IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 24-cv-21097-KMM

REPUBLIC OF PANAMA,	)
Petitioner,	)
v.	)
OMEGA ENGINEERING LLC and OSCAR RIVERA,	)
Respondents.	)

MOTION FOR JUDGMENT ON PETITION TO RECOGNIZE AND ENFORCE ICSID AWARD AND INCORPORATED MEMORANDUM OF LAW

The Republic of Panama ("Panama" or "Petitioner"), through undersigned counsel and pursuant to Fed. R. Civ. P. 12(c), moves the Court for an order granting its "Petition to Recognize and Enforce ICSID Award" (hereinafter, "Petition") and entering judgment in Panama's favor as outlined in the Petition. In support of this Motion for Judgment on the Pleadings ("Motion"), Panama states as follows.

On March 21, 2024, Panama filed its Petition, seeking enforcement of the Award it won in the ICSID case brought against it by Respondents. D.E. No. 1. On May 13, 2024, Omega Engineering LLC ("Omega") and Oscar Rivera ("Rivera," and with Omega, "Respondents") filed an "Answer, Affirmative Defenses, and Counterclaims" ("Answer") in response to the Petition. D.E. No. 17.

Respondents' Answer provides no grounds to deny enforcement of the Award. Respondents have ignored the summary nature of ICSID award enforcement proceedings and have presented "affirmative defenses" that fall far outside the limited grounds available to the Court to deny the enforcement of such an award. Judgment on Panama's Petition is now appropriate.

FACTUAL BACKGROUND

A. THE ICSID AWARD WAS ISSUED IN PANAMA'S FAVOR

As detailed in Panama's Petition and its Memorandum of Law in Support of its Petition, Respondents commenced a treaty-based investor-state arbitration against Panama, heard before an experienced arbitral tribunal[1] convened pursuant to the Convention on the Settlement of

[1] *See* Petition to Recognize and Enforce ICSID Arbitration Award (D.E. No. 1), ¶¶ 11-12; Memorandum of Law in Support of Panama's Petition to Recognize and Enforce ICSID Arbitration Award (D.E. No. 1-4), pages 2-3. The tribunal members are all extremely experienced ICSID arbitrators; as to Professor Zachary Douglas, *see* https://3vb.com/barrister/prof-zachary-

Investment Disputes Between States and Nationals of Other States ("ICSID Convention" or the "Convention").[2] In that arbitration, Respondents alleged that Panama breached its international law obligations under two treaties to which it is a party with the United States, and sought damages with respect to multiple construction projects it had undertaken for the Panamanian government.[3]

All of Respondents' claims were unanimously denied by the Tribunal. While Respondents assert that the Tribunal dismissed the claims "based on a jurisdictional finding that the claims were commercial in nature and not based on sovereign acts,"[4] that statement is wrong. The Tribunal reasoned that the question of whether Panama acted in a sovereign or commercial capacity could only be assessed by examining the merits of the claims.[5] The Tribunal then examined the four heads of claim asserted by Respondents (expropriation; breach of the fair and equitable treatment obligation; breach of full protection and security; and breach of the umbrella clause) and denied them all, concluding that Respondents failed to show that Panama's actions were taken in its

---

douglas-kc/ (last accessed June 17, 2024); as to Professor Horacio Grigera Naon, https://icsid.worldbank.org/sites/default/files/arbitrators/2021-03/CV_Grigera%20N..pdf (last accessed June 17, 2024); as to Laurence Shore, *see* https://siac.org.sg/wp-content/uploads/2022/07/Laurence-Shore_Profile_Jan2020.pdf (last accessed June 17, 2024).

[2] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. Mar. 18. 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

[3] *See* Award (D.E. No. 1-3), ¶¶ 128-164.

[4] *See* Answer (D.E. No. 17), ¶ 7 (page 11).

