06-2121-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

VAMVASHIP MARITIME LTD.,

Plaintiff-Appellee,

—against—

LITTLE ROSE TRADING LLC,

Movant-Appellant,

—and—

SHIVNATH RAI HARNARAIN (INDIA) LTD.,

Defendant.

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

BRIEF OF *AMICUS CURIAE* THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF APPLICATION OF FEDERAL MARITIME LAW

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AMICUS' IDENTITY AND INTEREST, AND SOURCE OF AUTHORITY TO FILE

On consent of the parties and with leave of Court, The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the lower court's conclusion that state law should not govern the reach of Rule B.

The MLA is a nationwide voluntary law association founded in 1899, with a membership of approximately 3,100 attorneys, judges, law professors, and other distinguished members of the maritime community.[1] Its attorney members, most of whom are specialists in maritime law,[2] represent all maritime interests--shipowners, charterers, cargo interests, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.

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1. The facts stated in this section are set forth in the Affirmation of Lizabeth L. Burrell dated February 9, 2007 in support of the MLA's motion to file this brief.

2. The Supreme Court, in *Offshore Logistics v. Tallentire*, 477 U.S. 210, 223 (1986), noted that the MLA is "an organization of experts in admiralty law." That expertise is recognized by the U.S. governmental agencies that work with the MLA on statutes, regulations, and other matters involving maritime affairs.

The purposes of the MLA are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime Internationale and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, the MLA has sponsored a wide range of legislation during its 107 years of existence.[3] Especially relevant here is the MLA's leading role in the 1966 merger of the former

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3. Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1300-1315; the maritime portions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1603-1611; the Maritime Lien Acts of 1910 and 1920 and their 1988 amendments, *see* 46 U.S.C. §§ 31341-31343; the Act permitting appeals from interlocutory admiralty decrees, 28 U.S.C. § 1292(a)(3); the Public Vessels Act, 46 App. U.S.C. §§ 781-790; the Extension of Admiralty Jurisdiction Act, 46 App. U.S.C. § 740; and the Inland Rules Act, 33 U.S.C. §§ 2001-2038.

General Admiralty Rules of the Supreme Court and the Federal Rules of Civil Procedure, which preserved the unique features of admiralty proceedings, including arrest and attachment, possessory, petitory, and partition actions, and *concursus* in limitation of liability proceedings. FED. R. CIV. P. Supplemental Rules for Certain Admiralty and Maritime Claims.

The MLA By-Laws define the criteria for seeking *amicus curiae* participation as follows:

> (a) Whether or not the outcome would adversely affect uniformity.
>
> (b) Whether or not the outcome would adversely affect traditional admiralty practice or procedure.
>
> (c) Whether or not the outcome would adversely affect traditional admiralty jurisdiction.
>
> (d) Whether or not the outcome would affect the meaning of a law or treaty advanced by the Association.[4]

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4. By-laws of The Maritime Law Association of the United States, § 702.3(a)-(d).

The instant case, which concerns the interpretation of a quintessentially maritime procedural rule, presents a rare instance in which all four criteria are invoked.

It is the policy of the MLA to participate as *amicus curiae* only when important issues of maritime law or practice are involved and only when the effect of the Court's decision may be substantial.[5] The MLA's By-laws require that its participation as *amicus curiae* be approved by the President, in consultation with the First and Second Vice-Presidents, and then submitted to the Board of Directors. The By-laws provide that such approval must be given sparingly and only when certain criteria are met. In this case, the vote of the Board of Directors to participate was unanimous.

Having actively participated in the 1966 merger of the former General Admiralty Rules of the Supreme Court and the Federal Rules of Civil Procedure, and as the organization which encompasses the practitioners who utilize these Rules on a day-to-day basis, the MLA has

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5. *E.g.*, *The Merchants National Bank of Mobile v. Dredge GENERAL G.L. GILLESPIE*, 663 F.2d 1338 1 (5th Cir. 1981).

an interest in promoting the uniform application of the Admiralty Rules in manner consistent with their intent and purposes.

