Nos. 23-10151 & 23-10171

In the United States Court of Appeals for the Eleventh Circuit

HAVANA DOCKS CORPORATION, PLAINTIFF-APPELLEE

v.

ROYAL CARIBBEAN CRUISES, LTD., DEFENDANT-APPELLANT

HAVANA DOCKS CORPORATION,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

ROYAL CARIBBEAN CRUISES, LTD.;
NORWEGIAN CRUISE LINE HOLDINGS, LTD.;
CARNIVAL CORPORATION, A FOREIGN CORPORATION
DOING BUSINESS AS CARNIVAL CRUISE LINES;
MSC CRUISES S.A. CO.; MSC CRUISES (USA), INC., ET AL.,
DEFENDANTS-APPELLANTS-CROSS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA (CIV. NOS. 19-23590 & 19-23591) (THE HONORABLE BETH BLOOM, J.)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, Defendant-Appellant Carnival Corporation certifies that the Certificate of Interested Persons and Corporate Disclosure Statements in its opening brief and the other briefs filed in this appeal are complete.

/s/ Kannon K. Shanmugam
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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Pursuant to Federal Rule of Appellate Procedure 28(i) and 11th Circuit Rule 28-1(f), Carnival Corporation adopts and joins in full the arguments made by Royal Caribbean Cruises, Ltd.; MSC Cruises S.A.; MSC Cruises S.A. Co.; MSC Cruises (USA), Inc.; and Norwegian Cruise Line Holdings, Ltd., including their arguments that (1) the cruise lines did not traffic in "property" that was "confiscated"; (2) the cruise lines' activities were "incident" and "necessary" to "lawful travel"; (3) Havana Docks is not a "United States national"; (4) the cruise lines did not "knowingly" and "intentionally" traffic in confiscated property; (5) the damages award violates the one-satisfaction rule and the Due Process Clause of the Fifth Amendment to the United States Constitution; and (6) the district court erred by trebling the interest it awarded.

INTRODUCTION

Havana Docks argues that Carnival took a "calculated business risk" by allegedly using property confiscated by the Cuban government to engage in unlawful travel. Br. 1. But there was no "calculated risk" in using property that always belonged to the Cuban government. Nor was there a "calculated risk" in conducting travel that was authorized—indeed, encouraged—by the American government. And even if Carnival could be held liable, Havana

Docks cannot sue under the Helms-Burton Act because it is a European national, and the exorbitant damages of some $109 million are not permitted by the Act or the United States Constitution.

First, Carnival's operations at the Havana Cruise Terminal did not infringe on any property interest ever held by Havana Docks. Havana Docks never held a right to conduct passenger operations at the terminal, and neither passing language in the claim certified in an ex parte agency proceeding nor the evidence in the record proves otherwise. For that reason alone, the judgment below should be reversed. And even if Havana Docks had a right to conduct passenger operations at some point, it cannot recover for acts that occurred after the concession would have expired in 2004. Neither the certified claim nor any principle of law can toll that expiration. For that reason, the judgment below should be vacated with a remand for further proceedings.

Second, the judgment below should be vacated and the case remanded for the independent reason that Carnival's use of the terminal was both incident and necessary to lawful travel. The Helms-Burton Act did not freeze the relevant regulations in place in 1996, and it would be absurd to interpret the regulations to forbid even a minute of free time for even a single passenger. Moreover, Havana Docks' argument that the use of confiscated property must

be *strictly* necessary to travel *anywhere* in Cuba would eviscerate the congressional design of permitting the use of confiscated property when it is helpful for lawfully traveling to a particular place in Cuba.

Third, even if Carnival had trafficked in confiscated property, the judgment below should be reversed because Havana Docks is not a "United States national" and thus not a proper plaintiff. Havana Docks failed to plead that it is a natural person, and there is no genuine dispute that Havana Docks' principal place of business was in Europe when the complaint was filed.

Fourth, even if Carnival could be held liable to Havana Docks, the award of approximately $109 million in damages should be vacated and remanded as contrary to the one-satisfaction rule and the Due Process Clause. With respect to the one-satisfaction rule, Havana Docks musters no persuasive reason to permit infinite recoveries under a statute designed to place traffickers in the shoes of the Cuban government. And with respect to the Due Process Clause, neither the age of the relevant precedents nor the need for deterrence justifies the exorbitant award.

Carnival did exactly what the Executive Branch intended American businesses to do. And the result of Carnival's cruises was to expose Cubans to Americans, and vice versa. The judgment below should be reversed.[1]

[1] Docket entries in Civ. No. 19-21724 are cited by document number and ECF page number.

