Case No. 20-12407

United States Court of Appeals
for the
Eleventh Circuit

MARIO DEL VALLE, ENRIQUE FALLA, AND ANGELO POU, AS INDIVIDUALS AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiffs — Appellants,
v.
EXPEDIA GROUP, INC., HOTELS.COM L.P., HOTELS.COM GP, ORBITZ, LLC, BOOKING.COM B.V., BOOKING HOLDINGS INC.,
Defendants — Appellees.

On Appeal from a Final Order of Dismissal by the United States District Court for the Southern District of Florida, Case No. 19-cv-22619-RNS

APPELLANT'S INITIAL BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Appellants Mario Del Valle, Enrique Falla, and Angelo Pou, plaintiffs below, on their own behalf and on behalf of a class of similarly-situated persons, certify—pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3—that the following persons and entities may have an interest in the outcome of this case:

1. AAE Travel Pte. Ltd. (Subsidiary of Appellee)
2. Agoda.com (Subsidiary of Appellee)
3. Aguila, M. Paula, Esq., (counsel for Appellants)
4. Akerman LLP (counsel for Appellees)
5. Analytical Systems Pty Ltd. (Subsidiary of Appellee)
6. Baker McKenzie (counsel for Appellees)
7. Booking Holdings Treasury Company (Subsidiary of Appellee)
8. Booking Holdings, Inc. (Appellee) [BKNG]
9. Booking.com B.V. (Appellee)
10. Booking.com Holding B.V. (Subsidiary of Appellee)
11. Booking.com Holdings B.V. (Subsidiary of Appellee)
12. Booking.com Ltd. (Subsidiary of Appellee)
13. BookingSuite (USA) Inc. (Subsidiary of Appellee)
14. Classic Vacations, LLC (Subsidiary of Appellee)

15. Coronado Pte Ltd. (Subsidiary of Appellee)
16. Cruise, LLC (Subsidiary of Appellee)
17. Del Valle, Mario (Appellant)
18. Dohop Ltd. (Subsidiary of Appellee)
19. Duffy, Michael A., Esq. (counsel for Appellees)
20. EAN.com, LP (Subsidiary of Appellee)
21. Ebookers Limited (Subsidiary of Appellee)
22. Egencia France SAS (Subsidiary of Appellee)
23. Egencia LLP (Subsidiary of Appellee)
24. Egencia UK Ltd. (Subsidiary of Appellee)
25. EXP Global Holdings, Inc. (Subsidiary of Appellee)
26. EXP Holdings Luxembourg S.A. (Subsidiary of Appellee)
27. Expedia Asia Holdings Mauritius (Subsidiary of Appellee)
28. Expedia do Barsil Agencia de Viagens e Turismo Ltda. (Subsidiary of Appellee)
29. Expedia Group, Inc. (Appellee) [EXPE]
30. Expedia Lodging Partner Services Sárl (Subsidiary of Appellee)
31. Expedia Southeast Asia Pte. Ltd. (Subsidiary of Appellee)
32. Expedia.com Limited (Subsidiary of Appellee)
33. Falla, Enrique (Appellant)

34. FareHarbor Holdings, Inc. (Subsidiary of Appellee)

35. Home Away Spain SL (Subsidiary of Appellee)

36. HomeAway Holding, Inc., (Subsidiary of Appellee)

37. HomeAway Netherlands Holdings B.V. (Subsidiary of Appellee)

38. HomeAway Sarl (Subsidiary of Appellee)

39. HomeAway UK Ltd. (Subsidiary of Appellee)

40. HomeAway.com, Inc. (Subsidiary of Appellee)

41. HotelClub Pty Ltd. (Subsidiary of Appellee)

42. Hotels.com GP (Appellee)

43. Hotels.com L.P. (Appellee)

44. Hotwire, Inc. (Subsidiary of Appellee)

45. HRN 99 Holdings, LLC (Subsidiary of Appellee)

46. Interactive Affiliate Network, LLC (Subsidiary of Appellee)

47. Kayak (Subsidiary of Appellee)

48. Law Office of Manuel Vazquez, P.A.

49. Lowestfare.com LLC (Subsidiary of Appellee)

50. Malave, Ana, Esq. (counsel for Appellants)

51. Mathy, Patricia, Esq. (counsel for Appellees)

52. McCutcheon, Michael C., Esq. (counsel for Appellees)

53. Mestre, Jorge, Esq. (counsel for Appellants)

54. Olson, Kyle R. (counsel for Appellees)

55. OpenTable (Subsidiary of Appellee)

56. Orbitz Travel Insurance Services, LLC (Subsidiary of Appellee)

57. Orbitz Worldwide (UK) Limited (Subsidiary of Appellee)

58. Orbitz Worldwide, Inc., (Subsidiary of Appellee)

59. Orbitz Worlwide, LLC (Subsidiary of Appellee)

60. Orbitz, Inc. (Subsidiary of Appellee)

61. Orbitz, LLC (Appellee)

62. Pou, Angelo (Appellant)

63. Priceline.com (Subsidiary of Appellee)

64. Priceline.com Europe Holdco Inc. (Subsidiary of Appellee)

65. Priceline.com Europe Holdings N.V. (Subsidiary of Appellee)

66. Priceline.com Mauritius Co. Ltd. (Subsidiary of Appellee)

67. Priceline.com Agoda Holdco LLC (Subsidiary of Appellee)

68. Riccio, Andrew S., Esq. (counsel for Appellees)

69. Rivero Mestre LLP (counsel for Appellants)

70. Rivero, Andres, Esq., (counsel for Appellants)

71. Scola, Hon. Robert N., Jr. (United States District Court Judge)

72. Rocket Travel, Inc. (Subsidiary of Appellee)

73. Rodriguez, Carlos A., Esq., (counsel for Appellants)

74. Rolnick, Alan, Esq., (counsel for Appellants)

75. Scott Douglass & McConnico LLP (counsel for Appellees)

76. Shank, David, Esq. (counsel for Appellees)

77. SilverRail Technologies, Inc. (Subsidiary of Appellee)

78. Sosa, Lolita, Esq. (counsel for Appellees)

79. Travelscape, LLC (Subsidiary of Appellee)

80. Travelweb LLC (Subsidiary of Appellee)

81. Trip Network, Inc. (Subsidiary of Appellee)

82. Trivago N.V. (Subsidiary of Appellee) [TRVG]

83. Vazquez, Manuel, Esq. (counsel for Appellants)

84. Venga, Inc. (Subsidiary of Appellee)

85. Webre, Jane, Esq. (counsel for Appellees)

86. WWTE Travel S.á.r.l. (Subsidiary of Appellee)

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument and submit that the order on appeal made numerous legal errors in dismissing the amended complaint without leave to amend on the first motion to dismiss adjudicated below, which also was an abuse of discretion. Oral argument will assist the Court in framing, clarifying and deciding the issues on appeal, some of which are issues of first impression.

STATEMENT OF JURISDICTION

Jurisdiction over this appeal exists under 28 U.S.C. § 1291 because it is an appeal from a final judgment dismissing, without leave to amend, appellants' action in the United States District Court for the Southern District of Florida, which alleged jurisdiction under 28 U.S.C. § 1331 and a claim under Title III (22 U.S.C. §§ 6081- 6085) of the Helms Burton Act (22 U.S.C. §§ 6021- 6091). The district court entered final judgment on May 26, 2020, after granting the motions to dismiss of appellees Expedia Group, Inc., Hotels.com L.P., Hotels.com GP, Orbitz, LLC, Booking.com B.V., and Booking Holdings Inc. Appellants timely filed a notice of appeal on June 24, 2020.

STATEMENT OF THE ISSUES

I. The first issue on appeal is whether the order on appeal erred in dismissing appellants' legally sufficient complaint for a purported failure to adequately allege that appellees were "operating, conducting, engaging in, or carrying on a business venture" in Florida under Fla. Stat. §48.193 (1)(a)(1), and that appellees "commit[ed] a tortious act within" Florida under Fla. Stat. §48.193 (1)(a)(2). This issue is reviewed de novo.

II. The second issue on appeal is whether the order on appeal improperly dismissed appellants' complaint, while jurisdictional discovery was pending, in an order that barred a motion for leave to amend, citing *Wagner v. Daewoo Heavy Indus. Amer. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002), which was not permitted under *Brisson v. Ford Motor Co.*, 349 Fed. Appx. 433, 435 (11th Cir. 2009). This issue is reviewed for abuse of discretion.

III. The third issue on appeal is whether the order on appeal improperly "noted" in a footnote with no analysis that it would be "futile" for one "and possibly" two of the appellants to amend because they "do not appear to have actionable ownership interests." This issue is reviewed de novo.

STATEMENT OF THE CASE

Title III (22 U.S.C. §§ 6081-6085) of the Helms-Burton Act, 22 U.S.C. §§ 6021-6095 ("Title III" of the "Act"), provides U.S. nationals whose property in

Cuba was confiscated by the communist Cuban regime with a right of action against those who traffic, and benefit from trafficking, in that property.

Appellants brought this class action because appellees Expedia Group, Inc., Hotels.com L.P., Hotels.com GP, LLC, Orbitz LLC (together, the "Expedia appellees"), Booking.com B.V., and Booking Holdings Inc. (the "Booking appellees") trafficked in Florida the appellants' properties on Varadero Beach and in Matanzas Cuba, which were confiscated by the communist Castro regime shortly after the 1959 Cuban revolution (the "Properties").

