

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ADMIRAL CHARTERS, INC.,)	
)	
<i>Plaintiff</i>)	
)	
<i>v.</i>)	Civil No. 99-54-P-H
)	
SON YACHT CHARTERS, INC.,)	
<i>d/b/a SUN YACHT CHARTERS, INC.,</i>)	
)	
<i>Defendant</i>)	

**MEMORANDUM DECISION ON MOTION TO EXCLUDE AFFIDAVIT
AND MOTIONS FOR ATTACHMENT AND STAY
AND RECOMMENDED DECISION ON MOTION TO DISMISS**

In this diversity action Admiral Charters, Inc. (“Admiral”) moves for attachment and trustee process against Son Yacht Charters, Inc. d/b/a Sun Yacht Charters, Inc. (“Sun Yacht”) and for a stay of trial on the merits pending the outcome of arbitration in Florida. Motion for Attachment and Trustee Process (“Attachment Motion”) (Docket No. 2); Motion To Stay Trial Pending Arbitration (“Motion To Stay”) (Docket No. 4). Sun Yacht moves to dismiss Admiral’s complaint pursuant to Fed. R. Civ. P. 12(b)(5) and (6) for insufficiency of service of process and failure to state a claim upon which relief can be granted. Defendant’s Motion To Dismiss (“Motion To Dismiss”) (Docket No. 11). Admiral, finally, moves to exclude consideration of the Affidavit of John J. Bush in connection with Sun Yacht’s Rule 12(b)(6) motion to dismiss. Plaintiff’s Motion To Exclude Consideration of the Affidavit of John J. Bush, etc. (Docket No. 21). For the reasons that follow,

I grant Admiral's motions for attachment and stay and to exclude the Bush affidavit from consideration in connection with Sun Yacht's Rule 12(b)(6) motion and recommend that Sun Yacht's motion to dismiss be denied.

I. Motion To Dismiss; Exclusion of Bush Affidavit

A. Applicable Legal Standards

“When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending [the] plaintiff every reasonable inference in [its] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim “only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

A motion for dismissal pursuant to Rule 12(b)(5) focuses on the manner in which service has been made, including whether there has been a failure to comply with the procedural requirements of applicable service provisions. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1353 at 193 (Supp. 1999).

B. Discussion

1. Rule 12(b)(6): Failure To State a Claim

Sun Yacht moves to dismiss pursuant to Rule 12(b)(6) on the ground that maintenance of the instant action would offend the parties' contractual forum-selection clause. Motion To Dismiss at 6-11. Sun Yacht next invites the court to convert its motion to dismiss into one for summary judgment pursuant to Fed. R. Civ. P. 56, liberally cross-referencing the Bush affidavit in a statement

of material facts. *See* Defendant’s Statement of Material Facts (Docket No. 15); Affidavit of John J. Bush (“Bush Aff.”) (Docket No. 13). Such a conversion is contemplated in certain circumstances by Rule 12(b):

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In this case, however, no conversion is warranted. All documents material to a decision whether to dismiss are appended to, and made an integral part of, the complaint. *See* Complaint (Docket No. 1). Consideration of such documents does not necessitate conversion to a summary-judgment motion. *See, e.g., Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996) (court may properly consider relevant entirety of document integral to or explicitly relied upon in complaint, even though not attached to complaint, without converting motion to dismiss into summary-judgment motion). Because the Bush affidavit neither is necessary to, nor alters the outcome of, the relevant legal analysis, I grant Admiral’s motion to exclude it from consideration in deciding the Rule 12(b)(6) portion of the Motion To Dismiss.

Turning next to the merits of the Rule 12(b)(6) motion, I glean the following relevant facts from the complaint and material attached thereto:

Admiral is a Delaware corporation with its principal place of business in Manakin-Sabot, Virginia. Complaint ¶ 2. Sun Yacht is a Maine corporation with its principal place of business in Camden, Maine. *Id.* ¶ 3. On or about September 12, 1996 Admiral and Sun Yacht entered into a contract by which Sun Yacht agreed to build for and sell to Admiral a sixty-five-foot catamaran

yacht. *Id.* ¶ 7. The contract provided in relevant part for a purchase-price ceiling of \$1,496,000 (inclusive of the seller's markup), a mechanism through which changes or modifications (including changes to price and completion deadline) could be agreed to through execution of written change orders, and a completion date of December 10, 1997. Sales Agreement ("Contract"), attached as Exh. A to Complaint, ¶¶ 3.1.1, 7, 13.1. The Contract contemplated that a third party, Bluewater Composites Limited of St. Lucia ("Bluewater"), with whom Sun Yacht had entered into a separate agreement, actually would build the yacht. *Id.* ¶ 17.1. The Contract also contained the following provisions:

19. ARBITRATION

Except as otherwise provided, any controversy or claim arising out of or resulting from this Agreement, or breach thereof, shall be settled by arbitration in accordance with the Commercial Rules of the American Arbitration Association. The decision of the arbitrator or arbitration panel shall be binding and judgment upon the award rendered by the arbitrator or arbitration panel may be entered in any Court having jurisdiction thereof. Such arbitration will take place at a mutually agreed upon site or in the County of Palm Beach or the County of Broward in the State of Florida, if the parties are unable to mutually agree upon another site. . . .

