UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 19-23591-CIV-BLOOM/LOUIS

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

NORWEGIAN CRUISE LINE HOLDINGS LTD.

Defendant.
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NORWEGIAN'S MOTION TO DISMISS

Defendant Norwegian Cruise Line Holdings Ltd. ("Norwegian"), through undersigned counsel and pursuant to Rule 12(b)(6), Fed. R. Civ. P., moves the Court for the entry of an Order dismissing the Complaint filed by Havana Docks Corporation ("Plaintiff" or "Havana Docks") for failure to state a claim.

INTRODUCTION

Plaintiff sued under Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act. *See* 22 U.S.C. § 6021, *et seq.* (either the "Act" or "Helms-Burton" or "Title III"). This Act, which until May 2019 had been suspended since its enactment nearly twenty-five years ago in 1996, creates a cause of action for Americans who own claims to confiscated Cuban property against a person who "traffics . . . knowingly and intentionally" in that property. *Id.* The Act defines trafficking narrowly, stating that "the term 'traffics' ***does not include*** . . . transactions and uses of property ***incident to lawful travel to Cuba***, to the extent that such transactions and uses of property are necessary to the conduct of such travel." 22 U.S.C. § 6023(13)(B)(iii) (emphases added). By its terms, the Act does not apply to persons who did not knowingly and intentionally engage in "trafficking" as statutorily defined, including, specifically, the large class of persons who have scrupulously followed the laws and regulations the United States enacted to govern travel to Cuba.

U.S. law allows citizens to travel to Cuba lawfully under certain circumstances. 31 C.F.R. § 515.560(a). When U.S. citizens choose to pursue this lawful travel to Cuba they must be transported there, and accordingly, the U.S. Government also expressly made lawful the transportation of people to Cuba. 31 C.F.R. § 515.560(c); *see also* 31 C.F.R. § 515.572(a)(1)-(4). Indeed, in September 2015, with the goal of "engag[ing] and empower[ing] the Cuban people," the Treasury Department approved a general license, which allowed the provision of "carrier services by vessel" to Cuba. *See* Cuban Assets Control Regulations, 80 FR 56915-01.[1]

[1] *Id.* stating, "[T]o further implement elements of the policy announced by the President on December 17, 2014 to engage and empower the Cuban people. Among other things, these amendments

In concert, and also "in support of the President's Cuba policy," with the express goal "to further promote private sector economic activity in Cuba [and] facilitate travel to Cuba for authorized purposes," the U.S. Department of Commerce's Bureau of Industry and Security changed its licensing policy explicitly to allow cruise ships to go to Cuba.[2] Operating under such express U.S. Government authorizations – and, indeed, ***active encouragement*** – Norwegian began lawfully offering cruises to Cuba in 2017. Despite the cruises being authorized by the U.S. Government, Plaintiff claims that, in providing cruises to Cuba, Norwegian has "trafficked" in the docks in Havana, which were expropriated by the Cuban Government in the 1960s.

Helms-Burton has no application here.[3] ***First***, Plaintiff has failed to plead sufficient facts to plausibly allege that Norwegian "knowingly and intentionally" "trafficked," or in this case, travelled unlawfully, as would be required to state a claim under the statute. ***Second***, applying Title III to Norwegian would violate the Ex Post Facto Clause. ***Third***, applying Title III retroactively violates the Due Process Clause. ***Finally***, Helms-Burton requires that a plaintiff actually own a claim to the property he or she claims is being "trafficked." But, the property Plaintiff claims was expropriated – a concession to run three piers in Havana, and the piers themselves – is not the property Plaintiff claims Norwegian is trafficking in because Plaintiff's concession expired in 2004, and at that point the piers reverted back to the Cuban government.

Helms-Burton was designed with the narrow intent to deter companies and individuals who knowingly and intentionally engaged in unlawful travel that implicated investment in or exploitation of confiscated property, not those who, with license and encouragement from the

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further facilitate travel to Cuba for authorized purposes (including authorizing by general license the provision of carrier services by vessel) . . . ."

[2] *See* 80 FR 56,898 (September 21, 2015) https://www.federalregister.gov/documents/2015/09/21/2015-23495/enhancing-support-for-the-cuban-people.

[3] Norwegian is aware that in a separate action, Carnival Cruise Lines has moved, unsuccessfully, to dismiss on several grounds similar, but not necessarily identical, to those argued in this action. *See Havana Docks Corp. v. Carnival Corp.*, Case No. 19-CV-21724. This motion raises several completely new and distinct arguments that support dismissal which have not been considered by this Court, alongside refined, but still distinct, versions of at least one argument this Court has seen before. To the extent there is a theory sharing similar reasoning to one presented in the *Carnival* action, Norwegian in any case reserves its due process right to present that argument in its own factually distinct case.

U.S. Government engaged in lawful travel in furtherance of well-established foreign-policy goals of the Executive and Legislative Branches of the U.S. Government. The findings in the text of the Act make clear its focus by reciting that "[t]he Cuban Government is offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets some of which were confiscated from United States nationals." *See* 22 U.S.C. § 6081(5). The Act does not reach companies, such as Norwegian, which are excluded because their use of property—if any—is "incident to lawful travel." 22 U.S.C. § 6023(13)(B)(iii). Indeed, if Norwegian's limited use of the subject docks was not "incident" to the "lawful travel" that the U.S. Government allowed and encouraged, it is hard to fathom what Congress could have envisioned as fitting its own bespoke exception to potential liability.

Because Plaintiff's claims against Norwegian fail as a matter of law, the Complaint should be dismissed with prejudice.

