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COURT OF APPEALS

STATE OF NEW YORK

AL RUSHAID,

Appellant,

-against-

No. 180

PICTET & CIE,

Respondent.

20 Eagle Street
Albany, New York 12207
October 19, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

GARY P. NAFTALIS, ESQ.
KRAMER LEVIN NAFTALIS & FRANKEL LLP
Attorneys for Appellant
1177 Avenue of the Americas
New York, NY 10036

MAEVE L. O'CONNOR, ESQ.
DEBEVOISE & PLIMPTON LLP
Attorneys for Respondent
919 Third Avenue
New York, NY 10022

Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is appeal number 180, Al Rushaid v. Pictet & Cie.

3 MR. NAFTALIS: May it please the court.
4 Gary Naftalis for the appellants.

5 May I reserve four minutes for rebuttal?

6 CHIEF JUDGE DIFIORE: You may, sir.

7 MR. NAFTALIS: Leave - - - we saw it, and
8 leave to appeal - - - leave to appeal was granted by
9 this court asking to review how, in our view, the
10 First Department of the Appellate Division failed to
11 apply this court's bright line standard found by a
12 unanimous court only a few years ago in the Licci
13 case for determining personal jurisdiction under CPLR
14 302(a)(1), and also that the Appellate Division
15 failed to address core allegations in evidence
16 showing that - - - showing in our allegations.

17 Because after all, we're here on a
18 complaint were all the allegations are assumed to be
19 true, and all inferences are to be drawn in our
20 benefit. And indeed, that how our allegations show
21 that Pictet repeatedly used its New York
22 correspondent banking relationship to - - -

23 JUDGE ABDUS-SALAAM: Is that the operative
24 standard that it has to be repeated use and that's
25 it?

1 MR. NAFTALIS: I would say so, Your Honor,
2 because if you recall the history of Licci, the
3 Second Circuit had the Licci case, it was removed
4 from the state court to the Southern District, and up
5 on the Second Circuit, and there was some confusion
6 as to what was required beyond mere maintenance of a
7 correspondent banking relationship.

8 What, in addition to mere maintenance of a
9 correspondent banking relationship, would suffice to hold
10 that a foreign bank transacted business, and would be
11 subjected jurisdiction under 302(a)(1).

12 JUDGE STEIN: Well - - - and we examined -
13 - - and we examined that in Licci based on - - -
14 based on the activities of the bank there, which seem
15 to me are very different from the activities of the
16 bank here.

17 In Licci, the bank had its own interest and - -
18 - and was - - - was actively using its account to - - - to
19 do something that was illegal, to even do what it did,
20 which was to send money to terrorists, and so it had the
21 direct relation. It seems that there are a lot of
22 distinctive features between Licci and this. And the
23 question is, is how far - - - how far does Licci take us,
24 not whether - - - because to me, I think it's pretty clear
25 that this is not Licci.

1 MR. NAFTALIS: I - - - I would respectfully
2 agree that this is not Licci because I would
3 respectfully submit this is a much easier case for
4 jurisdiction than Licci.

5 In Licci, the certified question was, does a
6 foreign bank's maintenance of a correspondent bank account
7 at a financial institution in New York, and use of that
8 account to effect dozens of wire transfers on behalf of a
9 foreign client, and I emphasize on behalf of a foreign
10 client, constitute a transaction of business in New York.

11 This court answered that question by saying,
12 complainants alleging a foreign bank's repeated use of a
13 correspondent account in New York on behalf of a client,
14 in effect, a course of dealing shows percible - - -
15 parsifal - - - if I can get some water.

16 JUDGE PIGOTT: Close enough.

17 JUDGE FAHEY: Purposeful.

18 JUDGE ABDUS-SALAAM: Purpose.

19 MR. NAFTALIS: I'm a better lawyer than I
20 am a grammarian, I hope.

21 JUDGE RIVERA: Time will tell.

22 MR. NAFTALIS: I hope so.

23 Shows purposeful availment of New York's
24 dependable and transparent banking system.

25 The allegation in Licci, which is really kind of

1 important, is that the allegation -- you look at the Licci
2 complaint, it says in paragraphs 51 and 53, which are
3 quoted in the record of our case at pages 278 and 279,
4 Judge Stein, that there that at all times, LCB, Lebanese
5 Bank, at all times, all transaction carried out in all the
6 Hezbollah accounts were carried out by Hezbollah at the
7 direction of Hezbollah. And between 2004 and July 2006,
8 Hezbollah made and received dozens of wire transfers via
9 defendant's AmEx bank.

10 So this at direction standard, which is contrary
11 to Licci which was set up by the First Department, is
12 completely contrary - - -

13 JUDGE RIVERA: Okay. So as I'm
14 understanding what your argument is about purposeful
15 availment is that there's a money laundering scheme,
16 right - - -

17 MR. NAFTALIS: Yes.

18 JUDGE RIVERA: - - - that facilitates that
19 breach of the fiduciary duty. Stealing from their
20 employers, they're using the vendors to get these
21 kickbacks, right, am I following you? And they are -
22 - -

23 MR. NAFTALIS: Not only following me;
24 you're doing better.

25 JUDGE RIVERA: Well, we'll see. And - - -

1 and - - - and then you have the money laundering
2 scheme. And Pictet & Cie and Chambaz are the money
3 launderers.

4 So now the whole case is whether or not the use
5 of Citibank in New York City is purposeful availment by
6 them in that money laundering scheme.

7 Tell me how they did that. Because that's what
8 - - - that's the test, the purposeful availment. What
9 you're calling this course of dealing as the way you get
10 to purposeful availment.

11 MR. NAFTALIS: But here, you have - - -

12 JUDGE RIVERA: Um-hum.

13 MR. NAFTALIS: - - - without any discovery
14 in this case - - -

15 JUDGE RIVERA: Um-hum.

16 MR. NAFTALIS: - - - we've been able to
17 discover fifteen bribes that were paid into the
18 correspondent bank accounts, and were then
19 transferred at Pictet's direction, because only
20 Pictet can direct the payment out of the
21 correspondent banking account, not - - -

22 JUDGE RIVERA: Well, this is what I wanted
23 to ask you. So as I understand it, the complaint
24 alleges that the money that goes to Citibank, the
25 correspondent account in New York, is credited to

1 TSJ. It's then divided up amongst these three
2 employees later on, and their accounts are credited.
3 What does that mean, "credited"?

