1 SUPREME COURT OF THE CITY OF NEW YORK

2 COUNTY OF NEW YORK : PART 1
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3 ROBERT M. MORGENTHAU
DISTRICT ATTORNEY OF NEW YORK COUNTY,
4
Plaintiff-Claiming Authority
5
- against - Index No.
6 402479/06

7 AVION RESOURCES LTD, et al.,,

8
Defendants
9 ---X
111 Centre Street
10 New York, New York 10013

11 February 8, 2007

12 B E F O R E:

13 HONORABLE MARTIN SHULMAN

14 Justice

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A P P E A R A N C E S:
16

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1 THE COURT: Before the court is the
2 Claiming-Authority's Order to Show Cause of
3 August 4, 2006 to confirm a second ex-parte order of
4 attachment issued August 2, 2006 and the defendants'
5 cross-motions containing branches of relief
6 uniformly adopted by each of the named corporate
7 defendants and individual defendants, which seek to
8 vacate the second order of attachment and to dismiss
9 this forfeiture action based on lack of personal
10 jurisdiction and/or insufficiency of service of
11 process, in the interest of justice and/or grounded
12 on forum non conveniens.
13 The Order of Attachment principally rests
14 on a 104 page affidavit of Thomas Dombrowski, a
15 Federal Customs Agent. The information contained in
16 Mr. Dombrowski's affidavit was gleaned from, among
17 other sources, his review of various banking records
18 of Valley National Bank with a New York branch,
19 faxed communications between the various named
20 defendants and one Carolina Nolasco, a former Vice
21 President of Valley National Bank intercepted via a
22 wiretap authorized by the Federal courts, as well as
23 conversations and records with U.S. Federal and
24 Brazilian investigators.
25 The focus of investigation covers a six

1 month period between January and June 2002. It is
2 essentially claimed that the individual and/or
3 corporate defendants engaged in the business of
4 transmitting money without a New York State banking
5 license violating Banking Law 650(2(b(1) and
6 utilized the services of Ms. Nolasco to facilitate
7 these banking transactions on their behalf at the
8 Valley National Bank.
9 As part of this record, is it noted that
10 Ms. Nolasco was charged in a federal action, among
11 other crimes, with operating an unlicensed money
12 transmission business in violation of federal law
13 and ultimately pled guilty to this crime on
14 October 4, 2002. Significantly, Nolasco was never
15 charged in the federal action with a purported
16 related offense of acting in concert with the named
17 defendants in this forfeiture action, as account
18 holders in her place of employ, to have committed
19 this crime or in engaging in a criminal enterprise
20 with these defendants, via-a-vis, violating the
21 federal banking Laws.
22 The following scenario is alleged to have
23 occurred: A particularly named defendant, operating
24 a Casa de Cambios or a money transmission business
25 in Brazil retained the services of an attorney to

1 establish a British Virgin Island Corporation
2 without a recorded principal place of business in
3 New York or stated corporate purpose to conduct any
4 business in New York. Said corporation,
5 characterized as a shell corporation, was solely
6 used by a particular Brazilian defendant or business
7 entity to open up a bank account at the Valley
8 National Bank. That defendant either individually
9 or through the Brazilian corporation arranged to
10 have Nolasco execute orders transmitted from Brazil
11 to her at the bank to complete transactions which
12 enabled approximately millions of dollars to be
13 moved in and out of the respective bank account.
14 What makes these transactions unique on this record
15 is that no reals, that is, Brazilian dollars, were
16 actually transmitted from Brazil to New York or U.S.
17 dollars from New York transmitted to Brazil. With
18 commissions paid for these transactions, the
19 entities in Brazil tapped into discrete pools of
20 currency in existence in both countries and
21 maintained parallel tracking systems to reflect
22 these transactions.
23 So, for example, a Brazilian customer
24 seeking to purchase goods in New York valued at
25 $20,000 would go to a Casa de Cambios or doleiro

1 operated by one of the defendants, pay $20,000 in
2 reals plus a commission. That entity would then
3 communicate with Nolasco to debit its New York
4 account for $20,000 the defendant opened with its
5 BVI corporation funded with U.S. dollars and
6 transmit this money to pay the recipient for the
7 goods without the Brazilian customer having to deal
8 with the strict currency laws of Brazil and their
9 attendant restrictions.
10 It is claimed that between 2000 and 2002,
11 this type of transaction was repeated hundreds of
12 times to the effect that over $630 million were
13 moved in and out of the defendants' accounts at
14 Valley National Bank with Nolasco's assistance. The
15 claiming authority alleges that the defendants used
16 these accounts as financial conduits to engage in
17 the business of transmitting money without a
18 license.
19 A Brief Description of the New Jersey Prosecution.
20 In or about 2002, Nolasco was indicted by
21 a federal grand jury for operating a money
22 transmitting business, filing false income tax
23 returns, and structuring various transactions at the
24 Valley National Bank to evade certain federal or
25 state reporting requirements for depositing sums of

