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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**TESORO REFINING & MARKETING
COMPANY LLC,**

Plaintiff,

v.

**UNITED STEEL, PAPER AND
FORESTRY, RUBBER,
MANUFACTURING, ENERGY,
ALLIED-INDUSTRIAL AND
SERVICE WORKERS
INTERNATIONAL UNION,
A.F.L.-C.I.O. LOCAL 675,**

Defendant.

Case No.: CV 19-08853-CJC(MRWx)

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS [Dkt. 11]**

I. INTRODUCTION

Plaintiff Tesoro Refining & Marketing Company LLC (“Tesoro”) brings this action to vacate a labor arbitration award issued in a dispute with Defendant United Steel,

1 Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service
2 Workers International Union, AFL-CIO, Local 675 (the “Union” or “Defendant”).
3 (Dkt. 1 [Complaint, hereinafter “Compl.”].) Before the Court is the Union’s motion to
4 dismiss for lack of subject matter jurisdiction and for failure to state a claim. (Dkt. 11
5 [hereinafter “Mot.”].) For the following reasons, the motion is **GRANTED**.¹

6 7 **II. BACKGROUND**

8
9 Tesoro operates a refinery in Los Angeles. (Compl. ¶ 6.) The Union represents a
10 bargaining unit of production, construction, and maintenance employees at the refinery.
11 (*Id.*) Tesoro and the Union executed a Collective Bargaining Agreement (“CBA”)
12 governing employment disputes. (Compl. Ex. 2 [hereinafter “CBA”].) This case arises
13 out of a dispute involving Union member Jason Davis, who holds a Maintenance Utility
14 Clean Up (“MUCU”) position at the refinery. (Compl. ¶ 10.)

15
16 In or about January 2017, Davis applied for an internal promotion to become an
17 entry-level pipefitter. (*Id.* ¶ 12.) The application process included a written test and a
18 practical test. (*Id.* ¶ 13.) Six internal candidates, including Davis, received at least the
19 minimum score on both tests to be eligible for the pipefitter position. (*Id.* ¶ 14.) Davis
20 did not receive the promotion. (*Id.* ¶¶ 15–17.) According to Tesoro, Davis was not
21 chosen because of his relatively low test scores. (*Id.*)

22
23 The Union filed a Grievance with Tesoro claiming that Tesoro violated the CBA
24 by failing to promote Davis. (*Id.* ¶ 20, Ex. 3.) The Grievance alleges that Tesoro
25 discriminated against Davis, who is African American, and failed to consider his
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27
28 ¹ Having read and considered the papers presented by the parties, the Court finds this matter appropriate
for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set
for December 9, 2019, at 1:30 p.m. is hereby vacated and off calendar.

1 seniority in its decision. (*Id.*) The parties were unable to resolve the dispute internally,
2 and the Union elected to arbitrate pursuant to the CBA. (*Id.* ¶¶ 21–23.) Under the CBA,
3 “[t]he decision of the arbitrator shall be final and binding on all persons concerned.”
4 (CBA Art. XX.) Article XXIII of the CBA prohibits discrimination against covered
5 employees based on race, color, or national origin. (CBA Art. XXIII.)
6

7 The appointed Arbitrator, Phillip Tamoush, received briefing and documentary
8 evidence and held a one-day hearing with oral arguments and witness testimony.
9 (Compl. Ex. 1 [Arbitration Opinion and Award, hereinafter “Arb. Op.”] at 6.) The parties
10 could not agree on the proper scope of the Grievance, which Tesoro defined narrowly to
11 include only the allegation of racial discrimination and the Union defined broadly to
12 include any violation of the CBA in connection with the decision not to promote Davis.
13 (*See id.* at 2.) The parties therefore allowed the Arbitrator to define the issues for
14 resolution, which he framed as “Did the Company violate the Collective Bargaining
15 Agreement, particularly Article XXIII, by failing to select Jason Davis for a pipefitter
16 position? If so, what is the appropriate remedy?” (*Id.*)
17

