JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ZHUHAI DINGFU PHASE I INDUSTRIAL ENERGY CONSERVATION INVESTMENT FUND, LP,

Petitioner,

v.

PHILLIP LIANG ZHANG,

Respondent.

Case No. 8:23-CV-02059-MRA-JDE

ORDER GRANTING PETITIONER'S MOTION FOR RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARD [ECF 21]

Before the Court is Petitioner's Motion for Recognition and Enforcement of Foreign Arbitral Award ("Motion"). ECF 21. The Court read and considered the Motion and deemed the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. For the reasons stated herein, the Court **GRANTS** the Motion, recognizes the foreign arbitral award, and enters judgment against Respondent.

I. BACKGROUND

On or about May 6, 2016, Petitioner Zhuhai Dingfu Phase I Industrial Energy Conservation Investment Fund ("Petitioner" or "Dingfu"),[1] on the one hand, and Shanghai

[1] Petitioner is a limited partnership located in the People's Republic of China. ECF 1 ¶ 5.

Boyan Investment Management Co., Ltd. ("Boyan"), along with Jingcan Metallurgical Machinery Co., Ltd. ("Jingcan") and Shanghai Q-Capital Investment Co., Ltd. ("Q-Capital"), both of which are businesses controlled by Respondent Phillip Liang Zhang ("Respondent"),[2] on the other hand, entered into an agreement, the Capital Increase Agreement of Shanghai Q-Capital Investment Co., Ltd. ("Capital Increase Agreement"), whereby Petitioner agreed to make certain capital contributions to Q-Capital.[3] ECF 1 ¶ 11; ECF 21 at 1. In return, Respondent and Jingcan agreed to certain obligations, including that Jingcan would fully fund its investment in Q-Capital by completing paid-in capital contributions equivalent to RMB 45,000,000. ECF 21 at 10. Respondent executed the Capital Increase Agreement on behalf of both Q-Capital and Jingcan. ECF 1 ¶ 12.

The Capital Increase Agreement requires arbitration of any disputes that may arise between the parties. *Id.* ¶ 13. Article 12.2 of the Agreement provides that: "All disputes arising out of or in connection with this Agreement shall be settled by all parties through friendly negotiation. If any dispute fails to be resolved through negotiation within fifteen (15) days upon its occurrence, any party may submit the dispute to Shanghai Arbitration Commission for arbitration in accordance with its arbitration rules then in effect . . . The arbitration award shall be final and binding on all the parties." *Id.* ¶ 15; ECF 1-2 (English translation of Capital Increase Agreement) at 30.

On the same day, the same parties—plus Respondent individually—entered into a second written agreement, the Shareholders' Agreement of Shanghai Q-Capital Investment Co., Ltd. (the "Shareholders' Agreement"). ECF 1 ¶ 15; ECF 1-4 (English translation of Shareholders' Agreement). Respondent once again executed the Shareholders' Agreement on behalf of Q-Capital and Jingcan. ECF 1 ¶ 16. Article 6.2 of the Agreement includes the same arbitration clause as in the Capital Increase Agreement. *Id.* ¶ 17. Through an

[2] The Petition for Recognition and Enforcement of Foreign Arbitral Award states that Respondent resides and owns real property and businesses in this judicial district. ECF 1 ¶¶ 6, 8.

[3] Boyan also agreed to invest RMB 10,000,000 for a 12.5% stake. ECF 21 at 10 n.3.

Accession Agreement attached as Schedule I to the Shareholders' Agreement, Respondent agreed that he, individually, "shall be deemed to be a party to the Shareholders' Agreement" and "fully accepts all the terms and conditions of the Shareholders' Agreement and agrees to be bound thereby." ECF 21 at 11; 1-4 at 35.

Thereafter, both Jingcan and Boyan "failed to pay in certain capital, which led to a restructuring of the parties' obligations as part of the investment." ECF 1 ¶ 18. As a result, on or about October 31, 2018, the same parties, including Respondent individually, entered into a third written agreement, the Supplementary Agreement to the Capital Increase Agreement and Shareholders' Agreement of Shanghai Q-Capital Investment Co., Ltd. ("Supplementary Agreement I"). *Id.* ¶ 19; ECF 1-6 (English translation of Supplementary Agreement I). In Supplementary Agreement I, Respondent agreed to repurchase all equity Petitioner invested in Q-Capital. ECF 1 ¶ 19. Respondent executed the Supplementary Agreement on behalf of himself and separately on behalf of Q-Capital. *Id.* ¶ 20.