ARGUMENT

I. CARNIVAL DID NOT USE 'PROPERTY' THAT WAS 'CONFISCATED' FROM HAVANA DOCKS

A. Havana Docks' Limited Concession Did Not Confer A Right To Conduct Passenger Operations

Havana Docks fails to identify any basis for concluding that its concession encompassed passenger operations and thus that Carnival trafficked in "property which was confiscated." 22 U.S.C. § 6082(a)(1); *see* Carnival Br. 25-32; Royal Caribbean Br. 45-47. The district court was not required to defer to a decision of the Foreign Claims Settlement Commission. And the historical record does not establish that Havana Docks possessed a right to conduct passenger operations at the terminal; to the contrary, the unrebutted expert testimony of an expert on Cuban law proves that Havana Docks lacked that right. *See* Havana Docks Br. 39-51.[2]

1. There is no dispute that the Helms-Burton Act places a plaintiff with a certified claim in "a privileged position" in *some* respects. Havana Docks Br. 40. The question is the *extent* of that privileged position, and Havana Docks' reliance on the limited presumption in favor of holders of certified claims is at odds with the statutory text and the canon of constitutional avoidance. *See* 22 U.S.C. § 6083(a)(1).

[2] Notably, Havana Docks does not embrace the baseless suggestion from the certified claim that it owned the terminal. *See* Doc. 73-8, at 7.

a. In effect, Havana Docks contends that Article III courts must accept every stray description of a property interest in a certified claim. *See* Havana Docks Br. 40-42. But the Helms-Burton Act requires only that a court "accept as conclusive proof of ownership of an interest in property a certification of a claim to ownership of that interest." 22 U.S.C. § 6083(a)(1). As explained in Carnival's opening brief (at 30-31), that presumption is limited to (1) the existence of an interest and (2) the value of that interest.

The Commission's organic statute does not change that interpretation. *See* Havana Docks Br. 49. That statute provides that the Commission's decisions "with respect to claims shall be final and conclusive on all questions of law and fact, and shall not be subject to review." 22 U.S.C. § 1622g; *see also* 22 U.S.C. § 1623(h) (similar). But the statute says nothing about what the Commission's decision encompasses.

Nor does the damages provision in the Helms-Burton Act require a court to defer to the Commission's description of the scope of a property interest. *See* Havana Docks Br. 49. The damages provision creates a "presumption that the amount for which a person is liable . . . is the amount that is certified" by the Commission. 22 U.S.C. § 6082(a)(2). Deference to a dollar value for purposes of damages, however, is perfectly consistent with de novo review of the scope of the claimant's property interest for purposes of liability.

Havana Docks next argues that the Commission "cannot certify the 'value' of a property interest without first identifying 'the nature or extent of [that] interest.'" Br. 49 n.5 (alteration in original) (quoting Carnival Br. 29). But identifying a property interest is different from evaluating its extent. And in the text of the statute, Congress has required a court to defer only to the existence and valuation of a claim.

b. Any ambiguity in the meaning of the presumption should be resolved in Carnival's favor to avoid the serious due-process concerns posed by Havana Docks' interpretation. *See* Carnival Br. 31-32; Royal Caribbean Br. 46-47. Havana Docks contends that it was enough that Carnival had notice of the Helms-Burton Act. *See* Br. 50-51. But a party is entitled not just to notice, but to "an opportunity to rebut charges leveled against it." *Stansell* v. *Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 727 (11th Cir. 2014), *cert. denied*, 575 U.S. 998, 577 U.S. 815 (2015). Havana Docks does not even discuss the relevant decisions of the Supreme Court and this Court cited by Carnival (at 31-32). And the cases Havana Docks cites (at 50-51) are unilluminating because they involve the constitutionality of notice, *see United States* v. *Locke*, 471 U.S. 84, 108 (1985); legislative classifications, *see Michael H.* v. *Gerald D.*, 491 U.S. 110, 119 (1989) (plurality opinion); *B&G Construction Co.* v. *Director, Office of Workers' Compensation Programs*, 662 F.3d 233, 253-254 (3d Cir. 2011); *Catlin* v. *Sobol*, 93 F.3d 1112, 1117 (2d Cir. 1996); *P.O.P.S.* v. *Gardner*,

998 F.2d 764, 766 (9th Cir. 1993); and a federal common-law rule, *see United States* v. *Chase*, 18 F.3d 1166, 1168-1169 (4th Cir. 1994).

2. Havana Docks also argues that, even if a court could revisit the non-conclusive aspects of the certified claim, the historical facts prove that it had a right to conduct passenger operations. *See* Br. 44-46. It contends that, because the concession granted usufruct rights "*greater* than the rights granted by a simple lease" and the Helms-Burton Act "specifically recognizes that 'any leasehold interest' is a protected property interest within the scope of the Act," "so too are the usufruct rights" in the concession. Havana Docks Br. 45-46. But even if its legal citations concerning usufruct rights under American law were somehow relevant to the question of Cuban law, that merely establishes the undisputed proposition that the usufruct rights granted by the concession constitute a cognizable interest under the Helms-Burton Act.

