶ 3–5.[8] Plaintiffs also asserted a successor liability claim against SGBL. *Id.* ¶¶ 951–54.

Facing anticipated motions to dismiss by all bank defendants, Plaintiffs amended their complaint in December 2019. A19. Plaintiffs now contend that "LCB was a rogue bank," A165, and Plaintiffs' FAC asserts ATA and JASTA claims solely against SGBL based on its purchase of LCB's assets and liabilities. A20, ¶ 4. The substantive factual allegations supporting LCB's liability mirror those made in *Kaplan*. As noted, Plaintiffs base personal jurisdiction over SGBL solely on its alleged successor status to LCB and the earlier findings in the *Licci* line of cases that found LCB was subject to jurisdiction in New York, asserting:

**PERSONAL JURISDICTION**

> 16. This Court has personal jurisdiction over defendant SGBL because in *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013), the U.S. Court of Appeals for the Second Circuit determined that LCB's conduct described herein rendered it subject to personal jurisdiction in the State of New York, and SGBL assumed and bears successor liability

[8] This complaint mirrored a complaint filed by another counsel in another ATA matter, *Bartlett v. Société Générale de Banque au Liban S.A.L.*, Case No. 1:19-cv-00007-CBA-VMS (U.S. Dist. Ct., E.D.N.Y.), Docket 1 (Filed 1/1/19), which remains pending.

> for LCB's conduct described herein and so is also subject to personal jurisdiction in New York.

A23, ¶ 16.

### H. The District Court Rejects Plaintiffs' Inherited Successor Jurisdiction Theory and Dismisses the FAC for Lack of Personal Jurisdiction

SGBL moved to dismiss on multiple grounds, including by asserting a *prima facie* challenge to personal jurisdiction. SGBL principally argued that Plaintiffs' inherited jurisdiction theory did not apply to an asset-and-liability purchaser like SGBL. A80. In opposition, Plaintiffs principally argued that the FAC alleged SGBL was LCB's successor under New York law and federal law for purposes of imposing substantive liability,[9] and, as a consequence, SGBL assumed LCB's jurisdictional status and amenability to suit in New York. A186.

The District Court (Dearie, J.) granted SGBL's motion to dismiss for lack of personal jurisdiction. The court recognized that "[j]urisdiction and liability are of course two distinct considerations," and while there were "certain limited circumstances," where a successor "may inherit its predecessor's jurisdictional status," Plaintiffs' jurisdictional inheritance theory did not apply because "New

[9] Under both New York law and traditional common law principles, a corporation that purchases the assets of another corporation generally is not liable for its predecessor's torts but that rule is subject to several exceptions. *Nat'l Serv. II*, 460 F.3d at 209; *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 195 (1983). This Court need not decide whether any exceptions to this non-liability rule apply here, that is, whether Plaintiffs sufficiently allege that SGBL is LCB's successor for the alleged liabilities, because, even if Plaintiffs did, their alleged basis of successor liability—a purchase of assets and assumption of liabilities—does not provide a basis for exercising personal jurisdiction over SGBL under either state or federal law.

York courts have held that short of a merger an asset acquisition is not sufficient to impute a target's jurisdictional status on an acquiror." Op. at 3, 5. The District Court also rejected Plaintiffs' reliance SGBL's alleged assumption of *all* liabilities for the same reasons. *See* Op. at 4 ("But plaintiffs' emphasis on 'all' liabilities is misplaced. While SGBL may be liable for any liability it assumed in the SPA, that does not address whether SGBL is subject to jurisdiction in New York.").

The court further found that the outcome was consistent with this Court's decision in *U.S. Bank*, which reasoned that a successor corporation may inherit a predecessor's jurisdiction status because "a successor by merger is deemed by operation of law to be both the surviving corporation and the absorbed corporation." Op. at 4 (quoting *U.S. Bank*, 916 F.3d at 156). The District Court therefore concluded that it lacked jurisdiction because "Plaintiffs have failed to allege any connection between SGBL and the forum, and have failed to allege that the two companies have merged such that SGBL is merely a continuation of LCB." Op. at 5.

## STANDARD OF REVIEW

This Court reviews *de novo* a district court's legal conclusion regarding whether a party has demonstrated a *prima facie* case of personal jurisdiction. *Spiegel*, 604 F.3d at 76.

## APPLICABLE LEGAL STANDARDS

"To determine personal jurisdiction, a federal district court applies the long-arm statute of the state in which it sits." *U.S. Bank*, 916 F.3d at 149 (citing *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163 (2d Cir. 2010)). The rule applies equally to federal question cases:

> To determine personal jurisdiction over a non-domiciliary in a case involving a federal question, the Court must engage in a two-step analysis. *See Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 243–44 (2d Cir. 2007). First, we apply the forum state's long-arm statute. *See id.* at 244; *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 22 (2d Cir. 2004).
>
> * * *
>
> If the long-arm statute permits personal jurisdiction, the second step is to analyze whether personal jurisdiction comports with the Due Process Clause of the United States Constitution.

*Chloé*, 616 F.3d at 163–64; *see also Best Van Lines*, 490 F.3d at 242 (courts "look first to the law of the State of New York, in which the district court sits[;]" "[i]f, but only if, our answer is in the affirmative, we must then determine whether asserting jurisdiction under that provision would be compatible with requirements of due process") (citing *Kronisch v. United States*, 150 F.3d 112, 130 (2d Cir. 1998); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945)).

New York's long-arm statute confers jurisdiction "over any non-domiciliary" only if a cause of action arises out of a defendant's "transact[ion of] any business within the state"; "tortious act within the state"; or, in certain circumstances, "tortious act without the state causing injury to person or property within the state."

N.Y. C.P.L.R. 302(a). Plaintiffs do not contend that SGBL's conduct independently satisfies the statute's requirements, but rather because its alleged predecessor itself was subject to personal jurisdiction in New York under this provision. *See Licci III*, 20 N.Y.3d at 339 (LCB's conduct constituted "a 'transact[ion]' of business in New York within the meaning of N.Y. C.P.L.R. § 302(a)(1)"); *Licci IV*, 732 F.3d at 174 (exercise of personal jurisdiction over LCB in New York comported with federal due process).

