UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 19-cv-22842-DPG

SUCESORES DE DON CARLOS NUÑEZ Y DOÑA PURA GALVEZ, INC., d/b/a BANCO NUÑEZ,

Plaintiff,

v.

SOCIÉTÉ GÉNÉRALE, S.A., d/b/a SG AMERICAS, INC.; THE BANK OF NOVA SCOTIA, d/b/a SCOTIA HOLDINGS (US) INC., a/k/a THE BANK OF NOVA SCOTIA, MIAMI AGENCY; THE NATIONAL BANK OF CANADA, d/b/a NATIONAL BANK OF CANADA FINANCIAL GROUP, INC.; AND BANCO BILBAO VIZCAYA ARGENTARIA, S.A., d/b/a/ BBVA, USA,

Defendants.

DEFENDANT SOCIÉTÉ GÉNÉRALE, S.A.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT 1

I. PLAINTIFF FAILS TO REFUTE SG'S SHOWING THAT IT IS NOT SUBJECT TO PERSONAL JURISDICTION IN FLORIDA. 1

II. PLAINTIFF FAILS TO REFUTE SG'S SHOWING THAT PLAINTIFF LACKS ARTICLE III STANDING. 5

III. PLAINTIFF FAILS TO REFUTE SG'S SHOWING THAT PLAINTIFF MAY NOT BRING A CLAIM ACQUIRED AFTER HELMS-BURTON WAS ENACTED. 7

IV. PLAINTIFF FAILS TO REFUTE SG'S SHOWING THAT SG IS NOT ALLEGED TO HAVE TRAFFICKED IN CONFISCATED PROPERTY 11

A. Plaintiff has changed its theory of trafficking liability. 11

B. Plaintiff's new trafficking theory lacks merit. 12

1. The Act's requirement that a defendant trafficked "in" property belies Plaintiff's attempt to satisfy the statutory standard with amorphous and unspecified "banking interests." 12

2. BNC is not a continuation of Banco Nuñez. 13

C. Conclusory allegations of trafficking do not state a claim. 15

V. PLAINTIFF FAILS TO REFUTE SG'S SHOWING THAT DOMESTIC TAKINGS ARE NOT ACTIONABLE UNDER HELMS-BURTON. 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Alpha Tech. U.S.A. Corp. v. N. Dairy Equip., Ltd.,
2018 WL 501598 (M.D. Fla. Jan. 22, 2018) 2

Barrocos of Fla., Inc. v. Elmassian,
2012 WL 1622988 (S.D. Fla. May 9, 2012) 2

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 7, 16

BTG Patent Holdings, LLC v. Bag2Go, GmbH,
193 F. Supp. 3d 1310 (S.D. Fla. 2016) 2, 3

Burgess v. Religious Tech. Ctr.,
600 F. App'x 657 (11th Cir. 2015) 6

C.I.R. v. Keystone Consol. Indus., Inc.,
508 U.S. 152 (1993) 20

In Re Claim of Isabella Shamma,
Decision No. CU-2593 (F.C.S.C. Sept. 8, 1971) 18

In Re Claim of John Korenda,
Decision No. CU-8255 (F.C.S.C. Mar. 26, 1969) 18

Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) 8

Cont'l Cas. Co. v. Ryan Inc. E.,
974 So. 2d 368 (Fla. 2008) 10

Doe v. Cigna Corp.,
2017 WL 3065112 (M.D. Fla. July 19, 2017) 4

Fid. Nat'l Bank & Tr. Co. of Kansas City v. Swope,
274 U.S. 123 (1927) 3

Films by Jove, Inc. v. Berov,
341 F. Supp. 2d 199 (E.D.N.Y. 2004) 18

Fin. Sec. Assurance, Inc. v. Stephens, Inc.,
500 F.3d 1276 (11th Cir. 2007) 16

Fraser v. Smith,
594 F.3d 842 (11th Cir. 2010) 2

Glen v. Club Méditerranée, S.A.,
450 F.3d 1251 (11th Cir. 2006) 16

Griner v. City of Sanibel, Fla.,
2017 WL 3782788 (M.D. Fla. Aug. 31, 2017) 7

Havana Docks Corp. v. MSC Cruises SA Co.,
2020 WL 59637 (S.D. Fla. Jan. 6, 2020) 4, 8, 12, 19

Hein v. Freedom From Religion Found.,
551 U.S. 587 (2007) 7

Hollis v. W. Academ. Charter, Inc.,
2017 WL 5239578 (S.D. Fla. Aug. 17, 2017) 6

Jackson v. Grupo Indus. Hotelero, S.A.,
2008 WL 4648999 (S.D. Fla. Oct. 20, 2008) 2

Lamie v. U.S. Tr.,
540 U.S. 526 (2004) 8

Landmark Bank, N.A. v. Cmty. Choice Fin., Inc.,
2017 WL 4310754 (S.D. Fla. Sept. 28, 2017) 10

Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Mktg. Ass'n,
276 U.S. 71 (1928) 8

Long v. Satz,
181 F.3d 1275 (11th Cir. 1999) 10

McLaulin v. Comm'r of Internal Revenue,
276 F.3d 1269 (11th Cir. 2001) 8

Merial Ltd. v. Cipla Ltd.,
681 F.3d 1283 (Fed. Cir. 2012) 2

Mohamad v. Palestinian Auth.,
566 U.S. 449 (2012) 8

Moody v. Ascenda USA Inc.,
2016 WL 4702681 (S.D. Fla. July 1, 2016) 6

Mother Doe I v. Al Maktoum,
632 F. Supp. 2d 1130 (S.D. Fla. 2007) 3

Posner v. Essex Ins. Co.,
178 F.3d 1209 (11th Cir. 1999) 4

Read v. Ulmer,
308 F.2d 915 (5th Cir. 1962) 4

Regent Grand Mgmt. Ltd. v. Tr. Hosp. LLC,
2019 WL 1112553 (S.D. Fla. Jan. 9, 2019) 3

