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.	)

PETITIONER'S MOTION TO STAY DISCOVERY PENDING RESOLUTION OF 1) PETITIONER'S MOTION FOR JUDGMENT ON PETITION TO RECOGNIZE AND ENFORCE ICSID AWARD AND 2) MOTION TO DISMISS RESPONDENTS' COUNTERCLAIMS

INTRODUCTION

Petitioner, the Republic of Panama ("Panama"), respectfully moves for an Order staying discovery pending the Court's rulings on Panama's Motion for Judgment on Petition to Recognize and Enforce ICSID Award ("Motion for Judgment") and Motion to Dismiss Respondents' Counterclaim ("Motion to Dismiss").

This proceeding should be relatively straightforward. Panama filed a petition to recognize and enforce an ICSID Award issued in its favor.[1] Such proceedings are designed to be summary in nature, with courts possessing limited review power and limited authority to deny enforcement. Nevertheless, Respondents have attempted to expand the scope of the proceeding by asserting various affirmative defenses suggesting that their liability to Panama under the ICSID Award was relieved by an alleged settlement agreement between the parties. Respondents also asserted counterclaims alleging that Panama breached that alleged settlement agreement.[2] Panama showed in its Motion for Judgment that Respondents' affirmative defenses fall outside the proper scope of review for an enforcement action and, in any event, fail as a matter of fact and law because the settlement agreement on which they are premised does not exist. Panama also showed in its Motion to Dismiss that it is immune from Respondents' counterclaims and, even if it were not immune, Respondents' counterclaims are predicated on a draft settlement agreement that was never signed or approved under Panamanian law (and, thus, never became binding) and contains a choice of forum provision that requires all disputes relating to that agreement be resolved in the courts of Panama.

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1 *See* Petition to Recognize and Enforce ICSID Arbitration Award (D.E. No. 1) ("Petition").

2 *See* Answer and Counterclaim (D.E. No. 17), ¶¶ 23-34 (pages 14-17).

After Panama filed this enforcement action, Respondents initiated a commercial arbitration against Panama's Ministry of Health seeking damages arising from work allegedly performed and fees allegedly owed under three contracts between Respondents and the Ministry. That arbitration is ongoing and will determine whether the Ministry of Health owes any money to Respondents and, if so, how much. In addition, Respondents are engaged in ongoing discussions with the Ministry of Health regarding amounts potentially owed under those contracts. Whether those discussions are part of a statutory process used when public works contracts are terminated or are part of settlement discussions relating to the ICC arbitration is irrelevant to the fact that the discussions themselves confirms that the alleged debt owed to Respondents in unsettled. Moreover, they represent another forum in which Respondents are attempting to resolve their claim that they are owed money for work performed under the Ministry of Health contracts.

On July 25, 2024, Respondents served their First Request for Production of Documents on Panama.[3] Respondents made thirteen (13) separate requests for documents that go far beyond the question of whether Panama breached the alleged agreement underlying Respondents' counterclaims.

The Court should stay discovery pending resolution of Panama's Motion for Judgment and Motion to Dismiss for four primary reasons. *First,* Panama has moved to dismiss Respondents' counterclaim on sovereign immunity grounds. As the Eleventh Circuit made clear, a defense of immunity protects a sovereign "not only from having to stand trial, but also from having to bear the burdens attendant to litigation, including pretrial discovery."[4] Staying discovery while the

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[3] Respondents' First Request for Production of Documents, dated 25 July 2024, attached hereto as **Exhibit 1** ("Request for Production").

[4] *Blinco v. Green Tree Servicing, LLC* 366 F.3d 1249, 1252 (11th Cir. 2004).

court considers Panama's Motion to Dismiss, therefore, is appropriate.[5]

Second, Panama moved to dismiss Respondents' counterclaims on the ground that it fails to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). As Panama showed in its Motion to Dismiss, the settlement agreement underlying Respondents' counterclaims was never signed or approved as a matter of Panamanian law.[6] As such, it conferred no rights on Respondents and imposed no burdens on Panama. In the absence of a valid and enforceable agreement, Respondents have failed to state a valid claim. Courts routinely stay discovery when considering a potentially dispositive Rule 12(b)(6) motion.

