IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PROSPECT CAPITAL MANAGEMENT L.P.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	C.A. No. 22-mc-89-MN-CJB
STRATERA HOLDINGS, LLC and DESTRA CAPITAL MANAGERS LLC,	)	
	)	
	)	
Respondents.	)	

RESPONDENTS STRATERA HOLDINGS, LLC AND DESTRA CAPITAL MANAGERS LLC'S ANSWERING BRIEF TO PETITIONER PROSPECT CAPITAL MANAGEMENT L.P.'S OBJECTIONS TO REPORT AND RECOMMENDATION

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The Magistrate's Report (the "Report") correctly upheld the Panel's conclusion that it had the authority to clarify its Interim Award to avoid the absurd result that approximately $7 million it intended to award Respondents Stratera and Destra would be reduced to approximately $300,000 because of an ambiguity in its award. Prospect asks the Court to put on blinders in reading the Interim Award, ignoring the award as a whole to focus on a single section, to conclude that the Interim Award should be robbed of what the Panel has told us was its intended effect.

I. Prospect seeks to apply the wrong standard to the review of the Panel's determination that its Initial Award was ambiguous[1]

Prospect misreads *Verizon Pennsylvania, LLC v. Communications Workers of Am., AFL-CIO, Local 13000*, 13 F.4th 300, 309 (3d Cir. 2021), to apply a different standard to the question of whether an arbitrator's award is ambiguous than is applicable to evaluating an arbitrator's clarification of the award. The Third Circuit in *Verizon* explains, "Where an arbitrator has actually decided an issue but the ruling is ambiguous, we defer to the arbitrator's *post hoc* interpretation of his award only if it is a *rational* clarification of the ambiguity. . . ." *Id.* (italics in original). Prospect initially dissects this statement to argue that the rationality standard applies only to a court's evaluation of the clarification, and a court is to "independently determine[]"—i.e., apply *de novo* review to an arbitrator's decision to the contrary—whether the original award was ambiguous. D.I. 47 at 4. But *Verizon* makes clear that a court's evaluation of both the arbitrator's clarification and its finding of an ambiguity are entitled to the same level of deference. The question, according to the court, is whether it is "*obvious* from the written opinion that the arbitrator exceeded his authority." *Verizon,* 13 F.4th at 310 (emphasis in original; cleaned up). The court follows this explanation with its conclusion that, it was obvious from the second award in that case that it revised the first award—i.e., that it did not resolve an ambiguity but rather changed the meaning.

[1] This section addresses arguments contained in Section A of Prospect's Objection. D.I. 47 at 4.

Id. The minimal rationality standard Prospect argues for applies to the arbitrators' conclusion that the original award was ambiguous, not just whether the clarification was a rational one.

Remarkably, Prospect goes even further, attempting to flip the minimal rationality standard on its head to not only refuse to enforce a clarifying award if a court determines *de novo* that the original award was not ambiguous but to require that the *arbitrator* have determined the original award not to be minimally rational. D.I. 47 at 4. Of course, as *Verizon* makes clear, the minimal rationality standard applies to *courts'* enforcement of arbitral awards, is derived from 9 U.S.C. § 10(a)(4), and reflects courts' deference to decisions of arbitrators the parties have chosen contractually to resolve their disputes. *Verizon,* 13 F.4th at 306. The standard thus is inapplicable to a contractually chosen arbitrator's evaluation of the ambiguity of its own decision.

This minimal rationality standard is the one applied in *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1297 (3d Cir. 1996), which Prospect incorrectly explains as applying only outside the context of ambiguity. Prospect states that "'an arbitrator's decision need be neither wise nor internally consistent' *when it is unambiguous*—it need only be 'minimal[ly] rational[].'" *Id.* (emphasis supplied); D.I. 47 at 4. But *Exxon Shipping* says nothing about an ambiguous award, much less sets up a different standard that applies to a determination of ambiguity. *Exxon Shipping,* 73 F.3d at 1297. If the Panel's determination in Order #22 that its Initial Award was ambiguous was minimally rational, and it was, it must be enforced. *See id.;* D.I. 36, ex. 1-L at 1, 4.

