UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHENGKANG FEI, RICHARD YUQIANG LU, and RANRAN XU,	:	
Petitioners,	:	
v.	:	Civil Action No. _____
WEILI SU and FLASH BRIGHT POWER LIMITED,	:	
Respondents.	:	

MEMORANDUM OF LAW IN SUPPORT OF PETITION TO CONFIRM ARBITRATION AWARD

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PRELIMINARY STATEMENT

This is an action to confirm a final, binding arbitration award handed down in Hong Kong on May 25, 2018, after a years-long arbitration proceeding (the "Arbitration") between Petitioners Shengkang Fei, Richard Yuqiang Lu, and Ranran Xu and Respondents Weili Su and Flash Bright Power Limited. (Declaration of John Han dated January 29, 2019 ("Han Decl.") Ex. 1 ("Final Award").) The Final Award arises out of a dispute between Petitioners and Respondents over Petitioners' rights as shareholders in Sky Solar Holdings Co. Ltd. ("Sky Solar"). Respondent Su was the founder, indirect controlling shareholder, and Chairman of the Board of Directors of Sky Solar. Petitioners were minority shareholders of the company. Certain rights and obligations among Sky Solar and its shareholders were set forth in a Shareholders Agreement executed on January 22, 2010. *See generally* (Han Decl. Ex. 2 ("Shareholders Agreement").) Respondents' breach of their obligations under the Shareholders Agreement gave rise to the Arbitration, which produced the Final Award.

By signing the Shareholders Agreement, Sky Solar and its principals agreed to "use [their] commercially reasonable best efforts" to conduct an initial public offering, through which Sky Solar shares would be listed and traded on a public exchange, "as soon as practicable and within three years from the Completion Date." (Shareholders Agreement § 8.1(a).) To enable Sky Solar shareholders to protect this and other rights, the Shareholders Agreement also required Sky Solar to promptly notify all shareholders about any transfer of Sky Solar shares "[w]ithin five Business Days after registering" the transfer on its books. (*Id.* § 3.8.) And the Shareholders Agreement made clear that the "Controlling Shareholder" (Respondent Flash Bright Power Limited) and "Founder" (Respondent Su) would be liable for any failure by Sky Solar to fulfill these or other obligations that the company assumed by entering into the Shareholders Agreement. (*Id.* § 6.11.)

Several years later, through a complex transaction involving the creation of two additional companies, Sky Power Group Limited ("Sky Power") and Sky Solar Holdings Limited (the "Holding Company"), Respondents secretly stripped Sky Solar of its assets and transferred them to the Holding Company. (Final Award ¶¶ 106–09.) Although this transaction involved a transfer of Sky Solar shares, Petitioners were not notified of the transfer and were thus unable to either participate in or challenge it. After transferring Sky Solar's assets to the Holding Company, Respondents took the Holding Company public on the National Association of Securities Dealers Automated Quotations Stock Market ("NASDAQ") based in New York, where it remains listed to this day. Sky Solar, by contrast, is a worthless, asset-less entity. (*Id.* ¶¶ 109–114.)

Upon becoming aware that Respondents had wrung the value out of Sky Solar, Petitioners and several other shareholders referred the dispute to arbitration, consistent with the terms of an arbitration clause in the Shareholders Agreement. *See* (Shareholders Agreement § 15.2.) After proceedings spanning nearly three years, the Tribunal unanimously concluded that Respondents had breached their obligations to Petitioners under Sections 3.8 (by failing to notify Petitioners of the offending transaction) and 8.1 (by failing to pursue an initial public offering with diligence and good faith) of the Shareholders Agreement. (Final Award ¶¶ 158–74.) The Tribunal ordered Respondents (i) to pay to the Petitioners damages of US $12,461,625 and legal fees and costs of US $74,200.40 and (ii) to reimburse the Petitioners for the Tribunal's and the HKIAC's fees and expenses of HK $2,854,846.49 and HK $180,822.50, respectively. (*Id.* ¶¶ 201–02.) Interest on the amounts due under the Final Award—totaling US $13,619,646.19 as of January 29, 2019—continues to accrue at a rate of $2,832.41 per day. (Han Decl. Ex. 3 (Interest Calculation).)

