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 TO DISMISS RESPONDENTS' COUNTERCLAIMS
AND INCORPORATED MEMORANDUM OF LAW

The Republic of Panama ("Panama" or "Petitioner"), through undersigned counsel and pursuant to Rule 12(b)(1) and 12(b)(6), moves the Court for an order dismissing Respondents Omega Engineering LLC ("Omega") and Oscar Rivera's ("Rivera," and with Omega, "Respondents") "Answer, Affirmative Defenses, and Counterclaim" (the "Counterclaim"). In support of this Motion to Dismiss the Counterclaim ("Motion"), Panama states as follows.

On March 21, 2024, Panama filed its "Petition to Recognize and Enforce ICSID Arbitration Award" ("Petition"). D.E. No. 1. On May 13, 2024, Respondents filed its Counterclaim (D.E. No. 17) alleging that Panama, in bringing this action, breached its obligations under a supposed settlement agreement in which Panama agreed not to enforce the Award in exchange for an agreement by Respondents to "relinquish their rights under the ICSID Convention to seek interpretation, revision or annulment of the Tribunal's Final Award, and to refrain from pursuing their substantive claims in any commercial arbitration."[1] However, **there was no such settlement agreement**, and Respondents' Counterclaim rests on an entirely false premise. Although the parties engaged in discussions regarding a potential settlement and exchanged drafts of such an agreement, no agreement was ever reached, or signed, or submitted to the Panamanian government for approval, or published in Panama's Official Gazette, as required by Panamanian law.

The Counterclaim should be dismissed on three independent grounds. First, pursuant to Rule 12(b)(1), the Court lacks subject matter jurisdiction because Panama enjoys immunity from suit under the Foreign Sovereign Immunities Act, codified at 28 U.S.C. §§ 1602 *et seq.* ("FSIA"). Second, even if the Court were to exercise jurisdiction over Panama to hear the

[1] Counterclaim (D.E. No. 17), ¶ 18 (page 11). The Counterclaim utilizes an odd paragraph numbering scheme – for example, there are three different paragraphs numbered 1 – so both paragraph numbers and page cites are required.

Counterclaim, this Court should decline to do so on the basis of *forum non conveniens* because Panamanian courts are the proper forum to hear that dispute. Third, even if the Court were to proceed to adjudicate the Counterclaim, pursuant to Rule 12(b)(6), Respondents fail to state a claim for breach of the alleged settlement because no settlement agreement was ever effectuated, as the pleadings make clear.

Respondents' Counterclaim, therefore, should be dismissed with prejudice.

FACTUAL BACKGROUND

The factual background relevant to this motion is set forth in the Petitioner's "Motion for Judgment on Petition to Recognize and Enforce ICSID Award and Incorporated Memorandum of Law," filed simultaneously herewith, D.E. No. 25 (hereinafter, "Motion for Judgment"). The Motion for Judgment addresses the deficiencies in Respondents' Answer and Affirmative Defenses, and explains that they do not prevent the Court from entering judgment in favor of Panama on its Petition, as it should do forthwith.

ARGUMENT

A. RESPONDENTS' COUNTERCLAIM SHOULD BE DISMISSED WITH PREJUDICE

1. Motion to Dismiss Standard of Review

Pursuant to Rule 12(b)(1), the Court may evaluate the sufficiency of the Counterclaim's allegations on its face and determine that Respondents have failed to make an initial showing that any of the exceptions to sovereign immunity apply. *Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213, 1221 n.9 (11th Cir. 2018) (the party arguing for jurisdiction must make an "initial showing that jurisdiction exists based on an exception"); *see also Watson v. Kingdom of Saudi Arabia*, No. 3:21CV329-MCR-ZCB, 2024 WL 1344643, at *5 (N.D. Fla. Mar. 30, 2024) ("The Plaintiff must then overcome the presumption of immunity by identifying a FSIA exception and setting out a *prima facie* case that the exception applies, both legally and factually."). If the

