UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PREBLE-RISH HAITI, S.A.,	§	
	§	
Plaintiff,	§	
VS.	§	**CIVIL ACTION NO. 4:21-CV-01953**
	§	
REPUBLIC OF HAITI, *et al*,	§	
	§	
Defendants.	§	

MEMORANDUM & ORDER

On August 30 the Court held a motion hearing on Garnishee BB Energy, Inc.'s ("BB Energy") Motion to Vacate, Plaintiff Preble-Rish Haiti, S.A.'s ("PRH") Motion to Stay, and Plaintiff's Motion to Compel. The Court issues this Memorandum & Order as to the Motion to Vacate and Motion to Stay.

At the hearing, the Court orally denied Garnishee's request for equitable vacatur and took under advisement the issue whether attachment under Rule B is proper. For the reasons set forth below, the Court finds that the Motion to Vacate should be **GRANTED IN PART** as to Rule B attachment, **DENIED IN PART** as to equitable vacatur, and **DEFERRED IN PART** as to other potential grounds for attachment.

Moreover, the Court **GRANTED** the Motion to Stay pending decision on Plaintiff's action to confirm and enforce the Partial Final Award in New York federal district court. The Court's reasoning is set forth below.

A. Procedural History

PRH filed this suit to invoke the Rule B process, which "allows a district court to take jurisdiction over a defendant in an admiralty or maritime action by attaching property of the

defendant." *Malin Int'l Ship Repair & Drydock, Inc. v. Oceanografia, S.A. de C.V.*, 817 F.3d 241, 244 (5th Cir. 2016); *accord* Fed. R. Civ. P. Supp. R. B(1)(a). "The rule has two purposes: to secure a respondent's appearance and to assure satisfaction in case the suit is successful." *Malin*, 817 F.3d at 244. The Court issued a writ of maritime attachment against BB Energy under Rule B, which it subsequently stayed.

BB Energy filed a motion to vacate the attachment, seeking a hearing under Federal Rule of Civil Procedure Supplemental Rule E(4)(f). It provides: "Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules." The Court previously found that BB Energy has standing to invoke a Rule E(4)(f) challenge to the Rule B attachment given its representation to the court that it has an interest in the property at issue in this proceeding. Doc. 32 at 3 n. 2. However, it has not decided whether the Rule B attachment was proper. The Court now reaches the merits of Garnishee's Rule E(4)(f) challenge.

B. Equitable Vacatur

Garnishee petitioned the Court for equitable vacatur. A district court has equitable discretion to vacate an attachment. *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 445 (2d Cir. 2006), *abrogated on other grounds by Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58 (2d Cir. 2009). While the scope of the district court's equitable vacatur power has not been defined by the United States Supreme Court or the Fifth Circuit, the Second Circuit has held that equitable vacatur is appropriate under any of the following conditions: "1) the defendant is subject to suit in a convenient adjacent jurisdiction; 2) the plaintiff could obtain *in personam* jurisdiction over the defendant in the district where the plaintiff is located; or 3) the

plaintiff has already obtained sufficient security for the potential judgment, by attachment or otherwise." *Id.* The Second Circuit held that the defendant bore the burden to establish any equitable grounds for vacatur. *See id.* at 445 n.5. Although the Fifth Circuit has not expressly adopted the equitable vacatur test, "[m]any district court cases in the Fifth Circuit have adopted and/or applied the Second Circuit's test for the vacatur of an attachment." *Agrocooperative Ltd. v. Sonangol Shipping Angola (Luanda) Limitada*, No. H-14-1707, 2015 WL 138114, at *5 (S.D. Tex. Jan. 8, 2015) (collecting cases).

