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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CHINA FORTUNE LAND DEVELOPMENT AND GLOBAL INDUSTRIAL INVESTMENT LIMITED,

Petitioners,

v.

1955 CAPITAL FUND I GP LLC, 1955 CAPITAL CHINA FUND GP LLC,

Respondents.

Case No. 19-cv-07043-VC

RESPONDENTS' OPPOSITION TO PETITION TO VACATE FINAL ARBITRATION AWARD AND NOTICE OF CROSS-PETITION AND CROSS-PETITION TO CONFIRM FINAL ARBITRATION AWARD AND FOR ENTRY OF JUDGMENT

Judge: Hon. Vince Chhabria
Date: December 19, 2019
Time: 10:00 a.m.
Courtroom: 4, 17th Floor

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NOTICE OF CROSS-PETITION AND CROSS-PETITION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 19, 2019 at 10:00 a.m., or as soon thereafter as the matter may be heard by the Honorable Judge Vince Chhabria in Courtroom 4 of the United States District Court located at 450 Golden Gate Avenue, San Francisco, CA 94102, Respondents and Arbitration Claimants 1955 Capital Fund I GP LLC and 1955 Capital China Fund GP LLC will and hereby do cross-petition and move this Court, pursuant to sections 9 U.S.C. §§ 201, 207, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (June 10, 1958), for an order confirming the Final Award issued on June 26, 2019, and reissued as corrected on August 1, 2019, by Arbitrator Gerald Ghikas, Q.C. and for entry of judgment in accordance with the Final Award.

This Cross-Petition is based on this Notice of Cross-Petition, the attached Opposition and Cross-Petition, and such oral argument as may be presented at any hearing. Respondents request the Petition to Vacate be denied, the Final Award be confirmed, and judgment be entered in accordance with the Final Award.

Dated: November 14, 2019

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By: */s/ Robert P. Varian*
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I. INTRODUCTION

The Petition to Vacate is a "Hail Mary" based on a fictitious account of a two-year ICDR arbitration before a highly accomplished international arbitrator. After several rounds of evidentiary and expert submissions, hundreds of pages of legal briefing, and an evidentiary hearing, the Arbitrator issued a carefully reasoned 147-page final award ("Final Award"). The Final Award meticulously analyzed Petitioners' myriad allegations and arguments to invalidate and rescind the venture capital investment agreements; confirmed the validity of investment agreements; and found Petitioners breached their binding contractual obligations under the agreements.

Undeterred by the Final Award, China Fortune Land Development ("CFLD") and its wholly owned Hong Kong subsidiary, Global Industrial Investment Ltd. ("GIIL"),[1] have continued their efforts to extricate themselves from the contracts by any and all available means. This Petition is a piece of that strategy.[2]

Faced with the exceedingly high bar for vacatur, Petitioners have resorted to a grossly misportraying the arbitration and Award. The Final Award amply demonstrates that Petitioners' pronouncements of a "denial of due process," that they "never had a fundamentally fair hearing," and that they "were severely prejudiced by the absence of any opportunity to present evidence," are entirely baseless. The same is true with respect to claims that the Arbitrator "exceeded his powers by crafting and enforcing his own contracts;" "proceeded beyond the scope of the submitted dispute;" "dispensed his own brand of industrial justice;" "imposed his own sense of equity;" and "discard[ed]" the Parties' "agreement altogether and substitute[ed] entirely different contracts of the Arbitrator's own making." The gap between these assertions and the ***actual*** Award is vast. More than anything else, it underscores the extent to which Petitioners must

[1] CFLD and GIIL were the Respondents in the arbitration—and are referred to in the Final Award as Respondents—but are the Petitioners in this proceeding.

[2] Petitioners' post-arbitration efforts to extricate themselves from their agreements are detailed in Respondents' Statement in Support of Sealing and Supporting Memorandum, Dkt. No. 17. Their tactics include commencing baseless litigation in China, filing a further arbitration demand, and using their Petition as a vehicle for filing dozens of confidential documents in their entirety, many of which they do not cite at all or cite unnecessarily, to attempt to pressure Mr. Chung through threat of public disclosure of confidential, proprietary information.

overreach in attempting to vacate an arbitration award that is beyond reproach and escape their binding contractual obligations.

Petitioners had every opportunity in the arbitration to raise every possible argument in their attempt to invalidate the investment agreements, and that is exactly what they did. The arguments that Petitioners made in their quest to invalidate and escape the investment contracts targeted both the agreements as a whole and every individual term they found objectionable. The November 26 Agreements Petitioners claim were never addressed were in fact the center of the bullseye. Over the course of 71 pages, the Arbitrator carefully enumerated, addressed, and ultimately rejected dozens of arguments for invalidating the agreements. As the Arbitrator held: "the fundamental disagreement between the parties … concerned the question of whether the Investment Agreements were valid and enforceable against [Petitioners]." Declaration of Kellen G. Ressmeyer in Support of Petition to Vacate, Dkt. No. 3-4, Ex. 1 ("Ex. 1") ¶ 487. The notion that Petitioners were deprived of the opportunity to present evidence and denied due process is astonishing.

Petitioners' portrayal of the November 26, 2015 Agreements as something entirely different from what they refer to as "the Operative Agreements," and their claim of being deprived an opportunity to present evidence or argument on the former, is bogus. Petitioners created the "Operative Agreements" construct as a defined term at the beginning of the Petition; it appears nowhere in the Final Award. The dichotomy Petitioners attempt to construct is a false one. And it does not alter the fact that they had a complete and unfettered opportunity to present evidence and argument directed at every jot and dash of the Investment Agreements reached November 26, 2015 *and* the legally ineffective revisions the Arbitrator referred to as "post-closing changes."