4 MR. NAFTALIS: What - - - what it means is
5 - - - is this. As the allegations of the complaint
6 say - - -

7 JUDGE RIVERA: Um-hum.

8 MR. NAFTALIS: - - - Pictet was a central
9 player in the money laundering.

10 JUDGE RIVERA: Um-hum.

11 MR. NAFTALIS: Pictet, this fellow Chambaz,
12 who was the per - - - he knew - - - he knew the three
13 corrupt employees for thirty years, was friends with
14 them.

15 JUDGE RIVERA: With them, um-hum.

16 MR. NAFTALIS: He knew where they worked.

17 JUDGE RIVERA: Um-hum.

18 MR. NAFTALIS: He knew about their
19 fiduciary duties to Al Rushaid, he knew that they did
20 - - - they were not permitted to take monies from
21 vendors of Al Rushaid.

22 JUDGE RIVERA: Okay. No, no, no. But this
23 is - - - this is a exercise of - - - as I understood
24 your allegation, by the bank of their authority. And
25 I just want to know what that means to credit the

1 account. Does that mean the correspondent account -
2 - - let's just use easy numbers. A vendor puts in
3 100 dollars' worth of kickbacks, that correspondent
4 account informs Pictet, Pictet credits TSJ 100.
5 Right. That's what I understand the allegations are.

6 Does that mean that the Citibank account
7 now is at zero and the Pictet account is at 100, or
8 does it mean something else? What does that mean to
9 credit - - -

10 MR. NAFTALIS: I think it - - - once Pictet
11 authorizes the transfer out of the correspondent
12 banking account, it's no longer there - - -

13 JUDGE RIVERA: Um-hum.

14 MR. NAFTALIS: - - - it's now in Pictet's
15 account.

16 Initially, in the phony corporation that a
17 Chambaz setup for them, which was this TSJ
18 Engineering, which was a fake - - -

19 JUDGE RIVERA: Um-hum.

20 MR. NAFTALIS: - - - which was used as a
21 conduit, and then first there, in that phony company
22 that was set up by Pictet for the corrupt employees
23 in the British Virgin Islands, and then transferred
24 from there to individual Swiss bank accounts that
25 Pictet had setup for the individuals in Switzerland.

1 And what Pictet has alleged to have done
2 here at the complaint stage here, is obviously be a
3 central player in the scheme. And why, in response
4 to Judge Stein's comment, I took a different view
5 than Judge Stein's initial question was, let me tell
6 you the difference between this and Licci.

7 In Licci, what was the real harm? The real harm
8 didn't occur in the United States. The real harm occurred
9 in Israel. Because what happened in Licci, the allegation
10 was that the alleged terrorist organization, Hezbollah,
11 was killing innocent Israeli civilians, i.e. the
12 plaintiffs or relatives of the plaintiffs who were killed
13 or injured. But they were all killed or injured in Israel
14 by the Hezbollah terrorists.

15 JUDGE STEIN: So was it your argument - - -
16 is it your argument that here, it's Pictet - - -
17 because Pictet knew about this - - - this bribery
18 scheme, and enabled it, so to speak, that that's what
19 gets it passed just being a passive transfer?

20 Because we said that merely having a
21 correspondent bank account isn't enough. And as you
22 describe it, whenever there is a correspondent bank
23 account, the foreign bank has to be the one to direct
24 money from that account to somewhere else. So in
25 that view, then Three Amigos would be meaningless

1 because anytime there was a correspondent bank
2 account, there would be - - - there would be direct
3 action directed by the foreign bank, and in your
4 view, it would be long-arm jurisdiction, right,
5 purposeful availment.

6 MR. NAFTALIS: Well, I think that - - -
7 most respectfully, I think you may be reading Licci a
8 little too narrowly. Because - - -

9 JUDGE STEIN: Well, I'm trying to figure
10 out where the line is.

11 MR. NAFTALIS: Well, the line is this. The
12 line is this. What Licci was talking about, or this
13 court - - - your court was talking about in Licci
14 was, does - - - when is something purposeful as
15 opposed to a mistake. In other words, if something
16 happens once, and that's language in Licci, that they
17 talked about not being a mistake. If something
18 happens once, it could happen by accident; it could
19 happen by - - -

20 JUDGE FAHEY: Well, isn't that - - - isn't
21 it a little different? Isn't it to show
22 purposefulness, you have to look at them on a
23 continuum. So - - - and that means - - - so on one
24 hand you've got Licci, and on the other hand you've
25 got Amigo Foods. One transaction doesn't show a

1 purposeful pattern of behavior. Licci was dozens,
2 right? So in Licci, there was purposeful behavior,
3 and that shows that this seems to fall somewhere
4 between - - - on that continuum between the two of
5 them.

6 MR. NAFTALIS: Well, if you look at - - -

7 JUDGE FAHEY: In other words, it's not,
8 three transactions gets you in, no, that - - - that
9 gets you jurisdiction; it's not the way it works. We
10 have to look at the whole thing as a continuum, and
11 to see - - - and to see if there was enough there in
12 the record. Here, we have fifteen transactions that
13 we have to determine whether or not that would
14 constitute purposeful behavior.

15 MR. NAFTALIS: Here, you have - - - but
16 what I - - - what I was trying to - - -

17 JUDGE FAHEY: Go ahead.

18 MR. NAFTALIS: Answer - - - both in answer
19 to your question and getting back to something Judge
20 Stein said to me, fifteen transactions involving four
21 million dollars' worth of bribes, why I say this is
22 an easier case than Licci, and why it easily fits
23 within it, here, as I was saying, the primary
24 wrongdoing in Licci occurred in Israel because the
25 killing of the people. The financial - - - the

1 financial assistance to it - - -

2 JUDGE FAHEY: I know we got there, yeah.

3 JUDGE RIVERA: - - - was secondary. Here,
4 what was the principle violation? The principle
5 violation was a breach of fiduciary duty by the three
6 corrupt employees to our clients. And where did that
7 happen initially? The payment of the bribes occurred
8 in New York. It occurred at the correspondent bank.
9 At that point in time, the breach of fiduciary duty
10 was proven, and Pictet and it's - - - Pictet was
11 central to that.

