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.
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HAVANA DOCKS' MEMORANDUM OF LAW ON
CARNIVAL'S WAIVER OF ATTORNY-CLIENT PRIVILEGE

Plaintiff Havana Docks Corporation ("Havana Docks") has sued Carnival Corporation ("Carnival") for its unauthorized trafficking in, and commercial exploitation of, the Havana Cruise Port Terminal (the "Subject Property"), in violation of Title III of the Cuban Liberty and Democratic Solidarity Act of 1996 (the "LIBERTAD Act"). As its principal defenses, Carnival asserts that it is immune from liability for violating that federal statute because it was licensed to conduct cruises to Cuba under regulations issued between 2015 and 2016 by the Department of Treasury's Office of Foreign Assets Control ("OFAC"). 31 C.F.R. § 515, *et seq.*; *see* D.E. 160 at 18. These regulations were not issued under the LIBERTAD Act and do not purport to interpret that statute. 31 C.F.R. § 515.101(b).[1] In fact, these regulations were issued without statutory authority and contrary to Congress' clearly expressed will in the LIBERTAD Act.[2]

Recognizing this, Carnival alternatively asserts a Government reliance defense, arguing that it cannot be found liable because it relied on Government regulations authorizing travel to Cuba, Government encouragement to travel to Cuba and Government inaction in permitting lawsuits under Title III when it decided to exploit the confiscated Subject Property. (D.E. 160 at 18.) Carnival also asserts that it lacks the requisite intent to traffic in confiscated property, ostensibly due to its claimed belief in the legality of its conduct under the OFAC regulations. (*Id.* at 20.)

But the only way to test whether Carnival actually relied on these Government representations or truly believed that its conduct was lawful is to assess Carnival's knowledge of the LIBERTAD Act and OFAC regulations. Yet, the evidence that forms that knowledge is what Carnival's attorneys told it, and Havana Docks cannot access that information due to Carnival's

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[1] **Exhibit A**, Dep. of Carnival's General Counsel, A. Perez (Dec. 22, 2020) at 133:14 – 134:5 ("Q. And do you agree, sir, that OFAC does not administer the Libertad Act? A. I think that's correct.")

[2] "**Codification of economic embargo.** The economic embargo of Cuba, as in effect on March 1, 1996, 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. § 6032(h).

privilege invocations. (*See* **Exhibit B**, Carnival's Amended Privilege Log.) In this circumstance, Eleventh Circuit precedent is well-established and clear that Carnival cannot use the attorney-client privilege to prevent Havana Docks from cross-examining its asserted state of mind. Thus, Havana Docks respectfully requests that the Court order Carnival to produce withheld evidence reflecting its knowledge of, and intent to comply with, the LIBERTAD Act and OFAC regulations.

LEGAL STANDARD [3]

The attorney-client privilege applies to "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1262 (11th Cir. 2008). In the Eleventh Circuit, the party invoking the privilege "must establish":

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is (the) member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. Fulwood, 569 F. App'x 691, 694 (11th Cir. 2014); *United States v. Noriega*, 917 F.2d 1543, 1550 (11th Cir. 1990) (same).[4]

Absence of waiver is an element of the attorney-client privilege that must be established by the privilege's proponent. *See Fulwood*, 569 F. App'x at 694; *Noriega*, 917 F.2d at 1550; *MCZ/Centrum Flamingo II, LLC v. City of Miami Beach*, No. 08-cv-22419, 2009 WL 10701007,

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[3] Federal common law of privilege applies to this suit because it arises under federal law. *See Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992); Fed. R. Evid. 501.

[4] "The attorney-client privilege 'is not a favored evidentiary concept in the law since it serves to obscure the truth, and it should be construed as narrowly as is consistent with its purpose.'" *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987), *cert. denied*, 484 U.S. 987 (1987).

*3 (S.D. Fla. Aug. 6, 2009) (Altonaga, J.) (for "at-issue waiver," the "burden of establishing nonwaiver' rests on the party seeking to assert a claim of privilege," and collecting cases).

