

United States District Court  
Northern District of California

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**NOT FOR CITATION**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CROSS LINK, INC. DBA WESTAR  
MARINE SERVICES,

Petitioner,

v.

SALT RIVER CONSTRUCTION  
CORPORATION,

Respondent.

Case No. 16-cv-05412-JSW

**ORDER GRANTING PETITION TO  
CONFIRM ARBITRATION AWARD**

Re: Dkt. No. 1

Now before the Court for consideration is the Petition to Confirm Arbitration Award filed by Cross Link., Inc. d/b/a Westar Marine Services (“Petitioner”). The Court has considered the parties’ papers, relevant legal authority, and the record in this case. For the reasons set forth in this Order, the Court **HEREBY GRANTS** the Petition.<sup>1</sup>

**BACKGROUND**

On or about November 11, 2011, Petitioner and Respondent Salt River Construction Corporation (“Respondent”) executed a contract, pursuant to which Petitioner agreed to provide “Vessel(s) to tow [Respondent’s] vessel(s) as requested by [Respondent] on a call out basis (subject to Vessel availability).” (Petition, Ex. 2 (“Services Agreement”).) The Services

<sup>1</sup> On December 9, 2016, the Court issued an order to show cause why this case should not be stayed pending a state court proceeding discussed later in this Order. (Dkt. No. 23.) The Court has considered the parties’ papers on that issue. It also reviewed the state court docket, which shows the state court has deferred setting a trial date pending a resolution of this Petition. The Court has considered the factors relevant to a stay under *Landis v. North American Co.*, 299 U.S. 248 (1936), and it concludes that they do not weigh in favor of a stay. First, as noted, the state court has deferred setting a trial date until the Court issues a ruling in this case. Second, it is not clear that a ruling from the state court would simplify the issues in this case. Accordingly, the Court declines to exercise its discretion to stay this case in favor of the state court proceedings.

1 Agreement does not contain any provisions regarding its duration. Petitioner asserts that  
2 Respondent breached the terms of the Services Agreement by failing to pay it “in accordance with  
3 the terms of the” Services Agreement and failed to “pay any of the [Petitioner’s] invoices or  
4 otherwise compensate [Petitioner] for any services rendered during 2014.”<sup>2</sup> (Petition, ¶ 6 at 4:2-3,  
5 4:10-12 (emphasis in original); *see also id.*, Ex. 3, Final Award of Arbitration (“Final Award”) at  
6 2 (noting that services at issue were provided in 2014).)

7 The Services Agreement contains an arbitration clause, which provides, in part, as follows:

8 In the event of any dispute whatsoever between the parties, they  
9 shall exhaust every effort to settle or dispose of the same.

10 Any controversy or claim arising out of or relative to this agreement  
11 or breach hereof not disposed of under the previous paragraph  
12 within fourteen (14) days from the written notice of a part[y] to the  
13 other of its request for a resolution under this dispute clause shall be  
14 settled by arbitration administered by the American Arbitration  
15 Association [“AAA”] under its Construction Industry Rules, and  
16 judgment upon the award rendered by the arbitrator(s) may be  
17 entered into any court having jurisdiction.

18 (Services Agreement, § 15.)

19 The Services Agreement also contains an integration clause, which provides “[t]his  
20 agreement constitutes the entire agreement between the parties with respect to matters addressed  
21 herein and expressly supersedes all prior and contemporaneous negotiations, communications,  
22 understandings and agreements, whether written or oral. This agreement shall not be modified or  
23 amended except through a writing signed by both parties.” (*Id.* § 17.)

24 Petitioner demanded arbitration on or about September 25, 2015. (Final Award at 1.)  
25 According to the record, “[o]n November 11, 2015, Respondent advised the AAA and Claimant  
26 that the parties’ dispute was not governed by [the Services Agreement] and thus Respondent had  
27 not agreed to AAA arbitration.” (*Id.*) On December 23, 2015, the arbitrator conducted a  
28 preliminary hearing, which Respondent attended. From what the Court can glean from the record,  
the arbitrator issued a Preliminary Hearing Order and directed Respondent to provide evidence of  
a second contract by January 26, 2016, a date the arbitrator later extended to February 23, 2016.

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<sup>2</sup> Petitioner also asserts that Respondent breached the Services Agreement by failing to exhaust efforts to settle and by failing to participate in arbitration.