In a series of decision beginning with *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), the U.S. Supreme Court has limited both general (or all-purpose) jurisdiction, and specific (or conduct-linked) jurisdiction. "As to the former, [the Court] held that a court may assert jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Daimler*, 571 U.S. at 122 (quoting *Goodyear*, 564 U.S. at 919).

"Specific jurisdiction is very different" as "'the suit' must 'aris[e] out of or relat[e] to the defendant's contacts with the *forum*.'" *BMS*, 137 S. Ct. at 1780 (quoting *Daimler AG*, 571 U.S. at 127) (emphasis in original). To satisfy due process, a defendant "must have purposefully availed itself of the privilege of conducting activities within the forum State or have purposefully directed its

conduct into the forum State," and "the exercise of jurisdiction must be reasonable under the circumstances." *U.S. Bank*, 916 F.3d at 150 (citations and quotations omitted). In determining whether specific personal jurisdiction is present, a court must consider a variety of interests, "[b]ut the 'primary concern' is 'the burden on the defendant.'" *BMS*, 137 S. Ct. at 1780 (quoting *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

## SUMMARY OF ARGUMENT

The FAC fails to state a *prima facie* case of personal jurisdiction over SGBL, a foreign asset and liability purchaser with no culpability for the alleged wrongs, for four reasons.

*First*, Plaintiffs concede, as they must, that SGBL itself does not have any contacts with New York to support this Court's exercise of personal jurisdiction over SGBL. Nevertheless, Plaintiffs contend that personal jurisdiction exists over SGBL because it purchased the assets and liabilities of LCB, a predecessor corporation that was itself subject to personal jurisdiction in New York in a related litigation. A23, ¶ 16. The problem with Plaintiffs' argument is that state courts and federal courts in New York uniformly reject Plaintiffs' inherited jurisdiction theory in these circumstances. Those cases observe generally that successor rules are concepts of tort liability, not jurisdiction, and find specifically that a successor does *not* inherit the jurisdictional status of its predecessor except in very limited cases, such as a

merger. Because it is undisputed that SGBL and LCB did not merge, Plaintiffs fail to show personal jurisdiction exists over SGBL in this case.

*Second*, Plaintiffs' belated attempt to invoke a new statutory basis for personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2) is equally unavailing. Plaintiffs did not mention this rule or make this argument below and it is forfeited. Even if this Court considers the argument, the rule does not apply to confer jurisdiction in the circumstances presented here.

*Third*, the Court need not reach this issue, but constitutional due process would not permit the exercise of specific personal jurisdiction over SGBL in New York. When applied to an asset and liability purchaser, Plaintiffs' jurisdictional theory is not based on the contacts *the defendant to the litigation* has with the forum, as is required under Supreme Court precedent. Instead, the theory improperly relies on the unilateral conduct of a third party. Plaintiffs' theory also fails to establish that SGBL purposefully availed itself of the privilege of conducting activities within the forum, or purposefully directed its conduct into the forum, or that the exercise of jurisdiction would be reasonable, particularly given the entirely foreign nature of the asset and liability transaction.

*Fourth*, Plaintiff's request for this Court to adopt a special "substantial continuity" test to govern this dispute—including for purposes of conferring personal jurisdiction over SGBL—is without merit. There is zero authority

supporting such a request and Plaintiffs lack a sound basis for this Court to adopt such a test either for purposes of imposing corporate liability, or in conjunction with an inheritance theory to confer personal jurisdiction.

## ARGUMENT

### I. SGBL IS NOT SUBJECT TO PERSONAL JURISDITION BECAUSE BOTH STATE AND FEDERAL COURTS IN NEW YORK REJECT PLAINTIFFS' "INHERITED SUCCESSOR PERSONAL JURISDICTION" THEORY

#### A. Three New York Appellate Court Rulings Show That an Asset and Liability Purchaser Does Not Inherit the Jurisdictional Status of Its Predecessor

Established appellate rulings in New York uniformly show that Plaintiffs' asserted theory—inheritance of LCB's jurisdictional status based upon an asset and liability purchase—does not confer personal jurisdiction over SGBL. *See Semenetz v. Sherling & Walden, Inc.*, 801 N.Y.S.2d 78 (2005), *aff'd on other grounds*, 7 N.Y.3d 194 (2006); *BRG Corporation v. Chevron U.S.A., Inc.*, 82 N.Y.S.3d 798 (2018) ("*BRG*"); *Matter of Gronich & Company, Inc. v. Simon Property Group, Inc.*, 119 N.Y.S.3d 456, 467 (2020), *leave to appeal denied*, 36 N.Y.3d 902 (2020) ("*Gronich*").[10] Nor does the alleged assumption of all LCB's liabilities confer personal jurisdiction over SGBL.

[10] "This Court is bound to apply the law as interpreted by a State's intermediate appellate courts unless there is persuasive evidence that the state's highest court would reach a different conclusion." *V.S. v. Muhammad*, 595 F.3d 426, 432 (2d Cir. 2010).

### 1. Under New York law, successor liability allegations do not confer personal jurisdiction

Alleged successor liability is not a basis for exercising personal jurisdiction in New York. In *Semenetz*—New York's seminal appellate case—the Third Department ruled that the principles and common law exceptions under which a corporate successor may be subject to liability for the torts of its predecessor "deal with the concept of tort liability, not jurisdiction." *Semenetz*, 801 N.Y.S.2d at 81; *see also id.* at 80–81 (reversing trial court that had ruled "inasmuch as [the predecessor] was subject to long-arm jurisdiction . . . [the purchaser of "all of its assets, including goodwill, trade names and inventory"] likewise was subject to such jurisdiction as the successor").[11] Successor liability rules therefore "do not and cannot confer such jurisdiction over the successor in first instance," and, under New York law, a successor is only subject to liability for its predecessor's torts where it is subject to *in personam* jurisdiction. *Id.* at 81.

