UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 1:19-cv-21724-BLOOM/MCALILEY

HAVANA DOCKS CORPORATION,

Plaintiff,

vs.

CARNIVAL CORPORATION,

Defendant.
_____ /

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

Plaintiff Havana Docks Corporation ("Havana Docks") opposes the motion for certification of interlocutory appeal (the "Motion," ECF No. 84) filed by Defendant Carnival Corporation ("Carnival") as it fails to satisfy its heavy burden to establish the statutory requirements under 28 U.S.C. § 1292(b).

INTRODUCTION[1]

Carnival requests the Court to certify its Omnibus Order (ECF No. 79) for immediate interlocutory appeal on the following question:

> Whether "Title III's plain language creates liability for trafficking in the broadly defined 'confiscated property' – i.e., in any property that was nationalized, expropriated, or otherwise seized by the Cuban Government . . . without the property having been returned or adequate and effective compensation [paid] – not in a particular interest in confiscated property," and "regardless of . . . when the trafficking took place."

[1] Havana Docks refers the Court to its prior orders in this case for a full description of the procedural history relevant to the Motion. (*See* ECF No. 79 at 1-6.)

(Mot. at 2.)[2]

The Motion should be denied. Carnival has failed to meet its heavy burden of satisfying each of the requirements for certifying an interlocutory appeal under 28 U.S.C. § 1292(b). First, Carnival does not propose a controlling question of law that was specified by this Court in the Omnibus Order. Rather, it proffers a case-specific question, the relevance of which is entirely contingent on disputed facts that do not sit "neatly" and "cleanly" atop the record. Second, there is no substantial dispute about the correctness of this Court's interpretation of Title III, which is securely anchored on binding precedent from the Eleventh Circuit in *Glen v. Club Mediterranee S.A.*, 450 F.3d 1251 (11th Cir. 2006) and the plain language of the LIBERTAD Act. In this respect, the Court correctly held that Title III creates liability for trafficking in confiscated property, not in a property interest that was necessarily extinguished by expropriation. And, third, the requested appeal would not materially advance (or advance at all) the ultimate termination of this litigation.

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[2] Carnival's proffered question relies on language from the dismissal order in the *NCL* Case that was vacated by this Court and, in any event, was never a holding of this Court. (*See* Mot. at 2, n.1 (quoting *NCL* Case, No. 19-cv-23591, 2020 WL 70988, at *4 (S.D. Fla. Jan. 7, 2020) ("regardless of . . . when the trafficking took place.")).) That vacated order is not properly subject to appellate review. *See United States v. Sigma Int'l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002) (en banc) (vacated opinions "are officially gone. They have no legal effect whatever. They are void. None of the statements made in . . . them has any remaining force and cannot be considered to express the view of this Court."); *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1257 n.1 (11th Cir. 2003) ("A vacated decision has no effect whatever.").

Notably, the language that Carnival quotes from the dismissal order was not a holding in the Omnibus Order—the only order Carnival seeks to certify for appeal. (*See* Mot. at 2.) Thus, it is not properly subject to interlocutory review for that additional reason. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204-05 (1996) (section 1292(b) applies to "orders" not cases, and "[t]he court of appeals may not reach beyond the certified order to address other orders made in the case."); *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1275 (11th Cir. 2020) (same).

As such, Havana Docks respectfully requests that the Court deny the Motion.

LEGAL STANDARD

Requests for interlocutory appeals are disfavored in this Circuit. *Flying Cow Ranch HC, LLC v. McCarthy*, No. 19-cv-80230, 2019 WL 1258780, at *2 (S.D. Fla. Mar. 19, 2019) (Bloom, J.) ("Interlocutory review is generally disfavored for its piecemeal effect of cases."). A district court may only certify an order for interlocutory review if the moving party satisfies the requirements of 28 U.S.C. § 1292(b) "that: (1) the order presents a controlling question of law; (2) over which there is a substantial ground for difference of opinion among courts; and (3) the immediate resolution of the issue would materially advance the ultimate termination of the litigation." *Id.*; *see also Mamani v. Berzain*, 825 F.3d 1304, 1312 (11th Cir. 2016) (further requiring that the proffered question present "a pure question of law" that "was specified by the district court in its order").

Indeed, "[t]here is a 'strong presumption against interlocutory appeals,'" and requests for such review "should be denied except in rare circumstances." *In re Checking Account Overdraft Litig.*, No. 09-MD-02036, 2010 WL 3377592, *2 (S.D. Fla. July 1, 2010) (quoting *Teblum v. Eckerd Corp. of Fla.*, No. 2:03-CV-495FTM33DNF, 2006 WL 1151816, at *4 (M.D. Fla. Apr. 28, 2006)). As a result, parties pursuing "interlocutory appeal" face "profound hurdles" to meet this "high threshold," and the Eleventh Circuit "admit[s] that '[m]ost interlocutory orders do not meet th[e] test.'" *Nat'l Union Fire Ins. Co. of Pittsburgh v. Tyco Integrated Sec. LLC*, No. 13-CIV-80371, 2015 WL 11251735, at *1 (S.D. Fla. July 8, 2015) (Bloom, J.) (quoting *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1359 (11th Cir. 2008)).

