UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHINA SHIPPING CONTAINER LINES CO. LTD.,

Petitioner,

-against-

BIG PORT SERVICE DMCC,

Respondent.

15cv2006 (AT) (DF)

REPORT AND RECOMMENDATION

TO THE HONORABLE ANALISA TORRES, U.S.D.J.:

Currently before this Court for a report and recommendation is an application by Petitioner China Shipping Container Lines Co. LTD. ("CSCL") for an award of attorneys' fees and costs, as a sanction against Respondent Big Port Service DMCC ("BPS"). (Dkt. 95.) CSCL submitted this application following the issuance of an Order by the Honorable Analisa Torres, U.S.D.J., dated January 15, 2019 (the "January 15 Order") (Dkt. 79), which (1) granted CSCL's motion for an order recognizing and giving preclusive effect to certain foreign judicial decisions, (2) granted CSCL's petition for declaratory and injunctive relief, and (3) permanently enjoined the underlying arbitration between the parties. This motion represents the only open issue in this case, as the Judgment that was issued in CSCL's favor on March 29, 2019 (Dkt. 83) has now been affirmed on appeal (*see* Dkt. 98).

As the grounds for its fee application, CSCL relies on the Court's "inherent authority" to sanction, which requires the Court to engage in a two-pronged inquiry to determine whether CSCL has shown, by clear evidence: (1) BPS's challenged contentions were without a colorable basis, and (2) those contentions were asserted in bad faith, *i.e.*, motivated by an improper purpose such as harassment or delay. Although this Court finds that a number of contentions

made by BPS in this action were without a colorable basis, this Court is constrained to find, based on applicable precedent, that there is a lack of clear evidence in the record that BPS engaged in the type of bad-faith conduct necessary to satisfy the second prong of this inquiry, so as to warrant the Court's invocation of its inherent authority to sanction. Thus, as discussed in greater detail below, this Court recommends that CSCL's application be denied (Dkt. 95), except to the extent that, as the prevailing party in this action, CSCL seeks recoverable costs in the amount of $43.20.

BACKGROUND

A. Factual Background

The factual background of this matter is discussed in detail in the Court's January 15 Order, familiarity with which is assumed. In brief, CSCL commenced this suit, seeking a declaratory judgment and injunctive relief, in response to contentions by BPS that it was owed payment from CSCL for a supply of marine fuel oil (also known as bunkers) that was provided to the M/V *Xin Chang Shu* (the "Vessel") in November 2014, and that CSCL was required to arbitrate that claim pursuant to a New York arbitration clause in BPS's standard terms. (*See* Petition for Injunctive Relief, Declaratory Judgment and Damages, dated Mar. 16, 2015 ("Petition") (Dkt. 1).) At all relevant times, CSCL rejected BPS's attempt to arbitrate, taking the position that no bunker supply contract existed between CSCL and BPS, and that, accordingly, no arbitration agreement existed between the parties. (*See id.* ¶¶ 45-49.)

B. Relevant Procedural History

Starting in the fall of 2014, this matter was extensively litigated in two forums – Singapore and New York.

After BPS commenced an action in Singapore (the "Singapore Action"), and the Vessel was arrested based on BPS's application, BPS served CSCL on December 14, 2014 with a demand for arbitration to be conducted in New York City in accordance with the rules for the Society of Maritime Arbitrators, Inc. (*Id.* ¶¶ 34-35.) On February 23, 2015, the arbitration panel set a date for an initial arbitration hearing (*see id.* ¶ 43), and, on March 17, 2015, CSCL commenced this action seeking an order enjoining the New York arbitration and declaring that there was no agreement to arbitrate between the parties (*see id.*). In addition, CSCL sought an award for the "costs, expenses, and disbursements in prosecuting this action and the action in Singapore." (*Id.*, at 8.)

At the time it filed the Petition, CSCL also moved by order to show cause for a temporary restraining order and preliminary injunction to enjoin the arbitration. (Dkt. 5.) BPS opposed that motion arguing, *inter alia*, that "[t]he proper court venue for the dispute [was] Singapore." (Dkt. 10, at 6). Specifically, BPS stated to the Court that the proceedings between BPS and CSCL in Singapore were ongoing and "includ[ed] the issue of arbitration." (*Id.*, at 2.) Further, BPS explained to the Court that, "[i]f the [Singapore] High Court [were to] decide[] that the dispute [was] not arbitrable, CSCL [would] suffer no irreparable harm because it [would] not be forced to arbitrate." (*Id.*, at 7.)

On March 30, 2015, BPS requested a stay of this action in anticipation of an impending decision from the Singapore High Court. (Dkt. 15.) The next day, Judge Torres issued an Order that granted the stay, reasoning that the parties to both matters were the same, that there was "substantial overlap between the issues" in both proceedings, and that the Singapore Action was at a more advanced stage. (Dkt. 18, at 1-2.) Judge Torres also found that considerations of "judicial economy, potential prejudice, and convenience" strongly favored a stay because, "[if]

the [Singapore] High Court decide[d] that the dispute [was] not arbitrable, CSCL . . . [would] not be forced to arbitrate." (*Id.*, at 1.) This action then remained stayed for nearly two years while the issues were litigated in Singapore.