SUMMARY OF ARGUMENT

The Constitution allocates admiralty substantive and procedural law to federal, not state, control. The distinctive features of admiralty law and practice in place before the Constitution was adopted were incorporated in federal rules, statutes, and decisional law to govern maritime cases.

There is a fully developed body of federal decisional law defining "defendant's tangible or intangible personal property" subject to attachment pursuant to Supplemental Admiralty Rule B. FED. R. CIV. P. SUPP. R. B(1)(A). It is therefore unnecessary to superimpose any other body of law to decide whether or not certain types of property can be attached and what kind of interest is adequate to sustain an attachment.

Application of state banking law to interpret the reach of an admiralty rule would also violate the uniformity doctrine, which prohibits states from impairing a maritime claimant's access to traditional admiralty rights and remedies. Even if the existing body of law

interpreting Rule B had not yet determined the attachability of any particular property interest, it would nevertheless be up to the federal courts to fashion a rule consistent with the historical purpose and role of maritime procedural rules, not to default to inapplicable and potentially inconsistent state law that would disrupt the uniformity necessary to the smooth functioning of maritime commerce.

Moreover, the Supplemental Admiralty Rules represent a federal enactment defining the unique procedures applicable in cases that fall within admiralty jurisdiction. State law that would interfere with the function of those procedures is therefore preempted.

ARGUMENT

I. BECAUSE THE FEDERAL COURTS HAVE HAD CENTURIES TO REFINE THE SCOPE OF MARITIME ATTACHMENTS, THERE IS NO NEED TO ENGRAFT AN ALIEN BODY OF LAW TO DEFINE THE PROPERTY SUBJECT TO RULE B RESTRAINT.

It is unnecessary to look to anything other Rule B itself and the federal case law construing it to decide what "tangible or intangible personal property" may be attached in an admiralty suit.

The Rule itself is clear, and "the Federal Rules should be given their plain meaning." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 (1980). A court's task "is not to decide what the rule should be, but rather to determine what it is. Once we conclude that [a Rule] speaks to the matter at issue, our inquiry is complete." *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 549 (1991) (citing *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123, 126 (1989)); see *id.* at 540-41. There is therefore no need to look to state law to determine the plain meaning of Rule B's language. *See, e.g.*, *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 276 (2d Cir. 2003).

Moreover, an extraordinarily rich body of federal precedent has been developed over centuries to determine the type of property and the kind of "tangible or intangible" interest a defendant must have for that property to be subject to a Rule B attachment. As this Court stated in *Winter Storm*, 310 F.3d at 267-68:

> Maritime attachment is 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." *Atkins v. Fibre Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 303 (1873). As early as 1825, the Supreme Court was able to say of the right of attachment in *in personam* admiralty cases that "[t]his Court has entertained such suits too often, without hesitation, to permit the right now to be questioned." *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 486 (1825). "[M]aritime attachment is a feature of admiralty jurisprudence that antedates both the congressional grant of admiralty jurisdiction to the federal district courts and the promulgation of the first Supreme Court Admiralty Rules in 1844." *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 47 (2d Cir. 1996).

(Parallel citations omitted.)

Apart from real property, *see, e.g., Harriman v. Rockaway Beach Pier Co.*, 5 F. 461 (E.D.N.Y. 1880), a defendant's goods, chattels, credits, and effects have been consistently found to be subject to attachment. *See, e.g., Det Bergenske Dampskibsselskab v. Sabre Shipping Corp.*, 341 F.2d 50 (2d Cir. 1965).

Restrictions such as title or ownership are not the controlling factors in determining if given property may be restrained. *See, e.g., Florida Conference Association of Seventh-Day Adventists v. Kyriakides*, 151 F. Supp. 2d 1223 (C.D. Cal. 2001) (part of a promissory note was properly

attached because it evidenced a debt, even though debt was not due or payable at the time); *Linea Naviera de Cabotaje C.A. v. Mar Caribe de Navegacion C.A.*, 1999 U.S. Dist. LEXIS 22500 (M.D. Fla. Nov. 18, 1999) (sustaining attachment of bank accounts of two companies arguably related to the defendants because there were reasonable grounds to believe that defendant controlled the bank accounts); *Trans-Asiatic Oil Ltd., S.A. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1984) (affirming attachment of debt owed by third party to defendant); *Oil Transport Co., S.A. v. Hilton Oil Transport*, 1994 AMC 2817 (S.D. Tex. July 25, 1994) (permitting attachment of arbitration award in favor of defendant).

