

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

In the Matter of the Application of

IOAN MICULA,

VIOREL MICULA,

S.C. EUROPEAN FOOD S.A.,
S.C. STARMILL S.R.L and

S.C. MULTIPACK S.R.L
Petitioners

- against -

THE GOVERNMENT OF ROMANIA,

Respondent.

Civil Action No. 17 CV 2332

**OPPOSITION TO PETITIONERS'
MOTION FOR AN ORDER PURSUANT
TO 28 U.S.C §1610(C)**

**GOVERNMENT OF ROMANIA’S OPPOSITION TO PETITIONERS’ MOTION FOR
ORDER PUSUANT TO 28 U.S.C §1610(C)**

PLEASE TAKE NOTICE that the Government of Romania (“Romania”), by its undersigned counsel, submits its Opposition to Petitioners’ Motion for Order Pursuant to 28 U.S.C §1610(C) [ECF No. 97] (the “Motion”), pursuant to existing case law. In support of its Opposition, Romania states as follows:

PROCEDURAL BACKGROUND

1. On December 11, 2013, an arbitral tribunal convened under the International Convention on the Settlement of Investment Disputes rendered an award (the “Award”) in Petitioners’ favor. (ECF No. 55-2, ¶ 6).
2. On September 11, 2019, this Court granted Petitioners’ Petition to confirm the Award. (ECF No. 86).
3. The Court entered Judgment in favor of Petitioners on September 20, 2019 in the amount of \$356,439,727, plus post-judgment interest at the rate identified in the Award (the “Judgment”). (ECF No. 88).
4. On October 9, 2019, Romania filed its Notice of Appeal of the Court’s Orders, appealing the Orders to the United States Court of Appeals for the District of Columbia Circuit. (ECF No. 89).
5. Romania has filed a Motion and an Amended Motion to Stay Enforcement of Judgment and Discovery Pending Appeal and Motion to Waive Supersedeas Bond Requirement (the “Motion to Stay”), and a corresponding Memorandum and Amended Memorandum in support thereof (ECF 94 and 95), which is fully briefed (*see* Opposition (ECF No. 96) and Reply (ECF No. 101)). The Court has not yet ruled on the Motion to Stay.

6. Notwithstanding the pendency of Romania's Motion to Stay enforcement of the Judgment, Petitioners filed their Motion, seeking an Order from this Court allowing them to enforce the Judgment, the very act that Romania, by its Motion to Stay, has asked this Court to postpone pending its appeal.

ARGUMENT

Petitioners seek an order pursuant to 28 U.S.C §1610(c) to commence enforcement of the Judgment. In the first instance, this Motion is premature as the Motion to Stay, which seeks a stay of the case, including enforcement of the Judgment, pending Romania's appeal, has not yet been ruled upon by this Court. For this reason alone, Petitioners' Motion should be denied. In the alternative to its request that the Motion be denied as premature, if this Court does determine that Petitioners can proceed to enforce the Judgment, Romania requests that Petitioners be subject to and limited by the amounts outlined in a newly-issued decision by the Bucharest Court of Appeals ("BCA") in Romania on November 21, 2019 and provided to Romania on December 3, 2019. The BCA's decision, in effect, dismissed one of the Petitioners, SC European Foods, and prompted Mazilu & Asociații, the executor hired by Petitioners, to execute the Award and to, *inter alia*, produce an expert report outlining the amounts due and owing to the remaining Petitioners in the total amount of 912,501,030.60 RON (Romanian currency), or \$212,209,541 (USD). This amount includes executor costs in the amount of 5,443,607.55 RON, and is otherwise attributable to the respective Petitioners as follows: 241,788,020.05 RON to Viorel Micula and 665,269,402.69 RON to Starmill SRL, Multipack SRL and Ioan Micula. Given that this Court, in its Judgment, ruled that Romanian law applies and governs as to the amounts due and owing to Petitioners and prior payments attributed to Petitioners (ECF 86, at p. 27), this Court should defer to, accept and rely upon the BCA ruling and the executor's current amounts due and owing.

