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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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TMCO LTD.,

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Petitioner,

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v.

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GREEN LIGHT ENERGY SOLUTIONS
R&D CORP.,

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Respondent.

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Case No. [4:17-cv-00997-KAW](#)

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**ORDER GRANTING PETITION TO
CONFIRM ARBITRATION AWARD
AND ENTER JUDGMENT**

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Re: Dkt. Nos. 1, 26-28

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On February 27, 2017, Petitioner TMCO Ltd., a Bulgarian company, filed a petition to confirm an arbitration award (the “Final Award”) entered against Respondent Green Light Energy Solutions R&D Corp., a California corporation. The Award was issued by the sole arbitrator of the International Chamber of Commerce’s Court of Arbitration (“ICC”), pursuant to an arbitration clause contained in the relevant contract between the parties.

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Upon review of the moving papers, the Court finds this matter suitable for resolution without oral argument pursuant to Civil Local Rule 7-1(b), and, for the reasons set forth below, CONFIRMS the Final Award.

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I. BACKGROUND

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Petitioner TMCO, a Bulgarian company, specializes in heavy machine-building. Respondent Green Light Energy Solutions R&D Corp. (“Green Light”), a California company, specializes in “turn-key” waste processing machines.

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On or about February 6, 2012, Petitioner and Respondent executed a written contract (the “Contract”), under which TMCO was to produce and Green Light was to purchase equipment parts (the “Products”). (Pet., Dkt. No. 1-1 ¶ 8; Contract, Decl. of Tom Schoors, “Schoors Decl.”, Dkt. No. 1-4 ¶ 6, Ex. 1.) On the same date, Petitioner and Respondent also executed a document

1 entitled “Special Terms of Sale of Products No. 1” (“Special Terms No. 1”) and a document
2 entitled “Specification No. 1” (“Specification No. 1”), forming part of the Contract. (Pet. ¶ 8;
3 Schoors Decl. ¶ 6, Ex. 1.)

4 On or about November 22, 2012, Petitioner and Respondent executed an amendment to the
5 Contract (“the Amendment”), which allowed Green Light additional time to pay for the Products.
6 (Pet. ¶ 10; Amendment, Schoors Decl. ¶ 7, Ex. 2). The Contract contained an arbitration provision
7 requiring that all disputes be submitted to binding arbitration to take place in the British Chamber
8 of Commerce, London, Great Britain. (Pet. ¶ 10; Contract at 12.) The provision further provided
9 that the arbitration language required would be English, and that “[t]he material law subject to the
10 Contract is the legislation of Belgium.” Id.

11 A dispute arose between the parties pertaining to Green Light’s failure to take delivery of
12 and pay for the Products. (Pet. ¶ 11.) On November 28, 2014, Petitioner filed its Request for
13 Arbitration with the ICC Secretariat. (Pet. ¶ 12; Req. Arbitration, Schoors Decl. ¶ 13, Ex. 3.) On
14 February 25, 2015, Respondent filed an Answer to the Request for Arbitration. (Pet. ¶ 12; Answer,
15 Schoors Decl. ¶ 14, Ex. 4). On February 6, 2015, the ICC International Court of Arbitration
16 transmitted the file to Johan Lambers, the sole arbitrator of the proceedings (the “Sole
17 Arbitrator”). (Pet. ¶ 13.) On March 24, 2015, the Sole Arbitrator signed the Terms of Reference,
18 which was later signed by both parties. (Pet. ¶ 13; Schoors Decl., Ex. 5.) The Sole Arbitrator
19 followed the procedure proscribed by the ICC Rules of Arbitration, and Green Light fully
20 participated in the proceedings. (Pet. ¶ 14.)