By letter dated December 27, 2017, the parties jointly notified the Court that the High Court of Singapore had issued a final decision. (Dkt. 47.) In that joint letter, and in subsequent letter submissions to the Court, the parties disagreed as to the preclusive effect of the High Court's decision, as well as the prior decisions and orders issued by the Courts of Singapore (collectively, the "Singapore Decisions"). (*See id.*; *see also* Dkts. 55-56.) CSCL informed the Court that the High Court of Singapore had held there was no contract between the parties, and that, as a result, BPS could not arbitrate its claims against CSCL. (*See* Dkt. 47, at 3-4.) CSCL took the position that this decision by the High Court bound the parties and this Court under principles of collateral estoppel and/or *res judicata*. (*See id.*) BPS disagreed that the High Court's decision should be viewed as a binding and final adjudication of the validity of the arbitration agreement. (*See id.*, at 5.)

On March 6, 2018, CSCL moved for a declaratory judgment recognizing the Singapore Decisions (the "Preclusion Motion"). (Dkt. 58.) In particular, CSCL sought an order "recognizing and giving preclusive effect" to the Singapore Decisions, under several doctrines, including the doctrines of collateral estoppel, *res judicata*, and judicial estoppel. (Dkt. 59.) BPS opposed the Preclusion Motion, arguing, as an initial matter, that the Petition should be dismissed for lack of subject matter jurisdiction and for improper venue. (*See generally* Dkt. 65, at 7-13.) In addition, BPS argued that the Singapore Decisions should not be recognized or granted preclusive effect because, according to BPS, the Singapore Action was not intended to adjudicate the merits of BPS's underlying claim for payment. (*See id.*, at 14-29.)

The Court resolved the issues presented by the parties by issuance of its January 15, 2019 Order, which not only recognized and gave preclusive effect to the decisions of the Singapore courts, but also granted CSCL the declaratory relief it sought in its Petition and permanently enjoined the underlying arbitration based on the finding that "there [was] no valid agreement to arbitrate between CSCL and BPS." (January 15 Order, at 1.) In addition, the Court instructed "CSCL's counsel . . . to submit their request for costs, expenses, and disbursements." (*Id.*, at 17.)

C. CSCL's Application for Attorneys' Fees and Costs

On March 1, 2019, CSCL filed its "Application for Fees and Costs" (Dkt. 80), and submitted the Declaration of Gina M. Venezia, Esq. in support (*see* Dkt. 81). CSCL sought "an order requiring BPS to reimburse CSCL for attorneys' fees and related expenses in the total amount of $41,550.34 incurred in connection with the effort to have the Singapore [D]ecisions recognized and BPS held to its prior representations to the Court as to the impact of the Singapore proceedings on the captioned action."[1] (Dkt. 80, at 6.) While recognizing that the so-called "American Rule" typically requires each party to a lawsuit to bear the cost of its own attorneys' fees, CSCL argued that, here, pursuant to the Court's inherent authority, attorneys' fees and related expenses should be awarded in CSCL's favor because BPS had acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." (*Id.*, at 4 (citations omitted).) Specifically, CSCL asserted that BPS's

[1] In its "Application for Fees and Costs," CSCL has made "clear" that it is "not seeking an award of fees against BPS['s] counsel, but only against BPS itself." (Dkt. 80, at 6 n.1.) Indeed, CSCL has consistently maintained that BPS alone should be held responsible for CSCL's attorneys' fees, and has never argued that BPS's counsel should be separately sanctioned under Rule 11 of the Federal Rules of Civil Procedure, for making or maintaining frivolous arguments, or under any other statute, rule, or inherent power of the Court.

> choice to continue to litigate in New York after the conclusion of the Singapore Action was a vexatious, oppressive litigation tactic, particularly when BPS had already represented, *inter alia*, that '[t]he proper court venue for the dispute is Singapore' and that '[i]f the [Singapore] High Court decides that the dispute is not arbitrable, CSCL will . . . not be forced to arbitrate.'

(*Id.*) CSCL contended that, by BPS's conduct, it was forced to incur "attorneys' fees and related expenses that would have been unnecessary had BPS accepted the result it achieved in Singapore and honored its prior statements to this Court." (*Id.*) BPS opposed CSCL's fee application. (*See* Dkt. 82.)

On March 29, 2019, Judge Torres issued an Order denying CSCL's application for fees and costs, without prejudice to renew. (Dkt. 84 (the "March 29 Order").)[2] Judge Torres reasoned that CSCL's description of "fees and costs" did "not constitute contemporaneous records indicating the persons involved, dates, the hours expended and the nature of the work done in this litigation," and that the Court was thus "unable to assess the reasonableness of the attorney[s'] fees requested." (*Id.*, at 1-2.) Judge Torres specifically instructed CSCL and BPS to "confer in an effort to reach [an] agreement on what constitutes reasonable fees and costs." (*Id.*, at 2.) "Barring agreement," the Court set a deadline of April 12, 2019 for CSCL to refile its application. (*Id.*)

