

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DENIS MAYERS, NANCY CICCONE,
and ELBA QUINONES,

X

Plaintiffs,

-against-

CV-03-5837 (CPS/JMA)

NEW YORK COMMUNITY BANCORP, INC.;
NORTH FORK BANK; FLEET BANK;
MKM ACQUISITIONS, LLC; ARROW
FINANCIAL SERVICES, LLC; BETH ISRAEL
HOSPITAL; the Law Firm of MEL S. HARRIS
AND ASSOCIATES; the HON. JUDITH S. KAYE,
as Chief Judicial Officer of the State of New York;
JONATHAN LIPPMAN, as Chief Administrative
Judge of the Courts of the State of New York;
and DIANA L. TAYLOR, the New York State
Superintendent of Banks,

Defendants.

X

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTIONS TO DISMISS OR ALTERNATIVELY FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT.....	1
COLLECTION PROCEDURES IN NEW YORK.....	3
STATEMENT OF FACTS.....	5
A. Facts Concerning Plaintiff Mayers.....	6
B. Facts Concerning Plaintiff Ciccone.....	8
C. Facts Concerning Plaintiff Quinones.....	10
D. The Current Banking Status of the Plaintiffs.....	11
ARGUMENT.....	12
I. DISMISSAL IS APPROPRIATE ONLY IF THE COMPLAINT CANNOT BE READ TO ALLEGE ANY SET OF FACTS ENTITLING PLAINTIFFS TO RELIEF.....	12
II. DEFENDANTS ARE PROPER PARTIES.....	13
A. The Non-Governmental Defendants Acted Under Color of State Law When They Deprived Plaintiffs of the Use of Their Exempt Funds.....	13
B. The State Defendants Have a Direct Connection With the Enforcement of C.P.L.R. 5222 and So Are Proper Parties in This Action.....	19
III. N.Y. C.P.L.R. 5222 VIOLATES THE SUPREMACY CLAUSE BY COMPELLING BANKS TO FREEZE ASSETS EXEMPT FROM COLLECTION UNDER 42 U.S.C. §407(A).....	24
IV. PLAINTIFFS HAVE STATED A CLAIM FOR RELIEF UNDER 42 U.S.C. §1983 BECAUSE NEW YORK STATE RESTRAINT PROCEDURES, WHEN APPLIED TO ACCOUNTS THAT CONTAIN ONLY ELECTRONICALLY DEPOSITED EXEMPT FUNDS, VIOLATE THE DUE PROCESS CLAUSE.....	29
A. The Plaintiffs' Interest in Preserving Their Social Security and SSI Benefits is Substantial and Not Inconsistent with the Creditors' Interest in Seizing Non-Exempt Money.....	31

B.	Easily Identifiable Direct Deposit Has Changed the Risk of Erroneous Deprivation and the Value of Additional or Substitute Safeguards.....	32
C.	The Government’s Interest Would Be Furthered and Not Adversely Affected By Changes Sought by Plaintiffs.....	34
V.	PLAINTIFFS CLAIMS ARE NOT MOOT.....	37
VI.	CONCLUSION.....	3

PRELIMINARY STATEMENT

Plaintiffs brought this action to challenge the temporary restraint of exempt Social Security and Supplemental Security Income (“SSI”) funds that were electronically deposited into their bank accounts. Dramatic changes in technology and banking practices have rendered obsolete earlier holdings that sanctioned such temporary restraints. Now that the exempt status of the funds is immediately obvious from the direct deposit transmittal, even a temporary interruption of Plaintiffs’ access to their exempt funds violates the Supremacy Clause and the Due Process Clause of the U.S. Constitution.

Plaintiffs challenge the validity of the restraint provisions of New York Civil Practice Law and Rules 5222 as applied to bank accounts containing only legally exempt, electronically deposited funds. Plaintiffs challenge § 5222, as applied, on two grounds: first, that it directly conflicts with the federal statute that creates the exemptions, 42 U.S.C. § 407(a), and is therefore invalid based on the Supremacy Clause of the United States Constitution; and second, that it deprives Plaintiffs of their right to Due Process of law under the Fourteenth Amendment to the United States Constitution.

Defendants in this action include the law firm of Mel S. Harris which restrained Plaintiffs’ accounts in its capacity as “officer of the court”; various creditors represented by Mel Harris; the banking institutions, North Fork Bank, Fleet Bank and New York Community Bancorp, Inc., that acted in concert with Mel Harris to restrain the accounts; the Honorable Judith S. Kaye, as Chief Judicial Officer of the State of New York; the

Honorable Jonathan Lippman, as Chief Administrative Judge of the Courts of the State of New York; and Diana L. Taylor, as the New York State Superintendent of Banks (collectively “State Defendants”). State Defendants and Defendants North Fork Bank and Fleet Bank have moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), and defendant Fleet Bank has alternatively moved for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiffs submit this memorandum in opposition to these motions.

Contrary to the assertions of the Defendants, they are all proper parties: they are all state actors with direct connections to the challenged statute. State judicial Defendants are the state officials with responsibility to supervise the administration and operation of the courts of the State of New York. As such, they administer and enforce the Civil Practice Law and Rules, including § 5222, and they are responsible for the actions of attorneys who act as officers of the court in issuing restraining notices pursuant to § 5222. The Superintendent of Banks supervises and regulates all banking institutions in New York State that receive and process those restraining notices. Attorney Mel Harris is a state actor in his capacity as an officer of the court empowered to issue restraining notices pursuant to § 5222. The banking Defendants are state actors because they act jointly with and at the compulsion of the courts and attorneys when they process restraining notices and freeze bank accounts.

Defendants’ arguments in support of the constitutionality of the statute are wrong. Section 5222 is invalid under the Supremacy Clause because it directly conflicts with 42 U.S.C. § 407 (a) which protects Plaintiffs’ exempt Social Security and SSI payments

from legal process. Section 5222 violates Plaintiffs' rights to Due Process of law as applied to accounts containing only electronically deposited exempt money because the current state of technology allows banks receiving restraining notices to immediately determine whether money in a judgment debtor's account is exempt. The balance of equities involved in assessing § 5222 under the Due Process test established in Matthews v. Eldridge has shifted from what it was prior to the advent of electronic deposits. Advances in technology have increased the risk of erroneous deprivation, all but guaranteeing that exempt accounts will be frozen not just once, but over and over again. These same technical advances, however, also make it possible to protect exempt funds from even temporary restraint without imposing a burden on banks or creditors. In today's economy, even temporary loss of the use of exempt funds cannot pass constitutional muster because it can be so easily avoided.

Plaintiffs therefore respectfully request that the Defendants' motions be denied in their entirety.

COLLECTION PROCEDURES IN NEW YORK

Article 52 of the New York Civil Practice Law and Rules governs how a judgment creditor may proceed to collect a money judgment. One method is to locate a bank account belonging to the debtor, and then to restrain or "freeze" money in that account to satisfy the judgment. N.Y. C.P.L.R. 5222. To locate and restrain an account of the debtor, the creditor's attorney serves a restraining notice on banks where the debtor might hold an account. N.Y. C.P.L.R. 5222.

Serving a restraining notice is cheap and easy. The creditor does not need a

judge or court clerk to issue the notice. The creditor's lawyer can sign the restraining notice as an "officer of the court." N.Y. C.P.L.R. 5222(a). Service of the restraining notice can be done by certified or registered mail. N.Y. C.P.L.R. 5222(a); 5224(a)(3).

When a bank receives a restraining notice it examines its records to determine if the debtor has an account there. If so, the bank is required to freeze twice the amount of the judgment. The bank's failure to freeze the account "is punishable as a contempt of court." N.Y. C.P.L.R. 5222(a). If all the money in an account is frozen, any outstanding checks written by the debtor will be dishonored (bounced). In addition, any incoming deposits will be frozen unless they raise the balance above the freeze level (twice the judgment amount). N.Y. C.P.L.R. 5222(b).

The creditor's lawyer must mail the debtor a copy of the restraining notice and a "notice to judgment debtor" within four days of the issuance of the restraining notice. N.Y. C.P.L.R. 5222(d)(3). The "notice to judgment debtor" advises the debtor that his or her funds have been restrained and that certain property, such as Social Security and SSI, is exempt from collection efforts. N.Y. C.P.L.R. 5222(e). The "notice to judgment debtor" also explains that if the debtor thinks his or her account contains any money that is exempt, the debtor may contact the attorney who issued the restraining notice, or Legal Aid. N.Y. C.P.L.R. 5222(e). The notice further cites N.Y. C.P.L.R. 5239 and 5240 as the statutory "procedure for determining a claim to an exemption."

