

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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A.P. MOLLER-MAERSK A/S d/b/a MAERSK :
SEALAND, :
Plaintiff, :
:
-v- :
:
OCEAN EXPRESS MIAMI, et al., :
Defendants.:
:
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06 Civ. 2778 (KBF)
MEMORANDUM AND
ORDER

KATHERINE B. FORREST, District Judge:

This case is part of a larger dispute relating to A.P. Moller-Maersk's ("Maersk") transport of industrial printing machinery owned by defendant Quality Print, a Guatemalan printing company. In part, as a result of Hurricane Katrina, the machinery was allegedly damaged and delayed in transport. To recover its purported losses, Quality Print sued Maersk in multiple foreign courts. Maersk brought this suit for redress related to the foreign actions and to limit its liability.

On August 18, 2009, this Court granted summary judgment for Maersk on certain of its claims and imposed sanctions on Quality Print for civil contempt ("Summary Judgment Opinion"). Quality Print appealed. On July 7, 2011, the Second Circuit remanded the contempt sanctions "for clarification" as to whether they were purely punitive or, instead, compensatory to some degree. The panel did not "express[] a view as to whether any change

need be made to the judgment amount" - that is now for this Court to assess. (Docket No. 90 ("Mandate") at 9.) The Court must also resolve an issue regarding the proper ownership of certain electronic fund transfers ("EFTs") previously attached by Maersk. On appeal, the Second Circuit ordered those attachments vacated. At the time, however, Maersk had already applied them to its judgment, rendering vacatur ineffective.

BACKGROUND¹

In summer 2005, Maersk and Quality Print made arrangements for the shipment of the printing machinery. As part of those arrangements, Maersk issued a booking confirmation, incorporating its Bill of Lading. Clause 26 of the Bill of Lading includes a forum-selection clause, which provides that certain carriage "is to be governed by United States law and the United States District Court for the Southern District of New York is to have exclusive jurisdiction to hear all disputes in respect thereof." This Court has repeatedly found (e.g., Docket No. 68 ("SJ Opinion") at 10-11), and the Second Circuit has affirmed (Mandate at 4-6), that such clause is binding on Quality Print with respect to the carriage involved in this dispute.

¹ At this point in the proceedings, the Court assumes the parties' familiarity with the relevant facts and procedural history and discusses them here only for context. For additional background, the Court refers the parties to the Court's prior opinions at Docket Numbers 37, 52 and 68.

Despite that clause, after Hurricane Katrina in October 2005, Quality Print brought two suits in Panama against Maersk, claiming a total loss of the printing machinery, demanding excessive damages and seeking arrest of two of Maersk's vessels. (SJ Opinion at 4-5, 13-16.) To avoid arrest of its vessels, Maersk was forced to post a \$10,000,000 cash bond as security. (Id. at 4-5.) On May 4, 2009, the Supreme Court of Justice of Panama found that the majority of the \$10,000,000 attachment was unsupported by the evidence and reduced the amount of arrest to \$783,000. (Id. at 6, 26.) In October 2006, Quality Print commenced a third lawsuit in Guatemala. (Id. at 5-6.)

In April 2006, Maersk initiated the instant action. As security for any damage award it received, Maersk also obtained an order of attachment for the EFTs referenced above, which were passing through New York banks en route to or from Quality Print. (Docket No. 4.) In April 2007, Maersk filed a second amended complaint (the "Complaint"), seeking, inter alia:

- Damages, including "interest on the US \$10,000,000 security . . . accruing at a rate of approximately 6.25% per annum, as well as attorneys' fees and costs" (2d Am. Compl. ¶ 46), "arising from the commencement of the actions in Panama [which were] prohibited by [the forum-selection clause]" (SJ Opinion at 7; see also 2d Am. Compl. ¶¶ 42-47 (Second Cause of Action).)
- The same damages resulting from Quality Print's abuse of process in the actions in Panama by wrongfully obtaining excessive security. (2d Am Compl. ¶¶ 48-52 (Third Cause of Action).)