Rosenberg v. Gould,
554 F.3d 962 (11th Cir. 2009) 10

Slaihem v. Sea Tow Bahamas Ltd.,
148 F. Supp. 2d 1343 (S.D. Fla. 2001) 4

Steinberg v. A Analyst Ltd.,
2009 WL 838989 (S.D. Fla. Mar. 26, 2009) 2

Temurian v. Piccolo,
2019 WL 1763022 (S.D. Fla. Apr. 22, 2019) 6

Thompson v. Carnival Corp.,
174 F. Supp. 3d 1327 (S.D. Fla. 2016) 2

United States v. Smith,
499 U.S. 160 (1991) 10

Wiersum v. U.S. Bank, N.A.,
785 F.3d 483 (11th Cir. 2015) 8

Yates v. United States,
135 S. Ct. 1074 (2015) 13

Zurich Am. Ins. Co. v. Amerisure Ins. Co.,
2017 WL 366232 (S.D. Fla. Jan. 20, 2017) 6

Statutes

22 U.S.C. § 1623 .... 18, 19

22 U.S.C. § 1643 .... 18, 19

22 U.S.C. § 6023 .... 11, 13, 15

22 U.S.C. § 6081 .... 15, 17

22 U.S.C. § 6081(11) 17

22 U.S.C. § 6082 .... 7, 8, 9, 15, 16

Pub. L. 99-451, § 1, 100 Stat. 1138 (1986) 19

Other Authorities

104 Cong. Rec. S15083 (1995) 15

Black's Law Dictionary 24 (7th ed. 1999) 8

Cambridge Dictionary, https://dictionary.cambridge.org 12

FCSC Annual Report (1971) 18

Fed. R. Civ. P. 8(a) 16

Foreign Claims Settlement Commission, *Annual Report to Congress for Period January 1 to December 31, 1971* 18

H.R. Rep. No. 104-202 (1995).......... 14, 15

H.R. Rep. No. 104-468 (1996).......... 9

Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. 24955 (May 17, 1996).......... 13

MEMORANDUM OF LAW

PRELIMINARY STATEMENT

Société Générale, S.A. ("SG") showed in its Motion to Dismiss that the Amended Complaint ("AC") (1) fails to establish both personal jurisdiction over SG and Plaintiff's Article III standing; and (2) fails to state a valid claim under Helms-Burton for multiple reasons. In its Opposition, Plaintiff does not offer any serious response—or, as to many key points, any response at all—to SG's showings on these issues. Instead, Plaintiff tries to avoid dismissal by setting out radically new contentions resting on factual assertions and theories that nowhere appear in the AC.

These efforts to avoid dismissal of the AC should not succeed. Few pleading rules are more basic than that prohibiting a plaintiff from offering new factual assertions, absent from the complaint, in briefs opposing a motion to dismiss. Plaintiff's arguments should be rejected on this basis alone. Even were that not the case, Plaintiff's new theories are just as defective as the ones proffered in the AC: (1) Its arguments in support of personal jurisdiction and standing are precluded by dispositive holdings of the Supreme Court and the Eleventh Circuit; and (2) its arguments on the merits are inconsistent with the Act's plain language and manifest intent. Accordingly, the AC should be dismissed.

ARGUMENT

I. PLAINTIFF FAILS TO REFUTE SG'S SHOWING THAT IT IS NOT SUBJECT TO PERSONAL JURISDICTION IN FLORIDA.

In its Motion to Dismiss, SG demonstrated that Plaintiff has failed to allege a *prima facie* case that SG is subject to general or specific jurisdiction in Florida. *See* Mot. at 10-13. Through the Bourrinet Declaration, SG further demonstrated that it cannot be subject to general or specific jurisdiction in Florida because it lacks the necessary contacts with this State. *See* Mot. at 13-18. Crucially, SG demonstrated that Plaintiff cannot satisfy the Florida long-arm statute. *See* Mot. at 15-18. Plaintiff offers no argument to the contrary, conclusively conceding

these points. *See* Opp. at 13-16.

Instead, Plaintiff makes a single, unavailing attempt to salvage jurisdiction in Florida by invoking Federal Rule of Civil Procedure 4(k)(2), the federal long-arm statute. "[I]t is a rare occurrence when a court invokes jurisdiction under" Rule 4(k)(2). *Thompson v. Carnival Corp.*, 174 F. Supp. 3d 1327, 1337 (S.D. Fla. 2016). Rule 4(k)(2) applies only if "a defendant is *not* subject to the jurisdiction of the courts . . . *of any one state*." *See Fraser v. Smith*, 594 F.3d 842, 848-49 (11th Cir. 2010) (emphasis added) (citation omitted). Here, Plaintiff may not rely on Rule 4(k)(2) because SG is subject to specific jurisdiction in New York.

As courts in the Southern District of Florida have explained, "one precondition for applying Rule 4(k)(2) is that the defendant must not be subject to personal jurisdiction in the courts of any state (sometimes called the 'negation requirement')." *BTG Patent Holdings, LLC v. Bag2Go, GmbH*, 193 F. Supp. 3d 1310, 1316 (S.D. Fla. 2016) (citing *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1293 (Fed. Cir. 2012)). Accordingly, "[a] defendant who wants to preclude use of Rule 4(k)(2) has only to name some other state in which the suit could proceed." *Barrocos of Fla., Inc. v. Elmassian*, 2012 WL 1622988, at *6 (S.D. Fla. May 9, 2012); *Jackson v. Grupo Indus. Hotelero, S.A.*, 2008 WL 4648999, at *7 (S.D. Fla. Oct. 20, 2008) (same).

Federal courts in Florida routinely decline to apply Rule 4(k)(2) where, as here, the defendant identifies another state where it is amenable to suit. *See e.g., Alpha Tech. U.S.A. Corp. v. N. Dairy Equip., Ltd.*, 2018 WL 501598, at *5 (M.D. Fla. Jan. 22, 2018) (Rule 4(k)(2) was "inapplicable" because the defendant "has identified a state where suit would be possible" to bring against it); *Steinberg v. A Analyst Ltd.*, 2009 WL 838989, at *6 (S.D. Fla. Mar. 26, 2009) (Rule 4(k)(2) was not applicable where plaintiff "has not explained how [defendant] refused to identify any state where suit is possible").