21. NOTICES, BINDING EFFECT AND APPLICATION OF STATE LAW

This Agreement shall be binding upon and shall inure to the benefit of the respective parties hereto and their respective heirs, successors and assigns. This agreement shall be construed, interpreted and enforced in accordance with the laws of State of Florida and solely in the courts of the State of Florida. . . .

Id. ¶¶ 19, 21.

By a change order dated November 19, 1997 the parties agreed to extend the deadline for completion of the yacht to February 1998 and increase the ceiling price to \$1,630,534.42. Complaint

¶ 11. As of February 1998 the yacht was not completed. *Id.* ¶ 12. On or about March 3, 1998 the parties further amended the Contract to acknowledge that the cost of building the yacht would exceed the amended ceiling price and to provide for a loan of funds by Admiral to Sun Yacht and/or directly to suppliers to allow completion of construction. Amendment, attached as Exh. B to Complaint. Sun Yacht on the same date executed a promissory note in the amount of \$500,000 in favor of Admiral, repayable on March 3, 2000 with interest at the rate of ten percent per annum. Promissory Note, attached as Exh. C to Complaint. The obligation could be accelerated, upon written notice to Sun Yacht, in the event *inter alia* that Sun Yacht defaulted in the payment or performance of any obligation or agreement under the Contract. *Id.* at 1-2. Sun Yacht agreed to pay additional default interest of two percent per month on any overdue principal amount. *Id.* at 1. The Promissory Note contained no forum-selection clause but provided that it was to be governed by and construed in accordance with Florida law. *Id.* at 3.

Admiral paid the full \$500,000 face amount of the Promissory Note plus an additional \$838,942 to complete construction of the yacht, paying a total of \$1,338,942 beyond the amended ceiling price of \$1,630,534.42. Complaint ¶¶ 17, 22. Following notice to Sun Yacht of default on the basis of cost overruns and failure to deliver the yacht on time, Admiral on or about November 24, 1998 served Sun Yacht with a demand for arbitration under the terms of the Contract. *Id.* ¶¶ 19, 34. On or about the same date Admiral notified Sun Yacht of its default under the Promissory Note and the acceleration of its obligations thereunder. *Id.* ¶ 29. Admiral sought a total of \$1,676,535 in damages, which included \$337,593 in delay damages and interest due and owing as of February 3, 1999. *Id.* ¶ 22.

Sun Yacht asserts that because the parties agreed that the Contract would be construed,

interpreted and enforced solely in the courts of the state of Florida, no action upon it may be maintained in Maine. Motion To Dismiss at 6-10. Nor, Sun Yacht posits, may an action be brought in Maine upon the Promissory Note. *Id.* at 10. The Promissory Note contains no forum-selection clause; however, such a clause arguably is incorporated by reference to the Contract both in the Promissory Note and the corresponding Amendment. *Id.* In any event, Sun Yacht argues, the propriety of acceleration hinges on whether Sun Yacht defaulted on the Contract — an issue that must be adjudicated in Florida. *Id.*

Admiral does not dispute the enforceability of the Contract’s forum-selection clause. Plaintiff’s Objection to Defendant’s Motion To Dismiss, etc. (“Opposition to Motion To Dismiss”) (Docket No. 20) at 3; Plaintiff’s Reply Memorandum in Support of Motion for Attachment (“Attachment Reply”) (Docket No. 17) at 1-2. Rather, it insists that it is honoring that clause by having demanded arbitration of the parties’ Contract disputes in Florida. *Id.* It notes that it has filed the instant action for the limited purpose of gaining attachment and trustee process, whereupon it seeks a stay of trial on the merits of the action pending completion of arbitration in Florida. *Id.*; Motion To Stay at 2. In Admiral’s view the Contract simply is silent on the issue of where a prejudgment remedy such as attachment can be sought. Opposition to Motion To Dismiss at 3; Attachment Reply at 2-3. Admiral further reasons that, without the ability to resort to court in Maine (where Sun Yacht’s assets are located), it would have no prejudgment remedy. Attachment Reply at 2-3.