claimant has satisfied this initial burden, the burden shifts to the respondent to show that no FSIA exceptions to immunity apply. *See Devengoechea*, 889 F.3d at 1221 n.9. "Nevertheless, to the extent that a plaintiff's invocation of a FSIA exception rests exclusively on a legal argument (as opposed to a factual one), to establish jurisdiction under the FSIA, the plaintiff bears the ultimate burden of persuasion that the FSIA exception he or she seeks to invoke applies as a matter of law." *Id.* (citing *Bolivarian Rep. of Venezuela v. Helmerich & Payne Int'l Drilling Co*., 581 U.S. 170, 174, 187 (2017)).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. A complaint's factual allegations must be enough to raise a right to relief above a speculative level. *Id.* Detailed factual allegations are not required, but a pleading "that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Id*. (quoting *Twombly*, 550 U.S. at 555). A court need not accept legal conclusions in the complaint as true. *See Iqbal*, 556 U.S. at 678. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id*. at 679. "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.*

The purpose of a motion to dismiss is to test the facial sufficiency of a complaint. *See Hermoza v. Aroma Restaurant, LLC*, No. 11-23026-CIV, 2012 WL 273086, at *1 (S.D. Fla. Jan. 30, 2012). Therefore, a court's consideration when ruling on a motion to dismiss is limited to the complaint and any incorporated exhibits, which may include documents referenced in the

complaint as central to the plaintiff's claim. *See Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000); *Bickley v. Caremark Rx, Inc.*, 461 F.3d 1325, 1329 n.7 (11th Cir. 2006) ("[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleading for purposes of Rule 12(b)(6) dismissal[.]" (quotation omitted)).

2. 28 U.S.C. § 1607 Does Not Provide Jurisdiction over Panama

The FSIA is the sole basis for establishing jurisdiction over a foreign state.[2] Foreign states, therefore, are immune from suit in the United States unless a claimant can demonstrate that one of the exceptions to immunity enumerated in the FSIA applies.[3]

Respondents do not attempt to establish that any of the FSIA's exceptions to immunity apply in this case. Instead, Respondents argue that Panama is subject to jurisdiction pursuant to 28 U.S.C. § 1607, which states that "in any action brought by a foreign state," the foreign state "shall not be accorded immunity with respect to any counterclaim --

a. for which a foreign state would be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state, or

b. arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

c. to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state."

Respondents argue that subsection (b) applies because its counterclaims arise out of an alleged settlement between Panama and Respondents regarding the Award.[4] But that settlement

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2 *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

3 *See id.* (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 (1962)).

4 28 U.S.C. § 1607(b).

never came into effect and, as such, cannot constitute a basis for counterclaims against Panama. In any event, Respondents' argument regarding Section 1607's applicability is incorrect.

As discussed above, enforcement actions brought under Section 1650a are intended to be summary proceedings that focus solely on whether the award presented should be enforced. It is not a lawsuit initiated through the filing of a complaint that would subject the movant to the burdens of the full litigation process.[5] Similarly, it is not a mechanism by which a responding party may assert counterclaims. Indeed, allowing counterclaims against a foreign sovereign that initiates an ICSID award enforcement action would undermine the summary nature and purpose of such actions and would be inconsistent with the United States' obligations under the ICSID Convention. To the extent that a responding party has claims against the foreign state petitioner in an enforcement action under Section 1650a, those claims may be asserted only through the filing a separate proceeding in which all jurisdictional requirements must be met.

In addition, within the context of Section 1607, courts have interpreted the phrase "same transaction or occurrence" to equate to a compulsory counterclaim.[6] A "compulsory" counterclaim is one that must be brought within the same proceeding or is lost.[7] Due to the summary nature and

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[5] Respondents clearly anticipate a full litigation in this case as they have requested a jury trial and have reserved the right to assert additional defenses that may become available based on discovery. *See* Counterclaim (D.E. No. 17), ¶ 16 (page 9); page 17.