Garnishee argues that each potential ground for equitable vacatur is present here. The Court disagrees. First, the Second Circuit clarified in *Aqua Stoli* that vacatur based on "adjacent jurisdiction" or "convenience" is narrowly circumscribed:

> *A district court may vacate a maritime attachment only if the defendant would be subject to an* in personam *lawsuit in a jurisdiction adjacent to the one in which the attachment proceedings were brought. An "across the river" case where, for example, assets are attached in the Eastern District but the defendant is located in the Southern District is a paradigmatic example of a case where an attachment should be vacated. It is less clear to us that a district court could vacate an attachment on convenience grounds where the adjacent district is more remote and therefore less obviously "convenient" to the Plaintiff.*

460 F.3d at 444. *See also First Am. Bulk Carrier Corp. v. Van Ommeren Shipping (USA) LLC*, 540 F. Supp. 2d 483, 485 (S.D.N.Y. 2008) ("[T]he "adjacent district" is generally viewed as one of another federal court within the same state (such as the Eastern District to the Southern District of New York), not one in a different state, even if the two states are adjacent."). Therefore, the Court concludes that this District is not "adjacent" to New York state or federal courts.

As to the second potential ground for equitable vacatur—"the plaintiff could obtain *in personam* jurisdiction over the defendant in the district where the plaintiff is located" (emphasis added)—Garnishee notes that both PRH and Defendants Republic of Haiti and Bureau De Monétisation De Programmes D'aide Au Développement (collectively "BMPAD") are located in

Haiti. This is unavailing because Haiti is not a U.S. federal judicial district.

Regarding the third enumerated ground—the plaintiff has already obtained sufficient security for the potential judgment—Garnishee correctly notes that PRH has already obtained nearly $30 million in security in the Southern District of New York. Defendants in that case, however, are vigorously contesting the attachment and may win their motion to vacate.

Thus, Garnishee's arguments for equitable vacatur based on the Second Circuit's test in *Aqua Stoli* are unconvincing.[1] Plaintiff's request for equitable vacatur is denied.

C. Rule B Attachment

Garnishee additionally sought vacatur of attachment under Rule B based on its argument that the contracts between Plaintiff and Defendants were not maritime in nature and thus not subject to Rule B. Plaintiff counters that the contracts are indeed maritime given the number and specificity of provisions regarding transport by sea.

Under Rule E(4)(f) (and Rule B), "an attachment should issue only if a plaintiff establishes four factors: (1) that the plaintiff has a valid *prima facie* admiralty claim against the defendant; (2) that the defendant cannot be found within the district; (3) that the defendant's property may be found within the district; and (4) that there is no statutory or maritime law bar to the attachment." *Williamson v. Recovery Ltd. P'ship*, 542 F.3d 43, 51 (2d Cir. 2008). BB Energy has challenged the attachment on two grounds under this Rule: first, that the contracts underlying PRH's claims are not maritime in nature (and therefore do not satisfy prong one above), and second, that PRH has failed to show that the underlying arbitration provision is enforceable.

BB Energy's latter argument fails because a garnishee only has standing to challenge the

[1] Plaintiff also argued in its reply that *Aqua Stoli* established that the defendant (here, BMPAD), rather than the garnishee, bears the burden of substantiating equitable grounds for vacatur. Thus, Plaintiff argues, BB Energy has no standing to raise issues related to equitable vacatur. The Court need not decide whether Garnishee has standing to argue for equitable vacatur because, regardless, none of the enumerated grounds is present here.

validity of the attachment of property in its hands, not the sufficiency of the underlying action. *See Drew Ameroid Int'l v. M/V Green Star*, 651 F. Supp. 1056, 1058–59 (S.D.N.Y. 1988) ("NIAC, as garnishee, has no standing to move to dismiss their respective complaints against Kukje, or to obtain summary judgment in respect of the underlying merits of their claims against Kukje.").

Thus, the only issue in reviewing the validity of a Rule B attachment here is whether the contracts were "maritime in nature" and would therefore provide a basis for asserting admiralty jurisdiction under 28 U.S.C. § 1333. *Williamson*, 542 F.3d at 49. A Supreme Court case and three Fifth Circuit cases guide the Court on this issue. First, in *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 24 (2004), the Supreme Court held that a set of contracts was maritime in nature "because their primary objective [was] to accomplish the transportation of goods by sea." In that case, the contracts at issue were bills of lading, which record that a carrier has received goods from the party who wishes to ship them, state the terms of carriage, and serve as evidence of the contract for carriage. *Id.* at 18–19. The bills designated the loading port, discharge port, and ultimate destination for delivery. *Id.* at 19.

