UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 14-81622-CIV-ROSENBERG/REINHART

EARTH SCIENCE TECH, INC.,

Plaintiff,

v.

IMPACT UA, INC. et al.,[1]

Defendants.
_____/

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO CONFIRM ARBITRATION AWARD (DE 9) AND PLAINTIFF'S CROSS-MOTION TO PARTIALLY VACATE AWARD (DE 20)

Before this Court for disposition is the Defendant Cromogen Biotechnology Corporation's Motion to Confirm a Final Arbitration Award (DE 9) and Plaintiff Earth Science Tech's Cross-Motion to partially vacate the award. DE 20, 21. This case was referred to the undersigned by the Hon. Robin L. Rosenberg on October 30, 2018. DE 38. The undersigned has reviewed the motions, Cromogen's response/reply (DE 24), and Earth Science's reply (DE 25).[2] These matters are ripe for decision. For the reasons stated below, it is **RECOMMENDED** that Cromogen's Motion to Confirm the Arbitration Award (DE 9) be **GRANTED**, and Earth Science's Cross-Motion to Partially Vacate the Award (DE 20) be **DENIED.**

[1] The only Defendant involved in the present dispute is Defendant Cromogen Biotechnology Corporation.

[2] Cromogen moved for leave to file a sur-reply (DE 34), but Judge Rosenberg terminated the motion until the Court could "assess whether the proposed Sur-Reply is necessary and appropriate." DE 36. Having reviewed the parties' briefs, this Court finds that a sur-reply is not necessary.

FACTS

This action stems from the parties' contractual relationship whereby Cromogen agreed to designate Earth Science as its exclusive distributor to formulate, market and sell CBD (Cannabidoil) rich hemp oil. The parties entered into a Distribution Agreement on June 5, 2014, which contained the following arbitration clause:

> This Agreement and performance by the parties hereunder shall be construed in accordance with the laws of the State of New York, U.S.A., without regard to provisions on the conflict of laws. Both parties submit to exclusive International Arbitration through JAMS International using UNCITRAL Rules in New York, NY. U.N. Convention on International Sale of Goods shall not apply to this Agreement.

DE 1-2 at ¶ 15.[3]

Earth Science received its first two shipments of CBD oil from Cromogen in July and August 2014. The August shipment also contained four samples of CBD oil, which were shipped directly to Earth Science, but which Cromogen was obligated to deliver to another customer. Earth Science was advised on "numerous occasions" that it needed to forward the samples to Cromogen as soon as they arrived "because they were needed in order to proceed with a large deal" between Cromogen and another customer. Earth Science agreed to forward the samples, but never did.

On August 21, 2014, Earth Science accused Cromogen of breaching the Distribution Agreement, alleging that the product shipped in the first two deliveries was not pure CBD oil, as required by the specifications. Accordingly, Earth Science cancelled the agreement.

[3] Cromogen is a citizen of El Salvador and Plaintiff is a citizen of the United States. Both countries are parties to the Inter-American Convention on International Commercial Arbitration ("the Panama Convention"), which requires confirmation of international arbitration awards.

ARBITRATION PROCEEDINGS AND FINAL AWARD

In October 2014, Cromogen served a Demand for Arbitration on Earth Science. The parties agreed upon a panel of arbitrators and a hearing was held. On June 8, 2018, the panel of arbitrators issued a final award. DE 37.[4] The panel concluded that the CBD oil Cromogen sent to Earth Science was compliant with the contract's specifications and that Earth Science was in breach of the agreement. The panel entered a monetary award in favor of Cromogen for the breach, plus interest.[5]

Over Earth Science's objection, the arbitration panel also found that Cromogen's tort claims against Earth Science were within the scope of the agreement's arbitration clause. Specifically, Cromogen sought damages for (1) conversion of the samples sent in the second delivery, and (2) tortious interference with Cromogen's other contract. The panel noted the "strong policy favoring arbitration" and that "arbitration clauses are construed as broadly as possible, resolving any doubts concerning the scope of arbitrable issues in favor of arbitration." DE 37 at ¶ 98 (citing *AT&T Techs., Inc. v. Communications Workers of America*, 415 U.S. 643, 656 (1986) ("[w]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an

[4] Judge Rosenberg granted the parties' motion to file the arbitration award under seal. DE 19, 32, 37. Earth Science also moved to file under seal unredacted versions of documents included in the arbitration record, which are referenced in its cross-motion. DE 21, 33. Judge Rosenberg denied the filing of these "other documents" under seal, but allowed Earth Science to file a list of the documents "so that the Court is able to determine if those documents are indeed necessary to the Court's analysis." DE 32. Upon reviewing Earth Science's list of documents (DE 33) and its cross-motion, this Court finds these other documents to be unnecessary because they relate to facts and arguments presented during the arbitration.