If the debtor fails to raise any objections or exemptions to the restraint, the creditor's lawyer may collect the restrained money from the bank account. To do this, the creditor's lawyer, as an officer of the court, issues an execution notice on the Sheriff

or Marshall who then collects the money. N.Y. C.P.L.R. 5230.

Due to amendments to the N.Y. C.P.L.R. in 1994 and 2000, a restraining notice can be served electronically by email or magnetic tape when a bank has consented to such service. C.P.L.R. 5222(g); 5224(a)(4). As a result, finding a debtor's bank account and freezing an account is cheaper and easier than it was before the amendments. According to a Wall Street Journal article, "big banks" in New York have entered into agreements with large collection law firms such as those run by Defendant Mel. S. Harris. Lagnado, "*Cold-Case Files: Dunned for Old Bills, Poor Find Some Hospitals Never Forget,*" Wall St. J. June 8, 2004 ("*Cold Case Files...*") Attached to Affirmation of Johnson Tyler, Esq. ("Tyler Aff.") as Ex. C. The law firm "electronically zap[s] a bank a long list of unpaid court judgments. The bank matches the identities against a database of account holders. Where it gets a 'hit,' the bank alerts the collection firm, which then sends a restraining notice." Id. Bank consolidation has made this discovery tool even more powerful. Id. If such electronic discovery fails to produce information or satisfy the judgment, the creditor's attorney can reissue the restraining notice electronically at hardly any cost. "It is standard to try again and again to collect unpaid judgments long after they've been rendered," states Mel Harris, the founder of defendant Mel S. Harris and Associates. Id.

STATEMENT OF FACTS

Plaintiffs Denis Mayers, Nancy Ciccone and Elba Quinones are all disabled or have family members who are disabled. Plaintiffs all receive Social Security and

Supplemental Security Income (“SSI”) benefits. Second Amended Complaint at ¶¶ 41, 70, 100. Like 2.75 million New Yorkers, their Social Security payments are deposited electronically into their bank accounts each month.¹ Each electronic deposit is identified in the bank’s computer record, and in the account holder’s bank statement, as “US Treasury-303 Soc Sec” and “US Treasury-303 Supp Sec.” *Id.* at ¶¶ 38, 43, 71, 101. When funds are electronically deposited, a bank knows at all times whether an account contains only Social Security or SSI payments. *Id.* at ¶ 38.

Social Security and SSI payments are exempt from collection under federal law 42 U.S.C. 407(a). Nonetheless, from 2000 to 2003, Plaintiffs’ bank accounts were restrained (frozen) nine times even though their banks knew or should have known that their accounts contained no money other than exempt Social Security and SSI payments. *Id.* at ¶¶ 1, 20. The freezes have lasted from five days to as long as 28 days, with the average being between 10 and 14 days. *Id.* at ¶¶ 50, 60, 76, 88, 93, 105, 106, 117. Regardless of the length of the freeze each restraint has caused significant financial and emotional harm to the Plaintiffs. *Id.* at ¶¶ 48, 50, 56, 62, 77, 88, 89, 94, 97. And each restraint has done so without advancing the creditor’s interest in collecting his judgment, since the creditor is not legally entitled to collect the Plaintiffs’ funds, all of which are exempt.

A. Facts Concerning Plaintiff Mayers

¹ Social Security Administration, *Direct Deposit and Check Statistics, New York* (November 2004) (attached to Tyler Affirmation as Ex. A)

Plaintiff Denis Mayers is disabled and has no savings. Second Amended Complaint at ¶ 41. His only income is \$689.00 per month in Social Security Disability ("SSD"), a \$4.50 per diem stipend for volunteer work, and \$141 per month in food stamps. Id.

In 2000, Defendant MKM Acquisitions ("MKM") obtained a \$1,594.15 judgment against Mr. Mayers. Id. at ¶ 45, 46. In 2001 or 2002, MKM's collection attorney restrained Mr. Mayers' bank account at Chase Bank even though it contained only electronically deposited exempt Social Security payments. Id. at ¶ 47. With the help of a South Brooklyn Legal Services ("SBLs") attorney, the restraint was lifted. Id. The restraint nevertheless caused Mr. Mayers significant financial hardship and emotional distress. Id. at ¶ 48. Four checks bounced and Chase debited \$100.00 from Mr. Mayers' account for either the bounced checks or processing the restraining notice. Id. Chase refused to waive the fee. Id. at ¶ 49. In anger, Mr. Mayers left Chase and opened a new account at Roslyn Savings Bank. Id.

In September 2002, MKM restrained Mr. Mayers' Roslyn account even though it contained only electronically deposited exempt Social Security payments. Id. at ¶ 50. Mr. Mayers sought help from SBLs which again used bank statements to prove the account was exempt. By the time the account was lifted, Mr. Mayers had gone 13 days without access to his money. Id.

The third restraint (which gave rise to this action) occurred on October 16, 2003. Id. at ¶ 51. Defendant Mel. S. Harris, as the lawyer for MKM, restrained the Roslyn account even though it only contained \$415.30 of Mr. Mayers' electronically deposited

exempt Social Security payment. Id. at ¶ 53. Mr. Mayers never received notice of the restraint from Mel S. Harris. However, he knew from the previous restraints that he should go to SBLS for help when he realized his account was restrained. Id. at ¶¶ 54, 57. Using a bank statement, SBLS proved the account was exempt. Id. at ¶ 59. Although Defendant Harris told Roslyn Bank to lift the restraint on November 4, 2003, Roslyn Bank did not do so until November 13, 2003. Id. at ¶ 60. The harm from the restraint did not end when it was lifted on November 13th. Unbeknownst to Mr. Mayers, Roslyn Bank had returned his November SSD check to the Social Security Administration (“SSA”) due to the ongoing restraint in violation of N.Y. C.P.L.R. 5222(b). Id. at ¶ 58. As a result, Mr. Mayers had to wait another week before SSA reissued the check on November 20, 2003, some 17 days after it was originally due. Id. at ¶ 61.

During the 28 days that Mr. Mayers’ account was frozen, he survived on \$100 he was forced to borrow, his food stamps and the \$4.50 stipend he sometimes earned for volunteer work. Id. at ¶¶ 41, 60. His rent check for October 2003 bounced, generating a \$20.00 banking fee as well as a bounced check fee for his landlady. Id. at ¶ 56. He could not pay his November rent on time. Id. at ¶ 62. After the third restraint, Roslyn Bank was acquired by the New York Community Bancorp. Id. at ¶ 63. New York Community Bancorp has a written policy that bank accounts containing only electronically deposited Social Security or SSI payments should not be restrained. Id.

The policy states:

Certain funds are exempt from attachment in accordance with C.P.L.R. 5227, for example, Social Security, SSI

disability Benefits, etc. Therefore if an account receives direct deposit and it can be clearly determined that the funds in the account represent ONLY exempt funds, and the proceeds of the direct deposit are used almost in their entirety by the customer between deposit periods, then an exception may be made and no hold will be placed on the account.

(Affirmation of John Fennell, Vice President for New York Community Bancorp, dated October 15, 2004, (“Fennell Aff.”), attached to Tyler Aff. as Ex. E.)

B. Facts Concerning Plaintiff Ciccone

Plaintiff Nancy Ciccone is a 70 year old widow. She lives with her 45 year old son who is disabled by schizophrenia. Second Amended Complaint at ¶ 70. Mrs. Ciccone receives, by electronic deposit at North Fork Bank, \$954 per month in Social Security Widow’s payments and \$715 per month in Social Security Disability (“SSD”) payments as the representative payee of her son. Id. at ¶¶ 70, 71. Neither she nor her son has any other income or savings. Id. at ¶ 73.

In 2000, Defendant Arrow Financial Services (“Arrow Financial”) obtained a \$2,006.63 judgment against Mrs. Ciccone. Id. at ¶ 75. In July 2002 and again in April 2003, Arrow Financial twice restrained Mrs. Ciccone’s account at North Fork Bank even though it contained only electronically deposited Social Security payments. Id. at ¶ 76. Mrs. Ciccone got the two restraints lifted in about 10 to 14 days by calling and mailing documents to Arrow Financial’s attorney. Id.

