UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D'AMICO DRY D.A.C., Plaintiff, -against- MCINNIS CEMENT INC., Defendant.	Case No. 20-cv-03731-VEC

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT MCINNIS CEMENT INC.'S MOTION TO VACATE THE PROCESS OF MARITIME ATTACHMENT

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PRELIMINARY STATEMENT

Defendant McInnis Cement Inc. ("McInnis"), by and through its counsel, Holland & Knight LLP, submits this memorandum in support of its Motion to Vacate the Process of Maritime Attachment and Garnishment granted to Plaintiff d'Amico Dry d.a.c. ("d'Amico") by an Order dated May 19, 2020. (Dkt. # 8). Plaintiff commenced this action by asserting it has a maritime claim for breach of the charter party with McInnis for the M/V Ceilo de Gaspésie dated February 10, 2017 (the "Charter")(Declaration of Vincent J. Foley, dated May 25, 2020 ("Foley Decl."), Ex. 1), and that McInnis cannot be "found" in this District within the meaning of the Supplemental Rule for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure B.

McInnis does not dispute that d'Amico has alleged a maritime claim within the meaning of Rule B. As described in detail below, however, because McInnis is "found" within this District and within the convenient adjacent District of Connecticut for purposes of both personal jurisdiction and for service of process, the order of maritime attachment should be vacated. Further, Plaintiff's action is procedurally improper since the bank accounts that it seeks to attach are not those of McInnis.

STATEMENT OF FACTS

I. D'Amico's Complaint and Prayer for Writ of Maritime Attachment

Plaintiff asserts that McInnis is not present for personal jurisdiction purposes based on the declaration of Joseph Gross ("Gross Decl.")(Dkt. # 4-1), the Operations Manager for d'Amico Shipping USA Ltd. ("d'Amico USA"), the agent of d'Amico. Gross avers that d'Amico and McInnis entered the Charter based on negotiations between representatives of d'Amico USA and McInnis "by its agent in the United States," McInnis USA Inc. ("McInnis USA"), and through brokers BRS USA in Stamford, Connecticut. (Gross Decl. ¶ 5). D'Amico confirmed that it sent

invoices for sums owed by McInnis under the Charter to its agent, McInnis USA. (Gross Decl. ¶ 6). In addition, McInnis paid invoices to d'Amico from an account of McInnis USA at National Bank of Canada ("NBC"), New York branch. (Gross Decl. ¶ 7).

Upon information and belief, d'Amico USA is based in Stamford, Connecticut with an office and place of business listed as 1 Atlantic Street, #602, Stamford CT 06901. (Foley Decl. Ex. 4). D'Amico USA has a registered agent listed with the Connecticut State Commercial Recording Division. (Foley Decl. Ex. 5).

D'Amico also submitted an attorney declaration with the results of a search of records of the New York State Department of State database. The search produced a listing for McInnis USA Inc., but no similar listing for McInnis. (Declaration of Thomas L. Tisdale ("Tisdale Decl.")(Dkt. # 5) ¶ 2, Ex.1). D'Amico's attorney's search also reported a business address for McInnis USA at 50 Oakpoint Avenue, Bronx, New York (Tisdale Decl. ¶ 6, Ex. 2). Although not mentioned in the attorney declaration, this address is the location of the McInnis Bronx Terminal, described in more detail below, the terminal where d'Amico delivered numerous cement cargoes in this District pursuant to the Charter with McInnis.

Based on the averments of Gross and the attorney declaration reporting the findings of the search of records, d'Amico's counsel asserted that McInnis cannot be found within this District within the meaning of Rule B. (Tisdale Decl. ¶ 9). As described below, and as d'Amico is well aware from its performance under the Charter, McInnis has substantial, continuous and systematic contacts within this District through its agent McInnis USA and its own activities.

II. Mcinnis USA is the Managing and General Agent for McInnis's Business Activities in The United States, and in Particular in New York and Connecticut

McInnis USA is a Delaware corporation with a principal place of business at 850 Canal Street, Stamford Connecticut.[1] (Declaration of Edouard Ouellet, dated May 21, 2020 ("Ouellet Decl.") ¶ 7). McInnis USA is a wholly owned subsidiary of McInnis. On the McInnis website, http://mcinniscement.com, the address for McInnis USA is listed as the U.S. office of McInnis.