In December 2018, Petitioner and Respondent entered into a second Supplementary Agreement to the Capital Increase Agreement and Shareholders' Agreement ("Supplementary Agreement II"). ECF 21 at 12; 21-14 (English translation of Supplementary Agreement II). In this "creditor's rights" agreement, Respondent committed to "pay [Petitioner] the 'remaining repurchase price payment' in two installments – the first by December 31, 2019, and the second by June 30, 2020." ECF 21 at 12; 21-14. Respondent agreed that his real property in Shanghai City would serve as security for a mortgage guarantee until the repurchase debt was paid in full. ECF 21 at 12; 21-14. Supplementary Agreement II provided that either party could resolve any dispute under it by "filing a lawsuit to the People's Court with jurisdiction where [Petitioner] is located." ECF 21 at 12; 21-14.[4]

[4] Respondent asserts that the parties signed a second document titled "Supplementary Agreement II," which he refers to as "second Supplementary Agreement II." ECF 24 at 8 n.2, 24. For the first time on Reply, Petitioner acknowledges this agreement but, through an attached declaration, explains that it understands this "second Supplementary Agreement II" to refer to the Real Estate Mortgage Contract signed in April

Petitioner explains that after the signing of the above agreements, Respondent and Jingcan failed to perform their repurchase obligations. ECF 21 at 12. On May 14, 2020, Petitioner filed a suit for breach of contract against Respondent, Q-Capital, and Jingcan in the Intermediate People's Court of Zhuhai City, Guangdong Province (the "Zhuhai People's Court"). *Id.*; ECF 21-18 at 3. On October 14, 2020, the Zhuhai People's Court dismissed the lawsuit for lack of jurisdiction. ECF 21 at 13; ECF 21-18. It found that Supplementary Agreement II was a "continuation of the performance of" the earlier three agreements and could not be "deemed as a supplementation or change" to those Agreements. ECF 21-18 at 13. Therefore, Petitioner's claim requesting that Respondent, Jingcan, and Q-Capital assume liabilities for breach of contract were based on the first three agreements, which compelled arbitration. *Id.* The Zhuhai People's Court also dismissed Petitioner's claim against Respondent regarding his mortgage guarantee liabilities as stipulated in Supplementary Agreement II, not for lack of jurisdiction, but because the main creditor's rights and debts at issue in the first claim had not yet been determined. *Id.* at 13-14.

On November 3, 2020, Petitioner initiated an arbitration against Respondent, Q-Capital, and Jingcan at the Shanghai Arbitration Commission ("SHAC") in Shanghai, China. ECF 1 ¶ 21; ECF 21 at 13; ECF 21-18 at 13-14. Petitioner claimed that Respondent and Jingcan had failed to satisfy their repurchase obligations. ECF 21 at 13; ECF 1-8.

During the arbitration proceedings, Q-Capital and Jingcan raised objections to the arbitration process, including that Respondent had not been properly served with notice of the arbitration. ECF 21 at 13; ECF 1-8. Under the SHAC's rules, the SHAC is required to serve respondents with notice of the arbitration. ECF 21 at 13. The SHAC consequently issued a Notification Letter, in which it examined the sufficiency of notice and determined that Respondent had been properly served at the address he designated for notice in Article

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2019, which was "performance of the contractual agreement under the December 2018 Supplementary Agreement II," as described in Supplementary Agreement II. ECF 27-1 ¶ 13; ECF 21-14.

13.1 of the Capital Increase Agreement.[5] *Id.*; ECF 21-16. The Notification Letter also stated that Respondent had received proper notice of the arbitration because of Respondent's position with Q-Capital, which participated in the arbitration proceeding. ECF 21 at 13; ECF 21-16.

The SHAC held hearings on May 8, 2021, and July 7, 2021. *Id.*; ECF 27-1 at 32 (Statement on Arbitration Dispute Case (2020) HZAZ No. 3700, correcting dates of arbitration hearings). Respondent did not appear at the hearings or otherwise participate in the arbitration proceedings. On December 2, 2021, the SHAC rendered an award, signed by all three arbitrators, that found in Petitioner's favor. ECF 1 ¶ 25. The award requires Respondent and Jingcan to pay "the principal amount of RMB 17 million of the price of repurchase of the equity interest," and three types of interest as set forth in the award, which together amount to RMB 712,800. ECF 1-8 at 22. The award separately finds that Q-Capital "should be jointly and severally liable for paying the price of repurchase and interest as claimed" against Respondent and Jingcan. *Id.* Respondent, Jingcan, and Q-Capital were also ordered to pay Petitioner's attorney fees, litigation preservation expenses, insurance costs for realizing claims, and the arbitration costs of the case. *Id.*

On November 1, 2023, Petitioner filed its Petition for Recognition and Enforcement of Foreign Arbitral Award ("Petition") in this Court. ECF 1. With interest accrued through October 31, 2023, Petitioner states that the award amounts to approximately RMB 40,387,985.67, or approximately $6.3 million.[6] *Id.* ¶ 26. Petitioner has partially recovered on the award in China, and the remaining balance owed is RMB 26,370,552.08, or

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[5] The SHAC award states that "[a]fter accepting the Case, SHAC . . . sent the *Notice of Arbitration*, a copy of the *Statement of Claim*, and attachments thereto, the Arbitration Rules and the *Roster of Arbitrators* to the three Respondents." ECF 1-08 at 3. A copy of the Notice of Arbitration was not attached to the SHAC's Notification Letter, at least not to the version filed with this Court.

[6] The Court converts RMB to dollars based on the exchange rate prevailing on the date of the award. On December 2, 2021, the RMB-Dollar exchange rate was RMB 6.3763 to US $1. Historical Rates for the Chinese Renminbi, Board of Governors of the Federal Reserve System, https://www.federalreserve.gov/releases/h10/hist/dat00_ch.htm.

approximately $3.6 million. *Id.* Interest continues to accrue daily. *Id.* Respondent filed his Answer to the Petition on January 16, 2024. ECF 12.

