06-2121-cv

IN THE

FOR THE SECOND CIRCUIT

VAMVASHIP MARITIME LTD.,

Plaintiff-Appellee,

—against—

LITTLE ROSE TRADING LLC,

Movant-Appellant,

SHIVNATH RAI HARNARAIN (INDIA) LTD.,

Defendant.

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

BRIEF FOR *AMICUS CURIAE* THE CLEARING HOUSE ASSOCIATION L.L.C. IN SUPPORT OF MOVANT-APPELLANT

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Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for The Clearing House Association L.L.C. hereby certifies that The Clearing House Association L.L.C. is not a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

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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 Movant-Appellant Little Rose Trading LLC's ("Little Rose") appeal from an Opinion and Order entered by the United States District Court for the Southern District of New York (Baer, J.) on April 20, 2006 (the "Opinion"). The District Court denied Little Rose's motion to vacate a certain *ex parte* process of maritime attachment and directed the District Court Clerk to close the motion and remove it from the Court's docket. *Vamvaship Maritime Ltd.* v. *Shivnath Rai Harnarain (India) Ltd.*, No. 06 Civ. 1849 (HB), 2006 WL 1030227, at *3 (S.D.N.Y. Apr. 20, 2005) (A-48-51).

The Opinion relied on this Court's now-questioned decision in *Winter Storm Shipping, Ltd.* v. *TPI*, 310 F.3d 263 (2d Cir. 2002), *cert. denied*, 539 U.S. 927 (2003), and held that an electronic funds transfer ("EFT" or "funds transfer") requested by Little Rose – a third party with no connection to the dispute underlying this action – was attachable by Plaintiff Vamvaship Maritime Ltd. ("Vamvaship") as "property" of Defendant Shivnath Rai Harnarain (India) Ltd. ("Shivnath"). (A-48-51).

Little Rose, a Dubai-based grain merchant, was required to make an advance payment of 25% of the purchase price to Shivnath, an Indian grain merchant, pursuant to a purchase-and-sale rice contract. (A-21.) Little Rose asked a currency exchange house in Dubai, Al Fardan Exchange Co. ("Al Fardan"), to transmit a payment order to the State Bank of Mysore in India for the benefit of Shivnath. (A-25.) The payment was to be made through "intermediary banks" in New York – as international commercial transactions often are – Wachovia Bank, N.A. ("Wachovia") and JPMorgan Chase Bank, N.A. ("Chase").[1]

Vamvaship, a Cypriot vessel owner, had commenced an action in the Southern District to secure a London arbitration award against Shivnath, and in that connection had obtained an "*Ex Parte* Order for Process of Maritime Attachment" targeted at Shivnath's property in the District (the "Order of Attachment") (A-16-18). Pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims (the "Supplemental Rules"), "[i]f a

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[1] The court below stated that "both Wachovia and Chase acted as intermediary banks" (A-49), and for purposes of this brief The Clearing House will address the issues using that characterization. However, because it is not clear that Al Fardan is a bank, *see* N.Y. U.C.C. ("U.C.C.") § 4A-105(1)(b), it also is unclear whether Wachovia was the originator's bank or an intermediary bank. No one argues that the creditor (here Vamvaship) of an EFT beneficiary (here Shivnath) can reach funds at an originator's bank. The Clearing House maintains that, even if Wachovia was an intermediary bank, this should make no difference because under no circumstances was Wachovia holding property of the funds-transfer beneficiary, Shivnath.

defendant is not found within the district . . . , a plaintiff may seek "to attach the defendant's tangible or intangible personal property – up to the amount sued for – in the hands of garnishees named in the process." Fed. R. Civ. P. Supp. R. B(1)(a). Vamvaship served the Order of Attachment on Wachovia, among other garnishee banks, and, as a result, Wachovia "froze" the $290,000 payment that otherwise would have been executed, as described more fully below, in the form of a series of debits and credits, from Al Fardan to Wachovia, from Wachovia to Chase and then to the State Bank of Mysore, to be credited to the Defendant's account in India (A-25).