LEGAL STANDARD

Under Rule 12(b)(6), a complaint should be dismissed unless it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level," *id.*, meaning that a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. And while the Court must accept a plaintiff's well-pleaded facts as true, it need not accept "conclusory allegations, unwarranted deductions of fact[]," *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002), or "legal conclusion[s] couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quotation omitted).

ARGUMENT

I. Plaintiff Has Failed to Plead That Norwegian "Trafficked" In The Property Because Plaintiff Has Not, and Cannot, Allege Unlawful Intent

Helms-Burton provides, among other things, a cause of action against people who "***knowingly and intentionally*** . . . traffic" in the property of United States nationals that was confiscated by the Cuban government, as "traffic" is defined by the statute. 22 U.S.C. § 6082 (emphasis added).[4] The Complaint contains only a conclusory allegation with respect to the scienter Title III requires, alleging that in May 2017, Norwegian "knowingly and intentionally commenced, conducted, and promoted its commercial cruise line business to Cuba using the Subject Property by regularly embarking and disembarking its passengers on the Subject Property." Compl. ¶ 13. Plaintiff makes no plausible factual allegations, however, regarding whether Norwegian "knowingly and intentionally" did so unlawfully (and given that the only available evidence and allegations indicate that Norwegian's acts were guided by then-existing U.S. Government policy and corresponding regulations designed to encourage lawful travel, this deficiency is unsurprising). Helms-Burton cannot be "unknowingly and unintentionally" violated. And here, the only allegations and evidence available indicate that Norwegian's intent was to comply with the Act's safe harbor.

A. *Plaintiff Has Failed to Plead the Required Elements Under the Statute Because Plaintiff Does Not Plead That Norwegian Had Any Unlawful Intent*

Title III is not a strict liability statute. Instead, it requires that a party knowingly and intentionally engage in prohibited trafficking. This is a distinct requirement from the one for which Carnival argued, and the Court declined to apply, in a separate case before this Court. *See Havana Docks Corp. v. Carnival Corp.*, Case No. 19-CV-21724, Mot. to Dismiss (ECF No. 17). There, Carnival asked the Court to find Plaintiff had not sufficiently pled Carnival's travel *was* unlawful. *See id.* By contrast, here, Norwegian merely asks the Court to hold Plaintiff has not alleged the proper scienter, or state of mind, required by the statute and case law. Specifically,

[4] Under the Act the term "knowingly" is defined as, "with knowledge or having reason to know." 22 U.S.C. § 6023(9).

Plaintiff failed to plead sufficient facts to create a plausible claim under the statute because there are no allegations regarding Norwegian's required state of mind that is: that Norwegian "*knowingly or intentionally*" engaged in prohibited trafficking (*i.e.*, travelled unlawfully). Title III of the Act prohibits "trafficking" in property confiscated by the Cuban government.

> (1) Liability for trafficking.--(A) Except as otherwise provided in this section, any person that, after the end of the 3-month period beginning on the effective date of this title, traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages . . . .

The Act provides a very specific definition of trafficking:

> ***Except as provided in subparagraph (B)*** [a] person "traffics" in confiscated property if that person ***knowingly and intentionally***—
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> (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
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> (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
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> (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.

22 U.S.C. § 6023(13)(A). Immediately after defining "trafficking," the Act states that "the term 'traffics' ***does not include*** . . . transactions and uses of property ***incident to lawful travel to Cuba***, to the extent that such transactions and uses of property are necessary to the conduct of such travel." 22 U.S.C. § 6023(13)(B)(iii) (emphases added). It is not a violation of the Act to knowingly and intentionally engage in lawful travel. Indeed, the Act is clear on its face that it is for the limited "Purposes" to protect against "*wrongful* trafficking," not *all* trafficking. 22 U.S.C. 6022(6) ("To protect United States nationals against . . . the ***wrongful*** trafficking in property confiscated by the Castro regime."). The Committee Report to the Act, which "next to the statute itself it is the most persuasive evidence of congressional intent," *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1462 (11th Cir. 1992), likewise explains that the reason for adding

the lawful travel carve-out was to "remove[] any liability for . . . any activities related to lawful travel." 142 Cong. Rec. H1645-02 at H1656. The Committee Report thus makes clear that, consistent with the text of the carve-out, Helms-Burton is not meant to reach uses of property involved in lawful travel to Cuba.[5] To properly allege a statutory violation, Plaintiff must therefore plausibly allege facts indicating Norwegian's state of mind does not fall within the safe harbor within the definition of trafficking.

The requirement to plead facts necessary to meet the Act's elements, including state of mind, is an elementary matter of pleading a statutory cause of action. To plausibly plead a claim, a complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.'" *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282–83 (11th Cir. 2007) (quoting *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001)). Courts in this Circuit have routinely required a plaintiff pursuing a statutory claim to plead facts that plausibly meet the statutory definition. *See, e.g.*, *Arko Plumbing Corp. v. Rudd*, 13-CV-22434, 2013 WL 12059615, at *3 (S.D. Fla. Sept. 26, 2013) (under Computer Fraud and Abuse Act, which has a statutory definition of "damage," "pleading a type of damage within the statutory definitions is an

