

09-2254-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

EXPORT-IMPORT BANK OF THE UNITED STATES,

Plaintiff-Appellant,

—against—

ASIA PULP & PAPER COMPANY, LTD., PT INDAH KIAT PULP & PAPER TBK,
PT PABRIK KERTAS TJIWI KIMIA TBK, PT PINDO DELI PULP & PAPER MILLS,

Defendants-Appellees.

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

**BRIEF OF *AMICUS CURIAE* THE CLEARING HOUSE ASSOCIATION
L.L.C. IN SUPPORT OF DEFENDANTS-APPELLEES AND
AFFIRMANCE OF THE JUDGMENT BELOW**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for The Clearing House Association L.L.C. (the “Clearing House”) hereby certifies that the Clearing House is not a subsidiary of any other corporation. The Clearing House is a limited liability company and as such has no shareholders. Rather, each member holds a limited liability company interest in the Clearing House that is equal to each other member’s interest. The ten 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, and each member holds a 10% limited liability company interest in the Clearing House.

Dated: New York, New York
September 2, 2009

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PRELIMINARY STATEMENT

The Clearing House Association L.L.C. (the “Clearing House”) submits this brief as *amicus curiae* in support of the decision below. The question of first impression in this appeal is whether the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. § 3001 *et seq.* (the “FDCPA”), preempts substantive state law and as a result redefines the rights of parties to a funds transfer established under uniform state laws that have been adopted throughout the United States. The Export-Import Bank of the United States (“Ex-Im”) seeks to enforce two writs of garnishment, quashed by the district court, served against intermediary banks in the funds-transfer process.

The unprecedented and unsupported position of Ex-Im, driven by an understandable desire to satisfy judgments owed by the judgment creditor below, is that the FDCPA dictates that both the originator and the beneficiary of a funds transfer have a property interest in the amount of a funds transfer arising from a payment order received by an intermediary bank, even though this position is plainly contrary to the law governing funds transfers that has been adopted by every state, including New York, and by federal regulation governing the Federal Reserve Banks’ own funds-transfer system. The error in Ex-Im’s position is that there is nothing in the language of the FDCPA, including the terms “substantial nonexempt interest” and “future interest,” that requires such a result, and nothing

in its history to suggest that it was intended to go beyond procedural issues and to preempt state-law definitions of substantive property rights.

Analysis of whether property may be garnished under the provisions of the FDCPA should start with consideration of underlying state law and then proceed to consideration of whether that law is preempted by a clear mandate of federal law. Here, as shown below, under New York's codification of the Uniform Commercial Code ("U.C.C."), neither the originator nor the beneficiary of a funds transfer has any contract right or property right with respect to the amount of a funds transfer which can be asserted against an intermediary bank. *See* U.C.C. §§ 4A-502(2); 4A-502(4) & cmt. 4; 4A-503 & cmt. The Second Circuit has endorsed this principle by its decision in *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97 (2d Cir. 1998). And, notwithstanding the broad language used in the definition of "property" under the FDCPA, nothing in the text or legislative history of the FDCPA suggests that the Act was intended to preempt the application of state law to determine who has property interests that can be asserted against an intermediary bank that has been asked to execute a payment order by another bank.

The district court thus correctly granted the judgment debtors' motion to quash the Writs to the extent they may have been interpreted to permit garnishment of the amount of a funds-transfer payment order received by an

intermediary bank for which one of the judgment debtors was the originator or beneficiary. In addition to holding correctly that any order held by an intermediary bank is “not [held] for the account of the [originator] or as a future interest of the beneficiary” under the U.C.C., the court below rightly observed that the interpretation of “property” advanced by Ex-Im would “result[] in any single EFT transfer— indeed, of the same EFT transfer — being ‘co-owned’ by the [originator] and the beneficiary of the transfer.”¹ (SPA-8.) Although holding that this result bars garnishment of the funds at issue under the co-ownership provision of the FDCPA, the district court was right to be concerned about the creation of what Ex-Im now calls “concurrent interests” in property (App. Br. at 33-35), in particular when the drafters of the U.C.C. very deliberately attempted to avoid just that. *See ReAmerica, S.A. v. Wells Fargo Bank Int’l*, --- F.3d ---, 2009 WL 2432731, at *3-*4 (2d Cir. Aug. 11, 2009) (the provisions of Article 4A “represent a careful and delicate balancing of [competing] 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” (quoting U.C.C. § 4A-102)) (alteration in original).

¹ Funds transfers are often referred to as “electronic funds transfers” or “EFTs,” although not all funds transfers are done electronically. *See* U.C.C. § 4a-104 cmt. 6.

