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.

_____/

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

Plaintiff Maria Dolores Canto Marti, as personal representative of the Estates of Dolores Martí Mercadé and Fernando Canto Bory ("Plaintiff"), respectfully moves this Court to lift the stay previously entered on April 24, 2020 [D.E. 17], and if denied, to certify the order denying such motion for certification under 28 U.S.C. § 1292(b) and in support states as follows:

INTRODUCTION

On April 23, 2020, Defendant Iberostar Hoteles y Apartamentos S.L. (the "Defendant" or "Iberostar") moved to stay these proceedings so that it could obtain a ruling from the European Commission on its request for an authorization to file a response to Plaintiff's Complaint [D.E. 16] (the "Motion to Stay"). In its filing, Defendant specifically limited the requested stay to a period of seventy-five (75) days. Motion to Stay at ¶ 2 ("To avoid a protracted delay, this request for a stay is limited to no more than 75 days."). The next day, this Court stayed these proceedings indefinitely "until the European Union ***grants*** Iberostar's request for authorization" and required Defendant to submit status reports every thirty days [D.E. 17] (the "April Stay Order") (emphasis added).

More than ninety days passed without a ruling from the European Commission when Plaintiff first moved to lift the April Stay Order on July 27, 2020 [D.E. 21] (the "Motion to Lift the Stay"). Defendant then filed its opposition to Plaintiff's Motion to Lift the Stay [D.E. 22] on August 10, 2020 (the "Response"). And Plaintiff submitted its reply in support of the same on August 17, 2020 [D.E. 23] (the "Reply"). Thereafter, on September 17, 2020, this Court issued its Order Denying Motion to Vacate Stay [D.E. 25] (the "Order").

Now, over ten months have passed since Defendant's response to the Complaint was due pursuant to the Court's April 8, 2020 paperless order granting in part and denying in part Defendant's Motion for Enlargement of Time to Respond to the Complaint [D.E. 13]. Over 300 days have passed since Defendant submitted its application to the European Commission on April 15, 2020. And, there is no end in sight. Indeed, the European Commission has not provided any estimated timeframe for their decision-making process. In fact, Iberostar's monthly status updates to this Court illustrate one recurring theme—delay.

Herein, we explain why this 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 EU policy against it, fitted with more tools to counter its effects. Defendant has feigned international comity despite knowing the EU's contentious position on the Helms-Burton Act. Given such opposition and the passage of time, deference to the European Commission process is an abdication of this Court's jurisdiction, contrary to established legal precedent. *See Societe Nationale Industrielle Aerospaitale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). Defendant must be stopped from continuing to play the game of distorting the principles of international comity, which has become obvious to all.

Moreover, the delay here, which has been perpetuated by the April Stay Order, has been and continues to be prejudicial to Plaintiff. Indeed, the April Stay Order is immoderate and should be vacated as it meets the textbook definition of indefinite and does nothing to safeguard Plaintiff's right to have her claims adjudicated. Quite the opposite. The April Stay Order deprives Plaintiff of such right, all for the sake of what this Court has regarded as international comity. However,

this Court's extension of international comity to the European Union's EC Blocking Regulation[1] is misguided.

In fact, in considering international comity, the Court utilizes the various factors set forth in *Turner*. However, as is more fully discussed below in Section III, such factors are inapplicable here, where there is no alternative foreign proceeding that can adjudicate Plaintiff's claims before this Court. And, to the extent the *Turner* factors do apply here, they too weigh in favor of vacating the stay. Notwithstanding, the proper application of the principles of international comity here, where the EC Blocking Statutes' sole purpose and effect is to nullify the Helms-Burton Act, require vacating this immoderate stay immediately.

MEMORANDUM OF LAW

I. The Stay Order is Immoderate and Should be Vacated

The United States 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, 57 S. Ct. 163, 167 (1936). Therefore, a stay is considered immoderate unless it has a reasonable, foreseeable limit. *See id.* And as the Court in *Landis v. N. Am. Co.* further clarified "an order which is to continue by its terms for an immoderate stretch of time is not to be upheld as moderate because conceivably the court that made it may be persuaded at a later time to undo what it has done." *Id.* Moreover, the *Landis* court has also held that a court does not have the power "by a stay to compel an unwilling litigant to wait upon the outcome of a controversy to which he is a stranger." *Id.*

The Eleventh Circuit Court of Appeals (the "Eleventh Circuit") explained that the term "immoderate" contains two components: (i) "the scope of the stay (including its potential duration)" and (ii) "the reasons cited by the district court for the stay." *Trujillo v. Conover & Co. Communs., Inc.*, 221 F.3d 1262, 1264 (11th Cir. 2000). The Eleventh Circuit clarified that staying

[1] The "EC Blocking Regulation" hereinafter refers to 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). *See* Exhibit A, D.E. 16-1.

"a case pending the resolution of related proceedings in another forum . . . ." is improper and immoderate. *See id*. In *Trujillo*, the court cited *CTI-Container* in support of its holding. *Id.* at 1264-1265. In *CTI-Container*, which Iberostar cited in its opposition to Plaintiff's motion to lift the stay (*see* Response, D.E. 22 at p. 13), the Eleventh Circuit vacated the district court's stay where the duration of the stay could "safely be described as an indefinite period." *CTI-Container Leasing Corp. v. Uiterwyk Corp.*, 685 F.2d 1284, 1288 (11th Cir. 1982). In that case, the district court stayed litigation pending a determination by the Iran-United States Claims Tribunal in part because there was "no way to estimate the months or even years that may pass before [the claims] are decided" by the Tribunal. *Id*. at 1287. Applying the *Trujillo* principles, a court in this district rejected a motion to stay the federal court action pending resolution of a parallel action in a foreign country. *French Cuff v. Markel Am. Ins. Co.*, No. 07-60006-CIV-LENARD/TORRES, 2007 U.S. Dist. LEXIS 115813 at *3-4 (S.D. Fla. May 21, 2007).

