



1 order prohibiting Luciana from fleeing the district. The Court issued a TRO on June 16, 2017,  
2 and ordered the U.S. Marshals to take the couple's two children in coordination with Child  
3 Protective Services, where the children have been housed pending the hearing on  
4 preliminary injunction and trial on June 20, 2017. After granting a three-day continuance, the  
5 Court held the hearing on June 23, 2017. Luciana, a Brazilian attorney, represented herself  
6 with the assistance of a certified Portuguese interpreter. The Court received documents and  
7 testimony, including testimony from both Andre and Luciana, and heard argument from the  
8 parties.

### 9 **Analysis**

10 The Hague Convention on the Civil Aspects of International Child Abduction is  
11 designed to "protect children internationally from the harmful effects of their wrongful removal  
12 or retention and to establish procedures to ensure their prompt return to the State of their  
13 habitual residence." *Convention*, 19 I.L.M. 1501 (1980). The United States implemented the  
14 Convention by enacting the International Child Abduction Remedies Act. 22 U.S.C. § 9001.  
15 The Act empowers courts to order the return of wrongfully retained children. *Id.* § 9004.

#### 16 **A. Jurisdiction**

17 Luciana did not specifically challenge the Court's jurisdiction at the hearing, but she  
18 discussed a pending hearing on a temporary restraining order against Andre issued by the  
19 San Diego County Superior Court, Family Court Division. The Hague Convention, however,  
20 "preempts a state family court's jurisdiction to decide the merits of a custody dispute relating  
21 to the child until a determination is made as to whether the child must be returned pursuant  
22 to the Convention." *Jurisdiction and Litigation Choices*, Cal. Prac. Guide Family L. Ch. 7 A;  
23 *see Holder v. Holder*, 305 F.3d 854, 865 (9th Cir. 2002). And federal courts may order the  
24 return of children under the Hague Convention even when one parent has obtained a state  
25 court domestic violence injunction against the other parent. *See Mendez Lynch v. Mendez*  
26 *Lynch*, 220 F. Supp. 2d 1347, 1366 (M.D. Fla. 2002) (granting Hague petition and ordering  
27 father to take two children back to Argentina despite mother obtaining a domestic violence  
28 injunction against father in Florida state court). Therefore, this Court has jurisdiction to



1 decide the Hague petition despite Luciana's *ex parte* proceedings in state court.

2 **B. Wrongful Retention**

3 Under the Convention, Andre has the burden to show by a preponderance of the  
4 evidence that Luciana wrongfully retained the children in the United States. *Holder v. Holder*,  
5 392 F.3d 1009, 1015-16 (9th Cir. 2004). That means Andre needs to prove that Luciana  
6 breached his "rights of custody" established in the State where his children were "habitually  
7 resident immediately before the removal or retention" and that he would have "exercised" his  
8 rights "but for the removal or retention." *Convention* at 1501; *Holder*, 392 F.3d at 1014. The  
9 Court finds Andre has made that showing.

10 Andre submitted a certified translation of the couple's August 30, 2016 divorce  
11 agreement. The agreement provides for joint custody of the children and states, "Andre  
12 authorizes the stay of his children with their mother in the city of Boston/USA, from  
13 08/31/2016 to 01/13/2017. The authorization is given on an exceptional basis and does not  
14 change the children's domicile, which is still Brazilian." The agreement also provides that the  
15 stay in Boston is "non-extendable," that the children "shall be delivered" to Andre on January  
16 13, 2017, and that Andre "shall return with them to Brazil" where "they shall be delivered to  
17 the mother, for the beginning of the school year in Sao Paulo." Instead of turning the children  
18 over to Andre on January 13, 2017, Luciana fled to San Diego with the children. Applying the  
19 Hague Convention to these facts, the conclusion is straightforward: Luciana breached  
20 Andre's rights of custody as provided in the Brazilian divorce agreement.

21 At the hearing, Luciana suggested that the United States was the children's habitual  
22 residence since they have been present here since September 2016 and two state courts  
23 (Massachusetts and California) issued TROs. However, it is undisputed that "immediately  
24 before" Luciana retained the children in Boston, and then in San Diego, the children were  
25 habitually resident in Brazil. The terms of the divorce agreement make clear that "the settled  
26 intention of the parents" was for the children to return to school in Sao Paulo and retain their  
27 Brazilian domicile. *Mozes v. Mozes*, 239 F.3d 1067, 1078 (9th Cir. 2001) (reversing denial  
28 of Hague petition because district court improperly found United States was children's new

1 habitual residence). Moreover, the argument that the children have acclimated to the United  
2 States lacks merit. Luciana is temporarily permitted to be in the United States on a student  
3 visa, does not have a job, and does not have a place for the children to stay. She is  
4 dependent on financial support from Andre pursuant to the Brazilian divorce agreement.  
5 During the course of several months, Luciana moved the children from Brazil, to Boston, and  
6 then to San Diego, where the children were staying in a hotel until funds were exhausted.  
7 At the time the TRO issued, Luciana had vacated the hotel and her plans for food and  
8 shelter were uncertain. The Court “can say with confidence” that the children's attachments  
9 to the United States have not “changed to the point where requiring return to the original  
10 forum would now be tantamount to taking the child out of the family and social environment  
11 in which its life has developed.” *Id.* at 1081.

