Preliminary Statement

The Defendant-Appellee, JALDHI OVERSEAS PTE, LTD. ("Defendant" or "Jaldhi"), submits this Memorandum of Law in Opposition to the Plaintiff-Appellant's, The Shipping Corporation of India, Ltd. ("Plaintiff" or "SCI"), Brief on Appeal of the District Court's June 27, 2008 Order vacating the maritime attachment dated May 7, 2008 ("Attachment Order"); and in Support of the Defendant's Cross-Appeal of the same date denying the Defendant's Motion for Counter-Security. For the reasons set forth below, the Plaintiff's Appeal should be denied; and the Defendant's Cross-Appeal granted.

Jurisdictional Statement

Appellate jurisdiction is vested in this Court for purposes of the Defendant's Cross-Appeal pursuant to 28 U.S.C.A. §1291 because this appeal is not from a final judgment concluding the proceedings in the District Court. *Result Shipping Co., Ltd. v. Ferruzzi Trading USA, Inc.*, 56 F.3d 394, 398 (2d Cir. 1995). Specifically, the District Court's denial of the Defendant's Motion for counter-security did not terminate the proceedings.

The petition for cross-appeal was timely submitted on July 25, 2008 (A-91).

This cross-appeal is not from a final order or judgment that disposes of all parties' claims.

Statement of Issues Presented on Appeal/Cross-Appeal

1. Did the District Court correctly decide to follow its 2006 decision of *Seamar Shipping Corp. v. Kremikovtzi Ltd.*, 461 F.Supp.2d 222 (S.D.N.Y. 2006), in vacating the attachment order as to funds from third parties of which Jaldhi was the intended beneficiary but not yet the recipient, where *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002) and its progeny as interpreted in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006), does not specifically address the ownership interest of funds from third parties directed to the defendant-beneficiary?

2. Did the District Court err in denying the Defendant's Motion for Counter-Security on the ground that SCI had immunity from pre-judgment attachment under the Foreign Sovereign Immunity Act, 28 U.S.C. §§1602-1611 – and SCI's attachment of Jaldhi's funds did not amount to an "unmistakable," "clear and unambiguous" waiver of SCI's immunity to pre-judgment attachment – where the counterclaims arise out of the same transaction as SCI's claims; are not frivolous; and SCI waived its defense of sovereign immunity as to the counterclaims?

Statement of the Case

The instant case is a maritime action in which the Plaintiff[1] sought a maritime attachment as security for its claim for alleged failure to pay hire pursuant to a charter party dated March 12, 2008 ("the Charter") between the parties. The Plaintiff filed suit on May 7, 2008, receiving an Ex Parte Order of Maritime Attachment and Garnishment. On May 22, 2008, the Defendant moved to vacate the ex parte order of attachment and for counter-security. On June 1, 2008, the Defendant answered the Plaintiff's Complaint. On June 27, 2008, the District Court (Rakoff, J.) granted the Defendant's motion to vacate the attachment, and denied its motion for counter security.

On July 11, 2008, the Plaintiff filed a Notice of Appeal (A-89).

On July 25, 2008, the Defendant filed a Notice of Cross-Appeal (A-91).

Statement of Facts

Pursuant to the Charter (A-20 [Verified Complaint, ¶4]; A-78 [Verified Answer and Counterclaim, ¶4]), the Plaintiff chartered "M/V Rishikeshi" ("the Vessel")(A-19 [Verified Complaint, ¶2]; A-78 [Verified Answer and Counterclaim, ¶2]) to the Defendant, a corporation organized and existing under

