No. 17-481

In the Supreme Court of the United States

AMCI HOLDINGS, INC., *et al.*,
Petitioners,

v.

CBF INDUSTRIA DE GUSA S/A, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can an award-creditor enforce a foreign arbitral award directly against an award-debtor's alter egos or successors-in-interest under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 and the Federal Arbitration Act (Pub. L. No. 68–401, 43 Stat. 883, enacted February 12, 1925, codified at 9 U.S.C. § 1 *et seq*.)?

RULE 29.6 STATEMENT

The Petitioners' caption contains the names of all the parties to the proceeding.

1. Gusa Nordeste S/A ("Gusa"): Gusa's parent company is Empresa de Mecanização Rural LTDA; no publicly held corporation owns 10% or more of Gusa's stock;

2. Da Terra Siderúrgica LTDA ("Da Terra"): Da Terra does not have a parent company; no publicly held corporation owns 10% or more of Da Terra's stock;

3. CBF Indústria de Gusa S/A ("CBF"): CBF's parent company is Empresa de Mecanização Rural LTDA; no publicly held corporation owns 10% or more of CBF's stock;

4. Siderúrgica União S/A ("Siderúrgica"): Three companies own a portion of Siderúrgica's stock, including JC Gontijo Topázio Empreendimentos S/A, Prima Vista Empreendimentos Imobiliários LTDA, and Elo Participações S/A; no publicly held corporation owns 10% or more of Siderúrgica's stock;

5. Siderúrgica do Pará S/A ("Sidepar"): Three companies own a portion of Sidepar's stock, including JC Gontijo Topázio Empreendimentos S/A, Prima Vista Empreendimentos Imobiliários LTDA, and Elo Participações S/A; no publicly held corporation owns 10% or more of Sidepar's stock;

6. Ferro Gusa do Maranhão LTDA ("Fergumar"): Two companies own a portion of Fergumar's stock, including LASA Participações S.A. and DMI Empreendimentos Ltda; no publicly held corporation owns 10% or more of Fergumar's stock; and

7. Ferguminas Siderúrgica LTDA ("Ferguminas"): Two companies own a portion of Ferguminas' stock, including LASA Participações S.A. and DMI Empreendimentos Ltda.; no publicly held corporation owns 10% or more of Ferguminas' stock.

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I. Preliminary Statement

It is a wholly uncontroversial proposition that American law permits award-creditors, like Respondents, to enforce foreign arbitration awards against an award-debtor's alter egos, like Petitioners. The Second Circuit's decision (the "Decision")—after examining the text and purpose of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "Convention") and its implementing legislation, the Federal Arbitration Act (9 U.S.C. §§ 201-208) (the "FAA")—simply determined that allowing such enforcement to be accomplished in one action, rather than two actions, advanced the pro-enforcement goals of the Convention. And, although the Decision's holding makes sense as a general proposition of law, it had unique application to the *sui generis* facts of this case in which a two-step enforcement process had been rendered impossible by a blatant fraud perpetrated by the Petitioners.

The Decision creates no circuit split, is consistent with settled practice, and expressly adopts the position of the United States in its *amicus curiae* brief before the Second Circuit. *See Medellin v. Texas*, 552 U.S. 491, 513 (2008) (holding the government's interpretation of a treaty that it participated in negotiating is "entitled to great weight" (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982))). Both the United States and the Second Circuit agree that the Convention set a floor on each signatory state's facilitation of the enforcement of foreign arbitral awards, and both agree that nothing in

the text or purpose of the Convention mandates that enforcement against an award-debtor's alter egos under domestic law proceed as a separate, second step.

Petitioners seek to gain this Court's interest by ignoring the Decision's factual narrative and its straightforward analysis of the Convention and the FAA, instead focusing on a parade of alleged horribles that would ensue should the Decision stand. Petitioners' arguments do not withstand scrutiny.

The Decision does no violence to basic arbitration principles, as alter egos routinely are held accountable in the United States for the judgments and awards issued against entities they dominate. In fact, Petitioners openly acknowledge that they have no objection to this body of law, but instead would prefer that any attempt to hold them accountable "proceed in two steps in the same courts" (Petition at 20), rather than in a single step, knowing full-well that their bad acts have made their proffered two-step solution an impossibility.

Nor does the Decision violate any international consensus (a claim Petitioners support by reference to a single inapposite case from the United Kingdom). Petition at 22-23. The Decision merely, but strongly, reinforces the availability of domestic procedures for enforcement of awards under the Convention. Lastly, as detailed *passim*, a reversal of the Decision would create a template by which unscrupulous alter egos could game international law to make themselves and the entities they dominate judgment-proof under the Convention.

Accordingly, the Petition should be denied.

II. Counterstatement Of The Case

Petitioners' "Statement of the Case" bears little resemblance to the facts set forth in the Decision.[1] As detailed in the Decision and below, Petitioners are part of a web of interconnected and financially related foreign and domestic parties that dominated and controlled Steel Base Trade, AG ("SBT"), causing it first to breach its contracts with Respondents, and then to participate in a fraudulent scheme to bankrupt SBT, leaving Petitioners trying to recover against an entity with no assets.

A. The Contracts Between Respondents And SBT

Respondents produce and sell pig iron. Pet. App. 6a. In the mid-1990s, they sold pig iron to a Swiss company called Primetrade AG ("Primetrade"). *Id.* at 6a-7a. Primetrade eventually became SBT and, on October 5, 2007, AMCI International GmbH ("AMCI International"), a company owned and controlled by Petitioners Mende and Kundrun, purchased SBT and its United States-based subsidiary, Primetrade, Inc. ("Primetrade USA"). *Id.* at 7a.

In 2008, Respondents and SBT entered into a series of contracts wherein SBT agreed to buy 103,500 metric

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[1] As the Decision was the result of Respondents' appeal of the district court's dismissal of the Respondents' complaints pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Second Circuit accepted, and this Court must accept, the facts pled in those complaints as true. Pet. App. 6a (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

tons of pig iron for more than $76 million (the "Contracts"). *Id.* Following the financial crisis in late 2008 and the attendant collapse in commodity prices, including pig iron, SBT ceased purchasing pig iron under the Contracts. *Id.* at 8a.

After SBT's breach, Respondents sought to negotiate a resolution with SBT short of engaging in the formal arbitration procedures set forth in the Contracts. *Id.* at 8a-9a. In response, a SBT representative said:

> "You know our group and it is not our style to walk away from obligations. . . . We will need a long time to work this out together. My message to your group is: we are not walking away!!!"

Pet. App. 8a-9a.

As Respondents soon would learn, however, it was in fact Petitioners' "style to walk away from obligations." *Id.*

B. Petitioners Lied To The International Chamber Of Commerce In Paris

On November 16, 2009, Respondents submitted their dispute with SBT (the "Arbitration") to the International Chamber of Commerce in Paris ("ICC Paris"). *Id.* at 9a. Thereafter, SBT requested an extension of time to respond to Respondents' arbitration demand, and the ICC Paris granted SBT an extension of time to respond until January 27, 2010. *Id.* at 10a. Shortly thereafter, Respondents became concerned about SBT's relationship with an entity called Prime Carbon GmbH ("Prime Carbon"). *Id.* Specifically, Respondents became concerned that SBT's

website appeared to be off-line and that Prime Carbon appeared to be taking SBT's place in the pig iron market. *Id.*

On January 15, 2010, Respondents contacted the ICC Paris with their concerns, stating that SBT appeared to be "transferring its business operations and assets to Prime Carbon." Pet. App. 10a. On January 25, 2010, Petitioners caused SBT to respond, telling Respondents and the ICC Paris:

> [SBT] does not try to evade from its obligations[.]
>
> It is true that the website www.steelbasetrade.com was shut down at the beginning of January 2010[.] The reason is that [SBT] first has to analyze [its] position regarding pending or imminent claims for damages from purchasers as well as against suppliers as well as [its] financial situation[.] Therefore, [SBT] has at least temporarily suspended [its] business activities. Please note, however, [SBT] is still existing and has not resolved to be dissolved and liquidated.

(the "January 25th Statement"). *Id*. at 10a-11a. Although Respondents did not know it at the time, this Statement was a blatant lie intended to distract Respondents and the ICC Paris while Petitioners effectuated a plan to steal SBT's assets.

Specifically, at the time of the January 25th Statement, Petitioners not only had drafted and entered into a secret transfer agreement (the "Secret Agreement") by which SBT would become insolvent and Prime Carbon would assume SBT's place in the pig iron

market, but also had sent letters to many of SBT's pig iron suppliers, *other than Respondents*, notifying them that, as of November 30, 2009, Prime Carbon had assumed control of SBT's business and was "willing to enter in[to] all contracts between your company and [SBT] and to perform under the same conditions" (the "Customer Notice"). *Id.* at 12a.

Thus, while telling Respondents and the ICC Paris on January 25th that SBT "is still existing and ha[d] not resolved to be dissolved and liquidated," Petitioners already had started "effectuat[ing] their plan to make SBT an assetless and judgment proof company."[2] *Id.* at 11a, 13a.

C. The Secret Agreement Was Not An Arms-Length Transaction, Turned SBT's Business And Assets Over To Prime Carbon, And Left The Debt Owed To Respondents With An Insolvent SBT

Under the terms of the Secret Agreement, SBT agreed to transfer nearly all of its assets—including SBT's ownership stake in Primetrade USA (its primary asset), insurance policies, physical assets, and bank lines (valued at approximately $126 million)—along with liabilities of approximately $130 million to Prime Carbon in exchange for $1. *Id.* at 11a. The Secret Agreement left SBT with only a few thousand Swiss

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[2] Whether the Secret Agreement was approved in November 2009, as the Customer Notice and some later-discovered board records indicate, or whether it was approved on January 27, 2010, Petitioners withheld such information from Respondents and willfully lied to the ICC Paris about SBT's status as a going-concern.

francs ("CHF") in assets, while retaining approximately $50 million in liability to Respondents and another $4.5 million in liability to another creditor. *Id.* at 11a-12a.

The Secret Agreement was signed on behalf of Prime Carbon by Thomas Buerger. Pet. App. 51a. Buerger was a former director of SBT, the then-Chief Financial Officer of AMCI Capital, and a director of SBT's parent company, Petitioner AMCI International. *Id*. at 51a. Following the effectuation of the Secret Agreement, Prime Carbon: (a) had at least five of the same directors as SBT; (b) assumed ten of SBT's employment contracts; (c) appointed Petitioner Mende to serve as the president of its Board of Directors; and (d) at all times, shared an office address with SBT or AMCI International. *Id.* at 12a.

D. SBT's Bankruptcy, Petitioners' Further Theft Of SBT's Assets, And Petitioners' Other Efforts To Frustrate Respondents' Efforts To Protect Their Ability To Collect Against SBT

The Secret Agreement was formally approved on January 27, 2010, the same day SBT filed its response in the Arbitration. *Id.* at 12a. SBT did not inform the ICC Paris about this material change in circumstances or that SBT's January 25th Statement was untruthful. And, although SBT was insolvent on January 27, 2010, it was not put into bankruptcy until April 28, 2010, but not before Petitioners "mysteriously" arranged to have

SBT transfer nearly all of its remaining cash to Prime Carbon.[3] *Id.* at 13a.

Following these developments, in June of 2010, Respondents asked the ICC Paris for discovery concerning SBT's actions and sought interim relief to seize up to approximately $42 million of SBT's assets (whether held by SBT or Prime Carbon) (the "Interim Relief").[4] *Id.* at 13a-14a.

The ICC Paris held hearings concerning the Interim Relief that SBT neither attended nor sought to postpone. Pet. App. 14a-15a. Thereafter, the ICC Paris sent SBT a list of questions concerning, *inter alia*, whether, and to what extent, SBT had "transferred goods and respective titles of goods to Prime Carbon AG . . . after being notified of the Request for Arbitration." *Id.* at 15a. SBT did not provide any response to these requests for information.[5] *Id.*

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[3] As the Decision noted, Petitioners admit that "none of SBT's records provide a contemporaneous explanation" for this transfer. Pet. App. 13a.

[4] Although they were not required to do so in order to bring claims under the Convention (*see infra* Section III.D.), Respondents' efforts to reach Prime Carbon during the pendency of the Arbitration refutes Petitioners' claim that "Respondents did not attempt" to do so. Petition at 5.

[5] Petitioners claim they are not responsible for SBT's failure to provide the requested information because, after the April 28, 2010 beginning of SBT's bankruptcy, SBT could no longer participate in the Arbitration or provide the requested information. Petition at 4-5. This position is untrue and irrelevant. *First,* even were it the case that SBT's bankruptcy prevented Petitioners from providing information to the ICC Paris, the bankruptcy was caused by

While pursuing the Interim Relief, Respondents obtained an order from courts in Brazil against SBT and Prime Carbon to seize pig iron in Brazil that had been purchased by Prime Carbon during the Arbitration. *Id.* at 16a-17a. SBT's and Prime Carbon's appellate efforts in Brazil failed, but, during the week the appeal was pending, Prime Carbon absconded with the cargo in question. *Id.* at 17a.

E. The Conclusion Of SBT's Bankruptcy And The Award

On March 29, 2011, SBT's bankruptcy administrator informed the ICC Paris that SBT did not have funds sufficient to participate in the Arbitration and "that the estate and SBT's creditors did not wish to defend the claims before the ICC Paris." *Id*. at 15a. The bankruptcy administrator admitted the claims against SBT, including the damages sought by Respondents (51,756,269.75 CHF). Pet. App. 15a. On November 9, 2011, the ICC Paris issued an award in

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Petitioners' theft of SBT's assets. *Second*, nothing prevented Petitioners from: (i) disclosing the transaction outlined by the Secret Agreement when they filed their response in the Arbitration; (ii) providing the ICC Paris with information concerning the Secret Agreement during the Arbitration but prior to SBT's bankruptcy filing; or (iii) providing SBT with liquidity sufficient to defend itself. Finally, nothing prevented Petitioners from providing the ICC Paris (at no expense to themselves other than the cost of copying and shipping) with a copy of the Secret Agreement, and it defies logic or understanding to suggest the ICC Paris would have refused to consider that information simply because it had been supplied after SBT had been put into bankruptcy.

that amount (plus Respondents' costs and interest) (the "Award").[6] *Id.* at 15a-16a.