Recently and consistent with these authorities, the Honorable Darrin P. Gayles stayed a Title III action against an EU defendant—Imperial Brands PLC ("Imperial"),[2] pending authorization from the European Commission 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). However, in that case, to avoid entering an indefinite stay, Judge Gayles limited the stay to a specific date – February 9, 2020 – five months after defendant's original deadline to respond to the complaint. *See id*. Indeed, at the hearing on defendants' motion to stay that case, Judge Gayles noted that "[t]he stay will not exceed past February 9th of 2021 ***because we cannot proceed or wait indefinitely for an answer regarding these issues***." *See* Hearing Transcript, D.E. 50 at 30, *Rodriguez et al.*, Case No. 20-cv-23287-DPG (emphasis added). The limited stay in *Rodriguez et al.*, ultimately yielded favorable results: Three days before the court's February 9, 2021 deadline, the defendant received

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

the authorization it required to proceed with the litigation. *See* Imperial's Fifth Status Report, D.E. 64, *Rodriguez et al.*, No. 20-cv-23287-DPG. Thereafter, on February 12, 2021, the court lifted the stay and reopened the case. *See* Paperless Order, D.E. 69, *Rodriguez et al.*, No. 20-cv-23287-DPG. Evidently, the court applied the necessary pressure to obtain the required authorization within a reasonable time. Further, the results in *Rodriguez et al.*, signal 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. The European Commission should not be held to a more lenient timeframe than the U.K. Here, perhaps for lack of incentive, the European Commission has stalled past a reasonable timeframe, for over ten months. Therefore, this Court should adopt a similar approach to that of Judge Gayles in *Rodriguez et al.*, and vacate the immoderate stay. Otherwise, this Court risks further prejudicial delay to Plaintiff.

Furthermore, this Court's April Stay Order is immoderate because the time frame of the order meets the textbook definition of "indefinite" – "not precise" and "having no exact limits." *See Indefinite*, Merriam-Webster, https://www.merriam-webster.com/dictionary/indefinite (last visited Feb. 12, 2021). The April Stay Order has no precise limits and is instead improperly pegged to the European Commission's authorization, which given the EU's newly reinforced opposition to the Helms-Burton Act, may never come. Therefore, the stay runs contrary to the *Landis* standard, which requires a stay order to have foreseeable, concrete limits, because there are no such limits here.

In its Order, the Court agreed "with Defendant that the stay is not indefinite because it will end as soon as the European Commission rules on Iberostar's application." Order, D.E. 25 at 4-5. However, the Court's April Stay Order stayed the case "until the European Union ***grants*** Iberostar's request for authorization," not until the Commission ***rules*** on Iberostar's application. April Stay Order at ¶3 (emphasis added). The terms of the April Stay Order, which is pegged to the European Commission granting their authorization, are even more tenuous as such authorization may never arrive. Nevertheless, the European Commission has failed to give any concrete deadline by which it intends to rule on Iberostar's application, nor has it shown any sign that it will ultimately authorize Iberostar's application. In fact, the European Commission has further clarified its defiance to the Helms-Burton Act since the Court's Order. In its Order, the

Court stated that "the European Commission is actively considering Iberostar's application[,]" which "is evidenced by the European Commission and Iberostar's active dialogue" regarding Iberostar's application. Order, D.E. 25 at 5. However, the active dialogue between Iberostar and the European Commission is irrelevant as such dialogue is void of any reference to a deadline (or even a foreseeable deadline) by which the European Commission will grant its authorization.

Indeed, this case is more like *Trujillo* where the court found the stay ordered by the district court was indefinite because "[t]he stay, by its own terms, remains in effect until the 'Bahamian Courts conclude their review.'" *Trujillo*, 221 F.3d at 1264. Here, the stay is also to remain in effect indefinitely – until the European Commission concludes its review and provides authorization to Iberostar. However, in this case, there is even less predictability for the timeframe of the stay than in *Trujillo* because in *Trujillo* the stay was pending a resolution of foreign litigation and appeals abroad, the procedure for which is generally known and somewhat predictable. Here on the other hand, in the absence of any foreign litigation, no such predictability exists. Instead, Plaintiff has no way of knowing how long the European Commission's process will endure.

Indeed, this case is like *CTI-Container* where the court vacated the indefinite stay that was pegged to the outcome of an international tribunal for which there was "no way to estimate the months or even years that may pass" before the tribunal would come to a decision. *CTI-Container*, 685 F.2d at 1287. Similarly, here, there is no way to accurately estimate the time it will take for the European Commission to come to a decision. In fact, Iberostar's original estimation – ten weeks, "but no longer than 75 days" – have proven grossly inaccurate. *See* Motion to Stay, D.E. 16 at ¶ 24.

The European Commission may characterize itself as actively considering Iberostar's application as the Court suggests in its Order. Order, D.E. 25 at p. 5. But such consideration, which according to the Court appears to be in the "normal course," does nothing to temper the indefiniteness of the stay because "normal" in this context is equally as imprecise. *Id*. Neither Plaintiff nor the Court know what the "normal course" of the European Commission's process is for such applications as they have both been left in the dark about the entire process. Indeed, Defendant has refused to supply Plaintiff or the Court with its application or communications with the Commission. And the snippets of European Commission communication that Iberostar has provided do not provide detail regarding the European Commission process for consideration or

the timetable for same. With no estimated timetable in sight, the stay has no reasonable limits and is therefore, improperly indefinite.

Although the European Commission's procedure and timeframe for authorization requests is wholly undefined and unpredictable, the European Commission's opposition to the premise and effect of the Helms-Burton Act is not. Indeed, the European Commission's opposition to the Helms-Burton Act has been further clarified since the Court entered its Order. On January 19, 2021, the European Commission published a Communication, which reveals that the European Union plans to bolster its existing tools to counter extra-territoriality (as in Title III) and consider new ones (the "Communication"). *See Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2021) 32 final (Jan. 19, 2021).*The Communication states:

> To fulfil its potential, ***the Blocking Statute must be part of a more comprehensive EU policy against extra-territoriality***, for which the Commission will put in place the following measures to make a better use of existing tools and create new tools, as appropriate, through:
>
> (I) clearer procedures and rules for applying Article 6 (in particular, to facilitate the recovery of defendants' assets across the EU);
>
> (II) strengthened national measures to block the recognition and enforcement of foreign decisions and judgments based on the listed extra-territorial measures (Article 4);
>
> (III) streamlined processing for authorisation requests pursuant to Article 5, second paragraph, including a review of the information requested;[3]
>
> (IV) possible involvement in foreign proceedings to support EU companies and individuals.

