No. _____

In The
Supreme Court of the United States

MARIE LAVENTURE, et al.,

Petitioners,

v.

UNITED NATIONS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An agreement to be liable binds a party to an enforceable obligation in law and justice. This is true under the laws of the United States and it has been affirmed repeatedly in official documents of the United Nations ("UN"). In conflict with this universal and widely understood definition, the Second Circuit ruled that an express assumption of liability by the Secretary-General of the UN, which was then legislatively adopted by the UN General Assembly, was limited to internal UN claims processes that are either nonexistent or not binding.

The questions presented are:

1. Whether the term "liability" can be used in an unenforceable, non-obligatory context, making it plausible that an entity would use the term in a legislative enactment to refer to claims processes that have never existed or are otherwise not binding on the party agreeing to be liable.

2. Whether an express agreement to be liable without limiting such liability to a binding forum subjects a party—which heretofore had absolute immunity—to the jurisdiction of any court with otherwise competent jurisdiction to hear the claim.

3. Whether, at the pleading stage of a tort action, a plaintiff has met its burden to survive dismissal under Federal Rule of Civil Procedure 12(b)(1) and 12(h)(3) where an affirmative, plausible case has been made for jurisdiction and there is no other plausible explanation for the use of a term in a legislative enactment that has a well-known meaning at common law and under the law of the United States.

PARTIES TO THE PROCEEDING

Petitioners, including Marie Laventure, Maggie Laventure, Cherylusse Laventure, and Sane Laventure, as well as more than 3,000 additional individuals listed in the complaint, are American and Haitian citizens, all of whom are plaintiffs in this case and were damaged as a result of the tortious conduct of the United Nations.

Respondents in this action, who did not enter an appearance in either the United States District Court or before the United States Court of Appeals, are the UN, the UN Stabilization Mission In Haiti ("MINUSTAH"), Ban Ki-Moon, former Secretary-General of the UN, Edmond Mulet, former Under Secretary-General for MINUSTAH, Chandra Srivastava, former Chief Engineer for MINUSTAH, Paul Aghadjanian, former Chief of Mission Support for MINUSTAH, Pedro Medrano Rojas, a former Assistant UN Secretary-General, and Miguel de Serpa Soares, Under Secretary for Legal Affairs of the UN (hereinafter referred to, collectively, as the "United Nations," "UN," or "Organization").

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Marie Laventure, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, No. 17-2908.

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit (App. 1) can be found at 746 F. App'x 80 (2d Cir. 2018). The opinion of the district court (App. 9) is published at 279 F. Supp. 3d 394 (E.D.N.Y. 2017).

JURISDICTION

The summary order of the court of appeals was issued on December 28, 2018. On March 18, 2019, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including May 13, 2019. *See* No. 19A937. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant treaty provisions are the *Convention of Privileges and Immunities of the United Nations*

("CPIUN"), 21 U.S.T. 1418, and the *Charter of the United Nations*, art. 105, § 1.

INTRODUCTION

Liability is defined as an enforceable obligation in law and justice. There is no other legal definition.[1] Liability can be absolved through immunity, it can be limited temporally, financially or jurisdictionally, but it cannot be relegated to a forum that doesn't exist and still be called liability. Without some binding mechanism for enforcement, the term "liability" is meaningless.

Given this universal and well-understood definition of liability, a party to a contract or legislative enactment would not plausibly use the term to refer to a forum that doesn't exist, or one that is voluntary and nonbinding on the entity agreeing to be liable. Yet in this case, the Second Circuit ruled that the UN's express agreement to be liable, made in reports of the Secretary-General that were then legislatively adopted by the UN General Assembly, were limited to internal UN claims processes that are either nonexistent or not binding in any way—despite the fact that the Secretary-General doesn't say this anywhere in the documents in question. In other words, the Second

[1] *See, e.g.*, Black's Law Dictionary (10th ed. 2014), *Liability*. In finance and accounting, of course, a liability can also be a financial or pecuniary obligation, *id.*, but that, too, is binding and legally enforceable.

Circuit ruled that, by implication, the Secretary-General and UN General Assembly were using the word "liability" to refer to unenforceable obligations in nonexistent forums.

The ruling in this case, therefore, directly conflicts with the understanding of liability at common law and under the law of the United States. The ruling is also at odds with this Court's long-standing precedent holding that where words are employed that have a well-known meaning at common law or in the law of this country, "they are presumed to have been used in that sense." *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 576 (1978). And critically, the Second Circuit's ruling conflicts with official documents of the UN itself, which resoundingly affirm the compulsory nature of liability.

At issue in this case is whether the UN, MINUSTAH and the individual Defendants have waived immunity from suit in U.S. courts for the tortious acts of UN peacekeepers in Haiti. In response to the filing of the case, the UN wrote a letter to the U.S. Department of State asserting immunity from suit under Article II, § 2 of the Convention of Privileges and Immunities of the United Nations ("CPIUN"), 21 U.S.T. 1418. Petitioners believe this assertion of immunity has no legal effect, since the UN had previously expressly waived immunity in these types of cases and therefore could not reassert it. *See*, *e.g.*, *Restatement (Third) of the Foreign Relations Law of the United States* § 456(3) (1986) ("Under the law of the United States, a waiver of immunity may not be withdrawn,

except by consent of all parties to whom (or for whose benefit or protection) the waiver was made.").

More specifically, in two reports of the Secretary-General, issued in 1996 and 1997, the UN expressly assumed liability for private law damages caused by UN peacekeeping forces in circumstances such as those present in this case. These reports were then adopted legislatively by the full UN General Assembly and are thus binding on the Organization as law. It is simply not plausible to suggest that this legislative enactment was intended to bind the UN to claims procedures that do not exist or are binding on no one. The only plausible conclusion is that the Secretary-General intended this assumption of liability to be an express waiver of immunity in the limited circumstances laid out in his reports. Any other reading of the Secretary-General's words would create a legal impossibility of the sort that this Court has long refused to countenance.

