UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GOULDS PUMPS, INC.,

Petitioner

-v-

DXP ENTERPRISES, INC.,

Respondent.

15-CV-7427 (VSB)

MEMORANDUM & OPINION

Appearances:

Peter Neil Wang
Foley & Lardner, LLP
New York, New York
Counsel for Petitioner

Alistair B. Dawson
Beck Redden LLP
Houston, Texas
Counsel for Respondent

VERNON S. BRODERICK, United States District Judge:

Petitioner Goulds Pumps, Inc. ("Petitioner" or "Goulds") commenced this action against Respondent DXP Enterprises, Inc. ("Respondent" or "DXP") to confirm the September 17, 2015 arbitration award ("Arbitration Award")[1] and enter judgment in Goulds' favor under Section 9 of the Federal Arbitration Act, 9 U.S.C § 1 *et seq*. ("FAA"). (*See* Doc. 1.) For the reasons that follow, Goulds' petition to confirm the Arbitration Award is GRANTED.

[1] A copy of the Arbitration Award is annexed as Exhibit 1 to the Supplemental Declaration of Jesse Beringer. (Doc. 11-1.)

I. BACKGROUND

A. Procedural Background

On September 18, 2015, Goulds commenced this action by filing its petition to confirm the Arbitration Award, (Doc. 1) ("Petition"), together with its Memorandum of Law in Support of the Petition, (Doc. 5) ("Goulds' Mem."), and the Declaration of Jesse Beringer in Support of the Petition, (Doc. 4) ("Beringer Decl."). As set forth in my Order, dated September 22, 2015, I directed: (i) Goulds to submit any additional materials in support of its Petition by October 20, 2015 and serve DXP with the Petition, memorandum of law, and declaration in support, and (ii) DXP to submit its opposition to the Petition, if any, by November 17, 2015. (Doc. 6)

In accordance with my September 22 Order, Goulds submitted the Supplemental Declaration of Jesse Beringer in Support of the Petition, dated October 20, 2015, (Doc. 11) ("Suppl. Beringer Decl."), and DXP submitted its Response to the Petition, dated November 17, 2015, (Doc. 15) ("DXP's Resp."), along with the Declaration of Alistair Dawson in Support of the Response, (Doc. 15-1) ("Dawson Decl.").

B. Factual Background

The following facts are taken from the parties' submissions, including the Petition, (Doc. 1), Goulds' memorandum of law and declaration in support of the Petition, (Docs. 4, 5), Goulds' supplemental declaration in support of the Petition, (Doc. 11), and DXP's response to the Petition and its declaration in support of that response, (Docs. 15, 15-1). The parties do not dispute any of the facts set forth in their respective submissions and are in agreement that the Arbitration Award should be confirmed.[2]

[2] In DXP's response to the Petition, DXP states that it "agrees that this action's arbitration award should be confirmed," and DXP represents that its response and declaration in support were submitted "for completeness" because the Petition included "only a partial record of arbitration proceedings." (DXP's Resp. at 1.)

1. The Parties

Goulds is a Delaware corporation with its principal place of business in Seneca Falls, New York. (Petition ¶ 3.) Goulds manufactures a wide variety of industrial pumps, which it sells to customers in the oil and gas, mining, power generation, chemical, pulp and paper, and general markets. (*Id*.) Goulds is a wholly owned subsidiary of ITT Corporation, an Indiana corporation with its principal place of business in White Plains, New York, that is traded on the New York Stock Exchange. (*Id*.)

DXP is a Texas corporation with its principal place of business in Houston, Texas. (*Id*. ¶ 4.) DXP is an international distribution management company that provides products and services to a variety of industries, including oil and gas, general manufacturing, chemical, transportation, food and beverage, mining, agriculture, and construction. (*Id*.) DXP sells Goulds' pumps, parts, and related products, in addition to the products of over twenty-five other manufacturers. (*Id*.) DXP is a publicly traded company, and is traded on the NASDAQ Stock Market. (*Id*.)

2. The Distribution Agreement and Dispute Relating to Section 7C

Goulds and DXP entered into a distribution agreement, dated July 20, 2010 ("Distribution Agreement").[3] (*Id.* ¶ 9.) The Distribution Agreement gave DXP the right to sell and promote certain lines of Goulds' products, including API[4] oil and gas pumps. Section 7.C of the Distribution Agreement prohibited DXP from selling or promoting products that competed with the Goulds products covered by the Distribution Agreement. Section 7.C states that DXP (as "Distributor") agrees:

[3] A copy of the Distribution Agreement is annexed as Exhibit 1 to the Declaration of Jesse Beringer, (Doc. 4-1).