1 (Petition, Ex. 6, Email string at 2-3.) The record also shows that the arbitrator raised the issue of  
2 whether it had jurisdiction to decide the contract questions. (*Id.* at 3.) Petitioner advised the  
3 arbitrator that it believed it had jurisdiction to do so. (*Id.* at 3-4.)

4 On December 29, 2015, Respondent filed a complaint in Marin County Superior Court,  
5 and it filed an amended complaint on February 19, 2016 (the “state court litigation”). (Dkt. No.  
6 20, Opp. Br., Ex. B, *Salt River Construction Corp. v. Cross Link, Inc.*, No. 1504626, First  
7 Amended Complaint (“FAC”).) There, Respondent alleged that it “entered into a verbal and  
8 written contract with [Petitioner] in May of 2014 for [Petitioner] to provide tug boat services to  
9 [Respondent] on three public projects[.]” (FAC ¶ 5; *see id.* ¶¶ 6-8 (alleging agreements regarding  
10 rates)). Respondent alleged that Petitioner failed to provide services on the projects, and it  
11 asserted claims for breach of contract and for indemnification. Respondent also alleged the  
12 Services Agreement had expired, and it sought a declaration that the work performed in 2014 was  
13 “governed by the agreement formed in May, July, and August of 2014, not the expired agreement  
14 of November 2011.” (FAC ¶ 22; *see also id.* ¶ 14.) In its opposition, Respondent argues that the  
15 contract the parties allegedly formed in 2014 “was memorialized in a series of emails and also via  
16 oral communications between the parties.” (Opp. Br. at 1:13-14.)

17 On December 31, 2015, Respondent sent a letter to the arbitrator and the AAA, in which it  
18 stated that it continued to object “to jurisdiction by AAA and proceeding in this forum.” (Opp.  
19 Br., Ex. A, Letter dated 12/31/2015 at 1.) Respondent maintained “that it did not agree to  
20 arbitration of its claims, and did not agree that the question of arbitrability was further submitted  
21 to arbitration, and the question is reserved to the courts.” (*Id.*) On February 9, 2016, the arbitrator  
22 sent an email to counsel in which it stated that it would proceed with the arbitration, “unless a  
23 court stays the proceedings.” (Email string at 2.) The arbitrator also advised the parties that “[i]f  
24 Respondent does not submit documents comprising the contract it believes to govern the dispute  
25 ..., the arbitrator will have no recourse but to declare [Petitioner’s] contract to be controlling.”  
26 (*Id.*)

27 On April 18, 2016, the arbitrator issued the Final Award in favor of Petitioner. As set forth  
28 in that award, Respondent did not provide the arbitrator with any further information about the

1 alleged second contract, and it declined to participate in the arbitration proceedings. (*Id.* at 1-2.)  
2 The arbitrator found Respondent breached the Services Agreement and awarded relief in the  
3 amount of “\$244,804.73 plus legal costs and fees incurred subsequent to the evidentiary hearing,  
4 according to proof.” (Petition, ¶ 9; Final Award at 3.) The award was served on Petitioner and  
5 Respondent on May 23, 2016. (Petition, ¶ 10.)

6 Respondent objected to the award and requested that the arbitrator withdraw it on the basis  
7 that the arbitrator lacked jurisdiction over the dispute. (Petition, Ex. 1, Ruling of Arbitrator on  
8 Claimant’s Request to Modify Award and Respondent’s Objection to Award (“Mod. Order”).)  
9 The arbitrator denied that request and stated:

10 Respondent reiterates the basis on which it has previously objected  
11 to this arbitration going forward. In summary, it cites California  
12 cases that reserve to the court the jurisdiction to determine the  
13 arbitrability of a case. However, what distinguishes this case is that  
14 no specific facts have been alleged, let alone documents supporting  
15 those facts, that constitute a contract on which Respondent says  
16 governs the work which is the subject of the disputes between the  
17 parties. There is no case of which the arbitrator is aware that  
18 deprives an arbitrator from asserting jurisdiction where there is not  
19 even a colorable claim of a contract that would exist instead of the  
20 clear written contract that on its face covers the scope and the  
21 duration of the work.

22 (Mod. Order at 2.)

