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 MEMORANDUM OF LAW IN RESPONSE TO JURISDICTIONAL QUESTION

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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 files her Certificate of Interested Persons and Corporate Disclosure Statement:

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

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

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

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

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

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

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

h) Scola, Robert N., Jr., U.S. District Judge

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

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

k) Zumpano, Joseph I., Esq. – *Attorney 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

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Question Presented by the U.S. Court of Appeals for the Eleventh Circuit:

Please address whether the district court's order denying Appellant's renewed motion to vacate the stay of proceedings, entered on May 4, 2021, is final or otherwise appealable. *See Am. Mfrs. Mut. Ins. Co. v. Stone*, 743 F.2d 1519, 1522-23 (11th Cir. 1984) (noting that a stay order is generally not final under 28 U.S.C. § 1291 for purposes of appeal); *Hines v. D'Artois*, 531 F.2d 726, 730-31 (5th Cir. 1976) (providing that a stay order is final and appealable if it puts the appellant effectively out of court); *King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1165-66 (11th Cir. 2007) (explaining that, in determining the extent to which a plaintiff is "effectively out of court," this Court has held that a stay order that is "immoderate and involves a protracted and indefinite period of delay" is final and appealable under 28 U.S.C. § 1291); *King*, 505 F.3d at 1169-70 (holding that stay orders entered pending the conclusion of parallel proceedings in a foreign court are immediately appealable); *see also Plaintiff A v. Schair*, 744 F.3d 1247, 1252-53 (11th Cir. 2014) (explaining that an order is immediately appealable under the collateral order doctrine if it: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from and collateral to the merits of the action; and (3) would be effectively unreviewable on appeal from the final judgment).

Short Answer: Holdings in this and other Circuits point to the appropriateness of appellate jurisdiction in this case. The decisions turn on the totality of the circumstances involved—here, the context in which the District Court issued and continued its stay. Decisions highlight three bases for proper appellate jurisdiction under the circumstances. First, the District Court's order denying Plaintiff's Renewed Motion to Lift the Stay entered on May 4, 2021 [D.E. 38] (the "Order") has left plaintiff effectively out of court without a remedy for a harm done despite a U.S. statute to the contrary. The District Court therefore was mistaken in its exercise of discretion with respect to making the stay depend on the unpredictable length of

an *ex parte* European Commission[1] process on the question of whether to allow the Defendant, an EU corporation, to participate in this Helms-Burton Act case.[2] That *ex parte* process is not a parallel proceeding on the merits. Second, appellate jurisdiction, based on the collateral order doctrine, is appropriate to determine the disputed questions here, crucially important to the disposition of the case, separate from the merits, which questions would not be reviewable on appeal from a final judgment— 1) whether the District Court erred in continuing to defer to a process created by the EC Blocking Regulation,[3] a foreign law passed specifically to block the effects of U.S. law, by indefinitely staying a Helms-Burton Act case until the EC decides an EU Defendant's *ex parte* application to participate in the case (when the EC has no deadline to do so)[4]; and 2) whether 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. Third, this Court has jurisdiction to review stay orders granted

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[1] The European Commission, hereinafter defined as the "EC," is the European Union's closest equivalent to the executive branch—made up of unelected senior officials and policy makers who are appointed by EU member states. However, the EC members do not act as representatives for their home countries.

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

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

[4] It has been over **486 days** since Defendant submitted its application for review by the European Commission.

pursuant to the doctrine of international abstention. *See Societe Nationale D'Industries Nutritive v. Coca-Cola Co.*, 410 F. App'x 179, 179 (11th Cir. 2010). Fourth, the All Writs Act, 28 U.S.C. § 1651(a), provides this Court with additional means for ensuring that the district court operates within the sphere of its discretionary power. In this case, invocation of the All Writs Act to issue a writ of mandamus would not constitute appeal by subterfuge; rather, it would constitute appropriate use of the extraordinary power granted by that Act.

RELEVANT FACTUAL BACKGROUND

On January 8, 2020, Plaintiff/Appellant, Maria Dolores Canto Marti, as personal representative of the Estates of Dolores Martí Mercadè and Fernando Canto Bory ("Plaintiff"), commenced this action against Iberostar Hoteles Y Apartamentos S.L., a Spanish limited liability company ("Defendant" or "Iberostar"), for its unlawful trafficking in Plaintiff's property in violation of the Helms-Burton Act and specifically in violation of Title III of the Act. D.E. 1 at 1.

Congress enacted the Helms-Burton Act in 1996. D.E. 16 at 3. Almost simultaneously, the European Union adopted the EC Blocking Regulation specifically to counteract the effects of Title III of the Helms-Burton Act. D.E. 16 at 1-2. Indeed, Article 1 of the EC Blocking Regulation states that its very purpose is 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. And,

Article 5 seeks to shield EU companies, such as Defendant, from participating in any Helms-Burton action, from the outset of the case by prohibiting such companies 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).

From 1996 until May 2, 2019, Presidents consistently exercised the Helms-Burton Act power to suspend the provisions granting the authority to litigate claims for trafficking in property expropriated by the Cuban government. On May 2, 2019, the President did not exercise this suspension power. The decision not to suspend made Plaintiff's Title III claim ripe for adjudication. D.E. 16 at 3. Soon thereafter, on June 26, 2019, Plaintiff first notified Defendant of her intent to initiate this action if Defendant did not cease and desist trafficking in Plaintiff's property in violation of the Helms-Burton Act. D.E. 23 at 2. Defendant ignored this first communication and did not file anything with the EC. *Id.*

On January 8, 2020, Plaintiff filed her Complaint. D.E. 1. On January 21, 2020, Defendant was served with the Summons and Complaint through local Spanish counsel's use of the Spanish postal service, but Defendant refused to accept the package. D.E. 9 at ¶ 3 and Exhibit A thereto. Despite receiving notice of the Complaint filed in this Court, Defendant failed to file anything with the EC. On February 13, 2020, Plaintiff again served Defendant. D.E. 9 at ¶ 4 and Exhibits B

and C thereto. This time service was accomplished pursuant to Spanish law by a Spanish public notary employed for this purpose. *Id*. Although Defendant refused to accept the package, its refusal did not affect the validity of the public notary's service under the laws of Spain. *Id*. at ¶ 7. After receiving yet another (now the third) communication regarding this case, Defendant still did not file an application, pursuant to the EC Blocking Regulation, seeking the EC's permission to participate in this lawsuit.

On March 19, 2020, Plaintiff (now for the fourth time) addressed a communication to the Defendant through service of the Summons and Complaint via DHL. *Id.* at ¶ 10. After receiving the fourth communication, Defendant yet again did not immediately file anything with the EC. Instead, on April 7, 2020, Defendant requested that the District Court grant it a three-month enlargement of time through July 8, 2020 to respond to the Complaint. D.E. 10. After receiving Plaintiff's objection to such a large extension [D.E. 12], on April 8, 2020, the District Court granted Defendant a thirty-day enlargement of time. D.E. 13.

Only then, after the District Court rejected a three-month delay, did Defendant allegedly, on April 15, 2020, file its request with the EC. D.E. 23 at 3. Therefore, Defendant delayed approximately ten months from when it received notice of Plaintiff's claim and four months after service of the summons and complaint before purportedly filing its application with the EC. *Id*. at 3-4.