Other New York appellate departments have followed *Semenetz* and held that allegations of successorship are applicable only as a means of establishing a defendant's *liability* and an independent basis for exercising personal *jurisdiction*

[11] The New York Court of Appeals affirmed the decision in *Semenetz* but did not reach the personal jurisdiction issue. The Court suggested, however, that inheritance of personal jurisdiction might be appropriate if the successor is "substantively responsible" for the tort. *Semenetz*, 7 N.Y.3d at 199 n.2 ("Because we do not adopt the 'product line' exception, we need not and do not address plaintiff's argument that personal jurisdiction may properly be imputed to a successor corporation whenever it is substantively responsible for its predecessor's allegedly tortious conduct.").

over a defendant is required. For example, in *BRG*, "plaintiffs contend[ed] that personal jurisdiction exists over defendant because it ostensibly bears successor liability for a predecessor corporation that was itself subject to personal jurisdiction in New York." *BRG*, 82 N.Y.S.3d at 799. The Fourth Department unanimously rejected this argument, relying upon and echoing *Semenetz*:

> The "successor liability rule[s]," . . . "deal with the concept of tort liability, not jurisdiction. When and if [successor liability] is found applicable, the corporate successor would be subject to liability for the torts of its predecessor in any forum having *in personam* jurisdiction over the successor, but the [successor liability rules] do not and cannot confer such jurisdiction over the successor in the first instance" (*id*.).

*Id.*

Joining the *Semenetz* and *BRG* courts, New York's First Appellate Department recently observed in *Gronich* that jurisdictional contacts are not inherited as a result of a traditional asset sale. *Gronich*, 119 N.Y.S.3d at 457. In that case, a judgment creditor (the petitioner) sought to enforce its judgment against the alleged successor corporation of the judgment debtor (the respondent). In finding personal jurisdiction over the successor, the First Department explicitly distinguished the case of a successor as a result of an acquisition of assets, where "contacts are not imputed," with a "successor by merger," where jurisdictional contacts may be imputed. *Id*.[12]

[12] As discussed in more detail below, merger presents an independent basis for personal jurisdiction because a successor by merger is deemed to be both the surviving corporation and the

New York appellate courts' holdings thus all show that personal jurisdiction over SGBL in New York is lacking and these new claims must be brought in another forum. *See* Op. at 5 ("SGBL's potential exposure in the wake of the SPA cannot be resolved in this action, but must await an appropriate forum consistent with applicable law and perhaps the demands of due process.").[13]

**2. Under New York law, SGBL's alleged assumption of all LCB's liabilities does not confer personal jurisdiction**

Plaintiffs argue in their brief that the District Court found that a successor inherits its predecessor's jurisdictional status *only* in the cases of merger, and New York law recognizes certain other circumstances, such as where a successor assumes all the predecessor's liabilities. Lelchook Br. at 16, 20; *see Semenetz*, 801 N.Y.S.2d at 81 ("we recognize that in certain circumstances a successor corporation may inherit its predecessor's jurisdictional status") (internal quotations omitted). To the contrary, the District Court explicitly recognized there were other circumstances where jurisdiction could be inherited, *see* Op. at 3 (quoting *Semenetz*), but it did not agree with Plaintiffs that an assumption of liabilities provided a basis under New York law. *Id.* at 4–5 (finding that "plaintiffs' emphasis on 'all' liabilities is

absorbed corporation, as the court appeared to have recognized. *See Gronich*, 119 N.Y.S.3d at 457 (citing this Court's opinion in *U.S. Bank*).

[13] Given the clear weight of evidence against their position, Plaintiffs' request to certify the question to the New York Court of Appeals lacks merit. Lelchook Br. at 21 n.11; *see DiBella v. Hopkins*, 403 F.3d 102, 111 (2d Cir. 2005) (certification not warranted where "sufficient precedents exist for us to make [the] determination").

misplaced" because "[j]urisdiction and liability are of course two distinct considerations," and "[w]hile SGBL may be liable for any liability it assumed in the SPA, that does not address whether SGBL is subject to jurisdiction in New York.").

In fact, the circumstances recognized by New York law where jurisdiction may be inherited do not extend to an assumption liabilities. In each of the federal cases cited in *Semenetz*,[14] the successor corporation is *not* subject to personal jurisdiction because it might be responsible for paying the judgment (*i.e*, it may be liable), or because an exception to the successor nonliability rule might apply (*e.g.*, that it expressly assumed tort liabilities). Instead, the successor might be subject to personal jurisdiction because the alleged circumstances have some other independent jurisdictional significance. *Accord Societe Generale*, 2003 WL 22852656 at *4 (doubting that "personal jurisdiction over [the successor defendant] should be determined by reference to its predecessor's contacts with New York.").

For instance, a successor may be subject to personal jurisdiction in New York where it assumes a predecessor's written contract containing a forum selection clause and the action arises from that contract. *See id.* ("personal jurisdiction over the original contracting party had been gained via a forum selection clause" to

[14] *Semenetz* cites the following cases: *Societe Generale v. Florida Health Sciences Ctr.*, No. 03 Civ. 5615 (MGC), 2003 WL 22852656, *4 (S.D.N.Y. Dec. 1, 2003); *Abbacor, Inc. v. Miller*, No. 01 CIV. 0803 (JSM), 2001 WL 1006051, *3 (S.D.N.Y. Aug. 31, 2001); *Applied Hydro–Pneumatics v. Bauer Mfg.*, 416 N.Y.S.2d 817 (1979); and *Schenin v. Micro Copper Corp.*, 272 F. Supp. 523, 526 (S.D.N.Y. 1967). *See Semenetz*, 801 N.Y.S.2d at 81. Each is considered below and none support Plaintiffs' position.

litigate any contract dispute in New York); *Abbacor, Inc.*, 2001 WL 1006051 at *3 ("Consent may be either express or implied, and typically takes the form of a contractual agreement containing a New York forum selection clause or the defendant's voluntary participation in certain state processes."). In other cases, a successor may be subject to jurisdiction when it performs a predecessor's contracts, constituting a ratification of a predecessor's actions. *See Applied Hydro-Pneumatics*, 416 N.Y.S.2d at 820 ("voluntary election to complete the contracts constituted . . . ratification" conferring personal jurisdiction). In other words, "[t]he issue was not . . . whether minimum contacts could be transferred, but whether the defendant's assumption of its predecessor's rights and obligations constituted a voluntary adoption of all of the terms of the contracts that the predecessor had executed." *Societe Generale*, 2003 WL 22852656 at *4.