[5] Because the amounts of the damages awarded by the panel are only specified in the sealed Final Award (DE 37), and have otherwise been redacted by the parties, the Court will not explicitly state those amounts here.

interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'").

The panel rejected Earth Science's "narrow" interpretation of the arbitration clause, which it claimed covered only the breach of contract claims. DE 37 at ¶ 100. According to the panel's decision, the "governing procedural law is the Federal Arbitration Act . . . [which] gives a broad interpretation to the scope of arbitration clauses." *Id.* Moreover, the panel explained:

> [a] plain reading of the clause, which not only refers to the [Distribution] Agreement but the "performance of the parties hereunder," supports a broad interpretation of the clause. In addition, the second part of the clause requires both parties to submit to "exclusive International Arbitration through JAMS International using UNCITRAL Rules in New York, NY" thus stating that all disputes between the parties would exclusively be resolved in arbitration. The Tribunal construes this language to mean that the parties were aware and agreed that this would be an international arbitration . . . and subject to a policy favoring a broad reading with *all* disputes to be submitted to arbitration.

Id at ¶¶ 101, 102 (emphasis in original). According to the panel, Earth Science "would never have received these samples were it not for its [Distribution] Agreement with Cromogen." *Id.* at ¶ 105. Thus, the panel concluded that Cromogen's tort claims were within the scope of the agreement and properly arbitrated.

On the merits of Cromogen's conversion claim, the panel found that the "separate samples were delivered and on August 14, 2014, that [Earth Science] promised in writing to send the samples to Cromogen," but never did so. Thus, the panel concluded that on these facts, "Cromogen has established its claim for conversion." *Id.* at ¶ 109.

Likewise, in assessing Cromogen's tortious interference claim, the panel determined that "Cromogen lost its contract with [its other customer] because Earth Science failed to deliver the samples as it had promised to do." *Id.* at ¶ 108. Specifically, the panel found that Earth Science "was aware" of Cromogen's contract with its other customer, having been "reminded many times

by Cromogen as to the importance of getting the samples that were included in the second shipment . . . because they were required for a major contract for Cromogen." *Id.* at ¶ 117. Earth Science's failure to forward the samples made Cromogen "unable to provide these samples to [its other customer, and] Cromogen ultimately lost the contract. It was the actions of Earth Science that led to the failure of the [other] Contract." *Id.* at ¶ 118. Thus, the panel concluded that Earth Science tortiously interfered with the Cromogen's other contract "by rendering performance impossible," and thus, was "liable for the resulting lost profits." *Id.* at ¶ 120. Cromogen presented evidence of its lost profits, and the panel found it had "proven its damages with sufficient certainty and reliability." *Id.* at ¶ 137. The panel entered an award in favor Cromogen on its tort claims, plus interest. *Id.* at ¶ 138.

As a final matter, the panel ordered Earth Science to reimburse Cromogen for the arbitrators' compensation and the administrative fees of the arbitration, but it denied Cromogen's request for attorney's fees. *Id.* at ¶ 140.

LEGAL CLAIMS AND APPLICABLE STANDARDS

In its motion to confirm the arbitration award, Cromogen argues that the arbitration panel's Final Award falls under the Panama Convention, and that "none of the grounds permitted by the Panama Convention for refusal to confirm apply in this case." DE 9 at 4. An award falls under the Panama Convention, if: (i) the award arises from a "commercial" relationship; (ii) the award concerns a defined legal relationship, whether contractual or not; and (iii) the award arises out of the relationship, which is not entirely between the citizens of the United States. DE 9 at 5 (citing 9 U.S.C. § 202 *incorporated in* 9 U.S.C. § 302).