[1] *SCI is a duly registered company registered as per the Companies Act of India. Although the major shareholding of SCI Limited is held by the Government of India, this does not prevent SCI from being declared insolvent / bankrupt as it is not an agent of the Indian Government but a company duly registered with shareholding held by both general members of the public as well as the Indian Government. In the event that counter security is not provided and SCI is declared insolvent in the interim period, the Defendants would be left with no recourse to enforce their claims at a later date.*

the laws of Singapore (A-20 [Verified Complaint, ¶3]; A-78 [Verified Answer and Counterclaim, ¶3]). The Plaintiff is a corporation or other business entity organized and existing under the laws of India (A-19 [Verified Complaint, ¶2]; A-79 [Verified Answer and Counterclaim, ¶19]). The March 12, 2008 Charter provided for the Vessel to carriage a cargo of bulk iron ore from India to China (A-80 [Verified Answer and Counterclaim, ¶22]). The Charter provided that the Plaintiff was to deliver the Vessel to Defendant on March 29, 2008 "with hull, machinery, and equipment in a thoroughly efficient state" (*Id.* at ¶22]).

Approximately six hours after delivery and loading, the Vessel's number one crane collapsed, resulting in one fatality (*Id.* at ¶23). Following the incident, the Kolkatta Port Trust suspended all loading operations until the Vessel's cranes were inspected; as a result of which the Defendant placed the Vessel off hire (*Id.*).

Despite the failure of the Vessel and the fact that no hire was due under the Charter until the Vessel was serviceable (*Id.*), the Defendant had already paid the Plaintiff $1,260,585 (A-20 [Verified Complaint, ¶7]; A-78 [Verified Answer and Counterclaim, ¶¶7, 23]).

Pursuant to the Ex Parte Order, the Plaintiff attached the Defendant's funds as security for hire until May 28, 2008, in a total amount of $3,503, 510.00 (A-81 [Verified Answer and Counterclaim, ¶25]). Due to the circumstances of the collapse and fatality, and occasioned losses, the Defendant claimed counter-

security in the amount of $8,505,844.00 (A-83 [Verified Answer and Counterclaim, p. 7, ¶1]).

The Defendant's counterclaim arose out of the same transaction or occurrences with respect to which the action was originally filed, and the Defendant gave security to respond to the Plaintiff's allegations (A-79 [Verified Answer and Counterclaim, ¶18]).

Summary of Argument

(i) The District Court correctly determined that the EFTs originating from a third-party and of which the Defendant was the intended beneficiary were not the proper subject of attachment. Specifically, the Court correctly reasoned that *Winter Storm* and interpretive case law did not speak to the right of a party to attach an EFT being sent to the defendant from a third-party while en route; and that an EFT does not become a defendant's property until the transfer is completed, therefore defeating the ability to effectuate an attachment.

(ii) The District Court erred when it denied the Defendant's Motion for Counter-Security on the basis that SCI was allegedly immune from attachment because its suit against the Defendant was not an "unmistakable," "clear and unambiguous" waiver of its immunity pursuant to the Foreign Sovereign Immunity Act, 28 U.S.C. §§1602-1611. Specifically, §1607 specifically provides that, in any action brought by a foreign state, that state "shall not be accorded immunity with

respect to any counterclaim." Here, since the motion for counter-security arose from a counterclaim arising from the same facts alleged in the Plaintiff's complaint, the Court was incorrect in finding SCI statutorily immune from attachment.

Argument

(i) The Lower Court Correctly Determined that the Plaintiff Had No Ability to Attach EFTs Directed to But Not Yet in the Defendant's Possession.

Rule B of the Supplement Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure provides, *inter alia*, that, in specified circumstances, a verified complaint may contain a prayer for process to attach a defendant's "tangible or intangible personal property—up to the amount sued for – in the hands of garnishees named in the process." *Id.* at (1)(a).

