APPENDIX

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1279

[Filed: August 5, 2021]

SERGE MATTHEW ALUKER,	)
	)
Petitioner - Appellant,	)
	)
v.	)
	)
SIMIN YAN, a/k/a Simin Aluker,	)
	)
Respondent - Appellee.	)
	)

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, Senior District Judge. (1:20–cv–01117–LO–IDD)

Submitted: June 25, 2021 Decided: August 5, 2021

Before MOTZ, KEENAN, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Stephen J. Cullen, Kelly A. Powers, MILES & STOCKBRIDGE P.C., Washington, D.C., for Appellant. Maya Eckstein, Richmond, Virginia, Kelly R. Oeltjenbruns, HUNTON ANDREWS KURTH LLP, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

In this appeal, we consider whether the district court erred in concluding that Serge Aluker, the father of two minor children, did not have custody rights recognized by the Hague Convention and, therefore, failed to prove that the children's mother, Simin Yan, wrongfully removed the children from Portugal to the United States. For the reasons stated below, we affirm the district court's judgment.

I.

Aluker is a United States citizen, a Russian citizen, and a legal resident of Portugal. Yon is a United States citizen who presently resides in Virginia. In 2006, Aluker and Yan were married in China, and they moved to the United States in 2008. While living in the United States, Aluker and Yan had two children. The family moved to Spain in 2015, and to Portugal in 2017.

Shortly after their move to Portugal, Aluker and Yan separated. Initially, they shared parental responsibilities. However, in November 2018, Aluker and Yan executed a Separation and Property

Settlement Agreement (PSA), which stated in relevant part:

> The parties desire to settle and determine their mutual obligations and all of their property rights, as well as the maintenance and support of each of the parties, by the other, and all rights, claims, relationships or obligations between them arising out of their marriage or otherwise.
> . . .
>
> In full and final settlement of the matters at issue between them, and in consideration of the mutual promises and covenants contained herein, and for other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:
> . . .
>
> [Yan] shall have sole legal and primary physical custody of [the two children]. [Aluker] shall be entitled liberal and reasonable visitation with the children.
> . . .
>
> The parties acknowledge that this Agreement is a full and final settlement that contains the entire understanding of the parties, and there are no representations, warranties, covenants, or undertakings other than those expressly set forth herein.
> . . .

> This Agreement shall be construed in accordance with the law of the Commonwealth of Virginia.

Aluker also agreed in the PSA that Yan would have sole ownership of their house in Falls Church, Virginia. The parties further stipulated therein that each had "the right to reside at any place . . . without the consent of the other party." The PSA was not incorporated into any court order.

Several months after the PSA was executed, Aluker initiated proceedings in May 2019 in a Portuguese court seeking an adjudication of child custody rights. The Portuguese court had not taken any action when, on October 3, 2019, Yan sent Aluker an e-mail stating that she was taking the children to the United States to live. Yan and the children traveled to the United States on the same day.

Almost a year later, in September 2020, Aluker filed a petition in the district court under the Hague Convention. In his "verified petition of return of children to Portugal," Aluker contended that the children were wrongfully removed from Portugal. On the day of a scheduled bench trial, Yan requested a judgment on partial findings under Federal Rule of Civil Procedure 52(c). The court conducted a brief evidentiary hearing, allowed Aluker to file a response memorandum, and later granted Yan's motion. The court concluded that the PSA was a valid agreement, which established that Yan had legal custody of the children at the time she removed the children from Portugal. Accordingly, the court held that Yan's status as legal custodian of the children defeated Aluker's claim of wrongful removal. Aluker appeals.

II.

In cases involving claims brought under the Hague Convention, we review a district court's findings of fact for clear error and its conclusions of law de novo. *Bader v. Kramer*, 484 F.3d 666, 669 (4th Cir. 2007). Our determination is limited to the merits of the wrongful removal claim, without consideration of any underlying custody dispute. *Miller v. Miller,* 240 F.3d 392, 398 (4th Cir. 2001).