18 On July 6, 2019, the Arbitrator issued his Opinion and Award, which found that
19 Tesoro violated the CBA by discriminating against Davis when deciding not to promote
20 him to the Pipefitter position. (*Id.* at 10.) The Arbitrator found that the CBA “implicitly
21 and explicitly requires the time-honored application of seniority in dealing with
22 employees and assuring a reasonable approach to promotions of capable and qualified
23 employees.” (*Id.*) He determined that Tesoro impermissibly changed its candidate
24 criteria by treating the tests as absolute, rather than threshold, criteria for promotion. (*Id.*)
25 Based in part on this shift, he concluded that Tesoro “acted discriminatorily and
26 unreasonably in not appointing the more senior employee, namely Davis, over lower
27 seniority employees who also had passed the threshold level.” (*Id.* at 10–11.)
28

1 The Arbitrator issued the following findings and orders under the heading
2 “Award”:

- 3 1. “The Company violated the Collective Bargaining Agreement by failing to
4 select Jason Davis for a Pipefitter position from among internal candidates in
5 April 2017.”
- 6 2. “The Company is ordered to appoint Davis to the Pipefitter position consistent
7 with the same position of the other internal appointees.”
- 8 3. “The Company is ordered to pay the Grievant whatever Pipefitter compensation
9 and benefits would have accrued had he been appointed when the other internal
10 candidates were appointed.”
- 11 4. “The Company is ordered to pay interest at the legal rate on the compensation
12 not earned, as indicated in number three above.”
- 13 5. “[Davis] shall be appointed to the appropriate compensation and benefits he
14 would have received had he been appointed along with the internal candidate
15 appointees.”
- 16 6. “The parties are ordered to meet and discuss the appropriate dates regarding
17 when Jason Davis is to be considered to have been appointed to the Pipefitter
18 position, whether Davis’ appointment is to be considered a fourth MUCU
19 substitute position, and related matters.”
- 20 7. “[The Arbitrator] retains jurisdiction over this matter solely to apply and
21 interpret the award in this matter at the request of either party.”
- 22 8. “The parties are ordered to split the fees of the Arbitrator in this matter.”

23
24 (*Id.* at 12.)

25
26 The Union claims that Tesoro has refused to comply with the Award and that the
27 parties cannot agree on the dates referenced in Item 6 of the Award. (Mot. at 7.) Tesoro
28

1 has not disputed either allegation. (*See generally* Dkt. 14 [Tesoro’s Opposition to the
2 Union’s Motion to Dismiss, hereinafter “Opp.”].)

3
4 Tesoro filed this action to vacate the Arbitrator’s Award and alleges that the
5 Arbitrator exceeded his authority by ignoring clear language in the CBA, adding terms to
6 the CBA, and “dispensing his own brand of industrial justice.” (Compl. ¶ 27.)

7
8 **III. DISCUSSION**

9
10 The Union moves to dismiss Tesoro’s Complaint for lack of subject matter
11 jurisdiction and for failure to state a claim. Because the Court finds that it lacks subject
12 matter jurisdiction over the dispute, it does not address the Union’s argument that Tesoro
13 fails to state a claim for relief.²

14
15 **A. Rule 12(b)(1) Standard**

16
17 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life Ins.*
18 *Co. of Am.*, 511 U.S. 375, 377 (1994). As such, federal courts are presumed to lack
19 jurisdiction in a particular case “unless the contrary affirmatively appears.” *Stock West,*
20 *Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir.
21 1989). In deciding a Federal Rule of Civil Procedure 12(b)(1) motion challenging subject
22 matter jurisdiction, the burden of proof is on the party asserting jurisdiction, and the
23 court will presume a lack of jurisdiction until the pleader proves otherwise. *See*

