07-0833-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CONSUB DELAWARE LLC,

Plaintiff-Appellee,

—against—

SCHAHIN ENGENHARIA LIMITADA,

Defendant-Appellant,

STANDARD CHARTERED BANK,

Garnishee.

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 DEFENDANT-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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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF INTEREST OF AMICUS CURIAE 9

BACKGROUND 11

1. Background Regarding Funds Transfers 12

2. The Burden of the Current Maritime Attachment Process in this Circuit 15

3. The Decision Below 15

ARGUMENT 16

I. THE CLEARING HOUSE RESPECTFULLY CONTENDS THAT THIS COURT SHOULD OVERRULE ITS DECISION IN *WINTER STORM* AND VACATE THE ORDER BELOW 17

1. *Winter Storm's* Reliance on *Daccarett* Was in Error 18

2. Supplemental Rule B Does Not Create Property Right............22

II. *WINTER STORM* FAILED PROPERLY TO ADDRESS THE DUE PROCESS CONCERNS INHERENT IN THE ATTACHMENT OF FUNDS TRANSFERS 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Page(s)

Adeleke v. *United States*,
355 F.3d 144 (2d Cir. 2004) 9

AET Inc. Ltd. v. *Procuradoria de Servicos Martimos Cardoso & Fonesca*,
464 F. Supp. 2d 241 (S.D.N.Y. 2006) 6

Amoco Overseas Oil Co. v. *Compagnie Nationale Algerienne de Navigation*,
605 F.2d 648 (2d Cir. 1979) 27

Aqua Stoli Shipping Ltd. v. *Gardner Smith Pty Ltd*,
460 F.3d 434 (2d Cir. 2006) .... *passim*

The Bank of New York v. *Norilsk Nickel*,
14 A.D.3d 140, 789 N.Y.S.2d 95 (1st Dep't 2004)..................................22, 24

Banque Worms v. *BankAmerica Int'l*,
77 N.Y.2d 362, 568 N.Y.S.2d 541 (1991)... 11-12

Burda Media, Inc. v. *Viertel*,
417 F.3d 292 (2d Cir. 2005) 9

Burlington Northern R. Co. v. *Woods*,
480 U.S. 1 (1977)..23

Butner v. *United States*,
440 U.S. 48 (1979)...17, 21

Caplin & Drysdale, Chartered v. *United States*,
491 U.S. 617 (1989)..19

Compania Sudamericana de Vapores S.A. v. *Sinochem Tianjin Co.*,
No. 06 Civ. 13765(WHP), 2007 WL 1002265 (S.D.N.Y. Apr. 4, 2007)..........6

Page(s)

Delaware v. *New York*,
507 U.S. 490 (1993) 21

European American Bank v. *Bank of Nova Scotia*,
12 A.D.3d 189, 784 N.Y.S.2d 99 (1st Dept. 2004) 13

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

Hanna v. *Plummer*, 380 U.S. 460 (1965) 23

J. Lauritzen A/S v. *Dashwood Shipping, Ltd.*,
65 F.3d 139 (9th Cir. 1995) 20

Manufacturas Int'l, LTDA v. *Mfrs. Hanover Trust Co.*,
792 F. Supp. 180 (E.D.N.Y. 1992),
aff'd, 47 F.3d 1159 (2d Cir. 1995) 19-20

Navalmar (U.K.) Ltd. v. *Welspun Gujarat Stahl Rohren, Ltd*.,
485 F. Supp. 2d 399 (S.D.N.Y. 2007) 24

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) 21

Seamar Shipping Corp. v. *Kremikovtzi Trade Ltd.*,
461 F. Supp. 2d 222 (S.D.N.Y. 2006) 6-7

Shaffer v. *Heitner*,
433 U.S. 186 (1977) 27

Sonito Shipping Co. Ltd. v. *Sun United Maritime Ltd.*,
478 F. Supp. 2d 532 (S.D.N.Y. 2007) 23

Szabo v. *Vinton Motors, Inc.*,
630 F.2d 1 (1st Cir. 1980) 14

Page(s)

United States v. *92 Buena Vista Avenue*,
507 U.S. 111 (1993) 20

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

United States v. *Komisaruk*,
874 F.2d 686 (9th Cir. 1989) 25

United States v. *Piervinanzi*,
23 F.3d 670 (2d Cir. 1994) 25

Vamvaship Maritime Ltd. v. *Shivnath Rai Harnarain (India) Ltd.*,
No. 06 Civ. 1849(HB), 2006 WL 1030227 (S.D.N.Y. Apr. 20, 2006) 8