Although Carnival supported its arguments on the scope of the concession under Cuban law with the unrebutted report of Ambar Diaz, a Chambers-ranked expert in Cuban law with 30 years of experience who was acknowledged as an expert by the district court, *see* Doc. 428, Havana Docks presented no expert or other direct evidence that the Cuban government granted any right to conduct passenger operations. Havana Docks' failure to put forth any

contrary expert testimony leads to only one inference: that Ms. Diaz's conclusions are irrefutable. The proposal made by Sylvester Scovel to the Cuban government in 1904 sought to charge fees for cargo operations, but not passenger operations. *See* Carnival Br. 27; Doc. 331-1, at 8, 18; Doc. 331-4, at 11. The decree granting a concession accepted those rates. *See* Carnival Br. 27; Doc. 331-4, at 13. And as a matter of law, *see* Havana Docks Br. 47 n.4, the Cuban Law of Ports and Law of Public Works confirms that the Cuban government always retained ownership and control of the terminal and that Havana Docks lacked the right to exclude anyone. *See* Carnival Br. 27-28; Doc. 331, at 2; Doc. 331-1, at 7, 10-11, 14, 22; Doc. 331-3, at 11, 13-14, 18-19; Doc. 331-12, at 4.

In its statement of the facts, Havana Docks cites a handful of financial records indicating that Havana Docks collected a small amount of fees related to passengers during a brief period of time. *See* Br. 9-10. But Havana Docks never actually argues that those cryptic records prove it had a legal right to conduct passenger operations. Because Havana Docks had no interest in "property" that allowed it to conduct passenger operations at the terminal, the judgment below should be reversed.

B. Havana Docks' Concession Would Have Expired In 2004

Even if Havana Docks had the right to conduct passenger operations, that right would have expired in 2004. *See* Carnival Br. 32-35; Royal Caribbean Br. 35-45. Havana Docks argues that it can recover for conduct that occurred between 2016 and 2019 because the certified claim has no time limit and the concession is indefinitely tolled. Neither point is correct.

1. The certified claim (which has no time limit) does not replace the concession (which does) for all purposes. *See* Havana Docks Br. 52-57. To be sure, the plaintiff must "own[] the claim to such property," 22 U.S.C. § 6082(a)(1)(A), and the certified claim provides a baseline for the damages calculation, *see* 22 U.S.C. § 6082(a)(1)(A)(i)(I). But the cause of action is against a defendant who "traffics *in property which was confiscated* by the Cuban Government," 22 U.S.C. § 6082(a)(1)(A) (emphasis added), not a defendant who traffics in a certified claim. And the identification of the plaintiff in the statute refers to the person who "owns the claim *to such property*." 22 U.S.C. § 6082(a)(1)(A) (emphasis added).

This Court's decision in *Glen* v. *Club Méditerranée, S.A.*, 450 F.3d 1251 (2006), is not to the contrary. *See* Havana Docks Br. 52. As Carnival explained in its opening brief (at 35), the Court did not hold that a plaintiff acquires a limitless interest in property when its limited interest is confiscated. The Court merely held that the act-of-state doctrine precluded adjudication of common-law claims against the owners of confiscated property, and it rejected

the argument that the Helms-Burton Act "proclaim[ed] the ineffectiveness of the Cuban expropriations." *Glen*, 450 F.3d at 1255.

It is beside the point that, "[u]nless and until the governments of the United States and Cuba resolve the property claims of U.S. nationals, that claim remains alive and well." Havana Docks Br. 57. As discussed above, the text of the Helms-Burton Act requires "traffic[king] in property which was confiscated," which means the plaintiff must have had a property interest that would have been infringed if it had not been confiscated. Congress has not made just any American defendant liable to a plaintiff with a claim; it has made liable only those defendants who traffic *in confiscated property* to which the plaintiff owns a claim.

A variation on the hypothetical lease discussed by Havana Docks illustrates the point. *See* Br. 56. A tenant with a sixty-year lease beginning in 1959 might have a claim for trafficking that occurred in 2016 (still during the lease period). But a tenant with a one-year lease beginning in 1959 would not have a claim for trafficking that occurred in 2016, after the lease expired. For the same reason, Havana Docks may not recover based on trafficking that occurred after its concession would have expired of its own accord.

2. Havana Docks' more general characterization of the concession as having "44 years to run," Br. 53, is at odds with the undisputed facts and law. Havana Docks does not dispute that it acquired a concession that began in

1905 and ran, by its own terms, no later than 2004. *See* Doc. 331-1, at 18-20; Doc. 337, at 3. Nor does Havana Docks identify any case or principle of statutory interpretation that would extend its property interest under Cuban law because of the alleged confiscation.

Havana Docks resorts to grammatical analysis of the Commission's written decision, *see* Br. 53, but that analysis misses the mark. The Commission stated that "the terms of the concession granted by the Cuban Government were to expire in the year 2004." Doc. 73-8, at 9. The use of the subjunctive merely indicates that the concession would have expired in 2004. And it would have made no sense for the Commission to use the simple future tense ("will expire") if it meant to convey that the concession would have expired in 2004, because it is undisputed that the concession ceased to exist in 1960 (hence the subjunctive). *See* Royal Caribbean Br. 40-41. Accordingly, even if the judgment is not reversed, it should be vacated with a remand for further proceedings because the concession would have expired in 2004—before the conduct at issue on appeal.