Neither maritime attachment cases, which are premised on “the broad, inclusive language” of the Admiralty Rules, *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 278 (2d Cir. 2002), nor asset forfeiture cases such as *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), are appropriate precedents for Ex-Im’s position here.

In *Winter Storm*, a panel of the Second Circuit in reliance on Admiralty Rule B allowed a maritime plaintiff to attach the amount of a funds-transfer payment order received by an intermediary bank as property of the *originator* of the funds transfer.² The point here is not to debate *Winter Storm* (although the Clearing House believes it was wrongly decided), but to point out that there is no basis to extend its reach outside the maritime context (on which the decision so heavily relied) — and no basis to conclude that, even if the Admiralty Rules preempt application of state-law property definitions, the FDCPA does likewise.

² Although certain opinions have extended *Winter Storm*’s holding to maritime cases where the defendant is the ultimate beneficiary of a funds-transfer payment order, *see, e.g., AET Inc. Ltd. v. Procuradoria de Servicos Martimos Cardoso & Fonesca*, 464 F. Supp. 2d 241, 245 (S.D.N.Y. 2006), the question of whether the amount of a funds transfer in which the maritime defendant is the beneficiary can be restrained under the Admiralty Rules is currently *sub judice* before the Second Circuit in *The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte Ltd.*, No. 08-3477.

Furthermore, although the government sometimes seeks to seize funds held by banks that are traceable to illicit activity (*e.g.*, drug proceeds), those forfeitures are not based on a finding that the funds involved are the property of the defendant, but rather that they are traceable to the proceeds of the crime and therefore subject to forfeiture regardless of ownership. 18 U.S.C. § 981(a)(1)(A). In this case, by contrast, Ex-Im is attempting to seize assets on the theory that they are *the defendants'* property.

There are important policy reasons why the rule adopted in the maritime attachment cases under the Admiralty Rules should not be applied to the FDCPA. Even within the relatively narrow confines of the maritime cases, the burden of the rule creating a property interest of an originator of a funds transfer in funds in the hands of an intermediary bank has required New York banks to process a staggering number of maritime writs on a daily basis. Because of the banks' exposure to process in maritime cases, banking customers having no dispute with the claimant are no longer assured of completing their funds transfers without judicial interference, which in turn causes those customers to consider alternatives to U.S.-dollar transfer mechanisms in completing international transactions. These problems will multiply if state law determining property

interests in funds transfers is ignored in the context of federal procedural statutes like the FDCPA that merely define property broadly.

The uniform state rules that govern the operation of the funds-transfer system in the United States are designed to assure reliability and certainty. The consequences of ignoring these rules are very real, and felt each day by banks in the Southern District of New York. As a result of the prevailing interpretation of the maritime attachment rules in the Second Circuit, financial institutions operating in New York have been harmed, and New York City's role in the international payment system has been undermined. Exposing funds-transfer payment orders received by intermediary banks in New York to a whole new category of restraints would, in addition to ignoring established property interests, raise a further serious threat to the efficiency and reliability of the funds-transfer system in the United States.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Clearing House is an association of leading commercial banks that, through an affiliate, The Clearing House Payments Company L.L.C. ("Payco") provides payment, clearing and settlement services to its member banks

and other financial institutions.³ 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.

Payco operates the Clearing House Interbank Payments System ("CHIPS"), the world's leading private-sector international funds-transfer system. CHIPS has 47 U.S. and foreign bank members, and through them and their thousands of correspondents each day processes on average over 330,000 payment orders, with an aggregate average daily value of \$1.450 trillion as of June 30,

³ The members of The Clearing House are identified in the Corporate Disclosure Statement at the front of this brief.

2009.⁴ The other principal payment system for international funds transfers in the United States is Fedwire, which is operated by the Federal Reserve Banks.

BACKGROUND

1. The Rights, Duties and Liabilities Created by Article 4A

“National uniformity in the treatment of electronic funds transfers is an important goal [of Article 4A of the U.C.C.], as are speed, efficiency, certainty . . . and finality.” *Banque Worms v. BankAmerica Int’l*, 77 N.Y.2d 362, 372 (1991). Hence, all fifty states and every U.S. territory (with the exception of Guam) have adopted Article 4A of the U.C.C. to determine the rights, duties, and liabilities of parties involved in the funds-transfer process. In addition, Article 4A of the U.C.C. has been adopted by the Board of Governors of the Federal Reserve System (the “Federal Reserve”) and thus is federal law governing funds transfers through Fedwire. *See* Federal Reserve System Regulation J, 12 C.F.R. Pt. 210.⁵

⁴ *See* www.chips.org/docs/000652.pdf (last visited Aug. 31, 2009).

