Case No. 21-11906-AA

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARIA DOLORES CANTO MARTI, as personal representative of the Estates of Dolores Marti Mercadé and Fernando Canto Bory,
Plaintiff/Appellant

v.

IBEROSTAR HOTELES Y APARTAMENTOS S.L, a Spanish limited liability company,
Defendant/Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
U.S. District Court Case No. 20-cv-20078-SCOLA/TORRES

PLAINTIFF/APPELLANT MARIA DOLORES CANTO MARTI'S REPLY BRIEF

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PLAINTIFF/APPELLANT MARIA DOLORES CANTO MARTI'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1-1, Plaintiff/Appellant, Maria Dolores Canto Marti, as personal representative of the Estates of Dolores Martí Mercadè and Fernando Canto Bory, by and through undersigned counsel, hereby identifies the following people and entities as having an interest in the outcome of this appeal:

a) Balear de Inversiones Financieras, S.L. – sole shareholder of Iberostar Hoteles y Apartamentos S.L.

b) Canto Marti, Maria Dolores (as personal representative of the Estates of Dolores Martí Mercadè and Fernando Canto Bory) – *Plaintiff/Appellant*

c) Darmon, Danit A., Esq. – *Attorney for Plaintiff/Appellant*

d) Fluxá, Miguel – primary beneficial owner of Balear de Inversiones Financieras, S.L.

e) Holland & Knight, LLP – *Law firm for Defendant/Appellee*

f) Iberostar Hoteles Y Apartamentos S.L., a Spanish limited liability company – *Defendant/Appellee*

g) Jimenez, Adolfo E., Esq. – *Attorney for Defendant/Appellee*

h) Mendez de la Cuesta, Katherine, Esq. – *Attorney for Defendant/Appellee*

i) Patricios, Leon N., Esq. – *Attorney for Plaintiff/Appellant*

j) Plasencia, Rebecca M. – *Attorney for Defendant/ Appellee*

k) Scola, Honorable Robert N., Jr., U.S. District Judge

l) Torres, Edwin G., U.S. Magistrate Judge

m) Zumpano, Joseph I., Esq. – *Attorney for Plaintiff/Appellant*

n) Zumpano Patricios, P.A. – *Law firm for Plaintiff/Appellant*

No publicly traded company or corporation has an interest in the outcome of the case on appeal.

/s/ Joseph I. Zumpano
Joseph I. Zumpano

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument as such would assist with the Court's understanding of the issues on appeal.

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ARGUMENT

I. INTRODUCTION

Defendant[1] does its best to ignore the elephant in the room—that the District Court's immoderate, continued stay has kept Plaintiff[2] effectively out of court for ***682 days[3] (nearly two years) and climbing*** with no end in sight. Defendant attempts to distract this Court from deciding the important issue here—Whether the District Court erred in continuing to defer to a process created by the EC Blocking Regulation,[4] a foreign law passed specifically to block the effects of U.S. law, by indefinitely staying a Helms-Burton Act[5] case until the European Commission,[6] which has no deadline to do so, decides an EU Defendant's *ex parte* application to participate in this case.

Defendant's strategy is simple—redirect the focus from the merits of this case (which Defendant spends only six pages hardly addressing) to Plaintiff's purported failure to timely appeal. However, Defendant's redirection gambit fails. To avoid

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[1] "Defendant" or "Iberostar" refers to Defendant/Appellee, Iberostar Hoteles Y Apartamentos S.L.

[2] "Plaintiff" refers Maria Dolores Canto Marti, as personal representative of the Estates of Dolores Martí Mercadè and Fernando Canto Bory.

[3] It has been 682 days since the District Court entered its Order Granting Iberostar's Motion to Stay. D.E. 17.

[4] The "EC Blocking Regulation" refers to the European Council Regulation ((EC) No. 2271/96)).

[5] The "Helms-Burton Act" or the "Act" refers to the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. § 6021, et seq.

[6] Hereinafter, the "EC."

any review of the merits, Defendant mischaracterizes Plaintiff's Renewed Motion to Lift the Stay, and, if Denied, Motion for Certification of Order Under 28 U.S.C. § 1292(b) [D.E. 32][7] (the "Renewed Motion") as an untimely "motion for reconsideration," the denial of which cannot be reviewed by this Court. In doing so, Defendant ignores the relevant procedural history and the substance of the Renewed Motion.

The procedural history establishes that Plaintiff did not file "impermissible" successive motions for reconsideration. Rather, the record shows that the District Court's Order Granting Iberostar's Motion to Stay [D.E. 17] (the "April Stay Order") and its subsequent Order Denying Motion to Vacate Stay [D.E. 25] (the "September 2020 Order") left the door open for Plaintiff to renew her motion based on the contents of the required "status reports" and the demonstration that the stay was no longer serving international comity interests. Taking the District Court's invitation, Plaintiff filed an appropriate Renewed Motion, and timely appealed to this Court the denial of such Renewed Motion. The procedural hurdle of the timeliness of the appeal aside, the issue before this Court, as in almost all reviews of stay orders, is whether this Court has jurisdiction to review such order.

