

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ARABIAN GAS AND OIL
DEVELOPMENT COMPANY,

Plaintiff,

v.

WISDOM MARINES LINES, S.A., et al.,

Defendants.

Case No. [16-cv-03801-DMR](#)

**ORDER RE: SPECIALLY APPEARING
DEFENDANTS' MOTION TO
INCREASE UNDERTAKING**

Re: Dkt. No. 57

Specially Appearing Defendants Wisdom Marine Lines, S.A. and Wisdom Marine Lines Co. (“Defendants”) move for an order to increase the undertaking posted by Plaintiff Arabian Gas and Oil Development Company (“Plaintiff”) by an additional \$186,804.05. [Docket No. 57]. Plaintiff opposes. [Docket No. 59]. Having considered the parties’ papers and oral argument, Defendants’ motion to increase the undertaking is **GRANTED IN PART** and **DENIED IN PART**. Plaintiff shall post an additional undertaking in the amount of \$171,804.05 within 14 days of this order.

I. FACTS & PROCEDURAL HISTORY

The dispute underlying this attachment action relates to a ship that Defendant Wisdom Marine Lines, S.A. (“Wisdom S.A.”) sold to Plaintiff. Plaintiff alleges that the ship is defective. The parties initiated arbitration proceedings in London. Compl. at ¶¶ 22-24 [Docket No. 1]. In the arbitration, Wisdom S.A. requests that Plaintiff be ordered to pay the balance of the purchase price for the ship, and that Plaintiff take possession of the ship. Compl. at ¶ 23; Defendant’s Claim Submission [Ex. 3 to Compl.]. Plaintiff filed a counterclaim, seeking a declaration that the Memorandum of Agreement regarding the sale of the ship is unenforceable. Compl. at ¶ 24; Plaintiff’s Defense and Counterclaim [Ex. 4 to Compl.].

On July 7, 2016, Plaintiff filed a verified complaint and an ex parte application for a writ

United States District Court
Northern District of California

1 of attachment to attach a ship owned by Wisdom S.A. as security for the London arbitration
2 proceedings. That vessel is named the Global Faith, IMO Number 9554169 (“Global Faith”), and
3 was located within the court’s jurisdiction at the time Plaintiff filed its application for the writ of
4 attachment. See Ex Parte Application for Writ of Attachment [Docket No. 3]. The court granted
5 Plaintiff’s ex parte application. See 7/8/16 Order [Docket No. 14]. Plaintiff thereafter posted the
6 statutory undertaking of \$10,000.00. See Special Bond [Docket No. 17]; see also Cal. Code Civ.
7 Pro. § 498.220(a) (“the amount of an undertaking filed pursuant to this article shall be ten
8 thousand dollars (“\$10,000”)”). The court issued a writ of attachment and the Global Faith was
9 arrested pursuant to the writ on July 11, 2016 and transferred to a substitute custodian. See Writ
10 of Attachment [Docket No. 19]; Declaration of Arrest [Docket No. 20].

11 On July 20, 2016, Defendants moved to dismiss Plaintiff’s verified complaint and, in the
12 alternative, to set aside the writ of attachment and to release the Global Faith. See Defs’ Mot. to
13 Dismiss [Docket No. 28]. Defendants also moved, in the alternative, to increase the amount of
14 Plaintiff’s undertaking to \$315,000.00. See Defs’ Mot. to Dismiss at 17-18; Notice of Objection
15 to Bond Amount [Docket No. 35]. The court thereafter ordered the parties to submit supplemental
16 briefing on issues related to the then-pending motion to dismiss. 8/1/16 Order Requesting
17 Supplemental Briefing [Docket No. 47]; Plaintiff’s Supplemental Briefing [Docket No. 50];
18 Defendants’ Supplemental Briefing [Docket No. 51].