McInnis USA acts as a managing and general agent for McInnis's business activities in the states of Connecticut, Delaware, Maine, Massachusetts, New Jersey and New York. (Ouellet Decl. ¶ 3). In each of these jurisdictions, McInnis USA is registered to do business with State authorities, and has appointed Corporation Services Company ("CSC") as its agent for service of process. (Ouellet Decl. ¶ 3, Ex. 1).

As noted above, McInnis USA is registered with the New York Department of State, Division of Corporations and has authorized CSC as its agent for service of process in New York. (Ouellet Decl. ¶ 8, Ex. 2). If any legal process directed at McInnis had been presented to or served on McInnis USA, either in person or by service on the New York Secretary of State or CSC, McInnis USA would have been obligated to accept service as an agent of McInnis, and report the service of process to McInnis. (Ouellet Decl. ¶ 8).

III. McInnis' Manufacture and Distribution of Cement Products in Canada and the Northeastern United States

McInnis is part of a group of companies that manufactures and distributes high-quality cement products to customers, primarily in Canada and on North America's eastern seaboard. (Ouellet Decl. ¶ 5). McInnis maintains its head office and principal place of business at 2000

[1] As of June 30, 2019, McInnis USA employees ceased working from the Stamford office and began working remotely or working directly in the field with clients. McInnis USA still receives its mail at this office, and the mail is redirected to McInnis' principal place of business located in Montréal, Québec, Canada. (Ouellet Decl. ¶ 9).

Mansfield, Suite 300, Montréal, Québec H3A 2Y9, Canada. (Ouellet Decl. ¶ 5). McInnis' affiliated entity, McInnis Cement Limited Partnership, owns and operates a cement plant located at Port-Daniel-Gascons, Québec which manufactures cement from limestone extracted from the onsite quarry. (Ouellet Decl. ¶ 6).

In order to transport the cement products to the market, McInnis charters vessels to load product in Port Daniel and transport it to terminals in Canada, and to its terminals in the Northeastern U.S. (Ouellet Decl. ¶ 6). The McInnis terminals in the Northeastern United States then distribute cement products to customers in the relevant metropolitan markets. (Ouellet Decl. ¶ 6).

In October 2018, McInnis officially opened its cement terminal located at 50 Oakpoint Avenue, Bronx, New York. ("McInnis Bronx Terminal"). (Ouellet Decl. ¶ 10). The newly constructed 100,000 square foot terminal was developed and financed by McInnis at a cost of approximately USD $100,000,000. *Id*. The terminal is used for storing and distributing cement to McInnis' customers in the New York and surrounding areas. *Id*. The site can store up to 44,000 metric tons of cement or the equivalent of 1,500 truckloads. McInnis USA maintains an office and place of business at the McInnis Bronx Terminal. *Id*.

IV. McInnis USA Ownership and Operation of the McInnis Bronx Terminal as Agent on Behalf of its Principal McInnis

All of McInnis USA's activities were and are financed by McInnis, including the construction of the McInnis Bronx Terminal. (Ouellet Decl. ¶ 11). McInnis USA's finances, accounting, human resources, logistics and legal are all managed by the McInnis staff, based in Montreal. *Id*. In addition, McInnis USA performs the following regular and continuous course of business on behalf of McInnis within the state of New York:

(a) McInnis USA leases the land at 50 Oakpoint Avenue, Bronx underlying the premises of the McInnis Bronx Terminal. McInnis is the guarantor for this lease. Attached as Ouellet Ex. 3 (Parcel A) and Ex. 4 (Parcel B) are true and correct copies of the guaranties from McInnis for leases of parcel A and parcel B in favor of the landlord Oak Point Property LLC. The Guaranties require application of the law of the State of New York (¶ 15 (D)), and provide (¶ 8(A)) that the Guarantor submits to the jurisdiction of the state courts of the State of New York, and to the jurisdiction of the United States District Court for the Southern District of New York for the purposes of each and every suit, action or other proceeding.

(b) McInnis USA owns and operates the terminal and all distribution assets at 50 Oakpoint Avenue.

(c) The New York market is part of McInnis' core market. The cement is sold by McInnis to McInnis USA on a delivered basis at the terminal (similar arrangements exist as to McInnis' sales to McInnis USA for delivery at other U.S. terminals located in Providence, Rhode Island and Bangor, Maine.) Thus, McInnis USA is the importer of record and thereafter sells and distributes the cement received at the terminal. McInnis (through McInnis USA) expects to sell 550,000 MT/year at maturity. (324,000 MT were sold through the McInnis Bronx terminal in 2019).

