IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 21-11906-AA

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

Plaintiff/Appellant,

vs.

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

Defendant/Appellee.

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

# APPELLEE'S RESPONSE TO JURISDICTIONAL QUESTION

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# CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

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

Canto Marti, Maria, *Plaintiff/Appellant*

Darmon, Danit, *counsel for Plaintiff/Appellant*

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

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

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

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

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

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

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

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

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

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

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

All others as listed by other parties in this matter.

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

## APPELLEE'S RESPONSE TO JURISDICTIONAL QUESTION

Appellee Iberostar Hoteles y Apartamentos S.L. ("Iberostar") submits its response to the Court's jurisdictional question and states that the appeal should be dismissed for lack of jurisdiction for three reasons. First, if, as Appellant argues, the stay entered by the district court is immoderate and indefinite and thus "final," then the time to appeal was following the entry of the stay on April 24, 2020 ("the April 2020 Stay Order"). But Appellant failed to appeal the April 2020 Stay Order, and a motion for reconsideration filed 11 months later—untimely under Federal Rules of Civil Procedure 59 and 60 and Federal Rule of Appellate Procedure 4—cannot resurrect her right to appeal or the Court's jurisdiction.

Second, the Court lacks jurisdiction because the stay is not immoderate and does not put Appellant effectively out of court. The district court did not cede jurisdiction to another forum, and Appellant will have her day in court. Thus, the stay is not a final appealable order. It remains a non-final order, and an order denying reconsideration of a non-final order is not appealable.

Lastly, the April 2020 Stay Order is not an appealable collateral order under the collateral order doctrine because it does not conclusively determine an important issue that is separate from the merits. Moreover, even if the April 2020 Stay Order was an appealable collateral order, the time to appeal expired long ago and could not be revived by a motion for reconsideration filed almost a year later. Nor is the order

denying reconsideration appealable as a collateral order because it likewise does not conclusively determine any issue and cannot be used to restart the appeal clock set in motion with the April 2020 Stay Order.

## I. JURISDICTIONAL QUESTION

The Court requested a response to the following jurisdictional question:

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

## II. APPELLEE'S RESPONSE TO THE JURISDICTIONAL QUESTION

The Court does not have jurisdiction in this case because (i) Appellant did not file a timely notice of appeal to the underlying stay order; (ii) the stay order is not a final appealable order because it is not immoderate and does not put the Appellant "effectively out of court"; and (iii) the collateral order doctrine does not apply as the

district judge did not conclusively determine an important issue separate from the merits of the case. Accordingly, the Court should dismiss the appeal for lack of jurisdiction.

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

On April 24, 2020, well over a year before the June 1, 2021 notice of appeal filed in this case, the district court entered a stay of the litigation to allow Iberostar to receive a decision from the European Commission—a branch of the European Union—as to whether Iberostar would be authorized to participate in the underlying federal lawsuit (the "April 2020 Stay Order"). [D.E. 17; D.E. 42]. Appellant did not appeal the April 2020 Stay Order. Instead, Appellant waited over three months to file a Motion to Lift Stay on July 27, 2020, in which Appellant argued that the stay was immoderate and should be vacated. [D.E. 21 at 2-5, 7-8]. The district court denied the Motion to Lift Stay on September 17, 2020 (the "September 2020 Order"), and Appellant waited another five and a half months from the entry of the September 2020 Order before filing her Renewed Motion to Lift Stay, And If Denied, Motion for Certification of Order Under 28 U.S.C. § 1292(b) on March 3, 2021. [D.E. 25; D.E. 32]. The Renewed Motion reiterated the arguments made in the original motion to vacate (and now repeated in the Initial Brief) that "the April Stay Order is immoderate and should be vacated." [D.E. 32 at 2]. On May 4, 2021, the district court denied the Renewed Motion ("May 2021 Order"), and on June 1,

2021, Appellant filed a notice of appeal of this May 2021 Order. [D.E. 38; D.E. 42]. But the May 2021 Order simply denied Appellant's renewed motion to lift a stay that had been entered over a year earlier, on April 24, 2020, in the April 2020 Stay Order. [D.E. 17]. Appellant's notice of appeal was untimely, and thus this Court lacks jurisdiction to review the propriety of the stay.

It is well settled that the filing of an untimely motion to vacate or motion for reconsideration does not toll the time for filing a notice of appeal. *See Advanced Estimating Sys., Inc. v. Riney*, 77 F.3d 1322, 1323–24 (11th Cir. 1996) (noting that only a timely filed Rule 59 or 60 motion will toll the time for filing the notice of appeal); *Am. Mfrs. Mut. Ins. Co. v. Stone*, 743 F.2d 1519, 1521 (11th Cir. 1984) (same). Rule 4(a)(4)(A), Federal Rules of Appellate Procedure, specifically provides that when a party files a motion for relief from an order under Federal Rules of Civil Procedure 60, that motion must be filed "no later than 28 days" after the underlying order or judgment is entered. Fed. R. App. P. 4(a)(4)(A)(vi). A motion to alter or amend a judgment or order under Rule 59 must also be filed no later than 28 days after the entry of the judgment to toll the time for filing the notice of appeal. Fed. R. Civ. P. 59(e); Fed. R. App. P. 4(a)(4)(A)(iv).

Here, Appellant's Motion to Lift Stay and subsequent Renewed Motion to Lift Stay constituted either Rule 59 or Rule 60 motions that needed to be filed within 28 days of the April 2020 Stay Order to toll the time for filing a notice of appeal. *See*

*Stone*, 743 F.2d at 1522 n.1 (reviewing the requirements for filing Rule 59 and Rule 60 motions in connection with the appellant's motion to lift stay and noting that the Appellant's "motion to lift the stay was not timely under any of the Civil Rules specifically mentioned in Fed. R. App. P. 4(a)(4)").[1] In this case, neither of Appellant's filings tolled the time for filing a notice of appeal. The first motion to lift stay was filed over three months after the April 2020 Stay Order was entered, well after the 28-day deadline. Even if that first motion to lift stay had been timely filed, Appellant's subsequent Renewed Motion to Lift Stay was also untimely, filed almost a year after the April 2020 Stay Order and over five months after the September 2020 Order denying the first motion to lift stay. Thus, to the extent that Appellant argues that the September 2020 Order denying her first motion to lift stay modified the original April 2020 Stay Order and restarted the appeal clock, that argument also fails because Appellant filed her Renewed Motion to Lift Stay in March 2021, five and a half months after the September 2020 Order. In short, both motions to vacate were filed well after the 28-day deadline set forth in Rule 4(a)(4)(A).

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

Appellant cannot revive appellate jurisdiction over the propriety of the stay entered via the April 2020 Stay Order—or even the propriety of the September 2020 Order denying her first motion to lift stay—by filing a renewed motion months later and then appealing the denial of that order. In fact, Appellant apparently recognized her failure to timely appeal the original April 2020 Stay Order and/or the September 2020 Order because she specifically requested as alternative relief in her Renewed Motion to Lift Stay that the district court certify the order denying her renewed motion for certification for interlocutory review under 28 U.S.C. § 1292(b). [D.E. 32 at 1].

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

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

Even if Appellant had timely appealed or moved for reconsideration of the April 2020 Stay Order, this Court still would not have jurisdiction to review the stay

entered in this case. As acknowledged in this Court's jurisdictional question, a stay is generally not a final appealable order. *Stone*, 743 F.2d at 1522-23 (noting that a stay order is generally not final under 28 U.S.C. § 1291 for purposes of appeal). A narrow exception has been made for stay orders that are immoderate and thus render a plaintiff "effectively out of court." *See Hines v. D'Artois*, 531 F.2d 726, 730-31 (5th Cir. 1976) (providing that a stay order is final and appealable if it puts the appellant effectively out of court); *King*, 505 F.3d at 1165-66 (explaining that, in determining the extent to which a plaintiff is "effectively out of court," this Court has held that a stay order that is "immoderate and involves a protracted and indefinite period of delay" is final and appealable under 28 U.S.C. § 1291). But that narrow exception does not apply here.

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

In *Miccosukee Tribe*, this Court noted that "[e]ffectively out of court by suspended animation is a ***narrow*** doctrine that applies only when a case is placed in an 'extended state of suspended animation' ***without good reason***." 559 F.3d at 1197 (citing *Hines*, 531 F.2d at 730) (emphasis added); *see also Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983) (noting that the "effectively out of court" exception "does not disturb the usual rule that a stay is not ordinarily a final decision for purposes of § 1291, ***since most stays do not put the plaintiff 'effectively out of court.'*** ") (emphasis added). In the few cases in this Circuit in which a stay has been held to be directly appealable, the stays resulted in indefinite delays pending the outcome of other proceedings that would not "control or significantly inform the litigation" that was being stayed. *Miccosukee Tribe*, 559 F.3d at 1197.

In *Hines*, for example, the stay put the plaintiff effectively out of court because the stay was in effect pending the ***conclusion*** of an EEOC proceeding (which had not been initiated at the time the stay was entered) that would take anywhere between 18 months to five years to conclude. *Hines*, 531 F.2d at 731, 736-37. In addition, there was no "reasonable probability that the EEOC conciliation efforts will be productive." *Id*. at 736. Similarly, in *Stone*, this Court held that the stay put the plaintiff effectively out of court and was thus reviewable as a final order because the stay was in effect until the ***resolution*** of a previously filed state action, which would

not decide issues presented in the stayed federal claim. 743 F.2d at 1521, 1523. *See also King*, 505 F.3d at 1172 (holding that a stay pending resolution of proceedings in Italian court put the plaintiff effectively out of court because there was no way of knowing when the Italian litigation would conclude and there was "no assurance at all that the Italian proceedings will directly relate to the issues in this [federal] lawsuit").