See id. (emphasis added). Moreover, the Communication outlines that the Commission intends to undertake "Key action 15: The Commission will consider additional policy options to further deter and counteract the unlawful extra-territorial application of unilateral sanctions by third countries to EU operators, including a possible amendment of Regulation (EC) No 2271/96." The Communication previously not available to the Court demonstrates that, given the European Commission's planned deterrence and counteracting measures against the Helms-Burton Act and its effects, this case is being stayed to no avail.

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

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

Furthermore, the 30-day status reports required by this Court do nothing to make the scope of the stay more definite. *See Trujillo*, 221 F.3d at 1264 n. 3 (finding that requiring plaintiff to submit status reports every three months "does not make the scope of the stay less indefinite"). Iberostar argued that the "30 day status reports provide a mechanism to ensure that the matter does not linger indefinitely." Response, D.E. 22 at ¶ 11. However, the court in *Trujillo* found the status reports do "not guarantee that the district court will reassess the propriety of the stay every three months. The district court could do nothing when status reports are filed, and the stay would continue in effect until the Bahamian litigation concluded." *See Trujillo*, 221 F.3d at 1264 n. 3. Moreover, the *Landis* standard is clear – the stay cannot "be upheld as moderate because

conceivably the court that made it may be persuaded at a later time to undo what it has done." *Landis*, 57 S. Ct. at 167. This is true despite the Court stating in its Order that it "evaluates the propriety of the stay entered in this case with the filing of Iberostar's status reports." Order, D.E. 25 at 5. To the extent that such evaluation suggests that the Court may be later persuaded to vacate the stay depending on the content of Defendant's status reports, such ex post facto analysis is improper under *Landis. See Landis* 57 S. Ct. at 167.

II. International Comity Considerations Warrant Vacating the Stay Because the EC Blocking Regulation Itself Runs Contrary to the Principles of International Comity

This Court should no longer extend international comity to the EU Blocking Regulation that was passed specifically to contradict United States law. Specifically, this Court must consider the extent of deference that is owed to the EU Blocking Regulation. *See Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("'Comity' summarizes in a brief word a complex and elusive concept -- the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum."). Courts have extended international comity to foreign proceedings in other contexts, but do so when there is a retrospective or prospective foreign proceeding that involves the same or similar issues and parties before that court. And, in that context, the *Turner* factors discussed below in Section III apply to evaluate the propriety of staying a case for international comity purposes. But here, there is no such alternative forum that can adjudicate Plaintiff's claims – only a forum that is preventing it. This Court should therefore consider that there are limits to international comity and vacate the April Stay Order, finding that such stay reaches beyond those limits.

Federal courts rarely abdicate their responsibility to adjudicate cases within their jurisdiction. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colo. River Water Conser. Dist. v. United States*, 424 U.S. 800, 813 (1976). It is well established that "[f]ederal courts have a 'virtually unflagging obligation' to exercise the jurisdiction conferred upon them." *Turner Entertainment Co.* 25 F.3d at 1518 (citing *Colorado River Water Conser. Dist. v. United States*, 424 U.S. 800, 817 (1976)). Staying a case for international comity considerations is rare. And, "courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States." *Pravin Banker Assocs. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997).

Indeed, international comity is not served when U.S. public policy interests are violated. Here U.S. public policy interests of the utmost importance are at stake. Title III of the Helms-Burton Act begins with a recitation of such interests, which include:

- "Individuals enjoy a fundamental right to own and enjoy property which is enshrined in the United States Constitution." See 22 U.S.C. § 6081(1).
- "The Cuban Government is offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets some of which were confiscated from United States nationals." Id. at § 6081(5).
- "The international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment from the use of wrongfully confiscated property by governments and private entities at the expense of the rightful owners of the property." Id. at § 6081(8).
- "To deter trafficking in wrongfully confiscated property, United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro's wrongful seizures." Id. at § 6081(11).

The Helms-Burton Act was passed to create a cause of action to pursue against "wrongful confiscation or taking of property" by the Cuban Government, and, in part, to penalize trafficking in confiscated property because of the financial benefit it provides to the Cuban Government, which ultimately "undermines the foreign policy of the United States." *Id*. at § 6081(11). The EC Blocking Regulation on the other hand is designed the thwart the Helms-Burton Act. Hence, the regulation is commonly referred to as a "blocking statute" because it was specifically enacted to counteract or block the effects of the Helms-Burton Act. This Court should not extend international comity to EU law that blatantly violates international comity.

Indeed, other courts have recognized that comity has limits. *See e.g.*, *Laker Airways, Ltd. v. Sabena, Belgian World Airlines* 731 F.2d 909 (D.C. Cir. 1984); *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169, 213 (Bankr. S.D.N.Y. 2017) ("[C]ourts generally extend comity provided the foreign court had proper jurisdiction and recognition of its judgment or proceeding does not prejudice the rights of United States citizens or violate domestic public policy.") (internal quotations and citations omitted).

In fact, this Court should consider that *Laker* is instructive here because, as is the case here, in *Laker* there also was no other forum available for the resolution of plaintiff's claims when the court considered extending international comity. 731 F.2d 909, 938 (D.C. Cir. 1984). In declining to extend international comity to U.K. law, the court in *Laker Airways, Ltd.* stated as follows:

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

Id. at 937-938 (emphasis added). In *Laker*, the court found that, where a foreign action is "specifically intended to interfere with and terminate" the domestic suit, it cannot be afforded comity. *Id*. at 938. Similarly, here, the EC Blocking Regulation is specifically intended to interfere with and terminate any actions brought under the Helms-Burton Act, including this one. Here, like the English injunction at issue in *Laker*, the EC Blocking Regulation is purely offensive. *See id*. Accordingly, like the English injunction in that case, the EC Blocking Regulation "seeks only to quash the practical power of the United States courts to adjudicate claims under United States law against defendants admittedly subject to the courts' adjudicatory jurisdiction." *See id.* Moreover, like defendants in *Laker*, Defendant contends "that that comity compels us to recognize a decision by a foreign government that this court shall not apply its own laws to corporations doing business in this country." *See id.* Nonsense. This Court cannot maintain the April Stay Order and consequently allow Defendant and the European Union to usurp its judicial functions and destroy its autonomy. *See id.*

The United States Supreme Court has specifically rejected attempts to supersede United States law with foreign law as such an approach would "effectively subject every American court hearing a case involving a national of a contracting state to the internal laws of that state." *Societe Nationale Industrielle Aerospaitale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987). In that case, the Supreme Court rejected the use of a French "blocking statute" that was being cited to deny use of United States discovery methods sought in a district court proceeding. *Id*. at 544 n.29. The Court remarked "[i]ndeed, the language of the statute, if taken literally, would

appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge….” *Id*.