Even putting aside SG's acknowledgement that a New York court may exercise specific personal jurisdiction in this case, Plaintiff's own AC, and its Opposition, confirm that Rule

4(k)(2) is inapplicable. As noted above, Rule 4(k)(2) "is neither applicable nor relevant until a court finds that a defendant is not subject to personal jurisdiction in the courts of any state." *Regent Grand Mgmt. Ltd. v. Tr. Hosp. LLC*, 2019 WL 1112553, at *8 (S.D. Fla. Jan. 9, 2019); *BTG Patent*, 193 F. Supp. 3d at 1316 ("[f]or Rule 4(k)(2) to apply, the Court must find that the defendant is not amenable to personal jurisdiction in *any* state's courts of general jurisdiction.").

Here, the Court may not make such a finding because the AC and Opposition demonstrate that specific jurisdiction does exist in New York. Plaintiff asserts that SG "used New York banking institutions including [SG's] New York branch, to engage in thousands of banking transactions," that "[t]hose transactions constitute trafficking under Helms-Burton," and are the basis for Plaintiff's claim. Opp. at 15. In just such circumstances, the court in *Mother Doe I v. Al Maktoum*, 632 F. Supp. 2d 1130, 1143 (S.D. Fla. 2007), evaluated a complaint that—like the AC—alleged facts supporting jurisdiction in *another* state, and thus the court held that "jurisdiction under Rule 4(k)(2) is not appropriate." *See also BTG Patent*, 193 F. Supp. 3d at 1321 (same).

Plaintiff mistakenly argues that Rule 4(k)(2) is applicable here because SG is not subject to *general* jurisdiction in New York. *See* Opp. at 14. But whether SG is subject to general jurisdiction in New York is irrelevant in this context because SG is subject to specific jurisdiction in New York—thus rendering Rule 4(k)(2) unavailable. *See BTG Patent*, 193 F. Supp. 3d at 1321 (Rule 4(k)(2) was inapplicable where the defendants were subject to personal jurisdiction—but not *general* jurisdiction—in another state). This is further confirmed by the plain language of Rule 4(k)(2), which provides that it is applicable if "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction."[1] The phrase "subject to

[1] The reference to "any state's courts of general jurisdiction" describes the type of state court, *i.e.*, one with "plenary power" (*Fid. Nat'l Bank & Tr. Co. of Kansas City v. Swope*, 274 U.S. 123, 131 (1927)), not the type of personal jurisdiction.

jurisdiction" is not limited to general jurisdiction. *See Havana Docks Corp. v. MSC Cruises SA Co.*, 2020 WL 59637, at *2 (S.D. Fla. Jan. 6, 2020) ("If the statute's meaning is plain and unambiguous, there is no need for further inquiry.").

Because Rule 4(k)(2) is inapplicable, SG's nationwide contacts are irrelevant to the personal jurisdiction analysis. Instead, to avoid dismissal here, Plaintiff must allege Florida contacts sufficient to satisfy the Florida long-arm statute and due process. Mot. at 8-9. The AC fails to do that, and Plaintiff's Opposition effectively concedes this point. The AC thus must be dismissed for lack of personal jurisdiction, as set forth in SG's brief.

Because "[a] court without personal jurisdiction is powerless to take further action" (*Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1214 n.6 (11th Cir. 1999)), SG made its jurisdictional argument the very first point in its Motion to Dismiss. Plaintiff, however, demoted its response on the issue to the third argument in its Opposition—perhaps hoping the Court will address substantive legal arguments ahead of jurisdictional ones or recognizing its failure to allege facts supporting personal jurisdiction. But whatever Plaintiff's rationale for addressing the issues out of order, a "court should decide a 12(b)(2) motion before a 12(b)(6) motion because a court without 12(b)(2) jurisdiction lacks power to dismiss a complaint for failure to state a claim." *Id.* (internal quotation marks omitted); *Doe v. Cigna Corp.*, 2017 WL 3065112, at *1 (M.D. Fla. July 19, 2017) (same). Moreover, respecting the bounds of personal jurisdiction "safeguard[s] defendants from being unwillingly placed under the jurisdiction of a foreign court in a manner that is unjust and inequitable." *Slaihem v. Sea Tow Bahamas Ltd.*, 148 F. Supp. 2d 1343, 1347 (S.D. Fla. 2001). Where, as here, "the court has no jurisdiction over a defendant, the defendant has an unqualified right to have an order entered granting its motion to dismiss." *Read v. Ulmer*, 308 F.2d 915, 917 (5th Cir. 1962).

II. PLAINTIFF FAILS TO REFUTE SG'S SHOWING THAT PLAINTIFF LACKS ARTICLE III STANDING.

In its Motion to Dismiss, SG demonstrated that the AC fails to satisfy the "fairly traceable" prerequisite of Article III standing, which requires a "causal connection" between the plaintiff's alleged injury and the defendant's alleged conduct. Mot. at 21-24. In fact, the AC (like Plaintiff's original Complaint) deliberately *disconnects* SG's alleged conduct from Plaintiff's alleged injury by clearly describing its alleged harm as "losses *attributable to the Cuban Government's confiscation of Banco Nuñez*." Mot. at 23 (citing AC ¶ 68 (emphasis added)). This, of course, is an injury that SG is not alleged to have caused.

In its Opposition, Plaintiff does not (because it cannot) cite a *single* paragraph of the AC to show that it makes allegations that satisfy the "causal connection" requirement of Article III standing. Instead, Plaintiff's Opposition attempts to avoid dismissal by: (1) misconstruing SG's standing argument as an attack on the fundamental constitutionality of Helms-Burton; (2) relying on theories and assertions not contained in the AC, in particular the notion that Plaintiff's injury was caused by SG's failure to obtain Plaintiff's consent to utilize Plaintiff's purported "10% equity in BNC" or its "pro rata share of the Cuban banking industry operated by BNC"; and (3) making the entirely unsupported and fanciful suggestion that SG somehow impeded Cuba and/or BNC from compensating Plaintiff by allowing "exploitation to prosper." *See* Opp. at 11-13. None of these tactics can or should alter the conclusion that Plaintiff lacks Article III standing.