Admiral’s argument is persuasive. The Contract provides that “any controversy or claim arising out of or resulting from this Agreement, or breach thereof, shall be settled by arbitration” in the state of Florida. Exactly as contemplated, Admiral invoked arbitration in Florida to settle the

controversies and claims between itself and Sun Yacht arising from the Contract. The forum-selection clause does not address the issue of prejudgment remedies. Given the potential unavailability of such remedies in Florida (where neither party is domiciled), I am unwilling to construe the parties' silence as an affirmative intention to limit the availability of such remedies to the forum in which substantive disputes were to be resolved.¹ *See, e.g., Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 633 (9th Cir. 1982) (holding that "in an admiralty action, absent express intent to the contrary, a forum selection clause providing that all disputes under the charter will be determined by a selected foreign court neither precludes a plaintiff from commencing an action in the district court to obtain security by maritime attachment, nor prohibits the district court from ensuring the availability of security adequate to satisfy a favorable judgment by the selected forum.")²

¹Consideration of relevant portions of the affidavit of John J. Bush would not change this outcome. Bush, the former president of Sun Yacht, avers that there were extensive negotiations concerning the forum-selection and choice-of-law clause, with Sun Yacht originally proposing that the Contract be governed by Maine law with arbitration to occur in Maine. Bush Aff. ¶¶ 1-3. Admiral vehemently objected, and Sun Yacht eventually agreed to the clause as contained in the Contract. *Id.* ¶¶ 4-5. There was no specific discussion during negotiations of any exception to the principle that an arbitration or court case based on the Contract would have to be brought in Florida, and no discussion at all as to whether either party could obtain prejudgment liens. *Id.* ¶ 6. As a result, Bush believed the parties agreed that all issues in any court case between them, including the availability of prejudgment liens, would be decided in a Florida court under Florida law. *Id.* The Bush affidavit, in essence, confirms what is evident from the plain language of the forum-selection clause: that the parties did not consider the issue of prejudgment remedies.

²Although Admiral does not style the instant action as one brought in admiralty, the underlying precepts of *Polar Shipping* resonate in this context, as well. *See, e.g., Polar Shipping*, 680 F.2d at 632-33 (had parties intended to limit proceedings to obtain prejudgment security to forum in which disputes were to be resolved, they could easily have worded applicable clause to so provide; furthermore, plaintiff could be substantially prejudiced and left without effective remedy were forum-selection clause construed to limit locale in which prejudgment remedy could be sought).

Sun Yacht's motion to dismiss on Rule 12(b)(6) grounds accordingly should be denied.

2. Rule 12(b)(5): Insufficient Service of Process

Sun Yacht next contends that Admiral's complaint should be dismissed on grounds of insufficient service of process. Motion To Dismiss at 11. Sun Yacht argues that Admiral had two options for service in hand upon a domestic corporation pursuant to Fed. R. Civ. P. 4(c)(2) and 4(h)(1). *Id.* Process could have been served either (i) by a person not a party and at least 18 years old, upon an officer, managing or general agent or other legally authorized agent of Sun Yacht, or (ii) by a deputy sheriff or other person authorized by law or specially appointed to serve process, upon an employee of the corporation. *Id.* Sun Yacht observes that in this case, service was made by a private process server upon an employee of the corporation. *Id.*

Pursuant to Fed. R. Civ. P. 4(c) service "may be effected by any person who is not a party and who is at least 18 years of age." Donald Saastamoinen, who served process in hand upon Sun Yacht, met those criteria. *See* Affidavit of Donald Saastamoinen ("Saastamoinen Aff.") (Docket No. 19) ¶ 1. A domestic corporation may be served "in the manner prescribed for individuals by subdivision (e)(1)," which is titled "Service Upon Individuals Within a Judicial District of the United States." Fed. R. Civ. P. 4(h)(1). Service upon an individual, in turn, may be effected "pursuant to the law of the state in which the district court is located." Fed. R. Civ. P. 4(e)(1). Maine Rule of Civil Procedure 4(d)(8) provides for service upon a domestic corporation "by delivering a copy of the summons and of the complaint to any officer, director or general agent; or, if no such officer or agent be found, to any person in the actual employment of the corporation"

Upon entering the corporate offices of Sun Yacht, Saastamoinen encountered a woman named Michel Christensen and asked if any officers were present. Saastamoinen Aff. ¶¶ 3-4.

Christensen replied that all officers were away attending a boat show in Annapolis. *Id.* ¶ 4. Saastamoinen then verified that Christensen was an employee of Sun Yacht and began filling out the papers to serve process upon her in that capacity. *Id.* ¶ 5. While he was so engaged, Christensen left the room and returned with a gentleman whom she identified as an officer. *Id.* ¶ 6. By that time Saastamoinen had completed his paperwork, and the gentleman indicated that as a new employee he was just as happy that Saastamoinen serve Christensen. *Id.* To this, Sun Yacht responds that Admiral essentially admits that its service of process was deficient. Defendant's Reply Memorandum in Support of Motion To Dismiss Complaint (Docket No. 25) at 6-7.

To the extent that Saastamoinen erred in serving Christensen despite the belated revelation of the presence of an officer, the error was harmless. Process was served upon an employee in the presence of and with the approval of an officer. Sun Yacht received actual notice of the proceedings against it and identifies no prejudice emanating from the deficient service. *See, e.g., St. John Rennalls v. County of Westchester*, 159 F.R.D. 418, 420 (S.D.N.Y. 1994) (deficiencies in method of service are harmless error under Fed. R. Civ. P. 61 when party asserting deficient service has actual knowledge of action and no prejudice results from deficiency).