⁵ The second footnote on page 12 of Ex-Im’s brief states that “[b]ecause the EFT credits restrained by Deutsche Bank and BoNY involve international fund transfers, they were made via the Clearing House Interbank Payments System (“CHIPS”), which is operated by a Clearing House affiliate.” In fact, not all international funds transfers are sent through CHIPS; indeed, an analysis of the 32 payment orders restrained by The Bank of New York Mellon shows that the bank received 13 from CHIPS (nos. 1, 5, 6, 9, 11, 12, 14, 16, 17, 18, 24, 30, and 31), 3 from Fedwire (nos. 7, 19, and 23), and the remaining 16 from SWIFT (a funds-transfer system operated by the Society for Worldwide Financial Telecommunication, which is based in Brussels). *See* J.A. at 215.

In typical funds transfers, such as those at issue here, an originator sets the process in motion by instructing its bank to send a payment order to the beneficiary's bank. If the originator's bank and beneficiary's bank are not members of the same payments system, which often is the case in international funds transfers, a second payment order is sent by the originator's bank to an intermediary bank. U.C.C. § 4A-104(1) and (2). There is no "fund" or money that belongs to the originator or the beneficiary that passes from one bank to the other. Instead, the originator's bank debits the originator's account before sending the payment order (thus exchanging a debt owed to the originator for an obligation to effectuate a funds transfer in the same amount), and in the next transaction credits the account of an intermediary bank (in exchange for an obligation by that intermediary bank to credit the account of the next bank in the funds-transfer chain).⁶

Under this process, an intermediary bank never holds property of the originator or beneficiary. *See Grain Traders*, 160 F.3d at 102-03.⁷ As described in

⁶ Alternatively, the bank may send its payment order to the next bank through a funds-transfer system that provides a mechanism for settlement of the sender's obligation to the receiving bank. *See* U.C.C. § 4A-403(1)(b).

⁷ The Second Circuit held in *Grain Traders* that 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, and its logic applies to suits by beneficiaries as well.

the recent supplementary commentary of the Permanent Editorial Board for the Uniform Commercial Code (“PEB”) to §§ 4A-502(d) and 4A-503, dated July 1, 2009, which provides a comprehensive description of the funds-transfer process:

The intermediary bank has no contractual obligation to the originator or to the beneficiary, and neither the originator nor the beneficiary has any contractual obligation to or rights flowing from the intermediary bank. Thus, credits in an intermediary bank are credits in favor of the originator’s bank, *and are not property of either the originator or the beneficiary.*⁸

Thus, a creditor of an originator may serve process on an originator’s bank before a funds transfer is initiated but not afterwards, because, in the funds transfer process, “no property of the originator is being transferred.” U.C.C. § 4A-502 cmt. 4.⁹ Moreover, “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.” *Id.* If, as here, a funds transfer is not completed, the intermediary bank has no obligation to either the beneficiary or the originator, and

⁸ Permanent Editorial Board for the Uniform Commercial Code, PEB Commentary No. 16, Sections 4A-502(d) and 4A-503, July 1, 2009, Addendum A to Brief for Defendants-Appellees (“Addendum A”) at 2 (emphasis in original). The PEB’s commentary, prepared in conjunction with the American Law Institute, may also be found at [http://extranet.ali.org/directory/files/COMMENTARY-4A-502\(d\)%20and%204A-503-final.pdf](http://extranet.ali.org/directory/files/COMMENTARY-4A-502(d)%20and%204A-503-final.pdf).

⁹ 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).

its only duty is to return the amount of the funds transfer to its sender. *See* U.C.C. § 4A-402(4). Indeed, 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., precisely because the intermediary bank holds no property of either the originator or the beneficiary.

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

The risk of systemic disruption from expanding the scope of the maritime attachment cases to other areas can be seen from considering the recent burden imposed by those maritime cases. At present, writs of attachment obtained pursuant to Admiralty Rule B are being employed as a virtual vacuum cleaner for funds transfers through New York banks. *See Hannah Bros. v. OSK Marketing & Commc'ns, Inc.*, 609 F. Supp. 2d 343, 352 n.3 (S.D.N.Y. 2009) (“*Winter Storm* and *Aqua Stoli* have led to the filing of Rule B cases, many of questionable merit, ‘by the hundreds.’” (citation omitted)).