SBT's bankruptcy was declared closed on January 27, 2012, with no assets left to satisfy the Award. *Id.* at 17a. Respondents' efforts to identify entities believed to be recipients of SBT's assets or related to SBT failed.[7] *Id.* Upon learning that Petitioners had

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[6] Petitioners' claim that the bankruptcy administrator's admission of liability and the Award are the end-result of Respondents' grand plan to "ensure[] that no entity was present in the arbitration to defend against [Respondents'] claims" is remarkable. Petition at 5. If SBT's bankruptcy rendered it unable to participate in the Arbitration or contest the Award, that incapacity was the express and intended result of Petitioners' serial theft of SBT's assets, not the result of any of Respondents' actions. Furthermore, Petitioners were aware of Respondents' efforts to hold Prime Carbon responsible for SBT's debt and not only failed to seek to intervene in the Arbitration, but refused to infuse any money into SBT to allow it to defend itself in the Arbitration. Pet. App. 13a-15a. And, even assuming Petitioners' claim that "Swiss bankruptcy law affirmatively prohibited [P]etitioners from intervening to take over SBT's defense" (Petition at 17) is true, Petitioners could have funded SBT with sufficient assets such that SBT could continue its own defense. Instead, Petitioners actually stole the bulk of SBT's remaining liquid assets the day before the bankruptcy filing precisely to keep SBT from being able to participate or defend itself in the Arbitration. *Id.* at 13a.

[7] Petitioners' lament that "Respondents . . . s[eek] to keep any recovery entirely for themselves, rather than returning assets to the estate of SBT" is, in many ways, a perfect distillation of the contempt with which Petitioners treat their obligations. Petition at 6. *First*, as SBT is a non-entity under Swiss law (a fact based upon which Petitioners sought and obtained dismissal of Respondents' claims in the past, *see infra* Section II.F.), it is not entirely clear how any assets could be returned to SBT. *Second*, Respondents are unaware of any legal obligation they have to

secretly transferred the most valuable asset Prime Carbon obtained from SBT to AMCI Holdings, Inc., a United States company under the ownership of Mende and Kundrun, Respondents began the process of seeking to hold Petitioners accountable in the United States. *Id.*

F. The Actions In The United States And Petitioners' Continued Lack Of Candor With Tribunals

On April 18, 2013, Respondents filed an action in the Southern District of New York to enforce the Award against Petitioners as SBT's alter egos and successors-in-interest pursuant to the Convention (the "Enforcement Action"). *Id.* at 17a-18a. The Enforcement Action also alleged common law fraud and violations of New York's fraudulent conveyance laws related to Petitioners' misconduct before the ICC Paris and thereafter (the "Fraud Claims"). Pet. App. 18a. Petitioners moved to dismiss the Enforcement Action on numerous grounds, including that the Award had not been confirmed against SBT; "*forum non*

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pursue claims on behalf of SBT. *Third*, Petitioners are, they believe, the holders of nearly 93% of SBT's debts (thus, any funds returned to SBT would be returned almost exclusively to them). *Fourth*, given that Petitioners are the ones who stole SBT's assets and bankrupted it, if they are truly concerned about SBT's estate, they could simply return SBT's stolen assets.

conveniens"[8]; and that the Fraud Claims were barred by the ICC Paris' ruling. *Id.* at 18a.

The district court dismissed the Enforcement Action's Convention claims on the grounds that *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp.,* 312 F.2d 299, 301 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963), required Respondents first to confirm the Award against SBT before seeking to enforce the Award against Petitioners. Pet. App. 18a-19a. Thereafter, Respondents filed an action seeking to confirm the Award against SBT (the "Confirmation Action"). *Id.* at 20a. It was during this proceeding that Petitioners finally disclosed to the district court SBT's removal from the Swiss Commercial Registry, arguing that, as a result, SBT was immune from suit under Rule 17 of the Federal Rules of Civil Procedure and that the Confirmation Action had to be dismissed. *Id.* The district court ruled that because *Orion* required a "two-step process" of confirmation against SBT followed by enforcement against Petitioners, and because SBT's immunity from suit rendered confirmation impossible, the Confirmation Action had to be dismissed as well. Pet. App. 19a-21a.

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[8] SBT was deleted from the Swiss Commercial Register while briefing on the Enforcement Action was ongoing—a fact that would have been highly relevant to the district court's consideration of Petitioners' *forum non conveniens* arguments that Switzerland, as SBT's home, was a proper forum for such claims. However, Petitioners failed to inform the district court of this material fact while the motion to dismiss the Enforcement Action was *sub judice,* just as they neglected to disclose relevant information to the ICC Paris. Pet. App. 18a.

G. The Appeals

Respondents filed timely appeals from the dismissal of the Enforcement Action and the Confirmation Action. In the consolidated appeal before the Second Circuit, Respondents argued:

> (1) the district court erred in holding that *Orion* . . . required [Respondents] to confirm their foreign arbitral award prior to enforcement; (2) the district court erred in dismissing [Respondents'] fraud claims on the basis of issue preclusion.

Id. at 22a. Following oral argument, the Second Circuit requested the parties provide additional briefing on the issues of:

> 1. Whether an award-creditor must first "confirm" a *foreign* arbitral award governed by the [Convention] and Chapter Two of the [FAA], prior to initiating an enforcement action on that award against an award-debtor in U.S. courts[; and]
>
> 2. If not, whether the circumstances are any different if an award-creditor is seeking to enforce a *foreign* arbitral award against an award-debtor's alleged alter egos or successors-in-interest, rather than against the award-debtor itself.

Resp. App. 38-39. Thereafter, the Second Circuit solicited the views of the United States on these issues. The United States responded, in relevant part:

> First, an award-creditor need not "confirm" a foreign arbitral award governed by the [Convention] before seeking to "enforce" that award against an award-debtor in U.S. courts; the Convention and its implementing legislation, Chapter 2 of the Federal Arbitration Act ("FAA"), contemplate a single-step process of reducing an arbitral award to a court judgment. Second, based on the text and purpose of the Convention and the FAA, as well as recent Supreme Court authority explaining the role of courts in interpreting the scope of arbitral agreements, an award-creditor may seek, in the appropriate circumstances, to confirm a foreign arbitral award directly against alleged alter egos or successors.

Resp. App. 41-42.

On January 18, 2017, the Second Circuit issued its ruling, further clarified by its ruling on March 2, 2017 (Pet. App. 3a), that the district court erred:

> (1) [] in determining that the [Convention and FAA] require Respondents to seek confirmation of a foreign arbitral award before the award may be enforced by a United States District Court and (2) [] in holding that [Respondents'] fraud claims should be dismissed prior to discovery . . . .[9]

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[9] Petitioners have not appealed the Second Circuit's reversal of the district court's dismissal of the Fraud Claims, in which the Second Circuit found that plausible allegations of fraud committed by Petitioners at the ICC Paris rendered the "district court's application of the equitable doctrine of issue preclusion [] inappropriate." Pet. App. 40a.

The Second Circuit further held that the district court should "evaluate [Respondents'] Enforcement Action, particularly [Respondents'] effort to reach appellees as alter-egos of SBT, under the standards set out in the [] Convention, Chapter 2 of the FAA, and applicable law in the Southern District of New York." *Id.* at 33a.

III. Reasons For Denying The Petition

The Decision creates no circuit conflict, is fully consistent with settled practice and standard principles of alter-ego liability, and presents no question worthy of this Court's review. *See* SUP. CT. R. 10. And, while Petitioners suggest that the Decision gives rise to a question of exceptional international importance,[10] there is nothing unusual, radical, or even particularly important about the Decision (other than to the parties at bar). The Decision merely holds that a result that previously had required two actions may now be accomplished in one. As that result pertains to the unique facts set forth in the Decision, the Second Circuit's holding merely confirms that fraudsters who abuse the corporate form through alter egos cannot avoid liability under the Convention and the FAA by rendering the named award-debtor immune from suit.

In all respects, the Decision serves the well-understood and publicized purpose of the Convention to build a "pro-enforcement" regime for arbitration awards under a "pragmatic, flexible and non-formalistic approach." *See* International Council for Commercial Arbitration, *ICCA's Guide to the*

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[10] S*ee* Petition at 24 (citing to petition in *BG Grp., PLC v. Republic of Argentina,* 134 S. Ct. 1198 (2014)).

Interpretation of the 1958 New York Convention: A Handbook for Judges, 71 (1st Ed. 2011). The Decision reflects this "pragmatic" regime by permitting Respondents to seek to enforce the Award against Petitioners as alter egos without first bringing a new action against SBT (which, in this case, was made legally impossible by Petitioners' willful and fraudulent misconduct).

For all these reasons, in addition to those set forth below, the Court should deny the Petition and send this case back to the district court, where Respondents can finally start the process of collecting on the nearly decade-old debt owed to them by Petitioners.

A. The Decision Will Not Result In The "Abuse" Of The Federal Courts

Petitioners argue that the Decision—which merely authorizes a one-step rather than a two-step process for enforcing an arbitration award against an alleged alter ego of an award-debtor—will result in a deluge of enforcement actions against otherwise unreachable deep-pocketed entities in the United States that have a "close relationship to an award debtor." Petition at 23. According to Petitioners, the Second Circuit's (and United States') preferred, streamlined approach to the enforcement of foreign arbitration awards creates an "irresistible incentive for prevailing parties in arbitration to bring enforcement actions in this country." *Id.* at 14.

These dramatic predictions are implausible. There is no reason why the ability to proceed in one step, rather than two, against an alter ego would result in a dramatic increase in enforcement actions in this

country. In fact, the only cases in which the Decision would invite an enforcement action that otherwise would not have been brought are cases like this one, in which the named award-debtor had been bankrupted and looted (and rendered immune from suit) by its alter egos. The Court should welcome, not prohibit, such actions under the Convention.

There will be no onslaught of enforcement proceedings in the Second Circuit for the same reasons this Court should not grant the Petition: this is a unique case with extraordinary facts, and the Decision is well-reasoned and justified. To be clear, what is unique about this case, as opposed to the numerous cases where post-judgment or post-award alter-ego liability has been sought in the federal courts, is that proceeding directly against SBT was impossible because of Petitioners' fraud. In the normal course of events following a foreign arbitration, there would be no reason for an award-creditor to seek enforcement directly against a named award-debtor's alter egos in the United States without also seeking to enforce the award against the named award-debtor directly. In this case, however, Petitioners committed a series of brazen frauds upon both Respondents and the ICC Paris in order to park funds in the United States, frustrate the Arbitration, and render the named award-debtor defunct and immune from any direct enforcement proceeding. For the rare case of international conspiracy and fraud—*i.e.*, for the rare case like this one—the Decision will provide a critical disincentive.

Indeed, taking Petitioners at their word that the Court should be concerned about "enormous incentive[s]" and "gambit[s]" (Petition at 21), the Decision must stand. Petitioners successfully stole a $50 million award, frustrated an international treaty with 154 parties (including the United States), and nearly succeeded in avoiding liability by convincing the district court that they could not be liable because their fraud had made SBT immune from suit. This state of affairs is what led Second Circuit Judge Pooler to tell counsel for Petitioners, "SBT and its other corporations didn't come in here with clean hands."

If the Decision is reversed, then the Convention's "pro-enforcement" regime leaks from a fraud-shaped hole. If this Court sanctions Petitioners' view of enforcement under the Convention, then other unscrupulous businesses will take note, and the treaty will falter, rather than deliver its intended "pro-enforcement" effect under a "pragmatic, flexible and non-formalistic approach." *See* International Council for Commercial Arbitration, *supra*, at 71.

B. Petitioners' Argument That The Decision Contradicts An International Consensus Is Unsupported and Wrong

Petitioners argue that the Decision contravenes an "international consensus" regarding enforcement under the Convention because, they allege, no other country would permit a direct enforcement action against an alter ego. Petition at 20.

Petitioners' only legal support[11] for this alleged "international consensus" is the decision in *Norsk Hydro ASA v. State Property Fund of Ukraine* [2002] EWHC 2120 (Comm), from the United Kingdom. *Norsk* concerned an award issued in Sweden to Norsk Hydro (as petitioner) against "The Republic of Ukraine, through the State Property Fund of Ukraine" (as respondent), resulting from an arbitration agreement that was signed by a different respondent, the "State Property Fund of Ukraine, being an agency of the Government of Ukraine." Norsk argued that the award should be enforced against *both* parties, based on both the nature of the arbitration proceedings and theories of agency liability. The court disagreed, holding it would not agree to enforce "an award made against a single party, against two separate and distinct parties." But *Norsk* is not relevant to this dispute and, even if it were, one case hardly supports Petitioners' contention of an international consensus.

First, *Norsk* involved a question about whether "two separate and distinct" parties could be held liable for

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[11] Petitioners claim, with no citation, that Respondents concede that the "ruling below permits an action that . . . every other Convention signatory would reject," and "no other signatory nation to the treaty would recognize their claim, because petitioners are not 'parties' to the arbitral award." Petition at 3. Respondents have never conceded this. Respondents did state, "[t]his Court is now the last and only forum where the [Respondents] can be granted relief against the [Petitioners]," but they said so because SBT's bankruptcy had, per Petitioners' own arguments before the district court, rendered SBT immune from suit anywhere. Resp. App. 33 ("[P]ursuant to the [Petitioners'] arguments, this could be the only forum available to [Respondents] to confirm against SBT.").

an award issued against "a single" party under British agency law. In this matter, as noted *infra* Section III.F., Respondents are not seeking to hold Petitioners and SBT liable for the award as "two distinct" entities. Rather, Respondents contend Petitioners and SBT are a "single party" under theories of alter-ego and successor liability. *See NYKCool A.B. v. Pac. Int'l Servs., Inc.*, 66 F. Supp. 3d 385, 393 (S.D.N.Y. 2014) (distinguishing alter-ego from principal/agency theory in general jurisdiction analysis and noting that any doubts expressed in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), about asserting general jurisdiction under the principal/agency theory do not apply to "the soundness of an alter ego theory of jurisdiction, which is present only in the rather different circumstance in which one person or entity truly dominates another so that the two are indistinguishable for practical purposes").

Second, even if Petitioners' unsupported contention that no other country would enforce an arbitration award directly against an alter ego under the Convention were true, that does not mean the Second Circuit's interpretation, which is backed by the United States government, is wrong or inconsistent with the Convention. As the United States advised the Second Circuit: "[t]he Convention places a *floor* on the situations in which awards may be recognized and enforced; it does not bar Contracting States from permitting more liberal enforcement." Resp. App. 59-60 (emphasis added) (citing Convention, art. VII); Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS 39, 66 (Emmanuel Gaillard & Domenico Di Pietro eds.,

2008) (The "Convention is aimed at facilitating recognition and enforcement of arbitral awards; if domestic law or other treaties make recognition and enforcement easier, that regime can be relied upon.").

C. Petitioners' Arguments That The Second Circuit Decision Offends Arbitration Principles Is Wrong

Petitioners further argue that holding them responsible for the Award in proceedings following the completion of the Arbitration would impair arbitration as a matter of private contract and undermine the finality of the arbitrator's decision. Petition at 16-17. But Petitioners admit that these arbitration-related objections are based solely on formality, rather than principle, when they note that their interpretation of the Convention would require Respondents merely to "proceed in two steps in the same courts" rather than in a single step. Petition at 20.[12] If the end result is the same under Petitioners' proffered approach—enforcement of an award against an alter ego of the named award-debtor in a second proceeding—then their fairness arguments regarding alter-ego enforcement cannot be credited.