The reason for this heavy burden, as the Eleventh Circuit has explained, is that interlocutory appeals are "inherently disruptive, time-consuming, and expensive." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000) (internal quotation marks omitted). Further, "[p]iecemeal appellate review has a deleterious effect on judicial administration. It increases the workload of the appellate courts, to the detriment of litigants and judges." *Id.* And "[b]ecause permitting piecemeal appeals is bad policy, permitting liberal use of § 1292(b) interlocutory appeals is bad policy." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004).

Only in the "exceptional case[]" may a district court certify a controlling question of law for interlocutory appellate review under 28 U.S.C. § 1292(b). *Id.* at 1256-57 (quoting Report of the Committee on Appeal from Interlocutory Orders of the District Courts, Sept. 23, 1953, reprinted in 1958 U.S.C.C.A.N. 5258, 5260-61). And while a district court's decision in this respect is "wholly discretionary,"[3] *OFS Fitel*,

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[3] Carnival cites dicta from the Seventh Circuit's opinion *Ahrenholz* for the proposition that district courts have a "duty" to grant interlocutory appeals if statutory criteria are met. (Mot. at 5 (quoting *Ahrenholz v. Bd. of Tr. of the Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000)).) But that is not the law of this Circuit. *OFS Fitel*, 549 F.3d at 1358 ("§ 1292(b) certification is wholly discretionary with both the district court and this court."). It is also notable that the petition for interlocutory appeal was denied in *Ahrenholz*, with Judge Posner observing that in that 19 months preceding that opinion:

> this court has received 31 petitions for interlocutory appeal under 28 U.S.C. § 1292(b) and has granted only six of them. . . . In several cases, however, including this one, we have been unsure whether the district court was using the correct standard. . . . [W]e think it may be useful to remind the district judges of this circuit of the importance of the careful application of the statutory test. . . .
>
> Unless all the[statutory] criteria are satisfied, the district court may not and should not certify its order to us for an immediate appeal under section 1292(b). To do so in such circumstances is merely to waste our time and delay the

549 F.3d at 1358, "[c]ertification is not an appropriate vehicle for early appellate review of hard cases." *Checking Account Overdraft Litig*, 2010 WL 3377592, at *2. Nor is the presence of a "question of first impression" generally "[]sufficient to yield a dispute ripe for interlocutory appeal." *Nat'l Union*, 2015 WL 11251735, at *3. Instead, the "Eleventh Circuit has made clear that the scope of interlocutory appeals is to be limited." *FXM, P.C. v. Gordon*, No. CIV.A.1:07CV1642, 2007 WL 3491274, at *2 (N.D. Ga. Nov. 6, 2007) (Carnes, J.).

Carnival, as the party seeking certification, "bears the heavy burden" of establishing that each of the elements set forth in 28 U.S.C. § 1292(b) are satisfied, *Checking Account Overdraft Litig*, 2010 WL 3377592, at *2, and otherwise overcoming "[t]he strong presumption against interlocutory appeals," *Nat'l Union*, 2015 WL 11251735, at *2.

ARGUMENT

The Court should deny the Motion for three reasons. First, Carnival does not propose a controlling question of law that was specified in the Omnibus Order. Instead, the proffered question is inappropriately case-specific and rests on disputed facts that do not sit "neatly" and "cleanly" atop the record. Second, there is no substantial grounds for difference of opinion that the Court correctly held that Title III of the LIBERTAD Act creates liability for trafficking in confiscated property, and

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> litigation in the district court, since the proceeding in that court normally grinds to a halt as soon as the judge certifies an order in the case for an immediate appeal.

Ahrenholz, 219 F.3d at 675-76.

not in a property interest that was necessarily extinguished by confiscation. And, third, an appeal would not materially advance the ultimate termination of this litigation.

Because Carnival does not satisfy any of the requirements for section 1292(b) certification, its Motion should be denied.

I. Carnival's Proposed Question is Not Specified in the Omnibus Order.

Carnival's proffered question is a combination of quotes from this Court's orders in Havana Docks' case against Norwegian Cruise Lines Holdings, Ltd. (Mot. at 2, n.1 (quoting *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 19-cv-23591, D.E. 53 at 24-25 (S.D. Fla. Apr. 15, 2020); *id.*, 2020 WL 70988, at *4 (Jan. 7, 2020)).) But to obtain certification under section 1292(b), a question of law must be "specified by the district court in its order" certified for appeal. *McFarlin*, 381 F.3d at 1264; *Mamani*, 825 F.3d at 1312 (same). Because the question Carnival frames was "specified by the district court in its" orders in the *NCL* Case—not the Omnibus Order in this case—Carnival has failed to satisfy this requirement. *McFarlin*, 381 F.3d at 1264. Thus, the Motion should be denied.

