IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 21-11906-AA

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

Plaintiff/Appellant,

vs.

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

Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

APPELLEE'S ANSWER BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellee, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rule 26.1-1, identifies the following people and entities as having an interest in the outcome of this appeal:

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

Canto Marti, Maria, *Plaintiff/Appellant*

Darmon, Danit, *counsel for Plaintiff/Appellant*

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

Holland & Knight, LLP, *law firm for Defendant/Appellee Iberostar Hoteles y Apartamentos S.L.*

Iberostar Hoteles y Apartamentos S.L., *Defendant/Appellee*

Jimenez, Adolfo E., *counsel for Defendant/ Iberostar Hoteles y Apartamentos S.L.*

Menéndez de la Cuesta, Katharine, *counsel for Defendant/ Appellee Iberostar Hoteles y Apartamentos S.L.*

Patricios, Leon N., *counsel for Plaintiff/Appellant*

Plasencia, Rebecca M., *counsel for Defendant/ Appellee Iberostar Hoteles y Apartamentos S.L.*

Scola, Honorable Robert N., *United States District Judge*

Torres, Edwin G., *United States Magistrate Judge*

Zumpano, Joseph I., *counsel for Plaintiff/Appellant*

Zumpano Patricios, P.A., *law firm for Plaintiff/Appellant*

All others as listed by other parties in this matter.

Appellee Iberostar Hoteles y Apartamentos S.L. certifies that it is a limited liability company organized under the laws of Spain and its sole shareholder is Balear de Inversiones Financieras, S.L., a limited liability company organized under the laws of Spain, whose primary beneficial owner is an individual named Miguel Fluxá. There are no additional publicly-held corporations that either directly or indirectly own 10% or more of the stock of Iberostar Hoteles y Apartamentos S.L.

STATEMENT REGARDING ORAL ARGUMENT

The issues on appeal are not complex and can be determined without need for oral argument, particularly since the lack of jurisdiction renders oral argument moot.

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STATEMENT OF JURISDICTION

Appellant initiated this suit in the United States District Court for the Southern District of Florida pursuant to federal question jurisdiction under 28 U.S.C. § 1331, because the Appellant's claims arise out of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. § 6021, *et seq*. (the "Helms-Burton Act") (D.E. 1 at 1).[1] However, this Court does not have jurisdiction over the appeal because (i) Appellant did not file a timely notice of appeal to the underlying stay order; (ii) the stay order is not a final appealable order because it is not immoderate and does not put the Appellant "effectively out of court"; and (iii) the collateral order doctrine does not apply as the district court did not conclusively determine an important issue separate from the merits of the case.

A. Appellant's Untimely Renewed Motion to Vacate Stay Did Not Toll the Time for Filing a Notice of Appeal of the Stay Order.

On April 24, 2020, well over a year before the June 1, 2021 notice of appeal filed in this case, the district court entered a stay of the litigation to allow Appellee Iberostar Hoteles Y Apartamentos S.L. ("Appellee" or "Iberostar") to receive a decision from the European Commission—a branch of the European Union—as to whether Iberostar would be authorized to participate in the underlying federal

[1] 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.

lawsuit (the "April 2020 Stay Order") (D.E. 17; D.E. 42). **Appellant did not appeal the April 2020 Stay Order**. Instead, Appellant waited over three months to file a Motion to Lift Stay on July 27, 2020, in which Appellant argued that the stay was immoderate and should be vacated (D.E. 21 at 2-5, 7-8). The district court denied the Motion to Lift Stay on September 17, 2020 (the "September 2020 Order"), and Appellant waited another five and a half months from the entry of the September 2020 Order before filing her Renewed Motion to Lift Stay, And If Denied, Motion for Certification of Order Under 28 U.S.C. § 1292(b) on March 3, 2021 (D.E. 25; D.E. 32). The Renewed Motion reiterated the arguments made in the original motion to vacate (and now repeated in the Initial Brief) that "the April Stay Order is immoderate and should be vacated" (D.E. 32 at 2). On May 4, 2021, the district court denied the Renewed Motion ("May 2021 Order"), and on June 1, 2021, Appellant filed a notice of appeal of this May 2021 Order (D.E. 38; D.E. 42). But the May 2021 Order simply denied Appellant's renewed motion to lift a stay that had been entered over a year earlier, on April 24, 2020, in the April 2020 Stay Order (D.E. 17). Appellant's notice of appeal was untimely, and thus this Court lacks jurisdiction to review the propriety of the stay.

It is well settled that the filing of an untimely motion to vacate or motion for reconsideration does not toll the time for filing a notice of appeal. *See Advanced Estimating Sys., Inc. v. Riney*, 77 F.3d 1322, 1323–24 (11th Cir. 1996) (noting that

only a timely filed Rule 59 or 60 motion will toll the time for filing the notice of appeal); *Am. Mfrs. Mut. Ins. Co. v. Stone*, 743 F.2d 1519, 1521 (11th Cir. 1984) (same). Rule 4(a)(4)(A), Federal Rules of Appellate Procedure, specifically provides that when a party files a motion for relief from an order under Federal Rules of Civil Procedure 60, that motion must be filed "no later than 28 days" after the underlying order or judgment is entered. Fed. R. App. P. 4(a)(4)(A)(vi). A motion to alter or amend a judgment or order under Rule 59 must also be filed no later than 28 days after the entry of the judgment to toll the time for filing the notice of appeal. Fed. R. Civ. P. 59(e); Fed. R. App. P. 4(a)(4)(A)(iv).