Waiver may occur expressly or by implication. *See Cox v. Adm. U.S. Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir. 1994). With respect to the latter, the rationale of the doctrine of waiver by implication is that "[a] defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes." *Id.* at 1417. It "reflects the position that the attorney-client privilege 'was intended as a shield, not a sword.'" *Id.* (quoting *GAB Bus. Servs., Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir. 1987). Thus, where a party "injects into the case an issue that in fairness requires an examination of otherwise protected communications," the party "waives the privilege over those communications." *Id.* at 1419. Courts find waiver by implication:

> (1) When a client testifies concerning portions of the attorney-client communication, (2) when a client places the attorney-client relationship directly at issue, and (3) when a client asserts reliance on an attorney's advice as an element of a claim or defense.

Id. at 1418 (alterations and citation omitted).

In *Cox*, the Eleventh Circuit further held that "[w]here a party asserts that he believed his actions to be lawful, he waives the attorney-client privilege as to what his attorney told him about the legality of his actions." *Id.* at 1418-20, 1423.

> All of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party.

Id. (alteration omitted; quoting *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444, 447 (S.D. Fla. 1980) (Aronovitz, J.); *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975)). "In such cases, 'there is a serious danger that the privilege-holder's assertions are false or misleading.'" *Siegmund v. Xuelian*

Bian, 2018 WL 3725775, at *11 (S.D. Fla. Aug. 1, 2018) (Louis, Mag. J.); *see also United States v. Woodall*, 438 F.2d 1317, 1324-26 (5th Cir. 1970) (en banc).

A "defendant need not raise an affirmative defense to inject a new issue into the case, although it frequently occurs that way." *Cox*, 17 F.3d. at 1419 (citing *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987)). Nor is the explicit assertion of advice of counsel defense a pre-requisite to finding implied waiver. *Id.* at 1418; *Barker ex rel. United States v. Columbus Reg. Healthcare Sys., Inc.*, 2014 WL 4287744, at *4 (M.D. Ga. Aug. 29, 2014); *United States v. Fresenius Med. Care Holdings, Inc.*, 2014 WL 11517840, at *2 (N.D. Ga. Feb. 21, 2014).

Rather, the operative question is whether a party "injected the issue of its knowledge of the law into the case and thereby waived the attorney client privilege." *Cox*, 17 F.3d at 1419. Where a party injects its beliefs about the legality of its conduct, reliance on advice of counsel as the basis of those beliefs is presumed. *See, e.g., In re Namenda Direct Purchaser Antitrust Litig.*, 2017 WL 2226591, at *5 (S.D.N.Y. May 19, 2017) ("Implied reliance on advice of counsel sufficient to waive privilege is confined to situations involving a party's state of mind concerning a question of law, such as the party's belief as to the lawfulness of its conduct.") (citation omitted); *Maar v. Beall's, Inc.*, 237 F. Supp. 3d 1336, 1340 (S.D. Fla. 2017) (Middlebrooks, J.) ("It is the articulation of a claim or defense explicitly *relying* on the litigant's subjective thinking, as potentially influenced by advice from legal counsel, that activates the doctrine of implied waiver.").[5]

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[5] Last year, the Eleventh Circuit affirmed a district court's order denying an implied waiver argument, in part, because the defendants "did not assert an advice of counsel defense" and did not put forth an "offensive, selective waiver of privilege that entitles [plaintiff] to discover the privileged material." *Knox v. Roper Pump Co.*, 957 F.3d 1237, 1248-49 (11th Cir. 2020). *Knox* is materially distinguishable. First, unlike this case and *Cox*, *Knox* did not involve a party affirmatively "assert[ing] that it believes its actions to be lawful" or only intended to comply with the law, and then withholding as privileged the evidence that forms the foundation of its beliefs and intentions. *Cox*, 17 F.3d at 1418, 1423; *In re Namenda*, 2017 WL 2226591, at *5 (reliance on advice of counsel is presumed in these circumstances). Second, Carnival did "offensive[ly and] selective[ly] waive[]" privilege by disclosing its in-house legal department as witnesses of Carnival's compliance with federal law, and then withholding the contemporaneous records evidencing the same.

In *Cox*, the defendant, USX, "consistently t[ook] the position," including through a motion to dismiss, "that 'at the time the revised leave-of-absence policy was implemented in October 1984, . . . USX believed the policy to be lawful." *Id.* at 1418 (citing USX's Memorandum in Support of its Motion to Dismiss, and the Pre-Trial Order). In doing so, USX made an affirmative act for its own benefit and waived attorney client privilege:

> Although USX [] denied any intent to assert a defense of advice of counsel or to rely on any privileged attorney-client communications in its defense, the district court observed that 'USX's defense necessarily implicates all of the information at its disposal when it made the decision to change the leave of absence policy and later, to rescind the change.' Reasoning that 'it would be inequitable to allow USX to present evidence tending to show that it intended to comply with the law, while allowing it to cloak in privilege those documents tending to show it might have known its actions did not conform to the law,' the district court held that USX waived the attorney-client privilege with regard to such communications.