[4] The parties do not define API, but it appears to stand for American Petroleum Institute, a trade organization in the oil and gas industry. *See* American Petroleum Institute website, http://www.api.org/about.

> Not to individually or jointly with others, directly or indirectly, or by any means whatsoever, except as may be expressly permitted by Manufacturer [i.e., Goulds] in writing, sell or promote products which are competitive with the Products covered by this Agreement. The foregoing restraint shall apply equally to Distributor and to the equitable owners of the Distributor, and a violation of this Agreement shall occur if competing product is sold or promoted by a third party owned, whether directly or as a subsidiary at any level, by substantially the same equitable owners as those that are the equitable owners of the Distributor, regardless of how such third party is acquired or developed. Notwithstanding the foregoing, it will not be considered a violation of this section if any of the equity owners of Distributor, as a separate, passive investment, own less than 5% of the shares of a corporation whose shares are traded on a recognized stock exchange or in the over-the-counter market, even if such corporation happens to sell products which are competitive with the Products. It being understood, however, that any such equity owner of Distributor shall not have any management, administrative or employee role in such other corporation. If Distributor is a publicly traded entity, then it is agreed that the term "equitable owners" used in this paragraph shall not apply to any institutional owner of stock of Distributor. An "institutional owner" shall mean pension funds, mutual funds or any other similar entity which owns shares of Distributor for investment purposes and is not engaged in the management or day to day operation of Distributor.

(Distribution Agreement § 7C.) The Arbitrator characterized Section 7.C as "DXP's promise to refrain from selling or promoting products 'which are competitive with the Products covered by this [Distribution] Agreement.'" (Arbitration Award at 7 (quoting Distribution Agreement § 7.C).)

In a transaction effective January 1, 2014, DXP acquired all the equity securities and interest of B27, LLC ("B27"), including its subsidiaries, Best PumpWorks and Pumpworks 610, LLC. (Arbitration Award at 6 ¶¶ 23, 26.) B27, through Best PumpWorks, manufactures and sells API pumps. (*Id*. at 8.) As a result of DXP's acquisition of B27, Goulds provided DXP with notice of DXP's violation of the parties' Distribution Agreement in a letter dated January 16, 2014. (*Id*. at 6 ¶ 27.) In its January 16 letter Goulds also reserved other rights, including its right to terminate the Distribution Agreement. (*Id*.)

The Distribution Agreement included an arbitration clause which states:

> Any controversy or claim arising out of or related to this Agreement or the breach thereof shall be resolved if possible by negotiations between Manufacturer and the Distributor during a ninety (90) day period from written notice of the claim or controversy. If such negotiations do not resolve the controversy or claim, then the claim or controversy shall be finally settled by conciliation or arbitration, commenced within one hundred and twenty (120) days after the expiration of the ninety (90) day period, in the English language. Conciliation or arbitration shall be held in New York City, United States of America, at an office designated by the American Arbitration Association, conducted by a conciliator or arbitrator knowledgeable about commercial contracts and business law appointed under the Commercial Rules of the American Arbitration Association who will conduct the conciliation or arbitration in accordance with governing law of this Agreement. Judgment upon an arbitration award may be entered in any court having jurisdiction or application for a judicial acceptance of the arbitration award or an order of enforcement as the case may be. Costs of arbitration shall be borne equally by the Parties. Notwithstanding the foregoing, either Manufacturer or Distributor may apply to a court of competent jurisdiction for the imposition of an equitable remedy (such as a Restraining Order or Injunction) upon a showing of the elements necessary to sustain such remedy.