Just as importantly, the United States Supreme Court recognized that foreign laws cannot “deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.” *Id*. Thus, the Supreme Court has rejected the application of blocking statutes in United States courts. After ten months and counting, the April Stay Order, which may have started as a generous accommodation by this Court has now turned fundamentally prejudicial to Plaintiff, United States law, and the interests of this forum in applying same.

III. The *Turner* Factors Are Inapplicable Because There is No Foreign Proceeding That Can Adjudicate the Parties’ Rights

In evaluating the propriety of this stay, the Court mainly considered the following factors set forth in *Turner*: “(1) a proper level of respect for the acts of our fellow sovereign nations—a rather vague concept referred to in American jurisprudence as international comity; (2) fairness to litigants; and (3) efficient use of scarce judicial resources.” Order, D.E. 25 at 2. However, as the *Turner* Court itself stated, such factors are three “goals in the area of ***concurrent international jurisdiction***.” *See Turner Entertainment Co.*, 25 F.3d at 1518 (emphasis added). However, there is no such concurrent international jurisdiction here. Indeed, the *Turner* Court faced an entirely different issue— “whether a federal court, which properly has jurisdiction over an action, should exercise its jurisdiction ***where parallel proceedings are ongoing in a foreign nation and a judgment has been reached on the merits in that litigation***.” *See Turner Entertainment Co.*, 25 F.3d at 1518 (emphasis added). The *Turner* principles “guide courts’ actions in cases of ***concurrent jurisdiction*** in a federal court and the court of a foreign nation.” *Id*. (emphasis added). Indeed, courts have stated that the *Turner* factors apply only “[o]nce a court determines that the two proceedings are substantially parallel.” *Risk Ins. & Reinsurance Sols. v. R + V Versicherung*, Case No. 04-61119-CIV, 2005 U.S. Dist. LEXIS 58628, at *6 (S.D. Fla. Sept. 21, 2005).

Defendant has not cited any case law wherein a court extended international comity to stay a case where there was no alternative foreign proceeding that could adjudicate plaintiff’s claims. Likewise, Defendant has not cited any case in which a court granted a stay specifically so that the defendant could obtain permission from the European Commission to participate in a case brought

under Title III of the Helms-Burton Act. The cases cited by Defendant are of no assistance to it here. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d. 1227 (11th Cir. 2004) (extending international comity to a German tribunal that provided a process and tribunal for American citizens to seek reparations for certain actions of the Nazi government of Germany); *Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994) (involving parallel foreign proceeding); *Posner v. Essex Ins. Co.*, 178 F.3d 1224 (11th Cir. 1999) (same); *Dash 224, Ltd. Liab. Co. v. Aerovias de Integracion Reg'l Aires, S.A.*, No. 13-22796-CIV, 2014 U.S. Dist. LEXIS 186689 (S.D. Fla. Mar. 26, 2014) (same); *In re Braga*, 789 F. Supp. 2d 1294 (S.D. Fla. 2011) (same); *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191 (11th Cir. 2009) (involving parallel proceeding). Here, there is no such parallel action -- just a unilateral action taken by Defendant before the European Commission in which Plaintiff has no voice.

Therefore, here, in the absence of a parallel foreign proceeding, a foreign court with concurrent jurisdiction and a foreign judgement, the *Turner* factors are inapposite. The application of the *Turner* factors to this case makes little sense. The Court noted as much in its Order when it excluded analyzing several much of the criteria set forth in *Turner* "given the lack of parallel judicial proceedings." Order, D.E. 25 at p. 3-4. In considering only a small subset of the *Turner* factors (because the rest is inapplicable), the entire evaluation is unfairly distorted. However, to the extent the *Turner* factors do apply in this context, such factors weigh in favor of vacating the stay.

A. International Comity Factors in *GDG Acquisitions, LLC* Are Inapplicable Because There Is No Foreign Proceeding That Can Adjudicate the Parties' Rights

The April Stay Order is immoderate when considering principles of international comity because the international comity factors set forth in *GDG Acquisitions, LLC* relied upon by this Court in its Order are misplaced here, where there is no foreign proceeding that can adjudicate the parties' claims. *See GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024 (11th Cir. 2014). Indeed, like *Turner*, *GDG Acquisitions, LLC* dealt with an entirely different issue than those before this Court—whether a foreign forum is the proper forum to resolve the dispute between the parties. *See id*. (vacating the district court's dismissal of the case based on prospective international comity, finding that such "exceptional doctrine" was inapplicable, even when there was a foreign forum that could potentially adjudicate the parties' claims).

The Eleventh Circuit has noted that "[t]he doctrine of international comity can be applied retrospectively or prospectively," but has not applied the doctrine where there is no foreign forum to adjudicate the parties' rights. *See St. Martinus Univ., NV v. Caribbean Health Holding, LLC*, No. 19-22278-CIV-ALTONAGA/Goodman, 2020 U.S. Dist. LEXIS 33457, at *18 (S.D. Fla. Feb. 27, 2020) (citing *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004)). In applying international comity ***retrospectively***, "courts consider whether to respect the judgment of a foreign tribunal or to defer to parallel foreign proceedings." *Id*. (citing *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1030 (11th Cir. 2014)). And "***[w]hen applied prospectively***, domestic courts consider whether to dismiss or stay a domestic action based on the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum." *Id*. (citations omitted) (emphasis added).

Here, neither retrospective nor prospective international comity is applicable because there is no foreign forum or proceeding warranting deference. The European Commission is not resolving the dispute arising from the Helms-Burton Act, particularly given its reinforced obstruction to the Act in its most recent Communication. It is instead working to prevent the application of the Helms-Burton Act altogether. Unlike in other cases where courts have applied international comity to allow a foreign forum to adjudicate the parties' rights, here, no such foreign forum exists. To allow the European Commission to determine whether Defendant can proceed with this action is to deprive Plaintiff of all due process as Plaintiff cannot present its case to the European Commission and Plaintiff cannot even access Defendant's application to the European Commission.