Id. (alteration omitted).

USX argued on appeal "that it was the plaintiffs who injected the issue of USX's 'state of mind' into the case by including allegations of intentional, criminal wrongdoing in their complaint," and that "it had merely denied the plaintiffs' allegations," which "should not constitute waiver of the attorney-client privilege." *Id.* The Eleventh Circuit rejected this argument and affirmed the trial court: "Having gone beyond mere denial, affirmatively to assert good faith, USX injected the issue of its knowledge of the law into the case and thereby waived the attorney client privilege." *Id.*

ARGUMENT

Carnival has injected into this case its beliefs about the legality of its operations in Cuba. Specifically, Carnival has put at issue its knowledge of the law by asserting that it was relying on Government regulations, encouragement and inaction in deciding to operate on the confiscated Subject Property and by arguing that it intended to comply with the law through its operations on the Subject Property.

In its Fourth Affirmative Defense, the Government reliance defense, Carnival asserts that:

> Plaintiff's claim is barred in whole or in part by the Fifth Amendment's Due Process Clause including because Plaintiff seeks to hold Carnival liable for conduct that the Federal Government authorized as lawful by both general and specific licenses and under regulations promulgated under 31 C.F.R. Part 515 and facilitated and encouraged as a matter of national policy, because Carnival reasonably relied on the LIBERTAD Act's suspension

(D.E. 160 at 18.)

Similarly, Carnival plead as it Thirteenth Affirmative Defense, titled "LACK OF INTENT," that "Plaintiff's claim is barred in whole or in part because Carnival did not knowingly and intentionally traffic in the Subject Property." (*Id.* at 20.) This defense is common among all members of Carnival's joint defense group, one of which described this defense as premised on the cruise lines' 'lawful intent' with respect to its travel to Cuba. (*See Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.,* No. 19-cv-23591 (S.D. Fla.) at D.E. 31 at 5-11; D.E. 41 at 2-6, D.E. 107 at 16 (Norwegian's "intent was at all times lawful"). This is a form of the defense of good faith. *See United States v. Morris,* 20 F.3d 1111, 1115-16 (11th Cir. 1994) (for defense of good faith, "intent may be negated by a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law, regardless of whether or not the belief is reasonable").

Based on Carnival's defenses and deposition testimony to date, in the event of a trial, it is apparent that Carnival will present argument and evidence pertaining to its beliefs in the legality of its conduct on the confiscated Subject Property. As testified by Arnaldo Perez, Carnival's General Counsel and Rule 30(b)(6) designee:

> Q. So, Mr. Perez, the decision was made at Carnival that even though the lawyer for Havana Docks Corporation had sent in a letter saying that Havana Docks Corporation had a claim to the subject property to which Carnival Corporation was trafficking, Carnival Corporation decided not to make any effort to contact Mr. Margol; is that your testimony?
>
> A. Well, A, we obviously disagree that we were trafficking in the property as defined under the act. And we didn't proceed further because we didn't believe we were trafficking because of the plain language of the statute which permits lawful and necessary travel.

(**Exhibit C**, Dep. of Carnival Corporate Rep. A. Perez (Oct. 23, 2020) at 26:7 – 29:23, 59:16 – 62:20; **Exhibit A** at 23:14-24:7, 83:4 – 89:23, 97-98, 106:23 – 115:16.)

With respect to its Due Process defense, Carnival will also present evidence and argument intended to create the inference that it relied on Government regulations, encouragement and inaction when it decided to traffic in the confiscated Subject Property. For example, Carnival discloses its President and CEO, Arnold Donald, as having information concerning "communications with Government officials regarding Carnival's cruises to Cuba." (**Exhibit D**, Carnival's Amended Rule 26 Disclosures at 5.) Mr. Donald is expected to provide testimony as to the "support and encouragement of the Obama Administration for cruise travel to Cuba." (**Exhibit E**, Email from Carnival's Counsel to Havana Docks' Counsel (Dec. 23, 2020).) Carnival's General Counsel, Arnaldo Perez, further testified that the company was relying on OFAC regulations when it decided to traffic in the Subject Property. (**Exhibit A** at 15:19 – 29:7; **Exhibit C** at 70:6 – 71:23.)