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

The stay in this case is not analogous to the "effectively out of court" stays in *Hines*, *Stone*, *King*, and *CTI*. Here, the stay entered by the district court will be lifted when the European Commission ("EC") renders a decision on Iberostar's application to the EC for authorization to participate in the federal lawsuit. Iberostar is a Spanish entity subject to the laws of the European Union, including EC Council Regulation No. 2271/96, which prohibits any entity incorporated within the European Union from participating in a lawsuit brought under certain acts, including Title III of the Helms-Burton Act, without first applying for authorization from the EC. [D.E. 16-1 at 3, 6]. Failure to comply with the regulation subjects Iberostar to fines imposed by the Spanish government of up to EUR 600,000 for each breach. [D.E. 16 at 2]. The application for authorization was filed with the EC before the stay was entered (and thus the review process was already underway), and the EC's decision will determine whether Iberostar can defend itself in this lawsuit. Clearly, this is a decision that will have "a substantial or controlling effect on the claims and issues in the stayed case" or "control or significantly inform the litigation" as the EC's decision will govern whether Iberostar will defend on the merits or will be required to decide between defaulting or facing hefty fines. *Miccosukee Tribe*, 559 F.3d at 1197-98. The district court did not abdicate its jurisdiction to determine the merits of Appellant's claims to another forum, and the Appellant will still have her day in federal court to hear *all* of the claims and issues that she has raised. Thus, the stay

does not put Appellant effectively out of court and does not constitute a final and appealable order.

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

Finally, even if Appellant had timely appealed or moved for reconsideration of the April 2020 Stay Order, this Court still would not have jurisdiction under the collateral order doctrine to review the propriety of the stay. The collateral order doctrine originated with the United States Supreme Court ruling in *Cohen v. Beneficial Indus. Loan Corp.*, which recognized a "small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. 541, 546 (1949). An order is immediately appealable under the collateral order doctrine set forth in *Cohen* if it: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from and collateral to the merits of the action; and (3) would be effectively unreviewable on appeal from the final judgment. *Plaintiff A. v. Schair*, 744 F.3d 1247, 1252-53 (11th Cir. 2014).

But, as the Supreme Court has emphasized, the collateral order doctrine is narrow, and few cases will fall under its ambit. *See Will v. Hallock*, 546 U.S. 345,

350 (2006) ("Accordingly, we have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope . . . . And we have meant what we have said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership."); *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994) ("The 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered . . . ."). In addition, "each part of the *Cohen* test is a critical condition for jurisdiction." *Miccosukee Tribe*, 559 F.3d at 1199. Thus, if any one of the three factors is not satisfied, the Court cannot assert jurisdiction under the collateral order doctrine. *Id*.

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

The April 2020 Stay Order did not conclusively determine the disputed question of the stay because it specifically directed Iberostar to submit status reports

every 30 days to update the court on the request for authorization to the EC. [D.E. 17]. Even in the September 2020 Order denying the motion to vacate stay, the district court noted that the status reports "have been useful to the Court in continuing to evaluate the stay." [D.E. 25]. In the May 2021 Order denying Appellant's Renewed Motion to Lift Stay, the district court again did not conclusively determine the disputed question, finding only that the Appellant had not met the standard for reconsideration, as the circumstances had not changed. [D.E. 38 at 2]. The district court did not, however, foreclose Appellant's opportunity to file another motion for reconsideration if circumstances changed at a later date. Thus, regardless which order the Court considers, the district court did not conclusively determine the disputed question, and the first *Cohen* factor is not met.

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

But the district court did not refuse to adjudicate the merits of the case. Unlike the stays discussed above in *Hines*, *Stone*, *King*, *CTI*, and the federal court's stay in *Moses H. Cone*, the district court in this case has not ceded jurisdiction to another forum. The district court is not awaiting a decision by an alternative forum on any disputed issue arising out of Appellant's claim. Iberostar is obliged pursuant to the laws of its jurisdiction to obtain prior authorization from the EC before participating in the lawsuit. The stay in question allows Iberostar the opportunity to comply with this mandatory regulation and to first obtain a decision from the EC either approving or denying Iberostar's application for authorization to participate in the federal litigation to avoid the potential implication of fines for up to EUR 600,000 for each breach in participating in the lawsuit without the EC's prior authorization.

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

## III. CONCLUSION

This Court should dismiss the appeal for lack of jurisdiction. Appellant did not timely appeal the April 2020 Stay Order, and her untimely motions to lift the

stay did not toll the time for filing a notice of appeal. Thus, this Court lacks jurisdiction to consider the propriety of the stay entered by the district court. Furthermore, even if Appellant had timely appealed, the stay in question is not a final appealable order because it is not immoderate and does not put Appellant effectively out of court. Nor does the stay satisfy the stringent requirements of the collateral order doctrine because the district court did not conclusively determine an issue that is important and separate from the merits. For all of these reasons, the Court should dismiss the appeal for lack of jurisdiction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13th day of August 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF System.

By: /s/ Rebecca M. Plasencia