

Outside Counsel

Expert Analysis

Expansive Take on Specific Jurisdiction: ‘Gucci America v. Weixing Li’

BY LANIER SAPERSTEIN, DANIEL W. BEEBE AND CAROL LEE

In *Gucci America v. Weixing Li*, 2015 WL 5707135 (SDNY Sept. 29, 2015), the district court found that it had specific jurisdiction over a non-party Chinese bank and required it to produce customer account records, even though the production of those records violated Chinese bank secrecy laws. The Gucci decision sought to inoculate its jurisdictional reasoning by supposedly hewing closely to the New York Court of Appeals’ decision in *Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327 (2012). However, *Gucci* represents a significant departure from recent Second Circuit precedent as well as *Licci*, where New York’s highest court held that a foreign bank’s “mere maintenance” of a correspondent account in New York is insufficient to support the exercise of personal jurisdiction over that bank.

The court in *Gucci* gave insufficient weight to the bank’s non-party status in the equities of asserting specific jurisdiction over it. The court reasoned that the bank’s non-party status favored the requesting party, as the underlying dispute did not involve the bank’s “own liability.” That reasoning was not restrained by established precedent that the non-party status of a subpoena recipient increases—not lessens—the burden on the requesting party.

Further, the court in *Gucci* found that it had specific jurisdiction over the non-party bank even though there were no allegations that the bank had deliberately and repeatedly chosen to process wire transfers through New York, and even though not a single one of the transfers passed through its New York branch. Under the logic of the district court in *Gucci*, a foreign, non-party bank can be haled into court simply by virtue of maintaining a correspondent account in New York for the processing of wire



Lanier Saperstein, Daniel W. Beebe and Carol Lee

transfers. Those two factors put *Gucci* squarely at odds with recent decisions.

The Decision

The Gucci decision was the district court’s second bite at the jurisdictional apple in that the U.S. Court of Appeals for the Second Circuit had rejected the district court’s previous ruling

Under the logic of the district court in ‘Gucci,’ a foreign, non-party bank can be haled into court simply by virtue of maintaining a correspondent account in New York for the processing of wire transfers.

that it had general jurisdiction over the foreign bank. In *Gucci v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014), the Second Circuit ruled that, under *Daimler v. Bauman*, 134 S. Ct. 746 (2014)—probably “the most important Supreme Court ruling on general jurisdiction in 70 years,”¹—the foreign bank was not subject to general jurisdiction in New York because it was not incorporated or headquartered in New York. The Second Circuit then remanded the case for a determination on whether the court could exercise specific jurisdiction over the bank. On remand, the district court concluded that it could exercise specific jurisdiction.

The district court primarily based its decision on the fact that the bank maintained a

correspondent bank account in New York and processed a handful of wire transfers via that correspondent account in its role as an intermediary bank. That, according to the district court, was sufficient to show “purposeful availing of New York’s dependable and transparent banking system.”

Further, the district court found the non-party bank’s conduct was related to the cause of action—trademark infringement under the Lanham Act against alleged counterfeiters of luxury handbags and jewelry. The district court found that Gucci’s interest in compelling the bank to produce its customers’ account records and the United States’ interest in enforcing the Lanham Act outweighed the bank’s interest in complying with Chinese bank secrecy laws and protecting the confidentiality of bank customer information.

The district court’s decision in *Gucci*, however, was wrongly decided because the court failed to recognize the inequity of exercising specific jurisdiction over the non-party foreign bank, and the court relied too heavily on the mere existence of a correspondent banking relationship in New York as a jurisdictional hook.

Haling Non-Parties Into Court

The first problem is that the court gave insufficient weight to the bank’s non-party status. In remanding the case, the Second Circuit had cautioned the district court that the foreign bank’s non-party status may “alter the equities of asserting jurisdiction” and directed the district court to a prior decision of the circuit court, *Heyman v. Kline*, 444 F.2d 65, 65-66 (2d Cir. 1971), supporting the proposition that “a nonparty with few if any connections to the activities giving rise to the suit may have a strong interest in its freedom to take actions that are ‘genuinely independent’ of any intent to frustrate a court’s [order].” 768 F.3d 122, 137 n.17.

On remand, however, the district court decided that the burden a non-party bank would suffer by subjecting it to specific jurisdiction in New York and ordering it to produce confidential customer information would only be minimal, or even “non-existent.” The district court found

LANIER SAPERSTEIN is a partner at Dorsey & Whitney and an adjunct professor at Fordham University School of Law. DANIEL W. BEEBE is an associate and CAROL LEE is an attorney at Dorsey.

that, since the only issue was compliance with a document subpoena and not the bank's own liability, there was even less cause for the bank to "complain of an outrage to fair play."

Had the district court taken the bank's non-party status into proper account, however, the result would have been different. The bank's actions did not give rise to the suit because the bank was not an alleged counterfeiter of Gucci's luxury goods. Further, the bank's processing of a few wire transfers was totally independent of any intent to frustrate justice or the plaintiff's pursuit of counterfeiters. In a proper balancing of the equities, the bank's status as an innocent non-party should have increased, not lessened, the burden on the requesting party to establish the court's specific jurisdiction over the bank.

Maintenance of Account

The second problem is that the court's finding of a "strong relationship" between the bank's conduct and the subpoena document requests lacked support given the small number of transfers involved, none of which were even processed by the foreign bank's New York branch.

A foreign bank, whether a non-party or defendant, cannot be haled into court simply by virtue of the maintenance of a correspondent account in New York for the processing of wire transfers. Correspondent accounts "facilitate the flow of money worldwide, often for transactions that otherwise have no other connection to New York, or indeed the United States." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 166 n.3 (2d Cir. 2013). As clearly stated by the Second Circuit in *Licci v. Lebanese Canadian Bank*, 732 F.3d 161 (2d Cir. 2013), the "mere maintenance" of such correspondent accounts is not sufficient "to support the constitutional exercise of personal jurisdiction." *Id.* at 171.