Because the parties could not reach an agreement, CSCL proceeded, on April 12, 2019, to file a "Notice of [] *Renewed* Motion for Taxation of Fees and Expenses" (emphasis in original), which stated that CSCL was moving for "an order awarding it certain attorney[s'] fees and disbursements, pursuant to the [January 15 Order] (Dkt. 79), the [March 29 Order] (Dkt. 84), and S.D.N.Y. Local [Civil] Rule 54.1." (Dkt. 85, at 1.) In this renewed application, CSCL sought a

[2] Also on March 29, 2019, the Clerk's Office entered Judgment on the January 15 Order. (*See* Dkt. 83.)

total award amount of $45,617.14, accounting for the $41,550.34 originally requested, plus $4,039.00 for "New York counsel fees [and related costs] incurred in connection with preparing [the] original application for fees." (Dkt. 86, at 2.)

Two weeks later, on April 23, 2019, BPS filed a Notice of Appeal (Dkt. 89) from the Judgment entered against it. Shortly thereafter, on April 26, BPS filed its opposition to CSCL's renewed fee application and argued, *inter alia*, that the renewed motion should be stayed pending BPS's appeal pursuant to Local Civil Rule 54.1. (*See generally* Dkt. 90, at 5-6.)

On the same date that BPS filed its opposition, Judge Torres referred CSCL's renewed "motion for fees and expenses" to this Court for a report and recommendation. (Dkt. 91.) CSCL then filed its reply, arguing, in part, that a stay was not required under Local Civil Rule 54.1 "because CSCL's application [was] not based exclusively on Local [Civil] Rule 54.1[, but was also] filed in accordance with the Court's January 15 (Dkt. 79) and March 29 (Dkt. 84) Orders." (Dkt. 92, at 2.) On February 12, 2020, this Court issued an order "[d]eferring ruling on [CSCL's] Motion for Attorney[s'] Fees, pending the resolution of [BPS's] Appeal." (Dkt. 94.)

On March 5, 2020, the Second Circuit, by Summary Order, affirmed the Judgment in its entirety. (*See* Dkt. 98.) One month later, on April 6, 2020, CSCL filed papers in support of what it characterized as its "*Second Renewed* Motion for Taxation of Fees and Expenses" (emphasis in original), which is the application now before this Court (the "Fee Application"). (*See* Petitioner CSCL's Memorandum in Support of Its *Second Renewed* Motion for Taxation of Fees and Expenses, filed Apr. 6, 2020 ("Pet. Mem.") (Dkt. 95 (emphasis in original)); Declaration of Gina M. Venezia, dated Apr. 6, 2020 ("4/6/20 Venezia Decl.") (Dkt. 96).) In its Fee Application, CSCL stated that it was raising "all arguments" set forth in its prior fees motions (*see* Pet. Mem., at 2 (citing Dkt. 86)), and summarized its argument as follows:

> In a nutshell, CSCL submits that an award of fees is warranted in the circumstances of this case given the positions taken by BPS throughout. Briefly speaking, BPS relied on numerous contradictory statements in an effort to force CSCL to continue to incur significant expenses defending BPS'[s] claims when, in reality, nearly all of BPS's arguments had previously been rejected. Specifically, BPS re-submitted several arguments that were flatly rejected by the Singapore Court, and also sought to renege on its prior representation to this Court that the Singapore Court's decisions would be dispositive.

(*id.*, at 2-3). CSCL also made clear that it was now seeking an increased award in the total amount of $79,326.89, as CSCL claimed that it had incurred an additional $33,709.75 in "New York counsel fees . . . in connection with BPS'[s] appeal." (*Id.*, at 3.)

BPS raised several arguments in opposition to CSCL's Fee Application (*see* Respondent's Memorandum of Law in Opposition to Petitioner's Second Renewed Application For Taxation of Fees and Expenses, dated Apr. 24, 2020 ("Resp. Mem.") (Dkt. 99)) – many of which it also raised in its prior submissions (*see* Dkts. 82, 90). Specifically, BPS argued: (1) that the Fee Application should be denied because the January 15 Order "only authorized CSCL to submit a request for 'costs, expenses and disbursements,' and did not expressly authorize an application for attorneys' fees" (Resp. Mem., at 1); (2) that, even if the January 15 Order can be construed as authorizing an attorneys' fee application, that Order was limited to fees incurred in connection with the Preclusion Motion, not the Second Circuit appeal (*id.*, at 1-2); (3) that the record "does not support a finding of patently abusive and bad faith litigation sufficient to abrogate the American Rule" (*id.*, at 2); and (4) that, even if CSCL's Fee Application were to be granted, certain fees should be reduced as duplicative, excessive, and/or improperly claimed (*see id.*, at 6). As relevant here, with respect to its contention that it did not engage in bad-faith conduct, BPS stated:

> BPS's opposition to CSCL's renewed application for injunctive relief was based on colorable arguments that the Singapore courts' decisions were not a final adjudication on the merits and did not consider all of the legal issues and the factual background that could support BPS's effort to pursue arbitration pursuant to BPS's terms and conditions. The Second Circuit's decision on appeal did not find that BPS's appeal, or its arguments below, were frivolous or imposed in bad faith.