Moreover, waiver of immunity through an assumption of liability is quite common, including in U.S. state and federal law. When an entity with absolute immunity subsequently reassumes its liability, it is without question an express waiver of its former immunity, subject to limitations contained in the waiver itself, be they temporal, financial or jurisdictional. Long-standing precedent of this Court in other areas of immunity holds that "magic words" are not needed to show an express waiver by a party with absolute immunity, but rather only an "unequivocal expression of . . . intent," *FAA v. Cooper*, 566 U.S. 284, 291 (2012).

Further, this Court has held that such an unequivocal expression of intent exists where "we cannot imagine any other plausible explanation" for terms used. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 10 (1989).[2] Therefore, absent any other plausible explanation for the words used by the Secretary-General—words which were then made binding on the UN through legislative adoption by the General Assembly—the only conclusion that can be drawn is that the Secretary-General intended an express waiver of UN immunity for damages caused by UN peacekeepers in the circumstances outlined in the reports.

In the face of this affirmative, plausible showing of an intent to waive its immunity, Petitioners also ask this Court to consider whether, in upholding the dismissal of Petitioners' claims at the pleading stage—without any plausible explanation as to why the UN would use the term liability to refer to claims processes that do not exist or are nonbinding—the Second Circuit has impermissibly raised the bar for surviving dismissal under Federal Rule of Civil Procedure ("FRCP") 12(b)(1) and 12(h)(3) to something akin to a "beyond all reasonable doubt" standard. In other words, by the reasoning of the Second Circuit, if any scintilla of doubt as to the UN's intent can be found, no matter how implausible, the prior express waiver didn't happen—even if an affirmative and plausible case for advance waiver has been demonstrated by a preponderance of the evidence, and even if no other plausible explanation has

[2] Abrogated on other grounds in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

been offered to rebut this presumption. Such a ruling is in direct conflict with pleading standards for surviving a motion to dismiss, including this Court's plausibility standard, laid out in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In that regard, this Court should consider whether the impact of the Second Circuit's decision is to "bolt the door to equal justice," *Griffin v. Illinois*, 351 U.S. 12, 16 (1956).

This is an important case—not just given the human cost of the UN's tortious actions in Haiti, and not just to resolve conflicts between the Second Circuit and the law of other Circuits and this Court related to the meaning of such basic legal principles as liability, express waiver of absolute immunity, and the burden of proof required to survive dismissal at the pleading stage of civil litigation. Throughout this case, Petitioners believe there has been a reflexive reaction on the part of governments, the courts, and others to *prejudge*—to decide, without proper consideration, that the UN is immune, despite the Organization's own express agreement to be liable and acceptance of responsibility for the damages it has wrought. As a result, there has never been a hearing in open court to consider the issues at the heart of this case, and arguments by Petitioners as to the nonexistence of UN standing claims commissions—or any other binding forum for the adjudication of claims—have been ignored by both the district court and the Second Circuit. Put simply, it has never been explained to the Petitioners

by *any* court how the UN can assume a liability that is enforceable nowhere.

Further, it must be understood that this case is not an attack on general concept of UN immunity. In fact, the express wavier by the UN at issue in this case is quite limited. Rather, Petitioners simply seek clarification from this Court regarding these critical matters, so that lower courts do not reflectively seek to uphold UN immunity above all else, even in the face of incontrovertible evidence of express waiver. Immunity is not an altar upon which all other principles of law should be sacrificed.

This Court should clarify the definition of liability, the scope of the UN's absolute immunity, and what the UN means when, unequivocally and without qualification, it assumes liability for the tortious acts of its peacekeeping forces.

STATEMENT OF THE CASE

There is little dispute over the facts of this case. In 2010, the United Nations spread cholera throughout Haiti by taking 1,075 peacekeepers from Nepal (where cholera was rampant) and deploying them to Haiti, a nation that had not seen a case of cholera in more than 100 years. App. 11. The UN never tested its Nepalese peacekeepers for the presence of the disease and constructed inadequate sewage facilities on a tributary of a major river used for bathing, cooking and drinking water. Cholera spread quickly. It is estimated that

10,000 people died and approximately 1 million were sickened as a result of the UN's actions. *Id*. The UN has admitted responsibility and apologized for its introduction of cholera into Haiti (App. 12), but it turned away, without consideration, approximately 5,000 claims presented to the Organization, and has otherwise refused to accept liability for its actions.[3]

On March 11, 2014, Petitioners sued the UN and the other Defendants for damages resulting from the UN's tortious acts. App. 13. Through a letter to the United States government (App. 7, 14), the Defendants asserted immunity from suit under Article II, § 2 of the Convention of Privileges and Immunities of the United Nations ("CPIUN"), 21 U.S.T. 1418, which specifies that the UN "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." The CPIUN's authority, in turn, flows from the Charter of the United Nations, which provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." U.N. Charter art. 105, § 1.

Petitioners assert that the UN had expressly waived its immunity from suit in U.S. courts and therefore could not reassert it. Specifically, in two reports issued in 1996 and 1997 (hereinafter referred to as reports "A/51/389" and "A/51/903"), the United Nations, through statements of the Secretary-General,

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[3] *See Laventure, et. al. v. United Nations* (2d Cir. C.A. Case No. 17-2908), Dkt. No. 41, pp. 23-24 (December 29, 2017).

expressly assumed liability for private law damages caused by UN forces in circumstances such as those present in this case.[4] These reports were then adopted legislatively by the full UN General Assembly, and therefore became binding on the Organization.[5] Petitioners requested that, if the district court could not find an express waiver of immunity, at the very least it should allow limited jurisdictional discovery to determine whether the UN did, in fact, intend a meaning when using the term liability so contrary to the commonly understood definition of the term. App. 5-6.