Of greatest significance here are the decisions defining the type of interest a defendant must have in intangible items in order for that property interest to be attached. Federal courts have permitted the attachment of debts, even if they have not yet matured or have only partially matured. *See, e.g., Iran Express Lines v. Sumatrop, AG*, 563 F.2d 648 (4th Cir. 1977); *Cowles v. Kinzler*, 225 F. Supp. 63 (W.D. Pa. 1963). Other interests that are contingent or have not yet matured may also be

attached. *See, e.g., Dominion v. Naviera*, 2006 U.S.Dist. LEXIS 85616 (S.D.N.Y. Nov. 21, 2006).

With a body of applicable precedent, and contrary to the banks' contention, there is no "hole" to be filled nor any need to look to anything other than the Rule and existing maritime precedents for guidance about the type of property or interest which may be the subject of a Rule B attachment.

II. THE CONSTITUTION REQUIRES THAT RULE B, WHICH EMBODIES A DISTINCTIVE, TIME-HONORED ADMIRALTY PROCEDURE, MUST BE INTERPRETED BY A UNIFORM BODY OF FEDERAL MARITIME LAW.

A. The Constitution Allocates Power Over Maritime Matters To Federal Control.

In addition to being unnecessary, it would be improper to allow state law to control or even to influence the meaning of terms used in an admiralty procedural rule because the Constitution commands that maritime matters be governed by federal law. U.S. CONST. art. III, § 1, § 2, cl. 2; U.S. CONST. art. I, § 8, cl. 3.

The Constitution

> took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose.

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920). In other words, the Framers intended "to place the entire subject [of maritime law]—its substantive as well as its procedural features—under national control." *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924).

While these principles were developed many years ago, recent decisions of the Supreme Court demonstrate that their strength remains undiminished to this day:

> Article III's grant of admiralty jurisdiction "'must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.'"

> *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (quoting *THE LOTTAWANNA*, 21 Wall. 558, 575 (1875)). See also *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210 (1996) ("[I]n several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision" (citing *Kossick v. United Fruit Co.*, 365 U.S. 731,] 742 [(1961)]; *Pope & Talbot [Inc. v. Hawn]*, 346 U.S. [406], 409 [(1953)]; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248-249 (1942))) . . . .

Norfolk Southern v. Kirby, 543 U.S. 14, 125 S. Ct. 385, 395-96 (2004) (parallel citations omitted).

Accordingly, state legislation is invalid if it "works a material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *American Dredging*, 510 U.S. at 446-47 (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1916)).

There can be no question but that Rule B attachment is one of the characteristic features of maritime law—like arrest, salvage, general average, and personification of the vessel. *See, e.g., Winter Storm*, 310 F.3d at 267-68; Point II.B, *infra* at 13-14.

There can also be no question but that the application of state UCC law would work a material prejudice to the characteristic features of this admiralty mechanism. *See, e.g., U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 391 (3d Cir. 2002) ("the area of maritime attachments [is] a subject of particular concern to the federal courts, and one where national uniformity is of some importance"); Point II.C, *infra* at 15-17.

B. Rule B Attachment Is a Characteristic Feature of Maritime Law which Recognizes the Special Circumstances of Maritime Commerce.

Maritime attachment has such a venerable history[6] because courts have long-recognized the pressure placed on admiralty creditors by the combination of the international character of maritime commerce and the fleeting presence of maritime property, which is both a means of obtaining jurisdiction and of enforcing a potential judgment. *Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 637 (9th Cir. 1982). "The frustrated creditor, much like Evangeline,[7] the poor Arcadian girl separated from her lover, is tragically left to roam the shores awaiting the

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6. *See, e.g., Winter Storm*, 310 F.3d at 267-68;

7. Henry Wadsworth Longfellow, *Evangeline, A Tale of Acadie* (1843).

debtor's next arrival." *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 732 F.2d 1543, 1548 (11th Cir. 1984).

