05-5385-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

AQUA STOLI SHIPPING LTD.,

Plaintiff-Appellant,

—against—

GARDNER SMITH PTY LTD.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* THE CLEARING HOUSE ASSOCIATION L.L.C. IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF INTEREST OF *AMICUS CURIAE* 3

FACTUAL BACKGROUND 4

1. Background Regarding Funds Transfers 6

2. *Winter Storm* 10

3. The Burden of the Current Maritime Attachment Process in this Circuit. 12

4. *Aqua Stoli* 17

ARGUMENT 19

A. RECOGNIZING THE DISRUPTION TO FINANCIAL INSTITUTIONS CAUSED BY *WINTER STORM,* THE RULING BELOW MAY SLOW THE FLOOD OF ATTACHMENT ORDERS 19

1. *Winter Storm* and Subsequent District Court Opinions Have Expanded Creditors' Maritime Attachment Rights 20

2. *Aqua Stoli* Demonstrates District Courts' Attempts to Recognize the Statutory Limits on Maritime Attachment Plaintiffs. 22

B. THE CLEARING HOUSE RESPECTFULLY CONTENDS THAT THIS COURT SHOULD REVISIT ITS DECISION IN *WINTER STORM*. 24

1. The Winter Storm Court's Reliance on *Daccarett* Was in Error. 25

2. Property Interests are Derived from State Law. 28

3. *Winter Storm* Created the Legal Fiction that Funds Are the Property of Two Entities at the Same Time. 30

4. In Bypassing the Property Analysis, Winter Storm Does Not Adequately Address the Due Process Concerns Inherent in Maritime Attachment of Funds Transfers. 31

CONCLUSION 34

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(B) 35

TABLE OF AUTHORITIES

CASES

Page(s)

Adeleke v. *United States*,
355 F.3d 144 (2d Cir. 2004) 3

Allied Maritime, Inc. v. *Rice Corp.*,
04 Civ. 7029 2004 U.S. Dist. LEXIS 20353 (S.D.N.Y.
Oct. 12, 2004), motion for reconsideration denied,
361 F. Supp. 2d 148 (S.D.N.Y. 2004) 22, 23

Amoco Overseas Oil Co. v. *Compagnie Nationale Algerienne*
de Navigation (CNAN), 605 F.2d 648 (2d Cir. 1979)....................................32

Aqua Stoli Shipping Ltd. v. *Gardner Smith Pty Ltd*,
384 F. Supp. 2d 726 (S.D.N.Y. 2005) .... *passim*

Board of Regents of State Colleges v. *Roth*,
408 U.S. 564 (1972)...28

Burda Media, Inc. v. *Viertel*,
417 F.3d 292 (2d Cir. 2005) 3

Butner v. *United States*,
440 U.S. 48 (1979)..13, 25, 28

Blake Maritime, Inc. v. *Petrom S.A.*, 05 ,
Civ. 8033 (PAC), 2005 U.S. Dist. LEXIS 26310
(S.D.N.Y. Oct. 31, 2005) 23

Coca-Cola Bottling Co. of N.Y., Inc. v. *Soft Drink & Brewery*
Wkrs. Union Local 812, 242 F.3d 52 (2d Cir. 2001) 3

Delaware v. *New York*,
507 U.S. 490 (1993)...28

Det Bergenske Dampskibsselskab v. *Sabre Shipping Co.*, 341 F.2d 50 (2nd Cir. 1965) 28

Erne Shipping Inc. v. *HBC Hamburg Bulk Carriers GMBH & Co. KG*, No. 05 CIV. 8915 (GWG), 2006 U.S. Dist. LEXIS 583 (Jan. 11, 2006) 24

Grain Traders, Inc. v. *Citibank, N.A.*, 160 F.3d 97 (2d Cir. 1998) .... *passim*

Greenwich Marine, Inc. v. *S.S. Alexandra*, 339 F.2d 901 (2d Cir. 1965) 5

HBC Hamburg Bulk Carriers GMBH & Co. KG v. *Proteinas y Oleicos S.A. de C.V.*, No. 04 Civ. 6884 (NRB), 2005 U.S. Dist. LEXIS 8009 (S.D.N.Y. May 3, 2005) 24, 27, 30

Integrated Container Serv. Inc. v. *Starlines Container Shipping, Ltd.*, 476 F. Supp. 119 (S.D.N.Y. 1979)....................17, 23

Manufacturas Int'l, LTDA v. *Mfrs. Hanover Trust Co.*, 792 F. Supp. 180 (E.D.N.Y. 1992) 26

Marshall v. *People of New York*, 254 U.S. 380 (1920)....................29

Noble Shipping, Inc. v. *Euro-Mar. Chartering Ltd.*, No. 03 Civ. 6039 (DLC), 2003 U.S. Dist. LEXIS 23008 (S.D.N.Y. Dec. 24, 2003) 15, 30

Reibor Int'l Ltd. v. *Cargo Carriers (KACZ-CO.), Ltd.*, 759 F.2d 262 (2d Cir. 1985) .... *passim*

In re Rodgers, 333 F.3d 64 (2d Cir. 2003) 28

SEC v. *Credit Bancorp, Ltd.*, 279 F. Supp. 2d 247 (S.D.N.Y. 2003) 28

Seaplus Line Co. Ltd. v. *Bulkhandling Handymax AS*,
No. 05 Civ. 4813 (JGK), 2005 U.S. Dist. LEXIS 33346
(S.D.N.Y. Dec. 13, 2005) 4, 23

T&O Shipping Ltd. v. *Lydia Mar Shipping Co. S.A.*,
No. 05 Civ. 7106 (SAS), 2006 U.S. Dist. LEXIS 2278
(S.D.N.Y. Jan. 20, 2006)..24

Ullises Shipping Corp. v. *FAL Shipping Co. Ltd.*,
05 Civ. 9424 (SAS), 2006 U.S. Dist. LEXIS 2283
(S.D.N.Y. Jan. 20, 2006).. *passim*

United States v. *Daccarett*,
6 F.3d 37 (2d Cir. 1993) .... *passim*

United States v. *Piervinanzi*,
23 F.3d 670 (2d Cir. 1994) 30

W. Pac. R.R. Corp. v. *W. Pac. R.R. Co.*,
345 U.S. 247 (1953)...3

Washington v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) 3

Wilder v. *Bernstein*,
No. 78 Civ. 957 (RJW), 1998 U.S. Dist. LEXIS 8891
(S.D.N.Y. Jun. 17, 1998) 3

Winter Storm Shipping, Ltd. v. *TPI*,
198 F. Supp. 2d 385 (S.D.N.Y. 2002) 10

Winter Storm Shipping, Ltd. v. *TPI*,
310 F.3d 263 (2d Cir. 2002), *cert. denied*, 539 U.S. 927
(2003)... *passim*