For these reasons, Sun Yacht's motion to dismiss on Rule 12(b)(5) grounds likewise should be denied.

II. Motions for Attachment and Stay

A. Applicable Legal Standards

Admiral seeks a writ of attachment and trustee process against Sun Yacht pursuant to Fed. R. Civ. P. 64 and Local R. 64, which permit such attachment in accordance with Maine law and procedure. Attachment Motion at 2. Applicable Maine law provides that an order of approval of

the entry of attachment or trustee process “may be entered only after notice to the defendant and hearing and upon a finding by the court that it is more likely than not that the plaintiff will recover judgment, including interest and costs,” in an amount equal to or greater than the sum of the attachment or trustee process plus any insurance, bond or other security, and any property or credits attached by other writ of attachment or by trustee process shown by the defendant to be available to satisfy the judgment. Me. R. Civ. P. 4A(c), 4B(c).³

A motion for attachment or trustee process must be accompanied by an affidavit or affidavits setting forth “specific facts sufficient to warrant the required findings and shall be upon the affiant’s own knowledge, information or belief; and so far as upon information and belief, shall state that the affiant believes this information to be true.” Me. R. Civ. P. 4A(i), 4B(c). The opponent may file affidavits or other documents in support of its memorandum in opposition to attachment. Me. R. Civ. P. 4A(c), 4B(c), 7(c).

Issuance of a stay in the context of arbitration is governed by 9 U.S.C. § 3, which provides in its entirety:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

B. Factual Context

In addition to those facts recited in the context of Sun Yacht’s motion to dismiss, the

³Notwithstanding the hearing requirement of Me. R. Civ. P. 4A(c), the Law Court has held that a formal hearing with oral argument is not necessary prior to ordering attachment. *See, e.g., Southern Me. Properties Co. v. Johnson*, 724 A.2d 1255, 1257 (Me. 1999).

following are relevant to Admiral's motions for attachment, trustee process and stay.

Among facts not in dispute for purposes of this motion:

1. The parties signed only one formal change order, on November 19, 1997, amending the price ceiling to \$1,630,534.42 and the delivery date to February 1998. Affidavit of Paul Saunders, etc. ("Saunders Aff.") (Docket No. 3) ¶ 8; Bush Aff. ¶ 16.

2. The yacht was not completed or delivered on time. Saunders Aff. ¶ 9; Bush Aff. ¶ 11.

3. There were cost overruns. Although Sun Yacht questions the claimed total overrun (excluding contract interest and penalties) of \$1,338,942, it has produced no evidence to contradict Admiral's figure. Saunders Aff. ¶ 20; Bush Aff. ¶ 11.

4. Interest and delay damages pursuant to the Contract and Promissory Note totalled \$337,593 as of March 1, 1999. Saunders Aff. ¶ 21.⁴ Sun Yacht denies that it is in breach of either the Contract or Promissory Note but does not contradict this figure. *See generally* Bush Aff.

5. The yacht as completed deviated in significant respects from its specifications, containing numerous upgrades. Bush Aff. ¶¶ 19-20, 30-31 & Exh. 9 thereto; Supplemental Affidavit of Paul Saunders, etc. ("Supplemental Saunders Aff.") (Docket No. 18) ¶¶ 11, 20-21.

6. Bluewater denied Sun Yacht access to its boatyard and records for the purpose of an audit of the cost overruns and delays despite repeated requests. Bush Aff. ¶¶ 22-24 & Exh. 7 thereto; Supplemental Saunders Aff. ¶ 23. The Contract provides for reasonable access to the yacht by Sun Yacht, among others. Contract ¶ 8.

7. Sun Yacht has not paid Admiral amounts demanded for Contract cost overruns or as a

⁴There is a discrepancy between the Saunders affidavit and the Complaint, which asserts that the same total of interest and default damages was due as of February 3, 1999. Complaint ¶ 22. For purposes of the motion for attachment, I accept the Saunders version.

result of acceleration of the Promissory Note. Saunders Aff. ¶¶ 17, 19; *see generally* Bush Aff. (not disputing same).

8. Following Admiral's demand for arbitration in Florida, Sun Yacht filed an answering statement on December 11, 1998. Bush Aff. ¶ 39; *see generally* Supplemental Saunders Aff. (not disputing same). On February 11, 1999 a panel of three arbitrators was appointed to hear the case. *Id.* The arbitration panel has conducted two hearings and has agreed to consolidate the original action with an arbitration initiated by Sun Yacht against Bluewater. *Id.*

9. Some portion of the delays and cost overruns is attributable to underestimates, unanticipated problems and other aspects of the building process. Bush Aff. ¶¶ 17-18, 35 (questioning validity of Bluewater's invoices); Supplemental Saunders Aff. ¶ 27 (Saunders informed that the delays and many changes were caused in part by failure to properly coordinate delivery and installation of materials, errors and unanticipated delays in hull molding process, errors and omissions in design plans and underestimates of overall magnitude of project).