II. Carnival Does Not Propose a Controlling Question of Law.

Carnival fails to identify a proper "controlling question of law," as it must to prevail on its Motion. 28 U.S.C. § 1292(b). In this Circuit, a "controlling question of law" is one which the Eleventh Circuit can decide "without having to delve beyond the surface of the record in order to determine the facts." *McFarlin*, 381 F.3d at 1258-59 ("what the framers of § 1292(b) had in mind is more of an abstract legal issue or

what might be called one of 'pure' law, matters the court of appeals 'can decide quickly and cleanly without having to study the record.'"). Such a question must also have "general relevance to other cases in the same area of the law." *Id.* Carnival's proffered question satisfies neither of these requirements.

Although Carnival attempts to state an abstract question, in application, the proposed "controlling question of law" framed by Carnival is not a proper one for interlocutory appeal. *See Drummond Co., Inc. v. Conrad & Scherer, LLP*, 885 F.3d 1324, 1336-37 (11th Cir. 2018) ("At first blush, the core issue" on appeal "appears to raise a purely legal question," but in actuality "the question posed here requires a fact-specific inquiry" that is inappropriate for interlocutory appeal, and declining review). Appellate courts do not answer questions of law in the dark. *Compare Gagliardi v. TJCV Land Trust*, 889 F.3d 728, 733 (11th Cir. 2018) ("We are not in the business of issuing advisory opinions that do not 'affect the rights of litigants in the case before' us or that merely opine on 'what the law would be upon a hypothetical state of facts.'").[4] Thus, even when a question is certified under section 1292(b), appellate courts are still obliged to ensure that the legal question is called for by the undisputed facts of a case to avoid issuing rulings that are impermissibly advisory. *Ray v. Edwards*, 725 F.2d 655, 658 (11th Cir. 1984) ("[F]or us to reach the legal question of whether Ray could prevail if that factual issue is resolved against him

[4] *Compare id. and Church of Scientology of Ca. v. United States*, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'"), *with* Mot. at 8 (characterizing the proposed question as "wholly untethered to any facts" and one which the Eleventh Circuit can answer "without considering *any* facts") (emphasis in original).

would be tantamount to issuing an advisory opinion. That, we cannot do," and denying section 1292(b) review). So, before addressing Carnival's proposed question, the Eleventh Circuit would first have to assess whether that question is actually raised by the undisputed facts of this case. [5]

But, by any assessment of the facts of this case, it is clear that they are hotly disputed. For example, Carnival's proposed question is only relevant to this case if Havana Docks' former interests in the Subject Property are found to have expired in

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[5] In *Ray*, the Eleventh Circuit illustrated why factual disputes are to be avoided on interlocutory appeal:

> We agree with the district court that the issue, as framed, presents a question of first impression in this circuit, over which there could be substantial ground for difference of opinion. We hold, however, that the district court erred in finding that its ruling amounted to a *controlling* question of law "in the sense," stated the district court, "that it is determinative of plaintiff's claim in this count of his complaint."
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> The district court overlooked the possibility that even if the standard put forward by appellants is correct, Ray might still be able to produce evidence showing that appellants were directly responsible for the disclosure of false, derogatory information. Such evidence would respond to the more limited legal theory proposed by appellants, thereby creating a factual issue such that the district court would not need to rule on Ray's broader legal standard. . . .
>
> We believe that evidence that appellants made false, derogatory statements to reporters about Ray at or near the time he was fired, coupled with appellants' denials of making any such statements, raises a significant factual issue sufficient to defeat summary judgment on count two. Therefore, for us to reach the legal question of whether Ray could prevail if that factual issue is resolved against him would be tantamount to issuing an advisory opinion. That, we cannot do.

Ray, 725 F.2d at 658 (emphasis in original); *see also Borskey v. Am. Pad & Textile Co.*, 296 F.2d 894, 895 (5th Cir. 1961) (on interlocutory appeal of separate, but related, cases arising from a helicopter crash, section 1292(b) petition denied where legal question rested on disputed facts, as appellate ruling "might call for an advisory academic opinion on facts that might never exist"); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 777 F.2d 598, 607-08 (11th Cir. 1985) (declining section 1292(b) review where proposed question was not "ripe" for appellate review and ruling "would be purely advisory").

2004. In its Amended Complaint, Havana Docks alleges that the concession did not expire by its terms in 2004, that 44 years of concessionary rights remained at the time of confiscation in 1960, and that the certified claim consists of other property rights that have no time limitation, including an indemnity right for the value of the works constructed by Havana Docks on the Subject Property. (Am. Compl., ECF No. 81 at ¶ 12-20.)

