

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-23590-CIV-BLOOM

HAVANA DOCKS CORPORATION,

Plaintiff,

vs.

ROYAL CARIBBEAN CRUISES LTD.,

Defendant.

**DEFENDANT'S MOTION FOR
CERTIFICATION FOR INTERLOCUTORY APPEAL**

Defendant Royal Caribbean Cruises Ltd. ("Royal Caribbean"), pursuant to 28 U.S.C. §1292(b), moves for the entry of an Order certifying the Court's Omnibus Order (the "Order") [DE 45] for interlocutory appeal. The grounds for this Motion are:

I. INTRODUCTION

Plaintiff alleges that it owned a concession for real property located on the waterfront at the port of Havana, Cuba (Order, p. 2). The documents granting the concession stated that it was to run for ninety-nine years beginning in 1905 (Order, p. 23; DE 32-1, ¶15; DE 46, ¶15). The Certified Claim that was written by the Foreign Claims Settlement Commission (FCSC) in 1971 said the concession was to expire in 2004 (which is ninety-nine years after 1905) (Order, p. 2; DE 32-1, Ex. A; DE 46-1). The Cuban Government confiscated the property in 1960 (Order, p. 2).

Plaintiff first filed suit against Carnival Corporation. *See Havana Docks Corp. v. Carnival Corp.*, Case No. 19-21724-CIV-BLOOM (S.D. Fla.) (the "*Carnival* Action"). Plaintiff's complaint purported to state a cause of action against Carnival for alleged violations of Title III of 22 U.S.C. §§6021 *et seq.*, the LIBERTAD Act (the "Act"). Plaintiff alleged that Carnival

committed “trafficking” for the purposes of the Act because Carnival – beginning in 2016 – operated cruises to the Port of Havana that used the real property that had been the subject of the concession (Order, p. 5).

Carnival moved to dismiss, arguing that Plaintiff failed to state a cause of action because, among other reasons, the certified claim that Plaintiff obtained from the FCSC certified Plaintiff’s ownership of a time-limited concession that was to expire in 2004, and Carnival did not begin using the property had been the subject of the concession until 2016 (Order, p. 5; *Carnival Action*, DE 17, pp. 11-15 (“As a matter of statutory text and logic, therefore, to be liable for trafficking under Title III of the Act, a defendant must have trafficked in a property interest to which a plaintiff actually owns a claim.”)).

The Court denied Carnival’s motion to dismiss and rejected this specific argument, ruling:

First, the plain language of the Libertad Act states that “any person ... that traffics in property which was confiscated by the Cuban Government ... shall be liable to any United States national *who owns the claim* to such property.” 22 U.S.C. § 6082(A) (emphasis added). Thus, the Libertad Act does not expressly make any distinction whether such trafficking needs to occur while a party holds a property interest in the property at issue. To this extent, the Court agrees with the Plaintiff that the Defendant incorrectly conflates a claim to a property and a property interest. Accordingly, the Court finds that the Complaint sufficiently alleges that the Plaintiff owns a claim to the Subject Property.

Further, the Defendant argues that the Claim Certification attached as an exhibit to the Complaint negates the Plaintiff’s claim because it identifies that it maintained only a timed concession to the Subject Property. ECF No. [17], at 15. As such, the Court should consider the exhibit as grounds to dismiss the instant lawsuit. However, even considering the timed-concession, such would not “negate” a valid claim to the subject property, and thus is also not a valid argument supporting dismissal at this stage.

(Order, pp. 5-6; *Carnival Action*, DE 47, pp. 8-9).

After the Court denied Carnival’s motion to dismiss, Plaintiff sued three more cruise lines, *including Royal Caribbean in this action*, alleging that they, too, committed “trafficking” in

violation of the Act by operating cruises to Havana – beginning *after* 2004 – that used the real property that had been the subject of the concession. The other two actions are *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, Case No. 19-23591-CIV (S.D. Fla.) (the “NCL Action”) and *Havana Docks Corp. v. MSC Cruises SA Co. et al.*, 19-23588-CIV (the “MSC Actions”). Each of the three actions was reassigned to this Court from other district judges in the District.

Royal Caribbean answered Plaintiff’s complaint (DE 16). As its second affirmative defense, Royal Caribbean alleged that “Plaintiff’s claim is barred because Plaintiff’s concession for the Subject Property expired years before Royal Caribbean’s use of the Subject Property began” (*Id.*, p. 3).