In *Winter Storm, supra*, the Court of Appeals stated that "EFT funds in the hands of an intermediary bank" qualified as "tangible or intangible property" subject to attachment under Rule B(1)(a). There, however, the EFT at issue originated from the defendant to a third party. Specifically, the District Court "identified the question on appeal as 'the validity of a maritime garnishment served before the garnishee comes into possession of the property to be garnished.'" 310 F.3d at 274 [citation omitted]. "In other words, the issue was whether a Rule B attachment cover[ed] 'after-acquired property,' that is, property of a defendant

coming into the possession of a garnishee after service of process upon the garnishee." *Id.*

While, in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.,* 460 F.3d 434 (2d Cir. App. 2006), this Court stated that "EFTs to or from a party are attachable by a court as they pass through the banks located in the court's jurisdiction," *Id.* at 435, in footnoting the point the Court recognized that *Winter Storm* "permitted the attachment of funds while those funds are in an intermediary bank temporarily as a credit before being passed through the beneficiary of the transaction . . . ." *Id.* at n1 [emphasis added].

The *Aqua Stoli* Court noted that the "correctness of [its] decision in *Winter Storm* seems open to question, especially its reliance on *Daccarett,* . . . .

> 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.* at §§4-A-502 cmt 4, 4-A-504 cmt. 1.

466, Fn. 6.

In *Consub Delaware LLC v. Schahin Engenharia Limitada,* -- F.3d --, 2008 WL 4304568 (2d Cir.), this Court "d[id] not reach [ ] the question of whether funds involved in an EFT en route to a defendant are subject to a Rule B attachment." *Id.*

at 9, fn1. There, unlike the instant case, the motion to vacate before the Court was one brought by the originator of the EFT, not the intended recipient.

In *Seamar Shipping Corp. v. Kemikovtzi Trade Ltd.*, 461 F.Supp.2d 222 (S.D.N.Y. 2006), the court noted that the "Second Circuit has not spoken with one voice . . . on whether an EFT in the hands of an intermediary bank can be said to be a 'defendant's property, where the defendant is either the originator or the intended beneficiary of the EFT." *Id.* at 224. In *Winter Storm*, the court noted, the question was not addressed "explicitly"; however, because the court "instructed the district court to reinstate the attachment at issue, that decision has been construed to hold that the EFT at issue was the property of the defendant—who was the originator of the EFT." *Id.* The *Seamar* court termed the *Aqua Stoli* Court's footnote calling *Winter Storm* into doubt "stop[ped] short of explicitly overruling *Winter Storm*, but nevertheless it raises a serious question of whether *Winter Storm's* implicit holding that EFTs may be considered to be a defendant's property while in transit remains good law." *Id.*

Casting aside the issue "of whether *Winter Storm* remains good law in general," the *Seamar* Court examined the "more narrow question at issue in this case: whether an EFT can be attached under Rule B(1)(a) where the defendant is the intended *beneficiary* of the EFT, rather than the originator." *Id.* at 225. The Court explained:

> . . . In reliance on *Winter Storm*, *Aqua Stoli* stated the broad rule that "EFTs *to or from* a party are attachable by a court as they pass through banks located in that court's jurisdiction." [citation omitted] This statement suggests that EFTs are attachable while in transit regardless of whether the defendant is the originator or the intended beneficiary of the EFT. In *Winter Storm*, however, the defendant was clearly the originator not the intended beneficiary of the EFT. In *Winter Storm*, however, the defendant was clearly the originator of the EFT, . . . , and in *Aqua Stoli*, although the attachment applied to EFTs "to or from" the defendant, neither the court nor the parties addressed whether the funds that were actually attached had been sent to or from the defendant, ... Thus, *Aqua Stoli's* statement that "EFTs to or from a party are attachable by a court," if construed as binding law, would substantially broaden *Winter Storm's* holding, which technically applies only where the defendant is the originator of the EFT.
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> Given that *Aqua Stoli* called *Winter Storm* into serious doubt, . . . , it would be illogical to construe other statements in *Aqua Stoli* to broaden *Winter Storm*. To the contrary, taken as a whole, *Aqua Stoli* requires this Court to construe *Winter Storm* narrowly. Accordingly, *Winter Storm's* holding that an EFT is the property of an originator while in transit does not imply a corollary rule that the EFT is also the property of a beneficiary while in transit.