Third, Panama moved to dismiss Respondents' counterclaims on the grounds that the agreement that Respondents allege Panama breached contains a choice of forum clause that requires disputes to be resolved in Panamanian courts.[7] Thus, even if the court were to find that Panama is not immune from Respondents' counterclaims, the counterclaims should be dismissed in favor of the forum selected by Respondents. Respondents cannot seek to enforce the benefit of the alleged settlement agreement while avoiding the obligation to resolve disputes in the forum set out in that document.

Fourth, Panama showed in its Motion for Judgment why the affirmative defenses asserted by Respondents either fall outside the scope of review permitted in ICSID enforcement actions or

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5 *See, e.g., Point Conversions, LLC v. Lopane,* No. 20-CIV-61549-RAR, 2020 WL 6700236, at *2 (S.D. Fla. Oct. 29, 2020) (granting motion to stay discovery to address defendants' immunity arguments); *Fla. Keys Com. Fishermens Ass'n, LLC v. Fish & Wildlife Conservation Comm'n,* No. 21-10009-CIV, 2021 WL 12144472, at *1-2 (S.D. Fla. May 26, 2021) (same).

6 Motion to Dismiss (D.E. No. 26), pp. 14-16 .

7 *Id.* at pp. 10-11.

fail on the merits.[8] Resolution of Panama's motion will either dismiss the enforcement issue or, at a minimum, narrow the scope of the dispute by curtailing certain defenses that have been asserted.

The Eleventh Circuit has "expressed its concern regarding the burdens and costs of conducting discovery before potentially dispositive motions are resolved."[9] Those concerns are apt here. Given the strength of Panama's Motion for Judgment and Motion to Dismiss, it would conserve judicial and party resources to stay discovery pending their resolution.

BACKGROUND

On March 21, 2024, Panama filed its Petition (D.E. No. 1). On May 13, 2024, Respondents filed their Answer, Affirmative Defenses, and Counterclaim ("Answer and Counterclaim") (D.E. No. 17) alleging that Panama, in bringing this action, breached an alleged settlement agreement in which Panama agreed not to enforce the ICSID Award in exchange for Respondents' agreement 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."[10]

On June 17, 2024, in response to Respondents' Answer and Counterclaim, Panama filed: (a) a Motion for Judgment on the Pleadings seeking a judgment enforcing the ICSID award issued

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8 Motion for Judgment (D.E. No. 25), pp. 10-15. .

9 *See, e.g., Dry Tech 24/7, Inc. v. Clorox Co.*, No. 22-61291-CIV, 2022 WL 20834472, at *1 (S.D. Fla. Dec. 2, 2022) (Singhal, J.) (citing *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1309 (11th Cir. 2020); *Chudasama v. Mazda Motor Corp.*, 123 F.2d 1353, 1367 (11th Cir. 1997)).

10 Answer and Counterclaim (D.E. No. 17) ¶ 18 (page 13).

in its favor; and (b) a Motion to Dismiss Respondents' Counterclaims pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Respondents' defense to enforcement of the ICSID Award is predicated on the argument that the Court lacks "subject matter jurisdiction over the present matter" because "there exists no live case or controversy" due to the alleged execution of a "binding settlement agreement."[11] Based on the existence of this alleged settlement agreement, Respondents asserted defenses of "mootness," "release," "accord and satisfaction," "equitable estoppel," and "waiver."[12]

Respondents also asserted a counterclaim alleging that Panama breached the purported settlement agreement and seeking damages supposedly arising from that breach.[13] As with its affirmative defenses, the validity of Respondents' counterclaim is predicated on the existence of an executed and legally valid settlement agreement between the parties. Panama showed in its Motion for Judgment and Motion to Dismiss, however, that the alleged settlement agreement was never executed and was never formally approved as a matter of Panamanian law.[14] Panama also showed that Respondents failed to establish jurisdiction over it under the Foreign Sovereign Immunities Act and why, even if jurisdiction could be established, the case should be dismissed on *forum non conveniens* grounds or because the alleged agreement contains a choice of forum clause that commits the resolution of any and all disputes relating to the agreement (including,

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11 *Id.* ¶ 8 (page 2).