In applying the doctrine of international comity to stay this case, the Court mistakenly considered the three factors laid out in *GDG Acquisitions, LLC v. Gov't of Belize*.[4] Indeed, such factors clearly relate only to cases where there is a potential foreign proceeding that may adjudicate the parties' claims. In fact, three out of the four factors relate specifically to such foreign proceeding. With no such foreign proceeding in question here, the *GDG Acquisitions, LLC* four-factor test is misplaced. The Court itself rendered the first factor – the strength of the United States'

[4] The three *GDG Acquisitions, LLC v. Gov't of Belize* factors for evaluating international comity are: (1) the strength of the United States' interest in using a foreign forum, (2) the strength of the foreign governments' interests, and (3) the adequacy of the alternative forum.

interest in using a foreign forum – inapplicable because there is no ongoing parallel proceeding. Order, D.E. 25 at p. 3. The Court did consider the third factor – the adequacy of the alternative forum – despite there not being an alternative forum to consider. *Id*. The Court noted that "[p]laintiff has provided no information calling into question the adequacy of the European Commission to undertake interpretation of its own rules and regulations, accordingly, the third factor weighs in favor of abstention pursuant to international comity." *Id*. But the adequacy of the European Commission to interpret its own rules and regulations is irrelevant here because the European Commission is not an available alternative forum wherein the parties' rights may be adjudicated. The European Commission is simply deciding unilaterally whether the Defendant may proceed in this case. Moreover, this Court should not defer to an institution whose goal is to undo U.S. law.

The district court's decisions in *French Cuff v. Markel Am. Ins. Co.* and *Kleiman v. Wright* are instructive here. *See French Cuff v. Markel Am. Ins. Co.*, No. 07-60006-CIV-LENARD/TORRES, 2007 U.S. Dist. LEXIS 115813 at *6 (S.D. Fla. May 21, 2007). The *French Cuff* court denied defendant's motion to stay the case, determining that another litigation proceeding in France could not be used as grounds to stay the action in the district court because the French proceeding addressed a "wholly distinct issue" from that which the district court would be addressing. *See French Cuff*, 2007 U.S. Dist. LEXIS 115813 at *6. Similarly, in *Kleiman* the court denied international abstention partly because the case was distinct from the case brought abroad and those foreign proceedings did not address any of the claims brought by the plaintiffs in the foreign proceeding. *See Kleiman v. Wright*, Case No. 18-CV-80176, 2018 U.S. Dist. LEXIS 216417, at *34-35 (S.D. Fla. Dec. 27, 2018). Also, both the *French Cuff* and *Kleiman* courts noted that the principle of international comity is typically used to "justify abstention only where a foreign court has already rendered a judgment." *See French Cuff*, 2007 U.S. Dist. LEXIS 115813 at *7; *see also Kleiman*, 2018 U.S. Dist. LEXIS 216417, at *34-35. Here, there is neither a foreign judgment nor an ongoing litigation abroad that can justify abstention. The ongoing European Commission process cannot be used as grounds to stay this action because, like the foreign proceeding in *French Cuff* and *Kleiman*, the European Commission is considering a wholly distinct issue from those before this Court. Put another way, particularly given the new EU

Communication, the European Commission is merely considering Defendant's application to participate in this case, while effectively suspending the Title III claims at the heart of this case.

B. Fairness to Litigants Favors Vacating the Stay

To the extent that fairness to litigants should be considered in evaluating the stay, such consideration weighs in favor of vacating the stay. Nevertheless, when courts, like the *Turner* Court, have considered fairness to litigants in staying on international abstention grounds it has been in the context of a parallel or prospective foreign proceeding that may be able to adjudicate the parties' claims. Because no such action exists here, the criteria for evaluating fairness to litigants is inapposite.[5] As this Court noted in its Order, "as no parallel proceedings are ongoing, the Court finds that factors one and two do not apply to its analysis." Order, D.E. 25 at 3. Therefore, the Court is left with evaluating only the third *Turner* factor regarding fairness to litigants – possible prejudice to the parties resulting from abstention.

Indeed, preventing prejudice to the party opposing the stay is paramount. *See Turner Entertainment Co.*, 25 F.3d at 1523 ("Before accepting or relinquishing jurisdiction a federal court must be satisfied that its decision will not result in prejudice to the party opposing the stay"). Therefore, it is vital that the Court ensure "the ability of the parties to fully and fairly litigate their claims in some tribunal." *See id.* (citing and quoting *Hilton v. Guyot*, 159 U.S. 113, 205, 16 S. Ct. 139, 159, 40 L. Ed. 95 (1895) ("It must, however, always be kept in mind that it is the paramount duty of the court before which any suit is brought to see to it that the parties have had a fair and impartial trial, before a final decision is rendered against either party.")).

Here, the prejudice to Plaintiff from the April Stay Order is overwhelming. Firstly, there is no alternative tribunal where the parties can fully and fairly litigate their claims. In *Turner*, the court concluded that staying the U.S. litigation pending the foreign proceeding in that case "will not foreclose any chance for Turner to obtain a fair and just result." Here, the opposite is true for Plaintiff. Plaintiff is not only being denied the opportunity to be heard by this Court but by ***any*** court as there is no parallel foreign proceeding where Plaintiff can plead her case. In fact, Plaintiff

[5] In evaluating fairness to litigants, the *Turner* Court considered: "(1) the order in which the suits were filed, (2) the more convenient forum, and (3) the possibility of prejudice to the parties resulting from abstention." *Turner*, 25 F.3d at 1521-22 (internal citations omitted).

has not even been permitted to see Defendant's filings to the European Commission, nor is she privy to the communications between Defendant and the European Commission.

Indeed, such lack of transparency is also prejudicial because Plaintiff has no input into the European Commission's decision-making process. And, Plaintiff has no way of gauging whether such process is fair. For example, because Plaintiff cannot see Defendant's application to the European Commission, Plaintiff cannot evaluate whether such application was adequately complete or persuasive. Frankly, especially because of the indefinite stay, Defendant has every incentive to continue to supply deficient information to the European Commission in the hopes of further prolonging the stay. Defendant's most recent status report reveals as much. Indeed, the European Commission stated that there were "possible gaps of information that require further investigation." Defendant's Status Report, D.E. 31 at ¶ 9. Plaintiff has no way of knowing whether such gaps are intentional. The continued lack of transparency here leaves Plaintiff defenseless – both before this Court and before the European Commission. Furthermore, this entire European Commission process is inherently prejudicial because it ultimately seeks to deprive Plaintiff of her rights under the Helms-Burton Act altogether, all the more so since the European Commission's recent Communication.