Id. at 225.

Because, in *Seamar*, the defendant was "the purported beneficiary of the EFT," "neither *Winter Storm* nor *Aqua Stoli* b[oun]d[ ] th[e] Court in determining whether the [ ] attachment c[ould] stand." *Id.* Recognizing that "state law may be borrowed if there is no federal admiralty law in point on the particular question presented," [citation and internal quotations omitted], the court looked to state law in "the absence of a federal rule governing whether an EFT is the property of an intended beneficiary while in transit . . . ." *Id.* at 226. The New York 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." *Id.* [citation and internal quotations omitted].[2]

The District Court in this case properly decided that *Seamar*, specifically examining the right to attach EFTs originating from a third-party and directed to but not yet in the possession of a defendant, was decisive. Given the question as to the validity and scope of *Winter Storm's* holding, and the narrowness of the facts before it, the *Seamar* decision was the guiding case. Therefore, the District Court properly vacated attachment on the EFTs sent to but not yet in the possession of the Defendant by a third-party, and the Plaintiff's Appeal should be denied.

(ii) The Lower Court Erroneously Concluded that the Plaintiff was Immune from Attachment Under the Foreign Sovereign Immunity Act.

The Foreign Sovereign Immunities Act §1607 provides:

> In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim
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> (b) arising out of the transaction or occurrence that is the subject matter

[2] This reasoning underscores the appropriateness of the *Seamar* decision. An originator of electronic funds has the ability to reverse course and revert the funds to his or her own account up until those funds are delivered to the recipient. Therefore, attaching an EFT originating from a third party before it has reached the defendant's account in actuality strips the third party – not the defendant – of a property interest.

of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

The District Court relied on the provisions of 28 U.S.C.A. §1609, providing:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

The court found "the only such exception to pre-judgment attachment predicated on waiver requires that such waiver be made 'explicitly.'" 28 U.S.C. §1610(d)(1). Continued the District Court:

> Unlike a waiver of a foreign state's immunity from attachment in aid of execution, which can be waived implicitly, "the immunity from *prejudgment attachment* [under §1610(d)] can be waived only by *unmistakable and plain language*." *S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 416 (2d Cir. 1983)(second emphasis added). "[A] waiver of immunity from prejudgment attachment must be explicit in the common sense meaning of that word: 'the asserted waiver must demonstrate unambiguously the foreign state's intention to waive its immunity from prejudgment attachment in this count.'" [citations omitted].

(A87 [Order, pp. 3-4]). In this case, the court held, "SCI's susceptibility to counterclaims under §1607 nor SCI's attachment of Jaldhi's funds amounts to an 'unmistakable,' 'clear and unambiguous' waiver of SCI's immunity to pre-judgment attachment . . . ." (A88 [*Id.* at p. 4]).

While the District Court relied on *Stephens v. Natl. Distillers & Chem. Corp.*, 69 F.3d 1226, 1229-30 (2d Cir. 1995) in support of its proposition that the

"Second Circuit . . . treats pre-judgment security for claims against a sovereign as a form of an 'attachment'" (A87 [Order, p. 3]), *Stephens* dealt specifically with a state statute requiring unauthorized foreign insurers to deposit a security prior to filing an answer in an action against it, and, therefore, the Defendant submits, its holding should be limited to the specific facts before it.

Moreover, the Second Circuit has previously recognized the existence of "doubt" as to whether "an order requiring the posting of security is an 'attachment' of a foreign state's property within the meaning of the FSIA," *Caribbean Trading and Fidelity Corp. v. Nigerian Natl. Petroleum Corp.*, 948 F.2d 111, 114 (2d Cir. App. 1991), citing, *inter alia*, *Willamette Transport, Inc v. CIA Anonima Venezolana de Navegacion*, 491 F.Supp. 442, 443-44 (E.D. La. 1980).

In *Willamette Transport, supra*, the plaintiff brought suit to recover damages from a collision involving its vessel and a vessel owned by the defendant. The defendant responded with a counterclaim praying for in rem process against the plaintiff's vessel. The defendant agreed not to arrest the vessel after the plaintiff issued a $1.5 million bond as security for the defendant's claims. The plaintiff then requested that the defendant post counter security pursuant to Rule E(7); and the defendant refused. The court gave this learned explanation of the permissibility of the demand:

CAVN argues that because the Act provides that the property of a foreign

> state is generally not subject to prejudgment attachment, [citation omitted], a foreign state should not be obliged to put up security before judgment. . . . [T]he purpose of counter-security is not to secure release for a vessel that might otherwise be attached in rem; it serves to create an "equality of security" between the litigants. . . . Furthermore, an argument similar to defendant's was made on behalf of the United States in a case that arose before the Admiralty Act of 1920 expressly relieved the United States from the requirement to post counter-security. In *The Gloria*, 267 F. 929 (S.D.N.Y. 1919), the United States brought suit and a counter-libel was brought against it. Although United States vessels were exempt from attachment, the court ordered a stay of the United States' claim until it posted security. Judge Learned Hand, for the court, stated:
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> ". . . . This, of course, does not trench upon the libelant's immunity from process, if he have any, because the rule does not attempt to acquire jurisdiction over him at all . . . ." [citation omitted]

948 F.2d at 443-44. Additionally, noted the court, "[b]ecause CAVN is not entitled to immunity under section 1605 of the Act, and because a private individual would be required to post counter-security, CAVN must post security . . . ." *Id.* at 444.

In other cases, courts have upheld imposition of counter-security in actions involving maritime parties. *See, e.g., Titan Nav., Inc. v. Timsco, Inc.,* 808 F.2d 400 (5th Cir. App. 1987)(upholding grant of counter-security in action against vessel owner); *Sea Transport Contractors, Ltd. v. Industries Chemiques du Senegal*, 411 F.Supp.2d 386 (S.D.N.Y. 2006); *Ocean Line Holdings Ltd. v. China Natl. Chartering Corp.*, -- F.Supp.2d -- , 2008 WL 4369262 (S.D.N.Y. Sept. 26, 2008); *Result Shipping Co., Ltd. v. Ferruzzi Trading USA Inc., supra,* 56 F.3d 394 (in

admiralty proceeding, countersecurity may be ordered when plaintiff has compelled defendant to give security); *Rosemary v. Jaldhi Overseas Pte Ltd.*, 531 F.Supp.2d 586 (S.D.N.Y. 2008); *Voyager Shipholding Corp. v. Hanjin Shipping Co., Ltd.*, 539 F.Supp.2d 688 (S.D.N.Y. 2008); *Dougbu Exp. Co., Ltd. v. Navios Corp.*, 944 F.Supp. 235 (S.D.N.Y. 1996).

The Defendant respectfully submits that the reasoning of *Willamette, supra*, should govern this matter. The facts involved in that case were analogous to the facts presented in this case. While the holding of *Stephens*, *supra*, was relied upon by the District Court and admittedly is instructive, *Stephens* dealt with the narrow issue of whether a state statute requiring prejudgment attachment was valid. Here, the issue is whether a counterclaim defendant demanding counter security under Admiralty Rule E(7) in a suit initiated by the plaintiff sovereign is permissible under §1607. As in *Willamette*, here the Plaintiff cannot use sovereign immunity to defend from a grant of countersecurity in an action it initiated and regarding claims stemming from its own complaint. Here, the Defendant is seeking to equalize security between the parties and should have been granted the countersecurity.

Conclusion

For the reasons set forth above, the Plaintiff's Appeal should be denied and the Defendant's Cross-Appeal granted.

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October 29, 2008

Respectfully Submitted,

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