

08-3477-cv(L)

08-3758-cv(XAP)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

THE SHIPPING CORPORATION OF INDIA LTD.,

*Plaintiff-Counter-Defendant-
Appellant-Cross-Appellee,*

—against—

JALDHI OVERSEAS PTE LTD.,

*Defendant-Counter-Claimant-
Appellee-Cross-Appellant.*

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-APPELLEE

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Dated: New York, New York
February 24, 2009

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TABLE OF CONTENTS

| | Page |
|--|------|
| INTRODUCTION | 1 |
| STATEMENT OF INTEREST OF AMICUS CURIAE | 8 |
| BACKGROUND | 9 |
| 1. Electronic Funds Transfers | 9 |
| 2. The Burden of the Current Maritime Attachment Process in this Circuit..... | 12 |
| ARGUMENT | 13 |
| I. THERE IS NO LEGAL BASIS FOR ATTACHING A FUNDS TRANSFER TO A BENEFICIARY BEFORE IT REACHES THE BENEFICIARY’S BANK | 13 |
| II. THE COURT SHOULD NOT EXPAND THE INTERRUPTION OF FUNDS TRANSFERS AND THE BURDEN OF RULE B ATTACHMENTS ON THE DISTRICT’S BANKS..... | 18 |
| III. THE ORDER BELOW SHOULD BE AFFIRMED TO AVOID EXACERBATING THE DUE PROCESS CONCERNS INHERENT IN THE ATTACHMENT OF FUNDS TRANSFERS | 21 |
| IV. WINTER STORM WAS BASED ON MANIFEST ERROR | 24 |
| CONCLUSION | 29 |

TABLE OF AUTHORITIES

CASES

| | <u>Page(s)</u> |
|---|----------------|
| <i>Adeleke v. United States</i> , 355 F.3d 144 (2d Cir. 2004) | 24 |
| <i>Amoco Overseas Oil Co. v. Amoco Transport Co.</i> , 605 F.2d 648 (2d Cir. 1979) | 22 |
| <i>Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.</i> , 460 F.3d 434 (2d Cir. 2006) | <i>passim</i> |
| <i>Banque Worms v. BankAmerica Int’l</i> , 568 N.Y.S.2d 541 (1991)..... | 9 |
| <i>Burda Media, Inc. v. Viertel</i> , 417 F.3d 292 (2d Cir. 2005) | 24 |
| <i>Burlington Northern R.R. Co. v. Woods</i> , 480 U.S. 1 (1987)..... | 15 |
| <i>Butner v. United States</i> , 440 U.S. 48 (1979)..... | 14 |
| <i>Cala Rosa Marine Co. Ltd. v. Sucres et Deneres Group</i> , No. 09 Civ. 425 (SAS), 2009 WL 274486 (S.D.N.Y. Feb. 4, 2009)..... | 3, 19-20 |
| <i>Consub Delaware v. Schahin Engenharia Limitada</i> , 543 F.3d 104 (2d Cir. 2008) | <i>passim</i> |
| <i>Crosby v. National Foreign Trade Council</i> , 530 U.S. 363 (2000)..... | 28 |
| <i>Delaware v. New York</i> , 507 U.S. 490 (1993)..... | 14 |

| | <u>Page(s)</u> |
|--|----------------|
| <i>European American Bank v. Bank of Nova Scotia</i> , 784 N.Y.S.2d 99 (1st Dep’t 2004) | 11 |
| <i>Grain Traders, Inc. v. Citibank, N.A.</i> , 160 F.3d 97 (2d Cir. 1998) | 10, 16, 18 |
| <i>Hanna v. Plumer</i> , 380 U.S. 460 (1965) | 15 |
| <i>J. Lauritzen A/S v. Dashwood Shipping, Ltd.</i> , 65 F.3d 139 (9th Cir. 1995) | 26 |
| <i>Reibor Int’l Ltd. v. Cargo Carriers (KACZ-CO.), Ltd.</i> , 759 F.2d 262 (2d Cir. 1985) | 5, 18, 27 |
| <i>In re Rodgers</i> , 333 F.3d 64 (2d Cir. 2003) | 14 |
| <i>Seamar Shipping Corp. v. Kremikovtzi Trade Ltd.</i> , 461 F. Supp. 2d 222 (S.D.N.Y. 2006) | 5, 6 |
| <i>Shaffer v. Heitner</i> , 433 U.S. 186 (1977)..... | 22 |
| <i>Sonito Shipping Co., v. Sun United Maritime Ltd.</i> , 478 F. Supp. 2d 532 (S.D.N.Y. 2007) | 15 |
| <i>Szabo v. Vinton Motors, Inc.</i> , 630 F.2d 1 (1st Cir. 1980)..... | 11 |
| <i>United States v. \$37,780 in United States Currency</i> , 920 F.2d 159 (2d Cir. 1990) | 27 |
| <i>United States v. 92 Buena Vista Avenue</i> , 507 U.S. 111 (1993)..... | 26, 27, 28 |