[5] The 1995 version of the Helms-Burton Act did not have a lawful travel carve out. H.R. REP. NO. 104-202(I), at 5, (1995), *reprinted in* 1996 U.S.C.C.A.N. 527, 0. In response, a number of Senators expressed concern that the Act would needlessly restrict Americans' ability to lawfully travel to Cuba. These concerns made sense because before Helms-Burton, a number of Presidents had allowed Americans to travel to Cuba. *See Regan v. Wald*, 468 U.S. 222, 224 (1984) (explaining that for five years OFAC allowed transactions incident to travel in Cuba). Thus, Senator Simon offered an amendment to the Bill that aimed to protect lawful travel. 141 CONG. REC. S15320-01, S15320, 1995 WL 614999. As he explained, Congress "should not restrict travel to any country unless security is threatened . . . ." *Id.* Senator Dodd echoed Senator Simon, explaining, "I think most of us believe that access and contact between peoples, particularly free people with the people who are living under a dictatorship, has a tremendous impact, or can have a tremendous impact, to say that no one in this country to the one place throughout the entire globe could travel makes no sense at all." *Id.* Although Senator Simon's initial travel-related amendment failed, 141 CONG. REC. D1225-02, D1255, 1995 WL 615160, when Helms-Burton passed the House and the Senate in 1996, Congress had added the lawful travel carve out to the definition of trafficking. 142 CONG. REC. H1645-02, H1647, 1996 WL 90487. *See Wexler v. Lepore*, 342 F. Supp. 2d 1097, 1109 (S.D. Fla. 2004), *aff'd sub nom. Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006) ("When the Legislature makes a change in the statute, it is presumed to mean something by that change.").

essential element" of the claim); *Brown v. Regions Mortg. Corp.*, 1:11-CV-3716, 2012 WL 13013583, at *3 (N.D. Ga. Dec. 3, 2012) (to state a claim under Fair Debt Collection Practices Act, a plaintiff must "allege facts showing how [the] defendant meets the statutory definition of a 'debt collector'"), *rep. and rec. adopted*, 2012 WL 13013984 (N.D. Ga. Dec. 31, 2012).

Further, causes of action (including those that arise under statutes) possessing elements of intent require that the requisite scienter is adequately, and not conclusorily, pled. *See, e.g.*, *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1192 n.12 (11th Cir. 2010) (holding that "[s]ection 559.72(9) of the Florida Consumer Collection Practices Act (FCCPA) requires a plaintiff to demonstrate that the debt collector defendant possessed *actual knowledge* that the threatened means of enforcing the debt was unavailable."); *Ruiz v. Experian Info. Sols., Inc.*, 16-CV-25102, 2017 WL 1378242, at *2 (S.D. Fla. Apr. 14, 2017) (dismissing action on account of Plaintiff's failure to allege facts sufficient to demonstrate knowledge or intent by the debt collector in order to state a cause of action under the FCCPA which requires actual knowledge that a debt is not legitimate in order to demonstrate a violation); *Owens v. Ronald R. Wolf & Associates, P.L.*, 13-CV-61769, 2013 WL 6085121, at *4 (S.D. Fla. Nov. 19, 2013) (dismissing cause of action under FCCPA for failure to state a claim because Plaintiff failed to allege the requisite knowledge and intent elements, i.e. that Defendant attempted to collect a debt it knew was illegitimate or intentionally asserted legal rights that it knew did not exist); *see also Torongo v. Roy*, 176 F. Supp. 3d 1320, 1324–25 (S.D. Fla. 2016) (dismissing cause of action under the Fair and Accurate Credit Transactions Act for failure to adequately plead defendant's knowing violation of the act); *Universal City Studios v. Nissim Corp.*, 14-CV-81344, 2015 WL 1124704, at *5 (S.D. Fla. Mar. 12, 2015) (dismissing cause of action for patent infringement because, "A review of these claims show that Defendant has done nothing more than state that Plaintiffs have knowledge of the patent and an intent to infringe. These barebone allegations do not provide the Court with an adequate basis [to infer knowledge and intent].").

Here, this means that Plaintiff must plead that Norwegian possessed a state of mind

(actual knowledge *and* intent) to *not* fall within the safe harbor of the statute, and therefore the actual knowledge and intent to engage in unlawful travel and impermissible trafficking. The absence of any such allegations in Plaintiff's Complaint is glaring. In *Universal City Studios*, for instance, a Court in this District considered whether a party had adequately pled a claim for patent infringement, which, as here, requires elements of knowledge and intent. *See Universal City Studios*, 2015 WL 1124704, at *5. Dismissing the cause of action for failure to state a claim, the Court explained that "[a] review of these claims show that Defendant has done nothing more than state that Plaintiffs have knowledge of the patent and an intent to infringe. These barebone allegations do not provide the Court with an adequate basis [to infer knowledge and intent]." *Id.* at *5. Here Plaintiff alleges only that "[t]he Defendant's knowing and intentional conduct with regard to the confiscated Subject Property is trafficking as defined in 22 U.S.C. § 6023(13)(A)." Compl. ¶ 15. This allegation, like those at issue in *Universal City Studios* is conclusory and thus insufficient to state a plausible claim for the required state of mind: actual knowledge of and intent to travel unlawfully or traffic impermissibly.[6]

B. *The Only Allegations and Evidence Demonstrate that Norwegian's Intent Was at All Times Lawful Pursuant to the Act's Safe Harbor*

Even if Plaintiff had tried to plead the knowing and intentional unlawfulness of the travel, those allegations would be implausible in light of the regulations that permitted Norwegian's actions. This Court can take judicial notice of these regulations and other public government statements on review of a motion to dismiss. [7]

[6] And while the Court must accept a plaintiff's well-pleaded facts as true, it need not accept "conclusory allegations, unwarranted deductions of fact[]," *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002), or "legal conclusion[s] couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quotation omitted).