These two restraints drained several hundred dollars from Mrs. Ciccone’s limited income. Id. at ¶ 77. North Fork charged her a \$100 processing fee for each restraint. Id. In addition, she bounced a number of checks, each of which generated a banking

fee of about \$30.00. Id. Some of the bounced checks were to credit card companies, and triggered late-payment penalties of \$29.00. Id.

After the second restraint, Mrs. Ciccone decided banking was unsafe. She began receiving her social security payments via paper check that she would cash. Id. at ¶ 78. However, this proved impractical because she needed to write checks. Id. So she switched back to electronic payment at North Fork. Id.

In May 2004, Mrs. Ciccone made her son trustee of her North Fork account in the event she died. Id. at ¶ 79. To accomplish this, North Fork opened a new account into which it transferred the remnants (\$7.71) of her electronically deposited Social Security payment from her old account, and then closed her old account. Id. SSA informed Mrs. Ciccone that electronic deposit would continue into the new account starting in July, but for June she would receive paper checks. Id. at ¶ 80.

On May 28, 2004, Defendant Mel S. Harris, representing Arrow Financial, restrained Mrs. Ciccone's North Fork account for a third time. Id. at ¶¶ 81, 82. Mrs. Ciccone learned of the freeze late Friday afternoon prior to Memorial Day weekend. Id. at ¶ 86. Over the three day weekend, Mrs. Ciccone was unable to sleep. Id. at ¶ 88. She worried about paying late a Medicaid "spend-down" bill that enabled her schizophrenic son to obtain medication because she had been late paying this bill once before and her son, after going without medication for ten days, became belligerent and irrational. Id. at ¶ 89.

On Tuesday, June 1, 2004, Mrs. Ciccone made a number of calls and eventually obtained help at SBLS. Id. at ¶ 90. A North Fork Bank representative confirmed to

SBLs that the only money in Mrs. Ciccone's frozen account was electronically deposited exempt Social Security payments; the bank representative faxed to SBLs a transaction history. Id. at ¶ 91. On Wednesday, June 2, 2004, SBLs presented the North Fork transaction records to Mel S. Harris, asking him to release the account. Id. at ¶ 92. Defendant Harris released the restraint that day, but North Fork Bank took seven days to unfreeze the account. Id. at ¶¶ 92, 93. Defendant North Fork Bank also charged Mrs. Ciccone a \$100.00 fee for restraining her account. Id. at ¶ 95.

C. Facts Concerning Plaintiff Elba Quinones

Plaintiff Elba Quinones is 58 years-old and disabled. Id. at ¶ 100. She has no savings. Id. Her only monthly income is \$241 per month in SSD benefits and \$430 per month in SSI benefits. Id. Ms. Quinones used to receive her SSD and SSI checks electronically at Norwest Bank, and after that at Defendant Fleet Bank. Id. at ¶ 101.

In 1997, Defendant Beth Israel Hospital ("Beth Israel") obtained a \$1,797.10 judgment against Ms. Quinones for an unpaid medical bill. Id. at ¶ 104. Beth Israel twice restrained Ms. Quinones' account, first at Norwest Bank and then at Fleet in 2002. Id. at ¶¶ 105, 106. Each time, Ms. Quinones' account contained only electronically deposited SSD and SSI payments. Id. at ¶¶ 105, 106.

Defendant Mel S. Harris served a third restraint from Beth Israel on February 26, 2004. Id. at ¶ 107. Ms. Quinones' account contained only \$2.18, all of which was Social Security payments that had been electronically deposited earlier that month. Id. at ¶ 106.

On March 1, 2004, Ms. Quinones was unable to withdraw any of her monthly SSI

payment that SSA had electronically deposited that day. Id. at ¶ 110. She learned why her account was frozen that afternoon when she received a letter from Fleet stating that she would be charged a legal fee for processing the restraint. Id. Realizing she was about to lose her next Social Security check, due March 3rd, Ms. Quinones called SSA and told it to mail a paper check. Id. at ¶ 114. SSA informed Ms. Quinones that it could not stop the electronic payment for March, but all payments thereafter would be by paper check. Id. at ¶ 114.

Ms. Quinones then sought to get the restraint lifted. Id. at ¶ 112. She called defendant Mel S. Harris about nine times over a three day period starting March 1, 2004. Id. Many times, Ms. Quinones told the receptionist and voice mail recipient to whom she was transferred that her frozen account contained only her SSI check. Id. No one from defendant Mel S. Harris' office ever called her back. Id. at ¶ 115. Ms. Quinones also left two messages with the billing director at defendant Beth Israel Hospital, who also never returned her calls. Id.

Ms. Quinones sought legal help. Id. at ¶ 113. After six calls to various free legal services offices, she received help at SBLS. Id. at ¶¶ 113, 116. SBLS used Fleet's bank statements to get defendant Mel S. Harris to agree to lift the restraint on March 4, 2004. Id. at ¶ 116. However, it was not until March 8, 2004 that Fleet lifted the freeze. Id.

Ms. Quinones went without her Social Security payments for nine days. Id. at ¶ 117. She ran out of food and had to buy it on credit at the local bodega. Id. She was late paying her rent and credit cards, and was charged late-payment fees of \$10.00 and

\$29.99. Id.

D. The Current Banking Status of the Plaintiffs

All three Plaintiffs live in fear of a future restraint. Id. at ¶¶ 64, 97, 118. Mrs. Ciccone continues to receive her Social Security payments electronically at North Fork Bank. Id. at ¶ 96. She does not like this arrangement but feels she has no option. Id. She must write numerous checks each month and cannot afford to pay for money orders. Id. Cashing a paper check is also difficult and expensive. Id. She tried once to go without banking services and it was difficult so she stopped. Id. at ¶ 78. She still worries considerably about a future freeze and sees bankruptcy as her only option for gaining piece of mind. Id. at ¶ 99.

Mr. Mayers is afraid that New York Community Bancorp's protective policy will end. Id. at ¶ 64. If his account is restrained a fourth time he will give up on banking altogether as the fees, financial hardship and emotional turmoil caused by a restraint are too great. Id.

After her third restraint in February 2004, Ms. Quinones stopped using electronic deposit altogether and instead cashed her check at a cash checking store. Id. at ¶ 118. This was difficult for her and expensive. Id. As a result of this federal court action, Beth Israel recently filed papers indicating their judgment is satisfied and will never be pursued. See Tyler Aff. at ¶ 2 and Beth Israel's Memorandum of Law ("Beth Israel Mem."), Docket #33.

ARGUMENT

**I.DISMISSAL IS APPROPRIATE ONLY IF THE COMPLAINT
CANNOT BE READ TO ALLEGE ANY SET OF FACTS ENTITLING
PLAINTIFFS TO RELIEF**

Defendants Fleet Bank, North Fork Bank (collectively referred to hereinafter as “Bank Defendants”), the Honorable Judith Kaye, the Honorable Jonathan Lippman, and the New York Banking Superintendent Diana L. Taylor (collectively referred to hereinafter as “State Defendants”), and Beth Israel Hospital have moved to dismiss the complaint “pursuant to Fed. R. Civ. P. Rule (12)(b)(6) on the ground that it fails to state a claim upon which relief can be granted.” See State Defendants’ Notice of Motion.

The function of a Rule 12(b)(6) motion to dismiss “is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.” Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980). “[T]he court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff.” Nettis v. Levitt, 241 F.3d 186, 191 (2d Cir. 2001); Sweet v. Sheahan, 235 F.3d 80, 83 (2d Cir. 2000). Accordingly, dismissal is inappropriate unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Harris v. City of New York, 186 F.3d 243, 250 (2d Cir.1999) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The Court is “required to read the complaint with great generosity,” Chan v. City of New York, 803 F. Supp. 710, 715 (S.D.N.Y. 1995) (quoting Yoder v. Orthomolecular Nutrition Institute, Inc., 751 F.2d 555, 558 (2d Cir. 1985)), as to both the facts alleged and the claims made. For the reasons that follow, Defendants’ motions to dismiss should be denied.

Plaintiffs do not dispute the facts as set forth in the Statement Pursuant to Rule

56.1 of Defendant Fleet Bank, but contend that on the basis of those facts Defendant's motion for summary judgment should be denied as a matter of law.

