UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTEGR8 FUELS, INC.,

Petitioner,

-against-

O.W. BUNKER PANAMA S.A.,

Respondent.

16cv4073 (VSB) (DF)

REPORT AND RECOMMENDATION

TO THE HONORABLE VERNON S. BRODERICK, U.S.D.J.:

Petitioner Integr8 Fuels, Inc. ("Petitioner"), originally commenced this action in 2016, by filing a Petition seeking to compel respondent O.W. Bunker Panama S.A. ("Respondent") to arbitrate a dispute between the parties. In June 2017, upon Respondent's default, the Honorable Vernon S. Broderick, U.S.D.J., issued an Order granting the relief requested in the Petition and directing that judgment be entered accordingly. As set out below, the matter then proceeded to arbitration, resulting in an award favorable to Petitioner. Now, Petitioner has returned to the Court, seeking an order confirming the arbitration award pursuant to the Federal Arbitration Act, 9 U.S.C. § 9, and the Convention on the Recognition and Enforcement of Federal Arbitral Awards, 9 U.S.C. § 207, and Judge Broderick has referred Petitioner's current application to this Court for a report and recommendation. While styled as a second "petition," Petitioner's current application was actually filed on the Docket as a post-judgment "motion," and, given that its filing did not commence a new proceeding, this Court will generally refer to it as a motion herein.[1] For the reasons discussed below, I recommend that Petitioner's motion

[1] *See D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 108 (2d Cir. 2006) (describing an application to confirm an arbitration award as a "motion[] in an ongoing proceeding rather than a

(Dkt. 32) be granted, and that the Court enter judgment in Petitioner's favor, confirming the arbitration award.

BACKGROUND

A. Factual Background

As stated in the motion before this Court, Petitioner is a foreign corporation registered in the Marshall Islands and "was and is a seller of marine fuels to vessel owners, vessel agents, vessel charterers, and vessel operators throughout the world." (Petition To Confirm Arbitration Award and Enter Judgment, dated Jan. 3, 2019 ("Pet. Mtn.") ¶ 4.) According to Petitioner, Respondent and Dynamic Oil Trading (Singapore) Pte. Ld. ("DOT") were both foreign marine fuels traders and supply corporations operating as subsidiaries under the umbrella of the O.W. Bunker network of companies (the "OW Group") (*see id.* ¶¶ 5-7; *id.*, Ex. A, at 2 (Final Award); *see also* Verified Petition To Compel Arbitration, dated June 1, 2016 ("Pet.") (Dkt. 1) ¶ 20), but the OW Group "became insolvent in November of 2014 and immediately ceased business operations" (*see* Pet. Mtn. ¶ 7).

Petitioner's submissions indicate that, at the time of the OW Group's insolvency, Petitioner owed Respondent $1,928,001.14 "for fuel supplied to the M/V AS SUWAYQ at Galveston Light, Texas," and DOT owed Petitioner $600,395.53 "for fuel supplied to the M/V DL NAVIG8 at Hong Kong." (*Id.* ¶ 8; *see also id.*, Ex. A, at 1-2.) These amounts were both allegedly based on transactions that occurred in October 2014. (*Id.*; *id.*, Ex. A, at 1-2.)

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complaint initiating a plenary action"); *Local 807 Labor-Mgmt. Health & Pension Funds v. Showtime on the Piers, LLC*, 18-CV-3642 (ARR), 2019 WL 440641, at *2 (E.D.N.Y. Jan. 14, 2019) ("[I]n order to streamline . . . a[n] [award-confirmation] proceeding, courts treat a petition to confirm an arbitration award as a motion to confirm." (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008))), *report and recommendation adopted*, 2019 WL 438476 (Feb. 4, 2019).

Petitioner contends that its purchase of fuel from Respondent was subject to the OW Group's Terms and Conditions of Sale for Marine Bunkers, and that DOT's purchase of fuel from Petitioner was subject to Petitioner's General Terms and Conditions (the "GTC"). (*Id.*; *id.*, Ex. A, at 1-2.)