Technically, to toll the time for filing a notice of appeal, the motion to vacate under Rule 59 or 60 must apply to final judgments. *Pruett v. Choctaw Cnty., Ala.*, 9 F.3d 96, 97 n.2 (11th Cir. 1993) (noting that the post-trial motions listed in Fed. R. App. P. 4(a)(4) as capable of tolling the time to file a notice of appeal, including motions under Fed. R. Civ. P. 59, are post-trial motions from final judgments and thus appellant's motion for reconsideration of an order denying summary judgment did not toll the time for filing a notice of appeal of the underlying order, which was not a final judgment). But even if the Court were to find that Appellant's Motion to Lift Stay and subsequent Renewed Motion to Lift Stay constituted either Rule 59 or Rule 60 motions, they still needed to be filed within 28 days of the April 2020 Stay Order to toll the time for filing a notice of appeal. *See Stone*, 743 F.2d at 1522 n.1

(reviewing the requirements for filing Rule 59 and Rule 60 motions in connection with the appellant's motion to lift stay and noting that the Appellant's "motion to lift the stay was not timely under any of the Civil Rules specifically mentioned in Fed. R. App. P. 4(a)(4)").[2]

In this case, neither of Appellant's filings tolled the time for filing a notice of appeal. The first motion to lift stay was filed over three months after the April 2020 Stay Order was entered, well after the 28-day deadline. Even if that first motion to lift stay had been timely filed, Appellant's subsequent Renewed Motion to Lift Stay was also untimely, filed almost a year after the April 2020 Stay Order and over five months after the September 2020 Order denying the first motion to lift stay. Thus, to the extent that Appellant argues that the September 2020 Order denying her first motion to lift stay modified the original April 2020 Stay Order and restarted the appeal clock, that argument also fails because Appellant filed her Renewed Motion to Lift Stay in March 2021, five and a half months after the September 2020 Order. In short, both motions to vacate were filed well after the 28-day deadline set forth in Rule 4(a)(4)(A). *Pruett*, 9 F.3d at 97 n.2 ("As we have stated previously, an untimely post-trial motion will not toll the running of the time for notice of appeal.").

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[2] Although the motion to lift the stay was not timely filed in *Stone*, the appellant in that case had hedged its bets and filed a notice of appeal of the original stay order within 30 days. 743 F.2d at 1521. The Appellant in this case did not show any such foresight.

Appellant cannot revive appellate jurisdiction over the propriety of the stay entered in the April 2020 Stay Order—or even the propriety of the September 2020 Order denying her first motion to lift stay—by filing a renewed motion months later and then appealing the denial of that order. Put simply, this Court does not have jurisdiction to review whether the stay entered by the district court on April 24, 2020 was "immoderate" or put Appellant "effectively out of court" because the Appellant failed to file a timely motion to vacate the April 2020 Stay Order or to directly appeal that order (or the September 2020 Order, for that matter). Accordingly, this appeal must be dismissed for lack of jurisdiction. *See King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1165 (11th Cir. 2007) ("[I]f the requirements for appellate jurisdiction are not met 'we cannot review whether a judgment is defective. . . .' ") (citation omitted).

B. The Stay is Not Immoderate and Does Not Put Appellant Effectively Out of Court.

Even if Appellant had timely appealed or moved for reconsideration of the April 2020 Stay Order, this Court still would not have jurisdiction to review the stay entered in this case. A stay is generally not a final appealable order. *Stone*, 743 F.2d at 1522-23 (noting that a stay order is generally not final under 28 U.S.C. § 1291 for purposes of appeal). A narrow exception has been made for stay orders that are immoderate and thus render a plaintiff "effectively out of court." *See 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*, 505 F.3d at

1165-66 (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). But that narrow exception does not apply here.

A stay is ***not*** immoderate if "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." *Landis v. N. Am. Co.*, 299 U.S. 248, 257 (1936). Where, for example, a parallel proceeding is already underway that may have a substantial or controlling effect on the claims and issues in the stayed case, this Court has held that a stay is not immoderate and does not put a plaintiff "effectively out of court." *See Peterson v. PNC Bank, N.A.*, No. 19-13082-GG, 2019 WL 7882649, at *1 (11th Cir. Nov. 29, 2019); *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1197-98 (11th Cir. 2009).

In *Miccosukee Tribe*, this Court noted that "[e]ffectively 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***." 559 F.3d at 1197 (citing *Hines*, 531 F.2d at 730) (emphasis added); *see also Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983) (noting that the "effectively out of court" exception "does not disturb the usual rule that a stay is not ordinarily a final decision for purposes of § 1291, ***since most stays do not put the***

plaintiff 'effectively out of court.' ") (emphasis added). In the few cases in this Circuit in which a stay has been held to be directly appealable, the stays resulted in indefinite delays pending the outcome of other proceedings that would not "control or significantly inform the litigation" that was being stayed. *Miccosukee Tribe*, 559 F.3d at 1197.

In *Hines*, for example, the stay put the plaintiff effectively out of court because the stay was in effect pending the ***conclusion*** of an EEOC proceeding (which had not been initiated at the time the stay was entered) that would take anywhere between 18 months to five years to conclude. *Hines*, 531 F.2d at 731, 736-37. In addition, there was no "reasonable probability that the EEOC conciliation efforts will be productive." *Id*. at 736. Similarly, in *Stone*, this Court held that the stay put the plaintiff effectively out of court and was thus reviewable as a final order because the stay was in effect until the ***resolution*** of a previously filed state action, which would not decide issues presented in the stayed federal claim. 743 F.2d at 1521, 1523. *See also King*, 505 F.3d at 1172 (holding that a stay pending resolution of proceedings in Italian court put the plaintiff effectively out of court because there was no way of knowing when the Italian litigation would conclude and there was "no assurance at all that the Italian proceedings will directly relate to the issues in this [federal] lawsuit").