Ythan Ltd. v. *Ams. Bulk Transp. Ltd.*,
336 F. Supp. 2d 305 (S.D.N.Y. 2004) 19, 21, 22

STATUTES

18 U.S.C. § 981 26

21 U.S.C. § 881(2005) 11, 26

N.Y. U.C.C. § 4A-104 and comment 7

N.Y. U.C.C. § 4A-402 7

N.Y. U.C.C. §§ 4A-502 and comment.. *passim*

N.Y. U.C.C. § 4A-503 and comment .... *passim*

OTHER AUTHORITIES

Fed. R. App. P. 35(a) 3

Admiralty Rule E(4)(f)...22

Federal Reserve System Regulation J, 12 C.F.R. Pt. 210 (2002).......................9, 29

55 Fed. Reg. 40792 (Oct. 5, 1990)..29

Committee on Banking and Financial Services, U.S. House of Representatives, Nov. 4, 1997, 84 *Federal Reserve Bulletin* 25 (1997)...8

Webster's Third New Int'l Dictionary 1818 (1986) 30

www.federalreserve.gov/PaymentSystems/FedWire/annual.pdf. 8

www.chips.org/docs/000652.xls 8

INTRODUCTION

With the Court's leave, The Clearing House Association L.L.C. (the "Clearing House") submits this brief as *amicus curiae* in support of Defendant-Appellee Gardner Smith Pty Ltd.'s ("Gardner Smith") opposition to Plaintiff Aqua Stoli Shipping Ltd.'s ("Aqua Stoli") appeal from a judgment entered by the United States District Court for the Southern District of New York (Rakoff, J.) on September 8, 2005, vacating Plaintiff's maritime attachment and dismissing the Verified Complaint pursuant to an Opinion and Order dated September 6, 2005. *Aqua Stoli Shipping Ltd.* v. *Gardner Smith Pty Ltd,* 384 F. Supp. 2d 726 (S.D.N.Y. 2005).

The Clearing House submits that the *Aqua Stoli* Opinion was correct in holding that, at an attachment hearing, the plaintiff must show by a preponderance of the evidence that the attachment order not only meets all technical requirements but also (i) is reasonably calculated to serve at least one of the two historical purposes of maritime attachment, *i.e.*, obtaining jurisdiction or securing a judgment, and (ii) is not simply a tactical device designed to harass the adversary in an ongoing litigation. Even if plaintiff meets that standard, the defendant nonetheless may justify vacating the attachment by showing that the

hardship the attachment order imposes substantially outweighs any benefit to the plaintiff. Accordingly, we urge this Court to uphold the decision below.

In addition, the Clearing House respectfully submits that this Court should take the opportunity to address the serious issue that has arisen since the Court's decision in *Winter Storm Shipping, Ltd.* v. *TPI*, 310 F.3d 263 (2d Cir. 2002), *cert. denied*, 539 U.S. 927 (2003). We respectfully submit that *Winter Storm* was in error because it failed properly to analyze judicial precedent and is inconsistent with established law regarding funds transfers and the sound policies on which that law is based. The impact of this error -- a significant impediment to an efficient payment system for U.S. dollar-based transactions -- has now become manifest. One Clearing House member, Citibank, in early February had pending 70 active writs of maritime attachment, seeking to attach over $195 million. Another, JPMorgan Chase Bank, received 70 writs on February 1, 2006 alone. Yet another, HSBC Bank USA, received 797 writs in December 2005. According to Southern District docket sheets, 28 new writs were obtained in January 2006, authorizing service on as many as 16 banks and seeking to attach over $43 million, undoubtedly to be added to the daily procession of service. With the benefit of this experience, it is clear that this burden placed on the funds-transfer system and

leading banking institutions should be corrected. We urge this panel to overrule, or take steps to overrule, *Winter Storm*.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Clearing House is an association of leading commercial banks that provides payment, clearing and settlement services to its member banks and other financial institutions.[2] The Clearing House regularly appears as *amicus curiae* before appellate courts in cases that raise significant legal issues relating to banking, and in particular in cases like this one that raise important questions concerning rules governing national and international payment systems.

The Clearing House banks have a substantial interest in the questions presented in this case. The dollar is the world's leading currency for international trade, and a large portion of international funds transfers involving U.S. dollars is

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[1] Panels of this Court have overruled prior opinions after providing notice to all active members of the Court. *See, e.g.*, *Burda Media, Inc*. v. *Viertel*, 417 F.3d 292, 298 (2d Cir. 2005) (overruling recent opinion as "ill-advised" and "reconfirm[ing]" two prior opinions after circulating opinion to judges from the three panels); *Adeleke* v. *United States*, 355 F.3d 144, 155 n.9 (2d Cir. 2004) ("To the extent this decision departs from our earlier decisions . . ., we note that this opinion was circulated before filing to all active members of the court."), *citing Coca-Cola Bottling Co. of N.Y., Inc*. v. *Soft Drink & Brewery Wkrs. Union Local 812*, 242 F.3d 52, 55 (2d Cir. 2001).

In the alternative, the Court could recommend the issue for *en banc* review. *See* Fed. R. App. P. 35(a); *Wilder* v. *Bernstein*, No. 78 Civ. 957 (RJW), 1998 U.S. Dist. LEXIS 8891, *4 (S.D.N.Y. Jun. 17, 1998) ("The Court of Appeals, *sua sponte*, ordered a rehearing *en banc*."); *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 468 (1979) (noting that Court of Appeals *sua sponte* sent issue for *en banc* review); *W. Pac. R.R. Corp.* v. *W. Pac. R.R. Co.*, 345 U.S. 247, 262 (1953) (recognizing Court of Appeals panel's right to initiate *en banc* hearing *sua sponte*).

[2] The members of the Clearing House are: Bank of America, National Association; The Bank of New York; Citibank, National Association; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; LaSalle Bank, National Association; UBS AG; U.S. Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association.

routed through Clearing House banks because of their role as leading U.S. financial institutions. Many foreign banks hold accounts with the Clearing House banks, which often act as intermediary banks in funds transfers.

In addition, the Clearing House operates the Clearing House Interbank Payments System ("CHIPS"), a funds-transfer system that serves 47 U.S. and foreign banks and that each day processes over 285,000 payment orders with an aggregate average value of $1.4 trillion. CHIPS and Fedwire, which is operated by the Federal Reserve Banks, are the principal payment systems for international funds transfers in the United States.

