UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LUIS MANUEL RODRIGUEZ, *et al.*, Plaintiffs, v. IMPERIAL BRANDS PLC, *et al.*, Defendants.	Case No.: 1:20-cv-23287-DPG

REPLY IN FURTHER SUPPORT OF DEFENDANT IMPERIAL BRANDS PLC'S MOTION FOR A LIMITED STAY

Defendant Imperial Brands plc ("Imperial") submits this reply in further support of its motion for a limited stay to give the European Commission an opportunity to decide Imperial's pending request for authorization to defend itself in this litigation [DE 14 ("Stay Motion")].[1]

PRELIMINARY STATEMENT

1. Imperial seeks a limited stay so that it can secure authorization from the European Commission to move to dismiss this ill-founded lawsuit. Imperial has shown that, under the controlling legal standard (Stay Motion ¶¶ 18-19), this modest relief is warranted in the interests of international comity. Absent a stay, Imperial would have to choose between (a) defying the European Commission by moving to dismiss without authorization, and risking criminal prosecution in its home jurisdiction, and (b) not responding to the Complaint and risking entry of an (unwarranted) default judgment in the United States. *Id.* ¶¶ 20-24. There is no reason to place Imperial in that impossible position. The requested stay is appropriate because it is limited in

[1] Undefined capitalized terms have the meanings assigned to them in the Stay Motion.

duration (*id.* ¶ 29), will not unduly prejudice Plaintiffs (*id.* ¶ 25-27), and will preserve scarce judicial resources (*id.* ¶ 28).

2. Plaintiffs have no genuine opposition, so they instead offer a hodgepodge of erroneous evidentiary objections to the materials submitted with the Stay Motion, mischaracterizations of the limited relief that Imperial is seeking, and alarming, baseless suggestions that the Court and Imperial should simply disregard EU and U.K. law. Plaintiffs also do not explain why this Court should reject the approach that Judge Scola has adopted in the *Iberostar* case. Stay Motion ¶ 23. On September 17, 2020, Judge Scola denied a motion to vacate the *Iberostar* stay, holding that "concerns of international comity weigh in favor of this Court maintaining the stay over these proceedings until the European Commission provides Iberostar authority to participate in this litigation." Ex. A (Order Denying Motion to Vacate Stay, *Marti v. Iberostar Hoteles y Apartamentos, S.L.*, No. 20-20078-Civ-Scola (S.D. Fla. Sept. 17, 2020), ECF No. 25). Accordingly, the Court should grant the stay requested by Imperial.

ARGUMENT

A. The Requested Limited Stay Will Promote International Comity by Allowing Imperial to Secure Authorization to Defend this Litigation

3. Imperial has shown that the Court should grant a limited stay to allow Imperial to comply with *all* of its legal obligations, here and at home. Stay Motion ¶¶ 20-24. By granting a limited stay, the Court can: (a) accord "due respect" to the European Commission's position that Article 5 of Regulation 2271/96 [DE 14-2] prohibits EU companies from moving to dismiss Title III actions without authorization, Stay Motion ¶ 20 (quoting *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987)); and (b) discharge its obligation to "take every reasonable precaution" to avoid subjecting Imperial to "differing legal

commands of separate sovereigns." Stay Motion ¶ 20 (quoting *In re Grand Jury Proceedings*, 691 F.2d 1384, 1391 (11th Cir. 1982)).

4. Plaintiffs have no genuine opposition to this relief. They therefore ignore the controlling standard and the relevant case law. Plaintiffs offer only a series of meritless arguments that do not support their request that the Court force Imperial to make an impossible, unnecessary choice between risking (a) criminal proceedings in the United Kingdom, or (b) default proceedings, however unwarranted, in the United States.

(i) Plaintiffs' misplaced evidentiary objections do not justify denying Imperial an opportunity to secure authorization to respond to the Complaint

5. Highlighting the lack of any substantive opposition to the Stay Motion, Plaintiffs stress two misplaced evidentiary objections. Opp. at 2, 6-7. As a threshold matter, these evidentiary objections are misplaced because this motion presents a "preliminary matter to which the Federal Rules of Evidence do not apply." *Carasquero v. Intrepid Glob. Imaging 3D, Inc.*, 3:08-cv-241-J-34JRK, 2010 WL 11507477, at *8 n.15 (M.D. Fla. July 2, 2010). Unlike a jury, "'[a] district judge can be trusted in general . . . to give evidence its proper weight without regard to the technical rules of evidence.'" *U.S. Commodity Futures Trading Comm'n v. S. Tr. Metals, Inc.*, 14-22739-CIV-KING, 2016 WL 4055685, at *2 (S.D. Fla. July 19, 2016) (brackets and ellipses in original) (quoting *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1568 (7th Cir. 1987)).[2] Plaintiffs' evidentiary objections are also incorrect as a matter of law.