W. Pac. R. Corp. v. *W. Pac. R. Co.*,
345 U.S. 247 (1953) 9

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

In re Yale Exp. System, Inc.,
370 F.2d 433 (2d Cir. 1966) 14

STATUTES, REGULATIONS AND RULES

21 U.S.C. § 881 .... 3, 19

28 U.S.C. § 2072 22-23

U.C.C. § 4A-102, comment 11

U.C.C. § 4A-104 .... 13, 24

U.C.C. § 4A-209 .... 13, 24

U.C.C. § 4A-402 13

Page(s)

U.C.C. § 4A-403 13

U.C.C. § 4A-404 24

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

U.C.C. § 4A-503 and comment 3, 14, 22, 24

Federal Reserve System Regulation J, 12 C.F.R. Pt. 210 14

Fed. R. App. P. 35(a) 9

Fed. R. Civ. P. Supp. R. B .... *passim*

OTHER AUTHORITIES

Fed. R. Civ. P. Supp. R. G advisory committee's note 2

George Arceneaux III, *Has Shaffer v. Heitner Been Lost At Sea?*, 46 La. L. Rev. 141 (1985) 27-28

www.chips.org/docs/000652.xls 10

www.federalreserve.gov/paymentsystems/fedwire/fedwirefundstrfqtr.htm 11

INTRODUCTION

The Clearing House Association L.L.C. (the "Clearing House") submits this brief as *amicus curiae* in support of Defendant-Appellant Schahin Engenharia Limitada's ("Schahin") appeal from an Opinion and Order entered by the United States District Court for the Southern District of New York (Scheindlin, J.) on February 13, 2007 (the "Opinion") denying Schahin's motion to vacate an *ex parte* order for process of maritime attachment (A-182-200).[1] The District Court, observing that this Court in *Aqua Stoli Shipping Ltd.* v. *Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006) (Walker, C.J.), "essentially invited parties to challenge the underpinnings of its prior holding" in *Winter Storm Shipping Ltd*. v. *TPI*, 310 F.3d 263 (2d Cir. 2002), *cert. denied*, 539 U.S. 927 (2003), certified its order for an immediate appeal and directed the Clerk of the Court to close the relevant motions. *Consub Delaware LLC* v. *Schahin Engenharia Limitada*, 476 F. Supp. 2d 305, 313, 314 (S.D.N.Y. 2007) (A-198, 199).

In *Winter Storm*, a panel of this Court held that Rule B(1)(a) of the then Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule B") permitted attachment of an electronic funds transfer ("EFT" or "funds transfer") request received by an intermediary bank as property of the "originator" of the

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1 The parties have consented to the filing of this *amicus curiae* brief. *See* FRAP 29.

EFT. Rule B permits a plaintiff to attach an absent admiralty defendant's "tangible or intangible personal property."[2]

Winter Storm did not follow established precedent, discussed *infra*, directing courts to apply state law if there is no relevant federal law determining an admiralty defendant's prerequisite interest in property. Rather, *Winter Storm* relied on *United States* v. *Daccarett*, 6 F.3d 37 (2d Cir. 1993), and held 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.'" 310 F.3d at 278 (quoting *Daccarett*, 6 F.3d at 55). The Court failed to note, however, that *Daccarett*, a forfeiture action under the federal drug laws, did not address whether the obligations created by an EFT are property of either the originator or the beneficiary of a funds transfer. That issue, although determinative in *Winter Storm* as here, was irrelevant under the forfeiture statutes, because the funds subject to attachment were the property of the

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[2] Rule B remains unchanged for all relevant intents and purposes since *Winter Storm* was decided in 2002. However, effective December 1, 2006, the rules embodying the practice of maritime attachment in civil forfeiture actions and other *in rem* proceedings have been aptly renamed the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the "Supplemental Rules"). In addition to the name change to include the reference to "Asset Forfeiture Actions," the revised Supplemental Rules added, *inter alia*, Rule G, governing forfeiture actions *in rem* arising from a federal statute, "to bring together the central procedures that govern civil forfeiture actions." Supplemental Rule G, Advisory Committee's Note.

government.[3] Under Rule B, 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 *Winter Storm* was in error by relying on *Daccarett* and not analyzing the property interests at stake.

State law directly applicable to funds 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 beneficiary of a funds transfer. *See* U.C.C. §§ 4A-502(4) & cmt. 4; 4A-503 & cmt. There is no contrary federal law or pre-*Winter Storm* decision, and *Winter Storm* cited none.

These critical errors in *Winter Storm* were recognized in *Aqua Stoli*, *supra*, where another panel of this Court 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

[3] 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).

> 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 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).

In addition to questioning the correctness of the central holding in *Winter Storm*, the *Aqua Stoli* panel further acknowledged 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").