[7] "A Court may take judicial notice of the rules, regulations and orders of administrative agencies issued pursuant to their delegated authority." *Sw. Ga. Fin. Corp. v. Colonial Am. Cas. & Sur. Co.*, 2009 WL 1410272, at *1 (M.D. Ga. May 19, 2009) (quoting *Int'l Bhd. of Teamsters v. Zantop Air Transp. Corp.*, 394 F.2d 36, 40 (6th Cir. 1968); *see Carter v. Am. Tel. & Tel. Co.*, 365 F.2d 486, 491 (5th Cir. 1966); *see also* 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number."). The Court may consider judicially noticed federal regulations on a motion to dismiss. *See* Fed. R. Evid. 201(d) ("The

The Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury is charged with regulating travel to Cuba. *See Martinez v. Republic of Cuba*, 10-CV-22095, 2011 WL 13115432, at *3 (S.D. Fla. June 27, 2011), *rep. and rec. adopted in part, rejected in part on other grounds*, 10-CV-22095, 2011 WL 13115471 (S.D. Fla. Aug. 26, 2011) ("Cuba-related travel transactions by persons subject to U.S. jurisdiction are prohibited unless authorized by OFAC."). Since 2015, OFAC has granted travel providers a general license, which allowed "[p]ersons subject to U.S. jurisdiction . . . to provide travel services in connection with travel-related transactions involving Cuba authorized pursuant to this part." 31 C.F.R. § 515.572(a)(1).

In doing so, OFAC "authorized" American companies like Norwegian "to provide carrier services to, from, or within Cuba in connection with travel or transportation," 31 C.F.R. § 515.572(a)(2)(i), and when those travel or carrier services were provided by a vessel, those companies were "authorized to provide lodging services onboard such vessels to persons authorized to travel to or from Cuba pursuant to this part during the period of time the vessel is traveling to, from, or within Cuba, including when docked at a port in Cuba." 31 C.F.R. § 515.572(a)(4). Because Norwegian operated under an OFAC license, the travel- related services it provided were, as a matter of law, lawful.[8] *Martinez*, 2011 WL 13115432, at *7 ("It is undisputed that the OFAC licensed Garnishees to provide travel services to Cuba and make payments associated therewith. The assets that Plaintiff seeks to garnish have thus been authorized for transfer to Cuba and are not subject to an across-the-board prohibition on transfer."); *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dept. of*

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court may take judicial notice at any stage of the proceeding."); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1277-80 (11th Cir. 1999).

[8] Indeed, immediately following the shift in policy by the U.S. Government, imposing new restrictions on travel to Cuba in June 2019, Norwegian ceased travel to Cuba in full compliance with the new regulations. Tariro Mzezewa, *Cruises to Cuba Are Abruptly Canceled, After New Travel Ban*, N.Y. TIMES, June 5, 2019, https://www.nytimes.com/2019/06/05/travel/cuba-cruise-travel-ban.html.

Treasury, 606 F. Supp. 2d 59, 64 (D.D.C. 2009) (explaining that an OFAC general licenses, like the one Norwegian operated under, "broadly authorizes entire classes of transactions").

Plaintiff has not sufficiently pled, and cannot plead, that Norwegian knowingly and intentionally "trafficked," as that term is defined by Helms-Burton — because the allegations and evidence which the Court can review on this motion indicate that at all times, Norwegian intended to travel lawfully such that Norwegian would fall within the safe harbor under Helms-Burton's lawful travel exception.[9] Put differently, since Norwegian can be said to have only "***knowingly and intentionally***" engaged in the acts enumerated in the trafficking ***exceptions*** under 22 U.S.C. § 6023(13)(B) ("The term "traffics" does not include . . . .), in effect, those acts which are not "trafficking" under 22 U.S.C. § 6023(13)(A), then, by definition, Norwegian cannot have violated the Act.

II. Applying Title III to Norwegian Would Violate the Ex Post Facto Clause

Plaintiff seeks treble damages against Norwegian based on a newly-imposed liability scheme for activities Norwegian engaged in years before that liability was imposed. Imposing liability under these circumstances would violate the Ex Post Facto Clause, U.S. Const. art. 1, § 10, cl. 1, and thus as a constitutional matter, the Complaint should be dismissed.

"The ex post facto prohibition forbids . . . any law 'which imposes a punishment for an act which was not punishable at the time it was committed.' " Weaver *v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri*, 4 Wall. 277, 325-326 (1867)). A law violates this this prohibition if it has two characteristics. First, the law must be retroactive – that is, it must "attach[ ] new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269-270 (1994). And second, it must be penal in nature; if a law is

[9] It is the Government at the time which determines whether travel is "lawful" or not. This is not an issue for either the Court or the Plaintiff to decide. The Act does not direct retroactive application of the law and it is well established that "[r]etroactivity is not favored in the law . . . [and] congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). In any case, Defendants have been at all times compliant, and remain compliant with U.S. laws concerning travel to Cuba.

purportedly civil, as is the case here, it must "provide[ ] for sanctions so punitive as to transform" it into a "criminal penalty." *United States v. Ward*, 448 U.S. 242, 249 (1980). The May 2019 activation of Title III is both retroactive and penal.