6. *First*, there is no basis for Plaintiffs' hearsay objection to a status report from the *Iberostar* matter [DE 14-4], in which counsel for another EU-based Title III defendant informed

[2] Accordingly, a district court may, for example, rely on hearsay evidence in the context of a motion to remand, *Cordova v. Sensa Prod., LLC*, 11-80835-CV-HURLEY/HOPKINS, 2011 WL 13160763, at *1 (S.D. Fla. Dec. 27, 2011), or a preliminary-injunction motion, *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995).

Judge Scola that the European Commission has cautioned that Article 5 of Regulation 2271/96 prohibits EU companies from moving to dismiss without prior authorization. *Id.* ¶ 7; Stay Motion ¶¶ 10, 24. There is, of course, no serious suggestion that counsel in the *Iberostar* case is lying to Judge Scola about what the European Commission communicated. Tellingly, Plaintiffs themselves rely on Iberostar's counsel's subsequent status report, Opp. at 7, and thereby have "effectively abandoned their evidentiary objections to these documents," *Aspen Specialty Ins. Co., v. Vista Realty Partners, LLC*, 1:10–cv–02793–AT, 2012 WL 13001907, at *2 (N.D. Ga. Sept. 13, 2012).

7. In any event, the *Iberostar* status report is not hearsay. Imperial is not adducing it for its truth, but rather to show that Imperial had to seek authorization. The status report contains a facially credible representation that the European Commission has just warned another EU company that Article 5 of Regulation 2271/96 prohibits moving to dismiss a Title III action without prior authorization. In the United Kingdom, Regulation 2271/96 is enforced through *criminal* sanctions. Stay Motion ¶¶ 11, 23. Under those circumstances, Imperial should be afforded a reasonable opportunity to secure authorization before responding to the Complaint.

8. *Second*, there is no substance to Plaintiffs' objections to the declaration filed in support of the Stay Motion [DE 15-1 ("Decl.")], which affirms that Imperial promptly submitted an application for authorization to the European Commission after being served in this action. Indeed, the Court should grant the stay even if it disregards the declaration. Regardless of the declaration, the record demonstrates that Imperial would be defying the European Commission and exposing itself to the risk of criminal liability if it moved to dismiss without authorization.

9. In any event, Plaintiffs have no genuine basis to question the veracity of the declaration. Their hearsay objection is baseless, as the Federal Rules of Civil Procedure permit a motion to be supported by declaration. *See* Fed. R. Civ. P 43(c); 28 U.S.C. § 1746. Here, the

declarant has personal knowledge of the facts stated, Decl. ¶ 1, so could competently testify to the facts if required. Plaintiffs are equally mistaken with their "best evidence" rule objection. Opp. at 6. The best-evidence rule only requires the use of original documents "where the party presenting evidence seeks to prove the specific contents of a writing." *Telecom Tech. Servs. Inc. v. Rolm Co.*, 388 F.3d 820, 830 (11th Cir. 2004). It does not bar the use of testimonial evidence to show the occurrence of an event—here, that Imperial has sought authorization. *Id*. And the best-evidence rule does not "require production of a document simply because the document contains facts that are also testified to by a witness." *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1543 (11th Cir. 1994).[3]

10. Finally, although Plaintiffs have articulated no genuine interest in reviewing the application for authorization, Imperial has legitimate reasons for *not* filing it publicly. Under Article 3 of Regulation 2271/96 [DE 14-3], the authorization process is confidential. Another federal court aptly noted that it would "make hash" of a similarly worded EU confidentiality provision if a party were required to disclose the document for use in U.S. litigation. *In re Qualcomm Antitrust Litig*., 17-md-02773 LHK (NC), 2018 WL 10731128, at *2, *4 (N.D. Cal. Mar. 26, 2018) (declining to order production absent "a particularized showing of need"); *see also In re Rubber Chems. Antitrust Litig*., 486 F. Supp. 2d 1078 (N.D. Cal. 2007) (denying on comity grounds motion to compel disclosure of defendant's communications with the European Commission). No doubt, Plaintiffs would be pleased if public disclosure of Imperial's application undermined Imperial's request, but Imperial will not risk that outcome by disrespecting the