19 On August 4, 2016, the court held a hearing at which it set aside the attachment order,
20 quashed the writ of attachment, and ordered the immediate release of the Global Faith. 8/4/16
21 Order setting aside the Right to Attach Order, quashing the Writ of Attachment, and releasing the
22 vessel from attachment [Docket No. 52]; 8/14/16 Minute Order [Docket No. 53]. The court
23 denied Defendants’ request to increase the undertaking, but instructed Defendants that they could
24 file a separate motion to increase the undertaking to cover any losses they were likely to incur if
25 the Global Faith’s attachment was ultimately deemed wrongful. 8/4/16 Hearing Trans. at 34:20-
26 35:24 [Docket No. 56].

27 On September 29, 2016, Defendants filed the instant motion to increase Plaintiff’s
28 undertaking by \$186,804.05, which represents the attorneys’ fees and costs Defendants incurred in

1 defeating Plaintiff’s writ of attachment of the Global Faith. See Defs’ Mot. to Increase
2 Undertaking [Docket No. 57]. Plaintiff opposes. See Opp’n to Mot. to Increase Undertaking
3 [Docket No. 59].

4 **II. DISCUSSION**

5 **A. Probable Recovery for Wrongful Attachment**

6 Defendants move to increase Plaintiff’s undertaking by \$186,804.05 pursuant to Cal. Civ.
7 Pro. Code § 490.020(a). They argue that such an increase is appropriate because that amount
8 represents their “probable recovery” for wrongful attachment of the Global Faith, consisting of the
9 attorneys’ fees and expenses they incurred in defeating the attachment. Plaintiff proffers a myriad
10 of arguments¹ against increasing the undertaking which are discussed below, but at the hearing,
11 Plaintiff stressed that the main reason Defendants’ motion should be denied is because Defendants
12 cannot establish that they are more likely to prevail in the London arbitration proceedings than
13 Plaintiff, and therefore cannot show that their recovery for wrongful attachment is “probable.”

14 Since the key arguments turn on the interpretation of California’s attachment statutes, the
15 court begins with the overall framework and language of California’s attachment statutes.

16 **1. California Attachment Statutes**

17 In attachment proceedings, federal courts apply the “law of the state where the court is
18 located.” See Fed. R. Civ. P. 64. California law requires courts to strictly construe the attachment
19 statutes. See *Jordan-Lyon Prods., Ltd. v. Cineplex Odeon Corp.*, 29 Cal. App. 4th 1459, 1466
20 (1994) (“[The court’s] starting point is the rule that the Attachment Law statutes (Code Civ.
21 Proc., § 481.010 et seq.) are subject to strict construction because they are purely the creation of
22 the Legislature.”) (quoting *Vershow v. Reiner*, 231 Cal. App. 3d 879, 882 (1991)); *Rose v.*
23 *Abraham*, No. CIV F 08-606 AWI SMS, 2008 WL 2127996, at *1 (E.D. Cal. May 20, 2008)
24 (collecting California cases regarding the same).

25 _____
26 ¹ At the August 4, 2016 hearing, the court held that it had subject matter jurisdiction over this
27 action under Section 202 of the Federal Arbitration Act. See 8/4/16 Hearing Trans. [Docket No.
28 56] at 26:19-27:20. In its opposition, Plaintiff argues that this court lacks jurisdiction because the
court vacated the writ of attachment and the Global Faith is no longer within the court’s territorial
waters. However, at the hearing on the instant motion, Plaintiff conceded that the court already
ruled on the existence of subject matter jurisdiction, and withdrew its jurisdictional argument.

1 Accordingly, an attachment is wrongful only under the circumstances specified in
2 California Code of Civil Procedure Section 490.010(b). One such circumstance occurs where an
3 attachment is levied “in an action where the plaintiff does not recover judgment.” Cal. Civ. Pro.
4 Code § 490.010(b); see, e.g., *Universal Trading & Inv. Co. v. Kiritchenko*, No. C-99-3073 MMC,
5 2010 WL 4010232, at *3 (N.D. Cal. Oct. 13, 2010) (plaintiff’s attachment was wrongful because
6 defendant prevailed on summary judgment).

