UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRONT CARRIERS LTD.,

Plaintiff,

-v-

TRANSFIELD ER CAPE LTD.,

Defendant.

Case No. 07 Civ. 6333 (RJS)
ORDER

RICHARD J. SULLIVAN, District Judge:

On October 25, 2007, the Court issued an Order for Process of Maritime Attachment and Garnishment ("PMAG") in this matter in the amount of $15,101,338 against all property of the Defendant that may be found within this District. After Plaintiff successfully attached the full amount of assets it sought, all in the form of electronic fund transfers ("EFTs"), Defendant obtained an Order from this Court on November 16, 2007 requiring Plaintiff to post security for Defendant's counterclaim in the amount of $5,210,280. At that point, the parties agreed to place all funds in an escrow account (the "Escrow Account") governed by an agreement (the "Escrow Agreement"). This was accomplished by a Court Order dated January 30, 2008.

On October 16, 2009, the Second Circuit issued its ruling in *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58 (2d Cir. 2009), which overruled *Winter Storm Shipping v. TPI*, 310 F.3d 263 (2d Cir. 2002), and held that EFTs were no longer attachable property for purposes of Rule B. One month later, on November 13, 2009, the Second Circuit concluded that *Jaldhi* applied retroactively to EFTs already attached pursuant to Rule B. *See Hawknet Ltd. v. Overseas Shipping Agencies*, --- F.3d ----, 2009 WL 3790654, at *2-3 (2d Cir. Nov. 13, 2009). Despite "a general presumption against the retroactive application of statutes and regulations," the Second Circuit

concluded that because *Jaldhi* "directly affects how the district court may obtain personal jurisdiction," it must be applied retroactively. *Id.* at *2; *see also Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 349 (1981) ("By definition, a jurisdictional ruling may never be made prospective only.").

By Orders dated October 20 and 23, 2009, the Court directed Plaintiff to address the Second Circuit's ruling in *Jaldhi* and its application to this case. The Court is now in receipt of Plaintiff's letter, dated November 16, 2009 (Pl.'s *Jaldhi* Letter), as well as Defendant's response of November 24, 2009 (Def.'s *Jaldhi* Letter), and Plaintiff's reply of November 25, 2009. The Court heard oral argument on December 11, 2009. For the reasons that follow, the Court concludes that the attachment was improper under *Jaldhi* and that the funds must be released.

Plaintiff contends that *Jaldhi* does not compel the release of the funds for four reasons: (1) after the funds were initially attached, they were placed in a segregated account, became subject to attachment even under *Jaldhi*, and were in fact attached again (Pl.'s *Jaldhi* Letter at 3); (2) the funds were also validly attached once placed in the Escrow Account (*id.*); (3) the Escrow Agreement contractually binds the parties to maintain and dispose of the funds in accordance with the terms of the Escrow Agreement (*id.*); and (4) equitable considerations require that the Court continue the attachment in this case. Additionally, at oral argument, Plaintiff presented a new, novel argument: that $5.4 million of the attached funds were attached while at correspondent banks rather than intermediary banks and thus are not within the reach of *Jaldhi*. The Court finds none of these arguments persuasive.

As an initial matter, the remedies available under admiralty law are equitable in nature and, accordingly, are subject to equitable considerations. *See Greenwich Marine, Inc. v. S. S. Alexandra*,

339 F.2d 901, 905 (2d Cir. 1965) ("The inherent power to adapt an admiralty rule to the equities of a particular situation is entrusted to the sound discretion of the district judge sitting as an admiralty court."); *cf. Chiquita Intern. Ltd. v. MV BOSSE*, 518 F. Supp. 2d 589, 597-98 (S.D.N.Y. 2007) ("Courts . . . have an 'inherent authority to vacate an attachment upon a showing of any improper practice or a manifest want of equity on the part of plaintiff.'" (quoting *Maersk, Inc. v. Neewra, Inc.*, 443 F. Supp. 2d 519, 528 (S.D.N.Y. 2006))).

Plaintiff's first and second arguments, that the funds became attachable once moved into a suspense account by the bank or into the Escrow Account by the parties, have been routinely rejected by courts in this District. *See, e.g.*, *Sinope Shipping Co. v. Indus. Carriers Inc.*, No. 08 Civ. 8999 (DC), 2009 WL 4908295, at *1 (S.D.N.Y. Dec. 16, 2009) ("Plaintiff may not make an end-run around *Jaldhi* by arguing that the EFT funds were converted into attachable property and then properly reattached."); *HC Trading Intern. Inc. v. Crossbow Cement, SA*, No. 08 Civ. 11237 (JGK), 2009 WL 4337628, at *1 (S.D.N.Y. December 02, 2009) (rejecting argument that EFTs attached and then placed in escrow became attachable); *Western Bulk PTE Ltd. v. Inspat Industries Ltd.*, No. 08 Civ. 9776 (WHP), 2009 WL 4039435, at *1 (S.D.N.Y. 2009) (same for Court Registry Investment System ("CRIS") account); *cf. Panamax Bulk AS v. Dampskibsselskabet Norden AS*, No. 08 Civ. 8601 (JSR), 2009 WL 3853422, at *1 (S.D.N.Y. Nov. 18, 2009) ("[S]ince deposit of the CRIS funds was the direct result of the attachment of the EFTs and would not otherwise have occurred, and since it is now clear that the Court lacked jurisdiction to attach the EFTs, the CRIS deposit was essentially made on the basis of that error and should now be released."). This Court agrees that "[n]o alchemy by the parties transformed EFTs that do not provide personal jurisdiction over the defendant under Rule B into a basis for this Court's jurisdiction over the defendant." *HC Trading*, 2009 WL

4337628, at *1. Accordingly, neither service of the PMAG upon the suspense account nor upon the Escrow Account could cure the infirmity of the original attachment.