Under clause 5.4 of the GTC, a copy of which has been provided to the Court (*see* Pet., Ex. 7), if the "financial condition" of a buyer or the buyer's "subsidiary, parent, associate, related, or affiliated company" were to become "impaired," Petitioner would be entitled to "accelerate the Buyer's payment obligations" and to "offset such accelerated payment obligations of the Buyer against any debts due to the Buyer or its subsidiary, parent, associate, related, or affiliate company" (*id.*; *see also* Pet. Mtn. ¶ 10). Petitioner asserts that it notified Respondent and DOT by email on November 9, 2014 that it was exercising its rights under the GTC "to accelerate payments due" from DOT and "to offset the amounts of the payments against" what Petitioner owed to "various members of the [OW] [G]roup." (Pet. Mtn. ¶ 11.)

B. Procedural History

1. The Petition To Compel Arbitration, the Court's Grant of that Petition, and the Subsequent Arbitration Award

According to Petitioner, it attempted – by a letter to DOT and Respondent dated November 17, 2015 – to initiate arbitration proceedings to "obtain a formal ruling" regarding the debt offset. (*Id.* ¶ 12.) Petitioner states that, in that letter, it indicated that it was appointing David Martowski as an arbitrator pursuant to clause 11.1 of the GTC, which provides for a panel of three arbitrators – one chosen by each party, and a third chosen by the two selected by the

parties. (*See id.*; Pet., Ex. 7, at 5).[2] Petitioner further states, however, that neither Respondent nor DOT responded to its demand for arbitration. (*See* Pet. Mtn. ¶ 13; *id.*, Ex. A, at 3.)

As DOT failed to appoint an arbitrator within 10 days of Petitioner's demand for arbitration, Petitioner, in accordance with the GTC (*see supra*, at n.2) acted on its own to appoint a second arbitrator, Michael Mitchell (*id.* ¶ 13; *id.*, Ex. A, at 3). Petitioner also commenced this proceeding in this Court, seeking to compel Respondent to appoint an arbitrator, or, alternatively, to authorize Petitioner to appoint an arbitrator on Respondent's behalf. (*Id.* ¶ 14; *see* Pet.

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[2] Clause 11.1 of the GTC states in full:

> Any dispute arising under, in connection with or incidental to this Contract shall be heard and decided at New York City, New York State, by three persons, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final and, for the purpose of enforcing any award, this Contract may be made a rule of the court. Should a party fail to appoint an arbitrator within ten days of notice of demand for arbitration, the demanding party may appoint the second arbitrator with the same force and effect as if appointed by the second party. Should the two arbitrators be unable to agree on the appointment of a third arbitrator within 10 days after appointment of the second arbitrator, the President of the Society of Maritime Arbitrators, Inc. shall make the appointment upon the request of either party without further notice. The proceedings shall be conducted in accordance with the Rules of the Society of Maritime Arbitrators, Inc., including paragraph "Consolidation." This Contract shall be deemed to have been executed and fully performed in the State of New York, and shall be interpreted and construed in accordance with and subject to the federal maritime law of the United States or, should no such law exist on any particular issue, the laws of the State of New York (excluding otherwise applicable statutory limitation periods and conflict of laws principles), to the exclusion of the laws of any other state or country. The arbitrators shall award reasonable attorney's fees and costs to the prevailing party.

(Pet., Ex. 7, at 5.)

¶¶ 7-8.) After Respondent failed to appear, the Clerk of Court entered a Clerk's Certificate of Default (Dkt. 28), and Judge Broderick issued an Order on June 14, 2017, directing that a default judgment be entered against Respondent to the extent of affording Petitioner the relief requested in the Petition (*see* Dkt. 30). In addition to granting Petitioner leave to appoint an arbitrator on Respondent's behalf in the absence of an appointment by Respondent, the Default Judgment that was then entered (Dkt. 31) implicitly provided – by granting the relief requested in the Petition – that the Court would retain jurisdiction over the matter until a final award was entered (*see* Pet. at 7-8).

Following the Court's issuance of the Default Judgment, Petitioner appointed a third arbitrator, A.J. Siciliano (*see* Pet. Mtn. ¶ 15; *id.*, Ex. A, at 3), and arbitration proceeded in front of a panel of the three arbitrators appointed by Petitioner (the "Arbitrators"). (*See id.* ¶ 16; *id.*, Ex. A, at 7.) Although Respondent and DOT apparently failed to participate in the arbitration, the panel determined that Petitioner had given Respondent and DOT "more than sufficient opportunity to take part in [the] proceeding" and found that clause 5.4 of the GTC "expressly provide[d] for the 'set off' remedy sought" by Petitioner. (*See id.*, Ex. A, at 7.)

In the final award granted by the panel, the Arbitrators unanimously determined that Petitioner was entitled to set off its debt of $1,928,001.14 to Respondent by the $600,395.53 that was owed to Petitioner by DOT. (*Id.*, at 8-9.) The Arbitrators further determined that Petitioner was entitled to reimbursement of its legal fees and costs, totaling $88,772.09, as well as reimbursement of the Arbitrators' fees, totaling $22,825.00. (*Id.*, at 8.) The Arbitrators directed Petitioner to pay Respondent the remaining balance of $1,216,008.52 within 45 days. (*Id.*, at 9.)

2. Petitioner's Motion for the Court To Confirm the Arbitration Award

Petitioner filed the motion currently before the Court on January 3, 2019, framing it, as noted above, as a "petition" to confirm the arbitration award. (*See* Pet. Mtn.) A copy of the Arbitrator's final award is attached as an exhibit to the motion (*see id.*, Ex. A), and the motion additionally refers to the GTC, attached as an exhibit to the original Petition (*see* Pet., Ex. 7). Petitioner also filed a memorandum of law in support. (*See* Memorandum of Law in Support of Petition To Confirm Arbitration Award and Enter Judgment, dated Jan. 3, 2019 (Dkt. 33).) By Order dated January 4, 2019, Judge Broderick noted that "[p]roceedings to confirm . . . arbitration awards must be 'treated as akin to a motion for summary judgment." (Order, dated Jan. 4, 2019 (Dkt. 34) (quoting *D.H. Blair*, 462 F.3d at 109).) The Court thus directed Petitioner to file and serve, by January 31, 2019, any additional materials with which it intended to support its request for confirmation of the award, and directed Respondent to file any opposition by February 27, 2019. (Dkt. 34.) The Court also ordered Petitioner to serve Respondent with a copy of the Court's Order, as well as a copy of Petitioner's motion, and to file proof of such service. (*See id.*)

Petitioner was apparently unable to effectuate prompt service of its motion and the Court's Order on Respondent. (*See* Letter to this Court from Patrick F. Lennon, Esq., dated Apr. 9, 2019 (Dkt. 40) (describing a delay in service due to Petitioner's difficulty in locating the addresses of two of Respondent's directors).) Petitioner finally filed proof of service on May 15, 2019, attesting that service had been completed on April 10, 2019. (Dkt. 41.)

Then, side-stepping the Court's directive that Petitioner's submission be treated as a summary-judgment motion, Petitioner, on May 24, 2019, filed a declaration by counsel, requesting that the Clerk of Court enter another certificate of default against Respondent.

(Declaration of Keith W. Heard in Support [of] Requests for Clerk's Certificate of Default, dated May 24, 2019 (Dkt. 42).) Attempting to characterize its motion as a petition that had "commenced the second stage of this action" (*id.* ¶ 4), Petitioner asserted that Respondent's "time to file an Answer ha[d] expired" (*id.* ¶ 11), and thus it was entitled to another entry of default (*see generally id.*). Judge Broderick denied that request on May 29, 2019, noting that "default judgments in confirmation[] proceedings are generally inappropriate" (Order, dated May 29, 2019 (Dkt. 43), at 1 (internal quotation marks and citation omitted)), but ordering that, if Respondent failed to respond by June 12, 2019 to the so-called "petition" to confirm the award, then the Court would treat it as a summary-judgment motion and deem it unopposed (*id.*, at 2 (noting that, if Respondent failed to respond by that date, "its failure to contest issues not resolved by the record will weigh against it" (quoting *D.H. Blair*, 462 F.3d at 109))). As of the date of this Report and Recommendation, Petitioner has made no additional filings, and Respondent has still not filed any response to Petitioner's motion.

