UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUCESORES DE DON CARLOS NUÑEZ Y DOÑA PURA GALVEZ, INC.; MYRIAM E. NUÑEZ, as Personal Representative and Executor of the ESTATE OF NESTOR FRANCISCO NUÑEZ GALVEZ; EILEEN DOMINGUEZ, as Personal Representative and Executor of the ESTATE OF BLANCA NUÑEZ; GLORIA TORRALBAS NUÑEZ; GLORIA PILAR MOLINA, as Personal Representative and Administrator of the ESTATE OF THOMAS TORRALBAS NUÑEZ; PURA AMERICA OCHOA NUÑEZ; NORKA CABANAS NUÑEZ; CARLOS CABANAS NUÑEZ; SILVIA NUÑEZ TARAFA; CARLOS NUÑEZ TARAFA; LOURDES NUÑEZ, as Personal Representative and Administrator of the ESTATE OF ALEJANDRO NUÑEZ TARAFA; CARLOS ARSENIO NUÑEZ RIVERO, as Personal Representative and Executor of the ESTATE OF CARIDAD MARIA RIVERO CABALLERO; and CARLOS ARSENIO NUÑEZ RIVERO, Plaintiffs, v. SOCIÉTÉ GÉNÉRALE, S.A. and BNP PARIBAS, S.A., Defendants.	Civil Action No. 1:20-cv-00851-KMW-KNF ORAL ARGUMENT REQUESTED

JOINT MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

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INTRODUCTION

The Plaintiffs in this action are (1) Sucesores de Don Carlos Nuñez & Dona Pura Galvez, Inc. ("Sucesores"), a Florida corporation not formed until August 19, 1996; and (2) twelve individuals (the "Individual Plaintiffs").[1] The Individual Plaintiffs allege that they are heirs of the founders of Banco Nuñez, a Cuban bank. Second Amended Complaint ("SAC") ¶ 19. Plaintiffs allege that Banco Nuñez was confiscated by Cuba in 1960 and consolidated into "the state-controlled entity Banco Nacional de Cuba" ("BNC"). *Id.* ¶¶ 2, 28. The Individual Plaintiffs assigned all of their interests in Banco Nuñez to Sucesores pursuant to a stockholders agreement dated May 24, 1997 (the "Stockholders Agreement") and an assignment of interest dated September 20, 2019 (the "2019 Assignment"). *Id.* ¶ 34.

Plaintiffs have sued Defendants under Title III of the Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C. § 6021, *et. seq.* ("Helms-Burton," "Title III," or "the Act"). The Act creates a cause of action pursuant to which any "U.S. national" who "owns the claim" to property that was "confiscated" by the Cuban government on or after January 1, 1959, may bring suit against entities that "traffic[] in . . . such property." In the case of property confiscated before March 12, 1996 (as alleged here), a plaintiff must be a U.S. national and have acquired

[1] The Individual Plaintiffs are: (1) Myriam E. Nuñez, as Personal Representative and Executor of the Estate of Nestor Francisco Nuñez Galvez; (2) Eileen Dominguez, as Personal Representative and Executor of the Estate of Blanca Nuñez; (3) Gloria Torralbas Nuñez; (4) Gloria Pilar Molina, as Personal Representative and Administrator of the Estate of Thomas Torralban Nuñez; (5) Pura America Ochoa Nuñez; (6) Norka Cabanas Nuñez; (7) Carlos Cabanas Nuñez; (8) Silvia Nuñez Tarafa; (9) Carlos Nuñez Tarafa; (10) Lourdes Nuñez, as Personal Representative and Administrator of the Estate of Alejandro Nuñez Tarafa; (11) Carlos Arsenio Nuñez Rivero, as Personal Representative and Executor of the Estate of Caridad Maria Rivero Caballero; and (12) Carlos Arsenio Nuñez Rivero.

the claim *before* that date. *See* 22 U.S.C. § 6082(a)(4)(B).[2]

Plaintiffs allege that the Cuban Government confiscated property from Banco Nuñez, including: (1) equity (*id.* ¶¶ 27, 30); and (2) assets, such as a deposit account maintained at BNC (*id.* ¶ 30), branches (*id.* ¶ 27), and a loan portfolio (*id.*). Plaintiffs' claimed injury is that "[t]he Cuban Government confiscated Banco Nuñez on October 14, 1960, and consolidated it into the state-controlled [BNC]" (*id.* ¶ 2), and that "[t]he Founders received no compensation for the banking enterprise that the Cuban Government confiscated and merged into BNC." *Id.* ¶ 31.

The SAC contains no well-pleaded allegations that the Defendants in the action, Société Générale ("SG") and BNP Paribas ("BNPP"), actually trafficked in any of the confiscated property. Rather, Plaintiffs claim that Defendants' deferred prosecution agreement ("DPA") and guilty plea (respectively) in connection with U.S. sanctions on Cuba reflect "conduct [that] includes engaging in commercial activity with BNC," *id.* ¶ 39, which Plaintiffs maintain is sufficient to support Helms-Burton liability. Expounding on this theory, Plaintiffs argue that Defendants should be liable not because their alleged transactions with BNC made use of particular confiscated assets, but instead because BNC's ownership of "confiscated property made BNC a more stable, less risky, and more desirable counterparty." SAC ¶ 45.

Plaintiffs' case rests on the assumption that the Act permits anyone whose assets were confiscated by the Castro regime to recover the value of those assets (in some cases, trebled)

[2] As discussed further below, the Individual Plaintiffs—appreciating that Sucesores acquired its claim *after* the Act's March 12, 1996 cut off—allege that if Sucesores cannot bring the Helms-Burton claim, then "Sucesores' purpose is frustrated and the Stockholders Agreement is void *ab initio*," *Id.* ¶ 65, in which case, under Plaintiffs' theory, Sucesores' claim would revert to the Individual Plaintiffs, who then would assert it through this suit. Two Sucesores stockholders (the "Absent Stockholders"), owning a little under 20% of the company as of May 24, 1997, are not included among Individual Plaintiffs, although it appears from the Stockholders Agreement that they would recover through Sucesores, if it were to prevail. As discussed below (*infra*, page 30), the Absent Stockholders do not appear to be U.S. citizens.

from *anyone* who did *any* business at *any* time after the confiscation with a Cuban-owned entity that benefited from the confiscation—even if (as is true here) the defendants are not alleged to have benefited from or used the particular alleged confiscated assets at issue. This theory has no support in the Act's plain language or in any case.

Accepting the allegations in the Complaint as true, the SAC should be dismissed for the following reasons:

First, Plaintiffs lack standing under Article III of the U.S. Constitution, which requires an injury in fact that is concrete and particularized, not conjectural or hypothetical, and that is "fairly traceable to the challenged conduct of the defendant." Here, there is no alleged connection between Plaintiffs' *only* claimed injury (the uncompensated confiscation of their property by the Cuban Government in 1960 and its absorption into BNC) and Defendants' alleged conduct, *i.e.*, entering into and profiting from credit facilities allegedly involving BNC some forty years *after* that injury was suffered. When, as here, there is no alleged causal connection between the plaintiffs' injury and the defendants' conduct, the plaintiffs lack standing. The absence of Article III standing deprives this Court of subject matter jurisdiction to adjudicate plaintiffs' claims. *See, e.g.*, *Glen v. Am. Airlines*, 2020 WL 4464665, at *2-3 (N.D. Tex. Aug. 3, 2020) ("*Glen v. AA*") (dismissing Helms-Burton claim in materially identical circumstances). The SAC therefore must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

Second, Sucesores is statutorily ineligible to seek Title III relief because the Act unequivocally states that for property confiscated before March 12, 1996, only U.S. nationals who acquired their claims *prior* to that date may assert a cause of action under the Act. Sucesores alleges that it acquired its claim by assignments dated May 24, 1997 and September 20, 2019. On this basis alone, Sucesores' claim in Count I of the SAC must be dismissed.

Third, the Individual Plaintiffs lack standing to bring Count II, which they assert "to the extent Sucesores" cannot bring Count I. As the Individual Plaintiffs acknowledge, they assigned any Banco Nuñez claims they purported to hold to Sucesores. Consequently, they lack standing to bring Count II as a contingent claim or otherwise. Nor can the Individual Plaintiffs cure this defect by invoking a "frustration of purpose" theory (or any other theory) to void the Stockholders Agreement, because a party that lacks standing, such as the Individual Plaintiffs, cannot request *any* relief from the Court. The Individual Plaintiffs, by asking the Court to issue a ruling on substantive contractual matters that they hope would redress their lack of standing, have put the cart before the horse. In any event, for the reasons discussed below, the Individual Plaintiffs' "frustration of purpose" theory fails as a matter of law.

