IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 19-cv-22629-FAM

DIEGO TRINIDAD

v.

EXPEDIA, INC.,

defendant.
_____/

TRINIDAD'S OPPOSITION TO
MOTION TO DISMISS THE COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES…….iii

INTRODUCTION……...1

LEGAL STANDARD…….…2

DEFENDANT'S MOTION SHOULD BE DENIED…….….3

I. Even If "Constitutional Standing" Were Not a Canard, Trinidad Would Have it, and He Plainly Has Standing to Bring this Case Under Title III of the Act……....4

II. This Court Has Specific Jurisdiction over Defendant Because Defendant Regularly Transacts Business within Florida and this District, Avails Itself of the Benefits of Its Presence here, and Committed a Tortious Act here…….7

III. Trinidad Adequately Alleged His Claim to the Property, Which Is in Fact "Property" Under Title III, Because the "Residential Purpose" Carveout in Title III Refers to Current—Not Pre-Confiscation—Uses of Confiscated Property…….12

A. Defendant Admits That Trinidad's Allegations Raise a "Reasonable Inference" That His Parents (and Now He) Owned the Property……..12

B. The Property is "Property" as Defined by Title III Because It is Not Currently Being Used For "Residential Purposes"……13

C. Trinidad Adequately Alleged That He Acquired His Claim Under Title III Prior to the Statute's Enactment……...15

IV. The "Incident to Lawful Travel" Exception Is Not Applicable Because Expedia Is Not Engaging in Transactions and Uses of Property That Are Incident and Necessary to Lawful Travel……..16

A. The "Incident to Lawful Travel" Exception Does Not Apply to Defendant's Online Booking Activities Because They Did Not Involve Transactions in and Use of Confiscated Property…….16

B. Trinidad Was Not Required to Allege That Defendant's Trafficking Was Not Incident to Lawful Travel……...…17

C. Even If the Incident to Lawful Travel Exception Were Not an Affirmative Defense (It Is), and Even If it Could Be Raised on a Motion to Dismiss (It Can't), Defendant's Trafficking Is Not

"Necessary to the Conduct Of [Lawful] Travel"……..….20

D. Even If the Exception Could Allow Defendant to Provide Online Booking Services (It Can't), Whether Defendant Complied with All OFAC Requirements is a Question of Fact That Cannot Be Resolved at This Stage of the Case……23

E. Trinidad Adequately Alleged That Defendant's Trafficking Was "Knowing and Intentional"……26

CONCLUSION……..27

TABLE OF AUTHORITIES

CASES

Adams v. Jumpstart Wireless Corp.,
294 F.R.D. 668 (S.D. Fla. 2013)……....18

Ashcroft v. Iqbal,
556 U.S. 662 (2009)…….…. 2, 13

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007)……..……..2, 3, 13

Bloom v. A.H. Pond Co.,
519 F. Supp. 1162 (S.D. Fla. 1981)…….…..10

Boigris v. EWC P&T, LLC,
2019 WL 5457072 (S.D. Fla. 2019)…….……18

Chudasama v. Mazda Motor Corp.
123 F.3d 1353 (11th Cir. 1997)……11

Conley v. Gibson,
355 U.S. 41 (1957)……3, 13

Crowell v. Morgan, Stanley, Dean Witter Servs. Co., Inc.,
87 F. Supp. 2d 1287 (S.D. Fla. 2000)…….……3

Cunningham v. Yellowstone Capital LLC,
2016 WL 11163899 (S.D. Fla. 2016)…….……...18

Dusek v. JPMorgan Chase & Co.,
832 F.3d 1243 (11th Cir. 2016)……..……...3, 23

Erikson v. Pardus,
551 U.S. 89 (2007) ……..3

Fish v. Kobach,
840 F.3d 710 (10th Cir. 2016)……...……..21, 22

Foreign Imported Prods. & Pub., Inc. v. Grupo Indus. Hotelero, S.A.,
2008 WL 4724495 (S.D. Fla. 2008)…….……8

Friends of Everglades v. S. Fla. Water Mgmt. Dist.,
570 F.3d 1210 (11th Cir. 2009)…….……14

FTC v. Morton Salt Co.,
334 U.S. 37 (1948)……18

Future Tech. Today, Inc. v. OSF Healthcare Sys.,
218 F. 3d 1247 (11th Cir. 2000) ……..……...8

Garcia-Bengochea v. Carnival Corp.,
Case No. 19-cv-21725-JLK at ECF No. 41…….…18, 20

Gasper v. La. Stadium and Expo. Dist.,
577 F. 2d 897 (5th Cir. 1978) ……..…. 2

Hartoy Inc. v. Thompson,
2003 WL 21468079 (S.D. Fla. 2003)…….……9

Havana Docks Corp. v. Carnival Corp.,
Case No. 19-cv-21724-BB at ECF No. 47…….18

In re Coffman,
766 F.3d 1246 (11th Cir. 2014)……...14, 22

Jackson v. Bellsouth Telecomms.,
372 F. 3d 1250 (11th Cir. 2004) ……..24

Javierre v. Central Altagracia,
217 U.S. 502 (1910)……..19

Kest v. Nathanson,
216 So. 2d 233 (Fla. 4th DCA 1968)……...……..…….3

La Grasta v. First Union Sec., Inc.,
358 F. 3d 840 (11th Cir. 2004) …….18

Lemoine v. Wong,
2017 WL 5127592 (S.D. Fla. 2017)……9

Licciardello v. Lovelady,
544 F. 3d 1280 (11th Cir. 2008)……11

Losada v. Norwegian (Bahamas) Ltd.,
296 F.R.D. 688 (S.D. Fla. 2013)……18

Louis Vuitton Malletier, S.A. v. Mosseri,
736 F.3d 1339 (11th Cir. 2013)……7, 11

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)…….…4

Manfred v. Bennet Law PLLC,
2012 WL 6102071 (S.D. Fla. 2012)……..18

M'Culloch v. Maryland,
17 U.S. 316 (1819)……21

Meacham v. Knolls Atomic Power Lab.,
554 U.S. 84 (2008)……18, 19, 20

Morrison v. Amway Corp.,
323 F.3d 920, (11th Cir. 2003)……23

Nat. Res. Def. Council, Inc. v. Thomas,
838 F.2d 1224 (D.C. Cir. 1988)……21

Nicolet, Inc. v. Benton,
467 So. 2d 1046 (Fla. 1st DCA 1985)……10

Osorio v. State Farm Bank, F.S.B.
746 F.3d 1242 (11th Cir. 2014)……19

Padilla v. Porsche Cars N. Am., Inc.,
391 F. Supp. 3d 1108 (S.D. Fla. 2019)……..18

Patel v. U.S. Att'y Gen.,
917 F.3d 1319, (11th Cir. 2019)……14

Pathman v. Grey Flannel Auctions, Inc.,
741 F. Supp. 2d 1318 (S.D. Fla. 2010)……..8

Randall v. Scott,
610 F.3d 701 (11th Cir. 2010)……2

Renaissance Health Pub., LLC v. Resveratrol Partners, LLC,
982 So. 2d 739 (Fla. 4th DCA 2008)……8

Scott v. Merchants Ass'n Collection Div., Inc.,
2012 WL 4896175 (S.D. Fla. 2012)……..23

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016)……4, 6

Sream, Inc. v. PB Grocery, Inc., of Palm Beach
2017 WL 6409006 (S.D. Fla. 2017)……8

Storms v. Haugland Energy Grp., LLC,
2018 WL 4347603 (S.D. Fla. 2018)……..……..…9

Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino,
447 F.3d 1357 (11th Cir. 2006)……...7

Sziranyi v. Allan R. Dunn, M.D.,
2009 WL 6613675 (S.D. Fla. 2009)……8

Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.,
525 F.3d 1107 (11th Cir. 2008)……18

Trans World Airlines, Inc. v. Thurston,
469 U.S. 11 (1985)……19

VP Props. & Devs. LLLP v. Seneca Specialty Ins. Co.,
645 Fed. App'x. 912,(11th Cir. 2016)……..18

Wilchombe v. TeeVee Toons, Inc.,
555 F.3d 949 (11th Cir. 2009)……...23

Wright v. King,
2007 WL 80844 (M.D. Fla. 2007)……...2, 3

Zippo Mfg. Co. v. Zippo Dot Com, Inc.,
952 F. Supp. 1119 (W.D. Pa. 1997)…….8, 9

STATUTES

22 U.S.C. § 6021……1, 5, 26

22 U.S.C. § 6023……..……...passim

22 U.S.C. § 6031….……...22

22 U.S.C. § 6032….……...22

22 U.S.C. § 6067……..5

22 U.S.C. § 6081…...…….5, 15

22 U.S.C. § 6082……3, 6, 15

31 C.F.R. § 515.560…….23, 25

31 C.F.R. § 515.572…….24, 25

47 U.S.C. § 227…….……19

Fla. Stat. § 48.193……..……...…….……8, 11

OTHER AUTHORITIES

Black's Law Dictionary (11th ed. 2019)……..……..17

Brian Bandell, *Inside Look: Expedia opens office on Brickell for nearly 100 employee, South Florida Business Journal* (Jan. 12, 2016) ……...…….……...8