24
25 ² For future proceedings, however, the Court notes that the Union’s Rule 12(b)(6) arguments are
26 properly raised in a Motion to Confirm Arbitration Award. *See, e.g., Am. Legal Funding, LLC v.*
27 *Etherton*, 2009 WL 10695384, at *1 (D. Ariz. Apr. 6, 2009), *aff’d*, 373 F. App’x 696 (9th Cir. 2010).
28 As Tesoro correctly notes, a motion to dismiss for failure to state a claim requires the Court to resolve
factual disputes in favor of the non-movant, which is at odds with the deferential standard properly
applied in a review of an arbitration ruling. *See United Steelworkers of Am. v. Enterprise Wheel & Car*
Corp., 363 U.S. 593 (1960).

1 *Kokkonen*, 511 U.S. at 377. A jurisdictional challenge under Federal Rule of Civil
2 Procedure 12(b)(1) may be made either on the face of the pleadings or by presenting
3 extrinsic evidence. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir.
4 2003); *see also Thornhill Publ'g Co., Inc. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733
5 (9th Cir. 1979) (noting that a Rule 12(b)(1) motion “may either attack the allegations of
6 the complaint or . . . attack[] the existence of subject matter jurisdiction in fact”). When
7 considering a facial attack on the allegations of the complaint, like the instant motion, a
8 court must assume the truth of the complaint’s non-conclusory allegations. *White v. Lee*,
9 227 F.3d 1214, 1242 (9th Cir. 2000) (internal citations omitted).

11 **B. Jurisdiction to Review Final Arbitration Awards**

13 District courts have jurisdiction to vacate or enforce an arbitration award pursuant
14 to the Labor Management Relations Act. 29 U.S.C. § 185; *Orion Pictures Corp. v.*
15 *Writers Guild of Am., W., Inc.*, 946 F.2d 722, 724 (9th Cir. 1991). However, absent
16 exceptional circumstances, a district court can only review an arbitrator’s ruling after
17 there is a “final award.” *Millmen Local 550, United Bhd. of Carpenters & Joiners of*
18 *Am., AFL-CIO v. Wells Exterior Trim*, 828 F.2d 1373, 1376–77 (9th Cir. 1987).³ Without
19 a final award or exceptional circumstances, an arbitration ruling is unripe, and a district
20 court lacks jurisdiction to review the arbitrator’s decision. *See Aerojet Rocketdyne, Inc.*
21 *v. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 2017 WL
22 9500948, at *1 (C.D. Cal. Nov. 27, 2017).

24 “To be considered ‘final,’ an arbitration award must be intended by the arbitrator
25 to be [a] complete determination of every issue submitted.” *Id.* at 1376. “Where an
26 arbitrator retains jurisdiction in order to decide a substantive issue the parties have not yet
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28 ³ Neither party argues that this case involves special circumstances that would allow the Court to review the arbitrator’s ruling before a final award.

1 resolved, this retention of jurisdiction indicates that the arbitrator did not intend the award
2 to be final.” *Orion Pictures*, 946 F.2d at 724. Specifically, “the issue of damages [must]
3 be resolved in order for an award to be considered final.” *Millmen Local*, 828 F.2d at
4 1376. The Ninth Circuit distinguishes between arbitration rulings that retain jurisdiction
5 to determine the appropriate remedy and rulings that simply require mathematical
6 computations to finalize the remedy. *See id.* at 1376–77. An award may be final even if
7 the arbitrator retains jurisdiction over future disputes about the implementation of the
8 award. *See Aerojet Rocketdyne*, 2017 WL 9500948, at *3.