During the arbitration, Petitioners presented evidence and argument in support of their contention that the November 26 Agreements were invalid when made and should be rescinded for reasons unrelated to the post-closing changes. Petitioners also argued that the November 26 Agreements were voidable and should be rescinded ***because of*** the post-closing changes. The Arbitrator considered and rejected these arguments, explicitly ruling that the Investment

Agreements reached November 26, 2015 were valid and the post-closing changes were never part of the agreement.

Petitioners' claim that the Arbitrator found the Investment Agreements "invalid under governing Delaware law," Petition to Vacate ("Pet.") at 1, is also false. Petitioners ***argued*** that the November 26 Agreements were invalid and/or void under Delaware law, for a variety of reasons both unrelated to the post-closing changes and based on subsequent revisions. The Arbitrator rejected those arguments for carefully articulated reasons that are both well-founded and beyond review. Unwilling to acknowledge those facts, Petitioners obscure and distort them, including by conflating the arbitrator's determination that the ***post-closing changes*** were invalid with a fabricated ruling that the ***Investment Agreements*** were invalid.

The Final Award makes clear exactly what the Arbitrator did and exactly why he did it. The Arbitrator explained precisely how and why a contract was formed on November 26, 2015. He analyzed and rejected Petitioners' multifaceted evidentiary and legal arguments that the November 26 Agreements were invalid when made. Having concluded that the November 26 Agreements were valid contracts, the arbitrator carefully analyzed Petitioners' efforts to convince him to rescind the November 26 Agreements due to the post-closing changes, and he concluded that there was no basis for doing so. Accordingly, he concluded that the November 26 Agreements were valid under Delaware law. He did ***not*** hold that the Investment Agreements reached November 26, 2015 were invalid under Delaware law.

Petitioners' assertions that the Arbitrator went beyond the scope of the dispute, discarded the Parties' agreements, and substituted entirely different contracts of his own making, are based on the same meritless contortions. It is obvious the Arbitrator did none of those things. The Final Award is based solely on the contracts the Parties placed before him and the arguments they made regarding them.

Petitioners' claims that the Arbitrator dispensed his own notions of justice and substituted his own sense of equity in place of the contracts are equally egregious. As Petitioners well know, the Final Award's solitary reference to equity was in the context of evaluating the ***equitable remedy they sought***—rescission of the November 26 Investment Agreements based on the post-

closing changes. Although one would not know it from reading the Petition, the post-closing changes were not asserted or relied upon. Respondents enjoyed no benefit from them, and Petitioners suffered no harm as a result of them. Accordingly, the Arbitrator concluded that "[i]n these circumstances it would be inequitable" to grant the rescission remedy Petitioners requested.

Petitioners' ongoing efforts to avoid at all costs their contractual obligations should be stopped. The Petition to Vacate should be denied, the Final Award confirmed, and judgment entered as set out in the Final Award.[3]

II. BACKGROUND AND PROCEDURAL HISTORY

A. The Parties

1955 Capital Fund I GP LLC and 1955 Capital China Fund GP LLC are each general partners ("GPs") of 1955 Capital Fund I ("Fund I") and 1955 Capital China Fund ("China Fund") (collectively, the "Funds"). Ex. 1 ¶ 2. The Funds are Delaware limited partnerships created for the purpose of engaging in venture capital investments. *Id.* Andrew Chung, an accomplished venture capitalist, is the GPs' managing member and the founder of 1955 Capital, a venture capital firm. *Id.* ¶ 2. Mr. Chung was previously a general partner at Khosla Ventures, one of Silicon Valley's preeminent venture capital firms with more than $5 billion under management. Mr. Chung formally announced the formation of the Funds on February 24, 2016.

CFLD is a publicly-traded Chinese real estate company with approximately RMB 50 billion (~ $7 billion USD) in annual revenue. CFLD is one of the largest (over 25,000 employees) and most profitable real estate companies in China. *Id.* ¶¶ 3-4, 55. CFLD's founder and Chairman, Wang Wenxue (known as "Chairman Wang"), is one of China's wealthiest industrialists. *Id.* ¶ 55. GIIL is CFLD's wholly owned Hong Kong subsidiary and the vehicle through which CFLD made its investment in the Funds. *Id.* ¶ 3.

As found, on November 26, 2015, GIIL entered into the Investment Agreements, committing to make a $200 million investment into two venture capital funds managed by the GPs, and agreed to deposit the entire amount into a U.S. escrow account over a two-year period.

[3] As the prevailing party in the arbitration, Respondents were awarded more than $9 million in fees and costs, which have yet to be paid.

Id. ¶ 3-4. GIIL is the sole limited partner ("LP") in each Fund and, as found in the arbitration, operated as CFLD's agent in entering into the November 26, 2015 Investment Agreements. CFLD and GIIL are, accordingly, jointly obliged and liable on those agreements. *Id.* ¶¶ 405, 412, 492.

B. The Underlying Dispute

The Funds had a successful public launch, followed by significant early progress. The GPs courted a promising array of additional investors for Fund I, one of whom signed a memorandum of understanding to invest $250 million into funds managed by 1955 Capital. *See id.* ¶¶ 435-55, 460-63. They developed an attractive slate of potential portfolio companies, made a $4 million investment in a promising early-stage company, and had a developed pipeline that included several additional deals in the final stages of evaluation. They had attracted top-tier talent and were in the process of bringing to the Funds additional highly qualified advisors and partners. They had also brought potential portfolio companies to China to introduce them to CFLD industrial parks. *See id.* ¶ 346.

For reasons that remain unclear, CFLD brought all this progress to a near-standstill. During meetings held on October 27th and 28th, 2016, CFLD launched an ambush in which outside attorneys posed as CFLD employees, falsely "accused Chung of fraud, demanded that he resign, demanded the return of the money in escrow, and threatened to force a shutdown of the Funds." *See id.* at p. 16. Thereafter, Petitioners demanded a shut-down of the Funds and breached their obligation to make a required $60 million deposit into escrow on December 1, 2016. *Id.* ¶ 421.