New York is a center of international funds transfers. To permit the funds-transfer process to function effectively, the law applicable to transfers passing through New York, Article 4A of New York's codification of the Uniform Commercial Code ("U.C.C."), plainly declares that intermediary banks are immune from attachment, specifically because an intermediary bank holds no property of the "originator" or the "beneficiary". *See* U.C.C. §§ 4A-502(4) & cmt. 4; 4A-503 & cmt. The policy embodied by these basic principles of funds-transfer law was acknowledged by this Court in pre-*Winter Storm* decisions, which recognized the considerable potential for disruption that the law of maritime attachment otherwise could have on international banking practice, *see Reibor Int'l Ltd.* v. *Cargo*

Carriers (KACZ-CO.), Ltd., 759 F.2d 262, 268 (2d Cir. 1985) ("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.* v. *Citibank, N.A.*, 160 F.3d 97, 102 (2d Cir. 1998) ("These are matters as to which an intermediary bank ordinarily should not have to be concerned and, if it were otherwise, would impede the use of rapid electronic funds transfers in commerce by causing delays and driving up costs.").

The operation of a funds-transfer system depends on observance of its rules, which are designed to promote efficiency and reliability; certainty is the bedrock of the system.

> In the drafting of these rules, a critical consideration was that the various parties to funds transfers need to be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately. This consideration is particularly important given the very large amounts of money that are involved in funds transfers.
>
> Funds transfers involve competing interests–those of the banks that provide funds transfer services and the commercial and financial organizations that use the services, as well as the public interest. These competing interests were represented in the drafting process and they were thoroughly considered. The rules that emerged represent a careful and delicate balancing of those

> interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article.

U.C.C. § 4A-102 cmt.

Nevertheless, the *Winter Storm* court disregarded prior decisions and the clear import of the U.C.C., and instead relied on *United States* v. *Daccarett*, 6 F.3d 37 (2d Cir. 1993), a forfeiture action under the federal drug laws, to conclude that an intermediary bank was holding property of the originator of a funds transfer. *See Winter Storm*, 310 F.3d at 278 ("It follows that the broad, inclusive language of Admiralty Rule B(1)(a) and the EFT analysis in *Daccarett* combine to fashion a rule in this Circuit that EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a).").[2] The result of *Winter Storm* was that banking customers were no longer assured of

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[2] Drug proceeds are "subject to forfeiture to the United States," such that "no property right shall exist in them." 21 U.S.C. § 881(a)(6). Without an applicable federal statute, the rules of property are determined by state law, *Butner* v. *United States*, 440 U.S. 48, 55 (1979), which directs that neither the originator nor the beneficiary has any property interest in a funds transfer at an intermediary bank. U.C.C. § 4A-502(4) & cmt. 4. Supplemental Rule B applies only to "defendant's property", none is present at an intermediary bank. Supplemental Rule C, used in *Daccarett*, and Rule B, used in *Winter Storm*, are only procedural; they do not create property rights where none existed under applicable law. To hold otherwise would violate the Rules Enabling Act, 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right.").

completing their funds transfers without judicial interference; the ruling thereby undermined the utility of dollar transfers through banks in the United States.[3]

However, less than two months ago, this Court took a step toward correcting *Winter Storm*. In *Aqua Stoli Shipping Ltd.* v. *Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006) (Walker, C.J.), this Court recognized the burden placed by *Winter Storm* on the funds-transfer system, leading banking institutions and the role of New York as an international financial center. *Id*. at 445 (noting widespread belief that *Winter Storm* "works an unfairness to litigants because EFTs to or from them can be attached despite the litigants' having no connection to the district at all, save that they happened to be a participant in a wire transfer of U.S. dollars"). The *Aqua Stoli* panel went so far as to say that "[t]he correctness of our decision in *Winter Storm* seems open to question," *id.* at 446 n.6, and that

> Because *Daccarett* was a forfeiture case, its holding that EFTs are attachable assets does not answer the more salient question of *whose* assets they are while in transit. In the absence of a federal rule, we would normally look to state law, which in this case would be the New York codification of the Uniform Commercial Code, N.Y. U.C.C. Law §§ 4-A-502 to 504. Under state law, the

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[3] As The Clearing House informed the Court in its *amicus curiae* brief in *Aqua Stoli*, in early February 2006, one Clearing House member, Citibank, N.A., had pending 70 active writs of maritime attachment (today it has 97) seeking to attach over $195 million. Another, Chase, received 70 such writs on February 1, 2006 alone. The specific numbers may have changed since February, but this problem remains.