(d) McInnis USA has 8 employees based in New York, and 15 employees based in the remainder of the United States.

(e) McInnis USA employs a terminal manager at the premises at 50 Oakpoint Avenue, Bronx, NY.

(f) McInnis USA has a terminals director who is an employee of McInnis and is based in Canada.

(g) McInnis USA has a vice president for sales who is an employee of McInnis and is based in Canada.

(Ouellet Decl. ¶ 12 (a) - (g)).

V. McInnis' Declaration of Force Majeure Under the Charter Due to COVID-19 impacts on its business operations

By letter dated 17 April 2020, McInnis informed d'Amico of its declaration of a *force majeure* event pursuant to Clause 34 of the Charter suspending performance of the agreement due to the extraordinary and unprecedented impacts of COVID-19 on McInnis' operations and cement shipments to the Northeastern United States. (Foley Decl. ¶ 4, Ex. 2). Subsequently, by way of a letter from McInnis' counsel to d'Amico's counsel, dated April 24, 2020, McInnis informed d'Amico that it had suffered serious reductions in cement sales, in some cases down to a standstill, and had no alternative but to shut down its cement plant in Port Daniel Canada obviating cement shipments from Port Daniel to the terminals in Providence and New York under the Charter. (Foley Decl. ¶ 5, Ex. 3). McInnis informed d'Amico it could not continue to supply cargo for cement shipments to the Bronx and Providence terminals because the storage capacity at the terminals was completely full, and government restrictions prohibiting all but emergency construction to prevent spread of the disease indicated that storage is expected to be at or near full capacity for an unknown period of time. (*Id.*).

Pursuant to Clause 35 of the Charter, disputes arising out of the contract are to be arbitrated in New York. (Foley Decl. ¶ 6, Ex. 1). Following the exchange of letters between counsel concerning McInnis's declaration of *force majeure*, the parties each appointed arbitrators as required by Clause 35 of the Charter, and the disputes as to *force majeure* and mitigation of damages under the Charter will be submitted to the panel of appointed arbitrators in New York. (Foley Decl. ¶ 7) (Verified Complaint (Dkt. #1), Exs. 3 and 4).

LEGAL STANDARD

Rule E(4)(f) provides:[2]

> Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules.

It is well-settled that a Rule B maritime attachment may not be obtained or maintained unless a plaintiff can establish that: (a) it has a valid *prima facie* admiralty claim; (b) the named defendant cannot be found within the district; (c) the defendant's property attached is within the district; and (d) there is no statutory or maritime law bar to the attachment. *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 445 (2d Cir. 2006), *abrogated on other grounds*, *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58 (2d Cir. 2009). Accordingly, "a district court must vacate an attachment if the plaintiff fails to sustain his burden of showing that he has satisfied the requirements of Rules B and E." *Aqua Stoli*, 460 F.3d at 445. D'Amico fails in its burden to establish that McInnis cannot be found within this District. McInnis has shown it meets the requirements for personal jurisdiction and service of process in this District through the substantial, continuous and systematic business activities of its agent McInnis USA in owning, operating and management of the McInnis Bronx Terminal. (Ouellet Decl. ¶ 12). In addition, McInnis' own activities in this District include delivery of twelve (12) cement cargoes to the McInnis Bronx Terminal during performance of the Charter with d'Amico from 2018-2020. (Ouellet Decl. ¶ 13). Moreover, McInnis' substantial investment in the Bronx Terminal as well as such acts as the

[2]As of the date of the submission of this motion to vacate, the attachment Order obtained by Plaintiff has been served on NBC, New York branch, but no funds held by the bank have been attached. (Foley Decl. ¶ 10). However, that does not mean that Defendant's motion is infirm or premature. *See Euro Trust Trading S.A. v. Allgrains U.K. Co.*, No. 09 Civ. 4483 (GEL), 2009 WL 2223581, at *2 n.2 (S.D.N.Y. Jul. 27, 2009) ("[T]here is no reason to conclude that the Rule [E(4)(f)] is intended to require a defendant who becomes aware of an attachment before its property is actually seized must wait to suffer an actual deprivation of the use of its property before challenging the legality of an attachment…"). If Defendant's property (or that of its agent, McInnis USA) is attached during the pendency of this motion, McInnis will promptly advise the Court so that the terms of Local Rule E.1 may be invoked.

issuance of guarantees for the lease of that terminal all further establish McInnis' significant contacts in New York.