Fourth, Plaintiffs fail to allege that Defendants "trafficked" in confiscated property within the meaning of Helms-Burton. The Act's language and legislative history make clear that a Helms-Burton action may proceed only when the defendant is alleged to have trafficked in the *particular* property confiscated by the Cuban Government. But the SAC contains no well-pleaded allegation that Defendants trafficked in Banco Nuñez's equity or assets. Instead, Plaintiffs assert in a conclusory fashion that Defendants supposedly engaged in commerce with BNC. According to Plaintiffs, that alleged commerce occurred long after the confiscation—which, indeed, was some sixty years ago—and Plaintiffs further concede that even at the time of confiscation, BNC was primarily comprised of assets *other than* Banco Nuñez. SAC ¶¶ 2, 30. Plaintiffs' claim thus boils down to the position that Defendants are liable for allegedly "engaging in commercial activity with BNC," SAC ¶ 39, a claim utterly unmoored from the statutory requirement that a defendant must have "trafficked" in "such property" as was "confiscated by the Cuban Government."

Fifth, the SAC fails to adequately allege that Defendants engaged in any trafficking "knowingly and intentionally," as the Act requires. The Act's language and relevant case law establish that defendants must have known that the particular property used in their transactions had been confiscated by the Cuban Government. The allegations here that Defendants simply intended to transact with BNC cannot suffice, nor does the boilerplate assertion that the "international banking community" (SAC ¶¶ 29, 44, 52) was on notice that all banks in Cuba were confiscated. Such allegations do not establish that the Defendants knew that the particular property used in alleged transactions with BNC had been confiscated. Plaintiffs also fail to establish that Defendants knew that Banco Nuñez assets were taken by the Cuban Government *without compensation or a later settlement*, which is also necessary to establish that Defendants knew the property had been "confiscated" under the Act. Further, the SAC alleges that the property was confiscated from the Founders when they were Cuban nationals, SAC ¶ 29-32, whereas case law holds that a defendant must have known a U.S. citizen owned the confiscated property at the time of confiscation. Here, the SAC's allegations demonstrate the opposite, *i.e.*, that the property in fact was *not* confiscated from a U.S. national, but instead from Cuban nationals.

Finally, the fact that the property at issue was confiscated from *Cuban nationals* is yet another reason that Title III relief is unavailable here. As numerous courts have recognized, Helms-Burton requires that a plaintiff allege a legally valid "claim" to the confiscated asset. The language, history, and structure of the Act show that such a claim must be valid as a matter of international law. But Cuba confiscated the Banco Nuñez assets from its own nationals—and it is long settled that international law does not recognize a claim for such purely "domestic" takings.

Each of these fundamental flaws independently requires dismissal of the SAC.

BACKGROUND

A. Plaintiff Sucesores Is A Florida Entity Set Up In August 1996 By Alleged Heirs Of The Founders Of Banco Nuñez, A Cuban Bank Allegedly Confiscated By The Cuban Government In 1960.

According to the SAC, Banco Nuñez was a Cuban-owned bank founded and solely owned by Carlos and Pura Nuñez (the "Founders"). SAC ¶¶ 2, 27. Plaintiffs allege that on October 14, 1960, all Cuban-owned banks, including Banco Nuñez, were nationalized and absorbed into BNC. SAC ¶¶ 2, 28. Plaintiffs allege that as of December 31, 1958, Banco Nuñez had equity with a book value of $7.8 million, twenty-two branches, a loan portfolio, and $9.9 million on deposit with BNC that also was confiscated. SAC ¶¶ 27, 30.

BNC was established as the Central Bank of Cuba in 1948, and came under control of the Castro regime in 1959, before the Cuban Government's confiscation of Banco Nuñez. *See Id.* ¶ 2 n.1. BNC is alleged to have absorbed all foreign and Cuban-owned banks in Cuba following Castro's seizure of power. SAC ¶ 18. Plaintiffs acknowledge that only "[a]bout 10% of BNC's equity was derived from property seized from Banco Nuñez." SAC ¶¶ 2, 30.

In August 1996, the corporate plaintiff Sucesores was created. SAC ¶ 34; *see* Declaration of Alex C. Lakatos ("Lakatos Decl.") Ex. B, Florida Secretary of State certificate (showing Sucesores incorporated on August 19, 1996). Plaintiffs allege that Sucesores was created by "heirs" of the Founders. SAC ¶ 34. "Through a Stockholders Agreement, dated May 24, 1997 and an Assignment of Interest, dated September 20, 2019, the heirs assigned all of the interests they inherited through Carlos's will to Sucesores." *Id.*; *see* Lakatos Decl. Ex. A, Stockholders Agreement (showing fourteen individuals as parties to the Stockholders Agreement). Twelve of the fourteen individuals who were parties to the Stockholders Agreement are Individual Plaintiffs in this action; two stockholders—who appear to have collectively owned 18.53% of Sucesores at

the time of the Stockholders Agreement—are not plaintiffs. *Compare* SAC ¶¶ 7-18, *with* Stockholders Agreement, Lakatos Decl. Ex. A at 9 (listing as signatories Dagmar Hidalgo Galvez and Elsa Ochoa Molina, who are not parties to this action). In addition, the SAC asserts that unspecified individuals, through "beque[st]" or "transfer[]," obtained shares of Sucesores at a "later" date. SAC ¶ 35. The SAC does not allege that these additional stockholders are among the Individual Plaintiffs.

According to the Stockholders Agreement, Sucesores' purposes were, among other things, to "conduct . . . business operations" (*see* Lakatos Decl. Ex. A §§ 4, 12); permit the sale of its stock to third parties in private sales, or even to the public (*see id.* §§ 6-9); and own assets, the stock of another company, and property that can be used to pay dividends to any purchasers or holders of its shares (*see id.* §§ 11-12). In addition, its signatories' objectives included (1) to "comply with the agreements by them" in a separate memorandum (the "MOU"), and (2) to "comply with . . . the will of [founder Carlos Nuñez]" ("Founder Carlos' Will"). *See* Lakatos Decl. Ex. A at 1. Plaintiffs have not attached the MOU or Founder Carlos' Will to the SAC, but he is alleged to have died in 1979, long before Helms-Burton was enacted. SAC ¶ 3.

B. The SAC Alleges A Claim Against Defendants For Allegedly Violating Title III Of The Helms-Burton Act.

Plaintiffs assert that the Defendants violated Title III of the Helms-Burton Act, which provides that a person who "traffics in" property confiscated by the Cuban Government on or after January 1, 1959, may be liable for money damages to any "United States national who owns the claim to such property." 22 U.S.C. § 6082(a)(1)(A). Title III provides that, for property confiscated before March 12, 1996, the private right of action is limited to U.S. nationals who acquired their claims prior to that date. *Id.* § 6082(a)(4)(B). As noted above, Sucesores was

incorporated on August 19, 1996—*i.e.*, after the statute's March 12, 1996 deadline—and acquired the interests held by the heirs of the Founders after that. SAC ¶ 34.

The Act became law on March 12, 1996, and its terms became effective six months later, on August 12, 1996, but the private right in Title III did not take immediate effect. "The passage of the [Helms-Burton] Act caused an international uproar among United States' allies due to the extraterritorial reach of Title III." *Odebrecht Constr. Inc. v. Prasad*, 876 F. Supp. 2d 1305, 1311-12 (S.D. Fla. 2012) (citations omitted). Presidents Clinton, George W. Bush, and Obama suspended the Title III right of action "[i]n light of [the] foreign reaction to Title III," *id.* at 1312-14, and the danger that a broad private damages action would alienate important U.S. trading partners such as Canada and EU member states. Those countries have supported U.S. efforts to foster democracy in Cuba but permit their nationals to do business there. Title III suits like this only became possible when President Trump broke with that bipartisan tradition.

Under the Act, a person "traffics" in confiscated property if that person "knowingly and intentionally" "us[es] or . . . benefit[s] from confiscated property," "causes, directs, participates in, or profits from" trafficking by another person, or engages in trafficking through another person. *Id.*, § 6023(13)(A)(ii)-(iii). The SAC alleges that Defendants extended "credit facilities" (*i.e.*, loans) to BNC and numerous other entities in Cuba, and processed certain transactions related to those loans. *E.g.*, SAC ¶¶ 40-54. The SAC alleges that such transactions were the subject of government investigations and criminal proceedings. *Id.* ¶ 39.

For SG, the allegations in the SAC are based on the November 18, 2018 Deferred Prosecution Agreement (the "DPA") between SG and the United States Attorney's Office for the Southern District of New York. SAC Ex. 3. Pursuant to the DPA, SG consented to the filing of a one-count Information, charging SG with conspiring to violate the Trading with the Enemy Act

("TWEA") and the Cuban Assets Control Regulations ("CACR"). *Id.* Although the DPA and Information are exhibits to the SAC and are cited in the SAC, they do not involve, or purport to involve, the Helms-Burton Act.