12 JUDGE RIVERA: But isn't that going to the
13 second prong of the statute, the articulable nexus,
14 and not this first prong, which is what we're still
15 talking about?

16 MR. NAFTALIS: I think that the first prong
17 is a much lower hurdle. The first prong - - - and
18 that's what Licci was saying. We - - - in order - -
19 - if somebody, and indeed, if you look at the Second
20 Circuit follow-up opinion to Licci by Judge Sack, at
21 some point, if you do enough, you're subject to the
22 jurisdiction. And certainly, we would suggest that
23 we plainly have a better situation than Licci on the
24 first prong.

25 Secondly, on the second prong, which I think is

1 really easy in this case, because - - - and the second
2 prong acts as a bit of a shield, because if there's no
3 connection, no relationship, no articulable nexus, as
4 Licci says, between the transactions and the tort, or in
5 the violation, then some - - - you wouldn't have long-arm
6 jurisdiction. Here, you have it, because the bribes
7 themselves are the wrong. Here, it's an easy case, on the
8 second leg, Judge Rivera.

9 JUDGE GARCIA: Counsel, I'm sorry, chief,
10 may I ask one question?

11 CHIEF JUDGE DIFIORE: Yes.

12 JUDGE GARCIA: Mr. Naftalis, so if you
13 split it that way, one and two, doing business in New
14 York and in the nexus, right - - -

15 MR. NAFTALIS: Yeah.

16 JUDGE GARCIA: So you have a bank, Zurich
17 Bank, they have a correspondent account at Citibank
18 and they do 10,000 transactions through that account
19 a day. Are they doing business in New York and
20 meeting the first prong?

21 MR. NAFTALIS: I think they are meeting the
22 first prong. If there was no connection whatsoever -
23 - -

24 JUDGE GARCIA: Understood. But just on the
25 - - -

1 MR. NAFTALIS: - - - they wouldn't be
2 meeting the second prong.

3 JUDGE GARCIA: Right. So just on the first
4 prong, you're not looking at fifteen transactions
5 related to this specific - - - to the nexus question;
6 you're looking at how much business are they doing in
7 New York through their correspondent account?

8 MR. NAFTALIS: I think what we - - - what
9 we have in terms of our record and our evidence here
10 is we have fifteen corrupt transactions. Fifteen
11 corrupt transactions - - -

12 JUDGE GARCIA: Right.

13 MR. NAFTALIS: - - - which we think is of
14 the same family as dozens of corrupt transactions in
15 Licci.

16 JUDGE GARCIA: So I guess my question is,
17 do you need them to be corrupt transactions to meet
18 the first prong, or if you do enough transactions in
19 your correspondent account in the Citibank in New
20 York, are you doing business such as to get by the
21 first prong of the jurisdiction?

22 MR. NAFTALIS: I think they don't have to
23 be corrupt transactions to get by the first prong of
24 Licci. I believe - - -

25 JUDGE GARCIA: And then the second is nexus

1 between X number of those transactions and the
2 alleged wrong in your complaint.

3 MR. NAFTALIS: Yes, Judge Garcia, I would
4 agree with that.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MR. NAFTALIS: Thank you, Your Honor.

7 CHIEF JUDGE DIFIORE: Ms. O'Connor.

8 MS. O'CONNOR: Good afternoon, and may it
9 please the court. Maeve O'Connor, for the defendants
10 and appellees in this case.

11 Before I jump into Licci, which I've been
12 calling [Lee'-chee] this entire time - - -

13 JUDGE GARCIA: So have I.

14 JUDGE RIVERA: Me too, so it's okay.

15 MS. O'CONNOR: Okay. I was good.

16 JUDGE RIVERA: Keep calling it Licci.

17 JUDGE GARCIA: I think Mr. Naftalis is
18 wrong.

19 MS. O'CONNOR: I feel better.

20 So before I jump into that, I do want to say
21 that the picture that Mr. Naftalis has painted of this
22 elaborate money laundering scheme masterminded By Pictet,
23 this case has traveled a very long way through the
24 successive rounds of briefing, and the lawyer's
25 argumentation, the rhetoric from the complaint and from

1 the documents attached to the complaint, and this was a
2 motion to dismiss that was initially decided by New York
3 Supreme based on a complaint that says one thing about
4 correspondent bank accounts. It doesn't say they were the
5 center of a huge scheme. What it says is that the - - -
6 the corrupt employees caused, you know, the vendors to pay
7 money, and instructed them to pay it through these
8 correspondent bank accounts. That's the allegation in the
9 complaint on the correspondent bank accounts.

10 JUDGE RIVERA: You know, I think we're
11 familiar with the complaint - - -

12 MS. O'CONNOR: Okay.

13 JUDGE RIVERA: - - - so let's now get to
14 purposeful availment. So can you clarify for me what
15 does it mean to have credited the account in
16 Switzerland?

17 MS. O'CONNOR: Well, I mean, again, there
18 is nothing in the complaint on this. Right.

19 JUDGE RIVERA: I understand that, but I'm
20 asking what does that mean.

21 MS. O'CONNOR: Right. Well, as a technical
22 matter, I'm not - - -

23 JUDGE RIVERA: Yes.

24 MS. O'CONNOR: - - - frankly entirely sure
25 - - -

1 JUDGE RIVERA: Yes.

2 MS. O'CONNOR: - - - how the crediting
3 works. My understanding is the wire - - - the money
4 gets wired into an account that's held in the names
5 of these individuals in Switzerland.