Furthermore, despite the Court's statements to the contrary, the prejudice to Plaintiff is immediate and concrete while the prejudice to Defendant is speculative at best. Defendant cites the threat of a EUR 600,000 fine for participating in this case as its potential harm. However, that threat is merely a pretext for further delay. 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. There is no evidence that the European Commission will impose the full EUR 600,000 fine, especially because the European Commission has not done so in the past.[6] Indeed, Defendant's own statements

[6] It appears that a similarly situated defendant has filed a motion to dismiss a Title III Helms-Burton action in this district without any apparent authorization from the European Commission or any apparent sanction for filing such motion or for participating in the litigation for upwards of four months since its appearance on March 11, 2020 . *See Cueto v. Pernod Ricard*, Case No. 20-cv-20157-KMW (S.D. Fla.) (D.E. 19 at 22 (referencing the EC Blocking Regulation as a reason for proper service), D.E. 30 at 33, n.15 (same)). Additionally, the author of a recent law review article reported that "[t]he ***sole attempt at enforcement*** of the EU blocking statute occurred in 2007, by the government of Austria . . . .Thus, the entire effort of the EU to thwart U.S. extraterritorial efforts with respect to Cuban sanctions ***ground to an unceremonious halt with one attempted –and failed*** – enforcement action by Austria, a member of the EU." Meaghan Jennison,

regarding the potential EUR 600,000 fine reveal its tenuousness. Specifically, as Defendant admits, EUR 600,000 is the ***maximum*** penalty that Defendant ***may*** suffer – there is no evidence that Defendant will suffer the full extent of the penalty. *See* Motion to Stay at ¶¶ 3 and 15 ("Should Iberostar ignore the European Commission's mandate and actively participate in this action without the Commission's authorization, each breach would be subject to a penalty ***of up to*** EUR 600,000 by the Spanish government…") ("A violation of this prohibition constitutes a serious infraction, which ***may*** result in fines imposed on Iberostar for ***up to*** EU 600,000 for each breach") (emphasis added).

Moreover, 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. Indeed, the interpretation of Article 5 is at the center of the *Bank Melli Iran v. Telekom Deutschland GmBH* case currently underway. Just last year in March 2020, the European Court of Justice was asked, for the first time, for the proper interpretation of Article 5 of the EC Blocking Regulation in that case. *See Case C-124/20: Request for a preliminary ruling from the Hanseatisches Oberlandesgericht Hamburg (Germany) lodged on 5 March 2020 — Bank Melli Iran, a public limited company under Iranian law v Telekom Deutschland GmbH*, Official Journal of the European Union (June 15, 2020).

Article 5 of the EC Blocking Regulation states as follows:

> No person referred to in Article 11 shall ***comply***, whether directly or through a subsidiary or other intermediary person, ***actively or by deliberate omission***, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom.

See Article 5, EC Blocking Regulation, D.E. 16-1 (emphasis added). Accordingly, Article 5 prohibits a European corporation like Defendant to ***actively comply*** with a requirement or prohibition resulting from the Helms Burton Act. Accordingly, moving to dismiss this case is not specifically prohibited by the EC Blocking Regulation. In fact, otherwise answering the Complaint or participating in this case is not explicitly prohibited either.

Comment: *The More Things Change, the More They Stay the Same: The United States, Trade Sanctions, and International Blocking Acts*, 69 Cath U.L. Rev. 163, 174 (2020) (emphasis added).

Surely other possible interpretations of Article 5 of the EC Blocking Regulation exist. For example, Article 5 may prohibit only the compliance with a judgment rendered by this Court. Or perhaps moving to dismiss a case arising from the Helms-Burton Act would not meet the threshold of active compliance and may not be prohibited under Article 5. Otherwise, perhaps moving to dismiss such a case would not warrant imposing the full extent of the EUR 600,000 fine. The realm for Article 5 interpretations is vast. Accordingly, there is no *actual, concrete* threat of a EUR 600,000 fine to Defendant because such threat assumes the validity of Defendant's Article 5 interpretation, which has yet to be confirmed.

Furthermore, any more delay is prejudicial to Plaintiff because such delay makes adjudicating Plaintiff's claims more difficult. Specifically, further delay means postponing discovery at the risk of losing important witness testimony. Indeed, as the subject property at the center of this litigation was confiscated over 60 years ago, there is a limited pool of potential witnesses who were present and have information regarding the property and the confiscation thereof. Delaying the case jeopardizes the opportunity to depose such witnesses.

Moreover, as Plaintiff pointed out in her Reply in support of the Motion to Lift the Stay [D.E. 23 at 6], delaying this case affords Defendant the time and opportunity to change its corporate relationships and arrangements in the United States to attempt to evade this Court's jurisdiction and prevent enforcement of judgment against it in the future. The Court stated that the threat that Defendant is moving assets abroad is speculative and that Plaintiff has not provided any evidence of same. However, Plaintiff cannot know what Defendant is doing or planning to do behind closed doors. In other words, Plaintiff cannot provide such evidence without discovery. Staying the case precludes discovery that may reveal important information regarding Defendant's attempts to move their assets abroad or otherwise change their corporate relationships in the U.S. to avoid this Court's jurisdiction. "[J]ustice delayed is justice denied." *See Hyde v. Irish*, 962 F.3d 1306, 1309 (11th Cir. 2020).

In addition, the EC Blocking Regulation makes any delay of this case increasingly prejudicial to Plaintiff. Specifically, the EC Blocking Regulation prohibits the enforcement of U.S. judgments rendered pursuant to the Helms-Burton Act in Europe. Consequently, any future collection efforts against Defendant's assets in Europe (where Defendant holds most of its assets) is impossible. And, while Defendant currently seems to have successful hotel ventures in the

United States (in New York and Florida), which could satisfy a judgment against it, such ventures may not remain successful after the duration of this indefinite stay. Accordingly, enforcing a potential judgment against Defendant in the United States may become difficult or even impossible down the line.