Admiralty creditors' rights can also be frustrated because shipping assets are often disguised behind corporate shells. *See, e.g., Inter-American Shipping Enterprises, Ltd. v. Turbine Tanker TULA*, 1982 AMC 951 (E.D.VA. 1981).

Maritime attachment, however, levels the field:

> [Rule B] commands a speedy clarification of vital facts underlying both prior disputes and the current seizure. It compels adjudication. Otherwise, pursuit of such unresolvable disputes, as the Court long ago acknowledged, "would in many cases amount to a denial of justice."

Schiffahartsgesellschaft, 732 F.2d at 1548 (citing *Polar Shipping*, 680 F.2d at 629-30; quoting *In re Louisville Underwriters*, 134 U.S. 488, 493 (1890)).

The role of attachment as one of the unique features of maritime procedure, set forth in a special group of rules formulated from traditional admiralty practice,[8] and the continuing importance of

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8. For a discussion of the distinctively maritime character and history of the Supplemental Rules, see Supplemental Rule A advisory committee notes, 1966 adoption.

attachment in facilitating maritime commerce by encouraging parties to do business with the confidence that a distant debtor can be made to answer and pay a claim, leave no doubt but that Rule B attachment is a characteristic feature of maritime law.

C. Application of State Law Would Impair the Uniform Application of Maritime Law in an Area in which Uniformity is Essential.

Even if all fifty states adopted identical versions of UCC Article 4A (which has not happened), application of state law would still disrupt the necessary uniformity in the availability of maritime attachments. *See generally* Norman Silber, *Why the U.C.C. Should Not Subordinate Itself to Federal Authority: Imperfect Uniformity, Improper Delegation and Revised Section 3-102(c)*, 55 U. PITT. L. REV. 442, 452-53, 456-57, 459-60, nn. 72, 134, 139 & 142 (1994) (discussing the deliberate choice made to enact a fifty-state statute rather than a federal statute so that, if desired, states could depart from the standard); *see also* Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & COMM. 553, 567 (1995) (discussing how apparent uniformity–adoption of the same text–quickly degenerates into

inconsistency); Albert H. Conrad, Jr. & Richard P. Kessler, Jr., *Proposed Revisions to the Georgia Uniform Commercial Code: A Status Report*, 43 MERCER L. REV. 887, 898 & n. 80, 899 (1992) (uniform law approaches have been insufficiently responsive to emerging technologies, economic considerations, and consumer protection needs, and such responsiveness can only be achieved through federal action).

The failure to maintain uniformity invites inconsistent results which subvert the "traditional commercial maritime interests' need for decisional stability." Michael F. Vitt, *Stemming the Tide: Uniformity in Admiralty Law*, 28 U. BALT. L. REV. 423, 444 (1999). Commentators have noted that national rules in the form of the general maritime law are necessary "to subject an industry to a single standard when the imposition of multiple standards would make it commercially burdensome for maritime commerce to operate efficiently." Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 TUL. L. REV. 1421, 1482 (2001). "Confusion and inefficiency will inevitably result if more than one body of law governs" the parties' rights. *Norfolk Southern v. Kirby*, 129 S.Ct. at 396.

Even if existing opinions did not already provide an answer to whether or not certain property interests were subject to Rule B attachment,[9] the Constitution and concomitant uniformity doctrine would require that the federal courts fashion a uniform maritime rule, not resort to state law. *See Norfolk Southern v. Kirby*,[10] 125 S. Ct. at 392; *Moragne v. States Marine Lines*, 398 U.S. 375, 396 (1970) ("There should be no presumption that Congress has removed this Court's traditional responsibility to vindicate the policies of maritime law by ceding that function exclusively to the States.").