Carnival apparently disputes these factual allegations. (*Compare id.*, *with* Carnival's Opp. to Mot. for Leave to Amend, ECF No. 75 at 17-22; *see also* ECF No. 78 at 8-10 (summarizing disputed allegations).) So, to find Carnival's question has any relevance to this case, the Eleventh Circuit will first be required to disregard the Amended Complaint's well-pled facts at the pleading stage. And then it would have to "root[] through the record in search of facts" to assess the extent and nature of Havana Docks' confiscated interests in the Subject Property, and determine whether any of them expired in 2004. *McFarlin*, 381 F.3d at 1258.[6] Otherwise, the appellate court would be in danger of rendering an advisory opinion that has no bearing on the issues in this case, which is reason alone to deny interlocutory review. *Ray*, 725 F.2d at 658; *Church of Scientology*, 777 F.2d at 608; *Borskey*, 296 F.2d at 895. Because the question framed by Carnival does not rest on undisputed facts and cannot be "decide[d] quickly and cleanly without having to study the record," it is not a "pure"

[6] In reality, none of these interests expired in 2004 because they were confiscated in 1960. (ECF No. 73-8 (certifying that all of these interests were confiscated)); *see Howard v. City of Atlanta*, 2007 WL 3169707, at *3 (N.D. Ga. Oct. 25, 2007) ("'[T]he characteristic of the advisory opinion' is that the order is 'purely advisory when it is made and did not pass through the refining pressure of reality.'") (quoting *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1560 (11th Cir. 1988)).

and "controlling question of law" suitable for interlocutory review. *McFarlin*, 381 F.3d at 1258-59.

For these reasons, neither *Barrientos* nor *Laperriere*, cited in the Motion, support certification here. (Mot. at 6, 8, 10.) The appellant in *Barrientos* proposed a "controlling question of law" that only required the Eleventh Circuit to verify undisputed facts about "the nature of the parties" and "that the claims arise out of the operation of a work program required by [federal law]." *Barrientos*, 951 F.3d at 1275. By contrast, here, the factual allegations underlying Carnival's proposed question are all disputed by Carnival. Similarly, in *Grabein v. 1-800-Flowers.com, Inc.*, Judge Huck certified a legal question that, unlike here, rested on an undisputed fact: Whether the receipts at issue were provided electronically. 2008 WL 11417701, *2 (S.D. Fla. Mar. 12, 2008) (certifying whether "receipts provided electronically are sufficient to satisfy FACTA's mandate that the seller 'print' the consumer's credit/debit card expiration date on the receipt 'at the point of sale.'").[7]

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[7] Carnival cites a string of cases for the proposition that a question of law does not necessarily have to be dispositive to be controlling. (Mot. at 9-10 (citing *Laperriere* and others).) True or not, that proposition is immaterial here, where the proposed question is predicated on Carnival's incorrect belief that Havana Docks' former concession expired 2004—an, apparently, disputed issue that is contrary to the Eleventh Circuit's opinion in *Glen*, the reality of confiscation and the well-pled facts in the Amended Complaint. That question therefore would not "materially affect the outcome of the case." (Mot. at 10.) In any event, in *LNC Invs., Inc. v. First Fid. Bank*, the Second Circuit denied the petition for interlocutory appeal. No. 92- cv-7584, 2000 WL 461612, at *3 (S.D.N.Y. Apr. 18, 2000), *cert. denied* No. 00-8018 (2d Cir. June 5, 2000). There is no indication that the appellate court accepted interlocutory appeal in *Sea Pines of Va., Inc. v. PLD, Ltd.*, a decision issued 45 years ago, and Havana Docks did not identify any appellate opinions from that case through its research. 399 F. Supp. 708 (M.D. Fla. 1975). The request for interlocutory appeal was denied by the district court in *Armfield. U.S. ex rel Armfield v. Gills,* No. 8:07-cv-2374, 2011 WL 2084072 (M.D. Fla. May 24, 2011). As for *Villarreal v. Caremark LLC*, the district court denied certification and observed the following:

Havana Docks also notes that the Court's statutory interpretation will not broadly impact other Title III cases, which is in line with the other cruise Defendants' representations to this Court at the March 9th hearing:

> **Mr. Baldridge**: And what I would tell you is this is not a wide-sweeping decision. This is an unusual situation, as counsel points out. . . . It's unusual because this is very limited to a leasehold interest situation. This isn't a wide-sweeping view of what happens to property under the Libertad Act. It's what happened in this case.