[5] *See* Award (D.E. No. 1-3), ¶¶ 371-376.

sovereign capacity.[6] The tribunal subsequently confirmed that these were "liability" decisions on the merits rather than jurisdictional decisions.[7]

Having denied all of Respondent's claims, the Tribunal awarded Panama US$ 4.8 million, representing a substantial portion of the fees and costs incurred by Panama in the arbitration.[8] The Respondents admit that they have not honored the Award and that they have paid Panama nothing.[9]

B. THERE HAS BEEN NO SETTLEMENT

After the Award was issued, Respondents approached Panama to discuss a settlement of Panama's fee award.[10] Respondents now allege that a settlement agreement was fully executed with Panama, pursuant to which their obligation to pay Panama the US$ 4.8 million was excused.[11] That is false; while there was discussion among counsel and drafts of an agreement exchanged, no settlement agreement was ever signed and multiple Panamanian law pre-conditions to the consummation of a settlement with the Government of Panama were never satisfied.

---

6 *See id.* (D.E. No. 1-3), ¶¶ 389, 395, 400, 403.

7 *See id.* (D.E. No. 1-3), ¶ 405 (denying Respondents' claim for economic and moral damages "[i]n view of the Tribunal's liability determinations, set out above, by which the Claimants have failed to demonstrate a breach of the" relevant treaties.)

8 *See id.* (D.E. No. 1-3), ¶ 426.

9 *See* Answer (D.E. No. 17), ¶ 21 (page 3) ("Respondents admit … that Respondents have not paid the Final Award."). The Answer utilizes an odd paragraph numbering scheme - for example, there are three different paragraphs numbered 1 – so both paragraph numbers and page cites are required.

10 *See* Answer (D.E. No. 17), ¶ 9 (page 10).

11 *See* Answer (D.E. No. 17), ¶ 7 (page 6).

Respondents evade all specificity in arguing there was a settlement with Panama: they tender no document and are evasive as to whether there is a signed agreement;[12] they do not specify the date of the supposed settlement; they do not quote from or describe the terms of the settlement; they offer no testimony; and they nowhere identify who negotiated the supposed settlement for Respondents or for Panama.[13]

---

[12] While Respondents in their Answer frequently refer to a settlement, they are careful not to describe its supposed form or to quote its terms. *See, e.g.,* Answer (D.E. No. 17), ¶¶ 8 (page 2), 17 (page 3), 1 (page 4), 4 (page 5), 13 (page 8), *et seq.* However, in one spot Respondents do allege it to be "evidenced by the formal settlement agreement executed by both parties…." *Id.* ¶ 7 (page 6) (emphasis added). Of course, it is not annexed and never quoted. Panama denies entering into, much less executing, any such agreement.

[13] Respondents also say, repeatedly, that in supposedly settling they "surrendered" their right to seek "interpretation," "revision" and "annulment" of the Award under the ICSID Convention. *See* Answer, ¶¶ 17 (page 3), 1 (page 4), 4 (page 5), 6 (page 6), 10 (page 7), *et seq.* However, they never even hint at any basis for such relief. Further, such relief would, if they had an argument, still be available. *See* ICSID Convention Art. 50 (defining "interpretation") and ICSID Arbitration Rule 69(3) ("An application for interpretation … may be filed at any time after the Award is rendered…."); ICSID Convention Art. 51 (defining "revision") and ICSID Arbitration Rule 69(4) ("An application for revision … shall be filed within 90 days after the discovery of a fact of such a nature as decisively to affect the Award, and in any event within three years after the Award … was rendered…," so not later than October 14, 2025); ICSID Convention Art. 52 (defining "annulment") and ICSID Arbitration Rule 69(5)(b) ("within 120 days after the discovery of corruption on the part of a member of the Tribunal and in any event within three years after the

Respondents' evasions are not surprising. Panamanian law is very explicit, and very demanding, as to the requirements for consummation of an effective settlement agreement with the government. As set forth in the declaration of Panamanian law expert Diego Herrera Dutary, attached hereto as **Exhibit A** ("Herrera Dutary Decl."), a settlement with the government is only effective under Panamanian law if at least the following steps have been taken:[14]

a. there must be an executed agreement;

b. that agreement must then be approved by:

- The specific ministries or agencies involved in the matter being resolved, which here included the Ministry of Health (referred to in Panama as "MINSA");
- The Ministry of Economy and Finance (referred to in Panama as the "MEF");
- The Attorney General;
- The President and Cabinet Council of Panama; and
- The Comptroller General.

c. The Resolution of the President and Cabinet Council must then be published in Panama's Official Gazette.