7 “Where a plaintiff causes a wrongful attachment,” a defendant may recover “ ‘(1) [a]ll
8 damages proximately caused to the defendant by the wrongful attachment’; and “(2) [a]ll costs
9 and expenses, including attorney’s fees, reasonably expended in defeating the attachment.’”
10 *Universal Trading & Inv. Co.*, 2010 WL 4010232, at *2 (quoting Cal. Civ. Pro. Code
11 § 490.020(a)). However, the defendant’s recovery for wrongful attachment is limited to the
12 amount of the undertaking posted by Plaintiff. See Cal. Civ. P. § 490.020(b).

13 A defendant may move to increase the amount of an undertaking pursuant to California
14 Code of Civil Procedure Section 489.220(b). Under section 489.220(b), a court must first
15 determine whether the defendant’s probable recovery for wrongful attachment exceeds the amount
16 of the posted undertaking. Cal. Civ. Proc. Code § 489.220(b). If so, then the court “shall order
17 the amount of the undertaking increased to the amount [the court] determines to be the probable
18 recovery for wrongful attachment if [the attachment] is ultimately determined that the attachment
19 was wrongful.” *Id.*

20 **2. Analysis**

21 The parties agree that Plaintiff’s attachment of the Global Faith will be considered
22 wrongful only if Plaintiff does not recover judgment in the London arbitration proceedings. See
23 Cal. Civ. Pro. Code § 490.010(b). If the attachment ultimately is deemed wrongful, Defendants
24 will be entitled to seek all damages proximately caused by the wrongful attachment, including
25 attorneys’ fees reasonably expended in defeating the attachment. See Cal. Civ. Pro. Code
26 § 490.020(a).

27 The parties disagree on what Defendants must show to establish “probable recovery for
28 wrongful attachment” in order to increase Plaintiff’s undertaking pursuant to section 489.220(b).

1 Defendants contend that the phrase “probable recovery” focuses on a determination of the amount
2 of money to which Defendants will likely be entitled if the attachment of the Global Faith is
3 deemed wrongful. Plaintiff posits a different interpretation. Plaintiff claims that the phrase
4 “probable recovery” refers to a merits-based inquiry that focuses on the likelihood that Defendants
5 will prevail in the London arbitration proceedings. As such, Plaintiff argues that in order to
6 support an increase in the undertaking, Defendants must show that they are likely to prevail, or
7 that it is “probable” that they will prevail in the London arbitration proceedings.

8 The court turns, as it must, to the language of the statute. Section 489.220(b) states that
9 “if, upon objection to the undertaking, the court determines that the probable recovery for
10 wrongful attachment exceeds the amount of the undertaking, it shall order the amount of the
11 undertaking increased to the amount it determines to be the probable recovery for wrongful
12 attachment if it is ultimately determined that the attachment was wrongful.” Cal. Civ. Proc. Code
13 § 489.220(b). On the one hand, the statute could be interpreted as requiring a determination of the
14 likely amount of the recovery for wrongful attachment, and whether it exceeds the amount of the
15 posted undertaking. This interpretation is bolstered somewhat by the fact that the Legislature has
16 used clear language in the text of the attachment statute when it has required a court to evaluate
17 the merits of the underlying claim. For example, the Legislature has specified that a court must
18 issue a writ of attachment when it makes four statutory findings, including that the “plaintiff has
19 established the probable validity of the claim upon which the attachment is based.” Cal. Civ. Pro.
20 Code § 484.090 (emphasis added). No similar language exists in section 489.220(b).

21 On the other hand, the language of section 489.220(b) is not expressly limited to a purely
22 monetary evaluation. Moreover, the text of the statute does not preclude a court from considering
23 the merits of the underlying action in determining a defendant’s “probable recovery for wrongful
24 attachment.” As such, the court finds that the term “probable recovery” is ambiguous.