FACTUAL BACKGROUND

In ruling that "EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a)," *Winter Storm* redesigned the landscape of maritime attachment in New York and inspired a cottage industry of swamping banks with multiple daily attachment orders. *See Aqua Stoli*, 384 F. Supp. 2d at 728 ("[T]he Second Circuit has recently upheld the practice of attaching funds routed through New York, the financial capital of the world, no matter how ephemeral and serendipitous their brief 'presence' in the district may be."); *Seaplus Line Co. Ltd.* v. *Bulkhandling Handymax AS*, No. 05 Civ. 4813 (JGK), 2005 U.S. Dist. LEXIS 33346, *9 (S.D.N.Y. Dec. 13, 2005) (Notice of

Appeal filed) ("It is clear that the ease with which a maritime attachment may be obtained makes that remedy particularly susceptible to abuse.") (citation omitted). The opinion below is one of several post-*Winter Storm* opinions attempting to enforce statutory limits, minimize unfairness to the targets of maritime attachments, and ease the resulting burden on intermediary banks, which are now flooded with attachment orders that are designed to interrupt the international funds-transfer system in order to gain a litigation advantage.

The current burden on major New York banks and the interference with the funds-transfer system cry out not only for affirmance on the instant appeal, but for a re-examination of *Winter Storm* itself. In addition to the 70 active maritime writs of attachment referred to above, Citibank received another 96 such writs since July 2004, now being settled or closed, that sought to attach another $184 million.[3] The 797 *ex parte* orders for process of maritime attachment that HSBC received in December 2005 has grown from 65 in January 2004. This is the

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[3] Many maritime writs of attachment yield amounts much smaller than the sum sought to be attached. The maritime defendant has few options: cease or limit its use of funds transfers, especially in U.S. dollars, or come to terms with the attaching plaintiff. The impact of such broad interference with the funds-transfer system becomes apparent when it is understood that such funds transfers are intended to meet contractual or other business obligations, usually due on a precise and strictly enforced payment schedule. That is why the court below and other district judges are exercising "the inherent power to adapt an admiralty rule to the equities of a particular situation." *Greenwich Marine, Inc.* v. *S.S. Alexandra*, 339 F.2d 901, 905 (2d Cir. 1965).

typical experience of major New York banks, which have suffered from a consistent pattern of abuse of the maritime attachment process since *Winter Storm*.[4]

The Clearing House has sought permission to file this brief *amicus curiae* to make the following points:

1. the maritime attachment process since *Winter Storm* has grown into a serious problem for the major financial institutions that clear dollar-denominated funds transfers through New York;

2. the process used for maritime attachments since *Winter Storm* offends due process and conflicts with this Court's prior decision in *Reibor Int'l Ltd.* v. *Cargo Carriers (KACZ-CO.), Ltd.*, 759 F.2d 262 (2d Cir. 1985);

3. the procedural protections recognized by the District Court in this case and in other recent decisions are reasonable and appropriate, particularly in light of the current abuse of the maritime attachment process; and

4. *Winter Storm* should be reviewed by this Court, and overruled.

1. Background Regarding Funds Transfers

The funds transfers at issue here are subject to N.Y. U.C.C. Article 4A. "Article 4A governs a method of payment in which the person making payment (the 'originator') directly transmits an instruction to a bank either to make payment to the person receiving payment (the 'beneficiary') or to instruct some

[4] As an association of banks, the Clearing House is in a unique position to inform the court regarding the effect *Winter Storm* has had on the banking industry. These statistics are presented to explain to the Court the context in which this *amicus* brief is filed. If the Court so desires, the Clearing House will submit one or more affidavits from the member banks attesting to these facts.

other bank to make payment to the beneficiary." N.Y. U.C.C. § 4A-104, comment 1. In international funds transfers, often the originator's bank is required to use an intermediary bank, *i.e.*, an international bank that is neither the originator's bank nor the beneficiary's bank. N.Y. U.C.C. § 4A-104(2).

The intermediary bank usually has no relationship with either the originator or the beneficiary. The funds transfer process requires the intermediary bank, when it issues a payment order, to debit the account of the sending bank. A funds transfer is completed when it is accepted by the beneficiary's bank. If the funds transfer is not completed, the intermediary bank's obligation is to re-credit the account of the sending bank. N.Y. U.C.C. § 4A-402(3), (4). The intermediary bank's relationships are only with, and its obligations are only to, other banks.

A creditor may not serve process on an intermediary bank. N.Y. U.C.C. § 4A-502(4). A creditor of an originator may serve process on an originator's bank before a funds transfer is initiated but not afterwards, "because no property of the originator is being transferred." N.Y. U.C.C. § 4A-502 comment 4, sentences 4 and 5.[5] Similarly, a creditor of a beneficiary cannot levy on property of the originator, nor even at the beneficiary's bank until that bank

[5] Because comment 4 to one or more versions of N.Y. U.C.C. § 4A-502 is truncated in two places, we recommend that the Court also review McKinney's *Uniform Commercial Code* (2001) regarding the references to the N.Y. U.C.C. herein.

accepts the funds-transfer payment order for the benefit of the beneficiary, because until that stage "the beneficiary has no property interest in the funds transfer which the beneficiary's creditor can reach." *Id*., sentence 6. No injunction is permitted against an intermediary bank, N.Y. U.C.C. § 4A-503 and comment thereto, because it holds no property of either the originator or the beneficiary.

Funds transfers have become an integral component of business transactions and the general economy, as they facilitate an efficient, high-speed and low-cost method of making payments. *See* Statement by Edward W. Kelley, Jr., Member, Board of Governors of the Federal Reserve System, before the Committee on Banking and Financial Services, U.S. House of Representatives, Nov. 4, 1997, 84 *Federal Reserve Bulletin* 25 (1997) ("The current average total daily value of Fedwire funds transfers is approximately $1.1 trillion."). Most funds transfers flow through the system without human interaction. Present daily volumes average well over $3 trillion.[6] Intermediary banks process funds transfers in less than 60 seconds, barring interruption. Speed and certainty are the hallmarks of the system.

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[6] *See* www.federalreserve.gov/Payment Systems/FedWire/annual.pdf (FedWire); www.chips.org/docs/000652.xls (CHIPS).

Recognizing the importance of this payment system, the legislatures of every state in the country and the Board of Governors of the Federal Reserve System have sought to assure its benefits by adopting a statutory or regulatory scheme that frees intermediary banks -- those banks in the payment chain that are not banks of the originator or the beneficiary -- from concerns over attachment of funds transfers.[7] Contrary to these efforts, *Winter Storm* encourages maritime attachments of intermediary banks in funds transfers, thereby inhibiting the free flow of funds among financial institutions, creating uncertainty as to rights and liabilities and exposing intermediary banks to tremendous administrative burdens and the continuous risk of litigation.