> EFT could not be attached because EFTs are property of neither the sender nor the beneficiary while present in an intermediary bank. *Id.* §§ 4-A-502 cmt. 4, 4-A-504 cmt. 1.

Id. (emphasis in original).

The Clearing House respectfully submits 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.

Furthermore, in contrast to *Winter Storm*, where the party originating the funds transfer was the actual judgment debtor, the affected party in this case is an apparent bystander without any connection to the underlying dispute. Not only was the transfer interrupted, but the payment was frozen and, as a result of the attachment, Shivnath cancelled the rice contract. (A-35). Other similarly situated parties initiating funds transfers involving very significant sums that become attached indeed could face financial ruin. This is precisely the scenario that the Uniform Commercial Code is designed to avoid.

We urge this panel to overrule *Winter Storm*.[4]

[4] Panels of this Court have overruled prior opinions after providing notice to all active members of the Court. *See, e.g.*, *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

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Clearing House is an association of leading commercial banks that, through an affiliate, provides payment, clearing and settlement services to its member banks and other financial institutions.[5] 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.

(footnote continued)
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))); *cf. 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).

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, at *4 (S.D.N.Y. June 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*).

[5] The members of the Clearing House are: Bank of America, National Association; The Bank of New York; Citibank, N.A.; 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.

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

In addition, The Clearing House's affiliate, The Clearing House Payments Company, L.L.C., operates the Clearing House Interbank Payments System ("CHIPS"), a funds-transfer system that serves 46 U.S. and foreign banks and that each day processes over 300,000 payment orders, with an aggregate average value of $1.5 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.

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, inspired a cottage industry of swamping banks with multiple daily attachment orders, and created a significant

threat to the role of U.S. banks and New York in international payments. The Opinion below is but one of many post-*Winter Storm* examples of the unfairness worked on litigants who are forced to endure the expense of defending their rights in this country because they have chosen a U.S. dollar-based payment system, and the corresponding burden on intermediary banks, which are now flooded with attachment orders that are designed to disrupt 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 reversal on the instant appeal, but for a further re-examination of *Winter Storm*.

1. Background Regarding Funds Transfers

Funds transfers are 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). Most funds transfers flow through the system without human interaction. Present daily volumes average well over

$3 trillion.[6] Intermediary banks ordinarily process funds transfers in less than 60 seconds, barring interruption. Speed and certainty are the hallmarks of the system.

The rules governing the rights and obligations of parties to EFTs are set forth in Article 4A of the U.C.C. "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 other bank to make payment to the beneficiary." U.C.C. § 4A-104, cmt. 1. Often in funds transfers, the originator's bank is required to use an intermediary bank, *i.e.*, a bank that is neither the originator's bank nor the beneficiary's bank. U.C.C. § 4A-104(2).[7]

Properly understood, a funds transfer is a "series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order." U.C.C. § 4A-104(1). There is no "fund" or money that belongs to the originator or the beneficiary that passes from one bank to the other. Instead, when a bank receives a payment order from a customer,

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[6] *See* www.federalreserve.gov/PaymentSystems/coreprinciples/default.htm (FedWire); www.chips.org/docs/000652.xls (CHIPS).

[7] *See also Aqua Stoli*, 460 F.3d at 436 n.1, quoting *Daccarett*, 6 F.3d at 43-44, for a further description of EFTs and the role of intermediary banks.

it can accept the order by executing a corresponding payment order to the beneficiary's bank or to an intermediary bank. U.C.C. § 4A-209(1). If it does accept the order, it is obligated to pay the receiving bank, U.C.C. § 4A-402(2), (3), and it is entitled to payment of the amount of the order from the sender, U.C.C. § 4A-402(3), with payment often accomplished by a debit to the sender's account, U.C.C. § 4A-403(1)(c).