[7] In accordance with 11th Cir. R. 28-5, record references relate to the docket entry number of the district court and, where appropriate, the respective page number.

Whether this Court has appellate jurisdiction to hear this case is intrinsically tied to the merits of this case – whether Plaintiff has been kept "effectively out of court." Defendant cannot overcome that the continued stay here puts Plaintiff "effectively out of court." The stay has proven to be indefinite and immoderate as it is predicated on an *ex parte* EC process that has proven to have no foreseeable deadline, has no controlling effect on the merits of this case, and is governed by the EC Blocking Regulation, which was passed specifically to subvert and counter Helms-Burton Act claims. The speculative threat of EU sanctions (which is imaginary, considering Defendant has not been sanctioned despite its participation in this appeal), does not justify the immoderate continued stay. Defendant fails to refute that the District Court erred in extending international comity to the EC Blocking Regulation, which Defendant fails to prove is in furtherance of U.S. law. Therefore, this Court should exercise its jurisdiction to hear this case and overturn the immoderate stay, which has kept Defendant effectively out of court for 682 days now, depriving her of her due process rights to be heard.

I. PLAINTIFF'S APPEAL IS TIMELY AND PROPER

Defendant's argument that Plaintiff's appeal is untimely is based on the faulty premise that ***only one*** opportunity exists to appeal the entry of a stay order. Under Defendant's faulty logic, that one opportunity arises from the entry of the stay order itself, and any orders denying motions to lift the stay appropriately filed after the

passage of time or after the occurrence of new circumstances are unappealable. If Defendant were correct (and it is not), a plaintiff, who appropriately filed successive motions to lift the stay at various points in the litigation based on a change in circumstances, would be foreclosed appellate review.

Indeed, Defendant fails to cite any cases foreclosing appellate review of a renewed motion to lift a stay. Instead, it cites inapplicable cases involving criminal procedure. In *U.S. v. Gupta*, 363 F.3d 1169 (11th Cir. 2004) following the conclusion of criminal jury trial, "the district court denied *all* of the pending post-trial motions on the merits." *Id.* 1172 at (emphasis in original). Thirty-three months later, the district court granted motions to reconsider the previously denied post-trial motions. *Id.* In reversing the district court, the Eleventh Circuit found that the district court lacked subject matter jurisdiction to grant any reconsideration given the strict deadlines contained in the Federal Rules of Criminal Procedure. *Id.* at 1174. It is in that context that this Court noted that the criminal defendants' misinterpretation of the FRCRP, inapplicable here, would cause "unlimited renewal or reconsideration of fully decided motions would needlessly tie up judicial resources and seriously delay the final disposition of cases." *Id.*[8]

[8] Defendant's citation to *U.S. v. Miller*, 775 F. App'x 974, 976 (11th Cir. 2019) is even further off the mark. In that unpublished decision, an Eleventh Circuit panel considering the merits of a criminal conviction declined to again reconsider its prior decisions rejecting the criminal defendant's challenge to an order sealing documents.

To avoid any review of the merits of the 682 day and climbing continued stay, Defendant mischaracterizes the Renewed Motion as an untimely "motion for reconsideration" that conveniently (for Defendant) cannot be reviewed by this Court. In doing so, Defendant ignores the relevant procedural history and the substance of the Renewed Motion.

The procedural history establishes that Plaintiff did not file "impermissible" successive motions for reconsideration. The April Stay Order [D.E. 17] was entered one day after Defendant filed its stay motion [D.E. 16] and before Plaintiff had the opportunity to respond. The one-page April Stay Order clearly left the door open for Plaintiff to move to lift the stay. The April Stay Order was entered in the "interest of international comity" [D.E. 17] and required Defendant to file monthly status reports to the District Court. As such, the April Stay Order did not, at that point, leave the Plaintiff "effectively out of court," but instead left the door open for Plaintiff to file a motion to lift the stay based on the contents of the required status reports and the demonstration that the stay was no longer serving international comity interests.

After the passage of three months from the April Stay Order, with little sign of any progress from the EC, Plaintiff moved to lift the stay. D.E. 21. The District Court did not find the motion to lift the stay untimely or inappropriate. In denying the motion, the District Court explained in its September 2020 Order that it ". . .

evaluates the propriety of the stay entered in this case **with** the filing of Iberostar's status reports." D.E. 25 at 5 (emphasis added). Thus, like the April Stay Order, the September 2020 Order also left the door open for Plaintiff to file another motion to lift the stay based upon, in part, the contents of Defendant's continued, required status reports. As such, the September 2020 Order did not, at that point, leave the Plaintiff "effectively out of court."