By way of background, on March 24, 2014, SC MULTIPACK SRL, SC STARMILL SRL, SC EUROPEAN FOOD SA and MICULA IOAN sought execution of the entire Award, hiring executor Mazilu & Asociații (execution file no. 22/2014). Romania challenged the forced execution initiated in year 2014 in case no. 15755/3/2014. *See* a true and accurate copy of the Declaration of Dana Vilaia (“Vilaia Decl.”) attached hereto as Exhibit A, at ¶6. Petitioners, SC MULTIPACK SRL, SC STARMILL SRL, MICULA IOAN and VIOREL MICULA hired Mazilu și Asociații to determine the amount of the Award then due and execute it in Romania. *See id.* at ¶25.

On March 2014, the executor Mazilu & Asociații issued a report on the entire amount due on the Arbitral Award of RON 301,146,583.20 (USD \$92,580,725) (“Mazilu Initial Report”). *See id.* at ¶7.

On October 21, 2019, Bucharest Court of Appeals (“BCA”) issued its ruling via Decision no. 1483A/2019 in case no. 15755/3/2014 (Decision “1483A/2019”), without issuing the basis for its decision. This is a final ruling in case no. 15755/3/2014. *See id.* at ¶8. The BCA then issued the written motivation and basis for its Decision 1483A/2019, which was communicated to the parties on December 3, 2019. *See id.* at ¶9 and its corresponding exhibit *the October 21, 2019 BCA Ruling for the Decision 1483A/2019* attached as Exhibit 1 to the Vilaia Decl.

The October 21, 2019 BCA Ruling for Decision 1483A/2019 holds that the set-off decisions issued by National Agency for Fiscal Administration (“NAFA”) no. 1202204/March 21, 2014 and no. 28892-20905/January 14, 2014 are valid until stated otherwise in case no. 378/35/CA/2014, which is currently on the dockets of the Romanian High Court of Justice and Cassation. *See id.* at ¶10.

**Decision 1483A/2019 of the Bucharest Court of Appeal
in case no. 15755/3/2014 (Excerpt page 17)**

“Criticisms regarding the failure by the first court to offset claims are founded, for the following reasons: First, the court notes that the verification of the validity of the claims setoff decisions exceeds the competence of the civil court vested with the judgment of the enforcement challenge, the competence belonging to the administrative litigation court in the application of art. 2 paragraph (1) lit. f) of Law no. 554/2004.

Until the final solution of the file no. 378/35 / CA / 2014 of the Oradea Court of Appeal, having as its object the annulment of the set-off decisions no. 1202204 / 21.03.2014 and no. 28892-20905 / 14.01.2014 issued by the MFP-NAFA (against the sentence no. 81/2015 issued by the Court of Appeal ORADEA was declared an appeal, which suspends the execution, according to art. 20 paragraph 2 of the law 554/2004), administrative acts enjoy the presumption of validity, so that their effects cannot be ignored.” See Exhibit 1 at page 17.

The BCA ruled that the court cannot ignore the legal effects of the setoff decisions issued by NAFA and recognizes that the set-off decisions apply only to 20% of the entire amount of the Award, namely, the payment of the Award by set-off against the claim of Petitioner European Food SA. *See id.* at ¶11. Splitting equally the entire amount of the Award between the five Petitioners, the BCA ignored the terms of the Award that rendered it collectively, and not independently. *See id.* at ¶12 and its corresponding Exhibit 1. The entire English version shall be further submitted.

**Decision 1483A/2019 of the Bucharest Court of Appeal
in case no. 15755/3/2014 (Excerpt page 17)**

“The court will use the defendants' statements regarding the lack of active solidarity, in terms of art. 1.435 of the New Civil Code, which provides that solidarity between creditors exists only if it is expressly stipulated. In the absence of active solidarity, the setoff decision produces effects only against the creditor SC EUROPEAN FOOD, whose debt is 20% of the total debt.”

Despite the original collective and unapportioned Award, the BCA apportioned the payment between the Petitioners, acknowledging full payment to SC European Food SA. *See id.* at ¶13. The BCA ruled that the Mazilu Initial Report is null and void, eliminated the Romanian State debt in favor of European Food SA, and required that a new Report be drafted by Mazilu. *See id.* at ¶14.

