THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Fortune Laurel, LLC

v.

Yunnan New Ocean Aquatic Product Science and Technology Group Co., Ltd.; Yunnan Ocean King Fisheries Co., Ltd. Yunnan Honghao Fisheries Co., Ltd.; U.S. Ocean Star Trade Co., Ltd.; and High Liner Foods (USA), Inc., Trustee

No. 2019-0307

MANDATORY APPEAL PURSUANT TO SUPREME COURT RULE 7 FROM FINAL DECISION FROM ROCKINGHAM SUPERIOR COURT

APPELLANTS' BRIEF

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N.H. Sup. Ct. R. 7

(1)(A) *Mandatory appeals*.

Unless otherwise provided by law or by these rules, a mandatory appeal, other than an appeal in a parental notification case under RSA 132:34, shall be by notice of appeal in the form of notice of appeal approved by the supreme court for the filing of a mandatory appeal ("Notice of Mandatory Appeal" form). Such an appeal shall be filed by the moving party within 30 days from the date on the clerk's written notice of the decision on the merits or, in the case of a sentence imposed in a criminal or juvenile delinquency proceeding, within 30 days of the date the sentence is pronounced.

(B) *Other appeals from trial court decisions on the merits*.

The supreme court may, in its discretion, decline to accept an appeal, other than a mandatory appeal, or any question raised therein, from a trial court after a decision on the merits, or may summarily dispose of such an appeal, or any question raised therein, as provided in Rule 25. Unless otherwise provided by law or by these rules, an appeal from a trial court decision on the merits other than a mandatory appeal shall be by notice of appeal in the form of notice of appeal approved by the supreme court for the filing of such an appeal ("Notice of Discretionary Appeal" form). Such an appeal shall be filed by the moving party within 30 days from the date on the clerk's written notice of the decision on the merits or, in the case of a sentence imposed in a criminal or juvenile delinquency proceeding, within 30 days of the date the sentence is pronounced.

(C) The definition of "decision on the merits" in Rule 3 includes decisions on motions made after an order, verdict, opinion, decree or sentence. A timely filed post-decision motion stays the running of the appeal period for all parties to the case in the trial court including those not filing the motion. If the trial court's decision on a post-decision motion creates a newly-losing party, and the newly-losing party files a timely motion for reconsideration, such motion will further stay the running of the appeal period for all parties to the case in the trial court including those not filing the motion. Untimely filed post-decision motions will not stay the running of the appeal period unless the trial court waives the untimeliness within the appeal period. In the absence of an express waiver of the untimeliness made by the trial court within the appeal period, the appeal period is not extended even if the trial court rules on the merits of an untimely filed post-decision motion. Successive post-decision motions filed by a party that is not a newly-losing party will not stay the running of the appeal period. *See Petition of Ellis*, 138 N.H. 159 (1993); *see also* Super. Ct. (Crim.) Rule 59-A; Super. Ct. (Civ.) Rule 12(e).

In criminal appeals, the time for filing a notice of appeal shall be within 30 days from the date of sentencing or the date of the clerk's written notice of disposition of post-decision motions, whichever is later, provided, however, that the date of the clerk's written notice of disposition of post-decision motion shall not be used to calculate the time for filing a notice of appeal in criminal cases if the post-decision motion was filed more than 10 days after sentencing.

(2) An appeal shall be deemed filed when the original and all copies of the notice of appeal in proper form, together with the filing fee, are received by the clerk of this court

within 30 days from the date on the clerk's written notice of the decision or, in the case of a sentence imposed in a criminal or juvenile delinquency proceeding, within 30 days of the date the sentence is pronounced.

(3) An appeal permitted by law on a different form and by a different procedure shall be deemed timely filed when it is received by the clerk of this court on the form and by the procedure prescribed by law.

(4) All parties to the proceedings in the court from whose decision on the merits the appeal is being taken shall be deemed parties in this court, unless the moving party shall notify the clerk of this court in writing of the moving party's belief that one or more of the parties below has no interest in the outcome of the transfer. The moving party shall mail a copy of the letter first class, or give a copy, to each party in the proceeding below. A party thus designated as no longer interested may remain a party in this court by notifying the clerk of this court, with notice mailed first class or given to the other parties, that the designated party has an interest in the transfer. Parties supporting the position of the moving party shall meet the time schedule provided for that party.

(5) If a timely notice of appeal is filed by a party, any other party may file a notice of cross-appeal within 10 days from the date on which the first notice of appeal was filed and shall pay a filing fee therewith.

