UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ROBERT M. GLEN,	)	
Plaintiff,	)	
v.	)	**CASE NO. 9:19-cv-23994-CMA**
AMERICAN AIRLINES, INC.,	)	
Defendant.	)	

DEFENDANT AMERICAN AIRLINES, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT, OR, IN THE ALTERNATIVE, TO TRANSFER VENUE

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American played no role in the commercial activity at the property allegedly confiscated from Plaintiff's ancestors in Cuba (the "Property"). The Cuban government, not American, expropriated the Property. And third parties, not American, built and operate the hotels (the "Subject Hotels") there. Indeed, American did not even choose to make reservations at the Subject Hotels available on the BookAAHotels.com website ("BookAAHotels")—that was a decision made by Booking.com ("Booking"). As American's Motion to Dismiss explained, these facts bar this case from going forward in this Court, and nothing in Plaintiff's Response alters this conclusion. Moreover, even if the Court were to reach the merits, Plaintiff's claim must be dismissed on several grounds, including that he admits to acquiring his claim to the Property outside the time period established by Congress, and that any involvement by American in facilitating travel to Cuba is not "traffic[king]" as Congress defined that term. American's motion should be granted.

ARGUMENT

I. PLAINTIFF'S CLAIM IS BARRED BY ESSENTIAL THRESHOLD REQUIREMENTS OF STANDING, PERSONAL JURISDICTION, AND VENUE.

A. Plaintiff Lacks Article III Standing.

To begin, Plaintiff lacks Article III standing because he has not suffered a concrete injury-in-fact that is fairly traceable to American. Plaintiff does not dispute that Cuba's confiscation extinguished any legally protected ownership interest that he or his family had in the Property. *See* Def.'s Motion (Dkt. 52) ("Mot.") 3–4.[1] He thus disclaims reliance on any injury traceable to the confiscation of, or the ongoing activities on, the Property. *See* Pltf.'s Opposition (Dkt. 56) ("Opp.") 10–11. Instead, Plaintiff asserts that he "need not allege actual harm beyond" American's alleged trafficking in violation of the HBA. *Id.* at 10 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (Thomas, J., concurring)).

Plaintiff's argument conflicts with the Supreme Court's majority opinion in *Spokeo* and Eleventh Circuit precedent. *Spokeo* holds that "Article III standing requires a concrete injury

[1] Indeed, Plaintiff's supplemental authority, a recent order from Judge Bloom in *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, No. 19-cv-23591 (S.D. Fla. April 15, 2020) (ECF 53), confirms that "the Cuban Government's expropriation of [property] extinguishe[s] all rights" a plaintiff has in that property. *Id.* at 18. The order is otherwise irrelevant to this case: it does not address the effect of expropriation on Article III standing, and instead focuses on how the HBA applies to a certified claim covering a confiscated temporary leasehold. This case involves no certified claim or temporary leasehold.

even in the context of a statutory violation." 136 S. Ct. at 1549 (majority op.) (emphasis added). Thus, while Congress can enable individuals to sue over "concrete, *de facto* injuries that were previously inadequate in law," this "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever [(1)] a statute grants a person a statutory right and [(2)] purports to authorize that person to sue to vindicate that right." *Id.* Rather, "[a] plaintiff [still] must suffer some harm or risk of harm from the statutory violation to invoke the jurisdiction of a federal court." *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[I]njury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.").

Here, Plaintiff has not identified any such harm. Although he refers vaguely to his "actual, concrete injury," he never specifically identifies the alleged concrete injury he has suffered. Opp. 10–11. The closest he comes is to suggest that he suffered economic harm when American allegedly facilitated reservations without "any payment to [Plaintiff]." *Id.* at 9–10; *see also id.* at 11 ("Even if the Subject Hotels fail to compensate [Plaintiff] out of their profits, so, too, does American."). But the HBA does not grant Plaintiff any affirmative right in the Property, including any right to share profits from operations or lodging at the Property. The HBA does create a cause of action for statutory damages, but "entitlement to statutory damages does not, on its own, amount to a concrete injury." *Zia v. CitiMortgage, Inc.*, 210 F. Supp. 3d 1334, 1344 (S.D. Fla. 2016). And in any event, Congress could not statutorily create an injury-in-fact for Plaintiff based on use of the Property because Plaintiff has no ownership interest in the Property that could be harmed. Mot. at 3–4; *see Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771–74 (2000) ("An interest unrelated to injury in fact is insufficient to give a plaintiff standing."); *United States v. Amodeo*, 916 F.3d 967, 971 (11th Cir. 2019) ("[S]tanding in a forfeiture proceeding" requires litigants to "ha[ve] an interest in the property subject to the forfeiture" because absent such an interest, "there is no case or controversy.").