[6] *See Cabiri v. Gov't of Rep. of Ghana*, 165 F.3d 193, 197 (2d Cir. 1999) (the phrase "transaction or occurrence" corresponds to the test for compulsory counterclaims in Rule 13(a)); *Reino de Espana v. Am. Bureau of Shipping, Inc.*, 328 F. Supp. 2d 489, 492 (S.D.N.Y. 2004).

[7] *See Stone Tech. (HK) Co. v. GlobalGeeks, Inc.*, No. 20-CV-23251, 2021 WL 86776, at *4 (S.D. Fla. Jan. 11, 2021) (citing *Baker v. Gold Seal Liquors*, 417 U.S. 467, 491 n.1 (1974)).

limited scope of enforcement actions under Section 1650a, there is no risk that the failure to assert a claim against a foreign sovereign would forfeit a party's right to bring that claim in a separate proceeding, subject, of course, to that party's ability to properly obtain jurisdiction over the foreign sovereign.

3. Panama is Immune Under the Foreign Sovereign Immunities Act

Panama is immune from suit in this Court unless Respondents can demonstrate that one or more of the exceptions enumerated in Section 1605 for the FSIA applies. *See* 28 U.S.C. § 1605. They cannot do so.

The facts underlying the dispute center around the alleged settlement of claims arising out of an international investment arbitration brought by Respondents under two treaties signed by the United States and Panama. Respondents alleged in the arbitration that Panama acted in its sovereign capacity against Respondents' property in Panama and, as such, violated international law obligations set forth in those treaties. Those allegations – and Respondents' related legal claims – were denied by the Tribunal. As a result, Panama was the prevailing party in the arbitration and was awarded a significant portion of its legal fees and costs.

Respondents now allege that Panama breached a settlement agreement that they claim precludes Panama's ability to seek enforcement of the Award and excuses Respondents' obligations to pay Panama the US$ 4.8 million awarded by the tribunal.

Given these circumstances, the FSIA's exceptions to immunity for cases involving property rights taken in violation of international law, immovable property in the United States or property in the United States acquired by succession or gift, or to enforce arbitration agreements made by a state are clearly inapplicable.[8] The alleged breach of a settlement agreement does not

[8] 28 U.S.C. § 1605(a)(2)-(6).

implicate questions of expropriation necessary to trigger the exception set out in Section 1605(a)(3) of the FSIA. Similarly, it does not involve any property in the United States, let alone immovable property or property acquired by Respondents by succession or gift, as required by Section 1605(a)(4). And, Respondents are not attempting to enforce an arbitration agreement.

The FSIA's commercial activity exception also would not apply. Commercial activities are those actions in which a private actor can engage.[9] Although states and private parties alike can enter into settlement agreements, this Court has reasoned that it must examine the underlying dispute in which the settlement agreement is based in order to determine whether the state's actions were sovereign or commercial in nature and whether the commercial activity exception applies.[10] In conducting this examination, this Court has distinguished between settlement agreements entered into to resolve a commercial dispute following the breach of a prior commercial contract entered into by the state and settlement agreements intended to resolve a dispute over liability arising out of a sovereign activity, such as the use of sovereign police powers or eminent domain in the case of an alleged taking.[11] In the former, the state is generally acting like a commercial actor and the commercial activity exception is more likely to apply. Where, however, a state enters into a settlement agreement to resolve a dispute arising out of non-commercial sovereign conduct,

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[9] *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992).

[10] *See Africa Growth Corp. v. Republic of Angola*, No. 19-21995-CIV, 2020 WL 9219119, *14 (S.D. Fla. Aug. 13, 2020) ("What matters is not necessarily a settlement agreement but whether private actors can undertake the same type of alleged activity.").

[11] *See id.* at *12 ("Plaintiff is not attempting to enforce a settlement agreement to resolve the breach of a prior contract. Plaintiff only wants Angola to fulfill its obligations with respect to a single contract and to compensate Plaintiff for a wrongful taking.").

that activity is considered to be sovereign in nature and, thus, protected by sovereign immunity.[12] This distinction is, of course, proper as it preserves the divide between a state's commercial and sovereign actions.[13]

As discussed above, the parties were negotiating a draft settlement agreement to address claims that arose out of a treaty-based international investment arbitration alleging breaches of international law by Panama. Such arbitrations can only be brought against sovereigns accused of having breached international law in their sovereign capacity. As such, the entry into a settlement agreement by a foreign state to resolve claims arising out of that arbitration alleging that Panama violated international law through the wrongful use of its sovereign power is a sovereign act. Although the settlement agreement here was never finalized, executed or approved, the act of negotiating the agreement was sovereign and the entry into that agreement also would have been sovereign. Panama's actions, therefore, would fall outside the commercial activity exception and Panama would be immune from suit.

Even if Panama's conduct could be considered commercial, the FSIA's commercial activity exception still would not apply, as the FSIA only applies to commercial activity that (a) is

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[12] *Compare United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir. 1992) (finding the commercial activity exception to sovereign immunity applied where the settlement agreement with Pemex arose to resolve disputes flowing from underlying contracts relating to the fabrication of steel and other materials) *with Africa Growth Corp.*, 2020 WL 9219119, at *12 (finding that where Angola entered into a settlement agreement to compensate plaintiff for a wrongful taking, the commercial activity exception did not apply).

[13] *See Africa Growth Corp.*, 2020 WL 9219119, at *12 ("entering into a settlement agreement cannot be *per se* commercial activity because it would vastly expand jurisdiction under the FSIA").

carried out by the foreign sovereign in the United States, or (b) is "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or (c) is "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." Respondents have nowhere endeavored to establish that such circumstances exist, nor could they.

In addition, Panama has not waived its immunity from suit brought in the United States by Respondents. Waivers are construed strictly, in favor of the sovereign, and may not be enlarged beyond what the language requires.[14] As stated, the underlying arbitration was brought pursuant to two treaties between the United States and Panama, which provided Respondents the limited right to pursue claims for breach of the treaties in international arbitration. Panama brought its enforcement action pursuant to Section 1650a and, in doing so, waived its immunity from suit for the limited purpose of enforcing the Award.

In addition, Panama did not waive its immunity to suit in the United States in the draft settlement agreement that serves as the basis for Respondents' counterclaims. That draft agreement expressly provides that "any dispute between the parties hereto arising out of or relating to this Settlement Agreement shall be resolved in the courts of the Republic of Panama and each party hereto agrees to submit to the jurisdiction of such courts."[15] To the extent that Panama can be held to have waived immunity from suit in this draft agreement, it did so only for suits brought in the courts of Panama.

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[14] *See Rackehlshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983); *Library of Cong. v. Shaw*, 478 U.S. 310, 318 (1986); *Wye Oak v. Republic of Iraq*, 24 F.4th 686 (D.C. Cir. 2022).

[15] *See* Draft Settlement Agreement dated January 6, 2023, Panama's Motion for Judgment, Ex. B, ¶ 6 (D.E. No. 25-2).

Accordingly, the Court should dismiss the Counterclaim for lack of subject matter jurisdiction due to Panama's sovereign immunity under the FSIA.

4. A Panamanian Court, not the Southern District of Florida, is the Proper Forum to Hear Respondents' Counterclaim

Even if the Court were to conclude that Panama is not entitled to sovereign immunity under the FSIA (it is), the Court must nevertheless dismiss this action in favor of the forum agreed to by the parties under the terms of the alleged settlement agreement, which is the courts of Panama. As stated above, the draft settlement agreement expressly provides that disputes "arising out of or relating to" that agreement "shall be resolved in the courts of the Republic of Panama and each party hereto agrees to submit to the jurisdiction of such courts."[16]

Courts routinely interpret the phrase "arising out of or relating to" in arbitration and choice-of-forum clauses as broadly encompassing contract and tort claims.[17] Courts also routinely enforce parties' agreed forum selection clauses. The Supreme Court has made clear that parties' contractual choice of forum should be enforced except in the most unusual circumstances, and that the party resisting the forum-selection clause has the burden of establishing that public interests disfavoring transfer outweigh the parties' choice.[18] Here, there are no "unusual" circumstances

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[16] *Id.*

[17] *See e.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Triple I: Intern. Inv., Inc. v. K2 Unlimited, Inc.*, 287 F. App'x 63, 65-66 (11th Cir. 2008); *Gregory v. Electro-Mech. Corp.*, 83 F.3d 382, 384 (11th Cir. 1996); *Vickers v. Wells*, No. 1:05-CV-0930-RWS, 2006 WL 89858, at *4 (N.D. Ga. Jan. 11, 2006).

[18] *See Atl. Marine Constr. Co. v. United States Dist. Ct. for the W. Dist. of Texas*, 571 U.S. 49 (2013).

that would justify disregarding the forum selection clause in the draft settlement agreement, if the Court believes that agreement provides a basis for a claim against Panama. The parties' use of "shall be resolved" confirms both the mandatory nature of the forum-selection clause and the parties' expectation that any disputes arising under that agreement would be resolved in Panama.

5. *Forum Non Conveniens*

Under the doctrine of *forum non conveniens*, a court may decline to exercise jurisdiction when a foreign forum is better suited to adjudicate the dispute.[19] Dismissal of an action on *forum non conveniens* grounds is appropriate where: (a) an adequate alternative forum is available; (b) the public and private factors weigh in favor of dismissal; and (c) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice."[20] Those factors are satisfied here. Moreover, in the analysis of these factors, a valid forum-selection clause should be given "controlling weight in all but the most exceptional circumstances" *Stewart Org., Inc. v. Ricoh Corp*., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring). "Only under extraordinary circumstances unrelated to the convenience of the parties should a court decline to enforce a forum-selection clause." *Stiles v. Bankers Healthcare Grp., Inc*., 637 F. App'x 556, 562 (11th Cir. 2016).

First, the Panamanian courts are an adequate and available forum. As explained above, the draft settlement agreement contains a forum selection provision stating that any disputes relating to that agreement shall be resolved in the courts of Panama. Under the terms of the draft settlement agreement, Panama is amenable to process in Panamanian courts, whereas it enjoys immunity from the Counterclaim in this Court, as explained previously. *See Del Istmo Assur. Corp. v. Platon*, No. 11-61599-CIV, 2011 WL 5508641, at *2 (S.D. Fla. Nov. 9, 2011)

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[19] *See Kolawole v. Sellers*, 863 F.3d 1361, 1369 (11th Cir. 2017).

[20] *Fresh Results, LLC v. ASF Holland, B.V.*, 921 F.3d 1043, 1048 (11th Cir. 2019).

("Generally, an alternative forum is available when the defendant is amenable to process in the other jurisdiction."). According to the declaration of Panamanian law expert, Diego Herrera Dutary accompanying Panama's Motion for Judgment, "Panama is a civil law jurisdiction with an impartial court system and the civil code of Panama recognizes all of the causes of action alleged in the Respondent's counterclaim." *See* Motion for Judgment, Ex. A, ¶ 4 (D.E. No. 25-1) ("Herrera Dutary Decl."). The Counterclaim assert no claims for which Panamanian courts would provide an inadequate remedy. *See Del Istmo Assur. Corp.*, 2011 WL 5508641, at *2 ("A remedy is inadequate when it amounts to 'no remedy at all.' The Eleventh Circuit has elaborated that it is 'only in rare circumstances where the remedy offered by the other forum is clearly unsatisfactory' that an alternative forum will be considered inadequate.") (internal quotation marks and citations omitted).

Second, the balance of the private and public factors weighs in favor of allowing the Panamanian courts to resolve Respondents' Counterclaim. With regard to the private factors, when faced with a mandatory venue provision such as the one in the draft settlement agreement, Courts in this District must weigh the private-interest factors entirely in favor of the preselected forum. *See, e.g.*, *Gordon v. Sandals Resorts Int'l, Ltd*., 418 F. Supp. 3d 1132, 1138 (S.D. Fla. 2019) ("private factors . . . weigh in favor of dismissal" because "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient . . . for themselves."). Accordingly, if according to Respondents, the draft settlement agreement is enforceable, the private interest factors would default to Panama.

If, as Panama contends, there is no enforceable settlement agreement with a mandatory forum-selection clause, then the private interest factors would *still* weigh in Panama's favor. Respondents allege that promises were made by representatives of the Panamanian government.

The witnesses and evidence regarding their conduct, therefore, are located solely in Panama. These witnesses would be within the jurisdiction of the Panamanian courts. By contrast, these witnesses are outside the scope of this Court's compulsory jurisdiction and the cost and burden to the Panamanian government of having witnesses attend hearings the United States versus Panama would be substantial. *See Del Istmo Assur. Corp.*, 2011 WL 5508641, at *2 (private interest factors weigh in favor of dismissal where the "witnesses crucial to this case are located in Panama," and were "outside the subpoena power of this Court," but "within the subpoena power of Panamanian courts and costly travel arrangements would be unnecessary.").

The public interest factors include: the court's administrative difficulties, the local interest in having localized controversies decided at home, the interest in having the trial in a forum governing the action that is at home with the law, the conflicts that may arise with the application of foreign law, and the unfairness of burdening citizens in an unrelated forum with jury duty. *Gonzalez v. Celebrity Cruise Lines Inc.*, No. 22-CV-24247, 2023 WL 4846604, at *8 (S.D. Fla. July 28, 2023). Each of these public interest factors weigh in favor of Panamanian courts: (a) this Court has one of the busiest dockets in the country, weighing in favor of dismissal; (b) Florida's interest in adjudicating this controversy is minimal, as the only connection to Florida is the residence of one of the two Respondents, who was not the contracting party in the underlying dispute, whereas Panama's interest in adjudicating a dispute that arose from contracts between Panama and Respondents for projects in Panama governed under Panamanian law is substantial; and (c) Panamanian courts are "at home with the governing law" under the draft settlement agreement, which avoids a potential conflict with this Court adjudicating the Respondents' breach

of contract counterclaim to the extent it relies upon Florida law.[21] *See id.*; *see also McCoy v. Sandals Resorts Int'l, Ltd.*, No. 19-CV-22462, 2019 WL 6130444, at *15 (S.D. Fla. Nov. 19, 2019).

Finally, as described above, Panamanian courts have a substantially greater interest than this Court in adjudicating claims regarding the conduct of the Panamanian government. Those courts also would have greater familiarity with Panamanian law, which governs the contract and would apply directly to whether the draft settlement agreement was formally approved. Allowing the Panamanian courts to hear Respondents' Counterclaim, therefore, would avoid unnecessary problems regarding conflicts of laws and the application of foreign law.

For these reasons, the Court should dismiss Respondents' Counterclaim on the grounds of *forum non conveniens*.

B. RESPONDENTS' COUNTERCLAIM IS PREMISED ON A NON-EXISTENT SETTLEMENT AGREEMENT

If the Court were to conclude that it has subject matter jurisdiction over this dispute (it does not under the FSIA) and that it is the proper forum to adjudicate the Counterclaim (it is not on the grounds of *forum non conveniens*), the Counterclaim must still be dismissed for failure to state a claim for breach of the settlement agreement. As discussed above, Respondents allege that they entered into a settlement agreement with Panama.[22] That is false. Each of Respondents' defenses and counterclaims are premised on a draft settlement agreement that was never executed, never approved by the Panamanian government and never entered into force.

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[21] Count II of the Counterclaim does not set forth any choice of law for its breach of contract claim.

[22] Answer (D.E. No. 17), *e.g.*, ¶ 8 (page 2).

As set out in the declaration of Mr. Herrera Dutary on Panamanian law accompanying Panama's Motion for Judgment, an enforceable settlement with the Government of Panama requires formal approval by numerous government offices – any one of which has the authority to reject the agreement. Indeed, Article 200 of Panama's Constitution provides that, as a condition of settling any arbitration or litigation in which the state is a party, the President and the Cabinet Council of Panama must request that the Attorney General provide a legal opinion as to such settlement.[23] If the Attorney General recommends settlement, the President and Cabinet Council still must vote and authorize the settlement.[24] This authorization must be issued in the form of a Cabinet resolution or decree and published in the Official Gazette of Panama to be effective.[25] In addition, the Comptroller General of Panama, who is tasked with overseeing the state's treasury, must countersign any settlement agreement in which Panama would relinquish its right to recover money.[26] If any of these steps is not completed, the proposed settlement agreement is ineffective.[27]

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:

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23 Herrera Dutary Decl. ¶ 9.

24 *Id.*

25 *Id.* ¶ 11.

26 *Id.* ¶ 10.

27 *Id.* ¶ 12.

> 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.**"[28]

However, no formals approvals were ever obtained, and there can be no doubt that Respondents know that there is no settlement agreement in effect.

Respondents attempt to avoid this fatal defect with vague, and wild, speculation. They allege that an unidentified "legal advisor" for the Ministry of Finance and Economy of Panama in some unspecified manner "informed" Respondents that the agreement had been fully approved by the Ministry, "leaving only the administrative and routine task of finalizing the agreement's text."[29] Respondents then allege – again without detail as to time, place and individuals involved, and extremely implausibly – that the "Ministry's legal advisor and Counter-Plaintiffs fully understood and agreed that these administrative and routine tasks were not conditions precedent to the finality or binding nature of the settlement agreement."[30] These vague allegations are clearly and unsurprisingly at odds with the law of Panama.[31]

The facts are clear that the draft agreement was never signed by any of the parties and was never submitted to the formal approval process required by Panamanian law. The settlement agreement, therefore, never came into force and is without effect. Accordingly, Respondents' Counterclaim fails to state a plausible claim for breach of contract.

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[28] *See* Email from H. Weisburg to R. Ampudia dated January 6, 2023, Motion for Judgment, Ex. B (D.E. No. 25-2) (emphasis added).

[29] Answer (D.E. No. 17), ¶ 14 (page 12).

[30] *Id.*

[31] *See generally* Herrera Dutary Decl.

C. RESPONDENTS' COUNTERCLAIM FOR PROMISSORY ESTOPPEL FAILS

In recognition of this fatal defect in their Count 1 (Breach of Contract) claim, Count 2 of Respondents' Counterclaim is premised on promissory estoppel. According to Respondents, Panama "made explicit and implicit promises and commitments" that it would "not enforce the Final Award" and that the terms of the parties' unsigned settlement agreement either "had been granted, or would be granted, final approval by" the Ministry of Finance and Economy.[32] That claim is also without merit.

"Under Florida law, the elements of promissory estoppel are: (1) a representation as to a material fact that is contrary to a later-asserted position; (2) a reasonable reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon." *Chiron Recovery Ctr., LLC v. United Healthcare Servs., Inc.*, No. 9:18-CV-81761, 2020 WL 3547047, at *8 (S.D. Fla. June 30, 2020) (quoting *FCCI Ins. Co. v. Cayce's Excavation, Inc.*, 901 So. 2d 248, 251 (Fla. 2nd DCA 2005)) (internal quotation marks omitted). "The promise must be definite and the reliance upon it reasonable." *Id.* (quoting *Peacock Med. Lab, LLC v. Unitedhealth Grp., Inc.*, No. 14-81271, 2015 WL 5118122, at *5 (S.D. Fla. Sept. 1, 2015)) (internal quotation marks omitted); *see also GVB MD v. Aetna Health Inc.*, No. 19-22357-CIV, 2019 WL 6130825, at *9 (S.D. Fla. Nov. 19, 2019) ("Ultimately, the promise must be 'definite' and of a 'substantial nature,' the evidence 'clear and convincing,' and the reliance 'reasonable') (internal citations omitted).

As noted above, Respondents provide no details regarding the alleged promises that they claim were made by Panama. Instead, they simply refer to unnamed representatives for "the Ministry" and make unsupported assertions regarding what that person allegedly said.

[32] Counterclaim, ¶ 30 (page 16).

Respondents' statements stand in stark contrast to the clarity of Panama's outside counsel, Henry Weisburg's email to Respondents' then-outside counsel Ricardo Ampudia, which expressly stated that the parties needed to conclude the draft agreement so that "the process for getting formal approvals from within the government" could "start."[33] In the absence of any specific or definitive promise, Respondents' promissory estoppel claim must be dismissed with prejudice. *See e.g.*, *Chiron Recovery Ctr.*, 2020 WL 3547047, at *8 (dismissing promissory estoppel claims with prejudice where the claimant "failed to allege any specific, definite promise" made by the respondent).

Respondents' estoppel claim is also belied by the clear process set out in Panama's Constitution and laws applicable to settlement agreements with the government.[34] Respondents operated in Panama for years and, during that time, were represented by capable international counsel. Respondents were likewise represented by counsel in their discussions with Panama regarding a possible settlement of Panama's claims. Respondents therefore knew or should have known about the legal requirements necessary for the Panamanian government to enter into a settlement agreement. At a minimum, Mr. Weisburg's email would have placed Respondents on notice that any statements that may have been made during the negotiation process were subject to a "process for getting formal approvals." In the face of that knowledge, Respondents cannot credibly suggest that they relied to their detriment on alleged assurances vaguely provided by an unnamed person as the basis for waiver of a US$ 4.8 million award.

Accordingly, Respondents' Counterclaim simply fails to state a plausible claim for promissory estoppel under the *Iqbal/Twombly* standard of review pursuant to Rule 12(b)(6).

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33 *See* Email from H. Weisburg to R. Ampudia dated January 6, 2023, *supra* note 28.

34 *See generally* Herrera Dutary Decl.

CONCLUSION AND REQUEST FOR RELIEF

Panama filed a proper petition to enforce a valid and authentic ICSID award, as provided by 22 U.S.C. § 1650a. Respondents have attempted to transform that summary proceeding into a lawsuit by improperly filing the Counterclaim against Panama, based on the false premise that a settlement agreement exists between the parties. Respondents know that agreement was never executed and never approved by the Panamanian government. As such, Respondents' Counterclaim should be dismissed with prejudice.

Further, Panama reserves the right to seek its attorneys' fees and costs incurred in moving to dismiss the Counterclaim as a sanction against Respondents for filing this frivolous pleading and pursuing wanton and vexatious litigation. Panama clearly enjoys sovereign immunity from Respondents' Counterclaim, which belongs in Panamanian courts according to Respondents' own theory of liability, and the claims are not remotely plausibly pled under applicable Panamanian law. The tactic of filing a Counterclaim in response to a summary proceeding is dilatory and falls 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. Dismissing Respondents' entire Counterclaim with prejudice;
2. Granting Panama's entitlement to its reasonable attorney's fees and costs incurred in relation to this enforcement action, including the instant Motion; and
3. Awarding Panama any other relief that the Court deems appropriate.

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Respectfully submitted,

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