Award … was rendered…," so not later than October 14, 2025). While the time for Respondents to seek annulment on the basis that the Tribunal "was not properly constituted" or "manifestly exceeded its powers" may have run, Respondents have never suggested such things happened, nor could they, given the expertise of the Tribunal. *See* ICSID Convention Art. 52(1) and ICSID Arbitration Rule 69(5)(a).

[14] Herrera Dutary Decl. ¶¶ 5-11.

None of those requirements were met. In fact, outside counsel for Panama clearly informed Respondents' counsel that the draft settlement agreement would need to go through this formal approval process. On January 6, 2023, counsel for Panama sent Respondents an updated draft of the settlement agreement and, in a covering email, expressly stated:

> Please let us know by the end of the day on Monday if this is all now fine with the [Respondents], **as we'd like to start the process for getting formal approvals from within the government.**"[15]

However, no formals approvals were ever obtained, and there can be no doubt that Respondents know that no settlement was concluded.

PROCEDURAL HISTORY AND STANDARD OF REVIEW

A. THE ENFORCEMENT OF ICSID AWARDS IS GOVERNED BY THE ICSID CONVENTION AND 22 U.S.C. § 1650A

Article 53 of that Convention states that ICSID awards "shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."[16] In furtherance of this obligation, Article 54 states that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed within its territories as if it were a final judgment of a court in that State."[17]

The United States Congress enacted 22 U.S.C. § 1650a as the enabling legislation for the ICSID Convention. Pursuant to Section 1650a, ICSID awards "create a right arising under a treaty

---

15 *See* Email from H. Weisburg to R. Ampudia, attaching draft Settlement Agreement (in English and Spanish), dated January 6, 2023, attached hereto as **Exhibit B** (emphasis added).

16 ICSID Convention, Art. 53(1); 22 U.S.C. § 1650a

17 ICSID Convention, Art. 54(1).

of the United States" and "the pecuniary obligations imposed by such award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."[18] Section 1650a further makes clear that the Federal Arbitration Act does not apply and, as such, the discretionary grounds for refusing to enforce an award incorporated into that statute are not applicable.[19]

The mandatory language used in the ICSID Convention and Section 1650a, and the unavailability of the discretionary grounds for refusing to enforce an arbitration award set out in the Federal Arbitration Act, means that the Court's discretion to refuse to enforce an authentic ICSID award is extremely limited.[20] As this Court has previously held, its inquiry in an ICSID enforcement action is limited to determining whether the court has "subject-matter jurisdiction and personal jurisdiction" and "its enforcement order is consistent with the award."[21] Additionally, the Court may decline to enforce an ICSID award if the party opposing enforcement demonstrates that the award was procured through fraud.[22] Respondents' have raised none of these defenses and none are available.

---

18 22 U.S.C. § 1650a.

19 *See id.*

20 *See Oriental Republic of Uruguay v. Italba Corp.*, 606 F. Supp. 3d 1250, 1255 (S.D. Fla. 2022).

21 *Oriental Republic. of Uruguay*, 606 F. Supp. 3d at 1255 (citing *Teco Guat. Holdings, LLC v. Republic of Guatemala*, 414 F. Supp. 3d 94, 101 (D.D.C. 2019)).

22 *See Teco Guat. Holdings, LLC*, 414 F. Supp. 3d at 103.

B. PANAMA COMMENCED A SUMMARY PROCEEDING TO ENFORCE ITS AWARD, AS AUTHORIZED BY 22 U.S.C. § 1650A

Article 54(2) of the ICSID Convention states that a party "seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary General."[23] Accordingly, a party seeking to enforce an ICSID award need not commence a lawsuit; rather, enforcement proceedings are summary in nature and require only the submission of a certified copy of the award to be enforced.[24]

Panama complied with its obligations by submitting a petition to confirm and enforce the Award, accompanied by a copy of the Award. *See* D.E. No. 1. In keeping with the summary nature of the proceedings, the procedure for addressing these petitions is the same as in standard motion practice; the petitioner files an opening petition, the respondent files an opposition, and the petitioner can file a reply.[25]

Despite this established procedure, on May 13, 2024, Respondents filed in response to the Petition a document styled as an "Answer and Affirmative Defenses" to Panama's petition **and** a "Counterclaim" alleging breach of contract by Panama. The deficiencies of Respondents' answer and affirmative defenses are addressed below. Respondents' Counterclaim, which is also based on the false premise that a settlement agreement was concluded between Panama and the

---

[23] ICSID Convention, Art. 54(2).

