UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:20-cv-20078-RNS

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

Plaintiff,

v.

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

Defendant.

_____/

DEFENDANT'S RESPONSE TO PLAINTIFF'S RENEWED MOTION TO LIFT STAY, AND IF DENIED, MOTION FOR CERTIFICATION OF ORDER UNDER 28 U.S.C. § 1292(b)

Defendant IBEROSTAR HOTELES Y APARTAMENTOS, S.L.U. ("**Iberostar**") submits this Response to Plaintiff's Renewed Motion to Lift Stay in the above-titled action [ECF No. 32] ("**Motion**"). The proceedings were stayed by this Court on April 24, 2020 ("**Stay**"), "pending the Iberostar's request for authorization from the European Commission" [ECF No. 17] ("**Order**"). On July 27, 2020, Plaintiff filed a Motion to Lift Stay [ECF No. 21], and on August 10, 2020, Defendant replied [ECF No. 22]. On September 17, 2020, this Court issued an Order Denying Motion to Vacate Stay ("**Second Order**") [ECF No. 25].

In support of Defendant's opposition to Plaintiff's Motion, Defendant states as follows:

I. PRELIMINARY STATEMENT

1. This Court granted the Stay to allow Defendant, an E.U. national subject to the laws of the European Union, to seek a mandatory authorization from the European Commission ("**Commission**") to submit pleadings responsive to the Complaint, as required by E.U. regulations. Iberostar applied for authorization to the Commission on April 15, 2020 ("**Application**"), and it has diligently and actively pursued a determination from the European agency since then.

2. The Stay is not immoderate for multiple reasons. It is framed within reasonable limits, as described in the Order. In its Second Order the Court noted the Stay will extend only as long as it takes for the Commission to decide on Iberostar's Application. *See* Second Order, p. 1 [ECF No. 25]. This Court is not declining to exercise jurisdiction over this case, but temporarily abstaining from exercising jurisdiction, with no prejudice to Plaintiff, to allow a European entity to obtain a mandatory authorization to appear in this proceeding.[1] Defendant is between a rock and a hard place, and it is strictly following the procedure under E.U. law to defend this litigation.

[1] Under European Law, this proceeding arises out of a law with "extra-territorial application . . . [that] violate[s] international law." Council Regulation 2271/96 (as defined below), preamble.

3. Iberostar is, however, the first European entity to request the Commission to issue an authorization under the European Council Regulation 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*, 1996 O.J. (L 309) 1 (EC) ("**Council Regulation 2271/96**").

4. As a result, there is no precedent to guide the Commission's decision, which is of utmost importance for the European Union and its 27 members' interests. As opposed to the U.S. Department of State or the U.K. Department for International Trade, the Commission operates as a cabinet government with 27 members or commissioners, one member per member state. Each of them needs to be consulted before the Commission makes its decision. This decision will set precedent for other applications relating to, not only the Helms-Burton Act ("**Act**'"), but also other U.S. legislation covered by Council Regulation 2271/96.

5. Iberostar has complied with this Court's Order by filing monthly status reports. Far from showing "delay," Motion, p. 2, the status reports show progress. Iberostar has sought periodic updates from the Commission on the status of its Application, and the Commission has actively been working on it. The Commission has requested documents, asked questions, and it "trust[s] any such assessments and investigations will shortly be completed and the authorization process will pursue its course." Defendant's Status Report, February 18, 2021 [ECF No. 31].

6. Iberostar's Application should not be reviewed in isolation, but instead it should be contextualized within the E.U.'s ongoing review of its "unified response to the extra-territorial application of third-country measures…to streamline the processing of authorization requests pursuant to Article 5…and consider intervening in foreign proceedings in support of E.U. companies and individuals."[2]

[2] Questions and Answers: European Commission. 19 January 2021. "Fostering the openness, strength and resilience of Europe's economic and financial system."

7. Finally, the Commission has not, as Plaintiff contends, "defiantly strengthened its opposition to the Helms-Burton Act" since the Stay was mandated. Motion, p. 2. The E.U. has opposed the Act since its passing for 25 years, and Council Regulation 2271/96 is proof of that opposition. Council Regulation 2271/96, nonetheless, provides that an E.U. entity may seek authorization to comply with an order arising out of the Act, as Iberostar has sought.