First, SG's Motion to Dismiss did not argue that the Helms-Burton statute is wholly or facially unconstitutional, or that a victim of Cuban expropriation could never claim "injury" based on present-day conduct by a person dealing in confiscated property. *See* Opp. at 11. Rather, SG demonstrated in its Motion to Dismiss that—*in this specific case*—Plaintiff does not plead any causal connection between SG's alleged conduct and Plaintiff's alleged injury. *See* Mot. at 21-24. Plaintiff's Opposition does not even address, much less refute, this essential

point. Thus, as set forth in the Motion to Dismiss, the AC should be dismissed for lack of subject matter jurisdiction.

Second, it is well-settled that Plaintiff may not amend the AC by making new factual assertions in its Opposition. *Burgess v. Religious Tech. Ctr.*, 600 F. App'x 657, 665 (11th Cir. 2015); *Zurich Am. Ins. Co. v. Amerisure Ins. Co.*, 2017 WL 366232, at *7 (S.D. Fla. Jan. 20, 2017) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss."). Rather, the Court must evaluate the question of Plaintiff's standing by reference only to the allegations contained in the AC. *See, e.g.*, *Moody v. Ascenda USA Inc.*, 2016 WL 4702681, at *5 (S.D. Fla. July 1, 2016) ("[I]n determining whether the Amended Complaint sufficiently alleges a concrete and particularized injury [for Article III standing], the Court will not consider Plaintiffs' claims . . . which are set forth in their response to the motion to dismiss."); *see also Temurian v. Piccolo*, 2019 WL 1763022, at *4 (S.D. Fla. Apr. 22, 2019) (dismissing conversion claim where the specific and identifiable property converted was described in opposition to motion to dismiss, not complaint); *Hollis v. W. Academ. Charter, Inc.*, 2017 WL 5239578, at *3 n.2 (S.D. Fla. Aug. 17, 2017) (dismissing because "the first time [plaintiff] advances such a theory is in his Response, it is not properly pled in the [Complaint]; thus the Court declines to consider it.").

Thus, the Court must disregard the Opposition's new suggestion that Plaintiff's injury was caused "in part" by SG's "failure to secure Plaintiff's consent to utilize its pro rata share of the Cuban banking industry operated by BNC." Opp. at 12. As demonstrated in detail in SG's Motion to Dismiss, all of the circumstances alleged in the AC pertaining to the causation of Plaintiff's alleged injury—*including all allegations that reference the taking of Plaintiff's property without compensation or consent*—are attributable to conduct by BNC or the Cuban government, and not SG. *See* Mot. at 22-23 (citing AC ¶¶ 7, 10-13, 25, 50, 51, 56-68, 81-82).

Third, the Court should disregard Plaintiff's newly-minted theory of injury, untethered

to factual assertions in the AC or otherwise, that SG somehow "allow[ed] uncompensated exploitation [by Cuba] to prosper" by not "isolating Cuba." *See* Opp. at 13. Even putting aside the impropriety of making such unsupported assertions for the first time in a brief, the suggestion that Cuba would have reimbursed Plaintiff but for SG's dealings with BNC is so speculative and implausible that it must be disregarded. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *see also Griner v. City of Sanibel, Fla.*, 2017 WL 3782788, at *2 (M.D. Fla. Aug. 31, 2017) (granting motion to dismiss retaliation claim where plaintiff's argument in opposition was based on a theory of constructive discharge that was "at best speculative…[and] a naked assertion devoid of further factual enhancement that contravene[d] *Iqbal* and *Twombly*.") (internal quotation marks omitted). Moreover, the Supreme Court has recognized that the "fairly traceable" requirement of Article III standing may not be satisfied by a plaintiff's prediction that a government might take actions beneficial to plaintiff, if only the government were pressured. *See Hein v. Freedom From Religion Found.*, 551 U.S. 587, 619 (2007) (argument that government would lower plaintiff's tax bill if government were barred from unlawful expenditures was too speculative to support traceability under Article III).

In short, because the AC does not show that Plaintiff's alleged injury is "fairly traceable" to SG's alleged conduct, the AC must be dismissed for lack of Article III standing.

III. PLAINTIFF FAILS TO REFUTE SG'S SHOWING THAT PLAINTIFF MAY NOT BRING A CLAIM ACQUIRED AFTER HELMS-BURTON WAS ENACTED.

The Motion to Dismiss established that "a United States national may not bring an action under [the Act] unless such national acquires ownership of the claim *before* March 12, 1996." 22 U.S.C. § 6082(a)(4)(B) (emphasis added). Here, Plaintiff does not dispute that it is a U.S. national that acquired its claim *after* March 12, 1996. This, in itself, disqualifies Plaintiff under the clear terms of Section 6082(a)(4)(B). And Plaintiff does not deny that, if this statutory language means what it says, Plaintiff's claim must be dismissed. Instead, Plaintiff makes three

arguments for ignoring the unambiguous statutory language. Each argument fails.

First, Plaintiff notes that under the common law, assignees ordinarily may assert the claims of assignors. Opp. at 16-18. But that observation is wholly irrelevant here. Whatever rights assignees might have under the common law, it is the statutory language that governs. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 457 (2012) ("'Congress is understood to legislate against a background of common-law adjudicatory principles.' . . . But Congress plainly can override those principles."); *see also Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Mktg. Ass'n*, 276 U.S. 71, 89 (1928) ("a statute . . . may freely alter, amend, or abolish the common law"). By its express terms, Section 6082(a)(4)(B) disallows the bringing of claims "acquired" after March 12, 1996, a broad term that clearly encompasses assignment. *Black's Law Dictionary* 24 (7th ed. 1999) ("to gain possession or control of; to get or obtain"); *see also McLaulin v. Comm'r of Internal Revenue*, 276 F.3d 1269, 1275 & n.12 (11th Cir. 2001) (interpreting "plain meaning" of statutory term "acquired" in accordance with *Black's Law Dictionary's* definition). Because Plaintiff acquired its claim after March 12, 1996, Plaintiff's claim is barred by the statute.

