No. 25-

IN THE

# Supreme Court of the United States

GORE AND ASSOCIATES
MANAGEMENT COMPANY, INC.,

*Petitioner,*

*v.*

SLSCO LTD. AND HARTFORD
FIRE INSURANCE COMPANY,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## SUPPLEMENTAL APPENDIX

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**APPENDIX A — CORRECTED ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, DATED MAY 10, 2023**

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1762

IN RE: GORE AND ASSOCIATES MANAGEMENT COMPANY, INC.,

*Petitioner.*

**CORRECTED ORDER OF COURT***

Entered: May 10, 2023

Petitioner Gore and Associates Management Company, Inc., has filed a petition for a writ of mandamus, seeking to challenge the district court's order imposing a stay of petitioner's payment bond claims and claims under the Little Miller Act in Case No. 3:19-cv-01650-GAG (D.P.R.). While we express no opinion whatsoever as to relevant jurisdictional and merits issues, the Clerk is directed to transmit a copy of the mandamus petition to the district court for docketing as a notice of appeal. *See, e.g.*, *In re Urohealth Sys., Inc.*, 252 F.3d 504, 507-08 (collecting cases re construing mandamus filings as notices of appeal). This ruling is subject to revisitation by the ultimate merits panel. The notice of appeal should be treated as filed in the district court on the date the mandamus petition was filed in this court.

* Corrected Order issued to amend service list.

With their briefs in the *newly opened appeal*, the parties shall fully address all potential sources for this court's jurisdiction, including mandamus, and also should address the proper scope of any appeal. All relevant issues are reserved to the ultimate merits panel. This mandamus proceeding shall remain pending, and resolution of this proceeding and the appeal contemplated herein will be coordinated to the fullest extent possible.

So ordered.

By the Court:

Maria R. Hamilton, Clerk

## APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, FILED AUGUST 24, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

CIVIL NO. 19-1650 (GAG)

GORE & ASSOC. MGMT. CO., INC.,

*Plaintiff,*

v.

SLSCO LTD. and HARTFORD FIRE & INS. CO.,

*Defendants.*

### MEMORANDUM ORDER

Plaintiff Gore and Associates Management Company, Inc. ("Gore" or "Plaintiff") filed an amended complaint pursuant to diversity jurisdiction, 28 U.S.C. § 1332(a)(1), against SLSCO Ltd. ("SLSCO") and Hartford Fire and Insurance Company ("Hartford") (collectively, "Defendants") alleging breach of contract as well as acclaiming payment bond claims pursuant to third party beneficiary provisions and under P.R. LAWS ANN. tit. 22, § 51. (Docket No. 31).[1] The Court stayed the instant case at

1. Plaintiff also posited that the Court has jurisdiction under 28 U.S.C. § 1391(b)(2) because a substantial part of the services provided by Gore and Associates Management Company, Inc., individually,

Docket No. 64 pursuant to *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936), and instructed Plaintiff to "file its claims under the PR Subcontract and USVI Subcontract in the appropriate forums." (Docket No. 64). The Court considered it necessary for the principal contract claims to be disposed of prior to adjudicating the claims related to the surety bonds. *Id.* Plaintiff moved to lift the stay order and to file a second amended complaint. (Docket No. 66). Defendants opposed. (Docket No. 69). The Court denied the motion to lift the stay at Docket No. 66 because Plaintiff failed to abide by the Order at Docket No. 64 and reiterated that Plaintiff's initial contract claims must be adjudicated in their appropriate forums before this Court can proceed to the merits of Plaintiff's surety claims. (Docket No. 70).

Plaintiff now moves for reconsideration of its motion at Docket No. 66 under Fed. R. Civ. P. 59(e) and 52(b), again requesting that the stay be lifted and that it be permitted to file a second amended complaint. (Docket No. 71). Defendants again opposed. (Docket No. 74). After considering the parties' submissions, the Court hereby **DENIES** Plaintiff's motion for reconsideration at Docket No. 71.

## I. Standard of Review

Motions for reconsideration are granted at the Court's discretion. *Willens v. Univ. of Mass.*, 570 F.2d 403, 406 (1st Cir. 1978). Courts generally recognize three valid

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and the parties who assigned their rights to Gore in this action under the contracts at issue giving rise to this action, occurred in Puerto Rico. (Docket No. 31).

grounds for Rule 59(e) relief: "an intervening change in the controlling law, a clear legal error, or newly discovered evidence." *Soto-Padró v. Public Bldgs. Auth.*, 675 F.3d 1, 9 (1st Cir. 2017). Rule 59(e) does not allow parties "to repeat old arguments previously considered and rejected, or to raise new legal theories that should have been raised earlier." *Standard Química de Venezuela v. Cent. Hispano Int'l Inc.*, 189 F.R.D. 202, 205 n. 4 (D.P.R. 1999).

## II. Legal Analysis and Discussion

In the Opinion and Order dated September 25, 2020, the Court dismissed all of Plaintiff's claims based on the subcontract between Earthwrx and SLSCO for work in the Commonwealth of Puerto Rico, (Docket. No. 47 at 7), and all of those claims based on the sub-subcontract between Earthwrx and SLSCO for similar work in the United States Virgin Islands. *Id.* at 8 (citing valid forum selection clauses). The Court retained jurisdiction over the remaining claims that stem from those subcontracts' corresponding payment bonds issued in favor of Earthwrx and Uniify. *Id.* Defendants' liability under the payment bonds is contingent upon their liability under the Earthwrx-SLSCO subcontracts giving rise to the payment bonds because the payment bonds were issued pursuant to the Earthwrx-SLSCO subcontracts. (Docket No. 31 ¶ 12). Plaintiff cannot establish Defendants' liability under the payment bonds until Defendants' liability under the Earthwrx-SLSCO subcontracts is established, and this Court does not have jurisdiction to hear the claims relating to the Earthwrx-SLSCO subcontracts. (Docket Nos. 47; 64).