(*Id.*, at 2; *see id.*, at 4-6.)

In its reply, CSCL countered that the January 15 Order "invited CSCL to submit a request for 'costs, expenses, and disbursements,'" "indicat[ing] that the Court was indeed inviting CSCL to seek a greater recovery than what normally might be available to a prevailing party under the Local Rules." (Petitioner CSCL's Reply Memorandum in Support of Its *Second Renewed* Motion For Taxation of Fees and Expenses, filed May 8, 2020 ("Pet. Reply Mem.") (Dkt. 102), at 2.) Further, CSCL pointed out that Rule 54 of the Federal Rules of Civil Procedure provides that "an effort to tax attorneys' fees is to be made by motion" (*id.*, at 3 (citing Fed. R. Civ. P. 54(d)(2)), and, under Local Civil Rule 54.1, "attorneys['] fees and related costs" can be deemed "items taxable as costs" by Court order (*id*. (quoting Local Civ. R. 54.1(c)(7))). For these reasons, CSCL asserted that it was not required to obtain the Court's permission before moving for attorneys' fees. (*See id.*) Moreover, CSCL argued that its request for appellate fees was appropriate, as Local Civil Rule 54.1(a) "contemplates that the renewed application" after a pending appeal "will take into account events on appeal." (*Id.*, at 4.) According to CSCL, the circumstances of this case were sufficient to invoke the bad-faith exception to the American Rule against fee shifting because "BPS did not abide by the rulings" in the Singapore Decisions, "which it previously represented to this Court would be dispositive of the dispute," and because, "in response to CSCL's effort to hold BPS to its prior representations . . ., BPS lodged a series of unsupportable arguments, many of which were against controlling legal precedent." (*Id.*, at 4-5.)

Finally, CSCL asserted that its requested fees and costs were neither excessive, duplicative, nor improper. (*See id.*, at 6-8.)

DISCUSSION

I. APPLICABLE LEGAL STANDARDS

Although the "American Rule" against fee shifting states that a prevailing party generally is not entitled to recover attorneys' fees absent statutory authority or by contract, federal courts, under the direction of the Supreme Court, have allowed such awards in limited circumstances pursuant to the Court's inherent equitable powers. *See Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 247 (1991); *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78 (2d Cir. 2000) ("The court has inherent power to sanction parties and their attorneys, a power born of the practical necessity that courts be able 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'") (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)). One such recognized exception to the American Rule, commonly known as the bad-faith exception, exists when an opponent "has commenced or conducted an action 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Dow Chem. Pac. Ltd. v. Rascator Maritime S.A.*, 782 F.2d 329, 344 (2d Cir. 1986) (quoting F.*D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974) (footnote omitted)). The bad-faith exception extends to "the filing and the prosecution of the litigation." *Tedeschi v. Smith Barney, Harris Upham & Co., Inc.*, 579 F. Supp. 657, 661 (S.D.N.Y. 1984); *see Nemeroff v. Abelson*, 704 F.2d 652, 660 (2d Cir. 1983) (holding that "bad faith" can be found in the "continuation" of the suit).

"The assessment of fees for bad faith conduct, when exercised under the court's equitable power, may be imposed upon the errant litigant and his lawyer." *Tedeschi*, 579 F. Supp. at 661. However, both the Supreme Court and the Second Circuit have noted that the exception must be

applied with caution. *See Chambers*, 501 U.S. at 44 ("Because of their potency, inherent powers must be exercised with restraint and discretion."); *Nemeroff*, 704 F.2d at 654 (stating that the bad-faith rule "must be applied with caution"); *see also ED Capital, LLC v. Bloomfield Investment Resources Corp.*, 316 F.R.D. 77, 83 (S.D.N.Y. 2016) ("[T]he Court may only award attorneys' fees under its inherent authority in exceedingly limited circumstances.").

For a court to award attorneys' fees pursuant to bad-faith conduct under its inherent power requires both "'clear evidence' that the challenged actions 'are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes.'" *Weinberger v. Kendrick*, 698 F.2d 61, 80 (2d Cir. 1982) (quoting *Nemeroff*, 620 F.2d at 348); *see Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 194 F.3d 323, 336 (2d Cir. 1999) ("In order to impose sanctions pursuant to its inherent power, a district court must find that: (1) the challenged claim was without a colorable basis and (2) the claim was asserted in bad faith, *i.e.*, motivated by improper purposes such as harassment or delay."). "The test is conjunctive and neither meritlessness alone nor improper purpose alone will suffice." *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383, 390 (2d Cir. 1985), *cert denied* 475 U.S. 1084 (1986). Because of this two-pronged analysis, "in this Circuit, the bad faith standard is not easily satisfied and sanctions are warranted only in extreme cases." *McCune v. Rugged Entertainment, LLC*, No, 08–CV–2677 (KAM), 2010 WL 1189390, at *4 (E.D.N.Y. Mar. 29, 2010).