As to BNPP, Plaintiffs base their claim on BNPP's July 9, 2014 plea agreement entered into with the United States Attorney's Office for the Southern District of New York (the "Plea Agreement"). BNPP pled guilty to conspiring to violate the International Emergency Economic Powers Act of 1977 and TWEA. Like the DPA, the Plea Agreement does not involve, or purport to involve, the Helms-Burton Act.

As noted *supra*, pages 4, 5, the SAC does not allege any facts showing that the transactions at issue in Defendants' DPA and Plea Agreement related to any Banco Nuñez assets (such as any deposit account, loan portfolio, or branches) or any Banco Nuñez equity (such as common or preferred shares). As discussed *infra*, pages 24, 25, the scope of the laws that formed the basis of the DPA and the Plea Agreement are considerably broader than Title III. Unlike Title III, these laws, and other laws directed at limiting trade with Cuba, go far beyond imposing liability for "trafficking in" identifiable and specific confiscated property, instead imposing sanctions for virtually all activities or trade involving Cuba, subject only to limited, qualified exceptions. *See, e.g.*, TWEA; Foreign Assistance Act of 1961 ("FAA"); CACR; Cuban Democracy Act of 1992 ("CDA"); Trade Sanctions Reform and Export Enhancement Act of 2000 ("TSRA").

ARGUMENT

In the Helms-Burton Act, Congress imposed specific limitations on the cause of action under Title III. Among other things, Congress expressly limited the private right of action to (1) specific plaintiffs, *i.e.*, only U.S. nationals, and of them, only those that owned a claim to

confiscated property as of the date Helms-Burton was enacted, (2) specific defendants, *i.e.*, those who acted knowingly and intentionally, and (3) specific conduct, *i.e.*, "trafficking in" "such property" as was "confiscated"—all terms that, as used in the Act, have particular meanings. In imposing these limits, Congress was aware that nearly every U.S. ally—including Defendants' home country, France—allows its nationals to conduct business in Cuba. Congress therefore sought to create a "proportionate remedy," H.R. Rep. No. 104-202, at 39 (1995), providing meaningful relief within the Act's limitations, not a universal cause of action against anyone who has allegedly done business in Cuba during the last 60 years.

The claim in this suit ignores those limits. Plaintiffs' theory would impose vast damages (potentially trebled) on every entity that has conducted transactions with any Cuban-owned or operated instrumentality. Such an outcome is not permitted by the text of the statute and would frustrate, not advance, the congressional policy. For the reasons explained below, the SAC should be dismissed in its entirety.

I. PLAINTIFFS LACK STANDING TO PURSUE THIS ACTION.

As a threshold matter, the SAC should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because Plaintiffs have not established Article III standing. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (standing is a "threshold jurisdictional question" that must be addressed independent of the merits of a party's claims); *Cortlandt St. Recovery Corp. v. Hellas Telecommunications, S.a.r.l,* 790 F.3d 411, 417 (2d Cir. 2015) (citations omitted) ("[P]laintiff bears the burden of 'alleg[ing] facts that affirmatively and plausibly suggest that it has standing to sue.'"); *Glen v. AA*, 2020 WL 4464665, at *2-3 (same, dismissing Helms-Burton claim for lack of Article III standing).

At an "irreducible constitutional minimum," Article III requires a plaintiff to establish

that it suffered (1) an "'injury in fact" (2) that is "fairly . . . trace[able] to the challenged action of the defendant" and (3) is likely redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *accord Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Mahon v. Ticor Title Ins.*, 683 F.3d 59, 61, 66 (2d Cir. 2012) (affirming dismissal for lack of standing where "[plaintiff] does not allege any personal injury at [the defendants'] hands"). Failure to establish any one of these three standing elements deprives the court of subject matter jurisdiction. *Lujan*, 504 U.S. at 560-61.

Here, Plaintiffs have not even tried to satisfy the second, traceability requirement. An injury cannot be fairly traceable if it is "th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. The *only* harm that Plaintiffs allege is the confiscation of the Founders' property by the Cuban Government sixty years ago and the failure of Cuba or BNC to compensate the Founders. *See, e.g.*, SAC ¶ 1 ("This is an action for damages arising from the confiscation of property by the Cuban Government"); SAC ¶ 2 ("Despite confiscating their bank, the Cuban Government never compensated the Founders"); SAC ¶ 31 ("The Founders received no compensation for the banking enterprise that the Cuban Government confiscated and merged into BNC. Nor did the Founders, any of their heirs, or Plaintiffs receive any compensation for BNC's use of Banco Nuñez and its assets over the next 60 years, to the present day."). But that injury has absolutely nothing to do with Defendants' alleged transactions with BNC some 40-50 years after the fact; Plaintiffs do not contend otherwise. *See* SAC ¶¶ 39-54. Indeed, Plaintiffs' allegations negate any such connection: the SAC makes clear that it was solely the Cuban Government, under Cuban Law 891, that confiscated all Cuban-owned banks (including Banco Nuñez) and merged them into BNC. *See* SAC ¶¶ 2, 28, 29. That is fatal to any claim of standing by Plaintiffs. *See S. Illinois Laborers' & Employers Health & Welfare Fund v.*

Pfizer Inc., 2009 WL 3151807, at *8 (S.D.N.Y. Sept. 30, 2009) (Wood, J.) ("Plaintiffs have not alleged the necessary causal connection, and thus have not established Article III standing.").

The key question in the standing inquiry here is this: Would Plaintiffs' purported injury be *any* different if Defendants had not extended "credit facilities" to Cuba, as alleged? The answer, of course, is no—which means that the alleged injury in this case is not constitutionally traceable to Defendants. *See Nat'l Council of La Raza v. Mukasey* 283 F. App'x 848, 851-52 (2d Cir. 2008) (plaintiffs failed to satisfy the traceability requirement of Article III where defendant's alleged actions did not cause plaintiffs' alleged injury).[3]

Plaintiffs cannot make up for this deficiency by treating Defendants' asserted violation of Helms-Burton *as* the injury in fact. As explained *infra*, pages 13-36, there is no trafficking violation here. But even if there were, that alleged "trafficking" is not alleged to have caused any *injury in fact* to Plaintiffs (and it plainly did not cause any such injury). And a statutory violation that has not caused an actual injury to the plaintiffs does not establish constitutional standing: "Article III standing requires a concrete injury *even in the context of a statutory violation.*" *Thole v. U. S. Bank N.A.*, 140 S. Ct. 1615, 1620–21 (2020) (emphasis added); *see Spokeo*, 136 S. Ct. at 1549 (standing is not satisfied simply because "a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right"); *Glen v. AA*, 2020 WL 4464665, at *2 (dismissing Helms-Burton claim; holding that plaintiff could not establish injury in fact by

[3] As discussed below, *infra*, page 25, the examples meant to be actionable under Title III that Congress offered all involved the actual and meaningful use by the defendant of particular confiscated property. One Florida district court concluded that standing might be satisfied in a case, unlike this one, where there was actual and meaningful use of the particular confiscated property by the defendant, for which the plaintiff otherwise would have received compensation. *Cf. Havana Docks Corp. v. MSC Cruises SA Co.*, 2020 WL 5367318, at *3, *7 (S.D. Fla. Sep. 9, 2020) (defendant "regularly embark[ed] and disembark[ed] their passengers on the Subject Property").

alleging an "injury [that] is based entirely on defendant's alleged violation of the substantive rights given to plaintiff by the Act"). Congress cannot override a constitutional requirement and thus could not, even if it wanted to, "erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo,* 136 S. Ct. at 1547-48.

Accordingly, and regardless of whether Plaintiffs have met—or failed to meet—the statutory requirements of Helms-Burton, Plaintiffs' claims must be dismissed on constitutional grounds because Plaintiffs have not alleged facts showing that they incurred an injury that is "fairly traceable" to Defendants' alleged conduct. *Lujan*, 504 U.S. at 560; *Mahon*, 683 F.3d at 66 (affirming dismissal for failure to meet "causation" element of Art. III standing); *Nat'l Council of La Raza*, 283 F. App'x at 851-52 (same); *S. Illinois Laborers' & Employers Health & Welfare Fund*, 2009 WL 3151807, at *8 (dismissing claims for lack of traceability).

II. THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED.

Failure to satisfy the traceability requirement of Article III is not the only reason this suit must be dismissed: Plaintiffs' action also suffers from several independently dispositive failings.