First, a law is retroactive where, as here, it "attaches new legal consequences to events" that were not subject to suit when committed. *Landgraf*, 511 U.S. at 270. Title III does that. Title III went into force on August 1, 1996 and was *immediately* suspended by President Clinton. *See* 22 U.S.C. § 6085(b) (empowering President to suspend Title III for six months at a time). It remained suspended until May of 2019. *See* Sec. of State, Remarks to the Press, Washington, D.C., April 17, 2019 (Sec. Pompeo Remarks).[10] The cause of action contained in Title III thus lay dormant – that is, had no effect, and carried no legal consequences – until it became active in May of 2019 but now appears to authorize treble damages against Norwegian for pre-May 2019 activities in Cuba. Before May 2019, Title III did not apply to Norwegian's Cuban operations. After May 2019, it did. That is the definition of retroactivity.

Bolstering the retroactive nature of the newly-activated Title III is the reliance interests it upset. For one, Norwegian's activities were encouraged – and indeed ***licensed*** – by the United States Government.[11] In December 2014, President Obama announced that the U.S. would reestablish diplomatic relations with Cuba. *See* The White House, Statement by the President on Cuba Policy Changes (Dec. 17, 2014).[12] The Obama Administration then encouraged companies to invest in Cuba. *See* Felicia Schwartz, *Obama Administration Encourages U.S. Businesses to Forge Cuba Links*, W.S.J. (Nov. 6, 2015). And in October 2016, the Obama Administration set

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[10] *Available at* https://bit.ly/2nVuloY.

[11] OFAC issued new general licenses for this specific purpose. *See, e.g.*, 80 FR 56915-01 ("[T]o further implement elements of the policy announced by the President on December 17, 2014 to engage and empower the Cuban people. Among other things, these amendments further facilitate travel to Cuba for authorized purposes (including authorizing by general license the provision of carrier services ***by vessel*** . . . .") (emphasis added); BIS also changed its licensing policy to allow cruise ships to go to Cuba. 80 FR 56,898 (stating the change was "in support of the President's Cuba policy" and was, "[T]o further promote private sector economic activity in Cuba, facilitate travel to Cuba for authorized purposes").

[12] *Available at* https://bit.ly/2jOL72d.

forth specific priority objectives to normalize U.S.-Cuba relations.[13] The White House, Presidential Policy Directive -- United States-Cuba Normalization (Oct. 14, 2016).[14] During this concerted effort to normalize relations, and in reliance on roughly forty serial and contiguous suspensions of Title III, in March 2017 Norwegian began operating out of the ports at issue. *See* Compl. ¶ 13. In addition, at the time of Norwegian's activities, Title III had been continuously suspended for nearly twenty-five years.[15] Title III contains no guidelines on why, how, or when the Executive should suspend, or cease suspending, Title III. The only notice Norwegian had in such a vacuum were past patterns and present markers, both of which suggested that Title III's perpetual suspension was a near certainty. The activation of Title III thus carries with it all the risks of a lack of notice and of arbitrary government action that the Ex Post Facto Clause guards against. *See Rogers v. Tennessee*, 532 U.S. 451, 460 (2001) (explaining that the clause ensures there is "notice and fair warning" of the consequences of actions); *see also Hock v. Singletary*, 41 F.3d 1470, 1472 (11th Cir. 1995) (similar).

And second, a civil law is penal, and thus cannot be applied retroactively, where, as here, it is effectively penal in nature. There are several factors relevant to whether a statute is penal in nature. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–169 (1963); *Smith v. Doe*, 538

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[13] President Barack Obama touted the "historic new approach in U.S. policy toward Cuba" beginning December 17, 2014. *See* mention at 81 FR 13,972 (March 16, 2016) https://www.federalregister.gov/documents/2016/03/16/2016-06019/cuba-revisions-to-license-exceptions-and-licensing-policy. Then, making an historic personal visit to Cuba in 2016, President Obama announced in a carefully scripted and internationally publicized speech, "I'm also joined by some of America's top business leaders and entrepreneurs because ***we're ready to pursue more commercial ties*** . . . ***Ever since we made it easier to travel between our countries***, more Cuban-Americans are coming home. And for many, this is a time of new hope for the future . . . ***With last week's port security announcement, we've removed the last major hurdle to resuming cruises and ferry service*** — all of which will mean even more Americans visiting Cuba in the years ahead and appreciating the incredible history and culture of the Cuban people." (emphasis added) https://www.miamiherald.com/news/nation-world/world/americas/cuba/article 67364722.html.

[14] *Available at* https://bit.ly/2qoJZpo.

[15] Even the current Administration committed to suspending Title III on multiple occasions, using similar language in those suspensions to that used by prior Administrations. *See, e.g.*, Department of State, *United States Determination of Six Months' Suspension of Title III of Libertad* January 24, 2018, available at, https://www.state.gov/united-states-determination-of-six-months-suspension-under-title-iii-of-libertad/ ("[I]in order to suspend . . . the right to bring an action under Title III of the Act.").

U.S. 84, 97; *Waldman v. Conway*, 871 F.3d 1283, 1294 (11th Cir. 2017). Here, the relevant factors each support the commonsense conclusion that Title III is a penal statute.[16]

Title III's new right of action "comes into play only on a finding of scienter." *Kennedy*, 372 U.S. at 168. Title III creates liability for anyone who "traffics in property which was confiscated by the Cuban Government." 22 U.S.C. § 6082(a)(1)(A). And "a person 'traffics' in confiscated property only if that person *knowingly and intentionally*" engages in certain transactions. 22 U.S.C. § 6023(13) (emphasis added). Criminal laws nearly always require some level of scienter – that is, a "degree of knowledge sufficient 'to mak[e] a person legally responsible for the consequences of his or her act or omission.' " Rehaif *v. United States*, 139 S. Ct. 2191, 2195 (2019) (quoting Black's Law Dictionary 1547 (10th ed. 2014)). This criminal-law level of scienter points towards a penal statute. *Cf. United States v. Ursery*, 518 U.S. 267, 291 (1996) (retroactive civil forfeiture law was civil, not punitive, because it had no scienter requirement).