[24] *Oriental Republic of Uruguay*, 606 F. Supp. 3d at 1253-54 (citing *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 100 (2d Cir. 2017)).

[25] *Id.* at 1259.

Respondents, is discussed in Panama's "Motion to Dismiss Counterclaim," filed simultaneously herewith. D.E. No. 26.

C. JUDGMENT ON THE PLEADINGS IS AN APPROPRIATE MECHANISM FOR ENFORCING ICSID AWARDS

Courts in this District have previously found that an "action to enforce [an] ICSID Award is plenary" and "judgment on the pleadings is an appropriate method for effectuating the goals of the [ICSID] Convention and the enabling statute."[26] Judgment on the pleadings may be granted where "a party fails to offer any pertinent defense"[27] and "'where there are not material facts in dispute and the moving party is entitled to judgment as a matter of law.'"[28] Here, the relevant facts are clearly established and nowhere disputed, and Panama's application can be fairly and fully decided in a summary manner.

As discussed below, Respondents have not raised a pertinent defense to enforcement of the ICSID award under Section 1650a and there is no reason why this matter cannot be fully and fairly resolved in a summary manner.

---

26 *Id.*

27 *See id.* at 1258.

28 *Spottswood Cos., Inc. v. Zurich Am. Ins. Co.,* No. 20-cv-10077, 2021 WL 2515255, at *3 (S.D. Fla. June 14, 2021) (Moore, J.) (quoting *Cannon v. City of W. Pam Beach,* 250 F.3d 1299, 1301 (11th Cir. 2001)).

ARGUMENT

A. PANAMA HAS MET ITS OBLIGATIONS TO OBTAIN JUDGMENT ENFORCING THE AWARD

As noted above, a party seeking recognition or enforcement of an ICSID award "shall furnish to a competent court" a "copy of the award certified by" ICSID's "Secretary General."[29] Panama satisfied this obligation in its Petition.[30] Respondents do not challenge the validity or authenticity of the Award.[31] To the contrary, Respondents acknowledge that the "Award speaks for itself" and that they have not complied with their payment obligations thereunder.[32]

B. RESPONDENTS HAVE NOT RAISED VIABLE DEFENSES THAT WOULD PREVENT ENFORCEMENT OF THE AWARD

In deciding whether an ICSID award should be enforced, the Court's inquiry is limited to determining whether it has "subject-matter jurisdiction and personal jurisdiction," that "its enforcement order is consistent with the award,"[33] and that the award was not procured through fraud.[34] None of those defenses is available here.

---

29 ICSID Convention, art. 54(2).

30 *See* Award (D.E. No. 1-3), ¶ 426.

31 *See* Answer (D.E. No. 17), ¶¶ 2-3 (page 1), 11-18 (pages 2-3), 21 (page 3).

32 *See id.* (D.E. No. 17), ¶¶ 2, 11-18, 21.

33 *Oriental Republic. of Uruguay*, 606 F. Supp. 3d at 1255 (citing *Teco Guat. Holdings, LLC v. Republic of Guatemala*, 414 F. Supp. 3d 94, 101 (D.D.C. 2019)).

34 *See Teco Guat. Holdings, LLC*, 414 F. Supp. 3d at 103.

1. The Court Has Personal Jurisdiction Over Respondents

Respondents have not challenged the Court's personal jurisdiction in this matter. To the contrary, Respondents "admit" that Mr. Rivera is a resident of Miami, Florida and the owner of Omega, a company incorporated in the Commonwealth of Puerto Rico.[35] These facts provide the Court personal jurisdiction over Respondents.

