

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-24275-CV-MORENO/LOUIS

INVERSIONES Y PROCESADORA
TROPICAL INPROTSA, S.A.,

Petitioner,

vs.

DEL MONTE INTERNATIONAL GMBH,

Respondent.

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REPORT AND RECOMMENDATION

This cause came before the Court upon Respondent's Motion (1) for Entry of Order to Show Cause Why Petitioner, Petitioner's Officers, and Non-Party Fruver Should Not Be Held In Contempt and (2) To Enforce Order and Final Judgment Confirming Final Arbitral Award (ECF No. 123); Respondent's Motion for Proceedings Supplementary to Execution (ECF No. 125); and Petitioner's Motion to Abstain in Deference to Parallel Costa Rican Confirmation and Enforcement Proceedings and Request for Oral Argument (ECF No. 139). These matters are fully briefed and were referred to the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(A) and the Magistrate Judge Rules of the Local Rules of the Southern District of Florida, by the Honorable Federico A. Moreno, United States District Judge (ECF Nos. 131, 150). Having carefully considered the motions, the record as a whole, and being otherwise fully advised in the premises, the undersigned issues the following recommendations.

I. BACKGROUND

This case stems from a contract dispute between two foreign corporations: Petitioner Inversiones y Procesadora Tropical INPROTSA, S.A. (“Inprotsa”) and Respondent Del Monte International GMBH (“Del Monte”). The contract at issue entailed an exclusive sales agreement for Inprotsa to sell pineapples originating from Del Monte’s seeds, identified as “MD-2.” The parties operated under the contract from execution in 2001 until termination in 2013. Post termination, Del Monte suspected Inprotsa of breaching the terms of the contract and, in March 2014, commenced arbitration proceedings before the International Court of Arbitration of the International Chamber of Commerce, pursuant to the arbitration clause in the parties’ contract. Arbitration was conducted in Miami, Florida, and in November 2015, the arbitration panel conducted an evidentiary hearing on the merits.

On June 10, 2016, the arbitration panel decided in favor of Del Monte and issued an arbitral award (ECF No. 6-4 (“Award”)). The Award ordered that: (1) Inprotsa “return or destroy 93% of the MD-2 vegetative materials in [Inprotsa’s] farm” in Costa Rica (the “destruction injunction”); (2) Inprotsa is “permanently enjoin[ed]...from selling MD-2 pineapples to third parties for as long as [Inprotsa] shall not have complied with its obligation to destroy or return the MD-2 vegetative materials” with the exception of sales in amounts not exceeding 7% of each MD-2 harvest (the “sales injunction”); and (3) Inprotsa pay Del Monte damages in the amount of \$26,133,000.00, arbitral costs of \$650,000.00, and legal representation costs and fees of \$2,507,440.54, for a total amount of \$29,290,440.54, plus pre-award and post-award interest (the “damages award”) (Award at ¶ 122). The Award also gave Inprotsa the option to “sell to Del Monte all pineapples harvested from Del Monte Plant Stock on Inprotsa’s plantation” in lieu of

the “immediate destruction” of the MD-2 vegetation material as required by the Award’s destruction injunction (Award at ¶ 27, 122).

Following the issuance of the Award, Del Monte sought to have the Award confirmed first in Costa Rica and then in the United States.¹ The undersigned will first recount the proceedings that took place in the United States.

A. United States Proceedings

Though Del Monte first sought to confirm the Award in Costa Rica, it was Inprotsa who initiated the United States proceedings by filing a petition to vacate the Award in the Eleventh Judicial Circuit Court of Florida, on September 9, 2016. Del Monte timely removed the case to this Court, invoking jurisdiction under the New York Convention, 9 U.S.C. §§ 203, 205. Del Monte shortly thereafter moved to dismiss Inprotsa’s petition, and cross-petitioned to confirm the Award (ECF No. 6).

The Court ultimately granted Del Monte’s cross-petition to confirm the Award on May 2, 2017 (ECF No. 47), and entered Final Judgment in favor of Del Monte on May 17, 2017 (ECF No. 52).² The Final Judgment stated that “in accordance with the reasons stated in the Court’s Order Confirming the Arbitral Award on May 2, 2017, judgment is entered in favor of Respondent Del Monte International GmbH and against Petitioner Inversiones y Procesadora Tropical Inprotsa, S.A.” Inprotsa has appealed the Court’s orders to the U.S. Eleventh Circuit Court of Appeals, where the case is currently set for oral argument.

B. Costa Rican Proceedings

Two months before Inprotsa filed its petition to vacate in the United States, on July 18,

¹ While not relevant to the present motions, Del Monte also moved to confirm the Award in the Netherlands.

² The full procedural history of this litigation is more fully described in ECF No. 157.

2016, Del Monte initiated proceedings to confirm the Award in Costa Rica, by filing a petition in the First Chamber of the Supreme Court of Costa Rica. On November 15, 2016, Inprotsa filed an opposition brief, asserting a variety of defenses to confirmation under the New York Convention, the Inter-American Convention on International Commercial Arbitration, Costa Rica's Code of Civil Procedure, Costa Rica's International Commercial Arbitration Law, and Costa Rican public policy, including that the Award violated Costa Rican agrarian law. Specifically, Inprotsa argued that Costa Rican law prohibited it from immediately destroying 93% of its vegetative material on its farm as required pursuant to the Award's destruction injunction. Inprotsa also requested that the Costa Rican court stay enforcement of the Award pending resolution of Inprotsa's petition to vacate in the United States.

Inprotsa prevailed on its motion and, on May 9, 2017, the Costa Rican Supreme Court stayed the proceedings to enforce the Award, pending the appeal of this case in the Eleventh Circuit. Del Monte has twice moved to lift the stay, without success.