The final case signaled by *Semenetz* is perhaps most telling and cuts directly against Plaintiffs' argument here. The plaintiff in that case asserted, as Plaintiffs do here, that a defendant's assumption of liabilities allowed a federal court in New York to exercise personal jurisdiction over the "successor-in-interest." *Schenin*, 272 F. Supp. at 526. The court rejected that theory, finding that while a "statutory merger between [defendant] Micro and [dissolved company] Vanura" may provide a basis under New York's long arm statute for jurisdictional inheritance, plaintiff's claim "rest[ing] on an assumption of Vanura's liabilities by Micro" could be brought "only

where it [Micro] could be found." *Id.* The court concluded: "There exists no basis in law or reason to impute to Micro, for jurisdictional purposes, activities of Vanura in New York, such as they may have been." *Id.* The same can be said here with respect to SGBL.

SBGL's assumption of LCB's liabilities therefore provides no basis for the exercise of personal jurisdiction over SGBL in New York.[15] Indeed, as explained above, such a theory is wholly inconsistent with the statement of law set forth in *Semenetz*, *BRG*, and *Gronich*.[16]

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[15] Plaintiffs' reliance on (and misquotation of) a state trial court opinion in a discovery dispute is misplaced. Lelchook Br. at 18–19. In authorizing limited discovery, that court recognized generally that it might be possible to establish jurisdiction over a successor premised on jurisdiction over a predecessor, and, separately, reproduced the circumstances where "[a] successor corporation may be *liable* for its predecessor's conduct." *Arazosa v 3M Co.*, No. 190069/2016, 2018 WL 3098098, at *2 (N.Y. Sup. Ct. Feb. 20, 2018) (emphasis added). The case does not say a defendant that assumes a predecessor's liability also assumes the predecessor's jurisdictional status. Lelchook Br. at 19.

[16] Plaintiffs also suggest that personal jurisdiction should exist because "SGBL continued LCB's business operations." Lelchook Br. at 10; *see also id.* at 28. That allegation, even if true, does not provide a basis either to impose substantive liability, or to confer personal jurisdiction over SGBL, under New York law. As noted, Plaintiffs base SGBL's liability solely on its express assumption of LCB's liabilities. Lelchook Br. at 16–17 ("SGBL bears successor liability to Plaintiffs for LCB's conduct . . . because it assumed that liability"). Plaintiffs also concede the SGBL-LCB transaction was an asset and liability purchase, not a merger. A20, ¶ 4. Even apart from those concessions, the SGBL-LCB transaction was not a merger, de facto merger, or continuation of LCB as a matter of law because it was a $580,000,000.00 all-cash, no-stock purchase, arising from a competitive bidding process, without any allegation of continuing ownership by LCB or its shareholders (directly or indirectly), with two separate entities existing after the transaction. *See Cargo Partner*, 352 F.3d at 47 ("Because there is no continuity of ownership here, the asset purchase was not a merger . . . called something else.") (internal quotations omitted); *Schumacher*, 59 N.Y.2d at 244–45 (no merger exists where predecessor survives the transaction as "a distinct, albeit meager, entity"); *TBA Glob., LLC v. Fidus Partners, LLC*, 15 N.Y.S.3d 769, 780 (2015) ("We agree with the Second Circuit that, under New York law, continuity of ownership is the touchstone of the de facto merger concept and thus a necessary predicate to a finding of de facto merger.") (citations and internal quotation marks omitted); *Cargo Partner*, 352 F.3d at 45 n.3 (observing "the mere-continuation and de-facto-merger doctrines are so similar that they may be

### B. Federal Courts in New York Likewise Reject Plaintiffs' Inherited Personal Jurisdictional Theory

#### 1. This Court's reasoning in *U.S. Bank* forecloses Plaintiffs' argument here

Plaintiffs next argue in different portions of their brief that various federal opinions support their jurisdictional inheritance theory, apparently under federal law. Lelchook Br. at 17–18, 23–24. As a threshold matter, Plaintiffs themselves recognize the flaw of this argument when they acknowledge that the decision upon which they rely to impute personal jurisdiction on SGBL is based upon *Licci III*, a state decision that "found jurisdiction over LCB under New York law." Lelchook Br. at 24. The relevant jurisdictional analysis, including in this federal question case arising under the ATA, therefore begins—and ends—with how state law would resolve the jurisdictional inheritance issue.

In any event, the result is the same whether this Court looks to New York law or some basis in federal law because courts in this Circuit have found that the purchase of assets and liabilities is not a basis to exercise personal jurisdiction over a defendant. These cases instead limit jurisdictional inheritance to such instances where there has been a merger and there is one "entity that survives the merger."

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considered a single exception"); *Ladjevardian v. Laidlaw–Coggeshall, Inc.*, 431 F. Supp. 834, 839 (S.D.N.Y. 1977) (continuation envisions more of a reorganization, rather than a sale); *see also Vasquez v. Ranieri Cheese Corp.*, No. 07–CV–464–ENV–VVP 2010, WL 1223606, at *13 (E.D.N.Y. Mar. 26, 2010) ("there is no continuity of ownership where assets are purchased solely with cash") (citation omitted).

*U.S. Bank*, 916 F.3d at 155; *see also Bartlett*, 2020 WL 7089448 at *16 (relying on *U.S. Bank* and finding no personal jurisdiction over an asset and liability purchaser); *Schenin*, 272 F. Supp. at 526 (finding personal jurisdiction lacking because "[t]he insurmountable hurdle in plaintiff's path is the sound distinction in law between a statutory merger and an acquisition of assets").

In *U.S. Bank*, the majority succinctly observed "that the answer to our question—whether liability as a successor in interest also entails being subject to personal jurisdiction where the actions of the predecessor would have made the predecessor subject—depends on the basis of the successor liability." *U.S. Bank*, 916 F.3d at 156. Although the majority found the jurisdictional argument forfeited, it "nonetheless observe[d] that we can see no reason why . . . the entity that survives the merger should not be subject to personal jurisdiction in whatever court the actions of the merger partner in relation to the contract would have made the merger partner subject." *Id*. at 155. The majority reached this conclusion because "a successor by merger is deemed by operation of law to be both the surviving corporation and the absorbed corporation." *Id.* at 156; *see also id.* at 155 ("Upon a merger between two (or more) corporations, each of the merger partners is deemed to survive in the merged entity").