Second, Plaintiff asserts that Section 6082(a)(4)(B) should not bar its claim because, in its view, certain legislative history indicated that the Act "was aimed at preventing foreigners from assigning their claim to U.S. nationals." *See* Opp. at 18-19. Even if Plaintiff's recitation of the legislative history were accurate, however, Plaintiff's argument fails because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992); *see also Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004); *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 488 (11th Cir. 2015); *Havana Docks Corp.*, 2020 WL 59637, at *2.

In any event, Plaintiff errs in asserting that Congress enacted Section 6082(a)(4)(B) solely to prevent transfer of Helms-Burton claims from foreigners to U.S. nationals. The

congressional record makes clear that was *not* the provision's exclusive rationale: "[T]he[] provision[] [is] intended, *in part*, to eliminate any incentive that might otherwise exist to transfer claims to the confiscated property to U.S. nationals in order to take advantage of the remedy created by this section." H.R. Rep. No. 104-468, at 59 (1996) (Conf. Rep.) (emphasis added). It is easy to understand other rationales for the provision, among them the fear that allowing exceptions to the Act's unambiguous timing rule would lead to uncertainty, manipulation, and lengthy factual disputes about the statute's applicability. Indeed, this case—where Plaintiff now reveals for the first time in its Opposition that not all of the Nuñez heirs were U.S. nationals (*see* Opp. 19 & n.5)—illustrates why the plain-language reading of Section 6082(a)(4)(B) is not "absurd" (Opp. at 20), but rather is an appropriate and proportionate measure disallowing Title III claims acquired after passage of the Act.

Third, Plaintiff gets no further with its assertion that Congress harbored a tacit intention—not stated in the text of Section 6082(a)(4)(B)—to carve out an exception for transfers "from one generation of U.S. nationals to another." Opp. at 18. Even had Congress created such an exception, it would not benefit Plaintiff, which is not a generational heir of the Founders. To the contrary, Plaintiff is an artificially created corporation that received its rights through a voluntary transfer. Accordingly, the question of the rights of intergenerational heirs is not before the Court.[2]

But the fact is, Section 6082(a)(4)(B) does not permit ***any*** transfers after the date specified in that section (March 12, 1996). In contrast, its companion provision, Section 6082(a)(4)(C)—which, unlike Section 6082(a)(4)(B), applies to property confiscated after March 12, 1996—does permit certain transfers after that date. Subsection (C) states that "a United States national who, after the property is confiscated, acquires ownership of a claim to

[2] Moreover, conspicuously absent from the AC is any allegation that any of the heirs are, and were at the relevant times, U.S. nationals.

the property by assignment for value, may not bring an action on the claim under [the Act]." This language, which prohibits only assignments "for value," arguably does not bar a transfer "from one generation of U.S. nationals to another" which is not "for value." The contrast between Subsection (B), which contains no exceptions, and Subsection (C), which permits certain transfers, confirms that the omission of an exception from (B) was not an oversight; when Congress places an exception in one statutory provision and omits it from a related provision, the exception may not be read into the other provision. *See United States v. Smith*, 499 U.S. 160, 167 (1991). For this reason, Plaintiff's argument is wrong.

Finally, the Court should reject Plaintiff's offhand suggestion that it be permitted to "add the thirteen Nuñez heirs (or their living descendants) as parties" to the action if the Court rules that Plaintiff has no right to bring its claim. Opp. at 17-18. To begin, the Eleventh Circuit disallows such under-the-radar motions to amend. *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009) ("Where a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly."). "Filing a motion is the proper method to request leave to amend a complaint," and in moving for leave to amend, a plaintiff must comply with Rule 7(b) by either "set[ting] forth the substance of the proposed amendment or attach[ing] a copy of the proposed amendment." *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999).

More fundamentally, an amendment would be futile. Even assuming *arguendo* that the heirs are and were U.S. nationals—a fact that would have been easy enough to include in the AC if it were true—they no longer own the claims they transferred. *See Landmark Bank, N.A. v. Cmty. Choice Fin., Inc.*, 2017 WL 4310754, at *9 (S.D. Fla. Sept. 28, 2017) ("once transferred, the assignor no longer has a right to enforce the interest because the assignee has obtained all rights to the thing assigned."); *see also Cont'l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 376 (Fla. 2008) (same). Adding the Nuñez heirs therefore would not cure the AC's

incompatibility with Section 6082(a)(4)(B).

IV. PLAINTIFF FAILS TO REFUTE SG'S SHOWING THAT SG IS NOT ALLEGED TO HAVE TRAFFICKED IN CONFISCATED PROPERTY.

Plaintiff also fails to establish its trafficking claim, which requires a showing that SG "'traffic[ked]' in confiscated property." 22 U.S.C. § 6023(13)(A). Rather than address the central points in SG's opening brief, Plaintiff's Opposition offers a new theory of trafficking liability—a theory that departs from the Act's language and that would frustrate its policies.

A. Plaintiff has changed its theory of trafficking liability.

In the AC, Plaintiff left no doubt about the property that it alleged was confiscated from Banco Nuñez and is the subject of its "trafficking" claim: Banco Nuñez's "equity," its "physical assets," "$9.9 million in cash," and "$194,900 in shares of BNC." AC ¶¶ 3, 7, 9-11. Plaintiff was emphatic about this. As the AC puts it, "the Cuban Government failed to pay the Founders for any of Banco Nuñez's stolen property, including: the equity of Banco Nuñez, Banco Nuñez's $9.9 million in cash deposited at BNC, or Banco Nuñez's $194,900 worth of shares of BNC." AC ¶ 50. But the AC does not allege that SG trafficked in (or benefited from BNC's trafficking in) any of those specific assets.