II. LEGAL STANDARD

8. The Supreme Court has recognized that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co*., 299 U.S. 248, 254 (1936). "How this can best be done calls for the exercise of judgment, which must weigh competing interest and maintain an even balance." *Id*. at 254-55.

9. International comity may justify far-reaching relief, including the dismissal of a lawsuit. *See, e.g., Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004). The Order's relief is much more modest: based on international comity the Order mandates a limited Stay pending a decision by the Commission on Iberostar's Application to defend this lawsuit. This Court is temporarily abstaining from exercising jurisdiction so that Iberostar can defend itself. Providing Iberostar with a meaningful opportunity to comply where possible with applicable foreign laws, is neither unreasonable nor immoderate.

10. The Supreme Court has held that abstention principles not only "permit a federal court to enter a stay order that *postpones* adjudication of the dispute," but "an order merely staying the action does not constitute abnegation of judicial duty." *Quackenbush v. Allstate Ins. Co*., 517 U.S. 706, 719-21 (1996) (internal citations and quotations omitted). "On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition." *Id*. at 721.

11. The Eleventh Circuit has held that, "in some private international disputes the prudent and just action for a federal court is to abstain from the exercise of jurisdiction." *Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519 (11th Cir. 1994) (internal quotations omitted).

III. MEMORANDUM OF LAW

12. This Court granted the Stay "[i]n the interest of international comity," Order at ¶ 2, and properly limited the Stay's scope, as required by the Eleventh Circuit, until the Commission decides Iberostar's Application. Second Order, p. 1. *See also Trujillo v. Conover & Co. Communs., Inc*., 221 F.3d 1262, 1264 (11th Cir. 2000). The Stay is not "immoderate," *id*., or indefinite. The Stay is warranted to provide Iberostar a fair opportunity to obtain the mandatory authorization from the Commission, and as such it should not be lifted. As a European entity, failure to comply with Council Regulation 2271/96 exposes Iberostar to substantial fines up to EUR 600,000 for each violation pursuant to Spanish Law 27/1998. [ECF No. 16, at 2-3.] *See* Second Order, p. 1.

A. The Stay Is Moderate and Should Not Be Vacated

13. Plaintiff correctly points out that 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).

14. Plaintiff, however, omits important details of that case which prompted the Court to reverse an order granting a stay. In *Landis,* the "controversy hing[ed] upon the power of a court to stay proceedings in one suit until the decision of another" court. *Id.* at 249. The Court's *rationale* was driven by the fact that "only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Id.* at 255. The Court held that a federal court has power to stay one suit to abide proceedings in another, although in the two the parties are not the same and the issues not identical, but the stay must be

kept within reasonable limits. *Id.* at 255-56. It remanded the case to the District Court to determine the motion to stay in accordance with the principles laid down in the opinion. *Id.* at 259.

15. *Landis* makes this Stay moderate because the Stay meets the principles in *Landis* even if Plaintiff's rights will not be adjudicated in another court. There is no other proceeding here where the rule of law that will define Plaintiff's rights will be settled. It is untrue that "this entire European Commission process is inherently prejudicial because it ultimately seeks to deprive Plaintiff of her rights under the Helms-Burton Act altogether." Motion, p. 17. The Application has no bearing on Plaintiff's rights, only Defendant's. It is Defendant that needs to comply with E.U. requirements.

16. The Order is framed within reasonable limits because the Commission will eventually resolve Iberostar's Application. As stated in the Second Order, "the European Commission's active consideration of the application is evidenced by the European Commission and Iberostar's active dialogue." Second Order, p. 5. This dialogue has continued and intensified, and there is no sign that the Commission is unnecessarily delaying the process. To the contrary, the Commission is actively going through the complex process of considering an authorization of this nature for the first time in 25 years in the middle of a global pandemic by a cabinet government with 27 commissioners representing 27 different countries. In December 2020, the Commission said to Iberostar that it has "been actively liaising to complete the required consultations and . . . [it] trust[s] any such assessment and investigations will shortly be completed and the authorization process will pursue its course." [ECF No. 31, p. 2.]