Resisting this conclusion, Plaintiff predicates his standing theory on Justice Thomas's concurrence in *Spokeo*. Opp. 9–10. But that concurrence is not binding Supreme Court precedent, and Justice Thomas's views on this issue are not the law. Plaintiff also invokes this Court's decision in *Guarisma v. Microsoft Corp.*, 209 F. Supp. 3d 1261 (S.D. Fla. 2016). Opp. 10. There, the Court held that a plaintiff had standing to sue because (1) the Fair and Accurate Credit Transactions Act ("FACTA") "created a substantive right" for consumers "to

receive printed receipts truncating their personal credit card numbers," and (2) the plaintiff alleged that he received a receipt that failed to truncate his card number. *Guarisma*, 209 F. Supp. 3d at 1267. The Court did not require the plaintiff to allege that he suffered any concrete harm from the defendant's failure to truncate his credit card number.

Plaintiff's reliance on *Guarisma* is misplaced. To begin with, after *Guarisma* was decided, the Eleventh Circuit held that "[a] plaintiff must suffer some harm or risk of harm from [a] statutory violation to invoke the jurisdiction of a federal court." *Nicklaw*, 839 F.3d at 1003; *see also Spokeo*, 136 S. Ct. at 1550 (explaining that not all statutory violations "cause harm or present any material risk of harm"). And based on subsequent precedent, "several courts outside of this circuit have questioned the reliance of courts within this circuit on *Guarisma* and *Hammer*[*v. Sam's E., Inc.*, 754 F.3d 492 (8th Cir. 2014)]," on which *Guarisma* relied. *Gesten v. Burger King Corp.*, No. 17-cv-22541, 2017 WL 4326101, at *3 (S.D. Fla. Sept. 27, 2017). For example, the Eighth Circuit has observed that, because of *Spokeo*, *Hammer* is "no longer good law." *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 957 (8th Cir. 2019); *see also Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 119 (3rd Cir. 2019) ("Kamal's alleged injury"—receiving a receipt that did not adequately truncate his card number—"is not itself concrete and the alleged risk of identity theft is too speculative to satisfy the requirement of concreteness.").[2]

Further, and in any event, *Guarisma* is distinguishable. In *Guarisma*, the Court emphasized that "FACTA created a substantive legal right for Guarisma and other consumers to receive printed receipts truncating their personal credit card numbers, and thus protecting their financial information." 209 F. Supp. 3d at 1267. But as noted above, the HBA does not give Plaintiff any substantive rights in the Property, or entitle him to any revenue from the operations at, or reservations regarding, the Property. Moreover, FACTA concerns protection of a consumer's own financial information. Thus, a risk of disclosure of the information would bear directly on the consumer's own financial protection. In contrast, "trafficking" under the HBA does not cause Plaintiff to suffer any cognizable injury, because he does not own or have a right to possess the Property. Plaintiff would be no better off if the Property sat undeveloped in Cuba;

[2] The Eleventh Circuit recently held that a FACTA plaintiff had standing to sue in circumstances similar to those in *Guarisma*. *See Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175 (11th Cir. 2019). A majority of the Eleventh Circuit vacated the panel opinion and granted rehearing en banc. 939 F.3d 1278. The en banc court heard argument on February 25, 2020, but has not yet rendered a decision. *Muransky v. Godiva Chocolatier, Inc.*, No. 16-16486 (11th Cir.).

he is denied use of the land because the Cuban government confiscated it, not become someone later built hotels there. *Guarisma* does not help Plaintiff.

Plaintiff's final argument is that if he does not have standing, the HBA's cause of action "will become a nullity." Opp. 12. It is true that, because former owners of confiscated property lack legally protected interests in their former property, they are unlikely to have standing to sue anyone under the HBA. This constitutional problem likely exists because Congress passed the HBA before the Supreme Court had refined its Article III standing analysis for pure statutory violations. Mot. 3. Nonetheless, it is well settled that "the assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013) (alteration and quotation marks omitted).