Although Carnival attempts to plead objectively, its Due Process defense necessarily implicates Carnival's subjective interpretation and understanding of the LIBERTAD Act and OFAC regulations to discern whether Carnival, in fact, relied on these Government representations when it chose to exploit confiscated property. As one court held under similar circumstances:

> These defenses do not solely relate to the 'objective' representations of [the Department of Energy (DOE)] but directly concern Exxon's subjective interpretation and understanding of those representations; *i.e.*, Exxon's corporate state of mind. As in the *Connell* case, Exxon's affirmative defenses necessarily revolve around whether Exxon did, in fact, primarily or solely rely upon a particular DOE regulation or communication when the company made its pricing decisions. Thus, the only way to assess the validity of Exxon's affirmative defenses, voluntarily injected into this dispute, is to investigate attorney-client communications where Exxon's interpretation of various DOE policies and directives was established and where Exxon expressed its intentions regarding compliance with those policies and directives. There is no other reasonable way for plaintiff to explore Exxon's corporate state of mind, a consideration now central to this suit.

United States v. Exxon Corp., 94 F.R.D. 246, 247-50 (D.D.C. 1981); *Minebea Co., Ltd. v. Papst*, 355 F. Supp. 2d 518, 522-25 (D.D.C. 2005).[6]

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[6] *See also McLaughlin v. Lunde Truck Sales, Inc.*, 714 F. Supp. 916, 918-919 (N.D. Ill. 1989) ("the defendants' defense in the instant case depends on whether the defendants relied upon a particular DOL

Carnival raises this reliance defense notwithstanding that it has long known of Havana Docks and its certified claim to the confiscated Subject Property. (**Exhibit C** at 14:17 – 31; **Exhibit F**, Dep. of G. Israel (Dec. 3, 2020) at 64:1-15.) In discovery, Carnival produced a report titled "A Special Report on the Port of Havana," which contained eighteen pages of analysis about the Subject Property, including about Havana Docks' certified claim and the property's suitability for cruise ship operations. (**Exhibit G** at 8-26.) In 2002, an attorney, Nick Gutierrez, contacted Havana Docks regarding its certified claim. (**Exhibit H** (see enclosures line for reference to Carnival Cruise Line).) Mr. Gutierrez apparently was acting as a liaison between Carnival Corporation and Havana Docks. (**Exhibit C** at 33:21 – 34:13.) In August 2007, a year after Carnival formalized its internal Cuba Committee, Havana Docks was approached by another attorney, Timothy Ashby, about purchasing the certified claim. (**Exhibit I**.) Mr. Ashby is Carnival's long-time adviser on matters pertaining to Cuba. (**Exhibit F** at 52:23 – 55:15; **Exhibit A** at 45:18 – 54:3, 116:23 – 117:18, 118:18-119:13.) In January 2015, Carnival recognized that it needed to "[a]ddress the Havana situation" as a part of its "Cuba Strategy." (**Exhibit J** at 48.) A few months later, in April 2015, a member of Congress advised Carnival that it is "illegal under U.S. law to do business with

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representation or action. Consequently, the primary way to assess the validity of this reliance is to investigate attorney/client communications where the defendants' interpretations of DOL actions were established. Indeed, the defendants have implicitly recognized this fact by injecting their former counsel's affidavit in support of their good faith defense. Not only does Attorney Williams's affidavit reveal the need to assess privileged material to determine the existence and nature of the defendant's reliance but also demonstrates the inequity of the defendants' assertion of privilege.").