In March 2021, Plaintiff filed her Renewed Motion and, if denied, for certification of an appeal under 28 U.S.C. § 1292(b) [D.E. 32] based on several changes in circumstance including: (i) the passage of 300 days since Defendant had filed its application to the EC with no set time for the EC to issue a decision; (ii) the EC's publication of strengthened opposition to the Helms-Burton Act; (iii) evidence that another EU defendant that had moved to dismiss a Helms-Burton Act case had not been sanctioned by the appliable EU member;[9] and (iv) the issuance by Judge Gayles of a more limited stay order in a similar Helms-Burton Act case. [D.E. 32].

Plaintiff's Renewed Motion was an appropriate renewed motion addressed to a continuing stay and not an inappropriate, successive motion for reconsideration. *See, e.g., Mut. Ben. Life Ins. Co. in Rehabilitation v. Stanley Station Assoc., L.P.,*

[9] Defendant also fails to address Plaintiff's Notice of Supplemental Authority filed in support of her Renewed Motion, which identified ***five*** additional instances where EU defendants participated in Helms-Burton actions without evidence of suffering any sanctions. D.E. 36.

No. 92-4050-R, 1992 U.S. Dist. LEXIS 6957, at *9 (D. Kan. Apr. 21, 1992) ("***MBL's motion appears to relate <u>new circumstances</u> which were not considered with the first motion to stay relief***. ***<u>As such, the motion does not ask for modification or reconsideration</u> of the original order denying stay relief as much as it asks for stay relief on new grounds***.") (emphasis added). Notwithstanding Plaintiff's position that the April Stay Order and the September 2020 Order were wrongly decided, Plaintiff clearly filed a Renewed Motion with arguments grounded in "new circumstances." As a result, it is unreasonable and wrong to read the Renewed Motion as a motion for reconsideration and/or motion to vacate either the April Stay Order or the September 2020 Order.

It is important to note that the mere passage of time with no change in the status of the EC proceeding, in and of itself, is a sufficient ground to file a renewed motion. While one could argue over whether the passage of a few days is sufficient, it is without question that sufficient time had passed between the September 2020 Order and the filing of the Renewed Motion in March 2021. Indeed, to this very day, the status reports filed with the District Court provide the same canned answer—no progress by the EC.

The District Court's denial [D.E. 38] of the Renewed Motion made clear that Plaintiff was "effectively out of court" triggering Plaintiff's right to appeal. Even though Plaintiff had clearly noted the change in circumstances, including the lengthy

passage of time with no change in the status of the EC proceeding, the District Court mischaracterized Plaintiff's motion as a motion for reconsideration, applied a more stringent standard of review, and denied the Renewed Motion. Likewise, the District Court denied Plaintiff's request for certification of an interlocutory appeal.

Defendant does not come to grips with the passage of time. Instead, Defendant argues that the passage of time is insufficient to warrant reconsideration. Even if true, Defendant did not file a motion for reconsideration before the District Court; she filed a renewed motion. And Plaintiff's brief cites cases establishing that the passage of time may provide the impetus for the seeking and/or granting of relief from a stay. Initial Brief[10] at 27-28. The passage of time was not the only new circumstance presented in the Renewed Motion.

Defendant's attempt to diminish Plaintiff's second change in circumstance (i.e., the EC's subsequent strengthened opposition to the Helms-Burton Act) similarly fails.[11] Defendant first tries to downplay the Communication[12], arguing that because it is not an amendment or new law to the EC Blocking Statute, it is not significant. However, the Communication reveals the EU's determination to take

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[10] The "Initial Brief" refers to Plaintiff's Initial Brief.

[11] Defendant does not even address the additional change of circumstances presented by Plaintiff in its Renewed Motion.

[12] *See Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2021) 32 final* (Jan. 19, 2021) (the "Communication").

additional measures to expand and add to the EC Blocking Regulation: "To fulfil its potential, ***the Blocking Statute must be part of a more comprehensive EU policy against extra-territoriality, for which the Commission will put in place the following measures to make a better use of existing tools and create new tools***," including ***"strengthened national measures to block the recognition and enforcement of foreign decisions and judgments based on the listed extra-territorial measures (Article 4)."*** *See* Communication, Section II (emphasis added). The Communication also contains "Key Action 15," providing ***"[t]he Commission will consider additional policy options to further deter and counteract*** the unlawful extra-territorial application of unilateral sanctions by third countries to EU operators, including ***a possible amendment of Regulation (EC) No 2271/96***." *See* Communication (emphasis added).