II. DEFENDANTS ARE PROPER PARTIES

A. The Non-Governmental Defendants Acted Under Color of State Law When They Deprived Plaintiffs of the Use of Their Exempt Funds

Defendants Fleet Bank and North Fork Bank incorrectly argue that Plaintiffs do not have a claim under 42 U.S.C. § 1983 because the banks did not act under color of state law when they froze the exempt funds in Plaintiffs' bank accounts. The defendant banks, however, became state actors because they acted jointly with, and at the compulsion of, creditors' attorneys acting in their official capacity as officers of the court. Plaintiffs may therefore seek relief under § 1983 to enjoin Defendants' violations of their rights under the Due Process Clause of the United States Constitution.

To find that a nominally private party is acting under color of state law, the challenged conduct must be "fairly attributable" to the state. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982). Two requirements must be met: "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State . . . Second, the party charged . . . must be a . . . state actor." Id. at 937. In this instance, both of these requirements were met by Defendants' restraint of Plaintiffs' bank accounts pursuant to New York's attachment statute.

The first prong of the state action test is satisfied because the defendant banks

were forced by Section 5222 to freeze Plaintiffs' bank accounts. The Supreme Court in Lugar held that "the [challenged] procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a 1983 action." Id. at 941. Accord American Manufacturers Mutual Insurance Co. v. Sullivan, 520 U.S. 40, 50 (1999) (private insurers who act with the knowledge of and pursuant to state statute satisfy the first state action requirement). Accordingly, the restraint of Plaintiffs' bank accounts is a "product of state action" and provides the basis for a cause of action under § 1983.

The second prong of the state action test is satisfied because the banks became state actors when they restrained Plaintiffs' bank accounts in response to restraining orders issued by creditors' attorneys acting in their special capacity as "officers of the court." The language and structure of C.P.L.R. 5222 compels the conclusion that creditors' attorneys are "state actors." New York's attachment procedures authorize the issuance of restraining notices only by "the clerk of the court, or the attorney for the judgment creditor as officer of the court, or by the support collection unit designated by the appropriate social service district." N.Y. C.P.L.R. 5222 (a) (emphasis added). Thus the creditor's attorney acts not in his capacity as a representative of a private litigant, but clothed in the authority of the State in his capacity as an "officer of the court."

The language of the statute makes plain that attorneys, in issuing restraining orders, are acting with the same authority as court clerks and are representatives of the State and its court system. New York's Legislature, moreover, did not employ the

phrase “attorney as officer of the court” casually. Section 5222, and its companion sections 5230 and 5241 of the C.P.L.R., are the only provisions among all of New York’s statutes that vest attorneys with special powers based on such official status.²

Indeed, courts in New York have recognized that attorneys acting pursuant to C.P.L.R. 5222 are invested with special quasi-judicial power not possessed by members of the bar acting purely in the role of advocates. In Aspen Industries v. Marine Midland Bank, 52 N.Y.2d 575, 439 N.Y.S.2d 316 (1981), New York’s Court of Appeals explained that a restraining notice “serves as a type of injunction prohibiting the transfer of the judgment debtor’s property.” Id. at 579 (emphasis added). And in Sumitomo Shoji New York, Inc. v Chemical Bank New York Trust Co., 47 Misc.2d 741, 263 N.Y.S.2d 354 (Sup. Ct. N.Y. Co. 1965), aff’d 25 A.D.2d 499, 267 N.Y.S.2d 477 (1st Dep’t 1965) the Court emphasized the unique language of Section 5222(a) in holding that a restraining notice

is not a mere notice, but a form of process issued out of court intended to have the effect of an injunction. *CPLR 5222* significantly provides that it may be issued only by the Clerk of the court or the attorney for the judgment creditor “as officer of the court.

263 N.Y.S.2d at 360 (emphasis added). See also Bernard L. Broome v. Citibank, N. A.,

² By contrast, New York’s Supreme Court rules refer to attorneys as officers of the court only in the more figurative sense that as regular participants in court proceedings, they have a duty to act courteously and observe courtroom decorum. See 22 N.Y.C.R.R. §§ 604.1(d), 700.4(a).

166 Misc.2d 283, 632 N.Y.S.2d 410, 412 (Civ. Ct. Queens Co. 1995) (restraining notice is “type of injunction”); Ray Block Stationery Co., Inc., v. James W. Dougherty, P. C., 125 Misc. 2d 579, 479 N.Y.S.2d 700 (Civ. Ct. N.Y. Co. 1984) (Article 52 collection devices “involve sophisticated weapons like the injunction (which is really what the restraining notice of *CPLR 5222* is)”).

In Save Way Oil Co., Inc. v. 284 Eastern Parkway Corp., 115 Misc. 2d 141, 453 N.Y.S.2d 554 (Civ. Ct. Kings Co. 1982), the Court discussed at length the implications of Section 5222's unique designation of attorneys as officers of the court:

An attorney is authorized to issue an income execution or restraining notice in his capacity as an officer of the court . . . [W]hen an attorney acts as an officer of the court, [pursuant to C.P.L.R. Article 52], notwithstanding his obligation to his client, he is duty-bound to act with the same independence and impartiality presumed of, and in fact required of, a clerk, Judge, referee or administrator.

Id. at 557.

Thus under New York law, attorneys acting as “officers of the court” issue restraining notices pursuant to a special grant of authority from the legislature and must therefore be considered state actors within the meaning of 42 U.S.C. § 1983.

Consequently, the defendant banks must be considered state actors because in freezing Plaintiffs’ accounts they acted jointly with the creditors’ attorneys, serving in their official capacity as officers of the court. “A private party’s joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a ‘state actor’ for purposes of the Fourteenth Amendment.” Lugar, 457 U.S. at 941. See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); United States v. Price,

383 U.S. 787, 794 (1966) (“[P]rivate persons, jointly engaged with state officials in the prohibited action, are acting ‘under color’ of law for the purposes of the statute. To act ‘under color’ of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.”)

In the context of debt collection, the Supreme Court repeatedly has held that the conduct of private parties undertaken pursuant to attachment procedures can be ascribed to the State “whenever officers of the State act jointly with a creditor in securing the property in dispute.” Lugar, 457 U.S. at 932-33; North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

The defendant banks must also be considered “state actors” because they acted under the compulsion of the creditors’ attorneys, who were themselves state actors. As North Fork Bank acknowledges, “upon service of the restraining notice, NORTH FORK BANK was obligated ... to freeze CICCONE’s accounts ... failure to obey a restraining notice results in contempt of court ...” North Fork Bank’s Memorandum in Support of Motion to Dismiss, October 22, 2004 (“North Fork Bank Mem.”) at 5.

In Blum v. Yaretsky, 457 U.S. 991, 1004 (1982), the Supreme Court held that private actions may be considered to be state action for enforcement purposes when the State “has exercised coercive power or has provided such encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” In Chan v. City of New York, 1 F.3d 96, 106-107 (2d Cir. 1993), the Court of Appeals accordingly

found state action where a private contractor was compelled by terms of its contract with the City to pay less than the minimum wage. See also Fitzgerald v. Mount Laurel Racing, Inc., 607 F.2d 589 (3rd Cir. 1979) (racing association acted at direction of State racing judges in evicting plaintiff); Coleman v. Town of Hempstead, 30 F. Supp. 2d 356 (E.D.N.Y. 1999) (laboratory acted at direction of town in denying plaintiff access to urine sample).

In Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1295 (9th Cir. 1987), the Ninth Circuit found that a private telephone company acted “under color of state law” when it terminated Plaintiff’s phone service at the direction of an Arizona deputy district attorney, who threatened to prosecute the company if it did not comply. With this threat, Arizona “exercised coercive power over Mountain Bell and thereby converted its otherwise private conduct into state action.” Id. In the instant case, the creditors’ attorneys’ service of the restraining notices acted as a threat to hold the banks in contempt of court if they did not freeze Plaintiffs’ assets, whether exempt or not. Since the creditors’ attorneys were themselves state actors, their coercion converted the banks’ actions into state action as well.

North Fork Bank’s reliance on Johnson v. Chemical Bank, 1996 LEXIS 18027 (S.D.N.Y. 1996) is misplaced. In that case the plaintiff, proceeding pro se, sued a bank and a creditor claiming they had “violated his constitutional rights” in placing a restraint on his accounts pursuant to N.Y. C.P.L.R. 5222. The court found there was no state action and dismissed the § 1983 claim. However, the pro se plaintiff appears not to have alleged or briefed the implications for § 1983 jurisdiction of the creditors’ attorneys’

status as officers of the court, and the legal consequences for the banks who act jointly with and at the compulsion of these attorneys in their capacity as state actors. See id. at 12 (stating plaintiff “sets forth no allegations which could credibly satisfy [the under color of law] standard”).