17. Plaintiff also correctly explains that in considering whether a stay is "immoderate," the Eleventh Circuit examines "both the scope of the stay (including its potential duration) and the reasons cited by the district court for the stay." *Trujillo*, 221 F.3d at 1264 (11th Cir. 2000). But she misstates that in *Trujillo* the "Eleventh Circuit clarified that staying 'a case pending the resolution

of related proceedings in another forum . . . .' is improper and immoderate." Motion, p. 4 (quoting *Trujillo*, 221 F.3d at 1264.)

18. In *Trujillo* the Court confirmed that "[a] variety of circumstances may justify a district court stay pending the resolution of a related case in another court." *Trujillo*, 221 F.3d at 1264 (internal citations omitted). It acknowledged that "[a] stay sometimes is authorized simply as a means of controlling the district court's docket and of managing cases before the district court . . . And, in some cases, a stay might be authorized also by principles of abstention." *Id.*

19. What the *Trujillo* Court *clarified*, to use Plaintiff's language, is that "[w]hen a district court exercises its discretion to stay a case pending the resolution of related proceedings in another forum, the district court must limit properly the scope of the stay. A stay must not be immoderate." *Id.* (internal citations omitted). "In considering whether a stay is "immoderate," [the Eleventh Circuit] examine[s] both the scope of the stay (including its potential duration) and the reasons cited by the district court for the stay." *Id*. *See also* Second Order, p. 4.

20. Here, the "reasons cited by the district court for the stay," are to provide an opportunity for Defendant to obtain an authorization from the Commission. In the Order, this Court determined that, "in the interest of international comity . . . it [was] appropriate to stay this case pending the Iberostar's request for authorization from the European Commission." Order at ¶ 2. The reasons are consistent with abstention principles, including international comity, and with binding precedent. *See* Defendant's Response to Plaintiff's Motion to Lift Stay, ¶¶14-28 [ECF No. 22].

21. The Court found the stay in *Trujillo* to be "indefinite in scope" because the "stay appear[ed] to expire only after a trial of the Bahamian case and the exhaustion of appeals in that case." *Trujillo,* 221 F.3d at 1264. And because "the Bahamian case [was] not progressing quickly." *Id.*

22. Here, the status reports show the undeniable progress of Iberostar's Application, including Defendant's "attempts to hasten the authorization process," Motion, p. 8, insofar as an entity may influence the pace of an administrative agency's research, consultations, considerations, deliberations and final decision-making and drafting within a multi-state system that creates rules and governs on the basis of consensus. This progress is summarized below:

i. On May 19, 2020, the Commission acknowledged receipt of Defendant's Application. Defendant's February Status Report [ECF No. 32].

ii. On June 15, 2020, Iberostar requested the Commission to provide an update on the status of the Application. *Id*.

iii. On June 22, 2020, the Commission confirmed that it is "currently assessing [Defendant's] application," and that the Commission does "[its] utmost to ensure that a decision is taken in due course." *Id*.

iv. On July 24, 2020, the Commission requested additional information from Iberostar, which Iberostar promptly submitted. Defendant's Response to Plaintiff's Motion to Lift Stay, ¶ 6 [ECF No. 22].

v. On August 10, 2020, the Commission informed Iberostar regarding the procedures involved in the consideration of the pending Application. It explained that they require "extensive consultation of both the Commission's services and Member States' authorities." Defendant's February Status Report [ECF No. 32].

vi. On September 23, 2020, the Commission replied that its "services are actively assessing [Iberostar's] application." 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." Finally, the Commission confirmed that, "[d]espite the challenges presented by the current health situation, [they] do [their] utmost to ensure that a decision is taken in due course." *Id*.

vii. On November 19, 2020, the Commission informed Iberostar regarding the status of its pending Application. They explained that "challenges presented by the current health situation [have] lengthened the process." Further, it confirmed they "are doing [their] utmost to ensure a timely response." *Id*.

viii. On December 20, 2020, the Commission sent a communication to Iberostar in which it confirmed the Commission has "been actively liaising to complete the required consultations of both the Commission Services and Member States' authorities, as required." The Commission "trust[s] any such assessments and investigations will shortly be completed and the authorization process will pursue its course." *Id*.

ix. On February 18, 2021, the Commission sent a new communication to Iberostar in which it confirmed Iberostar's "application is still undergoing assessment by [the Commission] services." The Commission added that "the consultation of the Commission services raised questions and possible gaps of information that require further investigation." *Id*.

x. On March 16, 2021, Iberostar sent a new request to the Commission, seeking further guidance as to the progress that the Commission has made, the steps that lie ahead, and a timeframe, if possible, for when a determination may be made. Iberostar will inform the Court of the Commission's response in due course.