II. CARNIVAL DID NOT ENGAGE IN TRAFFICKING BECAUSE ITS CONDUCT WAS 'INCIDENT' AND 'NECESSARY' TO 'LAWFUL TRAVEL'

Havana Docks argues that, although Carnival's travel was encouraged by the Executive Branch, it was not "incident" to "lawful travel," 22 U.S.C.

§ 6023(13)(B)(iii), because the Helms-Burton Act froze the relevant regulations in place in 1996. *See* Br. 61-67. Havana Docks further argues that, even if the Office of Foreign Assets Control (OFAC) could update those regulations, Carnival's travel did not comply with the regulations in place from 2016 to 2019. *See* Br. 67-88. And Havana Docks argues that Carnival's use of the terminal was not "necessary" to any lawful travel because it was not strictly necessary. *See* Br. 88-91. All of those arguments are unavailing.

A. Carnival's Travel Was 'Lawful'

1. Section 102(h) of the Helms-Burton Act provides that "[t]he economic embargo of Cuba, as in effect on March 1, 1996, including all restrictions under [the Cuban Assets Control Regulations], shall be in effect upon the enactment of this Act, and shall remain in effect, subject to section 6064 of this Act." 22 U.S.C. § 6032(h). Havana Docks argues that the foregoing provision is a "one-way ratchet" that allowed the Executive Branch to tighten, but not loosen, the regulations as they existed in 1996. Br. 61-62, 65-67. The district court correctly rejected that argument. *See* Doc. 477, at 118.

Section 102(h) merely clarifies that the Helms-Burton Act does not disturb the existing regulations. It provides that the regulations are "in effect" on the day of the Helms-Burton Act's enactment and "shall remain in effect" thereafter. That language simply prevented any inference that the new statute had superseded the existing regulations. Accordingly, there is no reason

to conclude that Congress "alter[ed] the fundamental details of a regulatory scheme in vague terms" by freezing the existing regulations in place. *Whitman* v. *American Trucking Associations*, 531 U.S. 457, 468 (2001).

Five administrations have modified the relevant regulations without objection from the courts or Congress. OFAC has modified its Cuba regulations at least 26 times over the last three decades, *see* OFAC, *Cuba Sanctions* <tinyurl.com/ofaccubasanctions> (last visited Nov. 20, 2023), including 13 revisions to the travel provision alone, *see* 31 C.F.R. § 515.560; *see also* Kucik Br. 6. This Court has recognized that "the regulations have been alternately loosened and tightened in response to specific circumstances." *Odebrecht Construction, Inc.* v. *Secretary*, 715 F.3d 1268, 1276 n.1 (2013) (internal quotation marks and citation omitted). And since the passage of the Helms-Burton Act, Congress has acknowledged—without any objection—an amended version of the regulations. *See* Trade Sanctions Reform and Export Enhancement Act of 2000, Pub. L. No. 106-387, § 910, 114 Stat. 1549A-67, 1549A-71-72. The Court should not abandon 30 years of practice on the theory that Havana Docks has "discover[ed] in a long-extant statute an unheralded power." *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 324 (2014).

The language of Section 102(h) contrasts with language Congress has used when it wished to eliminate the Executive Branch's power to regulate. For example, another Cuba-related provision states that "[n]o commodities

which may be exported under a general license described in section 771.9 of title 15, Code of Federal Regulations, as in effect on May 1, 1992, may be exported under a general license to any vessel carrying goods or passengers to or from Cuba or carrying goods in which Cuba or a Cuban national has an interest." 22 U.S.C. § 6005(b)(3). Similarly, Congress removed the Executive Branch's power under the International Emergency Economic Powers Act to "regulate or prohibit . . . any transactions ordinarily incident to travel to or from any country." 50 U.S.C. § 1702(b)(4). In short, Congress may "freeze existing restrictions" by "do[ing] so explicitly," *Regan* v. *Wald*, 468 U.S. 222, 236 (1984), but it has not done so here.[3]

2. Turning to the regulations as they existed when Carnival sailed to Cuba, Havana Docks does not dispute that Carnival complied with the carrier-services license as long as it complied with the people-to-people license. And Carnival complied with the terms of the general people-to-people license because its shore excursions offered "a full-time schedule of activities intended to enhance contact with the Cuban people, support civil society in Cuba, or

[3] Havana Docks cites (at 61) legislative history stating that "all economic sanctions in force on March 1, 1996, shall remain in effect until they are either suspended or terminated" following a change in Cuba's government. H.R. Rep. No. 104-468, at 45-46 (1996). But that report does not explicitly refer to OFAC's power to adjust its regulations. And in any event, this Court "do[es] not consider legislative history when the text is clear." *Villarreal* v. *R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 969 (2016) (en banc).

promote the Cuban people's independence from Cuban authorities" that "result[ed] in meaningful interaction" with Cubans. 31 C.F.R. § 515.565(b)(2)-(3) (2016).

a. Havana Docks first cites federal guidance that "brief exchanges with shopkeepers while making purchases" and "casual conversations with waiters at restaurants and hotel staff" do not constitute meaningful interaction. Br. 70. But like the district court, Havana Docks fails to explain why Carnival's excursions amounted to nothing more than "brief exchanges" and "casual conversations." Nor could it. The record indicates that guests visited local communities, where they would "engage with" and "meet with" Cubans, including "Cubans working to improve their communities," "members of [a dance] performance group," and "artists." Doc. 311-38, at 3, 9, 12; *see* Royal Caribbean Br. 56-58.

