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' REPLY IN SUPPORT OF MOTION TO COMPEL AND MEMORANDUM OF LAW ON CARNIVAL'S WAIVER OF ATTORNEY-CLIENT PRIVILEGE

Carnival Corporation ("Carnival"), in shotgun fashion, has lodged twenty-nine affirmative defenses to the sole count asserted in Plaintiff Havana Docks Corporation's ("Havana Docks") second amended complaint.[1] (D.E. 160 at 18-23.) As observed at the January 11th hearing in this case, many of these defenses are not defenses at all and should be withdrawn.[2] Two of these

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[1] *Barmapov v. Amuial*, --- F.3d ---- , 2021 WL 359632, *2 (11th Cir. Feb. 3, 2021) ("Shotgun pleadings 'are flatly forbidden by the spirit, if not the letter, of these rules' because they are 'calculated to confuse the "enemy," and the court, so that theories for relief not provided by law and which can prejudice an opponent's case, especially before the jury, can be masked.'").

[2] *See, e.g.*, D.E. 160 at Aff. Defs. 4, 7, 13, 14, 15, 16, 18, 22, 24, 28.

See also Byrne v. Nezhat, 261 F.3d 1075, 1130 (11th Cir. 2001), *abrogated on other grounds* ("Depending on his financial resources, a defendant may use a shotgun answer to obtain a settlement that waters down a meritorious claim."); *id.* at 1130 n.108 ("It goes without saying that a plaintiff with a solid case does not need to file a shotgun complaint. By the same token, a defendant with a strong defense need not file a shotgun answer."); *Salargas v. Auto-Owners Ins. Co.*, 2012 WL 13106405, at *1 (M.D. Fla. Apr. 16, 2012) ("A shotgun answer and any affirmative defenses contained therein that are vague, ambiguous, and fail to respond to a particular allegation, should be stricken.").

improper defenses inject Carnival's corporate state of mind and are therefore pertinent to Havana Docks' motion to compel (the "Motion," D.E. 202): the "Fourth Defense—Due Process" and the "Thirteenth Defense—Lack of Intent."

Despite affirmatively asserting its state of mind as a defense, Carnival argues that it has not waived privilege because its "lack of intent" defense is merely a denial of Havana Docks case.[3] (D.E. 160 at 20; Opp. at 8-9.) It is highly doubtful that Carnival and its experienced counsel would assert a defense that is so obviously improper. *See, e.g., In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) ("A defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense."). Instead, it is far more likely that Carnival is raising the same "lawful intent" defense asserted by Norwegian Cruise Lines and has purposefully pled it in an ambiguous (and improper) manner to prevent Havana Docks from discovering the facts that underlie the defense. *See Norwegian* Case, No. 19-cv-23591 (S.D. Fla.) at D.E. 31 at 5-11; D.E. 41 at 2-6 (Norwegian's "intent was at all times lawful"), D.E. 107 at 16 (pleading identical defense to Carnival); *see also Cox v. Adm. U.S. Steel & Carnegie*, 17 F.3d 1386, 1418-20, 1423 (11th Cir. 1994) (affirming district court's finder of waiver where "it would be inequitable to allow [defendant] 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.").

But Havana Docks is entitled to know the grounds for Carnival's Thirteenth Defense, and Carnival should be ordered to disclose the legal theory underlying it. *Salargas*, 2012 WL 13106405, at *1. If this defense is like Norwegian's—that Carnival cannot be found to have acted

[3] Carnival incorrectly suggests that the LIBERTAD Act requires a showing of heightened "wrongful intent," apparently akin to willfulness. (Opp. at 8-10.)