Additionally, "a district court may vacate the attachment if the defendant shows at a Rule E hearing that 1) the defendant is subject to suit in a convenient adjacent jurisdiction; 2) the plaintiff could obtain *in personam* jurisdiction over defendant in the district where the plaintiff is located; or 3) the plaintiff has already obtained sufficient security for the potential judgment, by attachment or otherwise." *Aqua Stoli*, 460 F.3d at 445 (footnote omitted). McInnis is also subject to personal jurisdiction and service of process in the district of Connecticut, the principal place of business of its agent McInnis USA and the place where the Charter was negotiated between McInnis USA, d'Amico USA, and BRS Brokers USA. (Gross Decl. ¶ 5). In addition, upon information and belief, d'Amico USA is present, registered to do business in Connecticut, and has an office at 1 Atlantic Street, FL 6, Stamford, Connecticut CT 06901. (Foley Decl. ¶¶ 8-9). As such, Connecticut is a convenient adjacent jurisdiction for both plaintiff and defendant McInnis which also warrants vacatur of the order of maritime attachment.

ARGUMENT

I. THE MARITIME ATTACHMENT SHOULD BE VACATED BECAUSE DEFENDANT MCINNIS CAN BE FOUND IN THIS DISTRICT WITHIN THE MEANING OF RULE B.

Whether or not a defendant is "found" within a district for purposes of Rule B is analyzed under a two pronged inquiry: "First, whether [the defendant] is found in the district in terms of jurisdiction, and second, if so, whether the defendant is found in the district in terms of service of process." *Seawind Compania, S.A. v. Crescent Line, Inc.*, 320 F.2d 580, 582 (2d Cir. 1963); *see also Aqua Stoli*, 460 F.3d at 443. McInnis is "found" in this District for both specific and general jurisdiction based on the substantial, continuous and systematic activities in this District of its agent, McInnis USA, in its ownership, operation and distribution of cement products through the

McInnis Bronx Terminal. (Ouellet Decl. ¶ 12). In addition, under the Charter with d'Amico, McInnis engaged in specific contacts with this District by virtue of twelve (12) voyages during the period 2018-2020 delivering cement cargoes to the McInnis Bronx Terminal. (Ouellet Decl. ¶ 13). Pursuant to Fed. R. Civ. P. 4(h), McInnis, as a foreign corporation may be served by delivering a copy of the summons and complaint to a "managing or general agent." McInnis is therefore subject to service of process effected upon its agent, McInnis USA. As McInnis is present for personal jurisdiction purposes, and for service of process by service on its agent McInnis USA, the order of maritime attachment should be vacated and the Verified Complaint should be dismissed.

A. McInnis is Present in the District Based on the Contacts and Actions of its Agent Including McInnis USA's Ownership and Operation of the McInnis Bronx Terminal

"As to the first prong, where a defendant is 'found' for jurisdictional purposes depends on whether the defendant is 'engaged in sufficient activity in the district' to subject it to *in personam* jurisdiction." *Ivan Visin Shipping Ltd. v. Onego Shipping & Chartering B.V.*, No. 08 Civ. 1239 (JSR), 2008 U.S. Dist. LEXIS 25028 (S.D.N.Y. Apr. 1, 2008) (quoting *VTT Vulcan Petroleum, S.A. v. Langham-Hill Petroleum, Inc.*, 684 F. Supp. 389, 390 (S.D.N.Y. 1988) (internal quotation marks omitted)). In addition, "'A non-resident corporation may be subject to jurisdiction, on a general or specific basis, depending on the contacts and actions of its agents.'" *Id*. (citing *Automated Salvage Transp., Inc. v. NV Koninklijke KNP BT*, No. Civ. A. 96-369, 1997 WL 576402, *22 (D.N.J. Sept. 12, 1997). In this regard, a "[d]efendant may point to 'the contacts and actions of its agents.'" *Alaska Reefer Mgmt. LLC v. Network Shipping Ltd.*, No. 14 Civ 3580 (JFK), 2014 WL 2722978, * 6 (S.D.N.Y. June 16, 2014) (quoting *Ivan Vision* at *2 (citations and internal quotation marks omitted)). "Where an agent performs services that 'go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available,' courts in New York have exercised general

jurisdiction over the foreign entity." *STX Pan Ocean Shipping Co. v. Progress Bulk Carriers Ltd.*, No. 12 Civ. 5388 (RJS), 2013 WL 1385017, * 8 (S.D.N.Y. Mar. 15, 2013) (quoting *Wiwa v. Royal Durch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000)).