Respondent Su has confirmed that he indirectly owns 102,681,110 NASDAQ-listed shares in Sky Solar worth US $12.6 million and that the shares plus his other assets are sufficient to satisfy

the Final Award. (Declaration of Shengkang Fei ("Fei Decl.") ¶ 6.) Accordingly, Respondent Su has suggested that Petitioners should seek to enforce the Final Award in jurisdictions such as the United States rather than in Hong Kong where he purportedly has no assets. (*Id.*)

Petitioners are entitled to collect what they are owed. Petitioners therefore respectfully request that this Court confirm the Final Award and incorporate its terms into a U.S. judgment in their favor. Petitions to confirm international arbitral awards are governed by Chapter 2 of the Federal Arbitration Act (9 U.S.C. § 201 *et seq.*), which incorporates the treaty obligations of the United States under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). *See* 9 U.S.C. § 201. The New York Convention *requires* courts in contracting countries to confirm awards falling under the Convention unless one of several limited, enumerated grounds applies. None of these grounds for deferring or denying confirmation applies to the Final Award.

Nor do Respondents have any jurisdictional defense to confirmation of the Final Award. This Court has personal jurisdiction over Respondents for purposes of this claim, which "aris[es] from" Respondents business transactions within New York. *See* CPLR § 302(a)(1). Respondents breached the Shareholders Agreement—which the parties agreed would be governed by New York law (*see* Shareholders Agreement § 15.1)—by failing to use "reasonable best efforts" to take Sky Solar public on the NASDAQ, a New York-based securities exchange, and instead using the same exchange to access public capital markets through a mirroring entity that they created to receive assets stripped from Sky Solar without notice to Petitioners. Alternatively, the Court has *quasi in rem* jurisdiction over this recognition proceeding because the Respondents are believed to have assets, including the publicly traded shares in Sky Solar, which are located in New York.

BACKGROUND

A. Respondent Su founds Sky Solar and hires Petitioners Fei, Lu, and Xu.

In 2009, Respondent Su incorporated Sky Solar under the laws of the Cayman Islands. (Final Award ¶ 58.) Around the same time, Respondent Su incorporated Respondent Flash Bright in the British Virgin Islands to hold his controlling ownership interest in Sky Solar. (*Id.* ¶ 59.).

Petitioners were key investors and employees of Sky Solar during the initial phases of the company's existence. Petitioner Fei became involved with Sky Solar just after its founding, investing $1 million in Sky Solar in July 2009 and receiving 6,000,000 Sky Solar shares later that year. (*Id.* ¶¶ 92–93.) In January 2010, just one week before the Shareholders Agreement was executed, Petitioner Fei was hired as Sky Solar's Chief Financial Officer. (*Id.* ¶ 96.) Petitioner Lu was involved at a similarly early stage, purchasing 2,600,000 Sky Solar shares in October 2009. (*Id.* ¶ 93.) Petitioners Fei and Lu were thus shareholders in Sky Solar on January 22, 2010, when the Shareholders Agreement was executed.

Petitioner Lu later became the Executive Vice President of Sky Solar and was granted an option to purchase an additional 1,400,000 shares. (*Id.* ¶ 100.) Petitioner Xu, for her part, was hired as Sky Solar's Vice President of Operations in December 2009 and, as part of her compensation package, was granted 300,000 shares in the company. (*Id.* ¶ 94.) All three Petitioners thus held ownership interests in Sky Solar on January 22, 2010, when the Shareholders

Agreement was executed.[1] Two of them were already employed by Sky Solar, and the other—Petitioner Lu—would join them shortly thereafter.