II. The Report correctly finds, as did the Panel, that the Interim Award was subject to multiple interpretations and satisfied the ambiguity exception to *functus officio*

A. The Report correctly analyzes the entire Interim Award to determine ambiguity instead of looking at only a portion of it[2]

Prospect argues that the Court should view the Interim Award with blinders, pretending

[2] This section addresses arguments spread across the introduction and Sections A, B, and C of Prospect's Objection. D.I. 47 at 1, 4, 6-7.

that all portions of the Interim Award apart from the section labeled "Holding" do not exist in determining whether the Interim Award is ambiguous. As the Report correctly recognizes, this is not the law. *See* D.I. 42 at 37-38, n.16. Prospect relies on courts' statements that, for an ambiguity to provide an exception to functus officio, the ambiguity must be in the award itself and not in the opinion accompanying the award. D.I. 47 at 1, 4, 7-8. But even the authorities cited by Prospect are clear that this does not mean that courts only look at the section of the award labeled holding.

For example, Prospect cites *United Steelworkers of Am., Local 4839 v. New Idea Farm Equip. Corp.*, 917 F.2d 964, 968 (6th Cir. 1990), for the proposition that an ambiguity in an opinion does not constitute an exception to functus officio unless the ambiguity is in the award itself. D.I. 47 at 6-7. But the authority the *New Idea* court cites for that proposition is *Cleveland Paper Handlers & Sheet Straighteners Union No. 11 of Intern. Printing & Graphic Communications Union v. E. W. Scripps Co*. *v. E. W. Scripps Co*., 681 F.2d 457, 460 (6th Cir. 1982). *See New Idea,* 917 F.2d at 968. In *Cleveland Paper,* the Sixth Circuit immediately followed its statements on ambiguities in the reasoning with a clarification that, "If the arbitrator's opinion and award, read together, are not ambiguous the award should be enforced." *Cleveland Paper*, 681 F.2d at 460. Thus, courts are expressly authorized to consider portions of the opinion other than the specific portion labeled as a holding in determining ambiguity. And that is exactly what the Report does. The Report does not just point to some mistake in the reasoning, misstatement, or even ambiguous language contained only in the portion of the Interim Award outside the holding to determine that the Interim Award is ambiguous. The Report finds that the Interim Award, viewed as a whole, is "ambiguous as to which side prevailed as to the Provasi DRIP claim." D.I. 42 at 37.

Likewise, Prospect cites *United Steelworkers of Am. v. Enter. Wheel & Car Corp*., 363 U.S. 593, 598 (1960) for the proposition that an arbitrator's decision cannot be invalidated by

"mere ambiguity in the opinion accompanying award." D.I. 47 at 1. But the remainder of the sentence quoted by Prospect shows the Court is talking about something completely different: whether an ambiguity in the arbitrator's explanation of what he considered can be used to show that he considered more than he was permitted, such that the award would be invalidated. *Enter. Wheel*, 363 U.S. at 598. This was the same approach as in *Ball Metal Beverage Container Corp. v. Loc. 129*, No. 21-10755, 2022 WL 340573, at *7 (5th Cir. Feb. 4, 2022), which Prospect argues stands for the proposition that an ambiguity in reasoning will generally not disturb an award. D.I. 47 at 4. But that case again does not preclude a finding of ambiguity where the reasoning, read in conjunction with the award, creates an ambiguity about what the award actually means. *Ball Metal,* 2022 WL 340573 at *6-7.

This is consistent with how courts in the Third Circuit have approached the question. In *Colonial Penn Ins. Co. v. Omaha Indem. Co*., 943 F.2d 327, 334 (3d Cir. 1991), the Third Circuit held that an ambiguity "may be shown not only from the face of the award but from an extraneous but objectively ascertainable fact." If a court may look to objective facts outside an award to determine an ambiguity, it may unquestionably consider other parts of the award itself. Applying this instruction, the court in *Pittsburgh Metro Area Postal Workers' Union, AFL-CIO v. U.S. Postal Serv*., No. CIV.A. 07-00781, 2008 WL 1775502, at *12 (W.D. Pa. Apr. 16, 2008), looked at "the Arbitrator's discussion as to the merits of the case and the purpose of the award" to determine that there were two different interpretations of the arbitrator's holding. Likewise, in *Pittsburgh Metro Area Postal Workers' Union v. United Postal Service,* No. Civ. A. 04-0668, at *8-9 (W.D. Pa. Oct. 21, 2005), the court rejected the suggestion that a "one paragraph damage award be evaluated in isolation from the rest of the arbitrator's decision." The court explained that, in evaluating whether an ambiguity permits clarification, a "court is not obligated to ignore

the opinion where it aids the interpretation of the damage award." *Id.* at *8.

Prospect inaccurately characterizes the Third Circuit's holding in *Colonial Penn* as requiring that "[e]xtraneous evidence is only relevant where it shows that a premise of the award cannot be satisfied[.]" D.I. 47 at 7 n.6. But *Colonial Penn* contains no such restriction, instead using the phrase "[f]or example," to describe that situation. *Colonial Penn*, 943 F.2d at 334. The court also explicitly states, as the Report recognized, that the ambiguity may be shown from extraneous facts, with no additional qualification. *Id.;* D.I. 42 at 34. Of course, while the Report mentions certain elements of the parties' briefing to the arbitrators and the Panel's own explanation of their award (and such consideration was appropriate), most of the Report's analysis is based on the language of the Interim Award itself. D.I. 42 at 37-47.

The consideration of the entire record (instead of just the Interim Award) is consistent with *Hyle v. Doctor's Associates, Inc.*, 198 F.3d 368, 371 (2d Cir. 1999), where the Second Circuit analyzed the wording of the award in conjunction with an undisputed limitation by the petitioner to determine that the award was ambiguous as to whom among the respondents the arbitrator intended to charge with damages and an injunction. *See also Accuride Erie L.P. v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., Local Union 1186,* No. CIV.A. 05-169 ERIE, 2009 WL 426661, at *4 (W.D. Pa. Feb. 20, 2009) (looking to the language of a grievance to find that a seemingly unambiguous term was in fact ambiguous). Likewise, here, the Report appropriately considered that both Stratera and Destra had argued the issue of whether fees on "DRIP Shares" would be due on DCI-related and Provasi-related shares together instead of arguing that a different standard applied between the two types of shares such that the Panel would have some basis for awarding DCI-related shares but not Provasi-related ones, as Prospect argues the Interim Award did. D.I. 42 at 39. And, as the Report noted, "even Prospect lumped together

DCI-sold and Provasi-sold DRIP shares, referring to them simply as 'DRIP shares[.]'" D.I. 42 at 40. Given the ambiguous nature of the term "DRIP shares" and the overall thrust of the Interim Award, it is inconceivable ("Something is very wrong here," as the Report characterizes it (D.I. 42 at 44)) that the Panel intended to award fees only on DCI-related shares. D.I. 42, 46-47. The Report appropriately concludes that the Interim Award was ambiguous and subject to clarification.

B. The Report's justifications for finding the Initial Award subject to multiple interpretations are correct[3]

Prospect's challenges to the Report's justifications for its determination that the Interim Award was ambiguous do nothing to undercut the logic of those justifications or the Report's inescapable conclusion that the Interim Award was ambiguous.

First, the Report explains that the lack of differentiation in the Interim Award and the parties' briefing between Provasi-related DRIP shares and DCI-related DRIP shares means that the term "DRIP Shares" could be interpreted to include both despite the qualification in the section labeled "Holding" seemingly purporting to limit the term. As discussed in Section II.B, *infra,* this conclusion is supported by precedent establishing that terms subject to multiple interpretations establish ambiguity. Prospect argues that an arbitrator's opinion need not be internally consistent, but this misses the point. The ambiguity in the Interim Award was not created by inconsistencies in the reasoning but the clear implication by the Panel's explanation of its reasoning that it believed it was awarding fees on Provasi-related DRIP shares as well as DCI-related DRIP shares.

