UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

HAVANA DOCKS CORPORATION,
Plaintiff,
v.
CARNIVAL CORPORATION,
Defendant.
_____/

Case No. 19-cv-21724
BLOOM/MCALILEY

HAVANA DOCKS CORPORATION,
Plaintiff,
v.
MSC CRUISES SA, et al.,
Defendants.
_____/

Case No. 19-cv-23588
BLOOM/MCALILEY

HAVANA DOCKS CORPORATION,
Plaintiff,
v.
ROYAL CARIBBEAN CRUISES, LTD.,
Defendant.
_____/

Case No. 19-cv-23590
BLOOM/MCALILEY

HAVANA DOCKS CORPORATION,
Plaintiff,
v.
NORWEGIAN CRUISE LINE HOLDINGS, LTD.,
Defendant.
_____/

Case No.: 19-cv-23591
BLOOM/MCALILEY

PLAINTIFF'S REPLY IN SUPPORT OF ITS
MOTION FOR ENTRY OF FINAL JUDGMENT

SUMMARY OF ARGUMENT

Defendants oppose Havana Docks' motion for entry of final judgment on three grounds, none of which has merit.

First, Defendants argue that the Court must determine "what amount of the certified claim Plaintiff could recover before applying the applicable interest." (Resp. at 11). But the plain language of the statute does not say that. Instead, it says that damages are "the amount, if any, certified" by the Foreign Claims Settlement Commission ("FCSC") to a claimant. 22 U.S.C. § 6082(a)(1)(A)(i)(I). Accordingly, the applicable interest rate is applied to the "amount … certified" to Havana Docks: $9,179,700.88.

Second, Defendants ask this Court to reconsider, in light of *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.,* 48 F.4th 1236 (11th Cir. 2022) (*en banc*), its prior determination that Havana Docks has Article III standing. But *Hunstein* has no bearing on the Article III standing analysis here, because the plaintiff there alleged only an ***intangible*** injury. Here, as this Court has recognized, Havana Docks suffered a ***tangible*** economic injury: Defendants deprived Havana Docks of the ability to authorize (and so realize an economic benefit from) their use of the confiscated property.

Third, Defendants ask this Court to declare Title III's statutory damages unconstitutionally excessive, but without any principled basis. The legal standard they urge is incorrect and the "actual" damages they presume do not reflect Havana Docks' actual injuries. The proper excessiveness standard for statutory damages is whether they are proportional to the ***offense*** and the statute's ***purpose***. Here, Defendants' trafficking violated United States foreign policy, provided a financial benefit to the Cuban Government, exploited Havana Docks' confiscated property, and earned them over $1.1 billion in revenue. Measured against Title III's goals of compensation and deterrence, the statutory damages established by Congress are proportional and should be left undisturbed.

I. HAVANA DOCKS IS ENTITLED TO JUDGMENT BASED ON THE $9,179,700.88 CERTIFIED TO IT BY THE FCSC.

Following the plain language of the statute, Havana Docks has moved for the entry of judgment based on "the amount … certified to the claimant by the [FCSC] … plus interest[.]" 22 U.S.C. § 6082(a)(1)(A)(i)(I). Defendants now contend that "the amount certified" does not mean "the amount certified," but instead ***a portion of*** the amount certified. But nothing in the statute

allows (much less requires) courts to "slice-and-dice" the amount of the certified claim in this manner. Because the FCSC plainly "certifie[d]" the amount of $9,179,700.88 to Havana Docks, and because § 6082(a)(1)(A)(i)(I) looks to the "amount … certified," Defendants' attempt to calculate damages based on a lesser amount should be rejected.

A. Under the Plain Language of § 6082(a)(1)(A)(I)(i), Havana Docks is Entitled to Have Its Damages Calculated Based on the Amount Certified—$9,179,700.88.

Questions of statutory interpretation begin "where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enter., Inc.* 489 U.S. 235, 241 (1989). Where a "statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *Id.* (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). In such instances, the plain language "is presumed to express congressional intent and will control a court's interpretation." *United States v. Fisher*, 289 F.3d 1329, 1338 (11th Cir. 2002).

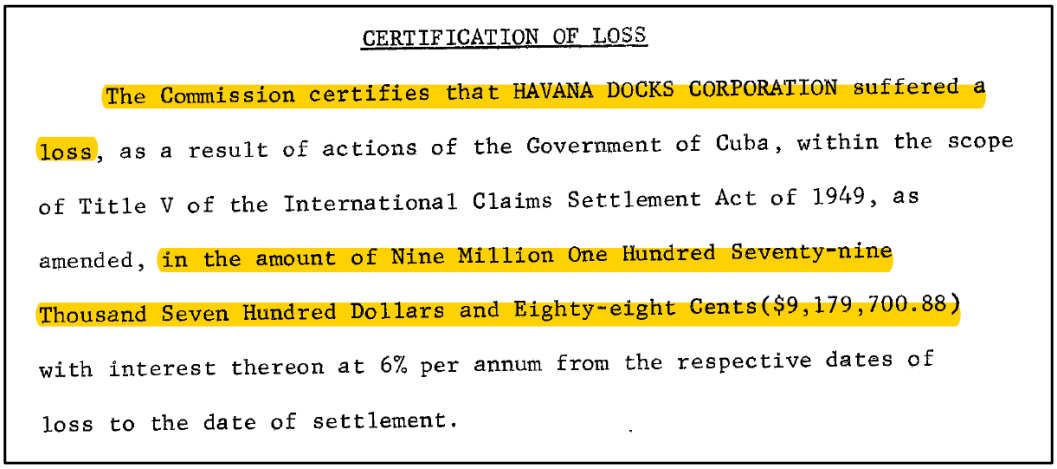
A plain reading of § 6082(a)(1)(A)(i)(I) is that the "amount … certified" refers to the amount in a claim's "certification of loss"—*i.e.*, the amount of loss certified to a claimant by the FCSC. Congress's use of this amount creates a practical and predictable method for calculating damages and provides would-be traffickers with clear notice of their potential liability. Indeed, as Defendants themselves once put it:

> [W]hen calculating damages under § 6082(a)(1)(A)(i)(I), a district court must begin with any amount of loss identified in a certified claim and then add interest according to § 6082 …. Damages in an action under [Title III] are keyed to the "***amount***" in a certified claim, and the "amount" of Plaintiff's Certified Claim is $9,178,700.88.[1]

Though Defendants now seek to distance themselves from this concession, it reflects a common sense understanding of the statute. It also avoids the complicated (and in some cases, impossible) task of parsing a certified claim into ***sub-***amounts. So far as a statute's plain language reflects congressional intent, *see Fisher*, 289 F.3d at 1338, § 6082(a)(1)(A)(I)(i)'s use of the term "amount … certified" refers to the amount stated in a claimant's "certification of loss." With respect to Havana Docks, that amount is clear. Its "certification of loss," as reproduced on the next page, says it all:

---

[1] Defs.' Mot. to Confirm Interest Calculation Pursuant to 22 U.S.C. § 6082(a)(1)(B) (ECF No. 398 at 7) (emphasis in original). Unless otherwise noted, all ECF references are to the docket in *Havana Docks Corp. v. Norwegian Cruise Line Holdings*, No 19-cv-23591.



CERTIFICATION OF LOSS

The Commission certifies that HAVANA DOCKS CORPORATION suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of Nine Million One Hundred Seventy-nine Thousand Seven Hundred Dollars and Eighty-eight Cents($9,179,700.88) with interest thereon at 6% per annum from the respective dates of loss to the date of settlement.

(ECF No. 43-8 at 4) (emphasis added).

Accordingly, the "amount … certified" means the amount certified to a claimant by the FCSC.

B. If Congress Had Meant to Limit § 6082(a)(1)(A)(I)(i), It Would Have Said So.

Defendants insist, however, that "damages for trafficking in confiscated property are tied to the value of the certified claim for 'such' property—not 'all' the property." (Resp. at 14.) For this argument, they point to Title III's civil remedy provision which makes a person who traffics in confiscated property liable to the United States national "who owns the claim to *such* property." § 6082(a)(1)(A) (emphasis added). But those are two totally different things: one provision describes to *whom* a trafficker is liable ("any United States national who owns the claim to such property"), while the other describes the *amount* of such liability ("the amount … certified to the claimant"). If Congress had meant for damages under § 6082(a)(1)(A)(I)(i) to be limited to a portion of the certified claim, it would have said so, like it did in the context of fair market value. *See* § 6082(a)(1)(A)(I)(iii) (tying fair market value to "*that* property" in which a defendant traffics) (emphasis added). Under the interpretive canon of intentional omission, § 6082(a)(1)(A)(i)(I) must mean something different.

