UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D'AMICO DRY D.A.C.,	:	
Plaintiff,	:	20 Civ 03731(VEC)
- against -	:	
MCINNIS CEMENT INC.,	:	
Defendant.	:	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO VACATE PROCESS OF MARITIME ATTACHMENT AND GARNISHMENT

Attorneys for Plaintiff,
d'Amico Dry d.a.c.,

Thomas L. Tisdale
Tisdale Law Offices, LLC
200 Park Avenue, Suite 1700
New York, NY 10166
Tel: 212-354-0025
ttisdale@tisdale-law.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PAGE(S)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D'AMICO DRY D.A.C.,	:	
Plaintiff,	:	20 Civ 03731(VEC)
- against -	:	
MCINNIS CEMENT INC.,	:	
Defendant.	:	

MEMORANDUM IN OPPOSITION TO MOTION TO VACATE PROCESS OF MARITIME ATTACHMENT AND GARNISHMENT

Plaintiff d'Amico Dry d.a.c. ("Plaintiff" or "d'Amico Dry") through its counsel Tisdale Law Offices, LLC, submits the Supplemental Declaration of Joseph Gross and the within Memorandum in Opposition to Defendant McInnis Cement Inc.'s ("Defendant" or "McInnis Cement") Motion to Vacate the Process of Maritime Attachment and Garnishment. Defendant cannot be found in the District and Plaintiff is entitled to maritime attachment pursuant to Supplemental Admiralty Rule B.

PRELIMINARY STATEMENT

Under the cover of COVID, Defendant seeks to extract itself from a nearly four-year ship charter with Plaintiff which Defendant has found to be more costly than anticipated. Since the inception of the Charter Party between Plaintiff d'Amico Dry in 2017, Defendant's performance has been inadequate. In April 2020, Defendant declared a *force majeure* event under the Charter Party and attempted to evade its obligations thereunder. In response to Defendant's actions, Plaintiff commenced arbitration in accordance with the Charter Party and pressed the Defendant to agree to expedite same. Defendant rejected this request.

Plaintiff filed this action to obtain security for its anticipated arbitration award against Defendant. Defendant McInnis Cement is a Canadian company with its principal place of business in Canada. In its Motion to Vacate, without the production of an agency agreement of any type, Defendant argues that McInnis USA is its purported agent and subject to jurisdiction in New York, which should render Defendant "found" within the District. McInnis USA is not Defendant's general agent and its ties with New York do not create personal jurisdiction over the Defendant.

Neither Defendant nor its purported agent are subject to general jurisdiction in New York. The Supreme Court's decision in *Daimler v. Bauman AG* (a case not cited in Defendant's Memorandum of Law) makes that quite clear. The same is true for specific personal jurisdiction since McInnis Cement's presence in this District is completely unmoored from the breach of charter party. Defendant's attempt to paint McInnis USA as a general or managing agent also fails since outside of a few generic labels, there is no evidence that their relationship would permit the exercise of personal jurisdiction over McInnis Cement. Defendant's motion should be denied.

FACTUAL BACKGROUND

Plaintiff d'Amico Dry is a foreign corporation organized and existing under the law of Ireland with an office and principal place of business in Ireland. At all material times, d'Amico Dry had an agent d'Amico Shipping USA Ltd ("d'Amico USA") located in Stamford, Connecticut. (ECF No. 1, ¶ 6). d'Amico USA was not a party to the Charter Party. Rather, Plaintiff d'Amico Dry d.a.c. was the Owner of the vessel chartered to Defendant. Defendant McInnis Cement is a Canadian business entity with a principal place of business in Montreal, Quebec. (ECF No. 13, ¶ 5). Defendant asserts that McInnis Cement has an agent McInnis USA

Inc., which is a Delaware corporation with its principal place of business in Stamford, Connecticut (*Id.* at ¶ 7), an office where it has had no employees since June 2019. (*Id.* at ¶ 9).

On or about February 10, 2017, Plaintiff entered a Charter Party with Defendant for the charter of the CIELO DI GASPESIE ("Vessel"), for the carriage of between 31,500 and 34,000 metric tons cement on consecutive voyages between Port Daniel, Quebec, Canada and Providence, Rhode Island and/or The Bronx, New York commencing on February 15, 2018 up to and including December 31, 2021. (ECF No. 1, ¶ 8). The vast majority of communications with Defendant concerning this Charter Party were conducted with McInnis Cement personnel in Quebec. (*Id.* at ¶ 11). The Charter Party was signed by Luciano Bonaso, the Chief Executive Officer of d'Amico Dry and Mark Newhart, identified as the Vice President of McInnis Cement. (*Id.* at ¶ 9).

Although the Defendant had agreed to load between 31,500 and 34,000 metric tons of cement on board the Vessel for each voyage, Defendant loaded an average of approximately 28,000 metric tons of cargo, resulting in significant "deadfreight" charges to the Defendant throughout the charter period. (*Id.* at ¶ 12). In addition, although Defendant agreed to load cargo at the rate of 20,000 metric tons per weather working day and discharge the cargo at 10,000 metric tons per weather working day (in order to make the anticipated 15 day roundtrip voyage), an average 13 additional days were spent at the load and discharge ports per voyage to load and discharge the short loaded quantity of cement resulting in substantial demurrage charges to the Defendant throughout this Charter. (*Id.*) Instead of the guaranteed minimum of 47 and maximum of 66 voyages which should have taken place between February 15, 2018 and May 1, 2020, only 26 voyages have been performed. All involved loading in Canada. Only 12 of the 26 involved discharged in the Bronx. (ECF 13-5, p. 2 of 2). Of the nearly 800 days the

charter has been in operation, the vessel has been in New York less than 200 days. (Supp. Decl. of Joseph Gross, ¶4).