Petitioners, Respondents, and other Sky Solar shareholders and investors executed the Shareholders Agreement "to provide for certain matters relating to the management and operation of the Company, the transfer of shares of the Company and other rights and obligations of the Parties in relation to the Company." (Shareholders Agreement at 2 (Section – Recitals (C)).) Among many other things, the Shareholders Agreement placed certain restrictions on the transfer of Sky Solar shares. One such restriction required Sky Solar to promptly notify all shareholders after any transfer of Sky Solar shares:

> Notice of Transfer. Within five Business Days after registering any Transfer of Ordinary Shares or other Equity Shares on its books, [Sky Solar] shall send a notice to each Shareholder stating that such Transfer has taken place and setting for the name of the transferor, the name of the transferee and the number and class of Equity Securities involved.

(*Id.* § 3.8.)

The Shareholders Agreement also reinforced the vision of Sky Solar's shareholders and employees to take the company public as soon as possible. To ensure that Respondents followed through on that vision, the Shareholders Agreement obligated both the company and Respondents—as the "Founder" (Respondent Su) and "Controlling Shareholder" (Respondent Flash Bright)—to promptly and diligently pursue an initial public offering:

> It is the intention of the Parties that the Company will conduct a Qualified IPO as soon as practicable and within three years from the Completion Date. The Company shall use its commercially

[1] Petitioner Xu was not listed initially in the schedule of shareholders appended to the Shareholders Agreement (*see* Shareholders Agreement, Sched. 1), but she entered into a Deed of Adherence two months later, through which she assumed all rights and obligations of a minority shareholder as set forth in the Shareholders Agreement. (Final Award ¶ 99.)

> reasonable best efforts to prepare and implement a Qualified IPO within such timetable.
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> * * *
>
> Each of the Founder and the Controlling Shareholder undertakes to use his/its commercially reasonable best efforts (i) to enable the completion of an IPO as soon as practicable, (ii) to cause the Controlling Shareholder and the Controlling Shareholder Directors to vote or otherwise approve an IPO, and (iii) to approve and cause the Company to complete all actions and matters required for or in furtherance of the completion of an IPO as soon as practicable.

(*Id.* § 8.1(a), (d).)

And to avoid any doubt, the Shareholders Agreement made clear that Respondents would be personally liable for Sky Solar's failure to comply with the Shareholders Agreement:

> Obligations of Controlling Shareholder and Founder. The Controlling Shareholder and the Founder hereby, jointly and severally, covenant and undertake to procure and ensure the due performance and observance by the Company and Controlling Shareholder of their respective obligations, covenants and undertakings in this Agreement.

(*Id.* § 6.11.)

B. Respondents strip Sky Solar of its assets and take a new company public.

Despite Respondents' promise to use their "commercially reasonable best efforts" to take Sky Solar public, several years passed with no initial public offering. As the Tribunal would later determine, this was no accident: Respondents believed that, by transferring Sky Solar's assets to a different entity and taking that (virtually identical) entity public, they could obtain the benefits of such a transaction without being forced to share them with Petitioners.

On June 24, 2013, Respondents incorporated Sky Power as a wholly-owned subsidiary of Sky Solar. (Final Award ¶ 106.) Just over two months later, Sky Solar and Sky Power executed a one-for-one share swap (the "Share Swap"), in which shareholders owning 94.8% of Sky Solar

transferred their shares for an equivalent interest in Sky Power. (*Id.* ¶ 109.) Petitioners were not notified of and did not participate in the Share Swap. (*Id.* ¶ 194.)

Around the same time, Respondents incorporated another entity: the Holding Company. The Holding Company was created as a wholly owned subsidiary of Sky Power. (*Id.* ¶ 107.) After the Holding Company was established, Respondents stripped Sky Solar of its assets and transferred them to the Holding Company. (*Id.* ¶¶ 109-111.) On November 13, 2014, the Holding Company held an initial public offering; it remains listed on the NASDAQ to this day. (*Id.* ¶ 114.) Sky Solar, by contrast, is worthless and remains private; the value of Petitioners' shares was destroyed by the Share Swap.