Appellees trafficked the Properties in Florida by offering and selling reservations, through appellees' websites, at the Starfish Cuatro Palmas and Memories Jibacoa (the "Resorts") located on the Properties, without paying any compensation to, or receiving permission from, appellants. Appellees continued to traffic the Properties after they were put on notice of appellants' intention to sue them for trafficking under Title III of the Act.

After technical amendments of the complaint during a worldwide pandemic and unprecedented lockdown, appellees moved to dismiss, arguing that (1) the district court lacked personal jurisdiction over them, (2) appellants lacked so-called "Article III standing," and (3) the complaint failed to state a claim based on a purported failure to adequately allege that (a) appellants had timely acquired their

claims, (b) appellees' trafficking was "knowing and intentional," and (c) Title III's so-called "incident to lawful travel" exception does not bar appellants' claims.

At the first time of asking, on the very first motion to dismiss that was briefed and adjudicated, while jurisdictional discovery requests were pending, the district court granted appellees' motions to dismiss, without leave to amend, holding that appellants had failed *even to allege* a prima facie case of long-arm jurisdiction under Fla. Stat. § 48.193(1)(a)(1) and § 49.193(1)(a)(2). The order on appeal stated that "[p]laintiffs have had multiple opportunities to plead jurisdiction and have failed to do so." D.E. 71 (the "Order") at 8. That ruling was error and is subject to de novo review.

In holding that appellants had failed even to adequately allege long-arm jurisdiction over appellees, the order overlooked or ignored the complaint's factual allegations regarding personal jurisdiction. It also ignored controlling Circuit and Florida authorities, which together demonstrated the complaint's legal sufficiency.

With regard to "doing business in Florida" long-arm jurisdiction under Fla. Stat. § 48.193(1)(a)(1), the order incorrectly stated that "the only allegations provided in the Second Amended Complaint concern the Defendants' websites being accessible in Florida." Order at 4. It also mystifyingly stated that the complaint "does [not] contain any allegations regarding the relevant factors. It does not say whether the Defendants have an office in Florida, whether they are licensed

to do business in Florida, how many Florida clients are served, and what percent of the Defendants' revenue is gleaned from Florida clients." Order at 3.

Appellants adequately alleged each supposedly "missing" factor the order mentioned, including that appellees have offices and employees in Florida, market and *sell reservations at the Resorts to Floridians in Florida*, have been licensed (for many years) to do business in Florida, serve a substantial number of Florida residents, and obtain a substantial portion of their business from Florida sales to Floridians. Comp. at 3, ¶¶ 15, 16, 36, 39, 50, 58; Omnibus Opposition to Defendants' Motions to Dismiss [D.E. 64] ("Omn. Opp.") at 8.[1] Further, in briefing the motions to dismiss, appellants asked the district court to take judicial notice of appellees' longstanding registrations to do business in Florida. The order on appeal ignored and denied the existence of legally sufficient allegations and facts.

The order completely ignored the complaint's allegations regarding appellees' use of their websites to solicit *and sell* reservations at the Resorts to

[1]The truth of each of these allegations has been conclusively demonstrated by appellees' initial discovery responses in three related, pending cases, and will be conclusively demonstrated here, as soon as appellees respond to *pending* discovery requests after a reversal and remand. Appellees had no hope of escaping a proper application of Florida's long-arm statute unless they could kill this case before responding to discovery, as demonstrated by the fact that one group of appellees here *conceded* personal jurisdiction after responding to initial discovery in a related case.

Floridians, incorrectly stating that "the only allegations provided in the Second Amended Complaint concern the Defendants' websites being accessible in Florida." Order at 4. This was error. The complaint expressly alleged that appellees offer and sell reservations at the Resorts to Floridians and send follow-up emails to Floridians who searched for the Resorts or other geographically proximate accommodations but had not bought a reservation. Comp. at 3, ¶¶ 13, 15, 36, 39, 50, 58. These allegations were erroneously overlooked by the order on appeal.

As for "committing a tort in Florida" long-arm jurisdiction under Fla. Stat. § 48.193(1)(a)(2), the order erroneously stated that "[a]ccording to the Plaintiffs, the tort was committed in Florida because the Plaintiffs reside in Florida and because the websites through which the Defendants rented the properties were accessible in Florida." Order at 5. That is not what appellants alleged or contended below. The heart of the matter is the complaint's express allegation that appellees used their websites to sell reservations *to Floridians in Florida*. Comp. at 3, ¶¶ 13, 15, 36, 39, 50, 58.

This allegation is undeniably true, as will be demonstrated beyond cavil by appellees' responses to discovery requests that were pending when the district court erroneously closed this case.[2] Moreover, that allegation is dispositive under

[2]As noted above, appellees' initial discovery responses in three related cases

Circuit precedent, including *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1351 (11th Cir. 2013), which the order purported to distinguish as a trademark infringement case "in which the infringement occurred through the website. In other words, the use of the website constituted the claim itself. Here, the Plaintiffs bring a Helms Burton claim, alleging that the Defendants trafficked in their confiscated property, which occurred in Cuba." Order at 5.

This observation ignored the necessary conclusion that "use of the website" also "constituted the claim" in this action, because "use of the website" was the means by which *appellees trafficked the Properties in Florida to Floridians*. The trafficking at issue manifestly *did not occur in Cuba*, nor was anything remotely resembling that alleged. *See* Comp. ¶¶ 13-15, 36, 39, 50, 58.

The order erroneously ignored numerous other allegations that appellees' trafficking occurred in Florida, through targeted marketing and sales of Resort reservations to Floridians in Florida. Comp. ¶ 15. It also ignored controlling precedent holding that statutory torts are committed in Florida when they are committed through websites used by Floridians, as was expressly alleged here. On

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confirmed each of those complaints' "doing business in Florida" allegations, and caused one group of appellees to *concede* personal jurisdiction in one of those cases. Appellees had no hope of avoiding proper application of Florida's long arm statute unless they could kill this case before their discovery responses came due.

this point, the order also erroneously ignored controlling (as well as persuasive) precedent in appellants' opposition to the motions to dismiss.

Further exacerbating the order's infection with error was its dismissal of the complaint without leave to amend and its refusal to wait until appellees responded to pending jurisdictional discovery, both of which were abuses of discretion. After erroneously stating that the complaint failed to allege what it *expressly did allege* as to personal jurisdiction, the order dismissed the complaint without leave to amend on the *very first motion to dismiss that was briefed and submitted for adjudication.* This apparently was punishment for appellants' purported "failure" after technical amendments to allege what the complaint *expressly did allege.* It was an abuse of discretion and would have been an abuse of discretion even if the complaint hadn't been legally sufficient.

The order not only granted, without leave to amend, the very first motion to dismiss submitted for decision in a case subjected to the vagaries and confusion of a worldwide pandemic and unprecedented lockdown, but did so with jurisdictional discovery requests pending. Responses to identical requests in three related cases have dispositively demonstrated the correctness of identical jurisdictional allegations and have caused one of the appellees here to *concede* personal jurisdiction in one of those related cases. This, too, was an abuse of discretion.

The order expressly denied appellants' request to wait for jurisdictional discovery responses and scolded appellants for a purported failure to investigate jurisdictional facts, which apparently was supposed to be easy despite the fact that important information is in communist Cuba, not to mention a worldwide pandemic and unprecedented lockdown. Like its dismissal without leave to amend, the order's refusal to wait for pending discovery responses was an abuse of discretion.

Finally, the order on appeal also relied on dicta in a footnote, stating with no analysis that it "also notes that it would be futile for Angelo Pou (and possibly for Enrique Falla) to amend their complaint because they do not appear to have actionable ownership interests." Order at 8, n.2. Even if it had not been dicta, this "note" ignored the complaint's detailed allegations of the lines of succession by which appellants inherited their claims to the stolen property on which the Resorts stand. Comp. at 19-33. The order failed to reach, much less analyze, *any* of the appellants' "actionable ownership interests."

Moreover, this dicta never could support dismissal without leave to amend, because there are *three*, not *two*, plaintiff/appellants in this action, which bears the name of lead plaintiff/appellant Enrique Del Valle, whose "ownership interest" wasn't mentioned in the order's "futility" footnote. Denial of leave to amend in a

dismissal order is reversed for abuse of discretion (which occurred here). However, when purported futility is a basis for denial of leave to amend, review is de novo.

In sum, the complaint was legally sufficient. The docket-sweeping order on appeal is infected with error. It should be reversed and the complaint reinstated.

I. STATEMENT OF THE FACTS

The order on appeal does not appear to have considered the allegations of appellants' complaint[3] or requests for judicial notice, in adjudicating the very first motion to dismiss that was submitted for decision below. It also was issued before appellees responded to appellants' pending jurisdictional discovery requests regarding "doing business in Florida" long-arm jurisdiction.