On April 17, 2020, McInnis Cement notified d'Amico Dry of its declaration of *force majeure* pursuant to Clause 34 of the Charter due to what Defendant alleges are the extraordinary and unprecedented impacts of COVID-19 on McInnis Cement's operations and cement shipments in the North-eastern United States. Defendant contends that the *force majeure* event may preclude its employment of the Vessel until the conclusion of the Charter, December 31, 2021, more than one and one-half years. (*Id.* at ¶ 13). Defendant's declaration of *force majeure* under Clause 34 due to the current COVID-19 pandemic was unwarranted and simply a tactic to justify its cancellation of the Charter because of its inability to economically perform its obligations thereunder. (*Id.* at ¶ 14).

As a result, Defendant has breached the Charter Party dated February 10, 2017 and Plaintiff has commenced arbitration in accordance with same. (*Id.* at ¶ 19). Plaintiff has requested expedited arbitration, a recognized feature of maritime arbitration when the parties so agree, to address the Defendant's declaration of *force majeure,* but the Defendant has declined that request. Instead, Defendant proposes that the parties delay arbitration until McInnis Cement declares the *force majeure* event concluded. (*Id.*) The Charter Party provides for arbitration in New York and the application of U.S. maritime law. (*Id.* at ¶ 20).

In support of its Motion to Vacate, Defendant submits documents purporting to evidence Defendant McInnis Cement's guaranty of the lease for the Bronx terminal. (ECF No. 13-3, 13-4). In the Declaration of Mr. Ouellet, Defendant asserts that "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." (ECF No. 13, ¶ 12(a)). Defendant repeats this assertion in its Memorandum of Law. (ECF No. 15, pp. 5, 11). However, the recitation is incomplete. Paragraph 8(A) of the Guaranty documents states as follows:

> 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 **arising out of or based on this Guaranty or the subject matter hereof brought by Landlord**...

ECF. No 13-3, p. 4; 13-14, p. 4 (emphasis added).

This action arises out of Defendant's breach of the Charter Party. Plaintiff is not McInnis's agent's Bronx landlord. Defendant's incomplete presentation of the facts is emblematic of its approach to this dispute: collapse the distinction between claims which arise from activities in the forum and claims which are completely unmoored from the forum. As will be discussed in greater detail, Defendant's breach of the Charter Party has no relation to McInnis USA's lease of the Bronx facility or its operations in this Judicial District. Therefore, Defendant cannot be "found" in the District within the meaning of Rule B and its Motion to Vacate should be denied.

PROCEDURAL BACKGROUND

On May 14, 2020, Plaintiff commenced this action with the filing of its Verified Complaint seeking a Rule B attachment to obtain security for its claims, which are the subject of the SMA arbitration proceedings. In support of this application, Plaintiff submitted the Declarations of Joseph Gross and Thomas L. Tisdale. On May 19, 2020, this Court granted Plaintiff's Motion for an Ex Parte Order of Maritime Attachment authorizing attachment of Defendant's assets up to $4,982,050. (ECF No. 8). Thereafter, Plaintiff served Garnishee

National Bank of Canada, New York Branch via e-mail. To date, the Garnishee has not restrained any funds subject to the Process of Maritime Attachment and Garnishment.

On May 25, 2020, Defendant filed this instant Motion to Vacate the Process of Maritime Attachment and Garnishment. (ECF Nos. 12-14). On May 26, 2020, this Court issued an Order to Show Cause and set a hearing date of June 11, 2020. (ECF No. 15). Plaintiff's Opposition is timely.

LEGAL STANDARD

To obtain a maritime attachment, a plaintiff must comply with Supplemental Rule B of the Federal Rules of Civil Procedure, which states in relevant part:

> If a defendant is not found within the district, ... a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process.... The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

Fed.R.Civ.P. Supp. R. B(1)(a)-(b).

Supplemental Rule E(4)(f) allows any person whose property has been attached pursuant to Rule B an opportunity to appear before a district court to contest the attachment. Fed.R.Civ.P. Supp. R. E(4)(f). "Rule E(4)(f) clearly places the burden on the plaintiff to show that an attachment was properly ordered and complied with the requirements of Rules B and E." *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.,* 460 F.3d 434, 445 n. 5 (2d Cir.2006), overruled on other grounds by *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte, Ltd.,* 585 F.3d 58 (2d Cir. 2009); *DSND Subsea AS v. Oceanografia, S.A. de CV*, 569 F. Supp. 2d 339, 343, 2008 A.M.C. 2503 (S.D.N.Y. 2008).

To carry this burden, the plaintiff "must demonstrate that 'reasonable grounds' exist for the attachment, and that all technical requirements for effective attachment have been met." *Maersk, Inc. v. Neewra Inc.*, 443 F.Supp.2d 519, 527 (citing *Ullises Shipping Corp. v. FAL Shipping Co. Ltd.*, 415 F.Supp.2d 318, 322-23 (S.D.N.Y. 2006)); *see also 20th Century Fox Film Corp. v. M.V. Ship Agencies, Inc.*, 992 F.Supp. 1423, 1427 (M.D. Fla. 1997) ("Plaintiff has the burden under Supplemental Rule E(4)(f) to come forward with sufficient evidence to show there was probable cause for the arrest or attachment of the [property].").