Defendant then ignores nearly the whole text and tone of the Communication, and focuses on one tangential sentence in the Communication, which regards needing to streamline processing for authorization requests pursuant to Article 5. Moreover, that the Communication mentions (in one tangential sentence) that the EC intends to streamline authorization requests under Article 5, does not erase the entire text and tone of the Communication, which undisputedly demonstrates the EC's commitment to deterring the enforcement of the Helms-Burton Act against EU individuals and entities through the adoption of new counteracting measures. The

Communication, coupled with the passage of time and signs of further delay by the EC warranted Plaintiff's Renewed Motion.[13]

II. DEFENDANT FAILS TO REFUTE THAT APPELLATE JURISDICTION EXISTS BECAUSE THE CONTINUED STAY HAS PUT PLAINTIFF EFFECTIVELY OUT OF COURT

This Court has held that a stay order that puts a plaintiff "effectively out of court" is final and subject to appeal under 28 U.S.C. § 1291 when it is "immoderate and involves a protracted and indefinite period of delay." *King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1165 (11th Cir. 2007) (citing *Am. Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Assoc.*, 743 F.2d 1519, 1523–24 (11th Cir. 1984); *CTI-Container Leasing Corp. v. Uiterwyk Corp.*, 685 F.2d 1284, 1287–88 (11th Cir. 1982); *Hines v. D'Artois*, 531 F.2d 726, 730 (5th Cir. 1976). Defendant even acknowledges that "stays are directly appealable when they result in indefinite delays pending the outcome of other proceedings that would not 'control or significantly inform the litigation' that is being stayed." *See* Answer[14] at 16 (quoting *Miccosukee Tribe of*

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[13] Defendant's authorities supporting that the filing of an untimely motion for vacatur or reconsideration does not toll the appellate clock thus miss the mark. *See* Answer Brief at 11-14. Because Plaintiff filed a Renewed Motion and not a motion for reconsideration or motion to vacate, Defendant's caselaw regarding the proper scope of a motion for reconsideration or motion to vacate, as well as Defendant's arguments that Plaintiff failed to satisfy such motions' legal standards, are irrelevant. *Id.* at 33-37. Similarly, Defendant's citation to *Pruett v. Choctaw Cnty., Ala.*, 9 F.3d 96, 97 n.2 (11th 1993) for the proposition that Rule 59 and Rule 60 motions are intended to be used *post-trial* is of no import given that Plaintiff did not file a motion for reconsideration or motion to vacate.

[14] "Answer" refers to Appellee's Answer Brief.

Indians v. S. Fla. Water Mgmt. Dist., 559 F.3d 1191, 1197 (11th Cir. 2009)); *see also Hines*, 531 F.2d at 731, 736–37; *Stone*, 743 F. 2d at 731, 736–37; *King*, 505 F.3d at 1172; *CTI-Container Leasing Corp.*, 685 F.2d at 1287–88.

This Court has further clarified that appeals of stays fit within the "effectively out of court" exception when a party has, for "all practical effects been put out of court indefinitely while litigation ***whose nature, extent, and duration are unknown***, is pending. . ." abroad. *See Cessna Aircraft Co*., 505 F.3d at 1169 (emphasis added). Defendant concedes that this Court also considers whether there is a "reasonable probability" that the outside proceeding on which the stay is predicated "will be productive." *See* Answer at 16 (citing *Hines*, 531 F.2d at 731, 736). Defendant acknowledges, moreover, that this Court has explained that when considering whether a stay is immoderate, a court considers both: (i) "the scope of the stay (including its potential duration)" and (ii) "the reasons cited by the district court for the stay." *Trujillo*, 221 F.3d at 1264. Nevertheless, Defendant still dodges the fact that Plaintiff finds herself within the Court's articulated exception to the rule regarding appeals of stays.

In fact, Defendant does not even grapple with the majority of Plaintiff's arguments and authorities—all of which demonstrate that Plaintiff has been kept effectively out of court. Instead, Defendant justifies its barebones, "brief address" of Plaintiff's arguments by insisting that Plaintiff should not be arguing the underlying

merits of the original stay order because only the District Court's Order denying Plaintiff's Renewed Motion [D.E. 38] (the "Order") is on appeal. While the District Court's most recent Order continuing the stay is the Order on appeal. The District Court's September 2020 Order contains the District Court's analysis. Therefore, when this Court reviews whether the continued stay is immoderate, it should consider the most recent Order continuing the stay but also the September 2020 Order. Considering the merits, and Defendant's failure to refute the same, this Court should find that it has appellate jurisdiction over the Order because it keeps Plaintiff "effectively out of Court."