Appellants brought this action on behalf of themselves and a class of similarly situated persons for appellees' unlawful trafficking of confiscated properties in Cuba pursuant to Title III, 22 U.S.C. §§ 6081-6085 ("Title III"), of the Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. §§ 6021-6095), a/k/a the Helms-Burton Act (the "Act").[4] The complaint alleged that appellees exploited and benefitted from (i.e., trafficked) appellants' confiscated Properties, which had been stolen by the communist Castro regime, without obtaining appellants' consent

[3] Second Amended Class Action Complaint [D.E. 50] ("Comp." or "complaint").
[4] *Id.* ¶ 1.

or compensating them.[5] It alleged that appellees trafficked the Properties by intentionally engaging in commercial activity as travel agents and sellers of room reservations at Resorts built on the Properties, and derived a direct benefit from advertising, facilitating and selling room reservations at the Resorts.[6]

The complaint alleged a *prima facie* case for specific jurisdiction under the "doing business in Florida" and "tort in Florida" provisions of Florida's long-arm statute, Fla. Stat. §§ 48.193(1)(a)(1) and 48.193(1)(a)(2). It expressly alleged that appellees "regularly transact[] business in Florida[,]"[7] by inducing travelers, "including Florida residents," to book online stays at the Resorts through Defendants' websites,[8] that appellants' claim relates to or arises from appellees' sales and marketing of the Resorts in Florida,[9] that appellants reside in the Southern District of Florida, and that a substantial part of the challenged conduct occurred in that district.[10]

Appellants also alleged all elements of a Title III claim: that (1) they are United States nationals,[11] (2) who own claims to the Properties, which were[12] (3)

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[5] *Id.* at 3.
[6] *Id.*
[7] *Id.* ¶ 12.
[8] *Id.* ¶¶ 36, 39.
[9] *Id.* ¶¶ 11, 67, 81.
[10] *Id.* ¶¶ 2-4, 13-16.
[11] *Id.* ¶¶ 2-4.
[12] *Id.* ¶¶ 40-42.

confiscated by the Cuban government on or after January 1, 1959,[13] and (4) were intentionally trafficked by appellees within two years of commencing the action.[14]

Despite the complaint's detailed allegations and appellees' failure to submit any affidavits to rebut any of the jurisdictional allegations, and before appellees responded to pending jurisdictional discovery requests (which demonstrated the legal sufficiency of similar "doing business" allegations in related cases), the district court dismissed the complaint without leave to amend and closed the case.

II. PROCEDURAL HISTORY

On July 1, 2019, Mario del Valle, Enrique Falla, and Mario Echevarría, on behalf of themselves and a class of similarly-situated persons, filed a Corrected Class Action Complaint [D.E. 5][15] against non-resident defendants Trivago GmbH ("Trivago"), Booking.com B.V. (appellee "Booking.com"), Grupo Hotelero Gran Caribe ("Gran Caribe"), Corporación de Comercio y Turismo Internacional Cubanacán S.A. ("Cubanacán"), Grupo de Turismo Gaviota S.A. ("Gaviota"), Raúl Doe 1-5, and Mariela Roe 1-5. This complaint stated that appellants had given statutory notice to other prospective defendants, including appellees Expedia Inc., Hotels.com L.P., Hotels.com GP and Orbitz LLC (the "Expedia Defendants"), and

[13] *Id.* ¶¶ 35, 37.
[14] *Id.* ¶¶ 36, 39.
[15] The Corrected Complaint corrected scrivener's errors in the original Class Action Complaint [D.E. 1].

appellee Booking Holdings Inc.,[16] of their intent to add them as defendants.

On January 17, 2020, appellants filed an Amended Class Action Complaint [D.E. 15] that dropped Gran Caribe, Cubanacán, Gaviota, and Raul and Mariela Doe as defendants, dropped Mario Echevarria as a plaintiff, added Angelo Pou as a plaintiff, and added the Expedia Entities and Booking Holdings, Inc. as defendants.

On March 27, 2020, appellants filed a Second Amended Class Action Complaint ("Comp." or "complaint") [D.E. 50], which alleged additional facts regarding: (1) appellees' engaging in and carrying on business in Florida, and committing tortious acts in Florida; (2) the lines of succession by which appellants inherited their claims to the Properties; (3) appellees' trafficking in the Properties despite knowing they had been confiscated; and (4) appellees' trafficking in the Properties for the purposes of tourism.

In response, appellants moved to dismiss, arguing that appellants lacked standing to bring this action, that appellees were not subject to personal jurisdiction, and that appellants had failed to state a claim. D.E. 52 (Booking defendants); D.E. 53 (Expedia defendants). In their motions to dismiss, appellees attached no affidavits and made no attempt to rebut the complaint's allegations regarding personal jurisdiction. As noted above and demonstrated below, appellees

[16] When appropriate herein, appellees Booking.com B.V. and Booking Holdings Inc. will be referred to as the "Booking Defendants".

would have been unable to rebut those allegations if they had tried.

Appellants filed the Omnibus Opposition [D.E. 64] to the motions to dismiss, describing in detail the complaint's factual allegation of a prima facie case for personal jurisdiction over appellees, setting forth appellants' ownership of their claims, and describing in detail the ways appellees trafficked the Properties in Florida with knowledge they had been confiscated. This response also cited and discussed extensive authorities that supported appellants' positions and undermined appellees' theories, particularly as to personal jurisdiction.

On May 26, 2020, on the very first motion to dismiss submitted for decision, and with discovery pending that would have confirmed the complaint's jurisdictional allegations, the district court entered the order on appeal and dismissed the complaint without leave to amend. Order at 8. The order mystifyingly stated that the complaint had failed to satisfy the initial burden of alleging "doing business" jurisdiction under Fla. Stat. § 48.193(1)(a)(1), for failing to allege that appellees have offices in Florida, are licensed to do business in Florida, the number of Florida residents served, and the percentage of overall revenue appellees earn from Florida clients. *Id.* at 3. This was mystifying because the complaint expressly alleged ***every one*** of these factors.

Equally mystifying was the order's statement that appellants had relied on but a single case to support the complaint's assertion of "tortious act" jurisdiction

under Fla. Stat. § 48.193(1)(a)(2), as if alleging a statutory tort as a basis for long-arm jurisdiction were something new and novel, when it is neither. *See* Order at 5. Moreover, the order also ignored appellants' citation of numerous cases on this point, which the order also overlooked or ignored. After stating that the complaint failed to allege what it *expressly did allege*, the order dismissed the complaint without leave to amend, for "failing" after technical amendments to allege what it *expressly did allege*. *Id.* at 8.

The order also scolded appellants for failing to "investigate" their "doing business" allegations before filing, (Order at 6-7), and denied appellants' request to wait for appellees' responses to jurisdictional discovery, which would confirm every allegation, as it has done in three related cases. The order failed to note that discovery requests were pending, in this case where meaningful investigation had been rendered exceedingly difficult by a worldwide pandemic and lockdown. This was an abuse of discretion. Finally, the order added a footnote which stated in dicta that amendment would be futile for one "and possibly" two of the *three* appellants because they "do not appear to have actionable ownership interests." *Id*. at 8, n.2.

This timely appeal followed.

III. Standard of Review

This Court reviews *de novo* whether a district court has personal jurisdiction over a nonresident defendant. *Oldfield v. Pueblo de Bahia Lora, S.A.*, 558 F.3d

1210, 1217 (11th Cir. 2009).

This Court typically reviews a district court's denial of leave to amend a complaint for abuse of discretion. *Jennings v. BIC Corp.*, 181 F.3d 1250, 1254 (11th Cir.1999). However, to the extent here that "the denial is based on a legal determination that amendment would be futile, we review the district court's decision de novo." *Gonzalez v. City of Deerfield Beach*, 549 F.3d 1331, 1332–33 (11th Cir. 2008).

Finally, this Court reviews a district court's denial of a motion seeking discovery for abuse of discretion. *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1280 (11th Cir. 2009).

SUMMARY OF THE ARGUMENT

The district court erred for the following reasons:

First, it was error to refuse to exercise personal jurisdiction over appellees under Fla. Stat. § 48.193(1)(a)(1) or § 48.193(1)(a)(2), because the order ignored the complaint's well-pleaded allegations of factors the order itself cited as relevant to personal jurisdiction, mischaracterized what it said had been alleged, and disregarded extensive authority in and out of this Circuit demonstrating the correctness of personal jurisdiction in similar circumstances. The order's failure to note, let alone credit, those allegations and authorities compels reversal.

Second, it was an abuse of discretion to dismiss the complaint in an order barring any motion for leave to amend, on the first motion to dismiss that was briefed and submitted for decision, during a worldwide pandemic and unprecedented lockdown, with initial discovery pending. The order on appeal improperly assumed that investigating the claim could have easily been done during the confusion and dislocation of the pandemic and lockdown, which frustrated efforts to investigate and conduct discovery as to any allegations in any case. Further, the order's makeweight footnote, which "noted" in *dicta* (with no analysis) that amendment would be "futile" for one of the appellants, and "possibly" for another, never could have supported dismissal of the complaint as a matter of law, much less a dismissal without leave to amend, because there are *three* plaintiff/appellants, not *two*.

Third, it was an abuse of discretion to deny appellants' request to wait for jurisdictional discovery that would have indisputably confirmed all jurisdictional allegations (as it has in three related cases). The order on appeal addressed the very first motion to dismiss that was briefed and submitted for decision in this case, during the dislocation of a worldwide pandemic and unprecedented lockdown, while initial discovery requests were pending. It was an abuse of discretion to punish appellees for "failing" to do what couldn't reasonably have been done.

In sum, the complaint was legally sufficient, the order's dismissal was error, and even if that were not so, any dismissal should have been with leave to amend.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT LONG-ARM JURISDICTION HAD NOT BEEN ADEQUATELY ALLEGED, AND IN REFUSING TO EXERCISE JURISDICTION OVER APPELLEES

In determining whether personal jurisdiction exists, the district court was required to conduct a two-step inquiry. *E.g., Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1319 (11th Cir. 2004). First, the district court was required to determine if personal jurisdiction was adequately alleged under a provision of Florida's long-arm statute, Fla. Stat. § 48.193. *Id*. Because it was, and appellees made no effort to factually rebut the allegations, the district court was required to determine if exercising personal jurisdiction over appellees would offend the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id*. The complaint's "doing business" allegations easily satisfied minimum contacts.