"[W]here Congress includes particular language in one section of a statute, but omits it in another … it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 64 U.S. 16, 23 (1983) (citation omitted); *see also Dep't. of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). In the event Congress makes such an omission, courts should "refrain from

concluding … that the differing language in the two subsections has the same meaning in each." *Rusello*, 64 U.S. at 23.

Here, § 6082(a)(1)(A)(i)(III)'s specific reference to "that property" is much different than § 6082(a)(1)(A)(i)(I)'s broad reference to the "amount … certified" by the FCSC. If Congress had intended to narrow the certified claim amount to the value of property in which a defendant traffics, it could have done so by including limiting language. For example, the provision could have read: "the amount, if any, certified to the claimant by the [FCSC]" *for that property*. However, "Congress did not write the statute that way," and courts should "not presume to ascribe this difference to a simple mistake in draftsmanship." *Russello*, 464 U.S. at 23 (cleaned up). As a result, the different language used in § 6082(a)(1)(A)(i)'s subclauses must be presumed intentional and the "amount … certified" means what its disparate inclusion suggests—the total amount certified to a claimant.

This result does not change even though § 6082(f)(2)(A)(i) permits a claimant to receive additional payments from a settlement program with the Cuban Government "if the *recovery* in the [Title III] action is less than the amount of the certified claim[.]" (emphasis added). A recovery from a judgment and a judgment itself are two different things. For example, a Title III plaintiff could secure a judgment against a defendant with no ability to pay, and so recover nothing. Similarly, a Title III plaintiff could choose to settle with a defendant in an amount less than the amount certified by the FCSC. Section 6082(f)(2)(A)(i) merely recognizes that, in such situations, a plaintiff may recover the balance of the amount of a certified claim through a subsequent claims settlement program. But it does not bar a claimant from obtaining a judgment equal to the amount certified by the FCSC in the first instance.

In sum, Havana Docks' damages should be calculated based on the "amount … certified" to it by the FCSC: $9,179,700.88.

II. DEFENDANTS PROVIDE NO BASIS FOR THIS COURT TO RECONSIDER ITS DETERMINATION THAT HAVANA DOCKS HAS ARTICLE III STANDING.

Defendants assert that "the Eleventh Circuit's *en banc* decision in *Hunstein* warrants reconsideration of the Court's prior holdings on standing." (Resp. at 8.) According to Defendants, *Hunstein* "demonstrates that Plaintiff cannot establish the bedrock requirement of constitutional standing in this case." *Id.* Defendants are wrong.

Hunstein in no way calls into question this Court's determination, repeated over the course of multiple orders over multiple years, that Havana Docks has Article III standing to pursue a

claim that Defendants violated Title III of the LIBERTAD Act by "trafficking" in confiscated property. *Hunstein* applies the U.S. Supreme Court's recent decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), which explains that a court resolving an Article III standing issue must make a threshold determination whether a plaintiff's alleged harm is tangible or intangible. If the alleged harm is tangible, *i.e.*, "a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III." 141 S. Ct. at 2204. It is only where an alleged injury is "intangible" that a plaintiff must prove that it bears "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts" in order to establish a concrete injury sufficient for Article III standing. *Id.*; *see also Hunstein*, 48 F.4th at 1243 (distinguishing an "obvious concrete harm [like] a physical injury or financial loss" from an "intangible" harm).

Hunstein involved an intangible injury—the plaintiff there alleged that the defendant violated the Fair Debt Collection Practices Act by sharing information about his debt with a mail vendor. There was no dispute that the alleged violation caused the plaintiff ***no*** physical or monetary injury. *See* 48 F.4th at 1245 ("What harm did this alleged violation cause? [The] complaint does not say. Even now, [the plaintiff] points to nothing tangible like financial loss or physical injury."). Accordingly, the only question was whether the plaintiff could analogize the harm from the alleged statutory violation to a traditional common-law injury. The *en banc* court held that he could not, because the analogous common-law tort on which he relied—public disclosure of private facts—recognizes an injury from ***public*** disclosure of private facts, and he failed to allege any such injury. *See id.* at 1245-50. The dissent did not disagree with the majority's analytical framework, but simply disagreed with the majority that the harm from the alleged statutory violation in that case was not "close enough" to the harm redressed by the common-law tort of public disclosure of private facts to establish a constitutionally cognizable injury-in-fact. *See id.* at 1258.

This Court has since confirmed that *Hunstein* was about an intangible injury. *See Ferriol v. Receivable Performance Mgmt., LLC*, 2022 WL 4376007 (S.D. Fla. Sept. 22, 2022) (Bloom, J.). As the Court explained, "[i]n *Hunstein*, the Eleventh Circuit found that the plaintiff lacked standing under Article III '[b]ecause Hunstein had pleaded what could be characterized, at best, as an intangible harm resulting from a statutory violation.'" *Id.* at *1 (quoting *Hunstein*, 48 F.4th at 1241). *Hunstein*, the Court continued, distinguishes between "a simple statutory violation," "a

legal infraction," or "a bare procedural violation," on the one hand, and "concrete harm," on the other. *See id.* at 2 (internal quotations omitted).

Hunstein does not warrant reconsideration of this Court's decision on Article III standing for the simple reason that a trafficking claim under Title III of the LIBERTAD Act—in sharp contrast to the claim in *Hunstein*—involves a "tangible" injury, and hence there is no need to look to a traditional common-law analogue to support standing. Indeed, this Court noted that point when Defendants indicated their intention to seek reconsideration in light of *Hunstein*: "[Y]ou've referenced that you want to move for reconsideration with regard to the Eleventh Circuit's *en banc* decision in *Hunstein*. I don't believe that's necessary. ***The Court has previously ruled … that there's a concrete injury for purposes of Article III standing***." 9/21 Tr. 12-13 (emphasis added).

And so it has. As this Court explained in its summary judgment order, "[t]he use of Havana Docks' property without its authorization constitutes a ***tangible*** injury" that is "entirely separate from the confiscation of its property rights by the Cuban Government." *Havana Docks Corp. v. Carnival Corp.*, --- F. Supp. 3d ---, 2022 WL 831160, at *80 (S.D. Fla. 2022) (emphasis added). This Court has never characterized Havana Docks' injury as 'intangible,' and thus "has not held that Plaintiff's claims are 'closely analogous' to anything." *Havana Docks Corp. v. Carnival Corp.*, 19-cv-21724, 2022 WL 3910707, at *3 (S.D. Fla. Aug. 31, 2022). (The Court drew an analogy to tort claims in the context of resolving the jury-trial issue in this case, but that analogy had nothing to do with Article III standing and "does not mean every aspect of a Title III claim should be viewed in the same manner as a common law tort claim." *Id.*)

The key point, as this Court has observed, is that the LIBERTAD Act gives claimants to confiscated property, like Havana Docks, "a ***right*** to prevent third-party use" of that property. *Havana Docks Corp. v. NCL Holdings, Ltd.*, 484 F. Supp. 3d 1215, 1227 (S.D. Fla. 2020) (emphasis in original). Under the Act, if third parties (like Defendants) want to use the property, they must obtain "the authorization of any United States national who holds a claim to the property." 22 U.S.C. § 6023(13)(A). Such authorization has real-world economic value, as the claimant can charge money to grant it.

Defendants here failed to seek Havana Docks' authorization to use the property, even though they were well aware of Havana Docks' ownership of a claim. As this Court has previously explained, that failure, and Defendants' concomitant failure to pay Havana Docks to use the property, inflicted a tangible injury on Havana Docks. *See NCL*, 484 F. Supp. 3d at 1227 ("[T]he

allegations of profiting from the use of property that was expropriated without obtaining consent or paying adequate compensation to the original owner is sufficient concrete harm for standing purposes."); *see also Carnival*, 2022 WL 831160, at *80 ("'[A] plaintiff is injured concretely when she is shut out wrongfully from the gains produced by exploiting property that is rightfully hers.'") (quoting *Sucesores de Don Carlos Nuñez y Doña Pura Galvez, Inc. v. Societe Generale*, 577 F. Supp. 3d 295, 309 (S.D.N.Y. 2021)). Congress gave claimants like Havana Docks the valuable right to control the use of the confiscated property, and Defendants' unauthorized use of that property (*i.e.*, trafficking) thereby inflicts a tangible economic injury on such claimants. *See, e.g.*, *Glen v. Am. Airlines, Inc.*, 7 F.4th 331, 336 (5th Cir. 2021) (holding that a LIBERTAD Act plaintiff has Article III standing to challenge defendants' use of his confiscated property "without his authorization or paying compensation to him") (internal quotation omitted).

Indeed, the United States Code is full of laws that both create property rights and provide a remedy for the injury stemming from the violation of those rights. Obvious examples include the copyright and patent laws, which give plaintiffs a right to exclusive use of their works and inventions, and a cause of action to sue defendants who use such property without authorization. *See* 17 U.S.C. § 501; 35 U.S.C. § 271. While the scope of the property right in a copyrighted work or a patented invention obviously differs from the scope of the property right to control the use of confiscated property, any such difference is immaterial to the Article III standing inquiry: the key point here is that a violation of Title III's economically valuable right of payment for authorized use (whatever its scope or source) creates a tangible injury.

Defendants argue that their trafficking did not inflict "a 'tangible' injury, since the use of property that the plaintiff neither owns nor possesses cannot be said to cause physical harm or financial loss to that plaintiff." (Resp. at 10.) That argument fails for two reasons. First, that argument provides no basis for reconsideration in light of *Hunstein*. As noted above, *Hunstein* involves what everyone acknowledged to be an ***intangible*** injury, and does not address the scope of ***tangible*** injuries. *Hunstein* thus cannot be characterized as "'an intervening change in the controlling law'" on this issue, and provides no basis for reconsideration. *Havana Docks Corp. v. Carnival Corp.*, 2022 WL 6122137, *2 (S.D. Fla. Oct. 7, 2022) (Bloom, J.) (quoting *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294, 295 (M.D. Fla. 1993)).

Second, defendants are wrong on the merits. As noted above, the LIBERTAD Act gives claimants to property confiscated by the Castro regime a substantive right to authorize the use of

that property. *See* 22 U.S.C. § 6023(13)(A). The violation of that right itself inflicts a real-world tangible injury on the claimants because the right to authorize the use of the underlying property has real-world economic value.

Defendants contend that this point "is just another way of saying that Plaintiff has been injured because it has a cause of action allowing it to seek money from Defendants, which is not enough to support standing." (Resp. at 12.) Again, Defendants are wrong. Havana Docks has been injured because Defendants violated its substantive statutory right under the LIBERTAD Act to give its authorization (and seek payment) for the use of its confiscated property. This is totally different than a right "to seek money" through a lawsuit for a "bare procedural violation" of the law.

Defendants thus err by insisting that they "have no obligation to pay Havana Docks that is 'independent of [the Title III] cause of action,' so the fact that Defendants did not pay Havana Docks is not a financial injury that can support standing." *Id.* Havana Docks' substantive right to charge for the use of the confiscated property ***is*** independent of the statutory cause of action. The LIBERTAD Act creates ***both*** a substantive right (a claimant's right to authorize the use of the confiscated property) ***and*** a private cause of action to remedy violations of that right. As this Court put it, "[t]hat the legal right and remedy at issue in this case are statutorily constructed does not sway the Court's analysis." *NCL*, 484 F. Supp. 3d at 1227.

Hunstein and similar cases where Article III standing was lacking stand only for the unremarkable proposition that Congress cannot confer standing on a party that has not ***otherwise*** suffered a cognizable injury by simply creating a statutory cause of action that (if successful) would provide that party a monetary recovery. *See Hunstein*, 48 F.4th at 1239 ("[P]leading a bare procedural violation of a statute [is] not enough, at least on its own, to establish concrete injury."); *see also TransUnion*, 141 S. Ct. at 2205 ("[T]his Court has rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'") (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)). Defendants thus err by asserting that this Court's view of Article III standing "would nullify *Hunstein*, *TransUnion*, and all other cases finding a lack of standing in an action for money damages." (Resp. at 12.) The plaintiffs in those cases had no substantive right to any economic value from the defendants beyond recovering damages in the action, whereas plaintiffs under Title III of the LIBERTAD Act have a substantive right to obtain

economic value for the use of confiscated property. It is thus Defendants, not Havana Docks, who conflate "the concept of injury in fact with the right to compensation that flows from the injury." *Id.* As noted above, Havana Docks was tangibly injured by Defendants' failure to seek (and pay for) authorization to use the confiscated property, not by Defendant's potential liability in a lawsuit. The latter, to use Defendants' term, is "circular," (Resp. at 12), whereas the former is not.

Indeed, the Supreme Court in *TransUnion* took pains to explain this point:

> For standing purposes, … an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law. Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations.

141 S. Ct. at 2205.

Defendants keep insisting that this case involves situation (i), but it actually involves situation (ii): Congress enacted a legal obligation for persons seeking to use confiscated property in Cuba to obtain authorization from the claimants to such property. By violating that obligation, and using the confiscated property without the claimants' authorization, Defendants engaged in illegal "trafficking" that deprived the claimants of economic value that was rightfully theirs. And Congress created a cause of action in Title III of the LIBERTAD Act for claimants to redress that harm. Nothing in Article III bars federal courts from adjudicating that cause of action.

III. DEFENDANTS' FIFTH AMENDMENT EXCESSIVENESS CHALLENGE SHOULD BE REJECTED.

Defendants claim that Title III's statutory damages are excessive for ***any*** defendant who traffics "for a limited period of time" and for ***these*** Defendants because they only paid $22 million to the Cuban Government-owned entity managing the Terminal. (Resp. at 24). Their supporting arguments, however, rely on an infirm facial challenge, mischaracterize the nature of Havana Docks' actual damages, grossly understate the gravity of their offense, and—most importantly—invoke the wrong legal standard. The correct excessiveness analysis looks not to the ratio between statutory damages and actual damages (which Defendants mistakenly insist is 21:1),[2] but instead

[2] For this ratio, Defendants aggregate Havana Docks' statutory damages in each of the four actions and, as a proxy for actual damages, use the amount Defendants paid Aries (which is just $22 million out of the $130 million they paid to various Cuban Government entities for the use of the Terminal and for assistance with their tourist excursions that left from the Terminal).

asks whether statutory damages are wholly out of proportion to the ***offense*** and the statute's ***purpose***. *See St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919).

Here, Defendants knowingly and intentionally violated the LIBERTAD Act by trafficking in Havana Docks' confiscated property for at least 912 days and paying over $130 million to the Cuban Government so they could bring hundreds of thousands of passengers to the island to engage in illegal tourism. They made a calculated business decision to traffic in the Terminal for several years with full knowledge of the risks and legal consequences. ***And they earned over $1.1 billion in revenue in the process***. *See Carnival*, 2022 WL 831160, at **22-25, **37-38 (itemizing Defendants' use of the Terminal, their contracts and payments to Cuban entities, and their revenues and profits). Having thwarted Congress's goal of stopping the flow of capital to the Cuban Government and having wrongfully exploited the economic value of Havana Docks' confiscated property without authorization, Defendants cannot now cry foul under the Due Process clause. With Title III, Congress told Defendants exactly what conduct was prohibited and what the monetary consequences for their violations would be. Defendants made the business decision to take the risk and traffic anyway.

In their response, Defendants opt for the kitchen sink argument, most of which has little relevance to the specific legal question they raise: whether an award of *statutory damages* under Title III violates the Fifth Amendment's Due Process clause. For clarity, Havana Docks has organized its brief as follows: first, Havana Docks sets forth the correct legal standard for excessiveness challenges to statutory damages awards. Next, Havana Docks responds to Defendants' as-applied excessiveness challenge under the correct standard. Third, Havana Docks addresses Defendants' facial excessiveness argument. Finally, Havana Docks explains why the punitive damages excessiveness precedent extensively invoked by Defendants has no application here, and why it would not change the outcome even if it did.

A. Statutory Damages Are Measured Against the Gravity of the "Offense" and the Purpose of the Statute.

Defendants' response is premised on the argument that Title III's statutory damages should be reviewed under the same legal framework as punitive damages. (*See, e.g.*, Resp. at 25 (arguing that the Supreme Court's "punitive-damages precedents" govern statutory damages and punitive damages alike).) But "[t]he Supreme Court never has held that the punitive damages guideposts are applicable in the context of statutory damages." *Capitol Records, Inc. v. Thomas-Rassett*, 692 F.3d 899, 907 (8th Cir. 2012). Instead, for over a century, the Supreme Court has instructed that

"damages awarded pursuant to a statute violate due process only if the award is 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'" *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1120 (9th Cir. 2022) (quoting *Williams*, 251 U.S. at 67). "*Williams* is still good law," *Thomas-Rassett*, 692 F.3d at 907, and it directs that statutory damages be measured against a statute's "goals of compensation, deterrence, and punishment and to the proscribed conduct." *Wakefield*, 51 F.3d at 1123.