Based on the foregoing, McInnis can establish "sufficient activity in the district" by reference to its own activity and based upon the actions of its agent, McInnis USA. *See also Grand Entm't Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 483 (3d Cir. 1993) ("[a]ctivities of a party's agent may count toward the minimum contacts necessary to support jurisdiction"); *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990) ("[f]or purposes of personal jurisdiction, the actions of an agent are attributable to the principal"); *Metal Transp. Corp. v. Canadian Transp. Corp.*, 526 F. Supp. 234, 235 (S.D.N.Y. 1981) (Rule B vacated as defendant was found in the jurisdiction by way of the activities of its agents in New York); *Green v. Compania De Navigacion Isabella, Ltd.*, 26 F.R.D. 616, 617-18 (S.D.N.Y. 1960) (holding that regular and continuous course of business conducted by corporation in New York on behalf of foreign vessel owner was sufficient to (1) establish that vessel owner was subject to personal jurisdiction in New York, and (2) establish that corporation was a managing or general agent of foreign vessel owner for purpose of service of process).

McInnis transacts business in New York through its general agent McInnis USA in numerous and very substantial ways. McInnis's core market for cement is New York. (Ouellet Decl. ¶ 12(c)). In 2019, 324,000 MT of cement were sold through the McInnis Bronx Terminal. *Id*. The cement is sold by McInnis to McInnis USA on a delivered basis at the terminal. McInnis USA is the importer of record and thereafter sells and distributes the cement. *Id*. McInnis employs a vice president for sales and a terminals director both of whom work for McInnis USA, but are based in Canada. *Id*. at 12(f) and (g). All of McInnis USA's activities were and are financed by

McInnis including construction of the $100 million terminal at 50 Oakpoint Avenue. *Id*. at ¶ 10. This is the same terminal to which d'Amico transported cement cargoes pursuant to the Charter of the M/V Cielo de Gaspésie. *Id*. at ¶ 13.

While McInnis USA leases the land for the terminal, McInnis itself is the guarantor of those lease obligations. (Ouellet Decl. ¶ 12(a)). Notably, the guaranties required McInnis to submit to jurisdiction of the state courts of New York, and to the Southern District of New York. *Id*. Accordingly, McInnis has "continuous and systematic" contacts with this District by reason of the ownership and operation of the McInnis Bronx Terminal by its agent McInnis USA as more fully described in the declaration of Edouard Ouellet, Chief Financial Officer of McInnis. (Ouellet Decl. ¶¶ 11-12).

B. McInnis Engaged in Substantial Activity Exceeding the Minimum Contacts Requirement for Specific Jurisdiction by its Performance of the Charter with d'Amico

"Specific Jurisdiction exists where an action 'aris[es] out of or relate[s] to the defendant's contacts with the forum.'" *Emerald Equip. Leasing, Inc. v. Sea Star Line, LLC*, No. 08 Civ 10672 (JGK), 2009 WL 1182575, *7-8 (S.D.N.Y. May 1, 2009) (quoting *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996) (internal quotation marks omitted)). "Under CPLR § 302, this Court may exercise personal jurisdiction over a foreign corporation if it 'transacts any business within the state' and the cause of action asserted against it is one 'arising from' the transaction of such business." *SK Shipping (Singapore) Pte Ltd. v. Petroexport Ltd.*, No. 08 Civ. 7758 (WHP), 2008 U.S. Dist. LEXIS 81752, * 8 (S.D.N.Y. Oct. 15, 2008) (quoting N.Y. C.P.L.R. § 302(a)(1)). Here, d'Amico and McInnis entered the Charter based on negotiations between representatives of d'Amico USA and McInnis "by its agent in the United States," McInnis USA. (Gross Decl. ¶ 5). In its supporting declarations, d'Amico confirmed that it sent invoices for sums owed by McInnis under the Charter to its agent, McInnis USA. (Gross Decl. ¶ 6). In

addition, McInnis paid invoices to d'Amico from an account of McInnis USA at NBC, New York branch. (Gross Decl. ¶ 7).