In its opening brief, SG explained that Plaintiff's theory of trafficking liability would rewrite the Act. As SG noted, Helms-Burton liability requires an allegation that the defendant trafficked in the *particular* assets that were confiscated from the plaintiff. Mot. at 28-32. SG showed that Plaintiff does not allege—and could not plausibly allege—that SG trafficked in Banco Nuñez's equity, cash, or other specific and identifiable assets. Mot. at 32-34. And SG demonstrated that trafficking liability may not be predicated simply on "doing business" with a Cuban entity that received confiscated assets, absent a showing that *those assets* were used in the challenged transaction. *See* Mot. at 28-32.

In its Opposition, Plaintiff does not take issue with *any* of these fundamental—and dispositive—propositions. Instead, it offers a new description of the relevant confiscated

property, characterizing it not as the specific assets that the AC alleges were confiscated, but instead as Banco Nuñez's amorphous and unspecified "banking interests" or "banking enterprise." Opp. at 7-9. Under this new theory, Plaintiff adds, BNC is operating the Banco Nuñez banking "enterprise." SG supposedly is liable because, by doing business with BNC, it benefited from BNC's use of Banco Nuñez's undefined "banking interests." *Id*.

B. Plaintiff's new trafficking theory lacks merit.

For several independent reasons, this new theory also is defective.

1. The Act's requirement that a defendant trafficked "in" property belies Plaintiff's attempt to satisfy the statutory standard with amorphous and unspecified "banking interests."

The term "traffics in" ordinarily is understood to mean buying, selling, or otherwise making use of particular items of contraband; someone who uses items stolen from a business can be described as trafficking "in" those stolen items, but would not, in normal usage, be described as trafficking "in" the business from which the items were stolen. *See*, *e.g.*, *Traffic*, Cambridge Dictionary, https://dictionary.cambridge.org (last visited Jan. 6, 2020) (defining "traffic" as "to buy and sell something illegally").[3] Plaintiff's new theory cannot be squared with that language.

That conclusion was recently confirmed by Judge Bloom's decision in *Havana Docks Corporation*. There, the court emphasized that: "if the interest at issue is a leasehold, following the plain language of the statute, a person would have to traffic *in the leasehold* in order for that person to be liable to the owner of the claim to the leasehold." *Havana Docks Corp.*, 2020 WL 59637, at *3 (emphasis added). The phrase "traffics in" must be given meaning. *See id.* at *3 ("to ignore . . . the qualifying words 'such' and 'that' . . . would run afoul of basic canons of statutory construction").

[3] Although the definition of trafficking is not limited to buying and selling property, nothing in the definition suggests that Congress meant to extend the meaning of trafficking beyond activities that profit from particular items of confiscated property.

This same understanding follows from the three-month grace period in Section 6082(a)(1)(A). As explained in the Act's summary (which the Act required the Department of Justice to draft in consultation with the Department of State), under Section 6082(a)(1)(A), "traffickers who *dispose of* their interests in confiscated property before November 1, 1996, will not be subject to liability to the owner of the claim." Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. 24955 (May 17, 1996) (emphasis added). As a matter of ordinary usage, it is only *particular* assets that can be "disposed of" to avoid liability or trafficked "in" to incur liability; disposing of property is not the same as ceasing to do business with the enterprise.[4]

For these reasons, indeterminate "banking interests" do not satisfy the Helms-Burton requirement that identifiable property was confiscated and trafficked in. Accordingly, Plaintiff must allege use by SG of particular confiscated assets in the challenged transactions—but Plaintiff makes no such allegation in the AC.

2. BNC is not a continuation of Banco Nuñez.

In any event, even if Plaintiff's new (and unpled) theory resting on a confiscation of Banco Nuñez "banking interests" were considered, it would still fail here. That is because, as

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[4] The definition of "property" further demonstrates that Congress had in mind that identifiable property must have been confiscated and trafficked in. The Act defines property: as "any property (including patents, copyrights, trademarks, and any other form of intellectual 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) (emphasis added). The law is clear that the words "real, personal or mixed" must shape the meaning of the term "property" as it is used in the Act's definition: Under the statutory-construction canons of *esjudem generis* and *noscitur a sociis*, as used by the Supreme Court and the Eleventh Circuit to interpret federal statutes, "a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'" *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (internal quotation marks omitted). In defining "property" in the Act, Congress could have expressly included complete business enterprises, or it could have omitted the terms "real, personal, or mixed," but it did neither. The language actually used in the statute's definition must be given effect, as the Supreme Court and Eleventh Circuit have emphasized.

the AC itself makes clear, BNC is *not* a continuation of Banco Nuñez under another name. To the contrary, the AC recognizes that BNC's operations long predated the confiscation of Banco Nuñez's assets in 1960. AC ¶ 5. And Banco Nuñez's assets are alleged to have constituted only a small fraction of BNC's property in 1960, even leaving aside the many additional assets that a national bank like BNC necessarily would have acquired from other sources over the intervening decades. *See* AC ¶¶ 6, 7 (Banco Nuñez equity constituted just over 10% of "BNC's value as of October 14, 1958"). Furthermore, BNC's property included not only the assets it had before the confiscation (AC ¶ 5), but also property confiscated from the numerous other banks, foreign and domestic, that operated in Cuba at that time. *See* AC ¶¶ 4-6. Consequently, the suggestion that any transaction conducted with BNC in 2000 effectively was a transaction with Banco Nuñez's "banking interests," and somehow presumptively made use of the assets confiscated from Banco Nuñez in 1960, is a self-serving fiction devised by Plaintiff to paper over the flaws in its theory of liability.

In short, absent allegations that particular confiscated assets were involved in the challenged transactions, doing business with such an entity does not give rise to Helms-Burton liability. Mot. at 28-32.