C. Post-Judgment U.S. Proceedings

Following this Court's entry of Final Judgment, Del Monte sought post-judgment discovery in aid of execution. Since June 1, 2017, Del Monte has served Inprotsa with over 100 document requests and over 50 interrogatories, and noticed five current and former Inprotsa officers for deposition in Miami. Inprotsa avers that it has complied with each of those discovery requests in timely answering the interrogatories served, responding to the document requests, producing over 30,000 documents, and submitting over 400 pages of privilege logs. Through its production, Inprotsa contends that it has produced to Del Monte nearly every financial and transactional record of the company since 2014. Del Monte also deposed Inprotsa's Chairman of

the Board, Mr. Jorge Luis Gurría Hernández, in March 2018. Mr. Gurría Hernández testified that Inprotsa has no assets located in the United States, and that all of its assets are located in Costa Rica (ECF No. 142-4 (“Gurría Hernández Dep.”) at 17:6-9).

Discovery also revealed the existence of the Costa Rican company Productora y Exportadora de Frutas Verduras Fruver S.A. (“Fruver”). One week before Inprotsa filed its petition to vacate the Award in state court, Inprotsa entered into three contracts with non-party Fruver: (1) a lease agreement with Fruver to lease its pineapple farms in exchange for the payment of periodic rents and fees by Fruver, among other rights and benefits; (2) an exclusive sales agreement in which Inprotsa agreed to sell Fruver MD-2 all pineapples grown on Inprotsa’s plantation; and (3) a services contract, in which Fruver agreed to pay Inprotsa fees to prepare, plant, maintain, harvest, and pack MD-2 pineapples grown on the lands leased by Inprotsa to Fruver. Del Monte contends that these transactions constitute a fraudulent transfer and that the contracts are a sham. Inprotsa firmly denies Del Monte’s characterization of the contract as fraudulent and contends that the contracts are a part of a legitimate arms-length transaction that has nothing to do with Del Monte.

On March 26, 2018, Del Monte filed a Motion (1) for Entry of Order to Show Cause Why Petitioner, Petitioner’s Officers, and Non-Party Fruver Should Not Be Held In Contempt and (2) To Enforce Order and Final Judgment Confirming Final Arbitral Award (the “Contempt and Enforcement Motion”) (ECF No. 123); and a Motion for Proceedings Supplementary to Execution (the “Motion for Proceedings Supplementary”) (ECF No. 125). Del Monte contends that post-judgment discovery reveals that Inprotsa has violated the Award and this Court’s order confirming the Award and Final Judgment. Del Monte seeks, among other things, an order to

show cause why Inprotsa should not be held in contempt and sanctions, including monetary damages and incarceration, against Inprotsa, its principles, and the principles of non-party Fruver, who Del Monte contends conspired with Inprotsa to violate the Award and Order.³

On April 24, 2018, Inprotsa filed a Motion to Abstain in Deference to Parallel Costa Rican Confirmation and Enforcement Proceedings and Request for Oral Argument (the “Motion to Abstain”) (ECF No. 139). Inprotsa urges this Court to take no action on Del Monte’s motions, which Inprotsa contends involve assets and actions in Costa Rica exclusively.

A hearing on the motions was held before the undersigned on November 8, 2018, after which supplemental briefing was submitted by both parties.

II. DISCUSSION

A. Inprotsa’s Motion to Abstain

Inprotsa asks this Court to “respect and defer to the decision of [the Costa Rica] tribunal and abstain from enforcing the Award in Costa Rica” (ECF No. 139 at 7). Inprotsa characterizes Del Monte’s two post-judgment motions as attempts to enforce the Award in Costa Rica and circumvent the stayed, parallel Costa Rican confirmation proceeding. As such, Inprotsa requests that the Court “deny [Del Monte’s] motions, defer to the pending Costa Rican confirmation proceeding, and abstain from exercising further jurisdiction over this enforcement proceeding” (*Id.* at 18).

The doctrine of international abstention determines whether a federal court should exercise jurisdiction over an action where parallel proceedings are ongoing in a foreign nation. *See Posner v. Essex Ins. Co.*, 178 F.3d 1209 (11th Cir. 1999); *Turner Entm’t v. Degeto Film*, 25

³ Del Monte also filed an unopposed Motion for Order Directing Service of Process on non-party Fruver (ECF No. 127), which the Court granted (ECF No. 152).

F.3d 1512 (11th Cir. 1994). “Federal courts have a ‘virtually unflagging obligation’ to exercise the jurisdiction conferred upon them.” *Turner*, 25 F.3d at 1518 (quoting *Colo. River Water Conser. Dist v. United States*, 424 U.S. 800, 817 (1976)). “Nevertheless, in some private international disputes the prudent and just action for a federal court is to abstain from the exercise of jurisdiction.” *Id.* “It is a settled principle of international and our domestic law that a court may abstain from exercising enforcement jurisdiction when the extraterritorial effect of a particular remedy is so disproportionate to harm within the United States as to offend principles of comity.” See *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 263 (2d Cir. 1989). “International comity reflects ‘the extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation.’ It is an abstention doctrine: A federal court has jurisdiction but defers to the judgment of an alternative forum.” *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 (11th Cir. 2004).

In *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994), the Eleventh Circuit outlined “three readily identifiable goals” in considering whether to abstain to parallel litigation: “(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.” The Eleventh Circuit in *Ungaro-Benages* further identified factors relevant to the international comity analysis as: “(1) whether the foreign court was competent and used ‘proceedings consistent with civilized jurisprudence,’ (2) whether the judgment was rendered by fraud, and (3) whether the foreign judgment was

prejudicial because it violated American public policy notions of what is decent and just.” 379 F.3d at 1238.