The Hague Convention was adopted to help "secure the prompt return of children wrongfully removed to or retained in any Contracting State." Convention on Civil Aspects of International Child Abduction ("Hague Convention") art. 1, Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501. Article 3 of the Hague Convention provides:

> The removal or the retention of a child is to be considered wrongful where . . . it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention . . .
>
> The rights of custody mentioned . . . above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Hague Convention, art. 3. To establish a claim of wrongful removal under the Hague Convention, a petitioner must show that: (1) the children habitually resided in "the petitioner's country of residence at the

time of removal," (2) the removal breached "the petitioner's custody rights under the law of his home state," and (3) the petitioner was actually exercising his custody rights at the time of removal. *Bader,* 484 F.3d at 668; *see also* Hague Convention, art. 3.

Aluker argues on appeal that the children were habitual residents of Portugal at the time of their removal and that, under Portuguese law, he maintains rights of custody recognized by the Hague Convention. He also contends that the PSA lacks any "legal effect" under the Hague Convention and that, therefore, Yan cannot rely on the PSA to defeat his wrongful removal claim. We disagree with Aluker's position.

Irrespective whether the children were habitual residents of Portugal at the time of their removal, Aluker's wrongful removal claim fails because he did not establish the other two requirements for proving his claim, namely, that when the children were taken to the United States, he had custody rights under Portuguese law and he was actually exercising those rights. *See Bader,* 484 F.3d at 668; Hague Convention, art. 3. At the time the children were removed from Portugal, no court had awarded custody rights to Aluker, and the parties had not entered into any written agreement providing Aluker with such rights. When the children were removed from Portugal, Yan had sole legal custody of the children, as agreed by the parties in the PSA.

Contrary to Aluker's assertion, Portuguese choice of law rules require that we apply United States law in this case. Article 57 of the Portuguese Civil Code directs that [r]elationships between parents and

children are regulated by the common national law of the parents, and in the lack thereof, by the law of their common habitual residence; if the parents habitually reside in different countries, the law of the child's country of origin shall apply." In applying Portugal's choice of law provision to this case, the "common national law of the parents" is the United States, because both Aluker and Yan are United States citizens. Accordingly, United States law, here, the law of Virginia, applies to resolve this matter.

Aluker has failed to prove under Virginia law that he had any custody rights at the time the children were removed from Portugal. As noted above, the PSA unambiguously provided that Yan "shall have sole legal and primary physical custody" of the two children. Although Virginia courts have the power to modify any private custody agreement that parents execute, parents still may enter into such custody agreements and courts may rely on them in making custody determinations. *See Shoup v. Shoup,* 556 S.E.2d 783, 787-89 (Va. Ct. App. 2001) ("Divorcing parents may and, indeed, are encouraged under Virginia public policy, to reach agreement respecting the care and support of their minor children."), Va. Code Ann. § 20-109.1 ("Any court may affirm . . . any valid agreement between the parties . . . concerning the . . . care, custody and maintenance of their minor children."). At the time the children were removed from Portugal, no court had altered the terms of the PSA or had adjudicated the issue of the children's custody.

The terms of the Hague Convention also support the district court's conclusion that the PSA was a valid

agreement addressing custody rights. Under the Hague Convention, custody rights can be determined by "an agreement having legal effect under the law of the [state of the child's habitual residence]." Hague Convention, art. 3. An agreement having "legal effect" under the Hague Convention can include "simple private transactions between the parties concerning the custody of their children." Elisa Pérez-Vera, Explanatory Report on the 1980 HCCH Child Abduction Convention, in 3 Actes et Documents de la Quatorziéme Session – Child Abduction, at 426, 447, ¶ 70 (1980). Accordingly, we conclude that the district court did not err in holding that the PSA had "legal effect" within the meaning of the Hague Convention, and that Aluker failed to prove his claim of wrongful removal.[*]

III.

For these reasons, we affirm the district court's judgment.