Expedia, Inc. Registration, Florida Department of State, Division of Corporations (last accessed Nov. 26, 2019)…….....8

HR Rep. No. 104-468 (1996)……..…….6

Enforcement Information for June 13, 2019, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190612_expedia.pdf (last visited on Dec. 5, 2019)……...…...24

President's Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, 32 Weekly Comp. Pres. Doc. 1265 (July 16, 1996)..…...….27

RULES

Fed. R. Civ. P. 12(b)(2)…….12

Rule 8(a)(2)……2, 13

Rule 12(b)(6)……3

In an ill-founded Motion to Dismiss [D.E. 35] (the "Motion" or "MTD"), defendant Expedia, Inc., makes two critical admissions. ***First***, defendant admits that Diego Trinidad's family home on Varadero Beach, Cuba (the "Property") was confiscated by the Cuban government, and that defendant was aware of this fact while it trafficked, and benefitted from others' trafficking, in the Property. *See* MTD at 1 (arguing that Trinidad's "real" injury is the "Cuban government's confiscation of the Property in the 1960's"); *Id*. at 13 (admitting that defendant "removed the Resort from its website after it received Trinidad's notice of intent to add Expedia as defendant to this action.").[1] ***Second,*** defendant admits that it trafficked in the Barceló Solymar (the "Resort"), which is built on the site of the Property.[2] *Id*. at 2 (admitting that defendant was "offering reservations at a hotel that, according to Trinidad, was built partially on land where the Property once stood."); *Id.* at 13 (admitting defendant's "decision to cease alleged trafficking conduct after receiving a notice of a Title III claim . . . .").

Nonetheless, defendant argues that Trinidad lacks "constitutional standing" to bring his claims because "there is no nexus or causal connection between his alleged injury (i.e., the Cuban government's confiscation of the Property in the 1960s) and Expedia's challenged conduct (i.e., offering reservations at a hotel that, according to Trinidad, was built partially on land where the Property once stood)." *Id*. at 1-2. This is a mischaracterization of Title III of the Helms-Burton Act, 22 U.S.C. § 6021, *et. seq.* ("Title III" of "the Act"), not to mention Article III of the U.S. Constitution. The express language of Title III and the complaint make clear that Trinidad's injury in this case is not the Cuban government's theft of his Property. Trinidad's injury—indeed the sole focus of Title III and this case—is defendant's *admitted* trafficking, and benefitting from others' trafficking, in the Property.

Hedging its longshot bet on an ill-conceived "constitutional standing" argument, defendant alternatively argues that: (1) this Court may not exercise personal jurisdiction over it despite the fact that it is registered to do (and regularly does) business in Florida, including

---

[1] One hopes defendant does not choose to pretend it didn't know it was booking rooms in a hotel built on stolen property. But if it does, Trinidad's pre-suit notice, attached as **Exhibit A**, made clear that the Property had been confiscated by the Cuban government.

[2] The statutory definition of trafficking in this case expressly includes "engag[ing] in a commercial activity ***using or otherwise benefiting*** from confiscated property." 22 U.S.C. § 6023(13)(A)(ii) (emphasis added). Running a business that books rooms in a hotel built on stolen property amounts to "benefitting from confiscated property" as a matter of law.

actively marketing the Resort to Florida residents and offering them an interactive website through which they could reserve and pay for rooms at the Resort; (2) Trinidad's Property is not "property" as defined in Title III and Trinidad has not sufficiently alleged that his parents owned, and he now owns, a claim to the Property; (3) Title III's "residential purpose" carveout for ***current residential properties*** somehow should apply because Trinidad and his family lived on the Property until the Cuban government stole it and demolished their home to build the Resort; (4) Trinidad acquired his claim to the Property when his mother died in 2008, not before March 12, 1996, despite the fact that Title III's definition of "property" includes future or contingent rights in real property; and (5) defendant's trafficking (and benefitting from others' trafficking) isn't actionable, on the theory that it is "incident to lawful travel," despite the plain meaning of the statutory language, two decisions of judges of this District holding that it is an affirmative defense which a defendant must plead and prove, and, the obvious, necessary conclusion that it is a factual issue that cannot be resolved on a motion to dismiss.

As more fully demonstrated below, this Court should deny the Motion and this case should proceed.

LEGAL STANDARD

"In general, courts disfavor motions to dismiss and grant such motions in rare circumstances." *Wright v. King*, 2007 WL 80844, at *1 (M.D. Fla. 2007) (citing *Gasper v. La. Stadium and Expo. Dist.*, 577 F.2d 897, 900 (5th Cir. 1978)). Rule 8(a) of the Federal Rules of Civil Procedure requires a complaint to contain (1) a "short and plain statement of the grounds for the court's jurisdiction . . . ," (2) "a short and plain statement of the claim showing that the pleader is entitled to relief," and (3) a demand for the relief sought . . . ." Fed. R. Civ. P. 8(a). To withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," so as to "nudge[] [his] claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although "a formulaic recitation of the elements of a cause of action will not do," *Twombly*, 550 U.S. at 555, "[t]o survive a 12(b)(6) motion to dismiss, the complaint does not need detailed factual allegations, but must give the defendant ***fair notice of what the plaintiff's claim is and the grounds upon which it rests***." *Randall v.*

Scott, 610 F.3d 701, 705 (11th Cir. 2010) (citing *Twombly*, 550 U.S. at 555; *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (internal quotations omitted) (emphasis added)).

Further, "[i]n deciding a Rule 12(b)(6) motion to dismiss, the court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff . . . ." *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1246 (11th Cir. 2016) (citing *Erikson v. Pardus*, 551 U.S. 89, 94 (2007)). Finally, a court may not resolve factual issues on a motion to dismiss, but may decide only questions of law. *Wright*, 2007 WL 80844, at *1 (citing *Kest v. Nathanson*, 216 So. 2d 233, 235 (Fla. 4th DCA 1968)). "In ruling on a motion to dismiss, the Court is constrained to review the allegations as contained within the four corners of the complaint and may not consider matters outside the pleading without converting the defendant's motion into one for summary judgment." *Crowell v. Morgan, Stanley, Dean Witter Servs. Co., Inc.*, 87 F. Supp. 2d 1287, 1290 (S.D. Fla. 2000).

DEFENDANT'S MOTION SHOULD BE DENIED

Title III provides that "any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns a claim to such property for money damages . . . ." 28 U.S.C. § 6082(a)(1)(A). Trinidad pleads, as he must, that (1) he is a United States national (2) who owns a claim to property that was (3) confiscated by the Cuban government on or after January 1, 1959, and (4) trafficked by the defendants within the last two years. Trinidad adequately alleged each of these elements. *See* Amended Complaint ("Am. Comp." and "complaint" throughout) [D.E. 15] at 2; ¶¶ 1, 9-13, 14, 21, 24-27. Nonetheless, defendant demands that Trinidad's case be dismissed, arguing that: (1) it is not subject to personal jurisdiction; (2) Trinidad did not adequately allege that his parents owned, and he now owns, a claim to the Property, which (3) purportedly is not "property" under Title III; (4) Trinidad purportedly did not acquire his claim to the Property before March 12, 1996; (5) Trinidad did not sufficiently allege that defendant's trafficking was "knowing and intentional";[3] and (6) defendant's trafficking is "incident to lawful travel." Trinidad addresses each argument in turn.

[3] We pause to note one of defendant's fantasies about the Act, that a Title III claim requires some sort of bad intent akin to an intentional tort. This is stuff and nonsense. Title III is a strict liability statute with limited, enumerated, statutory defenses. To adequately allege that a trafficker acted "knowingly and intentionally" merely requires alleging volitional, not accidental or unintended, trafficking. The latter is conceivable, for example, in the case of a business that bought and resold vinegar without knowing it was made in Cuba, where the communist Castro regime

I. Even If "Constitutional Standing" Were Not a Canard, Trinidad Would Have it, and He Plainly Has Standing to Bring this Case Under Title III of the Act

Defendant argues that Trinidad lacks "Article III standing" to bring this action.[4] MTD at 9-10. This theory demonstrates either (1) a fundamental misunderstanding of Article III, (2) a fundamental misunderstanding of Title III, or (3) a transparent strawman argument.

Under Title III, Trinidad's injury is not the Cuban government's confiscation of the Property. Trinidad's injury—indeed the sole focus of Title III—is defendant's ***trafficking*** in the Property. Defendant nonetheless doubles down on its distortion of the Act with the strawman argument that "Trinidad has not alleged any 'causal connection' between Expedia's challenged conduct—i.e., 'offering for economic benefit, reservations at the Resort' . . . and his alleged injury—i.e., that 'the Cuban government confiscated the Property from the Trinidad Family' without paying compensation[.]" MTD at 10. It is true that Trinidad's complaint did not allege these non-elements of his claim, because they don't exist except on defendant's wish list. The complaint's "alleged injury" plainly is not the Castro regime's confiscation of the Property, but Defendant's trafficking in the Property. *A fortiori*, even if Title III required alleging some "causal connection" between trafficking and something else (it doesn't), it wouldn't be confiscation of the Property.