| | <u>Page(s)</u> |
|--|----------------|
| <i>United States v. Daccarett</i> , 6 F.3d 37 (2d Cir. 1993) | <i>passim</i> |
| <i>United States v. Komisaruk</i> , 874 F.2d 686 (9th Cir. 1989) | 17 |
| <i>United States v. Piervinanzi</i> , 23 F.3d 670 (2d Cir. 1994) | 17 |
| <i>Winter Storm Shipping, Ltd. v. TPI</i> , 310 F.3d 263 (2d Cir. 2002) | <i>passim</i> |
| <i>In re Yale Exp. System, Inc.</i> , 370 F.2d 433 (2d Cir. 1966) | 11 |

STATUTES, REGULATIONS AND RULES

| | |
|--|---------------|
| 18 U.S.C. § 983 | 28 |
| 21 U.S.C. § 881 | 25-26 |
| 28 U.S.C. § 2072 | 15, 28 |
| 50 U.S.C. §§ 1701-1706 | 18-19 |
| 50 U.S.C. app. § 5 | 18 |
| Federal Reserve System Regulation J, 12 C.F.R. Pt. 210 | 11 |
| Fed. R. App. P. 35 | 24 |
| Fed. R. Civ. P. Supp. R. B | <i>passim</i> |
| Fed. R. Civ. P. Supp. R. G, Advisory Committee's Note | 1 |
| N.Y. U.C.C. § 4A-104 | 9, 10 |
| N.Y. U.C.C. § 4A-209 | 10 |
| N.Y. U.C.C. § 4A-402 | 17 |

| | <u>Page(s)</u> |
|---------------------------------------|----------------|
| N.Y. U.C.C. § 4A-502 and comment..... | <i>passim</i> |
| N.Y. U.C.C. § 4A-503 and comment..... | 6, 11, 14, 16 |

OTHER AUTHORITIES

| | |
|--|----|
| 67 Fed. Reg. 77,786 (Dec. 19, 2002)..... | 4 |
| George Arceneaux III, <i>Has Shaffer v. Heitner Been Lost At Sea?</i> , 46 La. L. Rev. 141 (1985)..... | 22 |
| Morten L. Bech, et al., <i>Global Trends in Large-Value Payments</i> , FRBNY Economic Policy Rev. 59 (Sept. 2008)..... | 4 |
| Board of Governors of the Federal Reserve System, <i>About Payment System Risk</i> (Jan. 5, 2009)..... | 4 |
| Howard Darmstadter, <i>Dark Thoughts in a Winter Storm</i> , A.B.A. Commercial L. Newsletter 8 (Dec. 2003)..... | 10 |

INTRODUCTION

The Clearing House Association L.L.C. (the “Clearing House”) submits this brief as *amicus curiae* in the appeal by The Shipping Corporation of India Ltd. (“SCI”), the plaintiff below, from a Memorandum Order entered by the United States District Court for the Southern District of New York (Rakoff, J.) on June 27, 2008 (the “Vacatur Order” (A-85-88)). The Clearing House supports the position of Jaldhi Overseas Pte Ltd. (“Jaldhi”), the defendant below, that Jaldhi’s motion to vacate an *ex parte* order for process of maritime attachment (the “*Ex Parte* Order (A-14-17)) was properly granted.¹

Winter Storm Shipping, Ltd. v. TPI, 310 F.3d 263 (2d Cir. 2002) held that what is now Rule B(1)(a) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (“Rule B”) permitted attachment of the amount of a funds-transfer payment order received by an intermediary bank as property of the *originator* of the funds transfer.² This holding was questioned in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 446 n.6 (2d Cir.