6 JUDGE RIVERA: Pictet would approve this
7 transfer, this wiring, or this crediting?

8 MS. O'CONNOR: I didn't hear the question.

9 JUDGE RIVERA: Is that correct; Pictet must
10 approve it?

11 MS. O'CONNOR: Your Honor, I'm sorry to say
12 that I don't know the answer to that question. I
13 don't - - - and again, there is no proof on that; we
14 heard assertions on it. So - - -

15 JUDGE RIVERA: There's a motion to dismiss;
16 we are assuming the factual allegations - - -

17 MS. O'CONNOR: There's no factual
18 allegation of this, Your Honor, at all.

19 JUDGE RIVERA: There's no factual - - -
20 they say you credited it.

21 MS. O'CONNOR: They don't allege that - - -

22 JUDGE RIVERA: Are you saying that's not a
23 factual allegation?

24 MS. O'CONNOR: There's no - - - there is no
25 factual allegation, I believe, Your Honor, that

1 Pictet affirmatively took an action to cause the
2 money to be wired into Geneva.

3 JUDGE RIVERA: I believe they say it's
4 credited, that you credited it.

5 MS. O'CONNOR: Okay. Well, I don't want to
6 - - - I don't have that allegation specifically in
7 front of me; I can look for it.

8 JUDGE RIVERA: Okay.

9 JUDGE GARCIA: Going back to the complaint,
10 doesn't, you know, paragraph 38 lay out this
11 conspiracy theory among the employees of the bank and
12 the corrupted employees? And it seems to me what the
13 allegation is accepting them as true for
14 jurisdictional purposes is the corrupt employees got
15 together with Pictet, and I have to admit, I was
16 calling it [Pic-tet], but Pictet bankers came up with
17 this way to get money to the Virgin Islands, and part
18 of that was setting up this company in the BVI.

19 But the allegations are that the insiders
20 in the bank were part of that. So it isn't Amigos,
21 certainly, where it was, the bank sends it to the
22 corresponding account in York when it could have sent
23 it to Maine.

24 And isn't it more like Licci, where the
25 allegations in the complaint, and I've read that

1 complaint, where Hezbollah was allegedly directing the
2 money into the New York correspondent account. The
3 allegation, and I think it was Judge Stein who was getting
4 at this earlier, that to me seemed to make the nexus was
5 that the Lebanese Bank itself was part of the scheme to
6 fund Hezbollah, and that using the accounts in New York
7 which Hezbollah was directing the money to, furthered that
8 scheme.

9 And isn't that analogous to this, where the
10 allegations, at least, or the bank was involved, for
11 whatever commercial purposes it might have had, in helping
12 these employees hide the money, those employees like
13 Hezbollah used the correspondent account?

14 MS. O'CONNOR: Your Honor, I don't believe
15 it's particularly analogous at all. I think that
16 Licci is a different case. And I think they make
17 some kind of extraordinary arguments, actually,
18 trying to get jurisdiction here, to the effect that -
19 - - that repeated use is the standard, as opposed to
20 purposeful availment.

21 JUDGE GARCIA: But let's look at nexus
22 through the crime, which seems to me the Appellate
23 Division is saying it was the corrupt employees,
24 let's call them, who directed the money to go through
25 the correspondent bank, which seems to be making an

1 analogy to Amigo.

2 But what's different to me about that, is, one,
3 Licci wasn't the bank itself saying there is no
4 allegation that I can find in that case that the bank
5 itself was directing the funds through its New York
6 correspondent accounts. In fact, the only thing in the
7 record I can find is that Hezbollah was allegedly
8 directing the money into the New York correspondent bank.

9 So I have a problem with what the Appellate
10 Division was saying was the distinction here; that the
11 direction came from the corrupt employees rather than the
12 bank; that doesn't make sense to me, especially in light
13 of those two cases.

14 MS. O'CONNOR: Well, I'd be happy to
15 address that, Your Honor. I think that the language
16 of the decision by this court certainly seems to
17 suggest something other. The allegation is that - -
18 - that the clients requested that money be funded,
19 but not that the clients requested that money be
20 funded through New York.

21 And what this court stated is, while it may
22 be that LCB could have routed the transactions on
23 behalf of Shaheed elsewhere, the fact that LCB used a
24 New York account dozens of times indicates
25 desirability and a lack of coincidence.

1 And this is very significant. I think the
2 court was focused on an active choice by that bank to
3 actively wire the funds to New York, to reach out to
4 New York, to choose New York as opposed to Miami or
5 someplace else.

6 JUDGE GARCIA: But how do you square that
7 with the language in Licci from all the documentation
8 below, and I think even in the circuit decision
9 referring the question to us that it's Hezbollah who
10 directs the money to go through the New York
11 corresponding bank?

12 MS. O'CONNOR: Well, I don't - - - I don't
13 know how to exactly square those, but it's the - - -
14 it's the opinion of this court that's the law, and so
15 I'm just reading this Code, and that's what we were -
16 - -

17 JUDGE GARCIA: I don't think we ever - - -

18 MS. O'CONNOR: - - - based on.

19 JUDGE GARCIA: - - - actually say the bank
20 directed it. We say something about the bank's
21 motives for using the New York correspondent account,
22 it may be cheaper, but I think that you could also
23 read Licci to say, the use by the bank of the
24 corresponding accounts in New York really went to
25 that the bank was part of the crime as alleged.

1 So the bank is using its accounts in New York to
2 further the improper purpose, and that's the use of the
3 bank of the New York accounts. Not that LCB, I think it
4 is, is saying, use our New York corresponding accounts.

5 MS. O'CONNOR: Well, that's not the way I
6 read the case, Your Honor, but - - - and I also think
7 that Licci key was further different in that the act
8 of the wire was - - - was the wrong. So the - - -
9 the - - - the bank is alleged to have shared a goal,
10 and this court said that the wrongdoing occurred when
11 the funds were wired. In this case, this is a case
12 against a bank, the alleged wrongdoing occurred five
13 months before anything was wired - - -

14 JUDGE GARCIA: But it's a - - -

15 MS. O'CONNOR: - - - in Geneva.

16 JUDGE GARCIA: - - - conspiracy allegation,
17 right, at least in part as two count - - - charges.
18 So one is a conspiracy that the bank was part of
19 aiding and abetting or conspiring, I guess are the
20 two counts, to breach fiduciary duty by these
21 employees. So if that's an ongoing crime, and part
22 of that conspiracy is to launder the money into the
23 British Virgin Islands, how is this not under our
24 nexus analysis of Licci part of that?