A. Sucesores' Claim Was Not Acquired Prior to March 12, 1996, And So Must Be Dismissed.

The Act expressly limits the "[a]pplicability" of its civil remedy: "In the case of property confiscated before the date of the enactment of this Act [March 12, 1996], a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim *before* [*March 12, 1996*]." 22 U.S.C. § 6082(a)(4)(B) (emphasis added). Sucesores cannot establish that element here because the SAC alleges that Sucesores received the assignment of the claim from the Individual Plaintiffs (and others) pursuant to the Stockholders Agreement, dated May 24, 1997, and the 2019

Assignment, dated September 20, 2019. SAC ¶ 34. Indeed, Sucesores did not come into existence, and thus necessarily could not have "own[ed]" any "claim," until, at the earliest, August 1996, *after* the enactment of Helms-Burton.[4]

Application of this plain statutory language to the alleged facts requires dismissal of Sucesores' purported claim, which it acquired after the March 12, 1996 cut-off date. *See Gonzalez v. Amazon.com, Inc.*, 2020 WL 2323032, at *2 (S.D. Fla. May 11, 2020) ("*Gonzalez II*") (holding that "the United States citizen filing suit [under Helms-Burton] must already own the interest in the confiscated property on March 12, 1996 when the Act was passed"); *Glen v. AA*, 2020 WL 4464665, at *4 (dismissing plaintiff's claim under Helms-Burton because "timely acquisition is a prerequisite to suit" and the plaintiff "did not acquire his claim . . . before March 12, 1996").

Congress specifically anticipated just this situation, and this result. As the House Committee responsible for development of the legislative language explained:

> [I]t is not the intention of the committee that the right of action be available to entities that are incorporated in the United States after the date of enactment, inasmuch as such entities could not have owned the claim to confiscated property on the date of enactment because they did not then exist.

H.R. Rep. No. 104-202, at 40 (1995); *see also* H.R. Rep. No. 104-468, at 59 (1996) ("Entities that are incorporated in the United States after the date of enactment cannot use the remedy with respect to property confiscated before the date of enactment[.]").

Respecting this Congressional directive is especially vital here because any damages awarded to Sucesores would be shared among all its stockholders, including the Absent

[4] *See supra*, page 6; Lakatos Decl. Ex. B, Florida Secretary of State certificate (showing that Sucesores was incorporated on August 19, 1996).

Stockholders, who appear never to have been U.S. citizens and thus were never eligible to bring a Helms-Burton claim. *See* SAC ¶ 33 (list of heirs who were U.S. citizens on March 12, 1996, *omitting* the Absent Stockholders). It would contravene the Act if such persons were to receive the benefits of Title III by the device of an assignment to Sucesores.

B. The Individual Plaintiffs, Having Assigned Their Purported Claim to Sucesores, Lack Standing to Pursue Count II.

The SAC admits that the Individual Plaintiffs assigned to Sucesores any "claim" they previously may have held. Accordingly, the Individual Plaintiffs have no standing to proceed, and so Count II must be dismissed. *See Valdin Invs. Corp. v. Oxbridge Capital Mgmt.*, LLC, 651 F. App'x 5, 7 (2d Cir. 2016) (holding that plaintiff "lacks standing" because its "assignment of its rights extinguished its claims against [defendant]"); *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, Nat'l Ass'n*, 731 F.2d 112, 125 (2d Cir. 1984) ("assignment extinguishes the assignor's rights . . . [which] leaves the assignor without standing to sue the obligor."); *Nastasi & Assocs., Inc. v. Bloomberg, L.P.*, 2020 WL 1166055, at *1 (S.D.N.Y. Mar. 11, 2020) (Furman, J.) ("A plaintiff cannot establish the requisite injury in fact [for Article III standing] where, before filing the lawsuit, it assigns its title or ownership of the claims at issue to another party."), *reconsideration denied*, 2020 WL 2555281 (S.D.N.Y. May 20, 2020) (Furman, J.).[5]

Recognizing that they have no claim to assert, the Individual Plaintiffs purport to bring a contingent claim in Count II, contending that, "[t]o the extent that Sucesores cannot bring" a Helms-Burton cause of action, "Sucesores' purpose is frustrated and the Stockholders Agreement is void *ab initio*." *See* SAC ¶ 65. But the Individual Plaintiffs' lack of standing means the Court lacks subject matter jurisdiction. As a result, they have no rights to seek any relief from the

[5] The SAC does not seek to void the 2019 Assignment, pursuant to which "all" of the Individual Plaintiffs' interests in Banco Nuñez were allegedly assigned to Sucesores. SAC ¶ 34.

Court, including this purported recast, "contingent" claim. *See Steel Co.*, 523 U.S. at 94 ("Without jurisdiction the court cannot proceed at all in any cause.") (internal quotations omitted); *Jones v. Schneiderman*, 101 F. Supp. 3d 283, 289 (S.D.N.Y. 2015) (Wood, J.) ("[i]f a plaintiff lacks standing, there is no case or controversy over which a federal court may exercise jurisdiction.") (internal quotations omitted).

In any event, the Individual Plaintiffs' frustration of purpose argument fails for three independent reasons.

First, as courts applying Florida law (which governs the Stockholders Agreement, *see* Lakatos Decl. Ex. A § 23) recognize, frustration of purpose "is not available concerning difficulties which could reasonably have been foreseen by the promisor at the creation of the contract." *Home Design Ctr.--Joint Venture v. Cty. Appliances of Naples, Inc.*, 563 So. 2d 767, 770 (Fla. Dist. Ct. App. 1990); *Valencia Ctr., Inc. v. Publix Super Mkts., Inc.*, 464 So. 2d 1267, 1269 (Fla. Dist. Ct. App. 1985) (same). Plaintiffs may not assert frustration of purpose because the effect of the Act's plain language prohibiting Sucesores from bringing a claim it acquired after March 12, 1996, was reasonably foreseeable—indeed, it was obvious—when the Individual Plaintiffs assigned their claim to Sucesores on May 24, 1997. *Id.*; *see also Gonzalez II*, 2020 WL 2323032, at *2 (holding that the "*plain language* of [Helms-Burton]" shows that a plaintiff that acquired a claim after March 12, 1996 cannot bring a Title III cause of action) (emphasis added).

Second, the Stockholders Agreement cannot be voided because a number of parties to that agreement—the Absent Stockholders, and the individuals to whom shares were transferred after Sucesores was originally formed—have not been joined as parties to this case. *Compare* Lakatos Decl. Ex. A at 9 (listing 14 stockholders, including Absent Stockholders), *and* SAC ¶ 35 (subsequent transferees), *with* SAC ¶¶ 7-19, 35 (listing the Individual Plaintiffs, excluding

Absent Stockholders).[6] "No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Crouse–Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 701 (2d Cir.1980) (internal quotations omitted). For that reason, "[s]everal courts have held that [Fed. R. Civ. P. 19(b)] requires dismissal of an action to set aside a contract where all parties cannot be joined." *Vedder Price Kaufman & Kammholz v. First Dynasty Mines, Ltd.*, 2001 WL 1190996, at *2 (S.D.N.Y. Oct. 9, 2001) (Pauley, J.) (absent parties to contract were indispensable) (collecting cases, including *Crouse-Hinds*); *see also Kawahara Enters., Inc. v. Mitsubishi Elec. Corp.*, 1997 WL 589011, at *5 (S.D.N.Y. Sep. 22, 1997) (Mukasey, J.) (same). Here, because voiding the Stockholders Agreement would deny the absent parties benefits they contracted to obtain, Plaintiffs cannot ask this Court to order that remedy. Indeed, any dispute between or among the parties to the Stockholders Agreement about its rescission would have to be decided in arbitration. *See* Lakatos Decl. Ex. A § 19 (arbitration clause).

Third, just because a contract fails to yield all of the benefits that the parties had hoped to achieve does not mean that its purpose has been frustrated. *See Williams, Salomon, Kanner, Damian, Weissler & Brooks v. Harbour Club Villas Condo. Ass'n, Inc.*, 436 So. 2d 233, 235 (Fla. Dist. Ct. App. 1983) (holding that "it cannot be said that the purpose of the parties' agreement was frustrated because the actual outcome was one not originally anticipated"); *Valencia Ctr.*, 464 So. 2d at 1269 (frustration inapplicable to void lease where "Valencia's *intent* when it entered the lease was to make a profit, an intention frustrated by the tax rise; however, Valencia's property can still be used for rental") (emphasis in original); *Lee v. Bowlerama*

[6] *See* Lakatos Decl. Ex. A § 6(b) (subsequent stockholder transferees deemed parties to the Stockholders Agreement).

Enters., Inc., 368 So. 2d 913, 916 (Fla. Dist. Ct. App. 1979) (frustration inapplicable to void lease where "subject property could be used for a nightclub, albeit not for one as large as desired").

