

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **SACV 18-00683 JVS(PLAx)** Date **June 25, 2018**

Title **Applied Underwriters Captive Risk Assurance Co., Inc. v. O’Connell  
Landscape Maintenance, Inc.**

Present: The Honorable James V. Selna

Karla J. Tunis  
Deputy Clerk

Not Present  
Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

**Proceedings: (IN CHAMBERS) ORDER DENYING DEFENDANT’S MOTION TO DISMISS/QUASH SERVICE OF SUMMONS and ORDER GRANTING PLAINTIFF’S MOTION TO CONFIRM ARBITRATION AWARD**

**The Court, having been informed by the parties in this action that they submit on the Court’s tentative ruling previously issued, hereby DENIES the Defendant’s Motion to Dismiss/Quash Service of Summons and GRANTS Plaintiff’s Motion to Confirm Arbitration Award. The Court makes these rulings in accordance with the tentative ruling as follows:**

Before the Court are two motions.

First, Respondent O’Connell Landscape Maintenance, Inc. (“O’Connell”) filed a motion to dismiss/quash service of summons pursuant to Federal Rules of Civil Procedure 12(b)(4) and 12(b)(5). (Mot., Docket No. 12.) Petitioner Applied Underwriters Captive Risk Assurance Co., Inc. (“AUCRA”) opposed. (Opp’n, Docket No. 44.) O’Connell replied. (Reply, Docket No. 16.)

O’Connell’s notice of motion failed to comply with Local Rule 7-3.<sup>1</sup> For that reason, and on the merits, the Court **denies** O’Connell’s motion.

Second, AUCRA filed a motion to confirm arbitration award. (Mot., Docket No.

<sup>1</sup> The Court may, in its discretion, deny a motion where moving counsel fails to meet and confer with opposing counsel at least seven days prior to the filing of the motion. L.R. 7-3, 83-7(c).

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13.) O'Connell failed to oppose. The Court deems O'Connell's failure to oppose the motion as consent to the granting of the motion. L.R. 7-12. For that reason, and on the merits, the Court **grants** AUCRA's motion.

**I. BACKGROUND**

On November 12, 2013, AUCRA and O'Connell executed a Reinsurance Participation Agreement ("RPA"), effective for a 3-year term. (Pet., Docket No. 1 ¶ 6.) Paragraph 13 of the RPA contains an arbitration provision requiring that any and all disputes between the parties arising out of or related to the RPA be "finally determined exclusively by binding arbitration." (*Id.* ¶ 7; Barzelay Decl., Docket No. 15-1, Ex. 2 ¶ 13(B).) At the end of the 3-year term, in November 2015, O'Connell renewed its agreement for an additional one-year period. (Pet., Docket No. 1 ¶ 10.) However, O'Connell canceled before the end of the one-year term and filed a Demand for Arbitration with JAMS on June 1, 2016. (*Id.*) The parties agreed to arbitrate before JAMS in Orange, California, even though the RPA specified an alternative default location. (*Id.* ¶ 11.) AUCRA sought an award of attorneys' fees and costs under the RPA. (*Id.* ¶ 12.) The arbitration took place on August 7 and 8, 2017. (*Id.* ¶ 14.) The arbitrator issued an Interim Award on September 14, 2017, in which it found for AUCRA and determined that AUCRA was the prevailing party. (*Id.* ¶ 15.) The arbitrator directed AUCRA to file an application for costs and expenses, including attorneys' fees. (*Id.*) The arbitrator issued a final award on December 4, 2017, awarding AUCRA \$38,960 in attorney fees and \$43,170.44 in costs. (*Id.* ¶ 16; Barzelay Decl., Docket No. 15-1, Ex. 1 at 12.) AUCRA filed its petition to confirm the arbitration award on April 23, 2018. (*See* Pet., Docket No. 1.)

**II. LEGAL STANDARD**

**A. Motion to Dismiss**

1. Improper Venue<sup>2</sup>

Under Federal Rule of Civil Procedure 12(b)(3), a Court may dismiss a complaint

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<sup>2</sup> O'Connell moved pursuant to Rule 12(b)(4), however Rule 12(b)(3) is the proper grounds to dismiss a complaint for improper venue.