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[12] To the extent Petitioners are claiming a finding of alter-ego or successor liability would constitute a modification of the Award because of the ICC Paris' statement that it could not grant Respondents' request for Interim Relief against any "non-SBT entities because such entities are not parties to the arbitration," (Petition at 5), the Decision, in a portion not appealed by Petitioners, expressly barred Petitioners from asserting any such equitable arguments (whether sounding in *res judicata* or collateral estoppel) on their motion to dismiss. Pet. App. 36a-40a.

Petitioners' arguments regarding arbitration principles also fall flat because federal courts already enforce private arbitration agreements against alter egos and others under other successor-liability theories—before, during, and after the arbitration—as a matter of routine.

Before arbitration, the FAA and Convention provide statutory causes of action to compel arbitration against parties who claim they cannot be bound by the arbitration agreement. *See* 9 U.S.C. § 4 (domestic arbitration); 9 U.S.C. § 206 (Convention). Courts adjudicating actions to compel arbitration have long held that parties not named in the agreement can nevertheless be bound under a "veil-piercing/alter ego" theory. *Smith / Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 97 (2d Cir. 1999) (citing *Thomsom-CSF S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)), *cert. denied*, 531 U.S. 815 (2000).[13]

During arbitration, even when an arbitration panel decides alter-ego questions, the federal courts, on post-award review, consider the arbitrator's alter-ego decisions *de novo* as part of any subsequent action to confirm the award. *See First Options Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (holding that the question of whether to bind nonparties to an arbitration agreement

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[13] Indeed, contrary to the implication in the Petition, the question of who is bound by an arbitration agreement—including alleged alter egos—is adjudicated by courts all around the world. *See, e.g.*, *IMC Aviation Solutions Pty Ltd. v. Altain Kjuder LLC*, [2011] VSCA 248 (Court of Appeal) (Austl.); *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pakistan*, [2010] UKSC 46 (UK).

is a matter for federal courts to decide); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 661 (2d Cir. 2005) (applying the *First Options* rule to an arbitral award governed by the Convention).

After arbitration, during post-award proceedings, Courts routinely enforce arbitration awards against parties not named in the arbitration. Even under Petitioners' rubric, when an arbitral award-creditor reduces an award to a judgment against the named award-debtor in federal court, the award-creditor may then seek to execute the judgment against the assets of an alter ego that did not participate in the arbitration. *See, e.g.*, *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 295 F. Supp. 2d 366, 380 (S.D.N.Y. 2003) (following confirmation of a foreign arbitral award, permitting subsequent action by a judgment-creditor against alleged alter egos of judgment-debtor who would "stand in the shoes" of the judgment-debtor).[14]

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[14] Petitioners also contend that a ruling that they are liable for the Award "through the Convention's summary enforcement procedure . . . overlooks that consent to arbitrate is a threshold determination, not made after the arbitration concludes." Petition at 16. In the first place, this argument suffers from the same "question begging" fallacy as does Petitioners' textual analysis (*see infra* Section III.F.); if Petitioners are SBT's alter egos, as Respondents allege, they did consent to the Arbitration because they were, for all relevant purposes, SBT. *See JSC,* 295 F. Supp. 2d. at 380. The same is true of Petitioners' contention that applying liability to them in a one-step process would "amount[]to a modification of the arbitral award itself." Petition at 16. The fact that a subsequent court would find that Petitioners were the alter egos of SBT does not "modify the award" (Petition at 17) because the Award was issued against SBT and, as alter egos of SBT, Petitioners were and are SBT.

Petitioners are also wrong to argue that a single action to establish alter-ego and successor-in-interest liability is improper because it "implicates significant factual disputes and requires developing a significant evidentiary record, such as whether there was a fair exchange of value in the transfer of SBT's assets" to Prime Carbon. Petition at 19. There is no reason why those same arguments would not have applied to the two-step process under the pre-Decision regime called for by the district court in this matter. Moreover, as set forth above, it is not inconsistent with the Convention for the district court to make it easier (*via* a single action as opposed to two actions) for a party to obtain "recognition and enforcement" of an award. *See* Pet. App. 33a ("There shall not be imposed substantially more onerous conditions . . . . on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on . . . domestic arbitral awards." (quoting Convention, art. III)); *see also* Petition at 21.

D. Petitioners' Claim That Respondents Were Required To Exhaust All Non-Convention Avenues Prior To Bringing This Action Is Wrong

Petitioners claim Respondents had "other non-burdensome avenues to proceed against the assets of third parties" instead of the Convention. Petition at 21. But Petitioners' arguments regarding the additional steps that Respondents allegedly could have taken in Europe and elsewhere to avoid the necessity of bringing the claims set forth in this action are irrelevant. *See, e.g.*, Petition at 6 (discussing SBT's other creditor's (*i.e.*, Progress Rail's) efforts to pursue

claims in Europe). Respondents are unaware of any requirement that they pursue or exhaust all non-Convention avenues for relief prior to bringing an action under the Convention, and Petitioners cite to none.

E. The Second Circuit's Decision, Based Largely On The Solicited Amicus Brief Submitted By The United States, Correctly Interpreted The Text And Intent Of The Convention And FAA

The Decision addressed two issues concerning the Convention. *First*, whether the Convention permits "recognition and enforcement" of an arbitration award to proceed in one proceeding, rather than two. *Second*, if only a single proceeding is required, whether such a "recognition and enforcement" proceeding may be brought directly against alleged alter egos of the named award-debtor. Both the Second Circuit and the United States (as *amicus curiae*) correctly answered "yes" to both questions.[15] Petitioners contend that a single-step "recognition and enforcement"—or, as the Decision accurately describes it, "confirmation"—proceeding cannot be brought against them as alter egos of the named award-debtor. Petition at 15-17; Pet. App. 27a. For the reasons set forth below, Petitioners are wrong, and the Second Circuit and the United States are correct.

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[15] In light of Petitioners' single "Question Presented" to this Court—though in apparent contradiction to several of their arguments—Petitioners have not appealed the first question, conceding that "recognition and enforcement" may take place in a single step under the Convention.

i. The Second Circuit Correctly Held—And Petitioners Do Not Contest—That "Recognition And Enforcement" Under The Convention May Proceed In A Single Action

With respect to the first question presented, the Second Circuit correctly adopted the position of the United States[16] that the Convention "envision[s] a single-step process for reducing a foreign arbitral award to a domestic judgment." Pet. App. 26a; Resp. App. 46. As explained in greater detail in the Decision, the Convention calls the process of reducing a foreign arbitral award to a domestic judgment "recognition and enforcement." Pet. App. 26a (citing Convention, arts. III, IV, V); Resp. App. 47-48.[17] The Decision explained that nothing about this phrase indicates that "recognition and enforcement" cannot occur in a single proceeding, and that the plain text of the Convention

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[16] The judiciary typically defers to the position of the United States concerning the meaning of an international treaty. *See Medellin*, 552 U.S. at 513 (holding the government's interpretation of a treaty that it participated in negotiating is "entitled to great weight" (quoting *Sumitomo Shoji*, 457 U.S. at 184-85)); *El Al Isr. Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *Sumitomo Shoji*, 457 U.S. at 184-85 ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

[17] The term "recognition" means that the "arbitral award is entitled to preclusive effect," whereas "enforcement" is the "reduction to a judgment of a foreign arbitral award." Pet. App. 26a; *see also* Resp. App. 47-48.

indicates that "recognition and enforcement" is a single process. *Id.*

Concerning the interplay between the Convention and its enabling legislation, the FAA, the Decision holds, "[r]ead in context with the [] Convention . . . the term 'confirm' as used in Section 207 is the equivalent of 'recognition and enforcement' as used in the New York Convention." *Id.* at 27a.[18] This was also the position of the United States, which agreed that the single "'confirmation' proceeding under Chapter Two of the FAA fulfills the United States' obligation under the Convention to provide procedures for 'recognition and enforcement' of Convention arbitral awards." Resp. App. 48. Thus, because the Convention talks about a single proceeding ("recognition and enforcement") as does the FAA ("confirm[ation]"), the Decision correctly held that Petitioners were not required to undertake the two-step process envisioned by the district court.

The Decision's clear-cut textual analysis is supported by the express purpose of the Convention. As the Second Circuit and the United States both agreed, "[a] single proceeding facilitate[s] the enforcement of arbitration awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs." Pet. App. 27a. "This, in fact, was the entire purpose of the New York Convention, which 'succeeded and replaced the Convention on the Execution of Foreign Arbitral Awards (Geneva Convention)'"—an

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[18] Pet. App. 27a ("Section 207's use of the term 'confirm' may be one source of the confusion we now attempt to rectify.").

enforcement regime that required award-creditors to proceed in two judicial steps, rather than one. *Id.* at 28a.

ii. The Second Circuit Correctly Held That A Single "Recognition And Enforcement"/Confirmation Proceeding May Be Brought Directly Against Alter Egos Of A Named Award-Debtor

The Second Circuit also correctly adopted the position of the United States that, under the Convention, "allowing such an action [directly against alter egos] is consistent with judicial decisions on the interpretation and enforcement of both domestic and international arbitration agreements, as well as the text and purpose of the Convention and . . . the FAA." Resp. App. 51. The Decision explained that Convention signatories are required to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . ." Pet. App. 33a.[19] Moreover, "[t]here

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[19] Petitioners cannot (and do not) dispute that domestic procedures in the Southern District of New York permit enforcement of arbitration awards against alter egos as a matter of routine. *See* Pet. App. 33a; *Orion Shipping & Trading Co.*, 312 F.2d at 301 (holding award-creditor could bring action to enforce nondomestic arbitral award against party not named in award under alter-ego theory of liability); *JSC*, 295 F. Supp. 2d at 379-80 (permitting action by judgment-creditor against alter egos of judgment-debtor who would "stand in the shoes" of judgment-debtor); *Leeward Constr. Co. v. Am. Univ. of Antigua-Coll. of Med.*, No. 12 Civ. 6280, 2013 WL 1245549, at *1 (S.D.N.Y. Mar. 26, 2013) (dismissing action to confirm against party not named in arbitral award but

shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." *Id.* (quoting Convention, art. III). In other words, the Convention prevents signatory states from limiting the process available to parties seeking to recognize and enforce awards; it does not preclude using domestic procedures that make it easier for parties to recognize and enforce awards.

The Convention's mandate regarding recognition and enforcement is crystal clear, leading the Second Circuit to conclude that whether a "party not named in an arbitral award may have that award enforced against it under a theory of alter-ego liability or any other legal principle . . . is one left to the law of the enforcing jurisdiction, here the Southern District of New York, under the terms of Article III of the . . . Convention." *Id.* As the Convention permits enforcement "in accordance with the rules of procedure of the territory where the award is relied upon," and the rules of procedure in the United States permit enforcement against alter egos of the named award-debtor, there is no question that the Convention permits a direct enforcement action against the Petitioners in this action.

The Second Circuit's (and the United States') reasoning is both correct and largely unrebutted in the

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"without prejudice to [their] filing a separate action against [unnamed] to enforce the judgment . . . under an alter-ego or other theory").

Petition. There is simply no reason why the standard procedures for enforcement against alter egos available to award-creditors in the Southern District of New York should become unavailable the moment the named award-debtor becomes judgment-proof as a result of the fraudulent acts of its alleged alter egos. The text and "pro-enforcement" purpose of the Convention thus permit, if not mandate, domestic procedures to enforce foreign arbitration awards against such alter egos, a just and appropriate result in this case.

F. Petitioners' Argument That The Convention And FAA Do Not Apply To "Third Parties" Is An Irrelevant Strawman

The Petition glides right past the textual and theoretical analysis set forth in the Decision, instead focusing on two implausible theories that rely, in large measure, on the Court believing that Petitioners are victims, rather than fraudsters: (1) the Convention does not apply to so-called "third parties" or "strangers" to the award; and (2) it would be unfair to enforce an arbitration award against a "third party." Petition at 3, 16. Both arguments ignore the nature of alter-ego proceedings and the pro-enforcement regime mandated by the Convention and FAA.

Petitioners contend that the Convention and the FAA do not apply to "third parties," and that it would be unfair to hold "third parties" liable for awards arising from arbitrations in which they were not the named party. Petition at 16. But in the United States, alter egos are not "third parties." They are, "in essence, parties to the underlying dispute; the alter egos are treated as one entity." *See Wm. Passalacqua*

Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 143 (2d Cir. 1991); *see also Petersen v. Vallenzano*, 849 F. Supp. 228, 233 (S.D.N.Y. 1994) ("Due [to the determination that Vallenzano was an alter ego of named judgment debtor], Vallenzano has become the judgment debtor of Petersen as of the date of the original judgment.").

In *JSC*, the Southern District of New York denied a defendant's efforts to dismiss a complaint seeking to hold her liable for an arbitration award resulting from arbitrations in which she was not a named party. 295 F. Supp. 2d. at 377. The court held that although an entity called "IDTS" was the party named in the arbitration, "if [defendant] is adjudged to be the alter ego of IDTS, then she would stand in the shoes of IDTS. . . . She would be considered to have been a defendant in the arbitrations and subsequently to be a judgment debtor at the same time that IDTS was a defendant and judgment debtor." *Id.* at 380. The court further noted that, "[t]his conclusion is consistent with the Second Circuit Court of Appeals' comment, in the context of the statute of limitations for judgment enforcement actions, that alter egos are 'in essence, parties to the underlying dispute; the *alter egos* are treated as one entity.'" *Id.* at 377 (citing *Passalacqua,* 933 F.2d at 143). Thus, as the alter egos of SBT, Petitioners *would be deemed parties* to the Arbitration, and there is no unfairness (and nothing unusual) about enforcing the Award against them.[20]

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[20] Likewise, Petitioners' argument that the FAA and Convention apply only against "parties" for "important reasons" (Petition at 16) is irrelevant, as Petitioners were parties to the Arbitration by reason of their alter-ego status.

Petitioners' supporting policy argument—that enforcement against them would be unfair because they did not have a chance to defend themselves in the Arbitration—suffers from the same question-begging fallacy; if Petitioners were alter egos of SBT, they participated in and had every opportunity to defend themselves in the Arbitration just as SBT did (because they were SBT). In any event, a policy preventing alleged alter egos from fraudulently bankrupting an award-creditor and absconding with the funds necessary to satisfy an award is far from unfair. To the contrary, such a policy is required to prevent unscrupulous award-debtors like SBT (or their upstream, controlling entities like Petitioners) from undermining the Convention via fraud.