Havana Docks next asserts that Carnival's shore excursions were non-compliant because Carnival contracted with Havanatur, which (like many Cuban entities) is closely controlled by the Cuban government. *See* Br. 71. But Havana Docks identifies no evidence that Havanatur personnel prevented "meaningful interaction" with local communities that "enhance[d] contact with the Cuban people" and "support[ed] civil society in Cuba." 31 C.F.R. § 515.565(b)(2)-(3) (2016). Moreover, every excursion exposed Cubans to the American way of life, even if Havanatur employees were present as well.

Havana Docks further cites a draft description of a cruise offered by a Carnival affiliate. *See* Br. 73-74. The annotations of that draft were designed to clarify "the type of cruise it is"—a people-to-people cruise—as well as "the US government entity that controls travel to the island." Doc. 310-3, at 2. The fact that Carnival sought to communicate carefully and remain sensitive to the Cuban government's reactions is perfectly consistent with conducting people-to-people travel.

For similar reasons, it is irrelevant how the Cuban government characterized Carnival's activities in Cuba. *See* Havana Docks Br. 74. All that matters is whether the shore excursions actually complied with the terms of OFAC's general licenses.

b. Carnival's evening excursions did not render the people-to-people expeditions noncompliant. As an initial matter, Carnival did not, as Havana Docks suggests, "acknowledge[]" that its evening tours did not qualify as people-to-people activities. *See* Br. 75. Rather, in an abundance of caution, Carnival advised its passengers that they needed a "full schedule of [compliant] activities" without taking into account the evening excursions. Doc. 311-38, at 4, 6, 8.

Havana Docks misreads OFAC's regulations as prohibiting any time spent by even a single passenger on something other than interacting with Cubans for educational purposes. Br. 75-76. Havana Docks cites an example

of noncompliant travel from the regulations, but that example involved an individual who "plans to spend *a few days* engaging in brief exchanges with Cuban food vendors while spending time at the beach." 31 C.F.R. § 515.565(b) (example 5) (2016) (emphasis added). Here, however, passengers spent seven to eight hours engaged in people-to-people programming *each day* in Cuba. *See*, *e.g.*, Doc. 311-38, at 3, 11. Havana Docks also cites versions of the regulations stating that "transactions in connection with tourist travel," 31 C.F.R. § 515.560(f) (2015), and "activities that are primarily tourist-oriented," 31 C.F.R. §§ 515.565(c) (2016), 515.565(f) (2017), were not authorized. But Havana Docks fails to explain why free time after a full day of people-to-people activities is "in connection with tourist travel" or "primarily tourist-oriented."

As explained in Carnival's opening brief, penalizing cruise lines for a single passenger spending a single moment doing something other than people-to-people programming would be contrary to the government's purpose of encouraging travel to Cuba and inconsistent with contemporaneous OFAC guidance allowing "free time or recreation" that is not "in excess of that consistent with a full-time schedule." Department of the Treasury, *Frequently Asked Questions Related to Cuba* 5 (Mar. 15, 2016) <tinyurl.com/FAQ-3-15-16>; Carnival Br. 41. As one amicus has observed, Havana Docks' draconian interpretation would prohibit a "rest stop" or "a ten-minute bus ride from activity to activity." CLIA Br. 18. It would also find unlawful a plethora of itineraries

offered by numerous non-profit organizations. *See id.* at 20-23. That is absurd, and it cannot be what OFAC intended.

c. Havana Docks cites three decisions in passing, none of which is on point. *First*, in *United States* v. *Fuentes-Coba*, 738 F.2d 1191 (11th Cir. 1984), the defendant was convicted of smuggling "airplane parts, bulk quantities of United States coins, and communications equipment" into Cuba, *id.* at 1195—a far cry from Carnival's excursions. *Second*, the impermissible study-abroad trips in *Emergency Coalition to Defend Educational Travel* v. *Department of Treasury*, 545 F.3d 4, 7 (D.C. Cir. 2008), are unlike the full-day people-to-people programming at issue here. *Third*, there is no dispute that a regulation "must be construed in light of the statute" it implements, *United States* v. *Marte*, 356 F.3d 1336, 1341 (11th Cir. 2004); here, the only reasonable reading of the regulations permitted Carnival's conduct.