Before *Winter Storm*, the Second Circuit had recognized the considerable potential for disruption that the law of maritime attachment could have on international banking practice, *see Reibor*, 759 F.2d at 268 ("Here, the law of attachment could have considerable impact on international banking practices. . . ."), and the uncertainty created by placing intermediary banks in the middle of civil disputes. *Grain Traders, Inc.*, 160 F.3d at 102. ("These are matters as to which an intermediary bank ordinarily should not have to be concerned and,

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[7] As this Court held in *Grain Traders* v. *Citibank, N.A.*, 160 F.3d 97 (2d Cir. 1998), U.C.C. Article 4A prevents an originator of a funds transfer from suing an intermediary bank. The logic applies to suits by beneficiaries as well. *See also* Federal Reserve System Regulation J, 12 C.F.R. Pt. 210 (2002).

if it were otherwise, would impede the use of rapid electronic funds transfers in commerce by causing delays and driving up costs.”).

2. *Winter Storm*

In *Winter Storm*, the District Court issued an *ex parte* order of maritime attachment, which was served on a New York bank. The bank at that time held no funds of the defendant, but placed a stop order on any funds transfers related to the defendant that might later pass through the bank. The defendant asked its bank in Thailand to make a payment by funds transfer to a customer that had an account at the Royal Bank of Scotland. The Thai bank accepted the request for the funds transfer and a payment order was received in due course by the New York intermediary bank, which did not complete the transfer because of its stop order.

An order of attachment under Supplemental Rule B by its terms may be applied only to defendant’s property within the district. The District Court in *Winter Storm* vacated the order of attachment because “it is apparent that a wire transfer at an intermediary bank is not property,” *Winter Storm Shipping, Ltd.* v. *TPI*, 198 F. Supp. 2d 385, 390 (S.D.N.Y. 2002), citing N.Y. U.C.C. §§ 4A-502 and 503. The Second Circuit reversed, stating that the Court earlier had determined that the amount of a funds transfer could be seized at an intermediary bank, *United*

States v. *Daccarett*, 6 F.3d 37 (2d Cir. 1993), and concluded on that basis that the intermediary bank was holding property of the originator of the funds transfer. The *Winter Storm* opinion overlooked the fact that *Daccarett* decided only that the amount of a funds transfer was seizable under a forfeiture statute, 21 U.S.C. § 881(a)(6), as proceeds of drug transactions, not that the intermediary bank was holding any defendant's property. *Winter Storm* cited no authority contradicting the N.Y. U.C.C. or supporting the view that an intermediary bank in a funds transfer holds property of either an originator or a beneficiary. *Daccarett* and other forfeiture decisions simply do not analyze property interests.[8]

The result of *Winter Storm* is that banking customers are no longer assured of completing their funds transfers without judicial interference; the ruling has undermined the utility of dollar transfers through banks in the United States.[9] As a consequence, U.S. banks' role in this international payment system has been undermined.

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[8] Under the applicable law, if the funds transfer is not completed, the intermediary bank's obligation is to neither the beneficiary nor the originator, but is to return the amount of the funds transfer to the prior bank. *See* N.Y. U.C.C. § 4A-402(4); *Grain Traders*, 160 F.3d at 102.

[9] "[T]he import of the decision only becomes clear upon realizing how common is the relationship between [the parties] in international trade, and how frequent, therefore, the need for a fund transfer through New York." *Reibor*, 759 F.2d at 264

3. The Burden of the Current Maritime Attachment Process in this Circuit.

The law in this Circuit regarding funds transfers is that an originator or a beneficiary of a funds transfer has no claim against an intermediary bank in the funds transfer process. *Grain Traders,* 160 F.3d at 105. An order of marine attachment served on an intermediary bank at a time when that bank holds no property of the defendant is "absolutely void." *Reibor*, 759 F.2d at 263. But, under *Winter Storm*, if an intermediary bank receiving process of maritime attachment places a hold on funds transfers related to a maritime defendant, and subsequently intercepts a funds transfer involving the defendant and places funds in a suspense account, the balance in that account could be considered as the maritime defendant's property, a *res* subject to maritime attachment. *Winter Storm,* 310 F.3d at 276.

Grain Traders and *Reibor* remain good law in this circuit. In *Reibor*, a vessel owner sought to use a maritime attachment to garnish funds to be paid to the vessel's charterer. Process of maritime attachment was served on the bank in question on four occasions, but at none of those times was the garnishee bank in possession of the charterer's funds, or even processing a funds transfer relating to the charterer. The question was whether such process was valid. The District

Court found no federal precedent on point and, turning to state law,[10] held that such a levy was "absolutely void." Since *Reibor*, therefore, the rule in this Circuit is that a maritime attachment served when the garnishee holds no property of the defendant is "absolutely void." Indeed, Rule B of the Supplemental Rules applies only to "property of the defendant found within this district."

In *Winter Storm*, the maritime attachment also was served when the bank held no assets of the defendant, but the bank nonetheless put in place a mechanism to intercept any funds transfer involving the defendant that later passed through the bank. 310 F.3d at 266. When the bank later received a funds-transfer payment order that listed the defendant as the originator of the funds transfer, it interrupted the processing of the payment order and credited the amount of the attachment to a suspense account. Quite apart from the flaws in the decision's due process and "property" rulings, *Winter Storm* dealt only with a circumstance where an intermediary bank placed a stop order on certain funds transfers and later placed the amount of a stopped funds transfer into a suspense account. [11]

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[10] In *Butner* v. *United States,* 440 U.S. 48, 55 (1979), the Supreme Court held that "[p]roperty interests are created and defined by state law." Even in a federal scheme as comprehensive as bankruptcy, the court held that it was improper to ignore state law in favor of adopting a federal rule defining such interests, a principle that the Court overlooked and contradicted in *Winter Storm*.

[11] With respect, the Clearing House believes *Winter Storm* was in error because it simply assumed that a funds transfer originated by a maritime defendant passing through an intermediary bank was the maritime defendant's "property," although applicable state law and related federal regulations clearly were to the contrary. Judge Haight concluded that if a defendant's bank account was property subject to attachment, he could find no

Today, *Winter Storm* has been expanded into a virtual vacuum cleaner for wire transfers through New York banks. The *Ex Parte* Order served by Aqua Stoli in this case (*see* A-6 to A-8) highlights the problem. The *Ex Parte* Order issued against "property belonging to, claimed by or being held for the Defendant" at these 16 banks:

> "American Express Bank
> Bankers Trust
> Bank of America
> Bank of China
> Bank of New York
> Barclays Bank
> BNP Paribas
> Calyon
> Citibank
> Credit Suisse First Boston
> Deutsche Bank
> HSBC (USA) Bank
> J.P. Morgan Chase [*sic*]
> Standard Chartered Bank
> Union Bank of Switzerland, and/or
> Wachovia Bank."[12]

(footnote continued)
basis for regarding a funds transfer any differently. 310 F.3d at 276. Neither the plaintiff nor defendant in *Winter Storm*, however, had any claim against the intermediary bank, or the amount of a funds transfer passing through it.