Petitioners' policy arguments simply ignore how reversing the Decision would encourage malefactors, like Petitioners, to craft schemes by which liability can be fraudulently avoided and the Convention frustrated. It is for this reason that courts evaluating alter-ego enforcement claims are not concerned with the "fairness" of holding parties not named in the arbitration accountable; they are concerned with whether the plaintiff has proven that the defendants are, in effect, the parties who ought to be held accountable. *See Solow v. Domestic Stone Erectors, Inc.*, 229 A.D.2d 312, 313 (1st Dep't 1996) ("These allegations are sufficient to warrant treating all four defendants as a single personality for purposes of enforcement of plaintiff's judgment.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 1, 2017

APPENDIX

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APPENDIX 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No.: 14-3034-RWS

[Filed September 18, 2014]

CBF INDÚSTRIA DE GUSA S/A, DA TERRA SIDERÚRGICA LTDA, FERGUMAR – FERRO GUSA DO MARANHÃO LTDA, FERGUMINAS SIDERÚRGICA LTDA, GUSA NORDESTE S/A, SIDEPAR – SIDERÚRGICA DO PARÁ S/A, and SIDERÚRGICA UNIÃO S/A, Plaintiffs,	)
v.	)
STEEL BASE TRADE AG, AMCI HOLDINGS, INC., AMERICAN METALS & COAL INTERNATIONAL, INC., K-M INVESTMENT CORPORATION, PRIME CARBON GMBH, PRIMETRADE, INC., HANS MENDE, and FRITZ KUNDRUN, Defendants.	)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiffs CBF Indústria de Gusa S/A, Da Terra Siderúrgica LTDA, Fergumar – Ferro Gusa do Maranhão LTDA, Ferguminas Siderúrgica LTDA, Gusa Nordeste S/A, Sidepar – Siderúrgica do Pará S/A, and Siderúrgica União S/A (collectively, "Plaintiffs") respectfully submit this memorandum of law in opposition to the Motion to Dismiss (the "Motion") of Defendants AMCI Holdings, Inc. ("AMCI Holdings"), American Metals & Coal International, Inc. ("AMCI"), K-M Investment Corporation ("K-M"), Prime Carbon GmbH ("Prime Carbon"), Primetrade, Inc. ("Primetrade USA"), Hans Mende ("Mende"), and Fritz Kundrun ("Kundrun") (collectively, the "Moving Defendants").[1]

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[1] A scanning error led the Complaint on the ECF system to be missing the final line of the caption listing Defendants Mende and Kundrun as well as the first two lines of the Complaint listing several of the Plaintiffs. Plaintiffs' counsel communicated the error to the Office of the Clerk of the Court, and on September 11, 2014, the incorrectly scanned first page of the Complaint was replaced on the ECF system with a full scan of the first page of the filed Complaint. The fully scanned Complaint from the ECF system is attached as Exhibit A to the Declaration of David L. Barrack in Opposition to the Motion to Dismiss, dated September 18, 2014 ("Barrack Declaration" or "Barrack Decl." filed contemporaneously herewith). A copy of the incorrectly scanned Complaint is attached as Exhibit B to the Barrack Declaration.

The Moving Defendants were not prejudiced in any way by this scanning error. As Defendants acknowledge, Defendants Mende and Kundrun were "listed as Defendants in the Summons in a Civil Action issued in this case and on the Court's electronic docket." (Memorandum of Law in Support of Motion to Dismiss ("Defs. Mem." Dkt. No. 28) at 1 n.1.) They were also listed as parties in the Complaint. (Complaint ("Compl." Dkt. No. 2) ¶¶ 22-23.)

PRELIMINARY STATEMENT

Plaintiffs bring this action to confirm an arbitration award against Defendant Steel Base Trade AG ("SBT") and a related action to enforce the award against the Moving Defendants, SBT's alter egos and successor-in-interest. Since before the arbitration was commenced, the Moving Defendants have sought to evade their and SBT's liability to Plaintiffs through a deliberate scheme to render SBT assetless while maintaining control and obtaining the continued financial benefit of its business. This Court is now the last and only forum where the Plaintiffs can be granted relief against the Defendants. Contrary to all of the Moving Defendants' representations and misrepresentations, there is no other forum, not France and not Switzerland, where Plaintiffs can confirm and enforce the award against the parties who, intentionally and with forethought and planning, left SBT assetless and in bankruptcy. In their papers and at argument, the Moving Defendants repeatedly represented to the Court that there was an alternative forum for relief. But the Moving Defendants' conduct and misconduct has rendered this Court as the only place to confirm and to enforce the award despite Plaintiffs' attempts to properly pursue their rights in this and other forums.

The core arguments by the Moving Defendants, that SBT lacks the capacity to be sued, that the alter-ego relationship between SBT and the Moving Defendants purportedly has ended and can no longer support personal jurisdiction or service of process, and that SBT was unable to defend itself in the arbitration, all are based on the Moving Defendants' intentional actions seeking to escape liability. During the pendency

of the arbitration resulting in Plaintiffs' award, including during periods of requested extensions and after SBT appeared, the Moving Defendants transferred the assets of SBT to another company they controlled – Defendant Prime Carbon. Thereafter, they placed SBT in bankruptcy and by their intentional acts they rendered SBT a bankrupt, assetless shell.

The law of this Circuit cannot be that a defendant's intentional looting and bankrupting of its alter ego after arbitration has commenced allows it to evade liability. Such a result would encourage contracting parties to rush to loot and bankrupt parties, transferring assets outside the reach of a putative creditor as that creditor engages in the agreed-upon arbitration. This action to confirm a $48 million foreign arbitration award rendered by the International Chamber of Commerce Paris ("ICC Paris") against SBT arises under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which embodies the principle that arbitration should be encouraged and supported by U.S. courts. The Moving Defendants' asserted position is that confirmation and enforcement of the award is foreclosed in this or **any other jurisdiction** – all because of steps they took to achieve just this result. The Court cannot and should not allow the Moving Defendants to escape their responsibilities and leave Plaintiffs with no forum in which to seek relief. The Court should deny the motion to dismiss and allow this action to proceed.

In April 2013, Plaintiffs brought a complaint (the "Enforcement Complaint") to enforce the Award against the Moving Defendants in the related action,

CBF Indústria de Gusa S/A, et al. v. AMCI Holdings, Inc., et al. (No. 13-2581) (the "Enforcement Action"). The Moving Defendants moved to dismiss (the "First Motion to Dismiss") arguing, among other things, that enforcement of the Award against the alter egos and successor-in-interest was not proper absent confirmation of the Award against SBT. (*See* Memorandum of Law in Support of First Motion to Dismiss ("Defs. First Mem." Enforcement Action Dkt. No. 23) at 24-31.) They also argued that the Enforcement Action should be dismissed on *forum non conveniens* grounds and asserted that Switzerland was a signatory to the New York Convention and it and France were the proper forums for the action. (*Id.* at 35-47.)

The Court, in an Opinion on April 9, 2014, granted the Moving Defendants' motion to dismiss and held that *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp.*, 312 F.2d 299 (2d Cir. 1963), "contemplate[d] separate actions for the confirmation of an arbitral award and an enforcement action against an award debtor's alter egos." ("Opinion," (Enforcement Action Dkt. No. 46) at 35.) The Court further stated that "Plaintiffs' enforcement action may be permissible if the Award was confirmed in Switzerland or other court of competent jurisdiction." (*Id.* at 37.)[2] In an

[2] While the Court dismissed Plaintiffs' claims for fraud against the Moving Defendants as barred because it found they sought the same remedy during the arbitration, the Court did not bar Plaintiffs from discussing the Moving Defendants' fraudulent conduct, particularly with respect to piercing the corporate veil. (*See* Opinion at 39 ("Plaintiffs' Second, Third, Fourth, Fifth and Sixth Causes of Action allege fraud and seek a remedy previously

effort to comply with the Court's Opinion, Plaintiffs brought this action to confirm the award and amended their complaint in the Enforcement Action (the "Amended Enforcement Complaint," Enforcement Action Dkt. No. 47) to separately enforce the Award against the Moving Defendants.

In their Motion, the Moving Defendants seek to dismiss this properly brought confirmation action on procedural arguments that ultimately rely on their intentional and improper acts to evade liability by looting SBT and placing it into bankruptcy. They argue that the Court lacks personal jurisdiction over SBT and that SBT has not been served with process, that SBT lacks the capacity to be sued, and that their arguments from the contemporaneously filed motion to dismiss the Enforcement Action are applicable and should be incorporated by reference.

The Motion should be denied. First, the Court has personal jurisdiction over SBT through the Moving Defendants, its alter egos and successor-in-interest. The Moving Defendants do not challenge and therefore waive arguments that all but one of them is subject to the Court's personal jurisdiction. The Moving Defendants argue that *Orion* forecloses the Court from relying on alter-ego analysis for personal jurisdiction, but the Court in its Opinion confirmed that such an approach was proper and Judge Scheindlin has done just such an analysis in a similar confirmation action.

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sought by Plaintiffs in the ICC Arbitration. These claims are therefore barred.").)

Second, the Moving Defendants argue the case must be dismissed because SBT lacks the capacity to be sued. The Moving Defendants are judicially estopped from taking this position; their current factual assertions about SBT are inconsistent with their assertions throughout the briefing and oral argument on the First Motion to Dismiss that Switzerland and France provided adequate alternative forums for this dispute and confirmation was possible. The date SBT purportedly lost the capacity to be sued came **before** the Moving Defendants filed their Reply Memorandum of Law in Support of the First Motion to Dismiss ("Defs. First Reply," Enforcement Action Dkt. No. 43) and yet they continued to assert that position in their Reply and at oral argument. The Court relied on these statements by Defendants and adopted this argument through its Opinion dismissing the Enforcement Complaint. The Moving Defendants cannot now take the inconsistent position that SBT lacks the capacity to be sued.

Third, insofar as the Moving Defendants incorporate by reference additional arguments from their Motion to Dismiss the Amended Enforcement Complaint, these repeated unpersuasive and inapplicable arguments do not warrant dismissal. Finally, the Moving Defendants are estopped from opposing confirmation because of their misrepresentations to Plaintiffs and the ICC Paris before and during the arbitration and their intentional bankrupting of SBT to evade liability.[3]

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[3] The Complaint in this action to confirm the Award and the Amended Enforcement Complaint in the related action, having arisen from the same factual circumstances, have similar factual

ARGUMENT

I. THE COURT HAS PERSONAL JURISDICTION OVER SBT.

The Court has personal jurisdiction over SBT because it has personal jurisdiction over the Moving Defendants, its alter egos and successor-in-interest, and Plaintiffs have made a prima facie showing of personal jurisdiction over SBT through its alter egos. On a motion to dismiss, "the plaintiff need only make a prima facie showing" that the Court has personal jurisdiction over the defendants. *MacDermid, Inc. v. Deiter*, 702 F.3d 725, 727 (2d Cir. 2012). In such an analysis, "[t]he allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits." *Id.* The Moving Defendants concede that the Court has jurisdiction over them, with the exception only of Prime Carbon.[4] And Plaintiffs

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allegations. Because the Moving Defendants relegate their discussion of the facts to their Memorandum of Law in support of the Motion to Dismiss the Amended Enforcement Complaint (Enforcement Action Dkt. No. 60), Plaintiffs have addressed the facts in their Opposition to the Motion to Dismiss the Amended Enforcement Complaint filed contemporaneously herewith in the Enforcement Action and attached to the Barrack Declaration as Exhibit C, and incorporate it by reference.

[4] In a footnote in their Memorandum of Law in Support of the Motion, the Moving Defendants "defer[ed] the issues of personal jurisdiction over them in this judicial district and the sufficiency of Plaintiffs' attempted service of process upon them." (Defs. Mem. at 8, n.8.) The Moving Defendants have not challenged the Court's personal jurisdiction over them or that service on them was proper. They have now waived their right to challenge personal jurisdiction and service of process for purposes of this case. *See*

have sufficiently pleaded that the Moving Defendants are the alter egos and successor-in-interest to SBT. In the Complaint, Plaintiffs allege that SBT and all the other Moving Defendants are part of the AMCI family controlled and dominated by Defendants Mende and Kundrun and held out to others and operated as one entity. (Compl. ¶¶ 103-108, 110.) The Moving Defendants also allege that SBT and all the other Moving Defendants are financially dependent upon Mende and Kundrun, have overlapping employees and/or corporate officers, share the same office space, and disregard corporate formalities. (*Id.* ¶¶ 109-130.)

Most importantly, the Moving Defendants do not challenge the sufficiency of Plaintiffs' alter-ego allegations. Rather, the Moving Defendants rely only on two unsupported arguments, (1) that the Court cannot undertake an alter-ego analysis for personal jurisdiction in a confirmation action and (2) that the

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Fischer v. Talco Trucking, Inc., No. 07 Civ. 4564, 2009 U.S. Dist. LEXIS 119550, at *7, n.1 (E.D.N.Y. Dec. 21, 2009) (quoting *Sokolow v. PLO*, 583 F. Supp. 2d 451, 460 (S.D.N.Y. 2008)) ("'In moving to dismiss [a] complaint under Rule 12, the failure to include a lack of personal jurisdiction as one of the grounds will result in the waiver of such a defense.'"); *see also* Fed. R. Civ. P. 12(g)(2), (h)(1).

While the Moving Defendants do not move to dismiss the action for lack of personal jurisdiction over Prime Carbon, they reference their similar argument in the Motion to Dismiss the Amended Enforcement Complaint. All of Plaintiffs' arguments regarding the Court's personal jurisdiction over SBT are also applicable to Prime Carbon. In addition, to the extent the Moving Defendants incorporate their arguments regarding Prime Carbon's personal jurisdiction from the Enforcement Action, Plaintiffs incorporate their arguments in response.

Court is foreclosed from finding personal jurisdiction over SBT because it ceased to exist by their own design. The law in this Circuit demonstrates that neither argument is availing.

A. Personal Jurisdiction Over SBT Can Properly Be Based on the Court's Personal Jurisdiction Over its Alter Egos.

The Moving Defendants argue that the Court does not have personal jurisdiction over SBT because "*Orion* and its progeny . . . preclude this Court from considering the factually-complex alter ego theory . . . for personal jurisdiction over SBT." (Defs. Mem. at 11; s*ee also* Defs. Mem. at 8-13.) There is no bar against alter ego determinations for personal jurisdiction purposes in confirmation actions in this District. The Court stated as much in its Opinion, this District has done so in the past, and the Moving Defendants' only authority to the contrary is non-persuasive precedent from another jurisdiction.

First, the Moving Defendants raised precisely this issue in their First Motion to Dismiss with regard to personal jurisdiction over Prime Carbon (*see* Defs. First Mem. at 30). In its Opinion, the Court squarely rejected this argument. (Opinion at 37, n.3.) The Court held applicable certain Second Circuit precedents that "[p]ersonal jurisdiction over an entity may be predicated on personal jurisdiction over its alter ego." (*Id.* (citing *Transfield ER Cape Ltd. v. Indus. Carriers Inc.*, 571 F.3d 221, 224 (2d Cir. 2009) ("'alter egos are treated as one entity' for jurisdictional purposes") (citation omitted); *William Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 142-43 (2d

Cir 1991) ("[I]f the plaintiffs in this case can prove the defendants are in fact the *alter ego* of Developers, defendants' jurisdiction objection evaporates because the previous judgment is then being enforced against entities who were, in essence, parties to the underlying dispute; the *alter egos* are treated as one entity.")).)