23. Further, the duration of the Stay is not immoderate, especially considering Iberostar is seeking the application of a European regulation, *i.e.*, the mandatory authorization to appear in a U.S. litigation arising out of the Act, for the first time in 25 years in the middle of a global pandemic. In *Trujillo*, the case had been stayed for 17 months, while here the Stay was mandated 10 months ago. In support of its holding in *Trujillo*, the Eleventh Circuit cited to *American Manuf. Mut. Ins.Co. v. Edward D. Stone, Jr. & Assoc*., 743 F.2d 1519 (11th Cir.1984). In *Stone*, the Eleventh Circuit found the stay of federal court proceedings pending conclusion of state court proceedings indefinite where the state proceedings had been pending for 18 months and no trial date had been set in state court. *Stone*, 743 F.2d at 1524.

24. The Stay is not of indefinite nature because it will expire as soon as the Commission resolves Iberostar's Application. Second Order, p. 1. There is no need to wait for a "trial of [a] Bahamian case and the exhaustion of appeals," like there was in *Trujillo*. *Trujillo,* 221 F.3d at 1264. There is no pending state court parallel proceeding that has caused this litigation to be stayed for *18 months*, like the case in *Stone*. *Stone*, 743 F.2d at 1524. This Stay has nothing to do with waiting for a full, complex and long foreign proceeding where Plaintiff's rights will be adjudicated: Iberostar requested authorization to file a Motion to Dismiss; the Commission is actively considering the Application; and Defendant is actively seeking updates and keeping the Commission informed of any developments in this litigation and the importance to obtain a prompt resolution of its Application.

25. Finally, to vacate the stay in *Trujillo*, the Eleventh Circuit considered that "courts regularly permit parallel proceedings in an American court and a foreign court." *Trujillo*, 221 F.3d at 1265 (internal citations omitted). Here, the authorization proceeding before the Commission and this U.S. litigation cannot proceed in parallel. Iberostar is seeking permission to defend this litigation,

which Iberostar cannot do unless it is expressly authorized. Otherwise, "Iberostar faces EUR 600,000 in sanctions for each breach for failure to first obtain authorization." Order at ¶ 2.

a. The European Union Has Not Defiantly Strengthened Its Opposition To The Helms-Burton Act

26. Plaintiff contends that,

> [T]his Court should lift the stay, including because after this Court's Order, the European Commission defiantly strengthened its opposition to the Helms-Burton Act. In fact, in the interim, the European Commission has moved from opposing the Helms-Burton Act to adopting explicit E.U. policy against it, fitted with more tools to counter its effects.

Motion, p. 2.

27. This is untrue. The European Union's opposition to the Act has been clear and evident since 1996, when it passed Council Regulation 2271/96, stating that the "extra-territorial application [of the Act] violate[s] international law and impede[s] the attainment of the . . . objectives" of the "free movement of capital between Member States and third countries, including the removal of any restrictions on direct investment." Council Regulation 2271/96, preamble. Consistent with this opposition, Council Regulation 2271/96 prohibits E.U. entities like Iberostar from abiding by orders from foreign courts based on the Act. The E.U. has also been mindful, since 1996, that certain circumstances may justify an exception to the prohibition, under which an E.U. entity may be authorized to comply with an order based on the Act when not doing so "would seriously damage [the entity's] interests or those of the Community." Council Regulation 2271/96, article 5.

28. The document Plaintiffs refers to in its Motion, a communication from the Commission to the European Parliament, the Council, the European Central Bank and the European Economic and Social Committee and the Committee of the Regions, dated January 21, 2021 ("**EC Communication**"),[3] supports the appropriateness of the Stay because it shows the Commission is mindful and supportive

[3] The Communication is available here: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:32:FIN

of "processing [the] authorisation requests pursuant to Article 5, second paragraph, including a review of the information requested." EC Communication, section 5.

b. The Authorization In The Imperial Case Was Granted By The U.K., Not By The European Commission

29. Plaintiff also refers to another Title III case in which Honorable Judge Gayles stayed the action against a British defendant, Imperial Brands PLC, pending authorization to participate in the case. *See Rodriguez et al., v. Imperial Brands et al*., Case No. 20-cv-23287-DPG (S.D. Fla. Sept. 23, 2020).