Section 207 of the FAA provides for confirmation of awards under the Panama Convention, subject only to the limited grounds for refusal specified in the convention. *Id.*

incorporated in 9 U.S.C. § 302; *see EGI-VSR, LLC v. Coderch Mitjans*, No. 15-20098-CIV, 2018 WL 2465345, at *2 (S.D. Fla. June 1, 2018) (J. Scola) (arbitration awards falling under the Panama Convention are "entitled to be recognized and enforced, unless an appropriate exception for non-recognition applies") (quotations and citations omitted). The "exclusive means for upsetting an arbitration award" are found in 9 U.S.C. §§ 10(a) and 11.[6] *White Springs Agr. Chems., Inc. v. Glawson Invest. Corp.*, 660 F.3d 1277, 1280 (11th Cir. 2011). A party seeking to vacate an award under Section 10(a) bears a "heavy burden." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568–69 (2013).

[6] In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration-

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. 9 U.S.C. § 11.

Here, Earth Science does not dispute that Cromogen's breach of contract claims are governed by the Panama Convention. DE 21 at 13. Rather, Earth Science contends that the arbitrators exceeded their authority by adjudicating Cromogen's tort claims, which it argues are beyond the scope of the parties' Distribution Agreement. Thus, Earth Science seeks vacatur of that part of the award under Section 10(a)(4) of the FAA. *Id.* at 7. Specifically, Earth Science argues that "claims related to [the] product samples [are] wholly outside the scope" of the parties' agreement, as is Cromogen's contractual relationship with another customer. *Id.* at 8.

Earth Science also seeks to have the arbitration award amended under 9 U.S.C. § 11 for a purported miscalculation by the panel. According to Earth Science, it filed an application "inform[ing] the [panel] that it had mistakenly calculated Cromogen's alleged lost profits by relying upon an incorrect (and much lower) Cost of Goods Sold" (DE 21 at 13), however, the panel denied the application, refusing to amend its award.

Standard of Review

"A federal court's review of an arbitration award is highly deferential and extremely limited." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Wise Alloys, LLC*, 807 F.3d 1258, 1271 (11th Cir. 2015). *See also Four Seasons Hotels & Resorts B.V. v. Consorcio Barr, S.A.*, 613 F. Supp. 2d 1362, 1366-67 (S.D. Fla. 2009) (J. Moore) (district court's review of a foreign arbitration award is "quite circumscribed" and "there is a general pro-enforcement bias manifested in the Convention"). Indeed, arbitration awards are "presumptively entitled to deference and enforcement." *Int'l Brot. of Teamsters v. Amerijet Int'l, Inc.*, No. 12-60654-CIV, 2013 WL 6388562, at *2 (S.D. Fla. Dec. 5, 2013) (J. Moreno); *see also Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs., Inc.*,

146 F.3d 1309, 1312 (11th Cir. 1998) (the FAA "presumes that arbitration awards will be confirmed").

"District courts hearing [a]rbitration appeals will not re-examine the merits or factual determinations of the underlying arbitration award." *Amerijet Int'l,* at *2 (quoting *Great Am. Ins. Co. v. Moye*, 733 F. Supp. 2d 1298, 1301 (M.D. Fla. 2010)). "[A] panel's incorrect legal conclusion is not grounds for vacating or modifying the award." *White Springs Agr. Chems., Inc*., 660 F.3d at 1280. This limited review is critical to "maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, L.L.C. v. Mattel, Inc*., 552 U.S. 576, 588 (2008). "If parties could take 'full-bore legal and evidentiary appeals,' arbitration would become 'merely a prelude to a more cumbersome and time-consuming judicial review process.'" *Sutter*, 569 U.S. at 569 (quoting *Hall Street Assoc.*, 552 U.S. at 588).

Here, Earth Science argues that the arbitrators "exceeded their powers" under 9 U.S.C. § 10(a)(4) by interpreting the arbitration clause in the Distribution Agreement to include "all disputes" between the parties. Earth Science contends that Cromogen's tort claims are beyond the scope of the arbitration clause. Earth Science also contends that the arbitrators miscalculated Cromogen's lost profits and that this Court should correct the award pursuant to 9 U.S.C. § 11.

DISCUSSION

1. The Breadth of the Arbitration Clause Extends to Cromogen's Tort Claims

At the outset, the Court recognizes that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (*United Steelworkers of Am. v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960)), and that the issue of arbitrability is "presumptively for the courts" to decide. *JPay, Inc. v. Kobel*, 904 F.3d 923, 929-930 (11th Cir.

2018).[7] Therefore, this Court will first consider whether the panel properly reached the merits of Cromogen's tort claims.