In addition, in *Glencore AG v. Bharat Aluminum Co.*, Judge Scheindlin engaged in the personal jurisdiction analysis that the Moving Defendants assert is inappropriate, an alter-ego analysis to determine personal jurisdiction in an action to confirm a foreign arbitral award. No. 10 Civ. 5251 (SAS), 2010 WL 4323264 (S.D.N.Y. Nov. 1, 2010). While the Moving Defendants cite *Glencore* to establish that "jurisdictional alter ego determinations require 'a fact-specific inquiry into the realities of the actual relationship between the parent and the subsidiary'" (Defs. Mem. at 11 (quoting *Glencore*, 2010 WL 4323264, at *5)), they ignore that *Glencore* in fact engages in this very inquiry.

In *Glencore,* plaintiff sought to confirm a foreign arbitral award against the award debtor. Plaintiff alleged that the court had personal jurisdiction over the award debtor because "this Court has personal jurisdiction over [the other defendants], and therefore has personal jurisdiction over [the award debtor], as their alter ego." *Glencore*, 2010 WL 4323264, at *1. Rather than dismiss the action based on *Orion*, as the Moving Defendants assert the Court should do in this proceeding, that court engaged in a lengthy "fact-specific inquiry" to determine if plaintiff had alleged facts sufficient to find personal jurisdiction over the award debtor through its alter egos. *Id.* at *5, 8-10.

The *Glencore* court explained that "[t]o find that this Court has personal jurisdiction over [the award debtor] as the alter ego [of the other defendants, it] must find both (1) that [it] has personal jurisdiction over [the other defendants] and (2) that [the award debtor] is their alter ego." *Id.* at *6. The court then examined the sufficiency of plaintiff's allegations as to whether (1) there was common ownership of the award debtor and the other defendants, (2) the award debtor was financially reliant on the other defendants, (3) the award debtor and other defendants had overlapping employees and disregarded corporate formalities, and (4) the other defendants controlled the award debtors' operational policies. *Id.* at *5.

That court "construing the allegations in the light most favorable to [plaintiff] and drawing all inferences in [plaintiff's] favor . . . conclude[d] that [plaintiff had succeeded in] mak[ing] out a prima facie case that [the award debtor] is an alter ego of [the other defendants]." *Id.* at *9. While the court in *Glencore* ultimately determined that it did not have jurisdiction over the award debtor, it did so not, as the Moving Defendants' argue, because jurisdictional alter ego determinations are barred by *Orion*, but instead, although alter ego was sufficiently shown, it did not have jurisdiction over the alter egos.

The *Glencore* determination that it did not have jurisdiction over the alter egos is inapposite to this case because the Court has personal jurisdiction over the alter egos, *i.e.*, Defendants AMCI Holdings, AMCI, K-M, Primetrade USA, Mende, and Kundrun. Plaintiffs have sufficiently pleaded that Defendants Mende and Kundrun are residents of New York (Compl. ¶¶ 22-23

and 26) and that the other Defendants operate in New York and/or are the alter egos of Mende and Kundrun (*id.* ¶¶ 17-21 and 27-36). Moreover, these Defendants have waived any right to challenge personal jurisdiction. *See supra* p. 6, n.4. The Court has already ruled in Plaintiffs' favor to allow an alter ego personal jurisdiction analysis consistent with the decision in *Glencore* and should do so again and deny the motion to dismiss.

The Moving Defendants' reliance on *Frontenac International, S.A. v. Global Marketing Systems, JLT*, Civil Action No. RDB-13-00122, 2013 WL 2896896, at *1 (D. Md. June 11, 2013), a decision from the District Court of Maryland, does not change this result. *Frontenac* incorrectly links *Orion* to the issue of personal jurisdiction for which *Orion* has no application and concludes that the determination of alter ego to find personal jurisdiction is too complex for a proceeding to confirm an arbitration award. *Id.* at *4-5.

As explained above, the *Glencore* court did precisely what *Frontenac* states is barred by *Orion*. Moreover, *Frontenac* fails to acknowledge that, in this Circuit, an alter ego determination in the personal jurisdiction context requires a less fact-intensive analysis than making an alter ego determination on the merits. *Glencore*, 2010 WL 4323264, at *5. *Frontenac* thus should be disregarded by the Court.

The other authorities cited by the Moving Defendants do not address personal jurisdiction and relate only to alter ego determinations on the merits. *See Orion*, 312 F.2d at 301 (concerning only alter ego determinations on the merits and not addressing its applicability to personal jurisdiction); *Daebo Int'l*

Shipping Co. v. Americas Bulk Transport (BVI) Ltd., No. 12 Civ. 4750, 2013 WL 2149591, at *4 (S.D.N.Y. May 17, 2013) (same); *In re Arbitration Between Promotora de Navegacion, S.A. & Sea Containers, Ltd.*, 131 F. Supp. 2d 412, 421 (S.D.N.Y. 2000) (same).

The Moving Defendants' reading of *Frontenac*, a non-precedential opinion from a different District, turns *Orion* into a shield to allow any foreign party with limited United States contacts to intentionally avoid an arbitrational award by merely transferring its assets to an alter ego in the United States. The Court should not countenance this inequitable result. Instead, the Court should proceed with a personal jurisdiction alter-ego analysis, just as the court did in *Glencore*, and hold that Plaintiffs have made a prima facie showing of personal jurisdiction over SBT, just as it did in the Opinion.

B. The Moving Defendants' Cannot Escape an Alter Ego Finding by Placing SBT into Bankruptcy.

The Moving Defendants argue that the Court does not have personal jurisdiction over SBT through them, its alter egos, because SBT could not be an alter ego as soon as they placed it into bankruptcy. (Defs Mem at 13-18.) The Moving Defendants are wrong on the law and on the facts, and the Court can properly exercise personal jurisdiction over SBT.

The Moving Defendants rely on the general rule that "'personal jurisdiction depends on the defendant's contacts with the forum state at the time the lawsuit was filed.'" (Defs. Mem. at 13 (quoting *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione*, 937 F.2d 44, 51

(2d Cir. 1991)).) As plainly stated in the authorities cited by the Moving Defendants, the time the lawsuit was filed relates to the Court's evaluation of a party's contacts with the forum. *See Klinghoffer*, 937 F.2d at 51. The parties in this action whose contacts with the forum the Court must evaluate are the Moving Defendants. The Moving Defendants' attempt to convince the Court that this general rule is applicable to the alter ego determination for personal jurisdiction determinations is unavailing. (Defs. Mem. at 14.) Both of the cases on which the Moving Defendants rely relate only to when the alter ego alleged to have sufficient connections to the forum (here, the Moving Defendants) did not have sufficient contacts with the jurisdiction at the time the complaint was filed. *See Roz Trading Ltd. v. Zeromax Group, Inc.*, 517 F. Supp. 2d 377, 384 (D.D.C. 2007); *China Nat'l Chartering Corp. v. Pactrans Air & Sea, Inc.*, 882 F. Supp. 2d 579, 594 (S.D.N.Y. 2012). This is precisely the opposite of the factual circumstances in this case, where the Moving Defendants have not challenged their connection to the forum or the Court's personal jurisdiction over them. No case cited by the Moving Defendants deals with what they argue here, that the alter-ego relationship of the parties, rather than the alter ego's contacts with the forum, must exist at the time the lawsuit was filed.

In addition, the Moving Defendants acknowledge that it is not just the moment of filing that is relevant, but rather "the course of a multi-year period prior to the filing of the complaint" (Defs. Mem. at 14 n.10 (citing *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569-70 (2d Cir. 1996) (examining the Defendant's contacts with the forum over the six

years preceding the litigation of the lawsuit)).) To the extent the time of filing of the complaint has any bearing on whether an alter-ego relationship exists, courts should examine the alter-ego relationship between the parties over a similar mult-iyear time period. The Moving Defendants can make no argument that Plaintiffs have not sufficiently alleged that the Moving Defendants were SBT's alter ego prior to placing it in bankruptcy.

Moreover, a dismissal of this action in these circumstances where the Moving Defendants themselves are responsible for the fact that SBT entered bankruptcy would make little sense and create an inequitable result. "If personal jurisdiction exists over an individual, personal jurisdiction exists also over his or her corporate alter ego." *SEC v. Montle*, 65 Fed. Appx. 749, 752 (2d Cir. 2003). The Moving Defendants cannot argue that their looting of SBT and placement of it into bankruptcy severed the connection between them and SBT such that confirmation of the Award is foreclosed. For all intents and purposes, they are still the alter ego of SBT. Plaintiffs sufficiently allege that the Moving Defendants were SBT's alter egos until its deletion. Could SBT be revived, it would be the Moving Defendants who would operate it. Any action taken by SBT despite its deletion form the corporate registry would be an action taken by the Moving Defendants who dominated and controlled SBT, shared employees and office space, ignored corporate formalities, and held themselves out as one entity to others.

The Moving Defendants also raise the red herring of Swiss veil-piercing law, and assume, without citing

any authority, that it should apply to the Court's determination of personal jurisdiction. Swiss law plainly should not apply.[5] In *Glencore*, the court applied the law of the forum to engage in its alter-ego analysis to determine if the award debtor, an Indian corporation, was subject to the court's personal jurisdiction. *Glencore,* 2010 WL 4323264, at *5. The Court should do the same in this action. Even if Swiss law did apply, the Moving Defendants' only argument under Swiss law is the same argument concerning the ability of the Moving Defendants to have been SBT's alter ego post-bankruptcy addressed above.[6]

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[5] Swiss law would not even apply to a determination of alter ego on the merits. *See Blue Whale Corp. v. Grand China Shipping Dev. Co.*, 722 F.3d 488, 496, n.7 (2d Cir. 2013) ("There are a number of cases that indicate that had [plaintiff] prevailed at the London arbitration proceeding [over the counterparty to the agreement] in advance of bringing an action for attachment or enforcement in the United States [against a non-signatory foreign alter ego], federal common law . . . would govern the court's evaluation of [the non-signatory foreign defendant's] alleged alter-ego status."); *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 660 (2d Cir. 2005) (holding that federal common law controlled in determining whether to enforce the arbitral award against a nonsignatory to the agreement). In any event, no merits alter ego determination is necessary in this action to confirm the award against SBT.

[6] *Glencore* similarly answers Defendants' assertion that personal jurisdiction cannot be found over a subsidiary through a parent corporation. (*See* Defs. Mem. at 17, n.12.) In *Glencore*, the Court concluded that the award debtor had made a prima facie showing that it was "its parents' alter ego" and, if there had been jurisdiction over the parents, there would have been jurisdiction over the award debtor subsidiary. *Glencore*, 2010 WL 4323264, at *9.

Plaintiffs have made a prima facie showing that the Court has personal jurisdiction over SBT and the Motion should be denied.

C. SBT Has Been Properly Served With Process Through the Moving Defendants.

SBT has been properly served through the Moving Defendants. The Moving Defendants argue that service on SBT was ineffective because the alter ego personal jurisdiction analysis discussed above is inappropriate in a confirmation proceeding and, even if the Moving Defendants are SBT's alter egos, they lacked the authority to accept service on SBT's behalf under Swiss law. (Defs. Mem. at 18-19.) This is not correct. "[S]ervice on the alter ego of a corporation constitutes effective service on the corporation." *Transfield ER Cape*, 571 F.3d at 224. "Where one defendant is subject to personal jurisdiction and service of process, its alter egos are subject to personal jurisdiction and may be served by serving it." *Glory Wealth Shipping PTE, Ltd. v. Indus. Carriers, Inc.*, 590 F. Supp. 2d 562, 564 (S.D.N.Y. 2008). As discussed above, Plaintiffs have sufficiently alleged a prima facie case for personal jurisdiction over SBT through the Moving Defendants as its alter egos. As such, service of SBT through the Moving Defendants was also appropriate and effective.

II. THE MOVING DEFENDANTS ARE JUDICIALLY ESTOPPED FROM ASSERTING A DEFENSE TO CONFIRMATION BASED UPON SBT'S LACK OF CAPACITY.

Judicial estoppel prevents a party from changing position after a court relied on the party's articulation of its position to render a decision, enter an order, or grant relief. A party must be forthright with a court and is bound by facts represented in an action. A party may not change its position in a later proceeding out of convenience. The Moving Defendants took the position before this Court in the Enforcement Action that confirmation against SBT was possible in another forum. The Court granted them a favorable decision in dismissing the Enforcement Action and directed Plaintiffs to confirm the award. (Opinion at 35-37.) The Moving Defendants now argue that confirmation is impossible in this **or any other forum** because SBT lack's the capacity to be sued. (Defs. Mem. at 3, 6-7.)

The Moving Defendants new position is inconsistent with its previous position adopted by the Court in the Enforcement Action. In the papers supporting their First Motion to Dismiss and, in particular, in arguing that this action should be dismissed on *forum non conveniens* grounds, the Moving Defendants asserted repeatedly that Switzerland and France provided adequate forums for Plaintiffs' claims and, indeed, were the proper forums for this action. (*See* Defs. First Mem. at 39-47.) The Moving Defendants asserted that Switzerland was an adequate forum at least six times in their Memorandum of Law in Support of First Motion to Dismiss. (*See id.* at 39 ("Switzerland Is an

Adequate Alternative Forum."); *id.* at 39 ("Switzerland is not only an adequate alternative forum"); *id.* at 40 ("Switzerland is an adequate alternative forum."); *id.* at 41 ("Switzerland is Not Merely an Adequate and More Convenient Forum"); *id.* at 41 ("not only is Switzerland an adequate forum"); *id.* at 47 ("Switzerland is unquestionably an adequate alternative forum.").) Defendants also asserted that "France is . . . an adequate alternative forum." (*Id.* at 40 n.14.)

The Moving Defendants also stated specifically that "Switzerland is also a signatory to the New York Convention, and permits litigation to enforce arbitration awards thereunder." (*Id.* at 40 n.15; *see also* Declaration of Dr. Andreas Rüd, dated July 19, 2013 ("Rüd Decl." Enforcement Action Docket No. 22) at 28 ("Switzerland is a signatory to the New York Convention and permits litigation to enforce foreign arbitration awards thereunder.").) The Moving Defendants' representation to the Court was that Plaintiffs should be forced to try their luck in confirming the Award against SBT in Switzerland or France. As such, the Moving Defendants are judicially estopped from taking the inconsistent position that SBT lacks the capacity to be sued in any forum and their motion to dismiss should be denied.

