No. _____

In The
Supreme Court of the United States

CANON LATIN AMERICA, INC.,
Petitioner,

v.

LANTECH (C.R.), S.A.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL DIAZ, JR.
Counsel of Record
CARLOS F. GONZALEZ
GARY E. DAVIDSON
BRANT C. HADAWAY
DIAZ REUS & TARG, LLP
2600 BANK OF AMERICA TOWER
100 SOUTHEAST 2ND STREET
MIAMI, FLORIDA 33131
(305) 375-9220

Attorneys for Petitioner

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

In *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 10 (1972), the Court departed from the traditional view against enforcing forum selection clauses, holding that such agreements were "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." This change in national policy was driven by the recognition that "[f]or at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States." *Id.* at 8. Since 1972, the Court has adhered to this position, reiterating that forum selection clauses are *prima facie* valid. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991). The Eleventh Circuit's decision in this case to part ways with the Court's precedent has created a significant conflict among three circuits that must now be resolved.

In breach of a mandatory forum selection clause contained in the parties' international distribution agreement requiring that any suit be brought in Florida, Respondent, a Costa Rican company and formerly one of Petitioner's foreign distributors, commenced an action against Petitioner in Costa Rica seeking more than $6 million in damages. The district court enjoined Respondent from pursuing its Costa Rican lawsuit on the grounds that it frustrated the policy of the United States courts of enforcing forum selection clauses and was vexatious. The Eleventh Circuit reversed, finding that Respondent's first-filed

claim in Costa Rica precluded entry of a foreign anti-suit injunction. Finding that Respondent's Costa Rican lawsuit hinged on a statutory claim that was not raised in the U.S. action, the Eleventh Circuit held that Petitioner could not satisfy the threshold test for relief because the foreign anti-suit injunction would not be dispositive of the Costa Rican lawsuit. In so ruling, the court of appeals gave no weight to the forum selection clause in the parties' distribution agreement. The Eleventh Circuit recognized that its ruling directly conflicted with the Ninth Circuit's decision in *E. & J. Gallo Winery v. Andina Licores, S.A.,* 446 F.3d 984 (9th Cir. 2006), and the First Circuit's decision in *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren,* 361 F.3d 11 (1st Cir. 2004) [App. at 8a].

The questions presented are:

1. Whether a party to an international contract is entitled to a foreign anti-suit injunction to enforce a mandatory forum selection clause where the claims raised in the action to be enjoined are not identical to those pending before the enjoining court.

2. Whether a party to an international contract seeking a foreign anti-suit injunction to enforce a mandatory forum selection clause should be required to demonstrate, as a threshold matter, that the parties and claims are the same in both the foreign and domestic lawsuits and that resolution of the case before the enjoining court would be completely dispositive of the action to be enjoined.

RULES 14.1 AND 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner is Canon Latin America, Inc., a Florida corporation, created in 1996, with its principal place of business in Miami, Florida. Petitioner is a subsidiary of Canon, Inc., and no other publicly-held corporation owns more than 10% of Petitioner's stock. Canon, Inc. manufactures cameras and camera accessories, business machines, mask aligners for semiconductor chip production, special purpose lenses, and electronic components. Petitioner markets and sells Canon® brand products in Latin America and the Caribbean (excluding Puerto Rico and Mexico).

Respondent is Lantech (C.R.), S.A., a supplier of office equipment and operating systems in Costa Rica. Petitioner does not believe that Lantech is owned, in whole or part, by any publicly-held corporation. In late 2004, at or about the time it commenced the lawsuit in Costa Rica, Lantech sold its assets to a Guatemalan company, Difoto, S.A. Lantech claims that it is no longer an operating company capable of being a distributor.

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Canon Latin America, Inc. ("Canonlat") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

This case concerns whether Respondent, Lantech (C.R.), S.A. ("Lantech"), a former distributor of Canon® brand products in Costa Rica, may be enjoined from pursuing a legal action in Costa Rica against Canonlat in violation of the forum selection clause in the parties' distribution agreement. The district court entered a preliminary anti-suit injunction on September 29, 2006, which is reported at 453 F. Supp. 2d 1357 (S.D. Fla. 2006) [App. C]. On July 18, 2007, the district court entered a permanent anti-suit injunction, which is reported at 497 F. Supp. 2d 1370 (S.D. Fla. 2007) [App. B]. The Eleventh Circuit's November 21, 2007 decision vacating the anti-suit injunction is reported at 508 F.3d 597 (11th Cir. 2007) [App. A].