The U.S. Government, for its part, filed a Statement of Interest (SOI) in the district court, and an *amicus* brief in the Second Circuit, supporting the contention of the UN that, despite the statements of the Secretary-General in his reports, the UN remained immune. App. 13-14.

The Second Circuit upheld the district court's dismissal under FRCP 12(h)(3) ("if the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). In a summary order dated December 28, 2018, the Second Circuit ruled that "[t]he reports describe procedures for redress for

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[4] The two reports in questions are:

(1) UN Report A/51/389 (September 20, 1996), found at https://undocs.org/A/51/389; and

(2) UN Report A/51/903 (May 21, 1997), found at: https://undocs.org/A/51/903

(both last accessed May 6, 2019).

[5] UN Resolution A/52/247, found at https://undocs.org/A/res/52/247 (last accessed May 6, 2019).

third-party claims through standing claims commissions or internal UN procedures. . . . It is clear that the reports' descriptions of the UN's liability refer only to their responsibility in these non-judicial forms and do not constitute an express waiver of immunity from legal processes in domestic courts." App. 6. While the Second Circuit stated that these reports provide that "such responsibility is discharged 'by means of a standing claims commission' addressing claims 'which for reasons of immunity of the Organization and its members could not have been submitted to local courts'," *id.*, the court did not address the fact that such standing claims commissions do not exist and have never existed in the history of the UN. Nor did the Second Circuit address Petitioners' argument that nowhere do these reports directly state that the UN's acceptance of liability is restricted to these nonexistent forums. Finally, the Second Circuit chose not to address how it could plausibly be argued that the UN's assumption of liability was somehow limited to claims processes that are either nonexistent or not binding on anyone.

REASONS FOR GRANTING THE WRIT

Is liability an agreement that binds a party to an enforceable obligation in law and justice, or does it mean something else, depending upon the context (or, perhaps, depending upon the party)? Can a binding enactment of a legislative body agree to assume liability, but restrict this liability to forums that do not exist, have never existed, or are completely voluntary or

nonbinding? Does any explanation, implausible though it may seem, shield a party with absolute immunity from a determination that it has expressly waived that immunity, even in the face of a clear assumption of liability?

The answers to these questions seem obvious. Liability creates an enforceable obligation, or else it is not liability. Without some mechanism for enforceability (even if limited by time, jurisdiction, or other restriction), the term liability is meaningless. Moreover, if an entity with absolute immunity subsequently agrees to be liable without limiting such acceptance to a binding forum, that entity is liable in any forum which otherwise would have jurisdiction, since this Court has long held that "wherever, by either the common law or the statute law . . . a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters. . . ." *Dennick v. Railroad Co.*, 103 U.S. 11, 18 (1881). Further, the burden of proof to survive dismissal at the pleading stage only requires an affirmative, plausible showing by a preponderance of the evidence of an intent to waive—and where there is no other plausible explanation, this Court has found express waiver is the only conclusion to be drawn.

Given all this, the decision of the Second Circuit in this case conflicts not just with other Circuits and the law of this Court, but with centuries of understanding of some of the most elemental principles in law. Neither the district court nor the Second Circuit

addressed these matters. With the increasing role that international organizations such as the UN play in the world, this Court should use this case to resolve these conflicts.

I. Given the meaning of the term "liability," the UN would never have used the term to refer to claims processes that do not exist or are nonbinding.

On several occasions over the course of the past century, this Court has characterized a central flaw in the Second Circuit's decision:

> . . . to acknowledge the liability but to deny the full extent of its enforceability recalls what was said in *The Western Maid*, 257 U.S. 419, 433 [1922]: "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp."

De La Rama S.S. Co. v. United States, 344 U.S. 386, 390 (1953).

The UN's legal obligations to those damaged through the tortious acts of UN peacekeepers are not mere elusive "ghosts." The UN repeatedly and unambiguously assumed liability for damages caused by its peacekeeping operations. These words accepting liability impose upon the UN an enforceable duty in a binding forum. In other words, liability imposes obligations. This is not merely a matter of acknowledging fault, or even accepting responsibility. It is more. Under U.S.

law and the UN's specific pronouncements, liability imposes upon the responsible party a legal obligation to be bound by an enforceable duty.

Black's Law Dictionary defines Liability in this manner:

> The quality, state or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.[6]

The Second Circuit's misapplication of the term in the case before this Court has placed it in conflict with other Circuits. The Ninth Circuit, for example, has held (*citing* California law), that liability is "the condition of one who is subject to a charge or duty which may be judicially enforced." *Kirsch v. Barnes*, 263 F.2d 692 (9th Cir. 1959). Other U.S. federal and state courts have held repeatedly that liability is "the state of being bound or obliged in law or justice." *Rasmus v. A. O. Smith Corp.*, 158 F. Supp. 70 (N.D. Iowa 1958); *CCF, Inc. v. First Nat'l Bank and Trust Co.*, 69 F.3d 468, 473 (10th Cir. 1995); *Vogel v. Trans World Airlines*, 346 F. Supp. 805 (E.D. Mo. 1970); *Fire Assoc. of Philadelphia v. Allis Chalmers Mfg. Co.*, 129 F. Supp. 335 (N.D. Iowa 1955).

In fact, the compulsory nature of liability is so well established as an underlying principle of the law that, in most cases, no explanation by a court is needed

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[6] Black's Law Dictionary (10th ed. 2014), *Liability*; *see also* 2 *Bouvier L. Dict.* 1950, *Liability*.

when using the term. Consider this Court's recent decision in *Jesner, et.al. v. Arab Bank*, 584 U.S. __, 138 S. Ct. 1386 (2018). In *Jesner* there are five separate opinions, with the words "liable" or "liability" used approximately 200 times. Not once is the word liability used to indicate anything other than a binding, enforceable obligation "imposed" upon a party. Thus, in Justice Kennedy's plurality opinion, " . . . it is proper now to turn first to the question whether there is an international-law norm imposing liability on corporations. . . ." *Id.*, at 1399. In the dissent, Justice Sotomayor wrote, "Although international law determines what substantive conduct violates the law of nations, it leaves the specific rules of how to enforce international-law norms and remedy their violation to states, which may act to impose liability collectively through treaties or independently via their domestic legal systems." *Id.*, at 1420. In most cases—in *Jesner* or any other decision where liability is considered—courts assume that liability is something that can be imposed upon a party in a binding, enforceable forum, since that is the only definition of the term that exists.