The Johnson court thus failed to consider the status of creditors’ attorneys as state actors, and held only that the “mere fact that Defendants utilized state statutes to pursue a state court remedy against the plaintiff does not constitute ‘state action’ by private parties.” Id. In the instant case, however, Plaintiffs do not argue that the defendant banks’ mere “use” of the statute creates state action; they argue that because the banks acted jointly with state actors and under the compulsion of state actors in restraining Plaintiffs’ accounts, the actions of the banks can fairly be attributed to the state.³

For all the above reasons, Plaintiffs have stated a claim for relief under 42 U.S.C. § 1983 because the defendant banks and creditors’ attorneys acted under color of state law when they restrained Plaintiffs’ bank accounts in violation of the Due Process Clause of the United States Constitution.

B. The State Defendants Have a Direct Connection With the Enforcement of C.P.L.R. 5222 and So Are Proper Parties in This Action

State Defendants move to dismiss the claims against them pursuant to Rule

³ Plaintiffs do not contest Fleet Bank’s 16th claim in its “Statement of Undisputed Facts” that the bank is not a “governmental entity.” Plaintiffs, however, maintain that Fleet Bank is nonetheless a “state actor” for the purposes of 42 U.S.C. § 1983.

12(b)(6) of the Federal Rules of Civil Procedure. They may prevail on this aspect of their motion only if the Plaintiffs, after discovery, can prove no facts establishing the State Defendants' connection to the restraint process at issue in this case. In Deary v. Guardian Loan Company, 563 F. Supp. 264 (S.D.N.Y. 1983), another case in which aspects of Section 5222 were challenged on constitutional grounds, Judge Lasker denied an identical motion to dismiss by the then Chief Judge, Sol Wachtler, Chief Administrative Judge Robert Sise, and Superintendent of Banks Vincent Tese, on the grounds that "it cannot be said that the Plaintiffs 'can prove no set of facts in support of [their] claim which would entitle [them] to relief.'" Id. at 266 (quoting Conley v. Gibson, 355 U.S. 41, 45-6 (1957)). This Court should reach the same result, denying state Defendants' motion to dismiss on the grounds that they are not proper parties.

Plaintiffs do not disagree with State Defendants' contention that "a state officer must have some connection with the enforcement of the act" in order to be joined as a defendant in a suit challenging a statute. See Ex Parte Young, 209 U.S. 123 (1908). But State Defendants do have a direct connection.

In Ex Parte Young, the Supreme Court held that it is not necessary that the duty to enforce the challenged statute be made explicit in the challenged statute itself. "The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists." Id. at 157. It is therefore not necessary that the connection of the Defendants be made explicit in the CPLR; what matters is that the Defendants, by virtue of their office, have

“some connection with the enforcement of the act.” Id.

The Defendants Hon. Judith S. Kaye and Hon. Jonathan Lippman are the administrative officers in charge of New York State courts. Section 5222 puts the power and authority of the state courts into methods for collecting money from judgment debtors. Disregard of restraining notices is punishable by contempt of court, making it clear that the power of the New York State Court system, headed by the judicial Defendants here, is invested in restraining notices. Defendant Diana L. Taylor is the administrator in charge of banks in New York State that process restraining notices received pursuant to § 5222. These Defendants administer and enforce the challenged statute and actions taken under it.

New York Judiciary Law § 210.1 states that “the chief judge of the court of appeals shall be the chief judge of the state of New York and shall be the chief judicial officer of the unified court system.” Judiciary Law § 212.1 sets out the functions of the chief administrative judge, who “on behalf of the chief judge, shall supervise the administration and operation of the unified court system.” The chief administrative judge shall also “adopt rules and orders regulating practice in the courts as authorized by statute with the advice and consent of the administrative board of the courts” Judiciary Law § 212.2(d). And Judiciary Law § 51 states that “[t]he court of appeals may from time to time adopt, amend, or rescind rules, not inconsistent with the constitution or statutes of the state, regulating the practice and proceedings in the court.”

The judicial Defendants exercise the State’s control over attorneys and

operations of the courts. In New York State the issuance of restraining notices is a court function which has been delegated to attorneys as officers of the court. The contempt remedy for disregarding restraining notices is a direct function of the courts. The fact that New York has assigned attorneys the power to issue restraining notices does not relieve the Defendants of their responsibility over the process: the attorneys are simply extensions of the court in this process. Thus, it is clear that Defendants Hon. Judith S. Kaye, Chief Justice of the Court of Appeals, and Hon. Jonathan Lippman, Chief Administrative Judge of the Courts of the State of New York, are the state officials with the responsibility to implement the CPLR which governs the operation of the civil functions of the state courts.

Defendant Diana L. Taylor, the Superintendent of Banks, has supervisory power over all banking institutions in New York State. “The superintendent of banks shall be the head of the banking department.” New York Banking Law § 12. The banking law states that “it is hereby declared to be the policy of the state of New York that the business of all banking organizations shall be supervised and regulated through the banking department” Banking Law §§ 10, 36. As the head of the Banking Department and the Banking Board, the superintendent has the power to oversee the operations of all banking institutions and “to make, alter and amend rules and regulations not inconsistent with law.” Banking Law § 14.1. If it appears to the superintendent that any banking organization has violated any law, or is “conducting business in an unauthorized or unsafe manner,” she may order the institution to discontinue such practices and to keep its books and accounts in a manner she

prescribes. Banking Law § 39.

Courts have found similar state defendants to be proper parties. In Georgevich v. Strauss, 772 F.2d 1078 (3d Cir. 1985), Plaintiffs sued a defendant class of Pennsylvania Common Pleas judges, challenging parole procedures governing certain Pennsylvania state prisoners. The judges claimed that they were not proper defendants. The Court found that the judges were proper defendants because they were “sued as enforcers of the statutes, in other words as administrators of the parole power.” Id. Here, the State Defendants are sued as enforcers and administrators of the restraint and attachment power of § 5222.

In Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), the Supreme Court found that the court and the chief justice of Virginia were proper defendants in a suit for declaratory and injunctive relief because of their role in the enforcement of disciplinary proceedings. Here, the judicial Defendants enforce § 5222’s grant of power to attorneys to issue restraining notices as officers of the court and the court’s power to issue orders of contempt if the restraining notices are not obeyed. The Superintendent of Banks has clear supervisory power over the application of § 5222 to banks receiving restraining notices.

The cases cited by State Defendants do not support their motion to dismiss. State Defendants cite Schulz v. Williams, 44 F. 3d 48, 61, n. 13 (2d Cir. 1994), in which the state defendants were found to be proper parties. In Schulz, the court said “[i]t is well settled that a state official may properly be made a party to a suit seeking to enjoin the enforcement of an allegedly unconstitutional act if that official plays some role in the

enforcement of the act.” Id. at 61 (citing Donohue v. Board of Election of N.Y., 435 F. Supp. 957, 963 (E.D.N.Y. 1976)). As discussed above, the state Defendants here do have a connection with the enforcement of the challenged act.

State Defendants’ remaining cases are easily distinguishable. In Mendez v. Heller, 530 F.2d 457 (2d Cir. 1976), the court affirmed a district court decision granting summary judgment to Justice Heller, the Presiding Justice of Special Term Part V of the New York State Supreme Court, the chief clerk of that part, and the New York State Attorney General on the ground that no justiciable controversy was presented because the plaintiff had not yet been harmed. This case is unpersuasive because here, Plaintiffs have already suffered the loss of use of their exempt funds.

In Warden v. Pataki, 35 F. Supp. 2d 354, 359 (S.D.N.Y. 1999), aff’d. sub nom., Chan v. Pataki, 201 F. 3d 430 (2d Cir. 1999), cert. denied, 531 U.S. 849 (2000), the state defendants were members of the state legislature and the governor. The court dismissed the complaint against the legislators because “[t]he principal basis for plaintiffs’ claims against the State Defendants is the State Defendants’ role in enacting the legislation at issue.” Id. at 358. The court dismissed the complaint against these Defendants on the “well-settled doctrine of absolute legislative immunity.” Id. The claims against the Governor were dismissed because the court found that his general duty to execute all the laws of the state is not enough by itself to make him a proper party, as that would make him a proper party in any suit involving any law in the state. The same reasoning applied in Fitts v. McGhee, 172 U.S. 516 (1899), in which the claims against the state Defendants were dismissed because the general responsibility

of the Attorney General to defend actions against the state and the duty of the Governor to execute all state laws was not sufficient to make either defendant a proper party. In the case at bar, the proper state defendants are the heads of the executive and judicial branches with particular responsibility over the challenged statute, that is the Chief Judge, the Chief Administrative Judge, and the Superintendent of Banks.

State Defendants also allege, incorrectly, that the complaint fails to state a claim against them because they did not personally participate in the restraint of the Defendants' funds. State Defendants' Memorandum of Law in Support of the Motion to Dismiss the Second Amended Complaint ("State Defs. Mem.") at 9. Defendants reliance on Green v. Bauvi, 46 F. 3d 189 (2d Cir. 1995) is misplaced, because the reasoning in that case only applies when the defendants are alleged to have acted outside their authority under the law. Direct, personal participation by the state official in the challenged act is not required in a situation like the one at bar in which the Defendants were administering and enforcing the statute as it is written. Monell v. Dept. of Social Services, 436 U.S. 658, 690-92 (1978).

State Defendants' motion to dismiss on the grounds that they are not proper parties should be denied. At the very least, if this Court does not accept as a matter of law that the State Defendants have a connection to the challenged statute, Plaintiffs are entitled to an opportunity to conduct discovery and prove the existence of the connection.

III. N.Y. C.P.L.R. 5222 VIOLATES THE SUPREMACY CLAUSE BY COMPELLING BANKS TO FREEZE ASSETS EXEMPT FROM

COLLECTION UNDER 42 U.S.C. § 407(A)

A state statute violates the Supremacy Clause if it “stands as an obstacle to the accomplishments and execution of the full purposes and objectives” of a federal statute.

Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Concourse Rehabilitation & Nursing Center, Inc. v. Whalen, 249 F.3d 136, 146 (2d Cir. 2001).

Section 5222 of the N.Y. C.P.L.R. is an obstacle to the accomplishment of the purpose of 42 U.S.C. § 407(a). Section 407(a) of the Social Security Act states that

the right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Section 407(a) “impose[s] a broad bar against the use of any legal process to reach all social security benefits.” Philpott v. Essex County Welfare Board, 409 U.S. 413, 417 (1973). Even attempts to reach social security funds are prohibited. Bennett v. Arkansas, 485 U.S. 395, 397 (1988) (“Section 407(a) unambiguously rules out *any attempt* to attach Social Security benefits.”) (emphasis added). Moreover, the ban is not limited to actions of creditors but also applies to judicial or quasi-judicial actions involving anyone, including banks. Washington State Dept. of Social & Health Services v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003) (“[Section] 407 does not refer to any ‘claim of creditors’; it imposes a broad bar against the use of any legal process to reach all social security benefits.”) (citations omitted).

The broad language of § 407(a) reflects the overarching purpose of the Social Security Act, which is “the protection of its beneficiaries from some of the hardships of

existence.” United States v. Silk, 331 U.S. 704, 711 (1947). Congress designed the Social Security Act to be “unusually protective” of claimants. Bowen v. City of New York, 476 U.S. 467, 480 (1986).

In direct conflict with § 407(a), New York State restraint procedures force banks to freeze customers’ accounts even if the banks know that the accounts contain only exempt social security funds. N.Y. C.P.L.R. 5222(a) states that a bank that receives a restraining notice from a creditor “is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt . . . except upon direction of the sheriff or pursuant to an order of the court”

This court cannot permit § 5222 to undermine § 407(a) as applied to bank accounts containing only electronically deposited social security payments. To do so would be to create an exception to Congress’ clear statement that social security is protected from garnishment and attachment. Guidry v. Sheet Metal Workers, 493 U.S. 365 (1990) (courts must fulfill congressional intent and apply anti-alienation provision in ERISA as Congress wrote it); Hubbard v. United States, 514 U.S. 698, 703 (1995) (“[a court’s] obligation is to apply the statute as Congress wrote it”). The purpose of § 407(a) - protecting Social Security recipients from hardship - is defeated by N.Y. C.P.L.R. 5222 as applied to accounts with only electronically deposited exempt money.

Defendants rely on Finberg v. Sullivan, 634 F.2d 50, 63 (3rd Cir. 1980), to support their argument that a temporary taking under § 5222 does not violate § 407 (a). North Fork Bank Mem. at 13; Fleet Mem. at 20; State Defs. Mem. at 18. However, the

Third Circuit in Finberg did not hold that Section 407(a) allows for a temporary taking. Rather, it stated in dicta that a taking “might” not run afoul of the Supremacy Clause if the taking was brief and “avoids any significant interruption of access to benefits.” Id. at 63. The Court provided no further reasoning or analysis to support its speculative comment, and this aspect of the Court’s decision therefore provides no support for Defendants’ assertion that a procedure that permits a temporary taking would not violate the Supremacy Clause.

With the advent of direct electronic deposit technology, however, banks today can immediately determine if an account contains only electronically deposited exempt money. See Fennell Aff., attached to Tyler Aff. as Ex. E. Because plaintiffs’ accounts contain only electronically deposited social security and/or SSI payments, a temporary taking serves no legitimate purpose, operates only to obstruct the purpose of § 407(a), and is therefore invalid under the Supremacy Clause.

Defendants argue that this Court should follow Huggins v. Pataki, 2002 U.S. Dist. LEXIS 13664, *12 (E.D.N.Y. 2002), which found no Supremacy Clause violation as applied to electronic deposit accounts. However, the Huggins court did not employ proper Supremacy Clause analysis. It stated the Supremacy Clause and Due Process Clause tests were “essentially the same.” Id. at *12. This is incorrect. Under Due Process analysis, one must balance the interests of the government with the interests of the other parties. Mathews v. Eldridge, 424 U.S. 319, 332 (1976). Under the Supremacy Clause, there is no balancing of interests. Rather, the inquiry is whether the state law “stands as an obstacle” to the Congressional purpose behind the federal law.

Hines v. Davidowitz, 312 U.S. at 67. Because Huggins did not conduct such an inquiry, its holding is not instructive for this court.

Defendants also cite Zeppieri v. New Haven Provision Co., 163 F. Supp. 2d 126 (D. Conn. 2001), in which the court found that a state garnishment statute did not violate § 407(a) and the Supremacy Clause. But Zeppieri did not consider the state garnishment procedures as applied to an account that contained only readily identifiable electronically deposited exempt funds. Rather Zeppieri concerned an account that contained only manually deposited paper checks. (“Defendants cannot know what property is contained in a bank account and which property is exempt”). Id. at 136. In any event, Zeppieri's holding is not persuasive given the ease with which exempt funds can be identified by banks today.

Defendant North Fork Bank asserts that Plaintiff Ciccone does not have a claim under the Supremacy Clause because Section 407(a) does not create an enforceable right under 42 U.S.C. § 1983. See North Fork Bank Mem. at 13. Plaintiffs' Supremacy Clause claim arises under 28 U.S.C. § 1331; whether or not Section 407(a) creates an enforceable right under Section 1983 is not relevant.

“A claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law.” Western Air Lines, Inc. v. Port Authority of New York and New Jersey, 817 F.2d 222, 225 (2d Cir. 1987).

4 Plaintiffs do not concede that the Court does not have jurisdiction over their Supremacy Clause claim under § 1983 but do not address it here because jurisdiction is so clearly available under Section 1331.

It is well-settled that federal courts have jurisdiction over Supremacy Clause claims under Section 1331. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983) (“It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.”). Courts following Shaw consistently find jurisdiction over Supremacy Clause claims under § 1331. See, e.g., Burgio and Campofelice, Inc. v. NYS Dep’t of Labor, 107 F.3d 1000, 1007 (2d Cir. 1997); Wright Electric, Inc. v. Minnesota State Board of Electricity, 322 F.3d 1025, 1028 (8th Cir. 2003); Qwest Corporation v. City of Santa Fe, New Mexico, 380 F.3d 1258, 1264 (10th Cir. 2004).

The objective of the Social Security Act and § 407(a) is to protect beneficiaries from the hardships of existence through uninterrupted use of their benefits. “[T]he net effect” of New York’s garnishment statute on bank accounts that contain only electronically deposited exempt funds “is to bring about precisely the consequences that Congress sought to prevent.” Finberg, 634 F.2d at 63. Under these circumstances, N.Y. CPLR 5222 is inconsistent with § 407(a) because, when applied to accounts that contain only electronically deposited exempt funds, it “stands as an obstacle to the accomplishments and execution of the full purposes and objectives” of § 407(a). Hines, 312 U.S. at 67; Concourse Rehabilitation, 249 F.3d at 146.