Inprotsa contends that all of these factors have been met. It argues that international comity favors deference to the Costa Rican proceedings, as Costa Rica is a signatory to the New York Convention that is capable of enforcing the Award within its own borders. Further, Del Monte availed itself of the Costa Rican forum by filing its petition to confirm the Award months before any confirmation proceedings were initiated in the United States. Inprotsa argues that it would be more fair to the litigants to abstain where the issues involve interpretation of Costa Rican law, the witnesses are located in Costa Rica, and Costa Rica is generally a more convenient forum. Finally, Inprotsa contends that abstention to the Costa Rican proceeding will promote the efficient use of judicial resources. Because Inprotsa has not sold any fruit in the United States since the Award was confirmed and because it claims to have no assets in the United States, Inprotsa claims that there are no factors that weigh in favor of allowing Del Monte to pursue its relief in the United States rather than in Costa Rica.

Del Monte argues that Inprotsa has mischaracterized its motions, and that Del Monte does not seek to enforce the Award in Costa Rica before this Court. It asserts that its Contempt and Enforcement Motion asks this Court to enforce its own Confirmation Order and Final Judgment by entering contempt sanctions and awarding post-Award damages; while its Motion for Proceedings Supplementary asks this Court to initiate proceedings supplementary in order to execute on Inprotsa’s intangible property rights in the United States. As such, Del Monte contends that the Court has jurisdiction to grant Del Monte the relief that it seeks. Del Monte further argues that there is no basis for abstention because the United States proceeding and the

Costa Rica proceeding are not parallel. It argues that Inprotsa has failed to show this essential prerequisite to abstention, as the two proceedings have no impact on one another. Regardless, Del Monte argues that the *Turner* factors for abstention have not otherwise been met.

Upon consideration, this is not a case where abstention to foreign proceedings is appropriate, or even applicable. While the proceedings before this Court and the stayed confirmation proceedings in Costa Rica involve the same parties and issues, the two proceedings are at entirely different postures. The Court here has exercised jurisdiction over this case for over two years, including post-judgment proceedings, before the Motion to Abstain was brought. The Court has confirmed the Award and dismissed Inprotsa's petition to vacate; meanwhile, the Costa Rican proceedings have not yet meaningfully begun. In all of the cases that Inprotsa cites for the propositions of parallelism and abstention to a foreign tribunal, none of the cases involve two proceedings where one had not yet started and the other was past judgment.

Compare the present case to the seminal *Turner* case: there, the American and foreign suits "proceeded concurrently," filed within one week of each other. *Turner*, 25 F.3d at 1516. The foreign suit had proceeded all the way to the entry of a declaratory judgment on the merits of the case, at which point the parties in the American proceeding disputed whether a stay should be granted in deference to the foreign suit. The *Turner* court thus examined whether a district court "should exercise its jurisdiction where parallel proceedings are ongoing in a foreign nation and a judgment has been reached on the merits in the litigation abroad." *Id.* at 1518 (emphasis added).

Here, no judgment has been reached in the Costa Rican proceedings, let alone any substantive progress in the case. Indeed, the Costa Rican proceedings are not in fact proceeding,

instead operating under a stay in deference to the proceedings here in the United States, before this Court and the Eleventh Circuit.

At the hearing, Inprotsa's counsel conceded that "abstention" may not even be the "best term" for their relief sought (ECF No. 183 ("Hrg. Tr.") at 31). Indeed the relief sought would be more accurately characterized as either a stay in favor of the Costa Rican proceedings (and the pending Eleventh Circuit appeal), or just a complete declination of any further action. Inprotsa has not demonstrated grounds for issuance of a stay here: indeed, the Costa Rican proceedings are stayed in favor of *this* litigation. Moreover, proceedings on appeal are no impediment to the Court exercising post-judgment ancillary proceedings and contempt proceedings.

Ultimately, the *Turner* abstention factors have not been met here. International comity is not implicated here where, as explained above, this case and the Costa Rican proceedings are at entirely different postures, and no judgment has been entered in the Costa Rican case. Nor would it be unfair to Inprotsa to proceed with post-judgment proceedings in this Court; it was in fact Inprotsa who sought United States jurisdiction, resulting in the stay in Costa Rica in the first place. Finally, there is little concern for a misuse of judicial resources, considering that the Costa Rican tribunal is awaiting the conclusion of United States proceedings before lifting its own stay.

Accordingly, the undersigned recommends that Inprotsa's Motion to Abstain (ECF No. 139) be DENIED.

B. Del Monte's Motion for Proceedings Supplementary

Del Monte seeks entry of an order initiating proceedings supplementary to execution, pursuant to Fla. Stat. § 56.29. Specifically, Del Monte moves to direct the U.S. Marshal to seize the intangible contract rights of the three contracts between Inprotsa and Fruver, and to assign

these rights to Del Monte or sell them at a judicial auction with the sale proceeds applied to the Final Judgment entered in this action. The three contracts at issue are: (1) the September 1, 2016 Lease of pineapple farms by Inprotsa to Fruver; (2) the Pineapple Purchase Agreement dated September 1, 2016 with Fruver; and (3) the Agricultural Services Contract for Planting, Harvesting and Packing “YELLOW” or “GOLDEN” Variety Pineapples on Own and Leased Farms dated September 1, 2016 with Fruver (collectively, the “Fruver contracts”) (ECF No. 135, Exhibits D, E, F). In its Motion for Proceedings Supplementary, Del Monte avers that the Fruver contracts are valuable, as Inprotsa continues to enjoy revenue paid by Fruver pursuant to these agreements.