One particularly troublesome aspect of this predicament is that maritime plaintiffs frequently have no means of predicting when a particular garnishee bank will be in receipt of a payment order for a funds transfer in which the maritime defendant is the originator or beneficiary, and they therefore serve writs of attachment under Admiralty Rule B on multiple banks for months on end,

in hope of hitting a payment order. Furthermore, many district court judges, recognizing that “[a]n EFT may be in the possession of a financial institution for only a very short period of time,” *DSND Subsea AS v. Oceanografia, S.A. de CV*, 569 F. Supp. 2d 339, 346 (S.D.N.Y. 2008) (internal quotation marks and citation omitted), routinely issue maritime writs with “continuous service” provisions, in circumvention of established circuit law prohibiting attachment of “after-acquired property,” *i.e.*, property not in the hands of the garnishee at the time the attachment order was served. *See Reibor Int’l Ltd. v. Cargo Carriers (KACZ-CO.) Ltd.*, 759 F.2d 262, 268 (2d Cir. 1985).

As a result of this practice, New York banks frequently have amended their software filters intended to flag transactions by persons and entities whose financial transactions must be manually scrutinized by banks for other compliance reasons. These filters are designed to address compliance requirements imposed by the U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”) because of money laundering, economic sanctions and terrorist funding concerns — not to catch transactions by civil judgment debtors. The process of constantly amending these 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 in this vital bank function.

Further interference with the funds-transfer process would create 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 and the possibility that it will be expanded through the government's debt collection efforts under the FDCA, companies around the world will have incentives to 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 to clear transactions through one of the proliferating off-shore dollar clearing networks.¹⁰

3. The Proceeding Below

On February 3, 2009, Ex-Im applied *ex parte* pursuant to 28 U.S.C. § 3205, *inter alia*, for writs of garnishment to be served on Deutsche Bank and BONY/Mellon. The Writs were obtained on February 4, 2009 and served on the

¹⁰ See Morten L. Bech et al., *Global Trends in Large-Value Payments*, FRBNY Economic Policy Rev. 59, 66 (Sept. 2008). The Federal Reserve has expressed concern about offshore clearing systems. See Board of Governors of the Federal Reserve System, *Payment System Risk* (Jan. 5, 2009), available at <http://www.federalreserve.gov/paymentsystems/PSR/default> ("In 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).

banks on February 6, 2009. (See J.A. 120-77.) After oral argument, the district court on April 17, 2009 entered the Memorandum Order setting forth its rulings (SPA 1-9). On May 27, 2009, the court entered the Disposition Order quashing the Writs pursuant to 28 U.S.C. § 3205(a)(7) and staying such order pending appeal. (J.A. 314-16.)

ARGUMENT

The Clearing House does not dispute that the provisions for pre-judgment and post-judgment procedures under the FDCPA preempt any state-law procedural limitations preventing the exercise of such remedies against a debtor's property. The important question raised in this appeal, however, is how to determine who has a property interest enforceable against the intermediary bank when that bank receives a funds-transfer payment order. As this Court put it in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, "the more salient question" is "whose assets they are while in transit." 460 F.3d 434, 446 n.6 (2d Cir. 2006) (emphasis in original).

The Clearing House respectfully submits that the answer to that question is not supplied by the FDCPA (or *Daccarett* and other forfeiture cases) and therefore can only be found in Article 4A of the U.C.C. Accordingly, the Court should affirm the decision below quashing the Writs insofar as they resulted

in restraints on the amounts of funds transfers for which the judgment debtors were originators or intended beneficiaries.

I. THE FDCPA DOES NOT PREEMPT ANY RELEVANT PROVISION OF ARTICLE 4A OF THE U.C.C.

Although there is no dispute that it is a “fundamental principle of the Constitution [] that Congress has the power to preempt state law,” *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000), “courts do not readily assume preemption.” *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 238 (2d Cir. 2006). Rather, “‘in the absence of compelling congressional direction,’ courts will not infer that ‘Congress ha[s] deprived the States of the power to act.’” *Id.* (quoting *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 540 (1979) (internal quotation marks omitted)); see *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). In particular, as the Supreme Court has cautioned, to invoke “conflict preemption” a “clear demonstration of conflict . . . must exist before the mere existence of a federal law may be said to pre-empt state law operating in the same field.” *Jones v. Rath Packing Co.*, 430 U.S. 519, 544 (1977).

Under these standards, the FDCPA does not preempt New York law with respect to the substantive determination of property interests in the amount of

a funds-transfer payment order received by an intermediary bank.¹¹ Although the FDCA includes a broad definition of “property,” the definition only identifies what is “property,” not who has “substantial nonexempt interests” in the property.