Furthermore, in its recent Communication, the EU referred to plans to make amendments to the EC Blocking Regulation "to further deter and counteract the unlawful extra-territorial application of unilateral sanctions by third countries to EU operators." *See* Communication, Key Action 15. Such amendment could delay the European Commission's decision-making process regarding Defendant's application, or it could alter the process entirely to preclude further prejudice Plaintiff. Thus, while the European Union tactically delays this suit and plans how to further nullify the effects of Helms-Burton, Plaintiff's case becomes increasingly complicated as does her chances of ever enforcing a judgment against Defendant. In the meantime, Plaintiff is forced to unfairly waste her resources litigating whether her case can ever even be heard.

C. Judicial Efficiency Favors Vacating the Stay

The criteria for evaluating judicial efficiency as laid out in *Turner* is not necessarily on point given the lack of parallel judicial proceedings. The Court agreed, finding that *only* the last *Turner* factor – "whether the alternative forum is likely to render a prompt disposition" – applied. Preliminarily, such factor is inapplicable because the European Commission is not an alternative forum. It is not adjudicating the parties' claims before this Court. Nevertheless, to the extent the *Turner* factors do apply in considering judicial efficiency here, such factors weigh in favor of vacating the stay.

Staying this case pending the European Commission's authorization is inefficient and endangers the Court's judicial resources. Courts have considered whether a stay will preserve judicial efficiency even when there is no parallel foreign proceeding. *See Garmendiz v. Capio Partners, LLC*, Case No. 8:17-cv-00987-EAK-AAS, 2017 U.S. Dist. LEXIS 122229 (M.D. Fla. July 25, 2017) ("Courts have considered the potential to simplify and streamline issues, together with the reduction of the financial burden on the parties and the Court, as factors in determining whether a stay will preserve judicial economy."). Courts have also established that "the ***Defendant*** bears the burden of establishing that judicial economy is best served by ordering a stay." *Id.* (citations omitted) (emphasis added). Here, the Defendant fails to meet its burden as it failed to

address the issue of judicial economy altogether in its Motion for Stay and Response. Therefore, judicial efficiency considerations weigh in favor of vacating the say.

This Court should easily find that it is inefficient to stay this case pending authorization from the European Commission because such authorization may never come and certainly has not come promptly. This Court considered only the fourth *Turner* factor – whether the alternative forum is likely to render a prompt disposition. In its Order, in considering the fourth *Turner* factor – whether the alternative forum is likely to render a prompt disposition – the Court stated that "there is no reason to presume that the European Commission is unlikely to render a prompt decision on Iberostar's request for authorization under Regulation 2271/96." However, at this point, after waiting more than nine months, there is no need to presume the unlikelihood of a prompt authorization from the European Commission because it is evident. The window for prompt authorization has closed. Nevertheless, as first noted above in Section I, the record is riddled with signs of further delay. And, in contrast to the delayed process here, in *Rodriguez et al.*, where the court issued a limited stay, the defendant received its authorization from the U.K. within one month of submitting its application for such authorization. Moreover, as discussed above in Section I, the European Commission has recently further clarified its opposition to the Helms-Burton Act in its Communication regarding measures to strengthen the EC Blocking Regulation. These measures indicate a complete lack of incentive to authorize Defendant to engage in this litigation, and certainly no incentive to do so quickly. Continuing this indefinite stay will only continue to encourage the European Commission to further delay this action and waste this Court's time and resources.

Moreover, in its Order, the Court dismissed the second *Turner* factor – "the desirability of avoiding piecemeal litigation" – in its inquiry of judicial efficiency. However, the April Stay Order will likely cause the piecemeal litigation that this Court seeks to avoid. Indeed, Defendant has made clear that, if it obtains permission from the European Commission, Defendant will be seeking "dismissal for, among other things, insufficient service of process and lack of personal jurisdiction." Motion to Stay, D.E. 16 at ¶ 10; Status Report, D.E. 20 at 1. n.1 ("Iberostar reserves all its rights and will move to dismiss based on its Rule 12 defenses when it receives authorization to do so from the European Commission."). Therefore, the Court should consider that the European

Commission may authorize Defendant to move to dismiss this case without authorizing them to participate in any further litigation.

Therefore, if this Court ultimately denies Iberostar's motion to dismiss, this Court will likely face another motion to stay by Defendant pending further authorization by the European Commission. Thus, this game may persist for every stage in this case, resulting in inconvenient and expensive piecemeal litigation contrary to the doctrine of judicial efficiency. To continue to grant Defendant and the European Commission this unobstructed freedom would set an unwise and inefficient precedent that every time a case contravenes the EC Blocking Regulation, the case must be indefinitely stayed and/or repeatedly halted pending authorization by the European Commission. The European Commission cannot be allowed to waste judicial resources and dictate the terms and procedure of this Court. Accordingly, this Court should find that judicial efficiency favors vacating the April Stay Order.

IV. If this Motion is Denied, this Court Should Certify Interlocutory Appeal of the Order Denying this Motion to the Eleventh Circuit Pursuant to 28 U.S.C. § 1292(b)

If this 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). Section 1292(b) states in pertinent part that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order...

28 U.S.C. §1292(b). Indeed, this Court is given "circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable" under 28 U.S.C. § 1292(b). *See Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 46, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995).

"Under the statute, then, the district court may exercise its discretion to certify an interlocutory order to the court of appeals only if: 1) the ruling involves a 'controlling question of law'; 2) there is 'substantial ground for difference of opinion' as to the ruling; and 3) an immediate appeal will likely 'material advance' the case towards its end." *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp. 2d 1226, 1251 (S.D. Fla. 2013) (citations omitted).

If this Motion is denied, 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 EU Defendant to participate in the case, pursuant to the EU Blocking Regulation, which was passed specifically to counter the effects of the Helms-Burton Act.*** As will be demonstrated below, Plaintiff meets the above requirements for a Section 1292(b) appeal.

