No. 16-12397

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GDG ACQUISITIONS LLC,

Plaintiff–Appellee,

v.

GOVERNMENT OF BELIZE,

Defendant–Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF FOR APPELLEE
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GDG ACQUISITIONS LLC,

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Defendant-Appellant.

APPELLEE'S ADDITION TO AND CORRECTION OF APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following entities listed on Appellant's Certificate of Interested Persons and Corporate Disclosure Statement no longer have an interest in this case under Eleventh Circuit Rule 26.1-2(a):

The Feldman Law Firm, P.C.

Vickory, Waldner & Mallia, LLP

No. 16-12397

GDG ACQUISITIONS LLC,
v.
GOVERNMENT OF BELIZE

The following entities not listed on Appellant's Certificate of Interested Persons and Corporate Disclosure Statement have an interest in this case under Eleventh Circuit Rule 26.1-2(a):

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STATEMENT REGARDING ORAL ARGUMENT

Appellee GDG Acquisitions LLC agrees with Appellant Government of Belize that the Court would likely benefit from hearing oral argument in this case. GDG disagrees that the case presents "a question of first impression," or that affirmance would create a circuit split. GOB Brf. at iii. On the contrary, the case involves straightforward, well-worn principles of foreign sovereign immunity and forum non conveniens. Nonetheless, GDG agrees that the issues are sufficiently unusual and complex as to justify argument.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. A government's waiver of foreign sovereign immunity is effective and binding under 28 U.S.C. § 1605(a)(1) if it constitutes action by the foreign state, regardless of whether the government oversteps its own law in the process. A Belizean government minister, acting with unanimous cabinet approval, contracted to lease phone equipment for use by government employees, and the contract includes a waiver of immunity. Does the minister's entrance into the agreement on behalf of the government constitute foreign state action under § 1605(a)(1)?

2. This Court's decision in *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279 (11th Cir. 1999), applied federal law to the question of whether a foreign ambassador was properly authorized to waive his nation's sovereign immunity. The Court held that applying the foreign country's law would be inconclusive and open to manipulation by that government. Was the district court correct to apply *Aquamar* here, and not consider proffered Belizean law on authorization, given that this case raises the same concerns as in *Aquamar*.

3. The district court found as fact that the Belizean government authorized a lease agreement. In contrast to testimony from former government officials who authorized the lease and testified to its lawfulness, the current government offers a lawyer's post-litigation legal opinion that the minister who handled the agreement years ago exceeded his authority, despite government approval at the time. Should the factual finding be affirmed regardless of the new legal opinion?

4. Courts must enforce forum selection clauses in contracts absent extraordinary circumstances. The district court found that the Belizean minister who executed a lease containing a provision mandating litigation in a U.S. forum was authorized to do so, and that there was no other basis for not enforcing the clause. Was the district court therefore correct to deny dismissal based on forum non conveniens?

INTRODUCTION

Appellee GDG Acquisitions LLC sued Appellant the Government of Belize ("GOB" or "the Government") for breach of an agreement by which GOB leased phone equipment beginning in 2003. GOB made lease payments until 2008 but then refused either to keep paying for the equipment or return it, as required by the lease.

In an earlier appeal in this case, this Court reversed the district court and rejected GOB's arguments to dismiss based on forum non conveniens and international comity. *See GDG Acquisitions, Inc. v. Gov't of Belize*, 749 F.3d 1024 (11th Cir. 2013). On remand, GOB again moved to dismiss under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* ("FSIA"), and forum non conveniens. This time, the district court denied the motion. The lease contains a waiver of foreign sovereign immunity, but GOB claims the whole agreement is void because different Belizean government ministries should have handled the transaction – the communications and foreign ministries, rather than the budget ministry. The district court rejected this argument, finding as a matter of fact that GOB fully authorized the budget minister to enter into the lease. It also applied this Court's decision in *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279 (11th Cir. 1999), and declined GOB's invitation to determine the

question of ministerial authority by delving into Belizean law. On appeal, the Government argues that *Aquamar* should not govern this case and that Belize's rules on ministerial portfolios require reversal.

The Court should affirm and permit this suit, finally, to proceed to the merits. First, the Court need not decide the issue that consumes most of GOB's argument: whether *Aquamar* applies here. Even if GOB is right that Belizean law should be considered and that different ministries should have overseen the lease, the contract's waiver of immunity still binds the Government. All that matters under the FSIA is that the waiver constitute action by the foreign state, and the record here unquestionably establishes the necessary state action by Belize. The Government's adherence to its own laws on which ministry should do what is irrelevant – the state can still act even if it oversteps its own rules in the process. The waiver in the lease is therefore no less binding because different ministries purportedly should have negotiated and signed the agreement.

Second, if the Court does examine whether *Aquamar* applies, it should still affirm. Various prudential concerns helped convince the Court in *Aquamar* to apply federal and international law, rather than foreign law, to the issue of whether an official who waived foreign sovereign immunity was properly authorized to do so. The district court correctly reasoned that these

concerns are present in this case too, and that GOB's motion did not compel it to slog through "lengthy, unpredictable, and frequently inconclusive inquiries" into Belizean law. *Aquamar*, 179 F.3d at 1298.

Finally, if the Court decides that Belizean law should be considered, affirmance is still required. GOB has offered a new, post-litigation legal opinion by a government lawyer with no firsthand knowledge of the facts at issue. By contrast, GDG provided testimony from several cabinet members and other officials who approved the transaction at the time, and who explain why their actions adhered to Belizean law. GOB's *post hoc* legal opinion offers no basis to upset the district court's finding on authorization.

In the end, GOB is simply looking for a way to renege on the lease. The FSIA expressly precludes foreign states from backing out of their waivers, *see* 28 U.S.C. § 1605(a)(1), so GOB is trying the next best thing: claiming, years later, that the minister who executed it actually lacked authority, despite unanimous cabinet approval and five years of paying on the lease. This is a tactic GOB has recently tried in several other contract disputes in U.S. courts, but to no avail.[1] The Court should reject it here, too.

[1] *See, e.g., Belize Social Dev., Ltd. v. Gov't of Belize*, 794 F.3d 99, 102-03 (D.C. Cir. 2015); *The Belize Bank, Ltd. v. Gov't of Belize*, __ F. Supp. 3d __, 2016 WL 3198228 at * 3 (D.D.C., June 8, 2016); *BCB Holdings, Ltd. v. Gov't of Belize*, 110 F. Supp. 3d 233, 244 (D.D.C. 2015), *aff'd*, __ Fed. Appx. __, 2016 WL 3042521 (D.C. Cir. 2016).

STATEMENT OF THE CASE

I. Statement Of Facts

A. Intelco's Lease Of Phone Equipment To The Government

In 2002, Belize's prime minister appointed Ralph Fonseca minister of budget management, investment and home affairs. Doc 21-1 – Exhibit B, Pgs 11-12 (App. Tab 4).[2] The ministry's portfolio included "Budget Management," "Investment," "Public Accounts," "Treasury," "Finance," and "Fiscal Management (Budget)." *Id.*; *see also* Doc 34 – ¶ 9 (App. Tab 10). In 2003, the title of the ministry changed but Fonseca retained most of these same budget-related responsibilities. Doc 21-1 – Exhibit C, Pgs 29-30 (App. Tab 4). As Dickie Bradley, a former attorney general and senator of Belize, avers: "The major function of the Ministry of Budget Management was the management of GOB's fiscal affairs with a view to ensuring that GOB maximized its return on the expenditure of its tax revenue funds." Doc 33 – ¶ 15 (App. Tab 9). One way the ministry tried to accomplish this "was by reducing as far as possible the price it paid for the provision of goods and services to the GOB." Doc 35 – ¶ 11 (App. Tab 11).

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[2] References to "App. Tab __" are to the specified volume in the appendix filed by GOB.

To that end, Fonseca began to explore ways to reduce the cost of phone calls between government offices, which were particularly expensive because the existing national provider routed them through a public switch and billed GOB by the minute. Doc 33 – ¶¶ 17-20. (App. Tab 9). Fonseca therefore proposed that the Belizean cabinet consider establishing a separate "wide area network" limited to government use – a "GOB WAN." Doc 33 – ¶¶ 20-24 (App. Tab 9). The cabinet agreed and authorized Fonseca to approach International Telecommunications, Ltd. ("Intelco"), which in turn agreed to lease the necessary hardware to GOB, such as telephones, cables, routers, and servers. Doc 33 – ¶¶ 23-24 (App. Tab 9); Doc 31-2 – Pg 46 (App. Tab 7).

The parties negotiated a "Master Lease Agreement" obligating Intelco to lease the phone equipment to the Government in exchange for quarterly payments of "rent" from 2003 through 2008 according to two schedules, each totaling $6,748.189.20 – or almost $13.5 million in all. Doc 31-2 – Pgs 16-46; Doc 31-2 – Pg 44; Doc 31-3 – Pg 48 (App. Tab 7). Through a purchase agreement, Intelco would simultaneously assign rent payments to the International Bank of Miami in exchange for two discounted cash payments totaling $10 million. Doc 31-2 – Pg 5 (§§ 2.1 – 2.2); Doc 31-3 – Pgs 5 (§§ 2.1 – 2.2), 49-50 (App. Tab 7). The bank would take a security

interest in the hardware and an assignment of Intelco's rights against the Government in case of default. Doc 31-2 – Pgs 47-65, 55 (¶ 14) (App. Tab 7). Intelco was not to provide services of any kind; instead, the Government was responsible for taking possession of the equipment in Florida; transporting it to Belize; and installing, operating, and maintaining it there. Doc 31-2 – Pgs 17 (¶ 2), 23-24 (¶ 14), 66 (App. Tab 7); Doc 33 – ¶ 9 (App. Tab 9).