Finally, in *CTI-Container Leasing Corp. v. Uiterwyk Corp.*, the district court stayed the entire action pending a decision by the Iran-United States Claims Tribunal on whether it would assert jurisdiction over (and then decide) the defendant's claims against Iran and an alleged instrumentality of Iran, both of which had been impleaded as third-party defendants in the federal court litigation. 685 F.2d 1284, 1286, 1287-88 (11th Cir. 1982). This Court held that the stay had the practical effect of putting the plaintiff "effectively out of court" and was thus reviewable as a final order because there was "no way to estimate the months or even years that may pass before [the defendant's] claims against Iran and IEL are decided by the Iran-United States Claims Tribunal" ***and*** because the defendant's third-party claims were actually contingent upon a finding in the district court of the defendant's liability to the plaintiff. *Id*. Thus, the stay of the entire action did not make sense because a determination by the Tribunal would not affect the merits of the plaintiff's underlying claims against the defendant. *See id*.

The stay in this case is not analogous to the "effectively out of court" stays in *Hines*, *Stone*, *King*, and *CTI*. Here, the stay entered by the district court will be lifted when the European Commission ("EC") renders a decision on Iberostar's application to the EC for authorization to participate in the federal lawsuit. Iberostar is a Spanish entity subject to the laws of the European Union, including EC Council Regulation No. 2271/96, which prohibits any entity incorporated within the European Union

from participating in a lawsuit brought under certain acts, including Title III of the Helms-Burton Act, without first applying for authorization from the EC (D.E. 16-1 at 3, 6). Failure to comply with the regulation subjects Iberostar to fines imposed by the Spanish government of up to EUR 600,000 for each breach (D.E. 16 at 2). The application for authorization was filed with the EC before the stay was entered (and thus the review process was already underway), and the EC's decision will determine whether Iberostar can defend itself in this lawsuit. Clearly, this is a decision that will have "a substantial or controlling effect on the claims and issues in the stayed case" or "control or significantly inform the litigation" as 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. *Miccosukee Tribe*, 559 F.3d at 1197-98. Providing Iberostar an opportunity to comply with legal requirements that it is subject to in its home country is reasonable. The district court did not abdicate its jurisdiction to determine the merits of Appellant's claims to another forum, and the Appellant will still have her day in federal court to hear *all* of the claims and issues that she has raised. Thus, the stay does not put Appellant effectively out of court and does not constitute a final and appealable order.

C. The Collateral Order Doctrine Does Not Apply Because the District Court Did Not Conclusively Determine an Important Issue Separate From the Merits.

Finally, even if Appellant had timely appealed or moved for reconsideration of the April 2020 Stay Order, this Court still would not have jurisdiction under the collateral order doctrine to review the propriety of the stay. The collateral order doctrine originated with the United States Supreme Court ruling in *Cohen v. Beneficial Indus. Loan Corp.*, which recognized a "small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. 541, 546 (1949). An order is immediately appealable under the collateral order doctrine set forth in *Cohen* 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. *Plaintiff A. v. Schair*, 744 F.3d 1247, 1252-53 (11th Cir. 2014).

But, as the Supreme Court has emphasized, the collateral order doctrine is narrow, and few cases will fall under its ambit. *See Will v. Hallock*, 546 U.S. 345, 350 (2006) ("Accordingly, we have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope . . . . And we have meant

what we have said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership."); *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994) ("The 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered . . . ."). In addition, "each part of the *Cohen* test is a critical condition for jurisdiction." *Miccosukee Tribe*, 559 F.3d at 1199. Thus, if any one of the three factors is not satisfied, the Court cannot assert jurisdiction under the collateral order doctrine. *Id*.

The collateral order doctrine does not apply in this case because the first and second conditions are not met as the order does not conclusively determine the disputed question or resolve an important issue completely separate from the merits. As the Supreme Court explained in *Cohen*, this first factor is not met if "the order involved only an exercise of discretion" that is "subject to reconsideration from time to time." *Cohen*, 337 U.S. at 547. "So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." *Id*. at 546.

The April 2020 Stay Order did not conclusively determine the disputed question of the stay because it specifically directed Iberostar to submit status reports every 30 days to update the court on the request for authorization to the EC (D.E. 17). Even in the September 2020 Order denying the motion to vacate stay, the

district court noted that the status reports "have been useful to the Court in continuing to evaluate the stay" (D.E. 25). In the May 2021 Order denying Appellant's Renewed Motion to Lift Stay, the district court again did not conclusively determine the disputed question, finding only that the Appellant had not met the standard for reconsideration, as the circumstances had not changed (D.E. 38 at 2). The district court did not, however, foreclose Appellant's opportunity to file another motion for reconsideration if circumstances changed at a later date. Thus, regardless which order the Court considers, the district court did not conclusively determine the disputed question, and the first *Cohen* factor is not met.

Nor did the district court resolve an important issue completely separate from the merits. The expiring nature of a right that would otherwise be lost is a unique characteristic of the types of issues that fall under the collateral order doctrine. Some examples include denials of the defenses of absolute presidential immunity, qualified immunity, Eleventh Amendment immunity, and double jeopardy. *Miccosukee Tribe*, 559 F.3d at 1199 (citing *Will*, 546 U.S. at 352). Similarly, an order that amounts to a refusal to adjudicate the merits of a case presents an important issue separate from the merits. *Moses H. Cone*, 460 U.S. at 12.

But the district court did not refuse to adjudicate the merits of the case. Unlike the stays discussed above in *Hines*, *Stone*, *King*, *CTI*, and the federal court's stay in *Moses H. Cone*, the district court in this case has not ceded jurisdiction to another

forum. The district court is not awaiting a decision by an alternative forum on any disputed issue arising out of Appellant's claim. Iberostar is obliged pursuant to the laws of its jurisdiction to obtain prior authorization from the EC before participating in the lawsuit. The stay in question allows Iberostar the opportunity to comply with this mandatory regulation and to first obtain a decision from the EC either approving or denying Iberostar's application for authorization to participate in the federal litigation to avoid the potential implication of fines for up to EUR 600,000 for each breach in participating in the lawsuit without the EC's prior authorization.