¹ The Clearing House has no interest in Jaldhi’s cross-appeal.

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 renamed the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the “Supplemental Rules”). The revised Supplemental Rules added, *inter alia*, the reference to “Asset Forfeiture Actions,” and 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.

2006) (“The correctness of our decision in *Winter Storm* seems open to question.”), but later endorsed in *Consub Delaware LLC v. Schahin Engenharia Limitada*, 543 F.3d 104 (2d Cir. 2008).

In *Consub*, however, the panel expressly did not reach the question whether *Winter Storm*’s property right concept should be expanded to apply where the defendant is the *beneficiary* of the funds transfer. This is the question here on appeal: “[W]hether funds involved in an EFT en route to a defendant are subject to a Rule B attachment.” 543 F.3d at 109 n.1.

This appeal seeks to compound the already drastic consequences of this Court’s decision in *Winter Storm* by virtually doubling the scope and number of maritime writs that could interfere with the international funds-transfer system. In so doing, the appeal demonstrates the fatal flaw in *Winter Storm* in creating a property right where none exists. The appeal would have two separate parties possessing identical yet contradictory property rights to be paid the same single obligation from a bank that has no legal obligation or relationship with either of them.

The practice of invoking Rule B to obtain a writ of attachment targeting funds-transfer payment orders received by banks in the Southern District of New York (the “District”) has become the *sine qua non* for any anticipated or pending maritime dispute arising the world over. In the past several months in

particular, maritime plaintiffs have swamped the District Court with hundreds of complaints asserting maritime claims and seeking Rule B writs of attachment involving funds-transfer payment orders received by intermediary banks in New York.³ Almost all these actions assert claims against foreign parties with few or no U.S. contacts and, it would appear, without any basis to expect or believe that a defendant's "property" is present, or will be present, in the District. *See, e.g., Cala Rosa Marine Co. Ltd. v. Sucres et Deneres Group*, No. 09 Civ. 425 (SAS), 2009 WL 274486, at *4 (S.D.N.Y. Feb. 4, 2009) ("there is no reason to believe that defendant's property was in the United States at the time this motion was filed or will be in the United States before the arbitration is settled"). Many of these writs are repeatedly served, day after day, for weeks or sometimes months on end without ever resulting in the attachment of property related to any funds transfer.

The result is a staggering number of maritime writs that New York banks are required to process on a daily basis. For example, from October 1, 2008 to January 31, 2009, maritime plaintiffs filed 962 lawsuits seeking to attach a total of \$1.35 billion. These lawsuits constituted 33% of all lawsuits filed in the Southern District, and the resulting maritime writs only add to the burden of 800 to

³ The Clearing House believes it can be of assistance to the Court because the parties' briefs do not explain the problems with the current maritime attachment process, or why those problems argue against extending *Winter Storm*.

900 writs already served daily on the District's banks. The explosion of maritime writs served on the banks has been logistically overwhelming. The banks have had to hire additional staff and suffer considerable expense to deal with the writs.

Of even more significance, however, this explosion of writs creates an additional threat to the U.S. dollar as the world's primary reserve currency and New York's standing as a center of international banking and finance. Confronted with this situation, companies around the world will restructure their transactions to provide for payments in euros, sterling, yen or some other currency to avoid using U.S. dollars cleared through intermediary banks in the United States, or clear transactions through one of the proliferating off-shore dollar clearing networks.⁴ Because the only contact with the United States in most of these transactions is the use of an intermediary bank in the United States to clear U.S. dollars, the U.S. litigation apparatus can be avoided entirely by the relatively simple expedient of using a different currency. As a result, *Winter Storm* and its progeny have had a

⁴ See Morten L. Bech et al., *Global Trends in Large-Value Payments*, FRBNY Economic Policy Rev. 59, 66 (Sept. 2008). The Federal Reserve Board has expressed some concern about offshore clearing systems. See Board of Governors of the Federal Reserve System, *About Payment System Risk* (Jan. 5, 2009), available at <http://www.federalreserve.gov/paymentsystems/PSR/default.htm> (“[i]n subsequent years, the Board expanded the PSR policy to address . . . offshore dollar clearing and netting”); see also 67 Fed. Reg. 77,786, 77,787 (Dec. 19, 2002) (recent movement of some U.S. dollar clearing and settlement activity offshore is a reason for expanding the operating hours of the Federal Reserve Banks' funds-transfer system).

far greater, and damaging, impact on U.S. and foreign banks located in New York than ever could have been anticipated.