(6)(A) The appealing party in a mandatory appeal shall attach to the notice of appeal the decision below, the clerk's written notice of the decision below, any order disposing of a timely-filed post-trial motion, and the clerk's written notice of any order disposing of a timely-filed post-trial motion.

(B) The appealing party in an appeal other than a mandatory appeal shall attach to the notice of appeal the decision below, the clerk's written notice of the decision below, any order disposing of a timely-filed post-trial motion, and the clerk's written notice of any order disposing of a timely-filed post-trial motion. Any other pleadings and documents that the appealing party believes are necessary for the court to evaluate the specific questions raised on appeal and to determine whether the appeal is timely filed shall be filed as a separate appendix. The appendix shall contain a table of contents referring to numbered pages, and only 8 copies shall be filed. Note: *Also see* Rule 26(5). If a ground for appeal is the legal sufficiency of the evidence, the question in the notice of appeal form raising that ground shall contain a succinct statement of why the evidence is alleged to be insufficient as a matter of law.

N.H. Sup. Ct. R. 3

"Decision on the merits":	Includes order, verdict, opinion, decree, or sentence following a hearing on the merits or trial on the merits and the decision on motions made after such order, verdict, opinion, decree or sentence. Untimely filed post-trial motions will not stay the running of the appeal period unless the trial court waives the untimeliness within the appeal period.

N.H. R.S.A §511:45 - "Dissolution of Attachments—By Judgment, Etc.,"

"[w]hen a judgment is rendered for the defendant, upon which execution may issue, or when the action is compromised or dismissed, the attachment made in the action is dissolved thereby."

QUESTIONS PRESENTED

1. Whether the Superior Court issued a final decision on the merits requiring the non-trustee Defendants to file a mandatory appeal under Supreme Court Rules 3 and 7 when it dismissed the non-trustee Defendants for lack of personal jurisdiction and issued a final order on the Trustee Defendant's Motion for Reconsider its Order Maintaining the Court's Attachment of Funds held by the Trustee Defendant.

2. Whether the Superior Court erred in maintaining jurisdiction over attached funds owed to the YOK Appellants, notwithstanding the Superior Court's ruling that it lacked personal jurisdiction over the YOK Appellants.

STATEMENT OF THE CASE

In December of 2017, Appellee Fortune Laurel, LLC ("Fortune Laurel" or "Appellee"), a Massachusetts company in the business of brokering international fish supply contracts and also buying and re-selling fish, filed a Complaint in New Hampshire Superior Court against Yunnan Ocean King Fisheries Co., Ltd., and its subsidiaries Yunnan Honghao Fisheries Co., Ltd., and U.S. Ocean Star Trade Co., Ltd., (collectively the "YOK Appellants" or "Appellant"), Chinese fish suppliers, alleging two counts for breach of contract and one count for violation of RSA 358-A. Fortune Laurel's contractual claims related to its role as a broker of tilapia sales between the YOK Appellants and High Liner Foods, Inc. (Canada) ("High Liner (CAN)"). Fortune Laurel also brought claims under RSA 358-A related to a dispute over fish sold by the YOK Appellants to Fortune Laurel to be re-sold to Gorton's Inc. ("Gorton's"), a Massachusetts company.

At the same time that it filed its Complaint, Fortune Laurel petitioned the Superior Court to issue an ex parte trustee attachment on $585,479.19 of funds owed to the YOK Appellants by the Trustee Defendant, High Liner Foods (USA), Incorporated. ("High Liner (USA)" or

("Trustee Defendant") a New Hampshire company. High Liner (USA) is a subsidiary of High Liner (CAN). The attachment amount is overwhelmingly made up of the alleged costs and damages associated with a dispute over fish that was supplied by the YOK Appellants to Gorton's in Massachusetts. The Superior Court granted Fortune Laurel's petition for ex-parte attachment of the funds held by High Liner (USA).

In response to the Complaint, the YOK Appellants entered a limited appearance in the Superior Court for the purpose of contesting the New Hampshire Superior Court's personal jurisdiction over them. On November 19, 2018, after hearing oral argument on the YOK Appellants' Motion to Dismiss, the Court issued its Order granting the YOK Appellants' Motion and dismissing Fortune Laurel's Complaint against the YOK Appellants for lack of personal jurisdiction. This decision has not been appealed.