A. Controlling Question of Law

"An interlocutory order involves a controlling question of law when it concerns the meaning of a statutory or constitutional provision, regulation, or common law doctrine, or an ***abstract legal issue that the court of appeals can decide quickly and cleanly without having to study the record***." *Id*. (internal quotations and citations omitted) (emphasis added). The questions should be "presented at a high enough level of abstraction and will have general relevance to other cases in the same area of law. They are not fact-bound questions." *Id.* at 1252 (internal quotations and citations omitted). Furthermore, the controlling question of law should have a "determinative impact on the case." *See Grabein v. 1-800-Flowers*, No. 07-22235-CIV-HUCK, 2008 U.S. Dist. LEXIS 140776, at *5 (S.D. Fla. Mar. 12, 2008) (granting certification for interlocutory appeal).

Here, like in *Mais* where this Court certified the order therein for interlocutory appeal, the central issue here is an abstract one that is highly relevant to other cases arising under the Helms-Burton Act. *See Mais*, 944 F. Supp. 2d 1226 at 1252. The propriety of a stay pending EU authorization to an EU Defendant pursuant to the EC Blocking Regulation is not fact-bound as the facts here are undisputed and simple. It is, therefore, unnecessary to study the record of this case to address the issue here. Indeed, the propriety of a stay in this context is an issue "that interlocutory appeals were designed to address" because it is limited and specific to the propriety of stays pending the European Commission's authorization to an EU defendant in Helms-Burton Act cases. *See Grabein*, No. 07-22235-CIV-HUCK, (S.D. Fla. Mar. 12, 2008) at *5-6.

Moreover, the central issue here is a purely legal one that will not only have a determinative impact on this case but will have major implications for all Helms-Burton Act cases involving an EU defendant. The propriety of a stay in this context not only determines whether Plaintiff will ever be given the opportunity to resolve her claims under the Act, it is also determinative of whether any similarly situated plaintiff will have such opportunity. Accordingly, if a stay in this

context is deemed proper, all plaintiffs with Helms-Burton Act claims will be at the mercy of the European Commission, which has already expressed its clear opposition to the Act. Indeed, this case is like *Grabein* where the court emphasized the relevance of the question to numerous similar cases in a "developing and expanding area of law" because cases arising out of the Helms-Burton Act have only recently began proliferating. *See Grabein v. 1-800-Flowers*, No. 07-22235-CIV-HUCK, 2008 U.S. Dist. LEXIS 140776, at *5-6 (S.D. Fla. Mar. 12, 2008) ("[B]ecause e-commerce is a developing and expanding area of commercial activity, the answer to this question likely will affect almost all electronic transactions and the contents of the receipts a seller provides"). Therefore, the central issue here is a controlling question of law that meets the first requirement for certifying appeals under Section 1292(b).

B. Substantial Ground for Difference of Opinion

There 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. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp. 2d 1226, 1251-52 (S.D. Fla. 2013) (quotations and citations omitted). Here, there is substantial ground for difference of opinion as to the propriety of stays in this context as Judge Gayles, confronting an almost identical issue in *Rodriguez et al.*, Case No. 20-cv-23287-DPG (S.D. Fla. Sept. 23, 2020), arrived at a different conclusion. In *Rodriguez et al.*, instead of pegging the stay of that case to Defendant receiving the required authorization, Judge Gayles limited the stay to a specific date, five months from the original deadline for defendant's response to the Complaint ***because we cannot proceed or wait indefinitely for an answer regarding these issues***." *See* Hearing Transcript, D.E. 50 at 30, *Rodriguez et al.*, Case No. 20-cv-23287-DPG, (emphasis added). *See* Section I, *supra* for further implications of Judge Gayles' order.

Thus, like in *Grabein*, the issue presented here "by the intra-district split is a close question of [legal] interpretation upon which reasonable minds could differ." *See Grabein v. 1-800-Flowers*, No. 07-22235-CIV-HUCK, 2008 U.S. Dist. LEXIS 140776, at *6 (S.D. Fla. Mar. 12, 2008). Moreover, other courts have refused to extend international comity, which is the basis for this Court's issuing the stay at issue here, when international comity would be offended (*See* Section II, *supra*). Therefore, given 1) the difference of opinion regarding stays in this context (if this Motion is denied); 2) the dearth of causes of actions arising out of the Helms-Burton Act because

the Act was just recently unsuspended, and 3) courts' general reluctance to extending international comity when doing so runs contrary to U.S. interests, the central issue herein is substantial enough to meet the requirements for certification under Section 1292(b).

C. Material Advancement of the Case to its End

"An immediate appeal can be said to 'materially advance' the case when 'resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation.'" *See Mais*, 944 F. Supp. 2d 1226 at 1252 (citing *McFarlin*, 381 F.3d at 1259). One factor that the Eleventh Circuit considers when considering the material advancement of the case is whether "resolution of the question may reduce the amount of litigation necessary on remand." *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, No. 19-cv-23591, 2020 U.S. Dist. LEXIS 110042, at *6 (S.D. Fla. June 23, 2020) (citations omitted).

Here, like in *Mais*, resolving the issue at hand – the propriety of a stay in this context – would certainly materially advance the case and shorten the litigation. To wit, this stay, which is pegged to the European Commission's authorization can persist indefinitely. And, given the EU's further opposition to the Helms-Burton Act, which was made clear in its recent Communication, such authorization may never come. Or, at best, such authorization will be substantially delayed. Determining the propriety of such a stay has the potential to move the case forward to resolution more quickly. Moreover, resolving the issue presented herein will likely reduce the amount of litigation necessary on remand because it would prevent the Defendant from repeatedly seeking authorization to participate in this case at every stage of the litigation, preventing this Court from having to stay this case at every such stage. *See* Section III.C., *supra* for a more detailed discussion on the piecemeal litigation stemming from staying this case. Even if the European Commission will grant its authorization for Defendant to move to dismiss the case in the interim, the European Commission may not otherwise allow Defendant to participate in this case without first seeking authorization, resulting in re-staying this case again and again.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court vacate the stay and allow this case to proceed. And, if this Court denies Plaintiff's motion, Plaintiff respectfully requests that this Court certify this Court's order denying the Motion to the Eleventh Circuit pursuant to 28 U.S.C. § 1292(b).

Dated: March 3, 2021

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH CONFERENCE

In compliance with Local Rule 7.1(a)(3), undersigned counsel represents that he has conferred with counsel for Defendant, and Defendant does not agree to the relief requested herein.

/s/ Leon N. Patricios
Leon N. Patricios