B. This Court Lacks Personal Jurisdiction Over American.

General personal jurisdiction. Plaintiff fails to show that this Court has personal jurisdiction over American. Plaintiff half-heartedly suggests that American's presence in Miami may meet the "at home" test for general jurisdiction. Opp. 17. But Plaintiff makes no effort to show that American is directed or controlled through a surrogate nerve center in Miami. He does not rebut American's showing that nearly all executive officers are in Texas; that the one such officer in Florida reports directly to a superior in Texas; and that all high-level policies and decisions regarding American's operations (including its Miami operations) are made in Texas. Mot. 6. These facts alone are sufficient to refute Plaintiff's argument. *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1318 (11th Cir. 2018).[3]

Specific personal jurisdiction. Plaintiff also fails to establish that this Court has specific jurisdiction over American for his claim. Plaintiff devotes most of his discussion to Florida's long-arm statute. But American has not challenged statutory jurisdiction. Rather, it raises a due process challenge, asserting that the "purposeful availment" and "arising out of" elements of the

[3] Plaintiff also relies on the fact that American advertises itself as "Miami's hometown airline." Opp. 15. But that is a marketing phrase, not a legal description, and American also uses the phrase for its hubs in North Carolina and Pennsylvania. Mot. 6. Plaintiff's other evidence shows only that American has a sizeable business in Miami—just as it does in its other hubs in North Carolina, Pennsylvania, and Illinois. *Id*. Plaintiff offers no reason why these facts are any different from those rejected as "plainly" inadequate in *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014); *see Waite*, 901 F.3d at 1318 ("*Daimler* tells us that even 'substantial, continuous, and systematic' business is insufficient to make a company 'at home' in the state."). Plaintiff does not cite a single case in which a court has found general jurisdiction based on a "surrogate" principal place of business.

specific jurisdiction test are not satisfied in Florida based on the use of a globally available hotel-booking website, BookAAHotels.[4] Mot. 5–9. Use of the website is insufficient to establish personal jurisdiction for two reasons: (1) the website is controlled by a third party, and (2) operating a globally available website does not establish jurisdiction in each state in which a person interacts with it. Plaintiff's responses to these arguments are unavailing.

To start, specific jurisdiction is absent here because Plaintiff's suit is based on the actions of a third party, Booking. Mot. 7. Booking controls and operates the website BookAAHotels, and Booking unilaterally made the decision to list the Subject Hotels—the heart of the alleged trafficking at issue here. Mot. 7–8. Plaintiff asserts that this argument "should be disregarded" because it is a "merits argument." Opp. 14 n.7. But control of the website is directly relevant to both the purposeful availment and arising out of requirements, which together help "ensure[] that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *see also id.* at 472–73; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, (1984). Now that jurisdictional discovery is closed, this Court cannot simply accept the allegations in the Complaint as true on a material jurisdictional point when the defendant has presented contrary evidence. *See Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009).

The record demonstrates that Booking made the unilateral decision to post specific hotels on the website, including the Subject Hotels. Mot. 7. There is direct, specific, and unrefuted testimony that Booking "controls what is inside, the inventory inside" the website. Pl.'s Ex. A (Markwood Dep.) 42:16–17; *id.* 160:9–12; 161:12–15. In response, Plaintiff points only to a general statement about a "partnership" between American and Booking, and a handful of general provisions from the American/Booking contract, such as a clause stating that the website would be designed "in consultation with American." Opp. 14–15. Those general provisions do not speak to the specific issue here: whether Booking made independent decisions about which hotels to include on the website in real time. Other contract provisions specifically confirm that

[4] Plaintiff asks the Court not to reach specific jurisdiction because American allegedly "waived a due process argument" during a discovery hearing. Opp. 16. But as is clear from the cited transcript, counsel stated only that American would not challenge the *third element* of the due process test for specific jurisdiction, whether exercising jurisdiction would comport with "fair play and substantial justice." Pl.'s Ex. DD at 32:18–19; 33:4–16.

Booking made those decisions. Pl.'s Ex. F at App. 5 §§ 2(a), 2.1, 3(b). American cannot be subjected to specific jurisdiction in Florida based on Booking's conduct.

Even if Booking's actions could be imputed to American, the "purposeful availment" element would also be absent because operating a generally available booking website does not establish personal jurisdiction in every state where a resident makes a reservation. Mot. 8.[5] None of Plaintiff's three responses to this argument has merit. First, Plaintiff argues that "American repeatedly solicited South Florida residents to make reservations at the Subject Hotels." Opp. 12. But the website was equally accessible in every state. The mere fact that some customers in Florida booked hotels using the website does not mean American purposefully targeted Florida residents. If the rule were otherwise, "every hotel operator would be subject to personal jurisdiction in the state of residence of every guest who used the hotel's website to make the reservation." *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 143 n.6 (4th Cir. 2020); *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1357 (11th Cir. 2013) ("[O]peration of an interactive website alone" does not "give[] rise to purposeful availment anywhere [it] can be accessed."). It is also irrelevant that American sent automatic flight confirmation emails to customers in Florida after they purchased tickets. Such emails go to every customer anywhere who purchases a ticket; they do not target any specific state. They also do not "solicit[]" anyone "to make reservations at the Subject Hotels," Opp. 8; they simply provide a link to BookAAHotels. Pl.'s Exs. A (Markwood Dep. 47:11–49), L, M, N.