JURISDICTION

The court of appeals entered its judgment in the current proceeding on November 21, 2007. [App. at 1a]. Canonlat timely filed a petition for rehearing and rehearing *en banc* on December 11, 2007. The court of appeals denied Canonlat's rehearing petition on February 13, 2008 [*Id.* at 57a], but stayed the effect of its decision dissolving the foreign anti-suit injunction on February 22, 2008, pending the filing of this

petition. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Costa Rica's Public Law 6209, entitled "Representatives of Foreign Companies Act," states, in relevant part:[1]

> Article 2: (Recission of the agreement for reasons alien to the representative, distributor or manufacturer. Consequences). If the representation, or distribution or manufacturing agreement is rescinded for reasons beyond the control of the representative, distributor or manufacturer, or when the term of the agreement expires and it is not extended for reasons beyond the control of the same, the foreign company shall indemnify them with an amount calculated on the basis of the equivalent of four months of gross profits for each year or fraction of time passed. The value of the indemnity in no event shall be calculated for a period exceeding nine years of service.
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> Article 4: The following are deemed as just causes for the termination of the contract of

[1] Respondent appended an English-only version of the text of Costa Rica's Public Law 6209 to its Initial Brief [A-1-A-5] before the Eleventh Circuit. The court of appeals, in turn, relied on certain portions of that text in its decision. [App. at 4a].

representation, distribution or manufacture, with liability for the foreign company: . . . e – The appointment of a new representative, distributor or manufacturer, when the affected parties have exercised the representation, distribution or manufacture on an exclusive basis.

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Article 6: (Individual or corporation that partially or wholly assumes any business activity, which was performed previously by a foreign company through a representative, distributor or manufacturer. Liability). The individual or corporation that partially or wholly assumes any business activity which was previously conducted by a foreign company through a representative, distributor or manufacturer shall be responsible for the continuity of the representation, distribution or manufacturing agreement, unless the foreign company had previously covered the pertinent indemnity.

Article 7: The jurisdiction of the Costa Rican courts of justice and the rights of the representative, distributor, or manufacturer, by virtue of this law, cannot be waived.

STATEMENT OF THE CASE

This case presents a direct conflict between the Eleventh, Ninth, and First Circuits over the threshold test a party must satisfy in order to obtain a foreign

anti-suit injunction. The initial test, as defined by each of these circuits, requires that the enjoining court determine, first, whether the parties and the claims in both the foreign and domestic litigation are the same, and second, whether the action before the enjoining court is dispositive of the action to be enjoined. Collapsing the "same claim" and "dispositive" prongs of the test, the Eleventh Circuit has held that "the interest of international comity and judicial restraint" require that the claims pending before the enjoining court be identical to those in the action to be enjoined so that the anti-suit injunction will "settle or finish the dispute." [App. at 8a]. In contrast, the Ninth Circuit, reviewing the denial of a foreign anti-suit injunction to enforce a forum selection clause, has ruled that the threshold test is satisfied where "all the issues" raised in the action to be enjoined are also before the enjoining court. The First Circuit, in turn, will consider issuing a foreign anti-suit injunction where the claims involved in the competing actions are "substantially similar."

By ignoring the parties' forum selection clause and focusing on a non-particularized concern over comity, the Eleventh Circuit inexplicably parted ways with the Court's well-established policy in favor of enforcing such clauses in international contracts. This national policy is so strong that even those circuits in disagreement over the weight to be given to comity in issuing foreign anti-suit injunctions have uniformly agreed that such injunctions are appropriate in order to enforce the forum chosen by the contracting

parties.[2] The Eleventh Circuit's ruling not only discounts this national policy, it ignores the practical realities underlying the shift from rejecting forum selection clauses to enforcing such agreements as *prima facie* valid.