The intermediary bank usually has no relationship with either the originator or the beneficiary. The intermediary bank's relationships are only with, and its obligations are only to, other banks.[8] Indeed, a creditor may not serve process on an intermediary bank. U.C.C. § 4A-502(4) & cmt. 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." U.C.C. § 4A-502 cmt. 4, sentences 4 and 5.[9] Similarly, a creditor of a beneficiary cannot levy on property of the originator, not even at the

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[8] As this Court held in *Grain Traders*, *supra*, U.C.C. Article 4A prevents an originator of a funds transfer from suing an intermediary bank. 160 F.3d at 102. The logic applies to suits by beneficiaries as well. *See also* Federal Reserve System Regulation J, 12 C.F.R. Pt. 210.

[9] Because comment 4 to U.C.C. § 4A-502 is truncated in two places in several published versions, *see e.g.*, *Goldbook: New York Commercial Law* at 662 (2006 Bender Pamphlet Ed.), we recommend that the Court also review McKinney's *Uniform Commercial Code* (2001) regarding the references to the N.Y. U.C.C. herein.

beneficiary's bank until that bank 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, U.C.C. § 4A-503 & cmt., because it holds no property of either the originator or the beneficiary.

Additionally, U.C.C. Article 4A establishes as a matter of commercial law the time that final settlement and discharge of the sender's payment obligation in respect of a payment order occurs. Notably, Section 4A-403(2) and Section 4A-501 defer, as a matter of New York law, to the CHIPS rules. Recognizing the importance of this payment system, the legislatures of every state in the country (in the U.C.C.) and the Board of Governors of the Federal Reserve System (in Regulation J) have sought to assure its benefits by adopting a statutory or regulatory scheme that frees intermediary banks from concerns over attachment of funds transfers. Subverting 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 significant administrative burdens and the continuous risk of litigation.

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-transfer payment orders related to the defendant that might later pass through the bank. Defendant TPI 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 issued a payment order to its New York correspondent bank. The payment order was received in due course by the New York intermediary bank, which did not accept the payment order 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 U.C.C. §§ 4A-502 and 503. The Second Circuit reversed, stating that the Court earlier had determined in *Daccarett* that the amount of a funds transfer could be seized at an intermediary bank, 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.[10] *Winter Storm* cited no authority contradicting the 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.[11]

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.[12] As a consequence, U.S. banks' role, and New York City's role, in this international payment system has been undermined.

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[10] Under 21 U.S.C. § 881(a)(6), drug proceeds are "subject to forfeiture to the United States" such that "no property right shall exist in them."

[11] 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 its sender. *See* U.C.C. § 4A-402(4); *Grain Traders*, 160 F.3d at 102.

[12] "[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 102. And 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.

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 payment order relating to the charterer. The question was whether such process was valid. The court found no federal precedent on point and, turning to state law, held that such a levy was "absolutely void."[13] Since *Reibor*, therefore, the rule in this Circuit is that a maritime attachment served when the garnishee holds no property

[13] In *Butner* v. *United States*, *supra*, the Supreme Court held that "[p]roperty interests are created and defined by state law." 440 U.S. at 55. 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, *see id*. at 56, a principle that the Court overlooked, and thereby effectively contradicted, in *Winter Storm*.

of the defendant is absolutely void.[14] 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. [15]

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[14] 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; the effectiveness of an attachment when the funds transfer was being processed at the bank remained to be decided.

[15] 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 law was to the contrary. Judge Haight concluded that if a defendant's bank account was property subject to

Winter Storm subsequently has been expanded into a virtual vacuum cleaner for funds transfers through New York banks. *Winter Storm's ipse dixit* determination that an intermediary bank holds property of an originator permits maritime plaintiffs to wreak havoc on the funds-transfer process. Major banks in New York face being served with maritime writs of attachment several dozen times a day. At each such occasion, the bank would be required to review its records and, under the terms of the writs as they are currently being issued, the process is effective until the next business day and renewable by facsimile. (*See* A-17). To meet this burden, banks are forced to amend their Office of Foreign Assets Control ("OFAC") filters, 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 formulate appropriate administrative processes.[16] The process is not error-free.