The "operation" of Title III's new right of action "will promote the traditional aims of punishment—retribution and deterrence." *Kennedy*, 372 U.S. at 168. Title III's goal is to deter certain behavior in Cuba. Section 6081(11) baldly declares that Title III is intended "[t]o *deter* trafficking in wrongfully confiscated property." 22 U.S.C. § 6081(11) (emphasis added). Deterrence is "a traditional goal of criminal punishment." *Hudson v. United States*, 522 U.S. 93, 105 (1997). To be sure, money damages may serve "civil as well as criminal goals," as in the case of forfeiture. *Ursery*, 518 U.S. at 292. But Title III is not a mere forfeiture provision; it allows for treble damages, *see* 22 U.S.C. § 6082(a)(3)(C), which "reveals an intent to *punish* past, and to *deter* future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) (emphasis added). Indeed, the Supreme Court has recognized that treble damages are "essentially punitive in nature." *Vt.*

[16] Three of the factors do not apply here. The newly-applicable private right of action is not an affirmative restraint (the first factor), it does not authorize something historically regarded as punishment (the second factor), and it does not regulate behavior that is already a crime (the fifth factor). *See Kennedy*, 372 U.S. at 168–69.

Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 784 (2000).

Finally, to the extent there is an "alternative purpose" beyond punishment "to which [Title III] may rationally be connected," the remedies it authorizes "appear[] excessive in relation to the alternative purpose assigned." *Kennedy*, 372 U.S. at 168. Because the U.S. Government *encouraged* and *licensed* Norwegian's activities that are the basis of this suit, the only reasonable explanation for the activation of Title III is that the Government *now* wishes to punish those who took the Government up on its encouragement. But even if one looks beyond that inescapable reality and assumes that the newly-activated Title III is intended to "provide protection against wrongful confiscations" and deprive the Cuban Government of "financial benefit," 22 U.S.C. § 6081(10), (6), the means it uses to do so and the remedies it authorizes are so disconnected from that purpose as to be excessive. *Cf. Smith*, 538 U.S. at 105 ("The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective.").

Title III's private cause of action against persons who traffic in confiscated property is not reasonably related to the goal of "provid[ing] protection against wrongful confiscations by foreign nations." 22 U.S.C. § 6081(10). First, that goal is directed towards nations, not corporations. Second, guarding against wrongful confiscations implies *preventing* wrongful confiscations. Applying Title III here – against a corporation that had no part in confiscating private property – furthers neither of these goals. It does not punish the actor who deprived these nationals of their property in the first place: the Cuban Government. *See* 22 U.S.C. § 6023(4). Instead, it merely punishes those who – years after the confiscation took place and who have no say in the policy of future confiscations – use that property to advance other policy goals of the United States Government. And no amount of damages against Norwegian will hamper a foreign government's decision to confiscate private property for the simple reason that the foreign government is not Norwegian. The rational relationship factor is the "most significant" when assessing whether a nominally civil law is actually penal in nature. *W.B.H.*, 664 F.3d at 859. Because the enormous monetary awards Title III authorizes bear no rational relationship to

the goals stated in the legislative findings, this factor supports the commonsense conclusion that Title III is penal.

Even if there is a connection between protecting against confiscation, or depriving the Cuban Government of financial assistance, and forcing those who use confiscated property to pay damages, the law has long held that the damages here are clearly excessive. *See Burgess v. Salmon*, 97 U.S. 381, 384 (1878) ("To impose upon the owner of the goods a criminal punishment or a penalty of $377 for not paying an additional tax of four cents a pound, would subject him to the operation of an ex post facto law."). Title III sets damages at the "greater of" three potential valuations of the confiscated property. *See* 22 U.S.C. § 6082(a)(1)(A). There is no required causal connection between the defendant's action and the plaintiff's damages, as there would be with, for example, a disgorgement damages remedy that would require Norwegian to forfeit any profits it gained from the use of the confiscated property. *See Kokesh v. SEC*, 137 S. Ct. 1635, 1640 (2017) ("Disgorgement requires that the defendant give up 'those gains . . . properly attributable to the defendant's interference with the claimant's legally protected rights.' " (quoting Restatement (Third) of Restitution and Unjust Enrichment § 51, Comment a, p. 204 (2010)). And there is no mechanism to apportion liability among other potential defendants, such as with an action for contribution. *See Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 88 (1981) (explaining that a contribution "reflects the view that when two or more persons share responsibility . . ., it is inequitable to require one to pay the entire cost"). As a result, under Plaintiff's theory,[17] Norwegian and any other potential defendants can *each* be liable for the full, current market value of the plaintiff's ownership share. And those damages can be trebled. *See supra* p. 13. A plaintiff with a potential claim under the newly-activated Title III can thus recover (1) three times (2) the highest possible valuation of his property interest (3) as many times over as there are defendants he can

[17] To be clear, Norwegian reserves the right to dispute Plaintiff's interpretation of the statute and theory of collective liability. It is only for purposes of this Motion to Dismiss that Norwegian accepts Plaintiff's allegations underlying this theory as true.

reach. This goes further than merely "lack[ing] a close or perfect fit"; there is *no* required fit between a defendant's actions, the plaintiff's harm, and the plaintiff's remedy. *Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1207 (Fed. Cir. 2014). Title III is a penal provision.