Second, the Report cites the undifferentiated use of the term "DRIP shares" in the Interim Award as an indication that it was being used to refer to both Provasi-related and DCI-related DRIP shares. Prospect argues this is incorrect without explaining why. DI. 47 at 8. In fact, the Panel's use of the term "DRIP Shares" to refer to both Provasi-related and DCI-related DRIP

[3] This section responds to a portion of Section C of Prospect's Objection. D.I. 47 at 8.

shares renders its use of that same term in its holding ambiguous.

Third, the Report cites the Panel's heavy reliance on Schedule 11.18 and Section 11.18 in awarding fees on DRIP shares to Respondents given that there is no logical basis for applying those sections to DCI-related DRIP shares but not Provasi-related ones. D.I. 42 at 41-43. Prospect identifies another type of share that was not awarded, but that does not address the lack of distinction between Provasi-related DRIP and DCI-related DRIP. D.I. 47 at 8-9. Prospect also argues that the Panel noted that Destra was entitled to fees because of its role as a subwholesaler (*id.),* but this is a distinction without a difference given Provasi also did the same work selling shares before Destra was retained. Without a rational basis for differentiating between the shares, it was necessary to find an ambiguity because courts will not enforce an award that is inherently contradictory. D.I. 42 at 43, *citing Sheet Metal Workers Int'l Ass'n Local Union No. 420 v. Kinney Air Conditioning Co.,* 756 F.2d 742, 745 (9th Cir. 1985); *Steelworkers of Am., Local No. 12886 v. ICI Americas Inc.*, 545 F. Supp. 152, 154 (D. Del. 1982).

Fourth, the Report explains that the Interim Award's failure to address the background facts related to Provasi-related DRIP supports the conclusion that it was analyzing Provasi-related DRIP and DCI-related DRIP under the same analytical framework and treating them the same for purposes of its award. D.I. 42 at 43-44. Prospect does not challenge the Report's logic but instead falls back on the Interim Award's Mother Hubbard statement that all relief not addressed is denied. D.I. 47 at 9. This again misses the Report's point: that statement reflected the Panel's understanding that it had already addressed Provasi-related DRIP together with DCI-related DRIP.

Fifth, the Report points to the Panel's own explanation of what it understood its Interim Award to do and its ambiguity. D.I. 42 at 45. Prospect raises the same incorrect argument addressed in Section I, *supra*, that the arbitrator's decision is entitled to no consideration. As discussed, the

Report was actually insufficiently deferential to the Panel's conclusion that the Interim Award was ambiguous. *See* Section I, *supra*; D.I. 35 at 1-4.

Finally, the Report cites the policy of judicial restraint in not overturning the Panel's explanation of its intention and the ambiguity in its award. D.I. 42 at 45-46. Prospect argues that judicial restraint would instead require the Court to ignore the arbitrators' conclusions in favor of its own, which is, of course, nonsensical. D.I. 47 at 10.

C. The Report correctly finds that the Interim Award's inconsistent descriptions of relief constituted an ambiguity, not a mere mistake[4]

While Prospect argues that revisions to make an award consistent with an arbitrator's intent are not permitted, the cases it cites are ones where there could be no argument that an ambiguity was present. D.I. 47 at 5-6. In *Credit Agricole Corp. & Inv. Bank v. Black Diamond Capital Mgmt., LLC*, No. 18-CV-7620(KNF), 2019 WL 1316012, at *8 (S.D.N.Y. Mar. 22, 2019), the arbitration panel awarded a specific dollar amount and attempted to modify its award to a different amount. There could, of course, be no argument that the amount awarded was ambiguous. Likewise, in *San Diego AFL-CIO Bus Drivers Local Div. 1309 of Amalgamated Transit Union v. San Diego Transit Corp.*, 972 F.2d 1342, 1992 WL 180221, *2 (9th Cir. 1992) (Table), the court found there was a modification of the award and not a clarification of an ambiguity when an arbitrator corrected an opinion by adding the word "not." The court's reasoning was that an arbitrator would not have the power to clarify an ambiguity where two parts of the award were in tension but rather that there was no conflict between the sentences in the award that were identified because they addressed different issues. *Id.*

[4] This Section responds to Section B of Prospect's Objection. D.I. 47 at 5-7.