Southwire Co. v. Essex Grp., Inc., 570 F. Supp. 643 (N.D. Ill. 1983) ("Even were we to view Essex' 'objective' evidence as entitling it to an inference or prima facie showing of reliance, fairness dictates that Southwire be permitted to rebut the showing. The supposed 'objective'—'subjective' dichotomy is in a way illusory. Essex' 'objective' evidence, which may include proof of delay, unfulfilled threats of suit and the like, is merely evidence which permits a trier of fact to infer that Essex actually relied on those factors. If Southwire has evidence that Essex actually relied on something other than Southwire's actions or silence, that serves to undercut the inference that Essex seeks to have drawn from its 'objective' evidence. In short, Essex asserts that it relied on Southwire's delay in building the four plants; Southwire says that Essex relied on something else. What Essex is arguing here is that Southwire is not entitled to prove what Essex actually relied on, even though the court should be entitled to infer actual reliance from Essex' own proof. The unfairness of Essex' position is manifest.").

anyone who is operating expropriated properties" and that "all of the ports on that island are expropriated properties that are run and operated by the military." (**Exhibit K**.) That same month, Carnival drafted a memo analyzing Havana Docks' claim and noted that "there must have been a legal way to avoid the consequences of the ITT claim to enter in such business agreements." (**Exhibit L** at 4.)[7]

Despite of all of this knowledge, Carnival never contacted Havana Docks to obtain authorization to use the port. Instead, in 2019, when the United States Government indicated that it was contemplating lifting the suspension of Title III's right to sue, and while Carnival was still operating on the Subject Property, Carnival extensively lobbied the United States Government for legislative, regulatory and executive immunity from liability under Title III. Carnival's President and CEO, Mr. Donald, for example, requested Secretary of State Michael Pompeo to clarify that "the lawful travel exclusion applies to cruise ships calling at Cuban ports" because it would be "manifestly unjust to make [cruise lines] targets for lawsuits for activities approved by the U.S. government." (**Exhibit M**.) Two months later, the Chairman of Carnival's Board, Micky Arison, reiterated that request in a personal message to President Donald Trump. (**Exhibit N**.) That Carnival was lobbying the government for immunity under Title III is "directly relevant in determining the extent of [Carnival's] knowledge" and beliefs about the legality of its conduct, "and, as a result, [its] intent" to comply with the law. *Cox*, 17 F.3d at 1419 (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)).

All this evidence points in one direction: Carnival knew the Subject Property was confiscated from Havana Docks and took a calculated business risk when it decided to traffic

[7] ITT is another certified claim owner. The legal consequences of the ITT claim were avoided in that case because the foreign investor (STET) obtained the authorization of, and paid compensation to, the claim holder. *See Lamb v. ITT Corp.*, 2010 WL 376858, at *2 (D. Neb. Jan. 26, 2010). Unlike that case, here, Carnival neither sought Havana Docks' authorization, nor paid it compensation, before exploiting the Subject Property.

without the authorization of Havana Docks. Carnival should not be permitted to put forward evidence about Government licenses, encouragement and inaction to create the inference that it was actually relying on these Government representations when it decided to exploit confiscated property, while at the same time cloaking in privilege the communications from its lawyers demonstrating that it knew its conduct did not comply with the LIBERTAD Act, that these Government representations did not change that and that Carnival simply assumed the risk of liability. *Exxon Corp.*, 94 F.R.D. at 247-50; *McLaughlin*, 714 F. Supp. at 918-919; *Southwire*, 570 F. Supp. at 649-50; *Minebea Co.*, 355 F. Supp. 2d at 522-25. By raising these defenses, as indicated through its deposition testimony, Carnival has placed directly at issue its attorney-client relationship and its reliance on its attorney's advice, particularly considering that Carnival discloses four in-house counsel as trial witnesses who will testify about the lawfulness of Carnival's conduct in Cuba. (**Exhibit D** (listing Arnaldo Perez, Enrique Miguez, Jose Fernandez and Sepedeh Tofigh).)

Carnival injected its knowledge of the law into this case and thereby waived the attorney-client privilege. Fairness requires that Havana Docks be permitted to rebut Carnival's Due Process defense by examining what Carnival knew about the legality of its conduct and whether it truly believed that these Government representations would exempt it from liability under Title III. *Cox*, 17 F.2d at 1419; *Exxon Corp.*, 94 F.R.D. at 247-50. As the Eleventh Circuit affirmed in *Cox*, "it would be inequitable to allow [Carnival] to present evidence tending to show that it intended to comply with the law, while allowing it to cloak in privilege those documents tending to show it might have known its actions did not conform to the law." *Cox*, 17 F.3d at 1418.

For these reasons, Havana Docks respectfully requests that the Court order Carnival to produce withheld evidence reflecting its knowledge of, and intent to comply with, the LIBERTAD Act and OFAC regulations.

Dated: February 8, 2021.

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 8th day of February, 2021, 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