The order on appeal erred in holding that long-arm jurisdiction had not been adequately alleged, and in refusing to exercise personal jurisdiction over appellees under Fla. Stat. §§ 48.193(1)(a)(1) or 48.193(1)(a)(2). Appellants adequately alleged each basis for jurisdiction in the complaint, adequately alleged minimum contacts, and in their Omnibus Opposition cited controlling decisions finding long-arm jurisdiction in similar circumstances, all of which the order on appeal

overlooked or ignored. Below, we address each basis for personal jurisdiction, and then briefly address due process to support the necessary conclusion that personal jurisdiction exists.

A. The Complaint Adequately Alleged "Doing Business" Jurisdiction Under Fla. Stat. § 48.193(1)(a)(1)

The order erroneously held that the complaint had failed to adequately allege "doing business in Florida" long-arm jurisdiction. Under Fla. Stat. § 48.193(1)(a)(1), appellees subjected themselves to personal jurisdiction by "[o]perating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state" to which appellants' claim relates.

This Court holds that "[i]n order to establish that a defendant is 'carrying on business' for the purposes of the long-arm statute, the activities of the defendant must be considered collectively and show a general course of business activity in the state for pecuniary benefit." *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162, 1167 (11th Cir. 2005). "Factors relevant, but not dispositive, to this analysis include [1] the presence and operation of an office in Florida . . . [2] the possession and maintenance of a license to do business in Florida . . . [3] the number of Florida clients served . . . and [4] the percentage of overall revenue gleaned from Florida clients." *Id*. (internal citations omitted).

Citing *Horizon*, the order on appeal mystifyingly and erroneously stated that the Complaint "does [not] contain any allegations regarding the relevant factors. It does not say whether the Defendants have an office in Florida, whether they are licensed to do business in Florida, how many Florida clients are served, and what percent of the Defendants' revenue is gleaned from Florida clients." Order at 3. The order either overlooked or ignored the complaint's allegations regarding each of these factors:

- **Presence and operation of an office in Florida:** "On information and belief, a substantial part of the Expedia and Booking.com Entities' business and revenue derives from their Florida offices." Comp. ¶ 16;
- **Possession of a license to do business in Florida:** "As evidenced by their official state filings, defendants and their agent subsidiaries have been registered to do business in Florida for many years." Omn. Opp. at 8 (citing appellees' Florida registrations to do business);[17] and
- **Number of Florida clients served and percentage of revenue earned from Florida clients:** "On information and belief, a substantial part of [appellees'] business and revenue derives from their Florida offices." Comp. ¶ 16.[18]

[17] The order on appeal should have taken judicial notice of the Florida Department of State's business registry. *Sream, Inc. v. PB Grocery, Inc., of Palm Beach*, 2017 WL 6409006, at *4 n.5 (S.D. Fla. 2017) (citing *Sziranyi v. Allan R. Dunn, M.D., P.A.*, 2009 WL 6613675, at *2 n.2 (S.D. Fla. 2009), *aff'd*, 383 Fed. Appx. 884 (11th Cir. 2010)).

[18] Appellants could not then specify the Florida clients served because their discovery requests were pending when the district court dismissed the action and denied appellants that discovery. Appellees' responses would have admitted sales to

The order also overlooked or ignored the allegations that appellees offered not only interactive, transactional websites to Florida residents, which itself is legally sufficient for "doing business" jurisdiction, but also that appellees had done business with, and made sales to, Floridians through those websites.

The order purports to distinguish *Pathman v. Grey Flannel Auctions, Inc.*, 741 F. Supp. 2d 1318 (S.D. Fla. 2010), and *Renaissance Health Publishing, LLC v. Resveratrol Partners, LLC*, 982 So. 2d 739 (Fla. 4th DCA 2008), by stating that "these cases do not support [the proposition that having a website in Florida is sufficient to be considered carrying on a business venture under Fla. Stat. § 48.193(1)(a)(1)], and, if anything, demonstrate the opposite—that merely having a website accessible in Florida is not sufficient." Order at 4. But the complaint did not allege "merely having a website," and this strawman falls of its own weight. The complaint expressly alleged that appellees used their websites to solicit and sell reservations at the Resorts to Floridians in Florida. Comp. at 3, ¶¶ 13, 15, 36, 39, 50, 58.

Floridians and that a significant percentage of revenue is obtained from Floridians, both overall and as to the Resorts. Those numbers and percentages will not be small. Florida is the third most populous state in the U.S., and its Cuban-American population is a principal target of defendants' trafficking in the Properties. As noted above, appellees' only hope of avoiding long-arm jurisdiction in this case is to kill it before their discovery responses come due and Rule 11 requires them to concede.

The order on appeal noted that in *Pathman*, the defendant traveled to Florida several times a year to sell and consign items, sent catalogs to Floridians to solicit sales, made phone calls to Floridians, and made sales to Floridians through its website. Order at 4. As noted above, all of that and more was alleged here but remained mystifyingly invisible in the order on appeal. As for *Renaissance Health*, the order noted that defendant there made slightly more than $2,000 in sales to Floridians, which accounted for less than three percent (3%) of its gross domestic sales, and had caused an injury to a Florida resident by disparaging it. *Id.*

The order's distinction of those cases was based on a false premise—that "here, the only allegations provided in the [Complaint] concern the Defendants' websites being accessible in Florida." Order at 4. The complaint alleged far more. As in *Pathman*, the complaint alleged that appellees: **(1)** have offices in Florida from which they operate their business of selling travel (Comp. ¶ 16); **(2)** send direct communications to Floridians, *Id*. ¶ 15(b) (emails soliciting sales); and **(3)** made sales of reservations, including at the Resorts, to Floridians. *Id*. ¶¶ 36, 39 (Appellees "solicit and accept reservations from U.S. residents, including Florida residents."); *id.* ¶¶ 50, 58 ("On information and belief, many of [appellees'] customers (including customers from Florida) travel to Cuba, and to the Trafficked Hotels in particular for tourism . . . ."). As in *Renaissance Health*, the complaint

also alleged that a large number of appellees' sales and a large percentage of their revenue come from Florida. Comp. ¶ 16.

In distinguishing *Pathman* and *Renaissance Health* on the false basis that sufficient contacts with Florida and sales to Floridians had not been alleged, the order implicitly held that personal jurisdiction would exist on the allegations in those cases. As demonstrated above, those allegations *were* made in the complaint. If the order had not overlooked or ignored them, it would have been required to find that personal jurisdiction had been adequately alleged and exists.

To recap, the complaint alleged that appellees (1) have offices in Florida, (2) are registered to do business in Florida, (3) make large numbers of sales to Floridians in Florida and derive a large percentage of their revenue from those sales, (4) use direct emails to solicit Floridians in Florida to make reservations at the Resorts, and (5) sell reservations at the Resorts to Floridians in Florida.[19]

But the complaint alleged still more about appellees' marketing campaigns that traffic reservations at the Resorts to Floridians. Those involve, inter alia,

[19] Because appellees did not submit any affidavits contesting any of the jurisdictional facts alleged in the Complaint, those facts are deemed uncontested and must be taken as true. *E.g., Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006) (When a complaint alleges a *prima facie* case for personal jurisdiction, the burden shifts to the defendant to "submit[] affidavits contrary to the allegations in the complaint."). What actually was alleged below, which stood unrebutted, easily satisfied the long-arm statute as well as minimum contacts under Circuit precedent, including *Pathman* and *Renaissance Health.*

"search engine optimization (SEO) efforts, including [] developing titles and meta description tags to optimize the titles and 'snippets' that appear on Google and other search engine results pages," Comp. ¶ 15(a), and "banner ads promoting popular destinations in Cuba that direct Floridians to additional information and booking of Cuban hotels, including the Trafficked Hotels," *id*. ¶ 15(c).

Specific "doing business" jurisdiction has been found on far less, as in *Pathman, supra*. In *Carmel & Co. v. Silverfish, LLC*, 2013 WL 1177857, at *3 (S.D. Fla. 2013), the defendant sold sunglasses to Floridians on its website, using search engines and keywords to capture potential customers who used those keywords as search terms. Nothing more was alleged. Because the claim related to defendant's advertising of the website and customers' searching for sunglasses, the court asserted "doing business" jurisdiction. *Accord Clover Systems, Inc. v. Almagran, S.A.*, 2007 WL 1655377, at *4 (S.D. Fla. 2007) (Defendant "transmitted thousands of electronic communications, including telephone calls, into Florida.").

In sum, appellants' complaint adequately alleged "doing business in Florida" long-arm jurisdiction under Fla. Stat. § 48.193(1)(a)(1).

B. The Complaint Adequately Alleged "Tort in Florida" Jurisdiction Under Fla. Stat. § 48.193(1)(a)(2)

The order on appeal also erroneously held that the complaint had failed to adequately allege long-arm jurisdiction for committing a tort in Florida under Fla. Stat. 48.193(1)(a)(2)—which appellees did every day by trafficking in the Resorts.