A. Property Interests Are Defined by State Law.

A presumption against preemption applies here, because property interests generally are a matter of state law. *See Delaware v. New York*, 507 U.S. 490, 501-502 (1993) (“‘Property interests, of course, are not created by the Constitution,’ but rather ‘by existing rules or understandings that stem from an independent source such as state law.’” (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972))); *In re Rodgers*, 333 F.3d 64, 66 (2d Cir. 2003). Federal courts rely on state law to establish property rights in a variety of fields. *See Butner v. United States*, 440 U.S. 48, 55 (1979) (bankruptcy); *In re Rodgers, supra* (tax); *Securities and Exchange Commission v. Credit Bancorp, Ltd.*, 279 F. Supp. 2d 247, 261 (S.D.N.Y. 2003) (receivership);

¹¹ Preemption by virtue of any particular federal statute must be determined by reference to the language and purpose of that statute. *Winter Storm’s* holding that Supplemental Rule B preempts New York U.C.C. law was rooted in the maritime context of that case, and therefore provides no support for the proposition that the FDCA also has preemptive effect. *See Winter Storm*, 310 F.3d at 279 (“‘Maritime attachment is by any test a characteristic feature of the general maritime law,’ it being ‘self-evident that the maritime attachment is not merely well established in admiralty, but that it is a unique, characteristic feature of that branch of our law.’” (quoting *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 47-48 (2d Cir. 1996))).

see also United States v. Certain Real Property Located at 2525 Leroy Lane, West Bloomfield, Michigan, 910 F.2d 343, 347-48 (6th Cir. 1990) (“We conclude that recognition of state laws governing property rights does not contravene the federal forfeiture scheme, and that the application of state law is the most appropriate method of determining the interest of an innocent owner under 21 U.S.C. § 881(a)(7).”).

B. Under Applicable State Law, Originators and Beneficiaries of Funds Transfers Have No Property Interest in Funds in the Hands of Intermediary Banks.

New York and every other state has adopted Article 4A of the U.C.C., which makes clear that neither the originator nor the beneficiary of a funds transfer has a property interest in a funds transfer received by an intermediary bank in the funds-transfer process. *See* U.C.C. §§ 4A-502(2); 4A-502(4) & cmt. 4; 4A-503 & cmt.; *see also* PEB Commentary (Addendum A at 2). Moreover, state law outside Article 4A also defers to that provision to determine the extent of property interests at the various stages of the funds-transfer payment process. *Banque Worms*, 77 N.Y.2d at 369 (“While courts have attempted in wire transfer cases to employ, by analogy, the rules of the more traditional areas of law, such as contract law, . . . a new article [of the Uniform Commercial Code] was needed because ‘[t]here is no comprehensive body of law that defines the rights and obligations that arise from

wire transfers.” (citation omitted)); *see ReAmerica*, 2009 WL 2432731, at *4 (“We have previously read this language to support the proposition that Article 4A ‘preclude[s] common law claims when such claims would impose liability inconsistent with the rights and liabilities expressly created by Article 4-A.’” (citing *Grain Traders*, 160 F.3d 97, 103)).

Under some circumstances, “future interests” under a contract may be attachable, but Article 4A could not be more clear that no party has a contractual right against an intermediary bank in a funds transfer except (i) the bank that sent it a payment order, and then only if the payment order is not properly executed or completed for a reason not excused under law, U.C.C. § 4A-402(4), or (ii) the receiving bank if the intermediary bank executes its sender’s order by sending a corresponding payment order to a receiving bank, in which case it must pay the amount of the order to the receiving bank, U.C.C. § 4A-402(3). The drafters of Article 4A, and the legislatures that enacted it, specifically wrote the statute and added comments to clarify that state law permits no other result.

Accordingly, unless there is superseding substantive federal law, such as a drug forfeiture law or an OFAC regulation, Article 4A must be honored. As shown herein, the FDICPA is not such a superseding law.

C. Federal Debt Collection Procedures Do Not Conflict With — and Therefore Cannot Preempt — the Property Interests Established Under Article 4A of the U.C.C.

State law is preempted “when Congress has ‘unmistakably . . . ordained’ that its enactments alone are to regulate a part of commerce,” *Jones*, 430 U.S. at 525 (quoting *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142 (1963)), or “Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” *Id.* At 525. Neither rule applies here.

The FDCPA does provide that it “shall preempt State law to the extent such law is inconsistent.” 28 U.S.C. § 3003(d). As the Supreme Court recently observed, however, “[i]f a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law still remains.” *Altria*, 129 S. Ct. 538, 543.