The Eleventh Circuit's decision sets a dangerous precedent for U.S. businesses dealing in the global marketplace. Parties to international contracts attempt to minimize their legal risks by negotiating as many aspects of their agreements as possible. Concerns over the fairness of a particular forum's laws, in particular, often drive parties' decisions to negotiate and contract to litigate in a specific forum. These concerns also motivate parties' decisions to contract to arbitrate their disputes. Indeed, arbitration clauses are simply another form of forum selection clause. By ignoring the parties' agreement to bring all of their disputes in the courts of Florida, the Eleventh Circuit in this case has called into question the validity of such agreements to the detriment of U.S. businesses that have negotiated or may be in the midst of negotiating such agreements.

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[2] This is distinguished from the conflict which currently exists among the circuits as to the applicable legal standard to be applied in determining whether to issue an anti-suit injunction. That conflict is the subject of a pending petition for writ of certiorari in the case of *Goss Int'l Corp. v. Tokyo Kikai Seisakusho, et al*, Docket No. 07-618. However, because the Eleventh Circuit in this case resolved the case on the question of the threshold test, it never reached the issue of which of the applicable legal standards applied.

The Court's policy in favor of enforcing forum selection clauses remains critically important, as demonstrated by the facts here. Lantech and Canonlat enjoyed a business relationship for many years and negotiated an arms-length agreement including a forum selection clause under which Lantech agreed to bring any disputes in the courts of Florida. After their relationship soured, and contrary to the express terms of the parties' written agreement, Lantech sued Canonlat in Costa Rica for damages in excess of $6 million. In conjunction with its foreign lawsuit, Lantech procured from the Costa Rican court an *ex parte* order requiring that Canonlat post and maintain a $1 million bond or face a complete ban on the importation of its products into Costa Rica. For this reason, the district court found that the Costa Rican lawsuit was "vexatious." [App. at 28a, 49a-50a].

Under the Eleventh Circuit's "first to the courthouse" approach, parties will be able to avoid their contractual obligations by simply being the first to file suit, regardless of the forum selection clause. This approach, as the district court recognized, will undermine the Court's well-established policy of enforcing forum selection clauses. The Eleventh Circuit's approach will also hurt U.S. businesses that have attempted to limit their legal risks in the global marketplace by defining the specific location for the resolution of all disputes. This Court should settle the conflict among the circuits regarding the threshold showing parties to international contracts must make in order to obtain a foreign anti-suit injunction where such relief is necessary to enforce a forum selection clause.

A. The Parties' Business Relationship

On December 18, 1996, Canonlat entered into an "Office Distribution Agreement" with Lantech. [App. 2a-3a, 13a]. This agreement was subsequently superseded by the "Canon Brand Product Distribution Agreement" on July 21, 2003. [*Id.* at 2a, 13a]. Both the 1996 and 2003 agreements contained a mandatory choice of forum clause requiring that any dispute, regardless of the legal theory, be litigated in the courts of Florida, pursuant to Florida law. [*Id.* at 2a-3a, 13a]. The forum selection clause specifically provided:

> THIS AGREEMENT IS MADE IN THE STATE OF FLORIDA AND SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF FLORIDA . . . .DISTRIBUTOR FURTHER AGREES THAT ALL SUITS COMMENCED BY DISTRIBUTOR AGAINST CANONLAT UPON ANY AND ALL CAUSES OF ACTION, WHETHER OR NOT SUCH CAUSES OF ACTION HAVE ARISEN UNDER THIS AGREEMENT AND REGARDLESS OF THE LEGAL THEORY UPON WHICH SUCH CAUSES OF ACTION ARE BASED, SHALL BE BROUGHT EXCLUSIVELY IN A STATE OR FEDERAL COURT SITUATED WITHIN THE STATE OF FLORIDA.

[*Id.* at 3a, 13a-14a]. Before the district court, Lantech conceded that the 1996 and 2003 agreements were negotiated at arms-length, and entered into by Lantech willfully and voluntarily. [*Id.* at 13a, 36a].