- Attorneys' fees and costs based on Quality Print's bad faith conduct. (Id. ¶¶ 62-63 (Seventh Cause of Action).)

From June 13, 2008 until November 4, 2009, Quality Print was without counsel and, thus, in default in this Court. On December 5, 2008, based on the forum-selection clause, the Court enjoined Quality Print from proceeding with litigation relating to the shipment of the printing press in any forum other than this District (the "Injunction Order"). (Docket No. 52.) Despite Maersk's proper service of the Injunction Order, Quality Print took no action whatsoever in Panama or Guatemala to comply with that Order, continuing the actions there. (See SJ Opinion at 23.)

As noted previously, on August 18, 2009, the Court granted summary judgment for Maersk on the above claims and granted contempt sanctions related to Quality Print's failure to comply with the Injunction Order. Specifically, the Court found that Quality Print had breached the forum-selection clause in the Bill of Lading and that, as a result, Maersk "ha[d] incurred, and continue[d] to incur, substantial damages relating to the \$10 million security it was forced to post to prevent the arrest of its vessels in Panama, as well as substantial attorneys' fees and costs in defending the lawsuits in both Panama and Guatemala." (Id. at 10-11.) Separately, the Court found that Quality Print had committed abuse of process "[b]ecause the

unopposed facts establish[ed] that Quality Print sought extortionate advantage by tying up an unjustifiably large amount of Maersk's property when attachment of a small amount would provide sufficient security for a debt." (Id. at 17 (internal quotation marks omitted).)

With respect to the sanctions motion, the Court found that sanctions "[we]re warranted for both coercive and compensatory purposes, namely, to enforce compliance with the Court's [Injunction Order], and to compensate Maersk for the sizable damages which it continues to incur by virtue of Quality Print's refusal to dismiss the actions in Panama and Guatemala." (Id. at 22.) Specifically, on account of Quality Print's abuse of process and "its continued civil contempt," the Court "assessed damages in the amount of Maersk's interest costs on the \$10 million cash bond through May 4, 2009," the date the Supreme Court of Justice of Panama reduced the bond to \$783,000, and concluded that Maersk was also entitled "to continuing interest costs on the remaining cash bond." (Id. at 26.) Finally, the Court determined that because the Bill of Lading "specifically stipulate[d] that [Quality Print] sh[ould] pay attorneys' fees under certain circumstances" as well as Quality Print's continued noncompliance with the Injunction Order, Maersk was "entitled to judgment on its seventh cause of action in the amount of legal fees [("including attorneys' fees and costs")]

incurred as a result of the enjoined litigation." (Id. at 24-26.)

Following Maersk's submission of declarations regarding the costs of maintaining the Panamanian security and its legal fees related to the foreign law suits, this Court entered judgment for Maersk on October 22, 2009. (Docket Nos. 62 (Lenck Decl. Ex. 11), 71-73 (Lenck Decl. Exs. 8-10), 77 (the "Judgment").) The Court entered judgment in the amounts of \$2,101,768.26, representing interest costs on the \$10,000,000 and \$783,000 cash bonds in Panama "as damages for abuse of process in obtaining excessive security and contempt" and \$477,112.62, representing Maersk's "attorney fees and costs in connection with the enjoined actions in Panama and Guatemala." (Judgment at 3.) The interest awarded on the \$10,000,000 attachment corresponded to a rate of 6% per annum, less than the 6.5% rate asked for as damages in the Complaint. (See Lenck Exs. 8 at ¶ 9, 11 at ¶¶ 3-4; 2d Am. Compl. ¶ 51.) The judgment also directed the garnishee banks holding the attached Quality Print EFTs to release such funds to Maersk to satisfy the Judgment. (Judgment at 3-4.)

On November 4, 2009, Quality Print (at this point, represented by counsel) moved to alter and amend the portion of the judgment related to EFTs, and to vacate the attachment, based on Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte

Ltd., 585 F.3d 58 (2d Cir. 2009). (Docket No. 79.) In a decision on April 14, 2010, the Court acknowledged that Jaldhi invalidated Rule B attachments of EFTs but found that "compelling equitable considerations" entitled Maersk to maintain the attachment (the "Attachment Order"). (Docket No. 87 at 1.)