The FDCPA addresses various procedural mechanisms for attaching a debtor’s property, both before and after the entry of a judgment. *See* 28 U.S.C. §§ 3101-3105 (prejudgment remedies); 28 U.S.C. §§ 3201-3206 (postjudgment remedies); *United States v. Mays*, 430 F.3d 963, 965 (9th Cir. 2005) (“FDCPA was enacted ‘to give the Justice Department *uniform Federal procedures* —

prejudgment remedies and postjudgment remedies — to collect debts owed the United States nationwide.” (quoting H.R. Rep. No. 103-883, at 81 (1995) (emphasis added)).

The legislative history of the FDCPA, and commentary upon it, emphasize that its purpose was *procedural*, “to create a comprehensive statutory framework for the collection of debts owed to the United States government,” in order to “improve the efficiency and speed in collecting those debts.” H.R. Rep. No. 736, 101st Cong., 2d Sess. (1990) (“House Report”), at 23, *reprinted in* 1990 U.S.C.C.A.N. 6472; *see Selbe v. United States*, 912 F. Supp. 202, 205 (W.D. Va. 1995) (FDCPA enacted “to provide a single process by which the United States could *collect debts* owing to it, thereby circumventing the 50 distinct *state debt collection procedures* under which it had formerly been compelled to proceed” (emphasis added)). Prior to the enactment of the FDCPA, “State law determine[d] the nature, availability and timing of execution of various collection remedies.” House Report at 23; *NLRB v. E.D.P. Med. Computer Sys., Inc.*, 6 F.3d 951, 953 (2d Cir. 1993) (“Previously the United States collected debts according to the laws of the different states which impeded collection efforts.”).¹²

¹² The case law has been consistent with the Congressional purpose of limiting state procedural interference with federal collection efforts. *See United States v. Wilson*, No. CR 305-

(footnote continued)

There is no precedent for Ex-Im’s position that the FDCPA preempts state property rights and redefines whether a debtor has a property interest in particular funds that it does not hold. As one court put it, the FDCPA’s “objective is to provide procedural uniformity, *not to alter substantive rights established by state law.*” *NLRB v. J&D Masonry, Inc.*, No. 1:07-CV-782, 2008 WL 4960157, at *3 (W.D. Mich. Nov. 19, 2008) (emphasis added).

The language of the statute itself supports this view. By its terms, the FDCPA only refers to property in which the debtor has a substantial non-exempt interest. 28 U.S.C. 3205. Although the legislative history to the FDCPA indicates that “‘property’ is defined broadly, House Report at 29, the statute does not define who has an “interest” in property nor suggest that the word means anything other than a property interest created or recognized by state law. In short, the statute does not and cannot *create* property rights where none exist.

(footnote continued)

008, 2007 WL 4557774, at *1 n.2 (S.D. Ga. Dec. 20, 2007) (conflict with state law limiting the garnishment of a defendant’s pension benefits); *United States v. McClanahan*, No. 3:03-00053, 2006 WL 1455698, at *4-*5 (S.D. W.Va. May 24, 2006) (same); *United States v. Gianelli*, 543 F.3d 1178, 1183 (9th Cir. 2008) (conflict with state laws imposing a time limit on enforcement of a restitution judgment); *United States v. Pierce*, 231 B.R. 890, 893 (E.D.N.C. 1998) (“state law providing the means for execution of a judgment” preempted); *Mahler v. United States*, No. 01-14152-CIV-MOORE, 2001 WL 1572070, at *1 (S.D. Fla. Oct. 5, 2001) (“requirement that a copy of the judgment be filed in addition to an abstract” preempted); *United States v. Teeven*, Civ. A. No. 92-418 LON, 1992 WL 683682, at *5-*6 (D. Del. Oct. 27, 1992) (procedures for amendment in attachment and garnishment proceedings preempted).

D. Courts Applying the FDCPA Routinely Turn to State Law to Determine the Debtor's Interest in Property.

Courts consistently rely on state law in construing the definition of “property” under the FDCPA. *See, e.g., United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728, 735 (8th Cir. 2001) (“Under Nebraska law, legal title remains in the grantor when funds are placed in escrow. Thus, if the funds were in escrow, the Tribe had legal title to the funds and they were subject to garnishment” under the FDCPA (internal citations omitted)); *United States v. Coluccio*, 51 F.3d 337, 342 (2d Cir. 1995) (“[I]f under New York law, Ms. Coluccio ‘owns’ the funds securing the bond, then the execution upon the funds underlying the bond by the Government would be limited to the extent that her ownership interest would require.”); *United States v. Becker*, No. 4:03 CV 1602 DDN, 2005 WL 6120994 (E.D. Mo. Sept. 25, 2005) (applying Missouri law to determine defendant’s interest in property under fraudulent conveyance provisions of the FDCPA).