The parties, however, sharply contest responsibility for delays and cost overruns, debating in particular:

1. Whether Richard Ford and his company, Richleigh Yachts, served in the capacity of Sun Yacht's agent, at least through August 1998, for purposes of the yacht's construction. Bush describes Ford as "project manager" for the yacht project, mutually agreed upon by Sun Yacht, Admiral and Bluewater. Bush Aff. ¶ 8. Paul Saunders, president of Admiral, denies that he was given any opportunity to approve the choice of Ford. Supplemental Saunders Aff. ¶¶ 1, 7. Saunders states that he was informed at the outset of his dealings with Sun Yacht that Ford and Richleigh served as Sun Yacht's agent overseeing the construction and management of the yacht. *Id.* ¶ 6. The

accuracy of this representation was confirmed many times over the course of these dealings. *Id.* & Attachments G-K thereto. As late as August 1998 Ford was forwarding invoices for the building of the boat bearing a Sun Yacht letterhead. Supplemental Saunders Aff. ¶ 4. Bush acknowledges that Ford, although not a Sun Yacht employee, was in charge of Sun Yacht’s Florida office. Bush Aff. ¶ 8. He describes Ford as in derogation of his fiduciary and contractual duties to Sun Yacht in allegedly conspiring with Admiral and Bluewater to have Sun Yacht bear responsibility for cost overruns. *Id.* ¶ 20.

2. Whether Admiral, Sun Yacht or some other party bore responsibility for initiating written change orders that would increase the ceiling price or extend the delivery deadline of the yacht. Bush states that paragraph 7.1 of the Contract, providing that all changes or modifications “must be accepted by the SELLER [Sun Yacht] in writing,” was intended to give Sun Yacht the opportunity to require adjustments in the ceiling price and schedule. Bush Aff. ¶ 13. If Admiral wished to make any changes, Admiral was required by the Contract to make the request through Sun Yacht, not directly to the builder, Bluewater. *Id.* Similarly, if Bluewater felt changes were appropriate, it was required to request them through Sun Yacht, not Admiral. *Id.* In fact, according to Bush, Admiral and Bluewater repeatedly disregarded the requirement that Sun Yacht approve all changes and modifications. *Id.* ¶ 14.

Saunders understood that Admiral would not be obligated to pay any monies beyond the contract price except to the extent it had agreed in a written change order to do so. Supplemental Saunders Aff. ¶ 12. Ford had reassured Saunders on a number of occasions that changes were within budget. *Id.* ¶ 11 & Attachment M thereto. To the extent that a change order was necessary, Saunders understood that Sun Yacht was to create one for his signature, per paragraphs 7.2 and 7.3 of the

Contract and as had been done in the case of the November 19, 1997 change order. Supplemental Saunders Aff. ¶ 12. Saunders would not have agreed to changes proposed by Ford and the architect if Admiral were to have had to pay more than the ceiling price as a result of them. *Id.* ¶ 13. At various times Saunders refused proposed changes because Ford suggested that if the change were made, Admiral would have to pay for it. *Id.* By memorandum dated February 11, 1998 Ford wrote to Saunders:

It weighs heavily on my mind presenting the increases to you that both Bluewater and subsequently Alex and I could be so far out on our initial budgets. Realizing the full magnitude of this project a year down the line and not at initial quoting has been the primary reason for the attached overrun. I have been put to blame for not making change orders for each change. You will notice from the following spread sheet that there are numerous items omitted from the original specs. In the initial budget there was fat for omitted items, but I went ahead and upgraded equipment within budget forgetting about the fat for omitted items. Now those omitted items are construed as an overrun.

Attachment L to *id.* Ford went on to propose that “the balance of the yacht past the \$1.62 Million be built at cost with no profit to Sun Yachts or Bluewater.” *Id.* Ford observed: “When it comes to money we are at your mercy but ask that you make your decision on what portion is to be repatriated once you see the finished product.” *Id.*

Section 7 of the Contract, concerning changes or extras, provides in its entirety:

7.1 The OWNER has the right to make changes and/or modifications to the Drawings and Specifications, provided that if such changes and/or modifications adversely affect work already executed by the SELLER or involve any extra materials, equipment and/or labor, then the SELLER may charge the OWNER an amount equal to SELLER’s net increase (if any) in costs, plus 10%, incurred in executing the changes and/or modifications in accordance with the following paragraphs 7.2 to 7.5, and the SELLER will have the right to extend the contract program in accordance with any additional time it takes the SELLER to make such changes and/or modifications, but only to the extent agreed in the written change order. Further, all such changes and/or modifications must be accepted by the

SELLER in writing.

