92874-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:19-CV-23988-RNS

DANIEL A. GONZALEZ,

Plaintiff,

v.

AMAZON.COM, INC. a
Delaware Corporation, and
SUSSHI INTERNATIONAL, INC.,
a Florida Corporation d/b/a
FOGO CHARCOAL,

Defendants.
_____/

DEFENDANT FOGO'S REPLY TO THE
MOTION TO DISMISS WITH PREJUDICE

Defendant SUSSHI INTERNATIONAL, INC., d/b/a/ FOGO CHARCOAL (hereinafter referred to as "FOGO"), by and through its undersigned counsel, pursuant to L.R. 7.1 and Florida Rules of Civil Procedure 8(a) and 12(b)(6), respectfully requests this Honorable Court enter an order dismissing Plaintiff's Complaint [DE 1] with prejudice and in support of its Motion to Dismiss [DE 13] files this Reply memorandum of law.

MEMORANDUM OF LAW

I. FOGO was not "trafficking" under Title III in "confiscated property."

As set forth in the motion to dismiss, the plain language of the Helms-Burton Act (the "Act") is not intended to create a civil remedy for the transactions at issue in this case. "[T]he purpose of the statute [is] to deter third party foreign investors from trafficking in the confiscated property (defined as 'purchas[ing] an equity interest in, manag[ing], or enter[ing] into joint ventures using property and assets some of which were confiscated from United States nationals.')." *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1255 (11th Cir. 2006) (*citing* 22 U.S.C. § 6081(5), (6), (11)). Hence, Plaintiff's conclusory allegations of "trafficking" in "confiscated property" by importing and selling of marabu charcoal is not "trafficking" intended to be deterred under the Act.

The Plaintiff fails to refute the legal arguments of his non-ownership of the marabu charcoal or marabu plant, and that "trafficking" is a specific activity not alleged to be occurring in his action under 22 U.S.C. § 6081(5)-(7), because he cannot. Plaintiff's failure to brief these issues warrants dismissal in favor of Defendant FOGO. *Brady v. Medtronic, Inc.*, 13-CV-62199-RNS, 2014 WL 1377830, at *6 (S.D. Fla. April 8, 2014) (J. Scola) (*quoting Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 800 n. 10 (10th Cir.2001) ("litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point. The court will not do his research for him.")). Because there is no discussion in Plaintiff's brief about how FOGO is a foreign investor being offered

"the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets some of which were confiscated from United States nationals," dismissal is proper with prejudice. *Glen,* 450 F.3d at 1255.

Plaintiff's only claim is that FOGO is liable because it sold charcoal made from the "marabu weed" that is "produced on the Subject [confiscated] Property." (Resp. p. 6) An item being "produced on the Subject [confiscated] Property" is not selling (or "trafficking" in) the "Subject [confiscated] Property." *See* 22 U.S.C. § 6023(12)(A); 22 U.S.C. § 6081(5), (6), (11). "The Act defines 'property' as 'any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest.'" (Resp. p. 11) This definition does not include items "produced on" the "Subject [confiscated] Property," which is Plaintiff's only claim. (Resp. p.p. 6, 9, 11) Recognizing that the Act's definition of "property" does not support his claim, the Plaintiff attempts to draw an analogy with a provision of the tax code defining "property" as including "the taxpayer's operating mineral interests in a separate tract or parcel . . . ." (Resp. p. 11) Even assuming this provision of the tax code was analogous, it is not helpful because the Plaintiff is not claiming the "Subject [confiscated] Property" are "operating mineral interests in a separate tract or parcel," but charcoal made from a weed that grows on certain real property.

"[T]here is nothing [in the Act] to suggest that Congress intended to grant victims of property confiscations more rights to the property than they would otherwise have simply by virtue of the confiscation." *Havana Docks Corp. v. MSC*

Cruises SA CO, 19-cv-23588[1], 2020 WL 59637, at *5 (S.D. Fla. Jan. 6, 2020) (Bloom, J.). Where the Plaintiff in *Havana Docks Corp.* "is the rightful owner only of a time-limited concession that expired in 2004," (*Id*.) the Plaintiff here is only the alleged owner in agricultural real property, not charcoal produced on it (Resp. p. 6). Thus, the Act "ensures that persons like Plaintiff may recover for any trafficking of their confiscated property, which in this case is" alleged to be only charcoal produced on said property, not the alleged confiscated property that the Plaintiff allegedly acquired through some alleged lineal succession on some unknown date. *Havana Docks Corp*., at *5.