2. The Court Has Subject Matter Jurisdiction Over Panama's Petition

As Panama stated in its Petition, the Court has subject matter jurisdiction over the Petition pursuant to 28 U.S.C. § 1331, Article 54 of the ICSID Convention, and 22 U.S.C. § 1650a.[36] Respondents do not challenge the applicability of these provisions. Rather, Respondents solely "deny that this Court has subject matter jurisdiction over the present matter as there exists no live case or controversy" due to the alleged execution of a "binding settlement agreement in which the Republic of Panama agreed to forego any payment of the Final Award by the ICSID Tribunal in exchange for Respondents" agreement not to pursue certain post-award remedies that Respondents believe are available to them.[37] Based on this allegation, Respondents asserted five "affirmative defenses," each of which is premised on the existence of an executed and binding settlement agreement: mootness; release; accord and satisfaction; equitable estoppel; and waiver.[38] These defenses and Respondents' argument that the Court lacks subject matter jurisdiction fail.

First, as explained above and as addressed in Panama's Motion to Dismiss Respondents' Counterclaims filed simultaneously herewith (D.E. No. 26), no valid and enforceable settlement

---

35 *See* Answer (D.E. No. 17), ¶¶ 5-6 (pages 1-2).

36 *See* Petition (D.E. No. 1), ¶ 8.

37 Answer (D.E. No. 17), ¶ 8 (page 2).

38 *See* Answer (D.E. No. 17), ¶ 1 (page 4) through ¶ 16 (page 9).

agreement exists between Panama and Respondents. Respondents' vague and unsupported allegations that such an agreement exists is insufficient to raise a credible question of fact. As such, Respondents' claim that "no live controversy exists" is without merit. Similarly, Respondents cannot argue that "the disputes underlying" Panama's Petition were "resolved,"[39] or that Panama has "released Respondents from all liability related to any claims" arising from the Award,[40] or that the non-existent settlement agreement "constitutes an accord,"[41] or that Panama "waived" its right to enforce the Award.[42]

Respondents' equitable estoppel argument equally lacks merit.[43] According to Respondents, Panama "reached a binding and complete settlement agreement with Respondents" and Respondents "did not pursue their rights under the ICSID Convention" based on that agreement.[44] This defense is invalid as, again, it is premised upon the false assertion that an executed and appropriately approved settlement agreement exists between the parties.

The equitable estoppel defense also fails as a factual matter. Respondents argue that they did not pursue the potential post-award remedies of "interpretation, revision, or annulment of the Tribunal's Final Award" because of the execution of the settlement agreement and that the time to pursue these rights "has now expired."[45] That statement is incorrect.

---

39 *Id.* ¶ 2 (pages 2-5).

40 *Id.* ¶ 4 (page 5).

41 *Id.* ¶ 6 (page 6).

42 *Id.* ¶ 13 (page 8).

43 *Id.* ¶ 10 (page 7).

44 *Id.* ¶¶ 10-11 (page 7).

45 *Id.* ¶ 10 (page 7).

Article 50 of the ICSID Convention, which governs requests for "interpretation," provides that "if any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary General." Rule 69(3) of the ICSID Arbitration rules provides that "an application for interpretation pursuant to Article 50(1) of the Convention *may be filed at any time after the Award is rendered.*"[46]

Applications for "revision" may be made if a new fact has been discovered that would decisively "affect the award."[47] Such an application must be made within 90 days after the discovery of the new fact but may be made up three years after the award was issued. Respondents (who have never identified any such fact), therefore have until October 14, 2025 to file an application for revision.

Applications for "annulment" must be made within 120 days of the award, unless the application is based on the discovery of corruption, in which case the application may be made up to three years after the award is issued.[48] The grounds for annulment of an ICSID Award are extremely narrow. Indeed, the only grounds on which an award can be annulled are: (a) if the Tribunal was not properly constituted; (b) the Tribunal manifestly exceeded its powers; (c) there was corruption on the part of a member of the Tribunal; (d) there was a serious departure from a fundamental rule of procedure; or (e) the award failed to state the reasons on which it is based.[49] Respondents have never suggested that any of these grounds exist. As such, Respondents' claim

---

46 ICSID Arbitration Rules, Rule 69(3) (emphasis added).

47 ICSID Convention, Art. 51.

48 *Id.*, Art. 52(2).