On September 22, 2010, Quality Print appealed the Injunction and Attachment Orders, Summary Judgment Opinion and Judgment on the bases that this Court lacked admiralty jurisdiction, erred in finding that Quality Print was bound by the forum-selection clause, abused its discretion in enjoining the foreign lawsuits and in finding contempt, and improperly refused to vacate the ETF attachment. (Mandate passim.) On July 7, 2011, the Second Circuit affirmed in part² and vacated in part. (Id.) As noted above, the appellate court vacated the portion of the Judgment which related to the contempt sanction and remanded for clarification about whether that portion was purely punitive "without expressing a view as to whether any change need be made to the judgment amount." (Id. at 8-9 ("[B]ecause the judgment does not distinguish between the

² In its opposition to one of the current motions, Quality Print attempts to reopen an issue already resolved - and rejected - by the Second Circuit: namely, that the Guatemalan action did not implicate the forum-selection clause in the Bill of Lading and so was improperly enjoined by this Court. (See Def.'s Opp. at 4-5; Mandate at 5-6 & n.2; see also Docket No. 33.) The Court refuses to reconsider that issue and adheres to its previous findings as affirmed by the Second Circuit.

damages that accrued before or after the anti-suit injunction, we cannot be sure that the contempt portion is not punitive.".)

The Second Circuit also remanded with directions to order vacatur of the EFT attachment, based on its holding in Jaldhi. (Id. at 9.) The appellate court rejected Maersk's argument (also embodied in the Attachment Order) that this case presented a "narrow exception" to Jaldhi because of, in part, "compelling equitable considerations." It stated, "[w]e have 'specifically forbidden resort to' such 'equitable considerations in addressing motions to vacate pre-Jaldhi attachment orders." (Id. at 10 (quoting Eitzen Bulk A/S v. Ashapura Minechem, Ltd., 632 F.3d 53, 55 (2d Cir. 2011))). On August 10, 2011, in accordance with the Mandate, this Court ordered each garnishee still holding attached funds to release them to Quality Print (the "Vacator Order"). (Docket No. 91.) After the April 2010 Attachment Order, however, Maersk had arranged for the funds to be applied to the judgment, taking them out of the hands of the garnishees. (Lenck Decl. Mot. Compel ¶ 6.)

On November 9, 2011, this action was reassigned to the undersigned. The parties have identified, and briefed, the two outstanding issues: (1) Whether the civil contempt sanction is purely punitive and, as such, should be vacated or modified; and (2) whether the Court should or must order Maersk to return to Quality Print the previously attached funds. (Docket No. 94.)

After reviewing the parties' briefing, and for the reasons set forth below, the Court now GRANTS Maerks's motion to clarify the contempt sanctions, and DENIES Quality Print's motion to compel return of the attached funds.

Motion to Clarify Contempt Sanctions

As set forth in this Court's Summary Judgment Opinion, the imposition of civil-contempt sanctions "may serve [the] dual purposes" of "secur[ing] future compliance with court orders and [] compensate[ing] the party that has been wronged." Paramedics Electromedicina Commercial, Ltda. V. GE Med. Sys. Info. Techs., Inc., 369 F.3d 645, 657 (2d Cir. 2004) (cited at SJ Opinion at 22). "[S]anctions may not be imposed as a purely punitive measure." Paramedics, 369 F.3d at 657. Accordingly, a sanction paid directly to a party, not the Court, "should correspond at least to some degree with the amount of damages." Id.; see also id. ("[S]ome proof of loss must be present to justify [a sanction's] compensatory aspects.") (cited at SJ Opinion at 22). On remand, it is clear that the Judgment here satisfies that standard. The damages awarded by the Court are based on the actual losses sustained by Maersk on its claims and as a result of Quality Print's continued prosecution of the Panamanian and Guatemalan actions after the Injunction Order.