In fact, imposition of liability in such circumstances would undermine Congress's goal of creating a "proportionate remedy." H.R. Rep. No. 104-202, at 39 (1995). As SG showed (Mot. at 31-32), such an approach would hold liable for the confiscation of Banco Nuñez's property 60 years ago *any* entity that did *any* business with BNC at *any* time during the intervening period—including every small-business owner who was paid for providing maintenance, contracting, HVAC, or other services to BNC or was paid for goods sold to BNC. Plaintiff tries to circumvent this defect in its theory by narrowly describing the type of "activity" that gives rise to Helms-Burton liability. Specifically, Plaintiff argues that companies that do not benefit from "banking activity" with BNC would not be liable. Opp. at 9 n.2. But

that assertion is contrary to the Act's language and is plainly wrong as a matter of logic. Trafficking includes engaging in a "commercial" activity using or otherwise benefiting from confiscated property. 22 U.S.C. § 6023(13)(A). Thus, if the theory of Plaintiff's pleading were accepted, the statute's definition of "traffics" would reach any "commercial" activity that benefited from doing business with BNC, whether that activity was involved in banking or not. That result would be a necessary consequence of Plaintiff's "doing business" theory, and there is no evidence in the language or legislative history of Helms-Burton that Congress wanted to create such an expansive remedy.

It is obvious why Plaintiff shies away from defending the necessary implications of its theory. As SG showed, Congress passed the Act to prevent third parties from exploiting particular confiscated assets—"essentially, the act of 'fencing' stolen goods" (104 Cong. Rec. S15083 (1995))—or from purchasing or leasing specific confiscated facilities, either directly or in joint ventures with Cuban government entities. 22 U.S.C. § 6081(5). Congress certainly did not intend to provide recovery against every company that has engaged in any commercial activity with a Cuban entity that previously absorbed a confiscated "enterprise," with damages against each of those companies measured by the value of that "enterprise" at the time of confiscation. Such a reading of Helms-Burton cannot, in any way, be seen as the "proportionate remedy for U.S. nationals who were targeted by the Castro regime" that Congress meant to create in the Act. H.R. Rep. No. 104-202, at 39 (1995). By contrast, a cause of action that provides a recovery against defendants that used or benefited from specific and identifiable property confiscated from an eligible plaintiff, with damages measured by "the fair market value of *that* property," would be much closer to the kind of "proportionate remedy" Congress described. 22 U.S.C. § 6082(a)(1) (emphasis added).

C. Conclusory allegations of trafficking do not state a claim.

Finally, Plaintiff gets no further by asserting that it has properly stated a claim under

the Act because "its pleading tracked the language of that statute." Opp. at 9. "[A] formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (quoting Fed. R. Civ. P. 8(a)). As the authority cited by Plaintiff for its argument makes clear, "[t]o plausibly plead a claim, a complaint must 'contain either direct or inferential allegations respecting all material elements necessary to sustain a recovery under some viable legal theory.'" *Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282-83 (11th Cir. 2007). On the face of the AC, Plaintiff has not alleged that SG trafficked in the specific property that Plaintiff alleges was confiscated, which is an essential element.

V. PLAINTIFF FAILS TO REFUTE SG'S SHOWING THAT DOMESTIC TAKINGS ARE NOT ACTIONABLE UNDER HELMS-BURTON.

In the Motion, SG quoted Eleventh Circuit authority stating that a "trafficking claim under the statute" does not exist where the "property at issue . . . was owned by Cuban nationals at the time of its expropriation" (*Glen v. Club Méditerranée, S.A.*, 450 F.3d 1251 (11th Cir. 2006)), a conclusion also reached by other courts. Mot. at 35-36. That is so, SG explained, because a prerequisite for a Title III cause of action is that a plaintiff possess a "claim" for expropriation against the Government of Cuba; this "claim" must be established under international law; and under the "domestic takings rule," a seizure by Cuba of property owned by Cuban nationals did not violate international law. *See* Mot. at 40.

In response, Plaintiff simply ignores *Glen* and similar decisions, while arguing that it may assert a claim that is not valid under international law. Opp. at 21. But Plaintiff is wrong. Its various arguments that the domestic takings rule is inapplicable to Helms-Burton claims are contrary to the Act's language and purposes.

First, Plaintiff errs in contending that Congress abrogated the domestic takings rule by providing a cause of action to "any United States national who owns the claim to such property," (22 U.S.C. § 6082(a)(1)(A)). *See* Opp. at 21-22. That language permits suit only by U.S. nationals who own a "claim"; it does not state *what* constitutes a valid "claim." As SG

demonstrated in its Motion, Title III makes clear that the existence and validity of a "claim" is determined by international law. Mot. at 37-39. Plaintiff gets no further in asserting that Congress adopted international law in the Foreign Sovereign Immunities Act by using the words "international law," and observing that Helms-Burton does not use that phrase (Opp. at 21), because Helms-Burton expressly incorporated other statutes that *do* use the words "international law."[5] Mot. at 38.

Second, Plaintiff incorrectly argues that the "purpose" of Title III is to "remedy" Cuba's confiscation of property from "Cubans who . . . later became naturalized citizens of the United States." Opp. at 22, citing 22 U.S.C. § 6081(3)(A)(iii). Plaintiff's argument misstates Title III's findings. The language quoted by Plaintiff is an illustrative example of persons who suffered from Fidel Castro's "personal despotism." *Id.* That reference does not purport to address who enjoys a Title III remedy; to the contrary, the same list includes Cubans who remained in Cuba, who Plaintiff acknowledges may not sue under Title III. Moreover, another finding in the Act, which *does* address who is afforded a Title III cause of action, conspicuously omits any reference to Cubans who later became U.S. citizens, referring instead to "United States nationals who were the victims of these confiscations." 22 U.S.C. § 6081(11). That language is most naturally read as describing persons who were U.S. nationals *at the time of confiscation*.