- 7.2 The SELLER shall require that all orders for changes and/or modifications shall be approved in writing by the OWNER or the OWNER's representative. Such approval shall specifically include the agreed price for each such change and/or modification or any savings arising from such changes and/or modifications and the resulting change in the Completion Date, if any. Further, the SELLER will charge to the OWNER a \$250.00 administrative fee for each such change and/or modification initiated by the OWNER. This fee shall be in addition to the contract price. There will be no administrative fee for changes and/or modifications initiated by the SELLER, the Architect, the Builder or any of their subcontractors.
- 7.3 No extra work shall be implemented or charged for except upon written approval of the OWNER or the OWNER's representative and the OWNER's written acceptance of any increase in the contract price and change in the completion date.
- 7.4 The OWNER shall pay the SELLER its cost (without mark-up) for work required to correct any errors, omissions, or discrepancies which may have been over-looked in the Drawings and Specifications. The SELLER, however, shall not be entitled, by reason of such work, to any increase in the US\$1,360,000.00 ceiling on the cost price for the YACHT or any extension of the Completion Date.. [sic]
- 7.5 Where the Drawings and/or Specifications name an article or a material and a substitution is proposed by the SELLER/Architect as being equal, it shall be left to the OWNER or OWNER's representative to decide if such substitutes are acceptable and equal. In all cases, the SELLER shall obtain written approval to any such substitution or work in accordance with revised plans before making any changes.

Pursuant to Section 13.3 of the Contract:

The SELLER must notify the OWNER in writing of the date of commencement of any delay and the reasons for that delay. The SELLER must send such notice within ten days of its discovery of the event giving rise to the delay claim; otherwise, the SELLER's right to any extension of the Completion Date by reason of such event shall be deemed waived. . . .

3. Whether Admiral, Bluewater or Ford suggested upgrades or deviations from specifications that added to the cost of the yacht. *Compare, e.g., Bush Aff. ¶¶ 19, 30-31 & Exh. 9*

thereto (Admiral unilaterally requested or approved and paid for many costly changes to specifications and drawings without Sun Yacht's approval, including approving change in finishes that cost an additional \$300,000) *with* Supplemental Saunders Aff. ¶¶ 20-21 & Attachment M thereto (disputing that Saunders acknowledged responsibility for upgrades identified in Ford statement; stating that clear majority of listed changes were proposed by persons other than Admiral and that Saunders was willing to discuss only \$30,000 worth of changes; noting that upgrade to finishes was proposed by Ford, who advised that upgrade would be within budget).

4. Whether Admiral (through its president, Paul Saunders) agreed that Sun Yacht was not responsible for cost overruns. *Compare, e.g.,* Exh. 9 to Bush Aff. (memorandum from Ford dated June 12, 1998 reporting that Saunders had said "he knew it was not Sun Yachts [sic] fault for the overruns. He also stated that his contract was with Sun Yachts and if he elected to be a 'nice guy' he would look at it once the project was over") *with* Supplemental Saunders Aff. ¶ 22 (Saunders never absolved Sun Yacht of responsibility but rather told Ford that he believed design work was insufficient to task and also that builder had mismanaged or underbid project; however, Saunders believed that Sun Yacht, rather than Admiral, had agreed to assume such risks given the price ceiling).

5. Whether Ford, Admiral and Bluewater conspired to have Sun Yacht bear the full cost of delays and overruns. Bush believes that Ford, in derogation of his fiduciary and contractual duties to Sun Yacht and in consort with Admiral and Bluewater, permitted or agreed to a course of conduct between Admiral and Bluewater whereby extensive upgrades in materials and changes in the specifications were made to the yacht. Bush Aff. ¶ 20. However, rather than making written change orders as required by the Contract, Ford, Admiral and Bluewater conspired to have the increased

costs of construction borne by Sun Yacht. *Id.* Saunders denies the existence of any conspiracy, stating that changes from the original design were made with Sun Yacht's approval because Ford, on behalf of Sun Yacht, proposed almost all of them. Supplemental Saunders Aff. ¶¶ 10-11.⁵

6. Whether Sun Yacht refused to pay Bluewater or other subcontractors and diverted payments made by Admiral for its own working-capital purposes. *Compare, e.g.,* Saunders Aff. ¶¶ 7, 17 (Saunders was informed by Ford that Sun Yacht was not paying its subcontractors and temporarily diverting payments to its own working-capital purposes) *with* Bush Aff. ¶¶ 11, 25 (denying same). Bush further states that through 1997 and 1998 he had increasing concerns about the validity of Bluewater's invoices and changes and modifications that he understood were being made to the vessel and specifications without his involvement. *Id.* ¶ 17. In early 1998 Bush advised Bluewater and Admiral, through Saunders, that because of his concerns Sun Yacht would not pay invoices until Bush was satisfied that the invoices were valid and the project was proceeding satisfactorily. *Id.* ¶ 18.

7. Whether Admiral breached the Contract when it began paying subcontractors, including Bluewater, directly rather than forwarding payments to Sun Yacht, and whether that turn of events relieved Sun Yacht of responsibility for any delays or cost overruns from that point forward. *Compare, e.g.,* Bush Aff. ¶¶ 18-19 (Sun Yacht agreed to the direct payment of one invoice in

⁵Sun Yacht notes that on or about September 29, 1998 it learned that Admiral had entered into a contract with Richleigh Yachts to manage the yacht in issue, breaching a previous contract dated September 11, 1996 pursuant to which Sun Yacht was to have managed the yacht. Bush Aff. ¶¶ 9-10 & Exhs. 2-3 thereto. Admiral rejoins that it relieved Sun Yacht of its responsibilities under the September 1996 yacht-management agreement because of the problems in building the yacht, and had no business relationship with Ford or his firm until entering into the contract in September 1998. Supplemental Saunders Aff. ¶ 24. Saunders further states that Admiral had a right to cancel Sun Yacht's services. *Id.* ¶ 25.

