UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TECO GUATEMALA HOLDINGS, LLC Petitioner, v. REPUBLIC OF GUATEMALA. Respondent.	)	**Civ. No._____.**

MEMORANDUM IN SUPPORT OF RESPONDENT'S EMERGENCY MOTION TO VACATE RESTRAINING NOTICE

Respondent, the Republic of Guatemala ("Guatemala" or the "Republic"), by and through its undersigned counsel, hereby files this memorandum of law in support of its Emergency Motion to Vacate the Restraining Notice to the Garnishee ("Restraining Notice"), issued on the Bank of New York Mellon Corporate Trust Administration ("BNYM") on November 2, 2020, and in support thereof, states as follows:

INTRODUCTION

Under N.Y. C.P.L.R. § 5201(b), a money judgment may only be enforced against property "which could be assigned or transferred" by the judgment debtor. The Restraining Notice issued by TECO Guatemala Holdings LLC. ("TECO") fails this basic standard and numerous others, requiring vacatur:

- The Restraining Notice targets Guatemala's interest payments on its sovereign bonds, but this money falls plainly outside § 5201(b) because BNYM is holding the money in trust for the bondholders. Numerous courts have repeatedly held such funds are not subject to attachment. *See e.g. EM Ltd v. Republic of Argentina*, 865 F. Supp. 2d 415, 423 (S.D.N.Y. 2012); *Petrohawk Energy Corp. v. Law Debenture Trust Co. of New York*, 2007 WL 211096, *4 (S.D.N.Y. January 29, 2007).

- By observing no limits in its scope, the Restraining Notice impermissibly tries to seize immune assets. *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993).

- No Restraining Notice can be proper because TECO never followed the proper procedure to begin execution against Guatemala, a "foreign state" as defined by the Foreign Sovereign Immunities Act. *Northrop Grumman Ship Systems Inc v. Ministry of Defense of the Republic of Venezuela*, Case No. 02-cv-785, ECF No. 441, at 7 (S.D. Miss. July 23, 2020).

In addition, this Court should decide this Motion on an emergency basis. TECO knows (or should know) that bond payments held in trust are not subject to attachment, yet TECO delivered the Restraining Notice less than 24 hours before an interest payment came due, creating unnecessary hardship on Guatemala. Now, as shown in the Ortega Declaration, Guatemala faces the risk of a default, cross-defaults, and cascading effects both domestic and foreign. The situation calls for an urgent decision vacating the Restraining Order in full.

FACTUAL AND PROCEDURAL BACKGROUND

1. On November 4, 2019, the District Court for the District of Columbia entered a judgment in favor of Petitioner TECO Guatemala Holdings LLC. ("TECO") in the amount of $35,462,237, plus interest ("Judgment"). Case No. 17-cv-102, ECF No. 50. Guatemala appealed the judgment to the United States Court of Appeals for the D.C. Circuit on December 4, 2019. Case. Case No. 19-7153. That appeal remains pending.

2. On June 2, 2020, the District Court for the District Court of Columbia granted TECO's motion under 28 U.S.C. § 1610(c), permitting TECO to "pursue all permissible method of attachment or execution of Guatemala's property to satisfy" the judgment. Case No. 17-cv-102, ECF No. 68.

3. On October 28, 2020, TECO registered the Judgement with the Supreme Court of the State of New York, New York County. Subsequently, it sent the Restraining Notice to BNYM,

forbidding it from making "any sale, assignment, transfer, or interference with any such property" that is owed to Guatemala or "in which [Guatemala] has an interest." According to TECO, BNYM has "possession or custody" of (1) unidentified "bank accounts, deposits, and/or depository accounts owned or controlled by" the Republic, as well as (2) "funds of the Republic…transmitted for the purpose of making [identified] interest and principal payments on the sovereign bonds issued by the Republic[.]" *See* **Exhibit 2**.

DISCUSSION

I. The Identified Assets Are Not in the Republic's Possession

4. The "interest and principal payments on the sovereign bonds" identified by TECO do not belong to the Republic and therefore cannot be used to satisfy the judgment. Before any sovereign assets can be attached under 28 U.S.C. 1610(a), they must first be owned by the sovereign debtor. The principle is obvious from the text of the statute, which limits attachment to property "of a foreign state." *See* 28 U.S.C. § 1610(a). This Court has made rulings to the same effect. *See EM Ltd v. Republic of Argentina*, 865 F. Supp. 2d 415, 424 (S.D.N.Y. 2012) ("The funds are not property of the Republic and therefore cannot be attached under § 1610.").