"When determining whether such reasonable grounds exist, 'Supplemental Rule E does not restrict review to the adequacy of the allegations in the complaint.'" *Maersk, Inc.*, 443 F.Supp.2d at 527 (quoting *Linea Navira De Cabotaje, C.A. v. Mar Caribe De Navegacion, C.A.*, 169 F.Supp.2d 1341, 1358 (M.D. Fla. 2001)). "A court also may consider any allegations or evidence offered in the parties' papers or at the post-attachment hearing." *Maersk, Inc.*, 443 F.Supp.2d at 527.

LEGAL ARGUMENT

I. Defendant McInnis Cement cannot be "found" within the District

A. The *Seawind* Test and Personal Jurisdiction

Rule B itself does not define what it means to be "found." The determination of whether a particular defendant is "found" is, in essence, a subjective-inquiry test, which turns not so much on whether the defendant has an actual presence (or can surface with one after the fact), but whether, with reasonable diligence, that presence could have been detected by plaintiff before the attachment application is filed. *Siderbulk, Ltd. v. M/S Nagousena*, No. 92 Civ. 3923 (JSM), 1992 WL 183575, at *1-*2 (S.D.N.Y. July 23, 1992). In fact, an attachment must stand, even if the defendant later demonstrates that it was "found" in both senses (jurisdiction and

service of process), when reasonable diligence would not have uncovered that fact. 7A MOORE'S, FEDERAL PRACTICE at 252.

The Second Circuit has long held that Rule B's requirement that a defendant be "found within the district" has two components: First, whether a defendant can be found within the district in terms of jurisdiction, and second, if so, whether it can be found for service of process. *Transfield ER Cape Ltd. v. Indus. Carriers, Inc.*, 571 F.3d 221, 223 (2d Cir. 2009) (citing *Seawind Compania, S.A. v. Crescent Line, Inc.*, 320 F.2d 580, 582 (2d Cir. 1963) (quoting *United States v. Cia. Naviera Continental S.A.*, 178 F. Supp. 561, 563 (S.D.N.Y. 1959) (Weinfeld, J.)); *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 268 (2d Cir. 2002), *overruled on other grounds*, *Shipping Corp. of India Ltd. v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58 (2d Cir. 2009); *Chilean Line, Inc. v. United States*, 344 F.2d 757, 760 (2d Cir. 1965). If the answer to either of these questions is "no," then the Court must conclude that Defendant could not be "found" and the attachment should be maintained.

There are two types of personal jurisdiction: specific and general. *Taormina v. Thrifty Car Rental*, No. 16-CV-3255 (VEC), 2016 WL 7392214, at *3 (S.D.N.Y. Dec. 21, 2016) (citing *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 624 (2d Cir. 2016)). Specific jurisdiction, also called "case-linked" jurisdiction, "is available when the cause of action ... arises out of the defendant's activities in a state." *Id.* General jurisdiction, or "all-purpose" jurisdiction, "permits a court to adjudicate any cause of action against the corporate defendant, wherever arising, and whoever the plaintiff." *Id.* Regardless of whether personal jurisdiction is specific or general, "the exercise of personal jurisdiction over a defendant is informed and limited by the U.S. Constitution's guarantee of due process, which requires that any jurisdictional exercise be consistent with 'traditional notions of fair play and substantial justice.'"

Id. (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)). "In particular, constitutional due process principles generally restrict the power of a state to endow its courts with personal jurisdiction over foreign corporate parties—that is, entities neither organized under the state's laws nor operating principally within its bounds—with regard to matters not arising within the state." *Id.* (citing *Lockheed Martin Corp.*, 814 F.3d at 625).

B. McInnis USA is not a Managing / General Agent such that its Contacts with the Forum Subject Defendant McInnis Cement to Personal Jurisdiction

Defendant asserts that McInnis USA acts as a "managing and general agent" for McInnis Cement's business activities in Connecticut and New York. (ECF No. 15, p. 3). There is no evidence to support this assertion, not even an agency agreement. Moreover, a review of the relevant case law establishes otherwise.

In *Ivan Visin Shipping Ltd. v. Onego Shipping & Chartering B.V.,* in what was essentially an unopposed argument, the court concluded that the following facts established that a purported New Jersey agent was in fact an agent for purposes of imputing personal jurisdiction to the principal in a Rule B attachment case:

- The agent chartered and operated vessels in the name of and on behalf of the principal and was responsible for the operations of 6-8 ships under charter to the principal trading in the Americas.
- In addition to chartering vessels for the principal, the agent also, *inter alia,* solicited freight business; booked contracts for the carriage of cargo; arranged for necessaries, stevedores and surveyors; collected and remitted hires and/or freights and attended to Customs services; and filed Electronic Notice of Arrival (e-NOA/D) and Sea Automated Manifest Systems (Sea AMS)-all for the principal's vessels.
- This agency relationship was confirmed by the principal's website.
- The website also stated that the NJ agent controlled a fleet of 6-8 company vessels trading in the Americas, "concentrates ... on developing relationships with local clients and customers both for chartering and operations," and had taken control of AMS and e-NOA/D filing for the entire company fleet.
- Moreover, a Ship Management Agreement signed by principal and agent labelled the agent as "Manager" and principal as "Owner" of various vessels.
- The contract stated that the agent undertakes to use its best endeavors to provide management services on behalf of principal and to promote the interests of principal

- The contract also specified that the agent was to act as agent in undertaking a variety of services related to insurance, freight management, accounting, chartering, bunkering and operation.