Third, Plaintiff's observation that Congress made the "act of state doctrine" inapplicable to Title III (Opp. at 22) does not show that Congress also made the domestic takings rule inapplicable. Lifting the act of state doctrine enables adjudication of trafficking actions by U.S. nationals holding claims to confiscated property. Had Congress not done so, that doctrine—which "precludes the courts of this country from inquiring into the validity of

[5] Although Plaintiff cites parts of the legislative history suggesting Title III plaintiffs may include persons who were not U.S. citizens at the time of taking (Opp. at 22-23), this does not mean the Act covers domestic takings. A plaintiff who today is a U.S. citizen may have had third-country citizenship when its assets were nationalized, in which case the seizure may well have violated international law at the time of the taking.

the public acts a recognized foreign sovereign power committed within its own territory," even acts by the foreign sovereign taken against non-citizens (*see* Opp. at 22)—could have barred adjudication of many trafficking actions by U.S. nationals whose property was confiscated in violation of international law.[6] The domestic takings rule, by contrast, bars a different set of claims. The abrogation of one does nothing to alter the other.

Fourth, as noted above and in SG's opening brief (Mot. at 37-39), much of Helms-Burton is concerned with plaintiffs whose "claims" were resolved by the FCSC, the agency established under the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621-1645o ("ICSA"), to determine, in accordance with international law, the validity and amount of claims asserted by U.S. citizens against the Cuban Government. Mot. at 39-40. Plaintiff now asserts that FCSC certifications were never subject to international law. Opp. at 24. This is simply incorrect. The 1964 legislation establishing the first Cuban Claims program mandated that any decision as to the "validity" of a U.S. national's claim be made under "international law." 22 U.S.C. § 1643b(a). The FCSC's decisions reflect this requirement.[7] The second Cuban Claims Program, established in 2005, was likewise governed by international law, by virtue of the 1986 amendments to the ICSA that: (1) reiterate that "[t]he [FCSC] shall apply . . . [t]he applicable principles of international law, justice and equity" (22 U.S.C. § 1623(a)(2)); and (2) mandate

[6] Congress partially abrogated the act of state doctrine before passage of Helms-Burton through the "Second Hickenlooper Amendment," which permits certain claims involving foreign expropriations of property notwithstanding that doctrine. That Amendment, however, was not broad enough to permit U.S. nationals to bring all the claims permitted by Title III. *Cf. Films by Jove, Inc. v. Berov*, 341 F. Supp. 2d 199, 210 (E.D.N.Y. 2004) (noting certain claims fall outside the scope of the Second Hickenlooper Amendment). Helms-Burton's abrogation of the act of state doctrine thus assured that the doctrine would not bar Helms-Burton claims by U.S. nationals.

[7] *See, e.g.*, *In Re Claim of John Korenda*, No. CU-8255 (F.C.S.C. Mar. 26, 1969), reprinted at Foreign Claims Settlement Commission, *Annual Report to Congress for Period January 1 to December 31, 1971* ("FCSC 1971 Rep.") at 125; *In Re Claim of Isabella Shamma*, No. CU-2593 (F.C.S.C. Sept. 8, 1971), reprinted at FCSC 1971 Rep. at 229-30.

that such principles apply to all actions of the FCSC. *See* Pub. L. 99-451, § 1, 100 Stat. 1138 (1986); codified at 22 U.S.C. § 1623(k).[8]

Plaintiff fares no better when it cites Helms-Burton's amendments to the ICSA, which authorize the FCSC to evaluate the "amount and ownership of a claim by a United States national . . . whether or not the United States national qualified as a national of the United States . . . at the time of the action by the Government of Cuba." 22 U.S.C. § 1643l. *See* Opp. at 24. An obvious explanation for this amendment is that it benefited non-Cuban victims of confiscations who were not U.S. nationals at the time of taking who subsequently obtained U.S. citizenship. Moreover, such decision-making by the FCSC is subject to 22 U.S.C. § 1623(k), which mandates that the FCSC apply international law in the "exercis[e]" of "authority granted" under "*this chapter [the ICSA] or any other Act [i.e., including Helms-Burton]*." *Id.* (emphasis added). International law standards thus govern the FCSC's role under the provision of the Act cited by Plaintiff.

Finally, Plaintiff's approach would mean that persons who were Cuban nationals at the time their property was taken and had their claims denied by the FCSC pursuant to the domestic takings rule may not bring a Helms-Burton claim (*see* Mot. at 39); whereas Plaintiff, which asserts precisely the same sort of injury in exactly the same circumstances, would be exempt from the domestic takings rule and would enjoy a different result. Especially given that the FCSC certification process is central to the interpretation of the Title III, (*see Havana Docks Corp.*, 2020 WL 59637, at *3), it could not have been Congress's intent to have one set of

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[8] Plaintiff wrongly asserts that Congress "excluded" international law in the operation of the Cuban Claims Program because the housekeeping provisions of Title V of the ICSA (22 U.S.C. § 1643h) did not cross-reference two provisions of Title I (22 U.S.C. § 1623(a) and 22 U.S.C. § 1623(k)) that generally apply international law to the FCSC. But the first Cuban Claims Program (1) was already subject to "international law," *see* 22 U.S.C. § 1643b(a), obviating the need to cross-reference Title I, and (2) did not cross reference Section 1623(k) because 22 U.S.C. § 1623(k) was not enacted until 1986, 22 years later. The second Cuban Claims Program was explicitly governed by both 22 U.S.C. §§ 1623(a) and (k). *See* 2005 FCSC Ann. Rep. 16.

claims determined according to international law standards, while leaving identical claims to be determined under other (indeterminate) standards. Plaintiff cannot avoid this problem by asserting that there is nothing "irregular" about treating certified and uncertified claims differently (Opp. at 24 n.7); it is clearly irregular for Plaintiff to argue that the same word ("claim") means different things and has different requirements depending on the identity of the plaintiff. *See C.I.R. v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) ("identical words used in different parts of the same act are intended to have the same meaning") (citation omitted).

CONCLUSION

For the reasons stated herein and in SG's opening brief, the AC should be dismissed with prejudice in its entirety.

Dated: January 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that the foregoing is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

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