23 The Court shall address additional facts as necessary in the analysis.

## 24 ANALYSIS

### 25 A. The Court Grants the Petition.

26 Petitioner moves to confirm the arbitration award, pursuant to Section 9 of the Federal  
27 Arbitration Act (“FAA”). Section 9 states “at any time within one year after [an] award is made  
28 any party may apply to the court . . . for an order confirming the award, and thereupon the court  
must grant such an order unless the award is vacated, modified, or corrected.” 9 U.S.C. § 9.  
Unless clear statutory grounds exist for vacating an award, a court must grant the motion to  
confirm. *Id.* “These grounds afford an extremely limited review authority, a limitation that is  
designed to preserve due process but not to permit unnecessary public intrusion into private  
arbitration matters.” *Kyocera Corp. v. Prudential Bache Trade Servs.*, 341 F.3d 987, 998 (9th Cir.

1 2003); *see also G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1105 (9th Cir. 2003) (noting that  
2 courts “have interpreted sections 9 and 10 [of the FAA] narrowly.”).

3 The issue before this Court is whether the arbitrator exceeded his powers when he went  
4 forward with the arbitration proceedings after Respondent asserted that the Services Agreement  
5 had expired and asserted there was no agreement to arbitrate. *See* 9 U.S.C. § 10(a)(4) (court may  
6 vacate an arbitration award “where the arbitrators exceeded their powers, or so imperfectly  
7 executed them that a mutual, final, and definite award upon the subject matter submitted was not  
8 made”). “A party seeking relief under that provision bears a heavy burden.” *Oxford Health*  
9 *Plans, LLC v. Sutter*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2064, 2068 (2013). A court cannot find an arbitrator  
10 exceeded his or her powers “when they merely interpret or apply the governing law incorrectly.”  
11 *Kyocera*, 341 F.3d at 997. Rather, a court must uphold an arbitrator’s decision unless it is  
12 “completely irrational ...or exhibits a manifest disregard of law[.]” *Id.* (internal quotations and  
13 citations omitted). “The burden of establishing grounds for vacating an arbitration award is on the  
14 party seeking” to vacate that award. *U.S. Life Ins. Co. v. Superior Nat. Ins. Co.*, 591 F.3d 1167,  
15 1172 (9th Cir. 2010).

16 When a court is faced with a motion to compel arbitration, it is required to decide two  
17 issues: (1) is there a valid agreement to arbitrate; and (2) do the parties’ claims fall within the  
18 scope of that agreement. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395,  
19 400 (1967). Parties, however, may delegate gateway issues of arbitrability to the arbitrator, if they  
20 do so “clearly and unmistakably.” *Rent-A-Center West., Inc. v. Jackson*, 561 U.S. 63, 69-70 & n.1  
21 (2010); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-85 (2002); *Mohamed v. Uber*  
22 *Technologies, Inc.*, 848 F.3d 1201, 1208-09 (9th Cir. 2016). Although parties may delegate  
23 questions of arbitrability to an arbitrator, under the FAA, “whether parties have agreed to submit a  
24 particular dispute to arbitration is typically an issue for judicial determination. ... It is similarly  
25 well settled that where the dispute at issue concerns contract formation, the dispute is generally for  
26 courts to decide.” *Granite Rock Co. v. Int’l Brotherhood of Teamsters*, 561 U.S. 287, 296 (2010)  
27 (internal brackets, quotations, and citations omitted); *accord Three Valleys Mun. Water Dist. v.*  
28 *E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140-41 (9th Cir. 1991); *Bruni v. Didion*, 160 Cal. App.

1 4th 1272, 1284 (2008); *see also* 9 U.S.C. § 4 (“If the making of the arbitration agreement ... be in  
2 issue, the court shall proceed summarily to the trial thereof.”).

3 The Court finds guidance in *Camping Construction Co. v. District Council of Iron*  
4 *Workers*, 915 F.2d 1333 (9th Cir. 1990). In that case, which involved a labor agreement, the party  
5 opposing arbitration took the position that the agreement containing the arbitration clause had  
6 been terminated and, thus, the parties’ dispute was not subject to arbitration. The Ninth Circuit  
7 held that “once it is found that a contract did exist at some time, the questions of whether that  
8 contract has expired, or has been terminated or repudiated, may well present arbitrable issues,  
9 depending upon the language of the agreed-upon arbitration clause.” *Id.* at 1340. If the arbitration  
10 clause is broad enough, questions about termination may be arbitrable. *Id.* at 1339-40.