[12] Nine of these banks are Clearing House members, or affiliates of members; all except Credit Suisse First Boston are CHIPS participants.

The amount garnished was $1,449,440.00, calculated as:

"A.	On the principal claim:	$806,000.00
B.	3 years of interest at 8% per annum:	$193,440.00
C.	Arbitration fees and expenses:	$100,000.00
D.	Attorneys' fees and expenses:	$350,000.00
	Total:	$1,449,440.00"[13]

Verified Complaint at 2 (A-14). The complaint and the affidavit supporting the attachment assert that, upon information and belief, defendant has, "<u>or will have during the pendency of this action</u>, assets within this District and subject to the jurisdiction of this Court." (A-10, 14) (emphasis added). *Reibor* is ignored.

The *Ex Parte* Order further provides that supplemental or subsequent service of maritime attachment may be made by facsimile or e-mail, that each bank must provide plaintiff with a facsimile number or e-mail address for that purpose, and that any such service "is deemed effective continuous service throughout the day from the time of such service through the opening of the garnishee's business the next business day." (A-7) By these provisions, therefore, the maritime attachment seeks effectively to overrule *Reibor*, the law in the Second Circuit.

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[13] This amount garnished is another example of the expansion of the maritime attachment in the Southern District. Even early decisions after *Winter Storm* that sustained an attachment declined to authorize attachment of more than the amount of the principal claim. *See Noble Shipping, Inc.* v. *Euro-Mar. Chartering Ltd.*, No. 03 Civ. 6039 (DLC), 2003 U.S. Dist. LEXIS 23008, *3, n.2 (S.D.N.Y. Dec. 24, 2003).

The law applicable to funds transfers immunizes intermediary banks, and is specific that such a bank holds no property of originator or beneficiary, in order to permit the funds transfer process to function effectively. To do that, the system must permit payment orders to go through without interruption. *Winter Storm's ipse dixit* determination that an intermediary bank holds property of an originator instead permits maritime plaintiffs to wreak havoc on that process. Major banks in New York now are served with a maritime writ of attachment several dozen times a day. At each such occasion, the bank must review its records and, under the terms of the writs as they are currently being issued, *see* A-7, amend its Office of Foreign Assets Control ("OFAC") filter, whose purpose is to prevent financial transactions by individuals (such as global terrorists) and entities (*e.g.*, countries and their agencies and instrumentalities) that are subject to U.S. economic sanctions. To deal with this stream of attachments, a bank has to employ or re-assign staff and create an administrative system.[14] The process is not error-

[14] After *Winter Storm*, some banks have agreed to accept facsimile or e-mail service, subsequent to original service by hand, or agree that service is effective throughout the day, because otherwise process servers retained by maritime plaintiffs simply reappear at the bank throughout each day with copies of the same process. One reason that certain banks have submitted to this broader procedure is to protect the integrity of the OFAC filter. The banks simply do not want to interrupt or adjust that filter several times a day as *Winter Storm*-inspired attachments are served. Permitting e-mail or equivalent service effective for the duration of the day is a method to prevent the flood of maritime attachments from having even more onerous consequences. Deutsche Bank, another Clearing House member, resists e-mail or facsimile service and does not consent to "effective all day" service, and so is rewarded with an average of 32 personal services of writs of attachment each banking day, each resulting in immediate review of the bank's current funds transfer status. None of these cumbersome "solutions" is envisioned under applicable funds transfer law.

free. In this case, for example, the names “Gardner” and “Smith” are not uncommon, and the possibility of false “hits” is apparent. And of course, every time a funds transfer is interrupted, a commercial transaction that depended on the efficiency of the funds-transfer process is put at risk.

The impact of this Court’s opinion in *Winter Storm* has far exceeded the level of interference with funds transfers that could have been foreseen at the time of the ruling.

4. *Aqua Stoli*

In this case, after plaintiff Aqua Stoli obtained an attachment order below, defendant Gardner Smith moved to vacate. The District Court, concerned that the state of maritime attachment law “creates a real risk of ‘abusive use of the maritime remedy,’” granted defendant’s motion. *Aqua Stoli*, 384 F. Supp. 2d at 729, *quoting Integrated Container Serv. Inc.* v. *Starlines Container Shipping, Ltd.*, 476 F. Supp. 119, 124 (S.D.N.Y. 1979). The Court held that plaintiffs at an attachment hearing are required to show “that the attachment order . . . is reasonably calculated to serve at least one of the two historical purposes of obtaining jurisdiction or securing judgment and is not simply a tactical device designed to harass the adversary in an ongoing litigation.” *Aqua Stoli*, 384 F. Supp. 2d at 729.

If plaintiffs can make that showing, then defendants have the burden to show that, "nonetheless, the hardship the attachment order imposes on it or others substantially outweighs any benefit to the plaintiff." *Aqua Stoli*, 384 F. Supp. 2d at 729. The Court supported applying this latter test by describing the effect that the rights granted by *Winter Storm* have on defendant corporations and financial markets:

> the attachment order imposes a highly probable and immediate burden on defendant, and potential disruption to the financial markets themselves, because of the uncertainty wrought by the erratic attachment of EFTs. In a world where transactions are expected to be consummated instantly and with certainty, the attachment of EFTs may cause a defendant and its business partners to unwittingly breach contracts and incur damages, legal and reputational, that far outstrip the sums to be attached.

384 F. Supp. 2d at 730; *see also Grain Traders,* 160 F.3d at 102. The *Aqua Stoli* opinion correctly identifies the burden and disruption that has resulted from plaintiffs' approach to serving maritime attachment orders after *Winter Storm*.

In the face of this risk, and given the ease of attaching funds, without judicial oversight and procedural safeguards, foreign companies may well reduce payment orders through U.S. banks and may even stop or limit trading in dollars. Such results are clearly inimical to the U.S. banking system and more broadly to the role of the U.S. dollar globally.

ARGUMENT

As a*micus curiae*, the Clearing House respectfully requests that this Court affirm the district court's opinion, which is a step toward bringing some control back into a process that has been abused over the past three years. In addition, the Clearing House submits that this panel should overrule, or take steps to overrule, *Winter Storm*.

A. RECOGNIZING THE DISRUPTION TO FINANCIAL INSTITUTIONS CAUSED BY *WINTER STORM*, THE RULING BELOW MAY SLOW THE FLOOD OF ATTACHMENT ORDERS.