C. Petitioners commence the Arbitration.

On March 16, 2015, Petitioners served Respondents with a notice of arbitration declaring their intent to seek recovery for Respondents' looting of Sky Solar, in violation of its obligations under the Shareholders Agreement. (*Id.* ¶ 115.) This was consistent with Section 15.2 of the Shareholders Agreement, which provided that in the event of "[a]ny dispute or claim arising out of or in connection with or relating to" the Shareholders Agreement "or the breach, termination or invalidity [thereof]," a party could submit the dispute for "arbitration in [Hong Kong] under the auspices of the [Hong Kong International Arbitration Centre] and in accordance with the UNCITRAL Arbitration Rules" as they existed at the time the Shareholders Agreement was executed. (Shareholders Agreement § 15.2.)

The Tribunal consisted of Ms. Teresa Cheng, Senior Counsel, an experienced barrister and arbitrator based in Hong Kong,[2] Mr. Tony ZhenAn Zhang, a partner in the Shanghai office of a

[2] On January 12, 2018, Professor Benjamin Hughes, an associate professor at Seoul National University Law School, replaced Ms. Cheng on the Tribunal, following Ms. Cheng's withdrawal

China-based law firm, and Dr. Michael Moser, an Honorary Chairperson of the HKIAC with more than 30 years of international arbitration experience, to act as presiding arbitrator. (Final Award ¶ 26.)

As stipulated in the Shareholders Agreement, the Arbitration was conducted in Hong Kong under the UNCITRAL Arbitration Rules. (Shareholders Agreement § 15.2.) The Tribunal considered several rounds of written submissions from both parties (accompanied by exhibits, legal authorities, and, in Petitioners' case, witness statements) and held an in-person hearing over two days in January 2018, at which both parties participated and were represented by counsel. (Final Award ¶¶ 52, 53.)

D. The Tribunal unanimously finds Respondents liable for breaching the Shareholders Agreement and awards Petitioners damages.

On May 25, 2018, after hearing the parties' oral presentations and accepting post-hearing briefing from both Parties, the Tribunal issued the 56-page Final Award. The Tribunal unanimously found that Respondents breached their obligations under Section 3.8 of the Shareholders Agreement by failing to notify Petitioners of the Share Swap and, by that failure, prevented Petitioners from participating in the Share Swap or taking judicial action to prevent the Share Swap from going forward without their participation. (*Id.* ¶¶ 172–74.) The Tribunal also unanimously found that Respondents' decision to execute the Share Swap and take the Holding Company public breached Section 8.1 of the Shareholders Agreement. (*Id.* ¶ 167.)

In addition, the Tribunal determined that Respondents had not used their "commercially reasonable best efforts" to effect an initial public offering of Sky Solar but, rather, had surreptitiously transferred the assets of Sky Solar to the Holding Company, completing the

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from the Tribunal in advance of her appoint as Hong Kong's Secretary of Justice. (Final Award ¶ 51.)

contemplated transaction with a company that was "essentially the same entity as [Sky Solar]" in all but one respect—Petitioners had no beneficial interest in the Holding Company, and thus no ability to gain from its being listed on a public exchange. (*Id.* ¶¶ 158–160, 168.) The Tribunal observed that the evidence cast Respondent Su's conduct in a particularly negative light, suggesting "that Mr. Su viewed [Sky Solar] and the shares as his own private property, which he could deal with as he saw fit"—a view that the Tribunal characterized as "wholly inconsistent with the legal position in regard to shareholder rights." (*Id.* ¶ 166.)