Second, Plaintiff notes that "70% of Book AA Hotels users who reserved rooms at the Subject [H]otels were in South Florida." Opp. 13. But that is just the kind of "random" or "fortuitous" activity that cannot support jurisdiction. *Burger King*, 471 U.S. at 475. Reservations at those hotels were available to anyone. The fact that more Florida residents than others booked them is not a result of any purposeful targeting of Florida.

Finally, Plaintiff claims that "over half of the reservations were bundled with flights on American from Miami to Cuba." Opp. 13. But the testimony Plaintiff cites states only that these customers booked flights on American, not that they booked flights *from Miami to Cuba*.

[5] Because the property giving rise to Plaintiff's trafficking claim is in Cuba, this is not a case in which jurisdiction is proper because a company uses website sales to ship goods into the forum state. *See Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1357 (11th Cir. 2013) (upholding personal jurisdiction because defendant shipped goods into Florida); *Carmel & Co v. Silverfish, LLC*, 2013 WL 1177857, at *6 (S.D. Fla. Mar. 21, 2013) (same).

Markwood Dep. 109:20–110:8. Regardless, Plaintiff's cause of action is not based on flights; it arises from booking hotels. It makes no difference to Plaintiff's claim whether a customer books a hotel with or without a flight, and the website permits both options. Markwood Dep. 17:17–18:10, 41:7–13. Indeed, Plaintiff's own argument acknowledges that nearly half the reservations were *not* connected to an American flight. Because Plaintiff's claim is independent of American's flights to Cuba, those flights do not establish specific jurisdiction in Florida.

C. Venue Is Both Improper In This District And More Convenient Elsewhere.

For the reasons American set forth in its motion (including this Court's lack of personal jurisdiction over American), venue in the Southern District of Florida is improper, and the Complaint should be dismissed on that basis. Mot. 9. In the alternative, if the Court declines to dismiss, it should transfer this action to the Northern District of Texas "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a); *see also* 28 U.S.C. § 1406(a) (allowing a court, in lieu of dismissal, to transfer an action to a proper district).

This case has far more to do with Texas than Florida. Both Plaintiff and American reside in Texas, making that forum more convenient for both parties. AC ¶ 15; Mohr Decl. ¶ 2. Plaintiff's claim is based on a hotel-booking website accessible from anywhere in the world. All the American employees who manage American's relationship with Booking and the BookAAHotels website work in Texas. Markwood Decl. ¶ 2. Records related to the website are in Texas. And witnesses who can testify about those records are in Texas. Thus, to the extent there is any domestic "locus of operative facts" surrounding Plaintiff's claim, it is in Texas. *See Carucel Invs., L.P. v. Novatel Wireless, Inc.*, 157 F. Supp. 3d 1219, 1227 (S.D. Fla. 2016). Moreover, federal courts in Texas have as much familiarity with federal law and ability to engage in statutory analysis as federal courts in Florida, and there is no legitimate reason that a trial in Florida would be more efficient than in Texas, where the parties are located and the relevant American employees reside. *Id.* at 1229 n.5.

Other aspects of the case focus on Cuba. Plaintiff claims that his great-grandfather took ownership of beachfront property in Cuba, apparently by "travel[ing] by boat to the peninsula and build[ing] improvements upon it." AC ¶ 28. Any historical ownership records would be located in Cuba; and any information about whether pre-revolutionary Cuba recognized Glen's ancestor's alleged ownership of the property would likely be found in Cuba. Connections between this case and *Cuba*, however, do not provide a basis for litigating the case in *Florida*.

Plaintiff gives no reason why litigating in his home state of Texas would be inconvenient for him or why the relative means of the parties would matter when both parties reside in the same state. Instead, he claims that Florida will be more convenient for "non-party witnesses," specifically for Florida residents who booked a reservation at one of the Subject Hotels using BookAAHotels. Opp. 18–19. But there is no reason Florida customers would be witnesses at trial, let alone "key" witnesses. Opp. 2. To begin, the customers' Florida residence is relevant (if at all) only to personal jurisdiction, not the merits. Once personal jurisdiction is resolved, it makes no difference where customers lived when they used the website to book a reservation. And insofar as customer testimony is relevant, it could be provided by any customer, including one of the customers residing outside Florida.

More importantly, customer testimony is unnecessary to establish "the contours" of American's trafficking. Opp. 2, 19. On Plaintiff's theory, the only merits question related to customers is whether they used the website to book reservations at the Subject Hotels. Booking and American records establish those facts; customer testimony would add nothing. Similarly, the value of a trafficking claim is set by statute and has nothing to do with customer-specific facts. 22 U.S.C. § 6082(a)(1)(A). It is thus unlikely that any customer will be a witness at trial. Indeed, Plaintiff has filed two other HBA actions regarding the same Subject Hotels in Delaware, without any regard to whether even a single Delaware resident stayed at the Subject Hotels.