Consistent with FOGO's motion to dismiss, the alleged "trafficking" must be in "the property interest at stake." *Id*. at *3. In *Havana Docks*, the "trafficking" was in an expired leasehold. *Id*. at *2. Here, the alleged "trafficking" was in marabu charcoal "produced on" the subject property. However, the Plaintiff does not claim an ownership interest in marabu charcoal, only the agricultural land. (Resp. p. 6; Compl. ¶ 18) Because "[t]he plain language of the LIBERTAD Act states that 'any person . . . that traffics in property that was confiscated by the Cuban Government . . . shall be liable to any United States national who owns the claim to *such* property' [. . .] a person would have to traffic in the [confiscated marabu charcoal] in order for that person to be liable to the owner of the claim to the [confiscated marabu charcoal]." *Havana Docks Corp.* at *3 (quoting 22

[1] Plaintiff makes references to Judge Bloom's prior order in *Havana Docks* asserting that he had sufficiently stated a claim. In her January 6th opinion she reconsidered her construction of the statute and dismissed the claims with prejudice. *Id*. at *2.

U.S.C. § 6082(A)) (emphasis in original)). "In this case, Plaintiff [alleges] that the property interest at stake is [agricultural acre property located in the province of Oriente (now 'Granma), Cuba]" (Compl., ¶ 9), not confiscated marabu charcoal. *Id*. "Accordingly, the property interest in this case is" not the same as the one the Plaintiff is alleging FOGO is "trafficking" in, and thus cannot maintain this claim. *Id*. "Any other interpretation of the Act would require the Court to ignore the definition of "property," and the qualifying words "such" and "that" out of the liability imposing language [. . .]—which would run afoul of basic canons of statutory interpretation." *Id*.

Likewise, Plaintiff ignores that the Act does not envision imposing liability for selling a product "produced on" the confiscated property. (Mot. p.p. 10-2 (*citing* 22 U.S.C.A. § 6081 (5)-(7))) Extending Judge Bloom's analysis to the "Findings" section of 22 U.S.C.A. § 6081 shows the Act was intended to impose liability only for certain "trafficking"[2] not at issue here. "Any other interpretation of the Act would require the Court to ignore the definition of "trafficking," and the qualifying word[] ["This"] out of the [. . .] [Findings] language—which would [also] run afoul of basic canons of statutory interpretation." *Id*.

Relatedly, the Plaintiff contends that FOGO is by analogy arguing that charcoal becomes "magically" "unconfiscated" because it was extracted from the Subject Property. (Resp. p. 11) No. FOGO's motion is based on the fact that the

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[2] "[O]ffering [by the Cuban Government to] foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets some of which were confiscated from United States nationals." 22 U.S.C. § 6081 (5). *See also Glen*, 450 F.3d at 1255.

claim itself is not being made on the alleged confiscated property because the Plaintiff does not actually allege any ownership interest in marabu charcoal. Likewise, the Plaintiff does not allege a nexus between the marabu charcoal made from an invasive weed sold by FOGO and the alleged confiscated real property that Plaintiff allegedly has an ownership interest in. Thus, while the "Act defines 'property'" in "broad terms," the Plaintiff never contends he has an ownership interest in the "personal" property made on it, *i.e.*, marabu charcoal. Plaintiff only alleges he has an interest in the "Subject Property" (Compl., ¶ 9) that is defined by him as "approximately 2,030 agricultural acre property" that the "marabu charcoal [is] produced on." (Compl., ¶ 18) This is insufficient.

II. FOGO's general license is set forth in the Federal Regulations.

The Plaintiff also misconstrues what a "general license" is, suggesting that it is a separate paper outside the four-corners of the complaint. (Resp. p. 11) Licenses issued by the Office of Foreign Asset Control are the product of federal regulation. *See e.g. Guardian Ad Litem v. ViajeHoy, LLC*, 3D18-182, 2020 WL 20667, at *3 (Fla. 3d DCA Jan. 2, 2020) ("The Regulations reference licenses which can be issued to authorize limited commerce with Cuba. These licenses take two forms: a general license authorizes a category of more general transactions, § 501.801(a); a specific license authorizes specific transactions that do not fall within the transactions authorized by a general license, § 501.801(b)."); 31 C.F.R. § 515.317 (General License: "any license or authorization the terms or which *are set forth in this part*.") (emphasis added); *cf*. 31 C.F.R. § 515.318 (Specific License: "any license or authorization issued