Appellant *will* have her day in court—and in the federal court that she chose, no less. A stay pending a decision by the EC of a request for authorization to participate in a lawsuit does not constitute an abdication of jurisdiction or responsibility by the district court and does not implicate or endanger an expiring right. Accordingly, regardless which order the Court considers, the order does not conclusively resolve an important issue that is completely separate from the merits.

For all or any one of these reasons, the Court lacks jurisdiction over this appeal.

STATEMENT OF ISSUES

I.

Whether the district court properly denied Appellant's renewed motion to vacate stay where Appellant did not raise any change in facts or law that would satisfy the standard for reconsideration of the district court's prior order.

II.

Whether the stay entered by the district court in April 2020, which was not timely appealed, should be lifted where: (1) the stay is limited in duration until the European Commission enters a decision on Iberostar's application for permission to defend this lawsuit; (2) the absence of a stay would subject Iberostar to significant financial penalties; and (3) international comity weighs in favor of staying the case pending a decision from the European Commission.

STATEMENT OF THE CASE

Nature of the Case

This is an action seeking to recover money damages from Appellee for alleged violations of the Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. §§ 6021, *et seq*. (the "Helms-Burton Act" or, sometimes, the "Act").

Course of the Proceedings and Disposition Below

Plaintiff/Appellant is Maria Dolores Canto Marti, as personal representative of the Estates of Dolores Marti Mercadé and Fernando Canto Bory.

Defendant/Appellee is Iberostar Hoteles y Apartamentos S.L. ("Iberostar"). Appellant's single-count complaint purported to state a cause of action against Iberostar for alleged violations of the Helms-Burton Act (D.E. 1).

On March 19, 2020, a copy of the complaint and summons was delivered to Iberostar at a corporate office in Spain (D.E. 10 at 2). Iberostar moved for an extension of time to respond to the complaint in part because of the state of emergency that had been formally declared by the Spanish government on March 14, 2020, placing the country in complete lockdown due to the coronavirus pandemic and resulting in the complete shutdown of Iberostar's offices, which were operating with only 5% of its normal staff (D.E. 10 at 2-3). In addition, Iberostar sought an extension to evaluate the claims and issues raised under European law, in particular European Council (EC) Regulation No. 2271/96, which prohibits its citizens from giving effect to the extra-territorial application of certain legislation (D.E. 10 at 3).

The district court granted the motion in part, allowing Iberostar thirty days to respond to the Complaint (D.E. 13). Before the expiration of the enlargement of time, Iberostar filed a Motion to Stay Proceedings, seeking a stay of the action until Iberostar could obtain authorization from the EC to answer or otherwise move to dismiss the Complaint (D.E. 16). The district court granted Iberostar's motion on April 24, 2020 (D.E. 17). Appellant did not file a notice of appeal of this stay order.

Over three months later, Appellant filed a motion to lift the stay, which the district court denied on September 17, 2020 (D.E. 21, 25). Appellant did not appeal this order either. Instead, almost six months later, Appellant filed a renewed motion to lift the stay (D.E. 32). The district court denied the renewed motion to vacate the stay, noting that the motion did not meet the standard for reconsideration of the court's prior order because, "[o]ther than the passage of additional time, the circumstances presented by this matter have not changed" (D.E. 38 at 2). Appellant filed a notice of appeal to this order (D.E. 42).

On July 30, 2021, this Court issued an order directing the parties to respond to a jurisdictional question: whether the district court's order denying Appellant's renewed motion to vacate the stay of the proceedings is final or otherwise appealable. On January 13, 2022, this Court reserved ruling on the jurisdictional issue and directed the parties to proceed with merits briefing.

STATEMENT OF THE FACTS

I. Appellant's Complaint[3]

In March 1909, Appellant's grandfather, Fernando Canto Granda, acquired the real property located at Calle Enramadas, Esq. Santo Tomás, Santiago de Cuba, Cuba, 90200, and began developing the property (D.E. 1 at 3). By 1916, the property

[3] This factual background is derived from the allegations of the Complaint. Iberostar does not admit that the facts alleged are correct or complete.

housed a hotel named "El Imperial" that had a restaurant and bar, as well as a department store (*id*.). In 1942, Fernando Canto Granda died intestate in Cuba, leaving four heirs, two of whom died with no descendants thereby passing their respective interests in the subject property to their two living siblings (*id*.). One of those siblings was Fernando Canto Bory, Appellant's father, who inherited a one-half interest in the property (*id*.).

In 1961, the Cuban government nationalized, expropriated, and seized ownership and control of the property without authorization or compensation to the owners of the property (*id*. at 4). While Fernando Canto Bory was not a United States citizen at the time of the confiscation in 1961, he allegedly became a United States citizen in 1972 and later died in Puerto Rico in 1992 (*id*.). The Complaint alleges that Fernando Canto Bory's one-half interest in the claim to the subject property passed to his wife, Dolores Marti Mercadé, who also became a United States citizen in 1972 (*id*.). Dolores Marti Mercadé, Appellant's mother, died on February 27, 2007 (*id*.).

In 1996, the United States passed the Helms-Burton Act, which created a cause of action for U.S. nationals who own claims to confiscated property: "[A]ny person . . . that traffics in property that was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages . . . ." *See* 22 U.S.C. § 6082. Since

the Act's enactment in 1996, every President has suspended the enforcement of actions brought under the Helms-Burton Act until May 2, 2019, when President Donald Trump allowed the prior suspension to expire (D.E. 16 at 3). Nearly one year later, on January 8, 2020, Appellant filed the Complaint, claiming that Iberostar trafficked in her father's one-half interest in the confiscated property (D.E. 1).