According to BCA Decision 1483A/2019, all NAFA set-off decisions against the Petitioners are valid (NAFA Decisions no. 1202204/March 21, 2014 and no. 28892-20905/January 14, 2014) until a final decision is ruled in case no. file no. 378/35/CA/2014. *See id.* at ¶21.

Because the BCA deemed the NAFA Decisions valid, the European Food’s debt was considered paid by the set-off of the correspondent NAFA Decisions and Mazilu și Asociații erased such debt from the execution file no. 22/2014 and no longer requested it from Romania. *See id.* at ¶22 and its corresponding exhibit *the Romanian version of such Final Report of Mazilu și Asociații* attached as Exhibit 2 to the Vilaia Decl.

Petitioners, SC MULTIPACK SRL, SC STARMILL SRL, MICULA IOAN and VIOREL MICULA again hired Mazilu și Asociații to determine the amount of the Award currently due and execute it in Romania following the BCA ruling. *See id.* at ¶25.

As of December 11, 2019, per the BCA Decision 1483A/2019, the amounts due on the Award to Petitioners, SC MULTIPACK SRL, SC STARMILL SRL and MICULA IOAN is RON 665,269,402.69 (USD \$154,713,815), as was determined by the Mazilu și Asociații in Mazilu Final Report (pp. 57-59). *See id.* at ¶23. The amount due to Petitioner VIOREL MICULA, according to Mazilu Final Report (pp. 57-59), is RON 241,788,020.05 (USD \$56,229,773). *See id.* at ¶21.

Mazilu hired an expert, Stela Anton, to draft an accounting report on the amounts due and owing to Petitioners (“Mazilu Final Report”). *See id.* at ¶16 and its corresponding Exhibit 2 (*excerpt translation of page 57-59 of Mazilu Final Report dated November 18, 2019 (Romanian Version)*) to the Vilaia Decl. The entire English version shall be further submitted.

The Mazilu Final Report is clear as to the amounts due and owing to Petitioners: RON 907,057,422.74, which is broken down as follows:

- the amount of **RON 241,788,020.05** due to the creditor Viorel Micula,
- the amount of **RON 665,269,402.69** due to the creditors SC Starmil, SC Multipack and loan Micula, respectively 221.756.467.56 lei / creditor.

Mazilu Final Report – Excerpt pages 57-59

At Objective no. 7 *"Determination of the debt due to the creditors Starmil, Multipack, loan Micula and Viorel Micula (less SC EUROPEAN FOOD SA), after deducting the amounts that have been distributed to them, taking into account the date of distributions made to Starmil, Multipack, loan Micula."*, I formulate the following answer:

Answer

„The debt updated by reference to the calculation agreement of the Actual / Actual interest and the remaining payment on 11.11.2019 (after deduction of the compensations and the amounts received) is in the total amount of RON 891,570,296.97, which includes:

- √ *the amount of RON 237,808,821.33 due to the creditor Viorel Micula and*
- √ *the amount of RON 653,761,475.64 due to the creditors SC Starmil, SC Multipack and Loan Micula, respectively RON 217,877,808.61 / creditor.*

The evolution of the debt from the date of the clearing up to the date (11.11.2019) is presented in detail on each creditor in part in the table no. 12-A / A.

[table no. 12-A / A not included here See table in Exhibit no. 2 page 58].

*The debt updated by quantifying the interest using the Actual / Actual convention and the payment remaining on 11.11.2019 (after deduction of the compensations and the amounts received) is in the total amount of **RON 907,057,422.74**, which is composed of:*

√ the amount of **RON 241,788,020.05** due to the creditor Viorel Micula,
√ the amount of **RON 665,269,402.69** due to the creditors SC Starmil, SC Multipack and Ioan Micula, respectively 221.756.467.56 lei / creditor.
The evolution of the debt from the date of the clearing up to the date (11.11.2019) is presented in detail on each creditor in part in the table no. 12 A / 360”
[table no. 12 A / 360 not included here. See table in Exhibit no. 2 page 59]

On November 8, 2019, the Romanian Ministry of Finance challenged the commencement of the enforcement procedure by Mazilu și Asociații in case no. 33484/3/2019 before the First Instance Court District 5 and sought to stay the enforcement procedure. *See id.* at ¶17.

On November 18, 2019, just before the stay was decided by the First Instance Court District 5, Mazilu și Asociații issued another payment notification against the Romanian Ministry of Finance for the same amount of RO 665,269,402.69 (SD 154,713,815) on behalf of SC MULTIPACK SRL, SC STARMILL SRL and MICULA IOAN together with RON 5,443,607.55 (USD \$1,265,955) his own fees. *See id.* at ¶19 and its corresponding exhibit *the Romanian version of such payment notification* attached as Exhibit 4 to the Vilaia Decl.

On November 26, 2019, the First Instance Court District 5 ruled in favor of the Romanian Ministry of Finance and stayed the enforcement procedure, waving the bond, until the merits of the case shall be examined and the court will enter a final judgment. *See id.* at ¶18 and its corresponding exhibit *the Romanian version of such Order* attached as Exhibit 3 to the Vilaia Decl.

Excerpt of the First Instance Court District 5 Ruling

“Therefore, the court will admit the provisory motion to stay, meaning in which it will order the provisional stay of the forced execution in the forced execution file number 22/2014 instrumented by the certified enforcement agent “Mazilu and Associates” until the Motion to Stay has been solved.”

On November 19, 2019, Mazilu și Asociații eliminated European Food SA as creditor of the Award and established the amount determined for execution to be a total of RON 907,057,422.74 (USD \$210,943,587), including up-to-date interest for all remaining Petitioners out of which RON 665,269,402.69 (USD \$154,713,815) awarded to SC MULTIPACK SRL, SC STARMILL SRL and MICULA IOAN. *See id.* at ¶15. Additionally, the cost of the enforcement procedure in Romania is

RON 5,443,607.55 (USD \$1,265,955), according to Mazilu's payment notification dated November 18, 2019. *See id.* at ¶26.

The Mazilu Final Report is also consistent with the Elf Expert, which is an expert report obtained by Romania in the Belgian case. *See id.* at ¶30 and its corresponding exhibit *Elf Report* attached as Exhibit 5 to the Vilaia Decl. In light of this Court's September 21, 2019 Order that held that Romanian law applies to any issues of payment (ECF 86 at p. 27), Romanian law dictates in the matter pertaining to payments and amounts due to Petitioners. *See id.* at ¶27.

Mazilu's Final Report is done at the request of Petitioners, by the executor hired by Petitioners, according to BCA Order and it includes all of the amounts currently considered due on the Award, calculated in RON and taking into consideration the ROBOR (interest) rate as stated by the Award. *See id.* at ¶28. Any other amounts than these are incorrect and improper, including any amounts identified in the Brattle Report which, among other defects, uses a wrong exchange currency. *See id.* at ¶29.

In light of the above, the amounts due to Petitioners are no greater than 912,501,030.60 RON, or \$212,209,541 USD, which includes executor costs in the amount of 5,443,607.55 RON, attributable as follows: 241,788,020.05 RON to Viorel Micula and 665,269,402.69 RON to Starmill SRL, Multipack SRL and Ioan Micula.

WHEREFORE, The Government of Romania, and its undersigned counsel, respectfully prays that this Court enter an Order; (a) denying Petitioners' Motion for an Order on the ground that it was prematurely filed because the Court has not yet ruled on Romania's first-filed and currently pending Motion to Stay the enforcement of the Judgment; or, in the alternative: (b)(1) dismiss European Food SA as a party Petitioner because it has been determined under Romanian law that the portion of the Award attributable to European Food SA has been fully satisfied; and (b)(2) recognize and enforce only the sums identified in the Mazilu Report as the valid amounts

due and owing to Petitioners (other than European Foods SA), in total amount of 912,501,030.60 RON, or \$212,209,541 USD, which includes executor costs in the amount of 5,443,607.55 RON, attributable to the remaining Petitioners as follows: 242,788,020.05 RON to Viorel Micula and 665,269,402.69 RON to Starmill SRL, Multipack SRL and Ioan Micula; and (c) for such other and further relief this Honorable Court deems necessary, just and proper.

Dated: December 11, 2019

Respectfully submitted,

THE GOVERNMENT OF ROMANIA

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