Despite determining that it lacked personal jurisdiction over the YOK Appellants, the Court nevertheless requested briefing on the issue of whether it had the authority to exercise jurisdiction and continue to maintain the trustee attachment of the YOK Appellants funds, located in New Hampshire. On February 20, 2019, the court issued its Omnibus Order on Chargeability and Jurisdiction, holding that it did have sufficient jurisdiction to maintain the trustee attachment "pending the adjudication of the underlying case in the Commonwealth of Massachusetts." See, Omnibus Order at p. 21 (A.30). Following the Superior Court's February 20 decision, the YOK Appellants filed their mandatory notice of appeal as to the Court's decision to continue restricting the YOK Appellants' funds by maintaining the trustee attachment under Sup. Ct. R. 7. On December 17, 2018, Fortune Laurel filed a separate and new action the in Superior Court in Massachusetts, to which the YOK Appellants responded by filing three counterclaims of their own. That Massachusetts litigation in ongoing.

This Court initially denied the YOK Appellants' mandatory notice of appeal on July 17, 2019, "without prejudice to raising the issue in an appeal from a final judgment of the superior court." On September 13, 2019, upon the YOK Appellants' Motion for Reconsideration, this Court vacated its previous order and accepted the YOK Appellants' appeal. In doing so, this Court requested briefing on both the issues set forth in the YOK Appellants' notice of appeal and also on the question of whether or not the Superior Court issued a final decision on the merits as to its continued maintenance of the trustee attachment.

STATEMENT OF THE FACTS

Fortune Laurel's underlying claims relevant to this Appeal stem from a business relationship with the YOK Appellants going back to 2012, involving the import and sale of frozen tilapia from China to the United States and Canada. Appellee Complaint ¶11 (A.61). Fortune Laurel is a Massachusetts limited liability company located in Quincy, Massachusetts and is in the business of acting as a broker and reseller of imported and wholesale food. Appellee Compl. ¶¶1, 9 (A.60, A.61). The YOK Appellants are affiliated Chinese entities that are in the business of processing and selling fish. Id. ¶10 (A.61). From 2012 to 2014, the YOK Appellants entered into a series of contracts with Fortune Laurel in which Fortune Laurel agreed to act as a broker for the sale of frozen tilapia to companies within the United States and Canada, including High Liner (CAN). See Affidavit of Tim Rorabeck ¶¶9-12 (A.53-A.54); See Affidavit of Jane Yu ¶¶2-4 (A.51). For this service, Fortune Laurel was paid a brokerage fee based on the amount of tilapia sold by the YOK Appellants to High Liner (CAN).

High Liner (CAN) is a company with a number of subsidiaries in the United States and Canada, including High Liner (USA), which is based in New Hampshire. High Liner (CAN) procures all products to be used in its subsidiaries' business operations and subsequently sells

that product to those subsidiaries. *Id*. ¶¶9-13 (A.54-A.55). Consistent with that practice, between 2012 and 2014, Fortune Laurel brokered the sale of frozen tilapia between the YOK Appellants and High Liner (CAN), who then sold that tilapia to its subsidiary, High Liner (USA). *Id*; Affidavit of Jane Yu ¶5 (A.51).

Fortune Laurel was paid for its brokerage services by a fee calculated as a per pound charge based on the weight of frozen tilapia supplied by the YOK Appellants to High Liner (CAN). Pursuant to the agreements in effect between 2012 and 2014 between the YOK Appellants and Fortune Laurel, the YOK Appellants agreed to pay Fortune Laurel $0.02 per a pound of frozen tilapia purchased by High Liner (CAN). Compl. ¶13 (A.62). The 2014 agreement between the parties required Fortune Laurel to develop two new high-end customers for which the YOK Appellants agreed to pay Fortune Laurel. *See* Affidavit of Jane Yu ¶4 (A.51). Fortune Laurel alleged in its Complaint that the YOK Appellants failed to pay Fortune Laurel for brokerage services that it provided to the YOK Appellants in 2017, related to the sale of fish to High Liner (CAN). *Id*. ¶14 (A.62).

Payments from the YOK Appellants related to Fortune Laurel's brokerage services were sent by the YOK Appellants in China to Fortune Laurel in Massachusetts after the YOK Appellants received payment from their customers, including High Liner (CAN). See Affidavit of Jane Yu ¶¶4-6 (A.51-A.52). The YOK Appellants never received payment or had any agreements with High Liner (USA). *See Id*. ¶6 (A.52). Furthermore, the YOK Appellants directed all of its shipments that were purchased by High Liner (CAN) to ports in Norfolk, Virginia or Boston, Massachusetts. See Omnibus Order on Chargeability and Jurisdiction, at 2(A.11). From those U.S. ports, the goods were then transported by High Liner (USA) to its locations throughout the United States, including Massachusetts. *See Id (*A.11*)*.