1. Interest Award of \$2,101,768.26 on the Panamanian Bonds

The \$2,101,768.26 judgment "for abuse of process in obtaining excessive security and contempt" is compensatory, corresponding to the costs to Maersk of maintaining the \$10,000,000 bond through May 4, 2009, and the \$783,000 bond thereafter. First, the \$2,088,125 awarded as interest on the \$10,000,000 bond corresponds directly with the harm Maersk claimed - and this Court found - on its third cause of action for abuse of process. (Compare Lenck Decl. Exs. 8 at ¶ 9, 11 at ¶¶ 3-4 and Judgment at 3 with 2d Am. Compl. at ¶ 51.) As discussed above, this Court granted summary judgment for Maersk on its third claim "[b]ecause the unopposed facts establish[ed] that Quality Print sought extortionate advantage by tying up an unjustifiably large amount of Maersk's property when attachment of a small amount would [have] provide[d] sufficient security for a debt." (SJ Opinion at 17 (internal quotation marks omitted).)

To compensate for the harm of "tying up an unjustifiably large amount," the Court "assessed damages in the amount of Maersk's interest costs on the \$10 million cash bond through May 4, 2009, the date on which the Supreme Court of the Republic of Panama reduced Maersk's cash security to \$783,000." (Id. at 26; see also Judgment at 3; Lenck Decl. Exs. 8 at ¶ 9, 11 at ¶¶ 3-4.) Such amount accords with the loss claimed by Maersk in its

complaint (2d Am. Compl. ¶ 51) and is calculated based on the period from when Maersk first posted the bond until the bond was reduced - not based on the date of the Injunction Order (see Lenck Decl. Exs. 8 at ¶ 9, 11 at ¶¶ 3-4).³

Second, the \$13,643.26 awarded as interest on the \$783,000 bond compensates directly for Quality Print's continued contempt of the Injunction Order after May 4, 2009. Had Quality Print properly withdrawn the Panamanian actions consistent with that Order, Maersk would not have had to maintain even the lower bond imposed by the Panamanian Supreme Court. As such, those costs are directly tied to Quality Print's contemptuous conduct.⁴ Thus, because the entire \$2,101,768.26 corresponds to the amount of Maersk's injuries on its third claim and as a result of Quality Print's contempt, it is not purely punitive.⁵ See Paramedics, 369 F.3d at 658.

³ The 6% interest awarded was based on Maersk's representations, accepted by the Court, about the actual cost of having to maintain the security in Panama. (Lenck Decl. Ex. 11 ¶¶ 3-4.) That amount was less, not more, than that claimed in the Complaint as loss. (See 2d Am. Compl. ¶ 51 (seeking 6.5%).) While Quality Print suggests now that this Court should have awarded interest at the post-judgment rate in 28 U.S.C. § 1961(a) (see Def.'s Opp. at 10), the Court agrees with Maersk that "the essence of our situation is not the rate of interest to be applied to a judicial award of damages, but rather the underlying damages themselves" (Pl.'s Reply at 5). Notably, the Court's judgment of the "underlying damages" related to the abuse of process claim was not vacated or reversed on appeal.

⁴ In April 2010, having determined that Quality Print's claims should be pursued only in this District, the Supreme Court of Justice of Panama closed both of the actions in that country and returned the entire cash bond. (Lenck Decl. ¶ 14; Pl.'s Mem. at 7.) At the time of this Court's Summary Judgment Opinion, however, the \$783,000 attachment was still in place.

⁵ Notably, the damages awarded do not include the additional \$1,000,000 in punitive damages Maersk sought on its abuse of process claim. (2d Am. Compl. ¶ 52.)