A. Defendant fails to rebut that the continued stay is immoderate because it is predicated on the EC's decision, which has no foreseeable deadline, and which will not control the legal issues in this case

Defendant fails to refute that the continued stay fits in the category of appealable stay orders. Contrary to Defendant's arguments, the continued stay here based on vanilla status reports showing zero progress meets the textbook definition of "indefinite" and is pegged to the EC's decision-making process (not even a parallel proceeding) that has no bearing on the legal issues in this case. Defendant relies upon two faulty arguments to defend the immoderate stay.

First, Defendant asserts that the stay has a deadline because it will be lifted when the EC issues a decision. But there is no time within which the EC must decide (not even an estimated timeframe), and, therefore, no deadline exists. The continued

stay does not "merely afford Iberostar a window to comply with local requirements" as Defendant contends. A window of time is not an unlimited timeframe but instead assumes that the window will close at a specific time. That is not the situation here. The continued stay has proven to be limitless.[15] It has already been ***691 days (nearly two years)*** since Defendant purportedly submitted its application. Based on the lack of information in the status reports, no one knows how long the EC will take to issue a decision, or if it ever will. Further, the continued stay has incentivized the EC to never issue a decision, leaving this case in limbo. Therefore, Defendant's attempt to distinguish Plaintiff's case law (*Hines*, *Stone*, *King*, and *CTI*) on the ground that the stay somehow has a deadline is unavailing.

Moreover, Defendant cannot refute the fact that the stay has resulted in indefinite delays. Indeed, Defendant does not seriously address Plaintiff's extensive showing that the record demonstrates that the EC process is not progressing quickly.

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[15] Defendant fails to address that U.S. District Judge Gayles issued a different, **5 months *limited stay*** of a Title III action against an EU defendant pending authorization from the EC ***after the defendant's original deadline to respond to the complaint***. *See Rodriguez et al., v. Imperial Brands et al.*, Case No. 20-cv-23287-DPG (S.D. Fla. Sept. 23, 2020), D.E. 32 at 4 (emphasis added). At the hearing on defendants' motion to stay that case, Judge Gayles noted that "[t]he stay will not exceed past February 9th of 2021 ***because we cannot proceed or wait indefinitely for an answer regarding these issues***." *See* Hearing Transcript, *Rodriguez et al., v. Imperial Brands et al.*, No. 20-cv-23287-DPG (S.D. Fla. Oct. 8, 2020), D.E. 50 at 30:3-5.

See Initial Brief at 34.[16] Defendant also does not address Plaintiff's argument that the continued stay in this matter is more egregious than the stays vacated in *CTI-Container*, *Cessna Aircraft Co.*, and *Trujillo* because, here, there is even less predictability regarding the duration of the stay. In those cases, this Court vacated stays depending on the outcome of foreign judicial proceedings, the procedure for which is generally known and predictable. In this case, the District Court ignored the failure of the "status reports" to provide any real progress and wrongly awaited the outcome of an entirely *ex parte* political process. The EC decision-making process has proven to be unpredictable *and*, as the EC Blocking Regulation governing the EC process makes clear in its attempt to prevent the application of U.S. law, explicitly hostile to Title III claims. The only thing clear about the EC process in this case is the that it incentivizes indefinite postponement of a decision. Therefore, although Defendant concedes that this Court consider the "reasonable probability" that the external pending process on which a stay is predicated "will be productive" [*see* Answer at 16], Defendant fails to refute the point that, to date, the EC process has been unproductive and gives no sign of changing.

[16] Defendant's argument that the EC needs more time to process Defendant's application (because, as Defendant asserts, this is a matter of first impression for the EC coupled with the effects of the global pandemic) cuts against Defendant's position because it simply evidences further delay.

Unable to transform the indefinite into the finite, Defendant emphasizes a second, equally faulty argument—that the continued stay is proper because the EU process will have a controlling effect on the legal claims and issues in this case. Specifically, Defendant argues that "the EC's decision will govern whether Iberostar will defend on the merits or will be required to decide between defaulting or facing hefty fines." Answer at 18. But the impact that the EC's decision may have on Iberostar and Iberostar's decision of whether to defend on the merits will have ***zero*** effect on the merits of this case. Whether Iberostar will face fines for participating in this case without the EC's authorization may affect Iberostar, but it does not control or even influence the legal claims in this case. The EC process is not a legal proceeding under the Helms-Burton Act; it cannot determine the issues in this case.

Defendant confuses the legal impact of an EC decision on this case—none—with the impact of an EC decision on Defendant's financial bottom line. Defendant's internal financial risk calculations do not control disposition of the merits of this case. In fact, Defendant's position that Plaintiff should have to wait (indefinitely) to have her claims heard so that Iberostar can avoid a business risk underscores the absurdity of the continued stay. Although the EC cannot control the legal issues of this case, the continued stay allows the *ex parte* EC process to dictate whether Plaintiff will ever have her day in court.