Legal scholarship reinforces this concept. Consider the seminal work of John Salmond, *Jurisprudence* (Stevens and Haynes 1907), at § 125:

> "Liability . . . is the bond of necessity that exists between the wrongdoer and the remedy of the wrong. This *vinculum juris* is not one of mere duty or obligation; it pertains not to the sphere of *ought* but to that of *must* . . . [a] man's liability consists in those things which

> he *must* do or suffer, because he has already failed in doing what he *ought*." (emphasis in original).

Or, more recently: "A longstanding maxim of English common law reads *ubi jus ibi remedium*: where there is a right, there shall be a remedy. If the law has proscribed conduct as wrongful toward others—if they have a right not to be so treated—and if another is injured by virtue of such conduct, the law will grant the victim the right to respond to the injurious wrongdoing." John C.P. Goldberg, Benjamin C. Zipursky, *The Oxford Introductions to U.S. Law: Torts* (Oxford University Press, 2010).

Therefore, in order for a party to accept liability, there must be a binding forum to enforce the obligation in law and justice. It can be constrained by time, substance, jurisdiction or remedies, to be sure, but no entity would, in a legal sense, use the term liability to refer to forums that do not exist or are wholly nonbinding. Yet the Second Circuit's ruling would expand the definition of liability to include forums that are nonbinding, non-obligatory or nonexistent. This is error. It has ramifications not just in circumstances where an entity with absolute immunity attempts to restore its immunity, but in any area of the law that relies on the well-established and universally acknowledged definition of liability.

a. The UN itself has agreed that liability entails a binding obligation in law and justice.

An argument cannot be made that the UN has some other definition of the term liability, different from that under the common law and the laws of the United States, and therefore, perhaps, did not intend its assumption of liability to be a binding obligation in an enforceable forum. In fact, in its official reports, the UN has promulgated a definition of liability that is entirely consistent with that under U.S. law. In a 1986 Report addressing "[i]nternational liability for injurious consequences arising out of acts not prohibited by international law," for example, a UN Special Rapporteur set forth a clear definition of liability. This definition specifically differentiated liability from mere "responsibility" and confirmed that specific and enforceable legal obligations attach when the UN assumes liability. According to this UN document, while "responsibility" refers "to the consequences of unlawful acts," liability refers "to the very obligation imposed by the primary norm."[7] The UN report further describes this understanding of the term liability by reference to the work of a "writer versed in common law, L. F. E. Goldie, examining the differences between the English

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[7] A/CN.4/402 and Corr.1, Corr.2 (S only) to 4, *Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur*, Extract from the Yearbook of the International Law Commission: 1986, vol. II(1), at 145. Available at: http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_402.pdf&lang=EFS (last accessed May 5, 2019).

terms 'responsibility' and 'liability'. . . ."[8] The Special Rapporteur noted that while "responsibility is taken to indicate a duty . . . liability connotes exposure to legal redress once responsibility and injury arising from a failure to fulfill that legal responsibility have been established."[9]

The report further stated:

> failure to observe one's responsibilities, or . . . being responsible in a causal sense for harm, carry the legal consequences (i.e. both the sanctioning and compensatory function) of incurring liability.[10]

The UN report underscores that, without enforcement, there can be no liability. Given the universal acceptance of this definition of liability—including by the UN itself—it is simply implausible that the Secretary-General did not understand the submission to binding legal authority inherent in the UN's express assumption of liability. It is equally implausible that the General Assembly did not understand the logical consequence of its adoption of the resolution that bound the UN to the meaning of the Secretary-General's words. In its ruling, the Second Circuit declined to address any of these arguments. This Court should resolve these conflicts, given the important principles at stake.

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[8] *Id.*, at 146.

[9] *Id.*

[10] *Id.*, *citing* "Responsibility and liability in the common law", in *Legal Aspects of Transfrontier Pollution* (Paris, OECD, 1977), p. 344.

II. An assumption of liability is a common manner through which an entity with absolute immunity waives such immunity, subject to the limitations of the waiver itself.

When entities with absolute immunity undertake to expressly waive such immunity, they commonly do so by agreeing to assume liability. Such waivers are not implicit or by implication; they are express. Put another way: if immunity is a blanket that shields a party from legal process, then to subsequently agree to assume liability casts off this jurisdictional immunity, subject to the limitations of the waiver itself.

While this Court has never directly addressed this question, both U.S. federal and state governments have waived their absolute immunity by their assumption of liability in a manner analogous to the UN's assumption of liability in this case.[11] A quote from New York's highest court deftly describes what happens when an immune entity subsequently assumes liability:

> In the assumption of liability and the creation of a remedy to enforce a liability, heretofore absent by reason of the sovereignty of the tort feasor, the sovereign has not generously dispensed charity . . . [i]t declares that no longer will the [entity] use the mantle of sovereignty

[11] Of course, an assumption of liability is not the only way to effectuate an express waiver of immunity. Both the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1330, 1602, *et seq*. and the International Organizations Immunities Act (IOIA), 22 U.S.C. § 6288, *et seq.*, waive immunity by subjecting heretofore immune entities to the jurisdiction of U.S. courts.

> to protect itself from such consequences as follow negligent acts . . . [i]t admits that in such negligence cases the sovereign . . . promises that in future it will voluntarily discharge its moral obligations in the same manner as the citizen is forced to perform a duty which courts and Legislatures have so long held, as to him, to be a legal liability. It transforms an unenforceable moral obligation into an actionable legal right. . . ."

Jackson v. State of New York, 261 N.Y. 134, 138, 184 N.E. 735 (1933).

As to the United States, "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Federal Deposit Insurance Corporation v. Meyer*, 510 U.S. 471, 475 (1994) (citation omitted). The sovereign's consent is central to waiver, as "[i]t is axiomatic that the United States may not be sued without its consent," the existence of which "is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). To be sure, just like the UN's waiver of immunity under CPIUN § 2, "[w]aivers of the Government's sovereign immunity, to be effective, must be "'unequivocally expressed.'" *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990), *quoting United States v. Mitchell*, 445 U.S. 535, 538 (1980), and *United States v. King*, 395 U.S. 1, 4 (1969). But this Court has also held that although there must be "an unmistakable statutory expression of congressional intent to waive the Government's immunity, Congress need not state its intent in any particular way. We have never required that Congress use magic words." *FAA v.*

Cooper, 566 U.S. 284, 291 (2012), *citing Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 589 (2008). To the contrary, this Court has held that "the sovereign immunity canon 'is a tool for interpreting the law' but that it does not 'displac[e] the other traditional tools of statutory construction.'" *Id*.

The example of the Federal Tort Claims Act ("FTCA") illustrates this point and is analogous to the waiver of immunity by the UN in this case. In the FTCA, the federal government expressly waived its immunity for certain tort claims of a private law nature through 28 U.S.C. § 2674. This statute provides: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." *Id.* In other words, as in the UN reports and resolutions at issue here, the U.S. government's acceptance of liability in the FTCA is an express waiver of immunity, subject to the exceptions and limitations contained elsewhere in the act. Other sections of the FTCA, most notably § 2680, provide exceptions to this waiver, and jurisdictional provisions are set forth in § 1346(b). Section 1346(b) also provides additional descriptions of possible claims and limitations on these claims. To be clear, however, these jurisdictional provisions are not where the waiver of immunity happens. As one scholar has noted: "Section 2674 states the substance of the waiver of sovereign immunity in the FTCA. Although Subsection 1346(b) is primarily a jurisdictional provision, conferring jurisdiction over FTCA actions in the United States District

Courts, it also includes language describing permissible claims."[12] In the absence of any jurisdictional provisions such as those contained in § 1346(b), the express waiver in § 2674 would still be express and still be valid—and, as discussed, *supra*, would be applicable in any court of competent jurisdiction.

Other federal statutes convincingly reinforce the fact that express waiver of immunity can be made through the assumption of liability. Indeed, it is quite common. The U.S. government, for example, has waived its sovereign immunity under both the Employment Opportunity (EEO) Act, 42 U.S.C.S. § 2000e-16, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C.S. § 633a, by accepting liability if government workplaces are not free of employment and age discrimination. Federal environmental statutes waive immunity in this manner as well. In the Clear Water Act, 33 U.S.C.S. § 1323, as well as the Clean Air Act, 42 U.S.C.S. § 7418, there are express waivers of immunity in an agreement to be subject to liability under various state and federal laws. So too, with federal CERCLA statute, as set forth in 42 U.S.C. § 9620(a)(1), otherwise known as the Superfund law. CERCLA provides: "Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity,

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[12] Gregory Sisk, *Litigating With The Federal Government* (West Academic Publishing, 2016), p. 134.

including liability under section 9607 of this title." In relation to the enactment, this Court held,

> This is doubtless an "unequivoca[l] express[ion]" of the Federal Government's waiver of its own sovereign immunity, *United States v. Testan*, 424 U.S. 392, 399 (1976), *quoting United States v. King*, 395 U.S. 1, 4 (1969), since we cannot imagine any other plausible explanation for this unqualified language.

Pennsylvania v. Union Gas Co., 491 U.S. 1, 10 (1989), abrogated on other grounds in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Finally, consider the Fair Credit Reporting Act (FCRA), which the Seventh Circuit in *Bormes v. United States*, 759 F.3d 793, 795 (7th Cir. 2014), ruled was an express waiver of the U.S. Government's sovereign immunity from the jurisdiction of the courts:

> Any "person" who willfully or negligently fails to comply with the Fair Credit Reporting Act is liable for damages. 15 U.S.C. §§ 1681n(a), 1681o(a). "Person" is a defined term: "any individual, partnership, corporation, trust, estate, cooperative, association, *government or governmental subdivision or agency*, or other entity." 15 U.S.C. § 1681a(b)

759 F.3d, at 795 (emphasis in original).

Bormes continues,

> The United States is a government. One would suppose that the end of the inquiry. By authorizing monetary relief against *every*

> kind of government, the United States has waived its sovereign immunity. And so we conclude.

Id. (emphasis in original).

Under the laws of various sovereign U.S. states as well, a waiver of absolute immunity from legal process is also found in the express assumption of liability. In California, for example, under Cal. Gov't Code, § 815, a public entity is "not liable for injury" except as provided for elsewhere in the statute. Thus, in Section 815.2, "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment. . . ." As with federal examples, it is the acceptance or acknowledgement of the liability in California law that is the waiver of immunity, not any jurisdictional provision.