In the proceeding below, the District Court addressed, among other things, the question of whether Rule B permits the attachment of property related to funds-transfer payment orders for which the defendant, Jaldhi, was the intended beneficiary. In answering this question, the District Court incorporated its reasoning from an earlier decision, *Seamar Shipping Corp. v. Kremikovtzi Trade Ltd.*, 461 F. Supp. 2d 222 (S.D.N.Y. 2006). (*See* A-85.)

In *Seamar*, Judge Rakoff observed that allowing an attachment involving a funds-transfer payment order for which the defendant was the intended beneficiary “would substantially broaden *Winter Storm*’s holding, which technically applies only where the defendant is the originator of the EFT.” *Id.* at 225. After determining that there was no federal rule governing whether an EFT is the property of an intended beneficiary while in transit, Judge Rakoff looked to state law for guidance. *Id.* at 225 (“The Second Circuit has held that looking to state law is ‘especially appropriate’ where ‘precedent in admiralty law is . . . thin,’ and ‘a decision . . . contrary to the general rule of the state might have disruptive consequences for the state banking system.’” (quoting *Reibor Int’l Ltd. v. Cargo Carriers (KACZ-CO.) Ltd.*, 759 F.2d 262, 266 (2d Cir. 1985)). Judge Rakoff correctly identified New York’s codification of Article 4A of the Uniform

Commercial Code (“U.C.C.”) as the state law directly applicable to funds transfers received by banks located in New York. *Id.* at 226. That state law is dispositive of the appeal here.

In relevant part, the U.C.C. provides that “until 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; *Seamar*, 461 F. Supp. 2d at 226. In addition, the U.C.C. plainly declares that intermediary banks are immune from attachments seeking property of the originator and the beneficiary, specifically because an intermediary bank holds no property of the originator or beneficiary of a funds transfer. U.C.C. §§ 4A-502(4) & cmt. 4; 4A-502(2); 4A-503 & cmt.⁵

Accordingly, in the Order now on appeal, the District Court below held:

⁵ 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.

[A]n attachment pursuant to [Rule B] only applies to a defendant's property, and EFTs directed by third parties to a defendant do not become the defendant's property until the transfer is completed. Hence, those EFTs from third parties that were attached before the transfer to the intended beneficiary, Jaldhi, had been completed cannot be attached pursuant to Rule B, and their attachment must be vacated.

(Vacatur Order at 1-2 (A-85-86) (citation omitted).)

The present appeal underscores the confusion that *Winter Storm* has fostered by failing to analyze the property interests at stake in a funds-transfer payment order. A holding that a funds-transfer payment order at an intermediary bank can be "property" under Rule B of *both* the originator and the beneficiary, when under all other circumstances the amount of a funds transfer at an intermediary bank is the property of neither, would be a recipe for chaos. Furthermore, to the extent that the beneficiary of a U.S. dollar-denominated funds transfer with no other material contacts with New York is forced to defend against Rule B attachments in New York, establishing *quasi in rem* jurisdiction over the entity solely by the seizure of a funds-transfer payment order is contrary to due process. Some maritime complaints are now even being filed under seal, which only compounds this problem. At the very least, this Court should affirm the Order below and avoid a continuing judicial creation of property rights that cannot be sustained.

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.⁶ The Clearing House regularly appears as *amicus curiae* in cases that raise significant legal issues relating to banking, and in particular in cases such as 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 remains 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 positions 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

⁶ The members of The Clearing House are: ABN AMRO Bank N.V.; Bank of America, National Association; The Bank of New York Mellon; Citibank, National Association; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; UBS AG; U.S. Bank National Association; and Wells Fargo Bank, National Association.