"A claim 'arises out of' a defendant's transaction of business in New York 'when there exists 'a substantial nexus' between the business transacted and the cause of action sued upon.'" *SK Shipping* at *9 (quoting *Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 29 (2d Cir. 1996)). Here, McInnis can be found for personal jurisdiction in this district because there is a "substantial" nexus" between its in-state activity through McInnis USA acting as agent under the Charter and d'Amico's alleged maritime claim for breach of the Charter, a contract with its purpose to deliver cargoes to this District at the McInnis Bronx Terminal. During the period of 2018 to 2020, McInnis conducted business in New York pursuant to the Charter with d'Amico by delivery of at least twelve (12) cement cargoes to the McInnis Bronx Terminal. (Ouellet Decl. ¶ 13).

C. McInnis can be "Found" in New York for Service of Process by Service of its Managing or General Agent McInnis USA

As to the second prong, McInnis is also "found" in the District for purposes of service of process by service of its managing or general agent McInnis USA. According to Rule 4(h) of the Federal Rules of Civil Procedure, service upon a corporation shall be effected by service on "an officer, a managing or general agent, or any other agent authorized by appointment of process." Fed. R. Civ. P. 4(h)(1)(B). *See also Seawind*, 320 F.2d at 582 (holding that defendant could be found within the district for service of process because defendant had a managing agent within the district); *Metal Transp.*, 526 F. Supp. at 235 ("[D]efendant is present within this district for the purpose of the service of process since as a corporation service can be made upon it through its general agent in New York…").

D'Amico's counsel asserted that he "was not able to locate an agent for service of process for Defendant within this Judicial District" based on a search of public records and the database of corporations registered with New York Department of State. (Tisdale Decl. ¶ 7). Notwithstanding this dubious assertion, McInnis meets the second prong of the "found" requirement because McInnis is subject to service of process through its managing and general agent, McInnis USA. *See Ivan Visin Shipping Ltd.*, 2008 U.S. Dist. LEXIS 25028 at *6. The court in *Ivan Visin* pointed out, "[w]hen a company's managing or general agent is present in the district, it is 'immaterial that the agent is not expressly authorized [by defendant] to accept service of process on its behalf.'" *Id*. (quoting *Proshipline Inc. v. M/V Beluga Revolution*, Civ. Action No. H-07-4170, 2007 WL 4481101, *1 (S.D. Tex. Dec. 18, 2007)). Accordingly, McInnis was not required to register with New York State and itself appoint an agent for service of process. It is enough that McInnis is subject to service through its agent, McInnis USA.

There is ample evidence that McInnis acted by and through its agent McInnis USA for its interactions with plaintiff d'Amico. D'Amico negotiated the Charter with McInnis through McInnis USA (Gross Decl. ¶ 5) and submitted its invoices for sums owed under the Charter by McInnis to McInnis USA. (Verified Complaint ¶ 23). Indeed, almost every aspect of the performance of the Charter involved d'Amico or its agent d'Amico USA interacting with McInnis USA as agent on behalf of McInnis. (Verified Complaint ¶ 10).

II. MCINNIS IS ALSO PRESENT FOR PERSONAL JURISDICTION AND SERVICE OF PROCESS IN THE CONVENIENT ADJACENT JURISDICTION OF CONNECTICUT SO AS TO WARRANT *VACATUR* OF THE ORDER OF ATTACHMENT.

If the Court concludes that d'Amico has established the requirements to maintain the order of attachment notwithstanding the substantial, continuous and systematic contacts of McInnis in this District, and despite the fact that McInnis is subject to service of process through its agent,

McInnis USA, defendant submits that the Court should nonetheless vacate the order of maritime attachment because Connecticut is a convenient adjacent jurisdiction available to plaintiff where McInnis is also subject to *in personam* jurisdiction. The Second Circuit provided the following circumstances under which a district court may vacate a writ of maritime attachment even if the requirements of Rule B are established by plaintiff:

1) the defendant is present in a convenient adjacent jurisdiction;

2) the defendant is present in the district where the plaintiff is located; or

3) the plaintiff has already obtained sufficient security for a judgment.