B. Lantech Sues Canonlat In Costa Rica In Violation Of The Forum Selection Clause In The Parties' 2003 Distribution Agreement

In March 2004, Canonlat informed Lantech that it wanted to appoint SB Technology as an additional distributor in Costa Rica. [App. 3a, 15a, 38a]. Despite the fact that the 1996 and 2003 agreements reflected that Lantech was a non-exclusive distributor of Canon® brand products, Lantech objected. [App. at 2a, 13a, 36a]. By March 2004, Lantech owed Canonlat $247,653.20 for goods it had received from Canonlat. [*Id.* at 3a, 14a, 38a]. In November 2004, Lantech, without notifying Canonlat, sued Canonlat and SB Technology in Costa Rica for purportedly violating Costa Rica Public Law 6209, entitled "Representatives of Foreign Companies Act." [*Id.* at 4a, 15a, 38a]. In its lawsuit, Lantech sought damages in the amount of $6,303,366.89 on grounds that Canonlat unlawfully terminated Lantech as an "exclusive" distributor. [*Id.* at 4a, 15a, 38a].

The following month, at Lantech's request, a Costa Rican court issued an *ex parte* order requiring that Canonlat post a $1 million bond or discontinue importing goods into Costa Rica. [*Id.* at 4a, 16a, 39a]. When it learned of Lantech's Costa Rican lawsuit, Canonlat retained local counsel, posted the bond, and sought unsuccessfully to dismiss the Costa Rican action for lack of jurisdiction, based in part upon the mandatory forum selection clause. [*Id.* at 4a, 16a, 39a]. In March 2005, Canonlat formally notified Lantech that it was terminating the 2003 Agreement

for cause due to non-payment for goods. [*Id.* at 4a-5a, 16a, 38a-39a].

C. Canonlat Petitions The District Court For An Anti-Suit Injunction

In February 2005, pursuant to the forum selection clause in the parties' 2003 Agreement, Canonlat sued Lantech in the Southern District of Florida for declaratory and injunctive relief. [App. at 5a, 16a-17a, 39a-40a]. Canonlat also sought a preliminary anti-suit injunction, prohibiting Lantech from prosecuting its lawsuit in Costa Rica. [*Id.* at 35a]. After an evidentiary hearing, the district court granted injunctive relief on the ground that Lantech's Costa Rican lawsuit "frustrates the policy of the United States courts of enforcing forum selection clauses" and is vexatious. [*Id.* at 49a].

The district court rejected Lantech's contention that Canonlat had not satisfied the threshold requirements for obtaining an anti-suit injunction. [*Id.* at 50a]. Because the parties were substantially the same and the basis for liability for the claims in both the U.S. and Costa Rican actions all arose from the distributorship relationship between the parties, the district court found that this threshold requirement was satisfied. [*Id.* at 50a-51a]. The district court dismissed Lantech's assertion that an injunction would deprive it of its rights under Costa Rica's Law 6209. "By freely entering into the Agreement which contained the choice of forum and law provisions," the district court explained "Lantech itself chose not to avail itself of the protection of litigating its action in a Costa Rica forum." [*Id.* at

53a]. Moreover, the district court found that Lantech failed to demonstrate that the district court could not apply Costa Rican law, were it to bring the Law 6209 claim as a counterclaim in the U.S. action. [*Id.* at 54a].

D. The District Court Enters A Permanent Anti-Suit Injunction

On July 18, 2007, the district court granted Canonlat's motion for summary judgment and entered a permanent, foreign anti-suit injunction. [App. at 12a]. Reiterating those grounds relied upon in issuing provisional relief to Canonlat, the district court found that the parties and claims in both the U.S. and Costa Rican action were similar, and thus Canonlat had satisfied the threshold requirements for issuance of a foreign anti-suit injunction. [*Id.* at 29a-31a]. Rejecting Lantech's contention that the claims were not sufficiently similar because the U.S. action would "not dispose of the issues in the Costa Rican action pertaining to Public Law 6209," the district court explained that Lantech should have filed its Law 6209 claim as a counterclaim to Canonlat's lawsuit in the U.S. [*Id.* at 30a].