System (“CHIPS”), a funds-transfer system that serves 47 U.S. and foreign banks and that each day processes on average over 326,000 payment orders, with an aggregate average daily value of \$1.495 trillion as of January 31, 2009.⁷ CHIPS and Fedwire, which is operated by the Federal Reserve Banks, are the principal payment systems for international funds transfers in the United States.⁸

BACKGROUND

1. Electronic Funds Transfers

Electronic 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 v. BankAmerica Int’l*, 77 N.Y. 2d. 362, 369, 568 N.Y.S.2d 541, 545 (1991) (“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.”).

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”

⁷ See www.chips.org/docs/000652.xls.

⁸ Average daily funds transfers using Fedwire amounted to \$2.963 trillion in the third quarter of 2008. See www.federalreserve.gov/paymentsystems/fedwire/fedwirefundstrfqtr.htm.

or money that belongs to the originator or the beneficiary that passes from one bank to the other. “Until 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. Indeed, the term “funds transfer” is in fact nothing more than a metaphor, akin to “sunrise” and “sunset” – a useful shorthand that will lead to incorrect results if the metaphor is taken as the reality. *See* Howard Darmstadter, *Dark Thoughts in a Winter Storm*, A.B.A. Commercial L. Newsletter 8 (Dec. 2003).

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 an intermediary bank. U.C.C. § 4A-209(1). Often in funds transfers, the originator’s bank does not have a U.S. dollar account at the beneficiary’s bank, and so 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).

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.⁹ Indeed, neither a creditor of the originator nor of the beneficiary may reach the amount involved in the funds transfer by serving process on an intermediary bank. U.C.C. § 4A-502(4) & cmt. 4; *see also European American Bank v. Bank of Nova Scotia*, 784 N.Y.S.2d 99, 100-01 (1st Dep't 2004). No creditor of an originator or of a beneficiary is permitted to obtain an injunction against an intermediary bank to interrupt a funds transfer, U.C.C. § 4A-503 & cmt., because the intermediary bank holds no property of either the originator or the beneficiary.¹⁰

Furthermore, Article 4A of the U.C.C. has been adopted by the Federal Reserve Board and thus is federal law governing payments 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*, funds transfers are treated differently based on whether the funds are wired through CHIPS or through

⁹ As this Court held in *Grain Traders, Inc. v. Citibank, N.A.* 160 F.3d 97 (2d Cir. 1998), U.C.C. Article 4A prevents an originator of a funds transfer from suing an intermediary bank. *Id.* at 102. *Grain Traders* remains good law in this circuit. Its logic applies to suits by beneficiaries as well.

¹⁰ 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).

Fedwire — exactly the non-uniform situation the federal government sought to avoid.

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

Winter Storm's ipse dixit determination that an intermediary bank holds property of an originator now permits maritime plaintiffs to disrupt the funds-transfer process. Major banks in New York are being served with maritime writs hundreds of times each day and placed in the middle of international civil disputes with which they have no connection.

The result of *Winter Storm* and its progeny is that banking customers are no longer assured of completing their funds transfers without judicial interference if they denominate their payments in U.S. dollars and permit the use of a U.S. intermediary bank. The ruling has undermined the utility of dollar transfers through banks in New York City. The number of Rule B writs of attachment served on major New York banks every day has far exceeded the level of interference with funds transfers that could have been foreseen when *Winter Storm* was decided.

ARGUMENT

As *amicus curiae*, the Clearing House respectfully suggests that the decision below should be affirmed, and the Court should reject the attempt to expand the rampant abuse of the Rule B attachment mechanism.

The attachment of amounts involved in funds transfers where the defendant originated the transfer should not be extended to situations where the defendant is the beneficiary for the following reasons: (1) there is no legal basis for such an expansion; (2) *Winter Storm* already is causing tremendous burdens on the banking system and the Southern District; (3) extending *Winter Storm's* reach would seriously exacerbate a process already threatening the interests of New York and the nation and that is open to serious constitutional uncertainty; and (4) *Winter Storm* was based on manifest error. If this Court does not correct this error, at least it should not compound it.