In addition to its agreement to broker the sale of fish between the YOK Appellants and purchasers in the United States and Canada, Fortune Laurel also directly purchased frozen tilapia from the YOK Appellants for resale. Appellee Compl. ¶19 (A.62). This sector of its business included the purchase and resale of fish from the YOK Appellants to Gorton's in Massachusetts. *Id*. (A.62). Fortune Laurel alleged that the YOK Appellants breached their agreement with Fortune Laurel by delivering frozen tilapia to Gorton's in Massachusetts that fell below Gorton's quality control standards, and by failing to reclaim rejected fish when notified of the rejection. *Id*. ¶¶44-45 (A.66-A.67). It also alleged that the YOK Appellants engaged in unfair and deceptive trade practices in violation of New Hampshire law, NH. Rev. Stat. §358-A:2, when they filed an allegedly false insurance claim related to the rejected delivery of fish to Gorton's. Appellee Compl. ¶¶27-2 (A.64).

ARGUMENT

I. The Superior Court's Decisions to Dismiss The YOK Appellants for Lack of Personal Jurisdiction and Maintain the Trustee Attachment Were Both Final Decisions on the Merits Under Sup. Ct. R. 7 and 3.

At the request of the court, we begin by addressing the threshold question whether the Superior Court has issued a final decision that supports a mandatory appeal by the non-trustee defendants under Sup. Ct. R. 3 and 7. Sup. Ct. R. 7 provides that "[a] mandatory appeal shall be accepted by the supreme court for review on the merits. Sup. Ct. R. 7. A mandatory appeal is an appeal…from a final decision on the merits issued by a superior court…" Sup. Ct. R. 7. A list of exceptions follows, none of which are pertinent here. Sup. Ct. R. 7. A "decision on the merits" is defined in Sup. Ct. R. 3 to include an "order, verdict, opinion, decree, or sentence following a hearing on the merits or trial on the merits and the decision on motions made after such order, verdict, opinion, decree or sentence." Sup. Ct. R. 3. The definitions do not separately define a

"final" decision on the merits. Sup. Ct. R. 3. Superior Court Rule 7(a) requires parties to file a Notice of Mandatory Appeal in the event that the Superior Court issues a decision on the merits. Sup. Ct. R. 7(a).

This case is in an unusual posture, in that the Superior Court held an evidentiary hearing after which it entered an order dismissing the defendants due to lack of personal jurisdiction, yet nonetheless allowed a pre-judgment attachment of funds owed to the defendants to continue in effect. The question then arises whether the decision dismissing the defendants, and the ultimate decision to maintain the attachment, was "final." The rules provide no direct answer in the definitions, but a review of the practical results of the decision strongly suggests that the decision issued by the court must be "final" for purposes of determining mandatory appeals. The defendants are no longer parties to the action in New Hampshire, having been dismissed for lack of jurisdiction, and there are no further claims pending against them in the New Hampshire Superior Court, and indeed there are no pending or forthcoming proceedings in this case at all. The only remaining involvement of the court, per its own order, is to maintain the attachment "pending the adjudication of the underlying case in the Commonwealth of Massachusetts." For all intents and purposes, the Superior Court's decision to dismiss the claims against the defendants and maintain the pre judgment attachment are final, and should be treated as such.

Because it is usually self-evident when a final decision has been reached, only a handful of cases address the issue of what constitutes a final decision on the merits for purposes of Rules 3 & 7. In general, a court's decision is "final" when it decides all of the issues before it, and a decision is not final when it decides some, but not all of the issues before the court. *See Putnam Lumber Co. v. Eddie Nash & Sons*, 141 N.H. 670, 671 (1997) (addressing final decisions for collateral estoppel purposes). Some exceptions to that rule permit an even broader definition of

"final decision" by considering decisions in a bifurcated divorce proceeding as "final" when the bifurcated issues are completely severable from any ongoing custody or support determinations. *See Germain v. Germain*, 137 N.H. 82, 84 (1993). A decision may also be "final" where, although it does not decide all the issues that were raised before it, it does nevertheless "conclude the proceedings," as when a court identifies procedural defects in a zoning board decision and remands to the zoning board for further proceedings consistent with the procedural requirements without addressing the substance of all of the issues raised. *See Fox v. Town of Greenland*, 151 N.H. 600, 602-03 (2004). Because the Superior Court decided all of the issues that were before it in this case when it issued its Omnibus Order on Chargeability and Jurisdiction on February 20, 2019, and because there are no longer any issues before the court to be decided, the order was by definition a "final decision on the merits" and the defendants appropriately filed their mandatory notice of appeal under Rule 7.