**IV. PLAINTIFFS HAVE STATED A CLAIM FOR RELIEF UNDER
42 U.S.C. § 1983 BECAUSE NEW YORK STATE RESTRAINT
PROCEDURES, WHEN APPLIED TO ACCOUNTS THAT CONTAIN
ONLY ELECTRONICALLY DEPOSITED EXEMPT FUNDS, VIOLATE
THE DUE PROCESS CLAUSE**

A judgment creditor cannot restrain or freeze the bank account of a debtor without

providing Due Process. Finberg v. Sullivan, 634 F.2d 50, 63 (3d Cir. 1980); Deary v. Guardian Loan Co., Inc., 534 F. Supp. 1178, 1188 (S.D.N.Y. 1982). To determine what process is due, courts must balance the interests of the creditor, debtor, and state under the Mathews v. Eldridge, 424 U.S. 319 (1976), three-prong test. When applying this test to cases that did not involve electronically deposited funds, courts have held that Due Process allows the post-judgment creditor to freeze the account without prior notice to the debtor, and to cause an interruption in the debtor's access to his funds while he receives notice of the freeze and the existence of possible exemptions to the freeze, and has a right to a speedy hearing to adjudicate the exemptions. McCahey v. L.P. Investors, 774 F.2d 543, 549 (2d Cir. 1985); Dionne v. Bouley, 757 F.2d 1344, 1350-55 (1st Cir. 1985); Finberg, 634 F.2d at 59-62; Deary, 534 F.Supp. at 1187-88. The reasoning of these courts was based on the fact that, at the time the cases were decided, no one but the debtor knew the sources of the funds in his bank account and a pre-deprivation fact finding on the contents of bank accounts would have to involve notice to the debtor, who might then respond by concealing his money. Finberg, 634 F.2d at 57, 59; McCahey, 774 F.2d at 550.

In the twenty years since McCahey was decided, electronic transfer of funds has changed this underlying fact. Today 2.75 million elderly and disabled New Yorkers receive their Social Security payments electronically. Each electronic transfer contains coding and wording that identifies it as exempt Social Security benefits. Second Amended Complaint at ¶ 38. Because of this, the bank can quickly and easily determine if an account contains only exempt money prior to restraining it. Id. at ¶¶ 38,

⁵ Social Security Administration, *Direct Deposit and Check Statistics*, New York

40; Fennell Aff., attached to Tyler Aff. as Ex. H. Because of this new technology, a new evaluation must be made of the factors to be analyzed in assessing due process. Direct deposit of identifiably exempt funds renders the Finberg, McCahey and Dionne rulings obsolete.

Due Process, “unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” Connecticut v. Doebr, 501 U.S. 1, 10 (1991) (quotation marks omitted). Rather, it is “flexible and calls for such procedural protection as the particular situation demands.” Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 15 (1978). As the Court stated in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), a “procedural rule that may satisfy Due Process for attachments in general, does not necessarily satisfy procedural Due Process in every case.” Id. at 340 (internal citations omitted) (striking down a prejudgment wage garnishment procedure).

Technological developments that simplify issues of proof can render unconstitutional procedures that previously passed constitutional muster. Compare Jeter v. Clark, 486 U.S. 456 (1988) (striking down a six year statute of limitations to bring paternity action since “increasingly sophisticated scientific tests facilitate the establishing of paternity regardless of the child's age”) with Cessna v. Montgomery, 344 N.E.2d 447 (Ill. Sup. Ct. 1976) (validating two year statute of limitation to bring paternity action prior to advent of genetic testing because problems of accurately proving paternity are magnified as the child ages).

(November 2004), attached to Tyler Aff. as Ex. A)

In McCahey, the Second Circuit used the factors set forth in Mathews v. Eldridge to assess the constitutionality of governmental procedures: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. McCahey, 774 F.2d at 549 (quoting Mathews, 424 U.S. at 334-5). A new analysis under Mathews compels a finding that N.Y. C.P.L.R. 5222 is unconstitutional as applied to the Plaintiffs, and that the decision in McCahey is no longer good law with respect to accounts containing only electronically deposited exempt money.

A. The Plaintiffs' Interest In Preserving their Social Security and SSI Benefits is Substantial and Not Inconsistent with the Creditors' Interest in Seizing Non-Exempt Money

The "private interest[s] that will be affected by the official action" here have not changed: creditors' want to collect money owed to them and debtors want to protect exempt money. But creditors have no cognizable interest in money that is legally exempt from collection. Therefore, when exempt money can be easily identified prior to restraint with no risk to the creditor, Plaintiffs' interest in continuous access to their unambiguously exempt and desperately needed Social Security and SSI benefits must be paramount. This interest is substantial. Social Security is designed to "save men and women from the poor house," Helvering v. Davis, 301 U.S. 619, 641 (1937), and to

protect them “from the hardships of existence.” United States v. Silk, 331 U.S. 704, 711 (1947). All three Plaintiffs live in poverty or on the brink of poverty. Second Amended Complaint at ¶¶ 41, 70, 71, 73, 100. Thus, “even the short term deprivation of [a Social Security recipient’s] main or only source of support can have disastrous consequences.” Dionne v. Bouley, 757 F.2d 1344, 1353 (1st Cir. 1985). Indeed, the loss of access to their exempt money caused Plaintiffs significant emotional distress and financial hardship as Plaintiffs’ Social Security payments were their only source of income and were needed to meet essential needs. Second Amended Complaint at ¶¶ 28, 50, 56, 58, 60, 62, 77, 88, 89, 94, 95, 105, 110, 117.

B. Easily Identifiable Direct Deposit has Changed the Risk of Erroneous Deprivation and the Value of Additional or Substitute Safeguards

The changes brought about by technology apply to the second prong of the Mathews analysis, the need for and effect of procedural safeguards and their cost and benefits. N.Y. C.P.L.R. 5222 creates a substantial risk of unwarranted freezing of exempt Social Security funds because it leaves a bank with no option but to freeze the judgment debtor’s account even when it is clear from the bank’s database that the account contains only exempt Social Security funds.

The key issue here concerns proof that the debtors’ funds are exempt. The Second Circuit in McCahey allowed the existing procedures to stand despite their resulting in a temporary loss of exempt funds because of the need to determine whether money was exempt. Any difficulty in doing that has been removed because the bank can easily determine if the money is exempt prior to restraining the money. Under

Mathews, the probable value of additional or substitute procedures affect the constitutionality of the existing procedures. Here the substitute procedures are obvious and simple: the bank must examine the debtor's account. If it contains only easily identifiable, electronically deposited exempt money, the bank must not restrain it. One of the original defendants in this case, New York Community Bancorp, has instituted this procedure, in spite of N.Y. C.P.L.R. 5222's prohibition against it. The procedure has worked, and has not been burdensome for the bank. See Fennell Aff., attached to Tyler Aff. as Ex. E.

When a simple, effective, inexpensive procedure can prevent the loss, even temporarily, of a protected property interest, it is a violation of due process to fail to utilize that procedure. This is particularly true because the very technology that has made it possible to protect exempt money has also increased the risk of erroneous deprivation that flows from § 5222. In Finberg, the freeze deprived the debtor of the social security check she had earlier deposited into her account. But Ms. Finberg's next Social Security payment was not subject to restraint because she received it by mail and did not deposit it into the frozen account. Finberg, 634 F. 2d at 58. In contrast, after Ms. Quinones' account was frozen, her next Social Security payments were electronically deposited into her frozen account, becoming inaccessible to her, despite her efforts to divert it. Section 5222(b) prevented the bank from giving her that money. Thus, the risk of erroneous deprivation for Plaintiffs exceeds that of the typical debtor envisioned by the McCahey court.