(Distribution Agreement § 23.) DXP commenced an action by filing a petition seeking a temporary restraining order and preliminary and permanent injunctive relief in the District Court of Harris County, Texas. (Petition ¶ 11.) After the Texas state court denied DXP's petition for a temporary restraining order, Goulds removed the case to the United States District Court for the Southern District of Texas. (*Id.* ¶ 12.) Goulds moved to stay the case and to compel arbitration, and on November 4, 2014 District Judge Lee H. Rosenthal issued an order dismissing the case without prejudice in favor or arbitration. *DXP Enters., Inc. v. Goulds Pumps, Inc.*, No. H-14-1112, 2014 WL 5682465, at *8 (S.D. Tex. Nov. 4, 2014) (dismissing action and holding that "DXP's claims for permanent injunctive and declaratory relief must be submitted to arbitration"). Thus, another federal district court has already determined that the parties' arbitration clause in Section 23 of the Distribution Agreement is valid and enforceable. *Id.* at *7

(noting that the arbitration provision is enforceable and its broad language weighs heavily in favor of arbitration).

3. Goulds Commences Arbitration Pursuant to the Parties' Distribution Agreement

On April 8, 2014, Goulds commenced arbitration against DXP, styled *Goulds Pumps, Inc. v. DXP Enterprises, Inc.*, AAA Case No. 01-14-0000-1246 ("Arbitration"), pursuant to the arbitration provision of the parties' Distribution Agreement, (*see* Distribution Agreement § 23). The AAA designated Benjamin A. Levin as the arbitrator to preside over the Arbitration ("Arbitrator"). Goulds' arbitration demand sought (i) a declaration that it had good cause to terminate the Distribution Agreement because DXP had purchased B27 in violation of Section 7.C, and (ii) compensatory damages. (Goulds' Mem. at 2.)

On January 26, 2015, the Arbitrator issued the Report of Preliminary Hearing and Scheduling Order ("Preliminary Order"),[5] which set forth, *inter alia*, the confidentiality agreement, discovery procedures and deadlines, summary judgment briefing schedule, and hearing dates concerning the parties' Arbitration. With respect to applicable law, the Preliminary Order stated:

> The Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act (codified at Tex. Bus. & Com. Code §57.001 et seq.) ("Texas Dealer Act") applies to the issue of Gould's termination of its Distributor Agreement with DXP. The Texas Dealer Act constitutes a fundamental policy of Texas[,] and New York law does not afford dealers like DXP similar protections as provided in the Texas Dealer Act.

(Preliminary Order ¶ 11.) The Preliminary Order further stated that: "New York law will apply to all other issues in this case." (*Id.*) The parties proceeded with discovery and dispositive briefing as set forth in the Preliminary Order. The arbitration hearing was held in New York,

[5] A copy of the Preliminary Order is annexed as Exhibit A to the Dawson Declaration. (Doc. 15-1.)

New York from June 15 through June 18, 2015 and July 7 through 9, 2015.

4. The Award of Arbitrator

The Arbitrator issued a final award, dated September 17, 2015, in Goulds' favor. (*See* Award of Arbitrator, hereinafter "Arbitration Award.") Specifically, the Arbitrator found that DXP's acquisition of B27 was a substantial breach of Section 7C of the Distribution Agreement. (*Id*. at 1 ¶ 1.) The Arbitrator also found that, pursuant to the Texas Dealer's Act, Goulds is required to provide DXP with 180 days' notice of termination of the Distribution Agreeement and a 60 day opportunity to cure the specified deficiency. (*Id*. at 11 ¶ 2.) "The specific deficiency or substantial breach found [was] DXP's acquisition of B27's manufacturing division, PumpWorks 610. Therefore, Goulds must give DXP 60 days to cure the deficiency by selling PumpWorks 610." (*Id*.) The Arbitrator further found that Goulds was not entitled to any compensatory damages, (*id*. at 11 ¶ 3), and denied DXP's counterclaims, (*id.* at 11 ¶ 4). The Arbitration Award was in "full settlement of all claims and counterclaims submitted to the Arbitration," and stated that "all claims not expressly granted [in the Arbitration Award] are hereby denied." (*Id.* at 11.)

II. LEGAL STANDARD

Goulds brings this action under FAA § 9 which states:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 9. In reviewing an arbitration award, a federal district court "can confirm and/or

vacate the award, either in whole or in part." *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006). However, "[t]he role of a district court in reviewing an arbitration award is 'narrowly limited' and 'arbitration panel determinations are generally accorded great deference under the [FAA].'" *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 103 (2d Cir. 2013) (quoting *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 19 (2d Cir. 1997)). "This deference promotes the twin goals of arbitration, namely settling disputes efficiently and avoiding long and expensive litigation. Consequently, the burden of proof necessary to avoid confirmation of an arbitration award is very high, and a district court will enforce the award as long as there is a barely colorable justification for the outcome reached." *Id*. at 103–04 (internal citations and quotation marks omitted).