E. The Eleventh Circuit Reverses The District Court's Injunction, Adding To The Conflict Between The Ninth And First Circuits

Finding that Lantech's suit in Costa Rica turned "on statutory rights that are unique to Costa Rica and that cannot be resolved by a judgment of the district court on Canonlat's claims in Florida," the Eleventh Circuit ruled that Canonlat could not establish the

threshold requirements for issuance of a foreign anti-suit injunction. [App. at 8a-9a]. Though it recognized that "[n]ot all circuits adhere strictly to the requirement that the action in the enjoining court be dispositive of the action to be enjoined or that the claims in both actions be the same," the Eleventh Circuit explained that "international comity and judicial restraint" required that it read "'dispositive' for what it means: to settle or finish the dispute." [*Id.*]. In so ruling, the court of appeals acknowledged a direct conflict with the Ninth Circuit's decision in *E. & J. Gallo Winery v. Andina Licores S.A.,* 446 F.3d 984 (9th Cir. 2006), and the First Circuit's decision in *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren,* 361 F.3d 11 (1st Cir. 2004). [*Id.*].

Although it noted the existence of a forum selection clause in the parties' distribution agreement [*Id.* at 3a], the Eleventh Circuit gave no weight to that clause's requirement that Lantech bring any and all claims exclusively in the courts of Florida. Significantly, the court of appeals rejected the district court's determination that Lantech could have [and should have] brought its Law 6209 claim as a counterclaim in the U.S. action. [*Id.* at 9a]. Citing to Federal Rule of Civil Procedure 13, the Eleventh Circuit explained that "a counterclaim is not compulsory if 'at the time the action was commenced the claim was the subject of another pending action.'" [*Id.* at 9a]. Discounting entirely the forum selection clause and the fact that the Law 6209 claim should not have been filed in Costa Rica in the first place, the court of appeals reasoned that "Lantech's Law 6209 claim was the subject of the Costa Rican suit pending at the time that Canonlat brought its claims in the

district court. As such, it was not a compulsory counterclaim." [*Id.*].

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve the conflict among the circuits regarding the threshold standard parties must satisfy before obtaining a foreign anti-suit injunction, particularly in those cases where injunctive relief is necessary to enforce a forum selection clause.

A direct conflict exists between the Eleventh, Ninth, and First circuits over the threshold showing a party must make in order to obtain a foreign anti-suit injunction. The Eleventh Circuit held that Canonlat could not satisfy the threshold test because Lantech's action in Costa Rica hinged on a statutory claim not asserted in the U.S. action. [App. at 9a-10a]. Giving no weight to the parties' forum selection clause, the court of appeals rejected the district court's determination that Lantech should have brought its claim in the U.S. action by way of counterclaim. [*Id.* at 9a]. The Ninth Circuit, on facts nearly identical to those at issue here, reached the opposite conclusion, finding that the threshold test was satisfied where all of the issues raised in the foreign court were also before the enjoining court. *E. & J. Gallo Winery,* 446 F.3d at 991. In its analysis, the Ninth Circuit focused on the fact that the competing claims – though based on different legal theories – arose out of the parties' written agreement and involved the ultimate question of whether a breach occurred. *Id.* at 991. Significantly, the Ninth Circuit noted that "[w]ithout an anti-suit injunction in this case, the forum selection

clause effectively becomes a nullity" where "[t]he potential implications for international commerce are considerable." *Id.* at 993. In an approach similar to the Ninth Circuit, the First Circuit had held that the threshold test is satisfied upon a showing that the claims in both actions are "substantially similar." *Quaak*, 361 F.3d at 20.

The conflict among the circuits leaves open to question the continuing validity of forum selection clauses. Under the Eleventh Circuit's ruling, a party will be able to block an anti-suit injunction merely by drafting a claim for relief based on a statute or legal theory different than that pending in the enjoining court. Unlike the Ninth and First Circuits, the Eleventh Circuit's determination turns on little more than how the claim is packaged. Despite the fact that the claims in Costa Rica and the U.S. arose out of the parties' written distribution agreement and concerned the ultimate question of whether a breach occurred, Respondent won the day by characterizing its claim as one for damages under Public Law 6209 (as opposed to Petitioner's breach of contract claim in the U.S. action). In *Roby v. Corp. of Lloyd's,* 996 F.2d 1353, 1360 (2d Cir. 1993), the Second Circuit foreshadowed the problem with the Eleventh Circuit's view in this case, noting that "[i]t defies reason to suggest that [a party] may circumvent [a] forum selection . . . clause merely by stating claims under laws not recognized by the forum selected in the agreement." *See also E. & J. Gallo Winery v. Andina Licores, S.A.,* 440 F. Supp. 2d 1115, 1127 (E.D. Cal. 2006) (stating "that the forum or choice of law specified by a contract affords remedies that are different or less favorable to the laws of the forum preferred by a plaintiff is not alone a valid basis

to deny enforcement of the forum selection . . . provisions.").