The lease agreement waives GOB's sovereign immunity, consents to suit in a United States forum, and waives objections to venue or claims of inconvenient forum. Doc 31-2 – Pgs 30-32 (¶¶ 25(a), (b), (d)) (App. Tab 7). These provisions were "key" to the transaction from Intelco's perspective, Doc 32 – ¶ 6 (App. Tab 8), and assured the International Bank of Miami and potential Intelco assignees of a neutral forum in case of disputes.

GOB counsel at the time of the transaction also provided a legal opinion to the bank confirming that the budget ministry was "authorized to bind, and to act for and on behalf of, the Government," and that the transaction was "duly authorized by all necessary action of the Government, and do[es] not contravene" Belizean law. Doc 31-2 – Pgs 79-80 (App. Tab 7). The opinion further specified that the waivers of sovereign immunity

and agreement to a U.S. forum were valid, irrevocably binding, and "permitted by the laws of Belize." Doc 31-2 – Pgs 82-83 (App. Tab 7).

Fonseca presented a draft of the lease and payment schedules to the cabinet, which unanimously voted to approve them. Doc 33 – ¶¶ 25-26 (App. Tab 9). In addition to Fonseca, the prime minister, foreign minister, and communications minister were present at the cabinet meeting and voted to authorize the transaction. Doc 33 – ¶ 27 (App. Tab 9). Under Belize's constitution, the cabinet is "the principal executive instrument of policy with general direction and control of the Government," and is "collectively responsible to the National Assembly… for all things done by or under the authority of any Minister in the execution of his office." Doc 31-4 – § 44 (App. Tab 7); *see also* Doc 33 – ¶ 27 (App. Tab 9). The constitution "vests all executive power and control of the Government in the Cabinet." Doc 34 – ¶ 20 (App. Tab 10). Following cabinet approval, Fonseca and Intelco executed the lease (with the first payment schedule and other transaction documents) in December 2002 in Miami, and executed the second payment schedule in August 2003 in Miami. Doc 32 – ¶ 13 (App. Tab 8).

B. The Government's Performance And Breach Of The Lease Agreement

After taking possession of Intelco's phone equipment in Florida and installing it in government offices, Belize made the required rent payments

to the International Bank of Miami, completing payment in August 2008 in accordance with the second lease schedule. *See* GOB Brf. at 6; Doc 32 – ¶¶ 30-33 (App. Tab 8); Doc 31-3 – Pg 48 (App. Tab 7). Each year, the Belizean national assembly appropriated the funds for these payments and successive financial secretaries issued payment warrants for the necessary withdrawals from the nation's consolidated revenue fund, established by the constitution. Doc 33 – ¶¶ 31-35 (App. Tab 9); *see also* Doc 36 (App. Tab 12). The warrants specifically referenced that GOB was making payment under the lease. Doc 31-9 – Pg 2 (App. Tab 7).

After GOB completed the scheduled payments, the lease required it to return the hardware or continue paying rent at the same rate, month-to-month. Doc 31-2 – Pg 25 (¶ 15) (App. Tab 7). Because the International Bank of Miami's right to rent payments and its security interest terminated upon receiving the $13.5 million, residual rights under the lease, including the right to extra rent payments for unreturned equipment, reverted to Intelco. Doc 31-2 – Pgs 10 (§ 6.1), 11-12 (§ 7.11), 56 (§ 18) (App. Tab 7).

In 2008, Belize held elections and a new administration took office. Doc 32 – ¶ 32 (App. Tab 8). After making the final two rent payments required by the second lease schedule, the new government neither returned the equipment nor made continuing payments of rent, as required by the

lease. Doc 32 – ¶¶ 32-37 (App. Tab 8). It has not made a lease payment since 2008, though it continues to use the Intelco hardware. Doc 32 – ¶¶ 34, 40-43 (App. Tab 8). At this point, the Government owes over $22 million in unpaid rent.[3]

II. Course Of Proceedings

A. The Government's Motion To Dismiss

Intelco assigned its interests in the lease agreement to GDG, a Florida company, in 2012. Doc 32 – ¶¶ 6, 44 (App. Tab 8). GDG then brought this action for breach of the lease. Doc 1 (App. Tab 2). GOB moved to dismiss the complaint on grounds of foreign sovereign immunity, forum non conveniens, and international comity. Doc 20 (App. Tab 3). The district court dismissed the action based on forum non conveniens and comity, and this Court reversed and remanded. *See GDG Acquisitions*, 749 F.3d at 1034.

Following remand, GOB renewed its motion to dismiss based on the FSIA and forum non conveniens. Doc 80 (App. Tab 24). It denied waiving immunity under § 1605(a)(1) because it claimed the lease agreement containing the waiver is null and void under Belizean law, since the transaction purportedly should have been overseen by a different

[3] As of February 2012, when this action was filed, Belize owed $10,347,223.44 under the two lease schedules. Doc 1 – Pgs 9-10 (App. Tab 2). From March 2012 through August 2016, it owes $11,921,800.92 more. *Id*. ($224,939.64 owed monthly under both schedules).

government ministry. Doc 20 – Pgs 7-8 (App. Tab 3); Doc 80 – Pg 3 (App. Tab 24).[4] GOB offered two declarations from a lawyer it employs, Gian Gandhi, though he had no involvement in or firsthand knowledge of the transaction. Doc 21-2 – ¶ 1 (App. Tab 4). Gandhi testified that the lease agreement violated the Belizean Constitution because it relates to "telecommunications services," and "power over telecommunications had been assigned to Mr. Maxwell Samuels, who was the Minister of Communications, Transport and Public Utilities," not Fonseca at the budget ministry. Doc 21-1 – ¶ 7 (App. Tab 4). He also testified that Fonseca could not consent to waive Belize's foreign sovereign immunity because this could only be done by the foreign minister, as such immunity supposedly "involves the relations between sovereign states." Doc 21-1 – ¶ 9 (App. Tab 4). Additionally, he stated that Fonseca "lacked the constitutional power" to agree to a Florida forum, "particularly because the agreements were between a Belizean company and the GOB, and related to matters entirely within Belize," though he did not explain why this authority was legally beyond Fonseca or which minister possessed it. Doc 21-1 – ¶ 10 (App. Tab 4).

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[4] The text of 28 U.S.C. § 1605(a) and other significant statutory provisions cited herein are set forth in full in a statutory addendum at the end of this brief. *See* FED R. APP. P. 28(f).

In response, GDG submitted testimony from several former officials in Belize's government at the time of the transaction. Bradley, the former attorney general, testified that the Intelco agreement is simply an equipment lease, not a contract to provide telecommunications services, Doc 33 – ¶ 9 (App. Tab 9) – a conclusion also reached by this Court in the first appeal in this case. *See* 749 F.3d at 1026 ("The lease terms provided that Intelco had no obligation to provide services once the Government took possession of the phone equipment in Florida"). Thus, Bradley averred that handling the lease deal fell within the portfolio of Fonseca's budget ministry. Doc 33 – ¶¶ 14, 30 (App. Tab 9). He testified that that the cabinet – of which he was a member – unanimously approved the lease, and that the national assembly endorsed it by appropriating funds for payments, which were then approved and arranged by the ministry of finance. Doc 33 – ¶¶ 19-27, 31-35 (App. Tab 9).

Samuels, the former communications minister who Gandhi testified should have signed the lease, testified that his ministry actually lacked power over government-related telecommunications, and was limited to regulating phone service to the public under applicable Belizean statutes. Doc 35 – ¶¶ 7-9 (App. Tab 11). Thus, in the *Belizean Gazette*, where the subject areas of his ministry are listed, "telecommunications" and

"telephones" appear under the heading "Public Utilities." Doc 21-1 – Pg 13 (App. Tab 7). Samuels was also a cabinet member when the lease was approved and, like Bradley, testified to the unanimous vote in favor. Doc 35 – ¶¶ 14-18 (App. Tab 11).

In addition, GDG submitted two declarations from Lisa Shoman, a former foreign minister and Belizean ambassador to the U.S., who testified that procurement of equipment fell within the portfolio of Fonseca's ministry because it had responsibility for "Budget Management," "Public Accounts," "Investments," and the like. Doc 34 – ¶ 9 (App. Tab 10). Waivers of Belize's sovereign immunity need not emanate from the foreign ministry, she explained, because such provisions in commercial contracts with private companies do not concern Belize's relations with other nations. Doc 34 – ¶¶ 12-15 (App. Tab 10). She also refuted the claim of a GOB witness, Carlos Perdomo, who testified that there was no mention of the cabinet's approval of the lease in 2002 in cabinet minutes or "briefing notes." Doc 39-2 (App. Tab 13). Shoman testified that, under Belizean law and practice, a matter like the lease transaction would not customarily appear in these records. Doc 42-1 – ¶¶ 2-6 (App. Tab 16).

Finally, GDG submitted declarations from Sydney Campbell, who served with the Central Bank of Belize for 27 years, including as its

governor and deputy governor. Doc 36, 37 (App. Tab 12). Campbell verified that Belize's financial secretaries issued payment warrants authorizing payments to the International Bank of Miami in 2003-08 in compliance with the lease agreement. Doc 36 – ¶¶ 13-16 (App. Tab 12). These funds were appropriated by the national assembly during the applicable years. Doc 36 – ¶ 14 (App. Tab 12).