The Tribunal determined that Respondents' breaches of the Shareholders Agreement "deprived [Petitioners] of the opportunity to participate in the . . . Share Swap and ultimately benefit from the [Holding Company] IPO" by selling their shares on the public exchange. (*Id.* ¶ 194.) Accordingly, the Tribunal calculated Petitioners' damages according to the average price per share of stock in the Holding Company over the first 10 days of trading on NASDAQ (US $10.07), multiplied by the number of shares in Sky Solar owned by each petitioner that, but for Respondents' conduct, could have been swapped one-for-one with shares in the Holding Company. (*Id.* ¶¶ 199–200.) The Petitioners' individual awards were as follows:

- Petitioner Fei: US $7,552,500.00
- Petitioner Lu: US $4,531,500.00
- Petitioner Xu: US $377,625.00

(*Id.* ¶ 201.)

In addition, the Tribunal ordered Respondents (i) to pay to Petitioners legal fees and costs of US $74,200.40, (ii) to reimburse Petitioners fees and expenses paid to the Tribunal and HKIAC of HK $2,854,846.49 and HK $180,822.50, respectively, and (iii) to pay to Petitioners "post-award interest . . . at the prevailing High Court of Hong Kong SAR default rate (currently 8% per annum) on any outstanding amount under this [Final] Award starting from the date of this [Final] Award."

(*Id.* ¶¶ 202 (footnote omitted), 274.) The High Court's default rate remains at 8% annually. (Han Decl. Ex. 4 (Interest on Judgments and Interest Rates published by the Hong Kong Judiciary).)

E. Respondents refuse to pay the Final Award.

Now, more than six months since it was issued, Respondents have failed to pay any of the Final Award even though Respondent Su has represented that he has more than sufficient assets to satisfy the Final Award including in the form of shares he indirectly holds in Sky Solar, which are alone worth more than US $12.7 million. (Fei Decl. ¶ 6; Final Award ¶¶ 29, 36, 41.) Respondents have therefore left Petitioners with no other choice than to enforce the Final Award through judicial means.

ARGUMENT

I. The New York Convention and U.S. law require confirmation of the Final Award.

The Federal Arbitration Act (the "FAA") governs the enforcement of international arbitral awards. Chapter 2 of the FAA (9 U.S.C. § 201 *et seq.*) incorporates the treaty obligations of the United States under the New York Convention, making the rules and procedures set forth in the Convention applicable in confirmation proceedings brought in the courts of the United States. *See* 9 U.S.C. § 201. And the Final Award is governed by the New York Convention because it arose out of a commercial contract—the Shareholders Agreement—between Petitioners (residents of China and Canada) and Respondents (a resident of China and a corporation organized under the laws of the British Virgin Islands). *See* 9 U.S.C. § 202 (providing that an "arbitral award arising out of a legal relationship . . . which is considered as commercial . . . falls under the Convention" unless the relationship was "entirely between citizens of the United States").

The New York Convention ***requires*** a court in a contracting country to confirm an award subject to the Convention unless the court finds that one of seven specific grounds for deferring or refusing confirmation applies. *See* 9 U.S.C. § 207 ("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." (emphasis added)). As the Second Circuit has explained, "in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award." *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997).

These limited, enumerated grounds for deferring or refusing confirmation are set forth in Article V of the Convention. In summary, they permit courts to deny confirmation only where:

- the parties' arbitration agreement is invalid;
- the award resolves a type of dispute that the parties did not agree to arbitrate;
- the award resolves a type of dispute that, under the laws of the country where confirmation is sought, cannot be resolved through arbitration;
- the award debtor had no notice of the arbitration proceedings or was unable to meaningfully participate;
- the arbitration used procedures (including for the composition of the tribunal) that are inconsistent with the parties' arbitration agreement;
- the award is not yet binding on the parties or has been set aside by a competent authority of the country in which, or under the law of which, the award was made; or
- confirming the award would contravene the public policy of the country where confirmation is sought.

See New York Convention art. V.

"The party opposing enforcement of an arbitral award has the burden to prove that one of the seven defenses under the New York Convention applies. . . . The burden is a heavy one as the showing required to avoid summary confirmance is high." *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 405 (2d Cir. 2009). "Given the strong public policy in favor of international arbitration, review of arbitral awards under the New York Convention is very limited in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding

long and expensive litigation." *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005) (internal citations and quotation marks omitted).