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where there is improper venue. “[A] motion to enforce a forum selection clause is treated as a motion pursuant to” Rule 12(b)(3). Kukje Hwajae Ins. Co., Ltd. v. M/V Hyundai Liberty, 408 F.3d 1250, 1254 (9th Cir. 2005) (citing Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996)).

2. Insufficient Service of Process

Under Federal Rule of Civil Procedure 12(b)(5), a Court may dismiss a complaint where there is an insufficiency of process or service of process. “Once service is challenged, plaintiffs bear the burden of establishing service was valid . . . .” Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004).

**B. Motion to Confirm Arbitration Award**

A court’s review of an arbitration award under the Federal Arbitration Act (“FAA”) is “both limited and highly deferential.” Coutee v. Barington Capital Grp., L.P., 336 F.3d 1128, 1132 (9th Cir. 2003) (citations and internal quotation marks omitted). Under the FAA, a district court must grant a timely motion to confirm an arbitration award (1) if the parties have agreed that a court shall enter a judgment on the award and (2) if the arbitration award is not vacated, modified, or corrected. See 9 U.S.C. § 9.

**C. 28 U.S.C. § 1927**

Under 28 U.S.C. § 1927, a court may order sanctions against an attorney for reasonable attorney fees and costs when the attorney “multiplies the proceedings in any case unreasonably and vexatiously.” 28 U.S.C. § 1927. The court must find recklessness or bad faith to impose sanctions under § 1927. United States v. Associated Convalescent Enter., Inc., 766 F.2d 1342, 1346 (9th Cir. 1985).

**III. DISCUSSION**

**A. Motion to Dismiss**

O’Connell argues that AUCRA’s petition should be dismissed because (1) the parties agreed that the only proper venue to confirm the arbitration award is the courts of

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Nebraska and (2) AUCRA failed to properly serve the petition. The Court addresses each argument in turn.

1. Venue

O'Connell argues that venue is not proper in this Court because the RPA specifies the "Courts of Nebraska" as the only proper venue to confirm an arbitration award. (Mot., Docket No. 12 at 2.-3.) The FAA provides that:

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 (emphasis added). Therefore, if the parties have specified a court in their arbitration agreement, only that court may enter an order confirming the award. Id. However, if the parties have not specified a court, either party may file an application for confirmation in the district within which the award was made. Id.

The RPA states that:

Participant hereby irrevocably and unconditionally submits to the exclusive jurisdiction of the Courts of Nebraska for the purpose of enforcing any arbitration award rendered hereunder and all other purposes related to this Agreement, and agrees to accept service of process in any case instituted in Nebraska related to this Agreement and further

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agrees not to challenge venue in Nebraska provided such process is delivered in accordance with the applicable rules for service of process then in effect in Nebraska. To the extent necessary, this consent shall be construed as a limited waiver of sovereign immunity only with respect to this Agreement.

(Barzelay Decl., Docket No. 15-1, Ex. 2 ¶ 16.) The agreement defines O'Connell as "Participant." (*Id.* at 1.) By its plain terms, only O'Connell agreed to submit to the exclusive jurisdiction of the courts of Nebraska. The parties did not agree that only the courts of Nebraska may enforce their arbitration award. Therefore, it was proper for AUCRA to file the present action in the court in the district in which the arbitration award was made. O'Connell does not contest that the arbitration award was made in this District. Therefore, this Court is the proper venue for the present action.<sup>3</sup>

2. Service of process

O'Connell argues that AUCRA's petition also must be dismissed because AUCRA failed to properly execute service. The FAA provides that:

Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. *If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court.* If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal

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<sup>3</sup> In its reply, O'Connell raises a number of arguments for the first time concerning other sections of the arbitration agreement. "The district court need not consider arguments raised for the first time in a reply brief." *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). Accordingly, the Court declines to consider those argument.

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of any district within which the adverse party may be found  
in like manner as other process of the court.

9 U.S.C. § 9 (emphasis added). O'Connell is a resident of this district. (Pet., Docket No. 1 ¶ 2.) Therefore, if AUCRA complied with the rules for service of a motion, its service of the petition was proper. See Golden State Foods, Corp. v. Mendoza, No. CV-14-07045-MWF (EX), 2014 WL 12589654, at \*3 (C.D. Cal. Nov. 4, 2014) (holding that Rule 5, governing motions, not Rule 4, governing summons, applied to determine proper service on residents pursuant to 9 U.S.C. § 9); see also LG Elecs. MobileComm U.S.A., Inc. v. Reliance Commc'ns, LLC, No. 18-CV-0250-BAS-RBB, 2018 WL 2059559, at \*2 (S.D. Cal. May 3, 2018) (distinguishing between residents and nonresidents for purposes of determining proper service on nonresidents of notice of an application to confirm).