Specifically, Appellant alleges—on information and belief—that Iberostar has been trafficking in her grandfather's property since November 2016 in violation of the Helms-Burton Act, when Iberostar allegedly entered into a commercial arrangement with the Cuban government to co-manage and co-operate the Iberostar Imperial hotel, including a restaurant and other amenities, on the subject property (D.E. 1 at 6). Appellant seeks treble damages as well as attorney's fees and costs.

II. The District Court's Stay Order

Shortly after the Act was passed in 1996, the European Union enacted a blocking regulation, EC No. 2271/96, that prohibits any entity incorporated within the European Union from participating in a lawsuit brought under certain acts—including Title III of the Helms-Burton Act—without first applying for authorization from the European Commission (the "Commission") (D.E. 16 at 5; 16-1 at 3, 6). In addition, in July 1998, the Spanish Congress passed a law providing that any violation of the prohibition from participating in such lawsuits would result in fines up to €600,000 for each breach (D.E. 16 at 15). Iberostar is a Spanish company

subject to the laws of the European Union and the Kingdom of Spain (D.E. 16 at 2). As a means of providing alternative means to punitive measures, Article 5 of EC No. 2271/96 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" (D.E. 16 at 6; 16-1 at 3). To facilitate this authorization process, the Commission promulgated the Commission Implementing Regulation (EU) 2018/1101, of 3 August 2018 (D.E. 16 at 6-7).

In accordance with these requirements, Iberostar filed a formal application with the Commission pursuant to Implementing Regulation (EU) 2018/1101, seeking authorization to participate in the Helms-Burton Act litigation initiated by Appellant (D.E. 16 at 7; 16-2 at 2-3). The application was submitted by Iberostar on an expedited basis (D.E. 16-2 at 3). Having filed the application for authorization from the Commission but facing a deadline to respond to the Complaint, Iberostar then filed a motion to stay Appellant's action pending the Commission's authorization so that Iberostar would not be sanctioned for participating in this case without having first obtained authorization from the Commission (D.E. 16).

On April 24, 2020, the District Court granted Iberostar's motion, staying this action until the Commission adjudicated Iberostar's application (D.E. 17). Appellant did not seek an interlocutory appeal from that order. Instead, more than

three months later, on July 27, 2020, Appellant filed a motion to vacate the stay (D.E. 21). Appellant did not argue that some new legal or factual development had arisen such that the stay was no longer appropriate. Rather, Appellant argued that the stay was inappropriate ***as initially entered*** in the April 2020 Stay Order, because the stay was, among other things, allegedly indefinite and immoderate and was not justified under grounds of international comity (D.E. 21). The district court denied Appellant's motion on September 17, 2020.

Appellant (again) did not seek an interlocutory appeal from the District Court's April 2020 Stay Order or even the September 2020 Order. Instead, almost six months later on March 3, 2021 (nearly one year after the district court entered its original April 2020 Stay Order), Appellant filed a renewed motion to vacate the stay—raising the same legal arguments and identifying no new facts other than the mere passage of time—or, in the alternative, to certify the issue for interlocutory appeal (D.E. 32). That is, as she did in her first motion, Appellant did not argue that the stay was *no longer* appropriate; rather, Appellant again argued that the stay entered in the April 2020 Stay Order was simply *never* appropriate (D.E. 32 at 2, 5, 13, 16). On May 3, 2021, the district court denied Appellant's renewed motion to vacate the stay, finding that Appellant's renewed motion did not meet the standard of reconsideration of the court's prior order because, "[o]ther than the passage of additional time, the circumstances presented by this matter have not changed" (D.E.

38 at 2). On June 1, 2021, Appellant filed a notice of appeal of this May 2021 Order (D.E. 42).

III. Appellant's Appeal & Jurisdictional Briefing

In her appeal, Appellant argues that the stay order was improper because it was purportedly immoderate as originally entered on April 24, 2020. On July 30, 2021, this Court directed the parties to address whether it has jurisdiction over this matter. In response to the Court's jurisdictional question, Iberostar argued that this Court lacks jurisdiction for the reasons set forth in the Statement of Jurisdiction, *supra*. On January 13, 2022, this Court reserved ruling on the jurisdictional issue and directed the parties to proceed with merits briefing.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to determine whether the district court's order staying this case, which was entered in April 2020, was proper. Appellant did not timely appeal that order. Nor did she move to vacate the stay within 28 days of the April 2020 Stay Order. Thus, her motion to vacate the stay, filed over three months later, did not toll the time for filing her notice of appeal. Compounding Appellant's error is the fact that, even when the district court entered its order in September 2020 denying Appellant's motion to vacate the stay, Appellant still did not file a notice of appeal. Instead, Appellant waited over five and a half months to then file a renewed

motion to vacate the stay. It is the district court's denial of this renewed motion to vacate that is (improperly) before this Court.

Besides having failed to timely appeal the April 2020 Stay Order or even the September 2020 Order denying her first motion to vacate the stay, Appellant now seeks a third bite at the apple before this Court, attempting to vacate the stay *via* an appeal. Appellant improperly argues to this Court the underlying merits of the original stay order, instead of acknowledging that the only order on appeal is the May 2021 Order denying her renewed motion to vacate, which the district court properly construed as a motion for reconsideration. Because Appellant's renewed motion to vacate did not raise an intervening change in facts or law and did nothing but argue that the district court had erred in its original entry of the stay, the district court properly denied Appellant's renewed motion to vacate as failing to meet the stringent requirement for a motion for reconsideration.