Pre-*Winter Storm* decisions by this Court recognized the considerable potential for disruption that the law of maritime attachment otherwise could have on international commerce conducted through New York banks, *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.").

Notwithstanding the U.C.C.'s clear resolution of this issue and the sound policy upon which it is based, financial institutions operating in New York and commercial entities with any dealings with a company engaged in maritime commerce now are forced to contend with *Winter Storm*'s direct and palpable impact on international banking practice. Indeed, foreign entities that choose the U.S. dollar as a means of payment are being forced to defend against Rule B attachments in New York simply because that choice results in the seizure of the amount of a funds-transfer payment order received by an intermediary bank in this jurisdiction. To the extent that the entity claiming to have a property interest in a frozen EFT has no other material contact with New York, establishing *quasi in rem* jurisdiction over the entity solely by the seizure of a funds-transfer order is contrary to due process.

Despite *Aqua Stoli*, and absent a clearer directive from this Court, district courts, including the court below, are reluctant to question *Winter Storm*'s erroneous holding that "EFT funds in the hands of an intermediary bank may be attached pursuant to [Rule B]." 310 F.3d at 278. Several post-*Aqua Stoli* decisions involving attempts to attach the amount of an EFT have concluded that the district courts remain bound by *Winter Storm*, and some even have extended its holding to apply to cases where the judgment debtor is the beneficiary, not the originator, of a funds-transfer order.[4] The extraordinary legal fiction that a *res* could at the same time be "property" of both the originator and the beneficiary underscores the confusion *Winter Storm* has fostered, and cannot be sustained.[5]

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[4] *See*, *e.g.*, *Compania Sudamericana de Vapores S.A.* v. *Sinochem Tianjin Co.*, No. 06 Civ. 13765(WHP), 2007 WL 1002265, at *4 (S.D.N.Y. Apr. 4, 2007) (denying motion to vacate attachment brought by the intended beneficiary of funds transfer, because "[i]t is undisputed . . . that *Aqua Stoli* ultimately reaffirmed the holding of *Winter Storm* that EFT funds in the hands of an intermediary bank qualify as property subject to attachment under Rule B(1)(a)") (citing cases); *AET Inc. Ltd.* v. *Procuradoria de Servicos Martimos Cardoso & Fonesca*, 464 F. Supp. 2d 241, 245 (S.D.N.Y. 2006) ("Under *Winter Storm*, the EFTs, which were intended for Proc, are Proc's property and therefore are subject to AET's Order of Attachment.").

[5] In contrast, at least one district court has noted that "[t]he Second Circuit has not spoken with one voice, however, on whether an EFT in the hands of an intermediary bank can be said to be a 'defendant's' property, where the defendant is *either the originator or the intended beneficiary of the EFT*." *Seamar Shipping Corp.* v. *Kremikovtzi Trade Ltd.*, 461 F. Supp. 2d 222, 224 (S.D.N.Y. 2006) (Rakoff, J.) (emphasis added). In *Seamar*, Judge Rakoff went on to apply the exact analysis suggested by *Aqua Stoli*: finding no federal admiralty law in point on the validity of the Rule B attachment of an EFT, the district court looked to state law – in the funds-transfer context, Article 4A of the U.C.C. – for guidance. 461 F. Supp. 2d at 226. New York law provides that "*until the funds transfer is completed* by acceptance by the beneficiary's

(*footnote continued*)

The consequences of *Winter Storm* have been drastic. In February 2006, one member of the Clearing House, Citibank, had pending 70 active writs of maritime attachment, seeking to attach over $195 million. Citibank was served with 435 new writs in 2006, up from 21 in 2004, and has to date been served with 421 new writs in 2007. JP Morgan Chase Bank was served with an average of 138 writs of maritime attachment *per day* during a week in June 2007. Wachovia Bank has been served in 2007 with an average of 210 writs per day, seeking attachment of over $500 million. UBS was served with 272 writs per week in June 2007, and the aggregate dollar amount of active writs at UBS exceeds $267 million. On July 16, 2007, The Bank of New York received 209 writs seeking to attach $528 million. On July 19, 2007, Deutsche Bank was served with 161 writs, and Bank of America was served with 209 seeking attachment of nearly $495 million.