DISCUSSION

I. THE COURT'S RETENTION OF JURISDICTION

"[A] court which orders arbitration retains jurisdiction to determine any subsequent application involving the same agreement to arbitrate, including a motion to confirm the arbitration award." *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 705 (2d Cir. 1985). Thus, a case that has been closed or terminated while arbitration proceeds may be reopened for the purpose of confirming an arbitration award. *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Excel Staffing Servs. Inc.*, No. 08cv7249 (SAS), 2009 WL 1706575, at *2 (S.D.N.Y. June 17, 2009) (reopening case and entering judgment confirming arbitration award); *Moosazadeh v. Cream-O-Land Dairy, Inc.*, No. 13-CV-6069 (RLM), 2015 WL 1062184, at *2

n.4 (E.D.N.Y. Mar. 11, 2015) ("[E]ven where a civil action has been discontinued while the parties voluntarily proceed to binding arbitration, a motion to confirm or vacate the resulting arbitration award may be addressed to the court that originally presided over the case.").

In this case, the Court issued a default judgment against Respondent, granting the relief that had been sought by Petitioner in the Petition by which it had commenced this action. (*See* Dkt. 31.) Specifically, as had been requested by Petitioner, the Court authorized Petitioner to appoint a third arbitrator (*see* Pet., at 8), so that arbitration could proceed. Under the law cited above, the Court retained jurisdiction, in these circumstances, to consider a post-judgment motion to confirm or vacate the resulting arbitration award. Further, the Court made its intention in this regard clear, as it stated, in the Judgment, that it was granting the relief sought by Petitioner at pages 7-8 of its Petition (*see* Dkt. 31), and as Petitioner had therein expressly sought the Court's retention of jurisdiction (*see* Pet., at 8). Accordingly, even though a judgment has already been entered in this case, the Court has retained jurisdiction to consider Petitioner's now-pending motion.

II. PETITIONER'S MOTION TO CONFIRM THE ARBITRATION AWARD

A. Applicable Legal Standards

"It is well-settled that arbitration awards are 'subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.'" *Harper Ins. Ltd. v. Century Indem. Co.*, 819 F. Supp. 2d 270, 275 (S.D.N.Y. 2011) (quoting *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997)). Courts "are not authorized to reconsider the merits of an award," *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987), and an award should be confirmed "as long as the arbitrator is even arguably construing

or applying the contract and acting within the scope of his authority," even if the reviewing court observes "serious error" in the arbitrator's decision, *id*. at 38.

Despite this deferential standard, courts should still vacate an arbitration award "if it contradicts an express and unambiguous term of the contract or . . . so far departs from the terms of the agreement that it is not even arguably derived from the contract." *New York City & Vicinity Dist. Council of United Bhd. of Carpenters & Joiners of Am. v. Ass'n of Wall-Ceiling & Carpentry Indus. of New York, Inc.*, 826 F.3d 611, 618 (2d Cir. 2016) (internal quotation marks and citation omitted).

Where an application to confirm an arbitration award is unanswered, the application "should [be] treated as akin to a motion for summary judgment based on the movant's submissions." *D.H. Blair*, 462 F.3d at 109. As with any motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, while the non-moving party's "failure to contest issues not resolved by the record will weigh against it," *id*., the moving party still bears the burden of establishing "that there is no genuine dispute as to any material fact and [that it is] entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a). Indeed, "[e]ven unopposed motions for summary judgment must fail where the undisputed facts fail to show that the moving party is entitled to judgment as a matter of law." *D.H. Blair*, 462 F.3d at 110 (internal quotation marks and citations omitted). Therefore, "the district court may not grant [a] motion [for summary judgment] without first examining the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial." *Amaker v. Foley*, 274 F.3d 677, 681 (2d Cir. 2001).

In this particular context, the evidentiary burden placed on the movant is not a substantial one. A motion to confirm an arbitration award "is generally accompanied by a record, such as an

agreement to arbitrate and the arbitration award decision itself, that may resolve many of the merits or at least command judicial deference," *D.H. Blair*, 462 F.3d at 109, and courts generally consider documents such as these sufficient to support the motion, *see, e.g.*, *Primex Plastics Corp. v. TriEnda LLC*, No. 13cv321 (PAE), 2013 WL 1335633, at *3 (S.D.N.Y. Apr. 3, 2013) (confirming award based on submission of agreement containing arbitration clause, arbitration demand, and final award); *Nobilis Fragrances GmbH v. Freeze 24-7 Int'l LLC*, No. 10cv5438 (DAB), 2010 WL 4237850, at *1 (S.D.N.Y. Oct. 12, 2010) (finding unopposed petition to confirm arbitration award adequately supported by copies of arbitration agreement and final award); *see also Wells Fargo Advisors, LLC v. Soliman*, No. 15cv1139 (PAC) (GWG), 2015 WL 4619821, at *2 (S.D.N.Y. Aug. 4, 2015) ("[C]ourts commonly adjudicate petitions to confirm arbitral awards based solely on the petition, any accompanying papers, and any response." (citing cases)), *report and recommendation adopted*, 2015 WL 6745960 (Nov. 4, 2015).