NCL and MSC moved to dismiss for failure to state a claim. They argued – just as Carnival had previously argued – “that Havana Docks’ [Plaintiff’s] claim failed as a matter of law because Havana Docks’ interest in the Subject Property was a leasehold interest that expired in 2004, and Havana Docks therefore could only assert a claim under Title III for trafficking that occurred prior to the expiration of its leasehold interest” (Order, p. 6) (internal citations omitted). “In its responses in both cases, Havana Docks relied heavily on the Court’s holding in the *Carnival* Order in arguing that it had sufficiently alleged a claim for relief under Title III” (*Id.*).

This time, however, the Court *agreed* with this argument and ruled that Plaintiff had failed to state a claim. As recounted in the Order:

In ruling on MSC’s Motion to Dismiss and NCL’s Motion to Dismiss, the Court found it necessary to reconsider its ruling in the *Carnival* Order. The Court determined that the issue regarding the nature of Havana Docks’ underlying ownership interest was dispositive, reasoning that because the Certified Claim was predicated on Plaintiff’s time-limited leasehold interest, Havana Docks could not, as a matter of law, state a claim for relief under the Act based on trafficking that occurred after Plaintiff’s leasehold interest expired.

(Order, p. 7). The Court granted NCL's and MSC's motions to dismiss, and dismissed with prejudice the complaints in those actions.

In light of the Court's rulings in the *NCL* and *MSC* Actions, Royal Caribbean moved for judgment on the pleadings (DE 26). Royal Caribbean argued that if Plaintiff had failed to state a claim against those cruise lines, then Plaintiff necessarily failed to state a claim against Royal Caribbean which, as Plaintiff alleged, did not begin cruising to Havana until 2017. And, in light of the rulings in the *NCL* and *MSC* actions, Carnival moved for reconsideration of the Court's order denying its earlier motion to dismiss (*Carnival* Action, DE 65).

Plaintiff then filed motions in the *NCL* and *MSC* actions asking the Court to reconsider its orders granting those cruise lines' motions to dismiss. Plaintiff also requested that it be granted leave to file amended complaints in those actions. In this action, Plaintiff responded to Royal Caribbean's motion for judgment on the pleadings, and separately moved for leave to file an amended complaint. In the *Carnival* Action, Plaintiff responded to Carnival's motion for reconsideration and moved for leave to file an amended complaint.

The Court held a consolidated hearing on the motions that were pending in this action and in the *NCL* and *MSC* actions. The pending motions in the *Carnival* Action were not considered at the hearing.

A few weeks after the hearing, the Court entered orders on the pending motions, including the ones in the *Carnival* Action. In its orders, the Court again reversed course by ruling that the Court's statutory interpretation in its orders granting NCL's and MSC's motions to dismiss was wrong, and the interpretation in the Court's earlier order denying Carnival's motion to dismiss was correct. Thus, the Court ruled that, as a matter of law, the Act creates liability for trafficking in property that was confiscated without regard to whether the trafficking was in the plaintiff's

particular interest in the property or when the trafficking took place (Order, pp. 11-22; *NCL* Action, DE 53, pp. 14-26; *MSC* Action, pp. 14-27; *Carnival* Action, DE 79, pp. 18-19).

In terms of timing and sequence, the Court first granted Plaintiff's motions for reconsideration in the *NCL* and *MSC* actions, and vacated the orders granting those cruise lines' motions to dismiss. Then, the Court entered the Order in this action, in which the Court wrote that "[t]he reasoning set forth in the Orders on Reconsideration applies with equal force in the instant action. Even setting aside the errors of fact, the numerous errors of law in the Motion to Dismiss Orders, which have since been vacated, preclude Royal Caribbean's entitlement to judgment as a matter of law here" (Order, p. 12). The Court went on to repeat that analysis in the Order, and denied Royal Caribbean's motion for judgment on the pleadings (*Id.*, pp. 11-22).

Finally, in each of the four actions, the Court granted Plaintiff leave to file an amended complaint.

Through this Motion, Royal Caribbean requests that the Court certify the Order for interlocutory appeal.