Measured against this legal standard, the Individual Plaintiffs' frustration argument fails. To begin, as discussed *supra*, pages 6-7, the Stockholders Agreement by its express terms shows that Sucesores has multiple purposes that go beyond merely "asserting interests in Banco Nuñez." Plaintiffs do not (and cannot) contend that any of those other purposes has been frustrated. Absent an allegation that all purposes were frustrated, the frustration doctrine does not apply. *See 1700 Rinehart, LLC v. Advance Am.*, 51 So. 3d 535, 537 (Fla. Dist. Ct. App. 2010) (doctrine requires that "agreement has been *totally* frustrated") (emphasis added). And even if Sucesores' "sole" purpose were to assert interests in Banco Nuñez—which the SAC itself belies[7]—Sucesores has been fulfilling that purpose. It has been asserting those interests by sending the Defendants notices of intent to sue, SAC ¶ 5, and prosecuting this action. The alleged purpose of asserting interests in Banco Nuñez is not "frustrated" within the meaning of the doctrine simply because the effort fails.

Moreover, even if Sucesores cannot continue to pursue a *Helms-Burton* claim, that does not prevent it from "asserting interests in Banco Nuñez" (SAC ¶ 3); it merely will foreclose one potential remedy. *See* H.R. Rep. No. 104-468, at 58 (1996) (Helms-Burton "provide[s] an *additional* remedy for U.S. nationals") (emphasis added). Plaintiffs entered into the Stockholders Agreement despite the fact that Title III's express and unambiguous language bars Sucesores

[7] As noted *supra*, page 7, one of the purposes of the Stockholders Agreement is to comply with Founder Carlos' Will—a purpose that necessarily has nothing to do with asserting a Helms-Burton claim because Helms-Burton was not enacted until decades after Carlos Nuñez executed his will.

from maintaining a Helms-Burton claim. Yet, Sucesores can continue to "assert interests in Banco Nuñez" outside of this litigation by, among other things, (1) advocating for new legislation providing compensation from sources such as assets blocked pursuant to U.S. sanctions on Cuba,[8] (2) participating in any claim settlement arrangements that may flow from any normalization of U.S.-Cuba relations,[9] and (3) if such settlement arrangements do not include cash settlement payments for parties in Sucesores' position, participating in any dispute resolution procedures that may be negotiated as part of that transition.[10]

C. Plaintiffs' Allegations Are Insufficient To Show That Defendants Trafficked In The Property That Plaintiffs Allege Was Confiscated.

Plaintiffs' action fails for the additional, independent reason that the Complaint lacks any well-pleaded allegation that Defendants used or benefited from the *particular* property claimed by Plaintiffs. The Act is clear, providing that the right of action against someone who traffics in

[8] *Cf.* Terrorism Risk Insurance Act of 2002, 28 U.S.C. § 1610 note (permitting use of blocked assets of terrorists to satisfy certain judgments against a terrorist party on a claim based upon an act of terrorism).

[9] Congress has recognized, as fundamental to any normalization of U.S.-Cuba relations, that Cuba first must agree to pay U.S. nationals' expropriation claims, *see, e.g.*, 22 U.S.C. § 6067 ("It is the sense of the Congress that the satisfactory resolution of property claims by a Cuban Government recognized by the United States remains an essential condition for the full resumption of economic and diplomatic relations between the United States and Cuba."). Similarly, the Obama administration, in making strides toward normalization, sought to ensure that Cuba would agree to pay such claims, *see* The White House, Presidential Policy Directive – United States-Cuba Normalization, 2016 WL 5956667 (Oct. 14, 2016) ("We launched dialogues or discussions on . . . claims."). Although the Trump Administration's Cuba policy so far has veered away from that approach, normalization remains a plausible path for U.S. nationals to obtain compensation.

[10] The Conference Report for the Act notes that U.S. support for a transition government in Cuba under Title II is conditioned "on such government publicly committing itself, and taking appropriate steps to establish a procedure under its law or through international arbitration, to provide for the return of, or prompt, adequate, and effective compensation for, property confiscated by the Cuban Government on or after January 1, 1959." H.R. Rep. No. 104-468, at 56 (1996).

property "which was confiscated by the Cuban Government" can be brought only by a U.S. national "who owns the claim to *such property*." 22 U.S.C. § 6082(a)(1)(A) (emphasis added). The plain language of the statute defines "traffics" in terms of the defendant's conduct regarding the "confiscated property" (that is, its use or drawing of benefits from that property) (22 U.S.C. § 6023(13)(A)), and confines the private right of action to persons who "own[] the claim to *such* property." *Id.* § 6082(a)(1)(A) (emphasis added); *see In re Harbor E. Dev. Ltd.*, 2011 WL 45335, at *3 (S.D. Fla. Bankr. Jan. 6, 2011) ("Title III of the Act was intended to grant U.S. nationals a private right of action to bring suit . . . against persons who 'traffic' in *their* confiscated property in Cuba.") (emphasis in the original); *cf. In re Mid-West Tar Prods. Corp.*, 150 F. Supp. 163, 172 (D. Md. 1956) (rule affording ancillary bankruptcy court authority to "hear and adjudge *claims to such property*, . . . refers to the power of the ancillary court to determine ownership, priorities and liens for the benefit of claimants to the *specific property* in its possession") (emphasis added) (internal quotation omitted).

Title III's "Findings" provisions underscore the express statutory requirement that the defendant have engaged in or benefited from transactions involving the particular property that was confiscated.[11] The Findings reflect Congress's specific disapprobation of "[t]he wrongful confiscation or taking of property belonging to United States nationals by the Cuban Government, and the subsequent exploitation of *this property* at the expense of the rightful owner." 22 U.S.C. § 6081(2) (emphasis added); *id.*, § 6081(6) (describing the foregoing conduct as "'trafficking' in confiscated property"). By tying the cause of action to transactions involving the *particular* confiscated property claimed by the plaintiff, the Act seeks to create a

[11] Findings applicable to the entire Act are set forth at 22 U.S.C. § 6021. The Act's purposes are set forth at 22 U.S.C. § 6022. Findings applicable to Title III are set forth at 22 U.S.C. § 6081.

"proportionate remedy for U.S. nationals who were targeted by the Castro regime when their property was confiscated." H.R. Rep. No. 104-202, at 39 (1995); *see also* H.R. Rep. No. 104-468, at 58 (1996) (Helms-Burton offers a "remedy for U.S. nationals through which they may take action to *protect their claim to a confiscated property in Cuba*.") (emphasis added); *id.* (Helms-Burton allows avoidance of treble damages "by ceasing to traffic in *the property in question*") (emphasis added).

The requisite identity between property Plaintiffs allege was confiscated and the property in which Plaintiffs allege Defendants trafficked is wholly absent from the SAC here. Plaintiffs premise this action on the property allegedly confiscated from the Founders in 1960: their equity in Banco Nuñez and Banco Nuñez's assets. SAC ¶¶ 2, 27, 30, 44-45, 52-53. But the SAC does not allege that Defendants trafficked in *such* property, or that any funds that BNC allegedly paid Defendants (or that otherwise are associated with any alleged exchange between BNC and Defendants) are specific property that once belonged to the Founders. This omission alone is dispositive.

In other words, Plaintiffs—aware of their inability to link the confiscated property to Defendants—seek to rewrite the Act, basing their claim on the assertion that Defendants trafficked by "engaging in *commercial activity with BNC*" and "assisted BNC's banking activities." SAC ¶¶ 39, 44-45, 52-53 (emphasis added). But Plaintiffs' standard is wholly untethered from the Act's language requiring that the defendant *traffic in the confiscated property*, not merely do business with an arm of the Cuban Government.

Under Plaintiffs' theory, they need not—contrary to the language of the Act—allege any facts showing that Defendants profited or benefited from any use by BNC of "such property," *i.e.*, the particular assets confiscated from Banco Nuñez, sixty years earlier. Plaintiffs' hypothesis

is that BNC's confiscation of Banco Nuñez made BNC a "more desirable counterparty"; and that this effect amounted to "trafficking" because it "potentially" inured to Defendants' "benefit." *See* SAC ¶ 45, 53. Conspicuously absent from this allegation are any facts showing that Defendants dealt with any specific property that had been confiscated—or any explanation why essentially the same boilerplate allegation cannot be made against any entity alleged to have done business in Cuba. That also is true for Plaintiffs' conclusory allegation that Defendants "assisted BNC's banking activities," SAC ¶¶ 44, 52, which has nothing at all to do with the specific assets allegedly confiscated from Banco Nuñez.

Plaintiffs' reading of the Act's "trafficking" element is impermissibly broad. Under Plaintiffs' approach, *any* entity worldwide that received *any* payment from BNC for *anything* at *any* time would be liable under Helms-Burton. *See* SAC ¶ 39 (Defendants are liable for "engaging in commercial activity with BNC"). That would make liable, to offer just one example, every small-business owner who was paid for providing equipment, maintenance or other services to BNC (in excess of the Act's threshold of $50,000), regardless of whether the service provider caused any injury to Plaintiffs. There is no evidence in the language or legislative history of Helms-Burton that Congress intended the Act to be applied in such a boundless manner.