A concurring opinion doubted that "an acquired company's jurisdictional contacts can be imputed to the successor-by-merger." *Id*. at 159 (Chin, J. concurring)

(relying in part on *BRG*, *supra*). Responding, the majority explicitly contrasted successor liability based on merger with "successor liability based on acquisition of a predecessor's assets," which "does not necessarily make the defendant also amenable to jurisdiction where the predecessor's actions would have made the predecessor subject to specific jurisdiction." *Id.* at 156; *see also id.* at 157 ("while the holding of *Semenetz* was that successor liability on the basis of . . . exceptions to successor-nonliability does not confer on the successor the jurisdictional status of the predecessor, the decision explicitly recognizes that the rule is otherwise when the successor status results from merger with the predecessor").

Applying the reasoning of *U.S Bank*, a federal district court in another ATA case recently concluded that plaintiffs failed to establish a *prime facie* case of personal jurisdiction over SGBL for a cause of action "for successor liability resulting from SGBL's assumption of LCB's assets and liabilities." *Bartlett*, 2020 WL 7089448 at *16. The plaintiffs in *Bartlett*, as here, asserted that "SGBL inherited LCB's personal jurisdiction status" and argued "that because the LCB-SGBL Sale and Purchase Agreement conferred all of LCB's liabilities, even if it was an asset acquisition rather than a merger, the distinction is moot and thus jurisdiction should transfer." *Id.* (footnote omitted).

The district court in *Bartlett* rejected plaintiffs' inherited jurisdiction theory, concluding that "[b]ecause SGBL purchased LCB's assets for cash as the result of a

bidding process and did not merge with or otherwise 'merely continue' LCB's ownership, SGBL did not inherit LCB's jurisdictional status in this forum." *Id.* at 17. The court further observed that "even if SGBL obtained all of LCB's liabilities, that does not necessarily confer jurisdiction," because "the Second Circuit explained (albeit in *dicta*) that it was only '[b]ecause 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*. at 16–17 (quoting *U.S. Bank*, 916 F.3d at 156).

The reasoning in *U.S. Bank* makes good sense and reflects a statement of law and limiting principle found in decisions in this Circuit beginning over fifty years ago in *Schenin* and carried forward to *Bartlett* last year. Plaintiffs have provided no basis for this Court to depart from this rule and adopt a new, more expansive one.[17]

[17] For example, the current inherited jurisdiction theory does not open the door to "serious abuse" through defensive forum-shopping, or allow corporations to immunize themselves by formalistically changing their titles. *See, e.g., U.S. Bank*, 916 F.2d at 156 (disapproving of a rule that might permit a company to merge with a dummy corporation to avoid jurisdiction); *Bartlett*, 2020 WL 7089448 at *17 (finding "[t]hat specter of jurisdictional abuse is absent for asset purchases without continuity of ownership"); *see also Schenin*, 272 F. Supp. at 526 ("in the absence of any allegation or proof that the transaction was part of a scheme to avoid jurisdiction, [courts] are obliged to recognize the transaction in the form adopted by the parties thereto").

### 2. Plaintiffs' reliance on *LiButti* (and federal cases that rely upon it) is misplaced

Plaintiffs rely largely on *LiButti v. United States*, 178 F.3d 114 (2d Cir. 1999), in support of their jurisdictional theory. Lelchook Br. at 17–18, 23. That case and its reasoning is inapt for several reasons.

First, as an initial matter, *LiButti* arose in an entirely different context and involved Federal Rule of Civil Procedure 25, which governs the discretionary substitution of parties through motions practice in the midst of ongoing litigation. Fed. R. Civ. P. 25(c).[18]

Second, *LiButti* did not affirmatively hold that "successors inherit the jurisdictional status of their predecessor, 'simply as a consequence of their status as a successor in interest'" as Plaintiffs state in their brief. Lelchook Br. at 17. The *LiButti* Court offered only the limited observation that: "*In several cases* involving the question of whether *a person could be substituted or joined* under Rule 25(c), *various courts have held* that when a person is found to be a successor in interest,

[18] The dispute in *LiButti* concerned the ownership of a prize thoroughbred racehorse. If the Internal Revenue Service ("IRS") could show the horse to be the property of the plaintiff's father, "the IRS would be in a position to levy upon it to satisfy over $4 million in unpaid income taxes owed by him." *LiButti*, 178 F.2d at 116. In the middle of the multi-year litigation, a syndicate agreement divided ownership of the racehorse into shares, half of which were sold to Margaux Stallions, LLC ("Margaux"). The government thereafter sought restitution from Margaux, which the district court denied on the grounds that it lacked personal jurisdiction. *Id*. at 122–23. On appeal, the *LiButti* Court concluded that Margaux lacked minimum contacts sufficient for the court to exercise either *in personam* or *in rem* jurisdiction, and then considered the IRS's alternative jurisdictional argument under Rule 25(c). *Id.*

the court gains personal jurisdiction over them . . . .” *LiButti*, 178 F.3d at 123 (emphasis added).

Third, *LiButti*’s jurisdictional observations are *dicta*. The Court did not reach the issue because, even if the Government properly raised the argument despite the lack of a motion under Rule 25(c), and even assuming the reasoning adopted by those various courts in the Rule 25(c) context were correct, the Court found the argument still failed because successor liability was lacking under the applicable law of New Jersey. *Id*. at 124–25. To the extent this Court looks to *dicta* for additional guidance, moreover, the observations found in *U.S. Bank* are not only more recent, but directly on point.