Carnival set sail with the open encouragement of the American government, to ports inspected by the United States Coast Guard, after disclosing sample itineraries to OFAC, and pursuant to licenses from OFAC and the Commerce Department. *See* Doc. 326, at 6. The chilling effect of holding Carnival liable now for that travel would leave any sensible business hesitant to cooperate with the Executive Branch's foreign-policy initiatives in the future. *See* USTA Br. 7-14. Because the statutory text and regulations do not require that result, the Court should hold that Carnival's travel was lawful.

B. Carnival's Use Of The Terminal Was 'Necessary To' The Conduct Of Its Lawful Travel

Carnival's use of the terminal was also "necessary to" the conduct of its lawful travel. In ordinary speech and in context, "necessary" means "important, helpful, or appropriate." And even if "necessary" meant "indispensable," docking at the terminal was indispensable for Carnival's voyages to Havana.

1. Interpreting "necessary" to mean important, helpful, or appropriate would not render superfluous the words "incident to lawful travel." Havana Docks Br. 90. The term "incident" has to do with the degree of connection between the conduct and lawful travel. *See* Carnival Br. 36 n.4. In that regard, it is similar to the phrase "pertain directly to." And this Court has not hesitated to construe "necessary" to incorporate a "test of reasonableness," even when used alongside the phrase "pertain directly to." *Inbesa America, Inc.* v. *M/V Anglia*, 134 F.3d 1035, 1036 (1998) (citation omitted).

In addition, Havana Docks argues that "necessary" does not mean important, helpful, or appropriate when accompanied by the phrase "to the extent." Br. 89. But two of the cases it cites adopted a definition similar to Carnival's. *See id.* In *Campbell* v. *Universal City Development Partners, Ltd.*, 72 F.4th 1245 (2023), this Court interpreted "necessary" discrimination in the Americans with Disabilities Act, 42 U.S.C. § 12182(b)(2)(A)(i), to include eligibility criteria without which "a public accommodation could not feasibly safely

administer [its] facility." 72 F.4th at 1260. And in *United States* v. *Church of Scientology of Boston, Inc.*, 933 F.2d 1074, 1078 (1991), the First Circuit interpreted "to the extent necessary" to mean "significantly help[ful]." *Id.* at 1077, 1079 (citation omitted).

Cinnamon Hills Youth Crisis Center, Inc. v. *Saint George City*, 685 F.3d 917 (10th Cir. 2012), and *Vorchheimer* v. *Philadelphian Owners Association*, 903 F.3d 100 (3d Cir. 2018), are not on point. The holding in *Vorchheimer* was "limited to [a] particular provision of the Fair Housing Amendments Act." 903 F.3d at 107. And the analysis in *Cinnamon Hills* relied on that statute's "objective of equal housing opportunities between those with disabilities and those without." 685 F.3d at 923. Both decisions contain broader dicta indicating that "necessary" means strictly necessary, but those dicta are flatly inconsistent with the Supreme Court's recognition that "necessary" may mean "something that is merely important." *Ayestas* v. *Davis*, 138 S. Ct. 1080, 1093 (2018).

To the extent the Court concludes that the term "necessary" is ambiguous, any ambiguity should be construed in Carnival's favor to avoid serious constitutional problems. *See* Carnival Br. 45; *see also* Havana Docks Br. 88-89 & n.11. Havana Docks offers no response to Carnival's argument that the imposition of liability for conduct that the President encouraged and OFAC authorized may violate the Due Process Clause of the Fifth Amendment to the

Constitution. *See* Carnival Br. 45. As such, even if "necessary" were ambiguous, this Court should conclude that "necessary" means important, helpful, or appropriate.

2. In any event, Carnival's use of the terminal was strictly necessary because it was impossible for Carnival to dock anywhere else in Havana. *See* Carnival Br. 45-46. Havana Docks repeats the district court's reasoning that, if docking somewhere else in Cuba were possible, then docking at the terminal was not "necessary." *See* Br. 90-91. But like the district court, Havana Docks has identified nothing in the statute or regulations restricting the category of lawful travel to specific Cuban cities. Nor does Havana Docks address Carnival's argument that the statute refers to the use of property that is "necessary to the conduct of *such* travel," 22 U.S.C. § 6023(13)(B)(iii) (emphasis added), which most naturally refers to the travel that Carnival actually undertook. *See* Carnival Br. 45-46. If the Helms-Burton Act prohibited the use of confiscated property simply because a defendant could travel somewhere else in Cuba, it is hard to imagine what transaction or use of property would ever be necessary to lawful travel.

The fact that cruises to other cities were permitted to dock elsewhere, *see* Havana Docks Br. 90-91, is irrelevant. Havana Docks does not dispute that the Cuban government required Carnival to dock at the Havana Cruise Terminal when traveling to Havana. *See* Carnival Br. 46. So while the use of the

terminal may not have been "necessary" for other cruises, it was "necessary" for Carnival. Because Carnival's use of the terminal was not "trafficking" within the meaning of the Helms-Burton Act, the judgment below should be vacated and the case remanded for further proceedings.