Petitioners' actions occurred at a critical time in the Funds' early life—weeks before an intended second close on accepting other investors to Fund I (*see id.* ¶¶ 397-98)—and had a severe impact on the Funds. As the Final Award explains, the threats, accusations and demands CFLD made against Mr. Chung at the October 2016 meetings were in bad faith, and were particularly harmful because CFLD was the anchor investor in the Funds:

> CFLD's conduct at the late October meetings was a **bad faith tactic**. . . In th[is] unique circumstance . . ., the fact that the **anchor investor** in the Funds was making allegations of fraud and had stated its

> intention to unwind its investment was something that Claimants would have to disclose to potential Fund 1 investors and attempt to explain away before crystalizing any potential commitment from other investors. These threats could have **immediate consequences**. They had the potential to **de-rail efforts to obtain additional investor commitments for Fund 1 and thereby undermine the overarching purpose** of the Fund 1 Investment Agreements.

Id. ¶ 397 (emphasis added).

As the Arbitrator further determined, the accusations Petitioners made in their attempt to evade their contractual obligations and force a dismantling of the Funds were unfounded and unjustified. The Petition's gratuitous attempts to malign Mr. Chung and the Funds are simply more of the same. In addition to being irrelevant to the issues at hand, they are unjustified.[4]

C. Relevant Procedural History

Respondents initiated arbitration on July 28, 2017 after efforts to resolve the dispute proved unsuccessful.

As discussed in more detail at pages 9-17 below, the focal point of the arbitration was Petitioners' ongoing attempt to evade their contractual obligations and force a shutdown of the Funds by invalidating and rescinding the Investment Agreements. To that end, Petitioners asserted a blizzard of accusations and legal arguments, including twenty separate counterclaims. They challenged the Investment Agreements in full, along with every individual term they found objectionable, with every accusation and argument they could conjure—including an array of contract defenses, various assertions of fraud and misrepresentation, breach of fiduciary duty, and securities fraud under Federal, California, China and Hong Kong law. *See, e.g.,* Ex. 1 pp. 20-25.

Gerald W. Ghikas, Q.C., a well-known international arbitrator, was appointed sole Arbitrator on December 1, 2017, and determined the arbitration would be conducted pursuant to the procedure prescribed by the International Dispute Resolution Procedures of the American Arbitration Association's International Centre for Dispute Resolution ("ICDR"). *Id.* p. 7. On

[4] In characteristic fashion, Petitioners have made multiple unsupported and misleading assertions about Mr. Chung and the Funds. *See, e.g.,* Pet. p. 18, fn. 18. These assertions are irrelevant to their Petition and—as with their dozens of irrelevant exhibits filed in support of the Petition—are included in a transparent effort to attempt to pressure Respondents to abandon the Funds.

August 1, 2018, the Arbitrator issued a Partial Final Award, determining that CFLD was subject to the Arbitrator's jurisdiction along with GIIL.[5]

Following the Arbitrator's jurisdictional decision, the Parties exchanged two additional rounds of briefing, evidentiary submissions, witness statements, expert submissions, and document production requests and documents. The Arbitrator then held a five-day evidentiary hearing in San Francisco. Afterward, the Parties submitted two post-hearing briefs, costs submissions, two supplemental post-hearing submissions, and a supplemental costs submission. *Id.* ¶¶ 41-53.

D. The Decision and Award

On June 26, 2019, the Arbitrator issued his reasons and award ("Award"), which, over the course of 147 single-spaced pages, carefully examined the evidence and arguments presented and addressed each of the Parties' claims and counterclaims.

The Arbitrator determined Respondents were the prevailing party. Ex. 1 ¶ 487. And he found that the Investment Agreements reached November 26, 2015 are valid and enforceable in accordance with their terms, resolving the "central controversy" in Respondents' favor. *Id.* He rejected virtually every claim, argument, and accusation Petitioners made. *See, e.g., id.* ¶¶ 395-97, 421, 487, 492(a), (c).

Each of Petitioners' comprehensive challenges to the validity of the Investment Agreements was specifically addressed and rejected. The Arbitrator found the Investment Agreements were "valid and subsisting agreement[s], enforceable in accordance with [their] terms." *Id.* ¶ 492(a). The Arbitrator held Petitioners breached the covenant of good faith and fair dealing and acted in bad faith in October of 2016, when CFLD made false accusations and baseless threats against Respondents and Mr. Chung in attempting to escape their contractual commitments and coerce Mr. Chung into abandoning the Funds. *See id.* ¶¶ 397-98 ("CFLD's conduct at the late October [2016] meetings was a bad faith tactic . . . because CFLD did not wish

[5] The Partial Final Award comprises 70 pages and was issued after two rounds of briefing, evidentiary submissions, witness statements and expert submissions; exchange of document production requests and documents; an evidentiary hearing held in San Francisco, California; and post-hearing briefing. *Id.*¶¶ 35-40; Ressmeyer Decl. Ex. 3.

to live with the consequences of the bargains GIIL had made on its behalf. … I find that the conduct of CFLD on 28 October 2016 was an immediate breach of CFLD's implied covenant of good faith and fair dealing"). And the Arbitrator found that Petitioners' failure to make the December 1, 2016 escrow payment was a breach of contract. *See id.* ¶ 421 ("[Petitioners] breached the Investment Agreements on 1 December 2016 by failing to make the second deposit of escrow funds.") [6]

Respondents were awarded $9,328,755.53 in fees and costs as the prevailing parties.[7] *Id.* ¶ 492(e). After issuance of the Final Award, Petitioners requested the Arbitrator "clarify" that the cost award must be satisfied from the escrow funds – a request he denied. Ressmeyer Decl., Ex. 2.

E. The Investment Agreements

1. The Arbitrator's Findings Regarding the Valid and Enforceable Investment Agreements

The Investment Agreements reached November 26, 2015 are comprised of interrelated contracts through which Petitioners subscribed to the Funds, committed to deposit their $200 million investment into escrow on a defined schedule, and agreed to terms for becoming a limited partner in the Funds. Typically, fund investors enter into two basic agreements: a subscription agreement ("SA") and a limited partnership agreement ("LPA"). Side Letters setting forth

[6] The Arbitrator also found Respondents had committed a technical breach of fiduciary duty by attempting to make certain "post-closing" changes to the Investment Agreements to strengthen the contractual default remedies available to the GPs to bring them more in line with market terms without obtaining Petitioners' express consent. Ex. 1 ¶¶ 391-93. Respondents attempted to make the changes in question based on their understanding of their rights under a power of attorney provision in the Investment Agreements. *Id.* ¶¶ 103-105. The changes were consistent with the Parties' understanding and made pursuant to the advice, and with the assistance, of fund counsel. *See id.* ¶ 114. Mr. Chung believed that the changes were promptly communicated to CFLD and only later learned that the task had fallen "through the cracks." *Id.* ¶ 300. As the Arbitrator found, none of these changes were relevant to the Parties' dispute, and no material change was ever relied upon by Respondents. *Id.* ¶¶ 309, 391-92. For this technical breach, the Arbitrator awarded Petitioners $100 in nominal damages. This minor determination was, not surprisingly, given no weight in the prevailing party analysis. *See id.* ¶ 487. And the Arbitrator flatly rejected CFLD's argument that the purported changes rendered the Investment Agreements invalid. *See id.* ¶¶ 92, 311.

[7] The arbitrator also awarded Respondents nominal damages of $200 for Petitioner's breaches of contract and awarded Petitioners $100 in nominal damages for the Respondents' fiduciary breach in attempting to make the post-closing changes.

additional agreements with a particular investor are also common. The Investment Agreements follow that general format, but they were customized according to CFLD's request, to better facilitate CFLD's internal review and approval of the Agreements by CFLD's Board of Directors. Ex. 1 ¶¶ 55, 180-84.

Despite the Petition's prodigious efforts to sow confusion on these points, there was a single set of Investment Agreements—not two different sets. As the Arbitrator explained in detail, the Parties' contracts were entered into on November 26, 2015. There was no separate set of "Operative Agreements"; that term is a construct that Petitioners manufactured in their Petition. *See* Pet. pp. 1-2. The post-closing changes were narrowly-focused attempted revisions that occurred after the November 26 Agreements were validly entered. The Arbitrator determined that the revisions exceeded the authority Petitioners had granted the GPs in a power of attorney to facilitate execution of the LPAs and were legally ineffective. Accordingly, they were never part of the Investment Agreements. Ex. 1 ¶ 123.

The Arbitrator analyzed the negotiating history between the parties in both his initial Partial Final Award and in the Final Award. *Id.* ¶¶ 55-56. He devoted nine pages of the Final Award to his analysis of contract formation, (*id.* ¶¶ 92-124) and explained precisely when and how the contracts were formed and why the post-closing changes were not part of the Investment Agreements reached November 26, 2015.

Contrary to Petitioners' assertions, there was no "discarding" agreements "and substituting entirely different contracts of the Arbitrator's own making." Pet. p. 21. Rather, there is a set of agreements for each of the two investment Funds: one for Fund I and one for China Fund, comprised of the contracts CFLD reviewed and approved. Thus, for each Fund there is:

(1) A Limited Partnership Agreement ("LPA") setting forth the terms of the Funds and the rights and obligations of the limited partner(s) and general partner.

(2) A Subscription Agreement ("SA"), accompanied by an Appendix that included key terms. In executing the SAs, Petitioners irrevocably subscribed to the Funds and became bound to the LPAs through a power of attorney granted to the GPs in the SAs. Ex. 1 ¶ 104.

(3) An Escrow Agreement ("EA") in the form of a side letter through which Petitioners agreed to fund their $200 million commitment on a defined schedule.[8]

These documents were sent to CFLD at different times during the course of the negotiation (as is typical in complex commercial transactions), but when CFLD and GIIL executed and returned them, they became binding. *Id.* ¶¶ 96-98. Specifically:

- On November 12 and 13, 2015, CFLD received customized SAs (which included the SA and an Appendix I with a summary of key terms) and LPAs.
- On November 23, 2015, CFLD received the EAs, along with instructions for executing the Agreements; specifically, that GIIL would sign the SAs and EAs, subscribing them to the Funds and binding them to the LPAs, which would be executed by the GP pursuant to the Power of Attorney granted to it in Appendix 1 to the SAs. *Id.* ¶ 95, 113.
- On November 23, 2015, CFLD's Board of Directors approved CFLD's investment. GIIL signed the SAs, subscribing to the Funds and agreeing to be bound by the LPAs.
- On November 26, 2015, CFLD returned signed versions of both SAs and the EAs to Mr. Chung. *Id.* ¶ 98.

After analyzing and rejecting Petitioners' numerous arguments that no agreement had been reached, the Arbitrator held that, viewed objectively, there was an "acceptance by GIIL of

[8] Specifically, the Investment Agreements here are:

(1) The China Fund Subscription Agreement executed by GIIL and China Fund GP, LLC dated 23 November 2015, including the 13 November Appendix I;

(2) The Fund 1 Subscription Agreement executed by GIIL and Fund 1 GP dated 23 November 2015, including 13 November Appendix 1;

(3) The China Fund Escrow Agreement executed by GIIL and China Fund GP dated 23 November 2015;

(4) The Fund 1 Escrow Agreement executed by GIIL and Fund 1 GP dated 23 November 2015;

(5) The 13 November 2015 China Fund LPA; and

(6) The 13 November 2015 Fund 1 LPA. Ex. 1 ¶ 492.

Claimants' offer, resulting in a binding agreement on the terms set out in the signed SAs, the 13 November Appendix 1, the 13 November LPAs and the signed EAs (collectively, the 26 November Agreements)."[9] *Id.* ¶¶ 96-98; *see also id.* ¶ 349.

The Arbitrator also gave full and careful consideration to Petitioners' arguments that the legally ineffective post-closing changes provided a basis for rescinding the Investment Agreements. Ex. 1 ¶¶ 291-93, 309-11, 350, 391-92.

2. Attempted Post-Closing Changes Were Never Part of the Agreement

After CFLD's Board of Directors reviewed and approved the investments, after GIIL signed the SAs and entered the Investment Agreements on November 26, 2015, and after GIIL made its first escrow deposit of $80 million on December 1, 2015, the GPs sought to make certain changes to the default provisions in LPAs. The changes were made with the assistance of Fund counsel, based on the GPs' understanding of their right to make changes based on the power of attorney. *Id.* ¶¶ 103-05, 119.[10] Although the revisions were made consistent with the Parties' understanding regarding the need for strong default, the Arbitrator concluded that the revisions exceeded the authority Petitioners had granted to the GPs through power of attorney provisions that enabled the GPs to sign the LPAs on Petitioners' behalf. *See id.* ¶¶ 114, 119. Thus, the

[9] Arbitrator Ghikas applied the correct legal standard in evaluating, from an objective standpoint, whether the parties assented to the November 26 Agreements. *See, e.g., William Lloyd, Inc. v. Hrab*, No. CIV.A. 98A-07-001HLA, 1999 WL 1611315, at *3 (Del. Super. Ct. Apr. 7, 1999) ("[T]his Court's inquiry is an objective one: whether a reasonable person would, based upon the objective manifestation of assent, can conclude that both parties intended to be bound by the Agreements they executed.") (internal quotations omitted). The Parties' subjective beliefs regarding when and if contracts are formed are irrelevant.

[10] The changes inserted certain additional default remedies, (Ex. 1 ¶ 16) consistent with the Parties' understanding that there would be clear and powerful remedies in the event of a default (*see id.* ¶ 114). There were two other changes made: the addition of a new "fee waiver" provision in the Fund 1 LPA allowing the GP to satisfy its 1% capital contribution obligation by waiving payment of a portion of its management fee and the deletion of restrictions in the China Fund LPA on the GP's ability to borrow money on behalf of the Fund. *Id.* In addition, Petitioners deleted erroneously included language in a risk disclosure to Appendix 1 of the SAs, carried over by fund counsel from an earlier precedent, stating what all parties understood to be incorrect: that the Funds' investments would be concentrated in mobile software and services. *Id.* ¶ 289. Respondents requested the Final Award be clarified to make explicit that the discussion of Post-Closing Changes to Appendix 1's risk disclosure does not mean to imply that the risk factor disclosure imposed a contractual obligation to limit investments to mobile software and services; the Arbitrator stated the question of whether the risk disclosures have contractual force was not before him for determination and refused the request for clarification. Ressmeyer Decl. Ex. 2.

attempt to make revisions after the closing was "ineffective as [a] matter of law." Ex. 1 ¶ 310; *see also id.* ¶ 309. Accordingly, "[t]he terms of the relevant Investment Agreements are those that were originally agreed, which, together, comprise the 26 November Agreements." *Id.* ¶ 123.[11] The Final Award is explicit that no severance was required to remove invalid terms, because "the ineffective terms were never part of agreement." *Id.*

The Arbitrator further noted that the Parties intended and agreed that the powers of attorney would be used to execute the LPA without the post-closing changes. *Id.* ¶¶ 109, 113. CFLD's Board reviewed and approved the SAs granting the powers of attorney, which had been formatted pursuant to CFLD's request. *Id.* ¶ 113. Petitioners were advised and understood that executing the SAs would bind Petitioners to the LPAs as of November 26, 2015. *Id.* [12]

Thus, the clear, adjudicated facts are (1) the Investment Agreements reached November 26, 2015 are valid and enforceable; (2) CFLD and GIIL bound themselves to them upon executing and returning to Mr. Chung the signed agreements to subscribe in the Funds; (3) the attempted post-closing changes were never part of the Investment Agreements; and (4) the ineffective post-closing changes did not render the Investment Agreements void or voidable.

3. Petitioners' Myriad Challenges to the Investment Agreements

Petitioners' claim that the Arbitrator denied them the opportunity to present evidence and argument challenging the validity of the Investment Agreements is concocted from their false narrative regarding two sets of contracts (the November 26 Agreements and the "Operative Agreements"), and their abject refusal to acknowledge what the Arbitrator ***actually*** did. Pet. p. 3.

[11] Each of the Parties attached to their initial filing with the ICDR the relevant LPAs, SAs and EAs. That the LPAs and the Appendix to the SAs also included the ineffective post-closing changes is irrelevant; the Arbitrator determined that those changes were never part of the agreement; not, as Petitioners falsely claim, that there was never an agreement to begin with. The Arbitrator specifically noted that "there are several versions of the LPAs and Appendix 1." Ex. 1 p. 5, fn 3. That, however, did not affect his conclusion that the Investment Agreements were binding on the Parties, but the post-closing changes were not.

[12] Petitioner's assertion that the LPAs cannot be binding absent their signature on the document is thus unfounded. Moreover, the assertion is contrary to Delaware law: a "partnership is bound by its partnership agreement whether or not the partnership executes the partnership agreement." 72 Del. Laws, c. 151-101(15). It is contrary to the facts: CFLD's Board approved the Investment Agreements and GIIL made an $80 million deposit into escrow. And, more to the point, it is contrary to the Arbitrator's finding that "viewed objectively," the Investment Agreements were formed on Nov. 26, 2015. Ex. 1 ¶¶ 96-98.

The Final Award itself conclusively rebuts the notion that Petitioners were prevented from presenting such evidence; it shows Petitioners made every argument they could think of regarding the validity of the Investment Agreements. They attacked the validity of the Agreements as a whole, the specific terms they found objectionable, and the post-closing changes. Petitioners challenged the validity of those Agreements ***as of*** November 26, 2015, ***and*** as purportedly affected by post-closing changes. The factual and legal arguments directed at the November 26 Agreements Petitioners claim they were denied the opportunity to challenge, and which in fact were fully addressed in the Final Award, included:

- Arguments that there was "no meeting of the minds" as of November 26, 2015 (Ex. 1 ¶ 92);
- Arguments that multiple circumstances "preclude a finding that there was a final binding agreement as of 26 November 2015" (*Id.* ¶ 99);
- Arguments that "as a result of pre-contractual misrepresentations and failures to disclose, the 26 November agreements are void or voidable at their instance" (*Id.* ¶ 125);
- Arguments that "the attempt to make the Post-Closing changes results in the entire transaction under the 26 November Agreements being void" (*Id.* ¶ 124);
- Arguments that "as a matter of Delaware contract law, an unauthorized attempt to make a material alteration to a written contract makes the entire agreement voidable" (*Id.* ¶ 291);
- Arguments that "Claimants' breaches of fiduciary duty preclude them from enforcing any obligations under the relevant Investment Agreements and that rescission or cancellation of a contract is an available equitable remedy" (*Id.* ¶293);

- Arguments that Petitioners were "entitled to the remedy of rescission for breach of fiduciary duty because the unauthorized Post-Closing Changes, even though ineffective as a matter of law, were asserted against [Petitioners]" (*Id.* ¶ 310);

- Arguments that "as a matter of Delaware contract law, an unauthorized material alteration to a written contract makes the entire agreement voidable" (*Id.* ¶ 311); and

- Arguments that "the Post-Closing Changes have been asserted against [Petitioners] and that as [a] result the 26 November Agreements should be rescinded or they should be awarded damages." (*Id.* ¶ 350).

Petitioners' comprehensive attack on the validity of the Investment Agreements also included challenges on the grounds of fraud and fiduciary duty, and violations of the securities laws and material breach by Respondents:

- Petitioners argued Respondents engaged in every imaginable form of fraudulent or negligent misrepresentations and failures to disclose material facts,[13] which rendered the Investment Agreements void or voidable.

- Petitioners argued the Investment Agreements were invalid under the securities laws of the U.S., California, Hong Kong, and China. *Id.* ¶ 72.

- Petitioners argued they were entitled to rescission because Respondents breached their fiduciary duties; breached the EAs by failing to maintain the right kind of

[13] These included claims that Respondents fraudulently misrepresented whether the terms of the agreements were "market;" fraudulently misrepresented the size of commitments by other investors; fraudulently misrepresented that increasing the size of CFLD's investment would benefit fundraising; failed to disclose information about Mr. Chung's employment and fundraising experience; failed to disclose that requiring portfolio companies to locate in a CFLD industrial park would be untenable; and fraudulently misrepresented that the SAs without the Appendix included all the material terms of the investment and were adequate to disclose the material terms of the deal. Ex. 1 ¶¶ 70-71.

escrow account; and breached the implied covenant of good faith and fair dealing by repudiating the Funds' stated investment objectives. *Id.* ¶ 73.

- Petitioners claimed the Investment Agreements were unconscionable,[14] and were void for lack of mutual assent and lack of consideration. *Id.* ¶¶ 67-68; ¶ 83(b).

Based on these comprehensive factual and legal invalidity arguments, Petitioners claimed they were entitled to (among other things) (1) a declaration that the Investment Agreements were void and/or rescinded and of no further force or effect; (2) an order that the GPs return the entire $80 million deposited into escrow; (3) an $80 million damage award; and/or (4) an order directing GIIL be repaid the balance of Escrow Funds on the account of the monetary awards in CFLD/GIIL's favor. *Id.* ¶ 85.

The Arbitrator carefully considered ***all*** of Petitioners' multifaceted arguments attacking the validity of the Investment Agreements, the post-closing changes, and the November 26 Agreements, and rejected ***each*** of them, for compelling reasons he explained in detail. He devoted ***71 pages*** of the Final Award to this analysis. *Id.* pp. 27-98. At the end of that process, he determined Respondents "overcame the myriad defenses" Petitioners asserted in challenging the validity of the Investment Agreements and that Petitioners' "counterclaims for rescission or damages failed." *Id.* ¶ 487. No one dealing fairly with the Final Award—or candidly with this Court—could possibly have missed this.

After the Final Award, Petitioners filed a request for clarification pursuant to ICDR Rule 33,[15] complaining the Final Award did not align with the Parties' requests for relief because it did not require the cost award to be paid from the escrow. Ressmeyer Decl., Ex. 2. Notably, Petitioners' request did not so much as intimate that the Arbitrator had invalidated the Investment

[14] Petitioners' unconscionability and lack of mutual assent arguments derived from, among other things, their incredible claims that CFLD – the multi-billion dollar, publicly traded, global corporation – was unsophisticated; that CFLD's American-educated negotiator did not speak English and could not understand the agreements; and that CFLD was deceived by the structure of the agreements that CFLD itself directed. *See id.* ¶ 99. *Cf., id.* ¶ 172.

[15] Petitioners complained that the Arbitrator did not require the cost award to be satisfied by funds from the escrow account, as the parties had requested; the arbitrator refused to create such a requirement. Ressmeyer Decl., Ex. 2.

Agreements, crafted new agreements, denied them the opportunity to make arguments directed at the November 26 Agreements, or that he had done any of the other things Petitioners now claim occurred. *Id.*

III. STANDARD OF REVIEW

As the Court is no doubt aware, arbitration awards cannot be disturbed absent serious misconduct by the arbitrator. The scope of review is extremely narrow and does not include legal errors or defects in evaluating evidence, none of which occurred here in any event.

The Federal Arbitration Act provides that for arbitral awards falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 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." 9 U.S.C. §§ 201, 207 (emphasis added).

The FAA, in turn, provides that federal courts may vacate an arbitral decision in the limited circumstances where "the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced," or "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. §§ 10(a)(3), (4).

Courts have "extremely limited review authority" and can vacate an award "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995); *see also PowerAgent, Inc. v. Elec. Data Sys. Co.*, 358 F.3d 1187, 1193 (9th Cir. 2004) (judicial review of arbitral awards is "both limited and highly deferential."). Such limited judicial review "maintain[s] arbitration's essential virtue of resolving disputes straightaway." *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 588 (2008). If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial review process." *Id.*

Neither "erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the [FAA], which is unambiguous in this regard." *Kyocera Corp. v. Prudential-Bache Trade Services, Inc*., 341 F.3d 987, 994 (9th Cir. 2003). An arbitral decision that "even arguably" construes or applies the contract "must stand, regardless of a court's view of its (de)merits." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2016). Courts "will not vacate an award simply because we might have interpreted the contract differently." *Bosack v. Soward*, 586 F.3d 1096, 1106 (9th Cir. 2009).

IV. ARGUMENT

A. Petitioners Were Not Prevented from Presenting Evidence or Argument Regarding the Validity of the Investment Agreements

Petitioners' various claims that the Arbitrator prevented them from presenting evidence and argument regarding the validity of the Investment Agreements, and hence denied due process, are patently frivolous. *See* pages 13-17 above. Petitioners made a host of arguments—and asserted twenty separate counterclaims—directed at all aspects of the Investment Agreements, from every conceivable perspective.

The "fundamental disagreement" and "central controversy" in the arbitration was "the question whether the Investment Agreements were valid and enforceable against" Petitioners. Ex. 1 ¶ 487. Petitioners submitted literally thousands of pages of evidence and argument on that central issue across six rounds of briefing, written statements of the case, witness statements and live testimony at the evidentiary hearing. The validity of the Investment Agreements reached November 26, 2015 was at center stage throughout the process.

Petitioners' statements that "the contractual status of the '26 November Agreements'" was not "in dispute" (Pet. pp. 13, 19-20), and that "the Arbitrator never afforded the parties the opportunity to present evidence or argument as to whether the '26 November Agreements' were valid contracts." (*id.* p. 3) are, again, pure fiction. *See* pages 9-17 above. Petitioners' attempt to construct two separate and independent sets of contracts – the November 26 Agreements and the "Operative Agreements" – to advance this claim compounds the prevarication. *See* pages 10-11 above. As the Arbitrator correctly determined and explained in detail, the Parties reached

agreement on November 26, 2015, and the ineffective post-closing changes did not become part of that agreement.

The face of the Final Award demonstrates beyond doubt that Petitioners received a full and fair hearing, but ***even a well-founded*** belief that they should have been able to advance different arguments is not a basis for vacatur under 9 U.S.C. § 10 (a)(3). In considering whether "an arbitrator's misbehavior or misconduct prejudiced the rights of the parties" courts ask "whether the parties received a fundamentally fair hearing." *Move, Inc. v. Citigroup Glob. Markets, Inc.*, 840 F.3d 1152, 1158 (9th Cir. 2016) (vacatur appropriate where the chair of the arbitral tribunal falsified his credentials to receive the chair appointment). "A hearing is fundamentally fair if it meets 'the minimal requirements of fairness'—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator." *Sunshine Min. Co. v. United Steelworkers of Am., AFL-CIO, CLC*, 823 F.2d 1289, 1295 (9th Cir. 1987).

An imperfect hearing—one in which the parties face some limitation on the evidence or arguments they can present—is not a fundamentally unfair hearing. *See, e.g., U.S. Life Ins. Co. v. Superior Nat. Ins. Co.*, 591 F.3d 1167, 1177 (9th Cir. 2010) ("perhaps [U.S. Life] did not enjoy a perfect hearing; but it did receive a fair hearing. It had notice, it had the opportunity to be heard and to present relevant and material evidence, and the decisionmakers were not infected with bias."); *Schilling Livestock, Inc. v. Umpqua Bank*, 708 F. App'x 423, 424 (9th Cir. 2017) (no misconduct in allowing a party to rely on an undisclosed defense); *Am., Etc., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, No. 17-CV-03660-DMR, 2017 WL 6622993, at *7 (N.D. Cal. Dec. 28, 2017), *appeal dismissed*, No. 18-15158, 2018 WL 3655965 (9th Cir. June 14, 2018) (no prejudice from purportedly not having notice of some of the opposing party's claims).

Nor is a petition to vacate an opportunity for a do-over by the Court. *See, e.g., Am., Etc., Inc.* 17-CV-03660-DMR, 2017 WL 6622993, at *7 ("Royal takes issue with the arbitrator's factual findings and legal conclusions, and not the fairness of the proceeding. This amounts to an improper invitation to review the arbitrator's factual findings and legal conclusions.") (internal citation and alteration omitted). Petitioners disagree with the Arbitrator's ruling that the

Investment Agreements are valid and should not be rescinded as a result of the attempted post-closing changes. But an unhappy result is not a due process failure, and it does not come close to satisfying the high burden for vacatur under 9 U.S.C. § 10(a)(3).

B. The Arbitrator Plainly Did Not Exceed His Authority or Substitute His Sense of Justice or Equity for the Contracts

Arbitration awards are vacated pursuant to 9 U.S.C. § 10(a)(4) only in extreme circumstances of significant, clear arbitrator overreach or misconduct. The Petition's assertions of Arbitrator overreach and misconduct, including that the Arbitrator disregarded the Investment Agreements, dispensed his own brand of industrial justice, and substituted his sense of equity in place of the contracts, are wholly unfounded. The cases in which awards have been vacated, including those cited in the Petition, bear no similarities with the carefully reasoned Award in this case.