*LiButti* thus makes *no* pronouncement—let alone one that would carry any precedential weight in the instant case that involves a direct claim against a defendant in the first instance—that successorship allegations are enough to confer personal jurisdiction under either state or federal law. In addition, a review of the federal district court decisions upon which Plaintiffs also rely, *see* Lelchook Br. at 17–18, show that they are equally inapt because they apply *LiButti* incorrectly. *See, e.g.*, *ILKB, LLC v. Singh*, No. 20-CV-4201 (ARR) (SJB), 2021 WL 2312951 (E.D.N.Y. June 7, 2021) (Slip Copy) (opinion relies upon *LiButti* outside the context of Rule 25); *Gentry v. Kaltner*, No. 17-CV-8654 (KMK), 2020 WL 1467358, at *7 (S.D.N.Y. Mar. 25, 2020) (opinion repeats (incorrect) statements of law in various

pre-*BRG* and -*Gronich* federal opinions that also erroneously rely on *LiButti* outside the context of Rule 25); *Fly Shoes v. Bettye Muller Designs*, No. 14 CIV. 10078 (LLS), 2015 WL 4092392, at *2 (S.D.N.Y. July 6, 2015) (opinion pre-dates *BRG* and *Gronich*, contains no analysis of New York law, and relies on *Time Warner Cable, Inc. v. Networks Grp.*, No. 09 CIV 10059 (DLC), 2010 WL 3563111, at *6 (S.D.N.Y. Sept. 9, 2010), which found alleged successors "are subject to personal jurisdiction because they agreed to the forum selection clause").

## II. PLAINTIFFS-APPELLANTS FORFEITED THEIR ARGUMENT THAT FED. R. CIV. P. 4(K)(2) PROVIDES A BASIS FOR PERSONAL JURISDICTION

For the first time on appeal, Plaintiffs argue that Fed. R. Civ. P. 4(k)(2) provides a basis for personal jurisdiction over SGBL. Lelchook Br. at 22–25. By failing even to mention this federal rule—let alone make and develop this argument below—Plaintiffs have forfeited their right to argue for jurisdiction on this basis. *Spiegel*, 604 F.3d at 76–77, 77 n.1; *Singleton v. Wulff*, 428 U.S. 106, 120–21 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *see generally United States v. Olano*, 507 U.S. 725, 733 (1993) ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'") (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (additional citations omitted).

Furthermore, even if this Court considers the argument, it would not confer personal jurisdiction over SGBL in this case.

### A. Plaintiffs' Sole Argument before the District Court Was That as LCB's Alleged Successor, SGBL Inherited LCB's Jurisdictional Status

Plaintiffs' only argument in the FAC and in opposition to SGBL's motion to dismiss was that the District Court had personal jurisdiction over SGBL under an inherited jurisdictional theory, that is, personal jurisdiction existed because SGBL was a successor to LCB under state and/or federal laws of successor liability. A23, ¶ 16 (reproduced *supra* at 13–14); A182–A187; A191–A192. Plaintiffs made no mention of a statutory basis for personal jurisdiction under Rule 4(k)(2), nor did they argue that, in the event New York law did not confer jurisdiction over SGBL per Fed. R. Civ. P. 4(k)(1), that Rule 4(k)(2) applied to confer jurisdiction over SGBL.[19]

### B. This Court Should Not Consider Plaintiffs' Newly Raised Theory of Personal Jurisdiction Because It Was Forfeited

Plaintiffs have forfeited the argument that "personal jurisdiction may be exercised over SGBL under Fed. R. Civ. P. 4(k)(2)." Lelchook Br. at 15, 22–25. This Court applies the "well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Greene v. United States*, 13

[19] Plaintiffs essentially concede that they never raised or developed this theory of jurisdiction below when they point this Court to but a single sentence in their memorandum of law in the district court that asserts "personal jurisdiction is governed by federal, not state, law." Lelchook Br. at 25 n.14; A191.

F.3d 577, 586 (2d Cir. 1994); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487, 487 n.6 (2008) ("litigation is a 'winnowing process,' and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided.") (quoting *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 531 (1st Cir. 1993)). This Court applies the rule to untimely personal jurisdiction arguments and this Court regularly deems plaintiff-appellant's arguments forfeited on appeal.

For example, in *Spiegel*, the district court dismissed for lack of personal jurisdiction. On appeal, plaintiffs-appellants argued for the first time that personal jurisdiction existed based on the company's registration to do business in New York. *Spiegel*, 604 F.3d at 76–77, 77 n.1. This Court held that "*the Plaintiffs did not raise this argument before the district court and, thus, it is waived*." *Id.* at 77 n.1 (emphasis added). The Court reached this conclusion even though the argument, had it been properly raised, would have been meritorious at the time. *Id*. (recognizing "such registration would have been sufficient to establish personal jurisdiction" under New York law).

This Court more recently has summarily rejected various plaintiffs-appellants' attempts to make a new personal jurisdiction arguments on appeal. For instance, in *Ritchie Capital Management, L.L.C. v. Costco Wholesale Corp.* ("*Ritchie*"), this Court ruled: "We decline to entertain [plaintiffs-appellants'] belated

argument; [plaintiffs-appellants' have] presented no explanation for why it did not make this argument before the district court, or why it would be a 'manifest injustice' if [plaintiffs-appellants' are] prevented from blindsiding [defendant-appellee] on appeal." *Ritchie*, 667 F. App'x 328, 329 (2d Cir. 2016) (quoting *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004)). Likewise, in *MacDermid, Inc. v. Canciani* ("*MacDermid*"), this Court found that where the appellant "failed to argue before the district court that [the appellee] transacted business in Connecticut by means of an agent[,]" the appellant "ha[d] therefore forfeited" that theory of personal jurisdiction on appeal. *MacDermid*, 525 F. App'x 8, 10 (2d Cir. 2013).

Nor should this Court exercise its discretion to excuse Plaintiffs' failure here. *Greene*, 13 F.3d at 586 ("Entertaining issues raised for the first time on appeal is discretionary with the panel hearing the appeal."). There is no reason Plaintiffs could not have squarely raised this argument for the District Court's consideration and then briefed the Rule's application to this case, including its factual and legal predicates and burden-shifting mechanism, rather than leave it to this Court on appeal. *See* Lelchook Br. at 22 n.12; *see also Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) ("availability of argument below weighs against exercising discretion to hear the belated argument on appeal," particularly where "Defendants proffer no reason for their failure to raise the arguments below").