5. New York Law agrees.[1] Under N.Y. C.P.L.R. § 5201(b), a money judgment may only be enforced against property "which could be assigned or transferred" by the judgment debtor, in this case Guatemala. *See also CIMC Raffles Offshore (Singapore) Limited v. Schahin Holding S.A.*, 2013 WL 12305899, at *3 (S.D.N.Y. May 1, 2013); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 83 (2d Cir. 2002) ("A determination

[1] Pursuant to Federal Rule 69(a)(1), enforcement proceedings concerning money judgments "must accord with the procedure of the state where the court is located." Here, TECO has invoked Article 52 of the CPLR, which governs the use of a restraining notice in post-judgment enforcement proceedings. Such restraining notices are subject to challenge and may be vacated or modified upon an appropriate motion. *See* CPLR Section 5240.

of [the debtor's] property interest in the disputed funds—i.e., whether [the debtor] can 'assign or transfer' any of these funds—is therefore dispositive...."). If the judgment debtor is not in possession of the property at issue or does not have a beneficial interest in the same, then that property is not available for attachment.

6. This issue frequently arises in the context of trusts and bond payments reserved for third parties—the situation presented here. Each time, this Court and the New York state courts have ruled that those funds are unavailable for attachment. *EM Ltd v. Republic of Argentina*, 865 F. Supp. 2d 415, 423 (S.D.N.Y. 2012); *Petrohawk Energy Corp. v. Law Debenture Trust Co. of New York*, 2007 WL 211096, *4 (S.D.N.Y. January 29, 2007) ("[F]unds held by a trustee or paying agent for the purpose of paying principal or interest to noteholders obtain the character of trust funds.") (citing cases); *Brown v. Morgan & Co., Inc.*, 40 N.Y.S. 2d 229 (1st Dep't 1943).

7. In the 1940s, a creditor of an Italian corporation tried to seize money held at the corporation's bank, which was acting as "fiscal agent" for the corporation. *Brown*, 40 N.Y.S. at 230. The money was "earmarked" as a payout on bonds previously issued by the company. *Id.* at 233. The New York Appellate Division ruled that the bond payments could not be seized because they were being held in "trust for the benefit of the bondholders." *Id*.

8. In a much more recent case, a note issuer deposited funds at the Bank of New York (acting as "paying agent"). *Petrohawk Energy*, 2007 WL 211096, *1. The funds were to be used for the "sole and exclusive purpose" of making payments on the notes issued. *Id*. For reasons not relevant, the issuer tried to get the funds back by filing a claim of conversion; but this Court denied the claim because the issuer no longer had ownership. *Id*. at 4 ("Once the funds were deposited to be held in trust for the purpose of paying the Noteholders, Petrohawk no longer had control over the funds.").

9. The principle is the same when a sovereign is involved. When a creditor of Argentina tried to attach funds paid to satisfy the State's bond obligations, this Court ruled, same as above, that Argentina lost possession and interest in those funds once they passed to a third party. *EM Ltd*, 865 F. Supp. 2d at 424 ("[T]he Republic had no further interest in the funds designated to pay the BODEN 12 bonds once it transferred those funds to CRYL."). A creditor of Romania, represented by TECO's current counsel, was most recently denied a similar attachment because the State "simply [did] not have an interest in any property" held by the third party. *Micula et al v. Romania*, 15-mc-107, ECF No. 122, Hr'g Tr. 21:9 (S.D.N.Y January 21, 2016).

10. There is no difference in the restraining notice issued here. TECO has identified funds purportedly held by BNYM that are earmarked as "interest and principle payments on the sovereign bonds" issued by Guatemala. The fact that BNYM has purported possession of the funds means that Guatemala does not have the possession needed for attachment. *Brown*, 40 N.Y.S. at 233; *EM Ltd*, 865 F. Supp. 2d at 424. Nor does Guatemala retain any beneficial interest in the funds since they are being held in trust for the benefit of the bondholders. *See* Fiscal Agreement, para. 7(b) (**Exhibit 3**) ("The Fiscal Agent shall make amounts received by it available to the Paying Agent and the Paying Agent shall hold such funds in trust and apply them to the payment of such principal and interest (including any Additional Amounts) on such Scheduled Payment Date."). Quite simply, the Restraining Notice targets property that does not belong to Guatemala.