pursuant to this part *but not set forth in this part*.") (emphasis added). It is absurd to contend that this Court cannot consider references to federal regulations when evaluating a motion to dismiss. "This Court may consider regulations from the Code of Federal Regulations without converting a motion to dismiss to a motion for summary judgment." *Yagoozon, Inc. v. Kids Fly Safe*, CA 14-040 ML, 2014 WL 3109797, at *2 (D.R.I. July 8, 2014) (*citing Greene v. Rhode Island*, 398 F.3d 45, 48–9 (1st Cir.2005) (federal statutes); *Demick v. City of Joliet*, 108 F.Supp.2d 1022, 1025 (N.D.Ill.2000) (rules and regulations).

FOGO's motion to dismiss sets forth where its general license for the import of charcoal from Cuba can be located within the database of federal regulations and lists. (Mot. p. 13-4) Because FOGO is not relying on any document beyond federal public records to demonstrate its conduct was licensed, there is no basis to accept Plaintiff's argument that FOGO's "argument regarding the lawfulness of the 'licensed activity' rests on a document wholly outside the four corners of the complaint: a license from the Office of Foreign Asset Control . . . ." (Resp. p. 11) In turn, FOGO explains that it's lawful activity[3]

[3] A Plaintiff must plausibly allege the facts to support a claim that knowledge of trafficking existed. *Republic Bank & Tr. Co. v. Bear Stearns & Co.*, Inc., 683 F.3d 239, 254 (6th Cir. 2012) (Plaintiff's complaint "would still fail because it does not plead enough factual matter to raise its allegations about [defendant's] knowledge [...] above mere speculation. Such allegations are not sufficient, even under Rule 9(b)'s more lenient standard for allegations of mental state.). The existence of a federal regulation permitting FOGO's conduct only allows a single inference: it did not "knowingly" traffic in "confiscated property." The same set of federal laws cannot both allow and deter the same conduct without leading to an improperly absurd result. *U.S. v. Turkette*, 452 U.S. 576, 570 (1981) (when construing a statute, "absurd results are to be avoided").

cannot be considered "trafficking" because "trafficking" cannot be both licensed conduct and conduct that subjects it to civil penalty when both are derived from the same root statute, the Act (22 U.S.C. §§ 6021–6091 (1996)); (Mot. p.p. 16-8]) This explanation is effectively unrebutted. (Mot. p.p. 16-8)

Relatedly, FOGO's general license is unlike the incident to lawful travel defense that was ruled to be an affirmative defense in *Garcia-Bengochea v. Carnival Corp.*, 1:19-CV-21725-JLK, 2019 WL 4015576 (S.D. Fla. Aug. 26, 2019). In *Garcia-Bengochea*, Judge King explained:

> [T]he DPPA required the plaintiff to show that his personal information was obtained "for a purpose not permitted" by the statute, rejecting the plaintiff's argument that the "permissible uses listed [in the statute] function as statutory exceptions" and should be viewed as affirmative defenses. [...] But the DPPA is unique, because even though it prohibits obtaining a driver's personal information "for a purpose not permitted," the statute only describes the purposes that are permitted. [...] As such, the Eleventh Circuit concluded, a plaintiff must establish a negative by showing that the defendant's purpose was not among those permitted by the statute.

WL 4015576, at *3 (internal citations omitted). Plaintiff's claim is based upon Title III of the Act, which modified the Cuba Embargo (22 U.S.C. § 2370). The Cuba Embargo is enforced via the Cuban Assets Control Regulations ("CACR"), both of which provide for "permissible uses listed [in the [CACR]] [and] function as statutory exceptions.[4]" *Id*. Thus, like the DPPA, Title III of the Act prohibits

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[4] Under the President's direction, the Department of the Treasury promulgated the Cuban Assets Control Regulations ("CACR" or "Regulations"), 31 C.F.R. § 515, *et seq.* These Regulations, and related regulations, constitute what is commonly referred to as the 'Cuban Embargo.' *** The Regulations reference licenses which can be issued to authorize limited commerce with Cuba.
ViajeHoy, LLC, 2020 WL 20667, at **2-3.