Plaintiffs also cannot show that consideration of their new theory of jurisdiction is "necessary to avoid a manifest injustice," as Plaintiffs themselves created this circumstance and any purported injustice both factually, by failing to pursue the $580,000,000.00 paid by SGBL to LCB, and legally, by failing to raise the theory below even though they had ample opportunities to do so. *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006) (citation omitted).[20]

## III. SUBJECTING SGBL TO SPECIFIC JURISDICTION IN NEW YORK BASED UPON AN ENTIRELY FOREIGN ASSET AND LIABILITY PURCHASE, WHERE IT LACKS SUIT-RELATED CONTACTS WITH THE UNITED STATES, AND UNDER A THEORY THAT RELIES EXCLUSIVELY ON THE CONDUCT OF A THIRD PARTY, VIOLATES FEDERAL DUE PROCESS

This Court need not reach this issue but the exercise of personal jurisdiction over SGBL by imputing LCB's earlier jurisdictional contacts based exclusively on a foreign asset purchase agreement that has no connection to New York or the United States would not comport with federal due process principles. *See Waldman*, 835

[20] Even if this Court were to consider plaintiffs' belated argument, it should reject it. Congress enacted Fed. R. Civ. P. 4(k)(2) to reach defendants who violated federal law and whose contacts with any one state were insufficient to confer personal jurisdiction, but whose contacts with the United States as a whole were sufficient. *See* Fed. R. Civ. P. 4(k)(2)(B) (allowing jurisdiction to be based on an aggregation of contacts with the nation as a whole); *see also* Fed. R. Civ. P. 4(k) Notes of Advisory Committee on Rules—1993 Amendment ("Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law . . . , but having insufficient contact with any single state to support jurisdiction under state long-arm legislation . . . ."). This does not apply here, where Plaintiffs do not allege that SGBL violated federal law, or that SGBL's contacts with the U.S. are sufficient to confer personal jurisdiction. In addition, this Court's decision in *U.S. Bank* shows that Plaintiffs' inherited successor jurisdiction theory lacks a legal basis and, relatedly, that subjecting SGBL to personal jurisdiction would not comport with federal constitutional due process principles (which is discussed next).

F.3d 317 at 331 (defendants must have "sufficient minimum contacts with the forum to justify the court's exercise of personal jurisdiction," and the exercise of jurisdiction must "comport[] with 'traditional notions of fair play and substantial justice' under the circumstances" (quoting *Daimler*, 571 U.S. at 126).

### A. The Exercise of Specific Personal Jurisdiction Must Be Based on the Defendant's Suit-Related Conduct

That due process does not permit the exercise of personal jurisdiction over SGBL flows naturally from this Court's reasoning in *U.S. Bank*. The majority in that case concluded that jurisdictional status could be imputed only because the surviving successor-by-merger corporation is deemed to be both the surviving corporation and the absorbed corporation. *U.S. Bank*, 916 F.3d at 155. The "minimum contacts" relied upon as a basis for threshold jurisdiction, therefore, is that of the defendant who is subject to suit in the litigation.

On the other hand, jurisdiction by imputation in the case of an asset and liability purchaser—particularly where the predecessor survives the transaction—is *not* based on the contacts the defendant to the litigation has with the forum. It therefore contravenes established U.S. Supreme Court precedent. *See Waldman*, 835 F.3d at 335 (for purposes of specific jurisdiction, the relationship "must arise out of contacts that the 'defendant *himself*' creates with the forum") (quoting *Burger King Corp.*, 471 U.S. at 475) (emphasis in original); *Walden v. Fiore*, 571 U.S. 277, 284–85 (2014) (to satisfy the minimum contacts inquiry, "the defendant's suit-related

conduct must create a substantial connection with the forum State"—that is, the "defendant [it]self" must create those contacts, and those contacts must be with the "forum State itself") (citation omitted); *see also Daimler*, 571 U.S. at 127 (for purposes of general jurisdiction, the defendant essentially must be "at home" in the forum). This is so because due process limits "principally protect the liberty of the nonresident defendant." *Walden v. Fiore*, 571 U.S. at 284; *see also Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("[t]he requirements of *International Shoe* . . . must be met as to each defendant"). Here, of course, SGBL, and not LCB, is the defendant in this case, and it is undisputed that neither SGBL independently, nor SGBL and LCB together, engaged in any jurisdictionally relevant acts, *i.e.*, took any action in New York or the United States related to either the underlying ATA claims, or the successor liability claims, including in connection with the asset and purchase transaction itself. *Goodyear*, 564 U.S. at 923 (defendants cannot be made to answer "with respect to matters unrelated to the forum connections").

### B. Plaintiffs' Inherited Jurisdictional Theory Impermissibly Relies Exclusively on LCB's Conduct and Fails to Show SGBL Purposefully Availed Itself or Directed its Conduct into New York or the United States

Recent decisions addressing both general and specific personal jurisdiction further confirm that personal jurisdiction cannot be based upon the conduct of agents or other third parties. *Daimler*, 571 U.S. at 134–36 (general jurisdiction cannot be based on imputed contacts of subsidiaries to corporate parents, often referred to as

"agency" jurisdiction); *Walden*, 571 U.S. at 284 (the Supreme Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State"). Imputing LCB's contacts and jurisdictional status to SGBL would impermissibly represent the "unilateral activity of another party or a third person," and therefore violate due process. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984); *see Burger King Corp.*, 471 U.S. at 475 (same); *Walden*, 571 U.S. at 284 (same).

### C. The Exercise of Specific Jurisdiction over SGBL Would Not Comport with Traditional Notions of Fair Play and Substantial Justice

Despite having no connections to the forum, Plaintiffs suggest that personal jurisdiction is proper because SGBL was aware of the *Licci* litigation and should have foreseen the possibility that it could be sued a decade later in the instant, new lawsuit—which Plaintiffs concede includes new and different plaintiffs. Lelchook Br. at 11. This argument fails because "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen Corp*, 444 U.S. at 295 (internal quotation marks omitted); *see also Burger King Corp.* v. 471 U.S. at 474 (mere "foreseeability of causing injury in another State . . . is not a sufficient benchmark for exercising personal jurisdiction") (citation and quotation marks omitted).