It was established law, prior to *Winter Storm*, that, "[a] Process of Maritime Attachment is void unless, at the time of service, there is a *res* capable of being attached; the fact that property subsequently comes into the possession of the served party hours, minutes or seconds after service does not revive the voided process." *Ythan Ltd.* v. *Ams. Bulk Transp. Ltd.*, 336 F. Supp. 2d 305, 307 (S.D.N.Y. 2004), *citing Reibor*, 759 F.2d at 262. In so holding, the *Reibor* court tracked the New York state rule, and recognized the "disruptive consequences" and "considerable impact on international banking practices" that would result from a more aggressive rule or one which diverged from New York state law. *Reibor*, 759 F.2d at 266, 268; ("New York being the situs for multiple transactions in world commerce, the New York banking system is particularly vulnerable to such

disruption.") *id.* at 266. *Reibor* recognized that this strict rule "works, to be sure, to the detriment of an attachment creditor," but reasoned that it "is simply the way the law was intended to operate." *Reibor*, 759 F.2d at 268. In considering the funds transfer before it, the *Reibor* court reserved the issue of the role of the intermediary bank in maritime attachment "for another day when somebody has served a writ of attachment on a bank either after it has received instructions from its forwarding bank to transfer a CHIPS credit but before it has made the transfer, or after it has received a CHIPS credit but before it has transferred any funds related thereto." *Reibor*, 759 F.2d at 268-69. In reserving the question in this way, the *Reibor* court reinforced the rule that an attachment could never be effective unless the funds transfer was at the intermediary bank when the order was served, and that the effectiveness of an attachment when the funds transfer was being processed at the bank remained to be decided.

1. ***Winter Storm*** **and Subsequent District Court Opinions Have Expanded Creditors' Maritime Attachment Rights.**

The practicalities of a funds-transfer system should have made it nearly impossible for an intermediary bank to seize funds in compliance with *Reibor*, because "[a]n EFT may be in the possession of a financial institution for only a very short period of time." *Ullises Shipping Corp.* v. *FAL Shipping Co.*

Ltd., 05 CIV 9424 (SAS), 2006 U.S. Dist. LEXIS 2283, *16 (S.D.N.Y. Jan. 20, 2006), *citing Winter Storm*, 310 F.3d at 278 ("an EFT may move through an intermediary bank 'almost instantaneously.'").

Certain lower court orders have continued to expand the rights of attaching creditors, however, realizing but even exacerbating some of the practical consequences of *Winter Storm*. It is now common for attachment orders to state that they will remain valid throughout the entire business day of service, rather than just at the time of service. This practice eviscerates the holding in *Reibor* that "the fact that property subsequently comes into the possession of the served party hours, minutes or seconds after service does not revive the voided process." *Ythan*, 336 F. Supp. 2d at 307.[15] Additionally, plaintiffs serve attachment orders via facsimile and on successive days until they are successful, rather than returning to court for a new order.

Ironically, the expansion of attachment procedures has occurred in part because lower courts and banks have recognized the tremendous disruption that *Winter Storm* causes, and attempted to deal with its practical effects. In an early case, one court authorized such a procedure because the bank in question had

[15] "The question in this case is not whether there is an exception to the requirement that process and a *res* must coexist in the hands of the garnishee at a single moment in time; undeniably that is a necessity." *Ythan*, 336 F. Supp. at 307. *Ullises* misinterprets this passage, 2006 U.S. Dist. LEXIS 2283, at *16, but correctly understood the impact of *Winter Storm*.

consented in advance. *Ythan*, 336 F. Supp. 2d at 308. A later decision allowed the practice even without the consent of the bank because "[s]ome provision for continuous service is required to allow attachment of EFTs without significant disruption to financial institutions. The Attachment Order is intended to avoid the absurdity, security problems, and inconvenience of requiring the garnishee banks to accept service repeatedly throughout the day." *Ullises Shipping*, 2006 U.S. Dist. LEXIS 2283, at *26-27. The attachment order in *Aqua Stoli* imposed conditions of subsequent facsimile or e-mail service effective throughout the day without the consent of any of the 16 banks. (*See* A-6 to A-8).

The inevitable consequence of *Winter Storm* is some form of material disruption to the funds-transfer process.

2. *Aqua Stoli* Demonstrates District Courts' Attempts to Recognize the Statutory Limits on Maritime Attachment Plaintiffs.

To provide some protection to defendants, Admiralty Rule E(4)(f) grants that "any person claiming an interest in [attached property] shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the . . . attachment should not be vacated." In several post-*Winter Storm* cases, District Courts have recognized that plaintiffs have the burden to justify their need for attachment at this hearing. For example, in *Allied Maritime, Inc.* v. *Rice Corp.*, 04

Civ. 7029 (SAS), 2004 U.S. Dist. LEXIS 20353, *5 (S.D.N.Y. Oct. 12, 2004), motion for reconsideration denied, 361 F. Supp. 2d 148 (S.D.N.Y. 2004), Judge Scheindlin required the plaintiff to demonstrate, "either that the attachment is necessary for the plaintiff to obtain jurisdiction in a convenient district, or that the plaintiff needs the security of the attachment to satisfy any judgment it may win in the underlying suit." More recently, in *Seaplus Line Co.*, Judge Koeltl agreed that "some showing beyond the prima facie case is required," and adopted the standard set forth in *Allied Maritime* and *Aqua Stoli*. 2005 U.S. Dist. LEXIS 33346, at *6. These cases acknowledge that, to prevent abuse of the maritime attachment process, "courts have long recognized their responsibility to ask whether 'plaintiffs' need for security is real' and their 'discretion to set aside an unfair attachment' if it is not." *Id.* at *9, *quoting Integrated Container Serv.*, 476 F. Supp. at 124. *Blake Maritime, Inc.* v. *Petrom S.A.*, 05 Civ. 8033 (PAC), 2005 U.S. Dist. LEXIS 26310, *9-10 (S.D.N.Y. Oct. 31, 2005), distinguished the facts at issue there from those presented in *Aqua Stoli*, while implicitly agreeing that *Aqua Stoli* was correctly decided. *See Seaplus Line Co.*, 2005 U.S. Dist. LEXIS 33346, at *15-16 (discussing *Blake Maritime* and recognizing that, while it did not formally adopt the standard outlined in *Aqua Stoli*, it did explore the facts in that context).