III. HAVANA DOCKS IS NOT A PROPER PLAINTIFF BECAUSE IT IS NOT A UNITED STATES NATIONAL

The judgment below should also be reversed for the independent reason that Havana Docks is not a "United States national" and thus not a proper plaintiff. 22 U.S.C. § 6082(a)(1)(A). A "United States national" is "any United States citizen," 22 U.S.C. § 6023(15)(A) ("paragraph (A)"), or "any other legal entity which is organized under the laws of the United States . . . and which has its principal place of business in the United States," 22 U.S.C. § 6023(15)(B) ("paragraph (B)"). Havana Docks failed to allege that it was a United States citizen under paragraph (A), and its principal place of business was not in the United States under paragraph (B).

1. Havana Docks cannot avail itself of paragraph (A) because it failed to plead that it was a "United States citizen." 22 U.S.C. § 6023(15)(A); *see* Havana Docks Br. 95-96 n.12. Havana Docks was required to plead "enough facts to state a claim to relief that is plausible." *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). Here, it did not do so, because it described itself as a "Delaware corporation" with a Kentucky address and as "a U.S. National under 22 U.S.C. § 6023(15)(B)." Doc. 149, at 2.

In any event, paragraph (A) applies only to natural persons. Havana Docks contrasts Section 6023(15) with Section 6023(8), *see* Br. 93-94, but Section 6023(8) does the same thing as Section 6023(15): it distinguishes natural persons from artificial persons. And Havana Docks' argument that "Congress knows how to distinguish between natural and corporate persons when it wants," Br. 93, assumes the answer to the question here. As Section 6023(8) demonstrates, there are multiple ways to communicate that distinction, rendering unilluminating instances where Congress did so using different words.

2. Turning to paragraph (B), Havana Docks did not have its "principal place of business" in the United States when it filed this lawsuit. *See* Carnival Br. 47-50. Havana Docks agrees that the "nerve center" test in *Hertz Corp.* v. *Friend*, 559 U.S. 77, 96 (2010), determines where a plaintiff has its principal place of business. *See* Br. 97. But its nerve center was in Europe.

Havana Docks relies on authorities from other courts for the proposition that a corporate officer's physical location, without more, does not determine the principal place of business. *See* Br. 100-101. Those cases are distinguishable because they involved corporate actors that did not exercise ultimate decisionmaking authority. *See Johnson* v. *SmithKline Beecham Corp.*, 724 F.3d 337, 356 (3d Cir. 2013); *St. Paul Fire & Marine Insurance Co.* v. *Scopia Windmill Fund, LP*, 87 F. Supp. 3d 603, 608 (S.D.N.Y. 2015); *Moore* v. *Johnson &*

Johnson, 907 F. Supp. 2d 646, 660-661 (E.D. Pa. 2012). Havana Docks President Mickael Behn, by contrast, exercised ultimate decisionmaking authority from Europe when he approved communications, records, the retention of an accountant and lawyers, the payment of fees, and lobbying and legal strategies, not to mention when he offered Jerry Johnson—on whom Havana Docks relies to establish its nationality—a position as an officer and board member. *See* Doc. 331, at 11, 14-15.

Havana Docks further argues that its principal place of business is in Kentucky because its former manager—who had been deceased for eight years when this suit was filed—once worked there. *See* Br. 97-98. But even if that manager's location were relevant in the past, a company's principal place of business can move.

Finally, in arguing that Johnson was the "brain" of the company, *see* Br. 101-103, Havana Docks disregards the wealth of evidence establishing that Behn exercised actual direction and control over Havana Docks' affairs, *see* Carnival Br. 48, including Johnson's testimony that Behn "would win out" if they disagreed. Doc. 349-5, at 9. That evidence warrants reversal because it shows Havana Docks was not a United States national. At the very least, the judgment should be vacated and the case remanded for a trial regarding Havana Docks' principal place of business.

IV. AT A MINIMUM, THE DAMAGES AWARD SHOULD BE SET ASIDE

Even if Carnival were liable under the Helms-Burton Act, the damages award would be excessive for two reasons. *First*, the one-satisfaction rule prevents multiple recoveries for the same injury, which is what Havana Docks has obtained here. *See* Carnival Br. 50-54; Royal Caribbean Br. 78-82. *Second*, the damages award is unconstitutionally excessive under the Due Process Clause. *See* Carnival Br. 54-55; Royal Caribbean Br. 84-85.

A. The 'One-Satisfaction Rule' Prohibits Duplicative Awards For The Value Of The Terminal

1. Havana Docks does not dispute that the one-satisfaction rule is a background common-law and equitable principle that "generally provides that a plaintiff is entitled to only one satisfaction for a single injury." *BUC International Corp.* v. *International Yacht Council Ltd.*, 517 F.3d 1271, 1276 (11th Cir. 2008); *see* Carnival Br. 50-53. Havana Docks briefly argues that the text of the Act does not expressly preclude multiple recoveries for the same injury, *see* Br. 118, but that misses the point. The rule forms part of the interpretive backdrop for statutory causes of action "in the nature of a tort," unless the statute overrides that rule. *BUC International*, 517 F.3d at 1278 (citation omitted).