Furthermore, fairness dictates that the appeal be allowed because as a practical matter, the instant appeal is the only mechanism available to the defendants to contest the jurisdictional basis of the attachment at issue. The defendants made a special appearance in the Superior Court for the purpose of contesting jurisdiction, and could not and cannot participate substantively in any other aspect of the proceeding without waiving the ultimately successful defense of personal jurisdiction. Having been dismissed from the case on this basis, the defendants have no mechanism to address the seeming inconsistency between the Superior Court's decision on personal jurisdiction and its decision to restrain substantial sums due to the defendants, other than an appeal to this Court. To consider this situation as anything other than a final decision on the merits would effectively leave the defendants without a means for review of the Superior Court's continued exercise of jurisdiction over those funds.

II. Standard of Review

"The plaintiff bears the burden of demonstrating facts sufficient to establish personal jurisdiction over the defendant." *Staffing Network, Inc. v. Pietropaolo*, 145 N.H. 456, 457 (2000), *quoting Phelps v. Kingston*, 130 N.H. 166, 170 (1987). Although the standard used to evaluate the plaintiff's showing can vary depending on the nature of the proceedings, the plaintiff must, at minimum, make a prima facie showing "based on evidence of specific facts set forth in the record…The 'plaintiff must go beyond the pleadings and make affirmative proof.'" *Boit v. Gar-Tec Prods, Inc*., 967 F.2d 671, 675 (1st Cir. 1992). "(T)he plaintiff ordinarily cannot rest upon the pleadings but is obliged to adduce evidence of specific facts." *Kimball Union Academy v. Genovesi*, 165 N.H. 132, 136 (2013), *quoting State v. N. Atlantic Ref. Ltd*., 160 N.H. 275, 280 (2010). The trial court employed this prima facie standard for the evidentiary hearing, and laid out its factual findings in its November 19, 2018, Order on the Defendants' Motion to Dismiss. Order Mot.to Dismiss at 1-2 (A.32-A.33). Where a trial court has used a prima facie evidence standard to evaluate the plaintiff's evidence of jurisdiction, an appellate court reviewing a trial court's ruling on a motion to dismiss for lack of personal jurisdiction uses a de novo standard. *The Lyme Timber Co. v. DSF Investors, LLC*, 150 N.H. 557, 559 (2004).

III. The Superior Court Erred When It Found That It Had the Authority to Continue Its Exercise of Jurisdiction Over the YOK Appellants' Funds and Maintain the Trustee Attachment Despite Finding That It Lacked Personal Jurisdiction Over the YOK Appellants

A. The Trial Court's Finding of Lack of Personal Jurisdiction

This case raises the question of whether a court that lacks personal jurisdiction over a defendant may nevertheless have sufficient jurisdiction to attach that defendant's property as security pending the outcome of litigation in another jurisdiction. The trial court in this case granted the defendants' motion to dismiss for lack of personal jurisdiction and that decision has

not been appealed. *See* Order Mot. to Dismiss at 19(A.50). Following that decision, however, the trial court considered separately the issue of whether it could maintain an attachment of funds that it considered to be owed to the defendants by a New Hampshire-based company. It concluded that it could under a theory of quasi in rem jurisdiction, and it is that second jurisdictional decision which is now before this Court. *See* Omnibus Order on Chargeability and Jurisdiction at 16-21 (A.25-A.30).

Because the two questions, of personal jurisdiction to adjudicate the underlying dispute on the one hand, and quasi in rem jurisdiction to maintain the attachment on the other, are so closely linked in both the legal theories involved and their factual basis, it is instructive to review the trial court's conclusions regarding personal jurisdiction before continuing on to address the question of quasi in rem jurisdiction. The plaintiff in this case claimed only specific, not general, jurisdiction over the defendants. Therefore, as the trial court noted, there must be a link between the forum and the underlying controversy. *See* Order Mot. to Dismiss at 7-8 (A.38-A.39), *citing Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017). The trial court noted that the familiar minimum contacts test set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), "applies with equal force in this scenario" to evaluate whether exercising personal jurisdiction over the defendants would satisfy the Constitutional requirements of Due Process. Order Mot. to Dismiss at 5. Using that test, the court examined whether (1) the contacts related to the cause of action; (2) the respondents had purposefully availed themselves of the protection of New Hampshire's laws; and (3) it would be fair and reasonable to require the respondents to defend the suit in New Hampshire. Order Mot. to Dismiss at 7-8(A.38-A.39). In considering the three sets of claims brought by the plaintiff, the court quickly concluded that most of the plaintiffs claims failed under the first "relatedness" prong of the test because they