Trafficking in violation of Title III, like other statutory torts, subjects the trafficker to long-arm jurisdiction for committing a tort in Florida. *See, e.g., Koch v. Royal Wine Merchants, Ltd.*, 847 F. Supp. 2d 1370, 1380-81 (S.D. Fla. 2012) (FDUTPA violation); *Foreign Imported Prods. and Pub. Inc. v. Grupo Indus. Hotelero S.A.*, 2008 WL 4724495, at *6 (S.D. Fla. 2008) (federal Copyright Act violation); *Keim v. ADF MidAtlantic, LLC*, 199 F. Supp. 3d 1362, 1367 (S.D. Fla. 2016) (TCPA violation). These allegations were legally sufficient and stand unrebutted.[20]

The complaint expressly alleged that defendants trafficked the Property in Florida. *E.g.*, Comp. ¶ 50, 58 ("On information and belief, many of [appellees'] customers (including customers from Florida) travel to Cuba, and to the [Resorts] in particular for tourism . . . ."); *id.* ¶ 13 ("[Appellees'] websites are fully-interactive, have robust internet e-business capabilities. They have worldwide reach on the internet and are fully accessible in Florida. Floridians can readily access [appellees'] websites and are able to book hotel accommodations in Cuba at more than 6,500 hotels, including the [Resorts]."); *id.* ¶ 15 ("[Appellees] promote

[20] Further, the legal sufficiency of appellants' "tort in Florida" long-arm allegations mooted further factual inquiry into "doing business" personal jurisdiction. Courts many conduct mini-trials on "doing business" allegations, but the legal sufficiency of tort allegations is governed solely by Rule 12(b)(6), which requires allegations to be taken as true unless so implausible as to violate Rule 8. The complaint adequately alleged a statutory tort that occurred in Florida through appellees' trafficking of the Properties to Floridians in Florida. That should have been the end of the matter.

their websites—and their interactive capabilities for the booking [of] hotel rooms at Cuban hotels, including the [Resorts]—on the internet, including to Floridians . . . [t]hrough their follow-up emails to Floridians . . . .").

The complaint also adequately alleged that appellants' injury results from appellees' advertising, facilitating, and selling room reservations at the Resorts, which constitutes trafficking under Title III. That injury is suffered in Florida no matter where defendants are located in directing their trafficking (which discovery will show was directed from Florida, too).

"Under Florida law, a nonresident defendant commits 'a tortious act within Florida' when he commits an act *outside* the state that causes *injury within Florida*." *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1353 (11th Cir. 2013) (quoting *Licciardello v. Lovelady*, 544 F.3d 1280, 1283 (11th Cir. 2008)) (emphasis in original). *Mosseri* held that "a trademark infringement on an Internet website causes injury and occurs in Florida by virtue of the website's accessibility in Florida." *Id.* at 1354 (non-resident plaintiff and defendant).[21] In *Mosseri*, this Court stated that "we need not decide whether trademark injury necessarily occurs where the owner of the mark resides, as the Florida district courts have held,

[21] Trademark and copyright infringement, like strict product liability and trafficking under the Act, are statutory torts that do not require a showing of "bad intent," but nonetheless subject the actor to "tortious act" long-arm jurisdiction.

because in this case the alleged infringement clearly also occurred in Florida by virtue of the website's accessibility in Florida." *Id.* (emphasis in original).

This case is easier than *Mosseri*. The tort occurred in Florida both because appellants live in Florida and because the websites through which defendants committed the statutory tort of trafficking were accessible in and targeted at Florida. If the district court had waited for pending discovery, appellees' inevitable admissions (as in three related cases) that they sold reservations at the Resorts to Floridians would have corroborated the complaint's allegations of a tort in that they committed a tort in Florida.[22] Nothing more was required.

But more was alleged. The complaint also alleged that appellees directly solicited persons they knew were located in Florida. When Floridians researched Cuban hotels, including the Resorts, but did not make reservations, appellees sent "you forgot something" emails urging them to make reservations and suggesting other attractions in the area. *See* Comp. ¶ 15(b). Even without any sales in Florida, the complaint's allegations of solicitations and sales in Florida supported a Title III

[22] Appellees' failure to dispute the complaint's jurisdictional allegations meant that they had to be taken as true below, not only for purposes of stating a claim under Rule 12(b)(6), but also in regard to alleging "tort in Florida" long -arm jurisdiction. Thus, on the motion to dismiss, and on this appeal, *the complaint's allegation of appellees' sales to Floridians in Florida was and is required to be taken as true.*

claim and "tortious act" jurisdiction because the solicitations themselves constituted trafficking. Appellees' actual sales erased all possibility of doubt.

The order purported to distinguish *Mosseri* because, in its view, "*Mosseri* is not analogous because it involved a trademark infringement claim in which the infringement occurred through the website. In other words, the use of the website constituted the claim itself." Order at 5. According to the order, "Plaintiffs bring a Helms Burton claim, alleging that the Defendants trafficked in their confiscated property, which occurred in Cuba." *Id*.

First, the complaint expressly alleged that appellees trafficked the Properties in Florida, not Cuba, and this observation has no basis in law or fact. Appellees *were not* soliciting and selling reservations to Cubans. They were trafficking the Properties to Floridians by soliciting and selling Resort reservations in Florida.

Second, the fact that *Mosseri* was a trademark infringement claim and the complaint alleges a Title III claim was an ephemeral distinction without a difference. The complaint alleged that appellees trafficked the Properties by soliciting and selling reservations at the Resorts, including to Floridians, primarily through their websites, emails and advertisements. *See* Comp. ¶ 88 ("[Appellees] have knowingly and intentionally used or benefitted, directly or indirectly, from the confiscated properties by offering, for economic benefit, reservations at the [Resorts] which constitutes trafficking . . . ."). In other words, appellees' use of

their websites to traffic the Properties *is the claim itself*, and for present purposes, plainly was alleged to have occurred (and did occur) in Florida.

District precedent confirms that appellees' tortious conduct occurred in Florida for purposes of Section 48.193(1)(a)(2). *Hartoy v. Thompson* states that "[t]he Eleventh Circuit . . . [has] interpreted the long-arm statute to mean that a defendant who commits a tort that causes injury in Florida is subject to personal jurisdiction under subsection 48.193(1)(b) [since renumbered as § 48.193(1)(a)(2)] *no matter where the act that caused the injury was actually completed*." 2003 WL 21468079, at *2 (S.D. Fla. 2003) (emphasis added). "The Florida Supreme Court has made explicit that a defendant's physical presence is not required to commit a tortious act in Florida." *Foreign Imported Prods. and Pub. Inc. v. Grupo Indus. Hotelero S.A.*, 2008 WL 4724495, at *6 (S.D. Fla. 2008) (citing *Wendt v. Horowitz*, 822 So. 2d 1252, 1260 (Fla. 2002)).

The above-cited opinions in *Pathman* and *Renaissance Health* also make clear that "'committing a tortious act' in Florida under section [48.193(1)(a)(2)] can occur through the nonresident defendant's telephonic, electronic, or written communications into Florida, as long as the plaintiff's cause of action arises from the communications." *Pathman*, 741 F. Supp. 2d at 1324 (Isolated activity and a merely informational, non-interactive website accessible in Florida might be insufficient, but "[a]ctive internet solicitation may subject a defendant to personal

jurisdiction."); *accord Renaissance Health*, 982 So. 2d at 742 (Internet sales to Floridians were "sufficient to subject defendants to jurisdiction.").

Appellees' interactive websites are not merely informational. The complaint alleged that "Floridians can readily access [appellees'] websites and are able to *book hotel accommodations at* more than 6,500 hotels, including *the [Resorts*]. Comp. ¶ 13. It further alleged that appellees use their interactive websites to send "follow-up emails to Floridians who have searched for the [Resorts] or other geographically proximate hotels." *Id*. ¶ 15(b).

In *Licciardello v. Lovelady*, 544 F.3d 1280 (11th Cir. 2008), the plaintiff alleged that defendant had posted plaintiff's trademarked material on a website accessible to Florida residents. The district court dismissed for lack of "tort in Florida" long-arm jurisdiction. This Court reversed, explaining that the website's accessibility in Florida was dispositive:

> We have held that § 48.193(b) [now 48.193(1)(a)(2)] of the Florida long-arm statute permits jurisdiction over the nonresident defendant who commits a tort outside of the state that causes injury inside the state. Therefore, although the website was created in Tennessee, the Florida long-arm statute is satisfied if the alleged trademark infringement on the website caused injury in Florida.
>
> We need not decide whether trademark injury necessarily occurs where the owner of the mark resides, as the Florida district courts have held, because in this case the alleged infringement clearly also occurred in Florida by virtue of the website's accessibility in Florida. On motion to dismiss, and under our precedent, then, [plaintiff's] allegations in the complaint are sufficient to invoke the Florida long-arm statute.

Id. at 1283-1284 (citations omitted). *Accord Foreign Imported Prods.*, 2008 WL 4724495, at *6 (same).

Similarly, the complaint here expressly alleged that appellees traffic the Properties in Florida through the offer and sale of reservations at the Resorts to Floridians, that "Floridians could reserve vacation packages at the [Resorts] from the [appellees'] websites," Comp. ¶ 36, and that "defendants solicit and accept reservations from U.S. residents, including Florida residents." *Id*.

In sum, appellants adequately alleged that appellees have committed a tort in Florida by engaging in "tortious conduct on a website accessible in Florida," which "the 11th Circuit has made clear . . . subjects the defendant to § 48.193[(1)(a)(2)]." *Foreign Imported Prods.*, 2008 WL 4724495, at *6. Appellees' websites are accessible to Floridians, their marketing is aimed at making sales to Floridians, and their trafficking in the Properties has caused and is causing injury to appellants in Florida. Tortious act jurisdiction under § 48.193(1)(a)(2) was adequately alleged, and any further squandering of judicial and party resources on further factual inquiry regarding "doing business" jurisdiction is moot. The only remaining question is whether minimum contacts exist, a question that is easily answered.