February 1998, but Bush warned Saunders more than once that if Admiral wished to deal directly with Bluewater, it could not expect Sun Yacht to be responsible for problems with the project) *with* Supplemental Saunders Aff. ¶ 17 (noting that per the March 3, 1998 amendment to the Contract Sun Yacht expressly requested that Admiral pay invoices directly to suppliers). The amendment to which Saunders refers states in relevant part: “Seller . . . requests that Owner loan funds to Seller and/or pay invoices directly to suppliers in order to allow Seller to complete construction of the Yacht.” Amendment, attached as Exh. B to Complaint.

8. Whether the parties understood that, to the extent Admiral was responsible for cost overruns, Sun Yacht would not be responsible for repayment of amounts otherwise due and owing pursuant to the Promissory Note. *Compare, e.g.,* Bush Aff. ¶¶ 27-28 & Exh. 8 thereto (Sun Yacht agreed to sign the Promissory Note on the basis that it would repay to Admiral the excess over the ceiling contract price, as adjusted; with proper adjustment Sun Yacht’s obligation would be reduced or eliminated; Bluewater noted upgrades in signing similar promissory note in favor of Sun Yacht) *with* Supplemental Saunders Aff. ¶ 15 (no discussion between Saunders and Bush that repayment of the Promissory Note would be made only for items or costs that Admiral did not approve). *See also* Promissory Note, Exh. C to Contract (no notation that repayment conditional on chargeability of cost overruns to Sun Yacht).

9. Whether Admiral has other security available to it, beyond the attachment and trustee process sought in the instant motion, for the satisfaction of any judgment against Sun Yacht. Saunders states that he is unaware of any security, bond or other credits that Sun Yacht has available to it to satisfy any judgment obtained by Admiral against it. Saunders Aff. ¶ 23. No prior attachments or trustee process have been sought by Admiral against Sun Yacht in this matter. *Id.*

Bush suggests that Admiral has sufficient security by virtue of Admiral's ownership of the yacht, the value of which Bush believes exceeds the contract ceiling price. Bush Aff. ¶ 38. Admiral denies that the yacht, which it already owns, serves as any security for satisfaction of a judgment against Sun Yacht. Supplemental Saunders Aff. ¶ 26.

C. Discussion

Sun Yacht resists Admiral's motion for attachment on four grounds: (i) that the forum-selection clause precludes maintenance of this action in Maine, (ii) that Florida, rather than Maine, law controls, (iii) that the arbitration clause prevents Admiral from seeking attachment in federal court and (iv) that, in any event, Admiral has not shown likelihood of success on the underlying merits. Defendant's Objection to Plaintiff's Motion for Attachment and Trustee Process, etc. ("Opposition to Attachment") (Docket No. 12) at 2.

For the reasons discussed above in the context of Sun Yacht's motion to dismiss, I find the first ground meritless. Sun Yacht next argues that in accordance with choice-of-law clauses in both the Contract and the Promissory Note, Florida law governs. *Id.* at 3-5. Admiral does not qualify under Florida law for an attachment, Sun Yacht asserts. *Id.* at 5-7. Admiral observes — correctly — that an attachment sought in federal court in Maine is governed by federal and Maine law; Florida law is inapposite. Attachment Reply at 4. Local Rule 64 directs that "[a] party to a civil action, other than an admiralty or maritime claim within the meaning of Fed. R. Civ. P. 9(h), may move for attachment of property, including attachment on trustee process, within the District of Maine in accordance with state law and procedure as would be applicable had the action been maintained in the courts of the State of Maine"

Sun Yacht thirdly contends that the existence of ongoing arbitration proceedings precludes

maintenance of the instant action in federal court. Opposition to Attachment at 2-3. Sun Yacht acknowledges that the First Circuit has held that a plaintiff may seek a preliminary injunction in district court during the pendency of arbitration proceedings; however, that holding should not be extended to attachment and trustee process, which is subject to fewer safeguards, Sun Yacht asserts. *Id.* (citing *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986)). Admiral asserts, on the strength of *Teradyne*, that the award in federal court of a prejudgment remedy such as attachment does not offend the arbitration process. Attachment Reply at 2-3.