[3] *See also Jackson v. Nat'l Credit Sys., Inc.*, 1:16-cv-01029-ODE-WEJ, 2017 WL 2903353, at *3 n.9 (N.D. Ga. Feb. 27, 2017) ("While the document itself may provide more detailed evidence as to precisely what [was] represented in writing, the best evidence rule does not preclude declaratory evidence on the matter."); *Exemar v. Urban League of Greater Miami, Inc.*, 585 F. Supp. 2d 1377, 1382 (S.D. Fla. 2008) (best-evidence rule "does not apply where a witness's testimony is based on his first-hand knowledge of an event as opposed to his knowledge of the document").

confidentiality of the process. Moreover, under Article 5 of Regulation 2271/96 [DE 14-2], and as reflected in Section 6 of the official EU application form, Ex. B,[4] an applicant for authorization must disclose the "serious damage" it would suffer if not permitted to defend itself. Imperial has legitimate interests in not disclosing such information to its adversaries, and, as a public company, legitimate interests in not disclosing such nonpublic information more broadly. Nevertheless, if the Court believes that it would assist the Court to review the application, Imperial will voluntarily make it available for *in camera* review.

(ii) Plaintiffs' misleading rhetoric should not obfuscate the narrow issue before the Court on this motion for a limited stay

11. Imperial has shown that it should be granted a reasonable opportunity to comply with Article 5 of Regulation 2271/96, as construed by the European Commission, by securing authorization before moving to dismiss. The Court should not permit Plaintiffs to obfuscate the narrow issue before the Court by criticizing *other* provisions of Regulation 2271/96 that are not relevant on this motion, Opp. at 7-8, or by falsely claiming that Imperial is asking the Court to "defer" to a foreign "Nullification Statute," Opp. at 2, 4, 7-8.[5]

12. Imperial is seeking only a reasonable opportunity to secure authorization so that it can move to dismiss. That is exactly the sort of "reasonable precaution," *In re Grand Jury Proceedings*, 691 F.2d at 1391, that should be made to allow Imperial to navigate a significant "special problem" that Imperial faces due to its nationality, *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 546.

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[4] This document is available on the European Commission's official website at https://ec.europa.eu/info/files/template-applications-authorisations-comply-foreign-laws_en.

[5] Plaintiffs are not assisted by *Odebrecht Construction, Inc. v. Secretary, Florida Department of Transportation*, 715 F.3d 1268 (11th Cir. 2013) (cited in Opp. at 2 n.1), which held only that the federal government's authority over foreign affairs preempted conflicting state regulation of commerce with Cuba, *id.* at 1285.

(iii) The Court should reject Plaintiffs' alarming contention that the Court and Imperial should disregard EU and U.K. law

13. There is no basis for the troubling suggestion that the Court should disregard the interests of international comity because Plaintiffs do not think that Imperial will be prosecuted for violating Article 5 of Regulation 2271/96. Opp. at 4-8. Imperial has shown that: (a) Article 5 prohibits Imperial from complying with U.S. court requirements in Title III cases without prior authorization, Stay Motion ¶ 10; (b) the European Commission takes the position that motions to dismiss are encompassed by that prohibition, *id.*; and (c) in the United Kingdom, Regulation 2271/96 is enforced through criminal sanction, *id.* ¶ 11. As Judge Scola recognized in the *Iberostar* matter, an EU company faces "immediate and concrete" harm if required to respond to a Title III action without first having an opportunity to secure authorization. Ex. A at 4.

14. Plaintiffs misplace their reliance, Opp. at 6, on cases that declined to extend comity to a French discovery-blocking statute that did not clearly apply to French persons and that had been repeatedly violated and rarely enforced. *In re Photochromic Lens Antitrust Litig.*, 8:10-MD-2173-T-27EAJ, 2012 WL 12904331, at *2 (M.D. Fla. May 2, 2012). Here, there is no question that EU companies such as Imperial are subject to Regulation 2271/96. And it is not surprising that there is not yet a public record of enforcement action, given that: (a) Title III did not come into effect until May 2019, Stay Motion ¶ 7; (b) it was not until last month that the European Commission articulated its position that a EU company cannot move to dismiss a Title III case without authorization, *id.* Ex. D ¶ 7; and (c) Imperial appears to be the first U.K. company to face a Title III action. Nor, under these circumstances, would it be surprising if the European Commission had not had cause until recently to consider a request for authorization to defend a Title III action, Opp. at 7, although Plaintiffs' submissions on that point lack foundation, given the confidentiality of the authorization process.