21 On January 20, 2016, the Sole Arbitrator issued the Final Award, and resolved the dispute
22 in favor of Petitioner TMCO (“Claimant”):

23 **16. THE ARBITRATOR'S AWARD ON THE PARTIES' RELIEF**
24 For all the reasons stated hereinabove, and rejecting all other
 requests, claims and reliefs, the Arbitrator:

- 25 1. Decides that the Contract is rescinded for the remaining 12 sets of
 Products.
- 26 2. Orders Respondent to pay Claimant EUR 646,695.13 for the first
 two sets of Products, plus interest compensation for late payment at
 the interest rate due under article 5 of the Belgian Law of 2 August
 2002 on the combat against late payment in commercial

1 transactions, as from 23 December 2012 until the date of full and
2 entire payment;

3 3. Orders Respondent to pay Claimant compensation for
4 conservation costs in the amount of EUR 176,250.00;

5 4. Orders Respondent to pay Claimant compensation for the cost of
6 materials in the amount of EUR 34,466.80 plus interest at the
7 Belgian legal rate, determined by article 2 §1 of the law of 5 May
8 1865 on loan at interest as from 18 December 2012, until the date of
9 full and 15 entire payment;

10 5. Orders Respondent to pay Claimant, for its loss of profit for the
11 remaining 12 sets of Products, the total amount of EUR 864,503.76
12 plus interest at the Belgian legal rate, determined by article 2 § 1 of
13 the law of 5 May 1865 on loan at interest, as from 18 December
14 2012, until the date of full and entire payment;

15 6. Orders for Respondent to take delivery of the first two sets of
16 Products in accordance with Article 5.2 of the Contract within 15
17 days after the payments pursuant to point (2) and (3) above.

18 7. Orders that if Respondent fails to take the delivery of the first two
19 sets of Products pursuant to point (6) above, Claimant may dispose
20 of these Products at its convenience and without any possible claim
21 or recourse by Respondent;

22 8. Decides that the costs fixed by the Court are borne by
23 Respondent; consequently, Respondent shall reimburse to Claimant
24 USD 107,000 towards these costs;

25 9. Respondent shall bear its own legal and other costs and shall pay
26 Claimant EUR 76,052.54 corresponding to Claimant's legal and
27 other costs.

28 10. All other requests, claims and reliefs are dismissed.

(Pet. ¶ 15; Final Award, Schoors Decl. ¶ 16, Ex. 6 at 67.) To date, Green Light has not sought
clarification or correction of the Final Award, nor have any payments been made. (Pet. ¶¶ 18, 20.)

On February 27, 2017, Petitioner filed a petition to confirm the Final Award. (Pet., Dkt. No. 1.) On July 17, 2017, Respondent filed a brief in support of its opposition to confirm the Final Award. (Resp't's Br., Dkt. No. 26.) On August 3, 2017, Petitioner filed a reply to Respondent's brief. (Pet'r's Reply, Dkt. No. 27.) On August 14, 2017, Respondent filed a reply brief. (Resp't's Reply, Dkt. No. 28.)

26 II. LEGAL STANDARD

27 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral
28 Awards ("Convention") governs the "recognition and enforcement" of all foreign arbitral awards

1 in United States courts. 9 U.S.C. § 201. Under the Convention, a district court “shall” confirm a
2 foreign arbitration award unless the party opposing confirmation can establish one of the defenses
3 enumerated in Article V of the Convention. 9 U.S.C. § 207. “Under the Convention, a district
4 court’s role is limited—it must confirm the award unless one of the grounds for refusal specified
5 in the Convention applies to the underlying award.” *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 307 (3d Cir. 2006), as amended on reh’g (Sept. 28, 2006) (citation omitted).

6
7 Specifically, the Court may only refuse to confirm an arbitration if the party resisting
8 confirmation can prove:

9 (a) The parties to the agreement referred to in article II were, under
10 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

12 (b) The party against whom the award is invoked was not given
13 proper notice of the appointment of the arbitrator or of the
arbitration proceedings or was otherwise unable to present his case;
or

15 (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

19 (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

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

23 ...

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

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

27 *Id.* at 307–308 (quoting Convention art. V).