AFFIRMED

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[*] We reject Aluker's assertion that he was not "fully heard" in accordance with Rule 52(c), because the court did not receive testimonial evidence from Aluker's expert witness on Portuguese law. In considering the legal issue regarding the effect of Portuguese law on the parties' custody rights, the district court received two affidavits from Aluker' s expert witness and one from Yan's expert witness on this topic. Rule 52(c) did not require an evidentiary hearing on this legal issue. Accordingly, we conclude that Aluker was "fully heard" on the dispositive issues before the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:20-cv-1117

[Filed: March 4, 2021]

SERGE ALUKER,	)
	)
Petitioner,	)
	)
v.	)
	)
SIMIN YAN,	)
	)
Respondent.	)
	)

Hon. Liam O'Grady

ORDER

Before the Court is Respondent Simin Yan's motion for judgment on partial findings (Dkt. 46). For the reasons set forth below, Yan's Rule 52(c) motion (Dkt. 46) is **GRANTED**.

I. BACKGROUND

The Court will "set forth only the facts most pertinent to [the instant motion], even though this

truncated version fails to fully capture the toxic air of acrimony that permeates the case." *Carrascosa v. McGuire,* 520 F.3d 249, 256 (3d Cir. 2008).

Petitioner and father Surge Aluker is a United States citizen and legal resident of Portugal. Dkt. 1, at 2, ¶ 7. Respondent and mother Simin Yan is a United States citizen, and currently resides in Falls Church, Virginia. *Id.* at 2, ¶ 8; *id* at 15, ¶ 90. Aluker and Yan have two children together, one of whom was born in the District of Columbia in 2009 and the other of whom was born in the Commonwealth of Virginia in 2011. *Id.* at 3, ¶ 11. Aluker and Yan are named on both children's birth certificates. *Id.* at 3, ¶ 12. Both children are United States citizens. *Id.* at 3, ¶ 13.

In September 2017, Aluker and Yan, then-married, moved with their children to Lisbon, Portugal. *Id.* at 4, ¶ 22. The family initially lived together, but Aluker and Yan thereafter separated. *Id.* at 4-5, ¶¶ 24-25. When they separated, Aluker and Yan arranged for the children to spend time with both parents. *Id.* at 5, ¶ 27.

On November 9, 2018, "while living in Portugal, the Parties ratified a Separation and Property Settlement Agreement (the 'PSA')." *Id.* at 6, ¶ 30. The PSA reads as follows:

> . . .
>
> D. The parties desire to settle and determine their mutual obligations and all of their property rights, as well as the maintenance and support of each of the parties by the other, and all rights, claims, relationships, or obligations between them arising out of their marriage or otherwise.

> E. The parties both fully understand the terms, conditions and provisions of this Agreement, and believe the terms to be fair, just, equitable, adequate, and reasonable. In full and final settlement of the matters at issue between them, and in consideration of the mutual promises and covenants contained herein, and for other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:
> . . .
>
> 3. *[Yan] shall have sole legal and primary physical custody of [both children]. [Aluker] shall be entitled liberal and reasonable visitation with the children.*

Dkt. 18-1, at 2-3 (emphasis added). The PSA also outlines spousal support payments, provides for a separation of the Parties' existing marital property, and establishes entitlements to future intangibles. *See id.* at 3-10. Finally, the PSA states:

> 16.1 . . . [N]either party shall file or initiate any complaints or charges against the other party, except any cause of action for a breach of this agreement.
>
> 17. The parties stipulate that they are entering into this Agreement freely and voluntarily and neither of them has been unduly influenced by the other or by anyone else. The parties clearly understand and assent to all of the provisions hereof and believe this Agreement to be fair, just and reasonable, after due thought and consideration to all relevant facts and circumstances regarding

> grounds for divorce, property rights, support, interests and the interests of all children involved, if any. The parties acknowledge that this Agreement is a full and final settlement that contains the entire understanding of the parties, and there are no representations, warranties, covenants, or undertakings other than those expressly set forth herein.
>
> 18. The parties agree that this Agreement in its entirety shall be submitted to the Court in which any divorce action is filed and it shall be ratified, approved and shall be incorporated, but not merged, into and made a part of the Final Decree of Divorce or Divorce Order of that action. The parties each agree not to oppose such incorporation and they agree that subsequent, this Agreement shall be enforceable as part of said decree or independently as a contract between the parties.
>
> . . .
>
> 21. Each party shall, at any time and from time to time hereafter, execute, acknowledge, and deliver to the other party any and all instruments and assurances that the other party may reasonably require for the purpose of giving full force and effect to the provisions of this Agreement.
>
> . . .
>
> 25. This Agreement shall be construed in accordance with the law of the Commonwealth of Virginia.