Campbell also testified that GOB waived its foreign sovereign immunity in several other agreements with private companies executed by Fonseca, not the foreign minister. Doc 36 – ¶ 23 (App. Tab 12); *see* Doc 31-16 – § 15 (share purchase agreement); Doc 31-17 – § 16 (share acquisition agreement) (App. Tab 7). In fact, Gandhi, GOB's witness, advised on and assisted in the execution of these contracts, specifically including a payment agreement that consents to suit and agrees to a U.S. forum despite not having been signed by the foreign minister. Doc 36 – ¶¶ 23-27 (App. Tab 12); Doc 31-18 – § 8(n) (payment agreement) (App. Tab 7). Gandhi also testified to the validity of the payment agreement in litigation in federal district court, Doc 31-13 (App. Tab 7), and GOB conceded that the contract effected a waiver of its sovereign immunity when the case reached this Court. *See Belize Telecom, Ltd. v. Gov't of Belize*, 528 F.3d 1298, 1309 n. 13 (11th Cir. 2008).

B. The District Court's Decision

The district court denied GOB's motion to dismiss. Doc 83 (App. Tab 27). It quoted from the parties' declarations in extensive detail and noted that GDG's witnesses had participated in the events in question while the Government's witness had not. Doc 83 – Pgs 11-17 (App. Tab 27). Applying *Aquamar*, it declined to consider GOB's argument under Belizean law that the lease was voided by Fonseca's supposedly having exceeded his ministerial portfolio. Doc 83 – Pgs 9-10, 15-16 (App. Tab 27). Having found, factually, that GOB authorized the Intelco transaction, the court concluded that the FSIA's waiver exception required denial of GOB's claim of foreign sovereign immunity. Doc 83 – Pg 17 (App. Tab 27). It likewise rejected the Government's argument based on forum non conveniens, applying the presumption in favor of enforcing forum selection clauses recently enunciated in *Atlantic Marine Constr. Co., v. U.S. Dist. Court for the W. Dist. of Tex.*, __ U.S. __,134 S. Ct. 568 (2013). Doc 83 – Pg 19-20 (App. Tab 27).

III. Standards Of Review

The Government correctly states the standards of review governing this appeal. GOB Brf. at 21-22. In evaluating the district court's decision that subject matter jurisdiction exists under the FSIA, this Court reviews

factual findings for clear error, and legal conclusions de novo. *See id.*; *see also Aquamar*, 179 F.3d at 1289-90.

SUMMARY OF THE ARGUMENT

Virtually all of GOB's brief is devoted to arguing that the district court should not have applied *Aquamar* to this case, and that, under Belizean law, the communications ministry and the foreign ministry should have handled the lease transaction and immunity waiver rather than the budget ministry. The Court can avoid both of these arguments, however, because even if both are correct, there is a different reason to affirm the district court's decision: the Government is bound by the waiver regardless of whether it violated Belize's laws regulating ministerial portfolios. Under 28 U.S.C. § 1605(a)(1), a waiver need only be the product of state action by the foreign government in order to be effective, and such state action may occur even if the government fails to adhere to its own laws. The record here leaves no doubt that negotiating and performing the Intelco lease was carried out by the Belizean state. It was performed by a government minister; served a governmental purpose; was approved by the cabinet; and was endorsed by the national assembly and successive financial secretaries, who appropriated and paid funds due under the lease for five years. The lease's waiver therefore binds GOB, requiring affirmance. *See* Point I, *infra*.

If the Court does decide whether *Aquamar* applies to this case, it should affirm. *Aquamar* recognizes that federal law should govern whether a foreign official has waived foreign sovereign immunity, not the sovereign's own law. This is in part because inquiries into foreign law would be "lengthy, unpredictable, and frequently inconclusive," and open to abuse by foreign governments tempted to skew their own law in their favor. *Aquamar*, 179 F.3d at 1298. The district court correctly recognized that these factors support applying *Aquamar* here, though the foreign official in this case is a government minister rather than an ambassador. Above all, GOB seeks to abuse the FSIA waiver process by taking a new, made-for-litigation position that the lease was unauthorized, directly contrary to its position and actions at the time. Avoiding this transparent gamesmanship is reason enough to apply *Aquamar* and affirm the district court's order. *See* Point II, *infra*.

In addition, the Court should affirm even if it decides to consider Belizean law. GOB's new lawyer's opinion is an *ipse dixit* devoid of any support in actual Belizean legal sources and is based on dubious premises – such as the claim that only the foreign minister can waive foreign sovereign immunity though such waivers in commercial contracts have nothing to do

with Belize's foreign relations. GDG's witnesses' declarations establish that Fonseca was properly authorized under Belizean law. *See* Point III, *infra*.

Finally, the district court also correctly denied GOB's motion on forum non conveniens grounds. The court did not wrongly rely on *Aquamar* in deciding this aspect of the motion, as the Government insists. And even if Belizean law is applied to this issue, GOB did not offer sufficient legal grounds to overturn the Court's finding of authorization. *See* Point IV, *infra.*

ARGUMENT

I. The FSIA's Waiver Exception Applies Because The Intelco Transaction Was A Governmental Act Regardless Of Its Status Under Belizean Law

The Government argues that it never waived Belize's foreign sovereign immunity because different ministries should have overseen the Intelco transaction rather than Fonseca's budget ministry. But even if GOB is correct – a proposition GDG strongly disputes in Point III, *infra*. – the Belizean legal question of which ministry should have done what is irrelevant. All that matters under 28 U.S.C. § 1605(a)(1) is whether Belize's participation in the transaction constituted governmental or state action, not whether it was in perfect compliance with Belize's rules on ministerial

portfolios. Because the record in this case demonstrates the requisite foreign state action beyond any doubt, the Court should affirm.[5]

A. A Foreign Government's Actions May Waive Immunity Even If They Violate That Country's Laws

The FSIA's waiver exception provides that "a foreign state" is not immune in any case where "the foreign state has waived its immunity." 28 U.S.C. § 1605(a)(1). "Foreign state" is defined to include the state's "political subdivisions." 28 U.S.C. § 1603(a). Thus, the question under § 1605(a)(1) is simply whether the action claimed to have waived immunity – here, entrance into and performance of the Intelco lease agreement – was taken by "a foreign state" or its "political subdivision." The Government recognizes this, arguing that the FSIA requires that "*the sovereign itself* must waive immunity." GOB Brf. at 23 (emphasis in original). And the authority GOB relies on so heavily, *Phaneuf v. Republic of Indonesia*, makes the same point in applying § 1605(a)(2)'s commercial activity exception. *See* 106 F.3d 302, 306 (9th Cir. 1997) ("Defendants should be permitted to argue against the application of the exception on the grounds that they did not act: that there was no 'commercial activity *of the foreign state.*'" (quotation

[5] Although the argument set forth in this section was not presented to the district court, this Court may affirm on any ground supported by the record, even if not considered below. *See The Royalty Network, Inc. v. Harris*, 756 F.3d 1351 n.2 (11th Cir. 2014).

omitted, emphasis in original)). Consequently, to prove that the waiver exception does not apply, the Government had to show that its entrance into and performance of the lease agreement was not carried out by the Belizean state.[6]

Conduct by a foreign government may qualify as "activity of the foreign state," *id.*, regardless of whether it complies with that country's local law. That a government oversteps its own law in the course of taking action doesn't mean that the state failed to act at all. Several decisions make this clear. In *Westfield v. Fed. Republic of Germany*, an art dealer's heirs sued the German government to recover the value of the dealer's collection, which had been seized and sold by Nazi authorities. 633 F.3d 409, 411 (6th Cir. 2011). After the war, a German court found the dealer's imprisonment to have been null and void. *Id.* at 412. The German government asserted immunity under the FSIA, but the heirs responded that the statute did not apply because the Nazi government's actions were not those of a "foreign state" under the basic immunity provision, 28 U.S.C. § 1604, given the illegal nature of the Nazi regime. *See id.* at 418. The Sixth Circuit disagreed:

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[6] The district court correctly noted that GOB bears the burden of proving that the waiver exception does not apply here. *See* Doc 83 – Pgs 8-9 (App. Tab 27); *accord* GOB Brf. at 22-23 (quoting *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1313 (11th Cir. 2009)).

> We find the Heirs' argument that this case does not involve a sovereign act because a German court declared Westfield's sentence and fine "null and void" unpersuasive…. [The Nazi government's] actions, even though they have been declared null and void, and even though they constituted an abuse of police and prosecutorial powers by the German government at the time, were nonetheless the acts of a sovereign. Congress did not create an exception for lawless activities in the Act.

Id. at 418. This reasoning applies fully here. Just as a government's actions can constitute the sovereign conduct of a foreign state under § 1604 despite being illegal at the time and declared void by a later administration, so too can a § 1605(a)(1) waiver of immunity.

The Second Circuit's decision in *Republic of Iraq v. ABB AG,* 768 F.3d 145 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 2836 (2015), is similar. In that case, Iraq sued companies that allegedly cooperated with Saddam Hussein's government to divert funds from the UN's oil-for-food program in 1996-2003. *Id*. at 151-52. The companies defended by arguing *in pari delicto,* "the principle that a plaintiff who has participated in wrongdoing equally with another person may not recover" from that person. *Id*. at 160. Iraq responded that the Hussein regime's illegal participation in the scheme should not be attributed to the current government, but the argument failed; whether the former government violated Iraqi law was "irrelevant to the question of whether the acts of the Hussein Regime were acts of Iraq." *Id*. at 164. "A foreign government's actions are attributed to the state regardless

of whether they are legal under the municipal law of the foreign state." *Id.* (quotation omitted); *accord Nat'l Coalition Gov't of Union of Burma v. Unocal*, 176 F.R.D. 329, 352 (C.D. Cal. 1997) ("The fact that a foreign sovereign has disregarded its own laws does not establish that its acts were private in nature").