In conducting this review, the "offense" is not to be viewed "narrowly." *Id.* at 1122. And in determining the "general reasonableness" of the relationship between an offense and an award, due consideration must be paid to the statute's "public importance and deterrence goals." *Id.*[3] Given Title III's core purpose—to deter trafficking and provide a compensatory remedy—the question here isn't whether statutory damages are excessive vis-à-vis actual damages. It's whether Title III's statutory damages are "wholly disproportioned to the prohibited conduct (and its public importance) and greatly exceed any reasonable deterrence value." *Id.* at 1122. Insofar as trafficking undermines the stated foreign policy of the United States and economically harms United States nationals who were the victims of confiscatory takings (it does both), Title III's statutory damages are a reasonable "matter[] of legislative discretion." *Williams*, 251 U.S. at 66 (citation omitted); *see also United States v. Plummer*, 221 F.3d 1298, 1309 (11th Cir. 2000) ("the role of the judiciary in foreign affairs is limited: Matters relating to the conduct of foreign relations are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.") (cleaned up).

The cases Defendants cite for a different analysis are inapposite and contrary to those Circuit courts that have ruled on the issue. For example, *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915) and *Missouri Pac. R. Co. v. Tucker*, 230 U.S. 341 (1913) were decided before *Williams* and involve incomparable fact patterns. *See Danaher*, 238 U.S. at 490 (finding statutory damages

[3] Further, given Congress's Article I authority to "fix[] [the] punishment for crimes or penalties for unlawful acts[,]" this review is extraordinarily deferential. *Id.* (quoting *Waters-Pierce Oil Co. v. State of Texas*, 212 U.S. 86, 111 (1909)). In fact, it is even "more [deferential] than in cases applying abuse-of-discretion review." *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007) (citing *Douglas v. Cunningham*, 294 U.S. 207, 210 (1935)) (noting, in the context of Copyright Act of 1909, that Congress's delineation of the statutory penalties "takes the matter out of the ordinary rule with respect to abuse of discretion."). That deference is even greater here, where the statutory damages reflect the political branches' foreign policy judgment. *See Plummer*, 221 F.3d at 1309.

excessive because, unlike here, the defendant corporation had engaged in "no intentional wrongdoing" and, by virtue of its role as a public utility, was not "free to act or not, as it chose."); *Tucker*, 230 U.S. at 490 (rejecting statutory damages because, unlike here, "there would be [no] difficulty in proving or ascertaining the actual damages."). Defendants' more recent citations fare no better. In *Wakefield*, for instance, the Ninth Circuit expressly "decline[d] to apply the Supreme Court's [punitive-damages precedent] outside the context of a jury's award of punitive damages[.]" 51 F.4th at 1123-22. That case, along with *Golan v. FreeEasts.com, Inc.*, 930 F.3d 950 (8th Cir. 2019), *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13 (2d Cir. 2003), and *Montera v. Premier Nutrition Corp.* --- F. Supp. 3d ---, 2022 WL 3348573 (N.D. Cal. Aug. 12, 2022), merely recognize that statutory damages could become excessive in the ***aggregate*** in the context of ***class actions*** where a ***single defendant*** is liable for the full aggregated sum—a concern that does not exist here.

In short, as further explained in Sec. III.D, *infra*, "[t]he substantive standards for review of punitive damages and statutory damages under the Due Process Clause are different." *Golan*, 930 F.3d at 962 n.12. Thus, when it comes to Title III, its damages are not measured against a claimant's actual damages, but rather against the "the goals of the statute and the conduct the statute prohibits." *Wakefield*, 51 F.4th at 1123 (citing *Williams*, 251 U.S. at 67).

B. Viewed in the Proper Legal Framework, Defendant's As-Applied Challenge Fails.

Defendants argue that Title III's damages are excessive because Havana Docks suffered no actual losses and, even if it did, those losses are limited to the value that Defendants paid to Cuban entities to access the Terminal. (Resp. at 36-44.) Defendants are wrong because they mistake the harm in these cases. As noted above, Havana Docks was injured because Defendants failed to seek (and pay for) authorization to use the Terminal. *See* Sec. II, *supra*. The amounts Defendants paid to the various Cuban entities managing the Terminal are not a proxy for the harm Havana Docks suffered under Title III. And that harm—the economic value of Havana Docks' ability to exclude persons from using the Terminal without paying for authorization—is difficult to calculate (especially since none of the Defendants ever engaged Havana Docks in such negotiations).

Statutory damages exist for precisely this situation. Where a plaintiff's actual damages are difficult to calculate, statutory damages step in "to provide 'reparation for injury,' [and] also 'to discourage wrongful conduct.'" *Sony BMG Music Entertainment v. Tenenbaum* (*Tenenbaum II*),

719 F.3d 67, 71 (1st Cir. 2013) (quoting *F.W. Woolworth Co. v. Contemporary Arts*, *Inc.*, 344 U.S. 227, 233 (1952)); *see also Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1310 (11th Cir. 2009) (recognizing that statutory damages are "often employed where damages are difficult or impossible to calculate."); *Thomas-Rasset*, 692 F.3d at 907-08 ("It makes no sense to consider the disparity between 'actual harm' and an award of statutory damages when statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate."). Statutory damages "show[] that something other than actual damages [are] intended—that another measure is to be applied in making the assessment." *Sony BM Music Entmt. v. Tenenbaum*, 660 F.3d 487, 502 (1st Cir. 2011) ("*Tenenbaum I*") (quoting *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106 (1919)). The selection of that measure reflects Congress's determination of the amount necessary to compensate injured parties, to compel compliance with the law, ***and*** "to sanction and vindicate the statutory policy[.]" *Woolworth Co.*, 344 U.S. at 233; *see also Wakefield*, 51 F.4th at 1122 (noting that statutory damages "combine deterrence, compensatory, and punitive goals into a single lump sum[.]").

With Title III, Congress expressly recognized that the "exploitation of [confiscated] property … undermines the comity of nations, the free flow of commerce, and economic development." 22 U.S.C. § 6081(2). And given the importance of fostering a democratic transition in Cuba and protecting the claims of United States nationals, Congress made clear that it would "deter trafficking" by imposing statutory damages at a level sufficient to "deny traffickers any profits from economically exploiting Castro's wrongful seizures." § 6081(11). So understood, Title III has two overarching goals: to (1) deter trafficking (which "provides [a] badly needed financial benefit" to the Cuban Government, and so "undermines the foreign policy of the United States") and (2) provide U.S. nationals with a compensatory remedy for any economic exploitation of their confiscated property that occurs without their authorization. 22 U.S.C. § 6081(6), (11). The focus, then, is not on the ratio of statutory to actual damages, as Defendants erroneously suggest. It is, instead, on the relation between statutory damages and the offending conduct the statute seeks to prohibit. *See Williams*, 251 U.S. at 67 (statutory damages are not to be "contrasted' with actual damages, but "considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence[.]").

Applied to these Defendants, Title III's statutory damages are proportionate. Contrary to Defendants' response, their offense was not simply "mooring ships at a pier." (Resp. at 35.) As the Court observed in its summary judgment order, all four cruise line Defendants acted "knowingly and intentionally" when they trafficked in violation of the LIBERTAD Act. *Carnival*, 2022 WL 831160, at *51. Defendants' ships docked at the Terminal hundreds of times carrying hundreds of thousands of passengers over several years to engage in unlawful travel to Cuba. *See Carnival*, 2022 WL 831160, at **22-23. Defendants trafficked by embarking and disembarking passengers at the Terminal; using it as a staging ground for their tourist excursions; and entering into contracts with various Cuban Government entities for use of the Terminal, for ground transportation, and for their tourist excursions. *Id.* at **22-25. From this trafficking, Defendants realized substantial revenue streams—Carnival earned approximately $112 million, MSC earned approximately $272 million in net cruise revenue, Norwegian earned nearly $300 million, and Royal Caribbean earned $430 million in gross revenues.[4] *Id.* at **37-38.

And contrary to Defendants' claim that their revenues and profits "ha[ve] no relevance under … the statutory framework of Helms Burton," (Resp. at 32), Congress defined the "offense" as just that: "profit[ing] from" trafficking and "engag[ing] in a commercial activity … benefiting from confiscated property." 22 U.S.C. § 6023(13)(A). Title III, moreover, expressly links "deny[ing] profits from economically exploiting Castro's wrongful seizures" to its deterrent and compensatory purposes. 22 U.S.C § 6081(11). To stop rational economic actors from trafficking, Congress selected a statutory damages measure that would make profit-seeking corporations think twice before violating the Act. Title III's legislative history makes this point clear:

> The purpose of this civil remedy is, in part, to discourage persons and companies from engaging in commercial transactions involving confiscated property, ***and in so doing to deny the Cuban regime ... the capital generated by such ventures*** and to deter the exploitation of property confiscated from U.S. nationals.

H.R. Rep. No. 104-468, 58 (1996) (Conf. Rep.) (emphasis added).