In 2010, the Fifth Circuit decided *Alphamate Commodity GMBH v. CHS Europe SA*, 627 F.3d 183 (5th Cir. 2010), in which the plaintiff sought a Rule B attachment on a shipment of corn. The contracts contemplated that the plaintiff would ship the grain via sea transport and include the term "CFR" (Cost and Freight), meaning that the plaintiff was responsible for arranging and paying for transport. *Id.* at 186. The plaintiff contended that paying for the ship's demurrage was a maritime obligation, so the contracts themselves were maritime. Citing *Kirby*, the court rejected that argument and held that the contracts were not maritime in nature because the "primary subject matter of the . . . contracts [was] the sale of grain," and "sea transport [was] incidental to accomplishing that purpose." *Id.* at 187. The court also held that neither was the contract a mixed

contract—i.e., one containing both maritime and non-maritime elements—because the demurrage claims were not severable from the sale of goods. The court, therefore, could not exercise maritime jurisdiction over any portion of the contract dispute. *Id.* at 188. It summarized: "In order to be considered maritime, there must be a direct and substantial link between the contract and the operation of the ship, its navigation, or its management afloat, taking into account the needs of the shipping industry, for the very basis of the constitutional grant of admiralty jurisdiction was to ensure a national uniformity of approach to world shipping." *Id.* at 187.

More recently, in *In re Larry Doiron, Inc.*, the Fifth Circuit established a simplified, two-prong test for determining whether a contract is maritime in nature. It asks (1) whether the contract is one to provide services to facilitate the drilling or production of oil and gas on navigable waters, and (2) if so, whether the contract provides or the parties expect that a vessel will play a substantial role in the completion of the contract. 879 F.3d 568, 576 (5th Cir. 2018). The Fifth Circuit later provided gloss on the *Doiron* test in the non-oil-and-gas context, holding that "[t]o be maritime, a contract (1) must be for services to facilitate activity on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract." *Barrios v. Centaur, LLC*, 942 F.3d 670, 678 (5th Cir. 2019) (internal quotations and modifications omitted).

BB Energy's argument is straightforward: the underlying contracts between Plaintiff and Defendants are not maritime in nature since the primary objective of the contracts was the sale of goods (specifically, petroleum) to Haiti. Therefore, the contracts' "primary objective" was not "to accomplish the transportation of goods by sea," *see Alphamate*, 627 F.3d at 187 (quoting *Kirby*, 543 U.S. at 24), nor were the contracts "for services to facilitate activity on navigable waters," *see Barrios*, 942 F.3d at 678.

PRH, on the other hand, asserts that the contracts at issue contain so many specific provisions relating to the details of shipping—in contrast to ordinary contracts for the sale of goods—that sea transport was the central purpose of the contracts, making it proper to characterize them as maritime. Plaintiff points out, for example, that the contracts require it to charter vessels, ensure compliance with maritime laws, agree to be bound by bills of lading, pay agency fees, ensure cargo loading occurred timely, and perform inspections at loading and discharge, among other provisions. Thus, PRH asserts, there is a "direct and substantial link between the contract and the operation of the ship, its navigation, or its management afloat, taking into account the needs of the shipping industry." *Alphamate*, 627 F.3d at 187. PRH further argues that, under *Barrios*, the contracts are "for services to facilitate activity on navigable waters," even if those services were in furtherance of shipping goods. 942 F.3d at 678.