On April 23, 2020, Defendant moved to stay these proceedings so that it could ostensibly obtain a ruling from the EC on its request for an authorization to file a response to Plaintiff's Complaint [D.E. 16] (the "Motion to Stay"). In its filing, Defendant specifically limited the requested stay to a period of seventy-five (75) days. D.E. 16 at ¶ 2 ("To avoid a protracted delay, this request for a stay is limited to no more than 75 days."). It its Motion to Stay, Defendant argued that the "duration of the requested stay is short and subject to reasonable limits" and stated that "[t]he estimated timetable for the European Commission to decide Iberostar's request for an authorization to defend its interests in this action is approximately ***ten weeks from receipt of Iberostar's April 15, 2020 application***." D.E. 16 at ¶ 24 (emphasis added).

The next day, before Plaintiff had an opportunity to oppose the motion, the District Court stayed the case "until the European Union grants Iberostar's request for authorization" and required Defendant to submit status reports every thirty days [D.E. 17] (the "April Stay Order"). In effect, as events have demonstrated, the District Court's stay is indefinite. Over a year ago, on July 27, 2020, after more than ninety (90) days without a ruling from the EC, Plaintiff moved to lift the April Stay Order [D.E. 21] (the "Motion to Lift the Stay"). Defendant then filed its opposition to Plaintiff's Motion to Lift the Stay [D.E. 22] on August 10, 2020 (the "Response"). On August 17, 2020, Plaintiff submitted its reply in support of its motion to lift [D.E. 23] (the "Reply"). Thereafter, on September 17, 2020, the District Court issued its

Order Denying Motion to Vacate Stay [D.E. 25] (the "September 2020 Order"). In denying Plaintiff's Motion to Lift the Stay, the District Court primarily relied upon the international abstention factors set out in *Turner Entm't. Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994) despite the fact that *Turner* involved a foreign court with concurrent jurisdiction over the parties not an *ex parte* process before a commission that has stated its intent to block the application of U.S. law.

Meanwhile, Defendant's monthly status reports to the District Court illustrated one recurring theme—delay. D.E. 32 at 8. For example, in one status report, Defendant notes that "The [EC] highlighted that the '***complexity of [Iberostar's] request*** requires careful consideration, including ***extensive consultation*** of both the Commission services and Member States' authorities.'" D.E. 30 at ¶ 6 (emphasis added). It further provides that: "They explained that 'challenges presented by the current health situation [have] ***lengthened the process***.'" *Id*. at ¶ 7(emphasis added). Moreover, another recent status report signaled even further delay, possibly at the fault of Defendant: "[t]he Commission added that 'the consultation of the Commission services ***raised questions and possible gaps of information that require further investigation***.'" D.E. 31 at ¶ 9 (emphasis added).

Notably, on September 23, 2020, after the District Court had denied Plaintiff's Motion to Stay and while this case was stayed pending the EC's authorization, U.S.

District Judge Darrin P. Gayles issued a different, ***limited stay*** of a Title III action against an EU defendant – Imperial Brands PLC ("Imperial")[5] – pending authorization from the EC ***to five months 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). Indeed, to avoid entering an indefinite stay, Judge Gayles limited the stay in that case to February 9, 2020. 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. Emphasis added.

Meanwhile, on January 19, 2021, the EC published a new Communication regarding the EC Blocking Regulation, further reinforcing its continued opposition to enforcement of the Helms Burton Act in cases such as this one and its

[5] Imperial Brands PLC ("Imperial") is a resident of the United Kingdom. On August 27, 2020 and before "Brexit," Imperial Brands submitted its application to the EC for permission to defend against the litigation. *See* Defendant Imperial Brands PLC's Fifth Status Report, *Rodriguez et al., v. Imperial Brands et al.*, Case No. 20-cv-23287-DPG (S.D. Fla. Feb. 8, 2021), D.E. 64 at ¶ 1. Thereafter, after the "Brexit" transition period ended on December 31, 2020, without the EC issuing a decision on Imperial's application, the U.K. incorporated the EU Blocking Regulation into U.K. law as "retained EU law." *Id*. at ¶ 1-2. Then, on January 10, 2021, Imperial submitted its application to the U.K. pursuant to its retained EU law. *Id*. at ¶ 3. And on February 5, 2021, the U.K. published its decision permitting Imperial to file and litigate a motion to dismiss the Complaint. *Id*. at ¶ 4.

determination to take additional measures to expand and add to its existing policies and procedures with respect to such opposition. *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"). The Communication states that:

> 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***, as appropriate, through:
>
> (I) clearer procedures and rules for applying Article 6 (in particular, to facilitate the recovery of defendants' assets across the EU);
>
> ***(II) strengthened national measures to block the recognition and enforcement of foreign decisions and judgments based on the listed extra-territorial measures (Article 4);***
>
> (III) streamlined processing for authorisation requests pursuant to Article 5, second paragraph, including a review of the information requested;[6]
>
> (IV) possible involvement in foreign proceedings to support EU companies and individuals.

Id. (emphasis added). The Communication 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)

[6] This is an admission that the current process is anything but efficient.

No 2271/96." The Communication demonstrates the EC's strengthened opposition to the enforcement of the Helms-Burton Act against EU individuals and entities through the adoption of new counteracting measures.

On March 3, 2021, ten months after the original deadline for Defendant to respond to the Complaint and more than 300 days after Defendant submitted its April 15, 2020, application to the EC [D.E. 13], Plaintiff filed her Renewed Motion to Lift the Stay, and if Denied, Motion for Certification of Order Under 28 U.S.C. § 1292(b) [D.E. 32] ("Plaintiff's Renewed Motion"). As of that date, the EC had not provided any estimated timeframe for a decision. D.E. 31 at 2-3. Given the passage of time and the EU's recently strengthened opposition to, and planned deterrence of, the Helms-Burton Act, Plaintiff argued that the stay should be lifted. Plaintiff also pointed out that the District Court misapplied the *Turner* factors and incorrectly extended international comity to a foreign process meant to subvert U.S. law. D.E. 32 at 12-22. Plaintiff's Renewed Motion also noted the different approach taken by Judge Gayles in *Rodriguez*, insisting on a time limit in the stay order. And in Plaintiff's Notice of Supplemental Authority filed on March 26, 2021, Plaintiff brought to the attention of the District Court ***five*** instances where EU defendants

have participated in Helms-Burton actions without evidence of suffering any sanctions by the EC.[7] D.E. 36.

On May 4, 2021, the District Court nonetheless denied Plaintiff's Renewed Motion [D.E. 38], citing "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, among other considerations stated in the Court's prior order." On June 1, 2021, Plaintiff appealed the District Court's Order. D.E. 42. As things now stand, the stay in this case has been in effect for over 15 months.

ARGUMENT

I. APPELLATE JURISDICTION EXISTS BECAUSE THE CONTINUED STAY PUTS PLAINTIFF EFFECTIVELY OUT OF COURT

A stay leaving a party "effectively out of court" is a final order appealable under § 1291. *See Cessna Aircraft Co.*, 505 F.3d at 1165 (citing *Am. Mfrs. Mut. Ins.*

[7] The below are ***five*** other actions involving Helms-Burton Act claims against EU defendants that have participated in their respective actions by, at least, filing a motion to dismiss. When Plaintiff filed her Renewed Motion, the court records reflected that such EU defendants had not suffered any sanctions by the EU or the EC for doing so: *Banco Nunez v. Societe Generale*, No. 1:19-cv-22842-DPG (S.D. Fla.) transferred to No. 1:20-cv-00851-KMW-KNF (S.D.N.Y); *Del Valle et al. v. Trivago GMBH et al.*, No. 1:19-cv-22619-BB (S.D. Fla.); *Mata et al. v. Expedia Inc. et al.*, No. 1:19-cv-22529-FAM (S.D. Fla.); *Echevarria et al. v. Trivago GMBH et al.*, No. 1:19-cv-22620-FAM (S.D. Fla.); *Pujol Moreira et al. v. Societe Generale et al.*, No. 1:20-cv-09380-JMF (S.D.N.Y).