2008 A.M.C. 1760, No. 08-cv-1239, 2008 WL 839714, at *2–3 (S.D.N.Y. Mar. 31, 2008).

The facts in *Ivan Visin* are a far cry from those in the instant case. Here, the Declaration of Edouard Ouellet makes the following averments which can be read to arguably support the claim that McInnis USA is a general agent of Defendant McInnis Cement,

- A threadbare statement that McInnis is a "managing and general agent" for McInnis in New York and Connecticut, among other states. (ECF No. 13, ¶ 3).
- All McInnis USA activities where financed by Defendant McInnis Cement. (ECF No. 13, ¶ 11).
- McInnis USA is the importer of record and thereafter sells the cement from the Bronx Terminal leased by McInnis USA. (ECF No. 13, ¶ 12).
- McInnis USA has employees in New York. *Id.*

Noticeably absent from Defendant's submissions are any allegations or evidence of an agency agreement. The best evidence of McInnis USA's relationship with Defendant would be the contract which authorizes the activities of McInnis USA on behalf of Defendant, yet none has been provided. No information has been provided which identifies McInnis USA's duties as Defendant's agent. The Charter Party in this case makes no reference to McInnis USA in any respect, and was executed by McInnis Cement. Mr. Ouellet says that McInnis USA purchases all of the McInnis Cement cargo and it is sold to McInnis USA on a delivered basis. (ECF 13, ¶ 12(c)). This would, at best, make McInnis USA the Defendant's best customer, nothing more. He further states that "McInnis USA's finances, accounting, human resources, and logistics and legal are all managed by the McInnis staff in Montreal." (*Id.* at ¶ 11). We know less about the services which McInnis USA provides for the Defendant than we do the services Defendant provides for McInnis USA.

In *TMT Bulk*, Judge Castel denied a motion to vacate a maritime attachment predicated on a purported agent's presence in the District. *TMT Bulk Co. v. Corus UK Ltd.*, No. 09 CIV. 1255PKC, 2009 WL 1119377, at *2 (S.D.N.Y. Apr. 23, 2009). That court cited the Restatement of Agency which cautions that, when identifying general agency relationships, "the labels matter less than the underlying circumstances that warrant their application." *Id.* at *3 (citing Restatement (Third) of Agency § 2.01 cmt. d (2006)). According to the Restatement, "[t]he prototypical general agent is a manager of a business, who has authority to conduct a series of transactions and who serves the principal on an ongoing as opposed to an episodic basis." *Id.*

In *TMT Bulk*, the court held that the following evidence was insufficient to establish that the defendant was subject to jurisdiction in the District on an agency theory,

- The purported agent's business operations consisted of acting as agent for five related entities in connection with their purchase of supplies from U.S.-based companies.
- The purported agent maintained a permanent New York City staff and office location "for the sole purpose" of performing services to these clients.
- The purported agent performed the following services for the principals

    — development of contacts and business relationships with U.S. coal suppliers;
    — advice on the price, timing, quality and type of their coal purchases;
    — assistance in the negotiation of coal purchase contracts;
    — coordination of the inland transportation of coal from U.S. suppliers to various U.S. ports for shipment to Europe;
    — review and approval of coal supplier invoices;
    — preparation of all paperwork and documentation related to the purchase and export of defendants' coal.

- The purported agent provided such services for 38 years.
- The principals and agent had a common owner.
- If any legal process for the principals were presented to or served on the offices of the agent, the agent would be obligated to immediately report such an event to the principal entity involved.

Id.

The court then assessed whether the agent's New York activities would subject the principal to general jurisdiction. For the Court to conclude that the purported agent is

defendants' general agent, the evidence must show that it "does all the business which [defendants] could do were [they] here by [their] own officials." *TMT Bulk Co.*, 2009 WL 1119377, at *4 (S.D.N.Y. Apr. 23, 2009) (citing *Jazini v. Nissan Motor Co., Ltd.,* 148 F.3d 181, 184 (2d Cir.1998)). This "mean[s] that a foreign corporation is doing business in New York ... when its New York representative provides services beyond 'mere solicitation' ..." *Id.* (citing *Gelfand v. Tanner Motor Tours, Ltd.,* 385 F.2d 116, 121 (2d Cir.1967), *cert. denied,* 390 U.S. 996 (1968)).

The *TMT Bulk* court concluded that the record did not demonstrate comparable business activity on defendants' behalf in New York. The court emphasized that there was no evidence that the agent would be authorized to execute coal purchase contracts on its own or to perform management services of any kind on defendants' behalf. The Court noted that the agent's services were the "type of general solicitation services that are insufficient to support general jurisdiction over an absent principal in New York." *Id.* at *5. The court concluded that the purported agent did not qualify as a general agent such that its presence in New York could provide a basis to vacate plaintiff's attachment of assets under Rule B and that the plaintiff satisfied its burden of proof that defendant was not found in the district. *TMT Bulk Co.*, 2009 WL 1119377, at *5-*6. The Defendant here has made far less of a showing that McInnis USA is its general agent than did the defendant in *TMT Bulk.* Therefore, McInnis USA's contacts with the forum cannot imputed to Defendant McInnis Cement.

C. There is no General Jurisdiction over Defendant in New York

1. Neither McInnis entity is at home in New York

In *Daimler*, the Supreme Court clarified that with respect to foreign corporate entities, the place of incorporation and principal place of business are the paradigm bases for general

personal jurisdiction. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). The Defendant argues that "McInnis has substantial, continuous and systematic contacts within the District through its agent McInnis USA and its own activities." (ECF 15, p. 2). But after *Daimler,* this is not the test. As Justice Ginsburg pronounced: "Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." 571 U.S. at 138-39 (citing *Goodyear Dunlop Tire Operators S.A. v. Brown,* 564 U.S. 915 (2011)).

Defendant has made no such showing.