Id. at 10-16. The PSA "has not been incorporated, or otherwise transformed, into a court order." Dkt. 18, at 10, ¶ 32.

After signing the PSA, the Parties' "previously amicable parenting relationship broke down." Dkt. 1, at 6, ¶ 33. In May 2019, the Father initiated proceedings against the Mother "relating to the children in the Family and Juvenile Court of Lisbon, Portugal" which led to divorce proceedings. *Id.* at 7, ¶ 34; Dkt. 18, at 11, ¶ 34. The PSA was not introduced into those proceedings. Dkt. 18, at 10, ¶ 32.

On October 3, 2019, Yan sent Aluker an email informing him that she was taking the children to the United States to live. Dkt. 1, at 7, ¶ 37. Yan and the children then flew from Portugal to the United States that same day. *Id.* at 7, ¶ 40.

On September 24, 2020, close to a year later, Aluker filed a "verified petition for return of children to Portugal" in this Court pursuant to The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("Hague Convention"), codified as the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001 *et seq*. *See generally id.* This verified petition asserted one count of Wrongful Removal, *id.* at 10, and one count of Article 18 Return, *id.* at 16. It also requested certain provisional remedies. The petition stayed all concurrent child custody proceedings in the Parties' respective jurisdictions. See Hague Convention, art. 16.

After some delay, Yan filed an Answer and the Parties agreed to a scheduling order. *See* Dkts. 18, 21, 22, 23, 24. The Parties conducted discovery and submitted trial exhibits and briefings in anticipation of a bench trial set for February 1, 2021. *See* Dkts. 33, 34, 40. A settlement conference was held that day in lieu of

the expected trial, but the Parties were unable to reach a resolution, notwithstanding the herculean efforts of the Magistrate Judge, who mediated for over seven hours.

The bench trial was then rescheduled for February 3, 2021. That morning, Yan submitted a motion for judgment on partial findings pursuant to Fed. R. Civ. P. 52(c). Dkts. 46, 47. The Court then conducted a brief evidentiary hearing, and inquired about the validity of the Parties' PSA in open court. *See* Dkt. 49. The Court thereafter granted from the bench Aluker's motion to continue the trial to allow him to file an opposition to Yan's Rule 52(c) motion. *See* Dkts. 48, 54. Aluker filed a memorandum in opposition to Yan's Rule 52(c) motion on February 15, 2021, and Yan submitted a rebuttal brief four days later. The matter is now ripe for review.

II. LEGAL STANDARD

Under Rule 52(c), the Court may grant Judgment on Partial Findings if a party has been fully heard on an issue, the Court finds against the party on the issue, and a favorable ruling on the issue is necessary for a judgment in the party's favor. *See* Fed. R. Civ. P. 52(c). In considering a Rule 52(c) motion, the Court is to assess and weigh the evidence presented and render judgment if the evidence is insufficient to support the claim or defense. *See Cherrey v. Thompson Steel Co.,* 805 F. Supp. 1257, 1261 (D. Md. 1992). No inferences are made in favor of one party or the other in considering the evidence; rather, the Court "is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies." *Id* (quoting 9 C.

Wright and A. Miller, Federal Practice and Procedure § 2371 (1971)). The Court's determination must be supported by specific findings of fact and conclusions of law. *See* Fed. R. Civ. P. 52(a), (c).

III. FINDINGS OF FACT

The Court finds, as a factual matter, that the PSA between the Parties is valid. On February 3, 2021, the Court questioned Aluker's counsel to establish whether Aluker was contesting the PSA's validity (e.g., if he intended to raise any defenses to formation). Dkt. 49. Counsel indicated that Aluker was stipulating to the PSA's validity. *Id.* Aluker's subsequent filings reaffirm this position. *See, e.g.,* Dkt. 50, at 8 ("Next, the Mother argues that the Father is attacking the 'validity' of the PSA. He is not.").

Finding the PSA valid, the Court turns its attention to the legal effect of that document under the Hague Convention.