II. ARGUMENT

When a district court enters an order that is otherwise not immediately appealable, 28 U.S.C. §1292(b) allows a district court to certify the order for interlocutory appeal if the district court is "of the opinion that" (1) "the order involves a controlling question of law" (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See* 28 U.S.C. §1292(b); *see also Simpson v. Carolina Builders Corp.*, 222 F. App'x 924, 925 (11th Cir. 2007). Each of those elements is satisfied here.

A. There Is A Controlling Question Of Law.

In the Order, the Court ruled that the language of the Act creates liability for trafficking in property that was confiscated without regard to whether the trafficking was in the plaintiff's particular interest in the property or when the trafficking took place. That is a controlling question of law that satisfies the first element of §1292(b).

For the purposes of §1292(b), the term “question of law”

has reference to a question of the meaning of a statutory [] provision The term “question of law” does not mean the application of settled law to fact. It does not mean any question the decision of which requires rooting through the record in search of facts Instead, what the framers of §1292(b) had in mind is more of an abstract legal issue or what might be called one of “pure” law, matters the court of appeals can decide quickly and cleanly without having to study the record.

See McFarlin v. Canseco Services, LLC, 381 F.3d 1251, 1258 (11th Cir. 2004) (quoting *Ahrenholz v. Board of Trustees of the University of Illinois*, 219 F.3d 674, 676-77 (7th Cir. 2000)) (alterations added) (additional quotation marks omitted).

The Court's Order turned entirely on the meaning of a statutory provision; here, the Act. The Order was based on the Court's identification of the relevant provisions of the Act, and the Court's interpretation of what those provisions mean and how they relate to, and interact with, each other. Indeed, the Order itself confirms that the controlling and dispositive issues were legal ones of statutory interpretation, and *not* factual issues:

Even setting aside the errors of fact, ***the numerous errors of law in the Motion to Dismiss Orders***, which have since been vacated, preclude Royal Caribbean's entitlement to judgment as a matter of law here.

* * *

[A]s explained at length below and in the Orders on Reconsideration in *MSC* and *NCL*, the Court's ***statutory interpretation of Title III's language*** in its Motion to Dismiss Orders was incorrect, and its resulting conclusions were contrary to the Act's express purpose. In particular, the Court in the

Motion to Dismiss Orders construed the liability provisions of §6082(a)(1)(A) too narrowly – a construction which it has since concluded is not in keeping with the Act. Instead, the Court’s ruling in the *Carnival* order was consistent with Title III’s language and purpose. As such, the reasoning in the Motion to Dismiss Orders incorrectly conflated the Certified Claim with Havana Docks’ former interests in the Subject Property.

(Order, pp. 12, 14) (emphasis added).

This is precisely the type of scenario that warrants certification under §1292(b): a legal question of statutory interpretation that the Eleventh Circuit can resolve without having to study a factual record. *See, e.g., McFarlin*, 381 F.3d at 1259 (citing *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1252-53 (11th Cir. 2004)) (“[Section] 1292(b) appeals were intended, and should be reserved, for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts.”).

Additionally, that this legal issue is a “controlling” one is shown by the fact that the Court’s changing views on the meaning and interpretation of this statutory language converted a dismissal with prejudice for failure to state a claim into orders vacating the dismissals and allowing the actions to proceed. *See, e.g.,* 16 Charles Alan Wright and Arthur R. Miller, *Federal Practice & Procedure*, §3930 (3d ed.) (“There is no doubt that a question is ‘controlling’ if its incorrect disposition would require reversal of a final judgment, . . . for a dismissal that might have been ordered without the ensuing district court proceedings.”). But, a question of law can be controlling even if it might not lead to reversal on appeal. “A steadily growing number of jurisdictions [] have accepted the better view that a question is controlling, even though its disposition might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants.” *See id.*

Finally, this question of law applies to more than only this action. *See, e.g., McFarlin*, 381 F.3d at 1259 (“The legal question must be stated at a high enough level of abstraction to lift the question out of the details of the evidence or facts of particular case and give it relevance to other cases in the same area of law.”). At the threshold, it is also relevant to the *NCL*, *MSC*, and *Carnival* Actions. But, even beyond the Havana Docks cases, this legal question is relevant to any case brought under the Act in which the plaintiff had a limited interest in real property, and the defendant’s alleged trafficking was not in that particular interest.¹

This element of §1292(b) is satisfied.