"'Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted); *see also In re Petition of Transrol Navegacao S.A.*, 782 F. Supp. 848, 853 (S.D.N.Y. 1991)

(confirming an arbitration award and precluding the party opposing the confirmation from taking an inconsistent position because it was "trying to play 'fast and loose' with the judicial system" and allowing it to take the inconsistent position "would be to condone inequitable manipulation of courts and litigants"). "'[T]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.'" *Intellivision v. Microsoft Corp.*, 484 Fed. Appx. 616, 619 (2d Cir. 2012) (quoting *New Hampshire*, 532 U.S. at 750). Nevertheless, "[j]udicial estoppel is invoked where (1) a party's later position is 'clearly inconsistent' with its earlier position, and (2) the party has succeeded in persuading a court to accept its earlier position." *Sewell v. 1199 Nat'l Ben. Fund for HHS*, 187 Fed. Appx. 36, 40 (2d Cir. N.Y. 2006) (citation omitted). Courts may also look to whether "the party asserting the two positions would derive an unfair advantage against the party seeking estoppel." *Don Lia v. Saporito*, 909 F. Supp. 2d 149, 174 (E.D.N.Y. 2012) (citing *DeRosa v. National Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010).

Judicial estoppel "requires only that 'the party's former position has been adopted in some way by the court in the earlier proceeding.'" *Lia v. Saporito*, 541 Fed. Appx. 71, 74 (2d Cir. 2013) (citation omitted) (distinguishing judicial estoppel from collateral estoppel because the later requires that the determination at issue "was essential to [the earlier] judgment," while judicial estoppel "demands no similar 'but for' causation."); *see also Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 397 (2d Cir. 2011) (Judicial estoppel "prevents a party from asserting a

'factual position . . . clearly inconsistent' with a position previously advanced by that party and 'adopted by . . . the court in some manner.'") (citation omitted). Adoption of the prior inconsistent position by the court need not be explicit, but instead can be "by obtaining a judgment." *Maharaj v. BankAmerica Corp.,* 128 F.3d 94, 98 (2d Cir. 1997).

The Court granted the Moving Defendants the relief they sought, dismissal of the first complaint in the Enforcement Action, based on the assertions and representations that confirmation was possible in other forums. The Court dismissed Plaintiffs first complaint in the Enforcement Action by acknowledging that "Plaintiffs' enforcement action may be permissible if the Award was confirmed in Switzerland or other court of competent jurisdiction." (Opinion at 37.)

The Moving Defendants now take an inconsistent position that confirmation against SBT is unavailable in Switzerland or in any other forum, including in this Court because SBT lacks the capacity to be sued. (Defs. Mem. at 3 and 6-7; *see* Memorandum of Law in Opposition to Motion to Stay ("Defs. Opp. to Stay" Enforcement Action Dkt. No. 57) at 4 (Plaintiffs' efforts to confirm the award against SBT are "futile" because "as a result of SBT's September 30, 2013 liquidation and deletion from the Swiss Commercial Register, SBT lacks capacity to be sued.").) The Moving Defendants' current position that SBT's deletion from the corporate registry forecloses confirmation of the Award against it is clearly inconsistent with its earlier position that confirmation against SBT was possible in other jurisdictions.

This inconsistent position was not the result of any good faith mistake or change in circumstance. The Moving Defendants had and have extensive knowledge of the SBT bankruptcy and access to the Commercial Register of Canton Zug. In a declaration dated July 19, 2013, the Moving Defendants' expert certified that he reviewed documents from the SBT bankruptcy and submitted exhibits to the Court consisting of 200 pages of documents from and related to the bankruptcy. (Rüd Decl. at 2; Exhibits.) He also submitted SBT's entry from the corporate registry as an exhibit to his declaration. (*Id.* Ex. 10.) His second declaration, executed October 6, 2013, six days *after* the deletion of SBT from the registry, again certified that he had "reviewed certain documents contained in the files of the Bankruptcy Office of the Canton of Zug, Switzerland, in the bankruptcy proceedings of [SBT]," but made no mention of SBT's deletion from the Corporate Registry. (Supplemental Declaration of Dr. Andreas Rüd, dated October 6, 2013, ("Sup. Rüd Decl." Enforcement Action Docket No. 44) ¶ 5.)

Even after SBT had been formally deleted on September 30, the Moving Defendants continued to maintain their position that SBT remained in liquidation and Switzerland provided an adequate alternative forum for Plaintiffs' action. In the Moving Defendants' October 8, 2013, Reply Memorandum of Law in Support of the First Motion to Dismiss, they referred to SBT as "a Swiss company in liquidation" (Defs. First Reply at 11, n.8) and continued to assert that Switzerland presented an adequate alternative forum to this Court (*see id.* at 17-20). A month after SBT was deleted, at the oral argument on the First Motion to Dismiss, the Moving Defendants continued

to press their case to the Court that this action should be dismissed on *forum non conveniens* grounds, asserting that Switzerland and France were not only adequate alternative forums, but were more appropriate forums for this case. The Moving Defendants argue only now that the original complaint was dismissed that SBT has lacked the capacity to be sued since September 30, 2014, eight days before they filed their Reply arguing confirmation was possible, a month before they argued confirmation was possible in front of the Court at oral argument on the First Motion to Dismiss, and more than six months before the court issued its Opinion.

The Moving Defendants' inconsistent position has provided them an unfair advantage. Their current position would foreclose Plaintiffs from obtaining confirmation in "Switzerland or other court of competent jurisdiction" as suggested by the Court. (Opinion at 37.) The Moving Defendants' argument that SBT lacks the capacity to be sued under Swiss law thwarts any attempt to confirm the Award in Switzerland. Similarly, the Moving Defendants' argument that SBT lacks the capacity to be served (Defs. Mem. at 7) would prevent Plaintiffs from confirming the Award in France. Plaintiffs have already submitted the Award to obtain an *exequatur,* a French court order confirming the award, but are required to serve it "'by a method prescribed by [Swiss] law'" pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, dated 15 November 1965 (the "Hague Convention"). (Declaration of Alexander B. Blumrosen in Opposition to Defendants' Motion to Dismiss Amended Complaint, dated September 18,

2014 ("Blumrosen Decl." filed contemporaneously in the Enforcement Action and attached to the Barrack Decl. as Exhibit D) ¶¶ 9-12) (citation omitted).) The Moving Defendants' position, if accepted, would eliminate any possibility to confirm the Award.

Moreover, no avenue exists for Plaintiffs to directly reverse the Moving Defendants' actions. Re-registry of a deleted Swiss company is not possible when the company has no assets. (Declaration of Dr. Daniel L. Bühr in Opposition to Defendants' Motion to Dismiss Amended Complaint, dated September 18, 2014 ("Bühr Decl." filed contemporaneously in the Enforcement Action and attached to the Barrack Decl. as Exhibit E) ¶¶ 9-15.) ("'The legitimate interest in the re-registration is moreover rejected by the Supreme Court when it is clear from the beginning that the claimant will not achieve the aim he is pursuing with the re-registration of the company. This is particularly the case when the company to be registered no longer has any assets of any kind. The existence of realisable assets must thus be substantiated by the claimant, so that re-registration can be ordered.'") (citation omitted).) Because SBT no longer has any assets, "no creditors of SBT, including Plaintiffs, have a legitimate interest to demand reregistering of SBT according to the requirements of Swiss law." (*Id.* ¶ 16.) As such, any action by Plaintiffs to reinstate SBT will be "considered an abuse of rights and dismissed." (*Id.* ¶ 11.) Nor is there any exception to allow for re-registration when the petitioner is seeking only to confirm an arbitration award. (*Id.* ¶ 17 ("I have not found any Swiss case law where the reinstatement of a company was granted in order for a party to lodge an action to confirm an arbitration award against it.").)

Having taken the position that confirmation was possible against SBT in Switzerland and the Court having adopted such position in its Opinion, the Moving Defendants should be judicially estopped from arguing the inconsistent position that SBT lacks the capacity to be sued in any jurisdiction, and their motion to dismiss should be denied.

III. THE MOVING DEFENDANTS' OTHER ARGUMENTS DO NOT WARRANT DISMISSAL.

The Moving Defendants also argue for dismissal based on its arguments in the Motion to Dismiss the Amended Enforcement Complaint, incorporated by reference, that considerations of due process and incapacity to defend as well as international comity and *forum non conveniens* compel dismissal. Plaintiffs address these arguments briefly in turn, and incorporate by reference their opposition to these arguments from the Opposition to the Motion to Dismiss the Amended Enforcement Complaint.

The Moving Defendants argument that SBT was denied due process or was precluded from defending in the arbitration ignores that the Moving Defendants caused SBT to enter bankruptcy as part of their intentional scheme to remove any recoverable assets from SBT. They cannot now claim that SBT did not have the opportunity to defend itself because of their own intentional acts. Moreover, SBT **did** have the opportunity to defend itself in the arbitration, but the decision-making authority was in the bankruptcy administrator's hands, rather than SBT's officers, per the Moving Defendants' design.

In addition, the Moving Defendants' incorporation of their international comity and *forum non conveniens* arguments cannot justify dismissal when they simultaneously argue that the Award cannot be confirmed against SBT in **any jurisdiction**, including the purported adequate and favorable jurisdictions of France and Switzerland. Plaintiffs brought this confirmation action in this forum because the Moving Defendants, and their assets, are located here. Moreover, pursuant to the Moving Defendants' arguments, this could be the only forum available to Plaintiffs to confirm against SBT.

IV. THE MOVING DEFENDANTS ARE ESTOPPED FROM OPPOSING CONFIRMATION.

In any event, the Moving Defendants are equitably and judicially estopped from opposing confirmation. "The doctrine of equitable estoppel is properly invoked where the enforcement of the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct." *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 725 (2d Cir. 2001) (citing *In re Ionosphere Clubs, Inc.*, 85 F.3d 992, 999 (2d Cir. 1996)). "Application of equitable estoppel rests on notions of essential fairness and sound discretion of court; the doctrine is invoked successfully against a party who has occasioned a loss through . . . an affirmative act fairly identified as the cause of the loss." *Joint Venture Asset Acquisition v. Zellner*, 808 F. Supp. 289, 303 (S.D.N.Y. 1992) (citation omitted). "Equitable estoppel is grounded on notions of fair dealing and good conscience." *Eastern Air Lines, Inc. v. The Ins. Co. (In*

re Ionosphere Clubs, Inc.), 85 F.3d 992, 999 (2d Cir. 1996). "[A] party may be estopped from pursuing a claim or defense where: 1) the party to be estopped makes a misrepresentation of fact to the other party with reason to believe that the other party will rely upon it; 2) and the other party reasonably relies upon it; 3) to her detriment." *Kosakow*, 274 F.3d at 725.

The Moving Defendants, through SBT, made numerous misrepresentations regarding SBT's commitment to its obligations and willingness to participate in the arbitration. After SBT defaulted on its contracts with Plaintiffs, the Moving Defendants and SBT falsely stated their intention not to "walk away from obligations." (Compl. ¶ 52.) When Plaintiffs proposed a negotiation of the dispute before it would be submitted to the ICC Paris, the Moving Defendants, acting through SBT, requested an extension, granted by the trusting Plaintiffs, so that the Moving Defendants could implement a scheme to dispose of SBT's primary assets. (*Id.* ¶¶ 54-56.) After Plaintiffs commenced an arbitration, the Moving Defendants, acting through SBT, requested an extension of time to respond until February 2010 and began transferring SBT's assets to Defendant Prime Carbon. (*Id.* ¶¶ 57-59.) On December 27, 2009, the Moving Defendants transferred SBT's business to Prime Carbon except for its liabilities to Plaintiffs and one other significant creditor, and they shortly thereafter notified SBT's suppliers that Prime Carbon was SBT's successor-in-interest. (*Id.* ¶¶ 3, 62-63.) Despite this transfer, the Moving Defendants, through SBT, falsely informed the ICC Paris and Plaintiffs that "SBT does not try to evade from its obligations [and] ha[d] not resolved to be dissolved and liquidated." (*Id.* ¶ 61.) Although SBT was

left virtually assetless by the transfer, Defendants waited four months until April 2010 to put SBT into bankruptcy to obfuscate the fact that it was bankrupt because it had been looted. (*Id.* ¶ 86.)

Plaintiffs relied on these misrepresentations in pursing the arbitration, pursuant to the valid contracts between Plaintiffs and SBT, to their detriment because the Moving Defendants now seek to rely on their actions to render SBT assetless and place it in bankruptcy to oppose confirmation. All of the Moving Defendants' arguments against confirmation arise from their intentional acts to trick Plaintiffs and evade liability for the Award. As such, they are estopped from opposing confirmation.

In addition, the Moving Defendants should be judicially estopped from opposing confirmation. The Moving Defendants, through SBT, agreed to arbitrate disputes arising from their contracts with Plaintiffs before the ICC Paris. (*Id.* ¶ 49.) As described above, when Plaintiffs commenced the arbitration, the Moving Defendants, through SBT, requested and received an extension of time to respond to the Request for Arbitration. (*Id.* ¶ 58.) Having obtained this favorable order of the ICC Paris, SBT put in motion its scheme to transfer all of SBT's business, apart from Plaintiffs and one other significant creditor. (*Id.* ¶¶ 3, 62-63.) Despite these actions, the Moving Defendants, through SBT, falsely represented to the ICC Paris that "SBT does not try to evade from its obligations [and] ha[d] not resolved to be dissolved and liquidated." (*Id.* ¶ 61.) Although SBT was left virtually assetless by the transfer, Defendants waited four months until April 2010 to put SBT into bankruptcy to obfuscate the fact

that it was bankrupt because it had been looted. (*Id.* ¶ 86.)

Judicial estoppel is appropriate where a party is "trying to play 'fast and loose' with the judicial system" and allowing that party to assert their position "would be to condone inequitable manipulation of courts and litigants." *Transrol Navegacao*, 782 F. Supp. at 853. The Moving Defendants, acting through SBT, elected to abandon the arbitration process by resorting to the route of self-inflicted bankruptcy. All of their present protestations regarding a lack of opportunity to mount a defense on the merits, ignore the indisputable fact that they looted a solvent corporation, SBT, and placed it into bankruptcy so as to avoid having their supposed defenses heard and resolved in an arbitral forum that provided all the indicia of due process of law. They frustrated the very purpose of arbitration and confirmation by putting SBT into bankruptcy and cannot now assert that their action precludes confirmation.

As a result of their representations and conduct to Plaintiffs and the ICC Paris, the Moving Defendants are equitably and judicially estopped from opposing confirmation.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Moving Defendants' Motion to Dismiss.

Dated: September 18, 2014
New York, New York

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APPENDIX 2

United States Court of Appeals
FOR THE SECOND CIRCUIT

Nos. 15-1133(L), 15-1146(con)

[Filed May 20, 2016]

DA TERRA SIDERURGICA LTDA, ET AL., *Plaintiffs - Appellants*,	)
v.	)
AMERICAN METALS INTERNATIONAL, INC. ET AL., *Defendants - Appellees*,	)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of May, two thousand sixteen.

It is hereby ORDERED that each party shall submit a letter brief, not to exceed ten (10) double-spaced pages, limited to the following questions:

1. Whether an award-creditor must first "confirm" a *foreign* arbitral award, governed by the New York Convention and Chapter Two of the Federal Arbitration Act, prior to initiating an enforcement action on that award against an award-debtor in U.S. courts.