D. The Report correctly finds that the Initial Award was subject to multiple interpretations because of the different meanings it applied to "DRIP Shares"[5]

The Report correctly finds that the Interim Award was subject to multiple interpretations as to the resolution of the question of fees owed for Provasi-sold DRIP shares. D.I. 42 at 46-47. Prospect has no rebuttal to most of the Report's rationale for this inescapable conclusion other than its incorrect argument that the Court must pretend that all facts and explanations not contained in the "Holding" section of the Interim Award did not exist and review the words in that holding out of context even with the rest of the Initial Award. D.I. 47 at 5, 7-10. To do so, Prospect misinterprets applicable precedent on when an award is subject to multiple interpretations.

An arbitration award's "use of terms subject to multiple interpretations without further explanation or definition may also render an award ambiguous." *Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 273 F. Supp. 3d 307, 321 (D. Conn. 2017), aff'd, 909 F.3d 544 (2d Cir. 2018). Thus, in *York Research Corp. v. Landgarten*, 927 F.2d 119, 123 (2d Cir. 1991) the court found an ambiguity where it was unclear whether the word "expense" included attorneys' fees. Likewise, in *Transtech Indus. v. A&Z Septic Clean*, 270 Fed. Appx. 200, 210 (3d Cir. 2008), the Third Circuit analyzed a situation where an initial award "had relatively little to say" about a specific contractual term, and the court found that the arbitrator was permitted to amend the award to clarify an ambiguity about that term. Similarly, in *Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local No. 24*, 357 F.3d 546, 556 (6th Cir. 2004) the Sixth Circuit addressed a situation where its holding refusing to apply an "incentive rate" did not include a different additional incentive that was added to replace that incentive rate. Even though "incentive rate" could have been read to have included the rate the arbitrator added in the clarified award, the fact that the term was subject to multiple interpretations rendered it ambiguous such that the arbitrator

[5] This Section responds to arguments made in Section C of Prospect's Objection. D.I. 47 at 7-10.

was permitted to clarify that ambiguity. *Id.*

Such was the case here with the Panel's use of the term "DRIP shares," which the Report explained could be interpreted to include both DCI-related and Provasi-related DRIP shares despite the apparent language to the contrary contained in the "Holding." D.I. 42 at 40-41. As the Report notes, the term "DRIP shares" was used throughout the Interim Award and arbitration proceeding to refer to both DCI-related and Provasi-related DRIP shares without "differentiating between DRIP shares sold by DCI or DRIP shares sold by Provasi." D.I. 42 at 39. Thus, the Panel's language in its "Holding" seeming to exclude Provasi-related DRIP shares would conflict with what the Panel characterized as the "inevitable" conclusion of its analysis in the full Interim Award. D.I. 36, ex. 1-L at 3. As in the cases discussed above, what the Panel meant by the term was ambiguous such that the Panel was entitled to clarify its meaning.

III. Even were Prospect's arguments on ambiguity correct, the Panel's finding that the Interim Award was ambiguous cannot be overturned because Prospect cannot show it demonstrated manifest disregard for the law

Prospect objects to the standard of review enunciated by the Report even though the Report did not actually apply that standard of review. D.I. 47 at 2 n.1, 5 n.2. For the reasons explained in Respondents' Objection (D.I. 46), the manifest disregard standard is the appropriate one. Importantly, each of the Report's findings that Prospect objects to are also appropriate because the Panel found that there was an ambiguity, binding in the absence of a finding of manifest disregard.

IV. Prospect's unsupported arguments regarding Rule 50 and fees should be rejected[6]

Prospect also objects, without argument or citing authorities, to the Report's determinations with respect to Rule 50 and attorneys' fees because Prospect contends the incorrect standard was applied. The Report applied the appropriate standard to those determinations by the Panel.

[6] This section responds to the arguments in note 10 of Prospect's Objection. D.I. 47 at 10 n.10.

Respectfully submitted,

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