As a general matter, standing requires that a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Here, defendant argues that Trinidad "fails to satisfy the second, causation element of constitutional standing."[5] MTD at 9. To do so, defendant disingenuously mischaracterizes Trinidad's claim as if it were based on

---

confiscated the real property on which the factory stood. This Court may (and should) take judicial notice of the fact that the Castro regime confiscated all real property, including Trinidad's Property. A defendant booking rooms in a hotel on that Property in Cuba may not plausibly claim it didn't know that the hotel stands on confiscated property. This is all the Act requires.

[4] The Court should reject defendant's attempt to use "standing" as a bootstrap to magically transform a Rule 12(b)(6) motion into an attack on subject matter jurisdiction.

[5] There's no such thing as a "causation element" of standing, either. That an injury be "fairly traceable" to defendant's challenged conduct does not equate to cause in fact or proximate cause, except on defendant's wish list.

the Cuban government's confiscation of the Property, and not defendant's trafficking in the Property, which is plainly and expressly what the Act targets.

Defendant cannot seriously dispute that Trinidad adequately alleged "an invasion of a legally protected interest." Title III expressly makes trafficking in confiscated property a "legally-protected interest" for which it expressly provides a remedy: "[t]o deter trafficking in wrongfully confiscated property, United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro's wrongful seizures." 22 U.S.C. § 6081(11). The simple and direct language of Title III may explain, but cannot justify, defendant's floating the frivolous argument that Trinidad's "alleged injury [is] that the Cuban government confiscated the Property from the Trinidad Family without paying compensation." MTD at 10. That said, we respond as follows:

First, what Trinidad does allege is that defendant is liable for its trafficking in the Property. Am. Comp. at 2 ("Together, the Cuban government, the Barceló Group, Expedia, and others have exploited and benefitted from Diego Trinidad's property for decades without his consent and without paying him—the rightful owner—any compensation whatever. Diego Trinidad now sues defendant Expedia under the Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. § 6021, *et seq.* (the "LIBERTAD Act"), for unlawful trafficking in his confiscated property in Cuba."); *Id.* ¶ 14 ("Trinidad never has given any sort of authorization to Expedia, and Expedia never has paid—and Trinidad never has received—any compensation whatsoever for Expedia's trafficking of the Resort."); *Id.* ¶ 26 ("Expedia has trafficked in the Resort, as that term is defined in 22 U.S.C. § 6023(13), by offering, for economic benefit, reservations at the Resort, which trafficking continued until at least June 25, 2019, in violation of Title III of the LIBERTAD ACT."); *Id.* ¶ 27 ("Expedia conducted this trafficking 'without the authorization of any United States national who holds a claim to the property' (22 U.S.C. § 6023(13)) in violation of Title III of the LIBERTAD Act.").

Second, Title III does not, and cannot, provide any recourse to plaintiffs like Trinidad for the Cuban government's confiscation of his property in Cuba. Title II of the Act, and not Title III, concerns claims for confiscation of property in Cuba. *See* 22 U.S.C. § 6067 ("Settlement of outstanding United States claims to confiscated property in Cuba"). The Conference Report for the Act notes that U.S. support for a transition government in Cuba under Title II (not Title III) is conditioned "on such government publicly committing itself, and taking appropriate steps to

establish a procedure under its law or through international arbitration, to provide for the return of, or prompt, adequate, and effective compensation for, property confiscated by the Cuban Government on or after January 1, 1959." HR Rep. No. 104-468, at 56 (1996). Thus, some other, not yet extant, procedure or law—not Title III—might someday (one hopes) provide for return of, or compensation for, property confiscated by the Cuban government. The notes to the Committee Report for 22 U.S.C. § 6082 leave no doubt:

> The committee of conference believes that this right of action is a unique but proportionate remedy for U.S. nationals who were targeted by the Castro regime when their property was wrongfully confiscated. The purpose of this civil remedy is, in part, to discourage persons and companies from engaging in commercial transactions involving confiscated property, and in so doing to deny the Cuban regime of Fidel Castro the capital generated by such ventures and to deter the exploitation of property confiscated from U.S. nationals. The substitute puts would-be investors on notice that if they traffic in confiscated property of U.S. nationals after this provision becomes law, they may be held liable to the legitimate U.S. owners in U.S. courts.
>
> It is the committee of conference's intent not to supplant or undermine the Foreign Claims Settlement process, but to provide an additional remedy for U.S. nationals through which they may take action to protect their claim to a confiscated property in Cuba. The committee of conference expects that the existence of this remedy will make the recovery process less complicated because it will deter investment in and development of confiscated property in Cuba, thereby facilitating efforts by the rightful owners to reclaim, sell, or develop such property under the laws of a democratic Cuba.

HR Rep. No. 104-468, at 58 (1996). Title III's purpose and remedy have nothing to do with anything the Cuban government did or does, except for the predicate fact of its having confiscated the Property, a fact that this Court may (and should) judicially notice. Title III is solely aimed at traffickers like defendant, who use or benefit from property that was confiscated. Thus, the injury in fact Trinidad alleged is—and only can be—defendant's trafficking in the Property without his permission and without compensating him. That injury is not only "fairly traceable" to defendant, but the direct result of defendant's trafficking in the Property.

Third, defendant wholly fails to address the self-evident fact that a favorable judicial decision awarding damages to Trinidad is intended to, and obviously will, redress defendant's failure to compensate Trinidad for trafficking in the Property. As such, Trinidad's injury indisputably can be "redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. In sum, defendant's "Title III standing" argument is meritless, and its Motion should be denied.

II. This Court Has Specific Jurisdiction Over Defendant Because Defendant Regularly Transacts Business Within Florida and this District, it Avails Itself of the Benefits of its Presence here, and Committed a Tortious Act Here

Defendant argues that the complaint does not make out a *prima facie* case for personal jurisdiction over it. MTD at 7. Defendant's argument lacks merit for four reasons.

First, as defendant concedes, the complaint alleges that defendant engages in business in Florida "'by offering, for economic benefit, reservations at the Resort.'" MTD at 7-8 (quoting Am. Comp. ¶ 26). Moreover, the complaint plainly alleges specific jurisdiction, because it is this conduct of defendant in Florida from which the action arises. *Id.* ¶¶ 6, 17. This allegation, together with other allegations that defendant "regularly transacts business in Florida[,]" Am. Comp. ¶ 4, by permitting travelers, "including Florida and other U.S. residents," to book online stays at the Resort through defendant's website, *Id.* at 1, makes out a *prima facie* case for specific jurisdiction under Florida's long-arm statute.[6] The complaint also alleges that Trinidad resides in this District and a substantial part of the challenged conduct occurred in this District. *Id.* ¶¶ 1, 4. The Eleventh Circuit has held that such allegations support specific jurisdiction. *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1351 (11th Cir. 2013) (finding that a *prima facie* case for specific, long-arm jurisdiction was established where a complaint alleged that: (1) the defendant conducts business within this Judicial District; (2) engages in the sale of particular products giving rise to the claim within the Judicial District through interactive websites; (3) purposefully directs that conduct toward consumers in the Judicial District; (4) sells or offers that product on its website; and (5) actively advertised the product).

Second, defendant fails to provide any affidavits to contradict the complaint's well-pleaded personal jurisdiction allegations, which demonstrate that it does business in Florida. *See Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006) (Once the plaintiff establishes a *prima facie* case of personal jurisdiction, the burden shifts to the defendant to "submit[] affidavits contrary to the allegations in the complaint . . . ."). Defendant could not in good faith rebut the complaint's "doing business in Florida" allegations, which might explain its failure even to try. As evidenced by its official state filings, defendant

[6] We have no idea why defendant argued that it is not subject to general jurisdiction (which was not alleged), except to stand up another strawman it might knock down. This case plainly arises out of, and is related to, defendant's contacts with the forum state, as the complaint alleges.

has been registered to do business in Florida since 1999.[7] Defendant has an office here at 701 Brickell Ave, Miami, where it has approximately 100 employees.[8] These facts alone demonstrate that defendant is "operating, conducting, engaging in, or carrying on a business venture in [Florida] or having an office . . . in [Florida]." Fla. Stat. § 48.193(1)(a)(1). Defendant fails to face these facts and, with blinders on, offers a blindfold to the Court by arguing that merely operating a website, standing alone, is insufficient to satisfy Florida's long-arm statute. MTD at 7. That was not alleged, and those are not the operative facts.

"In order to establish that a defendant is 'carrying on business' for the purposes of the Long–Arm statute, the activities of the defendant must be considered collectively and show a general course of business activity in the state for pecuniary benefit." *Pathman v. Grey Flannel Auctions, Inc.*, 741 F. Supp. 2d 1318, 1323 (S.D. Fla. 2010) (quoting *Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1249 (11th Cir. 2000)). While isolated activity, such as maintaining a merely informational, non-interactive website accessible in Florida may be insufficient, "[a]ctive internet solicitation may subject a defendant to personal jurisdiction." *Id.* at 1324; *accord Renaissance Health Pub., LLC v. Resveratrol Partners, LLC*, 982 So. 2d 739, 742 (Fla. 4th DCA 2008) (sales made to Florida residents through interactive websites were "sufficient to subject defendants to jurisdiction"). Defendant does not and cannot deny that it made sales to Florida residents through its interactive website, which exists for that very purpose.

Courts in this District routinely apply the sliding scale first identified by the court in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) to determine the sufficiency of a defendant's internet contacts with Florida. *See, e.g., Pathman*, 741 F. Supp. 2d at 1325; *Foreign Imported Prods. & Pub., Inc. v. Grupo Indus. Hotelero, S.A.*, 2008 WL

---

[7] *See Expedia, Inc. Registration*, Florida Department of State, Division of Corporations, http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=EntityName&directionType=Initial&searchNameOrder=EXPEDIA%20F990000058350&aggregateId=forp-f99000005835-543caa55-6246-423d-ac52-482da0b80d47&searchTerm=expedia&listNameOrder=EXPEDIA%20F990000058350 (last accessed Nov. 26, 2019). The Court may take judicial notice of the Florida Department of State's business registry. *Sream, Inc. v. PB Grocery, Inc., of Palm Beach*, 2017 WL 6409006, at *4 n.5 (S.D. Fla. 2017) (citing *Sziranyi v. Allan R. Dunn, M.D., P.A.*, 2009 WL 6613675, at *2 n.2 (S.D. Fla. 2009), *aff'd*, 383 Fed. Appx. 884 (11th Cir. 2010)).

[8] Brian Bandell, *Inside Look: Expedia opens office on Brickell for nearly 100 employees*, S. Florida Bus. J. (Jan. 12, 2016), https://www.bizjournals.com/southflorida/news/2016/01/12/inside-look-expedia-opens-office-on-brickell-for.html.

4724495, at *7 (S.D. Fla. 2008); *Hartoy Inc. v. Thompson*, 2003 WL 21468079, at *4 (S.D. Fla. 2003). The *Zippo* sliding scale describes the minimum contacts that support personal jurisdiction:

> At one end of the spectrum are situations where a defendant clearly does business over the internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an internet website which is accessible to users in a foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for exercise [of] personal jurisdiction. The middle ground is occupied by interactive website where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.

952 F. Supp. at 1124. Defendant's Florida contacts are at the "end of the spectrum" where jurisdiction exists because it "clearly does business over the internet." *Zippo*, 952 F. Supp. at 1124. Defendant's very business model, and its entire $11.2 billion business, is based on the sale of travel and lodging over the internet. Am. Comp. ¶¶ 18-21. It is beyond disingenuous for defendant to argue that it merely maintains a website that is accessible to Floridians. *Cf.* MTD at 1, 5-8. "[C]learly[,] [defendant] does business over the internet" and enters into "contracts with residents of [Florida] that involve the knowing and repeated transmission of computer files over the internet . . . ." *Zippo*, 952 F. Supp. At 1124. Accordingly, "personal jurisdiction is proper."[9] *Id.*

---

[9] Defendant's reliance on *Storms v. Haugland Energy Grp., LLC*, 2018 WL 4347603, at *8 (S.D. Fla. 2018) and *Lemoine v. Wong*, 2017 WL 5127592, at *4 (S.D. Fla. 2017) is misplaced. The *Storms* defendant filed an affidavit challenging personal jurisdiction that the plaintiff failed to rebut. The court found it unclear that defendant had "advertised" a job in Florida, and held that merely maintaining a website, without more, was insufficient. *Storms*, 2018 WL 4347603, at *6-*8. The *Lemoine* defendant also challenged personal jurisdiction with affidavits, stating that "(1) [defendant] 'has no contacts with, and has never had any contacts with, the State of Florida;' (2) [defendant] 'does not do business in the State of Florida and has never conducted business in the State of Florida;' (3) [defendant] does 'not maintain an office in the State of Florida and has never maintained an office in the State of Florida;' and (4) [defendant] 'does not advertise in the State of Florida and has never advertised in the State of Florida.'" 2017 WL 5127592, at *3-*4. Moreover, the *Lemoine* defendant's website did not "contain content reflecting that a dealer or consumer could purchase a shotgun over the internet." *Id.* at *6, n. 4. In dispositive contrast, this defendant's ***entire business*** is conducted, and ***all of its sales*** are made, over the internet.

Third, defendant's trafficking in Trinidad's property directly arises from its online advertisement of, and its booking of rooms at, the Resort, all from its website. Specific jurisdiction, therefore, comports with due process. Under Florida's long-arm statute, specific long-arm jurisdiction exists over a defendant "'where the cause of action arises from the doing of business in Florida . . . .'" *Nicolet, Inc. v. Benton*, 467 So. 2d 1046, 1049 (Fla. 1st DCA 1985) (quoting *Bloom v. A.H. Pond Co.*, 519 F. Supp. 1162, 1168 (S.D. Fla. 1981)). There must be "some nexus or connection between the business that is conducted in Florida and the cause of action alleged." *Id.* That nexus is obvious here.

Under Title III, a defendant is subject to liability for trafficking if it "knowingly and intentionally … engages in a commercial activity using or ***otherwise benefiting from confiscated property*** . . . ." 22 U.S.C. 6023(13) (emphasis added).[10] There is no question that this defendant is engaged in a commercial activity, namely acting as a travel agent for Florida residents and selling reservations for rooms at the Resort. Similarly, it cannot contend that is has not derived a direct benefit from advertising, facilitating and taking room reservations at the Resort.

The complaint alleges that defendant uses three profit models: the merchant model, the agency model, and the advertising model. Am. Comp. ¶ 18. Under the merchant model, defendant "facilitate[s] the booking of hotel rooms . . . from our travel suppliers and [defendant is] the merchant of record for such bookings." *Id.* Under the agency model, defendant "act[s] as the agent in the transaction" and "receive[s] commissions or ticketing fees from the travel supplier and/or traveler." *Id.* Under the advertising model, defendant "offer[s] travel and non-travel advertisers access to a potential source of incremental traffic and transactions through our various media and advertising offerings on trivago and transaction-based websites." *Id.* Defendant wholly ignores these allegations. Taken together, the complaint's allegations are sufficient to demonstrate that Trinidad's injury results from defendant's advertising, facilitating and taking room reservations at the Resort, which constitutes trafficking under Title III.

Moreover, at this early stage in the litigation, Trinidad is without knowledge of the actual number of Florida residents that booked reservations at the Resort through defendant's websites. That number will not be small, but if the Court were to have any doubt about the sufficiency of defendant's Florida contacts (out of which this action arises), jurisdictional discovery would be

[10] As noted above, "knowing and intentionally" in the context of the Act means nothing more than acting "on purpose." Defendant was not sleepwalking when it trafficked in the Property.

warranted. *E.g., Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) ("Resolution of a pretrial motion that turns on findings of fact—for example, a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2)—may require some limited discovery before a meaningful ruling can be made."). Such discovery would reveal: (1) the exact number of reservations Florida residents made at the Resort using defendant's services, and (2) the nature in which defendant profited from those reservations.

Fourth, Trinidad has adequately alleged specific jurisdiction over defendant for committing tortious acts within Florida. *See* Am. Comp. at 2 ("Stays at the Resort are offered to travelers, including Florida and other U.S. residents . . . through online booking providers like Expedia, Inc."); ¶ 4 ("The Court has personal jurisdiction over Expedia under Fla. Stat. §§ 48.193(1)(a)(1) and (1)(a)(2) because it maintains and carries on continuous and systematic contacts with Florida, regularly transacts business within Florida, regularly avails itself of the benefits of its presence in Florida, and committed a tortious act within Florida.").

Under Fla. Stat. § 48.193(1)(a)(2), "a person, whether or not a citizen or resident of this state, who personally or through an agent … commit[s] a tortious act within this state … submits himself or herself . . . to the jurisdiction of the courts of this state . . . ." Fla. Stat. § 48.193(1)(a)(2) (2019). "Under Florida law, a nonresident defendant commits 'a tortious act within Florida' when he commits an act *outside* the state that causes *injury within Florida*." *Mosseri*, 736 F.3d at 1353 (quoting *Licciardello v. Lovelady*, 544 F.3d 1280, 1283 (11th Cir. 2008)) (emphasis in original). In *Mosseri*, the court held that "a trademark infringement on an Internet website causes injury and occurs in Florida by virtue of the website's accessibility in Florida." *Mosseri*, 736 F.3d at 1254 (citing *Lovelady*, 544 F.3d at 1283).[11]

The *Mosseri* court concluded that "we need not decide whether trademark injury necessarily occurs where the owner of the mark resides, as the Florida district courts have held, *because in this case the alleged infringement clearly also occurred in Florida by virtue of the website's accessibility in Florida*." *Mosseri*, 736 F.3d at 1254 (citing *Lovelady*, 544 F.3d at 1283) (emphasis in original). In other words, the injury occurred in Florida not only because the plaintiff resided in Florida, but also because the website through which the defendant committed the tort was accessible in Florida. This case is no different—not only does Trinidad reside in

[11] Trademark infringement, like strict product liability and trafficking under the Act, is wrongful conduct that does not require a showing of "bad intent," but subjects the actor to "tortious act" long-arm jurisdiction.

Florida, but the website through which defendant tortiously trafficked in the Property was accessible in Florida. Thus, this Court has personal jurisdiction over defendant under Florida Statute § 48.193(1)(a)(2).

III. Trinidad Adequately Alleged His Claim to the Property, Which Is in Fact "Property" Under Title III, Because the "Residential Purpose" Carveout in Title III Refers to Current—Not Pre-Confiscation—Uses of Confiscated Property

Defendant next argues that Trinidad "does not allege that his parents owned the home or the land on which it stood, or that they held any other property interest in the home or land," and that perhaps "a relative or related entity owned the property and merely permitted Trinidad's parents to build a home on it and reside there during their lifetimes." MTD at 11. Defendant further argues that "Trinidad fails to sufficiently allege that 'the Property' underlying his claims constitutes 'property' under the Act." *Id*. at 11. According to defendant, "property" as defined by Title III excludes property that was used for residential purposes both at the time it was confiscated by the Cuban government, and as of March 12, 1996. Defendant pulled the latter date out of thin air, and this is not what Title III says or means.

A. *Defendant Admits That Trinidad's Allegations Raise a "Reasonable Inference" That His Parents (and Now He) Owned the Property*

Throughout the complaint, Trinidad alleged that his parents—and through succession, now he—owned the Property. *See* Am. Comp. at 2 ("In the late 1950's, Diego Cosme Trinidad Valdes and his wife Estela Esperanza García, built a beachfront home in Varadero, Matanzas Province, Cuba . . . which, on their passing, was inherited by their son, Diego Trinidad."); *Id*. ("Together, the Cuban government, the Barceló Group, Expedia, and others have exploited and benefitted from Diego Trinidad's property for decades without his consent and without paying him—the rightful owner—any compensation whatever."); *Id*. ¶ 11 ("On the passing of Diego Cosme Trinidad Valdez and his wife, the property which is the subject of this action was inherited by their son, Diego Trinidad, who has resided in the United States for decades."); *Id*. ¶ 13 ("As of the time of the filing of this lawsuit, Trinidad is one of the rightful owners of the Resort . . ."); *Id*. ¶ 25 ("Trinidad is the rightful owner of property that was confiscated by the communist Cuban government.").

These allegations (and the entire complaint) are subject to a notice-pleading standard under Rule 8(a)(2), to which recent cases have added a gloss of "non-implausibility," both of which the complaint satisfies. Defendant's challenge to Trinidad's ownership allegations concedes that they are plausible, which demonstrates their legal sufficiency, as we shall see.

Rule 8(a)(2) requires "'a short and plain statement showing that the pleader is entitled to relief,' in order to give the defendant 'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555 (quoting C*onley* v. *Gibson*, 355 U. S. 41, 47 (1957)); Fed. R. Civ. P. 8(a)(2). "'[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations.'" *Iqbal*, 556 U.S. at 678. In other words, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief ***that is plausible*** on its face[,]'" which means simply that "the plaintiff pleads factual content that allows the court to draw the ***reasonable inference*** that the defendant is liable for the misconduct alleged" *Id*. (emphasis added). This, the complaint indisputably did. If it hadn't done so, defendant wouldn't have been able to argue that it should have alleged "evidence" of ownership.

Defendant argues that "[t]he mere allegation that Trinidad's parents "built" the home does not give rise to a reasonable inference that they owned a property interest in the home or the land." MTD at 11. This is an absurd assertion. People seldom (if ever) build homes on property to which they have no ownership (or long-term possessory) interest. Moreover, defendant then concedes the plausibility of the complaint's ownership allegations by arguing that "it is ***equally reasonable*** to infer that a relative or related entity owned the property and merely permitted Trinidad's parents to build a home on it and reside there during their lifetimes." MTD at 11 (emphasis added). Defendant's "life-estate" speculation is not "equally reasonable," because it is highly unlikely that Trinidad's parents built a home on property they didn't own.

At bottom, however, defendant's "alternative explanation" argument concedes the plausibility and reasonableness of the complaint's ownership allegations, which renders them legally sufficient. The fact that defendant's "alternative explanation" is highly unlikely and ***far less plausible*** than the complaint's ownership allegations demonstrates, as a matter of law and logic, that the Court may (and should) "draw the reasonable inference" that Trinidad's parents (and now, he) owned the Property.

B. *The Property is "Property" as Defined by Title III Because It is Not Currently Being Used For "Residential Purposes"*

Defendant next argues that the Property is not "property" as defined by Title III because it "was used for residential purposes by Trinidad's parents" before the Castro regime confiscated it. MTD at 11. This argument has no merit, because Title III does not say, much less mean, what defendant contends. It says this:

> (A) The term 'property' means any property . . . whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest.
>
> (B) For purposes of subchapter III of this chapter, the term 'property' does not include real property used for residential purposes unless, as of March 12, 1996—
>
> (i) the claim to the property is held by a United States national and the claim has been certified under title V of the International Claims Settlement Act of 1949 . . . ; or
>
> (ii) the property is occupied by an official of the Cuban Government or the ruling political party in Cuba.

22 U.S.C. § 6023(12). Subsection (B)'s "residential purpose" carveout does not refer to pre-confiscation, residential uses of real property. It does not exclude "real property that ***was*** used for residential purposes," or "real property that ***formerly*** was used for residential purposes," or "real property that was used, ***prior to its confiscation***, for residential purposes." It excludes "real property ***used*** for residential purposes." This Court should decline defendant's invitation to improperly "add or subtract words from a statute." *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1224 (11th Cir. 2009).

Even if the plain language of 22 U.S.C. § 6023(12) were not unambiguous in stating that the "residential purposes" carveout refers to the current use of the property, that is the only reading that would be consistent with Title III's other provisions and stated intent, to punish traffickers in confiscated property, not innocent Cuban people who might be living in such properties.[12] *See, e.g., Patel v. U.S. Att'y Gen.*, 917 F.3d 1319, 1326 n.5 (11th Cir. 2019) ("one of the most basic interpretative canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void, or insignificant."); *In re Coffman*, 766 F.3d 1246, 1250 (11th Cir. 2014) (applying the canon that related statutes should be read *in para materia* and "interpreted together, as though they were one law").

In enacting Title III, Congress made the following findings:

---

[12] Congressional intent to punish and deter traffickers is further evidenced by the exception to the residential property carveout for property that "is occupied by an official of the Cuban Government or the ruling political party in Cuba," as of March 12, 1996. 22 U.S.C. § 6023(12)(B)(ii). Such occupation on the effective date of the Act renders trafficking in "residential property" actionable, in furtherance of congressional intent to punish members of the Castro regime and their accomplices, not the Cuban people.

> • The wrongful confiscation or taking of property belonging to United States nationals by the Cuban Government, and the subsequent exploitation of this property at the expense of the rightful owner, undermines the comity of nations, the free flow of commerce, and economic development. [22 U.S.C. § 6081(2)];
>
> * * *
>
> • The Cuban Government is offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets some of which were confiscated from United States nationals. [22 U.S.C. § 6081(5)];
>
> * * *
>
> • This "trafficking" in confiscated property provides badly needed financial benefit, including hard currency, oil, and productive investment and expertise, to the current Cuban Government and thus undermines the foreign policy of the United States . . . . [22 U.S.C. § 6081(6)]

These findings demonstrate express congressional concern over foreign investors becoming involved in joint ventures with the Castro regime to exploit confiscated property. There is no better example of this than building a hotel on stolen beachfront property and trafficking that property online, which is exactly what happened here. In view of these findings, Congress stated that "[t]o deter trafficking in wrongfully confiscated property, United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro's wrongful seizures." 22 U.S.C. § 6081(11).

To exclude property that ever was used for residential purposes prior to confiscation would be inconsistent with the Act's language and history and would undermine congressional intent to deter trafficking in confiscated property. Thus, even if 22 U.S.C. § 6023(12) did not unambiguously carve out only property currently used for residential purposes, Title III's findings and stated purpose would require it to be so construed.

C. *Trinidad Adequately Alleged That He Acquired His Claim Under Title III Prior to the Statute's Enactment*

Under Title III, "a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996." 22 U.S.C. § 6082(a)(4)(B). In the complaint, Trinidad alleged that "[o]n the passing of Diego Cosme Trinidad Valdez and his wife, the property which is the subject of this action was inherited by their son, Diego Trinidad, who has resided in the United States for decades." Am. Comp. ¶ 11. Defendant relies on probate records it attached as exhibits to its Motion to argue that Trinidad did not acquire his claim under Title III until 2008, when his

mother died. *See* MTD at 3, 12. This argument is frivolous. As his parents' son, Trinidad always had a future or contingent right in the Property and owned a claim to it before March 12, 1996.

Title III expressly defines property to mean "any property . . . whether real, personal, or mixed, and any present, ***future, or contingent right***, security, or other interest therein, including any leasehold interest." 22 U.S.C. § 6023(12)(A) (emphasis added). This definition makes clear that Trinidad, whose parents owned property in Cuba that the Castro regime confiscated, had an actionable interest in the Property when Title III was enacted.

IV. The "Incident to Lawful Travel" Exception Is Not Applicable Because Expedia Is Not Engaging in Transactions and Uses of Property That Are Incident and Necessary to Lawful Travel

Defendant argues that this case should be dismissed because booking rooms at the Resort is "incident to lawful travel" and "are necessary to the conduct of such travel." *See* MTD at 14-16. Defendant is wrong for at least four reasons. ***First***, in providing online booking services for the Resort, defendant is not engaging in "transactions and use[] of property" at all. ***Second***, the "incident to lawful travel" exception is an affirmative defense that defendant bears the burden of pleading and proving and cannot be resolved on a motion to dismiss. ***Third,*** defendant's trafficking is not "necessary to the conduct of [lawful] travel." ***Fourth***, the general license defendant claims authorizes its trafficking does not give blanket permission to provide hotel reservation services, and requires meticulous compliance with other laws and regulations regarding who defendant can provide services to and under what circumstances, and whether defendant complied is a fact issue that cannot be resolved on a motion to dismiss.

A. *The "Incident to Lawful Travel" Exception Does Not Apply to Defendant's Online Booking Activities Because They Did Not Involve Transactions in and Use of Confiscated Property*

The Act defines "trafficking" as follows:

> As used in subchapter III, and except as provided in subparagraph (B), a person 'traffics' in confiscated property if that person knowingly and intentionally—
>
> (i) Sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
>
> (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or

> (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,
> without the authorization of any United States national who holds a claim to the property.

22 U.S.C. § 6023(13)(A). From that definition, Congress excluded certain activities that otherwise would have been considered "trafficking," including "transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel . . . ." 22 U.S.C. § 6023(13)(B) (the "Exception").

Trinidad has not alleged that defendant has transacted in and used any property in Cuba, let alone the Property confiscated from Trinidad. The complaint alleges that defendant has trafficked in the Property by "offering, for economic benefit, reservations at the Resort . . . ." Am. Comp. ¶ 26. Defendant has provided online booking services; it has not "used" the Property. "Use" means "[t]he application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted." Black's Law Dictionary (11th ed. 2019). Trinidad has not alleged, and defendant does not contend, that defendant has any legal or possessory interest in the Property that would entitle it to "apply" or "enjoy" the Property in any respect. Nor has Trinidad alleged, or defendant contended, that defendant transacted in or used the Property at any time.[13] Accordingly, the Exception is inapplicable to defendant's trafficking, which does not involve transactions in and use of the Property, but defendant's benefitting from others' use of the Property.

B. *Trinidad Was Not Required to Allege That Defendant's Trafficking Was Not Incident to Lawful Travel*

Defendant demands dismissal because Trinidad failed to allege a negative—that the "incident to lawful travel exception" (the "Exception") does ***not*** apply, i.e., that defendant's online booking of room reservations at the Resort (defendant's trafficking) was ***not*** "incident to lawful travel" and "not necessary to the conduct of such travel." This argument is based on a faulty premise—that the elements of this Title III claim include the inapplicability of the Exception. Two courts of this District have held that the Exception is an affirmative defense

[13] 22 U.S.C. § 6023(13)(B) sets out the exception as a conjunctive—"transactions ***and*** use of property . . . ." (emphasis added). Thus, in order to come within the exception, defendant would have to plead and prove that it both transacted in ***and*** used property. There is not, and won't be any allegation that defendant did either, until defendant asserts affirmative defenses.

which a defendant must plead and prove. *Garcia-Bengochea v. Carnival Corp.*, Case No. 19-cv-21725-JLK at ECF No. 41, at 6-7 ("Based on the text and structure of Helms-Burton, the Court holds that the lawful travel exception is an affirmative defense to trafficking that must be established by Carnival, not negated by Plaintiff."); *Havana Docks Corp. v. Carnival Corp.*, Case No. 19-cv-21724-BB at ECF No. 47, at 5 ("Based on the language of the Libertad Act, the Court agrees with the Plaintiff that the 'lawful travel exception' is an affirmative defense to trafficking . . . Therefore, this exception must be established by Carnival and Plaintiff was not required to negate this exception in its Complaint.").

"An affirmative defense 'admits to the complaint, but avoids liability, wholly or partly, by new allegations of excuse, justification, or other negating matters.'" *Boigris v. EWC P&T, LLC*, 2019 WL 5457072, at *2 (S.D. Fla. 2019) (quoting *Adams v. Jumpstart Wireless Corp.*, 294 F.R.D. 668, 671 (S.D. Fla. 2013)); *accord Losada v. Norwegian (Bahamas) Ltd.*, 296 F.R.D. 688, 690 (S.D. Fla. 2013) (same); *VP Props. & Devs. LLLP v. Seneca Specialty Ins. Co.*, 645 Fed. App'x. 912, 916 (11th Cir. 2016) (same). "Plaintiffs are not required to negate an affirmative defense in their complaint." *Padilla v. Porsche Cars N. Am., Inc.*, 391 F. Supp. 3d 1108, 1112 (S.D. Fla. 2019) (Moreno, J.) (quoting *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004)) (internal quotes and citations omitted); *accord Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 93 (2008) (holding that the burden of pleading and proving an affirmative defense rests with the "one who claims its benefits"—the defendant). Accordingly, a plaintiff is not required to plead the non-existence of an affirmative defense. *Cunningham v. Yellowstone Capital LLC*, 2016 WL 11163899, at *2 (S.D. Fla. 2016); *accord Manfred v. Bennet Law, PLLC*, 2012 WL 6102071, at *2 (S.D. Fla. 2012) (In a Telephone Consumer Protection Act ("TCPA") case, "prior express consent is an affirmative defense, not an element of the claim[,]" and accordingly, "[p]laintiff need not plead that he did not give his prior express consent.").

"The touchstone for determining the burden of proof under a statutory cause of action is the statute itself." *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1110 (11th Cir. 2008). Where a statute "exempt[s] otherwise illegal conduct by reference to a further item of proof . . . the burden of persuasion falls on the 'one who claims its benefits.'" *Meacham*, 554 U.S. at 93 (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)). In this case, the Exception is a statutorily-created exception to liability under Title III. In other words, the Exception carves out a limited, very specific category of lawful conduct ("transactions and uses of property incident to lawful travel to the extent that such transactions

and uses of property are necessary to the conduct of such travel") from otherwise unlawful conduct ("trafficking"). *See* 22 U.S.C. 6023(13)(B)). This is far from unique, as other statutory schemes employ the same structure, which require holding that the exception is an affirmative defense.

For instance, the Telephone Consumer Protection Act ("TCPA") makes using certain calling technology unlawful, except for calls made for emergency purposes or with the prior express consent of the called party:

> It shall be unlawful for any person within the United States, or any person outside of the United States if the recipient is within the United States . . . [t]o make a call ***(other than a call made for emergency purposes or made with the prior express consent of the called party)*** using any automatic telephone dialing system or an artificial or prerecorded voice . . . .

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). In *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014), the plaintiff alleged a TCPA violation and the defense argued consent. The 11th Circuit held the consent exception an affirmative defense and, accordingly, held that the burden was on the defendant to plead and prove that the exception applied. *Id*. at 1253.

Similarly, in *Meacham*, the U.S. Supreme Court addressed an exemption to the Age Discrimination in Employment Act (the "ADEA"). The Court noted that the "ADEA's general prohibitions against age discrimination . . . are subject to a separate provision . . . creating exemptions for employer practices otherwise prohibited under [various subsections of the ADEA]." *Meacham*, 554 U.S. at 91 (internal quotes and citations omitted). The Court found that "[g]iven how the statute reads, with exemptions laid out apart from the prohibitions (and expressly referring to the prohibited conduct as such), it is no surprise that we have already spoken of the BFOQ and RFOA provisions as being among the ADEA's 'five affirmative defenses.'" *Id*. (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 11, 122 (1985)). The Court cited the "familiar principle that 'when a proviso . . . carves out an exception out of the body of a statute or contract ***those who set up such an exception must prove it***.'" *Meacham*, 554 U.S. at 91 (quoting *Javierre v. Central Altagracia*, 217 U.S. 502, 508 (1910) (emphasis added)).

With respect to Title III, Congress set forth the list of prohibited acts in defining when a person "traffics" in confiscated property:

> As used in subchapter III, and except as provided in subparagraph (B), a person 'traffics' in confiscated property if that person knowingly and intentionally—

> (i) Sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
> (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
> (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,
> without the authorization of any United States national who holds a claim to the property.

22 U.S.C. § 6023(13)(A). Congress then set forth an exception for a discrete, limited class of lawful conduct which, but for the Exception, would be prohibited by Section 6023(13)(A):

> (i) the delivery of international telecommunication signals to Cuba;
> (ii) the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated national;
> (iii) transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel; or
> (iv) transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban Government or the ruling political party in Cuba.

22 U.S.C. § 6023(13)(B). As Judge King recently held, "[b]y using the phrase 'except as provided in subparagraph (B)' immediately before describing the conduct that constitutes trafficking, Congress expressed a clear intent to make the travel provision an *exception* to unlawful trafficking." *Garcia-Bengochea*, Case No. 19-cv-21725-JLK at ECF No. 41, at 6-7.

Just as in *Osorio* and *Meacham*, Section 6023(13)(B) "exempt[s] otherwise illegal conduct by reference to a further item of proof" (i.e., provides an affirmative defense), and "the burden of persuasion falls on the one who claims its benefits." *Meacham*, 554 U.S. at 93. The Exception is an affirmative defense that Trinidad was not required to negate, and the Motion's contrary theory should be rejected out of hand.

C. *Even If the Incident to Lawful Travel Exception Were Not an Affirmative Defense (It Is), and Even If it Could Be Raised on a Motion to Dismiss (It Can't), Defendant's Trafficking Is Not "Necessary to the Conduct Of [Lawful] Travel"*

Defendant argues that "offering U.S. residents hotel reservations in Cuba is 'incident to' and 'necessary to the conduct of' lawful travel to Cuba," and that there cannot "be any question that offering hotel lodging in Cuba is both 'incident to' and 'necessary to the conduct of' such

lawful travel." MTD at 16. Nonsense. The plain meaning of "incident to" is "necessitated by" or "required by," in the sense that you can't have one without the other. Even if the Exception were not an affirmative defense that cannot be resolved on a motion to dismiss, it would remain indisputable that ***traveling to Cuba does not necessitate or require staying in a hotel, let alone booking a hotel room on defendant's website***.[14] This is doubtless why Congress added the necessity requirement, even though careful congressional drafting has not prevented defendants from arguing that necessity somehow means mere convenience.

In support of its theory, defendant cites *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016), *Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1236 (D.C. Cir. 1988), and *M'Culloch v. Maryland*, 17 U.S. 316, 413 (1819), cherry picking language that supposedly supports its position. Here is what that *Fish* actually says:

> We do recognize that some dictionaries define the term "necessary," at least among other ways, in this rigorous sense. *See, e.g.*, Webster's, *supra*, at 1510–11 (in defining the term "necessary," stating "that must be by reason of the nature of the thing . . . that cannot be done without: that must be done or had: absolutely required: essential, indispensable"). However, dictionaries also recognize that in common parlance "necessary" can mean something less. *See, e.g.*, *Necessary*, Black's Law Dictionary, *supra* ("1. That is needed for some purpose or reason."); The New Oxford American Dictionary, *supra*, at 1135 (observing in a usage note that "Necessary applies to something without which a condition cannot be fulfilled ... although it generally implies a pressing need rather than absolute indispensability").

Fish, 840 F.3d at 734. Thus, contrary to defendant's assertion, "necessary" does not mean merely "useful" or "convenient." *See* MTD at 16. The case it travels on says it means "indispensable" or "essential," but sometimes it can mean "a pressing need rather than absolute indispensability." *Fish*, 840 F.3d at 734. Under no circumstances could it be held ***as a matter of law*** that necessity means mere convenience, which is what the Motion demands, and prematurely at that, because the Exception is an affirmative defense. As we shall see, Title III is a statute where the word

[14] "Incident to" is defined as "closely related to; resulting from; likely to happen because of," https://www.translegal.com/legal-english-dictionary/incident-to, or "[l]iable to happen because of; resulting from," as in "the changes incident to economic development" and "[i]t is true if and only if the first argument is incident to the second." https://www.lexico.com/en/definition/incident (both accessed on Dec. 5, 2019). To illustrate, we note that office holders necessarily enjoy the emoluments of office, and those in lawful possession of real property necessarily possess a right to quiet enjoyment. These are situations where B is incident to A because possessing A necessarily means that one possesses B.

"necessary" was not intended to, and does not, mean anything less than "that must be by reason of the nature of the thing . . . that cannot be done without: that must be done or had: absolutely required: essential, indispensable." *See id*. (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1510-11 (1961)).

The OFAC regulations defendant relies on to argue that its trafficking is "incident to lawful travel" are exceptions to a general proscription on trade and economic activity with Cuba—the embargo. Congress made clear in the Act that the embargo was to persist and be strengthened. *See* 22 U.S.C. § 6032(c) ("The President shall instruct the Secretary of the Treasury and the Attorney General to enforce fully the Cuban Assets Control Regulations set forth in part 515 of title 31, Code of Federal Regulations."); 22 U.S.C. § 6032(c) ("The economic embargo of Cuba . . . including all restrictions under part 515 of title 31, Code of Federal Regulations, shall be in effect on March 12, 1996, and shall remain in effect, subject to section 6064 of this title."); 22 U.S.C. § 6031(2) ("the President should advocate, and should instruct the United States Permanent Representative to the United Nations to propose and seek within the Security Council, a mandatory international embargo against the totalitarian Cuban Government pursuant to chapter VII of the Charter of the United Nations . . . .").

Thus, courts must construe the "necessary to the conduct of such travel" language of 22 U.S.C. § 6023(13)(B)(iii) in a way that gives effect to the other provisions of the Act, quoted above, which require strict enforcement of the embargo. *See In re Coffman*, 766 F.3d 1246, 1250 (11th Cir. 2014) (Applying the canon that related statutes read *in para materia* "are to be interpreted together, as though they were one law."). Thus, there is little doubt that in using the word "necessary," Congress meant it in the "rigorous sense," i.e., "that must be by reason of the nature of the thing . . . that cannot be done without: that must be done or had: absolutely required: essential, indispensable." *Fish*, 840 F.3d at 734 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1510-1511 (1961)). There also is little doubt that Congress did not mean merely useful or convenient when it said necessary. Finally, there is no doubt that this argument is not ripe, because the Exception is an affirmative defense.

To illuminate the issue when it does become ripe, we note that the overarching purpose of the Act, and the necessary conclusion that the word "necessary" in Title III is meant in the "rigorous sense," together demonstrate that defendant's trafficking is not "necessary to the conduct of [lawful] travel." 22 U.S.C. § 6023(13)(B)(iii). One wishing to stay at the Resort could call the Resort and arrange it, go on Barceló's website and book it, go to the Resort and book the

stay in person, or book it through a travel agent. Absent defendant's trafficking, persons wishing to stay at the Resort would have many other ways to arrange it. As a matter of logic, then, defendant's trafficking simply cannot be "necessary to the conduct of [lawful] travel" under 22 U.S.C. § 6023(13)(B)(iii).[15] Thus, even if the Exception were not an affirmative defense (it is), and were appropriate to raise at this point in the proceeding (it isn't), defendant's trafficking is not "necessary to the conduct of [lawful] travel," and does not implicate the Exception. For this additional reason, the Court should deny the Motion.

D. *Even If the Exception Could Allow Defendant to Provide Online Booking Services (It Can't), Whether Defendant Complied with All OFAC Requirements is a Question of Fact That Cannot Be Resolved at This Stage of the Case*

Even if the Exception were not an affirmative defense and could properly be raised on a motion to dismiss, and even if the definition of the Exception somehow could be wrapped around defendant's trafficking in the abstract, the Motion still would require denial. Defendant violated its OFAC license every hour of every day, by selling room reservations to tourists, which is expressly prohibited by the regulations that authorize its license. *See* 31 C.F.R. § 515.560(f) ("***Nothing in this section authorizes transactions in connection with tourist travel to Cuba***.") (emphasis added). Virtually all of defendant's trafficking involved "tourist travel," which vitiates its attempt to invoke the lawful travel Exception as a matter of law. But even if this were not so, the question whether defendant's trafficking was incident and necessary to lawful travel would remain a fact-bound inquiry incapable of resolution on a motion to dismiss.

On this motion to dismiss, the "court's review . . . is limited to the four corners of the complaint." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009). Extrinsic evidence may not be considered. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003). A court must accept all factual allegations in the complaint as true and take them in the light most favorable to plaintiff. *E.g., Dusek*, 832 F.3d at 1246. An affirmative defense cannot be considered on a motion to dismiss unless "the complaint affirmatively and clearly shows the conclusive applicability of the defense to bar the action." *Scott v. Merchants Ass'n Collection*

[15] Booking a stay at the Resort or staying there is not "necessary to the conduct of [lawful] travel," and defendant has not attempted to argue that it is. Travelers to Cuba can choose from a wide range of accommodations, including private homes and other properties. It cannot be said that in order to travel to Cuba, it is necessary for one to stay at any hotel, including the Resort.

Div., Inc., 2012 WL 4896175, at *2 (S.D. Fla. 2012) (quoting *Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1274-75 (11th Cir. 2004)) (internal quotes omitted).

The Exception is an affirmative defense that defendant must plead and prove, and it may not be considered on this Motion unless it can bar this case as a matter of law, which it cannot. Nonetheless, defendant argues that merely because it operated under a general license from OFAC to provide travel services, all of its activities have been "incident to lawful travel" and this case should be dismissed. As a threshold matter, Trinidad submits that the licenses defendant relies on are unlawful and invalid. 31 C.F.R. § 515.101 provides that "no license or authorization contained in or issued pursuant to this part shall be deemed to authorize any transaction prohibited by any law other than the Trading With the Enemy Act, 50 U.S.C. App. 5(b), as amended, the Foreign Assistance Act of 1961, 22 U.S.C. 2370, or any proclamation, order, regulation or license issued pursuant thereto." The licenses defendant relies on, which purport to authorize transactions (defendant's trafficking) that are prohibited by a federal statute (Title III), are thus invalid and ineffective. But even if that were not the case, defendant's contention that all its activities have been "incident to lawful travel" is demonstrably false, because defendant admittedly violated its OFAC license at least 2,221 times and in June 2019 paid $325,406 to OFAC in settlement. *See Enforcement Information for June 13, 2019*, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190612_expedia.pdf (last visited on Dec. 5, 2019).

Moreover, while OFAC did purport to issue defendant a general license to provide travel services under 31 C.F.R. § 515.572(a)(1), that license, even if it had been valid, was subject to stringent restrictions and conditions that defendant violated every hour of every day. Travel to Cuba by persons subject to U.S. jurisdiction is only permitted for twelve specific purposes:

> The travel-related transactions listed in paragraph (c) of this section may be authorized by either a general license or on a case-by-case basis by a specific license for travel related to the following activities . . . :
>
> (1) Family visits:
> (2) Official business of the U.S. government, foreign governments, and certain intergovernmental organizations;
> (3) Journalistic activity;
> (4) Professional research and professional meetings;
> (5) Educational activities;
> (6) Religious activities;
> (7) Public performances, clinics, workshops, athletic and other competitions, and exhibitions;

(8) Support for the Cuban people;
(9) Humanitarian projects;
(10) Activities of private foundations or research or educational institutes;
(11) Exportation, importation, or transmission or information or informational materials; and
(12) Certain export transactions that may be considered for authorization under existing Department of Commerce regulations and guidelines with respect to Cuba or engaged in by U.S.-owned or -controlled foreign firms.

31 C.F.R. § 515.560(a). OFAC was very clear in stating that tourist travel is unlawful and outside the scope of defendant's license. 31 C.F.R. § 515.560(f) ("***Nothing in this section authorizes transactions in connection with tourist travel to Cuba***.") (emphasis added). Discovery will confirm that virtually all of defendant's trafficking involved "tourist travel to Cuba." Consequently, ***defendant never has been engaged in trafficking that could be held incident and necessary to lawful travel, because it always has been booking rooms for tourists***.

Further, anyone that provides travel services purportedly authorized by OFAC in Section 515.572 is required to keep detailed records of all such transactions:

> (b) Required reports and recordkeeping.
>
> (1) Persons subject to U.S. jurisdiction providing services authorized pursuant to paragraphs (a)(1) through (a)(4) of this section must retain for at least five years from the date of the transaction a certification from each customer indicating the section of this part that authorizes the person to travel or send remittances to Cuba. In the case of a customer traveling under a specific license, the specific license number or a copy of the license must be maintained on file with the person subject to U.S. jurisdiction providing services authorized pursuant to this section.
>
> (2) The names and addresses of individual travelers or remitters, the number and amount of each remittance, and the name and address of each recipient, as applicable, must be retained on file with all other information required by § 501.601 of this chapter. These records must be furnished to the Office of Foreign Assets Control on demand pursuant to § 501.602 of this chapter.

31 C.F.R. § 515.572(b).

If defendant wishes to invoke the affirmative defense of the Exception, it will be required to plead and prove that it complied with each and every requirement, condition, and limitation required by OFAC. This, defendant never will be able to do, in view of the 2,221 violations noted above. But even if there were no such violations, and even if defendant had never sold room reservations to tourists, any attempt to prove this affirmative defense would involve a fact-intensive inquiry requiring significant discovery that could not occur at this stage of the case, which is yet another reason why the Motion should be denied.

E. Trinidad Adequately Alleged That Defendant's Trafficking Was "Knowing and Intentional"

Defendant argues that Trinidad failed to adequately allege that its trafficking was "knowing and intentional." MTD at 13. We discussed this above, noting that Title III is a strict liability cause of action with limited statutory defenses, and does not require bad intent or any improper mental state. It merely requires that a trafficker have not trafficked accidentally or unintentionally, in other words, that the trafficker acted volitionally or "on purpose." The complaint adequately alleged that defendant did just that.

First, the complaint repeatedly alleged that defendant has trafficked in the Property. *See, e.g.*, Am. Comp. at 2 ("Diego Trinidad now sues defendant Expedia under the Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. § 6021, *et seq.* (the "LIBERTAD Act"), for unlawful trafficking in his confiscated property in Cuba."); *Id*. at n. 2 ("Expedia is nonetheless liable because it trafficked the Barcelo Solymar within the last two years."); *Id*. ¶ 13 ("As of the time of the filing of this lawsuit, Trinidad is one of the rightful owners of the Resort, which is being trafficked by the Cuban government, the Barceló Group, Expedia and others."); *Id*. ¶ 26 ("Expedia has trafficked in the Resort, as that term is defined in 22 U.S.C. § 6023(13), by offering, for economic benefit, reservations at the Resort, which trafficking continued until at least June 25, 2019, in violation of Title III of the LIBERTAD ACT.").

Second, Title III defines trafficking as when a person:

> knowingly and intentionally—
>
> (iv) Sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
>
> (v) engages in a commercial activity using or otherwise benefiting from confiscated property, or
>
> (vi) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,
>
> without the authorization of any United States national who holds a claim to the property.

22 U.S.C. § 6023(13)(A). The "knowing and intentional" language is a part of the definition of "trafficking." Thus, when the complaint alleged that defendant has "trafficked in the Resort, as that term is defined in 22 U.S.C. § 6023(13)," it necessarily alleged that the trafficking was "knowing and intentional."

Third, defendant was on express notice since 1996 that it faced "the prospect of lawsuits and significant liability" for its trafficking, which would be "established irreversibly during the suspension period" of Title III:

> I have decided to use the authority provided by Congress to maximize Title III's effectiveness in encouraging our allies to work with us to promote democracy in Cuba. I will allow Title III to come into force. ***As a result, all companies doing business in Cuba are hereby on notice that by trafficking in expropriated American property, they face the prospect of lawsuits and significant liability in the United States.***
>
> * * *
>
> Our allies and friends will have a strong incentive to make real progress because, ***with Title III in effect, liability will be established irreversibly during the suspension period and suits could be brought immediately when the suspension is lifted***. And for that very same reason, foreign companies will have a strong incentive to immediately cease trafficking in expropriated property, the only sure way to avoid future lawsuits.

President's Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, 32 Weekly Comp. Pres. Doc. 1265 (July 16, 1996) (G.P.O. authenticated version available at www.govinfo.gov/content/pkg/WCPD-1996-07-22/pdf/WCPD-1996-07-22-Pg1265.pdf), attached as **Exhibit B** (emphasis added). President Clinton's statement rendered defendant's conduct knowing and intentional as a matter of law.

Fourth, the complaint alleged, and defendant has admitted, that Trinidad provided the notice letter attached as **Exhibit A** on August 7, 2019, which expressly notified defendant that it was about to be sued for trafficking. The complaint alleges, and defendant admits, that defendant continued to traffic after receiving that notice, which alone would dispose of defendant's argument, even if Title III required more than merely volitional conduct (it doesn't). *See* Am. Comp. ¶ 29; MTD at 3. And defendant admits that it "removed the Resort from its website after it received Trinidad's notice of intent to add Expedia as defendant to this action." MTD at 2.

In sum, the complaint adequately alleged that defendant's conduct was knowing and intentional.

CONCLUSION

For all the reasons set forth above, the Court should deny defendant's Motion to Dismiss, and this case should proceed.

Dated: December 9, 2019

Respectfully submitted,

RIVERO MESTRE LLP
2525 Ponce de Leon Blvd., Suite 1000
Coral Gables, Florida 33134
Telephone: (305) 445-2500
Facsimile: (305) 445-2505
E-mail: arivero@riveromestre.com
E-mail: jmestre@riveromestre.com
E-mail: arolnick@riveromestre.com
E-mail: crodriguez@riveromestre.com

By: /s/ Andrés Rivero
ANDRÉS RIVERO
Florida Bar No. 613819
JORGE A. MESTRE
Florida Bar No. 88145
ALAN H. ROLNICK
Florida Bar No. 715085
CARLOS A. RODRIGUEZ
Florida Bar No. 0091616

MANUEL VAZQUEZ, P.A.
2332 Galiano St., Second Floor
Coral Gables, Florida 33134
Telephone: (305) 445-2344
Facsimile: (305) 445-4404
E-mail: mvaz@mvazlaw.com

By: /s/ Manuel Vazquez
MANUEL VAZQUEZ
Florida Bar No. 132826

CERTIFICATE OF SERVICE

I certify that on December 9, 2019, I electronically filed this document with the Clerk of the Court using CM/ECF. I also certify that this document is being served today on all counsel of record by transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/ Andrés Rivero
ANDRÉS RIVERO