---

[4] Despite operate at the Terminal for over 4 years, claims it did not ultimately make any profit. *Id.* at *37. Plaintiff disputes that contention. But, in any event, it is irrelevant: even where a defendant claims it did not earn a profit from violating federal law, it does not offend due process to award statutory damages. *See, e.g.*, *Broadcast Music, Inc. v. Crocodile Rock Corp.*, 634 F. App'x 884, 886 (3d Cir. 2015) ("That the infringement was unprofitable will not prevent a court from imposing a damages award anywhere within statutory limits."); *Woolworth*, 344 U.S. at 233 ("Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.").

Given the deterrent and compensatory purposes of Title III, and considering the enormity of Defendants' willful and systemic violations, it cannot be said that statutory damages in these cases are "wholly disproportioned to the offense" and "obviously unreasonable." Defendants as-applied challenge fails.

C. Defendants' Facial Challenge to "Use" of Confiscated Property Also Fails.

Though they avoid labelling it as such, the Defendants raise a facial constitutional challenge through their argument that "Title III Damages Are Excessive for a Defendant Who Only 'Uses' the Property." (Resp. at 28-34). *See Harris*, 564 F.3d at 1308 ("A facial challenge asserts that a law '*always* operates unconstitutionally'" and is a "purely legal claim"). "Facial challenges are disfavored for several reasons," and Defendants face a high bar: they "can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Wa. State Grange v. Wa. State Rep. Party*, 552 U.S. 442, 449-450 (2008) (alteration in original).

Defendants fail to carry this heavy burden for at least two reasons. First, the argument seeks an advisory opinion. A ruling that statutory damages are always excessive for parties that "use" confiscated property would provide no relief to these Defendants, given the numerous other ways in which they trafficked in the Terminal, all of which independently give rise to the same liability under the Act. Second, on the merits, Defendants have not, and cannot, establish that "no set of circumstances exists under which" statutory damages would be "wholly disproportioned to the offense and obviously unreasonable" in relation to a party's "use" of confiscated property.

1. Any resolution of the excessiveness challenge to "users" of confiscated property would provide no relief to these Defendants.

The Defendants seek a ruling that LIBERTAD Act statutory damages for "using" confiscated property will always be excessive. (Opp. at 28-34 ("Title III Damages Are Excessive for a Defendant Who Only 'Uses' the Property").) But any ruling on that argument would provide these Defendants no relief, as their trafficking went far beyond merely "using" the Terminal.

As the Court has held, the Defendants' trafficking was not limited to "using" the Terminal. Rather, they also trafficked through their "commercial contracts with Cuba entities"; "participat[ion] in trafficking by entering into agreements with Cuban entities that 'managed,' 'use[d],' or benefit[ed] from' the Terminal"; "earn[ing] hundreds of millions of dollars for their trips to Cuba" that operated at the Terminal; "pa[ying] Cuban entities tens of millions of dollars to use the Terminal and operate shore excursions"; and "admi[ssions] or fail[ure] to dispute that

they profited from the use of the Terminal"; among other things. *Carnival Corp.*, 2022 WL 831160, at **46-47.

Each of these trafficking acts independently imposes liability for the same statutory damages:

> Importantly, there is no threshold level or type of trafficking activity that must occur for liability to attach under the LIBERTAD Act. Section 6082(a)(1) unambiguously states that a person who "traffics" in confiscated property is liable, § 6082(a)(1), and "traffics" is defined broadly and disjunctively, encompassing many types of acts. *See* § 6023(13). Moreover, the LIBERTAD Act sets forth that a person who "traffics in property" is presumptively liable for "the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act" or "the fair market value of that property," if the presumption is rebutted by clear and convincing evidence. § 6082(a)(1)(A)(i), (2).

Id. at *46.

So, regardless of Defendants' excessiveness challenge to "use" of confiscated property, they will remain liable for statutory damages for the numerous other ways in which they violated the Act, which they do not contest are facially valid. *See Doe v. Valencia College*, 903 F.3d 1220, 1231 (11th Cir. 2018) (where party's "facial challenge cannot succeed unless all four of the provisions he was found to have violated are overbroad or vague," so "long as one of those four provisions can withstand the facial attack, it is not necessary to decide if the other three can as well," and recognizing the "long-standing policy of refusing to decide constitutional issues unless strictly necessary").

Because resolution of the facial challenge would provide no relief to these Defendants, any opinion on that constitutional question would be impermissibly advisory. *Christian Coalition of Ala. v. Cole*, 355 F.3d 1288, 1293 (11th Cir. 2004) (opinions are advisory where a "ruling by us would not grant a party any meaningful relief"). The facial argument should be denied on this basis alone. *Miller v. F.C.C.*, 66 F.3d 1140, 1146 (11th Cir. 1995) ("[N]o justiciable controversy is presented when the parties are asking for an advisory opinion.") (ellipses and citation omitted).

2. The facial challenge to "use" of confiscated property fails on the merits.

If the Court reaches the merits, the facial challenge should also be denied because Defendants have not—and cannot—establish that imposing statutory damages on a "user" of confiscated property would be "wholly disproportioned to the offense and obviously

unreasonable" in "all of its applications." *Wa. State Grange*, 552 U.S. at 449 (facial challenge standard); *Williams*, 251 U.S. at 67 (excessiveness standard for statutory damages).

For one, the application of statutory damages in these cases is clearly constitutional given the enormity of Defendants' violations of the Act. *See* Sec. III.B., *supra*. Consider further a scenario where the certified claim amount is low, but the value of the confiscated property is high. Suppose, for example, a plaintiff owns a certified claim of $60,000 for land in Cuba that was confiscated by the regime, but years later, valuable mineral deposits are discovered on the property, greatly increasing its worth. A U.S. corporation then sought to use that property to mine those deposits. In such a case, the value of a claimant's authorization "might be very close to the statutory damages." *Harris*, 564 F.3d at 1313.

And the facial validity of the Act becomes even clearer when considered under the correct excessiveness standard. As noted in Sec. III.A. *supra*, that standard compares the statutory damages against the "offense"—including the deterrent and compensatory purposes that underlie it—rather than solely the potential money the claimant might have earned had the mining corporation complied with the Act. *Williams*, 251 U.S. at 66-67. Given Congress' plenary authority over foreign commerce, under that analysis, it can hardly be said that statutory damages would be "wholly disproportioned to the offense and obviously unreasonable." *Id.*

For this additional reason, the facial argument should be denied. *Harris*, 564 F.3d at 1313 ("This mere possibility of a constitutional application is enough to defeat a facial challenge to the statute."*); see also Havana Docks Corp. v. MSC Cruises SA Co.*, 484 F. Supp. 3d 1177, 1203 (S.D. Fla. 2020) (Bloom, J.) (denying facial excessiveness challenge to LIBERTAD Act); *de Fernandez v. Crowley Holdings, Inc.*, --- F. Supp. 3d ---, 2022 WL 860373, **6-7 (S.D. Fla. Mar. 23, 2022) (Gayles, J.) (same).

D. The Framework for Excessiveness Challenges to Punitive Damage Awards is Inapplicable.

As explained above, the standards of review of punitive damages and statutory damages under the due process clause are different. *See Golan*, 930 F.3d at 962. n.12. Defendants, however, conflate these standards in their opposition and incorrectly invoke the punitive damages framework announced in the *BMW v. Gore* and *State Farm v. Campbell* line of cases. (*See, e.g.,* Resp. at 39-44.) Neither the Supreme Court, nor this Circuit, has held that the punitive damages guideposts apply to statutory damages. *See, e.g.*, *Thomas-Rasset*, 692 F.3d 899, 907; *Harris*, 564 F.3d 1301 at (citing *Williams*). To the undersigned's knowledge, no other Circuit has either, with

the First, Fifth, Sixth, Eighth and Ninth Circuits each expressly declining to apply the punitive damages standard to excessiveness review of statutory damages awards.[5] The reasons are several.