Here, Plaintiff is both attempting to raise new arguments and relitigate matters on which the Court has already passed judgment. Plaintiff is now asserting that it can establish liability under Uniify's payment bond independently from Earthwrx. (Docket No. 70 at 1-2). Plaintiff's argument contradicts Plaintiff's previous assertion in the amended complaint that "Uniify is a proper claimant because it has a direct contract with a sub-contractor, namely Earthwrx, of the Principal, SLSCO." (Docket No. 31 ¶ 48). Further, the Court has already ruled that Plaintiff cannot litigate the claims relating to Uniify without first litigating the claims related to the contract under which Uniify's payment bond was issued. (Docket Nos. 47, 57, 64, 70). As such, Plaintiff has failed to make a valid showing for relief under FED. R. CIV. P. 59(e) and 52(b).

**III. Conclusion**

For the foregoing reasons, the Court **DENIES** Plaintiff's motion for reconsideration at Docket No. 71.

**SO ORDERED**.

In San Juan, Puerto Rico, this 24th day of August 2021.

*s/ Gustavo A. Gelpí*
GUSTAVO A. GELPI
United States District Judge

**APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, FILED DECEMBER 15, 2020**

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

CIVIL NO. 19-1650 (GAG)

GORE & ASSOC. MGMT. CO., INC.,

*Plaintiff,*

v.

SLSCO LTD. & HARTFORD INS. CO.,

*Defendants.*

**JUDGMENT STAYING CASE**

Pursuant to the Court's Order at Docket No. 64, judgment is hereby entered **STAYING** the present case. This case will remain administratively closed and may be reopened upon motion.

**SO ORDERED.**

In San Juan, Puerto Rico this 15th day of December, 2020.

*s/ Gustavo A. Gelpí*
GUSTAVO A. GELPI
United States District Judge

**APPENDIX D — PETITION FOR WRIT OF MANDAMUS IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED SEPTEMBER 23, 2021**

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

IN RE GORE AND ASSOCIATES MANAGEMENT COMPANY, INC.,

*Petitioner.*

Petition for a Writ of Mandamus to the
United States District Court for the District
of Puerto Rico
Case No. 3:19-cv-01650, Judge Gustavo A. Gelpi, Jr.

**PETITION FOR WRIT OF MANDAMUS**

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Dated: September 23, 2021

*Appendix D*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner GORE AND ASSOCIATES MANAGEMENT COMPANY, INC. informs the Court that it is a non-governmental corporate party duly incorporated in the State of North Carolina and no publicly held corporation owns 10% or more of its stock.

*Appendix D*

[TABLES INTENTIONALLY OMITTED]

## REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Petitioner respectfully requests that oral argument be heard. Petitioner and its assignor are subcontractors that provided critical funding and manpower to Puerto Rico and the United States Virgin Islands in the wake of the deadly Hurricane Maria in 2017. Petitioner and its assignor have been not been paid for their recovery services, despite payment bonds existing to prevent this exact situation. The United States District Court for the District of Puerto Rico has denied Petitioner access to justice by staying Petitioner's bond claims and erroneously tying Petitioner's bond claims to the contractual rights of an intermediary contractor. The District Court has ordered the intermediary contractor, a defunct company, to complete contract litigations in multiple other forums *before* allowing Petitioner to make its bond claims. Those bond claims are valid and enforceable now. The stay, issued *sua sponte* via an unexplained minute order, creates an artificial hurdle to the payment bond process and destroys the purpose of a payment bond—to guarantee the swift payment of service-providing subcontractors and second-tier subcontractors. Oral argument will aid this Court in resolving these issues.

*Appendix D*

## INTRODUCTION

After nearly three years of litigating early motions in the lower court, prediscovery, the District Court's Memorandum Order issued on August 24, 2021 put a final, total stop to Petitioner's right to seek payment for its vital and fast recovery cleanup after the 2017 Hurricane Maria in United States Virgin Islands ("USVI") and Puerto Rico. Petitioner is a subcontractor, which was able to take great financial risk and move quickly in the cleanup effort because it had assurances of security: If its direct contractor failed to pay (which it did), the prime contractor and surety bond were in place to protect Petitioner and cover the payments. The complete stay on Petitioner's right to seek a remedy undermines the foundational legal system of subcontracting and bonds. In addition to the critical error of law, if this stay is condoned, it will cause systemic harm to the *victims* of natural disasters, who need help and need it quickly. Small businesses, such as Petitioner, will not be as willing to jump to the ready if they bear all the risk and cannot seek recovery unless a belly-up contractor completes its own contract claim. Yet this is what the District Court has required, depriving Petitioner of its right to redress. There is no legal link demanding that each higher tier subcontractor sequentially resolve its contract claims before those contractors at a lower tier can make their bond claims when not paid. The District Court's imposition of such a link amounted to an infringement upon Petitioner's rights to *bring* its claims. This is a great inequity, a potentially infinite result, and a drastic public harm.

*Appendix D*

## JURISDICTIONAL STATEMENT

Under the All Writs Act, 28 U.S.C. § 1651, this Court may issue a writ of mandamus to reverse a lower court's order or decision. *See, e.g.*, *United States v. Horn*, 29 F.3d 754, 769 (1st Cir. 1994).

## RELIEF SOUGHT

Petitioner hereby petitions for a Writ of Mandamus directing the District Court to vacate the stay order, re-start the proceeding, and recognize the independent right of subcontractors to bring bond claims for non-payment against the principal contractor and surety. Higher tier contractor claims need not be decided first, particularly when those claims would be brought by defunct companies in multiple venues—a likelihood never to occur. Such a requirement would undermine the foundational bond protections offered to subcontractors when a higher tier contractor fails to pay. Petitioner had filed a motion seeking leave to amend its complaint to clarify its position and to assert only the bond claims of a single subcontractor, which bond claims the District Court had previously, before abruptly staying the case, determined could be brought in the District Court for Puerto Rico. (A:261).[1] In addition to the stay being reversed, Petitioner seeks leave to file its Second Amended Complaint.