In addition, the district court did not abuse its discretion in entering a stay of the proceedings in April 2020, because the stay is neither immoderate nor indefinite, as it is limited in duration until Iberostar receives a decision from the European Commission on Iberostar's application for authorization to participate in this lawsuit. Appellant is in no way being denied her day in court because the district court has not abdicated its responsibility and ceded jurisdiction to another forum. The district court has merely exercised its discretion to temporarily stay these

proceedings to allow the Commission the time it needs to handle what Appellant admits is a case of first impression for the Commission. In this case in particular, the stay is not immoderate because it involves claims that have been essentially stayed for 23 years by successive waivers issued by U.S. Presidents from 1996 to 2019. The district court's temporary stay is thus supported by the fact that the absence of a stay would subject Iberostar to significant financial penalties, whereas Appellant would not suffer any prejudice from a temporary stay of this case (particularly since Helms-Burton Act claims were previously suspended for over twenty years). Finally, the district court properly found that international comity weighs in favor of staying the case pending a decision from the European Commission.

Accordingly, this Court should dismiss the appeal for lack of jurisdiction or, in the alternative, affirm the district court's ruling.

STANDARD OF REVIEW

The standard of review of an order denying a motion for reconsideration is abuse of discretion. *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1254 (11th Cir. 2007). This Court also reviews a district court's entry of a stay for abuse of discretion. *Ortega Trujillo v. Conover & Co. Commc'ns, Inc.*, 221 F.3d 1262, 1264 n.2 (11th Cir. 2000).

ARGUMENT

I. The district court properly denied Appellant's renewed motion to vacate the stay where Appellant did not raise any change in facts or law and thus failed to satisfy the standard for a motion for reconsideration.

Appellant's renewed motion to vacate the stay sought reconsideration of the April 2020 Stay Order and the September 2020 Order, which denied Appellant's first motion to vacate the stay. Appellant's renewed motion to vacate reiterated the legal arguments made in her first motion to vacate that the stay entered in April 2020 was immoderate and indefinite from its inception, often repeating verbatim the legal arguments made in her first motion (D.E. 32 at 2, 5, 6, 7, 9-12, 13, 14-16, 20). Appellant did not present the district court with any new legal theories or arguments that were unavailable to her earlier. Instead, Appellant relied extensively on the mere passage of time to support her argument that reconsideration was warranted (D.E. 32 at 2, 5, 6, 7, 8, 12, 19, 20, 21). As noted by the district court, however, the mere passage of time does not constitute changed circumstances sufficient to warrant reconsideration (D.E. 38 at 2).

The purpose of a motion to vacate or for reconsideration is not to ask the district court to reexamine an unfavorable ruling. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) ("Reconsidering the merits of a judgment, absent a manifest error of law or fact, is not the purpose of Rule 59."). It is only where there is a manifest error of law or fact that reconsideration is appropriate. *Id.*;

Z.K. Marine, Inc. v. M/V Archigetis, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) ("The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.") (citing *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985)); *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002). The three major grounds that justify reconsideration are: "(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." *Burger King Corp.*, 181 F. Supp. 2d at 1369. Put differently, reconsideration is appropriate only where a court "has patently misunderstood a party, or has made a decision outside of the adversarial issues presented to the Court by the parties, or has made an error not of reasoning, but of apprehension." *Z.K. Marine Inc. v. M/V Archigetis*, 808 F. Supp. at 1563 (citations omitted). To demonstrate clear error and obtain reconsideration, a party must do more than simply restate its previous arguments. *See Ayala v. U.S. Att'y Gen.*, 201 F. App'x 701, 702 (11th Cir. 2006) (affirming denial of motion for reconsideration because "rearguing the merits of a case is not the purpose of a motion for reconsideration").

In this case, no intervening change in controlling law occurred and no new evidence was presented. Appellant merely reiterated the arguments made in her first motion to vacate stay that a stay was improper and indefinite and not warranted under the circumstances of the case. Appellant did not show that the district court

made any fundamental error of apprehension. In fact, the September 2020 Order goes into a deep legal and factual analysis of why the district court believed a stay was warranted in this case. All the renewed motion to vacate does is argue that the district court got it wrong. But this is not enough.

As this Court noted in *Jacobs*, the proper remedy, if a party thinks the district court's ruling is wrong, is to appeal, not to seek a motion to vacate or for reconsideration. *Jacobs*, 626 F.3d at 1344. Instead of timely appealing either the April 2020 Stay Order or even the September 2020 Order denying Appellant's first motion to vacate, Appellant chose to wait five and a half months before filing a renewed motion to vacate that simply re-hashed the same arguments, thereby wasting judicial resources. *See U.S. v. Gupta*, 363 F.3d 1169, 1174 (11th Cir. 2004) ("To permit the unlimited renewal or reconsideration of fully decided motions would needlessly tie up judicial resources . . ."); *U.S. v. Miller*, 775 F. App'x 974, 976 (11th Cir. 2019) (affirming denial of "motion for reconsideration of [appellant's] motion to lift the protective order" because "a party may not request reconsideration of an order disposing of a motion for reconsideration previously filed by that party" and the appellant had already "filed two motions to lift the protective order" such that the "renewed motion is an impermissible successive motion for reconsideration").

To the extent that Appellant argues that a purported change in the European Union's position somehow warranted reconsideration, that argument is a red herring.

In her renewed motion to vacate, Appellant added a claim that the European Union had "plans to bolster its existing tools to counter extra-territoriality" of the Helms-Burton Act (D.E. 32 at 7), but Appellant did not present any evidence of an amendment or new law or regulation to (EC) No 2271/96. Instead, Appellant merely pointed to a communication issued by the Commission that noted that the Commission needed, among other things, "streamlined processing for authorisation requests pursuant to Article 5, second paragraph, including a review of the information requested" (*id*.). That is, all that Appellant could point to as part of the European Union's diabolical "plan" was a communication from the Commission acknowledging that the Commission needed to streamline the authorization processes by which companies like Iberostar could submit applications under Article 5 of (EC) No 2271/96. This is not a changed circumstance and is actually an understandable and reasonable course of action given the fact that, as Appellant conceded in her renewed motion to vacate, this case presented an issue of first impression for the Commission. (D.E. 32 at 17) ("The truth is that the EC Blocking Regulation has rarely been tested, and never in the context of a Helms-Burton Act lawsuit such as this one.").