II. TECO Has Not Shown that the Assets it Seeks are Not Immune under the FSIA

11. The Foreign Sovereign Immunity Act (FSIA) shields a foreign state and its instrumentalities against attachment and execution. *See* 28 U.S.C. § 1609. Such immunity could only be lifted if one of the exceptions under the FSIA applies. *See Letelier v. Republic of Chile*, 748 F.2d 790, 793 (2d Cir. 1984) ("[U]nder [28 U.S.C.] § 1609 foreign states are immune from

execution upon judgments obtained against them, unless an exception set forth in §§ 1610 or 1611 of the FSIA applies.").

12. The FSIA provides a "commercial activity" exception to immunity. To attach a property of a foreign state, a judgment creditor must first establish that the property in question is "used for a commercial activity in the United States." *See* 28 U.S. Code § 1610(a). The FSIA provides a similar condition for attaching a property of an agency or instrumentality of a foreign state. *See* 28 U.S. Code § 1610(b) ("any property in the United States of an agency or instrumentality of a foreign state engaged in a commercial activity in the United States.").

13. The burden of proving these exceptions rests on a judgment creditor. *Virtual Countries, Inc. v. Republic of S. Africa,* 300 F.3d 230, 241 (2d Cir. 2002) citing to *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (the plaintiff has the burden of going forward with evidence showing that, under exceptions set forth in the FSIA, immunity should not be granted) (internal quotations omitted). A claimant cannot evade this burden by filing a restraining notice. *See e.g.*, *Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 232 (5th Cir. 2004) (the court affirmed the district court's decision to vacate the temporary restraining order and dissolve the writs of attachment because the property was not "used for commercial activity.").

14. Here, the Restraining Notice casts a wide net. It freezes the following assets held in the Bank of New York: "1) bank accounts, deposits, and/or depositary accounts owned or controlled by, or for the benefit of, the Republic of Guatemala, or any subdivisions, agencies or instrumentalities of the Republic of Guatemala and 2) funds of the Republic of Guatemala, or its agents and employees, or any subdivisions, agencies or instrumentalities of the Republic of Guatemala, transmitted for the purpose of making interest and principal payments on the sovereign

bonds issued by the Republic of Guatemala…" *See* **Exhibit 2**. But TECO has neither alleged nor established that these assets fall under the exceptions enumerated under §§ 1610(a) or 1610(b). Accordingly, the Court should vacate the Restraining Notice.

III. This Court Has Not Made the Required Determination under 28 U.S.C. §1610

15. Before a foreign state's property can be attached to satisfy a judgment, the court ordering such attachment must first determine that (i) a "reasonable period of time has elapsed following the entry of judgment," and that (ii) the state has received the required notices under 28 U.S.C. 1608(e). *See* 28 U.S.C. § 1608(c). The purpose of § 1610(c) is two-fold: first, to ensure that the attachment is proper under subsections (a) and (b); and second to ensure that each state has a "fair and adequate opportunity to appear and contest any attachment or execution." *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 798 F.Supp.2d 260, 271 (D.D.C. 2011).

A. TECO Sought Relief in the Wrong Court

16. Section 1608(c) limits which court can determine whether a reasonable amount of time has passed. The only court authorized to make this determination for TECO is the court charged with attaching the assets—this Court; not the D.C. District Court. Section 1608(c) reads:

> No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment….

17. The statute's reference to "the court" authorizes only one court to make the determination at issue—the court ordering the attachment. *Northrop Grumman Ship Systems Inc v. Ministry of Defense of the Republic of Venezuela*, Case No. 02-cv-785, ECF No. 441, at 7 (S.D. Miss. July 23, 2020) ("Because this Court is not the one that will order any such attachment, it follows that it also is not the proper court to determine if a reasonable period of time has elapsed following the entry of the Judgment in this case."); *see also American Bus Ass'n v. Slater*, 231

F.3d 1, 4-5 (D.C. Cir. 2000) ("The definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'"); *Freytag v. Commissioner*, 501 U.S. 868, 902 (1991) (Scalia, J., concurring) (contending that use of the definite article the Constitutional phrase "the Courts of Law" "obviously narrows the class of eligible 'Courts of Law' to those courts of law envisioned by the Constitution"). Had Congress intended to open the determination to any court, it would have used an indefinite article such as "a court," as it did throughout Section 1610. *See, e.g.*, 28 U.S.C. § 1610(g)(3) ("Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately….").