Co. v. Edward D. Stone, Jr. & Assoc., 743 F.2d 1519, 1523-24 (11th Cir. 1984); *Dash 224 Ltd. Liab. Co. v. Aerovias de Integracion Reg'l Aires SA*, 605 F. App'x 868, 870 (11th Cir. 2015); *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); *Trujillo v. Conover & Co. Communications*, 221 F.3d 1262 (11th Cir. 2000); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962).

The "effectively out of court" rule of finality, which was first set out in *Idlewild Bon Voyage Liquor Corp.*, was later applied by the Supreme Court to stays of federal court proceedings pending conclusion of a related state court or state administrative agency proceedings. *See Idlewild Bon Voyage Liquor Corp. v. Epstein*. 370 U.S. 713, 715 n.2 (1962) (holding that abstention under the *Pullman* doctrine to allow a state court to interpret and clarify state law put plaintiff effectively out of court); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) (holding that remand under the *Burford* abstention doctrine to a state administrative agency put plaintiff effectively out of court); *Moses H. Cone*, 460 U.S. at 10-13 (holding that a stay granted under the *Colorado River* abstention doctrine to allow a state court to address the central issue of the lawsuit put plaintiff effectively out of court).

This "Circuit has had several opportunities to apply the 'effectively out of court' doctrine." *Cessna Aircraft Co.*, 505 F.3d at 1167 (citing *Stone*, 743 F.2d at

1522-24; *CTI-Container Leasing Corp.*, 685 F.2d at 1287-88; *Hines v. D'Artois*, 531 F.2d 726, 730-32 (5th Cir. 1976)). Indeed, this Court has applied the "effectively out of court" doctrine to expand appellate jurisdiction over federal court stay orders particularly when such stay orders are issued pending litigation in a non-state, foreign forum. *See Cessna Aircraft Co.*, 505 F.3d at 1165 (finding appellate jurisdiction over a stay order that granted a stay pending litigation in the Italian courts); *Trujillo*, 221 F.3d 1262 (assuming jurisdiction where a stay was granted pending litigation in a Bahamian court); *CTI-Container Leasing Corp*. 685 F.2d. at 1284 (finding appellate jurisdiction over a stay order pending proceeding in the Iran-United States Claims Tribunal).

Moreover, this Court has clarified that a plaintiff is "effectively out of court" when the case is put "in a state of suspended animation" pending the outcome of another proceeding that is "unlikely to control or to narrow substantially the claims or unresolved issues in the stayed lawsuit." *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1196-97 (11th Cir. 2009) (citing *Hines*, 531 F.2d at 730; *CTI-Container*, 685 F.2d at 1287-88; *Stone*, 743 F.2d at 1523-24; and *Cessna Aircraft*, 505 F.3d at 1172). As this Court has held, the stay in this case makes appeal appropriate: in *Miccosukee Tribe of Indians*, the Court wrote that:

> Effectively out of court by suspended animation is a narrow doctrine that applies only when a case is placed in an "extended state of suspended animation" without good reason. *See Hines*, 531 F.2d at 730. **In *Hines, CTI, Stone*, and *Cessna Aircraft*, the plaintiffs' federal**

> **claims languished for no good reason because there was little likelihood that the other forums' decisions would control or significantly inform the litigation.**

Id. It could have been writing about this case. *Miccosukee Tribe of Indians* turned on the fact, unlike in *Hines*, *CTI-Container*, *Stone*, and *Cessna Aircraft* and here, that "the reason for the district court's stay was at least a good one, if not an excellent one: to await a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case." *Id.*; *see also Cessna Aircraft*, 505 F3d. at 1172 (finding appellate jurisdiction and vacating the district court's stay order when the court had "no assurance at all that the Italian proceedings will directly relate to the issues in this lawsuit."); *Stone*, 743 F.2d at 1523 (finding appellate jurisdiction over a stay order when the pending action did not involve the same issues before the stayed federal court action) (clarifying that this Court had "jurisdiction over litigants placed 'effectively out of court' even where a 'state decision will not have res judicata effect on the merits of [the plaintiff's] federal claim.'").[8] Here, unlike in *Miccosukee Tribe of Indians*, there is no good reason to

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[8] Other courts in the Eleventh Circuit have upheld the same principal, rejecting a motion to stay a federal court action pending resolution of a parallel proceeding abroad involving distinct or unrelated issues. *French Cuff v. Markel Am. Ins. Co.*, No. 07-60006-CIV-LENARD/TORRES, 2007 U.S. Dist. LEXIS 115813 at *3-4 (S.D. Fla. May 21, 2007) (denying defendant's motion to stay the case because the French proceeding addressed a "wholly distinct issue" from that which the district court would be addressing); *Kleiman v. Wright*, Case No. 18-CV-80176-BLOOM/REINHART, 2018 U.S. Dist. LEXIS 216417, at *34-35 (S.D. Fla. Dec. 27, 2018) (finding international abstention principles did not apply where plaintiffs'

await the outcome of the *ex parte* EC process as the outcome (if the EC ever makes a decision) will have no impact on the merits of this case.

A. The *Ex Parte* EC process is meant to thwart Plaintiff's claims, not adjudicate them

Despite the *ex parte* EC process having no impact on the merits of this case, the process has and will continue to prevent Plaintiff's claims from ever being adjudicated. The very purpose of the EC Blocking Regulation is to subvert U.S. law, including Title III of the Helms-Burton Act. Article 5 of the EC Blocking Regulation is the first dagger meant for Title III claims. Indeed, Article 5 seeks to shield EU defendants from ever participating in any proceeding seeking to establish their liability for converting property seized without compensation by the Cuban government and for which the Helms-Burton Act provides an avenue for redress. 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).

Article 5 purportedly leaves an avenue for EU defendants to participate in a Helms-Burton action, but only after overcoming potentially insurmountable hurdles.

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case was "distinct from the [foreign] proceedings;" and it was "not readily apparent that the [foreign court] adjudicated the claims on the merits").

Article 5 provides that member state corporations "***may*** be authorized, in accordance with the procedures provided in Articles 7 and 8 to comply fully or partially to the extent non-compliance would seriously damage their interests or those of the Community." Emphasis added. However, EU defendants must apply for such authorization pursuant to EU law,[9] and only the EU defendant and the EC have any control over the application and authorization process. Plaintiff plays no role in such process whatsoever. Plaintiff and the District Court have no independent access to the application and authorization process and depend on Defendant's monthly status reports for information about it. *See* Section II.B.2(2), *supra*, discussing such status reports.

Further, on January 19, 2021, the EC published the Communication, which reveals that the European Union plans to bolster its existing tools to counter extra-territoriality (as in Title III) and consider new ones. The Communication states that: "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***

[9] The EC promulgated the Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 to vaguely outline the process for seeking such authorization. *Laying Down the Criteria for Application of the Second Paragraph of Article 5 of Council Regulation (EC) No 2271/96 Protecting against the Effects of the Extra-territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom. See Implementing Regulation 2018/1101, 2018 O.J. (L 199) 1 (EC.* An English language version of the Implementing Regulation is available at https://eur-lex.europa.eu/legalcontent/ EN/TXT/PDF/?uri=CELEX:32018R1101&from=EN (last visited April 18, 2020).

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). The Communication 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.