In New York, " . . . [w]hile pertinent decisions of many appellate courts (including the Court of Appeals) . . . have on occasion conflated references to the scope of the State's waiver of sovereign immunity with undefined usage of the term 'jurisdiction,'" *Brown v. State of New York*, 89 N.Y.2d 172, 180 (1996), "the State can be made liable for injuries arising from the negligence of its agents or servants, only by force of some positive statute assuming such liability." *Sipple v. State*, 96 N.Y. 284, 287 (1885). And in West Virginia, while the immunity of the sovereign described in the Constitution is from legal process (W. Va. Const. Art. VI, § 35: "The State of West Virginia shall never be made defendant in any court of law or equity. . . ."), express waivers of

this immunity are often in the form of assumption of liability. *See, e.g.*, W. Va. Code § 29-12A-4; *Univ. of W. Va. Bd. of Trs. ex rel. W. Va. Univ. v. Graf*, 205 W. Va. 118 (1998).[13]

The point, again, is not that sovereigns cannot, or do not, also waive immunity from legal process by stating an immune entity is now subject to the jurisdiction of the courts. Some do.[14] But specific language related to legal process or jurisdictional immunity is not needed: in each of the examples cited, one with immunity from legal process who, subsequently, expressly assumes liability, thrusts off that blanket of immunity, subject to any terms of the waiver itself as to jurisdictional, financial, temporal or procedural limitation. This Court should affirm that such assumption of liability is indeed a common manner in which an entity with absolute immunity waives its immunity and agrees to "voluntarily discharge its moral obligations in the same manner as the citizen is forced to perform

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[13] For additional examples of waiver of absolute immunity by U.S. states via assumption of liability, *see* Vermont, 12 V.S.A. § 5601; New Jersey, N.J. Stat. § 59:2-2(a); Idaho Code § 6-903(1); Kansas, K.S.A. § 75-6103; Florida, Fla. Stat. § 768.28; Maine, 14 M.R.S. § 8104-A(1); Massachusetts, ALM GL ch. 258, § 2; Minnesota, Minn. Stat. § 3.736; Montana, 2-9-102, MCA; Nebraska, R.R.S. Neb. § 81-8,215; North Dakota, N.D. Cent. Code, § 32-12.2-02; Oklahoma, 51 Okl. St. § 153; Pennsylvania, 42 Pa.C.S. § 8522(b); Rhode Island, R.I. Gen. Laws § 9-31-1; South Carolina, S.C. Code Ann. § 15-78-40; Virginia, Va. Code Ann. § 8.01-195.3; Washington, Rev. Code Wash. (ARCW) § 4.92.090.

[14] *See, e.g.*, Alaska: Alaska Stat. § 09.50.250; Colorado: C.R.S. § 24-10-108, *et seq*.; or Maryland: Md. Code. Ann., State Gov't § 12-101, *et seq*.

a duty which courts and Legislatures have so long held, as to him, to be a legal liability." *Jackson v. State of New York, supra.*

a. The Second Circuit previously held that liability and immunity are mutually exclusive jural opposites.

The conflicting nature of the Second Circuit's ruling in this case is underscored by its long-held precedent that assumption of liability and jurisdictional immunity are mutually exclusive jural opposites. In *Krenger v. Pennsylvania R. Co.*, the Second Circuit wrote that "*liability* is quite differentiated from a mere duty to pay damages and serves as . . . the opposite of *immunity* or exemption. 174 F.2d 556, 559 (2d Cir. 1949) (emphasis in original)."

This analysis, too, has been adopted by the UN. A report entitled "Jurisdictional Immunities Of States And Their Property," by the UN's Special Rapporteur, directly addressed this theory of liability and the "jural relationship":

> "[P]ower" has been correlated to "liability"; and the opposite of "liability", which is "immunity", is correlative to "no-power" or "disability". Thus, in a theory of jural relationship, if "a State has immunity from the jurisdiction from another State", the same expression could be stated correlatively from the standpoint of the other State as: "Another State has

> 'no-power' to exercise its jurisdiction over a State".[15]

Thus, the UN understands quite well the jural relationship analysis: that an express assumption or acceptance of liability negates its opposite, immunity, and removes the "disability" or "no-power" to exercise jurisdiction in actions where such liability has been assumed.

III. A binding forum for the adjudication of tort claims against the UN does not exist and has never existed.

A common misconception is that the UN has binding claims processes in place for the adjudication of claims for damages inflicted by the tortious acts of UN peacekeeping forces. This is not true.[16] Thus, while

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[15] A/CN.4/340 & Corr.1 and Add.1 & Corr.1, *Third report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur*, Extract from the Yearbook of the International Law Commission: 1981, vol. II(1), at 132-133. Available at: http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_340.pdf&lang=EFS (last accessed May 5, 2019).

[16] Consider Justice Breyer's dissent to this Court's decision in *Jam v. Int'l Fin. Corp.*, ___ U.S. ___, 139 S. Ct. 759 (2019), which, while perhaps accurate as to contract and other commercial claims, clearly is not as to tort claims (as this case has shown):

> Other organizations have attempted to solve the liability/immunity problem by turning to multilateral, not single-nation, solutions. The UN, for instance, has agreed to "make provisions for appropriate modes of settlement of . . . [d]isputes arising out of contracts or other disputes of a private law character." Convention

both the district court and the Second Circuit ruled that the assumption of liability by the UN in Reports A/51/389 and A/51/903 were limited to internal processes, the "standing claims commissions" referenced in these reports do not exist, and have never existed in the history of the UN. The Secretary-General acknowledges this in the reports, and the General Assembly knew this when enacting UN Resolution A/52/247. The Secretary-General also points out in A/51/389 that other internal UN claims processes are voluntary and nonbinding on the Organization, and indeed many claims are often left unresolved, particularly as a UN mission winds down.[17] A final point of evidence can be found in the fact that the claims of 5,000 victims of the Haitian cholera plague that were presented to the UN were dismissed without consideration as "not receivable."[18]

So, despite the clear acknowledgement of liability by the UN, it is quite impossible for a claimant to submit a claim to any binding UN forum for adjudication of tort claims such as this. And this Court has long held that the law will not read statutory enactments to yield such impossible results: "*Lex non intendit aliquid impossible* is a familiar maxim of the law. The supposition should not be indulged that [a legislative body] . . .