Moreover, courts in this and other Circuits have consistently cautioned that these grounds for deferring or denying confirmation are to be construed narrowly. *See, e.g.*, *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969, 976 (2d Cir. 1974) (holding "defense[s] to enforcement of a foreign award . . . should be construed narrowly" to "comport with the enforcement-facilitating thrust of the Convention"); *Ministry of Def. of the Islamic Republic of Iran v. Gould Inc.*, 887 F.2d 1357, 1364 n.11 (9th Cir. 1989) ("Courts construe . . . defenses to enforcement narrowly."); *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004) ("Defenses to enforcement under the New York Convention are construed narrowly, 'to encourage the recognition and enforcement of commercial arbitration agreements in international contracts . . .'"); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100, 110 (D.D.C. 2017) (characterizing "scope of review" under New York Convention as "narrow").

Because awards governed by the New York Convention must be confirmed unless one of these narrow grounds applies, the "confirmation of an arbitration award is a summary proceeding . . . and legislation implementing the New York Convention calls for the party to 'apply to' the court for an 'order confirming the award'; it does not envision an original action by complaint." *Encyclopaedia Universalis*, 403 F.3d at 89 n.2 (internal citations omitted); *accord* 3 FED. PROC., L. ED. § 4:140 (2018) ("Thus, an arbitration award under the Convention may be enforced by filing a petition or application for an order confirming the award supported by an affidavit. The hearing on such a petition or application will take the form of a summary procedure in the nature of federal motion practice.").

As explained below, Respondents cannot satisfy their burden of proving that any of these grounds applies. The Court must therefore confirm the Final Award.

A. Petitioners and Respondents entered into a valid arbitration agreement.

Under the New York Convention, one of the limited grounds for deferring or denying confirmation of an award is that "the parties to [an agreement to arbitrate] were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." New York Convention art. V(1)(a). Respondents cannot seriously claim that this ground applies here.

The plain language of Section 15.2 of the Shareholders Agreement is clear: it permits either party to submit for arbitration "[a]ny dispute or claim arising out of or in connection with or relating to [the Shareholders Agreement], or the breach termination or invalidity [t]hereof." (Shareholders Agreement § 15.2.) There can be no serious dispute that Petitioners are parties to the Shareholders Agreement. Petitioners exercised their rights under Section 15.2 by serving Respondents with a Notice of Arbitration on March 16, 2015, consistent with the terms of the Shareholders Agreement. (Final Award ¶ 29.)

B. The dispute resolved by the Final Award was squarely within the scope of the parties' agreement to arbitrate.

Under the New York Convention, confirmation of an award may be deferred or refused 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters

submitted to arbitration may be recognized and enforced." New York Convention art. V(1)(c). There is no basis for Petitioners to assert this ground, either.

At no point in the Arbitration did Petitioners contend that the parties' dispute fell outside the scope of their arbitration agreement, and with good reason. Section 15.2 of the Shareholders Agreement provides for arbitration of "[a]ny dispute or claim arising out of or in connection with or relating to" the Shareholders Agreement, including claims for "the breach" of that Agreement. It is beyond dispute that the Final Award is within the scope of this broad language; the Final Award holds Respondents liable for their breaches of multiple terms of the Shareholders Agreement and compensates Petitioners for damages caused by those breaches.

C. United States law permits—indeed, strongly favors—arbitration for the resolution of international commercial disputes.

The New York Convention permits courts "in the country where recognition and enforcement is sought" to defer or refuse confirmation of an award where "[t]he subject matter of the difference [i.e., the dispute submitted to arbitration] is not capable of settlement by arbitration under the law of that country." New York Convention art. V(2)(a). The courts of this country have long favored arbitration for the resolution of disputes arising out of international commercial contracts like the Shareholders Agreement. The Supreme Court has recognized an "emphatic federal policy in favor of arbitral dispute resolution," one which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Confirmation of the Final Award is entirely consistent with this policy.