First, the constitutional underpinning of the Supreme Court's punitive damages precedent is the principle of "fair notice"; specifically, "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). But "[t]his concern about fair notice does not apply to statutory damages, because those damages are identified and constrained by the authorizing statute." *Thomas-Rasset*, 692 F.3d at 907. Indeed, the Act itself provides the Defendants all the notice they are constitutionally due by clearly imposing liability in the amount of the certified claim plus interest, trebled, with attorneys' fees and costs. 22 U.S.C. § 6082(a).[6]

Next, the second *Gore* guidepost—the ratio of the punitive award to the actual or potential harm suffered by the plaintiff—is a poor fit for statutory damages. It invites speculation about the amount of a plaintiff's actual harm, which is exactly what statutory damages are imposed to avoid in the first place. *See, e.g.*, *Harris*, 564 F.3d at 1309-10, 1313; *Thomas-Rasset*, 692 F.3d at 907-08; *Tenenbaum II*, 719 F.3d at 70-71. As explained above, Havana Docks' actual damages (resulting from Defendants' failure to seek and pay for authorization) are difficult to calculate, and so cannot provide a viable comparison for this guidepost. Statutory damages, moreover, may

---

[5] *See Tenenbaum I*, 660 F.3d at 512-13; *Sony BMG Music Entmt. v. Tenenbaum*, 719 F.3d 67, 70-72 (1st Cir. 2013) ("*Tenenbaum II*"); *Vanderbilt Mortg. & Finance, Inc. v. Flores*, 692 F.3d 358, 373-74 (5th 2012); *Zomba Enters.*, 491 F.3d at 586-88; *Thomas-Rasset*, 692 F.3d at 907-08; *Golan*, 930 F.3d at 962 n.12; *Wakefield v. ViSalus, Inc.*, 51 F.4th at 1120-23.

[6] *See also Harris,* 564 F.3d at 1311-12 ("First, potential defendants have notice of the consequences of violating the FCRA because it clearly defines what conduct is prohibited and the potential range of fine that accompanies noncompliance."); *Tenenbaum II*, 719 F.3d at 70 ("The concerns regarding fair notice to the parties of the range of possible punitive damage awards, which underpin *Gore*, are simply not present in a statutory damages case where the statute itself provides notice of the scope of the potential award."); *Vanderbilt*, 692 F.3d at 374 (declining to apply *State Farm* because "no such discretion or problem with notice is applicable here, because the $120,000 award was mandated by statute as a minimum penalty"); *United States v. Dish Network L.L.C.*, 954 F.3d 970, 979 (7th Cir. 2020) (rejecting "fair notice" excessiveness argument to statutory damage award that "supposes that government must provide some notice on top of the statutes and rules themselves, but why? There's nothing ambiguous about them. If there is a problem, it isn't lack of notice.").

vindicate numerous policy objectives (i.e., compensation, compliance, and deterrence) through a single sum that is often impossible to segregate by purpose.[7] This undermines the accuracy and utility of the second *Gore* guidepost to excessiveness review of statutory damages awards.

Finally, the third *Gore* guidepost's consideration of the difference between the punitive damages and the civil penalties authorized or imposed in comparable cases has no bearing in the context of legislatively-imposed statutory damages. "Because an award of statutory damages is by definition an authorized civil penalty, this guidepost would require a court to compare the award to itself, a nonsensical result." *Tenenbaum II*, 719 F.3d at 71; *Thomas-Rasset*, 692 F.3d at 907-08 (same); *Vanderbilt*, 692 F.3d at 374 (same).

For these reasons, the framework for excessiveness review of punitive damages awards does not apply in this case. But, to the extent it informs the Court's decision, as explained next, the record overwhelmingly confirms that the Defendant had "fair notice" of both the conduct that would "subject [them] to punishment" and the "severity of the penalty" that would ensue. *Campbell*, 538 U.S. at 417.

E. With Actual Knowledge of the Consequences of Their Conduct, Defendants Willfully Assumed the Risk of Liability.

With full knowledge of the law and the liability for violating it, Defendants made a business decision and took a calculated risk by trafficking in the Terminal without Havana Docks' authorization.

This Court has previously found that Defendants had actual knowledge of Havana Docks and its Certified Claim:

> Carnival had a general awareness since 1996 that there was a Certified Claim concerning the Terminal, and Carnival specifically learned of the Certified Claim in 2012. Norwegian learned of the Certified Claim in February 2017. MSC and Royal Caribbean learned of the Certified Claim from the Havana Docks notice, in February 2019.

[7] *See Wakefield*, 51 F.3d at 1122 ("[S]tatutory penalties, unlike jury awards, are not generally disaggregated by purpose. Indeed most statutes combine deterrence, compensatory, and punitive goals into a single lump sum per violation."); *Tenenbaum I*, 660 F.3d at 513 (distinguishing the *Gore* guideposts, and noting the differences in "the relationship between the purposes of statutory damages under the Copyright Act as opposed to the purpose of punitive damages").

Carnival, 2022 WL 831160, at *37. "It is also undisputed that Defendant had reason to know of the Certified Claim long before cruise operators started traveling to Havana." *Id.* at 49. Nevertheless, "[n]o Defendant obtained authorization from Havana Docks to use the Terminal." *Id.* at *36. In fact, they never even asked.

There is likewise no dispute that the "Defendants have been aware of the LIBERTAD Act since 1996 or 1997." *Carnival*, 2022 WL 831160, at *36. And the record in these cases confirms that the Defendants remained well-aware of the restrictions imposed by that law at all times since. Consider the public statements of the Defendants' most senior executives on the subject from 2015:

- "Asked by [CNN business correspondent Richard] Quest whether there's a secret drawer of plans for Cuba at each cruise line, Frank Del Rio, president and CEO of Norwegian Cruise Line Holdings, said he's ready to deploy ships to Cuba at the snap of a finger when the U.S. embargo is lifted. . . . Pierfrancesco Vago, executive chairman of MSC Cruises drew a laugh when he said, 'We're European. We have no embargo. We're already there.'"[8]
- "Fain indicated the Helms-Burton Act of 1996, which extended the US embargo to apply to foreign companies trading with Cuba, would need to change before US cruise operators visit Cuba."[9]
- "[T]oday, no cruise line that is American-based – certainly not a publicly traded company like Norwegian – can routinely go to Cuba with tourists. Tourism is still illegal under today's set of rules and policies and guidelines. And it would be difficult for us to have a ship with 4,000 tourists – people let's call them – show up in Havana and call that people-to-people travel. That would be a stretch of the – of the rules. . . .

  Until the – my perspective is – and for my three brands – until Congress officially repeals Helms-Burton, even if OFAC were to – even if you can go backdoor through OFAC, it wouldn't be the proper thing to do, and I don't think you can do it on a sustained basis. Maybe you can do 50 folks at a time, but to run a business, you have to bring thousands of people at a time on an ongoing basis. I don't think that backdoor or that loophole, if you will, would work on a sustained basis."[10]

---

[8] *Cuba, China, and the Super Bowl: Cruise News*, Fran Golden, PORTHOLE CRUISE AND TRAVEL (Mar. 20, 2015), *available at* https://porthole.com/cuba-china-and-the-super-bowl-cruise-news-mar-20-2015/

[9] *Caribbean stronger, Europe weaker than forecast*, Anne Kalosh, SEATRADE CRUISE NEWS (June 11, 2015), *available at* https://www.seatrade-cruise.com/news-headlines/caribbean-stronger-europe-weaker-forecast (discussing comments to investors by Royal's former Chairman and CEO, Richard Fain).

[10] (ECF No. 221-15 at 6:6–7:10, 23:10–24:4.) (quoting Norwegian's President and CEO, Frank Del Rio).)

The Defendants were specifically warned by the United States Government that their conduct was illegal. In April 2015, Carnival sent lobbyists to Capitol Hill to attempt to garner support for cruising to Cuba. Following a meeting with Congressman Mario Diaz-Balart, the lobbyists provided the following summary to Carnival's Chairman (Micky Arison) and former General Counsel (Arnaldo Perez):

> Micky,
>
> Tandy and I have just finished spending almost an hour visiting with Mario on the "Turkey"[11] issue. He was . . . unwavering as it pertains to his strong opposition to anything that would give the Castro regime any comfort. . . . He spent some time reviewing with us the legal limits under the Helms-Burton Act, stating that it was illegal under U.S. law to do business with anyone who is operating expropriated properties, and he stated that all of the ports on that island are expropriated properties that are run and operated by the military. He further stated that this President and other President have provided waivers to companies who have subjected themselves to potential lawsuits by virtue of doing business on expropriated properties.

(ECF No. 235-36 at 248-49.) When asked for his "feel/reaction on" the meeting, Carnival's former President and CEO, Arnold Donald, replied: "We are a go." *Id.* At deposition, Mr. Donald elaborated:

> **Q**: So even though Congressman Diaz-Balart informed of – [Carnival's lobbyists] Mr. Alcalde and Ms. Bondi of his views that the ports in Cuba were expropriated, you, nonetheless, instructed Ms. Russell to go forward with the plans to cruise to Cuba; is that correct?
>
> **A**: Absolutely correct. Yes.

(*Id.* at 53:15-23 (Dep. of A. Donald).)

As the Court found, OFAC similarly warned Carnival:

> that "[t]he enclosed specific license does not authorize Carnival to transport any person who will disembark in Cuba and who is not authorized by a general license or a separate specific license." Finally, the letter warned that "compliance with the requirements of the CACR does not excuse a U.S. person from the need to comply with other provisions of 31 C.F.R. chapter V, and with other applicable provisions of law."