II. CSCL'S APPLICATION

A. CSCL's Request for Attorneys' Fees

CSCL argues that, pursuant to the Court's inherent authority, BPS should be sanctioned in an amount totaling $79,326.89, which CSCL claims is the amount it "incurred in connection with the effort to have the Singapore [D]ecisions recognized and BPS held to its prior

representations to the Court as to the impact of the Singapore proceedings on the captioned action." (Pet. Mem., at 3-4.) Over the course of this litigation, CSCL has filed multiple motions for fees in accordance with Rule 54 of the Federal Rule of Civil Procedure, and it has now submitted contemporaneous time records identifying the specific tasks employed by its individual attorneys in both New York and Singapore. (*See* 4/6/20 Venezia Decl. attachment 1; Dkt. 89 attachments 1-3.)

1. The Fee Application Is Properly Before the Court.

As an initial matter, this Court finds unpersuasive BPS's argument that CSCL is not entitled to attorneys' fees because the January 15 Order did not expressly authorize a fee award. (*See* Resp. Mem., at 1.) While it is true that, in its January 15 Order, the Court did not state that attorneys' fees were to be awarded, it also did not state that the recovery of fees was precluded. (*See generally* January 15 Order.) In fact, in its later March 29 Order, the Court indicated that it would consider whether to award attorneys' fees to CSCL, provided CSCL submitted the necessary contemporaneous time records. (*See* Dkt. 84, at 1.) Thus, BPS's argument on this ground fails. Furthermore, this Court agrees with CSCL that its request for appellate fees is not procedurally barred, as Local Civil Rule 54.1(a) contemplates that, where a party's fees application has been stayed pending an appeal, the applicant may take into account the costs and fees associated with the appeal, upon the later renewal of the application.

Accordingly, this Court finds that CSCL's Fee Application is properly before the Court and is ripe for determination. Nonetheless, as explained below, upon a careful review of the record, this Court cannot conclude that this matter presents the type of "exceedingly limited circumstance," *ED Capital, LLC*, 316 F.R.D. at 83, that warrants the award of attorneys' fees to CSCL under the American Rule's bad-faith exception.

2. CSCL Has Not Satisfied the Dual-Pronged Test Necessary to Demonstrate Entitlement to Fees.

a. CSCL Has Adequately Demonstrated that BPS Made Arguments to the Court that Were Not Colorable.

As set out above, to award sanctions, a court must first find that the challenged contentions or allegations were entirely without color. *See Eisemann v. Greene*, 204 F.3d 393, 396 (2d Cir. 2000). A contention "is entirely without color when it lacks *any* legal or factual basis." *Sierra Club*, 776 F.2d at 390 (internal quotation marks omitted) (emphasis added). Conversely, a contention is colorable "when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim." *Revson*, 221 F.3d at 78-79 (internal quotation marks and citation omitted). "The question of whether a reasonable attorney" – and for our immediate purposes, a reasonable party – "could have concluded that facts supporting the [contention] *might be established*, not whether such facts actually *had been established*." *Nemeroff*, 620 F.2d at 348 (emphasis added); *see Schlaifer Nance*, 194 F.3d at 337. Ultimately, "[t]he threshold for colorability is low." *McCune*, 2010 WL 1189390, at *4.

Here, while the issue of colorability presents a close call, this Court concludes that CSCL has, in fact, shown that BPS's contentions in opposition to the Petition and the Preclusion Motion were not colorable.

As one example, BPS's argument that venue was improper in this District appears to have lacked any factual or legal basis, given that it is undisputed that BPS had agreed to arbitrate in New York and had served on CSCL a demand for arbitration that stated the arbitral proceedings were to be "conducted in the City of New York." (Dkt. 66.) As Judge Torres noted in the January 15 Order, BPS's argument about improper venue was "bewildering," where, in the Second Circuit, it was well settled that "[a] party who agrees to arbitrate in a particular

jurisdiction consents not only to personal jurisdiction but also to venue of the courts within that jurisdiction." *Doctor's Asocs., Inc. v. Stuart*, 85 F.3d 975, 983 (2d Cir. 1996). Thus, this Court concludes that BPS's argument on the issue of venue was not colorable.

As another example, although BPS argued that the Court lacked maritime or admiralty jurisdiction because CSCL "fail[ed] to allege any claim for breach of a maritime contract" (Dkt. 65, at 10), this argument was belied by clearly applicable Second Circuit precedent. *See Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading Inc.*, 697 F.3d 59, 66 (2d Cir. 2012)). In *Garanti*, a vessel owner sought declaratory relief from the district court on the basis that it was not bound to arbitrate with the respondent bunker supplier. *See id.* at 62. The Second Circuit held that admiralty jurisdiction existed over the dispute, as it was the "mirror image" of the type of suit the defendant could have brought had it wanted to collect costs on a contract – a suit as to which the court would "unquestionably" have jurisdiction. *See id.* at 65-66. Here, as Judge Torres discussed in the January 15 Order, the holding in *Garanti* was plainly on point, and BPS raised no reasonable contention to distinguish it. (*See* January 15 Order, at 6-7.) Indeed, as Judge Torres explained, "[i]f BPS had brought an action for payment against CSCL, that would [have] give[n] rise to admiralty jurisdiction," and, since this action was "the mirror image of that suit," admiralty jurisdiction existed over CSCL's Petition. (*Id.*, at 6.) This Court finds that, in the face of clearly applicable Second Circuit precedent demonstrating that it had no merit, BPS's subject-matter-jurisdiction contention also lacked color.

As a final and most troubling example, although BPS argued in its opposition to the Preclusion Motion that the principles of comity did not require the Court's recognition of the Singapore Decisions (*see* Dkt. 65, at 14), it was BPS, itself, that had previously stated to the Court in earlier filings, in no uncertain terms, that the High Court of Singapore should decide the

question of arbitrability (*see* Dkt. 10, at 7-9). Indeed, in prior filings, BPS told the Court that it should not "interfere with the decision of the High Court of Singapore" because "international comity and the Supreme Court's requirement of generous[] constru[ction]' of intentions of arbitrability are intertwined, forefront principles here." (*Id.*, at 8-9 (citation omitted) (alterations in original).) As Judge Torres observed in the January 15 Order, BPS's effort to backtrack on this issue after the Singapore Decisions did not result in rulings in its favor was "disingenuous" and lacked support in the record. (*See* January 15 Order, at 9 n.5.) As a contention may only be only considered "colorable" when it has some factual and legal support, this Court does not see how BPS's arguments on the issue of comity could be deemed colorable in the absence of record support, and where the arguments were contradicted by BPS's own prior statements in court filings.

Overall, this Court finds that the evidence is clear that several of BPS's contentions to the Court lacked any factual or legal basis and, thus, cannot be considered colorable. This, however, does not end the analysis because, as tempting as it may be to assume that an argument that lacks color must have been made in bad faith, the two prongs of the applicable analysis should not be conflated. Rather, before fees may be awarded to CSCL under the Court's inherent authority to sanction, the Court must separately consider whether CSCL has shown by clear evidence that BPS acted in bad faith. *See Sherman, LLC v. DCI Telecomms., Inc.*, No. 03 Civ. 855, 2003 WL 21692763, at *4 (E.D.N.Y. July 21, 2003) (finding defendants' allegations "border on the frivolous," but noting that the bad-faith test "is conjunctive and requires that the challenged actions be meritless and be motivated by an improper purpose.").

b. CSCL Has Not Demonstrated the Requisite Bad Faith.

While there is no precise definition of what constitutes bad faith, the Second Circuit has "interpreted the bad faith standard restrictively." *Eisemann*, 204 F.3d at 396. What is necessary for bad-faith conduct is action taken for improper purposes such as to cause delay or to harass an opposing party. *See McCune*, 2010 WL 1189390, at *3 (citing *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986)). Such conduct may include:

> conduct, by which a party may attempt to undermine the court's authority, by, for example, attempting to mislead the court or skirt its orders, or use the judicial process as an instrument of abuse by, for example, filing a frivolous action or asserting a frivolous defense for the purposes of harassing his opponent.

Sherman, 2003 WL 21692763, at *4. In addition, a court's "factual findings of bad faith must be characterized by a high degree of specificity." *Schlaifer Nance*, 194 F.3d at 336; *see also Dow Chem.*, 782 F.2d at 344. Therefore, "[g]eneral characterizations of the nature of the losing party's behavior, unaccompanied by specific references to bad faith conduct, are not enough." *Kerin v. U.S. Postal Service*, 218 F.3d 185, 192 (2d Cir. 2000). Notably, the Second Circuit has explained that "[a]lthough a frivolous position will often signal an improper purpose, [the court has] never held that a frivolous position may be equated with an improper purpose." *Sierra Club*, 776 F.2d at 391; *see, e.g. Mahoney v. Yamaha Motor Corp. U.S.A.*, 290 F.R.D. 363, 369-70 (E.D.N.Y. 2013) (declining to award sanctions even if plaintiff's counsel "had knowledge that [plaintiff's] claims . . . were meritless" because it is "improper to determine that a party acted in bad faith" merely because "that party filed a meritless claim."). Additionally, the Second Circuit has noted that bad faith is personal, meaning "[t]here must be clear evidence of bad faith by a particular party before attorneys' fees may be assessed against him." *Dow Chem.*, 782 F.2d at 344.

With these restrictive parameters in mind, this Court does not find that CSCL has shown the "bad faith" required to satisfy the second prong of the standard.

As its primary argument as to how BPS engaged in "bad-faith" conduct, CSCL points to the representations that BPS made to the Court when it requested a stay of this action, which BPS later sought to retract after the Singapore Decisions did not come out in its favor. (*See* Dkt. 80, at 5.) In this regard, CSCL points to BPS's statements that "[t]he proper court venue for the dispute [was] Singapore" and that "[i]f the [Singapore] High Court decides that the dispute is not arbitrable, CSCL will . . . not be forced to arbitrate." (*Id.* (citation omitted).) While BPS's efforts to "backtrack" on its prior representations to the Court certainly did not evince good practice, it should be noted that those efforts have already resulted in negative consequences to BPS, as, in the January 15 Order, Judge Torres found that, in light of BPS's earlier representations to the Court, BPS was judicially estopped from arguing that CSCL could be ordered to arbitrate. (*See* January 15 Order, at 14-15.)[3]

More importantly, in its Fee Application, CSCL does not point to any authority for the proposition, implicit in its argument, that a court's application of judicial estoppel should warrant a fee award, based on the "bad-faith" exception to the American Rule. In this Circuit, the doctrine of judicial estoppel applies when: "(1) a party's later position is clearly inconsistent with its earlier position; (2) the party's former position has been adopted in some way by the court in the earlier proceeding; and (3) the party asserting the two positions would derive an unfair advantage against the party seeking estoppel." *Oklahoma Firefighters Pension & Retirement System v. Student Loan Corp.*, 951 F.Supp.2d 479, 494 n.6 (S.D.N.Y. 2013) (internal

[3] In the January 15 Order, the Court did not making a finding that BPS acted in bad faith (*see generally* January 15 Order), nor did the Second Circuit in affirming the March 29 Judgment (*see* Dkt. 98).

quotation marks and citation omitted). The judicial estoppel doctrine does not require a showing of "bad faith" within the meaning of the exception to the American Rule, and courts in this district have declined to exercise their inherent power to award attorneys' fees in cases where judicial estoppel has applied. *See, e.g.*, *Azuike v. BNY Mellon*, 962 F. Supp. 2d 591, 601-02 (S.D.N.Y. July 30, 2013) (declining to award attorneys' fees to employer on the basis of employee's failure to dismiss claims voluntarily where claims were barred by judicial estoppel, in the absence of clear evidence showing that the employee's actions were taken in bad faith). While a case may present circumstances justifying both judicial estoppel and sanctions for bad-faith conduct, the former, standing alone, does not justify the latter.

Moreover, while this Court acknowledges that BPS's litigation efforts in this action caused CSCL to experience a delay in achieving the outcome it sought, "delay alone" does not "rise to the level of sanctionable conduct contemplated by the case law." *Thai Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic*, No. 10 Civ. 5256 (KMW), 2011 WL 4111504, at *11 (S.D.N.Y. Sept. 13. 2011).

While this Court does recognize that BPS repeatedly presented unsupported arguments to the Court, it takes more than this to demonstrate that BPS's litigation strategy was intended to harass CSCL or was otherwise sufficiently egregious to qualify as "bad faith." This point is well illustrated by the very cases cited by CSCL in support of its request for attorneys' fees. For instance, *Carr v. Tillery*, No. 07-314-DRH, 2010 WL 1963398 (S.D. Ill. May 17, 2010) (cited in Dkt. 86, at 5) involved a plaintiff's eighth consecutive effort (over the course of seven years) to litigate a dispute with his former law partners that had previously settled, *see Carr*, 2010 WL 1963398, at *1-2. In *Carr*, where the plaintiff – who had previously been sanctioned for bringing a frivolous appeal – repeatedly violated the court filing rules and had "vituperative[ly]"

accused his former partners of fraud without any factual or legal support, the court had "little difficulty concluding that [the plaintiff] ha[d] prosecuted [the] action in bad faith." *Id.* at *4.

Likewise, in *Summerville v. Local 77*, No. 06cv00719, 2008 WL 3983118 (M.D.N.C. Aug. 26, 2008) (cited in Dkt. 86, at 5), the court explained that, prior to the suit, the plaintiff had filed four repetitive actions against the defendants, and as a result, had been enjoined from "initiat[ing] any [new] litigation" against the defendants without "written permission" from the court, *Summerville*, 2008 WL 3983118, at *4. After the plaintiff "willfully disobeyed" the injunction by filing a fifth action against the same defendants, the court concluded that the plaintiff's conduct constituted "obstinance and recalcitrance" and, thus, warranted the award of attorneys' fees and costs. *Id.* at 6 (internal quotation marks and citation omitted).

And, in *Kane v. City of New York*, 468 F. Supp. 586 (S.D.N.Y. 1979) (cited in Dkt. 86, at 5), the plaintiff was a serial litigator who filed 12 lawsuits over a claim that was previously dismissed on the merits on at least three occasions, *see Kane*, 468 F. Supp. at 592. In awarding attorneys' fees to the defendants, the court in *Kane* observed that the plaintiff's "[c]ommencement of action upon action based on the same facts dressed in different garb," after "having been repeatedly warned that the claims were barred by res judicata, [could] only be explained as malicious conduct." *Id.*

The level of misconduct described in these three cases support this Court's finding that BPS's conduct, in this case, lacks the requisite indicia of "bad faith" to impose sanctions under the Court's inherent authority. At bottom, these cases reinforce this Court's conclusion that, without more specific examples of BPS's improper course of conduct, CSCL's characterizations of certain of BPS's arguments as "groundless" – even if accurate – cannot suffice as "clear evidence" that BPS engaged in sanctionable conduct. *See also Schlaifer Nance*, 194 F.3d

at 340-41 (even though the district court characterized plaintiff's claim as "objectively frivolous," the appeals court could not "conclude that the continuation of [plaintiff's] action was anything more than the result of poor legal judgment"); *Colavito v. Hockmeyer Equipment Corp.*, 605 F. Supp. 1482, 1488 (S.D.N.Y. 1985) (ruling that each party would bear its own attorneys' fees, despite defendant's counsel's "total reliance" on an argument that had been rejected by the judge's prior ruling in a similar action, and despite the fact that "counsel['s] failure to disclose any grounds for its disagreement with that prior ruling" was "poor practice").