9
10 The Union argues that the Court lacks subject matter jurisdiction over this dispute
11 because the Arbitrator has not issued a final award. The Court agrees. The Arbitrator’s
12 opinion clearly resolves the substance of the Union’s claims. It unequivocally determines
13 that Tesoro violated the CBA. (*See Arb. Op.* at 12.) It also provides guidelines for the
14 appropriate remedy. The Arbitrator ordered Tesoro to appoint Davis to the pipefitter
15 position with the same compensation and benefits as the other applications, with backpay
16 and interest. (*See id.*) However, important details of the awarded remedy remain
17 unresolved. Specifically, the Award leaves open (1) the date when Davis is to be
18 considered to have been promoted, (2) his annual salary, benefits, and the amount owed
19 in backpay, and (3) the administrative definition of Davis’s new position—whether his
20 appointment will be considered “a fourth MUCU substitute position.” (*See id.*) These
21 are not details that can be resolved through “mathematical calculations.” *Cf. Sheedy*
22 *Drayage Co. v. Teamsters Local 2785*, 2013 WL 791886 (N.D. Cal. 2013) (finding that
23 an award was final where remedy could be determined through “mathematical calculation
24 not subject to reasonable dispute”). The unresolved terms of Davis’s appointment will
25 have significant implications for his recovery and involve factual disputes that the parties
26 are apparently unable to resolve on their own. *Cf. id.* (considering whether “there were []
27 undecided matters on which the parties might disagree”).

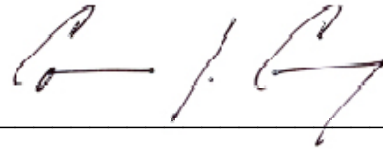
1 The Arbitrator’s ruling anticipates future proceedings to resolve these questions if
2 necessary. He ordered the parties “to meet and discuss the appropriate dates regarding
3 when Jason Davis is to be considered to have been appointed to the Pipefitter position,
4 whether Davis’ appointment is to be considered a fourth MUCU substitute position, and
5 related matters.” (Arb. Op. at 12.) He specifically reserved jurisdiction “to apply and
6 interpret the award” at either party’s request. (*Id.*) The Court finds that the Arbitrator
7 left certain terms of the remedy unresolved and “specifically retained jurisdiction to
8 decide the remedy if the parties could not agree.” *See Millmen Local*, 828 F.2d at 1376.
9 Ninth Circuit precedent clearly permits an arbitrator to create a framework for an award
10 and offer the parties the opportunity to finalize the terms of the remedy on their own. *See*
11 *id.* The Arbitrator’s use of the phrase “meet and discuss” implies negotiations that, if
12 unsuccessful, will give way to formal adjudication. Since negotiations between Tesoro
13 and the Union have apparently failed, the Arbitrator retains jurisdiction to determine the
14 proper remedy in this dispute.

15
16 The Court is troubled by Tesoro’s decision to file suit when the terms of Davis’s
17 appointment remain unresolved. (*See Mot.* at 7.) If the Court accepted jurisdiction, it
18 would either replace the Arbitrator in an ongoing labor dispute or be forced to navigate
19 parallel proceedings. The requirement of finality supports “the strong policy of favoring
20 arbitration of labor disputes under collective bargaining agreements.” *See Millmen*
21 *Local*, 828 F.2d at 1377. “To allow judicial intervention prior to the final award would
22 contravene the fundamental federal labor policy of deference to contractual dispute
23 resolution procedures, and would interfere with the purpose of arbitration: the speedy
24 resolution of grievances without the time and expense of court proceedings.” *Id.* at 1375.
25 The Court finds that the Arbitrator’s Award has not been finalized and therefore this
26 dispute is not ripe for review. Accordingly, the Union’s motion to dismiss for lack of
27 subject matter jurisdiction is **GRANTED**.

1 **V. CONCLUSION**

2
3 For the foregoing reasons, the Union’s motion to dismiss is **GRANTED**. This
4 case is **DISMISSED WITHOUT PREJUDICE**. Tesoro may file a subsequent
5 challenge to the Arbitrator’s ruling after the Award is finalized.
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8 DATED: December 5, 2019



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10 CORMAC J. CARNEY
11 UNITED STATES DISTRICT JUDGE
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