Plaintiff's third argument, that "FCL and Transfield entered into legally valid and binding Escrow Agreements under which they are contractually bound to maintain and dispose of the funds in accordance with the terms of the Escrow Agreements" (Pl.'s *Jaldhi* Letter), is equally unavailing. The Escrow Agreement specifically states that "[t]his agreement, in no way, shall prejudice the rights of either Party to seek any remedy that is available to it under the Supplemental Rules for Certain Admiralty and Maritime Claims." (Decl. of Sau Kong Ex. 3 (Escrow Agreement) ¶ 8.) Accordingly, the language of this clause alone is enough to preserve Defendant's challenge to the propriety of the original attachment. The Second Circuit addressed a similar situation in *Hawknet*. There, the plaintiff argued that the defendant had waived its personal jurisdiction objection by failing to raise it initially. *Hawknet*, 2009 WL 3790654, at *2. The Court rejected plaintiff's argument and concluded that "a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made." *Id.* (quoting *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981)). This Court does not find that the Escrow Agreement constituted a waiver of Defendant's objections to the validity of the underlying attachment. *See HC Trading*, 2009 WL 4337628, at *1.[1]

[1] The Court also rejects Plaintiff's argument that Defendant's subsequent registration with the New York Secretary of State cured any jurisdictional problem and obviates the need to release the funds. While Defendant's registration may now give the Court personal jurisdiction over Defendant, it does not cure the original defect in the attachment of the EFTs. Nothing in *Hawknet* commands that the Court continue an invalidly obtained attachment because, in reliance upon *Winter Storm*, a party subsequently submitted itself to the jurisdiction of this Court. In fact, the lesson of *Hawknet* is exactly the opposite.

Plaintiff next argues that this Court should decline to release the attached funds based on equitable considerations, including both parties' reliance on the Escrow Agreement. This argument is also unpersuasive. Indeed, it is difficult to see why the parties' execution of an escrow agreement following an attachment of funds now recognized to be improper should somehow alter the equities in Plaintiff's favor. Such an argument would, in essence, penalize Defendant and reward Plaintiff vis-à-vis litigants in other maritime cases simply because the parties deemed it expedient and efficient to execute an escrow agreement when confronted with a pre-*Jaldhi* attachment. Such a result would appear on its face to be manifestly inequitable. Accordingly, like other Rule B cases recently decided in this District, Plaintiff's equitable argument is insufficient to avoid release of the funds. *See, e.g.*, *BHP Billiton Marketing Inc. v. Jinyang Shipping Co. Ltd.*, No. 09 Civ. 1399 (NRB), 2010 WL 184685, at *1 (S.D.N.Y. Jan. 14, 2010); *Bulk Atlantic, Inc. v. Humara Shipping Agency*, No. 08 Civ. 8408 (LBS), 2010 WL 126007, at *1 (S.D.N.Y. Jan. 13, 2010); *Wind Container Leasing Ltd. v. C & Line Co., Ltd.*, No. 08 Civ 10540 (LBS), 2010 WL 126006, at *1 (S.D.N.Y. Jan. 13, 2010); *Navision Shipping A/S v. Young He Shipping (HK) Ltd.*, No. 07 Civ. 9517 (DC), 2009 WL 4911404, at *2 (S.D.N.Y. Dec. 17, 2009).

Finally, at oral argument held on December 11, 2009, Plaintiff argued for the first time that at least $5.4 million of the attached funds should remain attached because the funds were attached while at a correspondent bank, rather than at an intermediary bank. (*See* Pl.'s Letter, Dec. 14, 2009 at 2.) A correspondent account is simply an account in a domestic bank held by a foreign bank through which dollar denominated transactions are effectuated. *See Sigmoil Res., N.V. v. Pan Ocean Oil Corp. (Nigeria)*, 650 N.Y.S.2d 726, 727 (1st Dep't 1996). However, as *Sigmoil* makes clear,

"[n]either the originator who initiates payment nor the beneficiary who receives it holds title to the funds in the account at the correspondent bank." *Id.* In fact, *Jaldhi* cites to this precise passage of *Sigmoil* for the proposition that neither the beneficiary nor originator of an EFT has sufficient interest in the property for purposes of Rule B attachment. *See Jaldhi*, 585 F.3d at 81. Accordingly, there is no basis for maintaining the attachment of the $5.4 million from the correspondent bank.

For the reasons stated above, the Court orders that the attachment is hereby vacated and that the funds held in the Escrow Account shall be immediately released to Defendant.

SO ORDERED.

Dated: New York, New York
January 27, 2009

RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE