

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

TOP JET ENTERPRISES LTD.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 21-CV-00096-W-FJG
	)	
SKYBLUEOCEAN LTD. and	)	
JET MIDWEST GROUP, LLC.,	)	
	)	
Defendants.	)	
	)	

**ORDER**

Currently pending before the Court is plaintiff's Petition to Confirm and Enforce Foreign Arbitral Award (Doc. # 1).

**I. BACKGROUND**

On April 5, 2017, Top Jet Enterprises, Ltd. ("Top Jet") commenced an arbitration before the Hong Kong International Arbitration Centre ("HKIAC"). Top Jet was the sole claimant and the respondents were Sino Jet Holding Ltd. ("Sino Jet"), a Cayman Island corporation, Skyblueocean Ltd. ("Sky"), a British Virgin Island corporation and Jet Midwest Group, ("JMG"), a Delaware company. The Arbitration was conducted pursuant to the arbitration clause contained in Section 9.2 of the Shareholders Agreement ("SHA"). The Arbitration was heard and resolved by a panel of three arbitrators. After two years of preliminary proceedings, an in-person hearing on the merits was held in Hong Kong from June 10 to 14, 2019. Following the hearing, the parties submitted written submissions. Following its deliberations, the Tribunal issued the Award on June 22, 2020. Top Jet asserted two claims against respondents: 1) a

breach of contract claim and 2) in the alternative, a fraud claim. The arbitrators found in favor of Top Jet on the breach of contract claim and deemed the fraud claim to be moot. In the Arbitration, Sky and JMG asserted a counterclaim against Top Jet. The arbitrators dismissed that counterclaim on the merits. The Award grants Top Jet monetary damages against respondents jointly and severally in the following amounts: \$76,043,750, plus compound interest of 15% per year from June 30, 2019, through June 22, 2020 (the date of the award), for a total monetary award of \$87,200,000 as of June 22, 2020, plus, simple interest of 4.25% per year from June 23, 2020, until the amount owed is paid in full.

Top Jet commenced the above referenced arbitration proceeding as a result of a previous action filed in this court, Case No. 17-6005 (referred to as the “Term Loan Action”). Jet Midwest International, Top Jet and Sino Jet initially brought that action against JMG for defaulting on a loan agreement. JMG filed counterclaims and a third-party complaint against Top Jet, Sino Jet and Jet Midwest International. Sky moved to intervene as a third-party plaintiff, in order to assert the same counterclaim and third-party complaint against Top Jet, Sino Jet and Jet Midwest International. On June 7, 2017, the court dismissed the counterclaim and third-party complaint, finding that the arbitration clause contained in the SHA and the Share Purchase Agreement (“SPA”) contained mandatory arbitration clauses. The court found that because the clauses were “valid and mandatory they must be enforced according to their terms.” As the counterclaim and third-party complaint arose from and related to the SHA or the SPA they were dismissed in favor of arbitration. The Arbitration Award entered by the Hong Kong International Arbitration Centre is the result of the claims initially raised in the Term Loan Action.

On July 2, 2020, Top Jet filed an action Top Jet Enterprises, Ltd. v. Sino Jet Holding Ltd., et al., Case No. 4:20-cv-00532-FJG (the “First Confirmation Proceeding”). The purpose of the First Confirmation Proceeding was to seek confirmation of the earlier arbitration award dated June 22, 2020 (the “Damages Award”). On January 25, 2021, this Court entered an Order and Judgment confirming the Damages Award. On December 23, 2020, the Hong Kong Tribunal entered an award granting Top Jet its fees and costs from the Arbitration. The Costs Award reimburses Top Jet for its attorney and expert witness fees and other miscellaneous costs and Top Jet’s payment of the Arbitration Centre and the Tribunal’s fees. The Costs Award requires Sky and JMG to reimburse Top Jet’s fees and costs in the following amounts: 1) \$1,539,759.52 plus 2) \$779,759.21, for a total amount of \$2,319,518.73 as of December 23, 2020, plus 3) simple interest at the annual rate of 4.25% from December 24, 2020.

JMG and Sky filed opposition to the Petition to Confirm the Costs Award. They argue that the action violates the rule against claim splitting and that the award is so unreasonable it violates Missouri’s public policy.

## **II. STANDARD**

### **Recognition of Foreign Arbitration Awards**

Chapter 2 of the Federal Arbitration Act (the “FAA”), 9 U.S.C. §§ 201-208, codifies the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “Convention”), commonly known as the New York Convention. See New York Convention, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. The United States Supreme Court has explained:

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15, 94 S. Ct. 2449, 2457 n.15 (1974). The FAA provides:

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. 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.A. § 207. A district court must confirm the arbitral award unless a party “successfully assert[s] one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention.” Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1441 (11th Cir. 1998). (citing 9 U.S.C. § 207; New York Convention, art. III.). “The party resisting confirmation—in this case, [BlueOak] —bears the heavy burden of establishing that one of the grounds for denying confirmation in Article V applies.” Gold Reserve Inc. v. Bolivarian Republic of Venezuela, 146 F. Supp. 3d 112, 120 (D.D.C. 2015) (citing Imperial Ethiopian Gov’t v. Baruch–Foster Corp., 535 F.2d 334, 336 (5th Cir. 1976); Ottley v. Schwartzberg, 819 F.2d 373, 376 (2d Cir. 1987)).

Tetronics (Int’l) Ltd. v. BlueOak Arkansas LLC, No. 4:20CV00530 SWW, 2020 WL 5520917, at \*3 (E.D. Ark. Sept. 14, 2020).

The seven grounds for denying confirmation of an Arbitration Award under Article V include:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II 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; or

(b) The 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 his case; or

(c) 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; or

(d) The 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; or

(e) The award has not yet become binding on the parties ... or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Convention Done at New York June 10, 1958; T.I.A.S. No. 6997 (Dec. 29, 1970).

Id. at \*3, n. 13.

### **III. DISCUSSION**

#### **A. Sky and JMG's Opposition to Confirmation of Costs Award**

##### **1. Claim Splitting**

Sky and JMG state that Top Jet is seeking confirmation of a supplemental award of attorney's fees in the same arbitration proceeding that was at issue in the earlier confirmation action. Sky and JMG state that Top Jet's filing of this action as an entirely distinct and separate lawsuit, rather than seeking to amend the earlier confirmation action is procedurally improper and dictates that the Court deny the

petition. Sky and JMG state that this suit improperly splits Top Jet's claims against respondents because the prior confirmation action and this action both seek confirmation of awards made in the same arbitration proceeding.

In opposition, Top Jet states that claim splitting is not a legally cognizable defense to confirmation of the arbitration award under the New York Convention. Top Jet notes that “[T]he party opposing enforcement of an arbitral award has the burden to prove that one of the seven defenses under the New York Convention applies.” Zeiler v. Deitsch, 500 F.3d 157, 164 (2<sup>nd</sup> Cir. 2007) (quoting Encyclopedia Universalis S.A. v. Encyclopedia Britannica, Inc., 403 F.3d 85, 90 (2d Cir. 2005)). Additionally, Top Jet states that even if claim splitting was a recognized defense, it has not engaged in claim splitting. Top Jet states that the Damages Award and the Costs Award are separate documents containing separate awards which were entered at different points in time and dealing with different issues. Top Jet states that pursuant to the Rules of the Hong Kong International Arbitration Centre, an arbitration tribunal is permitted to “make a single award or separate awards regarding different issues at different times and in respect of all parties involved in the arbitration in the form of interim, interlocutory, partial or final awards.” Top Jet states that that Damages Award was entered on June 22, 2020, and the Costs Award was not entered until December 23, 2020, over six months later. Top Jet states that the Supreme Court and the Eighth Circuit have recognized that a merits judgment and a costs judgment are separate and distinct. Top Jet states that because these are two distinct awards, it had two distinct claims and it was not claim-splitting to file two separate petitions for confirmation of the separate awards

from the Tribunal. The Court agrees and finds that this is not a reason to deny Top Jet's petition for confirmation.

## **2. Award is Unreasonable and Violates Missouri Public Policy**

JMG and Sky state that confirmation of a foreign arbitration award should not be granted if "recognition or enforcement of the award would be contrary to the public policy of that country." Scherk v. Alberto-Culver, 417 U.S. 506, 519, 94 S.Ct. 2449, 2457 n. 14, 41 L.Ed.2d 270 (1974). JMG and Sky state that under Missouri law, reasonableness is an implied term in every contract for attorney fees and an award of \$2,319,518.73 in attorney fees is unreasonable. JMG and Sky state that their attorney fees by comparison were only \$167,107.06. JMG and Sky state that the arbitration tribunal stated, "[w]hile more detail may normally be required for the assessment of legal costs in the Hong Kong courts, the practices there do not apply to international arbitrations seated in Hong Kong." However, JMG and Sky state that the tribunal thus deliberately chose not to engage in any reasonableness analysis as to the amount of attorney fees. But JMG and Sky argue that this Court is required to assess the reasonableness of the fee award.

In opposition, Top Jet states that much of the Cost Award included the cost of the arbitration itself, which despite being obligated to pay half of the costs of the arbitration, JMG and Sky paid nothing. Top Jet states that it paid for all of the costs of the Arbitration. Top Jet also states that the arbitration was conducted in Hong Kong pursuant to HKIAC Rules. Top Jet states that JMG and Sky do not contend that Missouri considers its approach to fee-shifting to be applicable to foreign arbitrations and does not dispute that the Tribunal correctly applied the Rules regarding awarding fees to Top Jet. Additionally, Top Jet states that the Tribunal did analyze the

reasonableness of its fees and concluded that they were reasonable. The Tribunal made the following findings: “Claimant’s Legal Costs have been presented in sufficient detail to allow the Tribunal to assess if they are reasonable in amount and have been reasonably incurred.” *Costs Award* ¶ 21.4. “We agree with Claimant that, taking into account all the circumstances of the case – including the amount in dispute, the issues in dispute, the complexity of this case and the involvement of the laws of multiple jurisdictions- Claimant’s Legal Costs are reasonable.” *Id.* at ¶ 21.5. “Claimant’s legal fees - which are only slightly more than 2% of the sum in dispute - are reasonable in amount, and on a review of the itemized legal fees and expenses presented, are reasonably incurred taking into account the nature of the dispute and how the proceedings unfolded.” *Id.* at ¶ 21.6.

#### **B. Petition to Confirm Arbitration Award**

Top Jet states notes that “judicial review of arbitration awards is ‘severely limited,’ so as not to frustrate the ‘twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.” Stone v. Theatrical Inv.Corp., 64 F.Supp.3d 527, 532-533 (S.D.N.Y. 2014)(quoting Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60, 71-72 (2d Cir. 2012)). Top Jet states that it has timely filed the petition to confirm the Award and there is no basis to refuse or defer recognition of the Award. As noted above, the New York Convention identifies seven grounds on which a party may object to confirmation of an Award. Top Jet argues that none of those grounds are applicable in this case.

As noted above, Sky and JMG argued that this proceeding involved claim-splitting and that the Costs Award was not reasonable. However, as discussed above, the Court finds that there is no basis for these objections. The Court does not agree that

the Costs Award is an improper splitting of claims. The Hong Kong Tribunal made two separate awards – a Damages Award and a Costs Award. These are separate awards made six months apart which involved separate issues. Top Jet was not required to wait until the Tribunal made its Costs Award before seeking to confirm the Damages Award. Additionally, the Court finds no support for Sky and JMG's objection that the tribunal failed to consider the reasonableness of the attorneys' fees or that the amount of fees awarded was against public policy.

Accordingly, the Court hereby **GRANTS** Top Jet's Motion for Confirmation of the Award and as provided in the Award, grants monetary damages in favor of Top Jet and against Sky and JMG jointly and severally, in the amount of (i) \$1,539,759.52, plus; (ii) \$779,759.21, for a total base amount of \$2,319,518.73 as of December 23, 2020; and simple interest at the annual rate of 4.25% from December 24, 2020, until the judgment is paid in full.

Top Jet had previously requested a conference to discuss the status of this proceeding. However, in light of the ruling granting Top Jet's Petition to Confirm the Costs Award, the Court finds that there is no reason for a teleconference.

#### **IV. CONCLUSION**

Accordingly, for the reasons stated above, the Court hereby **GRANTS** Top Jet's Petition to Confirm and Enforce Foreign Arbitral Award (Doc. # 1).

Date: August 31, 2021  
Kansas City, Missouri

**S/ FERNANDO J. GAITAN, JR.**  
Fernando J. Gaitan, Jr.  
United States District Judge