IV. CONCLUSIONS OF LAW

The Court determines that the validly enacted PSA establishes Yan's full custody rights over the children under the Hague Convention. It thereby withdraws from Aluker his custody rights, rendering Yan's removal of the children from Portugal lawful. *See* Hague Convention, arts. 3, 5. Aluker cannot make out a *prima facie* case of wrongful removal, so his petition must fail.

a. Legal Framework

The Hague Convention, to which the United States is a signatory, was drafted "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence[.]" Hague Convention, preamble. To accomplish this, the Convention establishes legal rights and procedures for the prompt return of children who have been "wrongfully removed to or retained in" a nation that is a party to the Hague Convention. *See* Hague Convention, art. 1.

To make out a *prima facie* case for return under the Convention, a petitioner must prove by a preponderance of the evidence that a child has been wrongfully removed or retained *within the meaning of the Convention. See* 22 U.S.C. § 9003(e)(1)(A) (emphasis added); Hague Convention, art. 3. Under the Convention, removal is considered "wrongful" where:

> a) it is in *breach of rights of custody attributed to a person,* an institution or any other body, either jointly or alone, *under the law of the State in which the child was habitually resident immediately before the removal or retention*; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Hague Convention, art. 3 (emphasis added). Custody rights are "rights relating to the care of the person of the child and, in particular, the right to determine the

child's place of residence." Hague Convention, art. 5(a). They may originate from multiple sources under the Convention, including by "operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of [the] State" of the child's habitual residence immediately prior to removal. Hague Convention, art. 3. Without custody rights under Article 3, a Petitioner cannot make out a case of wrongful removal or obtain the remedy of return. *Abbott v. Abboll*, 560 U.S. 1, 9 (2010); *Maxwell v. Maxwell,* 588 F.3d 245, 250 (4th Cir. 2009) (citing *Miller v. Miller,* 240 F.3d 392, 398 (4th Cir. 2001)); Hague Convention, art. 3.

b. Whether the PSA has "Legal Effect" Under Article 3

The outcome of Yan's Rule 52(c) motion turns on whether the Parties' PSA furnished Yan with complete rights of custody by virtue of its legal effect under the law of the state of the children's habitual residence immediately prior to their removal. In other words, did Aluker's assent to the PSA relinquish his right to assert wrongful removal under Article 3 of the Convention?

Aluker recognizes, after some equivocation,[1] that Virginia law governs whether the PSA has "legal effect" and furnishes Yan with full custody rights under Article 3 due to Portuguese choice of law principles.[2] *See* Dkt. 50, at 3-7. However, he contends that the PSA has no "legal effect" under Virginia law because it has no "significance or force." *Id.* at 8 (citing Black's Law Dictionary (11th ed. 2019)). He reaches this conclusion by reasoning that the PSA is not binding on Virginia courts and Article 3 defers to the "States Parties." *See*

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[1] *See* Dkt. 50, at 3 ("Whether a petitioner has rights of custody to a child is determined based upon the law of the child's habitual residence. The Father's rights of custody are therefore analyzed under Portuguese law. . . . Under Portuguese choice of law rules, Portuguese law applies the law of the parties' common nationality in determining their respective rights of custody to the children. The parties' common nationality is the United States. Applying the substantive custody law of the United States, and in particular the Commonwealth of Virginia, the Father had rights of custody to the children at the time of their removal from Portugal. Under both Portuguese domestic law and its choice of law rules, the PSA has no legal effect on the Father's rights of custody.") (citations omitted). Aluker's waffling on this issue owes, perhaps, to the Convention's explanatory report, which observes that the "the law of the State of the child's habitual residence" can "equally as well be the internal law of that State as the law which is indicated as applicable by [the State's] conflict rules." *See* 1980 Conference de La Haye de droit international prive, Enlévement d'enfants, E. Pérez-Vera, Explanatory Report (the "Pérez-Vera Report"), in 3 Actes et Documents de la Quatorziéme Session, at 447, ¶ 70 (1982); *see also Feder v. Evans-Feder,* 63 F.3d 217, 225 (3d Cir. 1995).