25 At least one court is in agreement with this conclusion. See *N. Hollywood Marble Co. v.*
26 *Superior Court*, 157 Cal. App. 3d 683, 688 (1984) (explaining that “[t]here is ambiguity and
27 uncertainty as to precisely what the Legislature intends a trial court to consider in determining
28 ‘probable recovery for wrongful attachment’ under section 489.220(b)). In *N. Hollywood Marble*

1 Co., which neither party cited, the California Court of Appeal held that the term “probable
2 recovery” in section 489.220(b) should be construed as giving the trial court discretion to consider
3 the probability of a plaintiff prevailing in the underlying action in determining a defendant’s
4 “probable recover for wrongful attachment” under section 489.220(b) and, accordingly, denied the
5 defendant’s motion to increase the plaintiff’s undertaking because the defendant effectively
6 conceded the merits of the plaintiff’s claim. Id. at 688. N. Hollywood Marble Co. is well-
7 reasoned and highly instructive, and the court finds it appropriate to discuss the opinion at length
8 here.

9 In N. Hollywood Marble Co., the plaintiff sued the defendant for breach of contract,
10 obtained a right-to-attach order to seize inventory, equipment, and supplies of defendant’s
11 business equal to the amount of plaintiff’s breach of contract claim, and posted the statutory
12 undertaking. Id. at 686. The defendant moved to increase the plaintiff’s undertaking pursuant to
13 section 489.220(b). Id. The trial court denied the defendant’s motion, finding that “section
14 489.220[b] contemplates the trial court’s consideration of the probable validity of the plaintiff’s
15 claim in the process of determining the ‘probable recovery’ of defendant for ‘wrongful
16 attachment.’” Id. at 688.

17 On appeal, the defendant argued that the trial court was precluded from considering the
18 “probable validity of the plaintiff’s claim” in determining its “probable recovery for wrongful
19 attachment” under section 489.220(b). Id. at 689, 691. Like Defendants here, the defendant in N.
20 Hollywood Marble Co. advanced a reading of section 489.220(b) that was confined to a
21 determination of a monetary amount. Id. at 689. As explained by the California Court of Appeal,
22 under the defendant’s posited reading of section 489.220, a court should simply assume the
23 attachment is wrongful and increase the undertaking to the “total damages [or amount the]
24 defendant competently demonstrates it is likely to sustain from the attachment.” 157 Cal. App. 3d
25 at 689. “This reading, in effect, equates ‘probable recovery’ with ‘probable loss.’” Id.

26 The N. Hollywood Marble Co. court rejected the defendant’s construction of section
27 489.220(b) as contrary to the purpose of the attachment remedy. Id. at 689-91. As stated by the
28 court, the purpose of the attachment procedure is to protect an unsecured creditor plaintiff from the

1 dissipation of the defendant’s assets before the plaintiff can obtain and enforce a judgment against
2 the defendant, by allowing the plaintiff to attach certain assets in satisfaction of the plaintiff’s
3 claim. *Id.* at 690. This purpose would be frustrated by the defendant’s proffered construction of
4 489.220, because a plaintiff would then be required to unnecessarily finance a “massive
5 undertaking on a claim of certain merit.” *Id.* at 690. Under the specific facts of Hollywood
6 Marble Co., the court concluded that enforcing a literal interpretation of section 489.220 would
7 lead to an absurd result in the case before it, because the defendant had essentially conceded the
8 merits of plaintiff’s underlying claim. *Id.* at 691.

9 Instead, the court adopted a more expansive construction of the term “probable recovery.”
10 It construed the term as giving “the trial court discretion to consider . . . the probability that
11 plaintiff will prevail on his claim in the action” in determining a defendant’s probable recovery for
12 wrongful attachment. *Id.* at 689, 691-62. The court concluded that the “ambiguous language of
13 section 489.220, subdivision (b), does not reflect a clear legislative intent to divest trial courts of
14 [their inherent discretion] and to preclude the consideration of facts that are critical to the purpose
15 of attachment.” *Id.* at 692.