D. Respondents had notice of the Arbitration and were able to—and did—present their case.

Under the New York Convention, confirmation of an award can be deferred or denied if "[t]he party against whom the award is invoked was not given proper notice of the appointment of

the arbitrator or of the arbitration proceedings or was otherwise unable to present [its] case." New York Convention art. V(1)(b). This ground plainly does not apply to this case.

Petitioners gave Respondents proper notice of the Arbitration, and Respondents were fully able to present their case to the Tribunal. In addition to participating in administrative and procedural matters (including the appointment of the Tribunal), Petitioners were represented by the distinguished law firm of Shearman & Sterling LLP at each stage of the Arbitration (Final Award ¶ 20) and mounted a painstaking defense to the merits of Petitioners' claims on both liability and damages. Respondents submitted a preliminary objection challenging the Tribunal's jurisdiction to hear the Arbitration; and they defended themselves with written witness statements, other written submissions spelling out legal and factual arguments, and an appearance at a two-day hearing before the Tribunal. (Final Award ¶¶ 52-53.) In view of these facts, there can be no serious argument that Respondents lacked notice of the Arbitration or were somehow unable to present their case. To the contrary, Respondents made their case, and the Tribunal explained at great length why it was unpersuasive.

E. The composition of the Tribunal and the procedures used in the Arbitration were consistent with the parties' agreement to arbitrate.

A court may defer or deny confirmation under the New York Convention if it finds that "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." New York Convention art. V(1)(d). Respondents cannot reasonably object on this ground.

The Tribunal was composed with Respondents' involvement, and Respondents raised no objection during the Arbitration to the Tribunal's composition or the procedures that governed the Arbitration. Having remained silent then, Respondents cannot now cry foul. As courts in this

District have long recognized, "[f]ailure to raise an issue in an arbitration proceeding waives the issue in a confirmation or enforcement proceeding." *Am. Nursing Home v. Local 144 Hotel, Hosp., Nursing Home & Allied Servs. Union, SEIU, AFL-CIO*, 1992 WL 47533, at *4 (S.D.N.Y. Mar. 4, 1992); *accord Fishman v. Fairfield Towers*, 2001 WL 1338897, at *4 (S.D.N.Y. Oct. 31, 2001); *Mutual Marine Office, Inc. v. Transfercom Ltd.*, 2009 WL 1025965, at *3 (S.D.N.Y. Apr. 15, 2009).

F. The Final Award is binding and has not been set aside at the seat of arbitration.

No court has suspended, stayed enforcement of, or set aside the Final Award. On August 24, 2018, Respondents applied to set aside the Final Award in Hong Kong, where the Arbitration was seated, based on grounds already raised to and rejected by the Tribunal. On November 21, 2018, Petitioners counterclaimed in the Hong Kong proceedings to recognize the Final Award. Both Respondents' challenge to the Final Award and Petitioners' counterclaim to recognize and enforce it remaining pending before the High Court of Hong Kong. (Han Decl. ¶ 3.) Unless and until it is set aside, the Final Award remains enforceable.

G. Confirmation of the award is consistent with the public policy of the United States.

Finally, the New York Convention authorizes a court "in the country where recognition and enforcement is sought" to decline to confirm an award if "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." New York Convention art. V(2)(b). In this case, confirmation would be consistent with—not contrary to—U.S. public policy, which favors enforcement of commercial arbitration awards.

Confirming the Final Award would offend no public policy of the United States. In an action for confirmation under the New York Convention, "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." *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d

310 (2d Cir. 1998) (internal quotation marks omitted). The Final Award—a straightforward award of compensatory damages to three people based on their commercial counterparties' breach of contract—comes nowhere close to this standard. As the Second Circuit has observed, the public policy defense "is frequently invoked but rarely successful, particularly in view of the strong United States policy favoring arbitration." *Agility Pub. Warehousing Co. K.S.C., Prof'l Contract Adm'rs, Inc. v. Supreme Foodservice GmbH*, 495 F. App'x 149, 151 (2d Cir. 2012).