30. Plaintiff suggests the authorization was granted in around five months because "the court applied the necessary pressure to obtain the required authorization within a reasonable time." Motion, p. 5. The authorization, however, was granted in five months because the United Kingdom left the European Union and the Commission did not make the decision, but the U.K. Department for International Trade did instead. Plaintiff's assertion that, "if the U.K. only needed little over a month to publish its decision regarding Imperial, despite simultaneously undergoing the "Brexit" transition, the European Commission certainly does not need more time" shows a fundamental misunderstanding of how the European Union, the Commission and the Brexit transition work.

31. The United Kingdom decided to leave the European Union on June 23, 2016, and it took the U.K. more than four years to make the Brexit transition. While the U.K. Department for International Trade is responsible for protecting the foreign trade interests of one country, the United Kingdom, the Commission is the executive branch of the European Union, responsible for proposing legislation, implementing decisions, upholding the E.U. treaties and managing the day-to-day business of the E.U., a political and economic union of 27 member states.

32. As explained, both the Commission and Iberostar are diligently working on the Application, despite the complexity of the process and the challenges imposed by COVID-19.

B. International Comity Does Warrant the Stay of this Proceeding Until the European Commission Decides Iberostar's Application for Authorization to Comply with this Court's Summons

33. Plaintiff argues that international comity does not warrant the Stay because "there is no . . . alternative forum that can adjudicate Plaintiff's claims – only a forum preventing it." Motion, p. 9. But the fact that no alternative forum will decide Plaintiff's claims is precisely one of the factors that warrants this Stay. The Commission is not a foreign court, and it would never decide Plaintiff's claims. Through the Order, this Court has temporarily abstained from exercising jurisdiction until the Application is resolved on the basis of international comity.

34. Plaintiff requests this Court to consider *Laker Airways, Ltd. v. Sabena, Belgian World Airlines,* 731 F.2d 909 (D.C. Cir. 1984) instructive, because 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. Motion, p. 11. But one of the differences between *Laker* and this case is that, the foreign action here–if Iberostar's Application may be considered an action—is not intended to terminate this litigation, but to obtain authorization to defend it. This difference was raised in Defendant's Response to Plaintiff's previous Motion to Lift, and Plaintiff has failed to address it. Defendant has no alternative but to comply with the laws of Defendant's jurisdiction, as Council Regulation 2271/96 is.

35. International comity is not limited to the existence of parallel litigation, as Plaintiff contends. It is an abstention doctrine that reflects "[t]he extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation." *Hilton v. Guyot,* 159 U.S. 113, 163, 16 S.Ct. 139, 40 L.Ed. 95 (1895). It "serves as a guide to federal courts where the issues to be resolved are entangled in international relations." *Ungaro-Benages*, 379 F.3d 1227, 1237 (11th Cir. 2004) (internal citations omitted). Comity "is a nation's expression of understanding which

demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws." *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1030 (11th Cir. 2014) (internal citations omitted). *See also* Second Order, pp. 3-5.

36. The issues to be resolved here, namely, Plaintiff's claims brought against a European entity under Title III of the Act, "are entangled in international relations." *Ungaro–Benages,* 379 F.3d at 1237. Under Council Regulation 2271/96, Iberostar faces up to EUR 600,000 in sanctions for each breach of that regulation. See Motion, p. 17.[4] *See also* Order at ¶ 2 [ECF No. 17].

37. The Stay acknowledges an "expression of understanding" of a United States' district court to Defendant's difficult position, based on its European nationality and domicile and two conflicting legal systems. *GDG Acquisitions*, 749 F.3d at 1030 (internal citations omitted). The Stay also "demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws," *Id*. The Order demonstrated "due regard . . . to the rights of persons protected under [the Act]," because Defendant sought, and the Order granted, time to obtain permission from the Commission to engage in Plaintiff's litigation, not to avoid it.

38. There is no question that the Commission has a strong interest in evaluation its own rules and regulations, especially when it is the first time that this evaluation is made. *See Ungaro-Benages*, 379 F.3d at 1238. *See also* Second Order, p. 3.