Finally, in response to this Court's direction, Plaintiff asserts that, if this case is transferred, it should go to the District of Delaware so that it can "be coordinated with Glen's two other Helms-Burton actions … pending there." Opp. 21. But other than the presence of these other claims against different defendants, Plaintiff provides no basis for transfer to Delaware. As explained above, Texas is the superior venue because Plaintiff and Defendant both reside there, and because witnesses and records related to the website are located there as well.

II. PLAINTIFF DOES NOT SATISFY TITLE III'S PRECONDITIONS TO SUIT.

As explained in American's opening brief, Plaintiff's Complaint fails to satisfy four preconditions to an HBA suit. His responses to these points are without merit.

First, Plaintiff fails to state a claim for relief because he did not "acquire[] ownership of [his] claim before March 12, 1996." 22 U.S.C. § 6082(a)(4)(B). He concedes that he inherited his alleged claim to the Property many years after 1996, but argues that section 6082(a)(4)(B) does not apply to inherited claims. That is incorrect. Plaintiff's principal argument is that the ordinary

meaning of "acquire" does not include receiving an interest through inheritance. That contention is undermined by Plaintiff's own case law, which explains that "acquired" simply means "obtained as one's own," *Helvering v. San Joaquin Fruit & Inv. Co.*, 297 U.S. 496, 499 (1936), by whatever mechanism. It is also undermined by the myriad times Congress has used "acquire" to refer to obtaining interests through inheritance.[6] Plaintiff is thus mistaken that American is "stretching" the ordinary meaning of "acquire" to include inheritance. Opp. 23.[7]

Plaintiff similarly suggests that "acquire" refers only to acquisition through the sale of claims. Opp. 23. But Congress specifically addressed the sale of claims in the adjoining provision, § 6082(a)(4)(C), which states that, for property confiscated on or after March 12, 1996, "a United States national who … acquires ownership of a claim to the property *by assignment for value*, may not bring an action on the claim under this section." § 6082(a)(4)(C) (emphasis added). This express reference to acquisition by assignment for value demonstrates that section 6082(a)(4)(B)'s uncircumscribed reference to "acquir[ing] ownership" of a claim captures not only assignment for value, but also inheritance and gift. *See Lindh v. Murphy*, 521 U.S. 320, 330 (1997).

Indeed, Plaintiff's reading of the relevant statutory provision would actually narrow the statute even more than American's. Subsection 6082(a)(4)(B) is phrased broadly, providing that "[i]n the case of property confiscated before March 12, 1996, a [U.S.] national may not bring an

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[6] *See, e.g.*, 26 U.S.C. § 102(a) ("Gross income does not include the value of property acquired by … inheritance."); 48 U.S.C. § 1503 (referring to "acqui[sition] … by inheritance"); 11 U.S.C. § 541(a)(5) (same); 26 U.S.C. § 691(a)(4) (same); 26 U.S.C. § 1014(b)(1) (same); 26 U.S.C. § 273 (same); 35 U.S.C. § 4 (same); 43 U.S.C. § 390pp (same); 33 U.S.C. § 2703(d)(2)(C) (same); 43 U.S.C. § 390ww(e) (same); 42 U.S.C. § 9601(35)(A)(iii) (same).

[7] Plaintiff also asserts that the HBA's reference to future and contingent rights means that "Congress did not intend to bar recovery on inherited claims." Opp. 23 n.11. But as American's motion explained, that argument is refuted by settled principles of property law. Mot. 11.

In addition, Plaintiff cites an amicus brief submitted (but not yet accepted) in a different case, signed by two former members of Congress, discussing the putative legislative intent behind the HBA. Opp. 22 n.10, 24–25. The Court should disregard this brief. Because the statutory text is clear on this issue, consideration of legislative history is unnecessary. *Ratzlaf v. United States*, 510 U.S. 135, 147 (1994). And the brief is not even legislative history—it is a *post hoc* rationalization by two ex-congressmen. *See Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 298 (2010) ("[T]his letter [from congressmen] does not qualify as legislative 'history,' given that it was written 13 years after the amendments were enacted. It is consequently of scant or no value for our purposes.").

action under this section on a claim to … confiscated property unless such national acquires ownership of the claim before March 12, 1996." Because only a U.S. citizen may sue under the HBA, this provision addresses *all* possible plaintiffs with respect to property confiscated before March 12, 1996, and states that *none* of them may sue unless they acquire ownership before the relevant date. Thus, if Plaintiff were correct that "acquire" excludes inheritance and includes only purchases for value, even plaintiffs who inherited claims *before* March 12, 1996 would be unable to sue, and only persons who purchased claims before that date could be HBA plaintiffs.