The district court properly treated Appellant's renewed motion to vacate stay as a motion for reconsideration. Other than the mere passage of time, Appellant simply regurgitated the legal arguments made in her first motion to vacate,

explaining why she thought that the district court was wrong. The proper remedy was to appeal the April 2020 Stay Order when it was entered and not to file successive (and untimely) motions for reconsideration of that order. *See Jacobs*, 626 F.3d at 1344; *see also Wilson v. State Farm Gen. Ins. Co.*, No. 21-11722, 2021 WL 4947322, at *2 (11th Cir. Oct. 25, 2021) (holding that district court did not abuse its discretion in denying appellant's motion for reconsideration, which was untimely filed past the 28-day deadline of Rule 59(e) and repeated arguments previously raised in original motion). Having failed to timely appeal or to even timely move to vacate either the April 2020 Stay Order or the September 2020 Order, Appellant should not now be allowed a third bite at the already chewed-up apple.

Accordingly, this Court should affirm the order on appeal denying Appellant's renewed motion to vacate the stay entered almost a year earlier, which stay was never appealed.

II. The district court did not abuse its discretion in entering a stay of the proceedings in April 2020, because: (1) the stay is limited in duration until the European Commission enters a decision on Iberostar's application for permission to defend this lawsuit; (2) the absence of a stay would subject Iberostar to significant financial penalties; and (3) international comity weighs in favor of staying the case pending a decision from the European Commission.

Rather than framing her arguments in the proper procedural posture (*i.e.*, an appeal from an order denying a motion for reconsideration), Appellant ignores the standard of review for such decisions and instead argues the underlying merits of the

original stay order as if this Court were reviewing that order *de novo*. This is improper. The district court's stay of these proceedings in April 2020 is not properly before this Court. Nor is the district court's September 2020 Order denying Appellant's first motion to vacate stay, in which the district court explained in detail its reasoning for the imposition of the stay. The only order on appeal (which, as explained in the Statement of Jurisdiction, is not even properly before this Court) is the May 2021 Order denying Appellant's renewed motion to vacate the stay. Notwithstanding the impropriety of the arguments made in the Initial Brief, Iberostar does not wish to waive any of its arguments and briefly addresses Appellant's arguments to explain why the district court did not abuse its discretion in entering a stay of the proceedings in this case.

Appellant first argues that the stay should never have been entered because it is "immoderate." *See* Initial Brief at 24–35. That is wrong. "In considering whether a stay is 'immoderate,'" this Circuit "examine[s] both [1] the scope of the stay (including its potential duration) and [2] the reasons cited by the district court for the stay." *Ortega Trujillo v. Conover & Co. Commc'ns*, 221 F.3d 1262, 1264 (11th Cir. 2000) (citation omitted).[4] The Supreme Court has observed that, in deciding whether

[4] Although the Circuit in *Ortega Trujillo* found that the stay order was immoderate, *Ortega Trujillo*, 221 F.3d at 1264, the Circuit subsequently clarified and narrowed that holding in *Dash 224 LLC v. Aerovias de Integracion Reg'l Aires SA*, 605 F. App'x 868, 871 n.2 (11th Cir. 2015). In *Dash 224*, the Eleventh Circuit noted that the stay order in *Ortega Trujillo* did not "explain in detail the district

to stay a case, the district court must "weigh competing interests and maintain an even balance" so as to issue a moderate stay order. *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). Accordingly—and in contrast to Appellant's current position—the Supreme Court expressly rejected a *per se* rule that a stay is always immoderate simply because it depends on the "outcome of a controversy to which [the opposing party] is a stranger." *Id*. (collecting cases). Instead, the Supreme Court held that a "stay of indefinite duration" may be appropriate where there is "a pressing need" for it. *Id*. Such is the circumstance here.

Unlike the stays at issue in the cases cited by Appellant, which are discussed at length in the Statement of Jurisdiction, *supra*, the district court in this case did not abdicate its adjudicatory role over Appellant's claim to some other tribunal. That is, this is not the typical case in which a district court ceded its jurisdiction for an indefinite period of time merely because a parallel action might simplify some legal or factual issue.[5] Appellant will, in fact, have her day in court—and in the same

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court's reasoning in staying further proceedings" such that the Circuit "declined to presume that a district court that 'did not mention abstention at all' was in fact relying on international-comity abstention." 605 F. App'x at 871 n.2. The Court distinguished *Ortega Trujillo* because, in *Dash 224* (like here), "the district court laid out in persuasive detail in seven pages of its thirteen-page order its reasons for staying the case on the basis of comity." *Id.*

[5] But even then, and consistent with the Supreme Court's observations in *Landis*, the Eleventh Circuit has held that, under certain circumstances, such an indefinite stay may be appropriate. *See Schwindler v. Warden*, No. 19-11693-A, 2019 WL 11071814, at *2 (11th Cir. Aug. 28, 2019) (despite the "considerable

federal court that she chose, no less. A stay pending a decision by the EC of a request for authorization to participate in a lawsuit does not constitute an abdication by the district court of its jurisdiction or responsibility. Here, the stay merely affords Iberostar a window to comply with local requirements and minimize the exposure it will otherwise face.