Republic of Iraq cited an earlier Second Circuit decision that is also instructive here. In *Banco de Espana v. Federal Reserve*, the Spanish government established after the Spanish Civil War sued to recover the value of silver sold to the United States by the previous, defeated regime. 114 F.2d 438 (2d Cir. 1940). The Spanish government claimed the sale violated Spanish law, but the Second Circuit refused to decide the issue: "It has been squarely held that the courts of this country will not examine the acts of a foreign sovereign within its own borders, in order to determine whether or not those acts were legal under the municipal law of the foreign state." *Id.* at 443. The question is only whether the act is governmental, meaning "a step physically taken by persons capable of exercising the sovereign authority of the foreign nation." *Id*. at 444. "Persons who dealt with the former Spanish government are entitled to rely on the finality and legality of that government's acts, at least so far as concerns inquiry by the courts of this country." *Id*.

Notably, these decisions are consistent with and draw from the Act of State doctrine, which generally "precludes any review whatever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign State." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763, 92 S. Ct. 1808 (1972). Under this rule, foreign governmental acts are given effect in U.S. courts regardless of whether they may have violated foreign law, even against claims of non-authorization. *See, e.g., United States v. Merit*, 962 F.2d 917, 921 (9th Cir.), *cert. denied*, 506 U.S. 885 (1992); *Phoenix Canada Oil Co., Ltd. v. Texaco Inc.*, 560 F. Supp. 1372, 1381 (D. Del. 1983) (applying doctrine to reject claim that Ecuadorian minister's decree is invalid because he lacked authority under Ecuadorian law).

Although the doctrine does not directly govern this case, it supports GDG's view of § 1605(a)(1). As this Court recognized in *Aquamar*, "[u]nder certain circumstances, a foray into foreign law to determine whether a diplomatic representative has acted in accordance with its dictates also could implicate the act of state doctrine." 179 F.3d at 1298-99 (quotation omitted)); *see also Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 537 (SDNY 2013), *aff'd* 768 F.3d 145 (2d Cir. 2014) ("if courts had to examine whether a government's act was lawful in order to decide whether

it was attributable to the state, they would often run afoul of the act of state doctrine"). As in Act of State doctrine cases, this Court need not and should avoid trying to adjudge the legality of Belizean governmental action under that country's laws.

Federal law and the Restatement also support construing § 1605(a)(1) to require only that the waiver reflect state action by a foreign government regardless of its compliance with that country's law. The comment to the Restatement's provision governing when conduct should be attributed to foreign states holds that "[a] state is responsible for acts of officials and official bodies, national or local, even if the acts were not authorized by or known to the responsible national authorities, indeed, even if expressly forbidden by law, decree, or instruction." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 207 cmt. d (1987).

Likewise, federal law provides that state officers and entities may commit state action or act "under color of law," thereby exposing themselves to liability, though their conduct is illegal. *See, e.g., Addickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598 (1970) (officer's conduct may constitute state action essential to show Fourteenth Amendment violation though it was unlawful); *Dossett v. First State Bank*, 399 F.3d 940, 949 (8th Cir. 2005) ("the Supreme Court has made clear that

even the misuse of power possessed by virtue of state law is action taken 'under color of state law'" (quotation omitted)). Consider recent state and federal laws and actions held to be unconstitutional, such as state laws precluding gay marriage or the Obama administration's orders concerning immigration. While these measures were ultimately held to violate the federal constitution, no one would claim they were not governmental or state action at the time they occurred. Put simply, the existence of state action does not depend on the action's legality.

B. The Government's Participation In The Intelco Transaction Was Activity By A Foreign State Under § 1605(a)(1)

GOB's entrance into and performance of the Intelco lease from 2002-08 plainly constituted foreign state action under the FSIA regardless of whether it was carried out by what the Government now deems to be the correct ministry. "In determining whether an act was within the authority of an official or an official body, or was done under color of such authority… one must consider all the circumstances, including whether the affected parties reasonably considered the action to be official, whether the action was for public purpose or for private gain, and whether the persons acting wore official uniforms or used official equipment." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 207 cmt. d (1987). Courts distinguish

between the private acts of individual officials and "acts coordinated pursuant to the policies of an entire government." *Republic of Iraq*, 768 F.3d at 165. In *Republic of Iraq*, the government's conduct was attributable to the state because the plaintiff alleged government action with "a public goal, undertaken with public resources, pursued for political purposes, and using means only available to state actors." *Id.*

In this case, the Intelco lease was negotiated and executed by the Belizean budget minister acting in his official and governmental capacity. Doc 33 – ¶ 30 (App. Tab 9). His action was a "step physically taken by [a] person[] capable of exercising the sovereign authority" of Belize. *Banco de Espana,* 114 F.2d at 443. Because Fonseca's ministry was a "political subdivision" of Belize, its actions were necessarily those of Belize itself under § 1603(a). That is, there is no dispute that a Belizean political subdivision acted in this case, even if it was the wrong one. It is also undisputed that the Intelco agreement had a clear public purpose for Belize: to reduce the costs of government phone calls. Doc 33 – ¶¶ 16-27 (App. Tab 9).

As important, the Belizean government unanimously voted to approve the Intelco lease agreement. Doc 33 – ¶¶ 25-26 (App. Tab 9). The Government does not challenge the district court's factual finding of

authorization as clearly erroneous, but argues only that cabinet approval was, like Fonseca's execution of the agreement, legally deficient. GOB Brf. at 50-54. Nevertheless, the settled *fact* of cabinet approval demonstrates that the transaction occurred "pursuant to the policies of an entire government" and is thus attributable to the Belizean state. *Republic of Iraq*, 768 F.3d at 165.

Lastly, it is undisputed that GOB performed the agreement for five years, from 2003 to 2008, by making required rent payments totaling over $13 million to the International Bank of Miami. GOB Brf. at 6; Doc 33 – ¶¶ 31-35 (App. Tab 9); Doc 36 (App. Tab 12). The Belizean legislature appropriated money for these payments pursuant to the nation's constitution, and various financial secretaries issued payment warrants out of the Government's consolidated revenue fund to effect payment. *Id*. The warrants specifically state that payment is "[i]n accordance with" the Intelco lease agreement. Doc 31-9 – Pg 2 (App. Tab 7). This official, governmental action by GOB is further, uncontested evidence that executing and implementing the Intelco lease was "activity of the foreign state." *Phaneuf*, 106 F.3d at 308. As in *Republic of Iraq*, the Government performed the agreement it now seeks to repudiate "with public resources… using means only available to state actors." 768 F.3d at 165.

The district court's factual findings and the undisputed record therefore establish that entering into and performing the Intelco equipment lease were acts of the foreign state of Belize, irrespective of whether the government in power there at the time followed its own rules on ministerial portfolios. Moreover, this holding would not conflict with the authority from other circuits relied on by GOB. Unlike this case, those featured unauthorized, usually criminal commercial activities by rogue, low level officials that could not remotely qualify as state action under § 1605(a). *See* GOB Brf. at 31-33 (citing *Phaneuf*; *Velasco v. Gov't of Indonesia*, 370 F.3d 392 (4th Cir. 2004); *Dale v. Colagiovanni*, 443 F.3d 425 (5th Cir. 2006); *Allfreight Worldwide Cargo, Inc. v. Ethiopian Airlines Enter.*, 307 Fed. Appx. 721 (4th Cir. 2009)).

In *Phaneuf* and *Velasco*, two former staff members of Indonesia's national defense security council issued promissory notes and conspired with a Syrian official and a private financier to sell them to foreigners. *Velasco*, 370 F.3d at 395. One of the staff members admitted his lack of authorization to issue the notes, relied on a forged "letter of authorization," and was consequently fired. *Id.* at 396-97. As soon as the council and other organs of the Indonesian government became aware of the notes, they

publicly disavowed them, and the international press "reported widely on the fake notes." *Id*. Criminal prosecutions ensued. *Id*. at 402.

Dale and *Allfreight Worldwide Cargo* are similar. In *Dale*, a single minor Vatican official joined or unwittingly aided an insurance scam principally carried out by an American citizen who pled guilty to criminal fraud and racketeering. *See* 443 F.3d at 426-27. In *Allfreight Worldwide Cargo*, two employees of unknown rank at an Ethiopian state-owned company signed a contract with a private American firm without submitting the agreement for approval by the Ethiopian company's lawyer. *See* 307 Fed. Appx. at 722-23.

On their faces, the facts of these cases plainly reflect individual rather than state action under § 1605(a)(2), and they differ drastically from this case. Here, the relevant conduct was not devised and implemented by isolated, junior employees perpetrating criminal frauds that were quickly repudiated by their government. It was directed by a minister acting publicly and in his official capacity, unanimously approved by the foreign state's full cabinet, and effectuated for five years by its finance ministry using funds specifically appropriated for the purpose by its national legislature, and paid even after the government changed hands in 2008. Except for the judiciary, every branch of the Belizean government at the

highest level approved and performed the lease. There is simply no way to claim that their conduct was somehow not activity of the state of Belize.