(footnote continued)
attachment, he could find no basis for regarding a funds transfer any differently. 310 F.3d at 276. In fact, the laws regarding bank accounts and funds transfers are quite different. Neither the plaintiff nor defendant in *Winter Storm* had any claim against the intermediary bank, or against the amount of a funds transfer passing through it.

[16] 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

And, as has been made painfully obvious to Little Rose, 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. The Opinion Below

In this case, Little Rose moved to vacate the Order of Attachment, arguing that (1) seizure of the funds violated U.C.C. § 4A-502(4), (2) the Defendant did not have an attachable property interest in the funds transfer at issue and (3) equitable considerations favored vacating the Order of Attachment. (A-49).

The District Court denied Little Rose's motion, holding that the *Winter Storm* panel's ruling that "funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a)" was controlling, and that the

(footnote continued)
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.

hardship imposed on Little Rose by the combination of losing its funds *and* the benefit of its contract with Shivnath did "not provide sufficient reason to vacate an otherwise valid attachment." (A-49-51).

Particularly in light of *Aqua Stoli*, *supra*, where this Court took a step toward addressing "the problems associated with *Winter Storm*," 460 F.3d 446 & n.6, The Clearing House respectfully submits that this case presents the Court with an opportunity to take a second and final step toward restoring confidence in the safety of commercial transactions entailing payments passing through the United States. *See*, *e.g.*, *Grain Traders*, 160 F.3d at 102 ("One of Article 4A's primary goals is to promote certainty and finality so that 'the various parties to funds transfers [will] be able to predict risk with certainty . . . .'" (quoting U.C.C. § 4A-102, cmt.)). The vitality of the financial markets themselves and, more broadly, of the role of the U.S. dollar globally, are at stake.

ARGUMENT

As *amicus curiae*, The Clearing House respectfully suggests that this Court continue down the road paved by the *Aqua Stoli* panel and definitively overrule *Winter Storm*. At the least, the appeal by Little Rose should be upheld.

A. THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL.

This Court does have jurisdiction to hear this appeal under 28 U.S.C. § 1292(a)(3) and the *Cohen* doctrine. This Court has jurisdiction under 28 U.S.C. § 1292(a)(3) because, as a practical matter, the determination of the property interest in the attached funds transfer is in reality a final determination of the rights and liabilities as between Plaintiff and Movant-Appellant Little Rose. *See Kingstate Oil* v. *M/V Green Star*, 815 F.2d 918, 921 (3d Cir. 1987). The cases denying review of an order declining to lift an attachment, *e.g.*, *Drys Shipping Corp.* v. *Freights, Sub-Freights, Charter Hire*, 558 F.2d 1050 (2d Cir. 1977), are inapposite to the extent that those orders affect the rights and liabilities of *parties* prior to the final determination of the merits of the underlying claim. Moreover, those cases involved attachment of property that was conceded to be property of the party defendant, who would continue to litigate with the plaintiff. None of the cases involved a motion by a third party to set aside the order of attachment because, as here, the property attached did not belong to the defendant. Little Rose's argument to set aside the attachment will receive no further consideration below. The District Court denied the motion and directed the clerk to close the motion and remove it from the docket. (A-3, A-51). In addition, defendant Shivnath has not appeared and Vamvaship has moved to enter a default. (A-3,

dkt. entries 6-8). Under the circumstances, this Court is Little Rose's only opportunity for consideration of this collateral issue, finally determined below. Appellate jurisdiction should be sustained.

Moreover, Judge Baer's order is appealable under the "collateral order doctrine" established in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); by closing Little Rose's motion and removing it from the District Court docket, the Court's Opinion (i) "conclusively determine[d] the disputed question"; (ii) "resolve[d] an important issue completely separate from the merits of the action"; and, as clearly demonstrated by Little Rose's loss of its contract with Defendant, (iii) is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).

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

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 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 all 52 jurisdictions that have adopted the Uniform Commercial Code. Additionally, the Clearing House urges the Court to consider overruling *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 permitting 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, the plaintiffs have no cause of action against the banks. The property is considered forfeited at the moment the illegal act is committed." (citing 18 U.S.C. § 981(b) & 21 U.S.C. § 881(h))), *aff'd*, 47 F.3d 1159 (2d Cir. 1995). And, because the funds were forfeitable to the government, it did not matter at what stage of the EFT the funds were attached.