2. If not, whether the circumstances are any different if an award-creditor is seeking to enforce a *foreign* arbitral award against an award-debtor's alleged alter egos or successors-in-interest, rather than against the award-debtor itself.

Parties shall submit their briefs concurrently no later than Friday, June 17, 2016 at 5:00 PM.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

APPENDIX 3

[SEAL] **U.S. Department of Justice**

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

September 12, 2016

By ECF

Hon. Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
500 Pearl Street
New York, New York 10007

Re: *DA Terra Siderurgica LTDA v. American Metals International*,
Docket No. 15-1133 (L), 15-1146 (con)

Dear Ms. Wolfe:

By invitation of the Court and pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States respectfully submits this memorandum brief as *amicus curiae*.

Interest of the United States

The United States has a strong interest in ensuring the proper interpretation and implementation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or "Convention"). Because the United States is a party to the Convention and participated in its negotiation, the government's interpretation of the treaty is "entitled to great weight." *Medellín v. Texas*, 552 U.S. 491, 513 (2008) (quotation marks omitted). The United States also has an interest in encouraging the reliable and efficient enforcement of international arbitral awards in aid of international commerce.

Questions Presented

By letter dated May 20, 2016, this Court requested the views of the U.S. Department of State on two questions:

1. Whether an award-creditor must first "confirm" a foreign arbitral award—as opposed to a U.S. Convention award—governed by the New York Convention and Chapter Two of the FAA, prior to initiating an enforcement action on that award against an award-debtor in U.S. courts; and

2. if not, whether the circumstances are any different if an award-creditor is seeking to enforce a foreign arbitral award against an award-debtor's alleged alter egos or successors-in-interest.

The government's responses, as further explained below, are as follows. First, an award-creditor need not

"confirm" a foreign arbitral award governed by the New York Convention before seeking to "enforce" that award against an award-debtor in U.S. courts; the Convention and its implementing legislation, Chapter 2 of the Federal Arbitration Act ("FAA"), contemplate a single-step process of reducing an arbitral award to a court judgment. Second, based on the text and purpose of the Convention and the FAA, as well as recent Supreme Court authority explaining the role of courts in interpreting the scope of arbitral agreements, an award-creditor may seek, in the appropriate circumstances, to confirm a foreign arbitral award directly against alleged alter egos or successors.

Statement of the Case

A. The New York Convention and implementing legislation

The New York Convention is a multilateral treaty that establishes a regime for enforcement in Contracting States of international commercial arbitration agreements and awards. *See* The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518. The United States acceded to the Convention on September 30, 1970, and it entered into force in the United States on December 29, 1970.

In the United States, the Convention is implemented through Chapter Two of the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 201-208. Chapter Two provides subject matter jurisdiction in federal district courts for any "action or proceeding falling under the Convention . . . ." 9 U.S.C. § 203. The scope of "falling under the Convention" is in turn

defined by 9 U.S.C. § 202 to include international commercial arbitral agreements and awards.

Consistent with the Convention, the FAA permits a party that has prevailed in international commercial arbitration to seek recognition and enforcement of that award against an award-debtor. *See* 9 U.S.C. § 207; Convention, arts. III, IV. In actions to recognize and enforce an award, the Convention distinguishes between courts of "primary" and "secondary" jurisdiction. Primary jurisdiction lies in the courts of the country in which, or under the arbitration law of which, an award was made (often referred to as the "seat" of the arbitration); secondary jurisdiction lies in the courts of all other Contracting States. *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 n.1 (2d Cir. 2007). Courts of primary jurisdiction are "free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief," while courts of secondary jurisdiction "may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention." *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

B. Factual and procedural background

The following facts are taken from the plaintiffs' allegations, which are assumed to be true. *See, e.g., Freidus v. Barclays Bank PLC*, 734 F.3d 132, 135 (2d Cir. 2013).[1]

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[1] As the Court is aware, this appeal consists of two consolidated actions—the "Enforcement Action" and the "Confirmation Action."

In 2008, plaintiffs contracted to sell pig iron to Steel Base Trade, AG ("SBT"), a now-defunct Swiss corporation, but SBT breached its obligations by October of that year. (Joint Appendix ("JA") 783, 792). As the contracts required all disputes arising under the contract to be arbitrated before the International Chamber of Commerce ("ICC"), plaintiffs initiated arbitration. (JA 784, 793). Plaintiffs claim that, while arbitration was pending, the defendants in this case transferred virtually all of SBT's assets to a new corporate entity, Prime Carbon. (JA 784).

Approximately four months after transferring its assets to Prime Carbon, SBT declared bankruptcy in Switzerland in April 2010. (JA 798). Because SBT was financially unable to mount a defense to the arbitration, SBT did not participate in the arbitration proceedings to defend against the claims. (JA 799). SBT's creditors also declined to defend against the claims as an assignee of SBT, and the court-appointed bankruptcy administrator subsequently admitted plaintiffs' arbitral claims against SBT in the bankruptcy proceedings. (JA 799-800). The final arbitral award, issued on November 9, 2011, awarded plaintiffs approximately 50 million Swiss francs. (JA 800). The arbitral panel did not order any relief against any individual or corporation other than SBT. (JA 141). On September 30, 2013, approximately one year after the conclusion of its bankruptcy proceedings, SBT was struck from the Swiss Commercial Register consistent with Swiss law. (JA 873).

(Appellants' Br. 1 n.1). For the convenience of the Court, citations in this brief for plaintiffs' allegations are to the amended complaint in the Enforcement Action. (JA 782-812).

Plaintiffs brought suit in the Southern District of New York on April 18, 2013; the parties refer to this suit as the "Enforcement Action." (JA 34). In the Enforcement Action, plaintiffs sought to confirm the arbitral award against SBT's alleged alter egos, and also brought fraudulent transfer claims. (JA 808). The district court (Sweet, J.) granted defendants' motion to dismiss, principally on the ground that the award was not "enforceable" against alleged alter egos or successors in interest without first being "confirmed." *CBF Industria de Gusa S/A/ v. AMCI Holdings, Inc.*, 14 F. Supp. 3d 463, 478-79 (S.D.N.Y. 2014).

Plaintiffs then both filed an amended complaint in the Enforcement Action and brought a new suit seeking confirmation of the award against SBT; the parties refer to this second action as the "Confirmation Action." (JA 912). Defendants again moved to dismiss in both cases, and the district court granted the motions in separate opinions. *CBF Industria de Gusa v. AMCI Holdings, Inc.*, No. 13 Civ. 2581, 2015 WL 1190137 (S.D.N.Y. Mar. 16, 2015); *CBF Industria de Gusa S/A v. Steel Base Trade AG*, No. 14 Civ. 3034, 2015 WL 1191269 (S.D.N.Y. Mar. 16, 2015).

In the Enforcement Action, the district court again held that plaintiffs could not seek to "enforce" an arbitral award against any party other than the award-debtor, SBT, without first "confirming" the award against SBT. 2015 WL 1190137, at *8. The court reasoned that the arbitral panel had not entered an award against any alleged alter egos of SBT, and that to permit the suit against the alter egos would require the court to disturb the arbitral tribunal's determination, which, as a court sitting in secondary

jurisdiction, it could not do. *Id.* at *9. The district court further reasoned that a factually intensive inquiry would undermine "the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Id.*

In the Confirmation Action, the district court held that because SBT had been struck from the Swiss corporate register, it lacked capacity to be sued under Federal Rule of Civil Procedure 17(b)(2). 2015 WL 1191269, at *3.

Plaintiffs appealed the decisions in both actions, and the appeals were consolidated. This Court heard oral argument on March 2, 2016. Following argument, the panel ordered the parties to submit supplemental briefs on the questions above; the Court also invited the U.S. Department of State to submit an *amicus* brief on the same questions.

ARGUMENT

POINT I

Neither the New York Convention nor the FAA Requires an Award-Creditor to First "Confirm" an Award Before Seeking to "Enforce" It

The first of the Court's post-argument questions asks whether the winner of a foreign arbitration governed by the New York Convention must first "confirm" the award before seeking to "enforce" it in U.S. courts. The answer is no: both the Convention and the FAA envision a single-step process for reducing a foreign arbitral award to a domestic judgment.

A. The terms employed by the Convention and the FAA

The FAA and the Convention use different terms for two distinct legal processes: (1) the process of reducing an arbitral award to judgment, and (2) the process of executing on that judgment in order to obtain an award-debtor's assets.

Reducing an award to judgment. The term "confirmation" under the FAA and the term "recognition and enforcement" under the Convention both mean the process of applying to a court to enter judgment based on an arbitral award.

In domestic arbitration governed by Chapter 1 of the FAA, the process of reducing an arbitral award to a court judgment is referred to as "confirmation." *See* 9 U.S.C. § 9 ("If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, . . . any party to the arbitration may apply to the court . . . for an order confirming the award . . . ."). Chapter 2 of the FAA also uses the term "confirm," with the same meaning. *See* 9 U.S.C. § 207 ("[A]ny party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.").

The New York Convention does not employ the term "confirmation." Instead, it refers to "recognition" and "enforcement" of arbitral awards, almost always as part of the single phrase "recognition and enforcement." *See* Convention, arts. III, IV, V. Under the Convention, "recognition" of an award means giving it preclusive legal effect, while "enforcement" means

reducing that award to a domestic judgment (which entails "recognition" of the award). *See* Restatement (Third) U.S. Law of Int'l Comm. Arb. (Tentative Draft No. 2) § 1-1(z), (l); *id.* cmts. z, *l*.[2]

The text of section 207 of the FAA demonstrates that the terms "confirmation" and "recognition and enforcement" are synonymous: "The court shall *confirm* the award unless it finds one of the grounds for refusal or deferral of *recognition or enforcement* of the award specified in the said Convention." 9 U.S.C. § 207 (emphases added). Thus, by providing a procedure to reduce arbitral awards to judgment, the "confirmation" proceeding under Chapter Two of the FAA fulfills the United States' obligation under the Convention to provide procedures for "recognition and enforcement" of Convention arbitral awards.

Executing on a judgment. Chapter 2 of the FAA does not specify what further steps may be necessary for an arbitration-creditor to obtain an arbitration-debtor's assets following the entry of judgment. In the United States, however, this latter process is variously referred to as "enforcement of" or "execution on" a judgment, and trial courts have typically applied state-law procedures under Federal Rule of Civil Procedure 69 to order payment or execution against particular assets. *See, e.g.*, *Daum Glob. Holdings Corp. v. Ybrant Digital Ltd.*, No. 13 Civ. 3135, 2015 WL 5853783, at *2 (S.D.N.Y. Oct. 6, 2015). This latter meaning of

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[2] In their post-argument briefs on the two questions, both plaintiffs and defendants appear to agree with the government's understanding of this terminology. *See* Appellees' Post-Argument Br. 2; Appellants' Post-Argument Br. 3-6.

"enforcement" is distinct from the meaning of the term "recognition and enforcement" in the Convention.

The New York Convention is silent as to execution on judgments arising out of arbitral awards. However, the Convention does require that each Contracting State must "enforce [awards] in accordance with the rules of procedure of the territory where the award is relied upon," and forbids the imposition of "substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." Convention, art. III.

B. The New York Convention was designed to avoid a two-step process for confirmation

Thus, the New York Convention does not require an award-creditor to first "confirm" an award before seeking to "enforce" that award through conversion of the award into a court judgment. Rather, "confirmation" and "enforcement" are synonyms in this context. The former is the domestic statutory term, and the latter is the Convention term, but both mean reducing an award to judgment. In addition, regardless of terminology, requiring an award-creditor to proceed through two separate steps before obtaining a judgment would run contrary to one of the purposes of the Convention.

The New York Convention was specifically designed to provide a simple, single-step judicial process for recognizing and enforcing arbitral awards. The New York Convention "succeeded and replaced the Geneva Convention of 1927," whose "primary defect . . . was

that it required an award first to be recognized in the rendering state before it could be enforced abroad." *Yusuf Ahmed Alghanim*, 126 F.3d at 22. The two-step Geneva Convention procedure, referred to as "double exequatur," proved cumbersome, and the New York Convention was designed to eliminate it. *See id*. In transmitting the New York Convention to the Senate for advice and consent in 1968, the executive branch specifically noted that the new regime was intended to permit an arbitral award holder "to request recognition and enforcement of his foreign award without having to prove that the award was binding in the country in which it was made." *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Message from the President of the U.S., Exec. E, 90th Cong., 2nd Sess., at 20 (1968), *reproduced* 7 I.L.M. 1042, 1058 (1968).

Accordingly, all an award-creditor must generally do prior to initiating execution, under the Convention and section 207 of the FAA, is apply to a court of competent jurisdiction for the single-step process of reducing its award to a judgment.

POINT II

An Award-Creditor May Also Seek to Confirm a Foreign Arbitral Award Against an Award-Debtor's Alleged Alter Ego or Successor in Interest

The Court's second question asks whether, even if in general there is no requirement of "confirmation" that precedes "enforcement" of a Convention award, the situation is different where an award-creditor seeks to enforce directly against an award-debtor's alleged alter

ego or successor, rather than against the award-debtor itself. The New York Convention neither prohibits a Contracting State from allowing an award-creditor to seek enforcement of an award directly against an alter ego or successor, nor obliges a Contracting State to permit such an action. In the view of the United States, however, allowing such an action is consistent with judicial decisions on the interpretation and enforcement of both domestic and international arbitration agreements, as well as the text and purpose of the Convention and its implementing legislation, the FAA.

The United States takes no position on whether, and how, alter ego, successorship, or similar doctrines of agency or vicarious liability might apply in this or any other individual case. As an initial matter, even understanding which theories might be available in a specific case would require resolving threshold choice-of-law questions, which might vary depending on the specific theory or the point during the arbitral process at which it is invoked. Even after the applicable substantive law is identified, alter ego and successor theories of liability are different doctrines, which would require consideration of different threshold legal and factual questions. Determining whether an entity could be liable as a successor to an arbitral party, for example, might turn on an interpretation of the parties' agreement and its terms under the law governing the agreement. Determining whether an entity could be liable as an alter ego based on a theory of fraudulent conveyance of assets could require a determination as to whether the applicable law would be the law of the place where the assertedly fraudulent conveyance took place, or the law governing the parties' contract, or

some other body of law. The United States also takes no position on whether, and if so under what circumstances, an alleged alter ego or successor would have a valid defense to confirmation of an arbitral award under Article V of the Convention.[3]

A. The courts are empowered to decide who is bound by an arbitral agreement in the single-step confirmation proceeding

A court may decide whether a non-signatory to an arbitral agreement is bound by that agreement during the course of the single-step process for confirming a Convention award, just as it may in other arbitral contexts.