18. This reading is bolstered by the object and purpose of the statute. Subsection (c) is designed to ensure that a foreign state's property interests are protected and that the state receives adequate notice prior to the attachment. *Agudas*, 798 F.Supp.2d at 271. It is not a routine determination in any sense. To bifurcate the issue among different courts so that the § 1610 determination is made prior to an attachment request defeats the purpose of the statute because it fails to guarantee the State notice of the attachment.

19. This is precisely the situation presented here. Prior to any attachment request, TECO erroneously sought and received a § 1610(c) determination from the D.C. District Court. Its request was made on January 15, 2020, and district court granted the request on June 2, 2020. As of June 2, no restraining notice or attachment request had been made, making it impossible for the district court to determine whether Guatemala had received adequate notice.

20. The statutory language is clear, and until this Court determines that a reasonable amount of time has passed, any attempt at enforcement is invalid.

B. A Reasonable Period of Time has Yet to Elapse Following Final Judgment

21. Should TECO attempt to refile its request now, that request would be in vain

because a reasonable amount of time has not yet elapsed. What constitutes a "reasonable period of time" is a matter within the court's discretion. But instead of exercising that discretion by reference to a number of days or months, the court must consider the foreign state's "procedures, including legislation, that may be necessary for payment of a judgment by a foreign state." *Owens v. Republic of Sudan*¸ 141 F.Supp.3d 1, 8 (D.D.C. 2015) (citing H.R. Rep. No. 94-1487, at 30). The analysis will "of course vary according to the nuances of each case." *Ned Chartering and Trading, Inc. v. Republic of Pakistan*, 130 F.Supp. 2d 64, 67 (D.D.C. 2001).

22. The country is in the midst of recovering from "the deadliest episode of a storm" in Guatemala's history. *Guatemala Rescuers Search for Scores of People Buried in Mudslide Caused by Eta*, N.Y. TIMES (November 7, 2020). Hurricane Eta caused massive flooding and landslides around the country, leaving over 100 people dead and many others without shelter. The Government must prioritize the health and safety of its people.

23. Combined with a global pandemic that shut down Guatemala for over six months, followed immediately by the worst hurricane in the nation's history, any determination on appropriate time would have to take these two events into account. More time is all the more appropriate since the final judgment is currently on appeal, with a decision likely rendered soon. Immediate payment would force Guatemala to take attention away from the health and safety of its people at this dire time. On the other hand, a short delay does not prejudice TECO since interest is accruing.

24. In summary, enforcement is improper at this time since this Court has yet to consider whether a reasonable amount of time has passed pursuant to § 1610(c). Should TECO make such a request, Guatemala respectfully submits that a reasonable amount of time has not passed in light of recent events.

IV. TECO's Actions Have Caused Undue Prejudice to Guatemala

25. As explained above, TECO put the proverbial cart before the horse by restraining bond payments before a proper § 1610 determination could be made. Not only that, but the great weight of precedent in this Court and the state courts of New York leave no doubt that the funds currently restrained are not subject to attachment. Because of TECO's flawed legal strategy, the funds that were intended to satisfy Guatemala's bond obligations are currently restrained at the BNYM. And while Guatemala no longer owns or possesses those funds, the bondholders may very well declare a default on the bonds and cause grave financial consequences for the State. This kind of tactic is an improper use of the law that generates damages for Guatemala, which are currently being quantified. Guatemala reserves its rights to claim those damages at a later date.

CONCLUSION

26. For the reasons set out above, Guatemala respectfully requests that the Restraining Notice issued on BNYM be vacated. In light of the undue prejudice discussed immediately above, the State respectfully requests that the Court address this matter as a matter of urgency.

Respectfully submitted,

/*s*/ Mauricio Gomm
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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF filing system. I also certify that the foregoing document is being served this date on all counsel of record or pro se parties on the Service List below in the manner specified, either via transmission of Notices of Electronic Filing generated by the CM/ECF system or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ Mauricio Gomm