(*MSC* Case, No. 19-cv-23588, D.E. 54, Hr'g Tr. at 64:5-11.) Like this Court previously held, the issue Carnival frames is, in fact, "case-specific," *Mamani*, 825 F.3d at 1312-

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- "28 U.S.C. § 12929(b) must be 'construed narrowly' and 'applied sparingly,' *id.* at 1073;
- Appeal would delay, and not materially advance, the litigation; "[c]ompounding the potential for delay is the fact that [Defendant] also is seeking a stay pending any interlocutory appeal," *id.*;
- "[I]t is far from clear—and in the Court's view doubtful—whether the total burdens of litigation on parties and the judicial system would be lessened by" staying proceeding pending interlocutory appeal; "[w]here the issue of relative efficiency is a toss-up, this Court sees no value in encouraging parties to litigate requests for interlocutory appeal," *id.* at 1072 (citation omitted)
- "[W]here 'a substantial amount of litigation remains in th[e] case regardless of the correctness of the Court's ruling . . . arguments that interlocutory appeal would advance the resolution of th[e] litigation are unpersuasive,'" *id.* (citation omitted);
- "[I]mmediate appeal may be inappropriate where 'there is a good prospect that the certified question may be mooted by further proceedings,'" *id.* (citation omitted);
- Rejecting defendant's argument that "an appeal 'could dramatically change the path of this case, essentially blazing a shortcut to its termination.' Of course, this is speculation built upon several assumptions," *id.* at 1071 (internal citation omitted);
- Section 1292(b) is a "narrow exception[] to the final judgment rule," *id.*;
- Summarizing case law "reject[ing] as irrelevant' defendants' policy arguments that the anticipated expenses and settlement pressures of a class action provide an exception to the final judgment rule," reasoning that "[i]f the expense of litigation were a sufficient reason for granting an exception to the final judgment rule, the exception might well swallow the rule," *id.* at 1070 (citation omitted).

85 F. Supp. 3d 1063 (D. Ariz. 2015). In short, *Villarreal* strongly supports denying the Motion.

13, and not "general[ly] relevan[t] to other cases in the same area of the law," *McFarlin*, 381 F.3d at 1259; *Flying Cow Ranch HC, LLC*, 2019 WL 1258780, at *3 ("A question of law is 'controlling' 'only if it may contribute to the determination, at an early stage, of a wide spectrum of cases.'" (citation omitted)). (ECF No. 56 at 4-5 (denying Carnival's request for certification of this issue because it was "case-specific").)[8]

For these reasons, Carnival has failed to propose a "neat," "clean," "pure" and "controlling question of law," and its Motion should be denied.

III. There are No Substantial Grounds for Difference of Opinion.

There are no substantial grounds for difference of opinion in the Court's holding that Title III creates liability for trafficking in confiscated property, not in a property interest that was necessarily extinguished by expropriation.

The Eleventh Circuit has held that a "substantial ground for difference of opinion" does not exist where the appellate court is in "complete and unequivocal" agreement with the district court. *McFarlin*, 381 F.3d at 1258 (quoting *Burrell v. Bd. of Trustees of Ga. Military College*, 970 F.2d 785, 788-89 (11th Cir. 1992)). Moreover,

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[8] The question posed by Carnival does not implicate the three Title III cases cited in the Motion. (Mot. at 9.) The *John S. Shepard Family Trust v. NH Hotels USA, Inc.* case was voluntarily dismissed on February 26, 2020, meaning any appeal of the Omnibus Order would not affect it. No. 19-cv-9026, D.E. 41 (S.D.N.Y. Feb. 26, 2020). In *Sucesores de Don Carlos Nunez y Dona Pura Galvez, Inc. v. Societe Generale, S.A.*, the property at issue is confiscated equity in a bank, and whatever interest plaintiff had in that equity before confiscation did not have a temporal component. No. 20-cv-00851 (S.D.N.Y. Feb. 4, 2020). Moreover, *Sucesores* was transferred to the Southern District of New York, where *Shepard* was also pending, so an opinion of the Eleventh Circuit on Carnival's proposed question would not be determinative of either of those cases, in any event. Finally, in *Glen v. American Airlines*, the plaintiff's former interest in the confiscated property was not temporally limited. No. 19-cv-23994 (S.D. Fla.) (Altonaga, J.).

questions of first impression or an absence of binding authority on an issue, without more, are insufficient to demonstrate a substantial ground for difference of opinion.[9] *Nat'l Union*, 2015 WL 11251735, at **2-3 (citing *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996)); (ECF No. 56 at 5 (denying Carnival's request for certification of this issue and holding "that the 'novelty' of this case, standing alone, does not warrant section 1292(b) certification")); *Garcia-Bengochea v. Carnival Corp.*, No. 19-cv-21725, 2019 WL 7945691, at *2 (S.D. Fla. Sept. 26, 2019) ("The Court also disagrees with Carnival's argument that an immediate appeal is warranted because this case involves issues of first impression under Helms-Burton.") (citing *Checking Account Overdraft Litig.*, 2010 WL 3377592, at *3).