The Eleventh Circuit's disregard for forum selection clauses will also have a significant impact on U.S. businesses in the global marketplace. Without the ability to enforce forum selection clauses, nothing will prevent businesses from engaging in bad-faith negotiations, extracting concessions from a U.S. business in exchange for a forum selection clause they know will not be enforceable. Unable to enforce these clauses, U.S. businesses will face the uncertainty and inconvenience of having to litigate in far-flung jurisdictions. This is exactly what the Court attempted to avoid when it wrote, more than thirty years ago, that "[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *The Bremen,* 407 U.S. at 13.

The resolution of the conflict between the Eleventh, Ninth, and First Circuits is critically important, especially to U.S. businesses engaged in international commerce. Not only does the Eleventh Circuit's decision add to a growing split among the circuits, but it also misapplies the Court's longstanding precedent on the enforceability of forum selection clauses.

A. The Circuits Are In Conflict Over The Threshold Standards For Issuing Foreign Anti-Suit Injunctions

Vacating the anti-suit injunction in this case, the Eleventh Circuit acknowledged that "[n]ot all circuits

adhere strictly to the requirement that the action in the enjoining court be dispositive of the action to be enjoined or that the claims in both actions be the same." [App. at 8a]. The Eleventh Circuit acknowledged conflict with both the Ninth Circuit in *E & J Gallo Winery v. Andina Licores S.A.,* 446 F.3d 984 (9th Cir. 2006), and the First Circuit in *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren,* 361 F.3d 11, 21 (1st Cir. 2004).

In 1978, Gallo, a California-based winery, entered into a distributorship agreement with Andina, a wine and liquor distributor headquartered in Ecuador. *E & J Gallo Winery,* 446 F.3d at 987. Gallo and Andina executed an updated distributorship agreement in 1987. *Id.* Both the 1978 and 1987 agreements contained the same forum selection clause, which provided that "any cause of action arising between the parties, whether under this agreement or otherwise, shall be brought only in a court having jurisdiction and venue at the home office of Winery." *Id.*

In April and May 2004, Gallo and Andina exchanged a series of letters over disputes. *Id.* Several months later, Andina sued Gallo in Ecuador, alleging a violation of Decree 1038-A, a law purportedly intended to protect Ecuadorians who acted as agents, distributors, or representatives of foreign companies. *Id.* Like Costa Rica's Public Law 6209, Ecuador's Decree 1038-A contained a stiff damages provision. As part of its Ecuadorian lawsuit, Andina claimed $75,000,000 in damages. *Id.* at 988. Like Canonlat, Gallo also sought a preliminary, foreign anti-suit injunction in the U.S. court restraining Andina from pursuing its action in Ecuador. *Id.* The

district court denied the motion, *id.*, but the Ninth Circuit reversed.

Like Lantech in this case, Andina argued that Gallo could not satisfy the threshold requirements for a foreign anti-suit injunction because the claims in Ecuador were not the same as those in the U.S. action. *Id.* at 991. The Ninth Circuit rejected the district court's determination, noting that Andina sued for breach of contract in Ecuador, while in the district court, Gallo sought a declaration that it did not breach the distributorship agreement. *Id.* As such, the court of appeals explained, "all the issues before the court in the Ecuador action are before the court in the California action." *Id.* Stated differently, the claims in both actions stemmed from the parties' rights and responsibilities under the distributorship agreement, and both sought relief for an alleged breach of that agreement. The Ninth Circuit also rejected Andina's claim, likewise raised by Lantech in this case, that an anti-suit injunction would deprive it of its right to pursue relief under Ecuadorian law. *Id.* The court of appeals explained that those claims were potentially barred by the choice-of-law clause contained in the parties' contract. *Id.* Alternatively, the court continued, federal courts were capable of applying Ecuadorian law to Andina's claims. *Id.*

Adding to the conflict among the circuits, the First Circuit has held that the threshold test is satisfied where the parties and claims in both actions are "substantially similar." *Quaak*, 361 F.3d at 20. While the First Circuit in *Quaak* did not expand on the meaning of "substantially similar," it is clearly a more relaxed standard than the strict identity requirement

imposed by the Eleventh Circuit and is likely more akin to the "similar issues" standard set by the Ninth Circuit in *Gallo.* *Quaak* further exposes the lack of uniformity and confusion among the circuits regarding this important threshold test.