Plaintiff next mischaracterizes American's position on who may bring claims regarding property confiscated before March 12, 1996. Opp. 24 (arguing that American finds viable "only those claims where the owner of the property was (i) a U.S. national at the time of confiscation in 1959; and (ii) still alive today, over 60 years later, during the first-ever lifting of Title III's suspension"). American's position is simple and flows from the plain text of section 6082(a)(4)(B): to bring a claim regarding such property, a United States national must have (1) been a United States national as of March 12, 1996, and (2) acquired the claim (through inheritance or otherwise) before March 12, 1996. Heirs who meet these requirements satisfy section 6082(a)(4)(B) as to property confiscated before March 12, 1996.

Finally, Plaintiff falls back on policy arguments. He protests that "American's interpretation would preclude all actions where the original claimant died during the last 23 years." Opp. 24. But that is the consequence of multiple Presidents' suspensions of the HBA's cause of action, not American's interpretation. If the suspensions had not occurred, holders of pre-1996 claims would have been entitled to sue shortly after the HBA was enacted. Plaintiff's absurdity arguments are thus more relevant to these Presidential decisions to suspend the HBA's cause of action than American's straightforward interpretation of the statutory text.[8]

Second, Plaintiff fails to successfully address the HBA's exclusion for "property used for residential purposes." § 6023(12). He interprets the exclusion to mean that "confiscated property *currently* being used for residential purposes cannot form the basis of a claim." Opp. 26. But the

[8] Plaintiff suggests that it is absurd that, pursuant to section 6082(a)(5)(C), the death of a claimant with an uncertified claim in the two years following the HBA's enactment would extinguish the claim. Opp. 24 n.12. But Congress reasonably could have accepted that consequence in exchange for achieving the goal underlying that provision, which was "to enhance the position of the certified claimants to give them priority in pursuing actions against traffickers." H.R. Rep. No. 104-468, at 60 (1996).

statute does not say that. Plaintiff rests his argument on the unsupported assertion that "[t]he exclusion is meant to prevent a flood of claims where the alleged trafficking is the residential use of property by Cuban citizens." *Id.* But that is plainly incorrect, because Congress excluded from the definition of "traffics" "transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba," § 6023(13)(B)(iv)—meaning that actions concerning "the residential use of property by Cuban citizens" already fall outside the HBA. And Plaintiff does not provide any reason why there would be a "flood of claims" based on commercial activity by non-residents of Cuba at property currently used for residential purposes.[9]

Third, as American previously explained, the HBA's clear focus is on properties confiscated from United States nationals—or, at minimum, from Cuban nationals who later naturalized before March 12, 1996. Plaintiff does not dispute that he has not alleged that these requirements are satisfied. Instead, he claims that the HBA does not require that subject properties have been confiscated from United States nationals, or from Cuban nationals who later naturalized before March 12, 1996. But the statute's clear text speaks for itself. Mot. 11–12.

Plaintiff sweeps aside Judge Scola's recent holding that "a United States citizen must already own the claim to the confiscated property on March 12, 1996 when the Act was passed." *Gonzalez v. Amazon.com, Inc.*, No. 19-cv-23988, 2020 WL 1169125, at *2 (S.D. Fla. Mar. 11, 2020). Plaintiff asserts that this holding does not apply to him because he did not run afoul of one of Congress's concerns, which was that potential plaintiffs might relocate to the U.S. to take advantage of the HBA. Opp. 26. But that response wholly ignores the plain text of section 6082(a)(4)(B), which requires that a United States national hold a claim as of March 12, 1996. Judge Scola's ruling is loyal to that text; Plaintiff's effort to evade the ruling is not.

[9] Plaintiff also argues that the Property was divided in two and that his family's residence was on only one part. *See* Opp. 26 n. 15. But the Complaint alleges that the improvement was built when the Property was unified, and even provides a photo showing the Property being used for residential purposes. AC ¶¶ 28, 32. Plaintiff further claims that his mother's primary home was in Havana. Opp. 26 n. 15. But section 6023(12) covers property used for any "residential purpose[]," not just as a primary residence, and Plaintiff does not plead a single fact showing that his family ever used the Property *other* than for residential purposes.