28 Public policy strongly favors the confirmation of international arbitration awards.

1 *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 836 (9th Cir. 2010). “Extensive judicial review
2 frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the
3 expense and delay of extended court proceedings.” *Parsons & Whittemore Overseas Co. v. Societe
4 Generale De L’Industrie Du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974) (internal citations
5 omitted). “Thus, confirmation proceedings are necessarily summary’ in nature and are ‘not
6 intended to involve complex factual determinations, other than a determination of the limited
7 statutory conditions for confirmation or grounds for refusal to confirm.’ *BU8 Sdn. Bhd. v.
8 CreAgri, Inc.*, No. C-14-4503-EMC, 2015 WL 1010090, at *3 (N.D. Cal. Mar. 6, 2015) (quoting
9 *Marker Volkl (Int'l) GmbH v. Epic Sports Int'l, Inc.*, 965 F. Supp. 2d 308, 311 (S.D. N.Y. 2013)).

The party defending against enforcement of the award bears the burden of proving one of the Convention’s enumerated defenses. *See Empresa Constructora Contex Limitada v. Iseki, Inc.*, 106 F. Supp. 2d 1020, 1024 (S.D. Cal. 2000); *see also Injazat Tech. Fund, B.S.C. v. Najafi*, No. C 11–4133 PJH, 2012 WL 1535125, at *2 (N.D. Cal. May 1, 2012). The “burden is substantial because the public policy in favor of international arbitration is strong, and the New York Convention defenses are interpreted narrowly.” *Polimaster*, 623 F.3d at 836.

III. DISCUSSION

A. Confirmation of the Arbitration Award is Appropriate

18 There is no dispute that the New York Convention governs the Court’s review of the Final
19 Award. (Pet. ¶ 4; Resp’t’s Br. at 4.) Courts asked to confirm foreign arbitration awards pursuant
20 to the Convention “shall confirm the award” unless the party opposing confirmation can establish
21 one of seven specific defenses. 9 U.S.C. § 207. Here, Respondent argues that the enforcement of
22 the award would be contrary to public policy and that the enforcement of specific performance is
23 not feasible. (Resp’t’s Br. at 4-5.)

i. Specific Performance

25 As an initial matter, the issue of whether Petitioner is able to specifically perform—
26 furnish the first two sets of Products—is not properly before the Court. That Respondent attempts
27 to characterize this as a need for additional discovery does not entitle it to the relief sought,
28 namely avoiding the confirmation of the Final Award. Moreover, the Sole Arbitrator specifically

1 required payment of the Final Award before Respondent was entitled to take delivery of the first
2 two sets of Products. (Dkt.No. 1-4 at 143.) To date, no payments have been remitted.
3 Respondent is not entitled to inspection or reasonable assurances regarding the availability of the
4 products prior to payment. *See id.*

5 Thus, whether Petitioner is able to perform in accordance with the Final Award is
6 irrelevant at this juncture, and is not a valid reason to deny confirmation.

7 **ii. Public Policy**

8 In opposition to confirmation, Respondent argues that Final Award is contrary to public
9 policy, because it requires Green Light to pay for the two sets of products and for TMCO's lost
10 profits without taking delivery of the Product, which is inherently unfair. (Resp't's Br. at 5.)
11 Petitioner argues that alleged unfairness due to the potential impossibility of specific performance
12 does not fall within the purview of the public policy exception. (Pet'r's Reply at 8.) The Court
13 agrees.

14 The public policy exception is narrowly construed. *Ministry of Def. & Support for the*
15 *Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1097 (9th
16 Cir. 2011) (citing *Parsons*, 508 F.2d at 974). The Convention's public policy defense, Article
17 V(2)(b), states:

18 Recognition and enforcement of an arbitral award may ... be refused
19 if the competent authority in the country where recognition and
20 enforcement is sought finds that ... (b) The recognition or
21 enforcement of the award would be contrary to the public policy of
22 that country.
23 N.Y. Convention, art. V(2). "It applies only when confirmation or enforcement of a foreign
24 arbitration award 'would violate the forum state's most basic notions of morality and justice.'" "
25 *Ministry of Def.*, 665 F.3d at 1097 (quoting *Parsons*, 508 F.2d at 974). The defense is so narrowly
26 construed that it is rarely successful. *Ministry of Def.*, 665 F.3d at 1097 (citation omitted). Indeed,
27 to prevail, Respondent must demonstrate a countervailing public policy sufficient to overcome the
28 strong policy favoring confirmation of the Final Award. *See Ministry of Def.*, 665 F.3d at 1098.