Nor can Plaintiffs' case be saved by assuming that any BNC assets used in connection with its alleged transactions with Defendants were comprised of property confiscated from the Founders decades earlier. Such an assumption is not plausible for myriad reasons, including that (1) BNC is a Cuban Government-owned institution with many sources of funding, (2) the SAC itself makes clear that even BNC's original capitalization came from the assets of many Cuban banks *other than* Banco Nuñez, and indeed, that only 10% of BNC's equity in 1960 was derived

from property confiscated from Banco Nuñez, (SAC ¶¶ 2, 28, 30), and (3) the confiscation of Banco Nuñez occurred forty years before the activity alleged in the SAC, and there is no basis to assume that any particular asset associated with that activity is the same property seized generations ago. *See Freund v. Republic of France*, 592 F. Supp. 2d 540, 559-60 (S.D.N.Y. 2008) (Sullivan, J.) (accepting as true plaintiffs' allegation that an agency of the French government "took property from them and the property was not returned," but *declining to* infer that the agency *still* owned "property that was allegedly taken over sixty years ago," notwithstanding plaintiff's "conclusory" allegation that "[d]efendants . . . retained and converted the [p]roperty and its derivative profits into their own property") (internal quotations omitted), *aff'd*, 391 F. App'x 939 (2d Cir. 2010).

Plaintiffs' misreading of the Act is confirmed by a comparison of the Act's language with broader statutes, in particular, statutes that bar the conduct of any business in and with Cuba, including those statutes that are the subject of SG's DPA and BNPP's plea. SAC ¶ 39. As discussed *supra*, pages 8, 9, these statutes *omit* any reference to particular property.[12] The "presum[ption] that Congress is knowledgeable about existing law pertinent to the legislation it enacts," *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988), is particularly compelling here because Congress expressly positioned Helms-Burton within the broader context of the U.S. embargo against Cuba. The Act's Findings recognize pre-Helms-Burton Cuba embargo legislation, such as the Foreign Assistance Act of 1961 and the Cuban Democracy Act of 1992.

[12] These statutes also have no private right of action. *See Glen v. Club Méditerranée S.A.*, 365 F. Supp. 2d 1263, 1272 (S.D. Fla. 2005) ("Neither TWEA nor CACR provides Plaintiffs with a private right of action for declaratory relief."), *aff'd on other grounds*, 450 F.3d 1251 (11th Cir. 2006); *Am. Bank. & Tr. Co. v. Bond Int'l, Ltd.*, 464 F. Supp. 2d 1123, 1127 (N.D. Okla. 2006) (same).

See 22 U.S.C. § 6021(11), (12). Further, the Act defines key terms by cross-reference to the TWEA. *See* 22 U.S.C. § 6023(7)(A). These laws must be read together. *See Hunter v. Erickson*, 393 U.S. 385, 388 (1969) (acts "on the same subject" should be "read together"); *Betteroads Asphalt Corp. v. United States*, 106 F. Supp. 2d 262, 266 (D.P.R. 2000) (because "the Helms Amendment and the González Amendment [both addressing denial of foreign aid to nations that fail to pay debts to U.S. citizens] plainly relate to the same subject matter," the court would "read[] these two statutes together").

Here, the other statutes referenced in the Act are far more sweeping than Title III. The TWEA broadly prohibits "trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of [Cuba]." 50 U.S.C. § 4303; *see also Regan v. Wald*, 468 U.S. 222, 224 (1984) (TWEA regulation "prohibits any transaction involving property in which Cuba, or any national thereof, has '*any interest of any nature whatsoever*, direct or indirect'" (quoting 31 C.F.R. § 515.201(b)(1983))). Similarly, the FAA expansively states that "[n]o assistance shall be furnished . . . to the present government of Cuba." 22 U.S.C. § 2370(a)(1). The CDA empowers the President to impose sanctions on "any country that provides assistance to Cuba," including through "the form of a loan, lease, credit or otherwise." 22 U.S.C. § 6003(b).

Compared to these other statutes, the focus on specific property in Title III is noteworthy. Had Congress intended to impose civil liability merely for doing business with Cuban instrumentalities that received confiscated assets, it knew how to say so. Its decision not to do that in the Act therefore must be regarded as intentional and given effect. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more

specifically to the topic at hand."); *Chamber of Commerce of the U.S. v. NLRB*, 721 F.3d 152, 165-66 (4th Cir. 2013) (because comparable legislation expressly granted authority not mentioned in the National Labor Relations Act, its absence can "fairly be considered deliberate"). In short, the Act prohibits trafficking in the specific property confiscated. Plaintiffs' theory, which would substitute *engaging in business* with a confiscating *party* for the Act's requirement of trafficking *in* the confiscated *property*, is untenable.

Moreover, it is telling that the examples of conduct meant to be actionable under Title III that Congress offered—both in the enacted statutory findings and in the legislative history—*all* involve the actual and meaningful use of particular confiscated property by the defendant. *See* 22 U.S.C. § 6081(5) ("The Cuban Government is offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets . . . confiscated from United States nationals."); *Cuban Liberty and Democratic Solidarity Act*, 104th Cong. § 31 (1995) ("[I]n the typical case the defendant would be a foreign investor who went into Cuba, [and] acquired a leasehold interest or actual title to property."); 141 Cong. Rec. S15083 (1995) (The Act's "right of action is against the 'tort' of unauthorized, unlawful 'conversion' of property—essentially the act of 'fencing' stolen goods").[13] The defendant's actual dealing in particular property is thus a necessary component of Helms-Burton liability.

Finally, Plaintiffs' expansive reading of the Act's trafficking definition would raise

[13] *See also* Cuban Liberty and Democratic Solidarity Act of 1995, Markup Hearing before the House Committee on International Relations, 104th Cong. at 21, 27-28 (1995); Cuban Liberty and Democratic Solidarity Act, Hearings before the Senate Subcommittee on Western Hemisphere and Peace Corps Affairs of the Committee on Foreign Relations, 104th Cong. at 141 (1995). Of course, even in these hypothetical situations, the constitutional standing rules, discussed *supra*, pages 10-13, still apply, *i.e.*, every Helms-Burton plaintiff needs to show that the defendant's conduct with respect to that particular property caused an actual injury to plaintiff sufficient to create Article III standing.

serious doubts about the statute's constitutionality, further militating strongly in favor of Defendants' narrower and "fairly possible" (indeed, *more* plausible) construction. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("where an alternative interpretation of the statute is 'fairly possible,'" the court is "obligated to construe the statute to avoid" constitutional problems). As explained *supra*, pages 11-13, Plaintiffs' expansive interpretation would mean that Congress attempted to authorize claims by private parties, in contravention of Article III of the Constitution, where there is no causal connection *at all* between the injury (confiscation of particular property) and the cause of action (doing business years after-the-fact with an entity that received the property decades earlier, received even more property from other sources, and has numerous unrelated revenue streams). By contrast, if Plaintiffs' theory is rejected and instead the term "traffics" requires the defendant to have benefited from or used specific confiscated property, then certain Helms-Burton trafficking cases could satisfy Article III: *e.g.*, instances in which a defendant that trafficked in the particular property that had been confiscated actually caused the plaintiff harm. Congress should not be understood to have sought to create a cause of action that so far departs from the limitations of Article III of the Constitution—especially when, as here, a wholly reasonable, and much more constitutionally defensible, construction is available.

D. Plaintiffs Fail To Adequately Allege That Defendants Acted "Knowingly and Intentionally."

Plaintiffs' claims fail for the further reason that they do not allege that Defendants acted with the requisite scienter. *See Gonzalez v. Amazon.com, Inc.*, 2020 WL 1169125, at *2 (S.D. Fla. Mar. 11, 2020) ("*Gonzalez I*") (dismissing Helms-Burton claim for failure to adequately allege scienter); *Glen v. AA*, 2020 WL 4464665, at *6 (same).