12 *Id.*, pp. 4-8.

13 *Id.*, pp. 9-17.

14 Motion for Judgment (D.E. No. 25), pp. 3-6; Motion to Dismiss (D.E. No. 26), pp. 14-16.

therefore, disputes regarding its existence and validity) to the courts of Panama.[15]

In response to Panama's Motion to Dismiss and Motion for Judgment, Respondents filed a Motion for Leave to File First Amended Answer, Affirmative Defenses and Counterclaims (D.E. No. 27) ("Motion to Amend") seeking permission to add three additional defenses (set off, unclean hands, and violation of public policy) and two alleged new grounds for jurisdiction.

On July 26, 2024, Panama filed an its Opposition to Respondents' Motion for Leave to File First Amended Answers, Affirmative Defenses, and Counterclaim (D.E. No. 41) ("Opposition to Motion to Amend"). Panama showed that the proposed new defenses and purported grounds for jurisdiction are insufficient to defeat Panama's Petition, Motion for Judgment, and Motion to Dismiss. On August 9, Respondents filed their Reply Brief in Support of Motion for Leave to Amend Pleading. Nothing in that submission justifies allowing discovery to move forward pending resolution of Panama's Motion to Dismiss and Motion for Judgment.

On July 25, despite the pendency of motions that could dispose of the case, Respondents served Panama with their Request for Production. Those requests are overly broad and seek irrelevant discovery, including documents relevant to the ongoing ICC arbitration and related to the proposed new affirmative defenses sought to be introduced via amendments to their pleadings – defenses, therefore, that are nonexistent in the operative Petition and Respondent's affirmative defenses and counterclaim.

LEGAL STANDARD

Matters "pertaining to discovery are committed to the sound discretion of the district

[15] Motion to Dismiss (D.E. No. 26), pp. 6-14.

court."[16] As such, the Court has "broad discretion to stay proceedings as an incident to its power to control its own docket[,]" including discovery.[17]

A plaintiff does not have a right to discovery simply by virtue of having filed a complaint. Indeed, as the Supreme Court has stated, filing a complaint – or in this case, a counterclaim – does not "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[18] Rather, as the Eleventh Circuit has consistently found, trial courts have the responsibility to "manage pretrial discovery properly in order to avoid a massive waste of judicial and private resources."[19] "Granting a discovery stay until an impending motion to dismiss is resolved is," therefore, is "a proper exercise" of the Court's responsibility.[20]

ARGUMENT

A. DISCOVERY SHOULD BE STAYED PENDING RESOLUTION OF PANAMA'S MOTION TO DISMISS

1. Panama Has Raised Legitimate Claims of Immunity and Other Jurisdictional Challenges

Supreme Court and Eleventh Circuit precedent instruct that immunity defenses should be resolved at the earliest stages of litigation so that defendants subject to such immunity are not

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16 *See Patterson v. United States Postal Serv.*, 901 F.2d 927, 929 (11th Cir. 1990). *See also Johnson v. Bd. of Regents*, 263 F.3d 1234, 1269 (11th Cir. 2011) ("[W]e accord district courts broad discretion over the management of pre-trial activities, including discovery and scheduling.").

17 *Clinton v. Jones*, 520 U.S. 681, 706 (1997).

18 *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

19 *Rivas v. The Bank of New York Mellon*, 676 F. App'x 926, 932 (11th Cir. 2017).

20 *Id.*; *see also, Clinton v. Jones*, 520 U.S. 681, 706 (1997).

unnecessarily burdened with litigation requirements, including discovery.[21] Panama has moved to dismiss Respondents' counterclaim, in part, on grounds of sovereign immunity. If that motion is granted, nothing will remain of Respondents' affirmative case against Panama. Panama's immunity defense, therefore, should be resolved prior to subjecting Panama to the potentially unnecessary burden of responding to Respondents requests for discovery.

Courts have routinely found good cause to stay discovery where the resolution of pending motions could be dispositive.[22] This is particularly true where defenses of immunity or other "legitimate jurisdictional challenges" have been made, since, as this Court found, "discovery

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[21] *See Oueiss v. al Saud*, No. 20-CV-25022-KMM, 2021 WL 11606313, at *2 (Apr. 5 2021, S.D. Fla) (citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Howe v. City of Enter.*, 861 F.3d 1300, 1302 (11th Cir. 2017). *See also Guerra v. Linebarger Goggan Blair & Sampson, LLP*, No. 17-CV-20114-KMM, 2017 WL 2171832, at *1 (S.D. Fla May 16, 2017) (granting motion to stay discovery pending resolution of motion to dismiss on sovereign immunity grounds); *Wildhaber v. EFV*, 17-CV-62542, 2018 WL 11656373, at *2 (S.D. Fla. Mar. 6, 2018) (same); *Point Conversions, LLC*, 2020 WL 6700236, at *2 (same).

[22] *See, e.g., Rivas*, 676 F. App'x at 932 (affirming district court's discovery stay in anticipation of motion to dismiss); *Isaiah*, 960 F.3d at 1308-09 (same); *Skuraskis v. NationsBenefits Holdings, LLC*, No. 23-CV-60830-RAR, 2023 WL 8698324, at *1 (S.D. Fla. Dec. 15, 2023) (granting discovery stay pending resolution of motion to dismiss); *Solar Star Sys., LLC v. Bellsouth Telecomm., Inc.*, No. 10-21105-CIV, 2011 WL 1226119, at *1 (S.D. Fla. Mar. 30, 2011) (same)*; Dry Tech 24/7, Inc.* 2022 WL 20834472, at *1 (same); *Heikka v. Safeco Ins. Co. of Ill.*, No. 21-61885-CIV, 2021 WL 10256974, at *1 (S.D. Fla. Nov. 1, 2021) (same).

should not commence until such challenges are resolved."[23] Indeed, this Court has held that, "until immunity is resolved, discovery shall not be allowed because inquiries of this kind can be peculiarly disruptive of effective government."[24] Similarly, a stay of discovery is appropriate because dismissal of a "nonmeritorious claim before discovery has begun" will allow litigants and the court system" to avoid "unnecessary costs."[25]

To determine whether it is appropriate to stay discovery pending resolution of potentially dispositive motions, courts take a "preliminary peak" at the motions to assess whether they appear "to be clearly meritorious and truly case dispositive."[26] That is the case here.

Under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 et seq. ("FSIA"), Panama is immune from suit unless Respondents can show that Panama waived its immunity or one of the exceptions enumerated in the statute is met. As set out in Panama's Motion to Dismiss, Panama has not waived its immunity to litigate any issues relating to the alleged settlement agreement in the United States. To the extent that Panama has consented to suit with respect to that draft agreement, its consent is limited to the courts of Panama, as the draft settlement agreement expressly states 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

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[23] *Ouiess*, 2021 WL 11606313 at *2.

[24] *Guerra*, 2017 WL 2171832, at *1 (Moore, J.) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982) (holding that discovery was improper until the court resolved questions of immunity)).

[25] *Chudasama*, 123 F.3d at 1368.

[26] *Shuraskis*, 2023 WL 8698324, at *2; *see also Feldman v. Flood*, 176 F.R.D. 651, 652-53 (M.D. Fla. 1997) (same).

courts."[27]

Similarly, Respondents have not shown that any of the exceptions expressly enumerated in the FSIA are applicable. In fact, in their Counterclaim, Respondents made no effort to address the FSIA's exceptions. Respondents have attempted to overcome this fatal defect in their case by seeking leave to amend their counterclaim to allege that the exceptions set out in 28 U.S.C. §§1607(a) and 1607(c) apply.[28] In its Opposition to Motion to Amend, however, Panama showed that the commercial activity exception (§ 1607(a)) does not apply because the underlying activity – *i.e.*, the negotiation of an agreement arising out of an investor-state dispute and ICSID arbitration – was inherently sovereign and, even if it could be considered commercial, the territorial connections to the United States required under the exception are not met.[29] Panama similarly showed how the equivalent relief exception set out in Section 1607(c) does not apply since, as it made clear in its counterclaim, Respondents seek relief that differs in value and kind from the relief sought by Panama in its Petition.[30]

Under these circumstances, Respondents have not met their burden and cannot overcome Panama's immunity from suit. Resolution of Panama's Motion to Dismiss, therefore, should be dispositive and, as such, it would be appropriate to stay discovery while that motion is pending.

2. Panama Has Shown Why Respondents' Counterclaim Should be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6)

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[27] Draft Settlement Agreement dated January 6, 2023, Motion for Judgment, Ex. B, ¶ 6 (D.E. No. 25-2).

[28] Motion to Amend (D.E. No. 27), pp. 14-15.

[29] Opp. to Motion to Amend (D.E. No. 41), pp. 17-19.

[30] *Id.* at pp. 18-19.

In addition to staying discovery pending resolution of immunity claims, court also routinely stay discovery where a potentially dispositive FRCP 12(b)(6) motion is pending.[31] Respondents' counterclaim alleges that Panama breached a settlement agreement between the parties.[32] Respondents, however, have not identified any facts supporting their claim that a binding settlement agreement between the parties was signed and formally approved by the Panamanian government. Instead, in their counterclaim, they make vague and conclusory statements regarding that agreement.

In its Motion to Dismiss, Panama demonstrated that no settlement agreement exists.[33] Although the parties entered into negotiations and circulated a draft agreement, that document was never signed or formally approved by the Panamanian government.[34] As shown in Panama's Opposition to Motion to Amend, Respondents have not challenged the fact that a settlement agreement was never signed or approved pursuant to Panamanian law.[35] Instead, Respondents acknowledged the absence of a signed and legally binding settlement agreement in their Motion to Amend when they stated that: (a) "Panama *engaged in negotiations* with the Respondents under the pretense of reaching a binding settlement agreement;"[36] and (b) "the core of facts here center

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31 *See*, *e.g.*, *Rivas*, 676 F. App'x at 932 (affirming district court's discovery stay in anticipation of motion to dismiss); *Isaiah*, 960 F.3d at 1308-09 (same).

32 Answer and Counterclaim (D.E. No. 17), *e.g.*, ¶ 8 (page 2).

33 Motion to Dismiss (D.E. No. 26), pp. 14-16.

34 *Id*., *see also* Motion for Judgment (D.E. No. 25), pp. 3-6; Draft Settlement Agreement dated January 6, 2023, Motion for Judgment, Ex. B, pp. 2, 4-13 (D.E. No. 25-2).

35 Opp. to Motion to Amend (D.E. No. 41), pp. 6-7.

36 Motion to Amend (D.E. No. 27), pp. 10, 13 (emphasis added).

on *the alleged settlement agreement that both parties engaged in negotiations to finalize . . . .*"[37]

Conclusory statements and bald allegations are insufficient to survive a Fed. R. Civ. P. 12(b)(6) motion.[38] Respondents, therefore, cannot sustain a claim for breach of a contract without having provided some reasonable factual support that such contract exists – a burden they cannot meet in the face of the evidence to the contrary. As such, Respondents' counterclaim should be dismissed for failure to state a claim against Panama. Discovery, therefore, should be stayed pending resolution of Panama's Motion to Dismiss.

3. Panama Has Shown Why Respondents' Counterclaim Should be Dismissed in Favor of Panamanian Courts

Even if Panama were not immune from suit by Respondents in the United States, Respondents' counterclaim should be dismissed in favor of the forum specifically set out in the settlement agreement that Respondents allege has been breached. As noted above, the alleged settlement agreement requires that suits "arising out of or relating to" that agreement be resolved by Panamanian courts. It further provides that each party to the agreement submits to the jurisdiction of the Panamanian courts.[39]

Forum selection clauses in international agreements are presumed to be enforceable unless

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[37] *Id.*, p. 10 (emphasis added).

[38] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions") (citing *Papsan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

[39] Draft Settlement Agreement dated January 6, 2023, Motion for Judgment, Ex. B, ¶ 6 (D.E. No. 25-2).

the party challenging its enforcement can show that: (a) its formation was induced by fraud or overreaching; (b) the challenging party effectively would be deprived of its day in court because of inconvenience or unfairness of the chosen forum; (c) fundamental unfairness of chosen law would deprive plaintiff of remedy; or (d) enforcement of such provisions would contravene strong public policy.[40] None of those criteria are met here. As described in the ICSID Award, Respondents voluntarily invested in, contracted with, and operated a business in Panama for years.[41] They subjected themselves to agreements governed by Panamanian law and that called for the resolution of disputes in Panama.[42] Respondents were represented by counsel when negotiating the settlement agreement at issue in their counterclaim and agreed to resolve claims involving that dispute in Panama. The parties' choice of forum should be enforced. Panama should not be forced to respond to discovery in the United States when Respondents' claim must be brought in another forum. Discovery, therefore, should be stayed pending resolution of Panama's Motion to Dismiss.

B. DISCOVERY SHOULD BE STAYED PENDING RESOLUTION OF PANAMA'S MOTION FOR JUDGMENT

Panama's Petition seeks enforcement of the ICSID Award. In its Answer and Counterclaim, Respondents asserted five affirmative defenses to enforcement, each of which was predicated on the existence of a settlement agreement that allegedly resolved Respondents' liability to Panama under the ICSID Award.[43] However, as discussed above and shown in

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40 *See Lipcon v. Underwriters at Lloyd's London*, 148 F.3d 1285, 1296 (11th Cir. 1998).

41 *See* Final Award dated Oct. 14, 2022, Petition, Ex. 1, ¶¶ 6-7 (D.E. No. 1-3).

42 *Id*. at ¶¶ 383, 404

43 Answer and Counterclaim (D.E. No. 17), ¶¶ 1-16 (pages 4-9).

Panama's Motion for Judgment, that settlement agreement does not exist.[44] Respondents' affirmative defenses, therefore, fail.

In their Motion to Amend, Respondents have sought leave to assert three additional affirmative defenses against enforcement of the ICSID Award – set off, unclean hands, and violation of public policy.[45] Panama demonstrated in its Opposition to Motion to Amend, however, why these three additional affirmative defenses do not justify denying Petition or Motion for Judgment.

First, Respondents' proposed setoff defense is based on dicta from the Second Circuit, which said that certain "non-merits challenges" to an ICSID award," such as "offset," might be permissible.[46] The Second Circuit made clear, however, that set off would only be permissible as a defense to enforcement of an ICSID award where the existence and amount of the debt owed by the sovereign to the award debtor is valid, final, and undisputed.[47] Where "the parties dispute the validity, finality, or amount of one side of the transaction, courts have recognized that neither the ICSID Convention nor its implementing statute "permit setoffs in enforcement proceedings."[48]

The facts clearly show – and Respondents admit – that both the existence and amount of any debt owed by Panama to Respondents is unsettled. According to Respondents, the "underlying

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[44] Motion for Judgment (D.E. No. 25), pp. 3-6.

[45] Motion to Amend (D.E. No. 27), pp. 11-13.

[46] *Id.* at p. 11, citing *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 121 (2d Cir. 2017).

[47] *Mobil Cerro Negro, Ltd.*, 863 F.3d at 121.

[48] *Perenco Ecuador Ltd. v. Republic of Ecuador*, No. 1:19-CV-2943 (JMC), 2023 WL 2536368, at *5 (D.D.C. Mar. 16, 2023).

facts for" the set off defense "stem from the contractual obligations and commercial activities between the parties."[49] Those obligations are the subject of an ongoing ICC arbitration and discussions between the parties in Panama. Respondents, therefore, conceded in their Motion to Amend that "[t]he factual basis for the new defenses is still developing, reflecting the ongoing nature of the arbitration" initiated by Respondents against the Panamanian Ministry of Health "and [the] liquidation process."[50] As Panama noted in its Opposition to Motion to Amend, the fact that an arbitration and discussions regarding the rights and obligations owed under the contracts between Respondents and the Ministry of Health are ongoing means that the debt alleged by Respondents is disputed and unsettled.[51] As such, setoff is not a valid defense to enforcement or to Panama's Motion for Judgment. It would be entirely appropriate, therefore, to stay discovery until Panama's Motion for Judgment is decided.

Second, Respondents' proposed "unclean hands" defense is based on the allegation that Panama "engaged in negotiations with Respondents under the pretense of reaching a binding settlement agreement regarding the Final Award issued by the ICSID tribunal and that Panama acted "in bad faith by subsequently – unilaterally and unlawfully – withdrawing from this settlement agreement."[52] That defense is wholly without merit. There is nothing unlawful about terminating negotiations on a potential agreement. Respondent was not prejudiced by the failure

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49 Motion to Amend (D.E. No. 27), p. 11.

50 *Id.*, p. 5.

51 Opp. to Motion to Amend (D.E. No. 41), pp 8-10.

52 Motion to Amend (D.E. No. 27)p. 13.

of these negotiations in any way.[53] Moreover, the assertion that Panama "unilaterally and unlawfully" withdrew from "this settlement agreement" assumes that an agreement was actually signed and approved. As Panama has shown, that assumption is false.

Third, Respondents proposed "violation of public policy" defense is not a viable defense to the enforcement of an ICSID award. Although public policy grounds can be a defense to an arbitration award under the Federal Arbitration Act ("FAA") (which incorporates the non-recognition grounds set out in the Convention for Recognition and Enforcement of Foreign Arbitral Awards), Congress expressly excluded FAA's application in actions to enforce ICSID awards: "[t]he Federal Arbitration Act (9 U.S.C. 1 *et seq*.) shall not apply to enforcement of awards rendered pursuant to the [ICSID] convention."[54]

As Panama showed, courts have rejected other attempts to assert public policy as a ground for denying the enforcement of an ICSID award.[55] In doing so, the courts recognized that, "[b]y removing ICSID awards from the FAA's purview, Congress rejected the possibility that the FAA's grounds for vacatur could be applied to an ICSID award, thus reducing the scope of judicial review

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53 Motion for Judgment (D.E. No. 25), p. 4, fn 13; Opp. to Motion to Amend (D.E. No. 41), pp. 11-12.

54 22 U.S.C. §1650(a).

55 *See* Opp. to Motion to Amend (D.E. No. 41), pp. 12-15. *See also Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela*, 87 F.4th 510, 519-20 (D.C. Cir. 2023) (finding that there is "no roving public policy exception to the full faith and credit due to judgments" and, by extension under Section 1650a, ICSID awards)(citing *Baker by Thomas v. Gen. Motors, Corp*., 522 US 222, 232-33 (1998)) (internal quotations omitted).

of ICSID awards below even the "extremely limited" review available under the FAA."[56]

Even if violation of public policy were available as a defense to ICSID awards, Respondents have not met – and cannot meet – the extremely high standard required for the defense to prevail. Courts have held that an arbitration award will not be enforced on public policy grounds only when enforcement would be "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought" or where enforcement would "undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or private property.[57] Here, Respondents argue that it is "against public policy to compel Respondents to pay the amount awarded in the ICSID Final Award to Petitioner when Petitioner owes Respondents a significantly larger amount under the Construction Contracts."[58]

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[56] *Valores Mundiales, S.L.*, 87 F.4th at 520.

[57] *Pemex-Exploración y Producción*, 832 F.3d 92, 106 (2d Cir. 2016). *See also Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 69 (D.C. Cir. 2013) ("The public-policy exception under the New York Convention is construed extremely narrowly and applied 'only where enforcement would violate the forum state's most basic notions of morality and justice") (citing Restatement (Second) of Conflict of Laws, § 117, cmt. c (1971)); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1096-97 (9th Cir. 2011) (holding that public policy exception under the New York Convention is construed extremely narrowly and applies only where enforcement would violate the forum state's most basic notions of morality and justice); *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007) (same).

[58] Motion to Amend (D.E. No. 27), p. 11.

This allegation does not meet the high standards necessary to violate US public policy.

C. THE BALANCE OF EQUITIES WEIGHS IN FAVOR OF STAYING DISCOVERY PENDING RESOLUTION OF PANAMA'S MOTION TO DISMISS AND MOTION FOR JUDGMENT

Panama will be harmed if it is forced to engage in discovery at this stage of the proceedings. As a sovereign state, Panama is immune from suit unless it is clearly shown that Panama has waived its immunity or a statutory exception to immunity applies. That immunity from suit shields Panama from both the fact of being sued and also the bearing burdens of litigation – including discovery – when the defense of immunity is under consideration by the Court.[59]

Respondents have served thirteen (13) individual requests for documents that broadly seek documents far exceeding the limited scope of issues raised in Panama's Petition (i.e., enforcement of the ICSID Award) and Respondents' counterclaim (breach of an alleged settlement agreement pertaining to the ICSID Award). In fact, the majority of the requests are tied to Respondents' pending amendments to add affirmative defenses, which the Court has not granted, and are thus literally irrelevant to the Petition and Respondents' affirmative defenses and counterclaim. Moreover, many requests have no bearing at all on the issues before the Court and appear only relevant to the issues to be decided in the ICC arbitration. For example, Respondents seek:[60]

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[59] *See Oueiss*, 2021 WL 11606313, at *2; *Hunter*, 502 U.S. at 227; *Harlow*, 457 U.S. at 810; *Howe*, 861 F.3d at 1302; *Guerra*, 2017 WL 2171832, at *1; *Wildhaber* 2018 WL 11656373, at *2.

[60] Request for Production, pp. 5-6. Panama notes that it has objections to most, if not all, of Respondents' requests for production of documents, which will be raised in a motion for protective order if Panama is required to respond to the Request for Production.

- "[A]ll documents concerning the true-up or liquidation process under Panamanian law for the Construction Contracts, including any accounting records, reports, or correspondence related to this process." (Request 3)

- "[A]ll documents related to any payments or amounts claimed by Respondents under the Construction Contracts that are subject to the true-up or liquidation process." (Request 4)

- "[A]ll documents related to the termination of the Construction Contracts, including any notices, correspondence, and reports." (Request 10)

- "[A]ll documents related to any audits, reviews, or inspections of the Construction Contracts conducted by Petitioner or on behalf of Petitioner." (Request 12)

- "[A]ll documents related to any investigations, audits, or review conducted by Petitioner or on behalf of Petitioner into the performance of the Construction Contracts by Respondents." (Request 13)

Documents relating to the so-called "true-up" process are potentially relevant only to Respondents' purported "setoff" defense – a defense that, as noted above, has been proposed as part of Respondents' Motion to Amend. The "Construction Contracts" referred to in these requests are the "three commercial construction contracts" entered into in 2011 by Respondents and Panama's Ministry of Health.[61] Documents relating to those agreements and Respondents performance under those agreements have no bearing on whether Panama's Petition – which seeks enforcement

[61] *See id.* ¶ 11 (p. 4).

of a cost award issued by an ICSID tribunal following an ICSID arbitration – should be enforced or whether Panama breached an alleged agreement to settle Respondents' liability to Panama under that ICSID award.

If forced to respond to these requests before the Court rules on its Motion to Dismiss and Motion for Judgment, Panama will incur substantial costs and expend substantial resources challenging the legitimacy of the requests, as well as potentially collecting, reviewing, and serving responsive documents when the case may ultimately be resolved by those motions.

By contrast, Respondents will suffer no harm if discovery is delayed until Panama's motions are decided. If the Court determines to allow the case to proceed, the parties will have sufficient time to complete discovery under the current scheduling order. Under these circumstances, the balance of equities favors staying discovery pending resolution of Panama's Motion to Dismiss and Motion for Judgment.

CONCLUSION

Panama should not be required to respond to Respondents' discovery requests unless the Court denies its Motion to Dismiss and Motion for Judgment. The Supreme Court, Eleventh Circuit, and this Court have each held that discovery should be stayed pending resolution of immunity defenses and related dispositive motions. Even a cursory examination of Panama's Motion to Dismiss and Motion to Judgment will confirm the validity of Panama's positions, thereby justifying a stay of discovery in this case. Thus, for the reasons stated herein, Panama respectfully requests that the Court stay discovery pending resolution of Panama's Motion to Dismiss and Motion for Judgment.

Dated: August 9, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2024, the foregoing was filed with the Clerk of Court using CM/ECF, which will serve a Notice of Electronic Filing on all counsel of record.

By: */s/ Hans H. Hertell*
Hans H. Hertell