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1. Citations to "A:[#]" refer to the page numbers in Petitioner's concurrently submitted Appendix in Support of this Petition.

*Appendix D*

## ISSUES PRESENTED

A. Whether the District Court erred in staying the case *sua sponte* in a minute order to await indefinite resolution of a higher tier contractor's claims, even though lower tier subcontractors have independent and separate rights to bring claims of nonpayment against primary contractors and surety bonds.

B. Whether the District Court erred in denying Petitioner's Motion to Lift the December 15, 2020 Stay and for Leave to File a Second Amended Complaint for the same reasons.

C. Whether the District Court's rulings work a manifest injustice on the unpaid lower-tier subcontractors.

## RELEVANT BACKGROUND AND PROCEDURAL FACTS

### A. The Players, the Contracts, and the Bonds

In the wake of the devastation left behind by Hurricane Maria, Uniify of Puerto Rico, LLC and Uniify Strategic Business Solutions, LLC (collectively "Uniify") helped to urgently rebuild destroyed infrastructure in Puerto Rico and the USVI ("the recovery projects"). (A:7-8). Uniify was part of the proverbial, but literal, "boots on the ground" needed to advance recovery. (A:5-9). Petitioner Gore and Associates Management Company, Inc. ("Gore") is the assignee of Uniify, but is not a stranger to the Hurricane Maria recovery efforts. (A:7-8; A:52-53;

A:60- 63). Gore, along with Uniify, funded and managed the immense labor force tasked to the recovery projects in Puerto Rico and the USVI. (A:7-8). Gore and Uniify are small businesses specializing in payroll and temporary workforce management. They fronted the funds to move quickly on the recovery. (A:7-8).

Earthwrx, LLC ("Earthwrx") was a construction contractor on the projects, and it subcontracted with Uniify to staff labor on the projects. (A:6-8). Uniify and Earthwrx in turn contracted with Gore for payroll funding. (A:6-8).

At the top of the contracting chain was Respondent-Prime Contractor SLSCO, Ltd. ("SLSCO") who entered into two FEMA contracts—one in Puerto Rico with the Puerto Rico Department of Housing and one in the USVI with the Virgin Islands Housing Finance Authority—and Prime Contractor, AECOM Caribe, LLP ("the FEMA Contracts"). (A:5-6). Pursuant to the FEMA Contracts, SLSCO was to furnish labor, materials, tools, supplies, equipment, services, temporary facilities, supervision, administration, and other items as necessary to perform the construction repair work for the recovery projects. (A:5-6).

Pursuant to each of the FEMA Contracts, SLSCO was required to, and did, post labor and material payment bonds to ensure all subcontractors and second tier subcontractors on the recovery projects were paid for any materials and services they rendered on the recovery projects. (A:5-6). SLSCO contracted with Respondent-Surety Hartford

Fire and Insurance Company ("Hartford") to act as the surety of the required payment bonds for the FEMA Contracts. (A:5-6; A:17- 22; A:65-66). To satisfy the bond obligation in Puerto Rico, SLSCO obtained the Hartford Fire Insurance Company Labor and Material Payment Bond, Bond No. 46BCSHU0780 ("the Hartford PR Payment Bond"; A:17-22). To satisfy the bond obligation in the USVI, SLSCO obtained the Subcontract Payment Bond, Bond No. 46BCSHV7499 ("the Hartford USVI Payment Bond"; A:65-66; collectively with the Hartford PR Payment Bond, "the Bonds").

The Hartford PR Payment Bond defines a "Claimant" as "one having a direct contract with the Principal or with a sub-contractor of the Principal for labor, material, or both, used or reasonably required for use in the performance of the contract." (A:17). The Hartford USVI Payment Bond defines a "Claimant" as "one other than the Obligee having both: (a) a contract with the Principal or with a direct subcontractor of the Principal to supply labor and/or materials and said labor and/or materials are actually used, consumed or incorporated in the performance of the construction work under the Subcontract; and (b) an enforceable lien against the property improved under the Subcontract for labor and/or materials used, consumed or Incorporated in the performance of the construction work under the Subcontract." (A:65). The Bonds, accordingly, expressly intend to confer a benefit on subcontractors of the prime contractor and second-tier subcontractors.

Earthwrx did not pay Uniify, citing inability to pay and monies owed by SLSCO. (A:5). When Earthwrx did

not pay Uniify, Uniify could not pay Gore. Uniify and Earthwrx both made claims and demands to SLSCO and Hartford for payment for their services, but SLSCO and Hartford denied the claims. (A:11-14). Together, SLSCO and its surety, Hartford, owe Earthwrx and Uniify upwards of $1.4 million dollars. (A:9).

**B. Gore Filed Suit as an Assignee of Earthwrx and Uniify**

In an attempt to bring Earthwrx's and Uniify's claims against SLSCO and Hartford together in one action, Earthwrx and Uniify each assigned its rights to Gore, and on July 6, 2019, Gore sued SLSCO and Hartford as Plaintiff on the rights of Earthwrx and Uniify. Gore later amended its complaint, and Gore's First Amended Complaint asserted three counts: Count I - Breach of Contract; Count II – Action on Payment Bond; and Count III – Action Under PR Little Miller Act (P.R. Laws Ann. tit. 22 § 51) for Payment on the Puerto Rican Bond. (A:4-15).