For example, the arbitrator in *Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors, LLC* "voided and reconstructed" a contract between a California-based prime contractor and its Afghanistan-based subcontractor based solely on his view that the subcontractor had "primitive" business practices and thus could not be "required to comply" with the complex contracts at issue. 268 F.Supp.3d 1053, 1059-60 (N.D. Cal. 2017), *aff'd*, 913 F.3d 1162 (9th Cir. 2019). The award in *Aspic* derived from the arbitrator's personal notions of fairness and a party's capacity to negotiate and disregarded the parties' contract. *Id.*

In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, the Court upheld vacatur of a decision in which the arbitrator failed to conduct a choice-of-law analysis and instead based his ruling entirely on a public policy determination that contravened the governing law. 559 U.S. 662, 663, 669-70 (2010). *See also Federated Employers of Nevada, Inc. v. Teamsters Local No*. 600 F.2d 1263, 1264–65 (9th Cir. 1979) (arbitral award "plainly violated the terms of the arbitration clause" in obvious violation of the "unambiguous and mandatory" instructions to the arbitrator); *Dobbs, Inc. v. Local No. 614, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 813 F.2d 85, 88 (6th Cir. 1987) (affirming vacatur of an award that limited an employer's authority to terminate a tardy employee, notwithstanding contractual provisions *expressly*

permitting termination under the circumstances); *Axia NetMedia Corp. v. Massachusetts Tech. Park Corp.*, 381 F. Supp. 3d 128, 138 (D. Mass. 2019) ("in re-writing the contract, the arbitrator fundamentally altered the relationship between the parties to adhere to his own conception of fairness."). Needless to say, no such arbitrator misconduct occurred in this case.

As a review of the 147-page Final Award demonstrates beyond doubt, the Arbitrator based his decision on an exhaustive analysis of the contracts and the many arguments Petitioners made in attempting to invalidate them. His decision did not merely "draw its essence from" the contracts; it was steeped in them throughout. *See* pages 8-17 above.

The Petition's attempts to recast the Arbitrator's decision as imposing "his own sense of equity" (*see* Pet. pp. 16-17) lack any semblance of merit—both because the Final Award was based squarely on the contracts, and because the only "equitable determination" made by the Arbitrator was in connection with ***Petitioners'*** request for equitable relief (rescission of the Investment Agreements). As the Final Award makes clear, Petitioners argued that the November 26 Agreements should be rescinded based on the post-closing changes. *See* Ex. 1 ¶¶ 293, 310, 350, 391. After carefully analyzing Petitioners' invocation of that equitable remedy, the Arbitrator concluded: "[Respondents] have not enjoyed a benefit at [Petitioners'] expense. In these circumstances, it would be inequitable to rescind the relevant Investment Agreements . . . ." *Id.* ¶ 391. Petitioners' attempt to spin that contract-based determination on a claim they ***raised*** as arbitrator misconduct is of a piece with their tactics throughout. [16]

Petitioners' suggestion that the Arbitrator "crafted new, materially different contracts" (Pet. p. 1) to fit his personal sense of equity, rather than invalidating the Parties' agreements, is a

[16] Without authority, Petitioners suggest that the arbitrator exceeded his authority in determining the Investment Agreements remained valid despite the fact that, by the end of the arbitration, neither party sought to continue the limited partnership. Pet. p. 15. That is entirely beside the point; the relevant question is whether the award is "completely irrational," not whether it conformed to the parties' preferences. *See, e.g., Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1289 (9th Cir. 2009) (if the "basic outline" of relief awarded "makes sense," the court "cannot say that there is no basis in the record" for the decision); *Bosack v. Soward*, 586 F.3d 1096, 1107 (9th Cir. 2009) (an award that is consistent with the terms of the contract is not "completely irrational"); *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 645 (9th Cir. 2010) ("Because nothing in the parties' agreement removed the arbitrators' authority to resolve procedural matters, we need only find that the panel's interpretation of the agreement was plausible.").

similarly unfounded mischaracterization of the Final Award. What the Arbitrator appropriately and correctly found—in response to Petitioners' argument that equity required rescission—was that it would be inequitable to invalidate the underlying Investment Agreements on the basis of purported amendments, which were never a part of the agreement, were made after the fact, and were never relied upon by Respondents. *Id.* ¶ 391.

The Arbitrator's ruling denying equitable relief was plainly correct, but even if "these findings were inconsistent" with testimony, or they "flatly contradict[ed] both sides' positions," or even if they were internally inconsistent (Pet. p. 17), that would not be a basis for vacatur. *Kyocera*, 341 F.3d at 994 ("Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the [FAA], which is unambiguous in this regard."); *Bosack*, 586 F.3d at 1106 ("the question is whether the award is 'irrational' with respect to the contract, not whether the panel's findings of fact are correct or internally consistent."). Rather, vacatur under FAA section 10(a)(4) is warranted only where the Arbitrator exceeded his powers by issuing a "completely irrational" award that "fails to draw its essence from the agreement." *Comedy Club*, 553 F.3d at 1288.

The Final Award is as good an example as one can find of a thorough, meticulously reasoned, and fair resolution of a dispute. Petitioners are unable to point to any failure by the Arbitrator to apply the Parties' contracts and uphold those contracts as valid and enforceable. In light of the adjudicated facts and the "extremely limited" judicial review permitted of the Decision and Award, there is no basis whatsoever to vacate the arbitrator's decision. *See First Options of Chicago*, 514 U.S. at 942. Accordingly, the Final Award must be confirmed. 9 U.S.C. §§ 201, 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.").

V. CONCLUSION

For the foregoing reasons, the Petition to Vacate should be denied, the Final Award confirmed, and judgment entered in accordance with paragraph 492 of the Final Award.

Dated: November 14, 2019

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