As in *Banco de Espana*, GDG is "entitled to rely upon the finality and legality of [the former Belizean] government's acts" without this Court delving into Belizean law to reexamine them. 114 F.2d at 444. As long as execution and performance of the Intelco lease were Belizean state action, the lease's waiver of foreign sovereign immunity is valid under the FSIA. The Court should therefore affirm the order denying the Government's motion.[7]

II. If The Court Nonetheless Scrutinizes Fonseca's Individual Authorization, It Should Affirm The District Court's Authorization Finding And Its Application Of *Aquamar*

If, despite the foregoing, the Court concludes that the waiver question requires determining whether Fonseca's ministry was the one specifically authorized within the Government to execute the Intelco lease, it should affirm the district court's factual finding that such authorization existed, and

[7] In addition to the waiver exception, GOB also forfeited immunity under the commercial activity exception when it entered into the Intelco lease; that is, activity of the foreign state occurred under both provisions. *See* 28 U.S.C. § 1605(a)(2). The district court did not reach this issue, Doc 83 – Pg 17 n. 1 (App. Tab 27), and GDG agrees with the Government that, if the Court finds foreign state action or GOB authorization under § 1605(a)(1), it will not need to reach the commercial activity exception, since waiver and jurisdiction will have been established under § 1605(a)(1). GOB Brf. at 44 n. 14. Conversely, if it agrees with GOB and finds no state action or authorization, jurisdiction does not exist under either exception.

its legal decision to apply federal rather than Belizean law to the issue consistent with the Court's holding in *Aquamar*.

A. The District Court Correctly Found Authorization As A Matter Of Fact

The district court's decision that Fonseca was authorized to execute the lease agreement was a factual one, based on voluminous record evidence. The court undertook "careful review of all the Declarations submitted on behalf of both Parties." Doc 83 – Pg 17 (App. Tab 27). It reviewed and quoted at length from GDG's witnesses' testimony that Fonseca's ministry possessed the authority to negotiate and execute the Intelco lease in order to reduce GOB expenditures, and because this was historically the case under what Shoman called the "normal operations of Belize government affairs." Doc 83 – Pgs 11-15, 12 (Shoman quote) (App. Tab 27). The court placed particular faith in GDG's witnesses because, unlike Gandhi, they "were members of the Belizean Cabinet during the relevant time period" and had "personal knowledge of the events" in question. Doc 83 – Pg 15 (App. Tab 27).

Two other facts strongly support the district court's finding on authorization. First, the fact that GOB paid over $13 million under the lease agreement over five years is obvious, compelling proof that the transaction was authorized by the Government. If Fonseca lacked power to execute the

contract in 2002-03, why did the legislature appropriate and the finance ministry direct regular payments under the lease *for a full five years thereafter*?

Second, GOB counsel provided a legal opinion confirming that Fonseca's ministry was "authorized to bind, and to act for an on behalf of, the Government" in the transaction. Doc 31-2 – Pg 80 (App. Tab 7). This assurance was given to the International Bank of Miami in 2002 and was presumably important to its participation. Unlike Gandhi's opinion, it was not offered a decade later, in litigation. And Gandhi's current position contradicts his previous endorsement of contracts executed by Fonseca that waived immunity. Doc 36 – ¶¶ 23-27 (App. Tab 12).

The Government nowhere argues that the district court's factual finding of authorization was clearly erroneous, nor could it given the finding's ample support in the record. Instead, it argues that the district court misapplied *Aquamar* and therefore disregarded Gandhi's legal opinion about the parameters of Fonseca's ministerial authority. As discussed below, this claim is without merit.

B. The District Court Correctly Applied *Aquamar* To This Case

The district court was right to hold that *Aquamar* governs this case. In *Aquamar*, the Court held that federal law, informed by customary

international law, governed whether the Ecuadorian ambassador to the U.S. effectively waived that country's immunity from certain third-party claims. 179 F.3d at 1294. GOB contends that the Court in *Aquamar* "articulated a standard *specific to ambassadors*," GOB Brf. at 29 (emphasis in original), and it is true that the decision rests in part on ambassadors' role as "a sovereign's chief diplomatic representative." 179 F.3d 1295-96. Yet the Court's language was often broader,[8] and at least one commentator has interpreted the decision to endorse a general rule that "it may be inappropriate to examine an individual's authority under the sovereign's local law." Ved P. Nanda and David K. Pansius, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 3:26 (2d ed. 2016).

More importantly, this Court based its holding in *Aquamar* on various prudential grounds besides simply the nature of ambassadors. It cited the benefit to foreign governments and "those who do business" with them from the "uniform and predictable standard" of federal and international law. *Id*. at 1297-98. And it recognized that using foreign law:

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[8] For example, the decision states generally that the Court will "apply federal law to the question of whether a waiver has been effected by one with the authority to do so." *Id.* at 1294; *see also id*. at 1298 ("Requiring the courts to look to a sovereign's local law to determine the authority of *any agent* who purports to waive sovereign immunity, even if that agent is an ambassador, would hinder the goals of the FSIA and its waiver provision" (emphasis added)).

> at best would create a roadblock to all FSIA actions, requiring lengthy, unpredictable, and frequently inconclusive inquiries into conflicting interpretations of foreign law (such as that undertaken by the district court in this action). At worst, both foreign sovereigns and the parties involved in litigation with them could abuse such a rule.

Id. at 1298. In addition, applying foreign law "would increase the number of potentially intrusive and resented inquiries of foreign governments," threatening the executive branch's primacy in foreign affairs. *Id*. As noted above, assessing the legitimacy of foreign governments' actions could also run afoul of the Act of State doctrine. *See id*. at 1299.

The district court rightly held that these concerns are implicated here. Doc 83 – Pg 9 (App. Tab 27). GOB's approach would sacrifice a "uniform and predictable" inquiry under federal law in favor of indeterminate, case-by-case litigation over the meaning of foreign law. 179 F.3d at 1298. The Government also advocates a "lengthy [and] unpredictable… inquir[y] into conflicting interpretations" of Belizean governmental rules about ministerial portfolios. *Id*. Such an investigation has already substantially delayed this case and required the parties to traverse such unfamiliar terrain as the Belizean constitution, its statutes governing public utilities, and British common law as applied in former colonies.

Perhaps most important, the Court was prescient in *Aquamar* in predicting that adventures into foreign law in FSIA cases can easily be

abused. *See id.* "Abuse" is the only accurate description for the Government's tactical, post-litigation attempt to deny the legal validity and effectiveness of a contract it executed, approved, and performed for five years. Its tool for accomplishing the repudiation is a legal opinion from government counsel claiming non-authorization under Belizean law that directly contradicts a letter *confirming* such authorization from his predecessor at the time of the transaction, when GOB was eager to secure the participation of an American bank. In the first appeal, this Court correctly recognized that, "[w]hile the Government may now have an *ex post* interest in litigation in Belize, it may have had an *ex ante* interest in a federal forum." 749 F.3d at 1033. The same is true when it comes to authorization. When GOB was negotiating the transaction, it had an interest in assuring the bank in Miami that the contract had been properly approved and authorized by the Government. Now that the current administration prefers to keep the phone equipment without paying for it, its interest lies in suddenly discovering that, actually, the contract was never authorized in the first place.

In the final analysis, GOB is simply trying to evade the FSIA's rule that waivers, once given, may not be withdrawn. 28 U.S.C. § 1605(a)(1).

But courts reject the sort of transparent gamesmanship GOB has engaged in here. As one district court in this circuit put it:

> Brasileiro also contends that the waiver is ineffective because, under Brazilian law, Brasileiro's representatives did not have authority to waive sovereign immunity. The Court is unpersuaded… [I]t would be inequitable to permit representatives of a foreign corporation, such as Brasileiro, to obtain whatever benefits accrue from a binding contract, but then allow them to invoke the shield of sovereign immunity when economic fortunes take a turn for the worse.

Triton Container Int'l, Ltd. v. M/S Itapage, 774 F. Supp. 1349, 1351 (M.D. FL 1990), *disapproved on other grounds*, *In re Container Applications, Int'l, Inc.*, 233 F.3d 1361 (11th Cir. 2000); *see also Triton Container Int'l, Ltd. v. M/S Itapage*, 1991 WL 255613 at * 2 (S.D.N.Y. 1991) (same). In a similar context, the Supreme Court has refused to allow a foreign state to apply its own law to the question of whether a foreign company qualifies as a sovereign under the FSIA, since doing so would "permit the state to violate with impunity the rights of third parties… while effectively insulating itself from liability in foreign courts." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622, 103 S. Ct. 2591 (1983). Preventing GOB from withdrawing its waiver by fortuitously discovering that Fonseca wasn't authorized under Belizean law is reason enough to apply *Aquamar* and federal law to this case. *See* Nanda and Pansius, *supra* (applying sovereign's local law could "leave open the opportunity for

foreign litigants to manipulate foreign law to reach the outcome they desire").

Lastly, while applying Belizean law may not threaten current relations with that country, since it is the administration now in power that seeks the court's intrusion, in the next case, where the foreign sovereign is the one objecting, the effects may not be so benign. That sort of outcome risks eclipsing the executive's prerogative in foreign affairs, as the Court foresaw in *Aquamar*. *See* 179 F.3d at 1298-99.

For all these reasons, the district court properly held that *Aquamar* applies to this case.

C. The Government's Arguments Against Applying *Aquamar* Are Weak

GOB offers several grounds for disregarding *Aquamar*, but none is convincing.

First, it argues that "other circuits have uniformly adopted an actual authority standard;" that *Phaneuf* and *Velasco* require application of foreign law; and that "[a]ny extension of *Aquamar's* apparent authority standard… would create a circuit split." GOB Brf. at 30-32, 40. *Phaneuf*, *Velasco* and *Dale* are irrelevant to this case, however, because GDG is not relying on apparent authority. These three decisions rejected attempts by plaintiffs to find authorization of commercial activity based on apparent authority. *See*

Phaneuf, 106 F.3d at 308; *Velasco*, 370 F.3d at 399-400; *Dale*, 443 F.3d at 428-29. But GDG does not claim the Government should be bound to the lease agreement because Fonseca *appeared* to have the power to execute it. On the contrary, the district court found that he actually possessed that power.

Nor is GOB correct in arguing that *Aquamar* applied an "apparent authority standard" that, if extended, would conflict with other circuits' decisions. In fact, this Court expressly disclaimed applying apparent authority in *Aquamar*. *See* 179 F.3d 1299 n. 42 ("We, unlike the *First Fidelity* court, do not conduct a traditional apparent authority inquiry"). Rather, the Court inquired into actual authority, holding only that federal and international law dictate a rebuttable presumption in favor of finding actual authority where ambassadors are concerned. *Id*. at 1298-99.

True, the second decision in *Phaneuf*, 18 Fed. Appx. 648, 649 (9th Cir. 2001), and *Velasco* investigated foreign states' laws to some degree to determine actual authority, while this Court applies federal law, but that divergence in approaches already exists. And this Court did not abjure examination of a sovereign's local law entirely; it acknowledged that, in rare cases, there may be "compelling evidence making it 'obvious'" that authority is lacking, and such evidence theoretically could involve foreign

law. *Id.* at 1299. In any event, no true circuit split exists because the Ninth, Fourth and Fifth Circuits were not presented with, had no occasion to consider, and therefore are silent on the legal question of whether and why federal law should govern the authorization question rather than foreign law – which is one reason why *Phaneuf*, *Velasco* and *Dale* make no mention of *Aquamar*. Affirming the decision below will not cause a circuit split.

Next, GOB argues that customary international law "counsels looking to the law of the local foreign state" and "requires actual authority," and that the Restatement's rule for waivers of immunity – a party relying on the waiver must establish that the person giving it had authority to bind the state – "confirms an 'actual authority' requirement." GOB Brf. 35-36 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 456 cmt. b (1987)). This is all beside the point because there is no dispute here that actual authority, not apparent authority, must be shown. As noted above, *Aquamar* involves actual authority and the district court found that Fonseca possessed actual authority. The only question is whether federal or foreign law governs the actual authority inquiry.

GOB acknowledges that the Restatement "offers no further guidance regarding 'Waivers of Immunity' as to *who* has authority to bind the foreign state or *how* that scope of authority is determined." GOB Brf. at 37

(emphasis in original). Still, it insists that applying foreign law provides a "fixed, bright line rule." *Id*. This directly contradicts *Aquamar*, however, which held that applying federal law in U.S. courts is needed to "create uniform and predictable standards" for both governments and private parties. 179 F.3d at 1297-98. Equally important, applying federal law is fair and neutral and precludes the possibility of abuse by foreign sovereigns tempted to "manipulate foreign law to reach the outcome they desire" – precisely GOB's tactic here. Nanda and Pansius, *supra*.

GOB further contends that "whether a particular agent has actual authority… is necessarily dictated by the foreign sovereign's own laws." GOB Brf. at 37. There is no reason why general agency principles in U.S. and international law are not up to the job of providing the legal framework for deciding authorization under § 1605(a), though. The *fact* of authorization "is necessarily dictated" by legal and political developments in the foreign sovereign's government – as in this case. But whether those facts legally amount to sufficient authorization under the FSIA can and should be decided under federal law, as *Aquamar* held.

Incredibly, GOB asserts that applying foreign law will "lessen[] the opportunities for gamesmanship," and that applying federal law would result "the endless submission of competing fact declarations." GOB Brf. at 41.

The submission of declarations is inevitable under either approach, however. If foreign law governs, as GOB advocates, parties will submit affidavits from legal experts and others about the content of that law. *See* FED. R. CIV. P. 44.1. That is what happened in *Aquamar*, and the Court found such inquiries to be "unpredictable and frequently inconclusive." 179 F.3d at 1284, 1298. District courts will presumably find it easier to weigh "competing fact declarations" in cases decided under federal law – an everyday occurrence – than to navigate unfamiliar foreign law. The odds of gamesmanship are far greater if foreign sovereigns can declare one view of their law while negotiating a deal and another years later in litigation, as their shifting pecuniary interests dictate.

Lastly, GOB suggests that applying federal law would damage international relations and comity. *See* GOB Brf. at 42. In the first appeal in this case, the Court recognized that this is simply a "garden-variety commercial contract action" with no implications for foreign relations. 749 F.3d at 1032. More generally, applying federal law is predictable and reliable, and foreign governments dealing with U.S. companies will know in advance what law is to be applied should disputes about authorization arise. *See Aquamar*, 179 F.3d at 1297-98. It is hardly insulting to a foreign sovereign for an American court to apply American law to the construction

and application of an American statute, particularly in a case like this where the plaintiff "is an American corporation [a]nd the contract in dispute was negotiated, signed, and performed in the United States." *GDG Acquisitions*, 749 F.3d at 1033.

D. The District Court Correctly Found That No Extraordinary Circumstances Exist Here

After applying *Aquamar* to this case and finding, factually, that GOB authorized the Intelco lease, the district court further held that the Government had failed to demonstrate extraordinary circumstances rebutting the presumption of authorization: "the Court finds no evidence in the record that makes it 'obvious' that Minister Fonseca lacked the authority to waive Belize's sovereign immunity." Doc 83 – Pg 17 (App. Tab 27). This decision was correct. Regardless, a presumption of authorization is unnecessary here since the facts plainly demonstrate authorization.

The Government points to two factors supposedly establishing extraordinary circumstances. *See* GOB Brf. 55. First, it cites a different case where its high court concluded that a different government minister entered into a tax-related agreement without necessary legislation from the national assembly. GOB Brf. at 55; Doc 81-1 – Pgs 14-15 (App. Tab 25). This completely separate case has no relationship to the present dispute however, or even Minster Fonseca. Here, unlike in the case the Government

cites, the Belizean legislature endorsed the Intelco lease by appropriating funds to pay rent for the hardware. Doc 33 – ¶¶ 31-32 (App. Tab 9). Further, the cabinet and financial secretaries approved the lease. Doc 33 – ¶¶ 25-27, 33-35 (App. Tab 9). Finding one other unauthorized action by the Government in a totally different transaction hardly adds up to extraordinary circumstances in this case. Indeed, GOB's citation merely highlights yet another instance where the current administration hopes to evade a contract assumed by its predecessor using the excuse of non-authorization. *See* n. 1, *supra*.

Second, GOB complains that the district court failed to analyze federal or international law at all in deciding that Fonseca possessed actual authority. GOB Brf. at 55. Instead, it claims the court relied on Belizean law in the guise of the factual declarations from Samuels, Bradley and Shoman. *Id*. at 56. GOB is correct that the district court did not engage in an exploration of federal or international law in the course of denying its motion. *See* Doc 83 (App. Tab 27). But that is simply because no such analysis was necessary. The Court found facts that straightforwardly establish that the Government fully approved entering into and performing the Intelco lease. Tellingly, GOB does not point to any principle of U.S. or

international law that would support its argument, if only the district court had considered it.

On the contrary, Fonseca's authorization is clear according to hornbook principles of agency law. "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." RESTATEMENT (THIRD) OF AGENCY § 2.01 (2005); *see also Ramos-Barrientos v. Bland*, 661 F.3d 587, 600 (11th Cir. 2011) (citing Restatement and § 2.01 as "useful beginning point" in analyzing agency question related to federal statutory construction). The district court found as fact that Fonseca and the lease were unanimously authorized by the Belizean cabinet, which is "the principal executive instrument of policy" controlling the GOB. Doc 31-4 – § 44 (Belize Constitution Act, Chapter 4) (App. Tab 7); *see also* Doc 33 – ¶ 27 (App. Tab 9). This obviously suffices as a manifestation of the Government's assent to Fonseca's actions before he executed the lease on its behalf. *See, e.g., Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. Kommanditgesellschaft v. Republic of Romania*, 123 F. Supp. 2d 174, 185-87 (S.D.N.Y. 2000) (Romanian finance minister possessed

actual authority to execute settlement agreement given approvals of other Romanian high officials).

Basic agency principles would also support finding actual authority through ratification. Even if Fonseca acted outside the limits of his ministry's portfolio – which GDG vigorously denies – the Government's acceptance and use of Intelco's hardware and its payment for five years ratified the lease agreement. Ratification affirms "a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority." RESTATEMENT (THIRD) OF AGENCY § 4.01 (2005). It can occur through "knowing acceptance of the benefit of a transaction," *id*. cmt. d, or through performance, such as payment. *See Malin Int'l Ship Repair and Drydock, Inc. v. Oceanografia, S.A. de C.V.*, 817 F.3d 241, 250 (5th Cir. 2016). It does not involve apparent authority but "creates the legal effects of actual authority." RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt b; *see also id*., § 4.02 cmt. b. Courts have permitted plaintiffs to show waiver and commercial activity under § 1605(a) through ratification.[9] Here, GOB's

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[9] *See, e.g., 1964 Realty LLC v. Consulate of the States of Qatar-New York*, __ F. Supp. 2d __, 2015 WL 5197327 at * 13 (S.D.N.Y., Sept. 4, 2015); *Reiss v. Societe Centrale du Groupe des Assurances Nationales*, 185 F. Supp. 2d 335, 339 (S.D.N.Y. 2003). Courts have also looked to ratification outside the § 1605(a)(1) waiver context, such as when asking whether an agent's conduct imputes liability to the foreign sovereign. *See, e.g*, *Sachs v. Republic of Austria*, 737 F.3d 584 n. 6 (9th Cir. 2013), *reversed*

undisputed acceptance of benefits and performance under the Intelco lease ratified it, establishing waiver even if Fonseca lacked authority in 2002.