An arbitration agreement is a contract. Thus, the question of whether a specific entity has agreed to arbitrate a claim or is otherwise bound by an arbitration agreement is generally governed by ordinary principles of contract law. *First Options, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (FAA Chapter 1 case). Under *First Options* and related cases, questions of arbitrability—including questions about whether a non-signatory to an arbitration agreement is bound by that agreement—are for courts to decide, unless the parties have agreed otherwise. *Id.* at 943; *accord*

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[3] Because, as explained above, "confirmation" is the domestic term employed in both Chapter 1 and Chapter 2 of the FAA for the process of reducing an award to judgment, the remainder of this brief uses that term, rather than the Convention's "recognition and enforcement."

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002).[4]

The question of whether an entity is bound by an arbitration agreement may be raised at various stages in the dispute resolution process.

Prior to arbitration, a party may bring an action to compel arbitration against a party that was not a signatory to the arbitration agreement. *See* 9 U.S.C. § 4 (domestic arbitration); 9 U.S.C. § 206 (New York Convention). In such a case, the district court must decide in the first instance whether the non-signatory will be bound by the agreement, and may need to take evidence and resolve disputed facts in order to reach a conclusion. As this Court has held, non-signatories may be bound by an agreement to arbitrate under "ordinary principles of contract and agency," including "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95-97 (2d Cir. 1999) (quotation marks omitted; citing *Thomson-CSF,*

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[4] The term "arbitrability," as employed in United States law, diverges from its meaning elsewhere. In international practice, the term is used more narrowly to refer to whether, as a matter of public policy, a particular type of dispute is capable of resolution through arbitration. Other questions that are considered issues of "arbitrability" in the United States—including the existence or validity of the parties' arbitration agreement—are typically referred to elsewhere as matters of arbitral "jurisdiction" or "competence." *See generally* Lawrence Shore, *The United States' Perspective on 'Arbitrability,'* in ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES 69-83 (Loukas A. Mistelis et al. eds., 2009).

S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995)).

A party to an arbitration agreement may also raise the question of alter ego status (or other agency principles) for the first time in arbitral proceedings by asking the arbitral panel to enter an award against a non-signatory to the arbitral agreement. In a subsequent action to confirm an arbitral award against an alter ego, the district court would review de novo the arbitral panel's decisions as to alter ego status—unless the court first determined that the parties clearly and unmistakably intended that arbitrators should decide that question. *See First Options*, 514 U.S. at 943-46 (holding that a court should decide whether the arbitration contract bound parties who did not sign the agreement); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 661 (2d Cir. 2005) (applying *First Options*/*Howsam* rule to arbitral award governed by the New York Convention); *China Minmetals Materials Import and Export Co. v. Chi Mei Corp.*, 334 F.3d 274, 281 (3d Cir. 2003).

To decide whether (and which) non-signatories are bound by an arbitral agreement in the course of confirming an award against the non-signatory, the district court would need to resolve any factual disputes, conducting evidentiary hearings if necessary. *See, e.g.*, *China Minmetals*, 334 F.3d at 281, 284, 289-90; *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Custom Air Sys., Inc.*, 357 F.3d 266, 268 (2d Cir. 2004). Several foreign courts have taken a similar approach, conducting an independent review of an arbitral panel's rulings on alter ego or other agency theories. *See, e.g., IMC Aviation Solutions Pty Ltd. v.*

Altain Khuder LLC, [2011] VSCA 248 (Australia, Sup. Ct. Victoria); *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (Sup. Ct. United Kingdom).

Alternatively, an arbitral award-creditor may bring an action to confirm an award against the award-debtor, and then bring a claim (either by a second action, or as a separate claim in the original action) to execute on the resulting judgment against the assets of an alleged alter ego or successor who was not a party to the original arbitration. *See, e.g.*, *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 295 F. Supp. 2d 366 (S.D.N.Y. 2003) (following confirmation of a foreign arbitral award, subsequent action by judgment-creditor against alleged alter egos of judgment-debtor). In such an action, the district court will rule on the alter ego question even though that issue was not reached or passed upon by the arbitral panel.

In short, a party to an arbitral agreement can assert that an alleged alter ego or successor should be held liable for its damages in each of these circumstances, with initial or de novo review by a district court of the issue. There is no evident reason that that answer should change because the award-debtor can no longer be sued because it has no legal status following the completion of foreign bankruptcy proceedings.

B. The text of the FAA supports the conclusion that a confirmation action directly against an alleged alter ego or successor is permissible

The text of Chapter 2 further suggests that an award-creditor may seek to confirm an award directly against a non-signatory to the arbitration agreement under legal doctrines such as alter ego or successor liability. Whether in an action to confirm an award (under section 207) or to compel arbitration (under section 206), the courts' authority includes the power to determine whether a non-signatory to the arbitral agreement is bound by that agreement—and (under section 207) is bound by the arbitral award—and, if so, to confirm an award against such a non-signatory.

Judicial authority to decide which entities are bound by an arbitration agreement or an arbitral award derives ultimately from sections 202 and 203 of the FAA. Section 203 grants "original jurisdiction" to federal district courts for an "action or proceeding falling under the Convention." Section 202 states that a matter falls under the Convention when it is "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title." Thus, when a district court is asked to exercise jurisdiction against a non-signatory to an agreement, it must analyze the "legal relationship" between the parties to the suit, "whether contractual or not."

Federal courts have exercised that jurisdiction under section 206 of the FAA to compel arbitration by non-signatories to the agreement. Section 206 provides

that "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement." Courts interpret the scope of "the agreement" under section 206 in accordance with the common law principles (such as assumption, alter ego, and estoppel) described in *Thomson-CSF*. *See* 64 F.3d at 776. Courts therefore compel participation in arbitration by entities that have not signed an arbitration agreement when they are nonetheless bound to the agreement for a valid legal reason. *See, e.g.*, *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 47 (1st Cir. 2008); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1065 (2d Cir. 1993).[5]

Federal courts should similarly be understood to have authority under section 207 of the FAA to determine in confirmation actions which entities are bound by an arbitral award. Section 207 of the FAA provides that "any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration." Given that the scope of the "legal relationship" under section 202 and the scope of the "agreement" under section 206 are defined in part by reference to common law or comparable principles such as agency and alter ego, it would be anomalous if the analysis of which entities are "party to the

[5] Courts also hear suits seeking other relief, such as an anti-suit injunction in favor of arbitration or an injunction to stay pending arbitration, against non-signatories to the arbitral agreement. *See, e.g.*, *CRT Capital Grp. v. SLS Capital, S.A.*, 63 F. Supp. 3d 367, 371-72 (S.D.N.Y. 2014).

arbitration" under section 207 categorically excluded those theories.

Of course, application of such doctrines in an individual case would require a threshold determination as to the substantive body of law that would apply to govern that determination.[6] In addition, a determination that an entity is an alter ego of the arbitral award-debtor would be distinct from, and not necessarily conclusive of, the separate determination of whether that entity had a valid defense to confirmation under Article V of the Convention. An alleged alter ego might argue, for example, that the award should not be confirmed against it because it "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." Convention, art. V(1)(b). The United States takes no view on how these or similar questions should be answered in these proceedings.

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[6] In *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53 (2d Cir. 2004), this Court held that under some circumstances, the proffered arbitral agreement's own choice-of-law clause may dictate the substantive law applied to the court's analysis of which parties are bound to arbitrate. By contrast, in *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 661-62 (2d Cir. 2005), the Court held that American federal common law, not Egyptian contractual law, applied to the question of whether a non-party could be subject to enforcement. In addition, in *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95-96 (2d Cir. 1999), the Court held that federal common law, not New York law, applied in a case under the Convention. The question of what substantive law applies to determinations of vicarious liability, however, is beyond the scope of the Court's questions in this case.

C. Permitting confirmation directly against non-signatories is consistent with the Convention

The Convention does not address explicitly whether a court may directly confirm an award against an entity not specifically named as the award-debtor. Article III provides that each Contracting State must "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon," and that there "shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." Allowing confirmation against a non-signatory does not subject Convention awards to different or more onerous procedures than would be available for confirmation of domestic awards.

The defendants raise arguments to the effect that no other country would countenance an action to enforce the award at issue here against the defendants. (Appellees' Br. 84-85, 88-89). Even assuming that is true, it is not inconsistent with the Convention. The Convention places a floor on the situations in which awards may be recognized and enforced; it does not bar Contracting States from permitting more liberal enforcement. *See* Convention, art. VII ("The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."); *see*

also Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS 39, 66 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008) (the "Convention is aimed at facilitating recognition and enforcement of foreign arbitral awards; if domestic law or other treaties make recognition and enforcement easier, that regime can be relied upon").

D. This Court's *Orion* decision does not limit the authority to confirm a Convention award against alter egos

Nor does this Court's decision in *Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Panama, S.A.*, 312 F.2d 299, 300 (2d Cir. 1963), limit U.S. courts' authority to entertain an action for confirmation against alleged alter egos or successors. While the district court relied on that decision for its holding to the contrary, *Orion* predates Chapter 2 of the FAA; it has been limited in important ways by subsequent decisions of this Court; and its conception of which parties are bound by an arbitration agreement or arbitral award is more limited than that reflected in more recent decisions of this Court and the Supreme Court.

The *Orion* decision rejected an argument by the award-creditor that the district court, in an action seeking confirmation of a domestic arbitral award, could properly determine that a parent corporation was an "alter ego" of the award-debtor that could also be held liable for the award. The *Orion* court held that "an action for confirmation is not the proper time for a District Court to 'pierce the corporate veil.' " 312 F.2d

at 301. The Court reasoned that a confirmation action under 9 U.S.C. § 9 "is one where the judge's powers are narrowly circumscribed and best exercised with expedition," and the factually intense veil-piercing analysis would "unduly complicate and protract" that proceeding. *Id*. The Court distinguished cases seeking to compel arbitration, seemingly agreeing that in that context it would be appropriate for a district court to engage in a plenary analysis of veil-piercing under 9 U.S.C. § 4. *Id*. Finally, the Court noted that alternatives—such as a suit against the entity that is claimed to be the guarantor or the alter ego of the award-debtor—remained available to the plaintiffs, but that "an action to confirm the arbitrator's award cannot be employed as a substitute for either of these two quite distinct causes of action." 312 F.2d at 301.

As an initial matter, *Orion*—decided more than fifty years ago under Chapter 1 of the FAA, before the United States became a party to the New York Convention—should not govern actions under Chapter 2 of the FAA. Indeed, this Court has already suggested, in dicta, that the traditional principles of contract and agency law identified in *Thomson-CSF* might permit an award holder to bring a Convention action to confirm an arbitral award against an alleged alter ego, though it ultimately decided the case on other grounds. *See In re Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 495 (2d Cir. 2002).

Furthermore, *Orion*'s holding has been narrowed in important ways. First, this Court has rejected the proposition that *Orion* categorically bars consideration of all common law or agency theories of liability at the

confirmation stage. In *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 46-47 (2d Cir. 1994), the Court ruled that the district court should consider the question of successorship in interest in a confirmation proceeding because, in that case, successorship was factually straightforward. Second, the Court has already distinguished *Orion* as inapplicable to labor, as opposed to commercial, arbitration, because in labor arbitration, the intent to bind non-signatories is exceptionally clear. *See Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991). In addition, *Orion* did not consider whether its general rule should apply even when the original award-debtor itself can no longer be sued directly, making the two-step process urged by the Court unavailable.

More fundamentally, the basic approach of *Orion*—as well as the distinction drawn in *Productos Mercantiles* between "complex" veil-piercing cases and cases in which the application of common law or similar principles of agency, alter ego, or successorship is more straightforward—is inconsistent with the judicial role described by more recent cases such as *First Options* and *Howsam*. Under *First Options*, unless the parties have contracted otherwise, courts are empowered to decide questions of arbitrability de novo, including which parties are bound to an arbitral agreement. 514 U.S. at 943-45; *see Howsam*, 537 U.S. at 84. By contrast, *Orion*, despite reciting a legal rule similar to *First Options*,[7] went on to hold that a district

[7] "[A] decision whether parties other than those formally signatories to an arbitration clause may have their rights and obligations determined by an arbitrator when that issue has not

court's powers in confirmation actions pursuant to 9 U.S.C. § 9 "are narrowly circumscribed and best exercised with expedition." 312 F.2d at 301. But the *First Options* line of cases does not hold that courts' powers to evaluate who is bound to an agreement are "narrowly circumscribed"—to the contrary, those cases stand for the proposition that these matters lie within the courts' power (unless agreed otherwise by the parties), and nothing in those cases suggests that courts should circumscribe that power or conduct only a narrow inquiry in order to adjudicate those matters. *See, e.g., First Options*, 514 U.S. at 944 (holding that, in a Chapter 1 FAA case, a court should undertake ordinary analysis of state-law contract principles to decide whether parties had agreed to arbitrate); *China Minmetals*, 334 F.3d at 289-90 (in Convention case, remanding for the district court to decide a dispute of fact about whether parties had agreed to arbitrate). Indeed, in *First Options* itself—a post-arbitration confirmation action—the Supreme Court upheld the Third Circuit's lengthy, fact-intensive exploration of whether individuals were bound by an arbitral agreement on the basis of veil-piercing and alter ego theories. *See* 514 U.S. at 946-47.

For all these reasons, *Orion* should not be read to extinguish an award-creditor's right to pursue confirmation against an alleged alter ego, successor, or agent of the award-debtor when the award-debtor itself is defunct.

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been submitted to him is not within the province of the arbitrator himself but only of the court." 312 F.2d at 301.

E. Permitting direct confirmation against third parties prevents award-debtors from avoiding enforcement

Finally, leaving open the possibility in appropriate circumstances of confirmation directly against entities that are not named as award-debtors furthers the policy goal of preventing award-debtors from avoiding legitimate enforcement and collection. In a case where (as alleged here) an award-debtor is defunct and thus immune from suit, but fraudulently transferred its assets to another entity to avoid liability on the arbitral award, it makes little sense to reward that misconduct by requiring the creditor to engage in additional litigation to first confirm its award against the now-nonexistent award-debtor, and only then proceed to suing the award-debtor's alleged alter egos or successor or its transferees. Indeed, that first step may be impossible, given the award-debtor's unavailability for suit; the requirement to sue it then may frustrate the creditor's legitimate ability to collect. Whether, on the merits, the transferee of the defunct entity's assets would be liable for payment of the arbitral award would of course have to be resolved by the court in such a proceeding. But permitting a confirmation action directly against the transferee—in which the transferee can raise the typical defenses to confirmation of the award and can also challenge its alter ego or successor status—minimizes the chance that the arbitral award will be defeated by the debtor's manipulation or concealment. Although, as noted, the United States takes no position on whether and how any common law or comparable theory of liability may apply in this case, there is no reason to categorically bar an arbitral award-creditor from seeking confirmation of an award

against a non-party where applicable law provides for a valid claim and other defenses to enforcement do not apply.

Conclusion

The Court should vacate the judgments of the district court and remand for further proceedings in accordance with the interpretation of the FAA and the New York Convention described above.

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Respectfully submitted,

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