11 Respondent did not dispute the Services Agreement contained an arbitration provision, and  
12 it did not challenge the formation of that agreement or the arbitration clause contained therein,  
13 which distinguishes this case from *Three Valleys* and *Bruni*. Rather, Respondent took the position  
14 that the parties formed a new and different contract, which did not contain an arbitration provision.  
15 The arbitration clause in the Services Agreement provides that “[a]ny claim or controversy arising  
16 out of or relative to this agreement ... shall be settled by arbitration[.]” (Services Agreement §  
17 15.) The language “arising out of or relative to” has been construed broadly. *See, e.g., G.C. and*  
18 *K.B.*, 326 F.3d at 1104 (finding clause that “any claim, dispute, suit, action or proceeding arising  
19 out of or relating to this Agreement ... to binding arbitration” is broad).

20 In addition, the arbitration clause incorporated by reference the AAA Construction  
21 Industry Rules. Those rules provide, in part, that “[t]he arbitrator shall have the power to rule on  
22 his or her own jurisdiction, including any objections with respect to the *existence*, scope, or  
23 validity of the arbitration agreement.” (Petition, Ex. 5, AAA Construction Industry Rule 9(a)  
24 (emphasis added).) Those rules also provide that “[u]nless the law provides to the contrary, the  
25 arbitration may proceed in the absence of any party or representative who, after due notice, fails to  
26 be present or fails to obtain a postponement.” (AAA Construction Industry Rule 32.)

27 Although the issue is not entirely settled in the Ninth Circuit, it has noted that “[v]irtually  
28 every circuit to have considered the issue has determined that incorporation of the American

1 Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that  
2 the parties agreed to arbitrate arbitrability." *Oracle Amer., Inc. v. Myriad Group A.G.*, 724 F.3d  
3 1069, 1074 (9th Cir. 2013) (citing cases); *accord Rodriguez v. American Technologies, Inc.*, 136  
4 Cal. App. 4th 1110, 1123 (2006) (finding parties "clearly evidenced their intention to accord the  
5 arbitrator the authority to determine issues of arbitrability" by incorporating AAA Construction  
6 Industry Rules into contract).

7 The Court also finds guidance in *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138  
8 (7th Cir. 1985). In that case, the defendants were parties to an arbitration agreement with the  
9 plaintiff, received notice of the arbitration, and then refused to participate. *Id.* at 139. When the  
10 plaintiff petitioned to confirm the award, the defendants argued that the district court "should not  
11 have rejected, as too late, their offer to prove that they did not actually know about the arbitration  
12 clause." *Id.* The court affirmed the district court's decision to confirm the arbitration award. The  
13 court acknowledged that

14 [n]o one should be forced into an arbitration without an opportunity  
15 to show that he never agreed to arbitrate the dispute that is the  
16 subject of the arbitration. The Rudells had that opportunity when  
17 they were notified of the arbitration, and they let it pass by. It was  
18 then too late for them to sit back and allow the arbitration to go  
forward, and only after it was all done, and enforcement was sought,  
say: oh by the way, we never agreed to the arbitration clause. That  
is a tactic that the law of arbitration, with its commitment to speed,  
will not tolerate.

19 This would be clear enough if the Rudells had actually participated  
20 in the arbitration without challenging the arbitrator's authority  
[until] the arbitration was completed and they had lost. ... But, it  
21 may be asked, what concretely could the Rudells have done when  
22 they were notified of the arbitration, given that the arbitration clause  
23 allowed the arbitration to proceed in their absence. They might have  
brought suit to enjoin the arbitration. At the very least, they could  
24 have told the arbitrator that they did not recognize his authority to  
25 proceed, because they had not agreed to arbitration. That would  
26 have put the arbitrator and Comprehensive on notice that the  
27 arbitrator's jurisdiction was questioned. Comprehensive might then  
28 have moved under section 4 of the [FAA] for an order to arbitrate,  
and the Rudells would have gotten their day in court to challenge the  
existence of an agreement to arbitrate, before Comprehensive was  
put to the expense of the arbitration. If Comprehensive had not  
moved under section 4, but had gone ahead with the arbitration in  
the Rudell's absence, then the Rudells, having put Comprehensive  
on notice of their reservation, *might be allowed in the confirmation  
proceeding to litigate the question whether there was a valid*

1 *agreement to arbitrate[.]*

2 *Id.* at 140-41 (emphasis added).