I. THERE IS NO LEGAL BASIS FOR ATTACHING A FUNDS TRANSFER TO A BENEFICIARY BEFORE IT REACHES THE BENEFICIARY'S BANK.

The steps to processing funds transfers like the ones at issue here are not in dispute. An overseas originator instructs its bank to make a payment to a beneficiary. The originator's bank sends a payment order electronically to a New York intermediary bank, with instructions to pay the beneficiary's bank for further credit to the beneficiary. Only at the beneficiary's bank will the beneficiary have

any interest in the payment to be made by the funds transfer. U.C.C. § 4A-502 cmt. 4. *Winter Storm* dealt only with attachment involving a funds transfer where the defendant was the originator, *i.e.*, the party who gave the first instruction to its bank that a payment should be made. That decision decreed that the originator of the funds transfer had a sufficient property interest that could be attached, without identifying any law creating that interest. Even if the implication were that the originator maintains an interest in the funds transfer it initiated, that analysis cannot apply to a beneficiary.

“[P]roperty interests are created and defined by state law.” *Butner v. United States*, 440 U.S. 48, 55 (1979); *see also Delaware v. New York*, 507 U.S. 490, 501-02 (1993); *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* and *Consub* 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 an injunction or any other restraint of a funds transfer at an intermediary bank. *Id.* (“In particular, intermediary banks are protected . . .”). Unless there is

superseding federal law, such as a drug forfeiture law (*see United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993)) or an Office of Foreign Assets Control (“OFAC”) regulation, Article 4A must be honored.

The federal government undoubtedly 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 we are dealing here not with a substantive statute but with a procedural rule that lacks preemptive effect on substantive law. 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 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.R. Co. v. Woods*, 480 U.S. 1, 8 (1987). And unlike the clash between federal procedure and state law in *Hanna v. Plumer*, 380 U.S. 460 (1965), there is

no conflict between Article 4A and Rule B unless Rule B is impermissibly interpreted to create substantive rights.¹¹

Winter Storm and its progeny have substituted their own assumptions in lieu of uniform state law defining property rights. Although *Winter Storm* and *Consub* correctly stated that a defendant's bank account in New York would be property subject to maritime attachment, *Winter Storm*, 310 F.3d at 276; *Consub*, 543 F.3d at 110-11, they simply assumed that a funds transfer instruction received by an intermediary bank also created originator's property, *i.e.*, it was "TPI's [the originator's] funds in BNY's [the intermediary bank's] hands." *Winter Storm*, 310 F.3d at 276. 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

¹¹ In *Sonito Shipping Co., 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 537 n.2.

and comments thereto. A creditor of the originator or beneficiary can have no greater rights than the originator or beneficiary itself.

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 appellant's position would deal with this confusion by compounding it. On this appeal, appellant would extend the *ipse dixit* statement in *Winter Storm* that the originator has a property interest in a funds transfer received by an intermediary bank to apply also to the beneficiary of the funds transfer. A holding that a funds transfer can be property of both the originator and the beneficiary simply 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). Indeed the applicable state 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 accepts the payment order), or to its sender if the funds transfer is not “completed.” U.C.C. §§ 4A-402(3) and (4).

II. THE COURT SHOULD NOT EXPAND THE INTERRUPTION OF FUNDS TRANSFERS AND THE BURDEN OF RULE B ATTACHMENTS ON THE DISTRICT'S BANKS.

Winter Storm has significantly impeded the funds-transfer process and derailed thousands of business transactions, but at least the defendant in that case originated the U.S. dollar transfer, and one of its alleged debts (to the plaintiff) was reduced, although the transaction in which the originator was seeking to make payment was imperiled. The effect of an attachment where the defendant is the beneficiary would be even worse. Under applicable law, the beneficiary has no interest in a funds transfer until an instruction to pay reaches the beneficiary's bank, which it never does if interrupted at an intermediary bank. The originator of the transfer is thus confronted with the redirection of its funds transfer to a third party with whom it probably has not dealt, and it loses the transaction with the beneficiary even though the originator had no stake in the dispute between plaintiff and defendant.

Pre-*Winter Storm* decisions by this Court acknowledged the importance of shielding participants in the funds-transfer process — in particular, intermediary banks — from the burdens of litigation and the “sound policy reasons” for rejecting any course that would “impede the use of rapid electronic funds transfers in commerce by causing delays and driving up costs.” *Grain Traders*, 160 F.3d at 102. *Reibor*, *supra*, is particularly instructive. In that case,

the Court adopted the New York rule against attaching “after-acquired property” — *i.e.*, property not in the hands of the garnishee at the time the attachment order was served. 759 F.2d at 268. In turning to state law, the Court reasoned that a different approach “could have considerable impact on international banking practices” and prove “extremely and unfairly taxing” on New York banks. 759 F.2d at 268.