B. There Is Substantial Ground For Difference Of Opinion.

This element examines whether there is substantial ground for difference of opinion as to the controlling question of law. The Court’s multiple orders adopting diametrically opposed interpretations of the same statutory provisions shows that there is substantial ground for difference of opinion on this controlling question of law.²

¹ Royal Caribbean is currently aware of the following actions: *Glen v. American Airlines, Inc.*, No. 19-cv-23994 (S.D. Fla. Apr. 15, 2020) (DE 63) (Notice of Suppl. Authority) (identifying the order granting reconsideration in the *NCL* Action as one that “resolves several issues of statutory construction under the Helms-Burton Act, including the scope of the private right of action for unlawful trafficking and property interests for which a plaintiff may bring a Helms-Burton Act claim,” which “were raised by [Defendant] in its motion to dismiss and were addressed by Plaintiff in his responsive memorandum”); *Sucesores de Don Carlos Nunez y Dona Pura Galvez, Inc. v. Societe Generale, S.A.*, No. 19-cv-21724 (S.D. N.Y. Jan. 1, 2020), (DE 41 at 22) (Reply to Mot. to Dismiss Am. Compl.) (“On the face of the [Amended Complaint], Plaintiff has not alleged that [Defendant] trafficked in the specific property that Plaintiff alleges was confiscated, which is an essential element.”); Memorandum of Law in Support of Defendant’s Mot. to Dismiss, *John S. Shepard Family Trust v. NH Hotels USA, Inc.*, No. 19-cv-09026 (S.D. N.Y. Jan. 1, 2020), (DE 32 at 19-21) (citing to this Court’s order granting *NCL*’s motion to dismiss to support the proposition that plaintiff cannot state a claim “because the property interest it allegedly owned . . . is not the property in which Defendants are alleged to have trafficked”).

² The parties’ arguments regarding the issue of statutory interpretation – and the Court’s analysis of that issue across the multiple orders – will not be repeated here.

In its orders granting the motions to dismiss in the *NCL* and *MSC* actions, the Court provided approximately thirty pages of analysis explaining why (a) the proper interpretation of the Act is that it does not create liability for trafficking where the conduct at issue occurred after the date on which the plaintiff's time-limited leasehold interest would have expired, and (b) the Court's prior, contrary interpretation of the Act in the *Carnival* Action was incorrect.

In the Order in this action – and in the orders on the motions for reconsideration in the *NCL*, *MSC*, and *Carnival* Actions – the Court ruled that, on third-thought, the proper interpretation of the same statutory provisions is the one set out in the original order denying the motion to dismiss in the *Carnival* Action, and not the interpretation in the subsequent orders granting the motions to dismiss in the *NCL* and *MSC* actions.

That there is substantial ground for differing opinions on this issue of statutory meaning and interpretation is shown by the entry in these Havana Docks cases of three sets of orders offering extensive analysis as to why each of drastically differing interpretations of the same statutory language is the correct interpretation. This element is satisfied.

C. A Determination On Appeal Will Materially Advance The Ultimate Termination Of The Litigation.

This third element of §1292(b) looks at whether “an immediate appeal from the order may materially advance the ultimate termination of the litigation.” “This is not a difficult requirement to understand.” *See McFarlin*, 381 F.3d at 1259. As discussed above in connection with the “controlling” nature of the legal issue, that this element is satisfied is evident from the fact that the *NCL* and *MSC* Actions were dismissed with prejudice when the Court interpreted the Act in the manner that Royal Caribbean contends is correct.

That said, the plain language of this element does not require that the determination on appeal be case-dispositive. This element is satisfied “where resolution of controlling questions

could shorten the time, effort, and expense of the litigation[.]” *See McFarlin*, 381 F.3d at 1293 (citing *U.S. Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F.Supp. 1139, 1176 (W.D. Mich. 1988)). If there were anything to survive an appellate resolution in Royal Caribbean’s favor, the time, effort, and expense that would be involved in litigating those issues are infinitesimal compared to litigating an action involving alleged trafficking of an ownership interest in waterfront real property at the Port of Havana. This element is satisfied.

III. CONCLUSION

For these reasons, Royal Caribbean respectfully requests that the Court certify the Order for interlocutory appeal.

Certificate of Counsel

Counsel for Royal Caribbean conferred with counsel for Plaintiff before filing this motion. Counsel for the parties were unable to reach agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of April 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF System.

By: /s/ Scott D. Ponce