The Court correctly held that Title III creates liability for trafficking in confiscated property, not in a property interest that was necessarily extinguished by expropriation.[10] The Court's interpretation of Title III in this respect fully comports with the plain language of the Act and the Eleventh Circuit's published opinion in *Glen. Glen v. Club Mediterranee S.A.*, 450 F.3d 1251 (11th Cir. 2006). In *Glen*, the Eleventh Circuit recognized that the LIBERTAD Act provides a "new statutory

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[9] Carnival cites four cases for the proposition that courts "repeatedly" grant interlocutory appeal under section 1292(b). (Mot. at 11-12 (citing *Mamani v. Berzain*, 2014 WL 12689038, at *3 (S.D. Fla. Aug. 2014) (certifying "an issue of first impression").) But the presence of a question of first impression does not alleviate Carnival's heavy burden to satisfy all of the section 1292(b) requirements. *See Mamani*, 825 F.3d at 1313-14 (denying petition for permission to appeal that issue); *see also Solutia Inc. v. McWane, Inc.*, No. 03-cv-1345, 2008 WL 11337774, at *1 (N.D. Ala. June 25, 2008), *cert. denied* No. 08-90011-J (11th Cir. Sept. 2, 2008).

[10] Havana Docks will not recite to the Court its extensive and thoughtful analysis, which is well known by it.

remedy available [] to United States nationals who were victims of [Cuban Government] confiscations," and under the Act, the ownership of a claim by the former owners to such confiscated property is the "property interest that former owners of confiscated property now have." 450 F.3d at 1255.

Because this Court's holding is firmly grounded in the LIBERTAD Act's plain language and binding appellate precedent, there can be no "substantial dispute about the correctness" of it. *McFarlin*, 381 F.3d at 1258-59. By all accounts, on the question at issue here, the Eleventh Circuit is in "'complete and unequivocal' agreement with the district court." *Id.*; *compare NCL* Case, No. 19-cv-23591, D.E. 53 at 18 ("[I]n lieu of its property interest in the remaining 44 years of the concession to the Subject Property, which the Cuban Government confiscated, Plaintiff now owns an interest only in the Certified Claim, which reflects the right to compensation for the value of loss Plaintiff sustained due to the expropriation."), *with Glen*, 450 F.3d at 1255 ("By paraphrasing and taking language from this section out of context, the Glens arrive at the conclusion that Congress has established that the expropriations committed by the Cuban government failed to extinguish the ownership rights of those who owned the properties prior to the takings. We disagree."); *see also Heat Techs., Inc. v. Papierfabrik August Koehler Se*, 2019 WL 3430477, at *2 (Fed. Cir. July 18, 2019) ("[W]hile this court has not directly addressed the issue," there was no substantial ground for difference of opinion because "our prior cases compel the conclusion reached by the district court.").

By contrast, the statutory interpretation advanced by Carnival rests on the untenable premise that Castro's confiscation failed to extinguish former rights to expropriated property—a contention rejected by both the Eleventh Circuit in *Glen* and the Supreme Court in *Sabbatino*. *Glen*, 450 F.3d at 1255; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 414-15 (1964). "Because [Carnival] ha[s] presented no authority in support of th[e] premise" that Havana Docks' concession survived expropriation in 1960, continued to run for 44 years and then expired by its terms in 2004—"which is necessary to [Carnival's] position on the question [it] proffer[s] as controlling"—Carnival "ha[s] failed to carry [its] burden of establishing that as to this question 'there is substantial ground for difference of opinion.'" *McFarlin*, 381 F.3d at 1263.

As such, the Motion should be denied.

IV. Certification Will Not Materially Advance the Ultimate Termination of the Litigation.

Finally, Carnival fails to meet its heavy burden to demonstrate that interlocutory appeal would materially advance this litigation. (Mot. at 12-15.) With respect to Carnival's pre-2004 trafficking, an interlocutory appeal would do nothing to advance this case. As for the contention that an appeal might dispose of every aspect of the case dealing with Havana Docks' former concession, this argument is both legally and factually incorrect, and, as a result, resolution of the question posed by Carnival would not "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). This requirement "means that resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the

litigation." *McFarlin,* 381 F.3d at 1259. Neither result would obtain here, even if an appeal was resolved in Carnival's favor.

To begin, an appeal would not materially advance this litigation because Havana Docks' former concession to the Subject Property did not expire in 2004. (Omnibus Order at 18.) It was confiscated in 1960. (Am. Compl. at ¶ 15; ECF No. 73-8.) Reversal on appeal would not change that fact. *Sabbatino*, 376 U.S. at 414-15; *Glen*, 450 F.3d at 1255; (*NCL* Order at 16-19.) And, at a minimum, to the extent Carnival disputes that the concession was confiscated, resolution of that critical factual issue would be inappropriate at this stage of the proceedings on interlocutory appeal. *See Nice v. L-2 Commc'ns Vertex Aerospace LLC*, 885 F.3d 1308, 1312-13 (11th Cir. 2018) (section 1292(b) review denied where facts underlying proposed question were disputed and the "issue [wa]s neither neat nor clean from any vantage point in the record."). Because Carnival's legal argument is contingent on an incorrect premise that is contrary to both Eleventh Circuit precedent and the reality of confiscation (and a disputed issue of fact), the requested appeal would not materially advance the termination of this litigation.