Furthermore, here, the reason for the stay is unique. Absent the stay, Iberostar will be forced into an unconscionable Catch 22. If this Court directs the district court to lift the stay, Iberostar will have to decide between defaulting in this action, on the one hand, and being sanctioned by the European Union for up to €600,000 for each violation (which may include every instance that Iberostar participates in this action without authorization), on the other.

By contrast, the stay imposes only a relatively nominal burden on Appellant. Appellant's claims were in fact stayed for ***23 years*** by the suspensions signed each year by four U.S. Presidents. Appellant's assertion of prejudice is hollow. Her claims are preserved, and this action will proceed in the ordinary course after the Commission rules on Iberostar's application. The underlying factual issues in this case concern events that took place up to 100 years before she commenced this action. Any discovery hurdles that Appellant may face is not a product of the stay.

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delay" in the at-issue parallel actions, the stay pending resolution of those other actions—under the totality of the circumstances—was appropriate).

Rather, Appellant's hypothetical discovery hurdles—to the extent there are any—are a product of the fact that Helms-Burton Act claims were created twenty-six years ago and then suspended until 2019.

Appellant asserts that she will be prejudiced by the stay because (1) Iberostar might be supplying misinformation to the Commission regarding its request for authorization to participate in this action, and (2) Iberostar might be restructuring its organization so as to evade the district court's jurisdiction and render itself judgment proof. *See id.* at 43–44, 47–48. Appellant offered ***no evidence*** to the district court in support of such extreme, serious accusations. Nor do the accusations even make sense. It is in Iberostar's interest to obtain authorization from the Commission because otherwise, as discussed above, Iberostar will be faced with either defaulting in this action or being sanctioned for each individual violation (*i.e.*, unauthorized act of participation). Simply put—as the district court found—all of Appellant's accusations regarding her hypothetical prejudice are simply unfounded speculation.

In light of the facial inadequacy of Appellant's speculative allegations of prejudice and in light of the high sanctions that Iberostar faces if it were to actually participate in this case without first obtaining authorization, the district court's stay order is, under the totality of the circumstances, moderate.[6]

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[6] It is apparent that Appellant is seeking a lift of the stay merely in an effort to gain improper leverage in potential settlement negotiations. Indeed, Appellant touts Iberostar's quandary—asserting that being sanctioned for participating in this case

In addition, the district court did not abuse its discretion in finding that international comity weighed in favor of staying this case pending a decision from the Commission. Appellant argues that the Commission's regulation on which the district court's stay order is based subverts U.S. law such that the stay should not have been premised on international comity. *See* Initial Brief at 16–24. In doing so, Appellant engages in a lengthy discussion of inapplicable limitations to international comity. The cases on which Appellant relies address international laws that were directly at odds with U.S. law. But the stay in this case is directed at allowing the Commission time to process Appellee's application for authorization to ***participate*** in this action. That is, the international law in this case is expressly in furtherance of U.S. law. Appellant's framing of the district court's stay order (which is not even on appeal) as supporting a blocking regulation to subvert U.S. law is simply wrong.

This case presents a unique situation. For over twenty years, the enforcement provision of the Helms-Burton Act was suspended. As such, the Commission never had to deal with applications by European Union citizens or entities for authorization under Article 5 of (EC) No. 2271/96 to participate in Helms-Burton Act cases. In her renewed motion to vacate, Appellant conceded that this case was one of first impression for the Commission (D.E. 32 at 17) ("The truth is that the EC Blocking

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is simply the cost that Iberostar must bear for doing business in multiple countries. *See* Initial Brief at 45–46.

Regulation has rarely been tested, and never in the context of a Helms-Burton Act lawsuit such as this one.”).[7] As the district court properly found, “the European Commission and European Union has a strong interest in evaluating its own rules and regulations” (D.E. 25 at 3). *See Hale v. Fr. Lurssen Weft GmbH & Co. KG*, No. 09-23787-Civ-Ungaro, 2010 WL 11601558, at *3 (S.D. Fla. April 26, 2010) (recognizing foreign jurisdictions have an interest in interpreting their own laws). The European Union has strong commercial, economic, and diplomatic links to the United States. Accordingly, the district court properly found that principles of international comity weighed in favor of staying this case until the Commission decided Iberostar’s request for authorization.

In any event, Appellant has waived her right to contest the merits of the underlying stay because, as discussed above, she did not timely appeal either the April 2020 Stay Order or the September 2020 Order. Nor did Appellant file her motions to vacate the stay within 28 days of either order to toll the time for filing her notice of appeal. Accordingly, this Court is without jurisdiction to hear this appeal or to decide whether the district court’s stay of these proceedings was an appropriate exercise of its discretion.

[7] In addition, Appellant filed her lawsuit at the outset of a global pandemic. Given that this was a case of first impression for the Commission coupled with the unprecedented shutdowns across the globe, it is hardly surprising that the Commission needed time to process Iberostar’s application for authorization.

CONCLUSION

For the reasons set forth above, this Court should dismiss this appeal for lack of jurisdiction because Appellant did not timely appeal either the original stay order entered on April 24, 2020, or the subsequent order entered on September 17, 2020, denying her first motion to vacate stay. Appellant's failure to timely appeal and to timely file motions to vacate to toll the time for appeal deprives this Court of jurisdiction. In addition, even if the Court did have jurisdiction, this Court should affirm the district court's order on appeal denying Appellant's renewed motion to vacate the stay because Appellant did not satisfy the standard for reconsideration of an order and because the stay entered in this case was not an abuse of discretion given the unique circumstances of this case of first impression.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 8452 words, excluding the parts of the brief excluded by Rule 32(f) and Eleventh Circuit Rule 32-4. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ *Rebecca M. Plasencia*
Rebecca M. Plasencia

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF System.

/s/ *Rebecca M. Plasencia*
Rebecca M. Plasencia