2. Attorneys' Fees and Costs Award of \$477,112.62

The portion of the Judgment for attorneys' fees and costs related to the enjoined actions in Panama and Guatemala is not explicitly tied to any cause of action or to Quality Print's contempt. (See Judgment at 3; SJ Opinion at 26.) The Summary Judgment Opinion makes clear, however, that Maersk's second and seventh causes of action present two independent bases for recovering such fees and costs as damages. With respect to Maersk's second claim, the Court found that Quality Print, by pursuing the foreign lawsuits, had breached its forum-selection clause. As loss, "Maersk ha[d] incurred, and continue[d] to incur . . . substantial attorneys' fees and costs in defending the lawsuits in both Panama and Guatemala." (SJ Opinion at 10-11, 26.) With respect to Maersk's seventh claim, the Court found that Quality Print was liable for Maersk's fees and costs based on its obligations under the Bill of Lading. (See id. at 24-26.) Neither of those determinations was disturbed on appeal. (See Mandate passim.)

Consistent with the summary judgment determinations, this Court accepted Maersk's evidence of, and awarded, legal fees from the beginning of its lawyers' representations related to the enjoined actions in Guatemala and Panama, not from the date of the Injunction Order. (Compare Judgment at 3 with Lenck Decl. Exs. 8-10.) Maersk, and the Court, also excluded fees

incurred for services unrelated to the foreign law suits. (See Lenck Decl. Ex. 8 ¶ 5; Judgment at 3.) While in its Complaint, Maersk did not explicitly seek compensation for the fees and costs in the Guatemala action (though it sought "such other and further relief as the Court may deem just and proper") (2d Am. Compl. ¶¶ 46, 63, Demand ¶ N), the Federal Rules permit this Court to "grant the relief to which [a] party is entitled, even if the party has not demanded that relief in its pleadings" (Fed R. Civ. P. 54(c)). Thus, because the entire \$477,112.62 corresponds with the amount of damages this Court found Maersk to have sustained on its second and seventh causes of action, it follows that any portion that also constitutes sanctions is necessarily compensatory "at least to some degree." Paramedics, 369 F.3d at 658.

Motion to Compel Return of Attached Funds

Based on the Second Circuit's mandate and this Court's Vacatur Order, Quality Print seeks restitution of its previously attached EFTs. (Def.'s Mem. at 3; see also Mandate at 9-10; Docket No. 91.) Maersk agrees that "when a judgment has been reversed on appeal, a defendant . . . has a cause of action for restitution to recover funds paid under the reversed judgment" (Pl.'s Opp. at 3 (citing Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U.S. 134 (1919))), but argues that restitution is an equitable remedy and, as such, it is entitled

to keep the funds based on equitable considerations (Pl.'s Opp. at 3-4 (citing Atlantic Coastline R & R Co. v. Florida, 295 U.S. 301, 309 (1935); LiButti v. United States, 178 F.3d 114, 120 (2d Cir. 1999))). Quality Print disagrees, contending that the Second Circuit's holding "forbid[ing] resort to . . . equitable considerations in addressing motions to vacate pre-Jaldhi attachment orders" continues to apply where, as here, the previously attached EFTs have already been applied to a judgment at the time of vacatur. (Mandate at 10 (internal quotation marks omitted)); Def.'s Reply passim.) Maersk's position is correct. See Eitzen Bulk A/S, 632 F.3d 53; (see also Pl.'s Opp. at 5 (asserting that an equitable defense in the context of a restitution cause of action is "an entirely separate analysis" from the analysis for vacating a Rule B attachment)).

In Eitzen Bulk A/S, the appellate court "h[e]ld that EFTs attached pre-Jaldhi must be released where the plaintiff obtained a final judgment but ha[d] not executed it against the attached funds that [we]re being retained by banks . . . pursuant to Rule B attachments." 632 F.3d at 54 (emphasis added). In that decision, the Second Circuit made clear that its holding depended on a judgment not having been executed against the funds. Id. at 54-55 & n.2 ("Because the judgment against [defendant] was not executed against the funds, its

finality did nothing to alter the legal basis of the banks' retention.").