By redesigning the landscape of maritime attachment in New York, *Winter Storm* has inspired a cottage industry of swamping banks with multiple

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(*footnote continued*)
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 (emphasis added). Accordingly, Judge Rakoff concluded that the judgment debtor, the beneficiary of the funds transfer at issue in *Seamar*, "had no property interest in the attached EFT, as [Rule B] requires," and vacated the attachment order. *Id*. This Court had order the appeal of *Seamar* to be heard in tandem with this case, but the appellant recently moved to withdraw the appeal (*Seamar Shipping Corp.* v. *Kremikovtzi Trade Ltd.*, No. 06-5470-mv, July 24, 2007). On July 26, 2007, the defendant-appellee noticed its objection to the voluntary dismissal of the *Seamar* appeal.

daily attachment orders, creating an additional threat to the role of U.S. financial institutions and New York's standing as a center of international funds transfers. And, every time a funds transfer is interrupted, a commercial transaction that depended on the efficiency of the funds-transfer process is put at risk.[6]

One significant problem for banks is that the only practical way in which they can effectuate the post-*Winter Storm* attachments is by frequent amendments to their software screens that list entities and other persons whose financial transactions must be blocked by banks. The Office of Foreign Assets Control ("OFAC") in the U.S. Department of the Treasury administers U.S. economic sanctions programs arising under the Trading With the Enemy Act, 50 U.S.C. app. § 5, the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706, and other statutes. The process of constantly amending the software screens to deal with this flood of maritime attachments has greatly increased the number of "hits", including numerous false hits, that the screens now generate, creating real risks of inefficiency and error not only in the day-to-day

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6 For example, *Vamvaship Maritime Ltd.* v. *Shivnath Rai Harnarain (India) Ltd.*, No. 06 Civ. 1849(HB), 2006 WL 1030227 (S.D.N.Y. Apr. 20, 2006), involved the attachment of a funds-transfer order requested by Little Rose Trading LLC – a third party with no connection to the dispute underlying that action – in payment of its obligations under a rice contract entered into with the defendant. The rice contract was cancelled as a result of the attachment, imposing a significant hardship on Little Rose, an innocent bystander. *Id*. at *3. That appeal too was withdrawn days before it was to be heard by this Court. (*See Vamvaship Maritime Ltd.* v. *Shivnath Rai Harnnarain (India) Ltd.*, No. 06-2121-cv, Mar. 15, 2007).

processing of funds-transfer payment orders, but in the banks' compliance with OFAC regulations.[7]

In *Aqua Stoli*, this Court took a significant step toward correcting *Winter Storm*. We urge this Court now to complete this process and to overrule *Winter Storm*.[8]

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.[9] The Clearing House regularly

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[7] After *Winter Storm*, and contrary to this Court's holding in *Reibor*, many attachment orders provide that the order is effective until the opening of the next business day, and may be renewed by facsimile or e-mail service. Some banks have agreed to accept such service, subsequent to original service by hand, because otherwise process servers retained by maritime plaintiffs simply reappear at the bank throughout each day with copies of the same process, thereby further threatening the integrity of the OFAC filter.

[8] Panels of this Court have overruled prior opinions after providing notice either to the judges on the panels that issued the prior decisions, *see Burda Media, Inc.* v. *Viertel*, 417 F.3d 292, 298 & n.5 (2d Cir. 2005), or to all active members of the Court, *see Adeleke* v. *United States*, 355 F.3d 144, 155 n.9 (2d Cir. 2004).

The Court also could recommend the issue for *en banc* review, which the Clearing House would support. *See* Fed. R. App. P. 35(a); *W. Pac. R. Corp.* v. *W. Pac. R. Co.*, 345 U.S. 247, 262 (1953) (recognizing Court of Appeals panel's right to initiate *en banc* hearing *sua sponte*).

[9] 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.

appears as *amicus curiae* 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 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 position as leading financial institutions. Numerous other 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 330,000 payment orders, with an aggregate average daily value of $1.824 trillion as of June 29, 2007.[10] CHIPS and Fedwire, which is operated by the Federal Reserve Banks, are the principal payment systems

[10] *See* www.chips.org/docs/000652.xls.

for international funds transfers in the United States.[11] Present daily volumes of all funds transfers passing through, or ending in, New York average over $4.2 trillion.

BACKGROUND

New York is a center of international funds transfers. 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.

> 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. *See also Banque Worms* v. *BankAmerica Int'l*, 77 N.Y.2d 362, 372, 568 N.Y.S.2d 541, 547 (1991) ("National uniformity in the treatment of

[11] Average daily funds transfers using Fedwire amounted to $2.437 trillion in the first quarter of 2007. *See* www.federalreserve.gov/paymentsystems/fedwire/fedwirefundstrfqtr.htm.

electronic funds transfers is an important goal [of Article 4A of the U.C.C.], as are speed, efficiency, certainty . . . and finality.”).

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. As a consequence, financial institutions operating in the United States, and New York City’s role, in this international payment system have been undermined.

1. Background Regarding Funds Transfers

Funds transfers have long been 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 Banque Worms*, 77 N.Y.2d at 369, 568 N.Y.S.2d at 545 (“Electronic funds transfers have become the preferred method utilized by businesses and financial institutions to effect payments and transfers of a substantial volume of funds.”). Intermediary banks ordinarily process funds transfers in less than 60 seconds, barring interruption. Speed and certainty are the hallmarks of the system.

Properly understood, a funds transfer involves 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, it can

accept the order by executing a corresponding payment order to the beneficiary's bank or to another 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 usually accomplished by a debit to the sender's account, U.C.C. § 4A-403(1)(c).

Often in funds transfers, the originator's bank is required to use an intermediary bank, *i.e.*, a bank that has no relationship with either the originator or the beneficiary. U.C.C. § 4A-104(2). An intermediary bank's relationships are only with, and its obligations are only to, other banks.[12] Indeed, a creditor may not serve process on an intermediary bank. U.C.C. § 4A-502(4) & cmt. 4; *see also European American Bank* v. *Bank of Nova Scotia*, 12 A.D.3d 189, 190, 784 N.Y.S.2d 99, 100-01 (1st Dept. 2004). 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.

[12] 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. *Grain Traders* remains good law in this circuit.

§ 4A-502 cmt. 4, sentences 4 and 5.[13] 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.[14]

Furthermore, Article 4A of the U.C.C. has been adopted by the Board of Governors of the Federal Reserve System and thus is federal law governing funds transfers through Fedwire. *See* Federal Reserve System Regulation J, 12 C.F.R. Pt. 210. One of the 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 a funds transfer payment order is sent through CHIPS or through Fedwire – exactly the non-uniform situation the federal government sought to avoid.

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[13] 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 U.C.C. herein.

[14] The "Official Comments" of the Uniform Commercial Code "are powerful dicta for the Code is 'well on its way to becoming a truly national law of commerce,' and is, therefore, as we have noted, a most appropriate source of federal law." *In re Yale Exp. System, Inc.*, 370 F.2d 433, 437 (2d Cir. 1966) (citation omitted); *see also Szabo* v. *Vinton Motors, Inc.*, 630 F.2d 1, 4 (1st Cir. 1980) (comments are powerful dicta).

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

Winter Storm 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 disrupt the funds-transfer process. Major banks in New York face being served with maritime writs of attachment several dozen times a day. *See* p. 7, *supra*.

The impact of this Court's opinion in *Winter Storm* on major New York banks has far exceeded the level of interference with funds transfers that could have been foreseen at the time of the ruling. The present appeal presents the Court with an opportunity to take a final step toward restoring confidence in the integrity 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.)).

3. The Decision Below

Plaintiff-Appellee obtained an *ex parte* order for process of maritime attachment on November 14, 2006. (A-20-22). By serving the order on multiple

financial institutions in New York – as has been the habit of maritime plaintiffs since *Winter Storm* – Plaintiff-Appellee managed to attach $4 million, the amount of a funds transfer payment order received by Standard Chartered Bank from its customer, a Brazilian bank, that was originated by Defendant-Appellant Schahin to make payment to a third party's dollar account in Switzerland. 476 F. Supp. 2d at 308 (A-185).

On December 15, 2006, Defendant-Appellant Schahin moved, by order to show cause pursuant to Supplemental Rule E(4)(f), to vacate the attachment order, *inter alia*, because the restrained funds transfer was not Schahin's "property," and thus not subject to attachment under Rule B. *Id.* at 310 (A-190). Concluding that *Winter Storm* remained "good law and binding on this Court," Judge Sheindlin denied the motion on February 13, 2007. *Id.* at 311 (A-192).

On April 20, 2007, the Court granted Schahin's Petition for Permission to Appeal in this Court pursuant to 28 U.S.C. § 1292(b). (A-203).

ARGUMENT

As *amicus curiae*, the Clearing House respectfully suggests that *Winter Storm* should be overruled, because it is wreaking havoc on the efficiency and reliability of the funds-transfer system in New York, and the opinion

improperly relied on forfeiture principles, instead of Article 4A of the U.C.C., to determine the property interests in a funds transfer. Moreover, *Winter Storm* failed to take adequate account of the due process concerns raised by permitting funds-transfer credits to be attached at intermediary banks, essentially preventing victims of *Winter Storm* from objecting to the personal jurisdiction of the district courts.

I. THE CLEARING HOUSE RESPECTFULLY CONTENDS THAT THIS COURT SHOULD OVERRULE ITS DECISION IN *WINTER STORM* AND VACATE THE ORDER BELOW.