15. There also is no basis for Plaintiffs' contorted argument that Imperial should have faced enforcement action under Article 5 of Regulation 2271/96 for *not* involving U.S. nationals in its Cuban-cigar business, and that the absence of such enforcement action shows that Imperial is not likely to be punished for moving to dismiss without authorization either. Opp. at 5. Contrary to Plaintiffs' misleading account, Opp. at 5, the October 2007 Imperial filing states: "We seek to comply fully with international sanctions *to the extent they are applicable to us*." [DE 1-4 at 3 of 5 (emphasis added).] Expanding on that statement, Imperial explained that international sanctions might prevent employees of certain nationalities from participating in operations in sanctioned jurisdictions, such as Syria, Iran, and Cuba. *Id.* Plaintiffs are mistaken in their apparent contention that Article 5 of Regulation 2271/96 compels EU companies to cause their U.S.-national employees to engage in conduct that could expose those individuals to prosecution under the U.S. Cuban Asset Control Regulations. To the contrary, the European Commission has made clear that EU companies "are free to conduct their business as they see fit" and to "choose whether to start working, continue, or cease operations in" Cuba, provided their business decisions are not coerced by, *inter alia*, the extraterritorial application of U.S. sanctions. [DE 14-3 ¶ 5.] Moreover, Regulation 2271/96 is concerned with the extraterritorial application of U.S. sanctions [DE 14-2 Art. 1], a concern that is not obviously implicated by the application of U.S. law to U.S. persons.

B. The Requested Stay Is Appropriately Limited to Achieve Its Purpose

16. Imperial has demonstrated that the requested stay comports with the bar on "immoderate" stays. Stay Motion ¶¶ 19, 29. It has a longstop date of February 9, 2021, and could end considerably earlier if the European Commission grants authorization more quickly. As Judge Scola noted in the *Iberostar* matter, "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." Ex. A at 4.

17. There is no basis for Plaintiffs' contrary argument—based on a partial and misleading quotation from the Stay Motion—that the requested stay is "unlimited." Opp. at 8. Imperial has sought authorization to defend this action. Stay Motion ¶¶ 3, 16. In case the European Commission is not prepared to grant such blanket authorization, rather than risk a blanket denial, Imperial has sought, in the alternative, at a minimum, authorization to file and litigate a motion to dismiss. Stay Motion ¶¶ 3, 16. Plaintiffs have no legitimate complaint about this commonsense approach.

18. Plaintiffs speculate that a grant of limited authorization might require Imperial in the future to seek a further authorization and a further stay. Their argument fails for two reasons. First, under the controlling legal standard, the Complaint should not survive a motion to dismiss. Therefore, whether the European Commission grants broad or narrow authorization, there should be no need for additional requests. Second, the Court can decide the propriety of a further stay if and when the question arises. Plaintiffs' speculation about what could happen in the future provides no basis to deny a limited stay based on the facts that exist today.

C. Plaintiffs Concede that a Limited Stay Will Cause Them No Prejudice, and that It Will Conserve Judicial Resources

19. Imperial has shown that a limited stay is appropriate under the controlling standard because it would not cause Plaintiffs any prejudice, given their own lengthy delay in bringing suit, and as they are seeking only non-emergent monetary relief. Stay Motion ¶¶ 25-27. Plaintiffs offer no response to these showings. Moreover, the public docket shows that, *six weeks* after they filed this lawsuit, Plaintiffs *still* have not even issued a summons as to one of the defendants. They have no plausible claim of urgency.

20. Imperial has also shown that a limited stay is appropriate to conserve judicial resources, by avoiding the need both for unnecessary default-judgment proceedings here and, potentially, collateral litigation arising from such proceedings, and criminal proceedings in the United Kingdom. *Id.* ¶ 28. Again, Plaintiffs offer no response.

WHEREFORE, Imperial respectfully requests that the Court enter an order staying the proceedings as against Imperial until the earlier of: (a) forty-five days after the European Commission grants Imperial's request for authorization, or (b) February 9, 2021.

Dated: September 18, 2020
Miami, Florida

Respectfully submitted,

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