"Unless the parties have expressly agreed to submit the question of arbitrability to the arbitration panel, the court must independently decide that preliminary question based on ordinary principles of state contract formation law." *Hungry Horse LLC v. E Light Elec. Servs., Inc.*, 569 F. App'x 566, 570 (10th Cir. 2014) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995)). "In determining whether the particular issue is arbitrable, the district court should resolve any doubts about the scope of the arbitration agreement in favor of arbitration." *Hungry Horse*, 569 F. App'x at 570 (citing *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

Thus, in considering whether Cromogen's tort claims are within the scope of the arbitration clause in the parties' Distribution Agreement, the Court is guided by the principle that where parties have contracted to arbitrate *some* issue(s), any ambiguity about whether they agreed to arbitrate a *particular* issue is resolved by applying "a set of default presumptions, laid out by the Supreme Court, which help [ ] determine what the contracting parties intended." *JPay, Inc.*, at 929. "'[A]ny doubts concerning the scope of arbitrable issues' -- that is, doubts over whether an issue falls within the ambit of what the parties agreed to arbitrate – 'should be resolved in favor of arbitration.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). "This is because parties whose contract 'provides for arbitration of some issues . . . likely gave at least some thought to the scope of arbitration.'" *JPay, Inc.* at 929 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995). In

[7] Cromogen relies on case law from other circuits which hold that the UNCITRAL rules "clearly and unmistakably delegate questions of arbitrability to an arbitrator." DE 24 at 11 (collecting cases). Even though the arbitration clause at issue here specifically incorporates the UNCITRAL rules, the Court will nevertheless conduct an independent arbitrability analysis.

such circumstances, courts will generally find that any issue which is arguably within the agreement's scope is arbitrable because "if the parties thought about what they wanted to arbitrate, we can safely assume they thought about and articulated what they didn't want to arbitrate. We assume their intent to arbitrate anything not specifically excluded." *Id.*

Notably, Earth Science does not dispute that an enforceable arbitration clause exists under the Distribution Agreement, that the parties' breach of contract claims were properly arbitrated pursuant to it, or that the Panama Convention governs those claims. Earth Science only argues that the agreement's arbitration clause does not extend to Cromogen's claims for conversion and tortious interference with a contractual relationship. According to Earth Science, the agreement regarding the samples was a "separate unsigned 'agreement'" which did not contain its own agreement to arbitrate. DE 21 at 14-15.

In rejecting this argument the Court considers the plain language of the arbitration clause pursuant to the parties' New York choice of law provision. "Whether a contractual term is ambiguous must be determined by the court as a matter of law, looking solely to the plain language used by the parties within the four corners of the contract to discern its meaning and not to extrinsic sources." *Ashwood Capital, Inc. v. OTG Mgmt., Inc.*, 948 N.Y.S.2d 292, 297 (N.Y. App. Div. 2012) (citing *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998)).

Here, the agreement's arbitration clause is unambiguous and does not limit the scope of issues to be arbitrated. Instead, it broadly refers to "performance by the parties" and states that "[b]oth parties submit to *exclusive* International Arbitration . . ." (emphasis added). A plain reading of this language indicates that the parties intended to arbitrate *all* of their disputes stemming from their performance under the Distribution Agreement.

It is undisputed that Earth Science obtained the product samples in the course of Cromogen's performance under the Distribution Agreement. In fulfillment of the Distribution Agreement's performance obligations, shipments of CBD oil were sent to Earth Science which included four product samples that needed to be forwarded to Cromogen. Thus, Earth Science's receipt of those samples was a direct result of its participation in the Distribution Agreement. Earth Science's subsequent promise to immediately forward the samples to Cromogen is sufficiently related to the parties' performance under the Distribution Agreement to be considered part of the same business transaction and, therefore, encompassed by the broad arbitration clause.

Finally, in applying the presumptions set forth above, this Court finds that Earth Science could have carved-out exceptions to the arbitration clause, if it did not intend to arbitrate certain claims, yet it did not. This failure to specify carve-outs renders the presumption in favor of arbitration controlling.