One significant problem for banks is that the only practical way in which they can effectuate 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. OFAC 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 positives, that the screens now generate, creating real risks of inefficiency and error.

The speculative nature of most of the Rule B writs of attachment served on the District’s banks exacerbates the burden of amending the software screens, and results in higher costs and increased risks. Although maritime plaintiffs or their counsel almost always represent in their Rule B filings that the

defendant is believed to have, or will have, “assets” or “property” in the jurisdiction (*see, e.g.*, A-9), that very often proves not to be the case. Most of the District’s Judges, though not all, do not require maritime plaintiffs to provide factual support that the defendant has, or will have, “assets” in the jurisdiction. As a result of this practice, the District’s banks have been forced to add untold numbers of names to their software screens, at significant time, expense and incremental risk, despite the fact that such efforts often result in no attachment of a defendant’s “property.”

The enormous strains on the District’s banks were acknowledged by Judge Scheindlin in a recent opinion declining to authorize the issuance of a maritime writ of attachment with a “continuous service” provision:

[B]ecause plaintiff alleges only that defendant’s funds will be in the district sometime during the next two years — confirming this Court’s experience that many attachment orders are continually re-served over a period of many months — a continuous service provision may cause a lasting burden on New York banks in circumstances where the plaintiff has little reason to be assured of any success in attaching the funds in the near future (if at all).

Cala Rosa, 2009 WL 274486, at *5.

Upholding the appeal in this matter and expanding *Winter Storm* will only worsen the situation.

III. THE ORDER BELOW SHOULD BE AFFIRMED TO AVOID EXACERBATING THE DUE PROCESS CONCERNS INHERENT IN THE ATTACHMENT OF FUNDS TRANSFERS.

This Court should not extend *Winter Storm* because maritime attachment already is skirting due process limitations. The defendants in such cases invariably are foreign corporations with few or no contacts with the United States. The most recent innovation by maritime plaintiffs, to file their attachment cases under seal, only increases the degree to which the process is suspect.¹²

In this case, Jaldhi 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, SCI was required to attest, pursuant to Rule B(1)(b), that Jaldhi could not be found within the District. (*See* A-8.) Moreover, the funds transfer at issue in this appeal was meant to effect payment from a third party's foreign account to Jaldhi's foreign account. A New York bank was involved as an intermediary bank only because the payment was denominated in U.S. dollars. Concededly, Jaldhi does not appear to have objected to the district court's assumption of *quasi in rem* jurisdiction over it. This Court should, however,

¹² The perceived advantage to plaintiffs of filing under seal represents a concession on various levels. First, it is an admission that defendants have no notice that the funds transfers they originate are subject to attachment simply because they are using U.S. dollars. And second, plaintiffs rely on an absence of notice because they know that the *Winter Storm* problem for the potential defendant vanishes if the originator instead transacts its business in Euros or Sterling. This fact, of course, creates a major problem for U.S. banks, as customers turn to foreign currencies to avoid *Winter Storm*.

consider whether such a “contact” is by itself sufficient to constitute minimum contacts to satisfy due process in deciding whether to approve the extension of *Winter Storm* sought by appellant.

The Clearing House respectfully submits that *Winter Storm* erred in analyzing the substantive due process concerns raised by the defendant in that case when the opinion concluded that the 1985 amendments to the Supplemental Rules cured any due process problem. *See Winter Storm*, 310 F.3d at 273. The 1985 amendments 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 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 the well known “minimum contacts”/“fair play” rule set forth in *Shaffer* apply in maritime and admiralty cases, although they “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 a participant in a funds transfer, 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 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. The contacts with the jurisdiction are even more tenuous where, as here, the defendant is the beneficiary of a funds transfer, and not the party that might be said, by a considerable stretch, to have availed itself of the jurisdiction by setting the funds transfer in motion.