In an attempt to stem the tide of maritime attachment orders that resulted from *Winter Storm*, other district judges have upheld the balancing test outlined in *Aqua Stoli*. *See, e.g.*, *Ullises Shipping*, 2006 U.S. Dist. LEXIS 2283, at *9-13; *T&O Shipping Ltd.* v. *Lydia Mar Shipping Co. S.A.*, No. 05 Civ. 7106 (SAS), 2006 U.S. Dist. LEXIS 2278, *6 (S.D.N.Y. Jan. 20, 2006); *Erne Shipping Inc.* v. *HBC Hamburg Bulk Carriers GMBH & Co. KG*, No. 05 CIV. 8915 (GWG), 2006 U.S. Dist. LEXIS 583, *28-29 (Jan. 11, 2006). The Clearing House suggests that these cases are based on sound law and good policy. Although we submit that the correct remedy is to overrule *Winter Storm*, the standards applied by the court below are a welcome potential brake on the mushrooming maritime attachment problem and should be upheld in this case.

B. THE CLEARING HOUSE RESPECTFULLY CONTENDS THAT THIS COURT SHOULD REVISIT ITS DECISION IN *WINTER STORM.*

Rather than continue to craft standards designed to minimize the effects of *Winter Storm*, the Clearing House requests that this Court consider revisiting *Winter Storm* altogether. For both legal and policy reasons, *Winter Storm* should be overruled.

The Clearing House respectfully suggests that the Court's opinion in *Winter Storm* was in error because it relied on a forfeiture case, where property

was not at issue, to define the property interests in the amount of a funds transfer. The analysis in a forfeiture case is entirely different from, and should have no application to, a maritime attachment case. Because "the precedent in federal admiralty law is . . . thin," *Reibor*, 759 F.2d 266, and because "property interests are created and defined by state law," *Butner*, 440 U.S. at 55, the Court instead should give deference to New York's laws in this area, which are consistent both with federal law and the laws in the 52 jurisdictions that have adopted the Uniform Commercial Code. Additionally, the Clearing House urges the Court to consider reversal of *Winter Storm* on a policy basis. *Winter Storm* is being used to flood banks with attachment orders, and district courts have been forced to expand the already broad rights of plaintiffs in maritime cases in order to deal with the onerous practical consequences of any ruling that permits in general the attachment of funds transfers at intermediary banks.

1. The *Winter Storm* Court's Reliance on *Daccarett* Was in Error.

Looking for federal precedent concerning the "susceptibility of funds involved in an EFT to attachment under Admiralty Rule B," the *Winter Storm* court turned to *Daccarett*, a forfeiture case involving the drug trafficking and money laundering activities of a Colombian drug cartel. *Winter Storm*, 310 F.3d at 276.

Daccarett was not a property case. Analysis of property interests was unnecessary because, under the forfeiture statutes controlling in that case, the funds subject to attachment were the property of the federal government; the defendants abandoned all property interest upon commission of their initial illegal action. *Manufacturas Int'l, LTDA* v. *Mfrs. Hanover Trust Co.*, 792 F. Supp. 180, 188 (E.D.N.Y. 1992) ("In the context of a forfeiture proceeding, . . . [t]he property is considered forfeited at the moment the illegal act is committed."), *citing* 18 U.S.C. § 981(b) (1988 & Supp. III 1991).

Rather than analyzing property interests, the *Daccarett* court, as appropriate in a forfeiture case, identified the funds as traceable to an illicit activity and therefore subject to attachment. *See* Drug Control Act, 21 U.S.C. § 881(a)(6) (2005) (allowing the government to seize "moneys . . . furnished . . . in exchange for a controlled substance . . . [as well as] *all proceeds traceable to such an exchange*.") (emphasis added). For this reason -- that the funds already were property of the government because they were traceable to a drug transaction -- the *Daccarett* court determined that they were subject to seizure at any point in the transfer process, including while passing through an intermediary bank.[16]

[16] *Daccarett* also barred the claimants from taking any position on the banks' release of financial information to the government. The claimants were not bank customers and had no standing to raise the issue. *Daccarett*, 6 F.3d at 50.

Winter Storm relied on *Daccarett's* holding that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable res *under the forfeiture statutes*." *Daccarett*, 6 F.3d at 55 (emphasis added). Under Admiralty Rule (B)(1), it is not enough that the amount of a funds transfer constitutes a seizable *res* (which is the case in the federal criminal forfeiture statute), it must constitutes the *defendant's* seizable *res*. By relying on *Daccarett* and not analyzing the property interests at stake, we respectfully submit that the Court was in error. *See HBC Hamburg Bulk Carriers GMBH & Co. KG* v. *Proteinas y Oleicos S.A. de C.V.*, No. 04 Civ. 6884 (NRB), 2005 U.S. Dist. LEXIS 8009, *13 (S.D.N.Y. May 3, 2005) ("*Winter Storm* did not focus on the issue of ownership of an EFT in the hands of an intermediary bank; instead the decision centered on whether an EFT is [a seizable] *res* for attachment purposes.")

Winter Storm stated that a defendant's bank account would be property subject to maritime attachment, and then, simply assuming that a funds transfer at an intermediary bank was an originator's property, was unable "to discern . . . a basis for regarding [the originator's] funds in [the intermediary bank's] hands prior to their electronic transfer to [the receiving bank] as anything other than funds held by [the intermediary bank] for the account of [the originator]." 310 F.3d at 276. The analysis was incorrect, however, because the

amount of a funds transfer at an intermediary bank is not the property of the originator. The originator has no claim to it. *Grain Traders*, 160 F.3d at 102; N.Y. U.C.C. §§ 4A-502 and 503 and comments thereto.

2. Property Interests are Derived from State Law.

Contrary to *Winter Storm*, Admiralty Rule (B)(1) does not define "property," and there is no relevant federal maritime law on which to rely. *See Reibor*, 759 F.2d at 266 ("[T]he precedent in federal admiralty law is . . . thin."). When this is the case, courts turn to state law for guidance. *Det Bergenske Dampskibsselskab* v. *Sabre Shipping Co.*, 341 F.2d 50, 53 (2nd Cir. 1965) (relying on New York law where "there is no established admiralty doctrine . . . such as would reflect a predominant federal interest.").

Reliance on state law in this context is logical because property interests generally are a matter of state law. *In re Rodgers*, 333 F.3d 64, 66 (2d Cir. 2003), *citing Butner*, 440 U.S. at 55; *Delaware* v. *New York*, 507 U.S. 490, 501-502 (1993), *quoting Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972) ("'Property interests, of course, are not created by the Constitution,' but rather 'by existing rules or understandings that stem from an independent source such as state law.'"). Federal courts rely on state law to establish property rights in a variety of fields. *See Butner* (bankruptcy); *In re Rodgers* (tax); *SEC* v. *Credit*

Bancorp, Ltd., 279 F. Supp. 2d 247, 261 (S.D.N.Y. 2003), *citing Marshall* v. *People of New York*, 254 U.S. 380, 386 (1920) (receivership).