B. Speculative EU sanctions on Defendant do not warrant the immoderate stay that continues to prejudice Plaintiff

Defendant relies entirely on the speculative threat of EU sanctions against it as justification for the immoderate stay to continue in force. Iberostar feigns threat of financial penalty while ironically participating in this appeal with ***zero*** repercussions from the EU. Nevertheless, Defendant doubles down on its faulty argument that the threat of EU sanctions warrant the continued stay here and outweighs any prejudice to Plaintiff.

Neither Plaintiff nor this Court should be responsible for the consequences Defendant may face in the EU because Defendant decided to do business in the U.S. and in Cuba in violation of U.S. law. Such EU-related consequences, however speculative, should be borne by Defendant and Defendant only. Indeed, this Court has agreed that a company cannot "avail itself of the benefits of doing business here without accepting the concomitant obligations." *In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817, 828-29 (11th Cir. 1984).

Defendant cites to *Landis*, pointing out that in that case the Supreme Court held that a "stay of indefinite duration" may be appropriate where there is a "pressing need" for it. *See* Answer at 39 (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)). The Supreme Court never stated, however, that a "pressing need" would ever entail putting a foreign law over the law of the United States, particularly when such foreign law was passed specifically to thwart U.S. law. Certainly, the Supreme

Court did not envision that the "pressing need" would put a foreign defendant's interests to partner with Cuba – a U.S. designated state sponsor of terrorism – over the interests of a plaintiff seeking a remedy for confiscation and trafficking of property by such terrorist. Indeed, Defendant failed to answer Plaintiff's question in her Initial Brief – Why must Plaintiff, and all similarly situated plaintiffs with Helms-Burton Act claims against EU defendants, pay for Defendant's decisions that violate laws meant to protect Plaintiff's interests? Such would be the result if this Court does not exercise its appellate jurisdiction to vacate the continued stay.

Defendant fails to establish that the speculative threat of EU sanctions outweighs the overwhelming prejudice to Plaintiff. Defendant implies that, because successive Presidents suspended the Act for 23 years, Plaintiff can keep waiting. Along the same vein, Defendant argues that any discovery hurdles that Plaintiff may face are not a product of the stay but of the suspension. The suspension having been ended, present discovery hurdles result exclusively from the stay. Plaintiff initiated this suit as soon as practically possible after the Act became effective (approximately two years ago). As this Court recently noted, "justice delayed is justice denied." *See Hyde v. Irish*, 962 F.3d 1306, 1309 (11th Cir. 2020). Prejudice to Plaintiff is neither speculative nor, as Defendant contends, "nominal;" it is real and substantial.

Further, Plaintiff's discovery-related complications because of the Act's suspension, have now been compounded by the passage of time, exacerbated by the

continued stay. Defendant purports that the factual issues in this case relate to events that took place up to 100 years ago, so the continued delay here will have no impact. But the subject property was confiscated about 61 years ago, not 100 years ago. Defendant cannot turn back time to its advantage here. Therefore, Defendant fails to refute that the pool of potential witnesses is shrinking, and that continuing to delay this case will jeopardize the opportunity to depose such witnesses. Continuing to stay this case precludes discovery that may reveal important information regarding Defendant's attempts to move its assets abroad or otherwise change its corporate relationships in the United States to avoid this Court's jurisdiction.

Defendant fails to refute that the mechanisms of the EC Blocking Regulation itself, and the EU's planned supplements thereto, make any delay of this case increasingly prejudicial. Defendant first ignores Plaintiff's arguments that the *ex parte* nature of the EC decision-making process is prejudicial to Plaintiff because Plaintiff has no opportunity to provide her perspective to the EC. Neither Plaintiff nor the District Court is able to gauge whether such process is fair. Defendant does not deny that because Plaintiff cannot see Defendant's application to the EC, Plaintiff cannot evaluate whether such application was adequately complete or persuasive or substantively fair to the Plaintiff. Defendant contends that it is in its best interest to obtain authorization from the EC, but the truth is that Defendant has

every incentive to continue to supply deficient information to the EC in the hopes of further prolonging the stay.

Defendant touts that Plaintiff offered no evidence that Defendant might be supplying misinformation to the EC regarding its request for authorization. How can she? Plaintiff is not privy to any information Defendant provides to the EC. Defendant did not deny outright that it is supplying such misinformation and certainly did not deny supplying deficient information to further delay the process. Instead, Defendant says nothing about the EC statement that there were "possible gaps of information that require further investigation." Defendant's Status Report, D.E. 31 at ¶ 9.