In *Licci*, victims of rocket attacks, and their family members, brought an action against Lebanese Canadian Bank under the Anti-Terrorism Act, Alien Tort Statute and Israeli tort law. The plaintiffs alleged that the bank had facilitated the attacks committed by Hizballah by knowingly maintaining bank accounts for the Shahid Foundation—an alleged Hizballah-affiliated organization—and using a single correspondent account at American Express Bank in New York to effectuate wire transfers on behalf of the Shahid Foundation.

After the district court granted the Lebanese Canadian Bank's motion to dismiss for lack of personal jurisdiction, the plaintiffs appealed to the Second Circuit. The Second Circuit, in turn, certified two questions to the New York Court of Appeals concerning the exercise of specific jurisdiction under New York State's long-arm statute. The state Court of Appeals accepted and provided answers to the certified questions. First, the court responded that "a foreign bank's use of a New York correspondent account to execute dozens of wire transfers is sufficiently purposeful conduct to constitute a 'transaction of business'" within the meaning of New York's long-arm statute. *Licci*, 20 N.Y.3d at 338-339.

However, the New York Court of Appeals was careful to emphasize that the Second Circuit was correct in finding that the "mere maintenance" of a correspondent account in New York does not constitute purposeful availment under the long-arm statute. *Id.* at 388.

Second, the New York Court of Appeals responded that the allegations in the complaint, if true, "establish the requisite 'nexus' or 'relationship' between the foreign bank's New York business activity and the plaintiffs' claims to support the district court's exercise of personal jurisdiction under the long-arm statute." *Id.* at 339-341. The New York Court of Appeals was particularly swayed by the plaintiffs' central allegation that Lebanese Canadian Bank—a party in the action—"deliberately" used the correspondent account "again and again" to "effect its support of Shahid and shared terrorist goals." *Id.* at 340.

A foreign bank, whether a non-party or defendant, cannot be haled into court simply by virtue of the maintenance of a correspondent account in New York for the processing of wire transfers.

After the New York Court of Appeals issued its decision answering the certified questions, the Second Circuit in *Licci* then ruled that the exercise of personal jurisdiction over the foreign bank defendant in that case, Lebanese Canadian Bank, was consistent with due process because, in that case, "the correspondent account at issue is alleged to have been used as an instrument to achieve the very wrong alleged." *Id.* at 171. Thus, the court concluded that in "a lawsuit seeking redress for the allegedly unlawful provision of banking services of which the wire transfers are a part" that "allegations of [the bank's] repeated, intentional execution of U.S.-dollar-denominated wire transfers...to further Hizballah's terrorist goals, are sufficient." *Id.*

A key factor emphasized by the Second Circuit in *Licci* was the "deliberate" and "repeated use of the correspondent account" in New York "as an instrument to achieve the wrong complained of" in the lawsuit. Thus, absent such a strong connection between an alleged wrongdoing and a bank's repeated use of a correspondent account, the *Licci* decision does not support the exercise of specific jurisdiction.

The district court's Gucci ruling stretches the reasoning of *Licci* in that none of the wire transfers in *Gucci* were even processed by the non-party foreign bank's New York branch. Whereas in *Licci*, the Second Circuit stated that deliberately and repeatedly choosing to process wire transfers through New York constitutes purposeful availment, the "mere maintenance" of a correspondent account by a foreign bank does not constitute purposeful availment.

The district court did not find that the non-party bank ever made a deliberate choice to process wire transfers to further a counterfeiting

scheme. Nor was such intentional wrongdoing ever alleged. Thus, there is more than just a bit of daylight between the *Licci* decision and the district court's application of that decision in *Gucci*, which misused *Licci* as an end-run around the U.S. Supreme Court's ruling in *Daimler* that U.S. courts lack general jurisdiction over foreign corporations.

The U.S. Court of Appeals for the Fifth Circuit looked at the issue of correspondent bank account use in *Monkton Ins. Services v. Ritter*, 768 F.3d 429 (5th Cir. 2014). In *Monkton*, the Fifth Circuit affirmed the dismissal of claims against third-party defendant foreign bank, Butterfield Bank (Cayman) Limited, for lack of general and specific jurisdiction, and denied third-party plaintiff's motion for jurisdictional discovery. The court held that Butterfield Bank's contacts with Texas, including 20 wire transfers to Texas banks at the request of the third-party plaintiff, were insufficient for the exercise of personal jurisdiction over the foreign bank.

The fact that the wire transfers were initiated by the third-party plaintiff was critical to the court's analysis because "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Id.* at 432. Even though Butterfield Bank facilitated 20 wire transfers over a three-and-a-half year period, the court found that these facts still could not support a finding that Butterfield Bank had purposefully directed its activities toward Texas or purposefully availed itself of the privileges of conducting business in Texas.

Conclusion

In finding specific jurisdiction over the foreign bank's New York branch, the district court over-looked the non-party status of the bank that the Second Circuit specifically highlighted in its *Gucci* decision. Furthermore, by ruling that the foreign bank's use of its correspondent account in New York forms a sufficient nexus for the exercise of specific jurisdiction, the court failed to recognize the key factual differences from the *Licci* case and the lack of any allegations of wrongdoing by the foreign bank in *Gucci*. It is unfortunate that the district court failed to properly apply these two Second Circuit rulings which, when properly applied, are meant to protect non-parties from the improper exercise of specific jurisdiction.

.....●●.....

1. Stephen Baldini, Anthony Pierce, and Stanley Woodward, "Surveying the Application of 'Daimler' in the Circuits," NYLJ, Dec. 14, 2015.