involved contracts and conduct that were unrelated to New Hampshire. Order Mot. to Dismiss at 8-12 (A.39-A.43). For one claim, though, stemming from the alleged failure of the defendants to pay the plaintiffs commissions on sales to High Liner USA, the court found it to be a closer call because of the role that High Liner USA, a New Hampshire company, played in the alleged breach. Nevertheless, when it came to an analysis of the third "fair and reasonable" prong of the test, the court concluded that that "exercising specific jurisdiction in this case would be inconsistent with notions of fair play and substantial justice." Order Mot. to Dismiss at 19(A.50). It reached this conclusion because (1) it would be "especially onerous and inconvenient" to require the defendants to defend suit both in Massachusetts and New Hampshire, (2) New Hampshire lacked a strong interest in adjudicating the suit, (3) the plaintiff is a Massachusetts company and "the vast majority of the conduct at issue occurred in Massachusetts," (4) there is a risk of piecemeal litigation were the lawsuit to be litigated separately in New Hampshire and Massachusetts, and (5) the lawsuit involves no New Hampshire interest or resident and New Hampshire law would not apply to the breach of contract claim. Order Mot. to Dismiss 16-18 (A.47-A.49).

A. The Trial Court's Exercise of Quasi in Rem Jurisdiction to Secure an Out-of-State Judgment Prior to Obtaining a Judgment Was Improper

Notwithstanding the trial court's conclusion that it lacked personal jurisdiction over the defendants, in its February 20, 2019, order the court proceeded to approve the continued attachment of the property at issue even after it had already dismissed the underlying action.[1] In

[1] Arguably, the attachment automatically dissolved upon dismissal of the plaintiffs claims by operation of RSA 511:45. RSA 511:45, "Dissolution of Attachments—By Judgment, Etc.," provides that "[w]hen a judgment is rendered for the defendant, upon which execution may issue, or when the action is compromised or dismissed, the attachment made in the action is dissolved thereby." Based on the plain language of the statute, therefore, the attachment should have dissolved when the trial judge granted the

order to reach this conclusion the court had to wrestle with the seemingly straightforward holding of the Supreme Court's landmark decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977). In *Shaffer*, the Court held that Due Process required that the minimum contacts test first described in *International Shoe* for analyzing personal jurisdiction applied with equal force to actions based on quasi in rem jurisdiction, thereby abolishing the modern use of quasi in rem jurisdiction as a mechanism to acquire jurisdiction of defendants when personal jurisdiction was absent. "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would only serve to allow state court jurisdiction that is fundamentally unfair to the defendant." *Shaffer v. Heitner*, 433 U.S. 186, 206 (1977). Instead, the Court held, "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id*. at 212 (1977); *see also Pono v. Brock*, 119 N.H. 814, 817 (1979) (relying on *Shaffer v. Heitner,* to conclude that there the court could not exercise quasi in rem jurisdiction over a defendant unless sufficient minimum contacts existed to permit the exercise of personal jurisdiction).

As the trial court considered whether it could exercise quasi in rem jurisdiction over the defendants, it began by acknowledging that "the *International Shoe* minimum contacts test applies with equal force to quasi in rem actions." Omnibus Order at 12 (A.21). Considering that the trial court had just engaged in a lengthy minimum contacts analysis to reach the conclusion that an exercise of personal jurisdiction "would be inconsistent with notions of fair play and substantial justice," *See* Order Mot. to Dismiss at 19 (A.50). It is difficult to understand why that did not put an end to the issue. Rather than conclude its analysis at that point, the trial court

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defendants' motion to dismiss. *See Perley v. Roberts*, 138 F.2d 518, 520 (D.N.H. 1943) (affirming trial court's ruling that attachment was dissolved by the order dismissing the underlying action, describing it as "obviously correct").

chose to further explore an obscure jurisdictional theory sometimes known as the "security exception" to *Shaffer v. Heitner*. 433 U.S. 186, 210 (1977).

The "security exception" to *Shaffer*'s general prohibition on quasi in rem jurisdiction is a theory employed in a small number of extreme circumstances where no other avenue of recovery is available to plaintiffs. It is based on dicta from *Shaffer*, in which the Court addresses the primary justification for quasi in rem jurisdiction--the concern that without it a wrongdoer would avoid payment of obligations by removing assets "to a place where he is not subject to an in personam suit." *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977). The Court noted that that concern "[a]t most…suggests that a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*." *Id*. at 210. Furthermore, the Court noted that this justification "does not explain why jurisdiction should be recognized without regard to whether the property is present in the State because of an effort to avoid the owner's obligations." *Id*. at 210.