27 Here, Green Light argues that public policy requires that it be provided assurances that the
28 Product is available—such as an inspection—before it remits payment. (Resp't's Br. at 5;

1 Resp’t’s Reply at 2.) In opposition, Petitioner contends that specific performance is not required
2 by the Final Award. (Pet’r’s Reply at 9.) In fact, the only performance that is required is that
3 Respondent is required “to take delivery of the first two sets of Products in accordance with
4 Article 5.2 of the Contract within 15 days after the payments pursuant to point (2) and (3).”
5 (Pet’r’s Reply at 9 (citing Final Award at 67).) Indeed, as set forth above, the Final Award
6 requires Green Light to pay points (2) and (3) before taking delivery of the Product, and that
7 condition precedent has not occurred. *See discussion supra* Part III.A.i. Green Light’s claim that
8 the products do not exist is, at this juncture, purely conjecture, and an attempt to add additional
9 terms to the Final Award. Should it turn out that the products do not exist, Green Light would
10 potentially have an actionable breach of contract claim before the arbitrator. Notwithstanding, the
11 purported anticipatory breach of contract claim is too speculative to fall within the Convention’s
12 public policy exception.

13 Accordingly, the Court finds that Green Light has failed to show that the public policy
14 defense is applicable, and, thus, the undersigned confirms the Award.

15 **B. Attorneys’ fees**

16 In the Petition, TMCO asks for an award of attorneys’ fees in the amount of \$30,000. (Pet.
17 at 5.) Specifically, Petitioner seeks \$20,000 incurred in the preparation of the petition, and \$10,000
18 in anticipated fees incurred “in connection with the Opposition and Reply briefs to this Petition,
19 and the appearance at the hearing thereon.” *Id.*

20 Petitioner has not, however, demonstrated that it is entitled to have its fees borne by
21 Respondent. Petitioner has not furnished any information regarding hourly rates, the number of
22 hours billed, or who worked on the Petition and subsequent brief, such that it is impossible for the
23 Court to perform even a cursory review of the fees sought to determine reasonableness under the
24 lodestar method. *See Chalmers v. City of L.A.*, 796 F.2d 1205, 1210 (9th Cir. 1986) (“In
25 determining reasonable hours, counsel bears the burden of submitting detailed time records
26 justifying the hours claimed to have been expended”); *see also eADGEAR, Inc. v. Liu*, No. CV-11-
27 5398 JCS, 2012 WL 2367805, at *20 (N.D. Cal. June 21, 2012) (recommending the denial of
28 attorney’s fees where counsel failed to provide time sheets or affidavits in support of their request).

1 Accordingly, the Court declines to award Petitioner its attorneys' fees incurred in filing the
2 petition.

3 **IV. CONCLUSION**

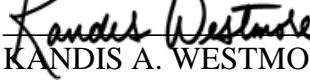
4 In light of the foregoing, the Court GRANTS TMCO's Petition to Confirm the Arbitration
5 Award. Specifically, TMCO is entitled to a total sum of EUR €1,797,968.23, and USD
6 \$107,000.00, as follows:

- 7 (1) First two sets of Products (€EUR): €646,695.13, plus interest;
- 8 (2) Conservation costs (€EUR): €176,250.00, plus interest;
- 9 (3) Compensation for cost of materials (€EUR): €34,466.80, plus interest;
- 10 (4) Loss of profit for the remaining 12 sets of Products (€ EUR): €864,503.76, plus
11 interest;
- 12 (5) Costs fixed by the ICC Court (\$USD): \$107,000.00; and
- 13 (6) Legal costs regarding arbitration proceedings (€EUR): €76,052.54.

14 Petitioner is also awarded interest, at the interest rate due under article 5 of the Belgian
15 Law of 2 August 2002 on the combat against late payment in commercial transactions, on awards
16 (1)-(4) from the date of Final Award until the date of full and entire payment.

17 IT IS SO ORDERED.

18 Dated: November 14, 2017

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20 KANDIS A. WESTMORE
21 United States Magistrate Judge
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