Further, the Government errs in claiming that the district court excluded its view of the substance of Belizean law but then relied on that law anyway, in the form of declarations offered by GDG from the former government ministers. GOB Brf. at 56. These declarations are *factual*, not legal, given by members of the government who personally witnessed and participated in the Intelco transaction. They establish what happened in 2002 and 2003, when Fonseca negotiated and the cabinet approved the lease, as well as in 2003-08, when the Government made rent payments by means of legislative appropriations and warrants issued by Belize's finance ministers. Shoman specifically testified that the agreement fell within the budget ministry portfolio because this had occurred historically "[u]nder the normal operations of Belize governmental affairs." Doc 34 – ¶ 9 (App. Tab 10). Likewise, when Samuels testified that his portfolio excluded power over "telecommunications services to the GOB," he spoke from personal knowledge, having led the ministry. Doc 35 – ¶ 8 (App. Tab 11).

By contrast, GOB's witness is a government lawyer with no firsthand information about the Intelco transaction or the facts surrounding Fonseca's

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on other grounds, 136 S. Ct. 390 (2015); *Belhas v. Ya'alon*, 515 F.3d 1279, 1283 (D.C. Cir. 2008).

authorization. His testimony consists entirely of his legal opinion that the lease must have been the responsibility of different ministries because the list of subjects assigned to those ministries includes the words "telecommunications" and "foreign." Doc 21-1 – ¶ 7 (App. Tab 4). This distinction between witnesses with personal knowledge of the authorization and one who simply offered a *post hoc* legal opinion was crucial to the district court, which based its finding "specifically upon the three Declarations filed by those who were members of the Belizean Cabinet during the relevant time period." Doc 83 – Pg 17 (App. Tab 27).

The Government has therefore failed to establish extraordinary circumstances that would justify overcoming the presumption of authorization set forth in *Aquamar*. But even if no such presumption is applied in this case, the district court's decision should be affirmed because the court found authorization as a matter of fact and did not rely on a presumption founded in international law. The court examined extensive and detailed evidence in the record and determined that Belizean governmental authorization occurred – a finding GOB leaves unchallenged. While the district court referred to GOB's failure to show extraordinary circumstances, *Aquamar's* presumption of authorization is not central to this case, given the court's factual finding. This Court therefore need not decide

whether the presumption should come into play when a government minister is the official who executes the waiver rather than an ambassador.

* * * * *

If the Court explores the question of Fonseca's individual authorization, it should affirm because the district court's factual finding of authorization is not clearly erroneous, and because the court correctly applied *Aquamar* and therefore declined to consider GOB's witness's made-for-litigation legal claims about Belizean law.

III. The Court Should Affirm Even If It Considers Belizean Law

Affirmance is required even if the Court chooses to consider Gandhi's legal opinions. Moreover, because the question is a legal one, this Court can and should perform the analysis itself. *See* FED. R. CIV. P. 44.1 (analysis of foreign law is a legal question). No remand is necessary, as GOB apparently agrees since its preferred remedy is that this Court reverse on this ground and dismiss the case. *See* GOB Brf. at 43-44; *Henderson v. Scientific-Atlanta, Inc*., 971 F.2d 1567, 1570 (11th Cir. 1992) (declining to remand "because the issue is solely a question of law and does not require any additional fact-finding"), *cert. denied*, 510 U.S. 828 (1993).

Gandhi's legal analysis begins by quoting Section 41 of the Belizean constitution, but this is merely a general provision permitting Belize's

Governor-General and Prime Minister to appoint (in writing) ministers to lead governmental departments. Doc 21-1 – ¶ 6 (App. Tab 4); GOB Brf. at 45-46. This clause sheds no light on which ministry properly had power to lease government phone equipment or waive sovereign immunity. Aside from Section 41, Gandhi's opinions boil down to two facile, deductive formulas:

1. one of the communications ministry's assigned subjects was "telecommunications," the Intelco lease "relates to telecommunication services," *ergo* the matter could only be the responsibility of the communications ministry; and
2. the foreign ministry handles relations between sovereign states; the lease waives Belize's foreign sovereign immunity, which "involves the relations between sovereign states;" *ergo* only the foreign minister could approve the waiver in the Intelco lease.

Doc 21-1 – ¶¶ 7-10 (App. Tab 4).

To begin with, these propositions lack any legal foundation. Neither Gandhi nor GOB points to any Belizean statute, court decision, or other legal authority holding that a matter like the Intelco lease must be handled by the communications ministry, or that only the foreign ministry can agree

to waive sovereign immunity. These pronouncements are merely Gandhi's *ipse dixit*, based simplistically on nothing more than overlapping words like "telecommunications" and "foreign" rather than any identified source of Belizean law.

Moreover, the premises underlying Gandhi's rhetorical formulas are flawed. This Court has already found that the lease does not involve "telecommunication services;" rather, its "terms provided that Intelco had no obligation to provide services once the Government took possession of the phone equipment in Florida." 749 F.3d at 1026. And Samuels, who actually led the communications ministry, testified that the inclusion of "telecommunications" in the list of matters assigned to his department referred to overseeing phone service to the public through Belize's Public Utilities Commission – not obtaining phone equipment for government use. Doc 35 – ¶¶ 8-9 (App. Tab 11). This is supported by the *Belizean Gazette* entry for his ministry in 2002, which lists "telecommunications" and "telephones" under "Public Utilities." Doc 21-1 – Pg 13 (App. Tab 4). Samuels's ministry administers the Belize Telecommunications Act, Doc 33 – ¶¶ 10-11 (App. Tab 9), which specifically excludes coverage of "any apparatus possessed or used by the Government for the purpose of or in connection with any such means of telecommunication." Doc 31-8 – § 4

(App. Tab 7). Claiming that only the communications ministry could agree to lease phone hardware for GOB use because one of its listed responsibilities was "telecommunications" is like saying only the F.C.C. can buy phones for use by the U.S. government.[10]

GOB contests this, asserting that the exclusion of government phone equipment from the Belize Telecommunications Act does not divest the communications ministry of authority over such equipment. GOB Brf. at 49. Yet Section 4 of the law clearly separates government phone systems from public ones and supports GDG's point that authority over the former resides outside the government department charged with administering the act. The district court rightly placed credence in Samuels on the scope of his ministry, since he actually administered it. Doc 83 – Pgs 10-12 (App. Tab 27).

Nor does Gandhi's other premise hold up – that foreign sovereign immunity "involves the relations between sovereign states," which is his reason why only the foreign minister can agree to waivers. Shoman, the former foreign minister and ambassador to the U.S., testified that the

[10] GOB notes that Samuels's and Bradley's declarations use the phrase "telephone services," and asserts that the lease was part of a "broader negotiation" regarding such service. GOB Brf. at 46. While it is true that the GOB WAN would provide service to the government, and Samuels and Bradley used the phrase, the lease itself did not obligate Intelco to provide service, only hardware, as this Court expressly found. 749 F.3d at 1026.

Belizean foreign ministry "involves itself with the relations between sovereign states," not private transactions:

> The Master Lease Agreement and Schedules are not agreements between Belize and another sovereign nation.... As such, the Master Lease Agreement and Schedules have nothing whatsoever to do with Foreign Affairs. The participation of the Ministry of Foreign Affairs in approving the Master Lease Agreements and Schedules would not have been expected or required.

Doc 34 – ¶¶ 12-13 (App. 10). Additionally, GOB waived its foreign sovereign immunity in several other contracts with private companies that were not executed by the foreign minister – some of which Fonseca himself signed and Gandhi assisted in. Doc 36 – ¶¶ 23-27 (App. Tab 12); Doc 31-16 – § 15; Doc 31-17 – § 16; Doc 31-18 – § 8(n) (App. Tab 7). These flatly disprove Gandhi's testimony.

There are several other reasons why the Intelco lease was properly authorized under Belizean law. First, GOB's entire argument is that the lease had to be authorized by the communications and foreign ministers, but both ministers voted in the cabinet to approve the transaction. Doc 33 – ¶¶ 25-27 (App. Tab 9). Thus, the transaction *did* receive the go-ahead from the two ministries the Government claims had to authorize it.

Second, Belize's Constitution provides that the cabinet is "the principal executive instrument of policy with general direction and control

of the Government." Doc 31-4 – § 44 (Belize Constitution Act, Chapter 4) (App. Tab 7); *see also* Doc 33 – ¶ 27 (App. Tab 9). The cabinet is also "collectively responsible to the National Assembly… for all things done by or under the authority of any Minister in the execution of his office." *Id*. The Constitution "vests all executive power and control of the Government in the Cabinet." Doc 34 – ¶ 20 (App. Tab 10). Accordingly, the cabinet's unanimous approval of the lease agreement provided the requisite authorization under Belizean law.