39. Defendant has also previously explained that the Stay is warranted because the related proceeding, the Commission's decision on the Application, is "likely to have a substantial or controlling effect on the claims and issues in the stayed case." *Miccosukee Tribe of Indians of Fla.*

[4] In the Motion, Plaintiff suggests that another defendant in a Title III case has not been sanctioned after filing a responsive pleading without seeking permission before the Commission. Motion, p 17. Any sanctioning proceeding before the European authorities would be confidential and Plaintiff, or Defendant, would never learn about it unless the sanctioned entity voluntarily discloses the information.

v. S. Fla. Water Mgmt. Dist., 559 F.3d 1191, 1198 (11th Cir.2009); *accord In re Braga*, 789 F. Supp. 2d 1294, 1310 (S.D. Fla. 2011). Plaintiff fails to address this issue in its Motion.

C. Turner Provides Guidance to this Court Absent Better Precedent

40. Plaintiff contends that "the *Turner* factors are inapposite" because here there are no parallel proceedings. Motion, p. 13. Plaintiff also complains that Defendant has not cited any case law on point. Motion, p. 12. Yet Plaintiff herself fails to cite any case law supporting her own Motion. Defendant has found no precedent directly on point, which is unsurprising.

41. Multiple U.S. administrations kept Title III of the Act suspended for 22 years (from 1996 to 2018). Before 2018, there was no Title III case pending in a U.S. court and, as a result, no request for authorization from an E.U. entity pending before the Commission. Since 2018, dozens of cases have been filed, but many of them have been dismissed or settled, and only a handful are pending. Among those pending cases, only one, this one, involves a European entity which had to seek permission from the Commission to defend this litigation.[5]

42. Although Defendant agrees there is no parallel litigation in this case, see Defendant's Response to Plaintiff's Motion to Lift Stay, ¶ 24 [ECF No. 22], this Court correctly considered the *Turner* factors for guidance. The Court also considered the factors stated in *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1030 (11th Cir. 2014). *See* Second Order, pp. 2-3.

c. Fairness to Litigants Favors Maintaining the Stay

43. Plaintiff contends that the "prejudice to Plaintiff from the April Stay Order is overwhelming," Motion, p. 16, yet it fails to show any real harm caused by the Stay.

44. Plaintiff first claims that the Stay is preventing it from being heard in *any* court because there is no parallel litigation, and it cites to *Turner*, 25 F.3d 1512 (11th Cir. 1994). But in *Turner*

[5] To the best of Defendant's knowledge Iberostar's application is the first one that has been submitted to the Commission pursuant to article 5 of Council Regulation 2271/96.

the Court concluded that staying the litigation would "not foreclose any change for Turner to obtain a fair and just result." 25 F.3d 1512, 1522 (11th Cir. 1994). This is exactly the case here.

45. The Application will not foreclose any change for Ms. Cantó to obtain a fair and just result. While if the Stay is lifted, Defendant will be in the difficult position of having to choose between violating European law and defend this litigation, or failing to file a responsive pleading to Plaintiff's complaint. The same applies if the Stay is maintained and the Commission denies Iberostar's Application. Only if the Stay is maintained and the Commission grants the Application will Iberostar be provided the opportunity to obtain a "fair and just result." *Id*. In none of the three scenarios Plaintiff's rights are affected. Plaintiff will have its day in court no matter what, and no other court will determine Plaintiff's claims as a result of this Stay.

46. Plaintiff further claims the Stay is prejudicial because Plaintiff has "no input into the European Commission's decision-making process." Motion, p. 17. This is because Plaintiff's interests are not at stake in that process, but only Defendant's are. To prevail in its Application, Defendant has to show that failing to respond to the Court's summons "would seriously damage [its] interests or those of the Community." Council Regulation 2271/96, article 5. The Complaint's relief sought is clear and nothing else is needed from Plaintiff. In fact, Defendant's and Plaintiff's interests with regards to the Application are probably conflicting. While Defendant wants to defend this litigation, Plaintiff would prefer the Defendant is denied permission to appear.

47. Plaintiff asserts that "Defendant relies on its own interpretation of Article 5 of the EC Blocking Regulation to mean that participating in this case, even by moving to dismiss, will subject it to a EUR 600,000 fine. However, such interpretation has never been confirmed." Motion, p. 18.