The First Amended Complaint's Count I for breach of contract was based only on contracts that existed between Earthwrx and SLSCO. (A:10-11). Uniify has no direct contract(s) with SLSCO, and Hartford's involvement is limited to its role as the surety for the payment bonds for the recovery projects. (A:4-15). Count I included two separate and distinct claims for breach of contract: (1) SLSCO's breach of its agreement with Earthwrx in Puerto Rico ("the PR Subcontract") (A:24-34), and (2) SLSCO's breach of its agreement with Earthwrx in the

U.S. Virgin Islands ("the USVI Subcontract") (A:36-43). On September 25, 2020, the lower court dismissed these claims due to venue provisions that required Earthwrx to bring its breach of contract actions in local courts. (A:261-262).

Counts II and III remain. Unlike the breach of contract count limited to Earthwrx's claims against SLSCO in each locality (based on each separate contract related to that locality's recovery project), Counts II and III for payment on the Bonds was not so limited. (A:11-14). Both Earthwrx (a direct contractor of SLSCO) and Uniify (a second-tier subcontractor of SLSCO) met the definition of "Claimant" set forth in each of the Bonds. (A:252-262). Thus, both Earthwrx and Uniify had independent rights to bring claims against SLSCO and Hartford as the obligee and surety, respectively, on the Bonds.

Count II for payment on the Bonds included, accordingly: (1) Earthwrx's bond claim against SLSCO and Hartford in Puerto Rico; (2) Earthwrx's bond claim against SLSCO and Hartford in the USVI; (3) Uniify's bond claim against SLSCO and Hartford in Puerto Rico; and (4) Uniify's bond claim against SLSCO and Hartford in the USVI. (A:11-12).

Lastly, Count III was based on the statutory provisions of 22 L.P.R.A. § 51 (Puerto Rico's "Little Miller Act"), which permit both Earthwrx and Uniify, as subcontractor and second-tier subcontractor, to file against SLSCO and Hartford based on the Hartford PR Payment Bond. (A:13-14).

## C. The District Court Improperly Stayed the Case

After twice moving for extensions of time to respond to the First Amended Complaint (A:67-71), SLSCO and Hartford jointly filed their Motion to Dismiss the Amended Complaint on February 14, 2020 ("the Motion to Dismiss"; A:72- 217). Gore filed its Opposition to Defendants' Motion to Dismiss the First Amended Complaint on February 28, 2020 ("the Opposition"; A:218-233). SLSCO and Hartford, after more delays and extensions of time, filed their Reply to the Opposition on April 15, 2020 ("the Reply") (A:234-251). On September 25, 2020, Judge Gelpi issued the District Court's Opinion and Order on the Motion to Dismiss ("the Opinion and Order") which granted some, but not all, of the relief requested by the Motion to Dismiss. (A:252-262). The Opinion and Order dismissed Count I, the breach of contract claims brought by Gore on behalf of Earthwrx for lack of venue. (*Id.*) The Court properly allowed Gore to proceed on the bond claims and Little Miller Act claims, which make up Counts II and III of the First Amended Complaint. (*Id.*).

The Opinion and Order, in dismissing Earthwrx's contract claims and permitting the remaining bond and Little Miller Act claims to proceed, concluded with a request that the parties submit supplemental briefing:

> Plaintiff's claims under the PR Subcontract and the USVI Subcontract are DISMISSED WITHOUT PREJUDICE, while their claims under the PR bond, the USVI bond, and the PR Little Miller Act (P.R. Laws Ann. tit. 22

> § 51) survive the present motion to dismiss. Nonetheless, moving forward, provided that the claims under the PR bond and the USVI bond may be dependent on the PR Subcontract and USVI Subcontract claims, both parties shall file simultaneous legal memoranda to Court on this issue, on or before November 22, 2020.

(A:261-262).

On November 23, 2020, in accordance with the directive in the Opinion and Order, the parties submitted supplemental briefing addressing the Court's question—whether the claims under the PR bond and the USVI bond are dependent on the PR Subcontract and the USVI Subcontract. (SLSCO and Hartford at A:274-286; Gore at A:287-309). After this submission, the case moved forward in the District Court under the Federal Rules of Civil Procedure with the parties preparing and filing a Joint Scheduling Memorandum on November 24, 2020 (A:263-273) and appearing before Magistrate Judge Marcos E. Lopez for a Rule 26 Conference on December 1, 2020 (A:310). The parties exchanged initial disclosures and issued written discovery in accordance with the Joint Scheduling Memorandum.

December 15, 2020 is where the District Court made the first of several errors, all of which prejudice Gore. On that date, the District Court entered a Minute Order ("the Stay Order"; A:329-330) and concurrent judgment ("the Stay Judgment"; A:331) staying the entire case. In its entirety, the Stay Order provides:

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> ORDER STAYING CASE: Noting [59] and [60] Motions in Compliance. The Court hereby STAYS the pending case given the Courts [sic] power to control the disposition of the claims in its docket with economy of time and effort for itself, for counsel, and for litigants. See Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). Plaintiff shall file its claims under the PR Subcontract and USVI Subcontract in the appropriate forums. The parties shall also inform the Court of the disposition of the principal contract claims so that the surety contract claims may proceed. Signed by Judge Gustavo A. Gelpi on 12/15/2020. (MES)
>
> (A:329).

The Stay Judgment, in its entirety, provides, "[p]ursuant to the Court's Order at Docket No. 64, judgment is hereby entered STAYING the present case. This case will remain administratively closed and may be reopened upon motion." (A:331). Aside from its reference to the *Landis* case and its desire to control its docket, Judge Gelpi provided no explicit reasoning, justification, case law, statutory law, or the like explaining the decision to stay the entire case, when having, on September 25, 2020 via the Opinion and Order (A:252-262), properly permitted Gore to proceed on the "claims under the PR bond, the USVI bond, and the PR Little Miller Act."

*Appendix D*

## D. The District Court Improperly Refused to Lift the Stay

On February 23, 2021, to limit its claims to those by Uniify only and entirely remove any claims related to Earthwrx from the Complaint, Gore filed a Motion to Lift the December 15, 2020 Stay and for Leave to File a Second Amended Complaint ("the Motion for Leave"; A:332-402). The Motion included a proposed Second Amended Complaint asserting only the bond and Little Miller Act claims relating to Uniify. (A:332-402). The Second Amended Complaint would eliminate Gore's need to file "claims under the PR Subcontract and USVI Subcontract in the appropriate forums" because Gore was no longer asserting Earthwrx's claims before the District Court. (A:345-402). In other words, Uniify's independent rights alone were the basis of the Second Amended Complaint. (A:345-356).

After opposition by SLSCO and Hartford (A:403-410), Judge Gelpi denied the Motion for Leave in another Minute Order ("the Order Denying Leave"; A:411-412) stating, in its entirety:

> ORDER: Denying [66] Motion to Lift Stay and Leave to File Second Amended Complaint. Plaintiff has not complied with the Order at Docket No. [64] directing Plaintiff to file the principal [Earthwrx] contract claims of the PR Subcontract and the USVI Subcontract in the appropriate forums. As such, Plaintiff

> cannot reopen the case upon motion. The Court cannot proceed with this case any further until the appropriate forums dispose all claims and defenses of the [Earthwrx] principal contracts. Signed by Judge Gustavo A. Gelpi on 3/10/2021. (MES)

(A:411).

On April 7, 2021, Gore timely filed a Motion for Reconsideration directed at the Order Denying Leave ("the Motion for Reconsideration"; A:413-428). SLSCO and Hartford opposed the Motion for Reconsideration (A:429-435), and on August 24, 2021, Judge Gelpi issued a Memorandum Order denying the Motion for Reconsideration ("the Order Denying Reconsideration"; A:436-438). This Petition follows the Order Denying Reconsideration.

## STANDARD OF REVIEW

A writ of mandamus is properly granted to correct a "clear abuse of discretion" or the "usurpation of judicial power." *Cheney v. U.S. Dist. Court for Dist. Of Columbia*, 542 U.S. 367, 380 (2004). The First Circuit distinguishes between "supervisory" and "advisory" mandamus. *Da Graca v. Souza*, 991 F.3d 60, 64 (1st Cir. 2021) (citing *In re Grand Jury Subpoena*, 909 F.3d 26, 29 (1st Cir. 2018)). Gore here seeks supervisory mandamus, which is available when: (1) a lower court order presents a question about the limits of judicial power; (2) there is a "special risk of irreparable harm" if the error is not corrected; and (3) the

lower court's error is "palpably erroneous." *Da Graca*, 991 F.3d at 64 (quoting *Horn*, 29 F.3d at 769).

## REASONS WHY THE PETITION SHOULD BE GRANTED

Had Gore originally brought only Uniify's claims on assignment, never touching Earthwrx's claims, the District Court's directive that Earthwrx must first bring its claims before Uniify could bring its claims would be palpably erroneous. The District Court's Stay Order, followed by the Order Denying Leave, and ultimately the Order Denying Reconsideration indefinitely—to the point of permanently—bar Uniify from bringing its claims because Uniify does not control Earthwrx and cannot force Earthwrx to cooperate in the bringing and prosecution of its claims against SLSCO. Gore was never afforded the opportunity to explain this to the District Court and to test Uniify's independent bond claim on the merits.

Gore would learn, only in the Order Denying Reconsideration, that the District Court was incorrectly lumping Uniify and Earthwrx together because it misunderstood why Uniify had pled the existence of its direct contract with Earthwrx. The Uniify-Earthwrx contract was pled because it is what makes Uniify a subcontractor for purposes of being a "claimant" under the Bonds. The Uniify- Earthwrx contract was not pled, as the District Court stated and relied upon in the Order Denying Reconsideration, because Uniify's bond claim is derivative of such contract. Uniify's bond claims are

independent, and the District Court's artificial gluing of Uniify's claims to Earthwrx's claims was wrong. The District Court has ignored Uniify's rights that stand alone, separate and apart from Earthwrx, and this Petition should be granted to allow Uniify to proceed on its independent rights.

### A. The District Court's *Sua Sponte* Stay Should Never Have Been Issued

In the multi-count First Amended Complaint, Gore advanced multiple claims based on the two sets of rights it obtained from two independent assignors: Earthwrx and Uniify. (A:4-15). Earthwrx, because it is in contractual privity with SLSCO, possesses contract claims against SLSCO, as well as bond claims against both SLSCO and Hartford. (A:10-11). Uniify, not in privity with SLSCO, possesses only bond claims against SLSCO and Hartford. The Earthwrx-SLSCO contracts (the PR Subcontract and USVI Subcontract) are relevant to Uniify because they demonstrate Uniify's status as a second-tier subcontractor to SLSCO on the recovery projects, nothing more. The Earthwrx-SLSCO contracts have no impact on Uniify's bond claims under the Hartford PR Payment Bond and under the Hartford USVI Payment Bond. When the District Court, without any motion to stay before it, issued the Stay Order and stayed Gore's *entire* case, it failed to recognize the independence of Uniify's bond claims and improperly tied those independent bond claims to Earthwrx's contract claims. Doing that exceeded the limits of the District Court's judicial power, put Gore at risk of irreparable harm, and was palpably erroneous.

"[S]tays cannot be cavalierly dispensed: there must be good cause for their issuance; they must be reasonable in duration; and the court must ensure that competing equities are weighed and balanced." *Marquis v. F.D.I.C.*, 965 F.2d 1148, 1155 (1st Cir. 1992) (citing *Ainsworth Aristocrat Int'l Pty. Ltd. v. Tourism Co. of P.R.*, 818 F.2d 1034, 1039 (1st Cir. 1987); *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979); *Chang v. Univ. of R.I.*, 107 F.R.D. 343, 344 (D.R.I. 1985)). The Stay Order offered no good cause, is indefinite in time, and denies Gore and Uniify, companies who provided services to Hurricane victims, access to justice via its indefinite postponing of Uniify's bond claims. Uniify has its own, independent bond claims, which it assigned to Gore, who brought them in the District Court. (A:60-63). The District Court never addressed this. Instead, it fixated on Gore's initial decision to bring Uniify's claims together with Earthwrx's contract and bond claims, which is immaterial and was done for the purpose of judicial efficiency. "It is axiomatic that an 'assignee stands in the shoes of the assignor.'" *MacKenzie v. Flagstar Bank, FSB*, 738 F.3d 486, 494 (1st Cir. 2013) (quoting *R.I. Hosp. Trust Nat'l Bank v. Ohio Cas. Ins. Co.*, 789 F.2d 74, 81 (1st Cir. 1986)) (additional citations omitted). There is no support for the proposition that when an assignee brings the rights of two assignors together in one, multi-count suit that the claims merge into an indistinguishable blob of claims. Indeed, the concept of "standing in the shoes of the assignor" necessitates that each claim maintains its independence.

In entering the Stay Order, the District Court stayed Gore's entire case (including Uniify's direct claims on

the Hartford PR Payment Bond and the Hartford USVI Payment Bond), directed Gore to "file its [Earthwrx] claims under the PR Subcontract and USVI Subcontract in the appropriate forums," and asked Gore to report back to it on "the disposition of the principal [Earthwrx] contract claims so that the surety contract claims may proceed." (A:329). The Stay Order, accordingly, tied Uniify's direct claims on the Hartford PR Payment Bond and the Hartford USVI Payment Bond to the filing, prosecuting, and disposing of Earthwrx's claims under the PR Subcontract and USVI Subcontract. The lone reason given for this abrupt about-face by the District Court in the Stay Order was its ability to "control the disposition of the claims in its docket with economy of time and effort for itself, for counsel, and for litigants" under *Landis*, 299 U.S. at 248. The Order Denying Reconsideration, cites no additional case or statutory law in support of the Stay Order. (A:436-438).

Uniify's bond claims are independent of all of Earthwrx's claims and are in no way reliant on the intervening contracts to which the Stay Order now binds them. This artificial binding of Uniify's bond claims to Earthwrx's contract claims exceeded the District Court's powers and became compounded by the subsequent Order Denying Leave and ultimately the Order Denying Reconsideration. Uniify's status as a second-tier subcontractor gives it the right (assigned to Gore) to bring a bond claim because Uniify qualifies as a bond "claimant" under the definition established in each individual bond instrument. The Opinion and Order had already determined Uniify's status as a proper claimant (at least for purposes of defeating the Motion to Dismiss)

under each bond instrument. (A:261). A bond contract "is an accessory contract, separate and different from the contract that establishes the main or guaranteed obligation." *Roman v. Excellence Enterprises & Assoc.*, LICI2001–00349, 2005 WL 2746328 (P.R. Cir. Sept. 8, 2005) (unofficial translation). The purpose of a payment bond "is to ensure that subcontractors are promptly paid in full for furnishing labor and materials…." *United States for the Use of Acoustical Concepts, Inc. v. Travelers Casualty & Ins. Co. of America*, 635 F. Supp. 2d 434, 438 (E.D. Va. 2009) (citing *United States ex rel. Sherman v. Carter*, 353 U.S. 210 (1957)). Uniify's claims based on the Hartford PR Payment Bond and the Hartford USVI Payment Bond are thus claims based on independent surety contracts. The payment bond system is designed to protect subcontractors and second-tier subcontractors ("claimants" under the bonds) if they have performed and not been paid *by a direct contracting party*. In this case, the Bonds are designed to protect Uniify when Earthwrx does not pay. No strings attached. The District Court, however, attached new strings to the Bond in its Stay Order, requiring Earthwrx to first go litigate in two state courts before Uniify could obtain any relief. This inappropriately created an artificial barrier to Uniify's payments rights under the Bonds.

To succeed in a bond claim, subcontractors or second-tier subcontractors are required to show non-payment from the direct contractor; they are not required to prove that the direct contractor successfully brought suit on its own claims (assuming it has any). *See Shearman & Associates, Inc. v. Continental Cas. Co.*, 901 F.Supp. 199, 202-03 (D.V.I. 1995) ("…inequity would arise here,

if plaintiff were precluded from seeking payment from [defendant] simply because the owner has not paid [the contractor]."). Bonds would be undermined if this were not true, and the plain language of each subject bond in this matter supports this notion. The Hartford PR Payment Bond provides that a proper claimant, like Uniify, "*may sue on this bond* for the use of such claimant, prosecute the suit to final judgment for such sums as may be justly due claimant, and have execution thereon." (A:17) (emphasis supplied). The Hartford USVI Payment Bond provides that a proper claimant, like Uniify, "*may bring suit on this bond*, prosecute the suit to final judgment for the amount due under Claimant's contract for the labor and/or materials supplied by the Claimant which were used, consumed or incorporated in the performance of the construction work, and have execution thereon." (A:65) (emphasis supplied). "Indeed, it is presumed that the parties did not intend that payment of the small subcontractors should await the determination of an extended legal dispute between the owner and general contractor over an issue not concerning him or his work." *Schuler-Haas Elec. Corp v. Aetna Cas. & Sur. Co.*, 49 A.D.2d 60, 64 (N.Y. 4th Dept. 1975) (citing *Eastern Heavy Constructors v. Fox*, 188 A.2d 286 (Md. 1963)).

In situations involving bond claims under the Miller Act (40 U.S.C. § 3133) (upon which the PR Little Miller Act is modeled), "[a] subcontractor that has performed as agreed need not await the Government's payment of the contractor before initiating an action under the Miller Act against the contractor *or* the surety." *United States ex rel. Walton Tech., Inc. v. Weststar Eng'g, Inc.*, 290 F.3d 1199, 1209 (9th Cir. 2002); *see also U.S. ex rel.*

*J.H. Lynch & Sons, Inc. v. Travelers Cas. & Sur. Co. of America*, 783 F.Supp.2d 294, 298 (D.R.I. 2011) (holding that "common sense dictates that it would defeat the policy underlying the Miller Act to read a pay-when-paid clause as precluding a subcontractor from bringing suit until its contractor receives payment" and declining to stay bond litigation indefinitely on that basis). While Uniify's rights are not asserted under the Miller Act, the situation is analogous, particularly given that the claims arise in the context of two FEMA contracts. (A:92-217).

In addition to being against the weight of the law, the District Court's decision to stay the entire case was additionally questionable because the Earthwrx claims, over which the District Court stayed the rest of the case (Earthwrx's "claims under the PR Subcontract and USVI Subcontract"), had already been disposed of in the Opinion and Order. (A:252-262). The Earthwrx claims were not before the District Court at the time the Stay Order was issued. In this light, using those as the measuring stick for the re-instatement of the bond claims that survived the Motion to Dismiss and were before the District Court was additional error.

Uniify's claims brought against the subject bond instruments, and bond claims generally, are proper and ripe without any reliance on the adjudication of any intervening contract claims. The District Court decided that, with respect to the bond claims, Gore had properly pled that Uniify was a claimant under each bond and that the District Court of Puerto Rico was a proper venue for each bond claim. (A:252-262). The District Court was not asked to stay the claims, and its decision to do so

*sua sponte*, which it would then adhere to despite Gore's efforts to adjust its claims, was made in clear error and must be reversed.

### A. Gore's Motion for Leave to Amend Should Have Been Granted

Although Gore was assigned Earthwrx's rights, it was under no contractual obligation to do anything with them. (A:55-58). Accordingly, in light of the Opinion and Order and in compliance with the Stay Order, on February 23, 2021, Gore sought leave to file a Second Amended Complaint containing only Uniify's claims and dropping all of Earthwrx's claims. (A:332-402). On this basis, Gore also moved to lift the stay because the case would no longer touch or concern claims by Earthwrx. (A:332-343). Again, Earthwrx is only relevant to Uniify's claims to show the contractual line of privity enabling Uniify to bring its claims for nonpayment against SLSCO and Hartford. Gore's February 23, 2021 motion was permitted by the Stay Judgment, which provided that the case "may be reopened upon motion." (A:331). Gore's motion further aligned with the only reasoned opinion issued by the District Court at that point, the Opinion and Order. (A:252- 262). Absent Earthwrx's claims, the District Court's directive to file Earthwrx's contract "claims under the PR Subcontract and USVI Subcontract in the appropriate forums" becomes moot.

Essentially, the District Court has prohibited Gore from dropping Earthwrx's bond claims, even though it dismissed Earthwrx's contract claims in its Opinion and Order. Under Federal Rule of Civil Procedure 15(a)(2),

"a party may amend its pleading only with the opposing party's written consent or the court's leave" and a district court with a motion for leave before it "should freely give leave when justice so requires." This Circuit has explained that such leave should be freely given unless reasons such as "undue delay in filing the motion, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice to the opposing party, and futility of amendment" exist. *U.S. ex rel. Gagne v. City of Worcester*, 565 F.3d 40, 48 (1st Cir. 2009) (citing *Foman v. Davis*, 371 U.S. 178 (1962) and *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720 (1st Cir. 2007)). The United States Supreme Court has held:

> Rule 15(a) declares that leave to amend '*shall be freely given* when justice so requires'; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, *he ought to be afforded an opportunity to test his claim on the merits.* In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'

*Foman*, 371 U.S. at 182 (emphasis supplied) (internal citations omitted).

*Appendix D*

Gore was denied the opportunity to test Uniify's bond claims on the merits for unexplained reasons. The District Court did not find, nor did Gore file the Motion for Leave with, any undue delay, bad faith, dilatory tactics, failure to cure deficiencies or futility. In fact, the District Court made no findings at all in its Order Denying Leave, holding only that:

> Plaintiff has not complied with the Order at Docket No. [64] directing Plaintiff to file the principal contract claims of the PR Subcontract and the USVI Subcontract in the appropriate forums. As such, Plaintiff cannot reopen the case upon motion. The Court cannot proceed with this case any further until the appropriate forums dispose all claims and defenses of the principal contracts.

This denial, which ignores the fact that the Stay Judgment appeared to permit Gore to seek leave to reopen the case upon motion (which Gore did), forces Gore to bring Earthwrx's contract claims in another court, despite Gore's clear intention in the draft Second Amended Complaint, as explained in the Motion for Leave (A:332-402) to drop Earthwrx's claims and proceed only on Uniify's independent bond claims. Upon the Motion for Leave being denied, Gore timely filed the Motion for Reconsideration which was directed at the Order Denying Leave. (A:413-428). In the Order Denying Reconsideration, the District Court, in relevant part, held:

> Defendants' liability under the payment bonds is contingent upon their liability under the Earthwrx-SLSCO subcontracts giving rise to

> the payment bonds because the payment bonds were issued pursuant to the Earthwrx-SLSCO subcontracts. (Docket No. 31 ¶ 12). Plaintiff cannot establish Defendants' liability under the payment bonds until Defendants' liability under the Earthwrx-SLSCO subcontracts is established, and this Court does not have jurisdiction to hear the claims relating to the Earthwrx-SLSCO subcontracts. (Docket Nos. 47; 64).
>
> …
>
> Plaintiff is both attempting to raise new arguments and relitigate matters on which the Court has already passed judgment. Plaintiff is now asserting that it can establish liability under Uniify's payment bond independently from Earthwrx. (Docket No. 70 at 1-2). **Plaintiff's argument contradicts Plaintiff's previous assertion in the amended complaint that "Uniify is a proper claimant because it has a direct contract with a sub-contractor, namely Earthwrx, of the Principal, SLSCO."** (Docket No. 31 ¶ 48).

(A:437-438) (emphasis supplied).

This is clear error.

Gore (Plaintiff) can establish SLSCO's and Hartford's (Defendants') liability under the payment bonds *irrespective of whether SLSCO and Hartford (Defendants) are liable under the Earthwrx-SLSCO subcontracts. See*

*Shearman & Associates*, 901 F.Supp. at 202-03; *Walton Tech.*, 290 F.3d at 1209; and *J.H. Lynch & Sons*, 783 F.Supp.2d at 298. Even if Earthwrx was paid in full by SLSCO, it does not matter. Earthwrx never paid Uniify. That is what matters.

To make the payment of a second-tier subcontractor contingent on liability under the intervening contract between the prime contractor and the first-tier subcontractor would defeat the entire purpose of a payment bond which is, again, "to ensure that subcontractors are promptly paid in full for furnishing labor and materials...." *Acoustical Concepts*, 635 F. Supp. 2d at 438. Further, the First Amended Complaint explains that "Uniify is a proper claimant because it has a direct contract with a sub-contractor, namely Earthwrx, of the Principal, SLSCO" because contractual connection is necessary to show how Uniify gains its status as a second-tier subcontractor. (A:12). *Gore needed to, and did, allege Uniify's contract with Earthwrx to evidence that Uniify was as a proper "claimant" under the Bonds.* (A:12). The District Court was wrong to read that allegation as suggesting that Uniify previously believed its bond claims were dependent on Earthwrx's intervening contracts. The District Court misinterpreted the law with respect to bond claims and misinterpreted the relevance of the intervening contracts as to Uniify. Accordingly, the Order Denying Reconsideration and the Order Denying Leave were each entered with palpable error.

The District Court should be ordered to grant the Motion for Leave and give Gore the ability to file its Second Amended Complaint, solely bringing Uniify's bond claims. SLSCO and Hartford would have, in no way,

been prejudiced by the granting of leave to file the Second Amended Complaint because it would have brought less claims, not more, of which both SLSCO and Hartford had already been on notice and which were based on the same operative facts as the First Amended Complaint. (A:345-402). Neither the Order Denying Leave (A:411-412) nor the Order Denying Reconsideration (A:436-438) found or indicated that the amendment would prejudice the opposing party, because it would not have. While staying this case may have freed up a minimal amount of time for the District Court, it created an indefinite increase of the time that Uniify's claims would remain unpaid. As such, the referenced orders were entered in error and Gore should be permitted to proceed on its Second Amended Complaint.

**B. The Indefinite Stay Is Wholly Inequitable to Gore**

The Stay Order threatens to prevent Gore from ever recovering on Uniify's claims. Gore and Uniify provided swift recovery services to people in great need. While there have been numerous natural disasters since, not to mention the global COVID-19 pandemic, it is worth noting that Hurricane Maria, a Category 4 storm at landfall, has been linked to at least 2,975 deaths making it one of the deadliest natural disasters in United States history. *See Santos v. Fed. Emergency Mgmt. Agency*, 327 F.Supp.3d 328, 344 n.13 (D. Mass. 2018). Gore and Uniify are owed a debt for their services. Causing them to await Earthwrx's actions to be brought in different venues and, assuming Earthwrx's claims are ever brought and determined, to wait indefinitely until these newly-commenced suits are decided does not advance any appropriate interest of justice. It also has a chilling effect on other potential

contractors, which rely on bonds to facilitate swift remediation in the face of natural disasters without betting their companies on the credit worthiness and litigiousness of a subcontractor. This Court can correct where the District Court went wrong by permitting Gore to proceed on Uniify's bond claims as sought in the proposed Second Amended Complaint.

Gore has been incredibly prejudiced by the District Court's Stay Order and then its refusal to re-open the case in the following Order Denying Leave and Order Denying Reconsideration. Manifest injustice "contemplates prejudice to the moving party." *AARP v. U.S. Equal Employment Opportunity Commission*, 292 F.Supp.3d 238, 240 (D.D.C. 2017). The subject services rendered by Uniify were performed in mid-2018. (A:5-9). This action was commenced in July 2019. After several delays, none of which were caused by Gore, discovery had finally begun and was proceeding on a schedule which would have had discovery concluding by mid-2021. (A:263-273). All of that was derailed by the District Court's issuance of the largely unexplained stay, which can only be seen as reversing the wellreasoned Opinion and Order. The Stay Order puts Gore back beyond square one because Gore now, incorrectly, has to first litigate multiple Earthwrx' claims in two state courts *before* it may proceed with Uniify's independent bond claims. Sending Gore back that far is contrary to the efficient administration of justice, contrary to the purpose of payments bonds, and a manifest injustice. Accordingly, Gore respectfully requests that this Court grant this Petition and direct the District Court to re-open this matter and permit Gore to proceed on its Second Amended Complaint.

*Appendix D*

## CONCLUSION

Gore's right to "secure the just, speedy, and inexpensive determination" of its action has been denied by the District Court's Stay Order, Order Denying Leave, and Order Denying Reconsideration. Fed. R. Civ. P. 1. Gore requests that this Court issue a Writ of Mandamus directing the District Court to promptly reopen the matter and permit Gore to proceed on its Second Amended Complaint. To do anything else works a manifest injustice on Gore and Uniify, who were the first on the ground but now face never being paid for their efforts in restoring Puerto Rico and the USVI in the wake of Hurricane Maria.

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Respectfully submitted,

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