As one recent court in this District recognized:

> 1. The Supreme Court's decision in *Daimler* established that, except in an "exceptional" case, a corporate defendant may be treated as "essentially at home," and subject to a state's general personal jurisdiction, only where it is incorporated or maintains its principal place of business. 571 U.S. at 138–39 & nn.18–19, 134 S.Ct. 746.
>
> 2. The *Daimler* decision addressed minimum contacts, holding that "continuous and systematic" contacts alone are insufficient to establish general personal jurisdiction and thus rejected the idea that a company could be brought into court merely for "doing business" in a state. *Id.; see Gucci Am., Inc. v. Weixing Li,* 768 F.3d 122, 135 (2d Cir. 2014).

d'Amico Dry D.A.C. v. Primera Mar. (Hellas) Ltd., 348 F. Supp. 3d 365, 387 (S.D.N.Y. 2018), *reconsideration denied*, No. 09-CV-7840 (JGK), 2019 WL 1294283 (S.D.N.Y. Mar. 20, 2019), and *aff'd sub nom. d'Amico Dry d.a.c. v. Sonic Fin. Inc.,* 794 F. App'x 127, 2020 WL 773048 (2d Cir. 2020).

"A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so

'continuous and systematic' as to render them essentially at home in the forum State." *Wilderness USA, Inc. v. DeAngelo Bros. LLC*, 265 F. Supp. 3d 301, 305 (W.D.N.Y. 2017) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). The Supreme Court in *Daimler* "made clear that the constitutional standard for finding a corporation to be essentially at home in a foreign jurisdiction is a stringent one, and that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Wilderness USA, Inc.*, 265 F. Supp. 3d at 309. Defendant's reliance on pre-*Daimler* cases addressing similar arguments concerning general personal jurisdiction are of no avail. The Supreme Court's *Daimler* decision changed the law on general personal jurisdiction and Defendant's failure to address *Daimler* is telling.

When a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, "no matter how 'systematic and continuous,' are extraordinarily unlikely to add up to an exceptional case." *Taormina v. Thrifty Car Rental,* No. 16-CV-3255 (VEC), 2016 WL 7392214, at *5 (S.D.N.Y. Dec. 21, 2016) (internal quotations and citations omitted). Defendant has conceded that McInnis Cement is incorporated in Canada and that its principal place of business is in Canada. (ECF No. 13, ¶ 5). It has also conceded that McInnis USA is a Delaware corporation with its alleged principal place of business in Connecticut. (This is addressed further in Point IIA, *infra*). As such, neither McInnis entity is subject to general personal jurisdiction in New York. (Id. at ¶ 7).

2. Defendant's authorities are inapplicable to the extent they rely upon pre-*Daimler* General Personal Jurisdiction Law

The majority of cases in Defendant's Memorandum rely upon pre-*Daimler* authority concerning general jurisdiction and do not weigh in favor of vacatur.

McInnis cites *Alaska Reefer Mgmt. LLC v. Network Shipping Ltd.*, No. 14 CIV. 3580 JFK, 2014 WL 2722978, at *2 (S.D.N.Y. June 16, 2014) for the notion that in regards to general jurisdiction a "[d]efendant may point to 'the contacts and actions of its agents.'" (ECF No. 15, p. 9). However, in order for the agent to be found in the district, the court must apply the proper test for personal jurisdiction stated by the Court in *Daimler*. The *Alaska Reefer Mgmt. LLC v. Network Shipping Ltd.* is a pre-*Daimler* case so the court applied the now outdated test set forth in *Int'l Shoe Co. See* No. 14 Civ 3580 (JFK), 2014 WL 2722978, * 2.

Defendant also cites *Emerald Equipment Leasing Inc. v. Seastar LLC,* No. 08 Civ 10672 (JGK) 2009 WL 1182575 (S.D.N.Y. May 1, 2009). To the extent *Emerald Equipment Leasing* relied on the Second Circuit's *Metropolitan Life* concerning general jurisdiction, it is no longer good law. As one court in this Circuit recognized:

> However, as the Second Circuit has stated, *Metropolitan Life* was a *pre-Daimler* case, and it employed a different general-jurisdiction standard. *See Lockheed Martin*, 814 F.3d at 626 *(pre-Daimler* standard that prevailed in the past was "more forgiving"); *see id.* at 628 n.8 (*Metropolitan Life* was decided "*pre-Daimler,* when the 'continuous and systematic' standard governed exercise of general jurisdiction"). In short, as the Second Circuit has stated regarding the test that now governs, "mere contacts, no matter how 'systematic and continuous,' are extraordinarily unlikely to add up to an 'exceptional case. *Id.* at 629.

Bertolini-Mier v. Upper Valley Neurology Neurosurgery, P.C., No. 5:16-CV-35, 2016 WL 7174646, at *5 (D. Vt. Dec. 7, 2016).

McInnis also cites *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)) for the proposition that if an agent goes beyond mere solicitation and is sufficiently important to the foreign entity, the agent can confer personal jurisdiction on the principal. Both cases cited are outdated due to the new test for

general personal jurisdiction developed in *Daimler*. *Wiwa* points to CPLR 301 for the proposition that a foreign corporation is subject to general personal jurisdiction in New York if it is "doing business" in the state. 226 F.3d 88, 95 (2d Cir. 2000). However, *Daimler* abrogated the notion that a corporation can be subject to general personal jurisdiction for "doing business" in the forum.

The Defendant also cites to cases that apply the outdated standard for general personal jurisdiction like in *Metal Transp. Corp. v. Canadian Transp. Co.*, where the court stated "It is clear that the defendant, both directly and through the acts of its authorized agents, conducts various activities in New York on a continuous and systematic basis, sufficient to make the defendant subject to this Court's in personam jurisdiction and therefore 'present' in the jurisdictional sense within this district." 526 F. Supp. 234, 235 (S.D.N.Y. 1981). While probative before *Daimler, Metal Transp. Corp.* applies the former standard for assessing general personal jurisdiction and is inapplicable.

The same is true for *Green v. Compania De Navigacion Isabella, Ltd.* In that sixty-year-old case, the court found the activities undertaken on the defendant's behalf were regular and systematic. 26 F.R.D. 616, 618 (S.D.N.Y. 1960)). However, for the Court to find general jurisdiction over McInnis' agent it would need to apply the standard established by *Daimler*. The facts of this case simply do not establish that McInnis USA has enough contacts with the forum to render it "at home" in New York.

There is no general personal jurisdiction over Defendant McInnis Cement or its purported affiliate McInnis USA.

D. There is no specific jurisdiction over Defendant in New York

Defendant briefly addresses the New York Long Arm Statute in its Memorandum at page 11 to 12. Although not entirely clear from a reading of Defendant's papers, it appears that Defendant relies upon CPLR § 302(a)(1) for its argument that McInnis is subject to specific personal jurisdiction in New York. (ECF No. 15, pp. 11-12). As factual support for this argument, Defendant asserts that there is a "substantial nexus" between its in-state activity through McInnis USA acting as an agent under the Charter Party, which concerned delivery of cargoes at McInnis USA's Bronx Terminal.[1] (ECF No. 15, p. 12). A review of CPLR § 302(a)(1) and cases applying same establish that this sub-section does not supply personal jurisdiction over Defendant.

In determining whether the defendant can be found in terms of *in personam* jurisdiction, CPLR 302 grants New York courts jurisdiction over nondomiciliaries when the action arises out of the nondomiciliaries' "transact[ion of] any business within the state." CPLR 302[a][1]. "In order to determine whether personal jurisdiction exists under CPLR 302(a)(1), a court must determine (1) whether the defendant transacted business in New York and, if so, (2) whether the cause of action asserted arose from that transaction." *Leuthner v. Homewood Suites by Hilton*, 151 A.D.3d 1042, 1043, 58 N.Y.S.3d 437, 438 (N.Y. App. Div. 2017) (citing *Fernandez v. DaimlerChrysler, A.G.*, 143 A.D.3d 765, 766, 40 N.Y.S.3d 128, 130 (N.Y. App. Div. 2016)). "Whether a defendant has transacted business within New York is determined under the totality of the circumstances, and rests on whether the defendant, by some act or acts, has 'purposefully avail[ed] itself of the privilege of conducting activities within [New York].'" *Leuthner* , 151

[1] The Bronx Terminal is just one place of delivery. See ECF No. 13-5, p. 2. By Defendant's logic, it would be subject to personal jurisdiction in Rhode Island and Texas also for this same breach. The Charter Party does not identify McInnis USA as an agent.

A.D.3d at 1043; (citing *Paradigm Mktg. Consortium, Inc. v. Yale New Haven Hosp., Inc.,* 124 A.D.3d 736, 737, 2 N.Y.S.3d 180, 181 (N.Y. App. Div. 2015)).

Further, in order to satisfy the second prong of the jurisdictional inquiry, there must be an "articulable nexus," *McGowan v. Smith,* 52 N.Y.2d 268, 272, 419 N.E.2d 321 (1981), or a "substantial relationship," *Kreutter v. McFadden Oil Corp.,* 71 N.Y.2d 460, 467, 527 N.Y.S.2d 195, 522 N.E.2d 40(1988), between a defendant's in-state activity and the cause of action asserted. *Leuthner*, 151 A.D.3d at 1043; (*see D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro,* 29 N.Y.3d at 296, 56 N.Y.S.3d 488, 78 N.E.3d 1172 (2017). This second prong is where Defendant's argument fails.

C.P.L.R. § 302(a)(1) allows a court to exercise personal jurisdiction over a non-domiciliary defendant that "transacts any business within the state or contracts anywhere to supply goods or services in the state," so long as "the claim asserted ... arise[s] from that business activity." *Herod's Stone Design v. Mediterranean Shipping Co. S.A.,* No. 18 CIV. 5720 (AT), 2020 WL 360184, at *6–8 (S.D.N.Y. Jan. 22, 2020) (citing *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL,* 732 F.3d 161, 168 (2d Cir. 2013)). Although "the 'arising from' prong ... does not require a causal link between the defendant's New York business activity and a plaintiff's injury," there must be "a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former." *Licci,* 732 F.3d at 168–69 (internal quotation marks and citation omitted) (emphasis added).

Plaintiff and Defendant entered into a Charter Party to carry cargoes from Defendant's Canadian facility to Providence, RI, and New York, NY. Occasionally, Plaintiff was directed to discharge cargo also in Houston, Texas. Plaintiff is a foreign entity organized and existing under the laws of Ireland. Defendant is a Canadian entity with a principal place of business in Canada.

Defendant now argues that its agent McInnis USA's lease of premises in New York City has a sufficient nexus with its principal Defendant McInnis Cement's breach of the Charter Party as to subject Defendant to personal jurisdiction in New York. Defendant's invocation of Clause 35 of the Charter Party by letter dated April 17, 2020 which declared a force majeure event, says nothing specific about McInnis USA's Bronx operations as compared to its Providence or Bangor, Maine facilities, but refers only to the impact of COVID-19 "in the Northeastern United States (and indeed globally)…"

The cases cited in support of Defendant's claim that it is subject to specific personal jurisdiction in New York establish that, in fact, the opposite is true: specific jurisdiction is lacking. (ECF No. 15, pp. 11-12). In *SK Shipping (Singapore) Pte. Ltd. v. Petroexport, Ltd.*, No. 08 Civ. 7758 (WHP), 2008 WL 4602540, at *4 (S.D.N.Y. Oct. 15, 2008) the court concluded that there was no nexus between the defendant's New York business activities and the charter party which formed the basis of the dispute and denied a defendant's motion to vacate the maritime attachment on the ground that the defendant was "found." As here, the defendant in *SK Shipping* argued that a local New York agent's actions subjected the principal/defendant to specific jurisdiction. Judge Pauley rejected this argument since there was an insufficient nexus between the charter party and the defendant's New York activities. Specifically, the court rejected defendant's arguments that email instructions exchanged through the New York agent subjected the principal to personal jurisdiction.

In another maritime case, another court in this District dismissed a complaint for lack of personal jurisdiction on the ground that specific jurisdiction was lacking due to an insufficient nexus between the contract of carriage and the claim asserted in New York. *See generally BBC Chartering v. Usiminas*, No. 08 Civ. 200, 2009 WL 259618 (WHP) (S.D.N.Y. February 4,

2009). After concluding that the court lacked general jurisdiction even under the less restrictive pre-*Daimler* test, the court concluded that the plaintiff's claim was independent of the cargo's New York destination. The claim arose out of a contract to carry cargo from Brazil to New York. Even though the defendant transacted business in New York, this was insufficient for the court to exercise specific personal jurisdiction over the defendant and the court dismissed the case.

Here, the mere fact that **some** of the cargo carried under the Charter Party was delivered to New York is insufficient to subject Defendant to personal jurisdiction because there is an insufficient nexus between the charter party and Defendant's agent's operations in New York. Therefore, Defendant cannot be found in the District for jurisdictional purposes.

II. Connecticut courts do not have personal jurisdiction over Defendant McInnis Cement

A. A Connecticut Court would not Exercise General Personal Jurisdiction over McInnis Cement, a Canadian Company with a Canadian Principal Place of Business

As discussed *supra*, *Daimler* is the leading case concerning general personal jurisdiction. Connecticut Superior Courts have applied *Daimler*. *See e.g.*, *Edgewell Pers. Care Co. v. O'Malley*, No. X08CV176038381S, 2019 WL 4741553, at *7, n.5 (Conn. Super. Ct. Aug. 21, 2019), *reargument denied*, (Conn. Super. Ct. 2019) (reasoning that a foreign corporation is subject to general jurisdiction only where its "affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State.") (citing *Daimler AG v. Bauman,* 571 U.S. 117, 139, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014)). Judge Lee further noted "[w]ith respect to a corporation, the place of incorporation and the principal place of business are paradig[m] ... bases for general jurisdiction." *Id.* (citing *Daimler*).

Another Superior Court recognized that a corporation is likely "at home" in only one place. *Rubenstein v. Reservation Servs. Int'l, Inc.*, No. HHDCV136042594S, 2019 WL 4858282, at *8 (Conn. Super. Ct. Sept. 3, 2019) ("Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." (Citations omitted; internal quotation marks omitted).

Here, Defendant concedes that McInnis Cement is not incorporated in Connecticut and has a principal place of business in Canada. Thus, Connecticut has no general personal jurisdiction over them. Nor do the contacts of McInnis USA, a Delaware corporation, make McInnis Cement subject to Connecticut jurisdiction. The Defendant argues that McInnis USA's principal place of business is at 850 Canal Street, Stamford, Connecticut. Not so.

Even if McInnis USA were found to be the general agent of Defendant, which is denied, McInnis USA's principal place of business is not Stamford, Connecticut, but Montreal, Canada. As Mr. Ouellet declares, there are no longer any employees of McInnis USA at the Stamford office. McInnis USA's finances, accounting, human resources, and logistics and legal are managed by the McInnis staff based in Montreal. Even the mail directed to McInnis USA is forwarded to "McInnis' principal place of business located in Montreal, Quebec, Canada." (ECF 13, ¶¶ 9 and 11).

A corporation's principal place of business "is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities." *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010). Many courts of appeals have aptly called the principal place of business the corporation's "nerve center." *Id.* The Supreme Court explained that this "headquarters" should be the place that "is the actual center of direction, control, and coordination…and not simply an office where the corporation holds its board meetings (for

example, attended by directors and officers who have traveled there for the occasion)." *Id.* Offices that are merely mail drop locations, offices with a computer or a "location of an annual executive retreat" do not constitute a corporation's principal place of business. *Greene v. Paramount Pictures Corp.*, No. 14-CV-1044(JS)(SIL), 2017 WL 4011240, at *3 (E.D.N.Y. Sept. 11, 2017).

The nerve center for McInnis USA, based on the undisputed statements of Mr. Ouelette, is Montreal, Canada, not Stamford, Connecticut.

B. There is no specific jurisdiction over McInnis Cement because the Connecticut Long Arm statute applicable to corporations only confers jurisdiction in cases brought by Connecticut Residents

Only Connecticut residents or parties with a usual place of business in Connecticut may acquire personal jurisdiction over a foreign defendant using the Connecticut corporate long arm statute. *Matthews v. SBA, Inc.,* 149 Conn. App. 513, 555 (2014).

The statute provides,

> (f) Every foreign corporation shall be subject to suit in this state, **by a resident of this state or by a person having a usual place of business in this state**, whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows: (1) Out of any contract made in this state or to be performed in this state; (2) out of any business solicited in this state by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the state; (3) out of the production, manufacture or distribution of goods by such corporation with the reasonable expectation that such goods are to be used or consumed in this state and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed or sold or whether or not through the medium of independent contractors or dealers; or (4) out of tortious conduct in this state, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

Conn. Gen. Stat. § 33-929 (emphasis added).

Federal courts applying Connecticut law reach the same conclusion. "[T]he Connecticut long-arm statutes do not confer jurisdiction over actions committed by a nonresident party against another nonresident." *PSARA Energy, LTD v. SPACE Shipping, LTD*, 290 F. Supp. 3d 158, 165, 2017 A.M.C. 2952, 2017 WL 5574298 (D. Conn. 2017)(citing *Estate of Nunez–Polanco v. Boch Toyota*, Inc., 339 F.Supp.2d 381, 383 (D. Conn. 2004) (*quoting Pomazi v. Health Indus. of Am.*, 869 F.Supp. 102, 104 (D. Conn. 1994)); *see also Kun Shan Ge Rui Te Tool Co. v. Mayhew Steel Prod., Inc.*, 821 F.Supp.2d 498, 502 (D. Conn. 2010) ("To establish jurisdiction over a foreign corporation pursuant to section 33–929(f), a plaintiff must be 'a resident of this state' or 'a person having a usual place of business in this state.' ")).

Although the Supreme Court in *Daimler* recognized that agency relationships can be relevant to a specific personal jurisdiction analysis, the Connecticut Long Arm statute applicable to foreign corporations does not permit suit by non-residents. Plaintiff is an entity organized under the laws of Ireland with a principal place of business in Ireland. Therefore, there is no specific jurisdiction over McInnis Cement Inc. because d'Amico is not a Connecticut resident and cannot rely upon the Connecticut Long Arm Statute as a basis for personal jurisdiction over Defendant.

C. Even if personal jurisdiction over Defendant exists in Connecticut, equity requires that this Court exercise its discretion and deny Defendant's request for vacatur

Even if personal jurisdiction over the Defendant were found to exist in Connecticut, which is denied, equity mandates that this Court deny Defendant's requested vacatur. "Vacatur **may** be warranted when the defendant can show that it would be subject to *in personam* jurisdiction in another jurisdiction convenient to the Plaintiff." *Aqua Stoli,* 460 F.3d at 444.

With full transparency, Plaintiff disclosed to the Court all of the relevant available information about Defendant and McInnis USA's activities. On the other hand, Defendant has withheld the agency agreement and other evidence of the duties and authorities granted to its purported agent. While Defendant asserts that the basis of its *force majeure* declaration was the effect of COVID-19 on the Northeast United States, the Defendant has never been able to properly perform its duties under the Charter Party. Despite having returned the CIELO DI GASPESIE to d'Amico Dry on May 2, 2020 because its facilities were filled to capacity, two other vessels (better suited for the trade) have loaded cement at Port Daniel for discharge in Providence and New York after the *force majeure* declaration. One of those vessels is due to return to Port Daniel Canada to load again. (Supp. Gross Decl., ¶ 5). And despite the fact that government restrictions on construction work have or are being lifted throughout the Northeast, Defendant has maintained that the event of *force majeure* may never let it resume the subject charter which is not due to expire for another 18 months. These factors, along with McInnis' continued efforts to forestall d'Amico Dry's attempts to expedite the arbitration until after the charter is concluded, leaves d'Amico Dry to absorb the huge losses caused by the Corona-virus depressed market with no security for its claim and the possibility it cannot have the dispute adjudicated for two years or more. This, simply, is not fair or equitable.

III. Plaintiff's Rule B Attachment Application is Entirely Proper

Defendant takes an unsupported and overly narrow reading of how Rule B and relevant legal authorities define "property" when it argues that just because the Garnishee National Bank of Canada does not hold an account in the name of "McInnis Cement, Inc." that the inquiry ends. (ECF No. 15, pp. 15-16). If, as Defendant avers, McInnis USA is acting as agent of Defendant

McInnis Cement, then it is entirely reasonable to believe that McInnis USA holds property for the benefit of its principal.

Here, freight invoices under the subject charter party are paid on behalf of Defendant from the McInnis USA bank account at National Bank of Canada. (ECF 4-1, p. 2). According to Defendant, McInnis Cement developed and financed the Bronx Terminal at a cost of approximately $100,000,000. (ECF No. 15, p, 4). The cement itself is sold by McInnis to McInnis USA. (*Id.* at p. 9)(emphasis added). It follows from the fact that Defendant pays its bills and also sells cement to McInnis USA that the bank account of McInnis USA holds funds owed to Defendant or for the benefit of Defendant. Thus, any funds due and owing or held on behalf of the principal McInnis Cement are subject to the properly issued Process of Maritime Attachment and Garnishment.

CONCLUSION

Based upon the foregoing, Defendant's Motion to Vacate should be denied and Plaintiff awarded such other and further relief as to this Court appears just and proper.

Dated: June 3, 2020
New York, NY

Respectfully submitted,
Attorneys for Plaintiff,
D'AMICO DRY D.A.C.

By: _____/s/_____
Thomas L. Tisdale (TT5263)
Tisdale Law Offices, LLC
200 Park Avenue, Suite 1700
New York, NY 10166
Tel: 212-354-0025
ttisdale@tisdale-law.com

CERTIFICATION OF SERVICE

I hereby certify that on June 3, 2020 a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's CM/ECF system.

/s/ Thomas L. Tisdale
Thomas L. Tisdale