48. On August 10, 2020, the Commission reminded Iberostar that "until and unless [Iberostar] receives an explicit authorisation from the Commission, Article 5, first paragraph, prohibits [

Iberostar] from actively appearing before U.S. courts pursuant to the relevant summons or any others based on Title III of the Helms-Burton Act, including the filing of a Rule 12 motion." Defendant's Response to Plaintiff's Motion to Lift Stay, ¶ 7 [ECF No. 22] (quoting a letter from the Commission to Defendant dated August 10, 2020). The Commission has confirmed that, pursuant to the Council Regulation 2271/96, Iberostar cannot answer this Court's summons.

49. Plaintiff further argues that the "interpretation of Article 5 is at the center of the *Bank Melli Iran v. Telekom Deutschland GmBH* case currently underway before the European Court of Justice ("**ECJ**"). This is also inexact because the ECJ's preliminary ruling in that case will have no bearing in Iberostar's Application.

50. In *Bank Melli*, the ECJ will decide whether "the first paragraph of Article 5 of Regulation No 2271/96 only apply where the acting E.U. operator within the meaning of Article 11 of that Regulation is issued directly or indirectly with an official or court order on the part of the United States of America or [whether] it suffice[s] for its application that the action of the E.U. operator is predicated on compliance with secondary sanctions without any such order." *See* Request for a preliminary ruling from the Hanseatisches Oberlandesgericht Hamburg (Germany) lodged on 5 March 2020 — Bank Melli Iran, a public company under Iranian law v Telekom Deutschland GmbH (Case C-124/20).[6] The case is inapposite because it deals with Telekom Deutschland's decision to voluntarily comply with U.S. sanctions against Iran without a specific order from a U.S. court requiring it to do so. The ECJ will decide whether an order is required to trigger the prohibition under article 5, or a E.U. member is also prohibited from voluntarily complying with U.S. regulations.

[6] The Request for a preliminary ruling from the Hanseatisches Oberlandesgericht Hamburg (Germany) lodged on 5 March 2020 — Bank Melli Iran, a public company under Iranian law v Telekom Deutschland GmbH (Case C-124/20) is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CN0124

51. Here, Iberostar is not voluntarily complying with the Act. To the contrary, Iberostar has a court order, this Court's summons, requiring it to appear and defend this lawsuit.

52. Finally, Plaintiff claims that "further delay means postponing discovery at the risk of losing important witness testimony." Motion, p. 19. Title III has been suspended by the U.S. government for 22 years, and it took Plaintiff eight months to bring this lawsuit after the U.S. decided to lift the suspension of Title III of the Act. The expropriations that engendered the enactment of the Act occurred between 1959 and 1961, more than 60 years ago. This Stay makes no significant difference and any prejudice relating to witness testimony cannot be attributed to a stay.

d. Judicial Efficiency Favors the Stay

53. "Federal courts routinely exercise their power to stay a proceeding where a stay would promote judicial economy and efficiency." *Cypress Chase Condo. Ass'n "A" v. QBE Ins. Corp.*, No. 10-61987-CIV, 2011 WL 1544860, at *15 (S.D. Fla. Apr. 15, 2011).

54. Here, the Stay promotes judicial efficiency because it affords Defendant a fair opportunity to participate in this proceeding. The Commission is actively going through the process of considering Iberostar's Application. *See* ¶ 22 *above.* In December 2020, it announced that it "trust[s] any such assessments and investigations will shortly be completed and the authorization process will pursue its course." Defendant's Status Report, February 18, 2021 [ECF No. 31].

55. Because Plaintiff is not being prejudiced by this short Stay (especially compared with the 25 year stay voluntarily adopted by the U.S. Government), there is no compelling reason to lift it.

D. Defendant's Motion for Certification of Order under 28 U.S.C. § 1292(b) Should Be Denied

56. If the Motion is denied, Plaintiff seeks certification of this Court's order denying such Motion to the Eleventh Circuit under 28 U.S.C. § 1292(b). Plaintiff seeks appellate review of the following underlying issue: "whether it is proper to stay a case arising out of the Helms-Burton

Act pending authorization from the European Commission to an E.U. Defendant to participate in the case, pursuant to the E.U. Blocking Regulation, which was passed specifically to counter the effects of the Helms-Burton Act." Motion, p. 23. Plaintiff, however, does not meet the requirements for interlocutory review under Section 1292(b).