Admiral again has the better of the argument. Maintenance of the instant action offends neither the parties' agreement to arbitrate disputes nor the federal Arbitration Act, 9 U.S.C. §§ 1-16. The First Circuit held in *Teradyne* that "a district court can grant injunctive relief in an arbitrable dispute pending arbitration, provided the prerequisites for injunctive relief are satisfied." 797 F.2d at 51. Such an approach "reinforces rather than detracts from the policy of the Arbitration Act" because it "preserve[s] the status quo pending arbitration and, *ipso facto*, the meaningfulness of the arbitration process." *Id.* Sun Yacht emphasizes that the *Teradyne* decision concerned injunctive relief, which is more difficult to obtain than a writ of attachment. Opposition to Attachment at 2-3. However, the reasoning of the *Teradyne* holding applies with equal force in the context of a writ of attachment, which likewise exists to ensure the maintenance of an adequate remedy pending determination on the merits. *See PMS Distrib. Co. v. Huber & Suhner, A.G.*, 863 F.2d 639, 641-42 (9th Cir. 1988) (citing *Teradyne* in holding that Arbitration Act does not preclude issuance of a writ of possession pending the outcome of the arbitration so long as prerequisites for writ are met).

Turning to the substance of the parties' dispute, I next find that Admiral has demonstrated that it is more likely than not to succeed on its claim. This is so because a fact-finder more likely

than not would conclude that:

1. Pursuant to paragraph 7.2 of the Contract, Sun Yacht (the seller) bore responsibility for initiating written change orders, even if proposed by Admiral. Sun Yacht in fact had the right to collect a \$250 administrative fee for the processing of written change orders necessitated by changes requested by Admiral.

2. Per paragraph 7.1 of the Contract, Sun Yacht's right to charge Admiral for cost overruns or alter the deadline for completion of the yacht hinged on whether Sun Yacht obtained Admiral's assent via a written change order.

3. Richard Ford, acting as Sun Yacht's agent, chose not to prepare written change orders for Admiral's signature, reassuring Admiral on a number of occasions that upgrades (even an extensive, costly upgrade to the finishes of the yacht) were within budget. Sun Yacht's assertion that Ford did so as part of a conspiracy is speculative.

4. Per paragraph 13.3 of the Contract, Sun Yacht bore responsibility for notifying Admiral in writing of delays, at the risk of waiving its right to seek extensions of the completion deadline. No such writings are evident.

5. Admiral did not breach the Contract when it began paying subcontractors directly. This was expressly contemplated by the amendment to the Contract (which did not indicate that the arrangement relieved Sun Yacht of any of its contractual responsibilities).

6. Admiral did not agree to relieve Sun Yacht of responsibility for repayment of the \$500,000 Promissory Note to the extent that modifications were made to the Contract ceiling price. Such an asserted agreement is nowhere reflected in a writing signed by Admiral.

7. To the extent that cost overruns resulted from errors or omissions in design or

specifications or underestimates in the bidding process, these were risks that Sun Yacht, rather than Admiral, agreed to bear, at least to the extent that the cost of addressing such errors raised the construction cost beyond the ceiling price.

8. In view of the foregoing, Sun Yacht breached its contract with Admiral by late delivery of the yacht and cost overruns totaling \$1,338,942.⁶

9. Because Sun Yacht breached the Contract, Admiral was entitled to accelerate the Promissory Note.

10. Interest and default penalties stemming from the Contract and Promissory Note totalled \$337,593 as of March 1, 1999.

11. Admiral possesses no other security to satisfy any judgment against Sun Yacht. The yacht itself does not constitute such security inasmuch as it is the property of Admiral, not of Sun Yacht.

Admiral accordingly is entitled to attachment and trustee process in the sum of \$1,676,535, representing the face amount of the Promissory Note, additional monies expended beyond the Contract ceiling price and \$337,593 in delay damages and interest expenses accrued as of March 1, 1999.

Turning finally to the issue of Admiral's request for a stay of trial on the merits of this matter during the pendency of arbitration proceedings in Florida, I find all prerequisites of 9 U.S.C. § 3 satisfied. The parties' substantive disputes clearly are referable to arbitration pursuant to the

⁶Sun Yacht points out, no doubt accurately, that Bluewater's refusal to permit it access to the boatyard and relevant documents impeded its ability to respond to Admiral's allegation of breach and to effectuate a cure, if it determined any were needed. Bush Aff. ¶ 34. However, I do not read the Contract as contemplating circumstances under which either party would be excused from its obligation to cure a breach within thirty days after receipt of written notice. Contract ¶¶ 15.1, 16.1.

Contract. Admiral is one of the parties both to the instant action and the arbitration proceeding. There is no evidence that Admiral is in default in proceeding with arbitration. Thus, Admiral's motion to stay must be granted.

III. Conclusion

For the foregoing reasons, I **GRANT** Admiral's motions for attachment (*see* separate Order) and stay and to exclude the Bush affidavit from consideration in connection with Sun Yacht's Rule 12(b)(6) motion and recommend that Sun Yacht's motion to dismiss be **DENIED**. If my recommendation is adopted, Admiral shall file a written report on the status of arbitration every sixty days, the first such report to be due August 9, 1999, and shall promptly advise the court of any decision of the arbitrators.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 8th day of June, 1999.

*David M. Cohen
United States Magistrate Judge*