Based on Federal Rule 69(a)(1), the appellate court noted that in a federal court in New York, New York C.P.L.R. § 5239 is "operable in an execution of a federal money-judgment." Id. at 55 n.2 (citing Fed. R. Civ. P. 69(a)(1) ("The procedure on execution . . . must accord with the procedure of the state where the court is located.")). Thus, "it would appear that attachments may be vacated at any time before property or debts are actually applied to the satisfaction of a judgment." Eitzen Bulk A/S, 632 F.3d at 55 n.2 (emphasis added). Because, here, the Court's Vacatur Order was issued after the EFTs had actually been released, or applied, to satisfy the judgment (see Lenck Decl. Mot. to Compel ¶ 6; see also Judgment at 3-4), that order was ineffective under New York and, in turn, Federal law (Eitzen Bulk A/S, 632 F.3d at 55 n.2). Accordingly, Quality Print can resort only to restitution (and its equitable analysis), not vacatur based on Jaldhi, to recover the proceeds of its EFTs.⁶

⁶ The Court acknowledges the Second Circuit's recent remand in Mediterranean Shipping Co. SA v. Lee, No. 10-4735, 2012 WL 688498 (2d Cir. Mar. 5, 2012). In that case, the district court entered judgment for the plaintiff, who then obtained a turnover order from the New York Supreme Court to execute on the judgment. Before it could serve that order, however, a bank-garnishee interpleaded the attached EFTs into the court registry. Id. at *2. On remand, the Second Circuit instructed the district court to determine "the fate of the attached funds in light of our post-Jaldhi jurisprudence" and to consider "the effect, if any, of [plaintiff's] attempt to execute against the judgment." Id. Mediterranean Shipping and the cases it cites, however, present a different situation from the one at issue here - and referred to in Eitzen Bulk A/S - in that in none of those cases was the judgment fully

Under the restitution analysis, the Court agrees with Maersk that it has a valid equitable defense to returning the \$270,794.29 it has received from the garnished EFTs.⁷ As recognized by this Court and the Second Circuit, Quality Print has persistently endeavored to evade the lawful, exclusive jurisdiction of this District by filing and maintaining actions in Panama and Guatemala in violation of the binding forum-selection clause and the Injunction Order. Cf. Motorola, 561 F.3d 123, 127-29 (2d Cir. 2009) (refusing to reduce a judgment in an analogous, equitable context because of similar conduct). Based on Quality Print's "indisputabl[e] fail[ure] to comply" with the Injunction Order, the Second Circuit also "identif[ied] no abuse of discretion in th[is] [] court's contempt finding." (Mandate at 8.) Moreover, Quality Print could have - but did not - move for a stay of the Judgment pending appeal by posting a supersedeas bond that would have prevented Maersk's execution. See Fed. R. Civ. P. 62(d). "[A] party's failure to seek a stay pending appeal" is another factor a court may consider when weighing the equities. LiButti, 178 F.3d at 121.

executed against the funds at the bank, nor did the bank actually release the funds into the plaintiff's possession. See id. (citing, e.g., Scanscot Shipping Servs. GmbH v. Metales Tracomex Ltda, 617 F.3d 679, 682 (2d Cir. 2010); India S.S. Co. Ltd. v. Kobil Petroleum Ltd., 620 F.3d 160 (2d Cir. 2010)). Accordingly, at least until a controlling decision from the Second Circuit comes down in Mediterranean Shipping, this Court follows what it believes to be the directly relevant, guidance in Eitzen Bulk A/S.

⁷ Of note, Quality Print has not even attempted to argue that the equities favor restitution in its motion papers. (See Def.'s Mem. and Reply passim.)

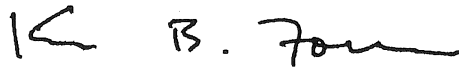
Accordingly, because the former EFTs are no longer attached, but rather applied to the Judgment, and because of Quality Print's unclean hands and bad faith, the Court refuses to compel the return of those funds.

CONCLUSION

For the reasons set forth above, the Court GRANTS Maersk's motion to clarify the contempt sanctions, and DENIES Quality Print's motion to compel return of the previously attached funds.

The Clerk of Court is directed to terminate the motions at Docket Numbers 95 and 99 and to close this case.

Dated: New York, New York
July 30, 2012



KATHERINE B. FORREST
United States District Judge