25 MS. O'CONNOR: I actually think that issue

1 is a huge problem for the plaintiffs, and here is
2 why. The whole thing is an aiding and abetting
3 claim. Right. So they're trying - - -

4 JUDGE GARCIA: There's also a conspiracy
5 claim, isn't there?

6 MS. O'CONNOR: Well, there is a - - -
7 there's also a conspiracy claim, but the - - - the -
8 - - the claim is that they aided and abetted the
9 breach of duty, and that the bribes are an essential
10 part of that payment.

11 But this is essentially an attempt to hold the
12 bank liable, or subject to jurisdiction based on the
13 conduct of others, because they're saying these other
14 people caused these funds to be wired - - -

15 JUDGE RIVERA: No, no, no.

16 JUDGE GARCIA: They're saying the conduct
17 of others is a conduct of your bank employees. It's
18 - - -

19 JUDGE RIVERA: Right.

20 JUDGE GARCIA: It's the bank being part of
21 this, the bank has the corresponding accounts, the
22 bank, and these are the allegations, set up the
23 British Virgin Islands company, and then the bank is
24 part of this, and the corresponding accounts are
25 being used. I think those are the allegations.

1 MS. O'CONNOR: Well - - -

2 JUDGE RIVERA: But their claim, as I said
3 before, is that you are the money launderers, and you
4 facilitated this breach of the fiduciary duty for the
5 clients, these employees, and that you are completely
6 active. That this is not a passive role; you're not
7 sitting at the bank and money comes in and out of
8 your accounts and you are unaware of it.

9 They alleged particular factual assertions
10 about what Pictet & Cie did, as well as Chambaz, and
11 the -- whatever it was, the eight board members,
12 however many it was, and I - - - I - - - I'm just
13 finding it very difficult to understand your argument
14 when there are assertions on a motion to dismiss,
15 just on the face of the complaint, is that that is
16 the active role, and that that role only makes sense
17 with respect to the correspondent bank if indeed you
18 are approving the use of that bank.

19 Money goes in, you credit it somewhere else.
20 And if that's part of the money laundering scheme, and
21 that's essential to the role that you played vis-a-vis the
22 claims that they assert, the aiding and abetting and the
23 conspiracy. That sounds to me like purposeful availment.
24 I'm not understanding your argument.

25 MS. O'CONNOR: Okay. Well - - - well,

1 that's not good news for me, so I'll make one more
2 attempt - - -

3 JUDGE RIVERA: You have time.

4 MS. O'CONNOR: - - - and then I'll move on
5 to another argument. But I guess our - - - our view
6 is that it's not - - - it's not - - - it's very
7 different from Licci, and different from other
8 purposeful availment cases. Because in Licci, the
9 bank was actively wiring money out through New York,
10 choosing New York, and wiring it in that direction.

11 In this case, the bank is - - - funds are
12 coming in, the actual allegations against the bank
13 pertained to a meeting in Geneva five months earlier.

14 JUDGE GARCIA: But then if your view of
15 Licci is correct and we accept it, why don't they get
16 jurisdictional discovery to see if there is any
17 correspondence or communications indicating that what
18 they allege are the insiders at your bank, your
19 client's bank, are involved in directing the money
20 through New York, since they set up the Virgin
21 Islands shell company?

22 I think there are two reasons why they don't get
23 jurisdictional discovery. The first is that Mr. Naftalis
24 said to Justice Scarpulla, we don't need additional
25 discovery.

1 JUDGE GARCIA: No. What he said was, I
2 don't need it; it's my fall back.

3 MS. O'CONNOR: Well, I think I was there,
4 and I heard it the same way Justice Scarpulla did,
5 and I thought to myself, okay, we're not going to
6 have that argument. And I don't think you can say
7 that to a court and then turn around and say, I'm
8 going to appeal your ruling because I was entitled to
9 something I said I did - - -

10 JUDGE RIVERA: Well, it was in the motion,
11 it's an alternative argument - - -

12 MS. O'CONNOR: Yeah.

13 JUDGE RIVERA: - - - it may very well be
14 you don't want to undermine what you think is the
15 strongest argument on that oral argument, but it's in
16 your papers.

17 MS. O'CONNOR: Yeah. So - - - but
18 secondarily, I think the other reason is because
19 there's no need for it. Judicial efficiency would
20 not - - - does not make sense to the parties to
21 engage in a whole lot of jurisdictional discovery - -
22 -

23 JUDGE GARCIA: But you are saying - - -

24 MS. O'CONNOR: - - - when this case is
25 subject to dismissal.

1 JUDGE GARCIA: - - - it's their missing
2 piece that you've - - -

3 MS. O'CONNOR: I'm sorry.

4 JUDGE GARCIA: You're saying it's their
5 missing piece that they don't have the bank in any
6 way affirmatively directing this money through New
7 York or taking an active role in the choice of the
8 correspondent account. And why wouldn't they be
9 entitled to do a limited amount of discovery to see
10 if you actually did that?

11 MS. O'CONNOR: Because the case is subject
12 to dismissal as a matter of law under this court's
13 decision in Mashreqbank. And under the United States
14 Supreme Court decision in Sinochem in 2007, you can
15 address forum non conveniens prior to addressing
16 personal jurisdiction.

17 Forum non conveniens is a ministerial
18 decision that a court can make and should make in a
19 case where otherwise the interest of judicial economy
20 would be disserved by undertaking expensive
21 jurisdictional discovery for no reason.

22 JUDGE STEIN: Well, you're not suggesting
23 that we should make that determination, right?

24 MS. O'CONNOR: Well, I believe this court
25 absolutely can make this determination for - - -

1 JUDGE STEIN: Isn't that -- isn't that a
2 highly factual discretionary balancing of a whole lot
3 of things?

4 MS. O'CONNOR: Well, this court could not
5 make it as an act of discretion; I would agree with
6 that. As an act of discretion, the lower court would
7 need to address the first, and this court would
8 review it for abuse of discretion. But this case, I
9 believe - - -

10 JUDGE STEIN: We have nothing to review for
11 abuse of discretion because no determination was
12 made.

13 MS. O'CONNOR: That's correct. Because
14 this is one of the unusual cases where the decision
15 can be made as a matter of law. This case, if you
16 march through the - - - the sort of key paragraph of
17 this court's decision in Mashreqbank, which
18 identifies that case as an unusual - - - as an
19 unusual case in which forum non conveniens could be
20 decided as a matter of law, the court said, "Apart
21 from the use of New York banks to facilitate dollars
22 transactions," a fact which we've said is of minor
23 importance here, "we see nothing in this case to
24 justify resort to a New York forum, no party is a New
25 York resident," it's also the case here, "no relevant

1 conduct apart from the execution of funds transfers
2 occurred here."

3 That's also true, because as I've said, the
4 claims against the Pictet will turn on conversations
5 in Geneva; they won't turn on the fund transfers.
6 "No party has identified any important New York
7 witnesses or New York documents." And the keyword
8 there is important because the standard does not - -
9 - as articulated by this court, no party can, by
10 scratching their head, identify any conceivable New
11 York witness.

12 Even in Mashreqbank, there was alleged to
13 have been transfers through a New York account, and
14 in fact, there was allege to have been a fraudulent
15 transfer from one New York bank to another. They
16 would have been some New York witnesses, but there
17 were not important witnesses in the case.

18 There is no property related to this dispute
19 that's located in New York.

20 The question of related litigation, the
21 plaintiffs have tried to sort of bootstrap their way up
22 here by filing some other cases in New York.

23 JUDGE ABDUS-SALAAM: Counsel, I know you
24 want us to take a different action, but I want to
25 stick to what's before us right here about whether

1 this is under Licci or not.

2 MS. O'CONNOR: Okay.

3 JUDGE ABDUS-SALAAM: And, you know, I - - -
4 I think that part of my concern about the Appellate
5 Division's decision is they never once used the term
6 "repeated". And that was something that we mentioned
7 in Licci.

8 Repeated banking activity shows New York
9 transactions are, in fact, purposeful. And the
10 Appellate Division never even use the word
11 "repeated", although there are twelve, fifteen
12 transactions here. So what does that tell us?

13 MS. O'CONNOR: Well, I think the word
14 "repeated", the way I interpret it, and I'm obviously
15 speaking to the authority on the meaning of the case,
16 but the way I interpret it is that it was used in
17 that case sort of as a proxy for purposeful
18 availment. And combined with other factors, such as
19 the - - - the - - - the sense that comes through from
20 the decision of an active choice to use New York.

21 In this case, there is deposits made
22 through that account at the direction of third
23 parties that are received by the bank, and I think
24 the court felt it might be appropriate that that was
25 not indicia of purposeful availment by Pictet, but

1 this, Your Honor. I think that this argument that -
2 - - that just receiving funds through a correspondent
3 bank account is very much akin to mere maintenance of
4 the bank account. Because merely - - - a bank that
5 merely maintains a bank account, if it's the case
6 that they need to take action to cause those funds to
7 be wired, they're doing that all the time, but that's
8 not enough.

9 JUDGE RIVERA: But if it's used for the
10 purpose of this laundering enterprise, it's not
11 merely, we deposit it there, and somehow we decide
12 it'll end up in Geneva at some point or another. But
13 it's part of, again, it's their allegations - - -

14 MS. O'CONNOR: Right, right, right.

15 JUDGE RIVERA: - - - I appreciate that.
16 But it's part of this enterprise.

17 MS. O'CONNOR: Right, but I - - -

18 JUDGE RIVERA: Doesn't that make that
19 different from just, you know, somebody is putting
20 deposits in my account?

21 MS. O'CONNOR: I don't think it does
22 because again, I think their claims against Pictet
23 are about a meeting in Geneva five months earlier.
24 That's what those claims against Pictet are about.
25 Did Pierre-Alain Chambaz know or did he not know?

1 JUDGE RIVERA: But again, the allegations
2 are that this - - - these are deposits, and it's a
3 kickback scheme that's over years.

4 Are you taking the position that this is all
5 like one day later?

6 MS. O'CONNOR: One day - - -

7 JUDGE RIVERA: The fifteen transactions are
8 all one day later - - -

9 MS. O'CONNOR: One day later - - -

10 JUDGE RIVERA: - - - after the meeting or -
11 - -

12 MS. O'CONNOR: - - - I'm sorry, but I'm not
13 understanding.

14 JUDGE RIVERA: As I understood the
15 complaint was that this is over years.

16 MS. O'CONNOR: Well, I'm not taking the
17 position that - - -

18 JUDGE RIVERA: Certainly it sounds like a
19 course of dealing over years.

20 MS. O'CONNOR: Well, I think our point
21 would be that the case against Pictet, this is a
22 foreign entity, the claims against it are going to
23 rise or fall not based on whether funds were
24 transferred through a correspondent bank account.

25 It's incidental. They're going to rise or

1 fall based on testimony by people who, by the way,
2 can't be compelled into New York. These - - - these
3 corrupt employees can't be compelled into New York by
4 anyone present here.

5 So it's going to rise or fall based on
6 testimony by them and by Pierre-Alain Chambaz about
7 what was discussed and was there a conspiracy, and
8 was there - - - that's what it rises or falls on.
9 This, the transfers, you know, they say they're
10 bribes, we say they're not bribes. I don't actually
11 think they have properly alleged much of this stuff
12 that is now spread all of their briefs.

13 But in any event, this is - - - this is not
14 the core of their complaint by any stretch; I don't
15 think there is a real substantial nexus to what needs
16 to be proved by burdening completely foreign parties
17 to speak in there not-native tongue about claims that
18 - - - that, you know, pertain to something that took
19 place in Geneva.

20 There is a perfectly adequate form
21 available in Switzerland, and I don't - - - I don't
22 think that there's any - - - any point in burdening
23 the parties further with judicial discovery.

24 I see I'm out of time. Thank you very much.

25 CHIEF JUDGE DIFIORE: Thank you, Ms.

1 O'Connor.

2 Mr. Naftalis.

3 JUDGE STEIN: Can I ask you a question
4 about the discovery? You made a request for
5 discovery, but in - - - in response to the motion to
6 dismiss, were there any affidavits or anything of a
7 factual nature submitted to the court to asserting or
8 providing a basis to say that there may be, you know,
9 facts that would be revealed, and how, to assist you
10 in establishing jurisdiction? I mean, isn't that
11 what you have to do?

12 MR. NAFTALIS: We - - - in connection with
13 the - - - in connection with the motion, we filed - -
14 - in addition to the documents, we filed, in there in
15 the record beginning at 209, a series of exhibits to
16 an affidavit of mine, which I think they are Exhibits
17 C through I, and they are at the record beginning at
18 page 209, which are the instructions to the bribe
19 payers to pay to the correspondent banks.

20 JUDGE STEIN: Okay. But that's your
21 evidence of this. But did you ever say that we think
22 that there may be other forms of - - - that's the
23 evidence you do have.

24 Did you ever say, this is what we think we
25 might be able to get, that's, you know, where the

1 case law clearly says it has to be more than
2 speculation and all that. Did you provide anything
3 to the court to support your argument that
4 jurisdictional discovery would be necessary and
5 appropriate here?

6 MR. NAFTALIS: Yes. Well, we didn't put it
7 - - - we didn't put it in an affidavit, we did put it
8 in our briefs, the kinds of questions - - - some of
9 the - - -

10 JUDGE STEIN: Well, I'm talking about at
11 the trial level.

12 MR. NAFTALIS: No.

13 JUDGE STEIN: Okay.

14 MR. NAFTALIS: I think we did that in
15 Supreme - - - in Supreme Court, not here. I can
16 check that to be sure, because I don't want to
17 misrepresent.

18 But obviously, the discovery - - - and just
19 so it's clear, I wanted to clarify one thing on the
20 discovery while I'm answer your question. We - - -
21 the notion that we gave up our rights to get
22 jurisdictional discovery, I mean, that's just not
23 correct.

24 JUDGE PIGOTT: Do you see any limit to
25 this? Your rule is that if you have an account in

1 New York, you're subject to New York jurisdiction.

2 MR. NAFTALIS: No, that's not our rule.

3 Look, the rule is the rule that your court, that this
4 court laid down in Licci. And what the court - - -
5 and I want to get back to Judge Stein, so that I - -
6 -

7 JUDGE PIGOTT: All right. Forget it.

8 MR. NAFTALIS: No, no, I don't want to
9 forget it; I want to answer both questions.

10 The - - - no, what was happening was
11 particularly in some Southern District of New York cases,
12 the courts were all over the place trying to figure out if
13 just simply having a correspondent banking account isn't
14 enough, what more do you need. And they posed the
15 certified question to this court under the facts of Licci,
16 which we would respectfully suggest are not dissimilar to
17 ours in any way in terms of the core route.

18 JUDGE PIGOTT: So you think that's the
19 rule. You - - - if you fall within, what I keep
20 calling Licci, then you're - - -

21 MR. NAFTALIS: I'll call it Licci, it's
22 okay.

23 JUDGE PIGOTT: - - - then you're fine; if
24 not, you're not.

25 MR. NAFTALIS: I think that rule, because

1 if - - - when - - - when this court was dealing with
2 it, they were trying to set up some kind of bright
3 line test.

4 JUDGE PIGOTT: Right.

5 MR. NAFTALIS: We don't want - - -

6 JUDGE PIGOTT: And my understanding - - -

7 MR. NAFTALIS: We don't want to take
8 jurisdiction when it's like - - - in Amigo Foods, it
9 was a onetime unintentional thing which didn't even
10 happen. And if it's once or twice, and the court
11 even knew this - - - this court even in Licci said
12 that, you know, if it's once or twice by mistake,
13 that's not what we're looking for.

14 JUDGE PIGOTT: My understand - - -

15 MR. NAFTALIS: We're looking for something
16 - - -

17 JUDGE PIGOTT: Okay.

18 MR. NAFTALIS: - - - and we think repeated
19 conduct indicates - - - I'm sorry, repeated use is -
20 - - is a nice bright line test.

21 And I think that's where the Appellate
22 Division went wrong. They didn't even cite the
23 standard. What they did was - - - was almost like a
24 reargument of Licci because they were the same. It's
25 - - - you know, they were trying to - - - they

1 weren't accepting the allegations as true; they were
2 trying to carve out some passive exception, which of
3 course is inconsistent with the actual facts of
4 Licci.

5 JUDGE PIGOTT: Well, that's why I ask you
6 the question. A passive exception doesn't sound like
7 a difficult thing to me. If - - - pick any bank you
8 want in the world, if - - - if there's a
9 correspondent with a New York bank that they don't
10 know a thing about, that's passive, we get
11 jurisdiction. We get - - - all of those cases come
12 to New York.

13 MR. NAFTALIS: No. I don't - - - no, I
14 think if all - - - if - - -

15 JUDGE PIGOTT: You just said they were
16 making a passive exception, I thought that - - -

17 MR. NAFTALIS: No, if in fact - - - if in
18 fact, I'm the foreign bank and I have a correspondent
19 bank in New York, and I don't do anything, period,
20 there is no jurisdiction there. The long arm - - -
21 you're not transacting business.

22 If you engage in repeated transactions
23 there - - -

24 JUDGE PIGOTT: The bank.

25 MR. NAFTALIS: If - - - yes.

1 JUDGE PIGOTT: Not employees, not
2 depositors, the bank does.

3 MR. NAFTALIS: Yes, and - - - but the
4 depositor - - - the bank, Judge Pigott, acts on
5 behalf of its depositors. That's - - - that's why I
6 think there was some mythology in the Appellate
7 Division's - - - a bank doesn't act for itself; it
8 acts on behalf of its depositors, its customers.
9 That's what they were doing in Licci.

10 JUDGE PIGOTT: Well, I think if the bank
11 knows that they've got a terrorist, and they're
12 trying to assist the terrorist in getting money, and
13 they use a bank in New York, there may be something
14 to be said about that.