1 $10,000 or greater. At that time, and using
2 warrants, the U.S. Attorney's office obtained
3 warrants and was able to seize the accounts in issue
4 as proceeds of Nolasco's crime of operating a money
5 transmission without a license. They seized
6 approximately $21 million.
7 Approximately two years later, after some
8 of the named defendants commenced a federal action
9 here in New York to recover these seized funds, the
10 U.S. Attorney's office then obtained a superseding
11 indictment which now included a forfeiture claim and
12 then opposed defendants' petitions in New York to
13 turn over the funds claiming New Jersey is the more
14 appropriate forum to deal with the forfeiture issue
15 and that the funds were in New Jersey.
16 The Southern District Court dismissed the
17 petition grounded on lack of subject matter
18 jurisdiction. After Nolasco pled guilty to Count 1,
19 which is relevant to this proceeding, to illegally
20 operating a money transferring business, the named
21 defendants again filed ancillary proceedings to
22 recover the seized funds as the true owners of the
23 accounts. The U.S. Attorney's office moved to
24 dismiss the petitions and Federal Judge Greenaway
25 denied its motion. Thereafter, the defendants, as

1 account holders and not the subject of any criminal
2 investigation or prosecution, moved for summary
3 judgment to be entitled to the return of their
4 respective funds. The U.S. Attorney's Office, among
5 others arguments, used the information of Special
6 Agent Dombrowski regarding the relationship between
7 the defendants and Nolasco to somehow establish the
8 defendants were not the true owners of the seized
9 funds and that discovery was needed to flesh this
10 out. Judge Greenaway did not find the opposition
11 credible and in an order dated June 7, 2006, granted
12 the defendants, petitioners in that matter before
13 the federal court, summary judgment and then they
14 were then entitled to the return of the seized
15 assets presumably maintained in a New Jersey account
16 held by U.S. Attorney's Office or under the aegis of
17 the U.S. Customs Office. Judge Greenaway
18 established that the petitioners in the ancillary
19 proceedings had a clear right, title and interest in
20 the seized proceeds, that the U.S. Attorney's
21 opposition papers raised issues about the
22 defendants' activities in Brazil, not relevant to
23 the Nolasco forfeiture claim, and that for four
24 years, the U.S. Attorney appeared to be conducting a
25 fishing expedition and used the Nolasco prosecution

1 as a tool to investigate Brazilian crime and
2 international wrongdoing.
3 Thereafter the Federal Court issued an
4 Order dated June 28, 2006 directing the release of
5 the funds. When read together, said funds were
6 required to be turned over to the 22 petitioners,
7 among the named defendants here. That did not
8 occur.
9 The New York Procedural Posture.
10 In the interim, on June 20, 2006, the
11 Claiming Authority filed and obtained an ex-parte
12 order of attachment to seize the funds in New Jersey
13 which were either in the custody of the U.S.
14 Attorney's Office or U.S. Customs Office and the
15 transfer of funds occurred.
16 Thereafter, the plaintiff moved to confirm
17 the order of attachment and the return date for same
18 was adjourned from July 18, 2006 to August 11, 2006.
19 On August 2, the D.A. obtained a second ex-parte
20 order of attachment and moved to confirm same. On
21 August 11, 2006, this Court issued a bench decision
22 vacating the June 20, 2006 TRO/Order of Attachment
23 based upon plaintiff's failure to timely move to
24 confirm the first order of attachment pursuant to
25 CPLR 1317(2). As stated earlier, the defendants

1 cross moved to vacate the second order of attachment
2 and dismiss this action.
3 Discussion.
4 After giving careful consideration to the
5 record developed before this Court, I must confess
6 that I am troubled about the manner in which this
7 action was commenced and the selective nature of the
8 information the D.A. made available to the Court to
9 obtain various court orders advancing the
10 plaintiff's position in this action.
11 As a preliminary observation, not advanced
12 by the defendants, I am unclear, based upon the
13 uncontroverted facts before the Court, why an
14 ex-parte TRO/Order of Attachment was proper since
15 the seized funds were in the custody of law
16 enforcement officials and there was no potential
17 risk of the defendants absconding with the funds.
18 This is a real concern plaintiff reasonably
19 experiences in almost every other forfeiture action,
20 but should not have here. Inexplicably, the D.A.'s
21 supporting papers for the ex-parte TRO and Order of
22 Attachment furnished no history of the New Jersey
23 federal action and omitted information about the
24 exact location of the seized funds. Knowing what I
25 know now, I would never had signed that first