Federal Rule of Civil Procedure 5(b)(2)(B)(i) permits service of a motion by "leaving it: at the person's office with a clerk or other person in charge of, or if no one is in charge of, in a conspicuous place in the office." Fed. R. Civ. P. 5(b)(2)(B)(I). AUCRA served O'Connell by causing a copy of the Petition to be hand-delivered to a receptionist at its main office, during normal business hours. (Barzelay Decl., Docket No. 15-1 ¶ 7.) There is no dispute that O'Connell actually received notice of the petition. (See id. ¶ 8.) Accordingly, AUCRA properly effectuated service of notice of its application to confirm the arbitration award.

In sum, the Court **denies** O'Connell's motion to dismiss/quash service of summons.

**B. Motion to Confirm Arbitration Award**

First, the Court deems O'Connell's failure to oppose the motion to confirm as consent to granting of the motion. L.R. 7-12.

Second, the Court grants the motion on the merits. As an initial matter, the parties agreed that a court would enter a judgment on the award. (See Barzelay Decl., Docket No. 15-1, Ex. 2 ¶ 13(G)). Their agreement specifies that "[j]udgment upon the award rendered by the arbitrator or arbitrators may be entered by any court of

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competent jurisdiction in Nebraska or application may be made in such court for judicial acceptance of the award and an order of enforcement as the law of Nebraska may require or allow.” (*Id.*) Therefore, judgment may be entered by any court of competent jurisdiction in Nebraska, or application may be made to any court of competent jurisdiction for an order in accordance with Nebraska law. (*See id.*) This Court is a court of competent jurisdiction.<sup>4</sup>

Additionally, the Court “must grant” an application to confirm an arbitration award “unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.” 9 U.S.C. § 9. O’Connell failed to file a motion to vacate or modify within “three months after the award [was] filed or delivered.” *See* 9 U.S.C. § 12. “Failure to timely move to vacate bars all defenses to arbitration awards.” *LG Elecs.*, 2018 WL 2059559, at \*6 (citing *Sheet Metal Workers Int’l Assn., Local v. Standard Sheet Metal, Inc.*, 699 F.2d 481, 483 (9th Cir. 1983)).

As the parties agreed that a court would enter a judgment on the award, and the arbitration award has not been vacated, modified, or corrected, the Court must grant AUCRA’s application for an order confirming the arbitration award. *See* 9 U.S.C. § 9.

**C. 28 U.S.C. § 1927**

AUCRA requests an award of sanctions against O’Connell pursuant to 28 U.S.C. § 1927. (Mot., Docket No. 13-1 at 11.) As noted above, the Court “may” require an attorney who “so multiplies the proceedings in any case unreasonably and vexatiously . . . to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” 28 U.S.C. § 1927. However, “the use of the word ‘may’—rather than ‘shall’ or ‘must’—confers substantial leeway on the district court when imposing sanctions. Thus, with § 1927 as with other sanctions provisions, ‘[d]istrict courts enjoy much discretion in determining whether and how much sanctions are appropriate.’” *Haynes v. City & Cty. of San Francisco*, 688 F.3d 984, 987

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<sup>4</sup> Alternatively, the choice of Nebraska could be read as permissive. Given that O’Connell has agreed to Nebraska as a proper jurisdiction, the provision ensures that judgment in Nebraska will bind O’Connell. But because O’Connell is a resident of this District, it would also proper to seek entry of judgment in this District.

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(9th Cir. 2012) (quoting Trulis v. Barton, 107 F.3d 685, 694 (9th Cir.1995)).  
Additionally, the court must find recklessness or bad faith to impose sanctions under § 1927. Associated Convalescent Enter., 766 F.2d at 1346. Here, the record does not show that O'Connell's counsel acted recklessly or in bad faith. The Court therefore denies the request for sanctions.

**IV. CONCLUSION**

For the foregoing reasons, the Court **denies** O'Connell's motion to dismiss. The Court **grants** AUCRA's motion to confirm arbitration award, but **denies** its request for sanctions.

**IT IS SO ORDERED.**

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