Under the Act's plain terms, the plaintiff must show that the defendant intended to traffic

in property that it knew (1) was confiscated by the Cuban Government, (2) without compensation or a later settlement payment, and (3) was owned by a U.S. national. Here, Plaintiffs make none of these necessary allegations:

First, under the Act, a person "traffics" in confiscated property only if that person does so "knowingly and intentionally." *See* 22 U.S.C. § 6023(13)(A). As courts have recognized, this requires actual knowledge that the particular property that the defendants made use of had been confiscated by the Cuban Government: "To commit trafficking under the Act, a person must know that the property was confiscated by the Cuban government and intend that such property be the subject of their commercial behavior." *Glen v. AA*, 2020 WL 4464665, at *6; *accord Gonzalez I*, 2020 WL 1169125, at *2 (to satisfy the Act's scienter requirement, a plaintiff must adequately allege that "the [defendant] knew the property was confiscated by the Cuban Government").[14]

[14] That conclusion follows from the Act's language and policy. To begin, the Act defines "knowingly" to mean "with knowledge or having reason to know" (22 U.S.C. § 6023(9)), but it does not define "intentionally." Congress must be understood to have meant the word "intentionally" as used in the Act to mean something different from, and in addition to, what it required through the use of the defined term "knowingly." *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (holding that "it is our duty 'to give effect, if possible, to every clause and word of a statute,'" so that "'no clause, sentence, or word shall be superfluous, void, or insignificant'"); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012) (a variation in terms indicates variation in meaning); *Novella v. Westchester Cty.*, 661 F.3d 128, 142 (2d Cir. 2011) (applying the canon of meaningful variation).

The meaning of "intentionally" as used in Title III is presumptively the one established at common law, under which something is "intended" only if done with knowledge of the facts that make the conduct prohibited. *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (defendant must have known "the facts that make [the defendant's] conduct fit the definition of the offense"); *United States v. Murphy*, 942 F.3d 73, 79–80 (2d Cir. 2019) (defendant must act "intending to engage" in prohibited conduct, knowing "the facts that make the defendant's conduct illegal"); *United States v. Infurnari*, 647 F. Supp. 57, 58 (W.D.N.Y. 1986) ("the defendant must have knowledge as to each of the subparts of the [statutorily defined term]"). This means that a Helms-Burton defendant must have acted with the purpose of dealing in property that it knew to have been confiscated.

In this case, Plaintiffs fail to allege that Defendants knew that the particular property involved in their transactions was confiscated from the Founders by the Cuban Government. Plaintiffs' scienter allegations do nothing more than recite the statutory language. *See, e.g.* SAC ¶ 44 ("In violation of Helms-Burton, [SG] knowingly and intentionally 'participate[d] in' and 'profit[ed] from' BNC's trafficking in confiscated property."); *see also* SAC ¶¶ 45, 52, 53, 62. These "[t]hreadbare recitals of the elements of a cause of action" are insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See Gonzalez I*, 2020 WL 1169125, at *2 (rejecting conclusory allegations of scienter) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)); *see also MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 431 F. App'x 17, 20 (2d Cir. 2011) (holding that "[b]ecause the allegation that [defendants] had actual knowledge of Madoff's fraud is purely conclusory, it is insufficient to support a cause of action for negligence" by the director-defendants), *aff'd*, 651 F.3d 268 (2d Cir. 2011); *Huizenga v. NYP Holdings, Inc.*, 2019 WL 1620743, at *3 (S.D.N.Y. Apr. 16, 2019) (Swain, J.) (holding that plaintiff failed to adequately allege actual malice where the second amended complaint asserted "in a conclusory fashion that [the statements] were made 'with the intention and knowledge that they were false . . . and/or with reckless disregard for the truth,'" but contained no "facts that would contextually support the inference that [the party] knew her statements were false").

Nor can Plaintiffs overcome this shortcoming with their allegations that: (1) "Cuba's confiscation of the banking industry was well known to the international banking community" and (2) "that BNC engaged in conduct constituting trafficking in confiscated property was well known to the international banking community." SAC ¶¶ 29, 44, 52. These allegations, too, are conclusory. Moreover, generalized allegations that "everybody knew" certain information are insufficient to impute knowledge of that information to individual defendants. *See, e.g., United*

States v. Figueroa-Ocasio, 805 F.3d 360, 369 (1st Cir. 2015) (assertion that "[e]verybody knows there's a school . . . it's common knowledge," was insufficient to support charge of possession of a firearm knowing or having reason to know that defendant was in school zone); *Atlas Assurance Co. v. Standard Brick & Tile Corp.*, 264 F.2d 440, 444–45 (7th Cir. 1959) (with regard to "common knowledge in the community," "we do not think that plaintiffs' knowledge could be established by inference or otherwise from the fact that such knowledge was possessed by some other person or group of persons."). Indeed, *Glen v. AA* specifically rejected the argument that American Airlines—which allegedly trafficked by referring travelers (for a fee) to hotels located on confiscated property—"undoubtedly had 'reason to know' that all real property in Cuba was confiscated," holding that theorizing that the defendant "must have" known of Cuban confiscations fails to establish intent. *Glen v. AA*, 2020 WL 4464665, at *4, *6.

Second, under the Act's plain terms, it is not enough for the defendant to know that the trafficked-in property had been taken from a private party; the defendant also must know that none of the owners of the claim to the confiscated property had received compensation or a settlement. "Confiscated property" is defined in the Act as property that was "nationaliz[ed], expropriate[ed], or other[wise] seiz[ed] by the Cuban Government . . . on or after January 1, 1959—(i) without the property having been returned or adequate and effective compensation provided; or *(ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure*." *Id.* § 6023(4)(A) (emphasis added). Consequently, to show that a defendant trafficked as defined under the Act, a plaintiff must show that the defendant had knowledge that the property at issue had been seized by the Cuban Government *without a claims settlement* provided to any owner of a claim, as those are "'the facts that make [the defendant's] conduct fit the definition of the

offense.'" *Elonis*, 135 S. Ct. at 2009.

But here, Plaintiffs do not allege that Defendants knew that the property at issue had been seized by the Cuban Government without a settlement for any owner of a claim to Banco Nuñez. And here, too, it cannot simply be assumed that Defendants knew that any persons owning a claim to bank property seized by the Castro regime did not receive a settlement. Cuba has entered into settlements resulting in payments to citizens of Canada, France, the U.K., Spain and Switzerland,[15] and indeed Plaintiffs have not alleged the nationalities of the Absent Stockholders.

Third, as the *Gonzalez I* court recognized, a Helms-Burton plaintiff is required to allege not only that the defendant knew that the subject property was confiscated without compensation or settlement, but also that the defendant knew that the claim was "owned by a United States citizen." 2020 WL 1169125, at *2 (citing 142 Cong. Rec. H1724-04, at H1737 (Mar. 6, 1996)) (Statement of Rep. Benjamin Gilman, "the only companies that will run afoul of this new law are those that are knowingly and intentionally trafficking in the stolen property of U.S. citizens."); *see also* 141 Cong. Rec. S15078 (1996) (Statement of Sen. Helms, Title III makes liable "persons or entities that knowingly and intentionally exploit stolen properties—United States properties, that is—in Cuba liable for damages").

This requirement is grounded in the Act's text. Included on the list of trafficking elements governed by the "knowingly and intentionally" scienter requirement, is that defendant act "without the authorization of any United States national who holds a claim to the property." 22 U.S.C. § 6023(13)(A). *A fortiori*, the defendant must, as *Gonzalez I* recognized, know that a

[15] *See* Richard E. Feinberg, *Reconciling U.S. Property Claims in Cuba*, Brookings at 11 (Dec. 2015). https://www.brookings.edu/wp-content/uploads/2016/07/Reconciling-US-Property-Claims-in-Cuba-Feinberg.pdf (last visited Oct. 2, 2020).

U.S. person owned the claim to the property. *Cf. United States v. Reyes*, 302 F.3d 48, 54 (2d Cir. 2002) ("common sense teaches it is logically impossible to intend" wrongdoing "if a defendant does not know of [the] existence" of predicate facts). This is an area where scienter makes all the difference between culpable and nonculpable conduct: Congress was concerned only with trafficking in the property of U.S. nationals, so a defendant that was unaware of the ownership status of the subject property could not have known that it was engaged in wrongdoing.

The SAC does not assert this scienter element of trafficking—knowledge that the property was "owned by a United States citizen." To the contrary, the SAC affirmatively alleges that property was *not* owned by a U.S. citizen, and therefore necessarily disclaims the existence of scienter. SAC ¶¶ 3, 32. This, too, forecloses Plaintiffs' claims. *Gonzalez I*, 2020 WL 1169125, at *2.

E. Plaintiffs Cannot State A Basis For Title III Relief Because the "Property" At Issue Is Alleged To Have Been Confiscated From Cuban Citizens.

Title III's language, structure, and context make clear that the Helms-Burton private right of action does not apply to confiscations of property from Cuban nationals. Congress enacted Title III against the background of the so-called "domestic takings" rule, which bars international-law claims based on a government's confiscation of property belonging to its own nationals. *See Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398, 84 S. Ct. 923 (1964) ('"[A]cts of a state directed against its own nationals do not give rise to questions of international law.'") (internal quotation omitted).[16]

[16] Claims stemming from such acts are governed by domestic law, and do not give rise to any claim under international law. *F. Palicio y Compania, S. A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966) (van Pelt Bryan, J.) ("confiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law"), *aff'd sub nom. F Palicio y Compania, S. A. v. Brush*, 375 F.2d 1011 (2d Cir. 1967).