III. PLAINTIFF DOES NOT ADEQUATELY PLEAD THE MENS REA AND TRAFFICKING ELEMENTS OF HIS CLAIM.

A. Plaintiff Fails To Plead That American Knowingly and Intentionally Used or Benefitted from Confiscated Property.

On the merits, Plaintiff does not remedy his failure to adequately allege that American "*knowingly and intentionally* ... engage[d] in a commercial activity using or otherwise benefiting from confiscated property." § 6023(13)(A)(ii) (emphasis added). In response to American's argument that "knowingly and intentionally" modifies "confiscated property," he states that "American never explains why 'knowingly' and 'intentionally' do not apply … to the more proximate list of verbs that appear at the beginning of each romanette," such as "sells," "engages in a commercial activity," and "directs." Opp. 27; § 6023(13)(A). But American agrees that "knowingly and intentionally" applies to these terms as well. Its point is simply that, as Judge Scola held in *Gonzalez*, it *also* applies to the phrase "confiscated property," and that Plaintiff's Complaint fails to adequately allege that American had this required *mens rea*.

Plaintiff dismisses *Gonzalez* because Judge Scola did not mention the fact that the HBA defines "knowingly" to mean "with knowledge or having reason to know." § 6023(9); *see* Opp. 27–28. But Judge Scola correctly interpreted the definition of "traffics," which requires "knowing[] *and intentional[]*" use of confiscated property. § 6023(13) (emphasis added); *cf.* 22 U.S.C. § 6033 (prohibiting certain "knowing[]" extension of financing by U.S. nationals, without any reference to "intention[]"). Unlike Plaintiff, Judge Scola correctly declined to read the word "intentionally" out of the statute, and thus required HBA plaintiffs to plead more than negligence (i.e., ignoring a "reason to know"). In any event, Plaintiff's Complaint does not allege facts supporting an inference that American had reason to know that the Property had been confiscated or owned by a U.S. citizen. *See Gonzalez*, 2020 WL 1169125, at *2. Plaintiff asserts that American "undoubtedly" had reason to know that "all real property in Cuba" was confiscated by the regime based on findings in the HBA. Opp. 28. But the findings Plaintiff cites merely state that the Castro regime confiscated the property of "millions of his own citizens" and "thousands of United States nationals." § 6081(3). Those general facts do not give reason to know that the Property was confiscated from persons who were, or later became, U.S. citizens.

Finally, Plaintiff makes a conclusory (and false) allegation that "American Airlines continued to traffic in the Glen Properties" after the 30 day-period following receipt of Glen's pre-suit notice letter. AC ¶ 175. This allegation, unsupported by any factual pleading whatsoever,

is insufficient to satisfy *Twombly*. The Complaint never alleges *when* Plaintiff sent the pre-suit notice letter, and it contains no factual allegations suggesting that any reservations were booked at the Subject Hotels after American received the letter.

B. Plaintiff Fails To Plead That American's Booking Service Is Not Incident To Lawful Travel.

Plaintiff also fails to successfully plead the lawful travel element of an HBA violation. As American explained in its opening brief, pursuant to longstanding statutory authority, OFAC has issued regulations authorizing personal travel to Cuba, "carrier services" for travel to Cuba, and "travel services in connection with" such travel. 31 C.F.R. §§ 515.572(a)(1), (a)(2)(i), 515.560; Mot. 14–19. Thus, far from engaging in some risky activity of questionable legality, American did only what the federal government affirmatively authorized it to do. Given that reality, the HBA should not be used to subject American—and the entire travel industry—to costly discovery and litigation without any plausible allegation that its travel services were not incident to lawful travel. When Congress passed the HBA, it was well aware of the statutory and regulatory framework governing travel to Cuba. *See Regan v. Wald*, 468 U.S. 222, 226 & n.2 (1984) (describing the history and statutory authority). The HBA itself instructs the President to "enforce" the OFAC regulations and expressly recognizes that OFAC may adjust its regulations on an ongoing basis. §§ 6032(c), 6042. Congress would not reasonably have designed the HBA as a whipsaw against defendants who are acting under express OFAC authorization.

Yet that is precisely how Plaintiff seeks to use the statute. He seeks to hold American liable for triple the current market value of four beachfront resorts located on the "second-best beach in the world" (AC ¶ 49), based solely on American's earning $503.18 in commissions (from Booking) for services that are expressly authorized by the federal government. *See* Pl.'s Ex. U at 1 col. 7. Plaintiff does not dispute that his conclusory allegation that the BookAAHotels booking service was not incident to lawful travel fails to satisfy *Twombly*. Mot. 14. And it is facially implausible that American's activities are not incident to lawful travel, given the nature of American's business and OFAC's authorizations. Plaintiff nevertheless insists that the suit should go forward because lawful travel is an affirmative defense. He is wrong for two reasons.