Thus, if this Court allows it, the EC, through the EC Blocking Regulation, will continue to keep Plaintiff effectively out of court as it has for over 15 months now. In other similar cases, including in *Cessna Aircraft Co.*, *Trujillo*, and *CTI-Container Leasing Corp*., this Court has extended appellate jurisdiction to overturn stay orders that have kept plaintiffs effectively out of court pending other parallel litigation, including parallel litigation abroad. In such cases, this Court found that "the plaintiffs' federal claims languished for no good reason because there was little likelihood that the other forums' decisions would control or significantly inform the litigation." *Miccosukee Tribe of Indians*, 559 F.3d at 1197.

Here, the stay and the District Court's abdication of its jurisdiction is even more egregious than in *Hines*, *CTI-Container*, *Stone*, and *Cessna Aircraft*, because here there is no parallel proceeding whatsoever. There is only an *ex parte* EC process meant to thwart Plaintiff's claims. Accordingly, Plaintiff's claims are languishing while there is ***zero*** likelihood that the EC's decisions would control or significantly inform the litigation. Therefore, this case is completely distinguishable from *Miccosukee Tribe of Indians*, wherein the pending litigation involved the same issues and parties. Here, the *ex parte* EC process, will have ***zero*** effect on Plaintiff's claims other than precluding them from ever being heard. And further, in *Miccosukee Tribe of Indians* this Court found that "unlike the traditional effectively out of court cases" and unlike *Cessna Aircraft*, the lower court had not surrendered its jurisdiction to a state court or administrative proceeding, or to a foreign court, but "instead it was surrendered to this Court, the same one that would decide any appeal from any final judgment in the stayed case, if the proceedings had not been stayed." *Id*. Here, unlike in *Miccosukee Tribe of Indians*, the District Court did not surrender its jurisdiction to this Court. Here, the District Court surrendered its jurisdiction to an *ex parte* foreign process specifically designed to thwart Plaintiff's claims and keep Plaintiff out of court.

B. Appellate jurisdiction exists because the stay is immoderate, protracted, and indefinite putting plaintiff effectively out of court

This Court has recently clarified in *Cessna Aircraft* that "a stay order that is immoderate and involves a protracted and indefinite period of delay is final and appealable under 28 U.S.C. § 1291." 505 F.3d at 1165 (citing Stone, 743 F.2d at 1523-24; *CTI-Container Leasing Corp.*, 685 F.2d at 1287-88).

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. It is improper and immoderate to stay a case pending the resolution of related proceedings in another forum without properly limiting the scope of the stay. *See id.* at 1264-65.

1. The stay is immoderate: it mistakenly extends international comity to the *ex parte* EC process designed to subvert U.S. law and preclude plaintiff's claims from being adjudicated

When considering the reasons cited by the District Court for the continued stay, the stay is immoderate because it is premised on extending international comity to the EC Blocking Regulation, which is meant to subvert U.S. law and prevent Plaintiff's claims from ever being adjudicated. But international comity cannot support any stay in favor of a foreign law that seeks to thwart or block the application

of U.S. law in U.S. courts. The District Court failed to recognize that international comity has limits.

Courts, including the Supreme Court, have found that it is improper to extend international comity to foreign laws that are passed specifically to subvert U.S. law. *See Hilton v. Guyot*, 159 U.S. 113, 165 (1895) ("The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and *is inadmissible when contrary to its policy, or prejudicial to its interests*") (citation omitted) (emphasis added); *Societe Nationale Industrielle Aerospaitale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines* 731 F.2d 909 (D.C. Cir. 1984); *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169, 213 (Bankr. S.D.N.Y. 2017) ("[C]ourts generally extend comity provided the foreign court had proper jurisdiction and recognition of its judgment or proceeding does not prejudice the rights of United States citizens or violate domestic public policy.") (quotations and citations omitted). Indeed, even when there is a prospective foreign forum that is available to adjudicate the parties' claims (which does not exist here), this Court will only extend prospective international comity when doing so would align with U.S. interests. *See GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1034 (11th Cir. 2014); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 (11th Cir. 2004).

The Supreme Court has rejected attempts to supersede U.S. law with foreign law as such an approach would "effectively subject every American court hearing a case involving a national of a contracting state to the internal laws of that state." *Société Nationale*, 482 U.S. at 546. In *Société Nationale*, the Supreme Court rejected the use of a French "blocking statute" that was cited to deny use of U.S. discovery methods in a district court proceeding. *Id*. at 568 n.29. The Court remarked: "[i]ndeed, the language of the statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge…." *Id*.

The Supreme Court recognized that foreign laws must not "deprive an American court of the power to order a party subject to its jurisdiction to produce evidence" even when producing such evidence would force that party to violate a foreign blocking statute. *Id*. Thus, in *Société Nationale*, the Supreme Court rejected the application of blocking statutes in U.S. courts even when a foreign party may face consequences for violating such blocking statute. *Id*. at 547.

In *Société Nationale*, the Supreme Court rejected extending international comity to a blocking statute that would interfere with the U.S. discovery process. Here, much more is at stake. The EC Blocking Regulation is, not only precluding discovery pursuant to U.S. law, but also, by way of the District Court's stay, allowing the EC Blocking Regulation to block Plaintiff's claims from being heard all-

together. Indeed, it has been more than a year and a half since Plaintiff filed her Complaint. The length of the stay to date has proven fundamentally prejudicial to Plaintiff and the interests of U.S. courts in applying U.S. law.

The D.C. Circuit Court's decision in *Laker* is also instructive because in that case no other forum existed that could resolve plaintiff's claims when the court considered extending international comity. 731 F.2d 909, 938 (D.C. Cir. 1984). In declining to extend international comity to U.K. law, the court stated:

> ***When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum.*** Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act. Case law on the subject is extensive and recognizes the current validity of this exception to comity.

Id. at 937-938 (emphasis added).

In *Laker*, the court found that, where a foreign action is "specifically intended to interfere with and terminate" the domestic suit, it cannot be afforded comity. *Id*. at 938. The EC Blocking Regulation is specifically intended to interfere with and terminate any actions brought under the Helms-Burton Act, including this one. Here, like the English injunction at issue in *Laker*, the EC Blocking Regulation is purely offensive. *See id*. at 938. Accordingly, like the English injunction in that case, the

EC Blocking Regulation "seeks only to quash the practical power of the United States courts to adjudicate claims under United States law against defendants admittedly subject to the courts' adjudicatory jurisdiction." *See id.* Moreover, like the defendants in *Laker*, Defendant's motion is founded on the premise "that comity compels us to recognize a decision by a foreign government that this court shall not apply its own laws to corporations doing business in this country." *See id.* at 939. Nonsense. The District Court's stay allows Defendant and the EU to usurp its judicial functions and destroy its autonomy. Such a stay is quintessentially immoderate.

Notably, the court in both *French Cuff* and *Kleiman* noted that the principle of international comity is typically used to "justify abstention only where a foreign court has already rendered a judgment." *See French Cuff*, 2007 U.S. Dist. LEXIS 115813 at *7; *see also Kleiman*, 2018 U.S. Dist. LEXIS 216417, at *34-35. The EC process has nothing to do with the merits of Plaintiff's claim; it is entirely focused on objections to an act of Congress.

2. The stay is immoderate because it is protracted and indefinite

Indefinite and protracted stays are considered immoderate and are unlawful. The Supreme Court has held that:

> [A] stay is immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, so far at least as they are susceptible of prevision and description.

> When once those limits have been reached, the fetters should fall off.

Landis v. N. Am. Co., 299 U.S. 248, 257 (1936). A stay is considered immoderate unless it has a reasonable, foreseeable limit. *See id.* The Court elaborated: "an order which is to continue by its terms for an immoderate stretch of time is not to be upheld as moderate because conceivably the court that made it may be persuaded at a later time to undo what it has done." *Id.* Relevant to this proceeding, the Court stated that a court does not have the power "by a stay to compel an unwilling litigant to wait upon the outcome of a controversy to which he is a stranger." *Id.* at 255. That is precisely the situation Plaintiff confronts as she is not a party to the *ex parte* EU process.