Helms-Burton, like myriad statutes before it, incorporates this rule, and under this rule, Plaintiffs—who assert a claim based on a confiscation by Cuba from Cuban citizens—have no causes of action.

First, Title III requires that Plaintiffs have an underlying claim that is valid under *international* law. By its terms, Title III relief is available only to a plaintiff that "owns" an underlying "claim" to "property that was confiscated by the Cuban Government." 22 U.S.C. § 6082(a)(1)(A). A predicate "claim" is not created by Helms-Burton itself, which does not define the word "claim" or set forth any elements of the underlying "claim" to confiscated property, as would be expected had Helms-Burton created the "claim" at issue. *See Bellikoff v. Eaton Vance Corp*., 481 F.3d 110, 116 (2d Cir. 2007) (absent an express law, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.").

Instead, it is inherent in Title III that the existence and validity of the underlying "claim" is determined by international law. Specifically, decisions of the Foreign Claims Settlement Commission ("FCSC")—an independent, quasi-judicial federal administrative agency within the Department of Justice that adjudicates claims of U.S. nationals against foreign governments—may be dispositive of the validity of a plaintiff's underlying Helms-Burton "claim." *See* 22 U.S.C. § 6082(a)(5)(B) (FCSC denial of claim dispositive under Helms-Burton); *id.* § 6082(a)(1)(A)(i)(I) (FCSC award may establish amount of damages under Title III). FCSC decisions, in turn, are governed by international law; Congress has long required that the FCSC "shall apply . . . [t]he applicable principles of international law, justice and equity" whenever it "exercis[es] authority" under any statute. 22 U.S.C. §§ 1623(a)(2)(B), 1623(k). Thus, a claim recognized in a FCSC decision (and that, accordingly, may be effectuated under Helms-Burton)

will be one that comports with international law.[17]

Second, international law, in turn, embraces the domestic takings rule, *See Banco Nacional de Cuba*, 307 F.2d at 861, meaning that under Title III, underlying "claims" that arise from domestic takings are not actionable. Other courts interpreting Helms-Burton have reached the same conclusion. *See, e.g.*, *Odebrecht Constr.*, 876 F. Supp. 2d at 1311 ("Title III, 'Protection of Property Rights of United States Nationals,' creates a statutory right of action against any person or entity who traffics property confiscated by the Cuban government *from any American citizen or company*."), *aff'd sub nom. Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268 (11th Cir. 2013) (emphasis added); *Lamb v. ITT Corp.*, 2010 WL 376858, at *2 (D. Neb. Jan. 26, 2010) (under "Title III of the Act, *United States nationals who owned property* in Cuba confiscated by the Cuban government since January 1, 1959, were provided a private right of action for recovery of damages") (emphasis added); *see also Prakash v. Altadis U.S.A. Inc.*, 2012 WL 1109918, at *24 (N.D. Ohio Mar. 30, 2012) ("Plaintiff lacks standing to assert a claim under the Helms-Burton Act, specifically 22 U.S.C. § 6082, because he never alleges that he is a *United States national whose property was confiscated* by the Cuban government.") (emphasis added); *Gonzalez I*, 2020 WL 1169125, at *2 (citing Congressional record indicating that "'the only companies that will run afoul of this new law are those that are knowingly and intentionally trafficking in the stolen property of U.S. citizens'" and dismissing claim for failure to allege knowledge that the confiscated property was "owned by a United States citizen") (citation omitted).

Likewise, in *Glen v. Club Méditerranée, S.A.*, 450 F.3d 1251 (11th Cir. 2006), the

[17] The FCSC began recognizing "claims" to expropriated Cuban property under its first Cuba Program, conducted between 1965 and 1967, well before Helms-Burton was enacted. This further demonstrates that Helms-Burton does not itself create such "claims."

Eleventh Circuit expressed its skepticism that Title III claims could ever apply to cases in which the property at issue was not confiscated from U.S. citizens:

> [W]e do note that the [] property at issue in this litigation was owned by Cuban nationals at the time of its expropriation and thus may not be the proper subject of a trafficking claim under the [Helms-Burton] statute. *See* 22 U.S.C. § 6081(5), (6) (defining "'trafficking' in confiscated property" as transactions in "property and assets[,] some of which were confiscated from United States nationals."); 22 U.S.C. § 6081(11) ("United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States. . . .").

Id. at 1255 n.3.

The applicability of the domestic takings rule to a Helms-Burton "claim" is further confirmed by congressional findings indicating that Title III was meant to respect, not override, international law. *See* 22 U.S.C. § 6081(9) ("International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.").

Third, against this background, reading Helms-Burton to allow plaintiffs to use "claims" that are not cognizable under international law to support a Title III action would create bizarre and inequitable inconsistencies that Congress could not have intended. The statute authorizing the FCSC to certify Cuba-related confiscation claims expressly excludes domestic takings as a basis from such certifications, permitting certification of a claim only if "the property on which the claim was based was owned wholly or partially, directly or indirectly by a national of the United States on the date of the loss." 22 U.S.C. § 1643c(a). Based on this, the FCSC routinely denied claims of persons who were Cuban nationals at the time of confiscation, even if they later became U.S. citizens. *See, e.g.*, *In Re Armando Sosa*., Decision No. CU-831, at 1-3 (F.C.S.C. Dec. 14, 1967) ("Claimant has been a national of the United States since his naturalization on January 6, 1964," but "the property claimed was taken on November 12, 1963," and "the claim is

therefore denied."). Under Helms-Burton, such claimants expressly are not eligible to seek Title III relief. 22 U.S.C. § 6082(a)(5)(B) (FCSC denials conclusive as to Helm-Burton claims). If Plaintiffs had presented their claims to the FCSC, then the FCSC would similarly have denied their claims as a domestic taking. *See* SAC ¶¶ 2, 3, 27-31 (alleging that Founders were Cuban citizens at time their property was taken by Cuban Government).

To then allow Plaintiffs to base their Title III action on a predicate "claim" that is not cognizable under international law, this Court would have to differentiate between two classes of plaintiffs with identical claims: (1) the class that brought a FCSC claim and was denied on domestic taking grounds (and thus is barred by § 6082(a)(5)(B) from bringing a Helms-Burton claim); and (2) the class that did not bring an FCSC claim (*i.e.*, the Plaintiffs). But that approach cannot be right: Congress presumptively did not intend the word "claim" to have two different meanings. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."); *Lamb*, 2010 WL 376858, at *7 ("The spirit, if not the letter, of the LIBERTAD Act would not be honored by the provision of more benefits to nonclaimants than to claimants."). As such, a domestic takings case, such as the Plaintiffs', cannot serve as a predicate claim under Helms-Burton.

Finally, the Act's language excluding claims for domestic takings furthers an express policy of Congress: In enacting Helms-Burton, Congress consistently explained that the goal of the trafficking provision was to provide relief for U.S. nationals whose property had been confiscated by the Cuban Government. *See* 22 U.S.C. § 6081(2) (congressional finding that "[t]he wrongful confiscation or taking of property *belonging to United States nationals* by the Cuban Government, and the subsequent exploitation of this property at the expense of the

rightful owner, undermines the comity of nations, the free flow of commerce, and economic development") (emphasis added); *id.* § 6081(10) ("The United States Government has an obligation *to its citizens* to provide protection against wrongful confiscations by foreign nations.") (emphasis added); 22 U.S.C. §§ 6022(3), (6) (stating that a purpose of Helms Burton is "to provide for the continued national security of the United States in the face of . . . *theft of property from United States nationals* by the Castro government" and "to protect United States nationals against confiscatory takings") (emphasis added). The Executive Branch agreed. *See* President Statement on Helms-Burton Waiver Exercise, July 16, 1996, 1996 WL 396122, at *1 ("Title III allows U.S. nationals to sue foreign companies that profit from *American-owned* property confiscated by the Cuban regime.") (emphasis added). Plaintiffs' claim, which relies on property alleged to be confiscated from *Cuban nationals* 60 years ago, must fail for this reason.

CONCLUSION

For the reasons above, the SAC should be dismissed with prejudice under Rules 12(b)(1) and 12(b)(6).

Respectfully submitted,

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MAYER BROWN LLP

/s/ Steven Wolowitz
Steven Wolowitz
Alex Lakatos
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 506-2500
swolowitz@mayerbrown.com
alakatos@mayerbrown.com

Attorneys for Defendant Société Générale, S.A.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

/s/ Carmine D. Boccuzzi, Jr.
Carmine D. Boccuzzi, Jr.
One Liberty Plaza
New York, New York 10006
Tel: (212) 225-2508
Fax: (212) 225-3999
cboccuzzi@cgsh.com

Attorneys for Defendant BNP Paribas, S.A.