57. The Eleventh Circuit has held that, "[t]hree factors are relevant in deciding whether an order merits interlocutory review under § 1292(b): (1) whether the case presents a controlling question of law; (2) whether there is a substantial ground for difference of opinion; and (3) whether the appeal will materially advance the ultimate termination of the litigation." *Simpson v. Carolina Builders Corp.*, 222 Fed. Appx. 924, 925 (11th Cir. 2007) (internal quotations omitted).

58. For a case to present a *controlling question of law*, "[t]he legal question must be stated at a high enough level of abstraction to lift the question out of the details of the evidence or facts of a particular case and give it general relevance to other cases in the same area of law." *McFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004).

59. This first factor is not met here because the "facts of [each] particular case" are critical to determine whether the case should be stayed, and for how long, to await an authorization from the Commission. For example, after the Commission decides Iberostar's Application, there will be precedent to follow based on the facts of each individual case. In its decision, the Commission will presumably lay down the criteria to resolve a request for authorization under the Council Regulation 2271/96, an issue that is being considered now for the first time. Subsequent applications will benefit from this first decision and future stays will presumably be shorter, or at least more predictable, than this first instance. Also, the Application is being considered in the middle of a global pandemic, which will hopefully not be repeated in the coming years.

60. As to the second factor, "[t]here is substantial ground for difference of opinion when the district court and other courts, and *particularly the court of appeals*, are not in complete and unequivocal agreement as to the resolution of the controlling legal question." *Mais v. Gulf Coast Collection Bureau, Inc*., 944 F. Supp. 2d 1226, 1251–52 (S.D. Fla. 2013), rev'd in part, 768 F.3d 1110 (11th Cir. 2014) (internal citations quotations and citations omitted) (emphasis added).

61. Again, this factor is not met here. The only other decision involving this issue was in agreement with this Court's Stay: Judge Gayles also stayed the case until a decision, this time from the U.K. Department of Trade, was made. In other words, under Judge Gayles' decision in *Rodriguez et al*., Case No. 20-cv-23287-DPG (S.D. Fla. Sept. 23, 2020), the answer to the issue of which Plaintiff seeks appellate review, i.e., *whether it is proper to stay a case arising out of the Helms-Burton Act pending authorization from the European Commission to an E.U. Defendant to participate in the case*, would be **yes**. Judge Gayles stayed the case.

62. The fact that the case in *Rodriguez* was only stayed for five months, while this case has been stayed for ten months, does not change the analysis. First, the law requires a difference of opinion among the district court and other courts, and particularly the court of appeals. *Mais*, 944 F. Supp. 2d at 1251–52. Here, there is no difference of opinion among district courts, let alone courts of appeals. Second, the length of the stay is not an element included in Plaintiff's issue.

63. The third factor "means that resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004).

64. Again, this factor is not met here. The resolution of the legal question Plaintiff poses would not avoid trial or otherwise substantially shorten the litigation. The Application has nothing to do

with the merits of the case or Plaintiff's claims. It only deals with Defendant's ability to defend this litigation.

65. For the reasons stated above, if this Court denies Plaintiff's Renewed Motion to Lift the Stay, it should also deny Plaintiff's Motion For Certification Of Order Under 28 U.S.C. § 1292(b).

IV. CONCLUSIONS

66. The Stay is warranted, consistent with Eleventh Circuit's precedent, and necessary for Iberostar to obtain authorization to comply with this Court's summons. Defendant has diligently been pursuing a determination from the Commission. The Commission has been sending periodic updates, addressing the progress made and keeping Iberostar, and this Court, informed of the developments as well as the challenges the process poses. Defendant has no choice, but to wait for this authorization to defend this litigation. Plaintiff has failed to identify any real prejudice caused by this Stay. Precedent shows that the Stay is not immoderate or indefinite, especially considering this is the first time that the Commission considers granting an authorization under Council Regulation 2271/96, and the world is going through a pandemic.

67. For the foregoing reasons, Defendant respectfully requests the Motion be denied.

Filed this 17th day of March, 2021.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 17, 2021, a true and correct copy of this RESPONSE TO PLAINTIFF'S MOTION TO LIFT STAY was filed with the Clerk of Court using the CM/ECF system which will send notification of the filing to all counsel and parties of record.

/s/Adolfo E. Jiménez
Adolfo E. Jiménez