Plaintiffs' contention is also undercut because the record shows Plaintiffs could have attempted to attach a portion of $580,000,000.00 paid by SGBL to LCB during the highly-publicized asset and liability purchase, or, even more readily, move to attach $150,000,000.00 of transaction funds that the U.S. government seized and held in 2011 in the United States as part of its asset forfeiture case against LCB. *See supra*, at 10. Plaintiffs did neither, and any difficulties they may face in recovering from LCB are due to their own inaction and own strategic decisions.

Indeed, subjecting SGBL to personal jurisdiction under Plaintiffs' theory here—when SGBL has no contacts with the forum or the United States—would be fundamentally unfair and undermine important due process goals of predictability by having the potential of subjecting a foreign asset purchaser to lawsuits in the U.S. whenever and wherever it acquires a liability of another company, whether that company is a U.S. corporation or not, and whether or not the asset purchase has any connection to the U.S. *Daimler*, 571 U.S. at 139–40; *see id*. 136–140 (warning that these protections are especially important where foreign corporations are involved).

Nor do any of the federal Circuit decisions cited by Plaintiffs show that the exercise of personal jurisdiction over SGBL would comport with due process. *See* Lelchook Br. at 23–24. Those cases either arise in the context of Rule 25, which involves different due process considerations, or apply to circumstances not present here. *See, e.g.*, *Transfield ER Cape Ltd. v. Indus. Carriers, Inc.*, 571 F.3d 221, 224

(2d Cir. 2009) (case involves "alter ego" liability in the context of maritime attachments, not a successor, notwithstanding court's citation quotation that included the word; opinion's reasoning is consistent with *U.S. Bank*'s conclusion that jurisdiction may be imputed if the entity is one and the same, but not otherwise); *Patin v. Thoroughbred Power Boats Inc.*, 294 F.3d 640, 652–53 (5th Cir. 2002) (conclusion is based on finding that "Velocity is a mere continuation of Thoroughbred" and therefore "the jurisdictional contacts of one are the jurisdictional contacts of the other for the purposes" of minimum contacts analysis); *Hawkins v. i-TV Digitális Távközlési zrt.*, 935 F.3d 211, 227 (4th Cir. 2019) (case involved waived appellate argument in connection with substitution in as parties under Rule 25(c)); *City of Richmond, Va. v. Madison Mgmt. Group*, 918 F.2d 438, 454–55 (4th Cir. 1990) (court relies on cases interpreting various state laws (not New York) and is concerned with a corporation "just reforming in some other jurisdiction and avoiding any accountability" on a defective product, which does not apply to an asset purchaser); *Rodriguez-Miranda v. Benin*, 829 F.3d 29, 45 (1st Cir. 2016) (case arises under Rule 25(c); court cites concern with defendant transferring interest to a different jurisdiction in the middle of litigation); *Minnesota Min. & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1263 (Fed. Cir. 1985) (case involves "pending litigation" and joinder or substitution under Rule 25(c)).

## IV. PLAINTIFFS' REQUEST FOR THIS COURT TO APPLY A SPECIAL FEDERAL RULE OF LIABILITY—A "SUBSTANTIAL CONTINUITY TEST"—IS MISPLACED, AND, IN ANY EVENT, FORECLOSED BY CIRCUIT PRECEDENT

Plaintiffs' final argument is to ask this Court to apply a more expansive federal rule of liability in ATA cases—the "substantial continuity test"—and then rely upon it to find personal jurisdiction over SGBL. This Court may readily reject this alternative argument.

As an initial matter, Plaintiffs' proposed test is a rule of substantive liability, not jurisdiction. Plaintiffs recognize this incongruity and lack a single example of a court applying this special test to confer personal jurisdiction over a defendant. Lelchook Br. at 28. And with good reason: there is, of course, no federal common law of personal jurisdiction and, in any event, little reason to depart from well-established jurisdictional law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

But even if a federal "substantial continuity test" were somehow relevant and applicable for purposes of exercising jurisdiction, this Circuit has explicitly declined to extend such a rule beyond very limited contexts. In *Nat'l Servs. I*, 352 F.3d at 685–87, this Court applied the U.S. Supreme Court's decision in *U.S. v. Bestfoods*, 524 U.S. 51 (1998), and reversed earlier precedent that had adopted a "substantial continuity test" in the CERCLA context. *Bestfoods* had held that CERCLA incorporates, but does not expand upon, "fundamental" common law principles of

indirect corporate liability. *Bestfoods*, 524 U.S. at 62–64. The Supreme Court therefore rejected application of special federal rules to govern the parent-subsidiary relationship in that context, observing that "CERCLA is like many another congressional enactment in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." *Bestfoods*, 524 U.S. at 63 (citation and quotation omitted).

This Court accordingly rejected the substantial continuity test, concluding that it "is not a sufficiently well established part of the common law of corporate liability to satisfy *Bestfoods*[']dictate." *Nat'l Servs. I*, 352 F.3d at 686. The decision was consistent with the Supreme Court's earlier admonition that the cases requiring the "creation" and application of a federal common law are "few and restricted," because it would invite federal courts to eviscerate both the *Erie* doctrine and the concept of dual sovereignty it embodies. *O'Melveny & Myers v. Federal Deposit Insurance*, 512 U.S. 79, 87 (1994) (citation omitted).

This reasoning applies with equal force to the ATA. Plaintiffs' have provided no basis for this Court to adopt a special rule either for purposes of imposing corporate liability, or in conjunction with an inheritance theory to confer personal jurisdiction. *See Jesner v. Arab Bank plc*, 138 S. Ct. 1386, 1405 (2018) (plurality opinion) ("The Anti-Terrorism Act . . . is part of a comprehensive statutory and regulatory regime that prohibits terrorism and terrorism financing" and "reflect[s]

the careful deliberation of the political branches on when, and how, banks should be held liable for the financing of terrorism.").

## CONCLUSION

Plaintiffs' inherited successor jurisdiction theory does not confer personal jurisdiction over SGBL in New York in this case. Accordingly, this Court should affirm the judgment below.

Dated: November 5, 2021

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Local Rule 32.1(a)(4)(A) because it contains 11,519 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in 14-point, Times New Roman font.

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## CERTIFICATE OF SERVICE

I certify that on November 5, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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