Plaintiff supports its contentions with *Agribusiness United DMCC v. Blue Water Shipping Co.*, 2018 WL 1468160 (E.D. La. Mar. 26, 2018). The district court in that case, citing *Alphamate*, found that a contract was maritime in nature because the defendant's contractual responsibilities included "securing all necessary inspections, approvals, bills of lading, and certificate for the Plaintiff's cargo." It stated that "contracts essentially for the preparation of cargo for sea transport may constitute maritime contracts." Thus, the plaintiffs had "met their burden of establishing a substantial link between the contract and the operation of the ship in transporting Plaintiffs' goods," and the court exercised its admiralty jurisdiction accordingly. *Id.* at *10–11.

This is a close question, but the Court finds Garnishee's argument the more persuasive. The case on which Plaintiff relies, *Agribusiness*, is distinguishable in that the contract at issue in that case was specifically to arrange services for cargo to be loaded onto a vessel. It was not between a seller and buyer, like the contracts here. Further, *Agribusiness* bases its reasoning on

Alphamate. As another court in this District recently observed, though the Fifth Circuit has not specifically overturned *Alphamate*, the *Doiron* two-part test now appears to control the analysis for classifying a contract as maritime in this Circuit. *Centurion Bulk Pte Ltd v. Nustar Energy Servs.*, Inc., No. CV H-19-931, 2020 WL 8368319, at *1 n. 1 (S.D. Tex. Mar. 24, 2020) (citing *Centaur*, 942 F.3d at 678; *In re Crescent Energy Servs., LLC*, 896 F.3d 350, 358 (5th Cir. 2018)). The *Centurion* court found that a brokerage agreement involving the sale of bunker fuel where title was to pass at a docked barge was not maritime in nature because (1) it did not include delivery by sea, and (2) its principal objective was the sale of goods, rather than services to facilitate activity on navigable waters. While the contracts in this case indisputably involved delivery by sea, unlike in *Centurion*, such delivery is necessarily premised on the purchase of petroleum from PRH. Despite the contracts' specific provisions regarding sea-based delivery, the Court concludes that the basic purpose of the contracts here is to accomplish the sale of oil to Haiti.

Thus, the contracts are not "for services to facilitate activity on navigable waters," as *Barrios* requires for maritime contracts. Because the contracts are not maritime in nature, Plaintiff has no valid *prima facie* admiralty claim against Defendants, and attachment under Rule B would be improper.

D. Motion to Stay In Light Of Possible Alternative Grounds For Attachment

While the Court now grants BB Energy's Motion to Vacate as to Rule B attachment, PRH argues that the New York Convention, as incorporated by Chapter Two of the Federal Arbitration Act ("FAA"), may provide alternative grounds for attachment. Article VI of the New York Convention, of which Haiti is a signatory, "authorizes the courts of each participating country to require other signatory countries to provide 'suitable security' upon seeking to set aside or suspend an award rendered within its jurisdiction." *International Ins. v. CAJA NAC. De Ahorro Y Ceguro*,

293 F.3d 392, 399-400 (7th Cir. 2002); *see also Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019), *cert. denied sub nom. Ukraine v. Pao Tatneft*, 140 S. Ct. 901 (2020).

The New York Arbitration Panel has issued a Partial Final Award in favor of PRH. This Partial Final Award may be converted into a final judgment via the confirmation and enforcement proceedings in New York federal district court. Other federal courts have stayed motions to vacate in similar circumstances. *See*, *e.g.*, *Commodities & Mins. Enter. Ltd. v. CVG Ferrominera Orinoco, C.A.*, 423 F. Supp. 3d 45, 47-48 (S.D.N.Y. 2019) (staying consideration of a motion to vacate an attachment of funds purportedly immune from pre-judgment attachment under FSIA until an arbitral award was confirmed into an enforceable judgment). Thus, the Court holds this case in abeyance pending a ruling in the confirmation and enforcement proceedings between Plaintiff and BMPAD.

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For the above reasons, the Motion to Vacate should be **GRANTED IN PART** as to Rule B attachment, **DENIED IN PART** as to equitable vacatur, and **DEFERRED IN PART** as to other potential grounds for attachment.

The Motion to Stay is **GRANTED** pending decision on Plaintiff's action to confirm and enforce the Partial Final Award in New York federal district court.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on September 3, 2021.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE