UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 19-CV-23593-KING/BECERRA

JAVIER GARCIA-BENGOCHEA,

Plaintiff,

v.

NORWEGIAN CRUISE LINE HOLDINGS LTD.

Defendant.
_____/

NORWEGIAN'S REPLY IN SUPPORT OF MOTION TO DISMISS

Defendant Norwegian Cruise Line Holdings Ltd. ("Norwegian"), through undersigned counsel, files this Reply in Support of its Motion to Dismiss Plaintiff's Complaint (ECF No. 26).

In its Motion to Dismiss, Norwegian demonstrates, based on binding authority from and within the Eleventh Circuit, why Plaintiff's Complaint fails to state a claim. Plaintiff's last-ditch effort to engage in unfounded policy arguments is of no moment where a statute, like the Helms Burton Act (the "Act") here, says what it means without ambiguity. The Court should dismiss the Complaint with prejudice because (1) Plaintiff does not, and cannot, plausibly allege that Norwegian "***knowingly and intentionally***" "trafficked," or in this case, travelled unlawfully, as required to state a claim under the Act; (2) applying Title III to Norwegian would violate the Ex Post Facto Clause; (3) applying Title III retroactively violates the Due Process Clause; (4) the Act requires that a plaintiff actually own a claim to the property in which he or she claims a defendant is "trafficking" and the public record demonstrates that Plaintiff could only have acquired his claim to the property ***after*** the period permitted to state a cause of action under the Act; and (5) Plaintiff has not, and cannot, allege that Norwegian "trafficked" in the property to which he owns a claim because Plaintiff only owns claims to shares, not docks.

ARGUMENT

I. Plaintiff Has Failed to Sufficiently Plead that Norwegian "Trafficked" in the Property Within the Meaning of the Act

A. *Plaintiff Has Failed to Plead the Required Elements Under the Act Because Plaintiff Does Not Plead That Norwegian Had Any Unlawful Intent*[1]

Plaintiff failed to plead sufficient facts to create a plausible claim under the Act because there are no allegations regarding Norwegian's required state of mind: that is, that Norwegian "***knowingly or intentionally***" engaged in prohibited trafficking (i.e., travelled unlawfully). The Act is clear that it is for the limited "Purposes" of protecting against "***wrongful*** trafficking," not ***all*** trafficking. 22 U.S.C. § 6022(6) (2019) ("To protect United States nationals against . . . the ***wrongful*** trafficking in property confiscated by the Castro regime."). To this end, Title III of the Act prohibits "trafficking" in confiscated property:

(1) Liability for trafficking.--(A) Except as otherwise provided in this section, any

[1] This is a distinct requirement from the one Carnival argued, and the Court declined to accept, in a separate case before this Court. *See* Motion to Dismiss, *Garcia-Bengochea v. Carnival Corp.*, No. 1:19-CV-21725-JLK, 2019 WL 4015576 (S.D. Fla. Aug. 26, 2019), ECF No. 14. There, Carnival asked the Court to find that Plaintiff had not sufficiently pled that Carnival's travel *was* unlawful. This argument focuses on conduct. *See id.* By contrast, here, Norwegian asks the Court to hold that Plaintiff failed to allege the proper scienter of Norwegian as required by the Act and case law. This argument focuses on state of mind.

> 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 the claim to such property for money damages . . . .

22 U.S.C. § 6082(a)(1)(A) (2019). The Act provides a very specific definition of trafficking:

> ***Except as provided in subparagraph (B)***, [a] person "traffics" in confiscated property if that person ***knowingly and intentionally***—
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> (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,
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> (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
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> (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.

Id. (emphasis added). Immediately after defining "trafficking," and calling back to the exception listed in subparagraph "(A)" and emphasized in bold above, the Act states that "the term 'traffics' ***does not include*** . . . 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)(iii) (2019) (emphases added). Put simply, it is not a violation of the Act to knowingly and intentionally engage in lawful travel.

This is not an issue of Norwegian attempting to obtain a legal ruling on a disputed issue of fact, as Plaintiff incorrectly frames it. *See* Pl.'s Resp. Opp'n Def.'s Mot. Dismiss 4, ECF No. 30. This is an issue of the sufficiency of Plaintiff's pleading. To plausibly plead a claim, a complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.'" *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282–83 (11th Cir. 2007) (quoting *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001)).[2]

Here, to properly allege a statutory violation, Plaintiff must plausibly allege facts indicating that Norwegian's state of mind (rather than conduct) does not fall within the safe

[2] Courts in this Circuit have routinely required a plaintiff pursuing a statutory claim to plead facts that plausibly meet the statutory definition. *See, e.g.*, *Arko Plumbing Corp. v. Rudd*, 13-CV-22434-UU, 2013 WL 12059615, at *3 (S.D. Fla. Sept. 26, 2013) (under Computer Fraud and Abuse Act, which has a statutory definition of "damage," "pleading a type of damage within the statutory definitions is an essential element" of the claim); *Brown v. Regions Mortg. Corp.*, 1:11-CV-3716-SCJ-ECS, 2012 WL 13013583, at *3 (N.D. Ga. Dec. 3, 2012) (to state a claim under Fair Debt Collection Practices Act, a plaintiff must "allege facts showing how [the] defendant meets the statutory definition of a 'debt collector'"), *rep. and rec. adopted*, 2012 WL 13013.

harbor within the definition of trafficking. *See infra* note.2. Plaintiff does nothing to dispute or distinguish the substantial body of authority Norwegian proffers on this point.[3] Indeed, as Plaintiff openly concedes through his Response (Resp. 4-5), and as is apparent from the face of Plaintiff's Complaint, Plaintiff's *only* allegation as to intent is that Norwegian "knowingly and intentionally commenced, conducted, and promoted its commercial cruise line business to Cuba using the Subject Property by regularly embarking and disembarking its passengers on the Subject Property." Compl. ¶ 13, ECF 1. Tellingly, there can be no dispute that this allegation actually describes precisely the kind of lawful conduct allowed by the Act itself.[4] There is no statutory violation for intending to travel lawfully. Even trafficking in confiscated property is permitted when done pursuant to a lawful travel exception. Plaintiff makes every effort, cherry-picking favorable language on pleading standards, to fabricate an artificially lower bar to stating a claim. For instance, Plaintiff argues that the Federal Rules allow for facts to be alleged only "generally," or else, only upon "reasonable inference." Resp. 3-4. Yet, Plaintiff makes ***no allegations*** generally, inferentially, or otherwise as to Norwegian's required intent to ***not*** fall within the safe harbor of the Act, and therefore the actual knowledge and intent to engage in unlawful travel and impermissible trafficking.

Again, Norwegian is not asking Plaintiff to negate the lawful travel exception, but rather to properly plead actual knowledge and intent as required by the plain language of the Act. Accordingly, Norwegian is not ensnared by Plaintiff's trap to equate this threshold pleading requirement to an argument about the propriety of adjudicating affirmative defenses when

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[3] *See, e.g.*, *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1192 n.12 (11th Cir. 2010) (holding that "[s]ection 559.72(9) of the Florida Consumer Collection Practices Act (FCCPA) requires a plaintiff to demonstrate that the debt collector defendant possessed *actual knowledge* that the threatened means of enforcing the debt was unavailable."); *Ruiz v. Experian Info. Sols., Inc.*, No. 16-CV-25102, 2017 WL 1378242, at *2 (S.D. Fla. Apr. 14, 2017) (dismissing action on account of Plaintiff's failure to allege facts sufficient to demonstrate knowledge or intent by the debt collector in order to state a cause of action under the FCCPA which requires actual knowledge that a debt is not legitimate in order to demonstrate a violation); *Owens v. Ronald R. Wolf & Associates, P.L.*, No. 13-CV-61769, 2013 WL 6085121, at *4 (S.D. Fla. Nov. 19, 2013) (dismissing cause of action under FCCPA for failure to state a claim because Plaintiff failed to allege the requisite knowledge and intent elements, i.e. that Defendant attempted to collect a debt it knew was illegitimate or intentionally asserted legal rights that it knew did not exist); *see also Torongo v. Roy*, 176 F. Supp. 3d 1320, 1324–25 (S.D. Fla. 2016) (dismissing cause of action under the Fair and Accurate Credit Transactions Act for failure to adequately plead defendant's knowing violation of the act); *Universal City Studios v. Nissim Corp.*, No. 14-CV-81344, 2015 WL 1124704, at *5 (S.D. Fla. Mar. 12, 2015) (dismissing cause of action for patent infringement because "[a] review of these claims show that Defendant has done nothing more than state that Plaintiffs have knowledge of the patent and an intent to infringe. These barebone allegations do not provide the Court with an adequate basis [to infer knowledge and intent]").

[4] Norwegian's limited use of the subject docks is the quintessential example of the carefully tailored exception for "lawful travel" carved out by the U.S. Congress in the Act and actively allowed and encouraged by the U.S. Government. It strains credulity to reason otherwise.

defects are evident on the face of a complaint – a different issue entirely – and neither should the Court be.

B. *The Only Plausible Allegations Demonstrate that Norwegian's Intent Was at All Times Lawful Pursuant to the Act's Safe Harbor*

Plaintiff's failure to sufficiently allege the requisite scienter is not remediable. It is on this basis that Plaintiff's cause of action should not only be dismissed, but dismissed ***with prejudice***. Plaintiff has not sufficiently pled, and cannot plead, that Norwegian knowingly and intentionally "trafficked," as that term is defined by the Act, because the allegations and evidence, which the Court can review on this motion, establish that at all times Norwegian ***intended*** (an inquiry that is statutorily tethered to state of mind rather than conduct) to travel lawfully such that Norwegian falls within the safe harbor under the Act's lawful travel exception.[5]

The U.S. Office of Foreign Asset Control of the U.S. Department of the Treasury ("OFAC") "authorized" United States companies like Norwegian "to provide carrier services to, from, or within Cuba in connection with travel or transportation," 31 C.F.R. § 515.572(a)(2)(i) (2019), and when those travel or carrier services were provided by a vessel, those companies were "authorized to provide lodging services onboard such vessels to persons authorized to travel to or from Cuba pursuant to this part during the period of time the vessel is traveling to, from, or within Cuba, including when docked at a port in Cuba." 31 C.F.R. § 515.572(a)(4) (2019). Because Norwegian operated under an OFAC general license, the travel-related services it provided were, as a matter of law, lawful.[6] *Martinez v. Republic of Cuba*, No. 10-CV-22095, 2011 WL 13115432, at *7 (S.D. Fla. June 27, 2011), *rep. and rec. adopted in part, rejected in part on other grounds*, No. 10-CV-22095, 2011 WL 13115471 (S.D. Fla. Aug. 26, 2011) ("It is undisputed that the OFAC licensed Garnishees to provide travel services to Cuba and make payments associated therewith. The assets that Plaintiff seeks to garnish have thus been

[5] It is the Government at the time which determines whether travel is "lawful" or not. This is not an issue for either the Court or Plaintiff to decide. The Act does not direct retroactive application of the law and it is well established that "[r]etroactivity is not favored in the law . . . [and] congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). In any case, Norwegian has been at all times compliant, and remains compliant, with U.S. laws concerning travel to Cuba.

[6] Indeed, immediately following the shift in policy by the U.S. Government, imposing new restrictions on travel to Cuba in June 2019, Norwegian ceased travel to Cuba in full compliance with the new regulations. Tariro Mzezewa, *Cruises to Cuba Are Abruptly Canceled, After New Travel Ban*, N.Y. Times, June 5, 2019, https://www.nytimes.com/2019/06/05/travel/cuba-cruise-travel-ban.html.

authorized for transfer to Cuba and are not subject to an across-the-board prohibition on transfer."); *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dept. of Treasury*, 606 F. Supp. 2d 59, 64 (D.D.C. 2009) (explaining that an OFAC general license, like the one Norwegian operated under, "broadly authorizes entire classes of transactions").

Norwegian only "***knowingly and intentionally***" engaged in the acts enumerated in the trafficking ***exceptions*** under 22 U.S.C. § 6023(13)(B) (2019). Since "[t]he term 'traffics' does not include . . . " those acts, which are not "trafficking" under 22 U.S.C. § 6023(13)(A) (2019), by definition, Plaintiff's Complaint does not plausibly allege that Norwegian violated the Act.

II. <u>Applying Title III to Norwegian Would Violate the Ex Post Facto Clause</u>

A law violates the Ex Post Facto Clause when it is retroactive – when it "attaches new legal consequences to events completed before its enactment," *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269-70 (1994) – and when it is penal – when it "provides for sanctions so punitive as to transform" it into a "criminal penalty," *United States v. Ward*, 448 U.S. 242, 249 (1980). Plaintiff, tellingly, does not dispute that Title III's cause of action is penal.[7] Instead, Plaintiff's response (Resp. 9-12) rises and falls with whether applying Title III to Norwegian is retroactive.

It is. Plaintiff first contends that Title III is not retroactive because its "effective date" was never suspended. Resp. 10-11. According to Plaintiff, only the "right to bring an action under" Title III had been suspended for over 20 years. Resp. 11. That is semantics. The ability to bring a cause of action is ***how*** Title III is effective. *Cf. Liability*, Black's Law Dictionary (11th ed. 2019) (defining liability as "[t]he quality, state, or condition of being legally obligated or accountable"). Perhaps for that reason this Court has already explained that "***Title III became effective for the first time on May 2, 2019***." *Garcia-Bengochea v. Carnival Corp.*, No. 1:19-CV-21725-JLK, 2019 WL 4015576, at *1 (S.D. Fla. Aug. 26, 2019) (emphasis added).

And in any event, whether Plaintiff can bring an action under Title III is exactly what this case is about: The question here is whether allowing Plaintiff to ***bring an action***, now, against Norwegian for its pre-May 2019 activities is "attach[ing] new legal consequences" to its earlier

[7] Norwegian explained at length how Title III is effectively penal in nature. *See* Mot. 11-14. Plaintiff's response is silent on this point. *See Bailey v. Carnival Corp.*, 369 F. Supp. 3d 1302, 1311 n.3 (S.D. Fla. 2019) (dismissing plaintiff's negligent hiring and retention claims on the basis that plaintiff failed to address defendant's argument regarding them such that the court found plaintiff abandoned these claims); *Decosta v. ARG Res., LLC*, No. 12-CV-23482, 2012 WL 12865835, at *3 (S.D. Fla. Dec. 7, 2012) (citing *Hooper v. City of Montgomery*, 482 F. Supp. 2d 1330, 1334 (M.D. Ala. 2007)) ("Failure to respond to arguments regarding particular claims in a motion to dismiss is a sufficient basis to dismiss such claims as abandoned or by default.").

activities. *Landgraf*, 511 U.S. at 270; *see* Mot. Dismiss 9-15. Plaintiff's rephrasing of the question is no answer at all.

Here's why: the Ex Post Facto Clause "places limits on the sovereign's ability to use its lawmaking power to ***modify bargains*** it has made with its subjects." *Lynce v. Mathis*, 519 U.S. 433, 440 (1997) (emphasis added). If the government wants to impose new penal consequences on a certain activity – that is, change the terms of the deal – "fundamental fairness" demands "notice and fair warning." *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001). These fairness principles are not thwarted by careful drafting: "[E]ven if a statute merely alters penal provisions *accorded by the grace of the legislature*, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." *Weaver v. Graham*, 450 U.S. 24, 30-31 (1981).

The Court's retroactivity inquiry therefore does not depend on whether Title III's "effective date ha[d] . . . been suspended" or whether the right to bring an action ***under*** Title III had been suspended. Resp. 10. *Either* suspension is the suspension of a "penal provision[ ]" through an act of Executive "grace." *Weaver*, 450 U.S. at 30. And when analyzing the retroactive nature of the lifting of such a suspension, this Court should look to that lifting's *effects*. *See id.* at 31. These effects exemplify a retroactive modification of a bargain. *See* Mot. 10-11. Title III's cause of action lay dormant for over 20 years. During that timeframe, no party could bring a cause of action under Title III against Norwegian for its Cuba operations, which in any event did not commence until March 2017. As of May 2019, a party could bring such an action for that *same* timeframe. That is the definition of retroactivity.

Plaintiff next suggests that President Clinton's 1996 comments put Norwegian on notice of potential Title III liability for actions taken 20 years later. *See* Resp. 10-11. But nearly 25 years of biannual suspensions buried any notice that one-off statement may have afforded companies such as Norwegian. *See* Mot. 11. And Title III contains no guidelines on why, how, or when the Executive should suspend, or cease suspending, Title III. President Clinton's single, generic statement from decades ago simply has no notice value when compared to the mountain of suspensions that accrued like clockwork over the intervening 23 years.

And that is not even taking into account the fact Norwegian's activities were ***licensed*** by the United States Government – a point on which Plaintiff's Opposition is entirely mute. *See* Mot. 10-11. In December 2014, the Obama Administration began normalizing diplomatic

relations with Cuba. *See id.* at 11. In 2015, the Obama Administration actively encouraged companies to invest in Cuba. *See* Felicia Schwartz, *Obama Administration Encourages U.S. Businesses to Forge Cuba Links*, W.S.J. (Nov. 6, 2015). In 2016, the Obama Administration set forth specific priority objectives to normalize U.S.-Cuba relations. *See* The White House, Presidential Policy Directive – United States-Cuba Normalization (Oct. 14, 2016).[8] ***This*** is the backdrop against which Norwegian, in March 2017, began operating out of the ports at issue. *See* Compl. ¶ 13. And by that point, the Obama Administration's new Cuba policy drained President Clinton's one-off statement of any remaining notice value.

That same license defuses Plaintiff's contention that Norwegian's post-May 2019 activities in Cuba subject it to Title III liability. *See* Resp. 12. As Norwegian explained in its motion to dismiss (Mot. 8-9), in 2015 OFAC granted travel providers a general license to "provide travel services in connection with travel-related transactions involving Cuba authorized pursuant to this part." 31 C.F.R. § 515.572(a)(1) (2019). Norwegian's *licensed* operations in Cuba were lawful and preempt any Title III liability. *See Martinez*, 2011 WL 13115432, at *7 ("It is undisputed that the OFAC licensed Garnishees to provide travel services to Cuba and make payments associated therewith. The assets that Plaintiff seeks to garnish have thus been authorized for transfer to Cuba and are not subject to an across-the-board prohibition on transfer."); *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dept. of Treasury*, 606 F. Supp. 2d 59, 64 (D.D.C. 2009) (explaining that an OFAC general license, like the one Norwegian operated under, "broadly authorizes entire classes of transactions"). But ***as soon as*** the Trump Administration revoked this license, Norwegian ceased its Cuba operations. *See* Tariro Mzezewa, *Cruises to Cuba Are Abruptly Canceled, After New Travel Ban*, N.Y. Times, June 5, 2019.[9] Indeed, Norwegian's absolute compliance with the law is evidenced by Norwegian's ceasing operations while a cruise ship was "en route to Havana." *Id.* Far from warranting discovery, this news article shows that there was no point at which Norwegian operated in Cuba without a license and thereby subjected itself to potential Title III liability by "***knowingly or intentionally***" engaging in prohibited trafficking.

In an effort to side-step Norwegian's valid Constitutional challenge, Plaintiff urges this Court to avoid the constitutional question by allowing discovery to proceed under its flawed

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[8] *Available at* https://bit.ly/2qoJZpo.

[9] *Available at* https://nyti.ms/36t8abP.

legal theory. But the avoidance-of-constitutional-doubt doctrine is a method of construing statutes, not managing a docket. *See Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1242 (11th Cir. 2015) ("[B]efore holding that a statute violates the Constitution we therefore look to "reasonable" alternative constructions."). It is also appropriate where there is another way to conclusively resolve the case. *See, e.g.*, *Williamson v. Brevard Cty.*, 928 F.3d 1296, 1316 (11th Cir. 2019) (not reaching some constitutional claims after vacating on *other* constitutional claims); *Santamorena v. Georgia Military Coll.*, 147 F.3d 1337, 1343 (11th Cir. 1998) (not reaching constitutional prong of qualified immunity analysis because the asserted constitutional right was not clearly established).[10] It is not a tool to allow plaintiffs to kick the can down the road in the hopes of unlocking discovery. The Court has all of the tools and information it needs to definitively resolve this question and it should do so here.

In short, allowing this cause of action to proceed would be a retroactive application of a penal law. When Norwegian took the actions at issue in this case, it was not subject to liability under Title III. Now, according to Plaintiff, it is. And as Plaintiff does not dispute, that liability is penal in nature. The Court should therefore dismiss this case as unconstitutional under the Ex Post Facto Clause.

III. <u>Applying Title III Retroactively Violates Due Process</u>

For similar reasons, applying Title III to Norwegian's pre-May 2019 activities in Cuba would violate due process. *See* Mot. 14-15. Retroactive application of a statute violates the Due Process Clause where such retroactive application is not "justified by a rational legislative purpose." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

Plaintiff does not advance a ***single*** "rational legislative purpose" supporting this cause of action. That is because there is none. Title III's deterrent value was overrun by biannual suspensions running over 20 years. The penalties it imposes – conceded by Plaintiff to be penal

[10] Plaintiff's citation to *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000), is inapposite. First of all, Plaintiff's characterization of that case is off-base. *Siegel* concerned the 2000 presidential election Florida recounts. *Id.* at 1168-69. Specifically, it was an appeal from the denial of a preliminary injunction. *Id.* at 1169. But "Plaintiffs' request on appeal . . . . represent[ed] a petition for permanent relief." *Id.* at 1171 n.2. Supreme Court precedent laid out a series of factors governing when appellate courts can convert appeals of denials of preliminary injunctions into hearings on the merits. *Id.* Based on those factors – which included considering whether there was a "largely incomplete" factual record – the court denied Plaintiffs' request. *Id.* The court was not holding that "the constitutional question was not ripe" (Resp. 13), but rather that it would be inappropriate, as an appellate court, to convert a preliminary proceeding into one on the merits. Such is not the case here. But even if *Siegel* were relevant, it would not be helpful to Plaintiff. The factual record here is *not* "largely incomplete." The court here has every piece of information it needs to determine whether allowing this cause of action to proceed against Norwegian is constitutional: whether this cause of action is retroactive, and whether it is penal. *See supra* pp. 4-8.

in nature – are so disconnected from any actual damages they might cause to plaintiffs as to be irrational. *See* Mot. 10-13. Norwegian had nothing to do with the original confiscation of the property. There is no required connection to or nexus between Norwegian's action and Plaintiff's damages. And there is no way to apportion the damages award among other potentially liable parties. *See id.* 15.

Plaintiff instead rests his due-process argument on this cause of action *not* being retroactive. *See* Resp. 10-12. That is wrong. *See supra* pp. 4-7. Because applying Title III to Norwegian *would* be a retroactive application of a law, and because that retroactive application is justified by no rational legislative purpose (*see* Mot. 14-15), this action violates due process. For this reason as well, this Court should dismiss this case with prejudice.

IV. <u>Plaintiff Has Failed to Plead Ownership to the Confiscated Property</u>

Plaintiff's claim also must be dismissed because he has failed to plead sufficient facts to demonstrate that he owns a cognizable claim. Plaintiff is incorrect to assert that Norwegian's argument is properly raised in an answer, not a motion to dismiss.[11] Here, Plaintiff's only allegation of ownership is that he is the "rightful owner, through inheritance," of the Subject Property. Compl. ¶ 7. Based on the public record, this is a claim that, if true even as conclusorily alleged, would have led Plaintiff to acquire ownership of the claim to the property *after* the period permitted by the Act. Thus, Plaintiff fails to state a claim.

Declining to present any argument to challenge the publicly-available facts, Plaintiff's sole response is that the Act's prohibition on acquiring a claim after March 12, 1996 should not, as a policy matter, apply to circumstances in which a claim was inherited. This is incorrect. On its face, the Act does not distinguish between types of claim owners (corporate or family) or the types of acquisitions (for value or through inheritance), and Plaintiff's efforts at crafting a revisionist policy history to advance his interests in recovery does not change the plain language of the Act, which controls. *Accord Universal Health Servs., Inc. v. United States*, 136 S. Ct.

[11] *See* Resp. 14. It is well established that while the Court must accept a plaintiff's well-pleaded facts as true, it need not accept "conclusory allegations, unwarranted deductions of fact[]," *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002). Norwegian has shown Plaintiff's allegations to be unfounded on their face. In fact, Plaintiff fails to rebut, in any way, the fact that Plaintiff acquired his claim following the period allowed under the Act. In such a case, not only is it appropriate for the Court to consider the issue on a motion to dismiss, the Court *should* dismiss the cause of action. *See Bailey*, 369 F. Supp. 3d at 1311 n.3 (dismissing plaintiff's negligent hiring and retention claims on the basis that plaintiff failed to address defendant's argument regarding them such that the court found plaintiff abandoned these claims); *Decosta*, 2012 WL 12865835, at *3 ("Failure to respond to arguments regarding particular claims in a motion to dismiss is a sufficient basis to dismiss such claims as abandoned or by default.").

1989, 2002 (2016) ("[P]olicy arguments cannot supersede the clear statutory text."). After all, courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see also BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (noting that statutory interpretation begins with the text and "ends there as well if the text is unambiguous").

The Act provides that if a plaintiff seeks to sue on property confiscated before 1996, the plaintiff must have "acquire[d] ownership of the claim before March 12, 1996." 22 U.S.C. § 6082(4)(B) (2019). "Acquire" means "[t]o gain possession or control of; to get or obtain." ACQUIRE, Black's Law Dictionary (11th ed. 2019).[12] Consistent with this broad meaning, the old Fifth Circuit held that the word "acquired" includes gaining possession of property "by purchase, gift, or inheritance." *United States v. Laisure*, 460 F.2d 709, 712 n.3 (5th Cir. 1972)[13] (noting that a weapon could be "acquired" "by purchase, gift or inheritance," and citing to Webster's definition of "acquire" relied on by the *Berrylane* court); *accord In re Hoerr*, 04-82851, 2004 WL 2926156, at *4 (Bankr. C.D. Ill. Dec. 13, 2004) ("[P]roperty may be 'acquired' by purchase, by gift, by devise, or even by loan."). Thus, when the Act says that a plaintiff must have "acquired ownership" of his or her "claim" before March 12, 1996, as a matter of law, it means that the plaintiff must have "obtained," by whatever means (including inheritance), ownership of the claim prior to that date.[14]

Context confirms this interpretation. Just below Subsection 4(B) – where Congress forbids suits under the Act when a plaintiff acquired a claim related to a pre-1996 confiscation after 1996 – Congress dealt with post-1996 confiscations.[15] In Subsection 4(C), Congress

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[12] *See also Berrylane Trading, Inc. v. Transp. Ins. Co.*, 754 Fed. App'x 370, 376 (6th Cir. 2018) (quoting Acquire, MERRIAM-WEBSTER.COM, http://merriam-webster.com/dictionary/acquire (last visited Sept. 19, 2018) ("[T]o get as one's own[,]" or "to come into possession or control of often by unspecified means.")).

[13] Fifth Circuit case law prior to October 1, 1981 is binding in this Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

[14] Likewise, the Florida Supreme Court has noted that "[i]t is commonly understood that acquire means to gain, obtain, receive, or to come into possession or ownership of property, and it '*[i]ncludes taking by devise*.'" *Shriners Hosps. for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990) (emphasis in original) (citing and quoting XII The Oxford English Dictionary (2d 3d. 1989) and Black's Law Dictionary (5th ed. 1979)); *see also Shaev v. Claflin*, C 01-0009 MJJ, 2001 WL 548567, at *6 (N.D. Cal. May 17, 2001) ("[S]ome shareholders may have acquired their stock by way of gift, inheritance, or some other means not involving a stock purchase."); *Descent*, Black's Law Dictionary (11th ed. 2019) (defining "descent" as "[t]he *acquisition* of real property by law, as by inheritance…" (emphasis added)); *Title*, Black's Law Dictionary (11th ed. 2019) (describing multiple types of titles that may be "acquired" by inheritance).

[15] The drafters were clear that the purpose of subsection 4(B) was to ensure that "in the case of property confiscated before the date of enactment of this Act, the U.S. national had to have owned the claim to the

provided that: "In the case of property confiscated on or after March 12, 1996, a United States national who, after the property is confiscated, ***acquires ownership of a claim to the property by assignment for value***, may not bring an action on the claim under this section." 22 U.S.C. § 6082(a)(4)(C) (2019) (emphasis added). It is a "basic premise of statutory construction" that when "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.'" *In re Vann*, 67 F.3d 277, 281 (11th Cir. 1995) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 1987)); *see also United States v. Jordan*, 915 F.2d 622, 628 (11th Cir. 1990). Accordingly, the fact that Congress chose to restrict Subsection 4(C) to acquisitions for value demonstrates that Congress did not intend to so restrict Subsection 4(B).

Indeed, when Congress wants to exclude certain types of acquisitions from the scope of the broad term "acquire" it knows how to do it. For example, Congress has prohibited "[o]fficers and employees of the Patent and Trademark Office" from "acquiring, directly or indirectly, except by inheritance or bequest, any patent[.]" 35 U.S.C. § 4 (2019). Likewise, "[e]mployees of the Plant Variety Protection Office" cannot "acquire directly or indirectly, except by inheritance or bequest, any right or interest in any matters before that office." 7 U.S.C. § 2324 (2019). So too with lands in territories: Congress has broadly prohibited non-citizens from "acquir[ing] title to territorial lands, 11 U.S.C. § 1501 (2019), but Congress was specific that its prohibition "shall not prevent aliens from acquiring lands or any interests therein by inheritance . . . " 11 U.S.C. § 1503 (2019). Though just a sample, these statutes indicate Congress meant what it said in Helms-Burton: *any* acquisition after March 1996 will bar a Helms-Burton claim.[16]

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property before the date of enactment in order to bring an action under this section." H.R. Rep. No. 104-202, 40, 1996 U.S.C.C.A.N. 527, 545. That rule makes sense because, as the Act's Conference Report explains, Congress was concerned that the Act would incentivize transfers of claims, and therefore, barred new acquisitions "in part, to eliminate any incentive that might otherwise exist to transfer claims to confiscated property to U.S. nationals in order to take advantage of the remedy created by this section." 142 Cong. Rec. H1645-02, H1660, 1996 WL 90487. To remedy that problem, Congress adopted a strict no-new-acquisitions rule. *Id.* Because Congress used "clear and unambiguous language" to denote its broad "acquisition" view in the Act, "that is as far as [the Court must] go to ascertain its intent." *United States v. Pertuz-Pertuz*, 679 F.3d 1327, 1328 (11th Cir. 2012).

[16] *See also*, *e.g.*, 43 U.S.C. § 544 (2019) (prohibiting "**acquir[ing]**, own[ing], or hold[ing]" certain types of "irrigable land . . . in excess of one hundred and sixty acres", with one exception: Land "acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgages, by **inheritance**, or by devise, may be held for five years and no longer after its acquisition" (emphases added)); 26 U.S.C. § 302(c)(2)(A)(ii) (2019) (defining the constructive ownership of stock in such a way that exempts "distributee[s]" who did "not **acquire** any such interest (other than stock acquired by bequest or **inheritance**) within 10 years from the date of such distribution" (emphases added)); 15 U.S.C. § 637(a)(18)(B) (2019) (prohibiting members of the

After all, "[w]here Congress knows how to say something but chooses not to, its silence is controlling." *Animal Legal Def. Fund v. U.S. Dept. of Agric.*, 789 F.3d 1206, 1217 (11th Cir. 2015); *accord Smith v. Zazzle.com, Inc.*, 589 F. Supp. 2d 1345, 1348 (S.D. Fla. 2008) (King, J.) (invoking same statutory presumption).

Desiderio Parreño's will conclusively evidences that Plaintiff did not acquire his interest in a claim to La Maritima shares until ***after*** March 12, 1996. The will demonstrates that as of January 25, 2000 – the date of the will's execution – Desiderio (and not Plaintiff) owned the claim to the shares. *See Garcia-Bengochea*, No. 19-CV-21725, Answer Ex. A. (ECF No. 44-1 at 6). In 2000, when the will was executed, Desiderio owned the claim to 3,300 shares of La Maritima stock that underlie Plaintiff's claim here. And the claim to the 3,300 shares that Desiderio bequeathed to Plaintiff ***exactly*** correspond to the 82.5% interest that Plaintiff now alleges he holds. After all, the Foreign Claim Settlement Commission document, which is a public record undisputed in accuracy of which this Court can take judicial notice, states that La Maritima had 4,000 outstanding shares. *See Garcia-Bengochea*, No. 19-CV-21725, Compl. Ex. A (ECF No. 1-1) (the "FCSC Claim") ("Since there were 4,000 shares of outstanding capital stock of the Cuban Corporation . . . "). The 3,300 shares (and claim thereto) that Desiderio attempted to give to Plaintiff at his death in August 2000 thus exactly match the 82.5% interest that Bengochea bases his suit on here. Accordingly, Plaintiff's ownership interest, if any, was derived from Desiderio. But because Desiderio's will establishes that Plaintiff acquired ownership of his claim after March 12, 1996, the Complaint must be dismissed.[17]

This result is compelled by the plain text of the Act, which, as described above, is unambiguous and, thus, ends the analysis. *See Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000). But the result is, in any event, neither unfortunate nor harsh; rather, it is precisely the result that Congress intended under these circumstances. Desiderio was a Costa Rican national. *See*

Executive branch from "buying, selling, or receiving (except by **inheritance**) . . . any legal or beneficial ownership of stock or any other ownership interest or the right to **acquire** such interest" in small businesses enrolled in a special contracting program (emphases added)).

[17] The statements in Desiderio's will concerning his ownership of the property are excepted from the rule against hearsay under Fed. R. Evid. 803(15), which excepts: "A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose." *See also* Fed. R. Evid. 803 Adv. Comm. Note (noting that "similar provisions [to 803(15)] are contained in . . . [the] California Evidence Code § 1330," which applies to "Evidence of a statement contained in . . . a will").

Garcia-Bengochea, No. 19-CV-21725, Answer Ex. A. (ECF No. 44-1 at 3).[18] His claims to Cuban assets confiscated by the Castro regime were not cognizable under the Act in his home country of Costa Rica, so he attempted to transfer them to his cousin, Plaintiff here, a U.S. citizen, who could potentially pursue a claim under the Act to recover for the value of these assets. But, as mentioned, Congress enacted the bar on transfers after the enactment of the law (March 1996) precisely because it wanted to "eliminate any incentive that might otherwise exist to transfer claims to confiscated property to U.S. nationals in order to take advantage of the remedy created by this section." 142 Cong. Rec. H1645-02, H1660, 1996 WL 90487. In order to eliminate that incentive, Congress enacted a broad, prophylactic rule that "the U.S. national had to have owned the claim to the property before the date of enactment in order to bring an action under this section." H.R. Rep. No. 104-202, 40, 1996 U.S.C.C.A.N. 527, 545. Plaintiff was such a U.S. national, but he did not own the claim before the date of enactment; rather, his Costa-Rican-national cousin, Desiderio, owned the claim, and he (post-enactment) attempted to transfer the claim to Plaintiff so that he could take advantage of the Act. This is the precisely the type of claim that Congress sought and did preclude.

V. Plaintiff Has Failed to Allege Norwegian Trafficked in Property to Which Plaintiff Owns a Claim

Even if Plaintiff had pleaded "trafficking" and "ownership" (he has not) his claims should be dismissed because Plaintiff has not alleged that Norwegian "trafficked" in the property he owned. The FCSC claim decision upon which Plaintiff bases his certified claim concerns stock in a Cuban company, which in turn owned the docks. *See* FCSC Claim. As the Commission explained, it was "La Maritima, S.A.," and not Alberto or Desiderio Parreño, "which owned and operated docks and warehouses in Santiago de Cuba." *Id.* at 3. Plaintiff does not allege that Norwegian is trafficking in La Maritima stock, and thus, his claim must fail because he has not alleged that he owns a claim to the property being trafficked.

CONCLUSION

For the foregoing reasons, as well as those set forth in Norwegian's Motion to Dismiss, the Court should grant the Motion and dismiss this action with prejudice.

[18] *Ellis v. Warner*, 15-10134-CIV, 2017 WL 634287, at *3 (S.D. Fla. Feb. 16, 2017) (considering probated will on a motion to dismiss because "[c]ourts may take judicial notice of publicly filed documents . . . at the Rule 12(b)(6) stage"); *United States v. Paulson*, 204 F. Supp. 3d 1102, 1108 (S.D. Cal. 2016) (same); *Lewis v. Parker*, 67 F. Supp. 3d 189, 195 n.6 (D.D.C. 2014) (same).

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019, the foregoing was filed with the Clerk of Court using CM/ECF, which will serve a Notice of Electronic Filing on all counsel of record.

By: */s/ Allen P. Pegg*
Allen P. Pegg