16 Applying the principles in *N. Hollywood Marble Co.*, this court finds no evidence in the
17 record to suggest that Plaintiff is more likely to prevail in the London arbitration proceedings than
18 Defendants. The court set aside the writ of attachment because Plaintiffs submitted conclusory
19 declarations in opposition to Defendants’ motion to set aside the writ. Such declarations did not
20 demonstrate the probable validity of Plaintiff’s claim in the London arbitration proceedings. See
21 8/4/16 Hearing Trans. at 16:8-17:22; 18:7-19:6; 28:21-32:17. [Docket No. 56]. As such, the court
22 finds that the amount of Plaintiff’s undertaking should be increased to provide security to
23 Defendants for a potential wrongful attachment claim in the event that Plaintiff does not recover
24 judgment in the London proceedings.

25 **B. The Amount of the Increase in the Undertaking**

26 The court now determines whether the requested increase in the amount of the undertaking
27 is appropriate.

28 //

1 counsel to increase the undertaking to include these fees and costs in the amount of \$115,884.05.
2 The Declaration of James A. Marissen attests that the Keesal firm spent over 370 hours
3 researching issues and preparing motions related solely to Plaintiff's writ of attachment, which
4 included gathering evidence from English, Baharaini, and Taiwanese counsel. See Marissen Decl.
5 at ¶¶ 6-7. The record supports this description of the work performed, and shows that Defendants
6 filed a (1) motion to dismiss Plaintiff's verified complaint and to set aside the writ of attachment,
7 which included a number of exhibits and declarations including a declaration from Baharaini
8 counsel, and (2) a supplemental brief which included an analysis of Taiwanese law. See Defs'
9 Mot. to Dismiss [Docket No. 28]; Amin Decl. [Docket No. 28-9]; Defs' Supplemental Briefing at
10 6 [Docket No. 49].

11 With respect to the work performed by Defendants' English counsel (\$40,850.00), the
12 court also finds there is sufficient support for an increase in the undertaking to include these fees.
13 Defendants contend that it was necessary to enlist English counsel because they were moving to
14 set aside the attachment on the ground that Plaintiff failed to show that it was likely to prevail in
15 the London arbitration proceedings. See Marissen Decl. at ¶ 11. This required research into the
16 London arbitration proceedings, and obtaining declarations from English counsel on points of
17 English law and the facts of the underlying dispute. *Id.* The record shows that Defendants moved
18 to set aside the attachment on that ground, and submitted two declarations from English counsel in
19 support of its motion. See Defs' Mot. to Dismiss at 13-16 [Docket No. 28]; Dunlop Decl. [Docket
20 No. 28-7]; Dunlop Reply Decl. [Docket No. 44-6].

21 Regarding the work performed by Baharaini counsel (\$13,300.00) and Taiwanese counsel
22 (\$1,000.00), the court similarly finds that there is sufficient support for an increase in the
23 undertaking to include these fees. Defendants assert that they retained Baharaini counsel to
24 research Baharaini law and Plaintiff's corporate status in connection with its motion to dismiss.
25 See Marissen Decl. at ¶ 12. The record shows that Defendants moved to dismiss on the ground
26 that Plaintiff lacked the capacity to sue under the law of Baharaini, and provided two declarations
27 from Baharaini counsel. See Mot. to Dismiss at 8-10 [Docket No. 28]; Amin Decl. [Docket No.
28 28-9]; Amin Reply Decl. [Docket No. 45]. Defendants also state that they retained Taiwanese

1 counsel to respond to this court’s request for supplemental briefing on whether the United
2 Kingdom’s arbitration decisions were enforceable in Taiwan. See Marissen Decl. at ¶ 13. The
3 record shows that Defendants responded to the court’s request for supplemental briefing of the
4 enforceability of the United Kingdom’s arbitration decisions in Taiwan. See Defs’ Supplemental
5 Briefing at 6 [Docket No. 49].

6 Regarding the fees for the Brookes Bell surveyor firm (\$740.00), the court also finds it
7 appropriate to increase the undertaking to include these fees. Defendants submitted a declaration
8 from the Brookes Bell firm in support of its motion to dismiss in order to refute Plaintiff’s claim
9 that the vessel in the underlying dispute is defective. See Eijkelenboom Decl. (Docket No. 44-4);
10 Marissen Decl. at ¶ 14.