[2] The application of Virginia law in accordance with Portuguese choice of law principles harmonizes with the choice of law provision contained in the Parties' PSA. *Compare* Dkt. 50, at 3, *with* Dkt. 18-1, at 12, ¶ 25.

Dkt. 50, at 7-8 ("Parents alone cannot contract for custody and support of a child. Any such agreement is meaningless absent [Virginia] court approval"); *see also id*. at 7 (citing 1980 Conference de La Haye de droit international prive, Enlévement d'enfants, E. Pérez-Vera, Explanatory Report (the "Pérez-Vera Report"), in 3 Actes et Documents de la Quatorziéme Session, at 447, ¶ 70 (1982)) ("The drafters of the Convention intentionally did not define the phrase 'agreement having legal effect.' They left interpretation of the phrase to the interpretation of the States Parties to the Convention."). Thus, he insists that the Parties' PSA has no "legal effect" in Virginia under the meaning of the Hague Convention, and that he wields custody rights under the meaning of Article 3.

In pressing his position, Aluker relies on the Pérez-Vera Report. This reliance is well placed. The Pérez-Vera Report outlines the definitive history of the Hague Convention's framing, and exerts significant influence as persuasive authority in Hague Convention decisions. *See, e.g., Monasky v. Taglieri*, 140 S. Ct. 719, 726 (2020) (citing the Pérez-Vera Report) ("The Convention's explanatory report confirms what the Convention's text suggests."). This influence owes, in part, to the nature of the legal instrument it documents. *See Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694, 700 (1988) ("Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.").

The Court's careful examination of the Pérez-Vera Report reveals that the Report does not support Aluker's position that the Parties' PSA lacks any "legal effect" under the meaning of Article 3. As the Report explains:

> [Regarding] the definition of an agreement which has 'legal effect' in terms of a particular law, it seems that there must be included within it *any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities.*

The Pérez-Vera Report, at 447, ¶ 70 (emphasis added). This guidance, distilled, indicates that the PSA can have "legal effect" under Article 3 so long as it (1) is not prohibited by law, and (2) provides a basis for presenting a legal claim to the competent authorities. *Id.* Both these conditions are satisfied in the instant case.

It is true, as Aluker contends, that a PSA is subject to Court approval in Virginia. Dkt. 50, at 8; *see Ford v. Ford,* 371 U.S. 187, 193 (1962) (citing *Buchanan v. Buchanan,* 197 S.E. 426, 434 (Va. 1938)); *Verrocchio v. Verrocchio,* 429 S.E.2d 482, 484 (Va. Ct. App. 1993). But Virginia law does not prohibit the making of private custody agreements, nor does it view these agreements as having no "significance or force," such that they are considered *ultra vires. See. e.g.,* Va. Code Ann. § 20-109.1; *Bousman v. Lhommedieu,* 2013 WL 3381369, at *5 n.4 (Va. Ct. App. July 9, 2013). In fact, Virginia courts regularly credit private child custody agreements as relevant and instructive when they are submitted by Parties for incorporation into judicial

decree. *See, e.g., Trainor v. Trainor*, 1985 WL 306780, at * 1 (Va. Cir. Ct. Mar. 25, 1985) ("The [custody] agreement is not binding of [sic] this Court; and in these proceedings the parties were free to explore all circumstances relevant to what custody arrangements may be in the best interests of the child. The agreement, however, is a relevant circumstance which this Court may consider in determining both the issues of custody and visitation."). The Court has identified numerous occasions in which Virginia courts have adopted private custody agreements into judicial decrees with minimal or no alteration. *See, e.g., Anderson v. Van Landingham,* 372 S.E.2d 137, 138 (Va. 1988); *see also Varma v. Bindal,* 2017 WL 3026786, at *2-4 (Va. Ct. App. July 18, 2017).

All this subverts Aluker's position that the PSA has no "legal effect" under Article 3. The PSA is not prohibited by Virginia law, Va. Code Ann.§ 20-109.1, and it provides a basis "for presenting a legal claim to the competent authorities." *Compare* The Pérez-Vera Report, at 447, ¶ 70, *with* Dkt. 18-1, at 11 (PSA) ("The parties agree that this Agreement in its entirety shall be submitted to the Court in which any divorce action is filed and it shall be ratified, approved and shall be incorporated, but not merged, into and made a part of the Final Decree of Divorce or Divorce Order of that action."). The case law cited above also casts doubt on Aluker's textual argument that private custody agreements exert no "significance or force under law to produce certain effects." *See* Dkt. 50, at 8 (citing Black's Law Dictionary (11th ed. 2019)). The reality of Virginia courts' treatment of private custody agreements suggests just the opposite.