"trafficking" in "confiscated property" "for a purpose not permitted." The Act amends the Cuba Embargo, which "describes [transfer(s)[5]/transactions[6]] that are[7] [and are not[8]] permitted." "As such, [...] a plaintiff must establish a negative by showing that the defendant's purpose was not among those permitted by the statute." *Id*. Plaintiff has failed to do so.

III. Plaintiff is not entitled to leave to amend.

The Plaintiff also requests via response brief for leave amend his complaint "if the Court is inclined to grant the Motion to Dismiss." (Resp. p.p. 6-7, 11-2) This is improper because the request was only made via response and fails to set forth the substance of the proposed change. *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir.2009) ("Where a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly."); *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir.1999)(Plaintiff did not "set forth the substance of the proposed amendment or attach a copy of the proposed amendment," as required). There is no amendment that can change the indisputable facts that: (1) the alleged trafficking is not trafficking designed to be deterred by the Act; (2) the item being "trafficked" is charcoal made from a weed, not the alleged confiscated real property; and (2) FOGO's actions are subject to a general license created by Federal Regulation.

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[5] 31 C.F.R. § 310
[6] 31 C.F.R. § 515.309
[7] *Supra* fn. 4; 31 C.F.R. §§ 515.317, 515.318
[8] 31 C.F.R. § 515.201

Amongst Plaintiff's pleading failures, he failed to include any allegation or proposed allegation that he acquired his interest in the subject claim on or before March 12, 1996—a material element of a Title III claim. This allegation would be readily curable if it could be accurately alleged. Yet, it was not alleged at first and there is no suggestion it could be asserted if allowed to amend.

The response also relies on *Garcia-Bengochea* for what it means to adequately plead standing in a Title III action. This case is unlike *Garcia-Bengochea* because no part of Plaintiff's claim is allegedly "certified." The "certified" portion of the *Garcia-Bengochea* claim "is dated September 16, 1970." 2019 WL 4015576, at * 5. "In the case of property confiscated before 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 acquired ownership of the claim before March 12, 1996." 22 U.S.C. § 6082(4)(B). The Plaintiff here never alleges or explains how or if he "acquired ownership of the claim before March 12, 1996." All Plaintiff alleges is "[his] grandfather, [. . .] purchased the land comprising the Subject Property from 1941 through 1952. By operation of succession, ownership of the Subject Property was passed on to Plaintiff." (Compl. ¶ 9) Despite Plaintiff's claim that his ownership interest is adequately alleged, the statute requires pleading factual detail to support a finding that his interest was acquired before March 12, 1996. 22 U.S.C. § 6082(4)(B). Plaintiff's silence is fatal to his claim for civil liability on his uncertified claim because he has not alleged the required elements. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

("[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'").

Relatedly, the Plaintiff contends that his ownership is sufficiently pleaded because "factually-intensive matters, such as inheritance of a claim to confiscated property in a foreign country, should not be decided at the motion to dismiss stage." (Resp. p. 5) FOGO is not asking for the issue to be decided on a motion to dismiss. FOGO has moved to dismiss because the Plaintiff has alleged no facts beyond the conclusion that "[b]y operation of succession, ownership of the Subject Property was passed on to Plaintiff." (Compl. ¶ 9) Plaintiff cites to *Wright v. King* for the unremarkable proposition that "[i]t is inappropriate for a court to decide factual issues on a motion to dismiss. Instead, a court must accept as true the factual allegations in the complaint." 3:06CV860 J16HTS, 2007 WL 80844, at *2 (M.D. Fla. Jan. 8, 2007). Unlike that case, Plaintiff's complaint contains no facts about when his grandfather passed and how or when the interest in the claim inured to him. In *Wright*, the complaint contained detailed factual averments about the events of the police encounter that led to the malicious prosecution claim. *Id*. at *1. No such detail is present here.

CONCLUSION

Plaintiff's position is only a conclusory discussion of his alleged entitlement to relief. The response fails to conjure any plausible way Plaintiff may recover for the alleged "trafficking" in "confiscated property" as defined by the Act. FOGO's motion to dismiss should be granted with prejudice.

Dated: 1/10/2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF system on January 10, 2020, and the foregoing document is being served this day on all counsel or parties of record on the Service List below, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

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