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on Privileges and Immunities of the United Nations, Art. VIII, § 29, 21 U.S.T. 1438, T.I.A.S. No. 6900, 139 S. Ct. 780.

[17] UN Report A/51/389, ¶ 28.

[18] *See Laventure, et. al. v. United Nations* (2d Cir. C.A., Case No. 17-2908), Dkt. No. 41, p. 23 (December 29, 2017).

intended to make its protection depend upon the performance of conditions which it was physically impossible to perform." *Chew Heong v. United States*, 112 U.S. 536, 554-555 (1884). *Chew Heong* is an immigration case involving an amendment to the Chinese Exclusion Act of 1882, wherein Congress required Chinese laborers residing in the United States to obtain reentry certificates before they left the country if they intended to return. Chew Heong, who left before the amendment was enacted, attempted to return not long after it went into effect. Lacking the certificate—which could only be obtained in the United States—he was denied permission to return. This Court ruled that the enactment would not be read "to lead to injustice, oppression, or an absurd consequence." 112 U.S. at 555.

Petitioners submit to this Court that it is no more possible for a victim of a tortious act by a UN peacekeeper to bring a claim before a binding UN claims process than it was for Chew Heong to travel freely, yet be in the U.S. to obtain his reentry certificate at the same time. Thus, in this case, the use of the term liability by the Secretary-General could not have been referring to these mythical or nonbinding processes, since this would create an impossibility in the enactment that this Court has long held it will not allow.

IV. The Secretary-General's reports do not state that the UN's assumption of liability was restricted to its internal claims processes, nor that the UN has retained immunity where liability is assumed.

While the Second Circuit held that any waiver of immunity by the UN related solely to claims brought before internal UN processes, nowhere in any of the statements of the Secretary General, nor in the binding resolution of the General Assembly adopting these reports, does it say this. Rather, the Second Circuit (and the district court before it) suggests these reports *imply* such limitation. The Second Circuit then combines parts of sentences from various sections of the Secretary-General's reports to justify its conclusion.

But in contrast to the out-of-context quotes in the decisions of the Second Circuit and the district court, a reading of the full reports reinforces that no direct limitation of the agreement to be liable to UN internal processes were either stated or implied. Report A/51/389, for example, stated that it will detail three different things: (1) the scope of UN liability for activities of UN forces; (2) procedures for the handling of third-party claims presented internally; and, (3) limitations of liability.[19] Nowhere does it suggest that the scope of UN liability as described in (1) is only in the context of, or otherwise constrained by, the internal procedure for handling third party claims review in (2), or that this scope of liability is only within the context

[19] UN Report A/51/389, ¶ 5.

of retained privileges and immunities. In fact, the report states the *opposite*:

> The undertaking to settle disputes of a private law nature submitted against it and the practice of actual settlement of such third-party claims—*although not necessarily according to the procedure provided for under the status-of-forces agreement*—evidence the recognition on the part of the United Nations that liability for damage caused by members of United Nations forces is attributable to the Organization (emphasis added).[20]

What the district court and the Second Circuit seem to be suggesting is that, simply by including this agreement to be liable in the same reports that discuss internal claims processes, the Secretary-General of the UN, despite never saying so, must have intended this assumption of liability to be restricted to these processes. But is such an interpretation enough to "bolt the courtroom doors," absent any other evidence to support such a reading—and where such a reading creates a condition that is impossible to perform given the undisputed definition of the term liability?

Notably, it is only in paragraph 7 of that 14-page document that there is single mention of immunity—the *only* mention in the entire 7,200-word document. There, the Secretary-General states that the UN "has undertaken in paragraph 51 of the model status-of-forces agreement [SOFA] . . . to settle by means of a

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[20] *Id.*, ¶ 8.

standing claims commission claims resulting from damage caused by members of the force in the performance of their official duties and which for reasons of immunity of the Organization and its Members could not have been submitted to local courts."[21] The model status-of-forces agreement referenced in this paragraph was written and published in 1990, five years before the unambiguous assumption of liability in this document.

Thus, the only mention of immunity in the Secretary-General's report is in the past tense and references a model status-of-forces agreement prepared long before the express acceptance of liability (and consequent waiver of immunity) in A/51/389. Contrary to the Second Circuit's ruling, it is highly implausible that this single mention of immunity was intended to cover the entire document, constraining the scope of UN liability to a nonbinding claims process.

In addition to laying out financial and temporal limits to the liability assumed in the UN's express waiver, the final section of A/51/389 also explains that while the UN *must* deal with claims by third parties where liability has been assumed, contributing Governments will be legally responsible for indemnifying the UN in cases where damages are caused by the "gross negligence or willful misconduct" of their own peacekeeping forces.[22] This provision, too, makes *no* reference to either an internal claims settlement

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[21] *Id.*, at ¶ 7.

[22] *Id.*, at ¶ 42.

process or a retention of immunity in circumstances where liability is assumed.

In sum, it is highly implausible to suggest that the statements in that report relating to the UN's acceptance of liability were, in any way, confined to its voluntary internal claims process. Nor does the Report anywhere suggest an intent on the part of the UN to maintain its privileges and immunities in those areas where the UN has agreed to be liable. There is simply no language to that effect. In fact, the UN's clear, unambiguous intent is that immunity is waived in these circumstances. To find otherwise would be to hold that a single, isolated reference to immunity contained in a paragraph relating to a status-of-forces agreement enacted years earlier somehow flows to every corner of this document—a provision that applies as readily to areas where liability is not assumed (such as for damages in the course of combat activities or operational necessity). The laws of contractual or statutory interpretation do not permit parties to conjure language missing from the clear text of a document. The document must be read as a whole.

In follow-up to A/51/389, on May 21, 1997, the UN Secretary-General issued Report A/51/903 as a "supplemental" report.[23] This report laid out further temporal and financial limitations to the liability of the Organization, described the nonbinding internal claims process, and recommended changes to the liability clause of the model status-of-forces agreement

[23] UN Report A/51/903, ¶ 1.