49 *Id.*, Art. 52(1).

that they were prejudiced by not pursing a remedy that was factually and legally unavailable to them is not credible. Bald assertions of prejudice and forbearance are insufficient to implicate the doctrine of equitable estoppel.

Second, even if the agreement described by Respondents in their Answer existed, it would not deprive this Court of subject matter jurisdiction over an action to enforce the Award. According to Respondents, Panama allegedly agreed "to forego any payment of the Final Award by the ICSID Tribunal."[50] An action to recognize and enforce an arbitral award is not the same as an action to execute on a judgment recognizing that award. Indeed, recognition and enforcement of an arbitral award is a procedural step in which the enforcing court acknowledges the validity of the award and converts it into a judgment. The judgment creditor must then seek to execute on that judgment in order to obtain payment if the judgment debtor does not voluntarily pay. This distinction is recognized in the ICSID Convention itself, where Article 54(3) states that "[e]xecution of the award shall be governed by the laws concerning execution of judgment in force in the State in whose territories such execution is sought."[51] As such, under Respondents' own argument, the alleged settlement agreement would not preclude recognition and enforcement of the Award even if the draft settlement agreement had been fully executed by the parties in accordance with Panamanian law (it was not).

---

[50] Answer (D.E. No. 17), ¶ 8 (page 2).

[51] ICSID Convention, Art. 54(3).

3. The Judgment Sought From this Court is Consistent with the Award

The order and judgment Panama seeks are wholly consistent with the Award. Panama seeks the recognition of the Award, which dismissed all claims raised by Respondents in the arbitration and sets out Panama's entitlement to recover legal fees and costs.

4. The Award was Certainly not Procured Through Fraud

Respondents have never suggested that the Award was procured through fraud. Respondents fully participated in all aspects of the underlying arbitration and, at no point raised any concerns that the proceedings were improper or that the Award was the product of any type of fraudulent conduct.

CONCLUSION AND REQUEST FOR RELIEF

Panama has filed the appropriate petition to enforce a valid and authentic ICSID award. Respondents have no defense to the enforcement of that Award. Instead, Respondents have raised wholly unsupported allegations about a non-existent settlement agreement, all to delay and frustrate these proceedings. Further, Panama reserves the right to seek its attorneys' fees and costs incurred in responding to Respondents' Answer, Affirmative Defenses and Counterclaims as a sanction against Respondents for filing this frivolous pleading and pursuing wanton and vexatious litigation. Respondents have failed to raise viable defenses to enforcement of the Award and those defenses that have been raised fall far outside the scope of the Court's permissible review in an ICSID award enforcement action. As such, Respondents should be sanctioned and required to pay Panama's fees and costs in this matter, as shall be more fully briefed in a separate motion for fees after entry of judgment in Panama's favor.

Under these circumstances, Respondents request a judgment and order:

1. Granting Panama's Petition;

2. Denying Respondents' Affirmative Defenses;

3. Granting Panama's entitlement to its reasonable attorney's fees and costs incurred in relation to this enforcement action, including the instant Motion; and

4. Any other relief that the Court deems appropriate.

Dated: June 17, 2024

Respectfully submitted,

HOGAN LOVELLS US LLP
600 Brickell Avenue
Suite 2700
Miami, Florida 33131
Telephone: (305) 459-6500
Facsimile: (305) 459-6550

By: */s/ Hans H. Hertell*
Richard C. Lorenzo
Florida Bar No. 071412
richard.lorenzo@hoganlovells.com
Hans H. Hertell
Florida Bar No. 071969
hans.hertell@hoganlovells.com

ALLEN OVERY SHEARMAN STERLING US LLP

Christopher M. Ryan (*admitted pro hac vice*)
401 9th Street, NW
Washington, DC 20004
(202) 508-8000

Henry Weisburg (*admitted pro hac vice*)
599 Lexington Avenue
New York, New York 10022
(212) 848-4000

Counsel for Petitioner