Cessna Aircraft Co. is particularly instructive here. In *Cessna Aircraft Co.*, this Court found that the "appeal fits within the 'effectively out of court' exception to the final judgment rule because the plaintiff in that case had been, for 'all practical effects been put out of court indefinitely while litigation whose nature, extent, and duration are unknown, is pending in Italy.'" *Id*. at 1169. In its holding, the Court in *Cessna Aircraft Co.* reasoned that the stay order had "the legal effect of preventing King from proceeding with his claims in federal court for an indefinite period of time, potentially for years." *Id*.

The stay in this case is even more egregious than in *Cessna Aircraft Co.* because the District Court's stay order, which has already kept Plaintiff out of court

for over a year, is pegged to an *ex parte* EC authorization process governed by the EC and the EC Blocking Statute, which are explicitly opposed to the enforcement of actions pursuant to the Helms-Burton Act. As the passage of time has demonstrated, there is no incentive to decide Defendant's application. Rather, continued inaction on Defendant's application serves those EU policies. By conditioning the stay on an EC decision, the stay, in effect, has no imminent or foreseeable deadline. Contrary to Eleventh Circuit principles, the stay is fated to last indefinitely, keeping Plaintiff effectively out of court.

When faced with a similar request from an EU defendant (Imperial) to stay a Title III action against it pending authorization from the EC, U.S. District Court Judge Gayles limited the stay to five months. *See Rodriguez et al., v. Imperial Brands et al.*, Case No. 20-cv-23287-DPG (S.D. Fla. Sept. 23, 2020). 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.[10] In contrast, the District Court here did not limit the stay to any specific timeframe.

[10] Ultimately, the limited stay in *Rodriguez* yielded favorable results: Three days before the court's February 9, 2021 deadline, the defendant received the authorization it required to proceed with the litigation. *See* Imperial's Fifth Status Report, *Rodriguez et al.*, No. 20-cv-23287-DPG, D.E. 64. Thereafter, on February

The unpredictability of proceedings abroad adds to the indefiniteness of stays that depend on the conclusion of such proceedings, rendering such stays immoderate and improper. *See CTI-Container Leasing Corp*, 685 F.2d at 1288 (vacating the district court's stay pending a determination by the Iran-United States Claims Tribunal where the duration of the stay could "safely be described as an indefinite period."); *Cessna Aircraft Co.,* 505 F.3d at 1160 (vacating the district court's stay pending the conclusion of a proceeding before an Italian court). Indeed, the stay in *CTI-Container* was deemed immoderate in part because there was "no way to estimate the months or even years that may pass before [the claims] are decided" by the Tribunal. *CTI-Container Leasing Corp*., 685 F.3d at 1287. Similarly, in *Cessna Aircraft Co.,* the stay was considered indefinite and thus immoderate, in part because the court had "minimal evidence to assess the scope of litigation in Italy." 505 F.3d at 1172.

(1) The continued stay has no concrete or foreseeable deadline

In its Order, appealed to this Court, the District Court erroneously refused to lift the immoderate stay and stood upon the rationale set forth in its September 2020 Order. D.E. 38 at 1-2. In its September 2020 Order, the District Court mistakenly

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12, 2021, the court lifted the stay and reopened the case. *See* Paperless Order, *Rodriguez et al.*, No. 20-cv-23287-DPG, D.E. 69.

agreed "with Defendant that the stay is not indefinite because it will end as soon as the European Commission rules on Iberostar's application." September 2020 Order, D.E. 25 at 4-5. But the EC has failed to give any deadline or even an estimate for completing its decision-making on Iberostar's application. The Court pointed out that "the European Commission is actively considering Iberostar's application[,]" which "is evidenced by the European Commission and Iberostar's active dialogue" regarding Iberostar's application. September 2020 Order, D.E. 25 at 5. The fact that Defendant may be in a dialogue with the EC is irrelevant: neither Plaintiff nor the District Court has insight beyond what Defendant reports because the process is *ex parte*. There has been no indication whatsoever as to when the EC may decide the application. With no deadline for an EC ruling on Defendant's application and no activity by the EC prior to the Order, the duration of the District Court's stay order is indefinite.

It is this indefiniteness and unpredictability of the duration of the continued stay that underscores the immoderateness of the District Court's stay and the vesting of jurisdiction before this Court. Indeed, the stay here is similar to the stay orders in *CTI-Container*, *Cessna Aircraft Co.*, and *Trujillo*—all of which this Court vacated as indefinite and immoderate. In *Trujillo*, the Court vacated and remanded because the district court's "stay, by its own terms, remains in effect until the 'Bahamian Courts conclude their review.'" *Trujillo*, 221 F.3d at 1264. Similarly, in *CTI-*

Container, the Court vacated the indefinite stay that was depended on the outcome of a proceeding before an international tribunal when there was "no way to estimate the months or even years that may pass" before the tribunal would come to a decision. *CTI-Container*, 685 F.2d at 1287. Here, no one knows when the EC will decide or even how to estimate a time for its decision. Iberostar's original estimation – ten weeks, "but no longer than 75 days" – completely missed the mark. *See* Motion to Stay, D.E. 16 at ¶ 24.

The continued stay here is more egregious than the stays that were 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 somewhat predictable. In this case, the court below awaits the outcome of an entirely *ex parte* political process. The EC decision-making process is unpredictable *and* explicitly hostile to Title III claims as it is governed by the EC and the EC Blocking Regulation which means to subvert the application of U.S. law. The only thing apparent about the EC process in this case is the existence of incentives to delay or never issue a decision.

Defendant, in its status reports following the District Court's September 2020 Order and up through the time of the filing of Plaintiff's Renewed Motion (the subject of this appeal), characterizes its application as being under active

consideration. D.E. 31 at 2. But such consideration, which according to the District Court appears to be in the "normal course,"[11] does nothing to temper the indefiniteness of the stay because "normal" in this context is imprecise. Neither Plaintiff nor the District Court knows what the "normal course" of the EC's *ex parte* process is for such applications as they have both been left in the dark about the entire process. Indeed, Defendant has refused to supply Plaintiff or the Court with its application or communications with the EC. D.E. 21-1 at 2. And the snippets of EC communication that Defendant has provided do not provide detail regarding the EC process and timing for consideration. From this perspective as well, the stay is and continues to be improperly indefinite. The passage of time, the Communication, and the status reports filed by Defendant have established that the stay issued by the District Court is immoderate because it has no concrete or foreseeable deadline and is therefore fated to keep Plaintiff effectively out of court. Thus, appellate jurisdiction is proper before this Court.

(2) The court-ordered status reports do nothing to define the scope of the stay

The 30-day status reports required by the District Court do not make the scope of the continued stay definite in any way. *See Trujillo*, 221 F.3d at 1264 n. 3 (finding that requiring plaintiff to submit status reports every three months "does not make

[11] September 2020 Order, D.E. 25 at p. 5.

the scope of the stay less indefinite"); *Cessna Aircraft Co.*, 505 F.3d 1160 at 1172 ("Although the district court has asked the parties to submit status reports on the Italian litigation, *Trujillo* rejected the idea that regular reports can save an otherwise indefinite stay") (citations omitted). Defendant argued that the "30 day status reports provide a mechanism to ensure that the matter does not linger indefinitely." Response, D.E. 22 at ¶ 11. How? As this Court found in *Trujillo*, the status reports do "not guarantee that the district court will reassess the propriety of the stay every three months. The District Court could do nothing when status reports are filed, and the stay would continue in effect until the Bahamian litigation concluded." *See Trujillo*, 221 F.3d at 1264 n. 3. The Supreme Court's *Landis* standard is on point: the stay cannot "be upheld as moderate because conceivably the court that made it may be persuaded at a later time to undo what it has done." *Landis*, 299 U.S. at 257. This conclusion is correct despite the District Court statement that it "evaluates the propriety of the stay entered in this case with the filing of Iberostar's status reports." September 2020 Order, D.E. 25 at 5. Indeed, under *Landis*, such ex post facto analysis is improper. *See Landis*, 299 U.S. at 257.