Moreover, Havana Docks possessed a number of rights in the Subject Property that can support a claim under Carnival's interpretation of Title III.[11] First, Havana Docks' concession granted a term of 99 years—not a fixed end date of 2004—and forty-four years of concessionary rights remained in 1960, the date of confiscation. (Am.

[11] These interests were described in detail in Havana Docks' briefing on its motion for leave to amend. (ECF Nos. 74, 78.) For the purposes of brevity, Havana Docks adopts and incorporates by reference those briefs here.

Compl. at ¶ 15; ECF No. 73-4 at 4.) Second, the concession granted Havana Docks the non-temporal right to indemnification for the value of the works constructed by it on the Subject Property in the event of expropriation. (ECF No. 73-3 at 5.) And, third, the certified claim recognizes a number of property rights beyond the concession that were not time limited. (Am. Compl. at ¶ 12.) None of these rights expired in 2004. And all of these rights were confiscated from Havana Docks, and certified and valued by the Foreign Claims Settlement Commission. Thus, even under Carnival's interpretation, they are actionable under Title III.

Havana Docks also factually alleges that Carnival trafficked in the Subject Property at numerous points between 1996 and 2001. (Am. Compl. at ¶¶ 24-39; Omnibus Order at 14-18.) Because that conduct pre-dates 2004, an appeal of Carnival's proposed question would not impact those allegations, a point Carnival concedes. (Mot. at 15.)[12] As a result, an appeal would not "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *McFarlin,* 381 F.3d at 1259.

Certification, therefore, would not advance this litigation at all. Even if the question were resolved in Carnival's favor on appeal, the case would still have to be remanded for discovery and trial on Havana Docks' confiscated interests in the

[12] Havana Docks also notes that Carnival incorrectly represents that the "pre-2004 allegations are factually distinct." (*See* Omnibus Order at 16 ("The pre-2004 allegations do not 'radically alter' the scope of this case nor are they tangentially related to the allegations in the initial Complaint. The crux of the proposed complaint remains the same as before: Defendant violated the Act by trafficking in the Subject Property, and the allegations relate directly to the period that the Court had determined to be actionable in the Dismissal Orders. Indeed, the proposed allegations involve the same Certified Claim, the same Subject Property, the same litigants, the same statutory violation, and the same alleged harm.").)

Subject Property and Carnival's pre-2004 trafficking. And, of course, if the question posed by Carnival were resolved in Havana Docks' favor, the case would likewise be remanded for discovery and trial on the certified claim and all of Carnival's trafficking from November 1, 1996 onward. So, either way, an appeal would not dispense with this case—or even a claim or a party to this case—and "would [not] serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin,* 381 F.3d at 1259 (citing *Ashmore v. N.E. Petrol. Div.*, 855 F. Supp. 438, 440 (D. Me. 1994) (§ 1292(b) appeal inappropriate where the same parties and issues would remain in district court regardless of resolution of issues on appeal)); *see also id.* at 1262 ("Resolution of one claim out of seven would do too little, if anything, to 'materially advance the ultimate termination of the litigation.'").

Far from that, piecemeal appellate review here would serve only to encumber the Eleventh Circuit, increase litigation costs and needlessly delay the ultimate resolution of this case, without even the prospect of more efficiently administering this action on remand.[13] *Prado-Steiman*, 221 F.3d at 1276 (piecemeal appeals are "inherently disruptive, time-consuming, and expensive"); *McFarlin,* 381 F.3d at 1259 ("Because permitting piecemeal appeals is bad policy, permitting liberal use of § 1292(b) interlocutory appeals is bad policy."); *OFS Fitel*, 549 F.3d at 1358-59 ("§

[13] "Piecemeal appellate review has a deleterious effect on judicial administration. It increases the workload of the appellate courts, to the detriment of litigants and judges. It requires the appellate courts to consider issues that may be rendered moot if the appealing party ultimately prevails in or settles the case. It undermines the district court's ability to manage the action. And it creates opportunities for abuse by litigants seeking to delay resolution of a case by raising with the appellate court objections to the scope of an order that should have been raised first with the district court itself." *Prado-Steiman*, 221 F.3d at 1276.