[11] Carnival referred to Cuba by the code name "Turkey." (Dep. of G. Israel, ECF No. 235-47 at 33:10–34:13.)

> The license itself similarly cautioned that it "does not excuse compliance with any law or regulation (including reporting requirements) administered by [OFAC] or any other agency applicable to the transactions herein licensed, nor does it release the Licensees or third parties from civil or criminal liability for violation of any law or regulation." The license also stated, "nothing in this License authorizes any person subject to the jurisdiction of the United States to engage in any transaction or activity prohibited by the CACR, or by any other laws and regulations administered by [OFAC]." Moreover, the license stated that it "appl[ies] only to the laws and regulations administered by OFAC and should not be interpreted to excuse the Licensees from compliance with other laws, regulations, orders, or rulings to which they may be subject[.]
>
> The U.S. Government did not require Carnival to cruise to Havana. The U.S. Government did not direct Carnival where to dock its ships in Cuba.

Carnival, 2022 WL 831160, at *19-20 (record citations omitted).

Before commencing operations in Cuba, Congressman Diaz-Balart also warned Royal's former in-house lobbyist (Eleni Kalisch) and former COO (Adam Goldstein) "[t]hat if [Royal] were to cruise to Cuba, [it] would likely be subject to Title III lawsuits in the future." (Dep. of E. Kalisch, *Havana Docks. Corp. v. Royal Caribbean Cruises, Ltd.*, No. 19-cv-23590, ECF No. 122-5 at 30:24–36:15.) He "made clear that there were those who felt that we were utilizing property that the Castro regime had confiscated. So I understood that." (*Id.*) Nevertheless, Royal's former General Counsel confirmed that the company conducted no due diligence before operating at the Terminal. (Dep. of B. Stein, ECF No. 235-39 at 43:21 – 44:1.)

Norwegian learned of Havana Docks and its Certified Claim in February 2017, before it commenced operations in Cuba. According to Norwegian's President and CEO, "[t]he Cuban authorities asked whether we along with other cruise companies were – were interested in investing in Cuba if we were allowed to, and the answer was yes, we would be interested." (Dep. of F. Del Rio, ECF No. 235-76 at 205:13-16.) Norwegian disclosed Havana Docks and its Certified Claim in a license application connected to its proposed investment in the Terminal and joint venture with Aries Transportes, S.A., the Cuban Government agency that operates the Terminal. (ECF No. 214-48.) OFAC never granted the license, and Norwegian withdrew the application in the summer of 2018, approximately a year and a half later. (Dep. of L. Vidal, ECF No. 214-5 at 141:2 – 144:18.) None of this was ever discussed with Havana Docks.

On January 16, 2019, the US Government indicated that it was considering allowing claims under Title III to go forward, and publicly "encourage[d] any person doing business in Cuba to

reconsider whether they are trafficking in confiscated property and abetting this dictatorship."[12] The Defendants received this notice, but continued to traffic anyway. (Decl. of B. Rose (Aug. 12, 2021), ECF No. 220-41 at 60.)

Instead of contacting Havana Docks, the Defendants (through Cruise Lines International Association ("CLIA"), the industry's centralized lobbying arm) embarked on an extensive effort to lobby the United States Government for a change in the law to immunize their conduct from liability in this suit. (*See, e.g.,* Decl. of B. Rose (Aug. 4, 2021), ECF No. 220-40 at ¶¶ 14-16; *see also* ECF No. 220-41 (compiled and authenticated records of same).) The industry's "goal" was to "work behind the scenes with key leaders on Capitol Hill" to "[e]nsure that legal claims under Title III cannot be made against cruise lines and/or maintain the overall suspension of lawsuits under Title III." (ECF No. 220-41 at 60.) The Defendants recognized that:

> [w]hile it might appear that [the lawful travel] exemption would protect cruise lines from legal claims under Title III, there is no legislative history which clearly spells out the intent of Congress when that exemption was added to the original legislation and there is some chance of adverse court interpretation.

(*Id.*) So, CLIA "recommend[ed] that [the cruise lines and CLIA] secure clarifying language in the regulation which would specifically exempt cruise lines engaging in lawful travel to Cuba from lawsuits under Title III." (*Id.* at 61; *see also id.* at 66 – 67 (Defendants' proposed legislative amendments to the definition of "traffics" in 22 U.S.C. § 6023(13)).)

On February 11, 2019, the Defendants received demand letters from Havana Docks informing them that they were knowingly and intentionally violating Title III of the Helms-Burton Act and demanding that each cease operating at the Terminal. (Decl. of B. Rose (Aug. 4, 2021), ECF No. 220-40 at ¶ 17.) None of the Defendants contacted Havana Docks to discuss these letters, nor did they cease operating at the Terminal. Instead, the Defendants "requested that CLIA counsel analyze, on behalf of its members, the merits of potential Title III claims and the risks that an active Title III poses to cruise lines." (*Id.* at ¶ 18.)

This resulted in a legal memo circulated on February 21, 2019, to the Defendants' highest executives, who sit on CLIA's Global Executive Committee ("GEC"). (ECF No. 220-41 at 93;

---

[12] *See* U.S. DEP'T OF STATE, *Media Note from Office of the Spokesperson: Secretary's Determination of 45-Day Suspension Under Title III of LIBERTAD Act* (Jan. 16, 2019) *available at* https://2017-2021.state.gov/secretarys-determination-of-45-day-suspension-under-title-iii-of-libertad-act/index.html

Decl. of B. Rose (Aug. 4, 2021), ECF No. 220-40 at ¶¶ 20, 21 ("The GEC is comprised of . . . executives of each of the Cuba Cruise Lines . . .").) That memo identified that "Havana Docks Corporation, incorporated in Delaware, holds a claim valued at $9.2 million by the FCSC in 1971 (absent interest) in connection with a concession it then held at the Havana Harbor." (ECF No. 220-41 at 101.) The memo warned that "a court may interpret that the use of port docks, which are associated with confiscated property, constitutes violative 'trafficking' under the Act" and that the "scope of Title III has very broad implications." (*Id.* at 95.) The memo noted that "a person that traffics in confiscated property is liable in an amount equal to the *greater* of: The amount certified to the claimant by the FCSC under the ICSA …." (*Id.* at 97 (emphasis in original).) The memo advised that "the accumulation of interest on these claims and the potential appreciation in the properties' value has significantly increased the value." (*Id.*) And the memo informed that "[f]or certified claims, a person that 'traffics' is liable for treble damages based on the amounts above." (*Id.* at 98.)

The memo also contained a section titled "Understanding the Ambiguities Associated with the Travel Exception." (*Id.* at 96.) This section warned that "it is unclear whether a court would find that carriers and travel service providers, including cruise lines, are covered by th[e lawful travel] exception." (*Id*.) The memo further "anticipate[d] that a court could interpret the Travel Exception narrowly." (*Id*.)

On February 22, 2019, the day after receiving the memo, the Defendants' highest executives attended a conference call to discuss its content. (ECF No. 220-40 at ¶ 21.) That same day those executives also sent a letter to then-Secretary of State Michael Pompeo to lobby for an "enabling order policy or rule" to "clarify the lawful travel exclusion applies to cruise ships calling at Cuban ports." (ECF No. 220-41 at 103.)

No clarification issued, and on March 4, 2019, the Government again gave notice of its intent to authorize suits under Title III and "encourage[d] any person doing business in Cuba to reconsider whether they are trafficking in confiscated property and abetting the Cuban dictatorship."[13] The Defendants received notice of this, but the trafficking did not stop. (*Id.* at

[13] U.S. DEP'T OF STATE, *Media Note from Office of the Spokesperson: Secretary Enacts 30-Day Suspension of Title III (LIBERTAD Act) With an Exception* (Mar. 4, 2019) *available at* https://2017-2021.state.gov/secretary-enacts-30-day-suspension-of-title-iii-libertad-act-with-an-exception/index.html.

105.) Rather, "CLIA, its outside lobbyists, and cruise line government affairs leaders" continued to "aggressively work[] with members of Congress and key officials in the Administration to secure clarification that cruises are included under the exemption for lawful travel within the existing statute." (*Id.* at 121.)

On March 26, 2019, "the leading lines' CEO's requested that [CLIA] convene a meeting of the Legal Working Group[14] to discuss" the "potential for CLIA to settle" Title III claims "on behalf of its affected members," "including potential claims against cruise lines using the docks and related properties in Havana and Santiago." (*Id.* at 129-30, 135-36.) Per CLIA's General Counsel, Lawrence Kaye: "[i]t seems to me that the most straightforward approach would be to simply settle (i.e. pay) the claims in exchange for a release, but maybe I'm missing something." (*Id.* at 135.)