On March 14, 2024, in response to statements filed by both parties, ECF 17 and 18, the Court ordered Petitioner to file its motion to enforce the award. ECF 20. On March 21, 2024, Petitioner timely filed the instant Motion for Recognition and Enforcement of Foreign Arbitral Award (the "Motion"). ECF 21. Petitioner asks the Court to confirm the SHAC's foreign arbitral award (ECF 1-7 and 1-08) pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards ("New York Convention"), 21 U.S.T. 2517, 330 U.N.T.S. 3, reprinted in 9 U.S.C. §§ 201-208. China is a signatory to the New York Convention. ECF 1 ¶ 22.

On April 12, 2024, Respondent filed his Opposition to the Motion, raising several defenses against enforcement of the award. ECF 24. Respondent argues that he did not receive proper notice of the arbitration proceedings and therefore was unable to present his case; that he signed the agreements securing corporate debt with his personal property under duress; and that he did not consent to arbitrate the underlying dispute. *Id.* On April 26, 2024, Petitioner filed its Reply. ECF 27. On May 21, 2024, Respondent filed a Motion for Leave to File Sur-Reply and Sur-Reply, ECF 32 and 32-1, which Petitioner opposes, ECF 38.

II. EVIDENTIARY OBJECTIONS

Petitioner and Respondent filed several evidentiary objections and responses to objections in connection with the Motion. *See generally* ECF 26, 27-3, 28, 30, 33, and 34. Where helpful, the Court addresses these evidentiary objections below. If the Court relies on any objected-to evidence, it overrules the corresponding objection.

III. MOTION FOR LEAVE TO FILE SUR-REPLY

Courts have discretion to grant or deny leave to file a sur-reply. *Great American Ins. Co. v. Berl*, 2017 WL 8180627, at *1 (C.D. Cal. Oct. 23, 2017) (citing *Schmidt v. Shah*, 696 F. Supp. 2d 44, 59 (D.D.C. 2010)). The Court has reviewed the relevant moving, opposing, and reply papers and finds that the additional context and explanation provided

by Respondent in his Sur-Reply is relevant and necessary in considering his defenses. The party seeking to avoid enforcement bears the burden of showing that an exception to enforcement applies. *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 836 (9th Cir. 2010). Petitioner appropriately relied on new evidence in its Reply in response to Respondent's Opposition, which effectively served as Respondent's opening brief. *See* ECF 38 at 4; *see also, e.g.,* ECF 27-1 (Huan Xingzhou Decl. with exhibits). It is fair and appropriate then to give Respondent an opportunity to respond to that new evidence and argument. *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (new evidence in reply may not be considered without giving the non-movant an opportunity to respond); *Glass v. Asic North, Inc.*, 848 F. App'x 255, 257 (9th Cir. Mar. 9, 2021) (finding that a district court "does not abuse its discretion when, before considering new evidence attached to a reply brief, it gives the opposing party an opportunity to respond to the new evidence") (citation omitted). Thus, the Motion for Leave to File Sur-Reply is **GRANTED**, and the Court accepts the Sur-Reply. Both parties have had sufficient opportunity to respond to each other's arguments and evidence.

IV. DISCUSSION

The New York Convention "governs the recognition and enforcement of *arbitral awards* made in the territory of a foreign state." *Castro v. Tri Marine Fish Co. LLC*, 921 F.3d 766, 773 (9th Cir. 2019) (internal quotation omitted). The United States codified its obligations under the New York Convention in Chapter 2 of the Federal Arbitration Act ("FAA"). *Id.* (citing 9 U.S.C. §§ 201-08). While the FAA "embodies the national policy favoring arbitration," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), the policy "has extra force when international arbitration is at issue," *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 45 (1st Cir. 2008).

District courts have original jurisdiction over disputes falling under the New York Convention and the FAA regardless of the amount in controversy. 9 U.S.C. § 203. However, the "review of a foreign arbitration award is quite circumscribed." *Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc.* ("*Ministry of Def.*"), 969 F.2d 764, 770

(9th Cir. 1992). When a petitioner seeks an order confirming a foreign arbitral award, the "district court has little discretion: 'The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.'" *Id.* (citing 9 U.S.C. § 207); *Castro*, 921 F.3d at 771 (describing "the principle insulating foreign arbitral awards from second-guessing by courts" as "central" to the New York Convention); *Polimaster Ltd.*, 623 F.3d at 835-36 (noting the "seven defenses to the recognition or enforcement of an arbitral award" enumerated in the New York Convention).

As noted above, the party seeking to avoid enforcement bears the burden of showing that an exception to enforcement applies. *Polimaster Ltd*., 623 F.3d at 836. That "burden is substantial because the public policy in favor of international arbitration is strong, and the New York Convention defenses are interpreted narrowly." *Id.* (internal citations omitted). "Absent a convincing showing that one of these narrow exceptions applies, the arbitral award will be confirmed." *Changzhou AMEC Eastern Tools and Equip. Co., Ltd. v. Eastern Tools & Equip., Inc.* ("*Changzhou*"), No. EDCV 11-00354 VAP (DTBx), 2012 WL 3106620, at *9 (C.D. Cal. July 30, 2012) (citing *Fitzroy Eng'g, Ltd. v. Flame Eng'g, Inc.*, No. 94C2029, 1994 WL 700173, at *3 (N.D. Ill. Dec. 13, 1994)).

A. Authenticity of Arbitral Award

In connection with Respondent's main defense against enforcement—that he was not given proper notice of the arbitration proceedings—Respondent initially argued that the arbitration notice was faulty because it was purportedly received on November 27, 2020, which would have been *after* the arbitration hearings occurred. ECF 24 at 5-6. As proof of this, Respondent pointed to language in the SHAC award stating that the case was heard on May 8 and July 7, 2020. *See* ECF 24 at 10-11 (citing ECF 21-9 at p.2); ECF 1-8 at 3. In response, Petitioner submitted with its Reply a Statement on Arbitration Dispute Case (2020) HZAZ No. 3700 ("Statement on Arbitration"), which corrected the recorded hearing dates to show them as May 8 and July 7, 2021, not 2020. ECF 27-1 at 32, 34. The Statement of Arbitration includes the SHAC's seal, is dated July 4, 2023, and states that

on June 29, 2023 (prior to this litigation), Petitioner submitted a written application to the SHAC noting the inconsistent dates. *Id.* The Court has no reason to question the authenticity of the Statement of Arbitration. The corrected dates accord with uncontested evidence in the record that shows that Petitioner did not submit its arbitration claim until November 3, 2020, and the SHAC accepted the case on November 19, 2020. *See* ECF 1-8 at 3; ECF 24 at 9 (Respondent noting that Petitioner seeks to enforce a SHAC arbitral award "initiated on November 19, 2020"). Thus, it would be nonsensical to believe that the SHAC held hearings in May and June 2020 if an arbitration claim had not yet been submitted.

Given this evidence, Respondent seemingly pivots and argues in the Sur-Reply that, due to these inconsistencies and notice of correction, Petitioner must have not presented "the true arbitral award" with its Petition. ECF 32-1 at 7 n.2; ECF 30 (Respondent's Evidentiary Objections to Petitioner's Reply). Respondent invites the Court to question the authenticity of the notice of correction itself because it is unsigned by the arbitrators and, according to Respondent, not properly authenticated by Huan Xingzhou, a Dingfu employee. ECF 32-1 at 7; ECF 27-1.

The Court is not persuaded by these arguments. Under the New York Convention, "the party applying for recognition and enforcement shall, at the time of application, supply": (1) a "duly authenticated original award or a duly certified copy thereof," and (2) the "original agreement" or a "duly certified copy thereof" containing the arbitration clause. 21 U.S.T. 2517, Art. IV, § (1). If the award and agreement were "not made in an official language of the country in which the award is relied upon," the party seeking confirmation must provide a translation of the documents "certified by an official or sworn translator." *Id.* Art. IV, § (2).

Here, Petitioner submitted a duly certified copy of the original award as well as a certified English translation of the award with its Petition. *See* ECF 1-7, 1-8, 1-9. Petitioner also submitted original and certified translated copies of the agreements relevant to the award, which contain the arbitration provisions. *See* ECF 1-1 through 1-5. The

Statement of Arbitration corrected the year of the hearings as set forth in the award, but it did not amend the award itself. ECF 32-1 at 6. Thus, there is no question that Petitioner submitted the original award, even if typos concerning hearing dates were later corrected in a separate document.

B. Adequacy of Notice

Respondent insists that, even if the Court considers the SHAC's notice of correction, the arbitral award cannot be enforced because he was not given proper notice of the arbitration proceedings, which is a defense against enforcement under the New York Convention. ECF 24 at 10; *see also* 21 U.S.T. 2517, Art. V, § (1)(b); 9 U.S.C. § 207 ("The Court shall confirm the award unless it finds one of the grounds for refusal or deferral . . . specified in the [New York] Convention.").

Petitioner argues that the SHAC previously addressed the sufficiency of its notice to Respondent, and therefore the Court may not review this issue. ECF 27 at 8; ECF 21-16. That is not correct. While the Court may not review the merits of the underlying arbitration decision, the Court must decide "whether [a] party [has] established a defense under the Convention." *China Nat'l Metal Prods. Imp./Exp. Co.*, 379 F.3d 796, 799 (9th Cir. 2004) (citing *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 260 (2d Cir. 2003)); *MediVas, LLC v. Marubeni Corp.*, 592 F. App'x 642 (9th Cir. 2015); *Polimaster Ltd.*, 623 F.3d 832. Adequacy of notice is one of those defenses. *See, e.g.*, *Linley Investments v. Jamgotchain*, 670 F. App'x 627 (9th Cir. 2016) (reviewing whether respondent was provided proper notice of arbitration proceedings); *Tianjin Port Free Trade Zone Int'l Trade Serv., Ltd. v. Tiancheng Int'l, Inc.*, No. ED CV 17-2127 PA (SHKx), 2018 WL 4502497 (C.D. Cal. Sept. 18, 2018) (same); *Ma v. Fang*, No. SACV 21-441 PSG (ADSx), 2022 WL 1078867, at *2 (C.D. Cal Mar. 2, 2022) (same).

"Federal courts have interpreted the New York Convention's notice requirements to mean that service regarding a foreign arbitration proceeding must comply with federal due process." *Ma*, 2022 WL 1078867, at *2 (citing *Linley Invs. v. Jamgotchian*, No. CV 11-724 JAK (RZx), 2012 WL 12953824, at *4 (C.D. Cal. May 11, 2012) (collecting cases));

see also Liu Luwei v. Phyto Tech Corp., No. CV 18-2174-JFW(GJSx), 2018 WL 6016958, at *4 (C.D. Cal. June 18, 2018) ("Courts have held that this provision 'essentially sanctions the application of the forum state's standards of due process.'") (quoting *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145-56 (2d Cir. 1992)). "In other words, service must be 'reasonably calculated, under all the circumstances, to apprise interested persons of the pendency of the action and afford them an opportunity to present their objections.'" *Ma*, 2022 WL 1078867, at *2 (quoting *Mullane v. Central Hanover Bank & Trust. Co.*, 339 U.S. 306, 314 (1950)); *see also Linley Invs. v. Jamgotchian*, 670 F. App'x 627, 628 (9th Cir. 2016) (applying this standard in affirming the district court's confirmation of a foreign arbitral award).

Petitioner initiated arbitration proceedings with the SHAC in November 2020. ECF 1 ¶ 21; ECF 21 at 13; ECF 21-18 at 13-14. The SHAC Arbitration Rules provide that:

> An arbitration document shall be deemed to have been served to one party if it has been delivered to the addressee in person or to the addressee's place of business, place of registration, place of residence, place of habitual residence or communication address. If despite reasonable inquiries by the other party, none of the above addresses can be found, service shall be deemed to have been effected if the arbitration document has been delivered by SHAC to the addressee's last known place of business, place of registration, place of residence, place of habitual residence or communication address confirmed in contracts or other materials, by way of registered mail, express mail services or other means that provides delivery record[.]

ECF 21-16 at 2.

The SHAC's Notification Letter states that the notice to Respondent regarding the arbitration proceedings was delivered to "Room 11A, 345 Xianxia Road, Changning District, Shanghai City." ECF 21-16. Petitioner insists that "345 Xianxia Road" was the correct business address for Respondent, *see* ECF 27 at 13-14, but that is not at all clear. As Respondent points out, Article 13.1 of the Capital Increase Agreement includes a different address for him within the same building: "Tower A, 11/F, 345 Xianxia Road,

Changning District, Shanghai City." ECF 1-2 at 31. The first address (Room 11A) is Q-Capital's principal place of business, and the second address (Tower A, 11/F) is the address designated for service in the Capital Increase Agreement. ECF 24 at 12-13.

In addition, Respondent explains that the building where his office was located is a "30-floor building with over a hundred companies, and no company relating to this matter had a mailbox in the lobby." ECF 24 at 11-12; *see also* ECF 24-2 (Zhang Decl. ¶ 25). The Notification Letter states that "[s]uch mail was shown to be signed and accepted on November 27, 2020," and the signing status was "Collected by others: it's on the shelf in the lobby on the first floor, please pick it up in time." ECF 21-16. However, the Notification Letter does not indicate who signed the notice or whether the notice was ever picked up or delivered to Room 11A or Tower A, 11/F or to Respondent in person. *See id.*; ECF 24 at 12.

The SHAC's own rules provide that, "[i]f despite reasonable inquiries by the other party," "the addressee's place of business, place of registration, place of residence, place of habitual residence or communication address cannot be found," then "service shall be deemed to have been effected if the arbitration document has been delivered by SHAC to the addressee's last known place of business . . . by way of registered mail, express mail services or other means that provides delivery record." ECF 21-16 at 2. Because there is no record showing that the notice was delivered to the specific office address, and the notice was left on the shelf of a lobby in a 30-floor building, the Court is not convinced that the SHAC "found" Respondent's "place of business." Moreover, there is no evidence that the SHAC took any other steps, or made "reasonable inquiries," to serve Respondent, such as by sending the notice to the email address Respondent listed in the Capital Increase Agreement. *See* ECF 1-2 at 31. This, without more, indicates insufficient notice to Respondent.

However, Petitioner argues that notice was sufficient here because Q-Capital received notice and participated in the arbitration proceedings, and Respondent was "the 100% controller and legal representative of Q-Capital." ECF 27 at 10-11, 14. Respondent

does not dispute that he knew that Q-Capital participated in the arbitration proceedings, but he argues that Q-Capital did not receive notice of the arbitration *on his behalf*, and that he did not control Q-Capital during the relevant time period. *See* ECF 24 at 13-15; ECF 32-1 at 10. Respondent's position appears to be that, despite his relationship with Q-Capital and knowledge of the arbitration, notice was insufficient as to him because the SHAC did not serve him directly. ECF 32-1 at 11. While the SHAC likely should have taken additional steps to ensure that Respondent received notice as an individual party to the arbitration, the Court is satisfied that notice nevertheless satisfies federal due process requirements.

First, Respondent has not shown that he did not control or serve as legal representative of Q-Capital during the arbitration process. Respondent states that he "ceased being active in Q-Capital." ECF 24 at 13 (citing ECF 14-3 (Huilan Shen Decl. ¶ 9)). Yet, as Petitioner points out, "[Respondent] provides the Court with no evidence to show that his control of Q-Capital changed at any point," nor does he "identify any <u>other</u> person who controls the company, if it is not him." ECF 27 at 12. In his Sur-Reply, Respondent argues that he was never a shareholder of Q-Capital, and that others held 100% equity in Q-Capital. ECF 32-1 at 12. He also states that Huilan Shen was personally responsible for daily operations since 2019, and Shen declared under oath that the notice at issue was not received at the Q-Capital address. *Id.* at 13. But this still does not establish that Respondent did not control Q-Capital. That Respondent moved to the United States and was not in China before the time of the purported service on him also does not mean that he no longer controlled the company or that he did not have notice of the arbitration proceedings based on his relationship with Q-Capital. *See* ECF 24 at 13; 32-1 at 8-9. It merely demonstrates his *physical* absence from Q-Capital's headquarters. Because it is Respondent's "'substantial' burden to demonstrate that a defense to arbitral award confirmation applies, his failure to supply any evidence that he was no longer at the helm of [Q-Capital] is significant." *Ma*, 2022 WL 1078867, at *4 (citing *Ministry of Def.*, 969 F.2d at 770).

Second, Petitioner provides compelling evidence that Respondent was in fact aware of the arbitration proceedings. While Respondent bears the burden of establishing a defense to enforcement, that does not "eviscerate completely the burden on [Petitioner] to present some evidence to support [an] asserted fact or legal argument." *Xuchu Dai v. Eastern Tools & Equip., Inc.*, 571 F. App'x 609, 611 (9th Cir. 2014) (affirming district court's determination) (internal citations and quotation marks omitted). Here, Petitioner provides a signed declaration from Huang Xhingzhou, a Dingfu representative, declaring that she discussed, through a voice call on WeChat, the initiation of arbitration with Respondent on December 4, 2020. ECF 27-1 ¶ 5. In addition, Petitioner provides a transcript of a voice message sent from Respondent to Xingzhou on May 18, 2021, where in the course of discussing the dispute between Petitioner and Respondent's companies, Respondent stated: "the nature of the contracts between us is not for you to decide, nor for me to decide, it is for the arbitration . . . commission to decide." *Id.* ¶ 6; ECF 27-2 at 4-5.[7]

Respondent tellingly does not challenge the authenticity of the voice message, arguing only that the voice message shows that he knew about the arbitration with respect to the companies, but not as it related to him or his personal assets. ECF 32-1 at 10. Additionally, because the date of the voice memo is May 18, 2021—which was after the first arbitration hearing—Respondent argues that the message demonstrates only that he was aware of the arbitration after it had begun. ECF 32-1 at 12. But Respondent's self-serving statements alone cannot override the fact that Q-Capital's participation in the arbitration and his voice message strongly indicate that he had actual notice and

[7] Petitioner also argues that Respondent must have had knowledge of the arbitration process because the attorney who represented him in preliminary negotiations served as counsel of record for Q-Capital and Jingcan in the arbitration proceedings. *See* ECF 27-1 at 11, 15. While this argument has some logical appeal, absent actual evidence that the attorney communicated with Respondent about the arbitration, the Court does not consider this as evidence that Respondent must have known about the proceedings.

opportunity to be heard.[8] *See Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193, 1203 (9th Cir. 2008) ("Because 'due process does not require actual notice,' it follows a fortiori that actual notice satisfies due process. We find the argument that the Constitution requires something *more* than actual notice strained to the point of the bizarre.") (quoting *Jones v. Flowers*, 547 U.S. 220, 225 (2006)); *Life Alert Emergency Response, Inc. v. Lifewatch, Inc.*, 2014 WL 2115189, at *3 (C.D. Cal. May 19, 2014) ("Because defendant received actual notice, the constitutional guarantee of due process was satisfied[.]") (citations omitted).

The Court finds *Ma v. Fang*, 2022 WL 1078867 (C.D. Cal. Mar. 2, 2022), instructive on these issues. There, the district court found that, after unsuccessfully attempting to serve respondents at their last known residential and business addresses, the fact that the businesses—of which one of the respondents was a legal representative—received notice suggested that respondent also had notice of the arbitration proceedings. In *Ma*, multiple attempts had been made to notify the respondent individually that he was a party to the arbitration proceedings, and the successful notice to his correct business address was just one of those attempts. *Id.* Here, there may not be evidence of any other attempts to serve Respondent beyond the notice being dropped in the lobby of a 30-floor building, but unlike in *Ma*, there is evidence of actual notice, and this satisfies due process.

[8] Respondent argues that any attempted delivery to Respondent through Q-Capital could have been thwarted by individuals "loyal" to Petitioner who had a role in Q-Capital. ECF 24 at 12. This argument is bizarre because Q-Capital and Jingcan raised concerns about service of process to Respondent with the SHAC, which would indicate that Q-Capital sought to *include* Respondent, not exclude him. Moreover, Shen's declaration corroborates that no one at Q-Capital's Xianxia Road office "accepted any mail, notices, or correspondences or any form of legal process" on Respondent's behalf, but it does not reflect any effort by anyone to prevent Respondent from participating in the arbitration process or negate that Respondent had actual notice of the arbitration proceedings, which satisfies due process. ECF 24-3 at 3.

While the SHAC likely should have taken additional steps to ensure that Respondent received notice as an individual party to the arbitration, the Court is satisfied that notice here was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314; *see also CBF Industria De Gusa S/A v. AMCI Holdings, Inc.*, 650 F. Supp. 228 (S.D.N.Y. 2023) (finding notice to an individual defendant satisfied due process where businesses that the individual controlled were found to have received proper notice). Because Respondent fails to provide convincing evidence that he did not control Q-Capital or receive actual notice, the Court finds that the notice sent to Q-Capital and Q-Capital's participation in the arbitration process, as well as Respondent's awareness of the arbitration, as evidenced by the voice message, comports with due process.

C. Additional Defenses

Respondent raises additional defenses against enforcement of the arbitral award under the New York Convention, but none are availing.

First, Respondent argues that he did not have an opportunity to present his case at the arbitration proceeding because COVID travel restrictions prevented his travel from the United States to China. ECF 24 at 15-17. Inability to present one's case is a defense against enforcement under the New York Convention. *See* 21 U.S.T. 2517, Art. V, § (1)(b); 9 U.S.C. § 207. Under this defense, courts consider whether the parties had an "opportunity to be heard at a meaningful time and in a meaningful manner." *Song v. Que*, No. 23-cv-02159-RFL, 2024 WL 2853983, at *2 (N.D. Cal. May 31, 2024) (internal citation and quotation omitted).

Accepting the difficulty of travel during the COVID-19 pandemic, the issue of Respondent's opportunity to present his case boils down to whether he could have made a remote appearance or presented his case through counsel. The SHAC issued a notice on February 13, 2020, regarding "Safeguard Measures of Shanghai Arbitration Commission for Serving Subjects of Commercial Arbitration During Pandemic Prevention and Control." ECF 27-1, Ex. 8. It states that the SHAC would "[j]oin hands with the arbitral

institutions at home and abroad in providing technical support for online court trial for the parties to arbitration who cannot go to the remote arbitral institutions to attend hearing due to pandemic prevention and control so as to achieve the substantive use of online arbitration hearing."[9] *Id.* Ex. 8 ¶ 3. Respondent argues in his Sur-Reply that the SHAC's notice does not prove that the SHAC implemented those pandemic measures, or that remote appearances were allowed in this case. ECF 32-1 at 16-17. But Respondent seems to forget that the party *opposing* enforcement of an arbitral award bears the significant burden of establishing that a defense applies. It is Respondent who must show that remote appearances were not available, which he has not done here.

Moreover, Respondent has not shown that it could not have appeared at the arbitration proceeding through counsel. ECF 27 at 14. Respondent previously hired counsel in China to represent him in negotiating the dispute with Petitioner. *Id.* at 15. Respondent argues that remote representation would have been "severely unfair and prejudicial to him in the underlying arbitral proceedings, where the intentions of the parties entering into the agreements were at issue." ECF 32-1 at 17. But Respondent does not explain why proper counsel could not have effectively represented his interests and communicated his intentions with respect to the agreements at the arbitration proceedings. Therefore, Respondent's argument on this point is also unpersuasive.

Second, Respondent argues that he entered into the agreements at issue under duress, and the New York Convention precludes the recognition or enforcement of an arbitral award that would be "contrary to the public policy of that country." ECF 24 at 19; 21 U.S.T. 2517, Art. V, § (2)(b); *see also Changzhou*, 2012 WL 3106620, at *9 ("A defense of duress can succeed as a defense to confirmation [of a foreign arbitral award] under

[9] The Court overrules Respondent's evidentiary objections to the SHAC's pandemic-related notice because it is self-authenticating and supported by declaration, pursuant to Federal Rule of Evidence 902(12). ECF 35 ¶ 10; *see also* Fed. R. Evid. 902 (13); Committee Notes on Rules—2017 Amendments (finding that a party "offers a certification under this Rule in which a qualified person describes the process by which the web page was retrieved").

Article . . . (2)(b) of the Convention."). However, "this public policy exception is to be construed very narrowly and should be applied only where enforcement would violate our most basic notions of morality and justice." *Kondot S.A. v. Duron LLC*, 586 F. Supp. 3d 246, 259 (S.D.N.Y. 2022) (quoting *Europcar Italia, S.p.A. v. Maiellana Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998)). Moreover, "because duress renders contracts voidable, rather than void, the person claiming duress must act promptly to repudiate the contract . . . or he will be deemed to have waived his right to do so." *Kephart v. Certain Underwriters at Lloyd's of London*, 427 F. Supp. 3d 508, 517-18 (S.D.N.Y. 2019) (internal quotation marks omitted).

Here, Respondent failed to take any steps to repudiate the agreements until now. Supplementary Agreements I and II were signed in 2018. Yet Respondent did not raise the issue during the arbitration proceedings. And, while Respondent here attempts to argue duress, claiming that he signed the agreements because he was at risk of being accused of fraud and having an "exit ban" imposed on him by Chinese government authorities, *see* ECF 24 at 19, this belated argument is unconvincing because Respondent did not seek to challenge the agreements when he returned to the United States and was no longer prevented from leaving China.[10] Thus, the Court finds that Respondent effectively waived this defense. *See Kondot*, 586 F. Supp. at 262 (reasoning that, in light of the Court's obligation to "very narrowly construe the Convention's public policy exception, and [respondent's] failure to promptly raise its duress defense, the Court finds [respondent] has failed to prove the public policy defense, under Art. V, § (2)(b)[.]") (internal quotation marks omitted); *Changzhou*, 2012 WL 3106620, at *8, *17-18 (determining whether agreement underlying arbitral award was result of duress where respondent had raised the issue of duress throughout the arbitration proceedings, and where the court found respondent had not otherwise ratified the agreement allegedly obtained under duress).