On October 16, 2017, the Court entered an Order Directing Clerk to Issue Writ of Execution (ECF No. 104). On October 16, 2017, the Clerk of this Court issued a Writ of Execution commanding the United States Marshal to:

levy on the goods and chattels, real and personal property, tangible and intangible property, equities of redemption and other interests in real and personal property, stock or other equity in corporations and other entities, and other properties subject to execution of INVERSIONES y PROCESADORA TROPICAL INPROTSA, S.A., pursuant to that certain Final Judgment attached hereto as Exhibit "A", which was docketed on May 17, 2017 by the United States District Court, Southern District of Florida, Case No. 16-24275-CIV-MORENO, and duly recorded in the Public Records of Miami-Dade County, Florida at Book 30561, Page 1788 in the principal amount of Twenty-Nine Million Two Hundred Ninety Thousand Four Hundred Forty and 54/100 U.S. Dollars (US\$29,290,440.54), plus interest through May 17, 2017, and post-judgment interest after May 17, 2017 at the statutory rate until the Final Judgment is paid in full, and to have this Writ before the Court when satisfied.

(ECF No. 105). Del Monte contends that this writ of execution remains valid, unsatisfied, and outstanding.

A certified copy of the Final Judgment was recorded on June 6, 2017 in the Public Records of Miami-Dade County, Florida at Book 30561, Page 1788 (ECF No. 135, Exhibit B). A Judgment Lien Certificate was filed with the Florida Secretary of State on August 23, 2017 (ECF No. 135, Exhibit C). Del Monte currently owns and holds the Final Judgment (ECF No. 135, Exhibit A (“Pinter Aff.”) at 8). The unsatisfied amount due under the Final Judgment is \$29,290,440.54, plus pre-award and post-award interest, for a total amount of \$33,531,329.40.

Proceedings supplementary to execution in Florida are governed by Fla. Stat. § 56.29 and are applicable in federal actions pursuant to Federal Rule of Civil Procedure Rule 69. *See Cuban Cigar Brands, N.V. v. Tabacalera Popular Cubana, Inc.*, No. 02-23124-CIV, 2008 WL 4279641, at *2 (S.D. Fla. Sept. 16, 2008). Fla. Stat. § 56.29(6) provides that the court may order “any property of the judgment debtor, not exempt from execution, or any property, debt, or other obligation due to the judgment debtor, in the hands of or under the control of any person subject to the Notice to Appear, to be levied upon and applied toward the satisfaction of the judgment debt.” “Proceedings supplementary are a useful, efficacious, and salutary remedy at law enabling the judgment creditor not only to discover assets which may be subject to his judgment, but to subject them thereto by a speedy and direct proceeding in the same court in which the judgment was recovered.” *Grovenor House, L.L.C. v. E.I. Du Pont De Nemours & Co.*, No. 09-21698-CIV, 2012 WL 12950042, at *2 (S.D. Fla. July 12, 2012) (italics and internal quotation marks removed).

Fla. Stat. § 56.29 enumerates the steps that must be taken in order to initiate proceedings supplementary. First, the judgment creditor who holds an unsatisfied judgment or judgment lien obtained under Chapter 55 of the statute must file a motion and an affidavit identifying, if

applicable, “the issuing court, the case number, and the unsatisfied amount of the judgment or judgment lien, including accrued costs and interest, and stating that the execution is valid and outstanding, and thereupon the judgment creditor is entitled to these proceedings supplementary to execution.” Fla. Stat. § 56.29(2). Then, the judgment creditor shall in a motion or supplemental affidavit “describe any property of the judgment debtor not exempt from execution in the hands of any person or any property, debt, or other obligation due to the judgment debtor which may be applied toward the satisfaction of the judgment.” *Id.*

Once the motion and affidavits described above are filed, then the Court “shall issue a Notice to Appear” to the judgment debtor or any other person with control or custody of the property sought to satisfy the judgment. *Id.* The Notice to Appear “shall direct such person to file an affidavit...stating why the property, debt, or other obligation should not be applied to satisfy the judgment” and “must describe with reasonable particularity the property, debt, or other obligation that may be available to satisfy the judgment, must provide such person with the opportunity to present defenses, and must indicate that discovery as provided under the rules of civil procedure is available and that there is a right to a jury trial as provided in s. 56.18.” *Id.* Moreover, the responding affidavit “must raise any fact or defense opposing application of the property described in the Notice to Appear to satisfy the judgment, including legal defenses, such as lack of personal jurisdiction.” *Id.* The court may enter any orders, judgments, or writs required to carry out the purposes of the statute. *See* § 56.29(6).

Before entry of judgment, the judgment creditor’s rights are determined at summary judgment, which is the proper procedural tool to under § 56.29. *Cuban Cigar Brands*, 2008 WL 4279641, at *2.

Del Monte contends that it has properly met the requirements of Fla. Stat. § 56.29 to initiate proceedings supplementary. It proffers that it has filed this motion seeking proceedings supplementary and attached the Affidavit of Zoltan Pinter, attesting that Del Monte holds an unsatisfied Final Judgment, identifying the issuing court, the case number, and that the unsatisfied amount of the Final Judgment, including interest, is \$33,531,329.40, attesting that the execution is valid and outstanding, and stating that Del Monte is entitled to these proceedings supplementary to execution. Del Monte also claims that it has sufficiently demonstrated that Inprotsa is in possession of valuable property—the Fruver contracts—that is not exempt from execution which may be applied toward the satisfaction of the Final Judgment, in the form of Inprotsa’s intangible contract rights under the three Fruver contracts.