Resisting this outcome, Aluker cites to two non-binding federal decisions to argue that the Parties' PSA cannot furnish Yan with complete custody rights under Article 3 of the Convention. *See* Dkt. 50, at 7-8 (citing *Shalit v. Coppe,* 182 F.3d 1124, 1129-30 (9th Cir. 1999); *Currier v. Currier,* 845 F. Supp. 916, 921 (D.N.H. 1994)). The Court finds these decisions unpersuasive, insofar as they conflate the definition of "legal effect" under a treaty signatory's "internal law" with the definition of "legal effect" as contemplated by Article 3. *See Shalit,* 182 F.3d at 1131; *Currier,* 845 F. Supp. at 921.

The definition of "legal effect" under the Hague Convention is an issue of treaty interpretation that does not necessarily merge with an assessment of domestic custody law. *See Ozaltin v. Ozaltin,* 708 F.3d 355, 367 (2d Cir. 2013) (citing *Abbott,* 560 U.S. at 1); *see also id.* ("[T]he relevant provisions of the Hague Convention determine whether those rights are considered 'rights of custody' under the Convention."). So much is clear from the plain language of Article 3, which establishes distinct and equally important methods by which custody rights can arise under the Convention. *See* Hague Convention, art. 3 ("[R]ights of custody . . . may arise in particular by operation of law or by reason of an administrative decision, or by reason of an agreement having legal effect under the law of that State."). This textual design guides the Court's interpretation of the treaty. *See Medellin v. Texas,* 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text."). To disregard the PSA, a private custody agreement that has a "legal effect" according to Article

3, would render a source of custody rights under the Convention nugatory and also duplicative of another source of those same rights ("by operation of law"). *See* Hague Convention, art. 3.

The Pérez-Vera Report makes this clear in no uncertain terms. It describes the "agreement having legal effect under the law" provision in Article 3 as functionally distinct from the other sources of custody rights outlined in that section:

> In principle, the agreements in question may be simple private transactions between the parties concerning the custody of their children. The condition that they have 'legal effect' according to the law of the State of habitual residence was inserted during the Fourteenth Session in place of a requirement that it have the 'force of law,' as stated in the Preliminary Draft. The change was made in response to a desire that the conditions imposed upon the acceptance of agreements governing matters of custody which the Convention seeks to protect should be made as clear and as flexible as possible.

The Pérez-Vera Report, at 447, ¶ 70 (emphasis added). Courts have generally endorsed this interpretation. *See, e.g., Hanley v. Roy,* 485 F.3d 641, 645 (11th Cir. 2007) (citing The Pérez-Vera Report, at 446-47, ¶¶ 67, 71). The Federal Judicial Center's Guide for Judges on the Hague Convention likewise embraces this view. That treatise observes that private agreements between parents can give rise to binding rights of custody under Article 3, even if those agreements are not "reduced to a judgment or incorporated into custody

orders." Federal Judicial Center, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 44-45 (2d ed. 2015).

In sum, the Court finds that the Parties' PSA can give rise to complete custody rights as a matter of law under Article 3 of the convention, even if this private agreement has not been formally "incorporated, or otherwise transformed, into a court order." *See* Dkt. 18, at 10, ¶ 32.

c. Whether the PSA Furnishes Yan with Full Custody Rights Under Article 3

A scrupulous review of the PSA leaves little room for doubt that the Parties' agreement grants Yan complete custody rights over the children as defined by Article 3 of the Hague Convention. One of the preeminent provisions in that document makes clear that "[Yan] shall have sole legal and primary physical custody of [both children]. [Aluker] shall be entitled liberal and reasonable visitation with the children."[3] Dkt. 18-1, at 3. Aluker attempts to rationalize this provision's existence as a matter of convenience, Dkt. 33, at 5, and suggests that it was inserted as a collateral consideration to his intense focus on quickly effectuating a separation agreement to maximize his "tax benefits" in light of "U.S. tax laws [that] were changing effective January 1, 2019 that would impact the parties' financial separation." Dkt. 33, at 4-5; *see also id.* at 5 (observing that the "provision relating to