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 interests were not at issue, to define the property interests in a funds transfer. 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 at 266, and because "[p]roperty interests are created and defined by state law," *Butner* v. *United States*, 440 U.S. 48, 55 (1979), 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. *Winter Storm's* Reliance on *Daccarett* Was in Error.

Looking for a federal precedent concerning the "susceptibility of funds involved in an EFT to attachment under Admiralty Rule B," *Winter Storm* turned to *Daccarett*, a forfeiture case involving the drug trafficking and money laundering activities of a Colombian drug cartel. 310 F.3d at 276-77 ("The case is instructive in the admiralty field because the attachments of funds in *Daccarett* were accomplished pursuant to the Admiralty Rules, incorporated by reference into the forfeiture statute.").

Reasoning from *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,'" *id.* at 276 (quoting *Daccarett*, 6 F.3d at 55), *Winter Storm* concluded that the "inclusive language of [Rule B] 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 [Rule B]." 310 F.3d at 278.

Respectfully, reliance on *Daccarett* was in error.

First, *Daccarett* never decided whether either an originator or a beneficiary of the EFT had a *property interest* in the amount of a funds transfer payment order received by an intermediary bank. The *Daccarett* court, as appropriate in a forfeiture case, identified the amount of the funds as "traceable" to an illicit activity and therefore subject to attachment under 21 U.S.C. § 881(a).[15] Any such funds thereby became property of the government. *See Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 627 (1989) (in "relation-back" provision of forfeiture statute, "Congress dictated that '[a]ll right, title and interest in property' obtained by criminals via the illicit means described in the statute 'vests in the United States upon the commission of the act giving rise to forfeiture.'" (quoting 21 U.S.C. § 853(c) (1982 ed., Supp. V))); *Manufacturas Int'l, LTDA* v. *Mfrs. Hanover Trust Co.*, 792 F. Supp. 180, 188 (E.D.N.Y. 1992) ("In the

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[15] 21 U.S.C. § 881(a) provides, in relevant part:

> The following shall be subject to *forfeiture to the United States* and *no property right shall exist in them*:
> []
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds *traceable* to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

(emphasis added).

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). Because Rule B permits attachment only of a defendant's property, a forfeiture decision like *Daccarett* sheds no light on the question of whether the amount of an EFT is attachable under Rule B.[16]

Second, as a remedy *quasi in rem*, the validity of a Rule B attachment depends entirely on the determination that the *res* at issue is property of the judgment debtor at the moment it is attached. *See J. Lauritzen A/S* v. *Dashwood Shipping, Ltd.*, 65 F.3d 139, 141 (9th Cir. 1995) (Rule B attachment characterized as *quasi in rem* jurisdiction "because jurisdiction is derived solely from the attachment of the property of the defendant"). Forfeiture, on the other hand, is a remedy *in rem*, based as it is on the legal fiction that "'property used in violation of law [is] itself the wrongdoer that must be held to account for the harms it [has] caused.'" *United States* v. *92 Buena Vista Avenue*, 507 U.S. 111, 125 (1993). This is a critical distinction between actions proceeding under Supplemental Rule C – now Rule G, *see* n.2, *supra* – and those brought under Rule B, not a "distinction[]

[16] 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. 6 F.3d at 50.

without a difference," as *Winter Storm* found. 310 F.3d at 278. In the forfeiture context, "even when the initial seizure is found to be illegal, the seized property can still be forfeited." *Daccarett*, 6 F.3d at 46 (citing *United States* v. *$37,780 in United States Currency*, 920 F.2d 159, 163 (2d Cir. 1990)). In contrast, under Rule B, it is not enough that the amount of a funds transfer constitutes a seizable *res* – it must constitute the *defendant's* seizable *res*. Since *Reibor*, which *Winter Storm* does not purport to disturb, the rule in this Circuit is that a maritime attachment served when the garnishee holds no property of the defendant is absolutely void. *Reibor*, 759 F.2d at 266.

Third, *Winter Storm*'s reliance on federal forfeiture law was clearly unfounded in light of the well-established principle that "[p]roperty interests are created and defined by state law." *Butner*, 440 U.S. at 55; *see also Delaware* v. *New York*, 507 U.S. 490, 501-02 (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 Colleges* v. *Roth*, 408 U.S. 564, 577 (1972))); *In re Rodgers*, 333 F.3d 64, 66 (2d Cir. 2003). Even in a federal scheme as comprehensive as bankruptcy, the Supreme Court in *Butner* held that it was improper to ignore state law in favor of

adopting a federal rule defining property interests, *see* 440 U.S. at 56, a principle that *Winter Storm* overlooked, and therefore effectively contradicted.