C. Minimum Contacts Exist and Due Process Is Satisfied

Asserting long-arm jurisdiction over a nonresident defendant under Florida law requires allegations that satisfy a provision of Fla. Stat. § 48.193, plus

allegations that demonstrate a defendant's "minimum contacts" with Florida, such that suing the defendant in Florida satisfies basic notions of fair play and substantial justice. *E.g.*, *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 856 (11th Cir. 1990) (applying *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 500 (Fla. 1989)). Minimum contacts exist where a nonresident defendant has by its own purposeful conduct created a "substantial connection" with the forum state. *Licciardello*, 544 F.3d at 1285 (citing *Burger King v. Rudzewicz*, 471 U.S. 462, 473-474 (1985)).

No pattern of conduct is required. "So long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction." *Burger King*, 471 U.S. at 475, n.18 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). "Intentional torts are such acts, and may support the exercise of personal jurisdiction over the nonresident defendant who has no other contacts with the forum." *Licciardello*, 544 F.3d at 1285 (citing *Calder v. Jones*, 465 U.S. 783, 790 (1984)).

Appellees' Title III claims are intentional, statutory torts, like FDUTPA or TCPA violations. Accordingly, appellees' solicitations and sales to Floridians of reservations at the Resorts are intentional torts committed in Florida, which, standing alone, constitute minimum contacts. This should end the analysis, but we pause to note that it also satisfies internet era decisions involving claims arising

from nonresidents' use of websites. The easy cases involve sales made on defendants' websites, as we have here. Many courts, including courts of this Circuit, have applied the sliding scale of *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), to hold that a defendant's internet sales in the forum satisfy minimum contacts. *Pathman*, 741 F. Supp. 2d at 1325; *Foreign Imported Prods. & Pub.*, 2008 WL 4724495, at *7; *Hartoy*, 2003 WL 21468079.

The *Zippo* sliding scale views a nonresidents' internet forum contacts along a "spectrum," where using a commercial website to make sales, without more, satisfies minimum contacts in a case related to those sales, but using a "passive" website to merely provide information may not. 952 F. Supp. at 1124. Appellees' Florida contacts are at the "end of the spectrum" where minimum contacts exist, because appellees "clearly do[] business over the internet." *Id.* Their business models and billion-dollar businesses are based on internet sales of travel and lodging, and this case plainly arises out of that activity. *See* Comp. ¶¶ 47-60.

This Court has not adopted *Zippo*, stating that a mechanical rule could inhibit case by case reasoning, in *Oldfield v. Pueblo de Bahia Lora, S.A.*, 558 F.3d 1210, 1220, n.26 (11th Cir. 2009) (A bright-line rule excluding "passive" websites from constituting minimum contacts would undermine the "purposeful availment" touchstone for due process analysis.).

Some district courts in this Circuit use *Zippo* either as a test (because Florida DCAs have used it), or a tool for determining purposeful availment, as an element of standard due process analysis. *E.g.*, *Pathman*, 741 F. Supp. 2d at 1324-26 ("The Eleventh Circuit has not directly addressed the issue presented in *Zippo*, however it has relied on the sliding scale analysis provided by the *Zippo* Court.") (citing *Oldfield*, 558 F.3d at 1220, n.26).

The complaint plainly satisfied this Circuit's three-part, due process test, which asks: "(1) whether the plaintiff's claims 'arise out of or relate to' at least one of the defendant's contacts with the forum; (2) whether the nonresident defendant 'purposefully availed' himself of the privilege of conducting activities within the forum state, thus invoking the benefit of the forum state's laws; and (3) whether the exercise of personal jurisdiction comports with 'traditional notions of fair play and substantial justice.'" *Mosseri*, 736 F.3d at 1355-58 (quoting *Burger King*, 471 U.S. at 472-73); *see Kumbrink v. Hygenic Corp.*, 2016 WL 5369334, at *2-4 and n.3 (S.D. Fla. 2016) (same); *Pathman*, 741 F. Supp. 2d at 1324-26 (same).

Minimum contacts and due process were not reached below. They should be reached, and their existence confirmed here. By any standard, the complaint adequately alleged; (1) a claim (for trafficking the Properties in Florida) that relates to appellees' contacts with Florida (marketing, soliciting and selling reservations in Florida); (2) that appellees purposefully availed themselves

(through business registrations, offices and employees) of the benefits of conducting business in Florida; and (3) that personal jurisdiction over appellees here comports with principles of basic fairness and justice (selling reservations in Florida makes being haled into a Florida court foreseeable).

Kumbrink found such analysis unnecessary "since the website's existence alone was not Defendant's sole contact, *as it conducted actual sales in Florida.* Even if the 'sliding scale' model were used, the website would be on the 'active' end of the spectrum and personal jurisdiction would be proper." 2016 WL 5369344, at *3, n.3 (emphasis added); *accord Hartoy*, 2003 WL 21468079, at *4–5. Appellees never disputed the complaint's allegations of sales to Floridians in Florida, which meant those allegations stood unrebutted, and due process was adequately alleged.

The complaint adequately alleged that appellees solicited, marketed, and made sales to Floridians in Florida through websites intended to make those sales. Appellees are physically present in Florida with offices and hundreds of employees and conducted the business activity in Florida that gives rise to this action.[23] Personal jurisdiction exists and due process is satisfied.

[23] Further discovery will reveal the total numbers of reservations at the Resorts that appellees sold to Floridians in Florida, but for present purposes, the complaint's allegations that such sales were made stood unrebutted and had to be taken as true,

II. IT WAS AN ABUSE OF DISCRETION TO DISMISS THE COMPLAINT WITHOUT LEAVE TO AMEND

As demonstrated above, this Court should reverse because the complaint adequately alleged personal jurisdiction and due process is satisfied. Moreover, because the complaint adequately alleged a statutory tort in Florida, i.e., trafficking the Properties in Florida through solicitations and sales of Resort reservations to Floridians in Florida, further inquiry into the complaint's "doing business" allegations was (and is) moot. Nonetheless, at the first time of asking, on the first motion to dismiss that was briefed and submitted for decision, the order dismissed the complaint, and committed further error by dismissing without leave to amend.

If the order had simply dismissed the case without mentioning leave to amend, it might have been proper under *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002), which holds that district courts are not required to grant leave to amend a complaint *sua sponte*, but does not (and could not) bar a plaintiff from filing a motion for leave to amend following a dismissal *that is not with prejudice*. *See id.* Here, however, the order went further, prejudging and purporting to bar any future attempt to amend the complaint, including by way

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which meant that "doing business" and "tortious act" jurisdiction were adequately alleged, and so was due process.

of a Rule 59(e) motion, which is one of many proper ways appellants could request leave to amend after dismissal.

This Court has held, both pre- and post-*Wagner*, that "[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991), *overruled by Wagner*, 314 F.3d at 542. Although *Wagner* overruled *Bank*, this Court's subsequent decisions have limited *Wagner's* reach, and have reversed district court orders that dismissed without leave to amend.

The applicable exception to *Wagner* here is that a dismissal order, like the one on appeal, may not prejudge and attempt to bar any post-dismissal attempt to amend the complaint. In *Brisson v. Ford Motor Co.*, 349 F. App'x 433, 435 (11th Cir. 2009), the district court dismissed a class action without leave to amend, where no motion for leave to amend was pending. This Court held that, if the district court had "simply dismissed the complaint . . . without more," then the "*Wagner* rule would apply." *Id.* However, "in the same order that dismissed the complaint," the district court went too far, also ordering "plaintiffs not to bother even attempting to amend because the court was deciding in advance that they could not do so." *Id.* This was improper because it denied plaintiffs their right to be heard, and this Court would not "hold against the plaintiffs their failure to defy the

district court's order telling them, in effect, not to file a motion to amend." *Id*. *Brisson* remanded to the district court to give plaintiffs an opportunity to amend their complaint.

That ruling applies no less forcefully here, because appellants now possess even more facts that support and demonstrate personal jurisdiction over appellees. "In other words, the plaintiffs are ready, willing, and able to plead" facts establishing personal jurisdiction over the defendants, "something the district court assumed, without asking, that they could not do." *Brisson*, 349 F. App'x at 435. If the order had not erroneously ordered appellants "in effect, not to file a motion to amend," appellants would have sought leave to amend to allege those facts post-dismissal, but reasonably decided not to "defy the district court's order," which should not be "h[eld] against" them. *Id*. Reversal on this basis is warranted.

A. Futility Could Not Have Supported Dismissal, And, In Any Event, Amendment Would Not Have Been Futile

Nowhere in the order was a purported futility of amendment even mentioned, let alone discussed, until footnote 8 on its last page, which "noted" in dicta "that it would be futile for Angelo Pou (and possibly for Enrique Falla) to amend their complaint because they do not appear to have actionable ownership interests." Order at 8. The overarching problem with this footnote is that it never could support dismissal of the complaint, because there were *three plaintiffs* below, *not two*, one of whom, Mario Del Valle, isn't even mentioned in footnote 8. This

dicta could not have been necessary to a dismissal of the complaint on any basis, because the order said nothing about appellee Del Valle's "ownership interest," let alone purport to dismiss or assert futility of amendment as to him.