First, "traffics" is indisputably a material element of a Title III claim. § 6082(a)(1). A plaintiff must therefore plead that the defendant "traffics" in order to state a claim under the HBA. And under the separate statutory definition of "traffics," a defendant's conduct cannot constitute trafficking if it is necessary and incident to lawful travel. § 6023(13)(B). Accordingly,

by definition, a plaintiff has not pleaded that a defendant "traffics" if he has not pleaded that the defendant's conduct is not incident to lawful travel. Put differently, it is not merely the case that a defendant is not liable for its trafficking under the HBA if it has engaged in conduct incident to lawful travel. Rather, in such a situation, the defendant has not engaged in "trafficking" at all.

American cited four cases holding that statutory carve-outs can be elements of a claim. Mot. 16. Plaintiff attempts to distinguish only one: *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1111 (11th Cir. 2008). Plaintiff claims that the HBA is different than the statute at issue in *Thomas*—the Driver Privacy Protection Act (DPPA)—because the DPPA creates liability for disclosing personal information for a "purpose not permitted under this chapter," and "the meaning of 'a purpose not permitted' can only be ascertained by reference to the [statutory] list of permissible purposes." Opp. 29. But the meaning of "traffics" in the HBA can likewise only be ascertained by reference to the definition of traffics, which includes not just prohibited conduct, but also a list of permissible activities. Plaintiff's only other argument is a fig-leaf from the HBA's legislative history, which states that the purpose of the lawful travel exclusion was to "remove any liability" for lawful travel. Opp. 30. That statement was not made in reference to pleading burdens in litigation; it referred to the chronology of an amendment adding the lawful travel provision to the definition, thereby "remov[ing]" lawful travel from the meaning of "traffics." H.R. Rep. No. 104-468, at 44 (1996).

Second, treating lawful travel as an affirmative defense would create needless conflict between the HBA and the statutes authorizing the President to permit lawful travel to Cuba. *See Regan*, 468 U.S. at 226 & n.2. Congress would not reasonably have designed the HBA to undermine the enormous reliance interests created through federal authorization of lawful travel and travel services. Mot. 17. Those reliance interests are disrupted at the outset of a lawsuit, when plaintiffs drag travel-industry defendants into court, subject them to onerous discovery, and force them to prove that they were providing lawful travel services, all without pleading a single fact to demonstrate that the defendants' activities were "trafficking" in the first instance.

Plaintiff not only ignores this argument, but also asks this Court to *create* conflict between the HBA and OFAC's travel regulations, arguing that a federal regulation "is not effective to supersede a federal statute." Opp. 30. Plaintiff would read the HBA as having abrogated OFAC's licensing scheme, rendering parties who rely upon those licenses potentially liable for treble damages under the HBA. But the HBA did no such thing. Travel that is

permitted by OFAC regulations is not "prohibited by" Title III; rather, it is exempted from Title III because it is "incident to lawful travel." § 6023(13). This is confirmed by the provisions of the HBA instructing the President to fully enforce OFAC regulations and recognizing that OFAC may adjust them on an ongoing basis. §§ 6032(c), 6042.

Even if lawful travel were an affirmative defense, American could properly raise it here because it is apparent from the face of the Complaint and can be decided as a matter of law. Mot. 19. In particular, Plaintiff's claim is that American provides travel services for customers who are traveling to Cuba, and the OFAC regulations establish that companies may provide "travel services in connection" with travel to Cuba. 31 C.F.R. § 515.572(a)(1).

Plaintiff offers no clear response to this argument. He first cites a regulation stating that "tourist travel" is not authorized. Opp. 30. If Plaintiff means to argue that American's travel services cannot be "incident to lawful travel" if even one of American's thousands of passengers traveled to Cuba for tourism, he is incorrect as a matter of law. Under the text of Title III, American's travel services are "transactions … incident to lawful travel" so long as the overall enterprise—including carrier services and travel services—is connected with lawful travel, even if some (unidentified) customers travel to Cuba for purposes not permitted by regulation. *See* Black's Law Dictionary (10th ed. 2014) ("Incident" means "[d]ependent on, subordinate to, arising out of, or otherwise connected with.").

Plaintiff also incorrectly suggests that hotel accommodations are not "necessary to the conduct of … travel." § 6023(13)(B)(iii). Opp. 30. But "necessary" has long been interpreted to mean "convenient" or "useful." *McCulloch v. Maryland*, 17 U.S. 316, 413–14 (1819). The only plausible interpretation of the HBA is thus that booking a hotel is "necessary to the conduct" of overnight travel to Cuba by anyone without somewhere else to stay. As a result, the lawful-travel provision applies on the face of Plaintiff's Complaint, and his claim fails as a matter of law.

CONCLUSION

For the foregoing reasons, the Court should grant the motion to dismiss or, in the alternative, the motion to transfer venue.

Dated: April 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 17, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Ricardo H. Puente
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