Because the newly-operated Title III both operates retroactively and is penal in nature, it violates the Ex Post Facto Clause. This Court should dismiss.

III. Applying Title III Retroactively Violates Due Process

For similar reasons, applying Title III to Norwegian's pre-May 2019 activities in Cuba would violate due process. Retroactive application of a provision violates the Due Process Clause where such retroactive application is not "justified by a rational legislative purpose." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

This is the case here. Title III is meant to deter companies from transacting with Cuba, and yet simultaneous to its becoming law it was suspended. *See supra* p. 13. And it remained suspended for nearly 25 years. *See supra* p. 12. A law that has never gone into effect – and by all signs would never go into effect – is no deterrent at all. And Title III imposes penalties on defendants that are so disconnected from any actual damages they might cause to plaintiffs as to be irrational. *See supra* pp. 11-15. Norwegian played no part in the original confiscation of the property. There is no required connection to or nexus between Norwegian's action and Plaintiff's damages. And there is no way to apportion the damages award among other potentially liable parties. *See supra* p. 15. Applying Title III to Norwegian thus imposes a burden that far outweighs any benefit that accrues to Plaintiff. For this reason as well, this Court should dismiss this case with prejudice.

IV. Plaintiff Has Failed to Allege Norwegian Trafficked in Property to Which Plaintiff Owns a Claim

Plaintiff has failed to plead that Norwegian ever trafficked in property to which Plaintiff has a claim. In fact, Norwegian could not traffic in Plaintiff's property because Plaintiff had a limited property interest – a leasehold concession – which expired in 2004, thirteen years before

Norwegian ships sailed to Cuba. Plaintiff does not, and cannot, own a claim that encompasses any use of the docks after 2004.

Plaintiff would only have a valid cause of action under Helms-Burton against an entity alleged to have trafficked in the property to which Plaintiff owns a claim before its time-limited concession would have expired in 2004. *See Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1255 (11th Cir. 2006) ("When (or if) the portion of Title III that allows private litigants to bring lawsuits becomes effective, actions brought pursuant to the new statutory scheme would be actions brought 'on a claim *to the confiscated property*' against traffickers *in the property*." (emphasis added)). But, when the property now forming the basis of the claim that Plaintiff owns was nationalized by the Cuban government in October 1960, Plaintiff did not own a fee simple interest in the docks which would allow a claim against a defendant who trafficked in the property at any point in the future. According to the Foreign Claims Settlement Commission, Plaintiff was granted a concession in 1934 to operate three piers in the Port of Havana, and *the concession expired in 2004*, and that upon expiration of the concession, Plaintiff was required "to deliver the piers to the government in good state of preservation."[18] *See Havana Docks Corp. v. Carnival Corp.*, Case No. 19-CV-21724, Compl. Ex. A (ECF No. 1-1 at 7, 9).[19] The Foreign Claims Settlement Commission Certification makes abundantly clear that Plaintiff's property interest in the Havana port was a temporary one that expired thirteen years before Norwegian began using the port for cruises. At the time of the alleged "trafficking" in 2017, the property

[18] Additionally, the Act requires this Court to "accept as conclusive proof of ownership of an interest in property a certification of a claim to ownership of that interest that has been made by the Foreign Claims Settlement Commission under Title V of the International Claims Settlement Act of 1949." 22 U.S.C. § 6083(a)(1). Necessarily then, the nature of the interest certified by the Commission would control regardless of the allegations pleaded in Plaintiff's Complaint.

[19] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1277-80 (11th Cir. 1999); *see also, Lee v. Jones*, No. 3:17-CV-656, 2017 WL 7038415, at *2 (N.D. Fla. Dec. 22, 2017) ("The doctrine of judicial notice permits a judge to consider its own court dockets.").

belonged to the Cuban government as a result of the concession's expiration. Thus, even without wrongful confiscation by the Cuban government, the property would not have belonged to Plaintiff at the time Norwegian used the property incident to lawful travel to Cuba.

Helms-Burton defines "property" as "any property . . . whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest." 22 U.S.C. § 6023(12)(A). This definition of "property" recognizes the common understanding that "property" encompasses "specific, finite, property rights in the entire bundle of rights associated with a piece of property." *Villas of Lake Jackson, Ltd. v. Leon Cty.*, 121 F.3d 610, 612 (11th Cir. 1997). For this reason, the Act recognizes that a given piece of land can have a "leasehold[er]," a current interest holder, and a future interest holder, as well as other "right" and "interest" holders, each of whom holds a "property" interest in the land. 22 U.S.C. § 6023(12)(A). The definition of property shows that Helms-Burton recognizes an interest-specific view of property.[20] It is fundamental that one's interest in property extends only so far as the bundle of property rights one has acquired.[21]

As a matter of statutory text and logic, therefore, to be liable for trafficking under Title III

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[20] *See generally United States v. Shotts*, 145 F.3d 1289, 1296 (11th Cir. 1998) (noting that "modern theory" of property views property as "bundle of rights"); *PVM Redwood Co., Inc. v. United States*, 686 F.2d 1327, 1332 (9th Cir. 1982) (Alarcon, J., dissenting) ("Current notions of property adopt a 'bundle of rights' analysis—that is, an analysis based on the notion of a set of legal relations or relationships among persons with respect to things.").