New York and every other state has adopted the Uniform Commercial Code, which allows courts to restrain only: (1) a person from issuing a payment order to initiate a funds transfer; (2) an originator's bank from executing the payment order of the originator; or (3) the beneficiary's bank from releasing the funds to the beneficiary. U.C.C. § 4A-503. Article 4A expressly does not allow for attachment of funds at an intermediary bank. Official Comment, U.C.C. § 4A-503 ("In particular, intermediary banks are protected. . . ."). Although *Winter Storm* quoted the U.C.C., 310 F.3d at 279, it ignored the substance, particularly of Official Comment 4 to U.C.C. § 4A-502, which makes it clear that a funds transfer processed by an intermediary bank does not involve property either of an originator or a beneficiary. Furthermore, Article 4A has been adopted by the Board of Governors of the Federal Reserve System and thus is federal law governing payment through Fedwire. *See* Federal Reserve System Regulation J, 12 C.F.R. Pt. 210 (2002). One of the primary goals behind Regulation J is uniformity in the law applicable to all funds transfers. *See* 55 Fed. Reg. 40792 (Oct. 5, 1990). In the wake of *Winter Storm*, there now is a risk that funds transfers will be treated differently based on whether the funds are wired through

the CHIPS system, which is managed by the Clearing House, or through the Fedwire system – exactly the situation the federal government sought to avoid.

3. *Winter Storm* Created the Legal Fiction that Funds Are the Property of Two Entities at the Same Time.

District Courts' application of *Winter Storm* has led to the legal fiction that, while passing through the intermediary bank, funds are the property of both the originator and the beneficiary. *HBC Hamburg*, 2005 U.S. Dist. LEXIS 8009, at *9-14 (holding that the amount of a funds transfer can be seized at the intermediary bank in any situation, whether the defendant is the originator or the beneficiary of the funds transfer), *citing Noble Shipping,* 2003 U.S. Dist. LEXIS 23008. *Winter Storm* involved a funds transfer where the defendant was the originator but, as the opinion below pointed out, the *Aqua Stoli* attachment applied to funds transfers to or from the defendant, *i.e.*, as beneficiary or originator. (A-60). But this cannot be. *See United States* v. *Piervinanzi*, 23 F.3d 670, 677 (2d Cir. 1994) ("[T]he word 'property' implies ownership, or the 'exclusive right to possess, enjoy, and dispose of a thing."), *citing* Webster's Third New Int'l Dictionary 1818 (1986).[17] In fact, the amount of a funds transfer at an intermediary bank is not property of, nor

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[17] In *Piervinanzi*, the Court went so far as to hold that, because the illegal funds transfer at issue was rejected by the beneficiary bank before the bank paid the beneficiary by crediting the amount of the funds transfer to defendant's account, the funds "never came into the possession or under the control of the conspirators," and therefore the defendant had never "derived" the "property." *Piervinanzi*, 23 F.3d at 677. On this basis, the Court overturned defendant's money laundering conviction.

subject to claims by, either the originator or the beneficiary. N.Y. U.C.C. § 4A-502, comment 4; *Grain Traders*, 160 F.3d at 102.

4. In Bypassing the Property Analysis, *Winter Storm* Does Not Adequately Address the Due Process Concerns Inherent in Maritime Attachment of Funds Transfers.

The Clearing House contends that it also is a violation of due process to bring a foreign company into a New York court by way of maritime attachment when that company has no connection to New York other than its involvement -- as the originator *or* beneficiary -- in a funds transfer that may pass through New York.

The *Winter Storm* district court expressed this same concern, noting that "[p]ermitting wire transfer credits to be attached at unforeseen and unknown intermediary banks runs contrary to the (minimal) due process accorded maritime defendants." 198 F. Supp. at 391. This Court dismissed that concern, *Winter Storm*, 310 F.3d at 268, reasoning that the 1985 amendments to Admiralty Rules B and E, which provide for judicial review of an *ex parte* attachment order before issuance and a due process hearing after the order is executed, were "sufficient to satisfy constitutional requirements," *Winter Storm*, 310 F.3d at 273. The Court concluded that, "if [the] funds involved in the EFT constituted 'property' of

[defendant] within the meaning of Admiralty Rule B(1), those funds are subject to a valid maritime attachment." *Winter Storm*, 310 F.3d at 274.

But as discussed *supra*, *Winter Storm* "did not focus on the issue of ownership of an EFT in the hands of an intermediary bank," *HBC Hamburg*, 2005 U.S. Dist. LEXIS 8009, at *13, and therefore never answered the critical question of whether the amount of a funds transfer processed by an intermediary bank was property of the defendant. The Court merely assumed as much. In fact, according to the controlling law on property interests, funds transfers are *not* seizable property of the defendant while at an intermediary bank. A funds transfer at an intermediary bank implicates obligations to and from other banks. "[N]o property of the originator is being transferred . . . . [U]ntil the funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary, the beneficiary has no property interest in the funds transfer which the beneficiary's creditor can reach." N.Y. U.C.C. § 4A-502, comment 4; *see also* § 4A-503. As a result, the Court cannot obtain jurisdiction over defendant based merely on the "ephemeral and serendipitous . . . 'presence,'" *Aqua Stoli*, 384 F. Supp. 2d at 728, of those funds in the district; *Amoco Overseas Oil Co.* v. *Compagnie Nationale Algerienne de Navigation (CNAN*), 605 F.2d 648, 655 (2d Cir. 1979) ("[M]aritime actors must reasonably expect to be sued where their

property may be found.”); *see generally id.* at 654-55 (analyzing *Shaffer* v. *Heitner*, 433 U.S. 186, 196-206 (1977) in the context of maritime attachment). Unless every maritime entity that initiates a U.S. dollar denominated funds transfer is deemed to submit itself to jurisdiction in New York, it cannot be sued here on that basis alone consistent with due process.

CONCLUSION

For the reasons stated herein, *Amicus Curiae* The Clearing House Association, LLC respectfully urges the Court to uphold the District Court's opinion in *Aqua Stoli Shipping, Ltd.* v. *Gardner Smith Pty Ltd.*, 384 F. Supp. 2d 726 (S.D.N.Y. 2005), and to revisit and overrule its previous opinion in *Winter Storm Shipping, Ltd.* v. *TPI*, 310 F.3d 263 (2d Cir. 2002).

Dated: February 22, 2006
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(B)

I certify that the length of this brief, as measured by the "Word Count" function of Microsoft Word software, is 6,796 words, exclusive of this certificate and other permissible exclusions contained in Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

Dated: February 22, 2006
New York, New York

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Bruce E. Clark

ANTI-VIRUS CERTIFICATION

Case Name: Aqua Stoli v. Gardner Smith

Docket Number: 05-5385-cv

I, Natasha R. Monell, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 2/22/2006) and found to be VIRUS FREE.

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