The risk of erroneous deprivation is also greater today because technological

developments make it exceedingly easy for a creditor to repeatedly restrain a debtor's exempt social security payments. In the late 1970's and early 1980's, when Deary and McCahey were decided, issuing a restraining notice was time consuming. The creditor's lawyer had to type the restraining notice, canvas the neighborhood where the debtor might bank, and then serve all those banks by mail. See Lagnado, "*Cold-Case Files: Dunned for Old Bills, Poor Find Some Hospitals Never Forget*," p. 3, Wall St. J. June 8, 2004, Attached to Tyler Aff. as Ex. C. In the mid to late 1980's, computer generated restraining notices enabled a judgment creditor to serve a "burdensome" number of restraining notices on any number of banks at little expense. See Poughkeepsie Sav. Bank, FSB v. RS Paralegal & Recovery Services, Inc., 160 A.D.2d 857 (2d Dep't 1990) (denying bank's motion to quash large quantities of computer generated restraining notices from one collection firm).

Legislative amendments in 1994 and 2000 created a third change in collection practice. Today, restraining notices can be served electronically on banks. N.Y. C.P.L.R. 5222(g). As a result, banks and large collection law firms such as that of Defendant Mel Harris, work together to locate and restrain the accounts of judgment debtors. According to the Wall Street Journal, large collection law firms "electronically zap a bank a long list of unpaid court judgments." "*Cold-Case Files...*" attached to Tyler Aff. as Ex. C. The bank then searches its records for a match, and "[w]here it gets a 'hit,' . . . alerts the collection firm, which then sends a restraining notice." Id. In short, technological and legislative changes increase the chances of erroneous deprivation. It is a violation of Plaintiffs' Due Process rights not to make use of the new technology to

protect them. This is especially true since neither creditors nor banks nor the government can assert any competing interest in restraining money that is exempt.

C. The Government's Interest Would Be Furthered and Not Adversely Affected by Changes Sought by Plaintiffs

Plaintiffs agree with Defendants' assertion, State Defs. Mem at 17, that the government's interest is no different here than it was in McCahey, where the court found:

The state has several interests in the matters at hand. First, it has an interest in providing inexpensive and rapid methods of collecting judgments, as part of its more general interest in ensuring compliance with its laws. Second, it has an interest in the efficient use of judicial resources, so they are not wasted in proceedings of little value. Finally, the state has an interest in seeing that laws exempting property from seizure are not evaded.

McCahey, 777 F. 2d at 549. The government's interest is the same as it was in 1985, when McCahey was decided, but the way those interests must be met has radically changed. The ability of banks to identify exempt money means that the state's interest in "the efficient use of judicial resources, so they are not wasted in proceedings of little value," can only be met by finding § 5222 unconstitutional as applied to accounts with only identifiable, directly deposited exempt money. To continue to allow restraints of such accounts, and then to require debtors to go to state court to institute proceedings to have the restraints lifted, is to require proceedings of little value, and is directly contrary to the interests of the state as well as that of the debtors. To allow restraints of such accounts does not provide inexpensive or rapid methods of collecting judgments,

because in the end, exempt money cannot be collected, and creditors' attorneys will also have had to spend time and money in the proceedings of little value. No one's interest is protected by allowing restraints of accounts that banks can determine contain only exempt money. Such restraints therefore violate Due Process, because they advance no legitimate interest and nonetheless deprive the Plaintiffs of the uninterrupted use of their protected property interest.

New York State's "ancillary interests" are to provide a fair and efficient remedy for creditors without imposing burdensome procedures on its courts or banks. These interests, too, would be promoted by the new procedures. New York's judicial resources would be conserved since many proceedings to determine the exempt status of bank accounts would become unnecessary. New York State's interests in encouraging low income persons to use banks rather than check cashing institutions would also be promoted.

Defendant Fleet National Bank argues that it would impose a serious burden on banks to require them to identify exempt money. However, the New York Community Bancorp has not found the process burdensome. Fennell Aff., attached to Tyler Aff. as Ex. E. Fleet argues that it is bigger than New York Community Bancorp and receives more restraining notices, but of course the fact that it is bigger also means it has a larger staff, so the relative burden is the same. The burden imposed on banks would be minimal. However, if there is a material factual dispute about this, Plaintiffs are entitled

⁶ In 1994 New York amended its banking law to require banks to provide basic banking accounts to low-income citizens. N.Y. Banking Law § 14-F (McKinney 2004).

to do discovery on the issue; it is not a basis for dismissal. Furthermore, Fleet, North Fork and most other banks charge a \$100 fee to process a restraining notice. Complaint at ¶¶ 48, 95 and Exhibit C attached to Fleet's Arcuri Declaration, Docket Sheet, #40, Part 4. Indeed, Fleet's restraining notice department in New York generated well over \$1 million in fees last year processing 189,000 restraints.

In sum, it is now possible for banks to identify accounts that contain only exempt assets when debtors receive electronically directly deposited funds. Second Amended Complaint at ¶ 38. On these motions to dismiss, this Court must accept this fact as true. This ease of identification of exempt accounts did not exist when McCahey was decided. It did exist when Higgins v. Pataki, 2002 U.S. Dist.LEXIS 13664 (E.D.N.Y. 2002), was decided, but the court failed to reconsider the Mathews factors in light of this fact. That was error. The constitutionality of temporarily restraining exempt money must be assessed in the context of the facts alleged in the Second Amended Complaint. Section 5222, as applied to accounts containing only easily identifiable, directly deposited exempt assets, violates plaintiffs' right to due process of law.

V. PLAINTIFFS' CLAIMS ARE NOT MOOT

Plaintiffs' claims are not barred by the mootness doctrine even though the restraints on their accounts have now been removed. Courts have repeatedly ruled that attachment of bank accounts during an attempt to garnish them is a "short-term activity 'capable of repetition, yet evading review,'" and that claims "for declarations that the

procedures employed in this activity violate the Due Process and Supremacy Clauses of the constitution, therefore, are not moot.” Finberg v. Sullivan, 634 F.2d 50, 56 (3rd Cir. 1980); Harris v. Bailey, 675 F.2d 614, 616 (4th Cir. 1982) (“due to her poverty, appellant will likely again be subject to the challenged statutory procedure”); Dionne v. Bouley, 757 F.2d 1344, 1348 (1st Cir. 1985) (plaintiff is “a person of very low income who will continue to be subject to the procedures . . . challenged in this action”).

The facts in the instant case show that Plaintiffs’ claims are not only “capable of repetition” but very likely to be repeated. Dennis Mayers’ bank accounts were frozen three times in a three year period based on his creditors’ attempts to collect the same debt. Each time, his account was released after he proved that the funds were exempt. Each time, Mr. Mayers suffered a significant interruption in access to the funds he used to meet his essential needs, and he incurred substantial fees and charges. Nancy Ciccone’s accounts were also frozen on three separate occasions during the past three years. Each time, Ms. Ciccone suffered significant hardship from loss of access to her money and incurred fees that reduced the amount available to pay for basic necessities. Like Mr. Mayers and Ms. Ciccone, plaintiff Elba Quinones also had three restraints placed on her bank account based on the debt she owed to Beth Israel Hospital. Ms. Quinones also experienced significant hardship from her inability to access desperately needed funds, and lost substantial sums due to the resulting fees and charges.

As set forth in the annexed affirmation of Johnson Tyler, Esq., the repetitive freezing of Plaintiffs’ bank accounts is not an aberration; collection law firms send out electronic inquiries to banks on a regular basis, and then restrain accounts without

inquiring whether the funds are exempt. Based on this practice, it is not just likely, but virtually certain, that Plaintiffs' bank accounts will be restrained as frequently in the future as they have been in the past. As defendant Mel Harris has said: "It is standard to try again and again to collect unpaid judgments long after they've been rendered."

In Finberg, the Third Circuit explained that to avoid mootness, "a complaining party must demonstrate a 'reasonable expectation' that he will be subject to a recurrence of the activity that he challenges" and show that the activity is "'by its very nature' short in duration, 'so that it could not, or probably would not, be able to be adjudicated while fully live.'" Finberg, 634 F.2d at 55 (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975) and Dow Chemical Co. v. EPA, 605 F.2d 673, 678 n.12 (3d Cir. 1979)). Plaintiffs have clearly established such a "reasonable expectation" in this case.

Defendant Beth Israel Medical Center argues that plaintiff Quinones' claims must be dismissed as moot because Beth Israel plans to file a satisfaction of its judgment in state court and will then not be in a position to attach her bank accounts in the future. However, this should not result in a dismissal of Ms. Quinones's claims. In Finberg, the Court found that attachment of the Plaintiffs' bank account was capable of repetition not only because she might be subject to attachment for the same judgment, but also because her "modest income and the difficulties that she has demonstrated in this case

⁷ *'Cold Case Files...'* attached to Tyler Aff. as Ex. C.