[21] Thus, in the context of compensating takings of temporary property interests, such as leaseholds, courts have recognized that leaseholders are only entitled to compensation for the duration and scope of their lease interests. *See Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976) ("It has long been established that the holder of an *unexpired leasehold interest* in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States." (emphasis added)); *id.* at 304 ("Ordinarily, a leasehold interest has a compensable value whenever the capitalized then fair rental value for the *remaining term of the lease*, plus the value of any renewal right, exceeds the capitalized value of the rental the lease specifies." (emphasis added)); *United States v. Petty Motor Co.*, 327 U.S. 372, 380-81 (1946) ("[E]ach tenant . . . should be permitted to prove damages for the condemnation of its rights *for any remainder of its term which existed after its ouster* by the order of possession but not costs of moving or relocation." (emphasis added)); *United States v. Gen. Motors Corp.*, 323 U.S 373, 382 (1945) ("When [the government] takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more . . . ."); *Nat'l R.R. Passenger Corp. v. Faber Enters., Inc.*, 931 F.2d 438, 440 (7th Cir. 1991) ("Determining which interests have been taken necessitates an inquiry into the relative rights of the lessor and lessee at the time of the taking, as defined in the lease.").

of the Act, a defendant must have trafficked in a property interest to which a plaintiff actually owns a claim. The cause of action in Helms-Burton provides: "any person that . . . traffics *in property* which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim *to such property* for money damages." 22 U.S.C. § 6082(a)(1)(A). "Such property" in this context refers to the "trafficked property" referenced in the first clause. *See generally DeMeo v. State Farm Mut. Auto. Ins. Co.*, 639 F.3d 413, 416 (8th Cir. 2011) ("The plain meaning of the modifier 'such' is, 'of the type previously mentioned.'" (quoting New Oxford American Dictionary 1738 (3d ed. 2010))); *see also Jeffrey Hart Grp., Inc. v. Int'l Motion Control, Inc.*, 00-CV-1052E (F), 2002 WL 34350532, at *2 n.13 (W.D.N.Y. Dec. 16, 2002) ("such" refers to the last antecedent). Thus, under the plain terms of the Act, if a plaintiff owns no claim to trafficked property, no liability exists.

An interpretation otherwise would read the entire definition (let alone the concept) of property out of the statute, granting a plaintiff the right to recover compensation for trafficking in property interests that it never owned. Ownership of some claim to a confiscated property interest, does not entitle a Plaintiff to recover for any trafficking in other property interests, regardless of whether they were confiscated from Plaintiff or not.[22]

This interpretation fully squares with the Congressional purposes behind the Act.

[22] An interpretation otherwise would lead to absurd results. (*See* Mot. to Dismiss at 14 (explaining why Plaintiff's reading of the Act "makes no sense").) Helms-Burton protects all interests in property—including future interests—from trafficking. *See* 22 U.S.C. § 6023(12)(A). The Act, however, also contemplates that claim owners may authorize conduct that would otherwise be deemed trafficking. *See* 22 U.S.C. § 6023(13) (". . . *without the authorization* of any United States national who holds a claim to the property." (emphasis added)). To illustrate how an interpretation otherwise would make the statute unworkable, consider that if instead of reverting back to the Cuban government, the temporary interest Plaintiff owned in the docks reverted back to another U.S. national on its expiration in 2004. That U.S. national would certainly own a claim to the docks for his or her confiscated future property interest. Now assume that the U.S. national authorized Norwegian to make use of the docks for cruises in 2017. Plaintiff's interpretation of the Act would permit Plaintiff to bring a suit under Helms-Burton against Norwegian despite the fact that the person who, but for the confiscation, would have held legal title to the docks in 2017, authorized Norwegian to use his or her property. Both individuals own "claims," which under Plaintiff's view is sufficient to state a cause of action, although those claims relate to two very different property interests. The only way to avoid such absurdly conflicting results is to recognize that a plaintiff must own a claim to *the* property interest that is being trafficked.

Plaintiffs who actually own the claims to trafficked, confiscated property may bring suit under Helms-Burton and, if appropriate, recover treble damages. The Act recognizes that the scope of a claim extends only as far as the confiscated property right vindicates the claim of the "rightful owner" and protects those rightful claims against other erstwhile "claim" holders. *See* 22 U.S.C. § 6081(2), (6). The deterrence rationale of the statute is fulfilled without unnecessarily infringing on the claims and interests of legitimate claim holders. Moreover, another purpose of the Act is to provide former property owners with a compensatory remedy for the unauthorized exploitation of their former property. *See* 22 U.S.C. § 6081(10); *Glen*, 365 F. Supp. 2d at 1270. Norwegian's reading of the Act fully performs this function. Under Norwegian's reading, Helms-Burton plaintiffs have claims that correspond to the property they owned before confiscation. Those plaintiffs can sue anyone who traffics in *that* property. What they cannot do is pursue a claim against someone who never trafficked in their confiscated property. But that is no loss as far as the Act is concerned because allowing plaintiffs whose property interests were never exploited by the defendant to recover damages from that defendant will do nothing to compensate the rightful owners of an exploited property interest.

In sum, to bring its case under Helms-Burton, Plaintiff must own a claim to confiscated property that was trafficked by Norwegian. But Plaintiff owns a claim only to a property interest in the Havana docks that expired in 2004, thirteen years before Norwegian began using those docks. Plaintiff never owned a property interest in the docks beyond 2004, thus Plaintiff can have no claim to confiscated property that was never trafficked by Norwegian. Accordingly, Plaintiff's Complaint must be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, the Court should grant this Motion and dismiss this action with prejudice.

Dated: October 11, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2019, the foregoing was filed with the Clerk of Court using CM/ECF, which will serve a Notice of Electronic Filing on all counsel of record.

By: */s/ Allen P. Pegg*
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