In those few jurisdictions that have adopted it, the theory permits that where a defendant has attachable property in a forum where the court lacks personal jurisdiction, and where the plaintiff has shown that there is a real risk that the defendant will attempt to hide or remove assets or that they will otherwise become unrecoverable without some immediate action, the court may attach the property to secure a potential future judgment in another jurisdiction, either in another state within the United States or another country. Such attachments may occur when there is an immediate risk that without prompt action the property will be removed or concealed, or when there is no other venue in the United States where the defendant has recoverable assets. *See Barclays Bank, S.A. v. Tsakos*, 543 A.2d 802 (1988); *Cameco Indus. v. Mayatrac*, 789

F.Supp. 200, 203-04 n.5 (D. Md. 1992); *National Union Fire Insurance Co. v. Kozeny*, 115 F.Supp.2d 1231 (D. Col. 2000). *But see American Refractories Co. v. Combustion Controls*, 70 S.W.3d 660, 663 (Missouri Court of Appeals, Southern District, Division Two, March 28, 2002) (holding that "only the court where the claim is pending has the authority to issue a write of attachment").

For example, in *Barclays Bank, S.A. v. Tsakos*, 543 A.2d 802 (1988), the case on which the trial court principally relied, the court considered the claim of a French bank, Barclays, seeking to recover a loan guarantee promised by a Greek family, the Tsakos family. The family lived in France, where the bank had brought legal proceedings against them, but the family had already removed its assets both from France and from Switzerland, where a second action had also been brought by the bank. *See id*. The bank sought to attach an apartment in Washington D.C. that was owned by the family, and to retain the attachment pending the outcome of the European litigation. *See id*. Central to the court's analysis were the facts that (1) there was an allegation of "intended effective removal of the property by way of sale and non-availability of assets elsewhere"; (2) that the property at issue was "immovable realty," and not intangible or in transitory passage through the district, and (3) that the Tsakos family had historical connections to the jurisdiction, because they had previously lived and operated a business in Washington D.C., although they had since moved. *Id*. at 805. Based on these factors, the court concluded that it had jurisdiction for the limited purpose of maintaining the attachment pending the outcome of the European litigation, although these factors did not provide the minimum contacts to support *in personam* jurisdiction. *See id*. The first factor addressed by the court—the previous attempts by the family to remove its assets from the reach of the bank, addressed the urgency required for the imposition of this form of jurisdiction. *See id*. The second two factors concerned

the contacts between the family and the forum. *See id*. The ownership of immovable real property and the family's historical presence there supplied some form of contact with the forum which, even if it fell short of the minimum contacts required for personal jurisdiction, could still support this more limited jurisdiction. *See id*.

Reviewing the very few decisions analyzing this issue reveals how difficult it is for courts to draw meaningful distinctions between the gradations of the minimum contacts required to support personal jurisdiction, the lesser contacts that might be required to support quasi in rem jurisdiction for purposes of attachment, and then the those cases where no jurisdiction can be exercised. The courts that have considered the exception strain to justify the shades of connection at issue and as a result the test has appeared unpredictable in its application. If a Due Process test can find that such a minimal connection to a forum will support quasi in rem jurisdiction, it is difficult to imagine any situation involving attachable assets that would not satisfy it. *See* 4A C. Wright & A. Miller, *Federal Practice & Procedure: Civil* §1072, (3d ed. 2004) (questioning whether "the application of a differential minimum contacts threshold in such circumstances is appropriate", and observing that "trying to distinguish between the minimum contacts needed for personal jurisdiction and those needed for property jurisdiction has a certain ethereal or other worldly quality").

The handful of courts that have considered application of *Shaffer*'s "security exception" theory and the differential minimum contacts test that goes with it, have usually placed significant limitations on its use, concluding in one case, for example, that "the exception applies only where a defendant has attempted to conceal his assets or remove them from the jurisdiction where he is subject to personal jurisdiction." *See Cameco Indus. v. Mayatrac*, 789 F.Supp. 200, 203-04 n.5 (D. Md. 1992); *see also National Union Fire Insurance Co. v. Kozeny*, 115

F.Supp.2d 1231 (D. Col. 2000) (permitting attachment of defendants' real property and tangible personal property citing undisputed evidence that property had been shipped to the forum to conceal proceeds of the underlying fraud and citing "serious concern" about the dissipation of assets from efforts to sell the property and its contents); *Matter of Sojitz Cor. v. Prithvi Info. Solutions Ltd.*, 82 A.D.3d 89 (Supreme Court New York County, October 5, 2009) (concluding that "security exception" attachment of accounts in New York pending outcome of foreign arbitration does not violate Due Process because statutory safeguards in New York's attachment statute required plaintiff show that any arbitration award would be ineffectual without provisional attachment, and noting uncontested facts of the case that defendant had already diverted funds from an escrow account intended to safeguard them). This limitation echoes the language from *Shaffer*, where the Court noted that any exercise of quasi in rem jurisdiction should have to consider whether the property's presence in the forum was "because of an effort to avoid the owner's obligations." *See Shaffer*, 433 U.S. at 210. Courts have held that the fact that the property to be attached is a liquid asset, and therefore potentially removable during the pendency of a suit, is not alone a sufficient justification of a "special need for very prompt action" of the kind that would permit pre-judgement seizure of an asset. *See Cameco Indus. Inc. v. Mayatrac SA*, 789 F. Supp. 200, 204-205 (D. Md. 1992).