The Government objects that the cabinet could not "confer authority not given to Minister Fonseca by the Governor-General," and it cites Section 44 of the Belizean Constitution, which provides that the cabinet has no power over "the assignment of responsibility to any Minister under section 41 of this Constitution." GOB Brf. at 51. The Government's argument misses the point. GDG does not argue that the cabinet could change Fonseca's ministerial portfolio – only that it could approve the Intelco transaction. What must be authorized by the Government under § 1605(a)(1) is the waiver, not the responsibilities of the official who executes the waiver. Nothing in the Belizean constitution prevented the cabinet from legally authorizing the lease, with its waiver of sovereign immunity, and that suffices for purposes of § 1605(a)(1). GOB also cites and quotes at length

from a Belizean court decision here. *See id.* at 52-53. That decision involved a secret settlement agreement invalidated by the court for lack of necessary legislative approval; it has nothing at all to do with the effectiveness of cabinet approvals of contracts. Doc 81-1 (App. Tab 25).[11]

Third, the leasing of phone equipment for government use in order to reduce government expenditures falls naturally within the policy areas assigned to the budget ministry, including "Budget Management," "Investment," "Public Accounts," "Treasury," "Finance," "Fiscal Management (Budget)," and "Public Debt." Doc 21-1 – Exh. B (App. Tab 7); *see also* Doc 34 – ¶ 9 (App. Tab 10). Charged with maximizing the Government's return on investment, the budget ministry "sought to… reduc[e] as far as possible the price it paid for the provision of goods and services to the GOB." Doc 35 – ¶ 11 (App. Tab 11). GOB asserts that the word "telecommunications" is more specific than "budget management," "investment" and the like, and it cites U.S. cases mentioning that specific statutes and language control over general ones. *See* GOB Brf. at 48. It is

[11] The Government also argues in a footnote that there is no written evidence of cabinet authorization, which therefore lacks binding effect under section 41 of the constitution. *See* GOB Brf. at 50 n. 16. That section only requires that ministerial appointments be in writing, not votes to approve contracts or other business. *See id.* at 45 (quoting § 41). Regardless, the district court found that cabinet approval occurred despite its absence from cabinet minutes and briefing notes because such decisions often did not appear in these records. Doc 83 – Pgs 16-17 (App. Tab 27).

ironic that GOB relies on U.S. law here, since it claims Belizean law is dispositive. In any event, its simplistic assertion that one term sounds more specific than another is no substitute for any actual Belizean legal authority having to do with ministerial portfolios.

Fourth, as former attorney general Bradley testified, cabinet ministers may sign contracts involving subjects outside their assigned portfolios. Doc 33 – ¶¶ 38-44 (App. Tab 9); *see also* Doc 34 – ¶¶ 22-29 (App. Tab 10). Belizean law retains certain British common law principles, including the "indivisibility of powers of Ministers of the Crown." Doc 33 – ¶¶ 40-41 (App. Tab 9). One British text widely used to construe Belizean law states that, "[a]lthough the secretarial duties are divided among persons presiding over their respective departments of government, the office of Secretary of State is one, and in law each Secretary of State is capable of performing the duties of all or any of the departments." Doc 33 –¶ 41 (App. Tab 9); Doc 31-6 (App. Tab 7). "Cabinet ministers in Belize… are the modern day equivalent of, and perform the same functions as, secretaries of States in England." Doc 34 – ¶ 25 (App. Tab 10).

The indivisibility of powers principle jibes with Section 44 of the Belizean Constitution, "which expressly provides for the sharing of collective responsibility and authority of all members of Cabinet." Doc 34 –

¶ 27 (App. Tab 10). Correspondingly, another law states that GOB contracts shall "be made in the name of the Government and may be lawfully signed by a minister." Doc 33 –¶ 44 (App. Tab 9); Doc 31-7 – Finance and Audit (Reform) Act of 2005 § 17(3) (App. Tab 7). Contracts signed by Fonseca, therefore, are binding under Belizean law irrespective of the ministry's portfolio's specific subject areas. GOB has not shown that ministers' authority over their subject areas is *exclusive*. In fact, referring to "the sharing of collective responsibility and authority of all members of the cabinet," Shoman testified that: "Without such a principle it would be next to impossible to administer the day-to-day affairs of the Government since the limits of responsibility of the various departments of government are not always clear and frequently overlap." Doc 34 – ¶ 27 (App. Tab 10).

In short, the Intelco lease was fully valid and authorized under Belizean law, if the Court decides to consider it. Nothing in Gandhi's declaration or the Government's legal argument requires setting aside the district court's finding of authorization as a matter of fact.

IV. The Court Should Uphold The District Court's Denial Of The Government's Forum Non Conveniens Motion

Lastly, GOB argues that the district court erred by denying its motion based on forum non conveniens. GOB Brf. at 57-58. It claims the court

erroneously imported *Aquamar* into the analysis. *See id*. This argument fails for at least three reasons.

First, while the district court correctly recognized that both sovereign immunity and forum non conveniens turn on Fonseca's authority, Doc 83 – Pg 3, there is no indication that the district court applied *Aquamar* to the forum non conveniens question. When resolving that defense in its order, the court discussed the lease terms; the Supreme Court's decision in *Atlantic Marine*; and an earlier order, which it incorporated. Doc 83 – Pg 18-19 (App. Tab 27). Then the court simply stated that it "finds that Minister Fonseca possessed the requisite authority to bind the Government of Belize and the forum selection clause is therefore enforceable." Doc 83 – Pg 19 (App. Tab 27). Earlier in the order, the court made clear that it carefully reviewed "all of the Declarations submitted on behalf of both Parties." Doc 83 – Pg 17 (App. Tab 27). Thus, there is no basis whatever to challenge the decision denying GOB's forum non conveniens motion on the ground that *Aquamar* somehow improperly shaped the outcome. GOB simply assumes this to be the case without any support in the order.

Second, it would not have been error if the district court *had* applied *Aquamar* to the forum non conveniens analysis. The same considerations that argue for applying federal law to the Fonseca authorization issue in the

FSIA context apply in the forum non conveniens setting: the need to avoid lengthy and inconclusive inquiries into foreign law and the prospect of abuse by foreign sovereigns sorely tempted to revise their law once litigation gets underway. It would be no more equitable for the Government to effectively withdraw its agreement to a U.S. forum in the forum non conveniens context than it is to withdraw a waiver under the FSIA.

Third, even if the Court concludes that the district court failed to consider Gandhi's opinion and should have done so as part of the forum non conveniens assessment, nothing in his testimony demands overturning the district court's factual finding of authorization as it concerns forum non conveniens. Because a forum selection clause is treated as a separate contract than the one containing it, it is not invalid because the larger agreement is void or unenforceable. *See Rucker v. Oasis Legal Fin., L.L.C.*, 632 F.3d 1231, 1238 (11th Cir. 2011). Consequently, GOB had to show that the forum selection clause itself was unauthorized.

Gandhi testified that Fonseca "lacked the constitutional power" to agree to a Florida forum, "particularly because the agreements were between a Belizean company and the GOB, and related to matters entirely within Belize." Doc 21-1 – ¶ 10 (App. Tab 7). But unlike his testimony regarding the budget ministry's supposed lack of authority over telecommunications or

foreign relations, Gandhi did not identify any legal or constitutional provision that supposedly deprived Fonseca of power to agree to a U.S. forum in a commercial contract. Nor did he say which Belizean minister would have such authority – again, unlike his other testimony. Other contracts executed by Fonseca and his successors at the budget and finance ministries agreed to U.S. forums. *See* p. 15, *supra*. Hence, Gandhi offered no legal or factual foundation for his summary opinion regarding Fonseca's supposed lack of authority over forum selection clauses. It therefore provides no valid justification for reversal. *See Munoz v. Orr*, 200 F.3d 291, 301 (5th Cir.) ("If the basis for an expert's opinion is clearly unreliable, the district court may disregard that opinion in deciding whether a party has created a genuine issue of material fact"), *cert. denied*, 531 U.S. 812 (2000).

To take it one step further, even if Gandhi's testimony that Fonseca could not legally agree to a U.S. forum is credited as true and adequately supported, the record, analyzed under federal agency law, still establishes that Fonseca nonetheless received sufficient actual authority to do so. *See P&S Bus. Machines, Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003) ("Consideration of whether to enforce a forum selection clause in a diversity jurisdiction case is governed by federal law, under 28 U.S.C. § 1404(a) (1982), not state law"). The cabinet and any individual minister had

power to agree to a U.S. forum in a commercial contract. Doc 34 – ¶ 15 (App. Tab 10). And as discussed above, cabinet approval of the lease with its choice of a U.S. forum adequately sufficed to manifest GOB assent under general agency principles so as to confer actual authority on Fonseca. *See* pp. 44-45, *supra*. GOB's ratification of the lease also supplied the necessary authorization. *See* pp. 45-46, *supra*. The cabinet's failure to follow the rules governing ministerial portfolios, as Gandhi claims occurred, would not divest Fonseca of actual authority as found factually by the district court. *See* RESTATEMENT (THIRD) OF AGENCY § 1.03 cmt d (2005) ("If a principal voluntarily manifests assent or intention, the manifestation is effective although it is made negligently or is otherwise in error"); *In re Auburn Ace Holdings LLC*, 2010 WL 1141457 at * 2 (W.D. Wash. 2010) (authorization of agent violated LLC agreement, but agent nonetheless sufficiently authorized by subsequent board of directors' resolution), *aff'd*, 441 Fed. Appx. 544 (9th Cir. 2011).

The Court should affirm the district court's denial of GOB's forum non conveniens motion.

CONCLUSION

The Court should affirm the order denying GOB's motions to dismiss.

September 1, 2016 Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 13,613 words.

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Dated: September 1, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2016, I electronically filed the foregoing brief with the clerk of this Court using the Court's CM/ECF service. I also certify that each of the following was served via the Court's CM/ECF service:

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STATUTORY ADDENDUM

28 U.S.C.A. § 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

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 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 to 1607 of this chapter.

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;