2. The Court Declines to Modify the Arbitration Award

The Court has considered Earth Science's request to modify the arbitration award based on the panel's purported miscalculation. Earth Science contends that the panel improperly relied upon inaccurate costs proffered by Cromogen in calculating its lost profits. Again, however, the Court is constrained by the high degree of deference it must show the arbitration panel. Section 11 of the FAA provides that a district court may modify or correct an arbitration award "[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award." *Funair Corp. v. Raytheon Co.*, No. 04-22327-CIV, 2005 WL 6718593, at *3 (S.D. Fla. May 20, 2005) (J. Altonaga) (quoting 9 U.S.C. § 11(a)).

While courts have modified arbitration awards when "mathematical errors appear on the face of the award" (*id.*, collecting cases), that situation is not the case here. Indeed, Earth Science seeks to modify the award because the arbitration panel "relied upon a calculation set forth in Cromogen's expert report" regarding the cost of goods sold. DE 21 at 23. Notably, the panel declined to recalculate the award when presented with this argument. *Funair*, 2005 WL 6718593, at *3 (court declined to modify award, finding it "difficult to accept" appellant's argument regarding a purported miscalculation, "particularly when the 'mathematical error' was pointed out to the arbitrator following entry of the award and was not 'corrected.'").

In any event, the panel was entitled to rely upon the testimony of Cromogen's expert in determining the lost profits. "[T]he burden of uncertainty as to the amount of damage is upon the wrongdoer . . . The plaintiff need only show a 'stable foundation for a reasonable estimate' " of the damage." *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 110 (2d Cir. 2007). Here, Earth Science did not present any expert report or testimony to counter the evidence of Cromogen's lost profits. Since Earth Science has failed to satisfy the criteria of Section 11, this Court declines to modify the award.

3. Cromogen is Not Entitled to Attorneys' Fees for the Motion to Confirm

Although the arbitration panel specifically declined to award attorneys' fees as a result of the arbitration, Cromogen argues that it is entitled to recover its attorneys' fees for being "compelled to file this Motion to secure the relief that [Earth Science] should have voluntarily provided." DE 9 at 13. Cromogen does not cite to any statute for this proposition, and in its response/reply, Cromogen acknowledges that courts in this Circuit have not addressed this issue. DE 24 at 22.

Notably, "[n]either the New York Convention nor the Federal Arbitration Act expressly address whether courts may award attorney's fees accrued in a proceeding to confirm a foreign arbitral award." *Swiss Inst. of Bioinformatics v. Glob. Initiative on Sharing All Influenza Data*, 49 F. Supp. 3d 92, 98 (D.D.C. 2014). Instead, Cromogen urges the Court to use its inherent power to sanction Earth Science for "engag[ing] in a pattern of bad faith, vexatious, wanton, and oppressive litigation." DE 24 at 22.

The Court rejects Cromogen's request for attorneys' fees. Under the circumstances here, the Court does not find Earth Science's motion to partially vacate the arbitral award to constitute sanctionable conduct. In *Swiss Inst. of Bioinformatics*, the court recognized "that a party seeking to confirm a foreign arbitral award under the New York Convention may recover reasonable attorneys' fees and costs, at least where the respondent *unjustifiably* refused to abide by the arbitral award." *Id.* at 98 (emphasis added). Cromogen has the burden of establishing bad faith by Earth Science. *See Spolter v. Suntrust Bank*, 403 F. App'x 387, 390 (11th Cir. 2010) ("[t]o impose sanctions under the court's inherent power, the court must find bad faith"). Cromogen has not satisfied its burden, and therefore, the Court declines to impose sanctions in the form of attorneys' fees against Earth Science.

RECOMMENDATION

WHEREFORE, the undersigned **RECOMMENDS** that Cromogen's Motion to Confirm the Arbitration Award (DE 9) be **GRANTED**, and Earth Science's Cross-Motion to Partially Vacate the Award (DE 20) be **DENIED.** Cromogen's request for attorneys' fees should also be **DENIED.**

NOTICE OF RIGHT TO OBJECT

A party shall serve and file written objections, if any, to this Report and Recommendation with the Honorable Robin L. Rosenberg, United States District Court Judge for the Southern District of Florida, within **FOURTEEN (14) DAYS** of being served with a copy of this Report and Recommendation. Failure to timely file objections shall constitute a waiver of a party's "right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." 11th Cir. R. 3-1 (2016).

DONE AND SUBMITTED in Chambers this 20th day of November, 2018, at West Palm Beach in the Southern District of Florida.

BRUCE REINHART
UNITED STATES MAGISTRATE JUDGE