II. Respondents have no jurisdictional defense to confirmation of the Final Award.

Finally, Respondents may argue that because they are both foreign citizens residing outside the United States, this Court lacks personal jurisdiction over them and therefore cannot confirm the Final Award. Because there are multiple grounds on which Respondents are subject to jurisdiction in New York, any such argument would be unavailing.

Both Respondents are subject to specific jurisdiction under CPLR § 302(a)(1), which permits New York courts to exercise of jurisdiction over a nonresident who "transacts any business within the state or contracts anywhere to supply goods or services in the state," provided that the "cause of action aris[es] from" that business. *See, e.g.*, *Fort Knox Music, Inc. v. Baptiste*, 203 F.3d 193, 196 (2d. Cir. 2000). A cause of action "arises from" a particular transaction when there is "some articulable nexus between the business transacted and the cause of action sued upon." *Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100 (2d Cir. 2006). And in contrast to "doing business," CPLR § 302(a)(1)'s "transacting business" standard "requires only a minimal quantity of activity, provided that it is of the right nature and quality." *Agency Rent a Car Sys., Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 29 (2d Cir. 1995). Here, Petitioners' seek to enforce an arbitration award arising from a contract that Respondents breached by, among other things,

taking the Holding Company public on a New York-based stock exchange—a step the Shareholders Agreement required them to take with Sky Solar.

And the contract Respondents breached—the Shareholders Agreement—is governed by New York law pursuant to the parties' agreement. *See* (Shareholders Agreement § 15.1 ("GOVERNING LAW. THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH THE STATE OF NEW YORK [sic], UNITED STATES OF AMERICA . . ." (emphasis in original)).) The Second Circuit has instructed that, in applying CPLR § 302(a)(1), a New York choice-of-law provision "is a significant factor in a personal jurisdiction analysis because the parties, by so choosing, invoke the benefits and protections of New York law." *Sunward Elec., Inc. v. McDonald*, 362 F.3d 17, 23 (2d Cir. 2004). Because Petitioners' cause of action arises from Respondents' breach in New York of a contract governed by New York law, this Court has personal jurisdiction over Respondents under CPLR § 302(a)(1).

Alternatively, because Respondents are believed to have assets in New York, the Court can exercise *quasi in rem* jurisdiction. In *CME Media Enterprises B.V. v. Zelezny*, a court in this District explained that *quasi in rem* jurisdiction may be exercised to enforce an arbitration award against the assets of even an absent defendant. 2001 WL 1035138, at *3 (S.D.N.Y. Sept. 10, 2001). "*Quasi in rem* jurisdiction is used primarily for two purposes: to secure a pre-existing claim in the designated property or to apply property of a defendant towards satisfaction of a judgment previously obtained against the defendant." *Id.* For this reason, the defendant need not have any contacts with the forum state for *quasi in rem* jurisdiction to exist, provided that it "is used to attach property to collect a debt based on a claim already adjudicated in a forum where there was personal jurisdiction over the defendant." *Id.* As the court in *CME Media* held, an arbitral tribunal before

which the defendant submitted to and participated in arbitration is precisely such a forum. *Id.* ("Minimum contacts are not required because an arbitration panel with personal jurisdiction over Zelezny has already adjudicated CME's claims against Zelezny and determined that he is a debtor of CME; the purpose of the instant proceeding is to collect on that debt."). In this case, Respondent Su has stated that continues to own 102,681,110 shares of Sky Solar worth approximately US $12.6 million, which are listed on NASDAQ and believed to be held in New York. (Fei Decl. ¶ 6.)

CONCLUSION

For the foregoing reasons, the Court should confirm the Final Award and incorporate its terms into a judgment against Respondents.

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New York, NY

Respectfully Submitted,

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