intentionally because of a claimed belief in the legality of its conduct on the Subject Property—then Carnival has injected its knowledge of the law and waived privilege, notwithstanding its attempt to artfully plead around the phrase "good faith." *Cox*, 17 F.3d at 1418-20, 1423 (where party injects its knowledge of the law, it waives privilege over what its attorney told it about the legality of its conduct); *Abromavage v. Deutsche Bank Secs., Inc.*, 2019 WL 6790513, **3-4 (S.D.N.Y. Dec. 11, 2019) ("While [defendant's] answer does not plead 'advice of counsel' or 'good faith' using those words, [defendant] is necessarily relying, to some extent, on the actions and recommendations of its in-house counsel to prove that it adhered to anti-retaliation law and policies in good faith," and finding waiver); *Scott v. Chipotle Mexican Grill, Inc.*, 67 F. Supp. 3d 607, 614 – 617, n.6 (S.D.N.Y. 2014) (similar). And if Carnival, in fact, is merely denying intent through its Thirteenth Defense, then it should have no problem withdrawing it because it is improperly asserted. *In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) ("A defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense.").

With respect to its Fourth Defense, the Due Process Defense, Carnival argues that it has not injected its reliance on Government representations, notwithstanding that it expressly pleads that it "reasonably relied on the LIBERTAD Act's suspension" in deciding to use confiscated property. (D.E. 160 at 18.) As demonstrated by cases like *Exxon* and *McLaughlin*, when a defendant pleads that it undertook certain action in reliance on Government representations—like Carnival does in its Fourth Defense—the plaintiff should be permitted to discover whether the defendant *actually* relied on those representations. (Mot. at 8-9, n.6.) Discovery of attorney-client communications is necessary in this circumstance to prevent a defendant from using the privilege to create a false narrative surrounding its state of mind. *United States v. Exxon Corp.*, 94 F.R.D. 246, 247-50 (D.D.C. 1981); *United States v. Woodall*, 438 F.2d 1317, 1324-26 (5th Cir. 1970) (en

banc). But that is exactly what Carnival is seeking to do by presenting "objective" evidence about the "state of the law" and actions of Government regulators, which is intended to create the inference that Carnival actually relied on these representations in deciding to operate on confiscated property.

If this case is tried, Carnival will parade out its legal department, one by one, to testify about OFAC regulations and Carnival's purported compliance with them, and then present its CEO to testify about how the Obama Administration allegedly "encouraged" Carnival to go to Cuba. But Carnival has known about its obligations under the LIBERTAD Act and Havana Docks for many years. (Mot. at 9-11.) And through discovery in this case it is apparent that Carnival was counseled that its conduct on the Subject Property was not as lawful as it now claims in this litigation.

For example, if Carnival truly believed that its conduct on the Subject Property was lawful under the LIBERTAD Act such that it actually relied on executive branch regulations and representations to insulate it from liability under that law, then why would Carnival's President and CEO, Arnold Donald, be lobbying the Secretary of State in February 2019 for an "enabling order policy or rule" to "clarify the lawful travel exclusion [under the LIBERTAD Act] applies to cruise ships calling at Cuban ports"? (D.E. 202-6.)

By the same token, if Carnival truly believed that its conduct on the Subject Property was lawful under the LIBERTAD Act, then why would [redacted]

Contrary Carnival's position in this litigation, someone clearly was advising Mr. Arison and Mr. Donald that Carnival's conduct was not lawful under the LIBERTAD Act. It would be manifestly unfair to allow Carnival to create a false narrative through its presentation of "objective" evidence of Government representations, while depriving Havana Docks of the ability to rebut that showing by demonstrating that Carnival knew that, regardless of what the executive branch said or did, operating on confiscated property subject to a certified claim would expose it to liability under the LIBERTAD Act.

Finally, the Court should reject Carnival's suggestion that it was somehow improper for Havana Docks to depose Carnival's witnesses about the bases of its defenses. (Opp. at 10-11.) These questions are required in this case in light of the legal nature of Carnival's affirmative defenses, the fact that Carnival designated its General Counsel as its Rule 30(b)(6) representative to testify to them, and where Carnival discloses four in-house lawyers as trial witnesses who will testify to Carnival compliance with federal law.

As set forth above and in the Motion, Carnival injected its knowledge of the law into this case. Havana Docks, thus, respectfully requests that the Court order Carnival to produce withheld evidence reflecting its knowledge of the LIBERTAD Act and OFAC regulations.

Dated: February 22, 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 22nd 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
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