[3] Visitation rights are equivalent to access rights, which do not give rise to custody rights under the treaty. *See* 22 U.S.C. § 9002(7); Hague Convention, art. 5.

the children was added to the [PSA] as an afterthought, with little to no discussion between the parties."). However, the custody provision's conspicuous placement in the PSA casts doubt on this position.

Even assuming Aluker's justifications for the existence of the custody provision in the PSA are true, they cannot override the clear and express language of the PSA, which indicates that the Parties deliberately entered the agreement with the clear intent that it be binding and incorporated into a judicial decree in connection with the Parties' impending divorce proceedings. *See* Dkt. 18-1, at 2, 10-11. Though Aluker's relinquishment of his custody rights via the PSA may be subject to final judicial approval under Virginia law, the language in the Parties' PSA deprives Aluker from now asserting wrongful removal under Article 3 of the Hague Convention because it gives rise to Yan's complete custody rights under the *treaty's* legal regime.[4] The Parties' PSA is exactly the type of "simple private transaction[] between the parties concerning the custody of their children" that Article 3 of the Hague Convention envisions. The Pérez-Vera Report, at 447, ¶ 70. Moreover, the PSA is not

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[4] The Court also observes that the PSA, in addition to furnishing Yan with complete custody rights, is probative to the affirmative defenses Yan may raise with respect to Aluker's allegation of wrongful removal, such as non-exercise of custody rights and acquiescence. *See* Hague Convention, art. 13(a). Yan need only prove these narrow affirmative defenses by a preponderance of the evidence. *See* Federal Judicial Center, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 87 (2d. ed. 2015) (citing The Pérez-Vera Report, at 448-49,¶ 73).

prohibited by Virginia law, it provides "a basis for presenting a legal claim to the competent authorities" in Virginia, and it is not entirely devoid of "significance or force to produce certain effects" under Virginia law. *Id.* Because it furnishes Yan with complete custody rights over the children while simultaneously relinquishing Aluker's rights over the same, Aluker cannot make out a *prima facie* case for wrongful removal under Article 3 of the Hague Convention. *Maxwell v. Maxwell*, 588 F.3d 245, 250 (4th Cir. 2009) (citing *Miller v. Miller,* 240 F.3d 392, 398 (4th Cir. 2001)). His petition must fail.

V. CONCLUSION

The Court is mindful that the Hague Convention seeks to grant courts of the receiving jurisdiction the circumscribed authority to determine the merits of an abduction claim, and that the treaty is not designed as a vehicle to dispose of an underlying custody dispute. *See* Hague Convention, art. 19; 42 U.S.C. § 11601(b)(4); *Friedrich v. Friedrich,* 983 F.2d 1396, 1400 (6th Cir. 1993). At the same time, the Court is obligated to dutifully interpret the treaty's custody provisions in Article 3 to determine the rights of the respective Parties. *See Ozaltin,* 708 F.3d 367. Undertaking this solemn responsibility, the Court **GRANTS** Yan's Rule 52(c) motion for judgment on partial findings (Dkt. 46). Aluker's verified petition for return of children to Portugal (Dkt. 1) is **DISMISSED WITH PREJUDICE.** Judgment is hereby entered in favor of the Respondent Yan and against the Petitioner Aluker. This ruling is, with entry of this order, a final judgment for purposes of appeal.

It is **SO ORDERED.**

March 4, 2021
Alexandria, Virginia

/s/ Liam O'Grady
Liam O'Grady
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1279
(1:20-cv-01117-LO-IDD)

[Filed: August 31, 2021]

SERGE MATTHEW ALUKER	)
	)
Petitioner - Appellant	)
	)
v.	)
	)
SIMIN YAN, a/k/a Simin Aluker	)
	)
Respondent - Appellee	)
	)

O R D E R

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Motz, Judge Harris, and Senior Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk