No. 24-__

IN THE
Supreme Court of the United States

PETROQUÍMICA DE VENEZUELA, S.A.,
Petitioner,

v.

ISAAC INDUSTRIES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Foreign Sovereign Immunities Act of 1976, *as amended*, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, a foreign state, including its agencies and instrumentalities, is immune from the jurisdiction of a federal or state court in a civil action unless a claim against it comes within one of the specified exceptions to immunity provided in 28 U.S.C. 1605–1607.

The questions presented are:

1. Whether a plaintiff who is suing a foreign state, and thus bearing the burden of establishing that the court has subject-matter jurisdiction, bears the burden of proving that an exception to sovereign immunity applies; or whether instead the foreign-state defendant has the burden to prove that the claimed exception *does not* apply.

2. Whether a foreign-state defendant categorically waives immunity in an action if it files a responsive pleading without including sovereign immunity as an affirmative defense, irrespective of any other efforts to preserve its immunity in that or in other filings.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Petroquímica de Venezuela, S.A. ("Pequiven"), who was the defendant-appellant below.

Respondent is Isaac Industries, Inc. ("Isaac"), who was the plaintiff-appellee below.

RULE 29.6 STATEMENT

Pequiven certifies that it is a Venezuelan corporation wholly owned by the Bolivarian Republic of Venezuela. Therefore, it is not a subsidiary or affiliate of a publicly held company and no publicly held company owns 10% or more of the stock of Pequiven.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Isaac Indus. v. Petroquimica de Venezuela, S.A., No. 19-23113, 676 F. Supp. 3d 1227 (S.D. Fla. June 6, 2023) (granting Isaac's motion for summary judgment).

Isaac Indus. v. Petroquimica de Venezuela, S.A., No. 23-12095, 127 F.4th 289 (11th Cir. Jan. 24, 2025) (affirming grant of summary judgment).

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Petitioner Petroquímica de Venezuela, S.A., respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The district court's order granting plaintiff's motion for summary judgment, App. 25a, is reported at 676 F. Supp. 3d 1227 (S.D. Fla. 2023). The Eleventh Circuit's decision affirming the district court's order, App. 1a, is reported at 127 F.4th 289 (11th Cir. 2025).

JURISDICTION

On January 24, 2025, the Eleventh Circuit entered judgment. This Court has jurisdiction to review the Eleventh Circuit's decision under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Foreign Sovereign Immunities Act of 1976, *as amended*, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, are set forth in the Appendix.

INTRODUCTION

Under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), *as amended*, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, foreign states are "presumptively immune from the jurisdiction of United States courts." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). They may be sued only if the foreign state elects to waive its immunity or if one of the FSIA's other "express exceptions to sovereign immunities applies." *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 31 (2015) (citation omitted). Unless the foreign state waives its immunity or another "specified exemption applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Nelson*, 507 U.S. at 355.

Earlier this term, the Court granted certiorari in *Republic of Hungary v. Simon* to review, among other questions, whether a plaintiff suing a foreign state has the burden to prove that an exception to sovereign immunity applies, or whether instead the defendant has the burden to prove that the claimed exception does not apply. 145 S. Ct. 480 (2025). The United States filed an amicus brief, urging this Court to answer that question. *See id.* at 490 n.1. The United States explained that the rule the D.C. Circuit adopted there—that foreign-state defendants bear the burden to prove that an exception to sovereign immunity does not apply—is "egregiously wrong" and "has the potential to upset foreign relations and the United States' own reciprocal interests by too permissively abrogating foreign sovereign immunity." U.S. Amicus Br. at 33, *Simon*, No. 23-867 (Sept. 3, 2024). This Court ultimately declined to answer the question because it was not necessary under the

particular facts and circumstances of that case. *Simon*, 145 S. Ct. at 490 n.1.

But this case squarely presents the question that *Simon* left open. Here, the Eleventh Circuit adopted a per-se rule that a foreign state waives its immunity from liability—and thus permits the court to exercise subject-matter jurisdiction over a plaintiff's claim—when the foreign-state defendant "files a responsive pleading in an action without raising the defense of sovereign immunity." App. 15a. Like the D.C. Circuit's rule in *Simon*, the Eleventh Circuit's rule places on the sovereign defendant the burden of establishing that an exception to sovereign immunity does not apply. That rule is incorrect, conflicts with the decisions of this Court, and exacerbates a circuit split. *See, e.g.*, *Missouri ex rel. v. People's Republic of China*, 90 F.4th 930, 936 (8th Cir. 2024) (holding that the *plaintiff* bears the ultimate burden to show that an exception to sovereign immunity applies).

The Eleventh Circuit's per-se rule rests on the faulty premise that sovereign immunity is an affirmative defense. Only in that circumstance would the sovereign defendant bear the burden to prove that it is immune from suit. Although some pre-FSIA cases have suggested that the foreign state bore the burden of proof, this Court has since explained that the FSIA made sovereign immunity a *jurisdictional* defense. This Court's precedents are clear that "the burden of establishing" a federal court's subject-matter jurisdiction "rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994); *see Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010). The Eleventh Circuit's rule turns that law on its head. Given its prior interest in the question, the Court should at a minimum invite the

United States to submit its view on whether Petroquímica de Venezuela, S.A.'s ("Pequiven") petition should be granted.

Pequiven's petition should be granted also because the Eleventh Circuit's per-se rule conflicts with the decisions of this Court and other courts of appeal in another material respect. Other Circuits, like the D.C. Circuit and the Second Circuit, have routinely held that the FSIA's waiver exception "must be construed narrowly" and that "any waiver must accordingly be unmistakable and unambiguous." *Drexel Burnham Lambert Grp. v. Comm. of Receivers for Galadari*, 12 F.3d 317, 326 (2d Cir. 1993) (cleaned up). Courts thus "rarely" find waiver absent "strong evidence that [it] is what the foreign state intended." *Rodriguez v. Transnave Inc.*, 8 F.3d 284, 287 (5th Cir. 1993). The Eleventh Circuit's decision conflicts with those bedrock immunity principles. Rather than presuming that Pequiven is immune from suit and finding jurisdiction only with "strong evidence" indicating its intent to waive immunity, the court of appeals treated the responsive pleading as dispositive of waiver and ignored other evidence indicating that Pequiven had no intent to waive its immunity at all.

This case offers a suitable vehicle for resolving the conflicts resurrected by the Eleventh Circuit's decision. The Court may not only answer the burden-of-proof question that remains open after *Simon*, but also affirm other core precepts of FSIA jurisprudence: Sovereign immunity is jurisdictional, plaintiffs suing foreign states carry the burden of establishing that the court has jurisdiction, and a foreign state waives immunity only if its intent to subject itself to suit in the United States is unmistakable. Accordingly, this Court should grant certiorari and reverse.

STATEMENT OF THE CASE

1. After rigged elections, Nicolás Maduro purported to assume the presidency of Venezuela on January 10, 2019. Appellant's C.A. App. 133 ¶ 38. That day, Venezuela's National Assembly ("2015 National Assembly") declared Maduro's presidency illegitimate. *Id.* ¶ 39. The 2015 National Assembly formed an Interim Government and authorized ad hoc administrative boards to direct and administer Venezuela's state-owned entities. *Id.* ¶¶ 43–47. The United States recognized the Interim Government and the 2015 National Assembly as the legitimate governing bodies of Venezuela. *Id.* ¶ 42.

In February 2019, the Interim Government enacted a statute to govern the transition to democracy (the "Transition Statute"), allocating specific powers to safeguard Venezuelan interests abroad. Appellant's C.A. App. 133 ¶ 43. The Interim Government appointed Ad Hoc Boards for Pequiven and another Venezuelan wholly owned oil company, Petróleos de Venezuela ("PDVSA"), granting the Special Attorney General authority to appoint counsel for the state-owned entities. Appellant's C.A. App. 133 ¶¶ 43–47.

During this time, Maduro continued to assert power as the illegitimate President of Venezuela, imprisoning members of the Interim Government, exploiting assets of state-owned entities, and preventing the Ad Hoc Boards from accessing the facilities and operations of state-owned entities, including defendants. App. 5a. The members of the Ad Hoc Boards "reside outside of Venezuela" and risk "arrest" if they return. *Id.*

In December 2022, the National Assembly approved a revised Transition Statute. It removed the position of Interim President, eliminated the Special Attorney General Office, and established a new body for managing asset protection: the Council for the Administration and Protection of Assets ("CAPA"). Appellant's C.A. App. 133 ¶ 48. On March 27, 2023, CAPA replaced Pequiven's Ad Hoc Board with a Single Administrator for Pequiven. *Id.* ¶ 50. Undersigned counsel appears before this Court at the behest of CAPA and the Single Administrator for Pequiven.

The United States continues to recognize the 2015 National Assembly as the only legitimate government in Venezuela. Appellant's C.A. App. 133 ¶ 42. Despite the National Assembly's efforts, the Maduro regime maintains de facto control over Venezuela and defendants' state-owned facilities. *Id.* ¶ 46.

2. Isaac Industries ("Isaac") is a Florida corporation engaged in the distribution of chemicals. Amid the political crisis in Venezuela, on July 26, 2019, Isaac filed its initial complaint in the U.S. District Court for the Southern District of Florida, alleging that the defendants—Bariven, S.A. ("Bariven"); PDVSA; PDVSA Services, B.V.; and Pequiven—breached a contract to purchase certain chemicals from Isaac. Pet. C.A. Br. 7. PDVSA and Pequiven are owned by the Bolivarian Republic of Venezuela while PDVSA Services, B.V. is owned by Bariven, which is a wholly owned subsidiary of PDVSA. PDVSA and PDVSA Services, B.V. were dismissed from the case by the district court. *Id.*

After failing to file proof of service, Isaac sought permission to serve the defendants through their

respective U.S. counsels in unrelated litigations. Pet. C.A. Br. 8. The district court granted that request and Isaac purported to serve defendants by emailing counsel. *Id.* In response, the defendants made limited appearances, reserving all defenses, and separately moved to dismiss Isaac's initial complaint on the basis of service, failure to state a claim, and subject-matter jurisdiction, including foreign sovereign immunity. *Id.* As to the latter ground, defendants explained that Isaac did not plead an exception to their foreign sovereign immunity. *Id.* at 9.

In response to the defendants' opening motions to dismiss, the parties agreed to, and the district court entered, an order granting the motions to dismiss on service grounds, affording Isaac additional time to effect service and permitting defendants the "ability to reassert the remaining bases for dismissal contained in their Motions to Dismiss." Pet. C.A. Br. 9; Appellant's C.A. App. 34 at 2.

After the parties briefed Isaac's attempt at service, Isaac moved for entry of default, which the magistrate judge recommended denying. Pet. C.A. Br. at 9–11; Appellant's C.A. App. 69. The magistrate judge also *sua sponte* recommended that Isaac's complaint be dismissed for lack of subject-matter jurisdiction under the FSIA and that the defendants be prohibited from challenging service of any amended complaint. Appellant's C.A. App. 69 at 35. The district court adopted the report and recommendation and dismissed the complaint without prejudice. Appellant's C.A. App. 70.

Isaac filed its amended complaint, reasserting the same claims and alleging the district court had jurisdiction over Isaac's action under the third clause

of the FSIA's commercial-activity exception, 28 U.S.C. 1605(a)(2). Pet. C.A. Br. 11–12. Pequiven declined to challenge the allegation underlying the exception for foreign sovereign immunity at that stage. But Pequiven moved to dismiss the amended complaint for failure to state a claim, which the court later denied. Appellant's C.A. App. 81 at 7. Pequiven filed its answer and affirmative defenses, repeating that it was a "state-owned" entity of Venezuela. Appellant's C.A. App. 82. Discovery ensued.

Further developments in the political crisis in Venezuela caused Pequiven's then-counsel, Hogan Lovells US LLP, to question whether they had authority to proceed as counsel and then, in turn, to request a stay, which the court denied. Appellant's C.A. App. A at 110. Amidst this uncertainty over counsel, Isaac moved for summary judgment. Pet. C.A. Br. 12–13. By March 2023, White & Case, LLP had replaced Hogan Lovells as counsel for Bariven and Pequiven. *See, e.g.*, Appellant's C.A. App. A at 106, 127.

Thereafter, defendants opposed Isaac's motion for summary judgment. Appellant's C.A. App. 132. Pequiven again asserted it was immune from jurisdiction under the FSIA, arguing Isaac had not shown the commercial-activity exception applied because the purported contract was signed by an individual who lacked the authority to bind Pequiven. *Id.* The district court ordered the parties to provide additional briefing on subject-matter jurisdiction. Pet. C.A. Br. 14. In its response, Isaac for the first time asserted that Pequiven had waived its foreign sovereign immunity by not asserting it as an affirmative defense in its answer. *Id.*

The district court granted in part Isaac's motion for summary judgment and later entered final judgment for Isaac. App. 25a. The district court held that it had subject-matter jurisdiction under the FSIA's commercial-activity and waiver exceptions to immunity. App. 37a–39a. The district court found that Pequiven implicitly waived its immunity when it omitted mention of sovereign immunity in its answer to the amended complaint and participated in the litigation thereafter. App. 38a. The district court also held that Isaac had shown that the commercial-activity exception applied and that Pequiven had failed to carry its burden to establish the exception did not apply. App. 39a.

3. Pequiven and Bariven timely appealed to the Eleventh Circuit, and the Eleventh Circuit affirmed. On subject-matter jurisdiction, the Eleventh Circuit held that Pequiven's litigation conduct constituted an implied waiver of sovereign immunity. App. 14a–16a. The litigation conduct relied upon by the Eleventh Circuit consisted of (1) the original motion to dismiss, which raised Pequiven's sovereign immunity; (2) the motion to dismiss the amended complaint, which did not repeat Pequiven's assertion of sovereign immunity; and (3) Pequiven's answer, which stated that Isaac's allegation of subject-matter jurisdiction under the FSIA was a legal conclusion to which no response was required. App. 14a–19a. The Eleventh Circuit declined to resolve whether the commercial-activity exception applied. App. 14a. Having determined that the district court properly asserted jurisdiction under the waiver exception, the Eleventh Circuit held that summary judgment was proper as to both defendants. App. 19a–22a.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Per-Se Waiver Rule Conflicts with This Court's and Other Circuit Courts' Precedents Holding that the Burden To Establish Subject-Matter Jurisdiction Rests with the Plaintiff

1. The FSIA explicitly presumes that the foreign state and its agencies and instrumentalities are immune "from the jurisdiction of United States courts." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *see* 28 U.S.C. 1604 ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" by the FSIA's exceptions.); 28 U.S.C. 1603 (defining a "foreign state" to include "an agency or instrumentality of a foreign state"). A foreign state may be sued only if the foreign state waives its immunity from suit or if one of the FSIA's other "express exceptions to sovereign immunity applies." *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 31 (2015); *see* 28 U.S.C. 1605(a)(1) (listing waiver as one of the exceptions to immunity from suit). Thus, unless the foreign state waives its immunity or another specified exemption applies, "a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Nelson*, 507 U.S. at 355 (citation omitted). A foreign state may waive its immunity from suit either "explicitly or by implication." 28 U.S.C. 1605(a)(1).

The Eleventh Circuit adopted a per-se rule that a foreign-state defendant waives its immunity from suit, permitting the court to exercise subject-matter jurisdiction over a plaintiff's claim, if the defendant "files a responsive pleading in an action without

raising the defense of sovereign immunity." App. 15a. That rule places the burden on the sovereign defendant to establish that an exception to sovereign immunity does not apply. The Fourth Circuit has adopted the same rule. *BAE Sys. Tech. Sol. & Servs. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 474 (4th Cir. 2018) (concluding that Korea waived its sovereign immunity when it filed a responsive pleading without raising its immunity defense). The D.C. Circuit has similarly held that "the burden of proof in establishing the inapplicability of the FSIA's exceptions is upon the party claiming immunity." *See Simon v. Republic of Hungary*, 77 F.4th 1077, 1116 (D.C. Cir. 2023) (internal quotation marks and citation omitted). Those courts' burden-of-proof rule is incorrect, and conflicts with the decisions of this Court and other courts of appeals including the Eighth Circuit, because it rests on the faulty premise that sovereign immunity is an affirmative defense. *See* App. 37a.

Although some pre-FSIA cases have suggested that the foreign state bore the burden of proof, this Court has since explained that the FSIA made sovereign immunity a *jurisdictional* defense. *Compare Pan Am. Tankers Corp. v. Republic of Vietnam*, 291 F. Supp. 49, 52 (S.D.N.Y. 1968) (suggesting that Vietnam had "the burden of proving its privilege of immunity"), *with Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 177 (2017) ("[E]xplicit statutory language" in the FSIA makes the existence of sovereign immunity a bar to subject-matter jurisdiction.). It also explained that the FSIA provides foreign states with presumptive immunity and the plaintiff with the burden of establishing an exception to such immunity. *See Helmerich*, 581 U.S. at 177; *Verlinden B.V. v.*

Cent. Bank of Nigeria, 461 U.S. 480, 493 n.20 (1983); *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 294 n.12 (1st Cir. 2005) (citing *Haven v. Polska*, 215 F.3d 727, 733 (7th Cir. 2000)). It follows that, as the Eighth Circuit has held, the *plaintiff* bears the burden of proving that an exception to immunity applies and thus that the court has jurisdiction over its claim. *See Helmerich*, 581 U.S. at 178 ("[A]s a jurisdictional matter," a plaintiff must "prove" that an exception to immunity applies.); *Missouri ex rel. v. People's Republic of China*, 90 F.4th 930, 936 (8th Cir. 2024) (noting that the plaintiff bears the ultimate burden to show that an exception to immunity applies); U.S. Amicus Br. at 17, *Broidy Cap. Mgmt. v. Benomar*, No. 19-236 (2d Cir. Oct. 9, 2019) (Because "foreign sovereign immunity is not an affirmative defense, there is no reason to rest the ultimate burden of proving immunity with the foreign state.") (cleaned up).

Indeed, "the burden of establishing" that a federal court has subject-matter jurisdiction always "rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994); *see Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010) ("The burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it."); *Broidy Cap. Mgmt. v. Benomar*, 944 F.3d 436, 444 (2d Cir. 2019) (applying the "usual rule[]" that plaintiff bears the burden of proving subject-matter jurisdiction in the context of diplomatic immunity). So unless that party proves that the foreign state waived immunity or that "a specified exception [to immunity] applies," "a federal court lacks subject-matter jurisdiction over a claim against a foreign state," and the foreign state is immune from suit. *Nelson*, 507 U.S. at 355; *see* 28 U.S.C. 1330(a) (granting courts subject-matter

jurisdiction in civil actions against foreign states only for claims "with respect to which the foreign state is not entitled to immunity"). As explained below, the United States agrees that this interpretation of the FSIA is correct. The Court should therefore invite the views of the United States on whether the petition for certiorari should be granted and then grant review to clarify that the plaintiff bears the burden of establishing that an exception to immunity applies.

2. This case offers the Court a suitable vehicle for doing so. Earlier this term, the Court issued a decision in *Republic of Hungary v. Simon*, a case raising questions about the substantive and procedural standards for establishing subject-matter jurisdiction in a civil action against a foreign state under the FSIA's expropriation exception to sovereign immunity. 145 S. Ct. 480 (2025); *see* 28 U.S.C. 1605(a)(3) ("A foreign state shall not be immune from" jurisdiction in a case "in which rights in property taken in violation of international law are in issue" and "that property or any property exchanged for such property" has a specified connection to commercial activity in the United States.). The Court answered the substantive-standard question not at issue here. But the Court declined to answer the procedural-standard question that is dispositive here: whether a plaintiff suing a foreign state has the burden to prove that an exception to sovereign immunity applies, or whether instead the defendant has the burden to prove that the claimed exception does not apply. *Simon*, 145 S. Ct. at 490 n.1.

In *Simon*, the Court determined that it was unnecessary to answer the latter question because it arises "after a plaintiff has pleaded adequately" that

an exception applies, and the plaintiffs had not done so there. 145 S. Ct. at 490 n.1. The question has arisen here, however, because regardless of whether the plaintiff adequately pleaded and proved its claimed exception, the Eleventh Circuit decided that the waiver exception applied based on a misconception of the nature of the defense of sovereign immunity.[1] The court of appeals applied that exception on the ground that Pequiven filed a responsive pleading without raising the defense of sovereign immunity. Although the Eleventh Circuit stated that it declined to reach the question of whether sovereign immunity is an affirmative defense, its decision necessarily answered that threshold question because the only circumstance in which the foreign-state defendant would bear the burden of proof is if immunity were an affirmative defense. *Cf.* App. 18a (stating that the "resolution of that issue has no effect on this appeal"); *see generally* U.S. Amicus Br. at 17, *Broidy*, No. 19-236 (2d Cir. Oct. 9, 2019). The question is now ripe for this Court's review.

Review is also appropriate because the United States has recently urged this Court to answer the burden-of-proof question in *Simon*. *See Simon*, 145 S. Ct. at 490 n.1. As the United States explained there, the "rule that foreign sovereign defendants bear the burden to disprove subject-matter jurisdiction" is "egregiously wrong." U.S. Amicus Br. at 33, *Simon*,

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[1] Isaac alleged in its amended complaint that the commercial-activity exception applied. Pet. C.A. Br. at 11–12. Pequiven answered that the allegation was a legal conclusion for which no response was required. App. 8a, 40a. The court of appeals held that the waiver exception applied instead and that it was explicitly declining to decide the applicability of the commercial-activity exception. App. 14a.

No. 23-867 (Sept. 3, 2024). In a similar case, the United States reiterated that because "foreign sovereign immunity is not an affirmative defense, there is no reason to rest the ultimate burden of proving immunity with the foreign state." U.S. Amicus Br. at 17, *Broidy*, No. 19-236 (2d Cir. Oct. 9, 2019). The United States has also expressed its concern that the rule "has the potential to upset foreign relations and the United States' own reciprocal interests by too permissively abrogating foreign sovereign immunity." U.S. Amicus Br. at 33, *Simon*, No. 23-867 (Sept. 3, 2024). Given these serious interests that Pequiven (as a foreign state) shares, it is especially important to correct the Eleventh Circuit's interpretation of the FSIA. This case offers the Court an appropriate vehicle to do so.

II. The Eleventh Circuit's Per-Se Rule Violates the Command To Construe Waivers Narrowly

A. The Eleventh Circuit's Rule Contravenes Well-Established Principles Underlying the FSIA's Implied Waiver Doctrine

1. As explained above, establishing an exception to foreign sovereign immunity is a jurisdictional prerequisite, and under the exception at issue here, plaintiffs must establish that the foreign state has waived its immunity. From that rule, two fundamental principles follow.

First, as a jurisdictional defense, *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000), sovereign immunity can be asserted at any point in the litigation—even "for the first time

in the court of appeals because the objection goes to the subject matter jurisdiction of the court." *Delta Foods Ltd. v. Republic of Ghana*, 265 F.3d 1068, 1071 (D.C. Cir. 2001); *see Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) ("Objections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy."); *Ungar*, 402 F.3d at 294 n.12 (explaining that "foreign sovereign immunity implicates federal subject matter jurisdiction," so "the failure to raise [it] in a timely manner cannot result in a waiver") (citing *Haven*, 215 F.3d at 733). Indeed, if the invocation of immunity is valid, "the court lacks power to hear the case." *World-Wide Min., Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 n.10 (D.C. Cir. 2002) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998)).

Second, to establish that a district court has subject-matter jurisdiction on the ground that the foreign state has waived its immunity, the plaintiff must prove that the alleged waiver was intentional and unequivocal. *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 697 (D.C. Cir. 2022) (Jackson, J.) (The plaintiff can prove waiver only if it presents unmistakable evidence that the sovereign has "indicated its amenability to suit.") (citation omitted). The touchstone of waiver is the sovereign's intent. An implied waiver of sovereign immunity must reflect "the intentional relinquishment" of that right. *Walters v. Indus. & Com. Bank of China, Ltd.*, 651 F.3d 280, 295 (2d Cir. 2011) (quotation marks omitted). That is, the sovereign must evince "a conscious decision" to forgo immunity. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 378 (7th Cir. 1985); *cf. Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (explaining that waiver of state sovereign

immunity turns on "the State's intention to subject itself to suit").

In light of this rule, "[w]aiver under the FSIA is rarely accomplished by implication." *In re Tamimi*, 176 F.3d 274, 278 (4th Cir. 1999). But where courts have made such a finding, it is because the plaintiff has provided "*strong evidence* that this is what the foreign state *intended*." *Rodriguez v. Transnave Inc.*, 8 F.3d 284, 287 (5th Cir. 1993) (emphasis added); *see Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991) (explaining that courts are "reluctant to find an implied waiver" unless it is "unambiguous" and "unmistakable"); *cf. Dep't of Energy v. Ohio*, 503 U.S. 607, 627 (1992) (A waiver of federal sovereign immunity must be "unequivocal."); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (A waiver of state sovereign immunity under the Eleventh Amendment must be "unequivocally expressed."). Indeed, "the basic principle" is that "an implied waiver depends upon the foreign government's having at some point *indicated* its amenability to suit." *Wye Oak Tech.*, 24 F.4th at 697 (emphasis in original) (cleaned up). What "matters when discerning any type of waiver of sovereign immunity is the foreign sovereign's actual intent." *Id.* An inquiry of this sort is fact-dependent and turns on the "circumstances of th[e] case." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990).

2. Despite these well-established principles, the Eleventh Circuit adopted the per-se rule that a sovereign waives its immunity if it "files a responsive pleading in an action without raising the defense of sovereign immunity." App. 15a. That decision is incorrect. The responsive pleading alone does not

evince the sovereign's intent to waive its immunity from suit. To the contrary, a sovereign defendant can assert immunity in a motion even if it does not make the same assertion in a responsive pleading. *See, e.g.*, *Drexel Burnham Lambert Grp. v. Comm. of Receivers for Galadari*, 12 F.3d 317, 326 (2d Cir. 1993).

The roots of the Eleventh Circuit's rule resolve any doubt that the court of appeals erred. To support its rule, the Eleventh Circuit relies in part on a case that provided three examples of waiver from the House Report on the FSIA. *See* App. 15a (citing *Calzadilla v. Banco Latino Internacional*, 413 F.3d 1285, 1287 (11th Cir. 2005)). The House Report observed that, before the FSIA's enactment, some courts "ha[d] found" waiver "where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." H.R. Rep. No. 94-1487, at 18 (1976). Contrary to the Eleventh Circuit's suggestion that the House thereby established such a rule, the House merely listed examples where courts had found implied waiver.

Even if the Eleventh Circuit's reliance on the House Report were sound, its rule must still be rebuked. As this Court has made clear, the House Report's examples of pre-FSIA waiver cannot be reconciled with FSIA's "explicit statutory language" that recognizes foreign "sovereign immunity is jurisdictional." *Helmerich*, 581 U.S. at 177. That is why this Court has already repudiated the House Report's description of sovereign immunity as an "affirmative defense." *See Verlinden*, 461 U.S. at 493 n.20); U.S. Amicus Br. at 32, *Simon*, No. 23-867 (Sept. 3, 2024). Regardless, as the United States has submitted, "'legislative history is not the law,'" U.S. Amicus Br. at 31, *Simon*, No. 23-867 (Sept. 3, 2024)

(quoting *Azar v. Allina Health Servs.*, 587 U.S. 566, 579 (2019) (citation omitted)), and explicit statutory language in the FSIA making sovereign immunity a bar to jurisdiction cannot be abrogated by it.

3. The Eleventh Circuit's per-se rule is not only incorrect, but it also minimizes the significance of a nation's sovereignty and the grant of immunity that preserves it. *See Helmerich*, 581 U.S. at 179 (Immunity "recognizes the absolute independence of every sovereign authority and helps to induce each nation state * * * to respect the independence and dignity of every other, including our own.") (cleaned up). From the start of the case, Pequiven invoked its immunity. It did so first in its answer to Isaac's complaint. Isaac was then forced to file an amended complaint when the district court dismissed its initial complaint. Though Pequiven did not include sovereign immunity explicitly in its answer to the amended complaint, Pequiven stated that Isaac's allegation of subject-matter jurisdiction under the FSIA was a legal conclusion to which no response was required and thus denied the applicability of the only FSIA exception pleaded. Pequiven also admitted that it was a foreign state under the FSIA. Pequiven then explicitly reasserted its sovereign immunity in opposition to summary judgment.

The Eleventh Circuit and the district court ignored all those relevant facts that give insight into Pequiven's intent to assert immunity. Instead, those courts myopically focused on a responsive pleading. In doing so, they not only subjected a foreign state to suit in a U.S. court, but they also entered a judgment against it without its consent and over its re-assertion of sovereign immunity. Nothing in the courts' decisions warrants disregarding a sovereign's

immunity, especially not one that the United States and Eleventh Circuit recognize as "the last remaining democratic institution in Venezuela." App. 5a.

B. The Eleventh Circuit's Per-Se Rule Also Conflicts with the Decisions of Other Courts of Appeals

The Second and D.C. Circuits have rejected the Eleventh Circuit's per-se waiver rule. On one hand, those courts have approvingly referenced the House Report when construing the FSIA's waiver provision. *See*, *e.g.*, *Shapiro*, 930 F.2d at 1017; *Wye Oak Tech.*, 24 F.4th at 702. On the other hand, neither goes nearly as far as the Eleventh Circuit's per-se waiver rule. Instead, these courts look to the totality of the circumstances to discern the foreign state's intent to waive its immunity.

The Second Circuit, for example, recognizes that the failure to assert sovereign immunity in an answer to an amended complaint does not amount to "unmistakable and unambiguous waiver" if the sovereign asserted its immunity in an "initial answer" and in subsequent filings. *Drexel Burnham*, 12 F.3d at 326 (internal quotation marks omitted). In fact, in the Second Circuit, a sovereign does not waive its immunity even if it fails to file a responsive pleading so long as it asserts immunity in other ways. *See Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277–78 (2d Cir. 1984). This is consistent with this Court's admonition that "even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the [FSIA]." *Verlinden*, 461 U.S. at 493 n.20.

On this particular point, the D.C. Circuit has agreed. In *Foremost-McKesson*, Iran filed an answer that did not raise immunity, did not "state the defenses raised in its motion to dismiss[,] and did not admit or deny" the complaint's allegations. 905 F.2d at 441. Instead, it argued that the case must proceed in an alternative forum. *Id.* Though Iran eventually invoked sovereign immunity in an amended answer, the D.C. Circuit made clear that the initial answer "does not exhibit" a "conscious decision" to waive immunity from suit. *Id.* at 444; *see* 28 U.S.C. 1605(a)(1) (stating that a foreign state's immunity remains waived "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver"). And looking to the totality of the "facts," the D.C. Circuit concluded that the "unusual circumstances of this case" made "clear that Iran did not make a conscious decision to take part in the litigation before the" district court. *Foremost-McKesson*, 905 F.2d at 444.

The Eleventh Circuit's split with the Second and D.C. Circuits is yet another reason for this Court to grant review.

C. This Case Is an Appropriate Vehicle To Define the Scope of the FSIA's Implied-Waiver Exception

This case is a suitable vehicle for review for the additional reason that it permits the Court to reaffirm that the touchstone of waiver under Section 1605(a)(1) is the sovereign's intent and that filing a responsive pleading in an action without raising the defense of sovereign immunity is not, by itself, "strong evidence"

of an intent to waive immunity—much less dispositive of it. *Cf. Verlinden*, 461 U.S. at 493 n.20.

This Court has never construed the FSIA's waiver provision. Unsurprisingly, the courts of appeal have failed to articulate a uniform rule to determine whether a foreign sovereign has implicitly waived its immunity from suit. The appellate courts do not agree on the basic question whether the plaintiff bears the burden to prove waiver and, thus, establish the federal court's subject-matter jurisdiction. Nor is there uniformity on the more nuanced question of how should courts discern a sovereign's intent. The lack of guidance on both questions partially explains the assertion of subject-matter jurisdiction here that, ultimately, trespassed upon Venezuela's sovereignty.

By reversing the decision below, this Court can also clarify that a foreign state's responsive pleading does not, on its own, dictate that the sovereign intended to waive immunity to suit in U.S. courts. Unlike the Eleventh Circuit in this case, courts applying Section 1605(a)(1) are instead required to consider *all* the evidence of the sovereign's intent and to find waiver only when the evidence "unmistakably" points to that conclusion.

Review is also appropriate in this case because this Court's rejection of the Eleventh Circuit's per-se rule would be outcome-determinative. As shown above, a single responsive pleading in this context provides scant evidence of a sovereign's intent to forgo its immunity, while additional evidence in the record establishes the opposite. For all these reasons, this Court should invite the views of the United States on whether the petition for certiorari should be granted,

grant the petition, and hold that petitioner has not waived its right to foreign sovereign immunity.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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April 24, 2025

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 23-12095

ISAAC INDUSTRIES, INC.,

Plaintiff-Appellee

v.

PETROQUÍMICA DE VENEZUELA, S.A. and BARIVEN S.A.,

Defendants-Appellants

PDVSA SERVICES, B.V., et al.,

Defendants

Appeal from the United States District Court for the Southern District of Florida
(1:19-cv-23113-RNS)

Before WILLIAM PRYOR, Chief Judge, JORDAN and MARCUS, Circuit Judges.

WILLIAM PRYOR, Chief Judge:

This appeal requires us to decide issues related to personal jurisdiction, foreign sovereign immunity, and

the merits of a complaint for breach of contract. Isaac Industries contracted with Bariven, S.A., a Venezuelan oil company, for the sale of chemicals. After Isaac shipped the products, Bariven failed to pay for them. Later, Petroquímica de Venezuela, S.A., another oil company, assumed Bariven's debt and negotiated an extended payment period. When that company made only the first payment, Isaac sued both companies in the district court. The oil companies initially raised objections about service of process and sovereign immunity. A magistrate judge concluded that effective service occurred but recommended denying Isaac's motion for default and ordering it to amend its complaint. The oil companies raised no objection and answered the amended complaint. When Isaac later moved for summary judgment, the oil companies hired new counsel, argued that no valid contracts exist and that sovereign immunity shields Pequiven from suit, and urged the district court to defer ruling. The district court granted summary judgment for Isaac. No reversible error occurred. We affirm.

I. BACKGROUND

Two interwoven plots—Isaac's sale of chemicals to the Venezuelan oil companies and the political upheaval in Venezuela— set the stage for this appeal, so we begin with them. We then turn to the procedural history of the lawsuit.

A. Isaac Industries Sells Chemicals to Bariven But Never Receives Full Payment.

This action involves four entities, one American company and three Venezuelan companies. Isaac Industries is a Florida corporation engaged in the wholesale distribution of chemicals. Its owner, David

Avan, runs the company from Miami. Petroleos de Venezuela, S.A., Petroquímica de Venezuela, S.A., and Bariven, S.A. are oil and chemical companies associated with or owned by the Bolivarian Republic of Venezuela. Petroleos de Venezuela, known as PDVSA, serves as Venezuela's state-owned and controlled oil company. Bariven, a "wholly owned subsidiary of . . . PDVSA," acquires the equipment and machinery used to find and extract oil. And Petroquímica de Venezuela, known as Pequiven, operates as a "petrochemical company engaged in the production and sale of" products like "fertilizers, industrial chemical products, olefins, and plastic resins."

According to Avan, Isaac contracted with Bariven for the sale and delivery of 2-Ethylhexanol in 2014. Under the contract, Bariven would order the quantity it required at a unit price of $2,975.00 per metric ton. Isaac would then ship the product to Vopak Terminal in Puerto Cabello, Venezuela. Between July and September 2014, Bariven placed three orders for a total of 5,993.873 metric tons of 2-Ethylhexanol.

After it shipped each order, Isaac provided Bariven with an invoice. The first two invoices, both dated July 6, 2014, charged Bariven $5,950,000.00 for one shipment and $5,941,928.83 for the other. The third invoice, dated September 19, 2014, charged Bariven $5,939,843.35. All three listed Bariven and PDVSA as the buyers and Pequiven as the consignee. Although Bariven never objected to the invoices, it never paid for the shipments.

After two years passed without payment from Bariven, representatives of Pequiven asked Avan to meet about the "the current status" of the debt. Avan agreed. Negotiations took place on September 21, 2016,

in Miami. Saul Silva, Pequiven's legal counsel, represented the oil company. During the negotiations, Avan discussed the "monies owed to Isaac by Bariven . . . at length." By the meet-ing's end, "Pequiven . . . voluntarily undertook the obligation to make the payments" Bariven owed.

A written contract memorialized the agreement. Silva signed on Pequiven's behalf. The contract began with a reference to a prior "payment contract with subrogation of debt signed between Bariven[,] S.A., PDVSA Services B.V., Pequiven, and ISAAC INDUSTRIES INC." It then described the terms of the newest repayment plan: that Pequiven agreed to pay the outstanding balance in exchange for Isaac's release of Bariven's debt. The payment structure applied an annual interest rate to the $17,831,772.18 principal amount. And Pequiven promised to pay 15 percent of the debt, plus interest, by December 31, 2016, followed by six quarterly installment payments. In turn, Isaac's release of Bariven's debt required Pequiven's full payment. Absent that payment, Bariven remained responsible for the outstanding balance.

Pequiven met the first deadline but no others. Consistent with the written agreement, it tendered a payment of $2,947,542.00 (15 percent of the debt plus interest) on December 30, 2016. Neither Pequiven nor Bariven tendered the six remaining installments.

Two years later, the corporate governance of the oil companies splintered when Nicolás Maduro declared himself the winner of Venezuela's presidential election. In protest, Venezuela's National Assembly declared Maduro's regime illegitimate and recognized Juan Gerardo Guaidó Márquez, the president of the National Assembly, as interim president in January 2019. The

United States immediately affirmed the 2015 National Assembly as the legitimate government. But Maduro refused to cede control and blocked Guaidó from power.

State-owned entities—like the oil companies—were caught in the middle of the dueling regimes. In 2019, the National Assembly granted Interim President Guaidó the power to appoint ad-hoc boards to govern state entities. Interim President Guaidó, in turn, appointed an ad-hoc board to govern PDVSA—a board that also "safeguard[s] Bariven's interests" abroad—and an ad-hoc board to govern Pequiven.

Maduro refused to recognize these ad-hoc boards. His regime occupied the oil companies' Venezuelan offices. And it declared the ad-hoc board members "criminals" for their "usurping [of] public functions." Today, the members of the ad-hoc boards "reside outside [of] Venezuela" and risk "arrest" if they return. The United States, for its part, continues to recognize the 2015 National Assembly "as the last remaining democratic institution in Venezuela."

B. Isaac Sues the Oil Companies for Breach of Contract.

Isaac sued Pequiven, Bariven, and PDVSA for breach of contract in July 2019. Although filing the complaint proved easy, effecting service on the oil companies was another matter. Within a month of filing the lawsuit, Isaac hired an international process service to "effectuate service . . . under the Hague [Service] Convention." On September 10, 2019, the process server confirmed that Venezuela's Central Authority received the process documents. Silence followed. The Central Authority never confirmed that it executed service to the oil companies or certified receipt

of service, as required by the Hague Service Convention. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters arts. 2–6, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 362–63.

The battle over service escalated near the one-year anniversary of the action. Citing its "unsuccessful" attempts to serve the defendants by the Central Authority, Isaac moved to permit alternate service. After the district court granted the motion, the oil companies began to participate in the litigation in earnest.

Each oil company moved to dismiss the action on two relevant bases. First, each company argued that it qualified as an "instrumentality of a foreign state" under the Foreign Sovereign Immunities Act, which made alternative service improper. Second, each company maintained that the district court lacked authority to hear the suit because Isaac's "[c]omplaint [was] completely devoid of any allegations" that the companies fell "within one of the [Sovereign Immunities Act's] enumerated exceptions to immunity." The district court granted the motions to dismiss "based [on] insufficiency of service of process," gave Isaac additional time to complete service, and affirmed the oil companies' ability to "reassert the remaining bases for dismissal."

After more time passed with no response from Venezuela's Central Authority, Isaac cited Article 15 of the Hague Service Convention and moved for an entry of default against the oil companies under Federal Rule of Civil Procedure 55(a). Article 15 permits a judge to enter a default judgment "even if no certificate of service or delivery has been received" so long as a

plaintiff "transmitted" the service documents "by one of the methods" described in the Convention, "six months . . . has elapsed," and "no certificate of any kind has been received, even though every reasonable effort has been made to obtain it." Hague Service Convention, *supra*, 20 U.S.T. at 364. Isaac argued that its attempt to serve process satisfied each of the three conditions: it effectuated service under the Convention; nearly two years had passed; and the Central Authority "ha[d] refused to return the required certificate of service."

In a report and recommendation, the magistrate judge agreed that Isaac met "all three requirements" of Article 15. Nevertheless, the magistrate judge recommended that the district court "exercise its discretion" to deny Isaac's "request for a default" because the oil companies appeared early in the case, contested service of process, and filed meritorious motions to dismiss. The magistrate judge gave the parties 14 days to file written objections to its report and recommendation and cautioned that "[f]ailure to file objections . . . shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this [r]eport." Despite this warning, the oil companies filed no objections.

The district court adopted the report and recommendation. It denied Isaac's motion for entry of a default, dismissed the complaint without prejudice, and ordered Isaac to file an amended complaint that "properly assert[ed]" that the oil companies satisfied an exception to immunity under the Sovereign Immunities Act. It also prohibited the oil companies from "re-asserting a challenge to service of process."

In compliance with that order, Isaac filed an amended complaint. This time, it alleged that the

companies satisfied the commercial-activity exception to immunity under the Act. In response, only PDVSA moved to dismiss based on sovereign immunity, and the district court later dismissed the claims against that entity.

Pequiven, in contrast, responded that Isaac failed to "allege that Pequiven received any consideration for its purported assumption of debt." Both Pequiven's and Bariven's answers to the amended complaint stated that the allegations about the commercial-activity exception required no response because they called for a "legal conclusion." And neither oil company challenged service of process.

After Isaac served various discovery requests, the oil companies admitted little and provided nothing in response. The presidents of Pequiven's and PDVSA's ad-hoc boards filed affidavits that attested that the oil companies could not "identify any individual[s] competent to testify" as their corporate representatives. Nor did they "have possession, custody or control of documents" relevant to the proceedings because the Maduro regime maintained "complete possession and control of all such information" and occupied their Venezuelan offices. These facts made any effort to "collect information" for production impossible.

When Isaac eventually moved for summary judgment, the oil companies rolled out new counsel, new legal positions, and new evidence. They filed a declaration from Jesus Bellorin, the new administrator of Pequiven, and a copy of Pequiven's bylaws—both submitted after the close of discovery. Pequiven sought to use that new evidence to resurrect its sovereign-immunity argument. It argued that the bylaws established that Silva, Pequiven's purported general

counsel, lacked authority to negotiate and sign the contract on its behalf. And it asserted that the contract with Isaac was invalid for lack of consideration. Without an official "act" or valid contract, Pequiven argued that Isaac could not establish the commercial-activity exception to sovereign immunity. As for Bariven, the oil companies invoked the Florida statute of frauds to argue that Isaac failed to prove that a valid contract existed.

The oil companies also asked the district court to "deny or defer consideration" of Isaac's motion for summary judgment under Federal Rule of Civil Procedure 56(d). With the "minimal" "discovery record," the oil companies contended that the "interests of justice . . . require[d] postponement." In their view, Isaac's motion asked the district court to rule in its favor "without ever allowing Defendants to identify evidence in its own records to support a full defense."

Isaac moved to strike Bellorin's declaration and Pequiven's bylaws under Federal Rules of Civil Procedure 26 and 37. It argued that the new evidence amounted to "sandbagging" because Pequiven "hadn't pled lack of authority as an affirmative defense and had answered a request for admission by stating it was 'without knowledge' regarding Silva's authority." The parties also filed a pretrial stipulation which stated for the first time that Bariven was not an agency or instrumentality of Venezuela.

The district court granted Isaac's motion for summary judgment for breach of contract. The district court ruled that Pequiven implicitly waived sovereign immunity when it failed to assert it in its answer and that, in any event, Isaac satisfied the commercial-activity exception. It also chastised Pequiven for

complaining about Isaac's thin factual record when it had failed to produce "contrary evidence" of its own. The district court ruled that the bylaws "were [not] properly before" it. Then it concluded that, even if they were, the bylaws would not change the outcome because they authorized "the delegation of authority . . . to allow for others," like Silva, "to execute contracts." And the district court then ruled that the undisputed material facts established that Pequiven and Bariven breached their contracts with Isaac.

The district court also refused to delay or defer its ruling under Rule 56(d). It explained that the oil companies "declined to depose Isaac's witness or otherwise proactively participate in the discovery process." They also failed to "identify a single piece of documentary or testimonial evidence that they believe might actually controvert Isaac's showing or help their case."

The final judgment assessed the damages owed by the oil companies. The total balance owed by Pequiven—inclusive of the principal plus interest—amounted to $23,384,373.00. The total balance owed by Bariven amounted to $15,111,440.00, plus interest. The district court held the oil companies jointly and severally liable for the principal amount of $15,111,440.00. Bariven owed prejudgment interest of $307,155.66 plus postjudgment interest. And Pequiven owed the additional amount of $8,272,933.00 plus postjudgment interest.

II. STANDARDS OF REVIEW

Two standards govern our review. We review *de novo* questions of law about service of process. *See*

Prewitt Enters. v. OPEC, 353 F.3d 916, 920 (11th Cir. 2003). We review *de novo* whether a defendant enjoys immunity under the Sovereign Immunities Act. *R&R Int'l Consulting LLC v. Banco do Brasil, S.A.*, 981 F.3d 1239, 1243 (11th Cir. 2020). And we review *de novo* a summary judgment. *See Tillis ex rel. Wuenschel v. Brown*, 12 F.4th 1291, 1296 (11th Cir. 2021). We draw all reasonable inferences for the oil companies and view the evidence in the light most favorable to them. *Black v. Wigington*, 811 F.3d 1259, 1265 (11th Cir. 2016). We review the denial of a motion under Rule 56(d) for abuse of discretion. *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1330 (11th Cir. 2021).

III. DISCUSSION

We divide our discussion in five parts. First, we explain that the oil companies waived their challenge to personal jurisdiction when they failed to object to the magistrate judge's report and recommendation and then omitted any reference to insufficient service of process in their answers to the amended complaint. Second, we explain that Pequiven waived sovereign immunity when it failed to raise sovereign immunity in either its answer or its motion to dismiss the amended complaint. Third, we explain that the record presents no genuine issue of fact that Pequiven breached its contract with Isaac. Fourth, we explain that the record also presents no genuine issue that Bariven too breached its contract.

Finally, we explain that the district court did not abuse its discretion when it denied the oil companies' motion under Rule 56(d).

A. The Oil Companies Waived Their Challenge to Personal Jurisdiction.

The oil companies contend that, without proper service, the judgment against them is void for lack of personal jurisdiction. Isaac responds that the oil companies waived their challenge when they failed to object to the magistrate judge's final report and recommendation. We agree that the oil companies waived their challenge.

Settled rules govern our inquiry. Under our precedent, a party who fails "to file objections to a magistrate judge's order in a non-dispositive matter to the district court waives that claim on appeal." *A.L. ex rel. D.L. v. Walt Disney Parks & Resorts U.S., Inc.*, 50 F.4th 1097, 1112 (11th Cir. 2022). Our rules reinforce this conclusion. *See* 11TH CIR. R. 3-1 ("A party failing to object to a magistrate judge's findings or recommendations . . . waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object."). And we have long warned defendants that they "waive[] any objection to the district court's jurisdiction over [their] per-son[s]" when they fail to "object[] to it in a responsive pleading or a [Rule] 12 motion." *Palmer v. Braun*, 376 F.3d 1254, 1259 (11th Cir. 2004). So, if a defendant fails to challenge a "defect in personal jurisdiction" in his answer to the operating complaint, he "consent[s] to the court's jurisdiction." *Pardazi v. Cullman Med. Ctr.*, 896 F.2d 1313, 1317 (11th Cir. 1990). And once he "consent[s] to litigate the action in [our] court, [we] may not . . . dismiss the suit for lack of personal jurisdiction or insufficient service of process." *Id.*

Under these tenets of civil procedure, the oil companies waived their objection to personal jurisdiction twice over. They first waived the challenge when they failed to object to the magistrate judge's report and recommendation on Isaac's motion for an entry of default under Rule 55(a). The report and recommendation advised the oil companies that this failure would bar them "from attacking on appeal . . . legal conclusions contained in this [r]eport." Despite this warning, the oil companies chose not to respond. And the district court then adopted the report and recommendation. This failure alone is enough to waive a challenge to insufficient service of process. *See Walt Disney Parks*, 50 F.4th at 1112. And the oil companies' second waiver, which occurred when they later filed answers to the amended complaint that omitted any reference to service of process, reinforces our conclusion that they abandoned this challenge and "consented" to the exercise of juris-diction over them. *Pardazi*, 896 F.2d at 1317.

The oil companies' counterarguments fail to convince us otherwise. They first contend that "it is unclear as to what [they] could have even objected" because the magistrate judge held "that service had not been effected under the Hague [Service] Convention." This argument misleads through half-truth. To be sure, the magistrate judge concluded that Isaac never perfected service under the Convention**.** But the magistrate judge also concluded that Isaac satisfied its obligations under the Convention because it met the three conditions for a default judgment under Article 15.

The oil companies could have raised several objections to the magistrate judge's recommendation—

including the same ones they raise here. They could have argued that Isaac did not satisfy the three conditions of Article 15. They could have argued that the Sovereign Immunities Act required Isaac to attempt service through alternative methods. And they could have objected to the magistrate judge's recommended prohibition on additional challenges to service of process. But they chose not to press these arguments, and we refuse to entertain them now.

The oil companies next argue that even if they waived this challenge, we should still review it for "plain error . . . in the interests of justice." We decline their invitation. The oil companies made a strategic choice when they declined to object to the report and recommendation or to object to personal jurisdiction in their answers. Instead of risking that Isaac would next move for, and perhaps obtain, a default judgment, the oil companies chose to defend the action on the merits. No "interest of justice" obliges us to consider their waived challenge to personal jurisdiction now that they lost on the merits of the claims for breach of contract.

B. Pequiven Waived Its Sovereign-Immunity Challenge.

Pequiven argues that the Sovereign Immunities Act shields it from this suit on two fronts. First, it asserts that it did not waive its sovereign-immunity challenge. Second, it argues that the commercial-activity exception to sovereign immunity does not apply. Because we decide its appeal on the first front, we do not reach the second.

The Sovereign Immunities Act provides the "sole basis for obtaining jurisdiction over a foreign state." *Argentine Republic v. Amerada Hess Shipping Corp.*,

488 U.S. 428, 434 (1989). Under the Act, we presume that a foreign state, along with its "agenc[ies]" and "instrumentalit[ies]," is immune from suit in federal courts. 28 U.S.C. §§ 1603–04. But this presumption falls away when one of the Sovereign Immunities Act's "specified exception[s]" applies. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

This appeal turns on the waiver exception, which provides that a federal court can hear an action "in which the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). "Under the law of the United States, a waiver of immunity"—either explicit or implicit—"may not be withdrawn, except by consent of all parties to whom (or for whose benefit or protection) the waiver was made." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 456(3) (AM. L. INST. 1987). So "sovereign immunity, once waived, cannot be reasserted." *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1287 n.18 (11th Cir. 1999). Our Court, wary of this harsh consequence and "loath to broaden the scope of the implied waiver provision," construes the exception "narrowly." *Id.* at 1291 n.24 (citation and internal quotation marks omitted). But even so, an agency or instrumentality of a foreign state "reveals its intent to waive its immunity" when it (1) "agree[s] to arbitration in another country," (2) "agree[s] that the law of a particular country should govern a contract," or (3) "file[s] a responsive pleading in an action without raising the defense of sovereign immunity." *Calzadilla v. Banco La-tino Internacional*, 413 F.3d 1285, 1287 (11th Cir. 2005).

Pequiven lands squarely within the implied-waiver exception: it filed a "responsive pleading" to Isaac's

amended complaint "without raising the defense of sovereign immunity." *Id.* This omission establishes a "clear and unambiguous" intent to waive the defense. *Aquamar*, 179 F.3d at 1292 (citation and internal quotation marks omitted). To be sure, Pequiven moved to dismiss the *original* complaint based on sovereign immunity. But Isaac cured its earlier omission of allegations about an exception to sovereign immunity when it alleged in its *amended* complaint that the commercial-activity exception applied to Pequiven. In response, the oil companies' joint motion to dismiss reasserted a sovereign-immunity defense only for PDVSA. That motion mentioned Pequiven—but argued that the complaint "fail[ed] to state a claim" against the entity because it did not allege that Pequiven "received any consideration for the assumption of debt." Pequiven's answer similarly omitted any assertion that sovereign immunity shielded the company. Instead, it asserted two affirmative defenses: one about the political crisis in Venezuela and one about lack of consideration. Sovereign immunity went unmentioned until Pequiven's new counsel sought to resurrect it in response to the motion for summary judgment.

This litigation conduct established Pequiven's intent to "waive[] its immunity . . . by implication." 28 U.S.C. § 1605(a)(1). After raising a sovereign-immunity challenge in the first round, Pequiven dropped all sovereign-immunity arguments in the second. Unlike PDVSA, it did not move to dismiss the amended complaint on sovereign-immunity grounds. Its answer failed to contest the amended complaint's allegations about the commercial-activity exception. It did not seek discovery. And it decided to take part in the litigation for over a year without even a hint (that is, until new counsel appeared) that sovereign immunity shielded it

from federal jurisdiction. Pequiven may regret this course of action, but it must live with the consequences of its litigation tactics.

Pequiven unpersuasively argues that it "asserted the defense throughout the litigation," starting with its original motion to dismiss. But in that motion, Pequiven's single grievance focused only on Isaac's failure to present *any* allegation that Pequiven satisfied any of the sovereign-immunity exceptions. After Isaac amended its complaint, Pequiven had the opportunity to contest the new allegations about the commercial-activity exception but failed to do so.

Pequiven also erroneously relies on an agreed order that granted Pequiven's motion to dismiss and affirmed its "ability to reassert the remaining bases for dismissal contained" in its motion "once service of process [was] effectuated." Pequiven casts that order as one that "preserv[ed] all of [its] defenses." But the text of the order, which preserved Pequiven's ability to "reassert" its sovereign-immunity defense, betrays Pequiven's description. The order did not preserve in perpetuity a general assertion of sovereign immunity. Instead, it required action that Pequiven declined to take.

Pequiven's remaining argument relies on two out-of-circuit precedents, neither of which support its position. In *Drexel Burnham Lambert Group Inc. v. Committee of Receivers for Galadari*, the Second Circuit declined to find an implicit waiver where the defendant did not plead the immunity defense in its answer but followed that pleading "almost immediately" with a "motion to dismiss that did." 12 F.3d 317, 326 (2d Cir. 1993). And in *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, the Second Circuit refused to find an implicit waiver where the defendant never filed an

answer, but still asserted the defense of sovereign immunity in a petition for removal, a memorandum in opposition to remand, a stipulation concerning the amended complaint, and a motion to dismiss the amended complaint. 727 F.2d 274, 276–78 (2d Cir. 1984). Unlike the defendants in *Drexel* and *Canadian Overseas*, Pequiven did not assert sovereign immunity in *either* its answer or its motion to dismiss the amended complaint. This omission, in the context of the procedural history before us, establishes a "clear and unambiguous" intent to waive the defense. *See Aquamar*, 179 F.3d at 1292 (citation and internal quotation marks omitted).

Pequiven also maintains that sovereign immunity is not an affirmative defense, and it argues that the burden-shifting framework we have long applied to these issues has been "undermined . . . by recent Supreme Court precedent." At oral argument, Pequiven added that the Supreme Court's recent grant of certiorari in *Republic of Hungary v. Simon* directly presents the question which party bears the burden of proof on sovereign immunity. 144 S. Ct. 2680 (2024) (mem.).

The resolution of that issue has no effect on this appeal. Even if a plaintiff bears the ultimate burden of proof on sovereign immunity, a defendant must, at least, raise it in a motion to dismiss *or* contest a complaint's allegations that an exception applies to avoid waiver "by implication." 28 U.S.C. § 1605(a)(1). That is, the burden of proof comes into play only if a defendant contests that the plaintiff has satisfied its burden by pleading and proof. And Pequiven offered no contest by motion, answer, or proof. The closest Pequiven came was a belated declaration and equivocal

bylaws offered at summary judgment, both of which were too little, too late. So we leave the burden-of-proof arguments for an appeal that actually presents the issue.

C. Summary Judgment for Isaac Industries Was Proper as to Pequiven.

Pequiven contends that the district court erred when it granted summary judgment to Isaac on its claim for breach of contract. Pequiven argues that Saul Silva lacked authority to bind it, and, in any event, the contract "was not supported by consideration." But Pequiven waived the lack-of-authority defense when it failed to assert it in its answer, and its argument about consideration fails on the merits.

Whether an agent possesses authority to bind its principal is an affirmative defense that must be pleaded. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271 (4th ed. 2024). "Failure to plead an affirmative defense generally results in a waiver." *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1239 (11th Cir. 2010). And when a defendant raises an affirmative defense in, for example, a motion for summary judgment, we have ruled that its "failure to specifically plead the defense in its answer or amended answer" bars a challenge on appeal. *See Easter-wood v. CSX Transp., Inc.*, 933 F.2d 1548, 1551 (11th Cir. 1991).

Pequiven first asserted a lack-of-authority defense in its response to the motion for summary judgment, so it waived the defense in the process. We decline to consider it now.

Waiver aside, Pequiven's lack-of-authority argument fails on the merits. In *GDG Acquisitions LLC*

v. Government of Belize, we declined to decide whether Belize's purported agent possessed "actual authority" to enter an agreement because Belize "subsequently ratified his actions and, therefore, agreed to be bound by them" when it made payments in line with the agreement. 849 F.3d 1299, 1308–10 (11th Cir. 2017). That logic applies with equal force here. Even if we assume that Silva lacked actual or apparent authority, Pequiven ratified the agreement months later when it met the first payment deadline and tendered a payment of $2,947,542.00 to Isaac.

Pequiven's argument about lack of consideration also fails. "In a bilateral contract, the exchange of promises by both parties constitutes consideration" whenever "each party must promise to do something which will yield a benefit or advantage to the other, or which will result in a detriment or disadvantage to himself in exchange for the other promise." *Johnson Enters. of Jacksonville, Inc. v. FPL Grp., Inc.*, 162 F.3d 1290, 1311 (11th Cir. 1998) (citation omitted). A promise, "no matter how slight," will "constitute sufficient consideration so long as a party agrees to do something that [it is] not bound to do." *Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1304 n.12 (11th Cir. 2007) (citation and internal quotation marks omitted). Isaac gave up its ability to file "any claim" against Pequiven, which, in exchange for its assumption of the debt, received an extended period for payment. This exchange of promises supplied consideration for the contract.

Pequiven responds that the district court erred when it found that "Pequiven is Bariven's parent company." The district court relied on that finding to conclude that Isaac's "release [of] Bariven from its

payment obligations" qualified as a benefit, in part, because of the "very close economic ties between parent and sub." Pequiven maintains that PDVSA, not Pequiven, was Bariven's parent company. And Pequiven relies on its nonparental status to assert that it could not have received a benefit because, until it entered the contract, it had no "repayment period to extend and [Isaac] had no claims against Pequiven to release."

We reject these arguments. Pequiven clearly had some relationship to Bariven and some role in the original transaction: each invoice listed Pequiven as a consignee. In addition, the agreement between Pequiven and Isaac referenced another "payment contract with subrogation of debt signed between Bariven[,] S.A., PDVSA Services B.V., Pequiven, and ISAAC INDUSTRIES INC." Pequiven had some obligation and received a benefit from the extended deadline. To be sure, as the district court explained, "this evidence might wither in the face of a rigorous cross examination, or the production of contrary evidence, [but] that is not the procedural posture of this case." Without evidence of its own, Pequiven cannot create a material dispute of fact about consideration through conjecture.

D. Summary Judgment for Isaac Industries Was Proper as to Bariven.

Bariven, for its part, argues that Isaac's "failure to adduce a signed written contract as required under Florida's statute of frauds prevented [Isaac] from proving the existence of an enforceable contract as to Bariven." Isaac responds that the district court correctly held that the contract was valid because it dealt with "goods which have been received and

accepted." Under the statute of frauds, "a contract for the sale of goods for the price of $500 or more is not enforceable . . . unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought." FLA. STAT. § 672.201(1) (2024). But the statute exempts contracts "[w]ith respect to goods . . . which have been received and accepted." *Id.* § 672.201(3)(c).

The exemption applies here. The district court concluded that the unsigned invoices—along with Avan's testimony, the email initiating negotiations over the unpaid debt, the written terms of Pequiven and Isaac's agreement, and the partial payment from Pequiven—supported the "find[ing] that Bariven agreed to purchase the chemicals, that it received and accepted the shipments, and that it failed to pay for them." We agree.

Bariven's attempts to conjure up disputed issues of material fact fail. It complains that the emails and contract between Isaac and Pequiven do not "reflect Bariven's assent to a contract." But Bariven does not dispute that the unrebutted evidence established that it received and accepted the 2-Ethylhexanol. It also faults the district court for "relying on the partial payment from Bariven's parent" when Bariven was a wholly owned subsidiary of PDVSA, not Pequiven. But, as discussed above, that error does not merit reversal or undermine the judgment in favor of Isaac.

E. The District Court Did Not Abuse Its Discretion When It Denied the Oil Companies' Rule 56(d) Motion.

The oil companies argue that the district court abused its discretion when it refused to deny or defer ruling on Isaac's motion, under Rule 56(d), "until such time that the crisis [in Venezuela] and its effect on [the oil companies'] access to discovery were resolved." The district court did nothing of the sort. A party seeking relief under Rule 56(d) must support its request with an affidavit or declaration that "specifically demonstrate[s] how postponement of a ruling on the motion will enable [it], by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Burns*, 999 F.3d at 1334 (citation and internal quotation marks omitted). The oil companies failed to make this showing. As the district court explained, they "declined to depose Isaac's witness or otherwise proactively participate in the discovery process." They also failed to "identify a single piece of documentary or testimonial evidence that they believe might actually controvert Isaac's showing or help their case." Because "vague assertions that additional discovery will produce needed, but unspecified facts" do not satisfy Rule 56(d), *id.* (citation and internal quotation marks omitted), the district court did not abuse its discretion when it declined to defer or delay granting summary judgment.

IV. CONCLUSION

We **AFFIRM** the judgments in favor of Isaac.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 23-12095

Errata

ISAAC INDUSTRIES, INC.,

Plaintiff-Appellee

v.

PETROQUÍMICA DE VENEZUELA, S.A. and BARIVEN S.A.,

Defendants-Appellants

PDVSA SERVICES, B.V., et al.,

Defendants

Appeal from the United States District Court for the Southern District of Florida
(1:19-cv-23113-RNS)

The opinion has been changed as follows:

On page 20, the phrase "directly presents the question of which" has been changed "directly presents the question which."

Appendix B
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 19-23113

ISAAC INDUSTRIES, INC.,

Plaintiff

v.

PETROQUÍMICA DE VENEZUELA, S.A. and OTHERS

Defendants

ORDER GRANTING, IN LARGE PART, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Isaac Industries, Inc., a wholesale distributor of various chemicals, seeks to recover nearly $18 million, excluding interest, from Defendants Petroquimica de Venezuela, S.A. ("Pequiven") and Bariven, S.A., in connection with three large shipments of 2-Ethylhexanol Isaac sent to Bariven in 2014.[1] In its complaint, Isaac lodges breach-of-contract claims

[1] The Court previously dismissed a third defendant, Petroleos De Venezuela, S.A. ("PDVSA"), finding Isaac failed to establish that PDVSA was not immune from suit. (Order on Mot. to Dismiss, ECF No. 81.)

against both Pequiven (count one) and Bariven (count two) and a claim for account stated against Bariven (count three). (Am. Compl. ("Compl."), ECF No. 71.) Isaac now seeks summary judgment in its favor, claiming entitlement to $23,384,373. (Pl.'s Mot., ECF No. 104.) In opposition, the Defendants argue Isaac failed to establish (1) the Court's subject-matter jurisdiction over Pequiven; (2) the existence or terms of any contract with Bariven; and (3) that Bariven promised to pay the amounts indicated on Isaac's invoices. (Defs.' Resp. to Pl.'s Mot., ECF No. 132.) Isaac has timely replied. (Pl.'s Reply, ECF No. 136.) After review, the Court **grants** Isaac's motion for summary judgment (**ECF No. 104**), **in part**, as to counts one and two and **denies it as moot, in part**, as to count three.

1. Background[2]

Through its owner, David Avan, Isaac says Bariven ordered a total of 5,993.873 metric tons of 2-Ethylhexanol, agreeing to pay $2,975 per metric ton. (Pl.'s Stmt. of Facts ¶¶ 5–6, ECF No. 105.) As each of three individual orders was shipped, Isaac says it provided Bariven with an invoice. (*Id.* ¶ 7.) The first two invoices, numbered 25012 and 250122, are both dated July 6, 2014, and reflect amounts due of $5,950,000.00 and $5,941,928.93, respectively. (*Id.*; *see also* Inv. 1, ECF No. 104-1, 5; Inv. 2, ECF No. 104-1, 6.) The third invoice, numbered 25114, is dated September 19, 2014, and reflects an amount due of $5,939,843.35. (Pl.'s Stmt. ¶ 7; *see also* Inv. 3, ECF No. 1041, 7.)

[2] The factual representations that follow are based on Isaac's statement of material facts and the documents cited therein. (Pl.'s Stmt. of Facts, ECF No. 105.) The Defendants' quarrel with those facts will be addressed within the Analysis section, below.

According to Isaac, the amounts indicated on the invoices were due within 60 days after each delivery in Venezuela, with payment to be made to Isaac in the United States, in U.S. dollars. (*Id.* ¶ 8.) Although Bariven never voiced any objections to Isaac about the invoices, it also never paid any of the amounts due. (*Id.* ¶¶ 9–10.)

After about two years went by, without any payment from Bariven, Avan, in September 2016, met with representatives from Bariven's parent company, Pequiven, in Miami, Florida. (*Id.* ¶¶ 11–12.) At that meeting, Avan discussed Bariven's outstanding balance at length and Pequiven agreed to cover the debt, memorializing the plan in a written agreement. (*Id.* ¶¶ 12–13; *see also* Agmt., Pl.'s Ex. C, ECF No. 104-1, 10–13.)

As set forth in this agreement, Pequiven "assumed the debt incurred by Bariven owed to [Isaac]." (Agmt. at 11; Pl.'s Stmt. ¶14.) The payment terms applied an annual 5% interest rate to the $17,831,772.18 principal amount, starting from the due date of the invoices through the date of the agreement. (Agmt. at 11; Pl.'s Stmt. ¶ 15.) On top of that interest, Pequiven also agreed to pay 6% interest per year, starting January 1, 2017, for financing the remaining amounts owed, until the full debt was paid. (Agmt. at 12; Pl.'s Stmt. ¶17.) Further, Pequiven agreed to pay 15% of the debt, plus interest, by December 31, 2016, followed by six quarterly installment payments, with the final payment due on June 30, 2018. (Agmt. at 11–12; Pl.'s Stmt. ¶¶16, 18.) All payments were due to Isaac in the United States and in U.S. dollars. (Pl.'s Stmt. ¶ 19.)

Consistent with the written agreement, Pequiven tendered a payment of $2,947,542.00 (representing 15%

of the debt plus interest) to Isaac on December 30, 2016. (*Id.* ¶ 20.) No further payments ever followed, however, from either Bariven or Pequiven. (*Id.* ¶¶ 21, 24.) Based on the written terms between Pequiven and Isaac, Isaac says Pequiven owes, as of February 15, 2023, $23,384,373.00, inclusive of principal and interest. (*Id.* ¶ 23.) Bariven's tab, on the other hand, amounts to $15,111,440.00, plus prejudgment interest. (*Id.* ¶ 25.)

Isaac filed its complaint against the Defendants on July 26, 2019. (*Id.* ¶ 26.) In answering the complaint and responding to discovery, the Defendants have repeatedly opined that the ongoing political crisis in Venezuela has prevented them from obtaining information and evidence relevant to the case against them. (*Id.* ¶¶ 31, 33–37.)

2. Legal Standard

Summary judgment is proper if following discovery, the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56. "An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case." *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259–60 (11th Cir.2004). "An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Id.* at 1260. All the evidence and factual inferences reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1280 (11th Cir. 2004).

"When the plaintiff moves for summary judgment and also bears the burden of proof on a claim at trial," as here, "then the plaintiff must affirmatively show that no genuine dispute exists as to any material fact relevant to the plaintiff[']s claims and must produce such evidence as would entitle the plaintiff to a directed verdict if not controverted at trial." *Lodge v. Kondaur Capital Corp.*, 1:10-CV-0736-WCO-LTW, 2012 WL 12868850, at *3 (N.D. Ga. Dec. 4, 2012), *rep. & rec. adopted*, 1:10-CV-736-WCO-LTW, 2013 WL 12092555 (N.D. Ga. Jan. 29, 2013), *aff'd,* 750 F.3d 1263 (11th Cir. 2014) (citing Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993)). Once a party properly makes a summary judgment motion by demonstrating the absence of a genuine issue of material fact, whether or not accompanied by affidavits, the nonmoving party must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories, admissions on file and other documents, and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 323–24. The nonmovant's evidence must be significantly probative to support the claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court will not weigh the evidence or make findings of fact. *Anderson*, 477 U.S. at 249; *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003). Rather, the Court's role is limited to deciding whether there is sufficient evidence upon which a reasonable juror could find for the nonmoving party. *Id.* "If more than one inference could be construed from the facts by a reasonable fact finder, and that inference introduces a genuine issue of material fact, then the district court should not grant summary judgment." *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 996 (11th Cir. 1990).

3. Analysis

A. Isaac has established its entitlement to summary judgment in its favor on its breach-of-contract claim against Pequiven.

Isaac maintains it has demonstrated an absence of any genuine dispute as to the material facts supporting its breach-of-contract claim against Pequiven. In response, the Defendants argue that Pequiven is immune from the Court's jurisdiction because Isaac has not proven the existence of any exception to Pequiven's sovereign immunity under the Foreign Sovereign Immunities Act. The Court agrees with Isaac and finds the Defendants' arguments unconvincing. As an initial matter, the Court is satisfied that Isaac has affirmatively shown, by producing evidence that would entitle it to a directed verdict if not controverted at trial, that no genuine dispute exists as to any material fact relevant to its claim against Pequiven. Secondly, the

Defendants' jurisdictional arguments miss the mark.

(1) The undisputed material facts establish Isaac's breach-of-contract claim against Pequiven.

"To prevail in a breach of contract action, a plaintiff must prove: (1) a valid contract existed; (2) a material breach of the contract; and (3) damages." *Deauville Hotel Mgmt., LLC v. Ward*, 219 So. 3d 949, 953 (Fla. 3d DCA 2017). Here, Isaac presents a written document that Isaac's owner, Avan, has testified encompasses Isaac and Pequiven's agreement. (Avan Decl. ¶¶ 12–14, ECF No. 104-1, 1–4; Agmt. at 10–13.) Avan testified that he met with representatives from Pequiven, Joel Alvarez and Saul Silva, in Miami, Florida, in

September 2016. (Avan Decl. ¶ 12.) According to Avan, Alvarez was Pequiven's "Manager of Planning and Market Intelligence" and Silva was acting in his capacity as Pequiven's agent. (*Id.*) During the meeting, Bariven's outstanding debt was discussed at length. (*Id.* ¶ 13.) Ultimately, as a result of the meeting, Pequiven, as Bariven's parent company, assumed Bariven's debt to Isaac. (*Id.* ¶¶ 13–14.) Avan testified that, in exchange for Pequiven's offer to take on the debt, under the terms set forth in the written agreement, Isaac would release Bariven from its payment obligations—contingent, however, on Pequiven's full performance— and allow for a protracted payment plan. (*Id.* ¶¶ 15, 17, 19.)

In disputing most of Isaac's statement of facts, and Avan's testimony upon which Isaac primarily relies, the Defendants' objections fall into two general categories. First, the Defendants repeatedly complain that they "are not in a position to confirm the veracity" of Isaac's various "bare statements." (*E.g.*, Defs.' Stmt. ¶¶ 11–12, ECF No. 133.) Second, they submit, generally, that Isaac has not proven that Bariven owes anything to begin with or that Pequiven and Isaac entered into an enforceable contract. (*E.g.*, *id.* ¶¶ 11–14.) The Court is not persuaded by either approach.

The Defendants' complaint that they are unable to access evidence to support their defense of Isaac's lawsuit against them has no bearing on whether the facts asserted are genuinely disputed. This case is now four years old. The Defendants have appeared and defended this case and the discovery period has long since closed. Neither Isaac nor the Court has prevented the Defendants from engaging in discovery, presenting evidence, or asserting defenses. The Defendants' inability to controvert Avan's testimony and Isaac's

documentary evidence, without more, leaves the facts Isaac presents through its motion for summary judgment uncontroverted.

Next, the Court finds the material facts Isaac relies on properly supported by the record and sufficient to prove its case. "If the moving party will bear the burden of persuasion at trial," like Isaac here, "that party must support its [summary-judgment] motion with credible evidence that would entitle it to a directed verdict if not controverted at trial." *Turnes v. AmSouth Bank, NA*, 36 F.3d 1057, 1062 n. 11 (11th Cir. 1994) (cleaned up). Despite the Defendants' various protestations, the Court concludes Isaac has done so.

For example, the Defendants' quarrel with Isaac's position that Silva was acting as Pequiven's agent is misdirected. Part of the Defendants' argument is that whether Silva was indeed Pequiven's agent "is a legal conclusion" and, therefore, is not appropriately designated as an undisputed material fact. (Defs.' Stmt. ¶ 11.) The Defendants also submit, in purely conclusory fashion, that Isaac "has not proven that the individuals purporting to act on Pequiven's behalf had the authority to bind Pequiven." (*Id.* ¶ 14.) But Isaac's agency claim is more than adequately bolstered by Avan's testimony and documentary evidence. Avan testified that he was invited by Pequiven's "Manager of Planning and Market Intelligence International Trade" to attend a meeting to resolve Bariven's outstanding debt. (*Id.* ¶ 12 (citing Email Corr. from Alvarez, Decl. Ex. B, ECF No. 104-1, 8–9).) Avan also testified that Silva attended and participated in this meeting on behalf of Pequiven. (Avan Decl. ¶¶ 12–14 (citing to Agmt.).) And, finally, Isaac produced a document specifying that Pequiven was "represented in this act"

by three individuals—Jose Luis Perez, Pedro Lugo, and Silva—who were acting "in their capacity[ies] as Commercial Director, Finance Executive Director and Legal Counsel." (Agmt. at 11.) Without any real challenge from the Defendants, these unrebutted facts, supported by credible evidence, are enough to establish that Silva was acting as Pequiven's agent.[3]

The Defendants also complain that Isaac's evidence does not sufficiently establish (1) that Bariven owed any money to Isaac; (2) that Pequiven and Isaac's agreement was supported by consideration; or (3) that the agreement is at all enforceable. (*E.g.*, Defs.' Stmt. ¶¶ 12–14.) The Court is unpersuaded. The invoices showing the shipments of the chemical from Isaac to Bariven, combined with Avan's testimony and other documentary evidence, sufficiently demonstrate Bariven's debt. And to the extent Isaac is even required

[3] The Defendants also attempt to present the testimony of Jesus Bellorin, who they say was recently appointed as "the Single Administrator of Pequiven," to establish that none of Perez, Lugo, nor Silva had any authority to act on Pequiven's behalf. (Defs.' Stmt. ¶ 51.) The Court declines to consider this testimony or any of the documentary evidence the testimony is based on in evaluating Isaac's motion: the Defendants failed to disclose any of this evidence during the discovery period in this case nor did they present any proper justification for producing it beyond the deadline to do so. *See* Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."); *De Zayas v. Bellsouth Telecommunications, Inc.*, 841 F. Supp. 2d 1257, 1258 (S.D. Fla. 2012) (Scola, J.) (rejecting a party's attempt to rely on a report produced after the close of discovery, finding it "properly excluded as the [parties] were given an adequate opportunity to prepare and to litigate this matter".

to establish the sufficiency of the agreement's consideration, it has shown that Pequiven is Bariven's parent company and that Isaac agreed to release Bariven from its payment obligations as well as allow for a protracted payment plan on amounts that were long since past due. While there are certainly cases where a benefit to a subsidiary does not necessarily translate to a benefit to a parent company, the Defendants have supplied no facts indicating that is the case here. And both the invoices and the written agreement here appear to establish very close economic ties between parent and sub. Two of the invoices for the chemical shipments, invoice numbers 25012 and 250122, indicate an understanding that Bariven's parent company—presumably Pequiven—will issue a "PARENT PERFORMANCE GUARANTEE." (Inv. 1; Inv. 2.) The third invoice, invoice number 25114, lists Pequiven as one of the "CONSIGNED/NOTIFY TO" entities. (Inv. 3.) And the agreement between Pequiven and Isaac references what appears to be a previously executed "payment contract with subrogation of debt" entered into among Bariven, PDVSA, Pequiven, and Isaac. (Agmt. at 11.) While this evidence might wither in the face of a rigorous cross examination, or the production of contrary evidence, that is not the procedural posture of this case. Without more, in light of the record supporting Isaac's motion for summary judgment, the Defendants unsupported speculation that the agreement is not enforceable is without merit.

If the Defendants had wanted to probe and test Avan's testimony or the legitimacy of the documentary evidence, they could have done so through a fulsome vetting during the discovery process. They chose not to and so now the evidence

stands unrebutted: Isaac has produced invoices directed to Bariven; an email from a Pequiven representative acknowledging the debt; a written document that on its face expresses an agreement between Isaac and Pequiven to take on the debt; a subsequent receipt for payment of nearly $3 million from Pequiven, consistent with the written agreement; and testimony from Avan, putting all the evidence into context. Isaac's unrebutted record evidence is enough.

In sum, Isaac has come forward with evidence that affirmatively shows there is no genuine dispute as to any material fact relevant to its breach-of-contract claim against Pequiven. Because the Court finds this testimonial and documentary evidence would be sufficient to entitle Isaac to a directed verdict if not controverted at trial, it grants summary judgment in Isaac's favor on count one.

(2) The Defendants have failed to establish that Pequiven is immune from suit.

Both in their response to the Court's order to show cause regarding jurisdiction (Defs.' Resp. to Court, ECF No. 149) and in their response to Isaac's motion for summary judgment, the Defendants argue that the Court lacks subject-matter jurisdiction over Pequiven as a result of Pequiven's sovereign immunity. Although the Defendants do not dispute that Isaac has properly pleaded the applicability of an exception to Pequiven's immunity, they complain that Isaac has not yet "proven" that the exception applies. In support they rely on many of the same arguments that the Court previously addressed, in section A.(1), above. In summary, the Defendants says Isaac has failed to definitively estabblish the applicability of the

commercial-activity exception or waiver. (Defs.' Resp. to Pl.'s Mot. at 8–16; Defs.' Resp. to Court at 4–12.) The Court is not persuaded.

First, the Court disagrees with the Defendants' position that, as a starting point, Isaac "must *prove* that each element of the exception [to immunity] is met." (Defs.' Reply to Court, ECF No. 151, 4; Defs.' Resp. to Pl.'s Mot. at 9 ("Plaintiff must actually prove that [the exception] applies.").) In light of the record in this case, it is not clear what the Defendants even mean by this. While the controlling case law expressly assigns the initial "burden of production" of establishing the applicability of an exception to FSIA immunity to the plaintiff, that is not the same as requiring a plaintiff to "prove" that exception. *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1313 (11th Cir. 2009). To be sure, that a plaintiff may meet its burden through both the "allegations in the complaint and the undisputed facts, if any, placed before the court by the parties," lays this distinction bare. *Id.*

Notably, the Defendants do not dispute that the complaint's allegations sufficiently plead the application of the commercial-activity exception as set forth in 28 U.S.C. § 1605(a)(2): a commercial activity, undertaken by Pequiven outside the United States in connection with a commercial activity elsewhere, which caused a direct effect in the United States. (Compl. ¶¶ 1–17.) With the statutory exception to immunity sufficiently demonstrated through Isaac's allegations of the commercial-activity exception, "the burden then shifts to the defendant to prove, by a preponderance of the evidence, that the plaintiff's claims do not fall within that exception." *Butler*, 579 F.3d at 1313; *see also Drexel Burnham Lambert Group Inc. v. Comm. of*

Receivers for Galadari, 12 F.3d 317, 325 (2d Cir. 1993) ("[T]he ultimate burden of persuasion remains with the alleged foreign sovereign.") (cleaned up). The Defendants have not met this burden.

As an initial matter, Pequiven answered Isaac's amended complaint, without asserting any claim to sovereign immunity. (Pequiven's Ans., ECF No. 82.) Prior to its response to Isaac's motion to summary judgment, Pequiven's only objection to jurisdiction based on the FSIA was through its motion to dismiss Isaac's initial complaint. (Pequiven's Mot. to Dismiss, ECF No. 21.) In that motion, Pequiven complained that the complaint was "*devoid* of any allegations that plausibly suggest that Isaac's claim against Pequiven falls within one of the FSIA's enumerated exceptions to immunity." (*Id.* at 12 (emphasis added).) But in answering Isaac's amended complaint, Pequiven failed to indicate in any way that it was not amenable to suit. (Pequiven's Ans., ECF No. 82.) Instead, Pequiven largely pleaded that it was "without knowledge" as to Isaac's allegations and interposed only two affirmative defenses: one complaining about the political crisis in Venezuela and one pleading a lack of consideration. (*Id.*) The Defendants fail to explain why this responsive pleading, omitting any assertion of sovereign immunity, was not an implicit waiver of its immunity. *See Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277 (2d Cir. 1984) (noting that the FSIA's legislative history recognized that "an implicit waiver would include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity" and that "sovereign immunity is an affirmative defense which must be specially pleaded for a court to consider it") (cleaned up) (citing H.R. Rep. No.

1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6616, 6617).

Despite Pequiven's answer, the Defendants insist Pequiven's immunity defense was preserved by (1) Pequiven's raising it in its motion to dismiss Isaac's initial complaint and (2) an agreed order wherein the Court preserved the "Defendants' ability to reassert the remaining bases for dismissal contained in their Motions to Dismiss" (ECF No. 34). The Court is not persuaded. First, the only claim to immunity Pequiven has made, until now, was based on deficiencies, since cured, in Isaac's initial pleading. Further, Pequiven's initial grievance was focused solely on Isaac's failure to present *any* allegations of an exception to immunity, not, as now, on the factual underpinnings of Isaac's allegations. Once Isaac amended its complaint, properly pleading the commercial-activity exception, the time for Pequiven to raise a challenge to Isaac's jurisdictional allegations was in its responsive pleading. By not doing so, the Court finds Pequiven exhibited "a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so." *Drexel*, 12 F.3d at 327, 328 (cleaned up) (finding no waiver where defendant, throughout the litigation "consistently invoked FSIA immunity, or reserved the right to do so in the future, to an extent that precludes a determination that FSIA immunity was unambiguously and unmistakably waived"). Based on Pequiven's participation in this case for a year, after Isaac filed its amended complaint, without raising even the suggestion of FSIA immunity, in combination with its responsive pleading where Pequiven fails to mention immunity at all, the Court finds Pequiven "unambiguously and unmistakably waived" its right to raise it now.

Furthermore, even if the Court did not find waiver, the Defendants' objections to the factual bases that Isaac claims support the commercial-activity exception are, in any event, unavailing. At bottom, the Defendants' opposition, with the exception of the evidence regarding Pequiven's bylaws, amounts to nothing more than a complaint about what the Defendants perceive as weaknesses in Isaac's record evidence. Without producing any of their own contrary evidence, however, the Defendants can't carry their burden of persuasion just by raising speculative and cursory concerns about the quality of Isaac's evidence. Further, even if the Defendants' newly produced bylaws were properly before the Court, the Defendants do not dispute Isaac's point that the bylaws explicitly provide for the delegation of authority, by the president or the executive committee, to allow for others to execute contracts. (Pl.'s Resp. to Court's Order at 9 n. 7, ECF No. 150 (citing Bylaws at Chs. V, Cl. 28 and VII, ¶ 6, ECF No. 131-7, 31, 32).) Simply put, while the Defendants express doubt about the strength of Isaac's evidentiary footing, they fail to produce any evidence actually controverting that evidence.

In sum, the Defendants fail to carry their "ultimate burden of persuasion" that Isaac's claim against Pequiven does not fall within a FSIA exception.

B. Isaac has established its entitlement to summary judgment in its favor on its breach-of-contract claim against Bariven.

Isaac's record evidence supports its breach-of-contract claim against Bariven. That evidence, both testimonial and documentary, shows that Bariven ordered nearly 6,000 metric tons of 2-Ethylhexanol from Isaac for $17,831,772.18; that Isaac shipped the

order to Bariven; and that Bariven never objected to the invoices nor submitted any payment to Isaac. (Pl.'s Stmt. ¶¶ 5–10.) In opposition, the Defendants (1) complain, once again, that the political crisis in Venezuela leaves them unable to confirm Isaac's claims and that the claims are merely legal conclusions masquerading as facts; (2) argue the invoices are unsigned and therefore insufficient to bind Bariven; and (3) insist Isaac has failed to establish that there was a meeting of the minds as to the essential elements of any agreement. (Defs.' Resp. to Pl.'s Mot. at 16–17.) The Court finds the Defendants' contentions unavailing.

The Court rejects the Defendants' first argument for the same reasons it rejected it with respect to Isaac's claim against Pequiven. (*See* section A.(1), above.) In short, the Defendants have appeared and defended this case and neither Isaac nor the Court has prevented them from litigating their defense. Further, in complaining about their lack of access to potential evidence in Venezuela, the Defendants do not even allege that they believe that that purported evidence would even be exculpatory. Further, by cherry picking Avan's testimony that the parties "contracted," the Defendants ignore all the testimonial and documentary evidence Isaac has produced, supporting its claim of a contract with Bariven.

The Defendants' supposition that, because the invoices are unsigned, they are therefore insufficient to establish an enforceable contract is also unpersuasive. The requirement, upon which the Defendants rely, under Florida's Uniform Commercial Code that "a contract for the sale of goods for the price of $500 or more is not enforceable . . . unless there is some writing

sufficient to indicate that a contract for sale has been made between the parties and *signed by the party against whom enforcement is sought*" is not determinative. Fla. Stat. § 672.201(1). That is, "the lack of signature does not necessarily defeat Plaintiff's claims because an unsigned writing that constitutes a contract may be enforceable 'with respect to goods which have been received and accepted.'" *T.T. Int'l Co., Ltd. v. BMP Int'l, Inc.*, 8:19-CV-2044-CEH-AEP, 2023 WL 1514347, at *13 (M.D. Fla. Feb. 3, 2023) (cleaned up) (quoting Fla. Stat. § 672.201(3)(c)). Although it's true that the "object of a signature is to show mutuality or assent," such aspects of a contract "may be shown in other ways, for example, by the acts or conduct of the parties." *Sierra Equity Group, Inc. v. White Oak Equity Partners, LLC*, 650 F. Supp. 2d 1213, 1228 (S.D. Fla. 2009) (Marra, J.) (quoting *Gateway Cable T.V., Inc. v. Vikoa Construction Corp.,* 253 So.2d 461, 463 (Fla. 1st DCA 1971)). Accordingly, there is no hurdle to the Court's concluding that a "contract may be binding on a party despite the absence of a party's signature." *Sierra Equity*, 650 F. Supp. 2d at 1228 (quoting *Gateway,* 253 So. 2d at 463 (Fla. 1st DCA 1971)).

Here, the unrebutted evidence—comprised of Avan's testimony, the invoices, the email from Alvarez, the written terms agreed to by Pequiven and Isaac, and the partial payment from Bariven's parent—combine to allow the Court to find that Bariven agreed to purchase the chemicals, that it received and accepted the shipments, and that it failed to pay for them. The Defendants' attempt to conjure a disputed issue of material fact misses the mark. Isaac has presented credible evidence that would entitle it to a directed verdict if not controverted at trial.

The Defendants also argue that, even if the Court finds that Bariven and Isaac did enter into a valid contract, Isaac's later agreement with Pequiven amounts to a novation, extinguishing Bariven's original obligation. (Defs.' Resp. to Pl.'s Mot. at 18.) In support, the Defendants maintain that Isaac "admits that the purported Plaintiff-Pequiven agreement was intended to release Bariven's alleged debt" and cite to Isaac's statement of facts. (*Id.* (citing Pl.'s Stmt. ¶ 14).) While Isaac does say that Pequiven indeed took on Bariven's debt in exchange for "Isaac's release," the very next sentence clarifies that the release "was wholly contingent upon full payment by Pequiven and barring such full payment, Bariven remained responsible for the outstanding debt." (Pl.'s Stmt. ¶ 14.) And Pequiven and Isaac's written agreement supports this: the agreement, by its own terms, recites that is "does not eliminate the commercial and legal value of the invoices that resulted in this debt, nor does it mean a change in same." (Agmt. at 12.) While it may true, as the Defendants posit, that the parties' intent is not "readily ascertainable from the contract's terms," Avan's unrebutted testimony clarifies the purported ambiguity. *See Electro-Protective Corp. v. Creative Jewelry by Kempf, Inc.*, 513 So. 2d 190, 192 (Fla. 5th DCA 1987) ("[W]here there are disputes concerning the terms of an agreement and the intention of the parties at the time of its making, these are questions of fact which should be submitted to the trier of fact for resolution.").

In sum, Isaac has come forward with evidence that affirmatively shows there is no genuine dispute as to any material fact relevant to its breach-of-contract claim against Bariven. Because the Court finds this testimonial and documentary evidence would be

sufficient to entitle Isaac to a directed verdict if not controverted at trial, it grants summary judgment in Isaac's favor on count two as well.

C. The Court denies the Defendants' request that the Court deny or defer consideration of Isaac's motion for summary judgment.

As they have throughout this litigation, the Defendants once again complain about "the extraordinary political circumstances" in Venezuela that have prevented them "from accessing their corporate records, facilities, and personnel to fill the factual gaps." (Defs. Resp. to Pl.'s Mot. at 21.) Because of those circumstances, the Defendants maintain that deciding this motion in Isaac's favor "would be akin to entering a default judgment against Defendants." (*Id.* at 23.) Indeed, they say, anything short of the Court's denying or deferring consideration of Isaac's motion would amount to a denial of the Defendants' due-process rights. (*Id.* at 24.) The Court is not persuaded by the Defendants' request that the Court revisit this issue.

This case has been pending for nearly four years. The Defendants have appeared and have defended this case. Neither the Plaintiff nor the Court has prevented the Defendants from engaging in discovery or litigating this case. For reasons known only to them, the Defendants declined to depose Isaac's witness or otherwise proactively participate in the discovery process. In essentially seeking an indefinite stay of this case—until the political situation in Venezuela is or may be resolved—the Defendants fail to specify with any degree of particularity what benefit they might reap from the delay, aside from simply delaying the inevitable. Indeed, the Defendants' claims of prejudice

and unfairness are wholly speculative, abstract, and hopeful: they do not identify a single piece of documentary or testimonial evidence that they believe might actually controvert Isaac's showing or help their case. Nor do they even explicitly deny Isaac's claims, instead confining their protests to purported deficiencies in Isaac's affirmative presentation of its case. In short, the Defendants' request for even further delay in this case is untenable and unjustified.

4. Conclusion

For the reasons set forth above, the Court **grants** Isaac's motion for summary judgment (**ECF No. 104**) **in part**, as to counts one and two of the complaint. But, because a plaintiff who "prevails on its breach of contract claims. . . may not also recover for account stated," the Court **denies** Isaac's motion **in part** as to count three. *T.T. Int'l*, 2022 WL 971950, at *11; *see also Rolyn Const. Corp. v. Coconut Grove PT Ltd. P'ship*, 07-20834-CIV-HUCK, 2007 WL 2071268, at *2 (S.D. Fla. July 19, 2007) (Martinez, J.) (dismissing account-stated claim as duplicative of breach-of-contract claim); *City Beverage-Illinois, LLC v. Vital Pharm., Inc.*, 20-CV-61353, 2022 WL 3137051, at *10 (S.D. Fla. July 13, 2022) (Strauss, Mg. J.) (recognizing that a party may not recover on duplicative claims of breach of contract and account stated).[4]

[4] Isaac preemptively addressed the Defendants' affirmative defenses in its motion. (Pls.' Mot. at 5–8.) The Defendants have not, however, established their entitlement to these defenses in the first instance. Accordingly, except where discussed incidentally to the Court's review, these affirmative defenses have not factored into the Court's analysis. *Office of Thrift Supervision v. Paul*, 985 F. Supp. 1465, 1470 (S.D. Fla. 1997) (Ungaro, J.) ("On a plaintiff's motion for summary judgment, the

As set forth in the record, the total balance owed by Pequiven, as of February 15, 2023, inclusive of principal and interest is $23,384,373.00. (Pl.'s Stmt. ¶ 23; Defs.' Stmt. ¶ 23 (objecting to liability but not amount).) And the total balance owed by Bariven is $15,111,440.00, plus interest. (Pl.'s Stmt. ¶ 25; Defs.' Stmt. ¶ 25 (objecting to liability but not amount).) Accordingly, Bariven and Pequiven are jointly and severally liable for $15,111,440.00, plus interest, while Pequiven is solely liable for amounts beyond this liability, as to the additional interest owed in accordance with the terms described above, in section 1., consistent with Pequiven and Isaac's written agreement. The Court orders the parties to meet and confer and thereafter, on or before **June 14, 2023**, jointly submit a proposed final judgment or, if they are unable to agree on the form of the final judgment, separate proposed judgments.

Further, except as touched on above, the Court **denies** the substance of Isaac's motion to strike (**ECF No. 138**) **as moot**. To the extent, however, that Isaac still believes monetary sanctions are warranted, as set forth in the motion, Isaac can renew that aspect of its request but must do so on or before June 14, 2023.

Finally, the Court **cancels** the upcoming **June 13, 2023,** calendar call and **June 20, 2023**, trial setting in this case and directs the Clerk to **administratively close** this case. The Court denies any pending motions as moot.

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defendant bears the initial burden of showing that the affirmative defense is applicable."); *see also Singleton v. Dep't of Corr.*, 277 F. App'x 921, 923 (11th Cir. 2008) ("[T]he burden of establishing an affirmative defense lies on the *defendant,* not on the plaintiff . . . .") (emphasis in original).

Done and ordered, in Miami, Florida, on June 6, 2023.

Robert N. Scola, Jr.
United States District Judge

Appendix C

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any noninjury civil action against a foreign state as defined in section 1603(a) of this title [*28 USCS § 1603(a)*] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title [*28 USCS §§ 1605-1607*] or under any applicable international agreement.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605–1607 of this chapter [28 USCS §§ 1605–1607]

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon 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;

(3) in which rights in property taken in violation of international law are in issue and that property or any properly exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;