Further, even as to the two plaintiffs it did mention, this statement was classic dicta, namely "a statement that neither constitutes the holding of the case, nor arises from a part of the opinion that is necessary to the holding of the case." *U.S. v. Gillis*, 938 F.3d 1181, 1199 (11th Cir. 2019). Footnote 8 was not the order's holding, nor in any way necessary to it. Further, its equivocal language—that amendment would be futile for one of the appellants, and ***possibly*** another one of the appellants, never could constitute a holding. It was dicta and "is not binding on anyone for any purpose." *Welch v. U.S.*, 958 F.3d 1093, 1098 (11th Cir. 2020).

The order held that "the Court grants the Defendants' motions to dismiss . . . without leave to amend," on the (incorrect) notion that "Plaintiffs have had multiple opportunities to plead jurisdiction and have failed to do so," and "have not requested leave to amend nor have they indicated in their response any inclination to do so." Order at 8. *Appellants' personal jurisdiction allegations were ruled on once, in an order that denied leave to amend*. As demonstrated above and below, this was an abuse of discretion, period, full stop. Further, the order on appeal has nothing to do with appellants' "ownership interests," and is solely based on

personal jurisdiction. Footnote 8 did not "arise from a part of the opinion that is necessary to the holding of the case." *Gillis*, 938 F.3d at 1199.

Generally, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief," *Foman v. Davis*, 371 U.S. 178, 182, (1962), leave to amend "should be freely given," Fed. R. Civ. P. 15(a). However, "denial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal." *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir.1999). That is not the case here, and appellants should have at least been given the opportunity to request leave to amend.

Even if footnote 8 could be considered (it cannot), the order's cite to *Gonzalez v. Amazon.com, Inc.*, 2020 WL 2323032 (S.D. Fla. 2020) would be inapposite. There, *on a second motion to dismiss after the first had been granted with leave to amend for failure to allege an actionable ownership interest,* the court held that plaintiff still had not alleged an actionable ownership interest. His mother had transferred her ownership interest to him in 2016, some 20 years after Title III's transfer deadline of March 12, 1996. *Id.* at *2.

In contrast, here the complaint alleged that appellants inherited their claims from their ancestors. This was not a transfer as a matter of law and, in any event did not occur after March 12, 1996. Title III defines "property" to include a "future or contingent right." 22 U.S.C. § 6023(12). At birth, appellants owned "future or

contingent" rights to the Properties, and whether those rights vested after March 12, 1996 is irrelevant.

This conclusion is compelled by Fla. Stat. § 732.101(2), which states: "The decedent's death is the event that vests the heirs' right to the decedent's intestate property." If heirs (like appellants) had no "future or contingent" rights to the Properties, there would be nothing to vest. In fact, such a construction would require reading out the words "the heirs' right" from the statute. That phrase presupposes a right that preexists its vesting, namely, a "future or contingent right." In sum, the order's citation to *Gonzalez* is wholly inapposite, except insofar as it compels reversal for an abuse of discretion in denying leave to amend. *Gonzalez* decided a *second* motion to dismiss, after a first had been granted with leave to amend, and the "ownership interest" issue was the basis for both decisions.

With respect to personal jurisdiction, which was the basis for the order's holding, the order didn't even assert, much less discuss, any purported futility of amendment to cure any purported pleading deficiencies. Moreover, there was no record of any "deficiencies" (as there wasn't with respect to ownership claims), because this was the first motion to dismiss that was fully briefed and submitted for decision. Finally, even assuming arguendo that such "deficiencies" could have existed, appellants would have been able to cure them when appellees responded to discovery requests that were pending when the order on appeal was issued.

B. Appellants Should Have Been Permitted to Get Answers to Their Pending Jurisdictional Discovery Requests Before Any Ruling on the Motion to Dismiss

On the first motion to dismiss that was briefed and submitted for decision, the order denied appellants' right to responses to pending jurisdictional discovery requests, stating three reasons:

(1) "Plaintiffs have failed to investigate, collect, and allege sufficient facts prior to responding to the motion to dismiss," Order at 7, and the district court had no obligation to "reserve ruling on a pending motion to dismiss in order to allow the plaintiff to look for what the plaintiff should have had—but did not before coming through the courthouse doors, even though the court would have the inherent power to do so."[24] *Id*. at 6;

(2) deferring ruling on the motions to dismiss was unnecessary where "there is no genuine factual dispute concerning personal jurisdiction because none of the parties submitted affidavit or declaration evidence in support of, or in opposition to, the exercise of personal jurisdiction over the Defendants."[25] Order at 7,

and;

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[24] The order on appeal was issued during a pandemic and global lockdown that impeded any litigant's ability to investigate anything, even where important information is not behind an iron curtain in a communist dictatorship.

[25] Appellants had no duty to submit affidavits, *because appellees failed to rebut any of the complaint's well-pleaded allegations*, which the order ignored and then claimed hadn't been made. As demonstrated above, everything needed for long-arm jurisdiction was alleged, and the order improperly ignored those allegations.

(3) a "hedged request [to defer ruling until appellants received jurisdictional discovery] is procedurally improper," where "[i]nstead of formally moving the Court to defer ruling on the pending Motions to Dismiss, Plaintiffs bury their request in in their Omnibus Response . . . ."[26] Order at 7.

None of those reasons had merit, and the order's preemptive dismissal of the case on the first motion submitted for decision, which addressed a question as to which discovery and mini-trials have become all but automatic, while discovery was pending, was an abuse of discretion.

1. The Order Relied on Wholly Inapposite Cases

The order relied on inapposite cases in stating that it need not "reserve ruling on a pending motion to dismiss in order to allow the plaintiff to look for what the plaintiff should have had—but did not before coming through the courthouse doors, even though the court would have the inherent power to do so." Order at 6.

In re Takata, 396 F. Supp. 3d 1101, 1158 (S.D. Fla. 2019), stated that "this litigation has been pending for over 4 years and discovery has indeed been undertaken." That court also found that the plaintiffs' "informal (and conditional)

[26] There is nothing "hedged" about reminding a district court in a brief that discovery should be had regarding "doing business" jurisdictional allegations before any ruling is made. This is particularly important where dispositive facts are in a defendant's hands, as they were here. The order improperly wore a blindfold in reading out of the complaint its legally sufficient allegations, then claiming they weren't there.

request [fails] to 'specify what information Plaintiffs have sought or how that information would bolster their allegations." *Id*. at 1157. In dispositive contrast, this case was barely one year old and its progress inhibited by the Covid-19 pandemic and lockdown. Further, the *Takata* plaintiffs, appellants specified exactly what discovery would show. *See* Omnibus Opposition at 14 ("Such discovery would reveal: (1) the exact number of reservations Florida residents made at the Resorts using defendants' services; (2) other contacts with Florida residents related to the Resorts, including emails or other communications sent by defendants directly to persons who defendants knew were Florida residents; and (3) the nature in which defendants profited from the reservations they sold to Florida residents.").

Lowery v. Ala. Power Co., 483 F.3d 1184 (11th Cir. 2007), could hardly be less relevant. The defendant there removed a mass action under CAFA, then asked the district court to defer ruling on the plaintiff's motion for remand until it took discovery on the $5 million jurisdictional amount. After hearings on that issue (there were no hearings here), the district court remanded and defendant appealed. This Court viewed the defendant as "a removing defendant that has asserted no factual basis to support federal jurisdiction and now faces a motion to remand," and stated that "defendant's request for discovery is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists." *Id*. at 1217.

Only in the order's world of disappearing allegations could that decision be relevant. The order ignored legally sufficient jurisdictional facts alleged in the complaint, then said those facts would have been legally sufficient, then likened appellants' request to wait for the discovery that would leave no doubt (as it left no doubt in three related cases), to a case like *Lowery*, where a party made a factual allegation with no basis at all. Nothing like that happened here.

Appellants' complaint adequately alleged the jurisdictional facts, ***which all parties to this case know to be true***, then sought discovery to provide further detail, including the reservations sold by appellees, the amount of revenue from their Florida operations, and the nature and extent of their Florida operations. This plainly is not information that appellants "should [or could] have had—but did not before coming through the courthouse doors." It is information that appellants only could have obtained through discovery because it is solely in the hands of appellees, who regard it as commercial information to be kept from each other for competitive reasons.

At the very least, the district court should have reserved ruling on the motions to dismiss until appellees responded to pending discovery requests.

2. Appellees' Failure to Factually Dispute Appellants' Jurisdictional Allegations Did Not Justify Denying Appellants' Right to Jurisdictional Discovery

The order misstated the law and the record in finding no need to defer ruling, on the notion that there was "no genuine factual dispute concerning personal jurisdiction because none of the parties submitted affidavit or declaration evidence in support of, or in opposition to, the exercise of personal jurisdiction over the Defendants." Order at 7.

As for the law, a plaintiff need not submit any affidavits or evidence in support of long-arm jurisdiction unless and until the defendant carries its burden of submitting affidavits that rebut the complaint's jurisdictional allegations. *E.g.*, *Stubbs v. Wyndham Nassau Resort and Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006). Appellees submitted no affidavits challenging anything the complaint alleged (they couldn't have, without violating Rule 11). Accordingly, the district court was required to take the complaint's alleged facts as true.