1 **ex-parte Order of Attachment. Why? Because this**
2 **Court could not attach property not within its**
3 **jurisdiction.**
4 **I find support in** Koehler v. Bank of
5 Bermuda, Ltd., **56 U.C.C. Rep. Serv. 2d (Callaghan)**
6 **782. There, the federal court cites with approval,**
7 National Union Fire Insurance Company of Pittsburgh,
8 Pennsylvania v. Advanced Employment Concepts, Inc.,
9 **269 A.D. 2d 101, 703 N.Y.S.2d 3 (1st Dept. 2000),**
10 **and other New York case law for the proposition that**
11 **in order for property to be levied, it must exist**
12 **within the jurisdiction of the state.**
13 **As the facts were then, Nolasco was the**
14 **sole person convicted of operating the money**
15 **transmission business using the Valley National**
16 **accounts. Any linkage between Nolasco and the**
17 **defendants, vis-a-vis, the alleged bribery payments**
18 **from the defendants to manage their accounts was**
19 **dispelled with the Kaufman supplemental Affirmation**
20 **advising the Court that Nolasco stole their funds.**
21 **With that being said, on June 7, 2006, the**
22 **seized funds became private funds located outside of**
23 **New York which belonged to the defendants and which**
24 **could not be seized as a matter of law. Further,**
25 **this was not the case where the U.S. Attorney's**

1 Office voluntarily desired to withdraw its
2 forfeiture action believing a State claim would be
3 more successful or appropriate, which would have
4 ostensibly allowed a seamless transfer of the seized
5 funds back to New York.
6 Contrarily, for at least two years, the
7 Federal government, without a single claim of
8 wrongdoing against the defendants, strenuously
9 opposed the release of the seized assets in New York
10 and/or New Jersey. These funds as of June 7, 2006
11 belonged to the defendants and were outside the
12 jurisdiction of this Court.
13 Under that legal scenario, there would
14 have been no basis to allow the filing of the second
15 ex-parte Order of Attachment in August, even though
16 the funds were already in New York because the
17 transfer from U.S. Attorney's Office to the D.A.'s
18 office was patently improper.
19 To round out this discussion, I fully
20 agree with the defendants' collective position that
21 the basis to cure a defective Order of Attachment
22 with a second one while an action is pending does
23 not fairly address the post-deprivation rights of
24 the defendant in present day forfeiture proceedings.
25 Upon reflection, I am not certain that

1 Mojarrieta v. Saenz, 80 N.Y. 547 (1880) is a sound
2 precedent to rely on, certainly not in a case as
3 here where there was no basis for the Claiming
4 Authority to be granted an ex-parte Order of
5 Attachment to begin with.
6 I am now discussing the ground of improper
7 service of process. After careful consideration of
8 the legal issues in this case, I see no justifiable
9 basis for the Plaintiff to have completed an end-run
10 to the proper manner of obtaining personal
11 jurisdiction over the 58 defendants in this case.
12 The Inter-American Convention on Letters Rogatory is
13 mandatory for signatories to that agreement.
14 In CFTC v. Nahas, 238 U.S. App. D.C. 93,
15 738 F.2d 487 (D.C. Cir., 1984) while addressing the
16 issue of compulsory process such as an investigative
17 subpoena to be served on a Brazilian citizen, the
18 Circuit Court had this to say: "Brazilian law
19 requires that service of process by foreign nations
20 be made pursuant to a letter rogatory or a letter of
21 request transmitted through diplomatic channels."
22 Equally persuasive upon this Court is Hypo
23 Bank Claims Group, Inc. v. American Stock Transfer &
24 Trust Company, et al., 4 Misc.3d 1020A, 791 N.Y.S.2d
25 870 (Sup.Ct.N.Y. Co., 2004, Edmead, J.), wherein the

court held that "cases involving a foreign corporation having its principal place of business overseas, the doctrine of comity trumps CPLR 311(a)(1) and requires the service of process be effectuated not according to New York law, but in compliance with the laws of the sovereignty where the foreign corporation is located..." See also Tucker v. Interarms, 186 F.R.D.450, 1999 U.S. Dist. LEXIS 13430 (N.D., Ohio, 1999); Alpha Omega Technology, Inc. v. PGM, et al., 1994 U.S. Dist. LEXIS 1218 (S.D.N.Y., 1994 ("New York Courts, however, interpret the doctrine the comity of nations to provide that service in violation of the law of a foreign country is ineffective..."); and Mastec Latin America v. Inepar S/A Industries E Construcoes, 2004 U.S. Dist. LEXIS 13132 (S.D.N.Y.,2004) ("Under New York law, service of process in violation of the laws of a foreign country is invalid...").

Against this legal backdrop, it was improper for the Claiming Authority to seek an ex-parte court order on August 10, 2006 providing alternative means of service pursuant to CPLR 308(5) based upon a purported claim that service via the convention would have been impracticable. The

1 papers reveal that the Brazilian authorities and New
2 York have a good working relationship and that the
3 U.S. Customs Office have been working with them
4 since 2000. They knew who the players were, where
5 they worked and where they lived in Brazil. There
6 was also no showing that the process would have been
7 evaded. After all, these same defendants are the
8 subject of criminal and civil proceedings involving
9 the same type of criminal activity vis-a-vis
10 Brazil's currency laws. The Brazilian government,
11 based upon mutual desire to deal with the burgeoning
12 problem of the doleiros, could have easily worked to
13 expedite the letters rogatory process. In fact, the
14 U.S. government could have lent its good offices to
15 move this along at a faster clip.
16 Parenthetically, reliance on the Mutual
17 Legal Assistance Treaty to short circuit lawful
18 service of process on Brazilian citizens and
19 corporations is misplaced as this is a civil
20 forfeiture proceeding, not a criminal matter. I
21 might also add that counsel's appearance in this
22 action did not waive their right to challenge
23 improper service of process and make their
24 respective cross-motions. Al-Dohan v. Kouyoumjian,
25 93 A.D.2d 714, 461 N.Y.S. 2d 2 (1st Dept., 1983).

Defendants, based upon settled federal and state case law, did not consent to jurisdiction and service of papers on counsel for the respective defendants was improper.

Finally, assuming my August 10th order granting leave to the plaintiff to complete alternative means of service and extending the time to October 10, 2006 was proper, and I hold it was not, still, the D.A.'s opposition papers contain no affidavit from someone with personal knowledge as to the manner in which any of the defendants allegedly were personally served with papers in Brazil, or any other appropriate affidavits of service by that deadline, or even to this very day. The County Clerk's file contains no affidavits of service, good, bad or otherwise.

I would also like to briefly discuss the forum non conveniens issue. Former Justice Miller in Banco Nacional Ultramarino, S.A. v. Chan, 169 Misc. 2d 182, 641 N.Y.S.2d 1006 (Sup. Ct. N.Y.Co., 1996) addressed this issue. "The doctrine is applied if notions of justice, fairness and convenience requires it. Among the factors the court must consider are (1) availability of another more convenient forum; (2) whether the dispute

1 centers around a transaction occurring primarily in
2 another jurisdiction; and (3) whether the foreign
3 jurisdiction has a permanent interest in resolving
4 the issues..."
5 I do find that it is more appropriate for
6 the District Attorney to prosecute a civil
7 forfeiture action here in New York as a companion
8 action to a criminal prosecution in New York related
9 to that action. On this record before this Court it
10 remains unclear whether Brazil or New York is the
11 more appropriate forum. What is clear from the
12 D.A.'s supporting papers is that Brazil is arguably
13 even more aggressive in pursuing the defendants in
14 both the civil and criminal actions with respect to
15 their purported violation of currency laws and
16 conducting their money transaction businesses.
17 In any event, this Court, given everything
18 that has been said decided thus far, does not really
19 have to reach this ground there is a sufficient
20 basis to grant the branches of defendants'
21 cross-motion to vacate the second Order of
22 Attachment, to deny the Claiming Authority's Order
23 to Show Cause to confirm that Order of Attachment
24 and to dismiss this action.
25 I am directing that the parties, within

1 seven days, submit mutually exchanged proposed
2 orders and judgments setting forth the recitation of
3 the papers and my conclusions. I expect to receive
4 a hard copy of the proposed orders and judgments
5 with affidavits of service, as well as a companion
6 Word Perfect disk so I can make appropriate changes
7 as I deem fit to accurately reflect my decision and
8 order this afternoon.
9 MS. MINER: Would you consider staying
10 your ruling?
11 THE COURT: Pardon?
12 MS. MINER: Would you consider staying it
13 a little longer.
14 THE COURT: Staying it? I may consider
15 that application in the context of signing the
16 proposed order and judgment. My decision today does
17 not have any effect until I sign the proposed order
18 and judgment.
19
20 * * * * * *
21 Certified to be a true and accurate
22 record of the proceedings herein.
23
24 ______________________________
ENIKA BODNAR, CSR, RPR
25 Official Court Reporter