There is no question that Article 4A of the U.C.C., adopted in New York and every other state, 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 . . . ."). 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*, 14 A.D.3d 140, 789 N.Y.S.2d 95 (1st Dep't 2004)), Article 4A must be honored.

2. Supplemental Rule B Does Not Create Property Rights.

The federal government has the power to limit the U.C.C.'s regulation of commercial activity by enacting legislation to combat the drug trade or funding for international terrorists, but not through a procedural rule. Supplemental Rule B permits the attachment of "tangible or intangible property" of the defendant, but Rule B is only a procedure. It does not create a property right. Ironically, to treat Rule B as establishing a property right, as *Winter Storm* did, would give Rule B substantive force, which not only fabricates an unnecessary conflict with state law but also is barred by federal statute, the Rules Enabling Act. 28 U.S.C. § 2072(b)

("Such rules shall not abridge, enlarge or modify any substantive right."). To pass muster under § 2072(b), a rule may affect "only the process of enforcing litigants' rights and not the rights themselves." *Burlington Northern R. Co*. v. *Woods*, 480 U.S. 1, 8 (1977). And unlike the clash between federal procedure and state law in *Hanna* v. *Plummer*, 380 U.S. 460, 470 (1965), there is no conflict between Article 4A and Rule B unless Rule B is impermissibly interpreted to create substantive rights.[17]

Winter Storm and its progeny have substituted their own assumptions in lieu of uniform state law defining property rights. *Winter Storm* correctly stated that a defendant's bank account in New York would be property subject to maritime attachment, 310 F.3d at 276, but then simply assumed that a funds

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[17] In *Sonito Shipping Co. Ltd.,* v. *Sun United Maritime Ltd.*, 478 F. Supp. 2d 532 (S.D.N.Y. 2007), Judge Haight applied English contract law in vacating an order of maritime attachment on the basis that Rule B was a procedural, not a substantive, rule:

> Neither Rule B nor any other of the Supplemental Rules create "a valid *prima facie* admiralty claim." Rather, the Supplemental Rules fashion procedures by which a valid maritime claim may form the basis for a writ of maritime attachment.

Id. at 537. Moreover, as with the procedures embodied by Rule B, the Court held that:

> The existence *vel non* of the maritime lien sought to be enforced is determined by the applicable substantive law, not by the procedures contained in Rule C.

Id. at 536 n.2.

transfer at an intermediary bank also was an originator's property, *i.e.*, it was "TPI's [the originator's] funds in BNY's [the intermediary bank's] hands." *Id.* Some lower courts have fallen into the same error, stating that the "money," *i.e.*, the funds transfer, "belongs to someone, either the originator of the funds transfer or the beneficiary, directly or through their banks." *Navalmar (U.K.) Ltd.* v. *Welspun Gujarat Stahl Rohren, Ltd.*, 485 F. Supp. 2d 399, 408 (S.D.N.Y. 2007). "[C]ertainly the funds, in temporary possession of the intermediary bank, are subject to rights of another 'to possess, use, and enjoy' those funds." *Id.* (citing Black's Law Dictionary 1232 (7th ed. 1999)). But the funds transfer is in fact not subject to the possession, use or enjoyment of either the originator or the beneficiary. If either walked into an intermediary bank to claim those "funds," those claims would be rejected, as this Court determined in *Grain Traders*, 160 F.3d at 102. See U.C.C. §§ 4A-502 & 503 and comments thereto; *see also Nickel*, 14 A.D.3d at 145-46, 789 N.Y.S.2d at 99.[18]

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[18] *Nickel's* holding that property rights in a funds transfer pass to the intermediary bank at the moment the intermediary bank accepts the payment order is correct, and should be applied to the funds transfer at issue here. As a technical matter, however, that court's description of how a funds transfer works is not entirely accurate. Rather than a "passage of title to the funds" being transferred, *see id.*, 14 A.D.3d at 147, 789 N.Y.S.2d at 100, a funds transfer does not involve the physical transfer of any money. Instead, a funds transfer is "a series of transactions," U.C.C. § 4A-104(1), that creates and discharges debtor-creditor relationships between the parties to each of the constituent transactions. These transactions are completed when the beneficiary's bank "accepts a payment order," *id.*, thereby incurring an obligation to pay the beneficiary. U.C.C. §§ 4A-104, 4A-209(2), 4A-404.