Lastly, this Court finds that CSCL has not clearly established "personal" bad faith as to BPS. *Dow Chem.*, 782 F.2d at 344. As noted above, CSCL seeks attorneys' fees only from BPS, not BPS's counsel, and, for this reason, CSCL must be able to ascribe specific bad faith acts *to BPS*. Nothing in CSCL's submission offers the type of evidence from which this Court could conclude that BPS engaged in "personal" bad faith, so as to warrant an award of attorneys' fees against it.

Accordingly, this Court cannot conclude that BPS's conduct, even if improper, was sufficiently egregious to justify fee-shifting sanctions under the Court's inherent authority, and I therefore recommend that CSCL's application for attorneys' fees be denied.

B. <u>CSCL's Request for Costs</u>

In addition to seeking attorneys' fees, CSCL has sought "disbursements," which it claims total $1,490.03. (4/6/20 Venezia Decl. ¶ 9(b).) CSCL breaks down those claimed "disbursements" as follows:

Duplication & photocopy:	$43.20
Telephone expenses:	$86.00
Online research:	<u>$1,360.83</u>
Total:	**$1,490.03**

(*Id.*, at 3.)

Pursuant to Federal Rule of Civil Procedure 54(d)(1), taxable "costs should be allowed to the prevailing party." The term "costs," as used in Rule 54, is defined in 28 U.S.C. § 1920 and Local Civil Rule 54.1 as including the price of transcripts, depositions, witness fees, printing, copying, and the like.

CSCL concedes that "telephone expenses" and "online research" are not "enumerated costs" under Local Civil Rule 54.1 (*see* Pet. Reply Mem., at 8), and, in fact, such costs are generally recoverable only in connection with an attorneys' fee award, s*ee Marisol A. ex rel. Forbes v. Giuliani*, 111 F. Supp. 2d 381, 401 (S.D.N.Y. 2000) ("telephone costs" are recoverable as "attorneys' fees"); *Anderson v. City of New York*, 132 F. Supp. 2d 239, 247 (S.D.N.Y. 2001) ("costs for computerized research" are "considered part of attorneys' fees"). Nonetheless, CSCL notes that, upon a court order, Local Civil Rule 54.1(c)(7) permits recovery of "attorneys' fees *and related costs*" (see Pet. Reply Mem., at 8 (emphasis added)), which, according to CSCL, should be broadly construed to include "disbursements" of the type it seeks here (*id.* (citing Local Civ. R. 54.1(c)(7))). As for the necessary "court order," CSCL suggests that, because the Court's January 15 Order "directed [CSCL's counsel] to submit their request for costs, expenses, and disbursements," that Order "made clear that CSCL [was] permitted to seek recovery of all costs, fees[,] and expenses associated with its effort, not simply the individual costs specifically listed by name in Local [Civil] Rule 54.1." (*Id.*, at 8-9.) In short, CSCL argues that the costs for telephone expenses and online research fall within the ambit of Local Civil Rule 54.1(c)(7) and should be recoverable under the Court's January 15 Order. (*See id.*)

As an initial matter, it is undisputed that, pursuant to S.D.N.Y. Local Civil Rule 54.1, CSCL is entitled to the $43.20 in duplication and photocopy costs. This Court, however, does not agree with CSCL's characterization of the January 15 Order as "ma[king] clear" that CSCL

has been permitted to recover costs for telephone expenses and online research. (*Id.*, at 8.) Rather, the January 15 Order noted that, although CSCL sought "costs, expenses, and disbursements in prosecuting this action and the action in Singapore," CSCL had not "moved for them," and, therefore, the Court needed to "order further briefing on the issue." (January 15 Order, at 16.) This Court has now had the benefit of such briefing and, for the reasons discussed above, has found that CSCL has failed to present the "clear evidence" necessary to warrant the award of attorneys' fees pursuant to the bad-faith exception of the American Rule.

As CSCL's disbursements for telephone expenses and online research are not the type of costs enumerated under Local Civil Rule 54.1, and as the relevant precedent characterizes such disbursements as part of attorneys' fees, I recommend that they not be awarded here.

CONCLUSION

For the reasons set forth above, I respectfully recommend that CSCL's application for attorneys' fees be denied, except to the extent that, as the prevailing party in this action, CSCL is seeking costs under Local Civil Rule 54.1. Under that Rule, CSCL has demonstrated that it is entitled to recover $43.20 in costs.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Analisa Torres, United States Courthouse, 500 Pearl Street, Room 2210, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Torres. FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW.

(*See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *IUE AFL-CIO Pension Fund v. Hermann*, 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 98, 300 (2d Cir. 1992); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d Cir. 1988); *McCarthy v. Manson*, 714 F.2d 234, 237-238 (2d Cir. 1983).)

Dated: New York, New York
May 15, 2020

Respectfully submitted,

DEBRA FREEMAN
United States Magistrate Judge

Copies to:
All parties (via ECF)