Defendant fails to overcome (or even address) that here, as in *Hines*, there is a real "danger of denying justice by delay" because if Plaintiff is forced to await an EC decision, the appellate court will never be able to review the validity of the stay and could never afford Plaintiff effective relief for the stay because it will have already been too late. *See Hines*, 531 F.2d at 732 ("If the stay was in fact in derogation of their rights, the appellate court at that point would be powerless to afford effective relief.").

Thus, in considering the immoderateness of the continued stay, this Court should find that the fictional threat of EU sanctions against Defendant does not

justify the substantial prejudice against Plaintiff, particularly in light of Defendant's failure to refute or even address Plaintiff's established prejudice.

C. International comity should not have been extended to the EC Blocking Statute passed specifically to subvert and counter U.S. law

Defendant fails to refute that the District Court abused its discretion in extending international comity to the EC Blocking Regulation by continuing the stay. As Plaintiff previously briefed, the case law is clear—it is improper to extend international comity to foreign laws that are passed specifically to subvert and counter U.S. law. *See* Initial Brief at 32-37 (discussing case law). The now *682 day* and climbing delay establishes that the EC Blocking Regulation has done exactly that. Indeed, although foreign jurisdictions have an interest in interpreting their own laws and the EU has strong ties to the United States, courts do not treat such interest and ties as superior to the U.S. interest in enforcing U.S. law. *See Societe Nationale Industrielle Aerospaitale v. U.S. Distr. Court for S. Dist. of Iowa*, 482 U.S. 522, 547 (1987).

Defendant summarily dismisses the cases cited in Plaintiff's Initial Brief by arguing that the EC Blocking Regulation is somehow not at odds with U.S. law. Nonsense. How can Defendant assert, in good conscience, that "the international law in this case is expressly in furtherance of U.S. law" when the EC Blocking Regulation was passed specifically to subvert and counter U.S. law and contains

built-in mechanisms to shield EU constituents from the consequences of breaking U.S. law? Defendant cannot erase the subversive elements of the EC Blocking Regulation simply by not addressing them in its Answer.

The potential sanctions that Defendant cites, which stem from Article 5 of the EC Blocking Regulation, is merely the Regulation's first dagger meant to destroy Title III claims against EU defendants. As Defendant concedes, Article 5 prohibits EU companies, such as Defendant, from complying with "any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from [the Helms Burton Act] . . . ." *See* D.E. 16 at ¶ 13 (quoting EC Blocking Regulation, Art. 5).

Defendant disingenuously tries to convert the facially hostile Article 5 into a law that is favorable to U.S. law, stating that the stay here is directed at allowing the EC "time to process Appellee's application for authorization to ***participate*** in this action." *See* Answer at 42. While the District Court's continued stay may be so directed, Article 5 most certainly is not. Article 5 requires prior authorization from the EC. And Article 5's "authorization process" does not stand alone; it is part of the EU's comprehensive EU Blocking Regulation, which is explicitly intended to counteract "the effects of the extra-territorial application of the laws specified in the Annex of this Regulation [i.e., the Helms-Burton Act]." D.E. 16-1 at 3, 6 (quoting EC Blocking Regulation, Art. 1). The fact that this case has been stayed for 682 days

(nearly two years) underscores the hostility of the EU Blocking Regulation, which has thus far been effective at achieving its ultimate goal: to shield EU defendants from any liability for claims arising out of the Helms-Burton Act by first shielding EU defendants from ever participating in Helms-Burton Act litigation.

Defendant's effort to distort the stated-purpose and nature of the EC Blocking Regulation does not end there. Defendant also attempts (and fails) to downplay the Communication that the EC published on January 19, 2021, which Plaintiff *first* presented to the District Court in Plaintiff's Renewed Motion. However, the Communication is not to be underestimated. It reveals that the EU is committed to deterring Helms-Burton Act claims involving EU Defendants by adopting new counteracting measures. *See* Initial Brief at 23-24 for relevant text of the Communication; *See* Section I *supra*.

Defendant cannot overcome the fact that the EU Blocking Regulation is meant to thwart, and in this case actually has thwarted, Title III claims against EU defendants such as Plaintiff's and that the District Court erred in extending international comity to the EU Blocking Regulation in contravention of well-established case law.

III. DEFENDANT FAILS TO OVERCOME THAT THE COLLATERAL ORDER DOCTRINE ALSO PROVIDES APPELLATE JURISDICTION

Defendant fails to refute the fact that Plaintiff has met the three requirements to establish appellate jurisdiction pursuant to the collateral order doctrine. *See Cohen v. Benefit Indus. Corp.*, 337 U.S. 541 (1949); *see also Plaintiff A v. Schair*, 744 F.3d 1247, 1253 (11th Cir. 2014) (finding that to establish appellate jurisdiction pursuant to the collateral order doctrine, the district court's order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment."). Indeed, Defendant fails to address the third factor altogether.