Aqua Stoli, 460 F.3d at 444-45.

In Swiss Marine Servs. S.A. v. Louis Dreyfus Energy Servs. L.P., 598 F. Supp. 2d 414, 416-417 (S.D.N.Y. 2008), the defendant sought to vacate a writ of maritime attachment based on its jurisdictional presence in three adjacent jurisdictions, Connecticut, New Jersey and the Northern District of New York. The Court concluded that Connecticut was a convenient adjacent jurisdiction because of its geographical proximity, and because the defendant was subject to *in personam* jurisdiction there, and could be compelled to appear in court. *Id*. at 419. The court also pointed out that the appropriate inquiry is not whether the defendant maintains a physical office, but whether a defendant maintains sufficient contacts for *in personam* jurisdiction with the forum state. *Id.*

As plaintiff has emphasized in its Verified Complaint and supporting affidavits, the agent for defendant McInnis, McInnis USA, has its principal place of business in Stamford CT. (Verified Complaint, ¶ 7; Tisdale Decl. ¶ 4). McInnis USA is registered to do business in Connecticut, and has appointed CSC as its agent for services of process. (Ouellet Decl. ¶ 3, Ex. 1). Similarly, plaintiff's agent, d'Amico USA has an office and a registered agent appointed in Connecticut.

(Foley Decl. ¶¶ 8 and 9, Exs. 4 and 5). Moreover, the Charter which forms the basis of plaintiff's complaint was negotiated between McInnis USA and d'Amico USA representatives (through BRS Brokers) in Stamford, Connecticut. (Gross. Decl. ¶ 5). In view of the foregoing, McInnis meets the requirements for *in personam* jurisdiction in Connecticut and McInnis may be served through its agent, McInnis USA, in the District of Connecticut. Because both McInnis and d'Amico are present for personal jurisdiction and for purposes of service of process in Connecticut, the District of Connecticut is a convenient adjacent district which provides this Court sufficient grounds to vacate the attachment and dismiss the Verified Complaint.

III. D'AMICO'S ATTACHMENT OF FUNDS IN A BANK ACCOUNT WHERE THE ACCOUNT OWNER IS MCINNIS USA IS IMPROPER.

It is common ground that the property of the Defendant that d'Amico seeks to attach are funds in a bank account at NBC, New York branch. However, as noted by Plaintiff (Verified Complaint, Ex. 5), the account is identified as the "MCINNIS USA INC OPERATING ACCOUNT." McInnis itself is not the account owner of any bank account at NBC, New York branch and also has confirmed that the accounts at that bank indeed belong to McInnis USA. (Ouellet Decl. ¶¶ 12(h) and (i)).

To address the fact that the account is not that of McInnis, Plaintiff asserts "There is no question that federal admiralty law regards a defendant's agent's bank account as property subject to a maritime attachment under Rule B." (Plaintiff's Memorandum in Support of Application for Issuance of a Writ of Maritime Attachment (Dkt. # 6) ("Plaintiff Memo.") at 11). However, the citations offered by Plaintiff in support of this legal proposition in fact provide it no support. *See Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 276 (2d Cir. 2002) ("There is no question that federal admiralty law regards a defendant's bank account as property subject to maritime attachment under Rule B.") (emphasis added), *overruled on other grounds*, *Jaldhi*, *supra*; *Aurora*

Maritime Co. v Abdullah Mohamed Fahem & Co., 85 F.3d 44, 45-46 (2d Cir. 1996) (attachment obtained of defendant's bank account); *Golden Horn Shipping Co. Ltd. v. Volans Shipping Co. Ltd.*, 14 Civ. 2168 (JPO)(JCF), 2016 WL 1574128, at *1-2 (S.D.N.Y. Apr. 15, 2016) (attachment of funds of *alter ego* of primary defendant); *A.R.A. Anomina Ravannate di Armamento, SPA v. Heidmar Inc.*, No. 97 Civ. 1383 (JSR), 1997 WL 615495, at *1 (S.D.N.Y. Oct. 6, 1997)(attachment of defendant's New York bank account).

Plaintiff then confounds the situation in the very next paragraph of its submission by stating: "Thus, Plaintiff has satisfied all of the requirements to file a Rule B attachment for garnishment of Defendant's bank account at National Bank of Canada New York Branch…" (Plaintiff Memo. at 11) (emphasis added). McInnis itself is not the account owner of any bank account at NBC, New York branch. (Ouellet Decl. 12(i), nor is McInnis USA a defendant in these proceedings).