Inprotsa opposes the motion on the grounds that the assets Del Monte seeks are located in Costa Rica, and that Del Monte must pursue those foreign assets through confirmation proceedings in Costa Rica, not here. Inprotsa again asks the Court to abstain in deference to the Costa Rican proceeding. Inprotsa also contends that the Motion for Proceedings Supplementary should be denied on the merits, arguing that this Court does not have jurisdiction over Inprotsa’s intangible contract rights in Costa Rica. Inprotsa further claims that its intangible contract rights are not the type of property subject to proceedings supplementary to execution. Finally, it argues that Del Monte has failed to make any showing that the writ of execution has been returned; Del Monte argues that the amended version of Fla. Stat. § 56.29 no longer requires that the writ of execution be returned unsatisfied, and instead only requires for the judgment creditor to have an unsatisfied writ of execution.

Inprotsa's arguments, even if ultimately successful at summary judgment, do not defeat Del Monte's present motion. Del Monte has met all of the requirements for an order granting motion for proceedings supplementary pursuant to Fla. Stat. § 56.29(1). Del Monte has filed the present motion and attached the requisite affidavit with the necessary information. Del Monte has further demonstrated that Inprotsa is in possession of assets, which may be applied toward satisfaction of the Final Judgment, namely the Fruver contracts rights.

Though Inprotsa contends that the Fruver contracts are exempt from execution, the statute does not limit such intangible contractual rights from being executed upon. Indeed, Florida courts and the courts in our district have found that intangible property is not exempt from proceedings supplementary under § 56.29. *See, e.g., Cuban Cigar Brands*, 2008 WL 4279641, at *2 (executing on intangible trademark and patent rights) ("Under Florida law, intangible assets...are amenable to execution under the statute."). As for Inprotsa's argument that the Court lacks jurisdiction to seize these contractual rights because Fruver and the farms are located in Costa Rica, this argument may be raised on (or in opposition to) summary judgment; the proper procedure is for the court to first initiate supplementary proceedings and then decide whether to act on the property. *Id.* at *1 (deciding whether to seize property rights on motion for summary judgment after granting motion for supplementary proceedings and entry order to show cause).

Accordingly, the undersigned issues the following recommendations with respect to the Motion for Proceedings Supplementary:

1. The Motion (ECF No. 125) should be GRANTED.

2. Pursuant to the requirements of Fla. Stat. § 56.29, the Court should enter a Notice to Appear, ordering Inprotsa to show cause as to why Inprotsa's intangible contract rights under (a) the September 1, 2016 Lease of pineapple farms by Inprotsa to Fruver; (b) the Pineapple Purchase Agreement dated September 1, 2016 with Fruver; and (c) the Agricultural Services Contract for Planting, Harvesting and Packing "YELLOW" or "GOLDEN" Variety Pineapples on Own and Leased Farms dated September 1, 2016 with Fruver (ECF No. 135, Exhibits D, E, F); should not be assigned to Del Monte or seized by the U.S. Marshal and sold at judicial auction with the proceeds applied toward the Final Judgment entered in this action on May 17, 2017 (ECF No. 52).

3. Inprotsa should be directed to file an affidavit, as provided in Fla. Stat. § 56.29, stating why its intangible contract rights under the aforementioned Fruver contracts should not be assigned to Del Monte or seized by the U.S. Marshal and sold at judicial auction with the proceeds applied toward the Final Judgment. Inprotsa shall be provided with an opportunity to present defenses and take discovery as allowed by the Federal Rules of Civil Procedure and this Court. Inprotsa's affidavit must raise any fact or defense opposing application of the property described in this Notice to Appear to satisfy the Final Judgment.

C. Del Monte's Contempt and Enforcement Motion

Del Monte moves for (1) entry of an order to show cause why Inprotsa, Inprotsa's officers, and non-party Fruver should not be held in contempt of court; and (2) to enforce the order confirming the Award and Final Judgment. The motion is premised on Del Monte's allegations that Inprotsa has not complied with any portion of the Award: not the destruction injunction, the sales injunction, nor the damages award. Because it is undisputed that Inprotsa

has not satisfied the damages award, at issue in the motion is the destruction injunction and the sales injunction, wherein Del Monte contends that Inprotsa has not destroyed 93% of the MD-2 vegetative material on its farm, and has instead continued to sell MD-2 pineapples to third parties, primarily to Fruver. In support of its motion, Del Monte submitted Inprotsa's sales records, accompanied by the Declaration of its expert, Patrick Gannon, that purport to show Inprotsa's continued sales from June 11, 2016, up until and throughout this Court's confirmation of the Award and entry of Final Judgment, and continuing to present day (ECF Nos. 136, 179). Del Monte contends that Inprotsa's financial records show continuous revenue from sales and do not reflect a precipitous decline after the Award, or even following entry of this Court's Order confirming the Award and subsequent Final Judgment, as would be expected if Inprotsa ceased sales in compliance with the injunction. Del Monte seeks various contempt sanctions for Inprotsa's alleged conduct, including daily coercive fines, compensatory fines, attorney fees and costs, and incarceration of Inprotsa's officers, until Inprotsa fully complies with the Confirmation Order and Final Judgment. Del Monte also moves the Court to "enforce its confirmation order and final judgment by awarding post-award damages" caused by Inprotsa's violation of the Award's injunctive provisions (ECF No. 137 at 15).

1. Contempt

Inprotsa contends that the motion should be denied because: (1) this Court cannot enforce the Award in Costa Rica through sanctions; (2) Del Monte has not suffered any actual losses as required for compensatory civil contempt sanctions; and (3) it is in compliance with the Award. The undersigned will first address Inprotsa's legal challenges to the motion, and then address the facts surrounding Inprotsa's compliance or lack thereof with the Award.

a. Legal Challenges

Inprotsa first argues that to enter sanctions based on conduct and parties in Costa Rica would have the extraterritorial effect of confirming the award in Costa Rica, beyond this Court's jurisdiction. In response, Del Monte maintains that that the Court has jurisdiction over Inprotsa, and jurisdiction to enforce its own judgment, and that by confirming the Award, the Court has made that injunction the same as if issued here.

“[T]o be enforced as a civil judgment, an award subject to the Convention...must first be confirmed and converted into a judgment by a court.” *Del Monte Int'l GMBH v. Ticofrut, S.A.*, No. 16-23894-CIV, 2017 WL 2901326, at *5 (S.D. Fla. Jan. 30, 2017), *report and recommendation adopted*, No. 16-23894-CIV, 2017 WL 2899978 (S.D. Fla. May 16, 2017). Upon confirmation of the award, “[t]he judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.” *Id.* (citing 9 U.S.C. § 13). The Court may accordingly enforce the judgment confirming the award and punish parties who violate said judgment through contempt or enforcement proceedings. *See W. Massachusetts Elec. Co. v. Int'l Bhd. of Elec. Workers, Local 455*, No. CIV.A. 11-30106-DPW, 2012 WL 4482343, at *8 (D. Mass. Sept. 27, 2012); *see also Nat'l Football League Players Ass'n v. Nat'l Football League Mgt. Council*, 523 F. App'x 756, 760 (2d Cir. 2013) (“once a court has confirmed an award, it has plenary authority over subsequent proceedings necessary to vindicate its authority, and effectuate its decrees”); *Zeiler v. Deitsch*, 500 F.3d 157, 170 (2d Cir. 2007).

Del Monte seeks contempt sanctions for Inprotsa's violation of this Court's Final Judgment, which confirmed the Award, entered on May 17, 2017.⁴ As such, Del Monte has a judgment against Inprotsa that subsumes the Award, including the destruction injunction and the sales injunction. The Court thus may treat the Award as if it had entered the order itself, and enforce compliance with these provisions through its contempt or enforcement powers. *See W. Massachusetts Elec. Co.*, 2012 WL 4482343, at *8; *Arrowood Indem. Co. v. Trustmark Ins. Co.*, No. 3:03CV1000 JBA TPS, 2012 WL 1596980, at *2 (D. Conn. May 7, 2012). Issuing contempt sanctions for violation of this Court's Judgment does not, as Inprotsa contends, implicate exercising jurisdiction over foreign parties or assets, and it is without dispute that this Court has jurisdiction over Inprotsa.

Inprotsa also contends that contempt sanctions are not available where there is nothing to now coerce, and where Del Monte has not shown that it has sustained any actual losses. It is not meaningfully disputed, as is further set forth below, that Inprotsa no longer has the prohibited vegetative material on its lands. Del Monte asserts that it was harmed in that it had bargained for Inprotsa to leave the pineapple market, yet they kept making sales and received ill-gotten gains.

"[S]anctions entered in civil contempt proceedings may be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *FTC v. Garden of Life, Inc.*, 516 F. App'x 852, 860 (11th Cir. 2013); *see also Citronelle-Mobile Gathering v. Watkins*, 943 F.2d 1297, 1304 (11th Cir. 1991) ("The court has the power to impose coercive and compensatory sanctions."). "The

⁴ Del Monte argues that the date on which the Court confirmed the Award, May 2, 2017, also results in a court order that Inprotsa violated. But 9 U.S.C. § 13 provides that it is the *judgment* entered with the arbitration award that has the same force and effect as if the judgment were entered in the action itself. Accordingly, the date and order that the undersigned will rely on is the May 17, 2017 Final Judgment, not the confirmation order.

measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief. This may entail the doing of a variety of acts....” *Id.* (citations omitted); *U.S. v. City of Miami*, 195 F.3d 1292, 1298 (11th Cir. 1999) (“a court’s civil contempt power is measured solely by the ‘requirements of full remedial relief’”) (citation omitted). The Court has “numerous options, among them: a coercive daily fine, a compensatory fine, attorneys’ fees and expenses ... and coercive incarceration.” *Citronelle-Mobile Gathering*, 943 F.2d at 1304; *Mesa v. Luis Garcia Land Service Co.*, 2016 WL 6956798, *3 (S.D. Fla. Nov. 15, 2016).

Here, Del Monte was damaged by loss of the benefit of its bargain with Inprotsa. The arbitration panel found that Inprotsa was supposed to have returned or destroyed all vegetative materials following the termination of the Agreement, and, because they breached this contractual provision, Inprotsa “must now account for the monies it improperly received” (Award at ¶ 108). To the same extent, Inprotsa’s continued sales of fruit *after* it was enjoined from keeping the contested fruit resulted in monies improperly received to the detriment of Del Monte. Accordingly, Del Monte’s contempt motion seeks relief available under this Court’s contempt powers.

b. Factual Challenges

Inprotsa contends that it is now in compliance with the Award and thus, with the Court’s orders. Inprotsa advanced evidence to show that it has complied with the Award, primarily in the form of affidavits of Mr. Gurría Hernández. At the time Inprotsa filed its response in opposition, Inprotsa avers that it had destroyed 440.26 out of the 460 hectares (95%) of the MD-2 vegetative material existing on its farms at the time of the Award. In a supplemental filing in anticipation of the Court’s evidentiary hearing, Inprotsa attached an updated affidavit of Mr. Gurría Hernández,

who swore that Inprotsa has destroyed 100% of the vegetative material on its farms, in addition to the vegetative material on farms owned by other farm operators, Productos Esmeralda and Mr. Fernando Baeza, for a total of 906.63 hectares (ECF No. 177-1 at ¶ 5). Del Monte counters that Inprotsa operates on over a thousand hectares, so the destruction of vegetation on 440 hectares was an insignificant amount. Del Monte offers proof of Inprotsa's sales in 2017 and 2018, which Del Monte argues demonstrates that Inprotsa's sales did not decrease in proportion to what would be expected if Inprotsa had destroyed the vegetation as required (ECF Nos. 136, 179).

The undersigned has carefully considered the filings and exhibits submitted by both parties. Though the parties dispute the rate at which Inprotsa destroyed the MD-2 vegetative material as required by the destruction injunction, it is not disputed that Inprotsa failed to comply with the destruction injunction by immediately destroying or returning the subject vegetation. Inprotsa defended its failure to accelerate the destruction on the grounds that Costa Rican law limited the amount it could destroy at a time, but does not deny the failure to comply with this aspect of the Award. Inprotsa's failure to comply with the destruction injunction thus required it to make no sales in excess of 7% of MD-2 pineapples derived from Del Monte's seeds unless those sales were made to Del Monte.

There is similarly no dispute that Inprotsa continued making sales after this Court's entry of Final Judgment confirming and subsuming the Award. Inprotsa's sales figures show that Inprotsa made sales exceeding 7% of each MD-2 pineapple harvest: from May 2, 2017 to September 30, 2018, Inprotsa made sales of first and second quality pineapples totaling \$17,606,111; with a permitted amount of sales capped at 7% of its harvest (\$1,232,428), Inprotsa made \$16,373,684 in excess sales over the 7% maximum. Inprotsa's president, Mr. Gurría

Hernández, testified in March 2018 that Inprotsa had been making sales on pineapples since June 10, 2016, and confirmed that it sold 100% of the harvests in the fiscal years 2016 and 2017 (Gurría Hernández Dep. at 122:16-20; 141:14-143-1; 146:17-22). Mr. Gurría Hernández “consider[ed] that the fruits produced [had] come from seeds whose property was transferred to Inprotsa by Del Monte from the delivery of the seeds themselves and its progeny as pointed out within the arbitral award” (*Id.* at 122:22-123:1). Mr. Gurría Hernández further explained that Inprotsa “needed to sell the fruit that Inprotsa was producing to comply with the commitments Inprotsa has in the operation it has in Costa Rica,” justifying its actions by pointing to the lack of confirmation and stayed proceedings in Costa Rica and the ongoing appeal in the United States (*Id.* at 244:9-23).

Accordingly, the evidence adduced, while not conclusive with respect to the amount or timing of destroyed vegetative material, is sufficient to show violation of the Court’s Final Judgment by proof that sales continued after the Court’s entry of Final Judgment in violation of the sales injunction. Even accepting Inprotsa’s evidence as true, Inprotsa completed destruction of the vegetative material by April 2018 (ECF No. 141-1); thus, Inprotsa impermissibly sold MD-2 pineapples in excess of the 7% cap before complying with the destruction injunction of the Award. Inprotsa’s violation of the Award constitutes contempt of this Court’s Final Judgment and the undersigned recommends that Del Monte’s motion for an order to show cause be granted as to Inprotsa, and its officers, Jorge Luis Gurría Hernández and Manuel Gurría Ordonez.⁵

⁵ Del Monte also seeks to hold non-party Fruver in contempt of the Court for its role as a co-conspirator in assisting Inprotsa in violating the Award. The undersigned recommends denying this request. The evidence advanced in support of Del Monte’s contention that Fruver knowingly conspired with Inprotsa to violate the Award is scant: Del Monte relies primarily on the timing of the execution of the contracts, the existence of a relationship between the principles of Inprotsa and Fruver, and disclosure of the Award against Inprotsa in the Fruver contracts (thus

Upon consideration of the record, the undersigned certifies the following facts:

1. On June 10, 2016, the arbitration panel at the International Court of Arbitration of the International Chamber of Commerce decided in favor of Del Monte and issued an arbitral award (“the Award”).

2. The Award ordered that (1) Inprotsa “return or destroy 93% of the MD-2 vegetative materials in [Inprotsa’s] farm” in Costa Rica; (2) Inprotsa is “permanently enjoined...from selling MD-2 pineapples to third parties for as long as [Inprotsa] shall not have complied with its obligation to destroy or return the MD-2 vegetative materials,” with the exception of sales in amounts not exceeding 7% of each MD-2 harvest; and (3) Inprotsa pay Del Monte damages in the amount of \$26,133,000.00, arbitral costs of \$650,000.00, and legal representation costs and fees of \$2,507,440.54, for a total amount of \$29,290,440.54, plus pre-award and post-award interest (Award at ¶ 122).

3. The Award also gave Inprotsa the option to “sell to Del Monte all pineapples harvested from Del Monte Plant Stock on Inprotsa’s plantation” in lieu of the “immediate destruction” of the MD-2 vegetation material (Award at ¶ 27, 122).

4. This Court confirmed the arbitration award on May 2, 2017, and entered a Final Judgment on May 17, 2017. The Final Judgment states that “in accordance with the reasons stated in the Court’s Order Confirming the Arbitral Award on May 2, 2017, judgment is entered in favor of Respondent Del Monte International GmbH and against Petitioner Inversiones y Procesadora Tropical Inprotsa, S.A.”

demonstrating Fruver’s knowledge of the Award). The evidence advanced tends to show that Fruver had opportunity and perhaps even desire to assist Inprotsa as Del Monte alleges, but the undersigned will not make the leap Del Monte urges from this circumstantial evidence, particular considering that Fruver is a foreign non-party, who has not appeared and defended against Del Monte’s charges.

5. The Award, and this Court's Final Judgment subsuming it, applied to 1,150 hectares of Inprotsa's farmland in Costa Rica (ECF No. 142-1).

6. After the Award was issued in 2016, Inprotsa did not elect to sell the MD-2 vegetative materials to Del Monte. Accordingly, the destruction injunction required Inprotsa to initiate the "immediate destruction" of the vegetative material (Award at ¶ 122).

7. Inprotsa did not destroy the MD-2 vegetative material "immediate[ly]," but rather at the same pace that occurs at the pineapple's normal growth and harvesting cycle.

8. Inprotsa "continue[d] with the growth cycle for each of the plants according to the stages they are in" (Gurría Hernández Dep. at 122:12-15).

9. Inprotsa waited "until the second harvest of pineapples during the normal growth cycle" and at that time destroyed "the MD-2 vegetative material after the second harvest of those particular hectares that became available" (*Id.* at 108:23-109:5).

10. Following the Award, Inprotsa continued to make sales of pineapples that it harvested from its normal growth cycles (*Id.* at 122:16-18).

11. Pursuant to the contracts executed on September 1, 2016, Inprotsa sold its pineapples exclusively to Fruver (Gurría Hernández Dep. at 51:11-20). Fruver is owned by Mr. Alejandro Aguilar, a close family friend of Inprotsa's officers, who purchased Fruver after being notified of the opportunity by Mr. Gurría Hernández (*Id.* at 175-77; 186-88).

12. From the time the Court entered its Final Judgment, Inprotsa sold fruits harvested from the vegetative material specified in the Award in excess of the 7% cap imposed by the sales injunction (Gurría Hernández Dep. at 122:16-20; 141-43; 146). Inprotsa did not make these sales

to Del Monte, the only sales permissible under the terms of the Parties' agreement and the Award.

13. According to Inprotsa's sales figures, between May 2, 2017 (the date of this Court's confirmation order) and September 30, 2018, Inprotsa's sales revenue was \$16,373,684, and was derived from first and second quality pineapples. This exceeded the 7% cap in violation of the injunction against sales (ECF No. 179, P. Gannon Supp'l Decl., at ¶ 3–Tables 7 & 13).

14. The MD-2 pineapples sold in the fiscal years 2017 and 2018 derived from the MD-2 vegetation planted on Inprotsa's 1,150 hectares, as identified in the Award, and incorporated in the Court's Final Judgment (Gurría Hernández Dep. at 171:11-18).

2. Enforcement

Del Monte also moves the Court to “enforce its confirmation order and final judgment by awarding post-award damages” caused by Inprotsa's violation of the Award's injunctive provisions (ECF No. 137 at 15). Inprotsa argues that Del Monte's request is redundant to its contempt requests and thus unnecessary, while Del Monte avers that the distinction between the requests is one of timing: the enforcement request seeks damages incurred since the issuance of the Award in June 2016, whereas the contempt request relies on the dates that the Court entered its own order of confirmation and Final Judgment in May 2017.

The undersigned does not recommend granting Del Monte's motion to enforce and request for damages arising before this Court entered Final Judgment. This Court's authority to enforce the Award's injunction provisions is rooted in the fact that it confirmed the Award and entered Final Judgment subsuming the award on May 17, 2017. Del Monte relies on a series of cases for the proposition that a court has the discretion to enforce its judgments by awarding

damages for conduct occurring after entry of an arbitral award; notably, however, none of these cases involve a court awarding damages for violation of an injunction that occurred prior to confirmation the award and entry of final judgment. As for damages incurred after this Court entered its Final Judgment, those damages sought are duplicative to those sought in its motion for contempt, which is the preferred vehicle for seeking such damages. *See In re Grand Jury Proceedings*, 142 F.3d 1416, 1424 (11th Cir. 1998) (“Injunctions are enforced through the district court's civil contempt power.”). Accordingly, the undersigned recommends denying Del Monte’s request for an award of post-award damages.

3. Recommendations

Accordingly, the undersigned issues the following recommendations with respect to the Contempt and Enforcement Motion:

1. The Motion (ECF No. 123) should be GRANTED IN PART and DENIED IN PART.
2. The Court should order Inprotsa, and its officers, Jorge Luis Gurría Hernández and Manuel Gurría Ordonez, to show cause why the Court should not hold them in contempt for failing to comply with the Court’s Final Judgment by making sales of MD-2 pineapples in violation of the permanent injunction of the Award, and order sanctions, including monies Inprotsa improperly received as a result of its sales made after entry of this Court’s Final Judgment.

III. CONCLUSION

For the foregoing reasons, the undersigned recommends as follows:

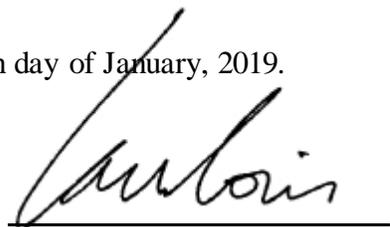
1. Petitioner's Motion to Abstain in Deference to Parallel Costa Rican Confirmation and Enforcement Proceedings and Request for Oral Argument (ECF No. 139) should be DENIED;

2. Respondent's Motion for Proceedings Supplementary to Execution (ECF No. 125) should be GRANTED; and

3. Respondent's Motion (1) for Entry of Order to Show Cause Why Petitioner, Petitioner's Officers, and Non-Party Fruver Should Not Be Held In Contempt and (2) To Enforce Order and Final Judgment Confirming Final Arbitral Award (ECF No. 123) should be GRANTED IN PART and DENIED IN PART.

Pursuant to Local Magistrate Rule 4(b), the parties have fourteen (14) days from the date of this Report and Recommendation to serve and file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to file objections by that date shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report and shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. *See* 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *Patton v. Rowell*, No. 16-10492, 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security*, No. 16-11238, 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

RESPECTFULLY SUBMITTED this 24th day of January, 2019.


LAUREN LOUIS
United States Magistrate Judge