"Normally, confirmation of an arbitration 'a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.'" *D.H. Blair & Co.*, 462 F.3d at 110 (quoting *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984)). The FAA provides that "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions." 9 U.S.C. § 6. Thus, "[u]nder the FAA, the petition itself should be treated as a motion to confirm the award." *In re Certain "Default" Motions Brought o/b/o Trs. of Empire State Carpenters Annuity, Apprenticeship, Labor-Mgmt. Cooperation, Pension & Welfare Funds*, No. 13-CV-6364, 2015 WL 968125, at *5 (E.D.N.Y. Feb. 27, 2015) (citing 9 U.S.C. § 6); *see also id*. ("[A] petition represents the procedural device that should be used to resolve these cases."). "Therefore, a court may decide the merits of a petition to confirm or vacate an arbitration award based solely on the papers submitted by the parties in support of their motions." *Companion Prop. & Cas. Ins. Co. v. Allied Provident Ins., Inc.*, No. 13-cv-7865, 2014 WL 4804466, at *2 (S.D.N.Y. Sept. 26, 2014) (citations and internal

quotation marks omitted). Courts commonly adjudicate petitions to confirm arbitral awards based solely on the petition, any accompanying papers, and any response. *See, e.g.*, *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, No. 15 Civ. 1784 (PAE), 2015 WL 4393060, at *3 (S.D.N.Y. July 14, 2015); *TapImmune, Inc. v. Gardner*, No. 1:14-cv-6087-GHW, 2015 WL 4111881, at *2 (S.D.N.Y. July 8, 2015); *Trs. of the N.Y.C. Dist. Council of Carpenters Pension Fund v. TNS Mgmt. Servs., Inc.*, No. 13 Civ. 2716 (JMF), 2014 WL 100008, at *2 (S.D.N.Y. Jan. 10, 2014).

"Only a barely colorable justification for the outcome reached by the arbitrator[] is necessary to confirm the award." *D.H. Blair & Co.*, 462 F.3d at 110 (internal quotation marks omitted). Even if I am convinced that "the arbitrator committed serious error, the award should not be vacated so long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." *Supreme Oil Co. v. Abondolo*, 568 F. Supp. 2d 401, 406 (S.D.N.Y. 2008) (alterations and internal quotation marks omitted).

III. DISCUSSION

Here, the parties are in agreement that the Arbitration Award should be confirmed. (*See* DXP's Resp. at 1 (agreeing "that this action's arbitration award should be confirmed").) Moreover, upon my independent review, the Petition meets all of the requirements to confirm an arbitration award pursuant to Section 9 of the FAA. There is no dispute that the parties entered into an arbitration agreement that allowed entry of an arbitration award by this court. (*See* Distribution Agreement § 23.) Additionally, the Petition was filed the day after the Arbitrator issued the Arbitration Award, which is well within the one year deadline, *see* 9 U.S.C. § 9.

The sole issue that DXP raises in its Response is that the record before me should "accurately reflect[] the course of arbitration proceeding." (DXP's Resp. at 1.) To that end,

DXP noted "for the sake of completeness," (*id.*), that the Arbitrator's Preliminary Report stated that the Texas Dealers' Act would apply to this case and New York law would govern all other issues in the Arbitration, (*see supra* Section I.B.3). These additional facts, like all the material facts stated herein, are not in dispute by the parties.

I have reviewed the entire record, including: (i) the Petition; (ii) Goulds' Memorandum of Law, the Beringer Declaration, and the Supplemental Berenginer Declaration in support of the Petition; (iii) and DXP's Response and the Dawson Declaration in Support of the Response. It is plainly the case that the Arbitrator's Arbitration Award was not arbitrary, did not exceed his powers, was not otherwise contrary to law and provides the parties with far more than "a barely colorable justification for the outcome reached." *D.H. Blair & Co.*, 462 F.3d at 110. Accordingly, I find that the Arbitration Award should be confirmed.

IV. CONCLUSION

For the foregoing reasons, Goulds' Petition to confirm the Arbitration Award, (Doc. 1), is GRANTED. The Clerk of Court is respectfully directed to close the case.

SO ORDERED.

Dated: July 18, 2017
New York, New York

Vernon S. Broderick
United States District Judge