(SOFA) that would recognize this new, clearly and unambiguously stated acceptance of liability.[24] As in Report A/51/389, there is but a single mention of UN immunity, in a paragraph discussing the prior version of the model SOFA, one that existed *before* the express assumption of liability was made in A/51/389.

Both A/51/389 and A/51/903 were expressly incorporated, agreed to and adopted by the UN General Assembly through UN Resolution 52/247, dated June 26, 1998. In A/52/247, the UN again expressly agreed to assume liability for "third-party claims against the Organization for personal injury, illness or death . . . resulting from or attributable to the activities of members of peacekeeping operations in the performance of their official duties."[25] There is no mention of the UN's immunity at all, and—as in each of the other documents that form the basis of this legislative enactment—no mention that such waiver of immunity is restricted to an internal claims process.

Finally, it should be noted that the express assumption of liability contained in these reports is quite limited. Report A/51/389 distinguishes between "tortious liability of the Organization for damage caused in the ordinary operation of the force . . . and its liability for combat-related damage whether in the course of a Chapter VII operation, or in a peacekeeping operation where force has been used in self-defence."[26] That is, the Secretary-General clearly states that the waiver

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[24] *Id*., at ¶ 10.

[25] UN General Assembly Resolution A/52/247, ¶ 5.

[26] UN Report A/51/389, ¶ 3.

does not apply to the UN's combat-related actions, nor to actions grounded in operational necessity, but rather only to those damages resulting from the "ordinary operation of the force"—thus vastly limiting the parameters of the waiver.[27] A subsequent report of the United Nations reinforces the limited nature of this acceptance of liability, noting that A/51/903 " . . . deals with third-party claims for personal injury, illness or death and property loss or damage attributable to the activities of members of peacekeeping operations in the performance of their official duties. It does not cover claims relating to troops nor does it apply in cases of injury to civilian staff . . . in cases of gross fault or wilful or criminal intent, the Organization would seek recovery from the individual or the troop-contributing State concerned."[28] Notably, there is no mention of immunity in this entire report.

V. A plaintiff has met its burden to survive dismissal under FRCP 12(h)(3) where an affirmative, plausible case has been made for jurisdiction and there is no other plausible explanation for the use of a term in a legislative enactment that has a well-known meaning at common law and the law of the United States.

The above review of the Secretary-General's reports is intended to show that, at the pleading stage of

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[27] *Id.*

[28] UN Report A/52/410, ¶ 4 (October 1, 1997), available at: https://undocs.org/A/52/410 (last accessed May 9, 2019).

this litigation, Petitioners more than met their burden to survive dismissal for lack of jurisdiction under FRCP 12(b)(1) and 12(h)(3). Yet, in upholding the dismissal of Petitioners' claims at the pleading stage, without any plausible explanation as to why the UN would use the term liability to refer to claims processes that do not exist or are nonbinding, the Second Circuit has impermissibly raised the bar for surviving dismissal under 12(b)(1) and 12(h)(3) to something akin to a "beyond all reasonable doubt" standard. In other words, the Second Circuit effective held that *any* alternate explanation for the UN's acceptance of liability, regardless of its impossibility or implausibility, is enough to establish doubt as to the Organization's actual intent. In holding plaintiffs at the pleading stage under Rule 12(h)(3) to a standard that is clearly beyond any other this Court has enumerated for express waiver of immunity in other contexts, the Second Circuit is in conflict with pleading standards set forth by this Court—most notably the plausibility standards of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

U.S. courts have held that the standard governing Rule 12(h)(3) is the same as that governing a motion under Rule 12(b)(1), *See, e.g.*, *Jo v. JPMC Specialty Mortg., LLC*, 248 F. Supp. 3d 417, 422 (W.D.N.Y. 2017), and a Rule 12(b)(1) motion is subject to the same standards as a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Tarros S.p.A. v. United States*, No. 13 CIV. 1932 (JPO), 2013 WL 6084243, at *4 (S.D.N.Y. Nov. 19, 2013), *citing Lerner v. Fleet Bank,*

N.A., 318 F.3d 113, 128 (2d Cir. 2003). If a plaintiff can prove subject-matter jurisdiction by a preponderance of the evidence, the case should not be dismissed. *Wells Fargo Bank, N.A. v. Ullah*, No. 13 CIV. 0485 (JPO), 2014 WL 470883, at *2 (S.D.N.Y. Feb. 6, 2014).

Under *Twombly* and *Iqbal*, to survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim will have facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 678, *citing Twombly*, at 556. Moreover, while "'[j]urisdiction must be shown affirmatively . . .'" *APWU v. Potter*, 343 F.3d 619 (2d Cir. 2003) (*quoting Shipping Fin. Servs. Corp v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998)), a "plausible" claim is . . . less than a "probability requirement." *Twombly*, at 556. As this Court has explained, "'[j]urisdiction . . . is not defeated . . . by the possibility that the averments [in a complaint] might fail to state a cause of action on which petitioners could actually recover.' What plaintiffs must allege to survive a jurisdictional challenge, then, 'is obviously far less demanding than what would be required for the plaintiff's case to survive a summary judgment motion' or a trial on the merits." *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venez.*, 415 U.S. App. D.C. 21, 28-29, 784 F.3d 804, 811-12 (D.C. Cir. 2015), *quoting Bell v. Hood*, 327 U.S. 678, 682 (1946).

A plausible, affirmative showing of subject matter jurisdiction is the hurdle that Petitioners in this case had to clear for this action to move forward. Plaintiffs have far exceeded this standard, and the Second Circuit erred in finding to the contrary. Plaintiff's thus petition this Court to consider whether the Second Circuit has impermissibly raised the pleading standard to survive dismissal under FRCP 12(h)(3).

CONCLUSION

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

Respectfully submitted,

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