[10] As Respondent explains, "exit bans" in China are a "tool used by Chinese litigations to prevent foreigners from leaving China until a civil dispute is resolved." ECF 24 at 21.

Third, Respondent argues that he did not consent to arbitrate before the SHAC. ECF 25 at 25. The New York Convention precludes enforcement of an arbitral award where the award "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." 21 U.S.T. 2517, Art. V, § (1)(c). The Court agrees with the Zhuhai People's Court's conclusions that Respondent's individual liability for breach of Supplementary Agreement I was subject to arbitration, that the dispute resolution clause included in Supplementary Agreement II did not override the arbitrability of that issue, and that Supplementary Agreement II and its dispute resolution clause only apply to Respondent's mortgagee liability. ECF 21-18; ECF 21-14. Because the SHAC's Arbitral Award concerned only matters falling under the Capital Increase Agreement, Shareholders' Agreement, and Supplementary Agreement I, and did not concern Supplementary Agreement II, ECF 21-18, the SHAC decided matters within its jurisdiction that Respondent agreed to arbitrate.

D. The Amounts Sought

Finally, Respondent "contests the basis and accuracy of the amounts [now] sought" by Petitioner and requests discovery regarding alleged damages, including documents and relevant information regarding the fair market value of his seized properties and any seized accounts (individual or corporate), the actual sale prices, and to whom the amounts now claimed are purportedly owed. ECF 24 at 30. Petitioner argues that because Respondent provides no legal authority or evidence to support his challenge to the amounts sought, this issue has been waived. ECF 27 at 23.

The Court agrees that Respondent fails to set forth evidence or explanation as to why he believes Petitioner's calculations may be wrong. Petitioner supports its calculations based on the principal and remaining interest. *See* ECF 21-20 (setting forth the principal amount owed, the formulas for calculating the three types of interest awarded by the SHAC, and explaining the amount that Petitioner collected from Respondent in China and that this amount was subtracted from the interest owed, not from the principal). Although

Petitioner does not submit records showing the amount recovered from Respondent through his assets in China, the Court agrees with Petitioner that this can be addressed when Petitioner takes discovery of Respondent's assets for collection purposes. *See* ECF 27 at 23.

E. Punitive Damages

In its Reply brief, Petitioner requests that this Court award attorney's fees "for Zhang's bad faith litigation tactics." ECF 27 at 23. "[A] court may assess attorneys' fees when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Int'l Union of Petroleum and Indus. Workers v. W. Indus. Maintenance, Inc.*, 707 F.2d 425, 428 (9th Cir. 1983) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975)) (internal quotation marks omitted); *Ministry of Def.*, 665 F.3d at 1096 (finding that a district court may award attorney's fees when confirming a foreign arbitral award governed by the New York Convention). "Generally, when a defendant simply refuses to pay an arbitration award and forces the plaintiff to file a petition to confirm the award, courts grant attorney's fees based on a finding of bad faith." *General Marine II, LLC v. Kelly*, 2022 WL 4488003, at *2 (S.D. Cal. Sept. 27, 2022); *see also Sheet Metal Workers' v. Madison Industries*, 84 F.3d 1186 (9th Cir. 1996) (affirming district court attorneys' fees award because defendant simply refused to honor the award rather than file a petition to vacate); *International Union of Petroleum and Indus. Workers v. Western Indus. Maintenance, Inc.*, 707 F.2d 425 (9th Cir. 1983) (affirming attorneys' fees award and agreeing with other circuits that failing to abide by an arbitrator's award, without justifiable grounds, may constitute bad faith).

Here, Respondent did not "simply refuse" to honor the arbitration award but presented several defenses to enforcement of the award. Although Respondent's defenses "do not prevail in this case . . . the court is not convinced that [Respondent] acted in bad faith in challenging the award." *See Immersion Corp. v. Sony Computer Entmt. America LLC*, 188 F. Supp. 3d 960, 977 (N.D. Cal. 2016). Therefore, Petitioner's request for attorney's fees is denied.

V. CONCLUSION

For the foregoing reasons, the Motion is **GRANTED**.

IT IS HEREBY ORDERED that:

(1) The Court recognizes and enforces the December 2, 2021, Award of the Shanghai Arbitration Commission.

(2) The Court enters judgment against Respondent Phillip L. Zhang in the amount of $4,425,365.64, calculated as of April 30, 2024.

(3) For every day after April 30, 2024, such judgment shall continue to accrue interest at a rate of $1,359.99 per day until paid in full.

(4) The Court retains jurisdiction over this matter to enable and enforce discovery of Respondent's assets pursuant to Fed. R. Civ. P. 64 and/or Fed. R. Civ. P. 69, and all applicable procedures or rules of the State of California, to execute on the judgment.

(5) The Court issues a Writ of Execution pursuant to Fed. R. Civ. P. 69 enabling Petitioner to execute on the judgment.

IT IS SO ORDERED.

Dated: January 21, 2025

HON. MÓNICA RAMÍREZ ALMADANI
UNITED STATES DISTRICT JUDGE