Unless every entity that even occasionally engages in maritime commerce, or does business with an entity engaged in maritime commerce, and that merely receives a U.S.-dollar-denominated funds transfer is thereby deemed to

submit itself to jurisdiction in New York, it cannot be sued here on that basis alone consistent with 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. *Winter Storm* should not be extended to embrace further weakening of our due process requirements.

IV. WINTER STORM WAS BASED ON MANIFEST ERROR. IF NOT OVERRULED, AT LEAST IT SHOULD NOT BE EXTENDED.

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. *Winter Storm* is being used to flood banks with attachment orders, and the District Court has 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-transfer payment orders at intermediary banks, for example by ordering that service will be deemed to be continuous, in direct contravention of *Reibor*.

We recognize that an appeal where no party challenges *Winter Storm* is not the ideal vehicle to correct that decision. But this Court could correct this situation if it chose to.¹³

Winter Storm/Consub's reliance on *Daccarett, supra*, 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

¹³ 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).

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 276. *Consub* endorsed *Winter Storm*’s reliance on *Daccarett*, with minimal independent analysis. See 543 F.3d at 110-11.

Respectfully, reliance on *Daccarett* was in error.

First, *Daccarett* never decided whether either an originator or a beneficiary of the funds transfer had a *property interest* in the amount involved in a funds transfer received by an intermediary bank. It did not need to do so because in a forfeiture case funds can be seized even if they do not constitute property of the defendant. 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).¹⁴ As this Court recognized in *Aqua Stoli*, 460 F.3d at 446, n.6, because Rule B permits attachment only of a defendant’s

¹⁴ 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).

property, a forfeiture decision like *Daccarett* sheds no light on the question of whether the amount of a funds transfer is attachable under Rule B.¹⁵

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[] 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

¹⁵ 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.

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* and *Consub* do 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, in *Consub* a panel of this Court compounded the problem by mis-analyzing the federal statute involved in *Daccarett*. The panel rejected the claim that the funds at issue in *Daccarett* were property of the Government. The opinion stated that that position was “belied by *Daccarett* itself, which referred to *United States v. 92 Buena Vista Avenue, supra*, for the proposition that the Supreme Court has clarified ‘the government cannot contend that it owns the defendant properties until a judgment of forfeiture is entered’ in favor of the government.” 543 F.3d at 110 (quoting *Daccarett*, 6 F.3d at 53-54). This analysis missed a key point. *Daccarett* acknowledged the general rule that property rights in illegal proceeds vest with the government at the time the crime is committed, whether directly or through the “relation-back” doctrine. The quoted language merely described a procedural exception that allowed an “innocent owner defense”

to be asserted under 21 U.S.C. § 881(a).¹⁶ *92 Buena Vista Avenue*, 507 U.S. at 128. This misunderstanding itself confirms that statutory forfeiture law is an inapposite proxy for determining property interests in an EFT.

Fourth, since 2000, issues regarding pre-emption have been subject to analysis on three levels: express pre-emption, field pre-emption and pre-emption through conflict with a federal statute. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). In *Winter Storm*, the opinion simply stated that the U.C.C. was pre-empted by Rule B, but failed to mention *Crosby* or engage in any pre-emption analysis. Rule B, however, is only a procedural tool, and it does not create property rights. *Winter Storm* created such a right so that a funds-transfer payment order could be attached, a result that ignored *Crosby* and the limitations imposed by the Rules Enabling Act, 28 U.S.C. § 2072(b).

The remedy for *Winter Storm* and the problems it created is to overrule that decision, but in the meantime at least it should not be extended.

CONCLUSION

For the reasons stated herein, the Clearing House respectfully urges the Court to affirm the District Court's Vacatur Order, and to take the steps

¹⁶ This exception was removed from 21 U.S.C. § 881(a) by P.L. 106-185, § 2(c)(2), April 25, 2000. *See* 18 U.S.C. § 983(d).

necessary to overrule *Winter Storm* and *Consub* or, at the very least, not to extend the deleterious effects of *Winter Storm* and its progeny on New York banks.

Dated: February 24, 2009
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 6,920 words, exclusive of this certificate and other permissible exclusions contained in Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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08-3477-cv(L), 08-3758-cv(XAP) The Shipping Corporation of India Ltd. v.
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