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) (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.[17]

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[17] Significantly, *Daccarett* also barred the claimants from taking any position on the banks' release of financial information to the government because the claimants were not customers of the intermediary banks 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 Supplemental Rule (B)(1), however, it is not enough that the amount of a funds transfer constitutes a seizable *res* (which is the case in the federal forfeiture statute), it must constitute the *defendant's* seizable *res*. We respectfully submit that the Court was in error by relying on *Daccarett* and not analyzing the property interests at stake. *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, at *13 (S.D.N.Y. May 4, 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."). *Aqua Stoli* strongly suggests that this Court now agrees.

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.[18] The analysis was incorrect, however, because the amount of a funds transfer at an intermediary bank is not the property of the originator or the beneficiary. Neither has a claim to it. *Grain Traders*, 160 F.3d at 102; U.C.C. §§ 4A-502 & 503 and comments thereto.

2. Property Interests are Derived from State Law.

Contrary to *Winter Storm*, Supplemental 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.”). In the absence of federal law, such as a forfeiture law, courts turn to state law for guidance. *See Det Bergenske Dampskibsselskab* v. *Sabre Shipping Co.*, 341 F.2d 50, 53 (2d 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. *See Delaware* v. *New York*, 507 U.S. 490, 501-502 (1993) (“‘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.’” (quoting *Board of Regents of State*

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[18] Ironically, in this case the District Court relied on *Winter Storm* to determine that the EFT was property not of the originator, but of the defendant beneficiary.

Colleges v. *Roth*, 408 U.S. 564, 577 (1972))); *In re Rodgers*, 333 F.3d 64, 66 (2d Cir. 2003). Federal courts rely on state law to establish property rights in a variety of fields. *See Butner* v. *United States*, 440 U.S. 48 (1979) (bankruptcy); *In re Rodgers*, *supra* (tax); *SEC* v. *Credit Bancorp, Ltd.*, 279 F. Supp. 2d 247, 261 (S.D.N.Y. 2003) (receivership).

New York and every other state has adopted the Uniform Commercial Code, which prohibits "interruption of a funds transfer after it has been set in motion." U.C.C. § 4A-503, cmt. Article 4A expressly does not allow for attachment of funds at an intermediary bank. *Id.* ("In particular, intermediary banks are protected . . . ."). Although *Winter Storm* quoted the U.C.C., *see* 310 F.3d at 279, it ignored the substance, particularly 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.[19]

Furthermore, Article 4A has been adopted by the Board of Governors of the Federal Reserve System and thus is federal law governing payments through Fedwire. *See* Federal Reserve System Regulation J, 12 C.F.R. Pt. 210. One of the

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[19] *Winter Storm* does not mention U.C.C. § 4A-502.

primary goals behind Regulation J is uniformity in the law applicable to all funds transfers. *See id*. In the wake of *Winter Storm*, there is a risk that funds transfers would be treated differently based on whether the funds are wired through CHIPS or through Fedwire – exactly the situation the federal government sought to avoid.

State law outside Article 4A does not support attachment of an EFT. Under some circumstances, certain contract rights may be attachable, but Article 4A could not be more clear that no party has a contract or any other right against an intermediary bank in an EFT except the bank that sent it a payment order, and then only if the EFT is not properly executed or not completed for a reason not excused under law. U.C.C. § 4A-402(4). The drafters of Article 4A, and the legislature that enacted it, specifically wrote the statute and added comments to clarify that state law permits no other result. Unless there is superseding federal law, such as a drug forfeiture law (*Daccarett*) or an OFAC regulation (*see The Bank of New York* v. *Norilsk Nickel*, 789 N.Y.S.2d 95 (App. Div. 2004)), Article 4A must be honored. Supplemental Rule B does not change that principle – Rule B is a procedure, not a property right. Ironically, to treat Rule B as establishing a property right, as *Winter Storm* did, would give Rule B substantive force, which is barred not only by state law but by federal law,

the Rules Enabling Act. 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right.").