In sum, Ex-Im here has “failed to demonstrate how [state] law, as it relates to this case, is inconsistent with the FDCPA.” *United States v. Golden Elevator, Inc.*, 868 F. Supp. 1063, 1067 (C.D. Ill. 1994). Accordingly, there is no basis to supplant the well-defined property interests applicable to funds transfers under Article 4A of the U.C.C., which plainly establish that the defendants in this

case have no property interest arising from the funds-transfer payment orders received by Deutsche Bank and BONY/Mellon.

II. THE COURT SHOULD AFFIRM THE ORDERS BELOW.

A. *Winter Storm* Should Not Be Applied to the FDCPA.

Although the Clearing House believes that the Second Circuit’s opinion in *Winter Storm* was in error, the issue before this Court stands on its own, and the issue is one of first impression – whether the FDCPA creates property rights as a matter of federal law where none exist under state law. *Winter Storm* concluded that Admiralty Rule B, in effect, preempted state law and imposed a maritime rule as to the property interests held by an intermediary bank in the funds-transfer process. It does not follow that the FDCPA preempts state law in the same respect and, as shown in Point I above, there is nothing in the language, legislative history or judicial application of the statute that suggests that it does.

The unique circumstances that persuaded the *Winter Storm* court are obviously not present here.¹³ That court emphasized that “[m]aritime attachment is

¹³ As U.S. District Judge Richard J. Holwell recently observed:

Winter Storm did not attempt to identify any existing rule or understanding (and the Court is aware of none) that defined the scope of “property” subject to attachment under Rule B, nor did it consider the Supreme Court’s holdings in [*Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995)] or [*Bank of Marin v. England*, 385 U.S. 99 (1966)]. Instead, relying on a drug-forfeiture case, 310 F.3d at 276-78, the Nicene Creed, *id.* at 276 n. 9, and the policy of liberal attachment in maritime proceedings, *id.* at 268, *Winter*

(footnote continued)

centuries old. ‘The use of the process of attachment in civil causes of maritime jurisdiction by courts of admiralty . . . has prevailed during a period extending as far back as the authentic history of those tribunals can be traced.’” 310 F.3d at 267 (quoting *Atkins v. Fibre Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 303 (1873)). Moreover, as the court below noted, quoting *Winter Storm*, “[t]he rationale underlying maritime attachment is twofold. First, attachment provides a means to assure satisfaction if a suit is successful’; the second purpose is ‘to insure a defendant’s appearance in an action, an aspect of attachment inextricably linked to a plaintiff’s substantive right to recover.’” (SPA-9 (quoting *Winter Storm*, 310 F.3d at 268 (internal quotation marks omitted)); see *STX Panocean (UK) Co., Ltd. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 130 (2d Cir. 2009) (“Maritime attachments arose because it is often more difficult to obtain jurisdiction over parties to a maritime dispute than parties to a traditional civil action.”). Indeed, Admiralty Rule B only applies “[i]f a defendant is not found within the district.” Fed. R. Civ. P. Supp. R. B(1)(a). There is no such justification in non-maritime cases. It is therefore not surprising that no court has applied *Winter Storm*’s

(footnote continued)

Storm found an electronic funds transfer sufficiently “property-like” to be subject to attachment. See *id.* at 276-78.

Hannah Bros., 609 F. Supp. 2d at 352 n.3.

holding outside the maritime attachment context, or that Ex-Im has not referenced a single non-maritime or pre-*Winter Storm* decision to support its desired definition of the interests in a funds transfer.

B. Neither *Daccarett* Nor the FDCPA Addresses Property Interests in a Funds Transfer.

Daccarett, although relied upon by the *Winter Storm* court, is not independently relevant to the present analysis. *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 payment order 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, on the basis that they are the proceeds of the defendant's crimes. The *Daccarett* court, as appropriate in a forfeiture case, identified the funds at issue as "traceable" to an illicit activity and therefore subject to attachment under 21 U.S.C. § 881(a) regardless of ownership.