(3) The EC process abroad is "not progressing quickly"

Just as in *Trujillo*, the foreign process upon which the stay is premised is "not progressing quickly." When Defendant originally argued that the "duration of the requested stay is short and subject to reasonable limits" it stated that "[t]he estimated

timetable for the European Commission to decide Iberostar's request for an authorization to defend its interests in this action is approximately ***ten weeks for receipt of Iberostar's April 15, 2020 application***. *See* Motion to Stay, D.E. 16 at ¶ 24 (emphasis added). However, over a year has passed since Iberostar submitted its application to the EC and the record is full of signs of further delay. For example, the EC has explained "that it requires ***'extensive consultation*** of both the Commission's services and Member States' authorities.'" Defendant's Status Report, D.E. 30 at ¶ 5 (emphasis added). "The Commission highlighted that the '***complexity of [Iberostar's] request*** requires careful consideration, including ***extensive consultation*** of both the Commission services and Member States' authorities.'" *Id*. at ¶ 6 (emphasis added). "They explained that 'challenges presented by the current health situation [have] ***lengthened the process***.'" *Id*. at ¶ 7(emphasis added). Defendant's recent status report signaled even further delay: "[t]he Commission added that 'the consultation of the Commission services ***raised questions and possible gaps of information that require further investigation***.'" Defendant's Status Report, D.E. 31 at ¶ 9 (emphasis added). Possible gaps of information supplied by Defendant could translate into months or years of further delay. Neither Plaintiff nor the District Court has any way of knowing what information Defendant did or did not supply and whether that information was purposefully deficient. Further, Defendant has not demonstrated that it has made any

attempts to hasten the authorization process. In short, the EC seems to have determined that the time for decision is not ripe, a classic formula justifying delay.

Staying Title III actions indefinitely until the EC decides whether an EU defendant can participate in the action is a deprivation of Plaintiff's due process right to be heard. Indeed, indefinite stays deny due process. *See Wimberly v. Rogers*, 557 F.2d 671, 673 (9th Cir. 1977); *Richards v. Pac. Gas & Elec. Co*., No. EDCV 16-2069-DMG (KK), 2017 U.S. Dist. LEXIS 54763, at *2-3 (C.D. Cal. Apr. 10, 2017) (denying plaintiff's request for a stay in part because he offered no proposed end date for the requested stay, finding that granting an indefinite stay "is tantamount to a denial of due process.") (internal quotations and citations omitted). The District Court's continued stay in this case has kept Plaintiff out of court for more than a year. There is no end in sight. The District Court has not only denied Plaintiff the opportunity to be heard by the District Court but by ***any*** court as there is no parallel foreign proceeding where Plaintiff can plead her case. The District Court inconceivably thought it proper to base its stay order on the EC application process that is itself inherently prejudicial because its governing body and law ultimately seeks to deprive Plaintiff of her rights under the Helms-Burton Act altogether. This is a dangerous precedent to set, one that may deprive the due process rights of all plaintiffs with Title III claims against EU defendants doing business in the U.S.

C. Balancing the inconvenience and costs of piecemeal review and the danger of denying justice by delay weighs in favor of construing the Order as final under § 1291

This Court has held that "finality under § 1291 is to be construed practically, rather than technically, with an eye toward balancing the competing considerations of the "inconvenience and costs of piecemeal review on one hand and the danger of denying justice by delay on the other.'" *Stone*, 743 F.2d at 1524 (citing and quoting *Hines*, 531 F.2d at 730). In *Stone*, this Court found that:

> The stay order ***does not further the goal of avoiding piecemeal litigation, because the state proceeding for which the federal action has been delayed will not decide the issues involved in the federal action*** and the district court will be obliged to consider AMMIC's claims in full when the state action concludes. On the other hand, the stay order in the instant case imposes "the danger of denying justice by delay."

Id. at 1525 (citing *CTI-Container*, 685 F.2d at 1288; *Hines*, 531 F.2d at 730). Like in *Stone*, *CTI-Container*, and *Hines*, the "proceeding" here – *ex parte* the EC process – for which the federal action has been delayed will not decide the issues involves in the federal action, and thus, will not avoid piecemeal litigation. In fact, this continued stay will likely cause the piecemeal litigation that courts often seek to avoid.

Even if the EC ultimately decides to permit Defendant to file its motion to dismiss, and the District Court ultimately denies Defendant's motion to dismiss, the District Court will likely face another motion to stay by Defendant pending further

authorization by the EC. Indeed, Defendant has made clear that, if it obtains permission from the EC, Defendant will be seeking "dismissal for, among other things, insufficient service of process and lack of personal jurisdiction." Motion to Stay, D.E. 16 at ¶ 10; Status Report, D.E. 20 at 1. n.1 ("Iberostar reserves all its rights and will move to dismiss based on its Rule 12 defenses when it receives authorization to do so from the European Commission."). The District Court overlooked the possibility that the EC may authorize Defendant to move to dismiss this case without authorizing Defendant to participate in any further litigation.

Thus, this game may persist at every stage in this case, resulting in inconvenient and expensive piecemeal litigation contrary to the doctrine of judicial efficiency. To continue to grant Defendant and the EC this unobstructed freedom would set an unwise and inefficient precedent that every time a case contravenes the EC Blocking Regulation, the case must be indefinitely stayed and/or repeatedly halted while the defendant seeks additional EC authorization. Such a result would allow defendants to use the EC process to waste judicial resources and dictate the terms and procedure of U.S. courts. Accordingly, this Court should find that it has the jurisdiction to practically construe the District Court's Order as a final order that should be vacated.

In addition to likely causing piecemeal litigation, the continued stay continues to prejudice Plaintiff. No alternative tribunal exists, meaning there is no alternative

where the parties can fully and fairly litigate their claims. In *Turner*, this Court concluded that staying the U.S. litigation pending the foreign proceeding in that case "will not foreclose any chance for Turner to obtain a fair and just result." Here, the opposite is true for Plaintiff. Plaintiff is not only being denied the opportunity to be heard by the District Court, but also by ***any*** court. No parallel proceeding exists. Plaintiff has not even been permitted to see Defendant's filings to the EC, nor is she privy to the communications between Defendant and the EC.

Such lack of transparency also is prejudicial 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. For example, 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. Frankly, especially because of the continued indefinite stay, Defendant has every incentive to continue to supply deficient information to the EC in the hopes of further prolonging the stay. Defendant's recent status report reveals as much. The EC statement that there were "possible gaps of information that require further investigation," Defendant's Status Report, D.E. 31 at ¶ 9, begs more questions than it answers. The continued lack of transparency here leaves Plaintiff defenseless – both before this Court and before the EC. Furthermore, the entire EC process is

inherently prejudicial because it derives from stated EC opposition to the Helms-Burton Act and suits brought pursuant to its provisions.