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

The *ipse dixit* statement in *Winter Storm*, contrary to applicable state law, that the originator has a property interest in an EFT at an intermediary bank, has been the basis for subsequent district court decisions holding that an EFT at an intermediary bank also is property of the beneficiary. *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) is an example. On the basis of *Winter Storm* and *Daccarett*, *Noble Shipping* concluded that an EFT at an intermediary bank is attachable property of the beneficiary, even though *Winter Storm* held it was attachable property of the originator. Whereas the applicable law says an EFT at an intermediary bank is property of neither the originator nor the beneficiary, U.C.C. § 4A-502(4) & cmt. 4, Supplemental Rule B is being used to create property in both, contrary to the Rules Enabling Act. 28 U.S.C. § 2072(b).

In *HBC Hamburg*, the District Court conceded that holding that an attachment of an EFT at an intermediary bank as property of either the originator or the beneficiary "might appear peculiar," but maintained that it is the "logical

result" of *Winter Storm's* interpretation of Supplemental Rule B. 2005 U.S. Dist. LEXIS 8009, at *14. This telling conclusion underscores the confusion *Winter Storm* has fostered by creating property rights in contradiction of both state and federal law.

This boundless concept of property cannot be sustained. *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))). In fact, the amount of a funds transfer at an intermediary bank is not property of, nor subject to claims by, either the originator or the beneficiary. U.C.C. § 4A-502, cmt. 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 uses a New York bank.

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. 2d 385, 391 (S.D.N.Y. 2002) (Scheindlin, J.). The appellate panel dismissed that concern, reasoning that the 1985 amendments to Supplemental 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 do not involve any seizable property of the defendant while being processed at an intermediary bank. A funds transfer processed 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." U.C.C. § 4A-502, cmt. 4; *see also* § 4A-503. 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.

5. The Appeal of Little Rose Should Be Sustained.

The holding of *Winter Storm* is bad enough; the hardship imposed on Little Rose is worse. In *Winter Storm*, the defendant (TPI) was the originator of the transfer, and the impact of the decision was that TPI involuntarily paid its creditor (Winter Storm) rather than its contract party (OPPSAL), the intended beneficiary of the funds transfer. Little Rose has no such "comfort." The transfer has not gone to Little Rose's contract party, it has lost the benefit of the contract, and the intermediary bank now is blocking the transfer under a court order obtained by Vamvaship with which, so far as the record reveals, Little Rose never dealt. *Winter Storm* justified its result by saying that it regarded funds at the intermediary bank as for the account of the originator, when the defendant TPI was the originator. Applying that analysis here, the funds held by the intermediary

bank would belong to Little Rose. As noted, applicable law says the EFT is property of neither the originator nor the beneficiary.

The disappointing fact is that this Court, historically the leading federal commercial court in the country, has created a cottage attachment industry, founded on mistaken analysis, with ever-expanding adverse ramifications. Decisions by district courts in this Circuit now pay little or no attention to whose property is involved in a funds transfer. *Winter Storm* says it is the originator's property; the court below says it is the beneficiary's; some courts even held that an EFT belongs to both. *See Noble Shipping*, *supra*; *HBC Hamburg*, *supra*. The applicable state law is being ignored, to the detriment of innocent maritime parties, the banks whose business requires a dependable funds-transfer system, and international maritime commerce in U.S. dollar transactions in particular.

CONCLUSION

For the reasons stated herein, *Amicus Curiae* The Clearing House Association L.L.C. respectfully urges the Court to reverse the District Court's opinion in *Vamvaship Maritime Ltd.* v. *Shivnath Rai Harnarain (India) Ltd*, No. 06 Civ. 1849 (HB), 2006 WL 1030227 (S.D.N.Y. Apr. 20, 2005), and to revisit and overrule its previous opinion in *Winter Storm Shipping, Ltd.* v. *TPI*, 310 F.3d 263 (2d Cir. 2002).

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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 6,601 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: October 2, 2006
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ANTI-VIRUS CERTIFICATION

Case Name: Vamvaship Maritime v. Little Rose

Docket Number: 06-2121-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 10/3/2006) and found to be VIRUS FREE.

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