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9. State property rights yield to the rights granted by maritime law. *See, e.g., Aurora Maritime*, 85 F.3d at 47 (bank's state-law right of set-off was inferior and had to yield to maritime plaintiff's right to security under Rule B); *In Re Sterling Nav. Co., Ltd. v. Sterling Nav. Co. Ltd. A/S*, 31 B.R. 619 (S.D.N.Y. 1983) (reversing bankruptcy court's award and holding that shipowner had enforceable lien even though it was not filed in accordance with UCC Article 9 because maritime liens were independent of UCC and have priority over trustee's lien in bankruptcy).

10. "Our authority to make decisional law for the interpretation of maritime contracts stems from the Constitution's grant of admiralty jurisdiction to federal courts. See Art. III, § 2, cl. 1 (providing that the federal judicial power shall extend to 'all Cases of admiralty and maritime Jurisdiction'). See 28 U.S.C. § 1333(1) (granting federal district courts original jurisdiction over '[a]ny civil case of admiralty or maritime jurisdiction') . . . ." 125 S. Ct. at 392.

III. BECAUSE UCC ARTICLE 4A CONFLICTS WITH A RULE OF PROCEDURE FOR THE DISTRICT COURTS, IT IS PREEMPTED.

The Supremacy Clause, U.S. CONST. art. VI, grants Congress the power to preempt state legislative and common law. *See, e.g., Public Utilities Commission of State of California v. United States*, 355 U.S. 534, 544 (1958).

When Congress authorized the Supreme Court to develop admiralty rules in 1792, it reiterated the peculiar nature of maritime law and instructed the Supreme Court to adhere to rules and usages of admiralty rather than those of the common law courts. *Amstar Corp. v. S/S ALEXANDROS T.*, 664 F.2d 904, 908 (4th Cir. 1981). It has been held that "Rule B is a sterling example of the Court's respect for that advice." *Schiffahartsgesellschaft*, 732 F.2d at 1547.

In the Act of June 19, 1934, Chap. 651, 48 Stat. 1064,[11] Congress again granted the Supreme Court the power

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11. The current version of this statute appears as 28 U.S.C. § 2072. *See* FED R. CIV. P. Rule 1 advisory committee notes, 1937 Adoption ¶ 3.

> to prescribe, by general rules, for the district courts of the United States . . . the practice and procedure in civil actions at law . . . . [T]hereafter all laws in conflict therewith shall be of no further force or effect.

This statute contains a direct and unambiguous preemption clause. Accordingly, any state legislation which conflicts with or restricts federal procedural rules prescribed by the Supreme Court is rendered ineffective by virtue of the express preemption provision of the Act of June 19, 1934.

In response to this Act, the Supreme Court adopted the Federal Rules of Civil Procedure, which, since 1966, have included the Supplemental Admiralty Rules. *See* FED. R. CIV. P. Rule 1 advisory committee notes, 1937 adoption ¶ 3; Supp. Rule A, advisory committee notes. The Admiralty Rules, including Rule B, are therefore a necessary feature of the federal procedural rules adopted pursuant to the Act, and to the extent that Rule B conflicts with UCC Article 4A—and the banks so contend in their briefs *amici curiae*—the latter can be of no force or effect.

Moreover, in accordance with the general rule that the UCC is displaced by federal law in cases involving federal subject matter,[12] the drafters of UCC Article 4A anticipated that conflicts would arise between Article 4A and federal law and that federal law would prevail in such cases. For example, in comment 3 to § 4A-107, the UCC drafters noted that "federal preemption would make ineffective any Article 4A provision that conflicts with federal law." *See* Thomas C. Baxter, Jr. and Raj Bhala, *The Interrelationship of Article 4A with Other Law*, 45 BUS. LAW 1485 (1990).