Havana Docks also points to the statutory limitations on multiple recoveries, *see* Br. 118-119, but it draws the wrong inference from those limitations.

See 22 U.S.C. §§ 6082(f)(1)(A), 6082(f)(1)(B), 6082(f)(2)(A)(i). As Carnival explained in its opening brief (at 51-52) those limitations on multiple lawsuits, as well as lawsuits to recover amounts already satisfied by a settlement of claims, indicate that Congress was concerned with the problem of multiple recoveries.

2. Contrary to its contention, Havana Docks is not newly injured each time a cruise line uses the property at issue. *See* Br. 120-123. Havana Docks correctly argues that trafficking makes a defendant liable under the Act, but that is not the injury for which a plaintiff may seek compensation. The statute authorizes the plaintiff to recover the value of its confiscated property, whether in the amount of a certified claim, the fair-market value of the property, or a valuation determined by other means. *See* 22 U.S.C. § 6082(a)(1)(A)(i). Congress notably did not authorize disgorgement or any other remedy calculated based on the trafficking itself.

That conclusion does not mean that Congress has "provide[d] a license for anyone to traffic at will once a particular plaintiff recovered against any defendant." Havana Docks Br. 123. Rather, at that point, the statute has simply accomplished its objective. Congress sought to remedy the injury of confiscation, and when a plaintiff has recovered the amount of that injury, it has been made whole.

This Court's decision in *Garcia-Bengochea* v. *Carnival Corp.*, 57 F.4th 916 (2023), is not to the contrary. *See* Havana Docks Br. 121. The Court did

recognize that a trafficker's "failure to obtain permission and pay for use of the property constitutes a pocketbook injury" for purposes of Article III standing. *Garcia-Bengochea*, 57 F.4th at 924. But the Court did not hold that each use of the same property by a different defendant constitutes a separate injury for purposes of damages, which were not at issue in that appeal.

Havana Docks freely admits that it could recover unlimited damages, and that result is nonsensical. *See* Havana Docks Br. 124. It may well be that Congress "desire[d] to deter" certain activities related to the Cuban regime. *Id.* But a congressional intent to deter certain behavior is not the same as a congressional intent to award a windfall to a plaintiff each time the behavior occurs, in the absence of a separate injury each time. For that reason alone, the damages award should be vacated and the case remanded.

B. The Damages Award Violates The Due Process Clause

Even if the damages award were consistent with the statute, it would still be unconstitutionally excessive. Havana Docks seeks to discount the Supreme Court's due-process cases as old, but the Constitution does not require a right to be "in vogue," Br. 128, in order to be protected. And in any event, lower courts have continued to review awards of statutory damages under the Due Process Clause. *See*, *e.g.*, *Golan* v. *FreeEats.com, Inc.*, 930 F.3d 950, 962 (8th Cir. 2019); *see also* Chamber Br. 7-12.

Havana Docks invokes the legislative decisions underlying the Helms-Burton Act's damages provision. *See* Br. 129. But the mere fact that Congress did not "allow[] for the reduction of statutory damages" or otherwise "create flexibility in statutory damages," does not mean that damages awarded under that statute are constitutional. *Golan*, 930 F.3d at 962.

Havana Docks' comparison of the amount of Carnival's net revenues with the amount of the award is inapt. *See* Br. 133. As discussed above, Title III creates a remedy for the value of property, not the revenue allegedly derived from trafficking in that property. *See* p. 26. Title III does not create a disgorgement remedy, as Havana Docks seems to suggest.

Finally, Havana Docks' characterization of Carnival's conduct is incorrect. *See* Br. 132-133. Carnival did not sail to Cuba because of an unlawful "lure of doing business in Cuba." *Id.* at 132. It instead sailed because it was lawful, and it did so in the context of a presidential foreign-policy initiative that promoted cruises to Cuba. *See* Carnival Br. 37-42, 45. Those facts are relevant because, where a defendant has no reason to "believe[] it was . . . violating" the law, a large award is more likely to be unconstitutional. *Golan*, 930 F.3d at 962; *see also* Chamber Br. 17-22. There is thus no need for deterrence in this case.[4]

[4] Finally, Carnival did not "waive[]" the argument, Havana Docks Br. 106, which it incorporates by reference, that it did not "knowingly and intentionally" traffic. Carnival denied that allegation. *See* Doc. 279, at 4.

CONCLUSION

The judgment of the district court should be reversed, and the case remanded with instructions to enter judgment in favor of Carnival. In the alternative, the judgment of the district court should be vacated, and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, a member of the Bar of this Court and counsel for defendant-appellant Carnival Corporation, hereby certify, pursuant to Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and 32(a)(7), that the attached Reply Brief of Defendant-Appellant Carnival Corporation is proportionately spaced, has a typeface of 14 points or more, and contains 6,498 words.

NOVEMBER 20, 2023

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