1292(b) sets a high threshold for certification to prevent piecemeal appeal. . . . Most interlocutory orders do not meet this test.”).[14]

Because certification would not materially advance the ultimate outcome of this litigation, Havana Docks respectfully submits that the Motion should be denied.[15]

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[14] Havana Docks notes that certification was denied by the district court or appellate court in the vast majority of district court opinions cited in the Motion. *See Classroomdirect.com, LLC v. Draphix, LLC*, No. 06-cv-1669, 2008 WL 11377637 (N.D. Ala. Aug. 1, 2008), *cert. denied* No. 08-15201 (11th Cir. June 30, 2009) (“We are here asked to determine [a legal question] without the benefit of a factual record posing a concrete issue. We decline to engage in such a hypothetical pursuit. Our acceptance of this interlocutory appeal will be vacated as improvidently granted.”); *U.S. ex rel Armfield v. Gills,* No. 8:07-cv-2374, 2011 WL 2084072 (M.D. Fla. May 24, 2011) (denying certification, and agreeing that certification was “premature in view of the pending dispositive motions”); *Lynn v. Monarch Recovery Mgmt., Inc.*, 2953 F. Supp. 2d 612 (D. Md. 2013) (reconsidering dispositive order and denying motion for certification for interlocutory appeal); *Villarreal v. Caremark LLC,* 85 F. Supp. 3d 1063 (D. Ariz. 2015) (denying cert.); *Nat’l Union Fire Ins. Co. of Pittsburgh v. Tyco Integrated Sec. LLC*, No. 13-CIV-80371, 2015 WL 11251735 (S.D. Fla. July 8, 2015) (same); ECF No. 56 (same); *Children First Found., Inc. v. Legreide*, No. Civ.A. 04-2137, 2005 WL 3088334 (D.N.J. Nov. 17, 2005) (same); *LNC Invs., Inc. v. First Fid. Bank*, No. 92- cv-7584, 2000 WL 461612, at *3 (S.D.N.Y. Apr. 18, 2000), *cert. denied* No. 00-8018 (2d Cir. June 5, 2000); *Solutia Inc. v. McWane, Inc.*, No. 03-cv-1345, 2008 WL 11337774, at *1 (N.D. Ala. June 25, 2008), *cert. denied* No. 08-90011-J (11th Cir. Sept. 2, 2008); *Winter v. United Parcel Serv., Inc.*, No. 214CV10555, 2016 WL 11214560, at *1 (E.D. Mich. Jan. 12, 2016), *cert. denied* No. 16-0101 (6th Cir. Mar. 4, 2016); *Unger v. United States*, No. 90 CIV. 0384, 1994 WL 90358, at *1 (S.D.N.Y. Mar. 16, 1994), *cert. denied* (2d Cir. Apr. 1, 1994) (*see* Dist. Ct. D.E. 46, 48); *Mamani v. Berzain*, No. 07-cv-22549, 2014 WL 12689038 (S.D. Fla. Aug. 18, 2014), *cert. denied in part* 825 F.3d 1304, 1312-14 (11th Cir. 2016).

[15] The Supreme Court recognizes the importance of the “screening procedure” tasked to district courts under section 1292(b), which “serves the dual purpose of ensuring that [interlocutory] review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals”:

> We also recognize that such savings may be nullified in practice by indulgent extension of the amendment to inappropriate cases or by enforced consideration in Courts of Appeals of many ill-founded applications for review. The problem, therefore, is to provide a procedural screen through which only the desired cases may pass, and to avoid the wastage of a multitude of fruitless applications to invoke the amendment contrary to its purpose. . . .

CONCLUSION

Ultimately, certification under section 1292(b) is the "rare exception" to the general principle that appeals be conducted after final judgment. *McFarlin*, 381 F.3d at 1264. The operative question remains whether a defendant has overcome "[t]he strong presumption against interlocutory appeals." *Nat'l Union*, 2015 WL 11251735, at *2. Here, Carnival has failed to meet that heavy burden: As set forth above, none of the section 1292(b) factors are met. Carnival has not proposed a proper, controlling question of law specified in the Omnibus Order. There is no substantial ground for difference of opinion that the Court correctly construed Title III in line with its plain language and the Eleventh Circuit's opinion in *Glen*. And resolution of the requested appeal would not materially advance (or advance at all) the ultimate termination of this litigation.

As a result, Havana Docks respectfully requests that the Court deny the Motion.

> . . . Requirement that the Trial Court certify the case as appropriate for appeal serves the double purpose of providing the Appellate Court with the best informed opinion that immediate review is of value, and at once protects appellate dockets against a flood of petitions in inappropriate cases. . . . [A]voidance of ill-founded applications in the Courts of Appeals for piecemeal review is of particular concern. If the consequence of change is to be crowded appellate dockets as well as any substantial number of unjustified delays in the Trial Court, the benefits to be expected from the amendment may well be outweighed by the lost motion of preparation, consideration, and rejection of unwarranted applications for its benefits.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 474-75, n.25 (1978), *superseded by rule on other grounds* (quoting H.R. Rep. No. 1667, 85th Cong., 2d Sess., 5-6 (1958)).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Court. I also certify that the foregoing document is being served this 11th day of May, 2020, on all counsel of record or pro se parties either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ Roberto Martínez
Roberto Martínez