The relevant sections of UCC Article 4A are in direct conflict with Rule B because they would prohibit the federal courts from exercising powers conferred by Rule B in two respects: (1) by preventing

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12. *See, e.g., Starmakers Publishing Corp. v. Acme Fast Freight, Inc.*, 615 F. Supp. 787, 791 (S.D.N.Y. 1985) (Interstate Commerce Act, not the UCC, governs interstate shipments); *North Am. Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233-34 (2d Cir. 1978) (federal law preempts all state law in interstate shipments); *National Garment Co. v. New York, Chicago & St. Louis R.R. Co.*, 173 F.2d 32, 35 (8th Cir. 1949) (federal law preempts state law in interpreting bills of lading); *Rio Grand Motor Way, Inc. v. Resort Graphics, Inc.*, 740 P.2d 517, 520 (Colo. 1987) (federal law preempts conflicting state UCC law on warehouseman's liens).

courts from issuing restraining orders to certain garnishees, even if it were impossible at the commencement of suit to determine the status of a garnishee in the relevant transaction (UCC § 4A-503), even though Rule B contains no such prohibition, and (2) if a court nevertheless issued a Rule B attachment order, by sometimes excusing garnishees from compliance (UCC § 4A-502) when they would otherwise be subject to contempt sanctions for disobedience, thus compromising the authority of an admiralty court to enforce its orders.

Impairing a federal court's procedural powers in this fashion is impermissible:

> [t]o hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.

Hanna v. Plumer, 380 U.S. 460, 473-74 (1965).

Such a topsy-turvy result is especially pernicious in admiralty, where the rules occupy a distinctively important role in the federal procedural system:

> [The admiralty rules'] lineage sets them apart from common law based sequestration, garnishment, and attachment laws developed by the legislatures of the several states. As offspring of the very institution charged with mandating the procedural safeguards required before property may be taken, Supplemental Rules for Admiralty must be reviewed with special deference.

Schiffahartsgesellschaft, 732 F.2d at 1549.

This unique stature of the Supplemental Rules arises from maritime commerce's international character and the mobility of vessels, so that "the [maritime] creditor . . . may more often be the one in need of special protections." *Trans-Asiatic Oil*, 743 F.2d at 961. Such special circumstances make it all the more inappropriate to superimpose state law to decide the reach and functioning of the Supplemental Rules.

Reading Rule B without resort to state law does not create any new substantive rights because maritime plaintiffs have always had a right to attach the tangible and intangible property of maritime defendants, wherever and in nearly whatever form it may be found in the district. *See* Point I, *supra* at 6-10. Nevertheless, any contention that Rule

B, absent a state law gloss, violates the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, must overcome significant hurdles:

> The Federal Rules of Civil Procedure are not enacted by Congress, but "Congress participates in the rulemaking process." [5A] Wright & Miller § 1332, at [494], and n. [59], *citing* Amendments to the Rules of Civil Procedure for the United States District Courts, H.R. Doc. No. 54, 98th Cong., 1st Sess., 3-25 (1983). Additionally, the Rules do not go into effect until Congress has had at least seven months to look them over. See 28 U.S.C. § 2074. A challenge to [a federal rule] can therefore succeed "only if the Advisory Committee, [the Supreme Court], and Congress [all] erred in their *prima facie* judgment that the Rule . . . transgresses neither the terms of the Enabling Act nor constitutional restrictions."

Business Guides, 498 U.S. at 552 (citing *Hanna v. Plumer*, 380 U.S. at 471) (sustaining Rule 11 against challenge alleging it conferred new substantive rights)

Moreover, "'Rules which *incidentally* affect litigants'[13] substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules.'" *Business Guides*, 498 U.S.

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13. Of course, garnishees are neither plaintiffs nor defendants in maritime suits.

at 552 (quoting *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 5 (1987)) (emphasis in original).

Congress has preempted state law that would impair of the effectiveness of federal procedural rules. "The legacy of admiralty's legal heritage is the deep-rooted historical basis surrounding its procedural rules." *Schiffahartsgesellschaft*, 732 F.2d at 1547. The distinctively federal character of the Supplemental Rules makes it all the more important to accord them preemptive effect over any state law that would impair their operation.

CONCLUSION

For all the foregoing reasons, the Court should hold that state law cannot be applied to construe Supplemental Rule B and that instead, federal admiralty law as embodied in that Rule and the associated decisional law should be used to determine what may and may not be the subject of a maritime attachment.

Dated: New York, New York
February 8, 2007

Respectfully submitted,

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