B. The Motion Should Be Granted.

Based on the limited review it is permitted to undertake, this Court finds no genuine dispute of material fact that would preclude a grant of summary judgment in Petitioner's favor, and accordingly recommends that the arbitration award be confirmed.

The terms of the GTC, the final arbitration award, and Petitioner's motion establish that (1) DOT's purchase of fuel from Petitioner was subject to the GTC (*see* Pet., Ex. 7, at 1; Pet. Mtn., Ex. A, at 2; *id.* ¶ 9); (2) clause 5.4 of the GTC allowed Petitioner to accelerate payments owed by a buyer and to offset those payments against any debts due to the same buyer or its "subsidiary, parent, associate, related or affiliate company" if the buyer became "impaired" (*see* Pet., Ex. 7, at 3; Pet. Mtn., Ex. A, at 7; *id.* ¶ 10); (3) the OW Group filed for bankruptcy on November 7, 2014 (Pet. Mtn., Ex. A, at 2; *id.* ¶ 7); (4) DOT is a subsidiary of the OW Group

(*id.*, Ex. A, at 2; *id.* ¶ 7); and (5) at the time of the OW Group's bankruptcy, Petitioner owed Respondent $1,928,001.14, and DOT owed Petitioner $600,395.53 (*id.*, Ex. A, at 1-2; *id.* ¶ 8). Further, per clause 11.1 of the GTC, Petitioner was within its rights both to select a second arbitrator when Respondent failed to respond in a timely manner and to petition the Court for leave to select a third arbitrator. (*See supra*, at n.2.)

In short, Petitioner properly followed the arbitration procedures specified in the GTC; the GTC unambiguously allowed a set-off; and the set-off calculation performed by the Arbitrators was uncomplicated. This Court does not find any evidence that the Arbitrator's decision was arbitrary, procured by fraud, or otherwise contrary to law. Additionally, while not dispositive, it is important to note that Respondent has not participated in this action, despite having been given multiple opportunities to do so, and has not attempted to vacate, modify, or challenge the Arbitrator's final award. *See D.H. Blair*, 462 F.3d at 109 (finding, in summary judgment context, that failure to respond or contest issues not resolved by the record would weigh against the non-moving party); *see also Laundry, Dry Cleaning Workers & Allied Indus. Health Fund, Unite Here! v. Jung Sun Laundry Grp.*, No. 08–CV–2771 (DLI) (RLM), 2009 WL 704723, at *5 (E.D.N.Y. Mar. 16, 2009) (finding that failure to respond to a motion to confirm an arbitration award weighed against the non-moving party).

Based on this Court's review of the uncontested record that has been presented, this Court finds that the Arbitrators were "arguably construing or applying the contract and acting within the scope of [their] authority," *United Paperworkers*, 484 U.S. at 38, and that their final award should therefore be confirmed. Petitioner is accordingly entitled to judgment confirming the arbitration award. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2009 WL 1706575, at *2.

CONCLUSION

For the foregoing reasons, I respectfully recommend that Petitioner's so-called "petition" for an order confirming the arbitration award (Dkt. 32) be treated as a motion for summary judgment. I further recommend that, as such, the motion be granted and judgment be issued confirming the arbitration award.

Petitioner is directed to serve a copy of this Report and Recommendation on Respondent by a means reasonably calculated to afford notice, and to file proof of such service. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. *See also* Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Vernon S. Broderick, United States Courthouse, 500 Pearl Street, Room 1030, New York, New York 10007, and to the Chambers of the undersigned, United States Courthouse, 500 Pearl Street, Room 1660, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Broderick. FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993);

Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d Cir. 1988); *McCarthy v. Manson*, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
August 12, 2019

Respectfully submitted,

DEBRA FREEMAN
United States Magistrate Judge

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