12 **C. Grave Risk of Harm Exception**

13 Children must be “promptly returned unless one of the narrow exceptions set forth in  
14 the Convention applies.” 22 U.S.C. § 9001. Here, the only colorable exception is whether a  
15 “grave risk” of harm exists if the Court orders the children returned to Brazil. *Convention* at  
16 1502. Luciana obtained a domestic violence restraining order from a state court in Boston  
17 and another one in San Diego. In the restraining order request, Luciana alleges that Andre  
18 called her on January 29, 2017, and threatened to kill her and the kids.

19 To overcome the Convention's imperative that courts return wrongfully retained  
20 children under the grave risk exception, “[t]he potential harm to the child must be severe, and  
21 the level of risk and danger required to trigger this exception has consistently been held to  
22 be very high.” *Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013) (alterations omitted). Some  
23 courts, however, have found that a threat to kill the children or a history of domestic violence  
24 qualifies as a grave risk. *See Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir.  
25 2005); *Ermini v. Vittori*, 758 F.3d 153, 164 (2d Cir. 2014).

26 To determine if a grave risk of harm exists, the Court heard testimony from Andre and  
27 Luciana, which was subject to cross examination and the Court's own questioning. Luciana  
28 testified that in twenty years of marriage, Andre never behaved violently except for a fight



1 the day they divorced—she says Andre hit her. More importantly, Luciana claimed that after  
2 she obtained a TRO in Boston, Andre threatened to kill her and the kids. Andre categorically  
3 denied both allegations. He also offered a third-party declaration from Carmen Gomide,  
4 Luciana's good Samaritan host for a few weeks in San Diego, who opined Luciana was  
5 unstable and said she feared Luciana would kill the kids.

6 After evaluating the testimony of the parties, the Court concludes Luciana has failed  
7 to show by clear and convincing evidence a “probability” that Andre will harm the children.  
8 *Souratgar*, 720 F.3d at 103 (affirming Hague petition grant because grave risk exception did  
9 not apply in the absence of credible evidence of harm against child). The testimony revealed  
10 that both parents deeply love their children and are highly protective of them. Indeed, the  
11 testimony was emotional and portrayed a bitter *custody* dispute, wherein both parties  
12 desperately want custody and leveled ugly allegations against each other in pursuit of that  
13 goal. Unfortunately, those types of allegations are all too common in custody disputes and  
14 the parties here succumbed to that temptation. But there is no credible evidence that Andre  
15 presents a grave risk of harm to the children.

16 Notably, after Andre is alleged to have threatened Luciana in Brazil, Luciana agreed  
17 to shared custody of the children. No reports of violence were ever filed. And the Brazilian  
18 divorce agreement was thereafter entered, in which joint custody was awarded. In addition,  
19 when Luciana refused to comply with the divorce agreement and called the police in Boston,  
20 Andre did not react with violence. He returned to Brazil and pursued lawful options through  
21 the courts; he filed suit in Brazil to enforce the divorce agreement, contacted the Central  
22 Authority (State Department), and retained legal counsel in the United States and filed this  
23 petition. Andre's past actions confirm that he will comply with this Court's order to safely  
24 return the children to Brazil and abide by any custody decision in the Brazilian courts, where  
25 that determination is properly made.

26 To be clear, this Court is not making a custody determination, nor does it have  
27 jurisdiction to do so. Rather, the Court is fulfilling a purely procedural task imposed by the  
28 Convention and Act, and returning the children to their “country of habitual residence so that

1 the courts of that country can determine custody." *Cuellar v. Joyce*, 596 F.3d 505, 508 (9th  
2 Cir. 2010). Whether Luciana's wrongful retention of the children affects her custody rights  
3 under the couple's divorce agreement is a matter solely for determination by the Brazilian  
4 courts. 22 U.S.C. § 9001 ("The Convention and this chapter empower courts in the United  
5 States to determine only rights under the Convention and not the merits of any underlying  
6 child custody claims.").

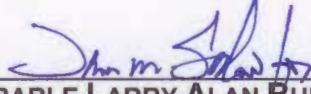
7 "The Hague Convention does not allow abducting parents to resort to courts [in  
8 another] country ... to thwart return of the child to its habitual residence[,] and district courts  
9 are cautioned "not to allow abducting parents to manipulate judicial process" to delay the  
10 return of children to their home country. *Cuellar*, 596 F.3d at 511-12. Andre's petition for  
11 return of the children to Brazil is therefore granted.

12 **Conclusion and Order**

13 Child Protective Services will transfer custody of Luiz Felipe Sciumbata Barone and  
14 Pedro Sciumbata Barone to Andre Barone, no later than 5:00 p.m. on Monday, June 26,  
15 2017. Andre's counsel shall coordinate with the Court's Courtroom Deputy, Jamie  
16 Klosterman, to obtain Pedro and Luiz Felipe's passports. Within seven days of receiving  
17 custody, Andre shall return to Brazil with Pedro and Luiz Felipe so the important matter of  
18 child custody can be determined by the Brazilian courts. Andre shall pay all reasonable travel  
19 expenses for the children and Luciana to return to Brazil. Luciana may return to Brazil at a  
20 time convenient to her and in accordance with the schedule of the Brazilian court to address  
21 the custody issues. Andre's counsel may file this order with the Superior Court of San Diego,  
22 Family Court Division, to inform that court of these proceedings.

23 **IT IS SO ORDERED.**

24 DATED: 6-26-17

25   
26 \_\_\_\_\_  
27 HONORABLE LARRY ALAN BURNS  
28 United States District Judge