The distinction was subsequently recognized in *Aqua Stoli, supra*, where another panel of the Second Circuit went so far as to say that "[t]he correctness of our decision in *Winter Storm* seems open to question," *id.* at 446 n.6, and that:

Because *Daccarett* was a forfeiture case, its holding that EFTs are attachable assets does not answer the more salient question of *whose* assets they are while in transit. In the absence of a federal rule, we

would normally look to state law, which in this case would be the New York codification of the Uniform Commercial Code, N.Y. U.C.C. Law §§ 4-A-502 to 504. Under state law, the 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).¹⁴

This pointed dicta provides yet another reason why this Court should not expand the holding of *Winter Storm* and its progeny outside the maritime context in which they arose, as this would have the potential for large-scale disruption of the vital funds-transfer system through which trillions of dollars pass each day. By way of example, Ex-Im’s conception (App. Br. at 33-35) of “concurrent property interest(s)” in a funds-transfer payment order received by an intermediary bank would result in two separate parties possessing identical, yet directly contradictory, property rights in the same asset even though the bank holding the asset has no legal obligation to or relationship with either of them.

¹⁴ In addition to questioning the correctness of the central holding in *Winter Storm*, the *Aqua Stoli* panel 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.

The Second Circuit in *Consub Delaware LLC v. Schahin Engenharia Limitada*, another maritime attachment case, followed the holding of *Winter Storm* with minimal analysis. 543 F.3d 104 (2d Cir. 2008). In *Consub*, however, the panel expressly did not reach the question of whether *Winter Storm*’s property rights concept should be expanded to apply where the defendant is the *beneficiary* of the funds transfer. *Id.* at 109 n.1 (“We do not reach today the question of whether funds involved in an EFT en route to a defendant are subject to a Rule B attachment.”).

Such an extraordinary legal fiction, so contrary to the property interests recognized under the laws of all fifty states, cannot be sustained.

Further, even if Ex-Im is correct that both beneficiary and originator have concurrent property interests, the Court below also was correct that under the FDCPA co-owned property is subject to garnishment only to the same extent as permitted under state law, SPA-6, citing 28 U.S.C. § 3205(a), and garnishment is barred here because state law prohibits garnishment of a funds transfer at an intermediary bank.

Daccarett's limitations are important here for the additional reason that the FDCPA explicitly provides that “[a] court may issue a writ of garnishment against property . . . *in which the debtor has a substantial nonexempt interest* and which is in the possession, custody, or control of a person other than the debtor, in order to satisfy the judgment against the debtor.” 28 U.S.C. § 3205(a) (emphasis added). Thus, as a remedy *quasi in rem*, garnishment depends entirely on the determination that the judgment debtor has a property interest in the *res* at issue at the moment it is attached. Forfeiture, on the other hand, is a remedy *in rem*, based 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) (citation omitted).¹⁵

In contrast, under the FDCPA, it is not enough that the amount of a funds transfer constitutes a seizable *res* – it must constitute the *defendant’s* seizable *res*. “[W]hether or not the Government can levy upon the [property] pursuant to a writ of execution turns on the identity of the [property] as ‘property in which the judgment debtor has a substantial . . . interest.’” *United States v. Coluccio*, 842 F. Supp. 663, 665-66 (E.D.N.Y. 1994) (citing 28 U.S.C. 3203(a)), *rev’d on other grounds*, 51 F.3d 337 (1995); *see Selbe*, 912 F. Supp. at 206 (“It is Selbe who is the government’s debtor and Selbe whose property must be subject to the FDCPA. The note is Victoria’s property, and as the property of someone other than the debtor, the note is not subject to the FDCPA.”). Nothing in the FDCPA determines that the defendants here have property interests in funds transfers at intermediary banks, and governing uniform state law is to the contrary.

¹⁵ In *Consub*, the panel rejected the claim that the funds at issue in *Daccarett* were property of the government. The opinion stated that position was “belied by *Daccarett* itself, which referred to *United States v. 92 Buena Vista Avenue*, 507 U.S. 111 (1993), 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: the quoted language merely described a procedural exception that allowed an “innocent owner defense” to be asserted under 21 U.S.C. § 881(a). *92 Buena Vista Avenue*, 507 U.S. at 128. The existence of this defense itself confirms that statutory forfeiture law is an inapposite proxy for determining property interests in a funds transfer.

Much as *Daccarett* did not address the “more salient question” (*Aqua Stoli, supra*) of whether an originator or beneficiary of a funds transfer has an interest in a payment order received by an intermediary bank, decisions that interpret the FDICPA’s broad definition of “property” to include various intangible rights do not support any determination that the defendants here have a “sufficient interest” in funds transfers while they are at intermediary banks. Rather, those cases simply determine that the broad definition of property under the FDICPA encompasses what the states determine are property interests. In the area of funds transfers, those rights are defined by Article 4A.

CONCLUSION

For the reasons stated, the Court should affirm.

Dated: September 2, 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 6,986 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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