Once applicable state law is ignored in the judicial creation of property rights, there are no clear principles and the consequence is confusion and uncertainty. The *ipse dixit* statement in *Winter Storm* 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. *See* n.4 *supra*. The applicable law says the amount of a funds transfer at an intermediary bank is the property of neither; rather it is a debt owed by the intermediary bank to the next bank (if the intermediary bank has accepted the payment order) or to its sender (if it has not accepted the payment order). Now instead an EFT has been held to be property of both the originator and the beneficiary. This boundless creation 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))); *United States* v. *Komisaruk*, 874 F.2d 686, 693 (9th Cir. 1989) (same). In fact, the amount of a funds transfer at an intermediary bank is not subject to possession, enjoyment or disposition by either the originator or the beneficiary. U.C.C. § 4A-502, cmt. 4; *Grain Traders*, 160 F.3d at 102.

II. *WINTER STORM* FAILED PROPERLY TO ADDRESS THE DUE PROCESS CONCERNS INHERENT IN THE ATTACHMENT OF FUNDS TRANSFERS.

Defendant-Appellant Schahin does not appear to have significant contacts, if any, with New York. Indeed, for its property to have been *prima facie* subject to a Rule B attachment, Plaintiff-Appellee was required to attest, pursuant to Supplemental Rule B(1)(b), that Schahin could not be found within the Southern District of New York. (*See* A-18). Moreover, the funds transfer at issue in this appeal was meant to effect payment from one foreign account to another. A New York bank was involved as an intermediary bank only because the payment was denominated in U.S. dollars. Concededly, Schahin does not appear to have objected to the district court's assumption of *quasi in rem* jurisdiction over it – again because of a questionable ruling in *Winter Storm*. This Court should, however, consider the important issue of whether such a "contact" is by itself sufficient to constitute minimum contacts to satisfy due process.

The Clearing House respectfully submits that *Winter Storm* also erred in analyzing the substantive due process concerns raised by the defendant in that case, with the result that litigants have been misled into believing that access to the procedures set forth in Supplemental Rule E for vacating an attachment are

sufficient to address any constitutional concerns that a Rule B attachment might create. *See Winter Storm*, 310 F.3d at 273.

But the 1985 amendments to the Supplemental Rules only addressed the *procedural* due process requirement that a party be given notice and an opportunity to be heard promptly after the arrest or attachment of its property. In contrast, *substantive* due process requirements demand that the relationship between the defendant, the forum, and the litigation provide the "minimum contacts" between the defendant and the forum state such that a court's assumption of jurisdiction does not offend traditional notions of "fair play and substantial justice." *Shaffer* v. *Heitner*, 433 U.S. 186, 207 (1977).

This Court's earlier decisions weighing due process considerations arising from Rule B attachments suggest that that the well known "minimum contacts"/"fair play" rule set forth in *Shaffer* apply in maritime and admiralty cases, but "must be understood in the light of the special history and circumstances of that unique body of law." *Amoco Overseas Oil Co.* v. *Amoco Transport Co.*, 605 F.2d 648, 655 n.7 (2d Cir. 1979); *see also* George Arceneaux III, *Has Shaffer v. Heitner Been Lost At Sea?*, 46 La. L. Rev. 141, 155 (1985) (observing that although *Amoco* recognized the "distinct nature of admiralty," "that difference

should not make *Shaffer* inapplicable – it should only present another factual element to be weighed in determining whether an assertion of jurisdiction is fair").

As the jurisprudence in existence prior to *Winter Storm* makes clear, there is nothing in the "special history and circumstances" of maritime and admiralty law that suggests that every originator or beneficiary of an EFT, who happens to be involved in maritime commerce, is automatically deemed to have the requisite minimum contacts in New York to be subject to litigation here. Indeed, nothing about *Winter Storm* or its progeny suggests that the amount of a funds transfer subject to attachment under Rule B must relate in some way to the matter under controversy, *i.e.*, the maritime claim being asserted, or even reflect a payment in connection with maritime commerce.

Unless every entity that even occasionally engages in maritime commerce, or does business with an entity engaged in maritime commerce, and that initiates or is to receive 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 Constitutional substantive due process requirements. Whatever lesser minimum contacts or broader concepts of fair play exist in maritime cases, something more than this happenstance must be involved.

CONCLUSION

For the reasons stated herein, the Clearing House respectfully urges the Court to reverse the District Court's opinion and order in *Consub Delaware LLC* v. *Schahin Engenharia Limitada*, 476 F. Supp. 2d 305 (S.D.N.Y. 2007), and to take the steps necessary to overrule *Winter Storm*.

Dated: August 2, 2007
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 6,906 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: August 2, 2007
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ANTI-VIRUS CERTIFICATION

Case Name: Consub Delaware v. Schahin Engenharia

Docket Number: 07-0833-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 CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/2/2007) and found to be VIRUS FREE.

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