Turning to the facts of the instant case, and comparing them to the kinds of extenuating circumstances addressed by the handful of other courts that have considered a "security exception" to *Shaffer*, it is clear that there are no similarly urgent concerns of the kind that could justify risking the Due Process concerns invoked by an extension of quasi in rem jurisdiction to permit pre-judgment attachment in this case. Most fundamentally, the plaintiff has made no showing that the defendants have attempted to or are likely to divert, remove, or conceal funds

from any jurisdiction within the United States. It was the plaintiffs burden to establish the facts necessary for the assertion of jurisdiction, which, under the "security exception" theory put forward by the plaintiff, includes the requirement that the plaintiff show some kind of extraordinary circumstance, such as where the defendant is attempting to remove or conceal funds. Without such a showing, the most appropriate course is to allow plaintiffs to await the outcome of the litigation ongoing in Massachusetts and then, should they ultimately secure a judgment there, enforce that judgment in New Hampshire or any other state, where the Full Faith and Credit Clause of the Constitution ensures it will be honored.

For reasons that are not entirely clear, the trial court focused instead on the difficulty of enforcing any hypothetical future judgment from the Massachusetts litigation in China, and ultimately grounded the jurisdictional decision on that potential difficulty. *See* Omnibus Order at 17 (A.26). But China is not the only jurisdiction in which plaintiff's hypothetical future judgment could be enforced. Based on the judge's findings, the defendants have an ongoing business relationship with New Hampshire-based High Liner (USA) that resulted in numerous ongoing interactions and transactions between the defendants and entities in locations throughout the United States, including Massachusetts. For example, the judge found that the defendants and High Liner (USA) and High Liner (CAN) "have a business relationship" that has existed since 2012 and that High Liner (USA) receives shipments of tilapia from the defendants "with some regularity." See Omnibus Order at 2 (A.3). The judge found that those shipments "usually arrive in either Virginia or Massachusetts," and that High Liner (USA) then "moves the goods to locations throughout the United States." Omnibus Order at 2-3 (A.3-A.4). The judge did not find that the business relationship between the defendants and the US-based seafood distributors was likely to end, and indeed the plaintiffs presented no evidence to support such a conclusion. Any

Massachusetts judgment, should one ever issue for the plaintiffs, could be enforced under the Full Faith and Credit Clause of the Constitution in any one of U.S. locations, including Massachusetts, where the defendants' ongoing businesses are likely to result in the presence of attachable assets. Additionally, the parties are currently engaged in litigation in Massachusetts, where the court has personal jurisdiction over the YOK Appellants. As part of that Massachusetts litigation the defendants have brought their own counterclaims against the plaintiffs based on the plaintiffs alleged failure to pay for shipments of tilapia to Massachusetts-based seafood suppliers. For the court to maintain jurisdiction over the YOK Appellants' funds pursuant to such a limited and rare exception is simply not appropriate or consistent with the due process requirements of *International Shoe. See* 326 U.S. at 316 (1945).

IV. Conclusion and Request for Relief

For all of the foregoing reasons, the YOK Appellants respectfully request that the court reverse the decision of the trial court to continue its exercise of jurisdiction over the YOK Appellants funds and therefore order the dissolution of the trustee attachment.

V. Request For Oral Argument

The YOK Appellants requests fifteen minutes of oral argument to be argued by Emily Smith-Lee, Esq.

Respectfully submitted,

YUNNAN NEW OCEAN AQUATIC
PRODUCT SCIENCE AND
TECHNOLOGY GROUP CO., LTD.,

By their Attorneys,

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Dated: November 4, 2019 By: *<u>/s/ William F. Gramer</u>*

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CERTIFICATION OF SERVICE

I hereby certify that on the 4th day of November, 2019, a copy of the foregoing Appellants' Brief and a copy of the Appendix to Appellants' Brief has been provided to the following through the Supreme Court's electronic filing system's electronic service or through conventional service, as indicated:

Name	Service Type
Jamie N. Hage, Esq.	eService
Katherine E. Hedges, Esq.	eService
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Christina A. Ferrari, Esq.	eService

/s/ William F. Gramer
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