First, Defendant cannot refute the fact that the District Court's Order conclusively determined the disputed question. By continuing the stay in the face of vanilla "status reports," the Order, in and of itself, conclusively determines that the District Court will continue to defer to an indefinite *ex parte* process created by the EC Blocking Regulation, a foreign law passed specifically to block the effects of U.S. law. In so doing, the Order also conclusively determines that it is proper to stay a case, including but not limited to cases involving the Helms-Burton Act, without a deadline, based on extending international comity to a foreign law passed specifically to block the effects of U.S. law.

Defendant argues that the District Court did not conclusively determine the question of the stay because the Order: 1) directed that Defendant submit status reports every 30 days; and 2) did not foreclose Plaintiff's opportunity to pursue reconsideration if circumstances later changed. However, the District Court's Order establishes that the court is not open to reconsideration. In fact, the District Court gave no direction as to what change of circumstances would warrant reconsideration of its Order. The District Court only clarified that the passage of time and the EC's indefinite delay, as shown in Defendant's status reports, would not warrant reconsideration of the stay. The District Court also clarified that other significant changes in circumstances would not warrant reconsideration, including the EC strengthening its opposition to the Act and that other EU defendants have participated in Helms-Burton Act litigation without EC authorization and without imposition of sanctions by the EU (*see* Section I, *supra*). Of note, since the District Court's Order, Defendant's "status reports" continue to suggest that the EC's decision is nowhere in sight, and yet, the stay continues.

Additionally, Defendant argues that the District Court did not determine the above disputed question because it found that the Plaintiff did not meet the standard for reconsideration. Such argument fails because even though the District Court misconstrued Plaintiff's Renewed Motion as a motion for reconsideration in its Order (*see* Section I, *supra*), the language of the Order itself evidences that the

District Court did indeed consider the merits underlying Plaintiff's Renewed Motion when it decided to continue the stay. *See* Order, D.E. 38 at 2 ("*Given the Court's concerns* relating to international comity *and in consideration of* the 'speculative nature of the harm alleged by the Plaintiff' should the stay not be lifted 'and the immediate and concrete harm faced by the Defendant' if the stay is lifted . . . *the Court is unmoved* that its decision to maintain the stay in this matter was incorrect or warrants reconsideration.") (emphasis added). Thus, Defendant cannot deny that the District Order conclusively determined, *after consideration*, the above disputed questions. Thus, the Order meets the first *Cohen* criteria as it left nothing "open, unfinished, or inconclusive." *Cohen*, 337 U.S. at 546.

Defendant similarly fails to refute that Plaintiff has met the second *Cohen* factor, i.e., that the Order "amounts to a refusal to adjudicate the merits," thus presenting "an important issue separate from the merits." *Moses H. Cone*, 460 U.S. at 12. Although Defendant implies that the issues herein are not important ones, Defendant fails to address Plaintiff's case law or arguments. Significantly, Defendant did not deny that the issues at stake in this appeal involve issues of utmost importance to U.S. interests and policy—the right of all claimants to: 1) have their Helms-Burton Act claims against EU Defendants adjudicated; and 2) have any claims under U.S. law adjudicated in a U.S. court despite foreign efforts to infringe

upon those rights. Therefore, resolving the issues before this Court are important and separate enough from the merits to meet the second *Cohen* requirement.

To dispute the second *Cohen* factor, Defendant argues that the District Court did not cede jurisdiction to another forum, and as such, did not resolve an important issue. However, the District Court has completely surrendered its jurisdiction – not to a state, federal or even a foreign court, but worse – to an *ex parte* EC political process established specifically to block Title III claims. Therefore, not only did the Order resolve the above important issues, but in surrendering its jurisdiction to the EC, the Order also resolved another important issue separate from the merits. Thus, because Defendant failed to refute that Plaintiff has met the first two *Cohen* factors, and because Defendant did not even address the third factor, this Court should find that it has appellate jurisdiction to review the Order under the collateral order doctrine.

IV. CONCLUSION

Defendant cannot cite to any case in this Circuit, upholding a District Court's indefinite stay, predicated upon an *ex parte* proceedings of a foreign body that does not reach the merits of the case pending before the District Court (and certainly none where the foreign body is acting upon a foreign law designed to counter and subvert the U.S. law upon which the merits of the case turns). Such simply cannot be permitted to stand without a boundary against unreasonable delay, and frankly

should never have been allowed to stand at all. For the reasons set forth herein, the Plaintiff respectfully requests that this Court reverse the District Court's Order and remand this case with instructions to lift the stay.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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DATED: March 7, 2022

By: */s/ Joseph I. Zumpano*
Joseph I. Zumpano

Counsel for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 7, 2022, I filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

By: */s/ Danit A. Darmon*
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