Indeed, despite the District Court's statements to the contrary, the prejudice to Plaintiff is immediate and concrete while the prejudice to Defendant is speculative at best. Defendant cites the threat of a EUR 600,000 fine for participating in this case as its potential harm. Defendant has used the possibility of such a fine as a pretext for further delay. The truth is that the EC Blocking Regulation has recently been tested in the context of a Helms-Burton Act lawsuit such as this one. Indeed, in Plaintiff's Notice of Supplemental Authority, Plaintiff brought to the attention of the District Court ***five*** instances where EU defendants have participated in Helms-Burton actions without evidence of suffering any sanctions by the EC. D.E. 36.

There is no evidence that the EC will impose the full EUR 600,000 fine, especially because it has not done so in the past. Defendant's own statements regarding the potential EUR 600,000 fine reveal its tenuousness. Specifically, as Defendant admits, EUR 600,000 is the ***maximum*** penalty that Defendant ***may*** suffer – there is no evidence that Defendant will suffer the full extent of the penalty. *See* Motion to Stay at ¶ 3 ("Should Iberostar ignore the European Commission's mandate and actively participate in this action without the Commission's authorization, each breach would be subject to a penalty ***of up to*** EUR 600,000 by the Spanish government…") (emphasis added); *id.* at ¶ 15 ("A violation of this prohibition

constitutes a serious infraction, which ***may*** result in fines imposed on Iberostar for ***up to*** EU 600,000 for each breach") (emphasis added).

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 Cuba in violation of U.S. law. Such 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":

> ***The Bank has voluntarily elected to do business in numerous foreign host countries and has accepted the incidental risk of occasional inconsistent governmental actions.*** It cannot expect to avail itself of the benefits of doing business here without accepting the concomitant obligations. As the Second Circuit noted years ago, "If the Bank cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and Panama, perhaps it should surrender to one sovereign or the other the privileges received therefrom." *First National City Bank of New York v. Internal Revenue Service*, 271 F.2d 616, 620 (2d Cir. 1959), *cert. denied*, 361 U.S. 948, 80 S. Ct. 402, 4 L. Ed. 2d 381 (1960).

In re Grand Jury Proceedings Bank of Nova Scotia, 740 F.2d 817, 828-29 (11th Cir. 1984).

Companies must and do consider such potential consequences as possible business expenses. It is this particular contradiction between laws of nations that constitute a very real "country risk" – a concept entities not only recognize, but either assume or forego. There are consequences for partnering with Cuba – a state sponsor

of terrorism. *See* Michael R. Pompeo, Former Secretary of State, Press Statement, *U.S. Announces Designation of Cuba as a State Sponsor of Terrorism*, U.S. Department of State (Jan. 11, 2021), https://2017-2021.state.gov/u-s-announces-designation-of-cuba-as-a-state-sponsor-of-terrorism/index.html (last visited Aug. 13, 2021) ("The State Department has designated Cuba as a State Sponsor of Terrorism for repeatedly providing support for acts of international terrorism in granting safe harbor to terrorists."). Defendant decided that doing business in the U.S. (while also doing business with the terrorist-Cuban government) made financial sense, knowing full well that Defendant would be subject to its laws, yet it violated U.S. law, nonetheless. And similarly, Defendant decided that simultaneously doing business with the terrorist government of Cuba (after the Helms-Burton Act was enacted and in effect), was also worth the risk. International comity cannot be afforded to enable partnering with terrorists, particularly in this Title III action, which is meant to provide a remedy for victims of confiscation of property by such terrorist. 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 of the dangerous precedent set by the District Court's Order if this Court does not extend appellate jurisdiction to vacate the continued stay.

Any more delay is prejudicial to Plaintiff. Such delay increases the difficulty of adjudicating Plaintiff's claims. Important witness testimony may be lost as witnesses age. More than 60 years ago, the Cuban government confiscated the subject property at the center of this litigation. As a result of the passage of time, the pool of potential witnesses is shrinking. Continuing to delay the case will jeopardize the opportunity to depose such witnesses.

Moreover, as Plaintiff argued below, delaying this case affords Defendant the time and opportunity to change its corporate relationships and arrangements in the United States to attempt to evade the District Court's jurisdiction and prevent enforcement of judgment against it in the future. The District Court stated that the threat that Defendant is moving assets abroad is speculative and that Plaintiff has not provided any evidence that such an action is contemplated. D.E. 25 at 3. Absent discovery, however, Plaintiff cannot know what Defendant is doing or planning to do and cannot enlighten the court on the point. What Plaintiff can say is that the unnecessary delay augments a window for secretion of assets—and that is neither fair nor equitable to a plaintiff seeking recover under already difficult circumstances against a Defendant with offshore affiliates. Staying the case precludes discovery that may reveal important information regarding Defendant's attempts to move their assets abroad or otherwise change their corporate relationships in the United States

to avoid this Court's jurisdiction. As this Court noted as recently as 2020, "justice delayed is justice denied." *See Hyde v. Irish*, 962 F.3d 1306, 1309 (11th Cir. 2020).

In addition, the EC Blocking Regulation makes any delay of this case increasingly prejudicial to Plaintiff's ability to collect any judgement. Specifically, the EC Blocking Regulation seeks to prohibit the enforcement of U.S. judgments rendered pursuant to the Helms-Burton Act in Europe. Consequently, any future collection efforts against Defendant's assets in Europe (where Defendant holds most of its assets) is likely impossible. And, while Defendant currently seems to have successful hotel ventures in the U.S. (in New York and Florida), which could satisfy a judgment against it, such ventures may not remain successful after the duration of this indefinite stay. Accordingly, enforcing a potential judgment against Defendant in the United States may become difficult or even impossible down the line.

Furthermore, in its recent Communication, the EU referred to plans to make amendments to the EC Blocking Regulation "to further deter and counteract the unlawful extra-territorial application of unilateral sanctions by third countries to EU operators." *See* Communication, Key Action 15. Such amendment could delay the EC's decision-making process regarding Defendant's application, or it could alter the process entirely to preclude further prejudice Plaintiff. Thus, while the European Union tactically delays this suit and plans additional steps to nullify the Helm-Burton

Act, Plaintiff's case becomes increasingly difficult as do her chances of ever enforcing a judgment against Defendant.

Further, like in *Hines*, there is a real "danger of denying justice by delay" here because awaiting an EC decision forecloses any opportunity to obtain effective relief from the improper continued stay. In *Hines*, the court found that:

> If plaintiffs were forced to await judicial review of the validity of the stay order until all EEOC proceedings and then all trial court proceedings were completed, they effectively would be denied review on that point altogether. ***If the stay was in fact in derogation of their rights, the appellate court at that point would be powerless to afford effective relief.***

Similarly, here, 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. Thus, in the interest of avoiding piecemeal litigation and in considering the dangers in denying justice by delay, this Court should find it has appellate jurisdiction over the District Court's Order.

II. THE COLLATERAL ORDER DOCTRINE PROVIDES APPELLATE JURISDICTION

The collateral order doctrine flowing from the Supreme Court's decision in *Cohen v. Benefit Indus. Corp.* 337 U.S. 541 (1949) provides a second path to appellate jurisdiction. The doctrine involves the class of issues raised here: "claims of right separable from and collateral to, rights asserted in the action, too important

to be denied review." *Id.* at 546-47. Such *Cohen* requirements have been distilled to a three-part test. *Plaintiff A v. Schair*, 744 F.3d 1247, 1253 (11th Cir. 2014) (citations omitted). To satisfy the *Cohen* test, 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." *Id.*

The District Court's Order meets the first *Cohen* requirement of conclusively determining a disputed question. According to the Supreme Court, a stay order conclusively determines a disputed question when there is no basis to suppose that the district judge contemplates any reconsideration of his decision, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13 (1983), or, as this Court has held, when the order settles the question, leaving nothing open, unfinished, or inconclusive. *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1355 (11th Cir. 2014).