In dissolving the foreign anti-suit suit injunction in this case, the Eleventh Circuit ignored the parties' forum selection clause in deference to "comity." [App. at 8a]. Canonlat's attempt to enforce the forum selection clause by obtaining an anti-suit injunction, however, did not threaten comity. As the Ninth Circuit has explained, "[i]n a situation like this one, where private parties have previously agreed to litigate their disputes in a certain forum, one party's filing first in a different forum would not implicate comity at all." *Gallo,* 446 F.3d 984. The court reasoned that where a case does not involve a governmental party and is limited to the enforcement of contractual rights among private parties, there is no threat to comity. *Id.*

Ultimately, it is Lantech that "set the stage for a crisis of comity," *Quaak,* 361 F.3d at 20, by initiating the foreign litigation in contravention of the forum selection clause contained in its contract with Canonlat. The Ninth Circuit has ruled that an approach which, as here, allows a party to evade the enforcement of a forum selection clause by simply rushing to another forum and filing suit will "vitiate United States policy favoring the enforcement of forum selection clauses" and will "also have serious deleterious effects for international comity." *Gallo,* 446 F.3d at 994. That is the very same conclusion that

the district court here reached in granting Canonlat an anti-suit injunction. [App. at 28a, 49a].

In sharp contrast to the Eleventh Circuit's ruling approving of Lantech's foreign lawsuit so that it could pursue relief under Costa Rica Public Law 6209, federal courts have consistently held that U.S. litigants may not sidestep forum selection clauses in favor of foreign jurisdictions in order to pursue U.S. law-specific remedies. In *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992), the Tenth Circuit ruled that "[t]he fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not inherently unfair." *Id.* at 958 (internal citations omitted). Four other circuits have similarly enforced forum selection and choice of law clauses against U.S. parties seeking to litigate in the U.S. *See Bonny v. Soc. of Lloyds*, 3 F.3d 156 (7th Cir. 1993); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Haynsworth v. The Corp.*, 121 F.3d 956 (5th Cir. 1997).

Ultimately, Lantech's decision to sue in Costa Rica is even harder to accept in light of the fact that it had the option, as the district court repeatedly recognized, to bring its claims against Canonlat in the U.S. [App. at 30a, 53a-54a; *See also Quaak,* 361 F.3d at 21 (explaining that KPMG-B's decision to initiate foreign litigation was "harder to accept" because it had the option to pursue relief in the district court.)].

The Eleventh Circuit erred in dissolving the anti-suit injunction on the basis of a non-particularized concern over comity and judicial restraint. By "genuflecting"[3] before the notion of comity, the Eleventh Circuit wholly disregarded the parties' contractual agreement and the significance of the forum selection clause. In doing so, the Eleventh Circuit forgot the Court's admonition that the enforcement of forum selection clauses "accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world." *The Bremen,* 407 U.S. at 11.

This Court should resolve the conflict between the Eleventh, Ninth, and First Circuits. The approach taken by the circuits reflects a clear divergence of opinion regarding the threshold elements that any litigant seeking a foreign anti-suit injunction must satisfy.

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[3] *See Kaepa, Inc. v. Achilles Corp.,* 76 F.3d 624, 627 (5th Cir.1996) ("We decline . . . to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action").

B. The Eleventh Circuit's Wholesale Disregard Of The Forum Selection Clause Will Undermine This Court's Established Policy Of Enforcing International Agreements To Litigate Or Arbitrate In A Particular Forum

In *The Bremen,* a case involving an international towage contract between a U.S. and foreign party, the Court reversed the longstanding policy of many federal and state courts to decline enforcement of forum selection clauses. Adopting a national public policy in favor of enforcing such clauses, the Court explained that they were especially important given the "expansion overseas of commercial activities by business enterprises based in the United States." *The Bremen*, 407 U.S. at 8. Nearly three decades later, the Eleventh Circuit has "given far too little weight and effect," *id.*, if any, to the parties' forum selection clause based solely on a non-particularized concern over comity. No reasoned basis exists for departing from the Court's precedent.

The Bremen established the Court's broadly recognized doctrine that contractual forum selection clauses "are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Id*. at 10. Since that holding, this Court has consistently upheld a policy in favor of enforcing contractual forum selection clauses. *See Scherk*, 417 U.S. 506 (enforcing agreement to arbitrate as a specialized kind of forum selection clause that specifies not only the location of the suit, but also the procedure to be used in resolving dispute); *Mitsubishi Motors Corp.*, 473 U.S. 614

(holding that anti-trust claim and allegation that agreement was tainted by fraud did not warrant refusal to enforce agreement to arbitrate in foreign forum); *Shute,* 499 U.S. 585 (enforcing forum selection clause in cruise passenger ticket contract based on adequate notice and despite possible hardship on passenger).

The policy underpinning the enforcement of forum selection clauses is consistent with the "expansion of overseas commercial activities by business enterprises based in the United States." *The Bremen,* 407 U.S. at 8. Such clauses have become "an indispensable element in international trade, commerce, and contracting" because they eliminate the uncertainties inherent in litigating in unknown fora. *Id.* at 13. As the Court explained shortly after deciding *The Bremen:*

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction . . .
>
> [A refusal to enforce a contractual forum selection provision] would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.... [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

Scherk, 417 U.S. at 516-517.

Although *The Bremen*, *Scherk*, and *Mitsubishi Motors* all involved the enforcement of agreements to bring claims in overseas fora, the Court's reasoning in those decisions likewise favors enforcing agreements to litigate (or arbitrate) disputes in the U.S. by enjoining parties from "jockeying" to "secure tactical litigation advantages" in foreign jurisdictions. *Id*. With the exception of the Eleventh Circuit's decision, in every other reported federal case involving a request for a foreign anti-suit injunction to vindicate a contractual forum selection clause, the anti-suit injunction has been granted. *See, e.g., Gallo, supra*; *Int'l Equity Inv. Inc. v. Opportunity Equity Partners, Ltd.,* 441 F. Supp. 2d 552 (S.D.N.Y. 2006), *aff'd* 2007 WL 2492139 (2d Cir. Aug. 30, 2007); *Farrell Lines, Inc. v. Columbus Cello-Poly Corp.,* 32 F. Supp. 2d 118, 130 (S.D.N.Y. 1997), *aff'd,* 161 F.3d 115 (2d Cir. 1998); *Int'l Fashion Prods., B.V. v. Calvin Klein, Inc.,* 1995 WL 92321, *2 (S.D.N.Y. March 7, 1995); and *Suchodolski Assoc. Inc. v. Cardell Fin. Corp.*, 2006 WL 3327625, *2 (S.D.N.Y. Nov. 16, 2006) (finding dispositive case threshold prong met under *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.,* 369 F.3d 645, 652 (2d Cir. 2004), where issues were "substantially the same" and injunction was appropriate to prevent simultaneous litigation in contravention of the bargained-for forum selection clause); *Smith / Enron Cogeneration Ltd, P'ship, Inc. v. Smith Cogeneration Int'l., Inc.,* 198 F.3d 88, 99 (2d Cir. 1999).

The Eleventh Circuit's narrow construction of the "same claim" threshold requirement threatens to render the Court's well-established line of authority favoring forum selection clause enforcement in

international disputes all but irrelevant. Moreover, with other circuits deciding the "same claim" threshold matter more broadly (and in a manner more harmonious with *The Bremen, Scherk, Mitsubishi,* and *Shute*), there is an absolute need to resolve this conflict if the Court's oft-stated goal of creating predictability in international business dealings is to be upheld.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL DIAZ, JR.
Counsel of Record
CARLOS F. GONZALEZ
GARY E. DAVIDSON
BRANT C. HADAWAY
DIAZ REUS & TARG, LLP
2600 Bank of America Tower
100 Southeast 2nd Street
Miami, Florida 33131
(305) 375-9220

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