11 With respect to the fees and costs incurred in connection with the instant motion as well as
12 for the anticipated motion for actual damages for wrongful attachment (\$15,000.00), unlike the
13 other categories of fees and expenses, the court finds that Defendants have not explained how they
14 fit into either category of damages allowable under section 490.020(a). Section 490.020(a) limits
15 a defendant’s damages for wrongful attachment to those damages either “proximately caused” by
16 the wrongful attachment or those “reasonably expended” in defeating the attachment. See Cal.
17 Civ. Pro. Code § 490.020(a). It is not clear that fees and costs connected with the preparation of
18 undertaking-related motions are recoverable under Section 490.020(a). As the court must strictly
19 construe the attachment statutes, and as Defendants did not provide any support for this portion of
20 their request, the court declines to allow these fees and costs for the purpose of increasing
21 Plaintiff’s undertaking.

22 In sum, the court finds there is sufficient information to increase the undertaking by
23 \$171,804.05. The court underscores that it is not making a finding regarding the reasonableness
24 of these fees. Rather, the court is making a preliminary determination of probable recovery, based
25 on the record before it, as to the amount by which Plaintiff’s undertaking should be increased
26 pursuant to section 489.220(b).

27 **C. Miscellaneous Arguments**

28 Plaintiff makes a number of miscellaneous arguments throughout its opposition. None of

1 these arguments are persuasive. Outside of its statutory argument which is discussed above,
2 Plaintiff's other main contention is that the court should deny Defendants' motion as a procedural
3 matter because the court denied Defendants' previous request to increase the undertaking. See
4 Opp'n at 5. Plaintiff misconstrues the record. The court told Defendants that they could file a
5 separate motion to increase the undertaking to cover any losses they were likely to incur if the
6 vessel's attachment was deemed wrongful. Defendants have now done this. See 8/4/16 Hearing
7 Trans. at 34:20-35:25 [Docket No. 56]; Defs' Mot. to Increase Undertaking [Docket No. 57]. In
8 any event, a court is not precluded from considering a successive motion to increase an
9 undertaking to account for new or additional damages. See *Tiffany Prods. of Cal. v. Superior*
10 *Court*, 131 Cal. App. 729, 735-36 (Cal. Dist. Ct. App. 1933) (explaining that a court may consider
11 a successive motion to increase undertaking based on new or additional damages suffered by a
12 party).

13 Plaintiff next argues that Defendants' motion should be denied because Defendants did not
14 suffer any actual damages, as the Global Faith's operations were not restricted during the period of
15 attachment. See Opp'n at 4. As discussed above, California law does not restrict an increase in
16 an undertaking to "actual damages;" it expressly permits Defendants to recover all fees and costs
17 including attorneys' fees "reasonably expended" in defeating the attachment, as well as all
18 damages proximately caused by the wrongful attachment. See Cal. Civ. Pro. Code
19 § 490.020(a).

20 Lastly, Plaintiff asserts that Defendants should not be permitted to seek relief before this
21 court because they have alternative avenues to recover their attorneys' fees, namely the London
22 arbitration proceedings and the Global Faith's ship insurance which purportedly covers legal costs
23 and attorneys' fees. See Opp'n at 4, 6. This argument misses the point. Defendants are not
24 moving for an award of actual damages for wrongful attachment at this point, nor could they, since
25 the London arbitration proceedings are ongoing. Instead, Defendants are requesting that the court
26 order Plaintiff to post a greater undertaking to cover the attorneys' fees and expenses incurred by
27 Defendants in defeating the attachment proceedings, as security in the event that the attachment is
28 ultimately deemed wrongful.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. CONCLUSION

In conclusion, the court grants in part and denies in part Defendants' motion to increase the undertaking. Plaintiff shall post an additional undertaking in the amount of \$171,804.05 within 14 days of the issuance of this order.

IT IS SO ORDERED.

Dated: March 30, 2017