The Order conclusively determines that the District Court will continue to defer to a process created by the EC Blocking Regulation, a foreign law passed specifically to block the effects of U.S. law, by indefinitely staying a Helms-Burton Act case until the EC decides an EU Defendant's *ex parte* application to participate in the case (when the EC has no deadline to do so). 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. Moreover, like in *Moses H. Cone*, there is no basis to suppose that the District Judge contemplated reconsideration here because after the passage of over 14 months, the District Judge denied Plaintiff's Renewed Motion, indicating that the District Judge will not reconsider the Order. The practical effect of the District Court's Order left nothing open or inconclusive regarding the disputed question. Thus, the Order meets the first *Cohen* criteria.

The District Court's Order meets the second *Cohen* criterion. 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. In *Miccosukee Tribe of Indians*, this Court determined that "[a] decision to grant a stay is 'separate from the merits,' but it must also raise an 'important issue,' which means that an important right is at stake." 559 F.3d at 1199. "Important issues" justify *Cohen* review when a substantial public interest exists in taking an immediate appeal or a particular value of high order would be imperiled by denial of review. *See Plaintiff A v. Schair*, 744 F.3d at 1254. And, in considering whether an issue is important, this Court considers whether review of the issue would prevent piecemeal litigation and unduly delay the resolution of district court litigation for that class of claims. *Id.* at 1255. Further, a stay issue is important enough to warrant *Cohen* review if it involves surrendering federal jurisdiction. *See Miccosukee Tribe of Indians*, 559 F.3d at 1200 (finding that

the district court did not surrender its jurisdiction when the district court stayed its own proceeding in favor of another proceeding within the same federal judicial system that involved the same issues and parties).

In *Schair*, the Court found there was no substantial public interest in taking an immediate appeal when doing so would serve an alleged sex-trafficker-defendant's interest in contravention to the interests of U.S. law. 744 F.3d at 1254-55. In contrast, here, neglecting to review this appeal would serve the interests of state sponsors of terrorism and alleged Title III traffickers of property in contravention to U.S. law. In *Schair*, the Court was asked by an alleged sex-trafficker-defendant to review the district court's order *lifting a stay* (not continuing a stay) mandated by 18 U.S. § 1595(b). *Id*. Unsurprisingly, the Court in *Schair* found that "[t]here is no reason to believe that § 1595(b)'s stay provision was intended to protect an alleged sex-trafficking defendant's rights or interests in any way, much less in an <u>important way</u>." *Id*. By contrast here, review of the *continued indefinite stay* serves the intended purpose of U.S. law – to protect the rights and interest of those with Title III Helms-Burton Act claims over the interests of terrorists and alleged traffickers in confiscated property under the Act, despite foreign efforts to the contrary. Additionally, unlike in *Miccosukee Tribe of Indians*, the stay issue here is important because the district court has completely surrendered its jurisdiction – not to a state,

federal, or even a foreign court, but for an *ex parte* EC process that is committed to blocking Title III claims.

Thus, unlike in *Schair* and *Miccosukee Tribe of Indians*, 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. Thus, the issues before this Court have significant implications – for all Helms-Burton Act claimants against EU defendants and further, for all cases against foreign defendants generally. Indeed, this Court must answer whether foreign nations (the EU here) should be able to effectively use blocking statutes such as the EC Blocking Statute to shield their citizens (EU defendants here) from participating in actions before U.S. courts. Should U.S. courts empower blocking statutes, which are passed specifically to subvert U.S. law, when doing so prevents U.S. citizens from adjudicating their rights? The interests of U.S. citizens to pursue their U.S. legal claims against foreign defendants (who do business in the U.S.) in U.S. courts are at stake. Therefore, resolving the issues before this Court are important and separate enough from the merits to qualify under the second *Cohen* requirement.

Moreover, in *Schair* the Court found that "[p]ermitting parties to undertake successive, piecemeal appeals every time a § 1595(b) stay is lifted would unduly

delay the resolution of district court civil litigation for sex trafficking and needlessly burden the appellate courts." 744 F.3d at 1255. But here, the opposite is true – reviewing the Order and lifting the stay would avoid piecemeal litigation and serve judicial efficiency as argued above in Section I.C.

The third *Cohen* factor is also met because the propriety of the district court's order is unreviewable on appeal from a final judgment. This Court has understood the Supreme Court to have "indicated that 'the decisive consideration [under the third *Cohen* prong] is whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order.'" *Royalty Network, Inc.*, 756 F.3d at 1357 (citing *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009)). Delaying review until the entry of final judgment may result in permanent denial of justice. The stay may last indefinitely, and a final judgment may never be entered. If the EC were to finally decide the Defendant's application and a final judgment were to be entered, even after years of delay, the important issues raised here will no longer be appealable, despite their significance.

III. THE ORDER WAS GROUNDED IN THE DOCTRINE OF INTERNATIONAL ABSTENTION

This Court has appellate jurisdiction to review stay orders granted pursuant to the doctrine of international abstention. *See Societe Nationale D'Industries Nutritive v. Coca-Cola Co.*, 410 F. App'x 179, 179 (11th Cir. 2010) (reviewing and affirming a district court's stay order that was issued under the doctrine of international

abstention); *Turner Entertainment Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994) (concluding that "the appropriate resolution is a stay rather than a dismissal of the American action" after applying the international abstention doctrine); *Trujillo v. Conover & Co. Commc'ns, Inc.*, 221 F.3d 1262, 1264 (11th Cir. 2000) (reviewing and vacating district court stay order issued pursuant to the doctrine of international abstention or for judicial economy).

In first denying Plaintiff's motion to lift the stay, the District Court applied the *Turner* factors under the doctrine of international abstention. Even though the District Court erred in applying the international abstention doctrine and the *Turner* factors because there is no parallel proceeding to adjudicate Plaintiff's claims (*see* Section IV of the Appellant Brief), because the District Court grounded its ruling in the doctrine of international abstention, this Court has jurisdiction to review the District Court's Order continuing the stay.

IV. A WRIT OF MANDAMUS IS APPROPRIATE

Pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and decisions applying it, this Court may treat this appeal as a petition for a writ of mandamus to the District Court. Doing so would not circumvent the law governing appeals; it would recognize that the District Court has misunderstood the dimension of its discretion in the circumstances of this case. It would amount to recognition that an abuse of discretion had occurred. *See Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 390

(2004) (mandamus available to confine the lower court to sphere of its discretionary power); *Hines v. Artois*, 531 F.2d at 731 (discretionary authority to treat appeal as petition for mandamus). The All Writs Act does not expand or extend the jurisdiction of Federal courts or expand on duties imposed by statute. But it does permit a court—this Court according to its precedents—to avoid keeping a plaintiff in indefinite limbo pursuant to an immoderate stay. 531 F.2d at 729. The District Court's continued stay in this case exceeds the court's proper exercise of necessary discretion. The law of this Circuit and of the United States grants redress. *See* the discussion in *Belize Social Development Ltd., v. Government of Belize*, 668 F.3d 724, 729 (D.C. Cir. 2012) (e.g., "This court has treated an attempted appeal as an application for a writ of mandamus, and granted effective relief, where a 'stay order as issued exceeded the proper exercise of authority by the District Court.'") (Internal citation omitted).

V. CONCLUSION

For the reasons stated here, this Court has appellate jurisdiction over this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 13, 2021, 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/ Joseph I. Zumpano*
Joseph I. Zumpano

Counsel for Plaintiff /Appellant