On March 27, 2019, CLIA circulated another legal memo in advance of the call. (*Id.* at 132-35.) It contained two sections: (1) the "implications for settling claims held by potential Title III claimants"; and (2) "the potential legal challenges, including constitutional challenges, that can be raised against Title III claims." (*Id.*)

Under the first section, the memo advised that "CLIA and/or its members could seek to potentially settle the two well-publicized claims certified with the [FCSC] relating to the Port of Havana and the Port of Santiago." (*Id.*) The memo also discussed an example of where a foreign corporation paid a claimant "$25 million for the right to use the [confiscated] property for ten years." (*Id.* at 133.)

Under the second section, the memo noted that there are "a number of potential constitutional arguments that may be asserted, though most of the arguments involve legal issues that are not well-settled." (*Id.*) The memo again warned that "a court could interpret the exemption for travel narrowly." (*Id.*) The memo also identified "a number of other potential arguments that could be raised based on due process grounds," including that the "statutory damages are unreasonable and excessive or are not sufficiently related to the conduct in question." (*Id.* at 134-35.) The memo qualified that "these arguments are not currently well-supported due to a lack of existing or analogous legal precedence," but nevertheless "anticipate[d] that challenges to [Title

[14] The "Legal Working Group" consists of "most of the [CLIA] member lines' general counsels," including the four Defendants in these cases. (ECF No. 220-41 at 135; ECF No. 220-40 at ¶ 24.)

III] claims will seek to assert as many potentially viable defenses in order to *'**see what sticks**.'"* (*Id.* (emphasis added).)

Minutes of the March 28, 2019, call reflect that it was attended by members of the CLIA Government Affairs Committee and Legal Working Group, of which employees of each Defendant are members. (*Id.* at 138; ECF No. 220-40 at ¶¶ 24-26.) The minutes reflect that the following was discussed:

- there were "two prominent potential claims affecting cruise lines," including "Havana Harbor claim held by the Havana Docks Corporation (valued at $9.18 million at the time of certification in 1971)";
- "any activity over the last two years that is found to be 'trafficking' in violation of Title III may result in an asserted claim";
- trafficking claims "would be brought in U.S. federal court and decided by a judge, who would then interpret the provisions of Title III, including the [lawful travel] exception";
- "Title III allows for a claimant to settle their claim(s)";
- "that a federal judge could possibly take a very narrow view" of the lawful travel exception;
- "whether there may be an advantage to CLIA pursuing settlement of the claims as opposed to individual members";
- "the valuation methodology for the claims"; and
- "the members discussed how a settlement could be crafted, so to appreciate the levels of risk and/or impact on the various members."

(*Id.* at 138-40.)

Ultimately, the Group determined that "the options appear to be [(1)] undertaking a proactive stance to pursue settlement with the claimants; [(2)] awaiting the decision by the Trump Administration . . . ; or [(3)] awaiting any filing by claimants and assess and defend those actions at that time, including potentially pursuing settlement." (*Id.*) The conference concluded with CLIA "encourag[ing] the members to each review and discuss the issues within their respective organizations, with the intent to reach a recommendation to present to the GEC." (*Id.*)

The next week, on April 3, 2019, the Government issued another public notice of its intent to authorize suits under Title III and, for the third time, "encourage[d] any person doing business in Cuba to reconsider whether they are trafficking in confiscated property and abetting the Cuban dictatorship."[15] The Defendants, however, continued to traffic.

[15] U.S. DEP'T OF STATE, *Media Note from Office of the Spokesperson: Secretary Pompeo Extends for Two Week Title III Suspension with an Exception (LIBERTAD Act) With an Exception*

On April 17, 2019, Carnival received word that the Government would authorize all suits under Title III. In response, Carnival's Chairman Micky Arison wrote a personal note to President Trump requesting "language to clarify that lawful travel [under Title III] includes current cruise operations in any guidance or regulations that should accompany the policy changes." (ECF No. 215-40.) Mr. Arison recognized that if "there are no exceptions or clarifications, we would be subject to significant legal liability for our use of the Ports***," and estimated that "the potential penalty to my company alone would be over $600 million.***" (*Id.* (emphasis added).) Later that day, the Government announced that Title III would be enforced in full on May 2, 2019, and "there w[ould] not be any exemptions."[16]

Havana Docks then sued Carnival in this case on May 2, 2019, and each of the Defendants continued to traffic in the Terminal until late May or early June 2019. As Royal's then-Chairman, Richard Fain, explained: "the change is likely to prompt litigation with companies that do business in Cuba. 'We believe we have solid defenses and are not expecting to change our itineraries as a result,' he said."[17] Norwegian's President and CEO, Mr. Del Rio, put it this way: Cuba "was a profitable itinerary to operate, and we didn't want to see it stopped." (ECF No. 235-76 at 78:7-11.) Mr. Donald summarized the industry's position on trafficking in confiscated property as follows:

> **Q**. Mr. Donald, didn't this same risk apply to all of Carnival's cruises to Cuba during the time frame of the 2016 to 2019?
>
> **A.** I think a risk. There was always a risk that someone would try to sue. There's always that risk. And that's the risk we live with all the time as a large corporation with assets. So people always, you know, trying to sue for one reason or another. So the risk here doesn't necessarily speak to winning or losing. It speaks, you know, to having to go through the hassle of -- of being sued.

(April 3, 2019) *available at* https://2017-2021.state.gov/secretary-pompeo-extends-for-two-weeks-title-iii-suspension-with-an-exception-libertad-act/index.html.

[16] Special Briefing, Office of the Spokesperson, Assistant Sec. for W. Hemisphere Affairs Kimberly Breier (April 17, 2019), *available at* https://2017-2021.state.gov/briefing-with-assistant-secretary-for-western-hemisphere-affairs-kimberly-breier/index.html.

[17] *Royal Caribbean chairman discusses uncertain future in Cuba*, Tom Stieghorst, TRAVEL WEEKLY (May 1, 2019), *available at* https://www.travelweekly.com/Cruise-Travel/Royal-Caribbean-chairman-discusses-uncertain-future-in-Cuba (quoting Royal then Chairman, Richard Fain)

> I think the consensus in the industry at the time, as I recall, was that this Act would increase the risk that we could be sued, not necessarily increase the risk that, you know, we would lose in final determination, but increase the risk we would be sued, would emboldened those who wanted to seek a claim, you know, to try to do so.
>
> So that's my interpretation of it.

(ECF No. 235-36 at 184:24 – 185:14, 188:16 – 189:23.)

The Defendants knew exactly what they were doing. They had extensive, actual knowledge of the requirements of the LIBERTAD Act, their liability for violating it, and the risks of litigation. They made a business decision to assume those risks and liabilities in the pursuit of profit. Of the alternatives available, litigating to judgment was the path the Defendants picked. They received all the process they were constitutionally due and lost. The Constitution does not absolve them of the known consequences of their business decisions. Judgment should be entered for Havana Docks for the full amount of statutory damages.

CONCLUSION

For the above reasons, the Court should reject Defendants' argument that the "amount … certified" means an amount less than the $9,179,700.88 certified to Havana Docks by the FCSC, deny their request for reconsideration of the Court's prior determination that Havana Docks possesses Article III standing, and reject their contention that Title III's statutory damages are unconstitutionally excessive.

Dated: November 18, 2022.

Respectfully submitted,

COLSON HICKS EIDSON, P.A.
255 Alhambra Circle, Penthouse
Coral Gables, Florida 33134
Telephone: (305) 476-7400
Facsimile: (305) 476-7444
E-mail: eservice@colson.com

By: s/ Roberto Martínez
Roberto Martínez
Florida Bar No. 305596
bob@colson.com
Stephanie A. Casey
Florida Bar No. 97483
scasey@colson.com

Zachary A. Lipshultz
Florida Bar No. 123594
zach@colson.com
Thomas A. Kroeger
Florida Bar No. 19303
tom@colson.com
Aziza F. Elayan-Martínez
Florida Bar No. 92736
aziza@colson.com
Sabrina S. Saieh
Florida Bar No. 125290
sabrina@colcon.com

– and –

MARGOL & MARGOL, P.A.
2029 3rd Street North
Jacksonville Beach, Florida 32250
Telephone: (904) 355-7508
Facsimile: (904) 619-8741

Rodney S. Margol
Florida Bar No. 225428
Rodney@margolandmargol.com

Attorneys for Plaintiff Havana Docks Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Court. I also certify that the foregoing document is being served on this 18th day of November, 2022 on all counsel of record or pro se parties either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner.

By: s/ *Roberto Martínez*_____
Roberto Martínez