The scope of an order of attachment issued pursuant to Rule B is not unlimited:

> Rule B limits the scope of an attachment to a defendant who is named in the verified complaint, and because [related corporation to Defendant] is not named in the Verified Complaint, Plaintiff cannot attach [related corporation to Defendant]'s funds. *See Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 269 (2d Cir. 2002)('In attachment and garnishment proceedings the persons whose interests will be affected by the judgment are identified in the complaint.'); *DS Bulk Pte. Ltd. v. Calder Seacarrier Corp.*, No. 05 Civ. 10146, 2006 WL 1643110, at *2 (S.D.N.Y. June 13, 2006)('The language of Supplemental Rule B clearly anticipates that only a 'defendant' will be subject to an order of attachment.')
> ….
>
> [Plaintiff]'s attempts to defend the Attachment are unpersuasive. First, the fact that [named defendant] may have an 'interest' in the attached funds is largely irrelevant to a motion to vacate; the standard for defending an attachment is more exacting than possession of a mere interest in the attached funds. [*DS Bulk Pte. Ltd.*] (noting that plaintiff could not cite 'authority for the proposition that property of a non-party to an action may be attached on the bare assertion that this property in fact belongs to a party to the action.'). Second, [Plaintiff]'s argument that [related corporation to Defendant] is a shell corporation that [Defendant] uses to shield itself from liability, even if it were true, would not justify the attachment of [related

> corporation to Defendant]'s funds, unless it was named in the Verified Complaint. Rule B demands as much.

T&O Shipping, Ltd. v. Source Link Co., Ltd., No. 06-CV-7724 (KMK), 2006 WL 3513638, at *4 (S.D.N.Y. Dec. 5, 2006). In *T&O Shipping*, although the court vacated the attachment directed at the corporation related to the defendant, the court also allowed the plaintiff to amend its complaint to allege that the related corporation was the *alter ego* of the named defendant. *Id*. at *8. *See also Ullises Shipping Corp. v. FAL Shipping Co. Ltd*, 415 F. Supp. 2d 318, 321, 325-27 (S.D.N.Y. 2006) (bank account of related corporation to defendant used to make payments of plaintiff's invoices to defendant, along with other evidence, sufficient to support *alter ego* assertion against related corporation), *overruled on other grounds*, *Aqua Stoli*, *supra*, *abrogated*, *Jaldhi*, *supra*.

In the present matter, there have been no allegations made that McInnis USA is the *alter ego* of McInnis and there is no indication in the record that the relationship between those two corporate entities is anything more than a typical parent-subsidiary, principal-agent corporate relationship. Moreover, if Plaintiff were to seek leave to amend its complaint to name McInnis USA as an additional defendant on an *alter ego* theory, its Rule B action would then fail entirely as, under *any* analysis, McInnis USA is "found" in this jurisdiction. *See Glory Wealth Shipping Ptd Ltd. v. Indus. Carriers, Inc.*, 590 F. Supp. 2d 562, 564 (S.D.N.Y. 2008) ("[I]f one defendant is present in the district for the purposes of issuing a maritime attachment, its alter egos are present as well.").

Plaintiff's alleges that because its invoices were paid from the McInnis USA's NBC New York branch then McInnis "holds bank accounts or other assets" and "maintains one or more bank accounts" at that bank. (Complaint, ¶¶ 23, 25-26). As established by relevant precedent, such bare allegations do not form a proper basis to attach funds in the McInnis USA accounts and thus the attachment should be vacated.

CONCLUSION

For the foregoing reasons, McInnis respectfully requests the Court to vacate the process of maritime attachment because McInnis can be found within this District for purposes of personal jurisdiction, and for service of process on it agent McInnis USA. In the alternative, the process of maritime attachment should be vacated because McInnis is also present for personal jurisdiction and service of process within the convenient adjacent district of Connecticut. Finally, Plaintiff's action is improper based on its allegations concerning the ownership of bank accounts within this jurisdiction. In view of the foregoing, McInnis asks this Court to vacate the writ of maritime attachment, dismiss the Verified Complaint, and award Defendant the attorney's fees and costs incurred in this action, and such other and further relief as the Court deems just and proper.

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