3 When Petitioner initiated the arbitration proceedings, the arbitrator was presented with the  
4 Services Agreement, which contained a broadly drafted arbitration provision and which  
5 incorporated the AAA Construction Industry Rules. It is undisputed that Respondent raised the  
6 issue of jurisdiction to hear the dispute with the arbitrator. The arbitrator then provided  
7 Respondent with the opportunity to come forward with evidence to support its assertion that the  
8 arbitrator lacked jurisdiction over the dispute. Respondent declined to do so, apparently to  
9 preserve its objections to the arbitrator's authority. It is not clear, however, that presenting  
10 evidence to support the lack of jurisdiction would have resulted in a waiver of that issue. *See, e.g.,*  
11 *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006) ("Nagrampa forcefully  
12 objected to arbitrability at the outset of the dispute, never withdrew that objection, and did not  
13 proceed to arbitration on the *merits* of the contract claim.") (emphasis added); *see also Wools v.*  
14 *Superior Court*, 127 Cal. App. 4th 197, 204 n.3 (2005) (concluding party resisting arbitration did  
15 not waive arguments regarding arbitrator's authority to proceed by participating in proceedings  
16 when it moved for a stay and presented written objections to arbitrator, which were overruled);  
17 *National Marble Co. v. Bricklayers & Allied Craftsmen*, 184 Cal. App. 3d 1057, 1064 (1986)  
18 (under California arbitration law, "[w]here an arbitration proceeding proceeds under a self-  
19 executing agreement, without a preliminary court order, the objecting party is required to  
20 participate in the proceeding and then raise his objections by a petition to vacate the award ... or  
21 by opposition to a petition to confirm").<sup>3</sup>

22 Respondent also never moved to stay the arbitration, although the arbitrator stated a  
23 willingness to stay the proceedings if ordered by a court to do so. Therefore, the only contract  
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26 <sup>3</sup> To the extent Respondent argues Petitioner should have obtained an order compelling  
27 arbitration, the arbitration clause in the Services Agreement was self-executing. Therefore,  
28 Petitioner was not required to seek a court order before proceeding with arbitration. *See, e.g.,*  
*Greg Opinski Const., Inc. v. Braswell Const., Inc.*, No. 1:09-cv-00641-LJO GSA, 2009 WL  
3789609, at \*4 (E.D. Cal. Nov. 10, 2009); *see also National Marble*, 184 Cal. App. 3d at 1063-64.

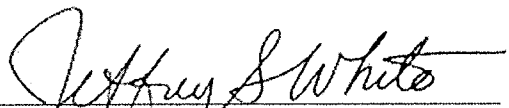


1 before the arbitrator was the Services Agreement. The same is true here. Apart from the  
2 allegations in the FAC, Respondent has not provided this Court with evidence of the contract the  
3 parties allegedly entered in 2014. *Cf. Three Valleys*, 925 F.2d at 1141 (noting that “[o]nly when  
4 there is no genuine issue of fact concerning the formation of the agreement should the court decide  
5 as a matter of law that the parties did or did not enter into such an agreement”); *Metter v. Uber*  
6 *Technologies, Inc.*, No. 16-cv-6552-RS, 2017 WL 1374579, at \*4 (N.D. Cal. Apr. 17, 2017) (on  
7 motion to compel where plaintiff denied formation of arbitration provision, court noted that “a  
8 litigant ... can[not] defeat a motion to compel arbitration simply by claiming he never saw [a]  
9 terms of service alert”).

10 In light of these facts, and the authority discussed above, the Court concludes the arbitrator  
11 did not exceed his powers by exercising jurisdiction over the dispute and issuing the award in  
12 favor of Petitioner. Accordingly the Court GRANTS the Petition to confirm the arbitration award.  
13 The Court shall enter judgment in the amount of \$244,804.73 plus legal costs sand fees incurred  
14 subsequent to the evidentiary hearing, according to proof.

15 **IT IS SO ORDERED.**

16 Dated: May 8, 2017

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19 JEFFREY S. WHITE  
20 United States District Judge  
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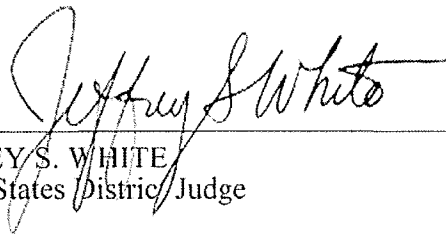
Case No. 16-cv-05412-JSW

**JUDGMENT**

Pursuant to the Court's Order confirming the arbitration award, issued this date, the Court  
HEREBY ENTERS JUDGMENT in favor of Petitioner and against Respondent.

**IT IS SO ORDERED.**

Dated: May 8, 2017

  
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JEFFREY S. WHITE  
United States District Judge