15 MR. NAFTALIS: I agree. And just - - -

16 JUDGE PIGOTT: If, on the other hand, they
17 say to Citibank, you know, we'd like to set up a
18 banking thing with you because we've got people that
19 travel back and forth between us and them, and the
20 people that are using it are doing whatever - - -
21 whenever they're doing, maybe the bank - - - maybe
22 you don't have jurisdiction over the bank.

23 Because otherwise, you're saying, you know,
24 you're saying just having the correspondent bank
25 makes you - - -

1 MR. NAFTALIS: Yeah, but - - - but just as
2 - - - indeed, even in the latest Licci, or the Licci
3 - - - the follow-up Licci opinion after - - -

4 JUDGE PIGOTT: Licci II.

5 MR. NAFTALIS: - - - this court certified
6 to the Second Circuit and Judge Sack wrote, I mean,
7 the New York courts have - - - if an interest in not
8 having the banks being used for either terrorism,
9 money laundering, which is what we have here, or the
10 like.

11 I think it seems to me what you - - - if - - -
12 if those are your allegations, and they are here, and they
13 are allegations supported by evidence, which I - - - even
14 without any discovery we have these fifteen bribes. And
15 obviously, if we got discovery, we might discover a whole
16 heck of a lot more.

17 And what I said, just so it's clear, at page 271
18 of the record before Judge Kapnick, who - - - Justice
19 Kapnick, when she first heard the argument before she got
20 elevated, it's our - - - after arguing why we had
21 jurisdiction, "It's our view that we don't need additional
22 discovery. I think we have enough here. We just add that
23 as a fallback argument. And I think we have plenty here
24 to show that the jurisdiction - - - "

25 So we weren't withdrawing it; we were saying we

1 had - - - we think we have enough here without
2 jurisdictional discovery. But if this court felt that we
3 didn't, we certainly have made a sufficient start by - - -

4 JUDGE RIVERA: Can we decide the forum non
5 conveniens as a matter of law?

6 MR. NAFTALIS: I'm sorry.

7 JUDGE RIVERA: Can we decide the forum non
8 conveniens as a matter of law?

9 MR. NAFTALIS: Oh, I wouldn't think so in
10 this case for two reasons. Number one, Mashreqbank
11 was, as this court said, a rare case, a rare case.

12 There was one - - - one unimportant
13 transaction in New York. And indeed, in Mashreqbank,
14 as you would recall, the original plaintiff - - -
15 this was - - - the original plaintiff said it ought
16 to be dismissed on forum non conveniens grounds.
17 This was a third party claim by the defendant.

18 And in addition, in Mashreqbank, there had been
19 two levels of discretion exercised before it got up to
20 this court. Supreme Court that there had made a ruling,
21 which said that - - - said that forum non conveniens
22 applied, the First Department reversed that ruling, and
23 then this court reversed the First Department. So there
24 had been review there.

25 And in addition, just for a minute or two, since

1 my - - - my - - - my friend here argued, this is hardly a
2 case. There is so little showing here. I mean, I think
3 it should be remitted as - - - if they want - - -if they
4 want to continue to press this issue, it should be
5 remitted so there is an exercise of discretion to be
6 reviewed.

7 But this is unlike any forum non conveniens
8 motion I ever heard; there was no affidavit from them with
9 a list of third-party witnesses who would be available in
10 Switzerland.

11 JUDGE RIVERA: But if - - - but if the
12 allegations are true, exactly as you state them - - -

13 MR. NAFTALIS: Yes.

14 JUDGE RIVERA: - - - And all you've got is
15 this account in New York and nothing else, why isn't
16 that an appropriate basis to rule as a matter of law
17 in the forum non conveniens?

18 MR. NAFTALIS: Well, for a number of
19 reasons. One, that's not all we have. There is an
20 affidavit in the record that we submitted to Judge
21 Scarpulla, I think I can get you the record cite,
22 where we had pointed out other witnesses, for example
23 - - - and connections to New York, for example the
24 individual plaintiff, Rasheed Al Rushaid, maintains
25 an office in New York.

1 Secondly, two of the critical witnesses
2 that we have, Dr. Ibler and Ms. Medler, who at that
3 time ran an investigation firm called Stratex
4 Capital, their principal place of business is in New
5 York, they're the ones who discovered the fraud.
6 They are critical - - -

7 JUDGE RIVERA: Those are your experts.

8 MR. NAFTALIS: They're not experts; they're
9 fact witnesses.

10 JUDGE RIVERA: Oh, I see.

11 MR. NAFTALIS: They discovered the fraud.

12 No, they weren't - - - they're not hired experts.

13 Indeed, although this is not in the record, Dr. Ibler
14 is now the CFO of ARPIC, and he maintains office in
15 New York.

16 In addition, there are the witnesses and
17 documents from Citibank and the other financial
18 institutions which are in the evidence we submitted; HSBC,
19 Merrill Lynch, Deutsche Bank, all of whom were involved in
20 the transactions here.

21 Thirdly, in the United - - - in the United
22 States, there's a lot of United States connection. First
23 of all, all the bribes from all the bribe payers that we
24 have discovered so far were paid in New York. And the
25 principle bribe payer is a United States company called

1 NOV, which is located in Texas, who would be susceptible
2 to discovery here, and would not be susceptible to
3 discovery in Switzerland.

4 In addition, there are a number of pending
5 actions in the - - - in the commercial division against
6 four or five of the bribe payers. So you have the issue
7 of coordination, which is - - - is a factor, and fine - -
8 - and as I said, they have made no showing there are any
9 nonparty witnesses in Switzerland, obviously that's where
10 they come from, that's where I assume they'd like to be.

11 And in addition, there is also a disproport - -
12 - a disconnect between the kind of discovery in process
13 you get in Switzerland. There is no real discovery there,
14 there are no depositions; you would never be able to get
15 the testimony of - - - here, you could get testimony
16 obviously of people in New York, but also like the third-
17 party bribe payers who could get a commission before a
18 state Supreme Court judge, to take a deposition and the
19 like.

20 JUDGE RIVERA: Thank you, counsel.

21 MR. NAFTALIS: Thank you very much for
22 hearing me.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Al Rushaid v. Pictet & Cie, No. 180 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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