As for the record, we demonstrated above that the complaint alleged everything the order on appeal said was necessary but failed to notice had been alleged. The complaint also made some allegations on information and belief, because discovery had not yet been obtained.[27]

[27] On information and belief, the complaint alleged that "a substantial part of the Expedia and Booking.com Entities' business and revenue derives from their Florida offices," Comp. ¶ 16; that "many of the Expedia Entities' customers (including customers from Florida) travel to Cuba, and to the Trafficked Hotels in particular, for tourism, which is not a permitted purpose of travel to Cuba under the U.S.

As appellants explained in opposing the motions to dismiss below, their jurisdictional discovery requests would have confirmed the allegations made on information and belief (as they have in three pending, related cases), and would have provided more detailed information to supplement the record on personal jurisdiction, including:

> (1) the exact number of reservations Florida residents made at the Resorts using defendants' services; (2) other contacts with Florida residents related to the Resorts, including emails or other communications sent by defendants directly to persons who defendants knew were Florida residents; and (3) the nature in which defendants profited from the reservations they sold to Florida residents.

Omn. Opp. at 14.[28] Any questions regarding personal jurisdiction would have been settled by the outstanding discovery.

Treasury Department regulations, and is thus, not lawful travel," *id.* ¶ 50; that "all revenues earned by Booking Holdings' subsidiaries, including Booking.com B.V., flow directly to Booking Holdings, which has no independent business or independent revenues other than those of its subsidiaries," *id.* ¶ 58; that "many of the Booking.com Entities' customers (including customers from Florida) travel to Cuba, and to the Trafficked Hotels in particular, for tourism, which is not a permitted purpose of travel to Cuba under the U.S. Treasury Department regulations, and is thus not lawful travel," *id.* ¶ 55; and that "Booking.com B.V., the operator of the booking.com website, acts as an agent of its 100% owner Booking Holdings Inc., which has operational control over the day-to-day activities of Booking Holdings B.V., and whose executives are compensated in part based on the performance of Booking.com B.V.," *id.* ¶ 60.

[28] The order states that "Plaintiffs have not requested leave to amend; nor have they indicated in their response to the Defendants' motion any inclination whatsoever to do so." Order at 8. To the contrary, appellants' description of the exact categories of jurisdictional facts that discovery would reveal (which naturally would go in an amended complaint) clearly evinces an "inclination" to amend the complaint as appellants discovered additional facts.

The fact that appellees failed to challenge, let alone rebut, the complaint's jurisdictional allegations (because they couldn't) did not cut off appellants' right to discovery on those allegations for the purpose of supplementing the record and removing any doubt. Moreover, such discovery was particularly important in this case, where the order ended up ignoring what was alleged.

Appellees' failure to challenge the alleged jurisdictional facts did, however, *concede them.* This made any further analysis unnecessary, because personal jurisdiction was appropriate as a matter of law on what the complaint alleged. Nonetheless, appellants stated below that if the district court had any questions about the complaint's personal jurisdiction allegations (reasonably not expecting it to ignore those allegations), it should allow appellants to obtain responses to their pending discovery requests before deciding the motions to dismiss.

3. Appellants Were Reasonably Diligent in Seeking Jurisdictional Discovery and Should Have Been Allowed to Address Any Remaining Jurisdictional Questions After Obtaining the Discovery

The order's final assault on appellants' discovery attempts was to claim they were "procedurally improper" because appellants did not "formally mov[e] the Court to defer ruling on the pending Motions to Dismiss." Order at 7. Relying on *United Techs. Corp. v. Mazer*, 556 F.3d 1260 (11th Cir. 2009) and *In re Takata, supra*, the order denied appellants' "informal request for jurisdictional discovery,"

misconstruing appellants' request and misapplying the court's own analysis, days earlier, in a case where it reached the opposite result.

First, at no time did appellants request jurisdictional discovery. Nor would they have needed to—discovery was open, the district court had not imposed any limits on discovery, and *appellants already had served discovery requests on appellees.* Instead, what appellants requested was that if and to the extent the district court had questions as to the legal sufficiency of the complaint's personal jurisdiction allegations, that appellants should have the opportunity to receive responses to their already-pending discovery requests before the court ruled on the motions to dismiss.

Second, scarcely one month before the district court granted the motions to dismiss and denied appellants' purportedly "hedged request" as "procedurally improper" based on *Mazer*, it had reached the opposite conclusion under analogous circumstances, distinguishing *Mazer* and other similar cases. In *Road Space Media, LLC v. Miami-Dade Cty.*, 2020 WL 2988424 (S.D. Fla. Apr. 24, 2020), the district court granted plaintiff's motion to clarify an order partially dismissing the action, stating that "its ruling is preliminary in nature and may be reevaluated after discovery." *Id.* at *2.

The defendant argued that "under Eleventh Circuit case law, a district court is under no obligation to give plaintiff an opportunity to conduct jurisdictional

discovery when, after a factual attack on jurisdiction is raised, the plaintiff does not *formally* move for jurisdictional discovery." *Id*. at 1 (emphasis in original) (internal quotes omitted). The court distinguished those cases, including *Mazer*, because in them, the plaintiffs had made no effort to obtain discovery:

> [E]ach of the cases cited by the Defendant for that proposition also pointed out that the plaintiffs in those cases failed to diligently seek jurisdictional discovery irrespective of whether they formally moved for jurisdictional discovery. In other words, it was not solely the absence of a "formal" request that drove the outcome in those cases. It was the absence of diligence altogether. *See, e.g., Henriquez v. El Pais Q'Hubocali.com*, 500 F. App'x 824, 830 (11th Cir. 2012) (noting that plaintiff "did not attempt to seek such discovery"); *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1281 (11th Cir. 2009) (noting that plaintiff "failed to take any formal action to compel discovery").

Road Space Media, 2020 WL 2988424, at *1.[29]

The district court said it was "aware of at least three controlling cases in the Eleventh Circuit, decided in the context of subject matter jurisdiction, that remanded for further jurisdictional discovery even absent a 'formal' motion for same where jurisdictional discovery was pending at the time of dismissal." *Road*

[29] *Road Space Media* states that "Defendant's cited cases addressed jurisdictional discovery in the context of personal jurisdiction," and that "[n]either party has cited any controlling authority explaining what exactly an 'opportunity for discovery' means in the context of subject matter jurisdiction." 2020 WL 2988424, at *1. There may be no analytical difference between discovery regarding personal jurisdiction and subject matter jurisdiction, but there is a legal difference. Discovery in support of personal jurisdiction is normal, if not required, under *Venetian Salami, supra*, and its progeny. *See Venetian Salami*, 554 So. 2d at 502-503; *Cable/Home Commc'n Corp.*, 902 F.2d at 855.

Space Media, 2020 WL 2988424, at *1 (citing *Majd-Pour v. Georgiana Cmty. Hosp., Inc.*, 724 F.2d 901, 903 (11th Cir. 1984) (remanding where "plaintiff's attorney protested that with discovery he could show the existence of jurisdiction"); *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 729-31 (11th Cir. 1982) (remanding because dismissal was premature where there was pending discovery); *Blanco v. Carigulf Lines*, 632 F.2d 656, 658 (5th Cir. 1980) (plaintiff had a right to discovery to resolve jurisdictional issue).

Based on this Court's decisions in *Majd-Pour*, *Eaton* and *Blanco*, *Road Space Media* held that despite plaintiff's failure to "formally" request that the court defer ruling pending jurisdictional discovery, the fact that plaintiff had served discovery requests justified allowing it to address the jurisdictional issues after it obtained the requested discovery:

> Like the plaintiffs in these three cases, the Plaintiff here did serve Defendants with Interrogatories, Requests for Production, and Requests for Admission. Although the present dispute could have been avoided had the Plaintiff formally moved for the Court to withhold ruling on the motion to dismiss and compel jurisdictional discovery, the Defendant has not shown that the Plaintiff was legally required to do so and the Plaintiff has been reasonably diligent in seeking such discovery.

2020 WL 2988424, at *1 (internal quotes omitted).

Here, as in *Road Space Media*, appellants were reasonably diligent in seeking discovery related to personal jurisdiction, serving appellees with requests for admissions regarding personal jurisdiction that were pending when the order

was issued. Thus, as in *Road Space Media*, the district court should have allowed appellants to obtain responses to that pending discovery before ruling on the motions to dismiss, instead of not only denying appellants responses to pending discovery requests, but preemptively denying leave to amend the complaint based on those responses. This was an abuse of discretion compelling reversal.

CONCLUSION

The order on appeal erroneously dismissed without leave to amend on the first motion to dismiss submitted for decision below, despite the fact that the complaint adequately alleged a legally sufficient Title III claim for appellees' unlawful trafficking of the Properties in Florida through the solicitation and sale of reservations at the Resorts to Floridians in Florida. The legal sufficiency of that claim meant "tort in Florida" personal jurisdiction exists, which mooted further factual inquiry into the complaint's allegations of "doing business in Florida" personal jurisdiction. Moreover, pending discovery below would have confirmed those allegations, as it has in three related cases.

Even if the order on appeal had not erroneously denied personal jurisdiction, it would have been (and was) an abuse of discretion to deny appellants answers to

their pending discovery requests before ruling, and to preemptively bar a motion for leave to amend.

For all these good and sufficient reasons, appellants respectfully request that the Court reverse the order and reinstate the complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This initial brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,195 words, excluding those parts that 11th Cir. R. 32-4 exempts. This brief also complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Office 365 Pro Plus and 14-point Times New Roman type style.

/s/ Andres Rivero
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CERTIFICATE OF SERVICE

I CERTIFY that on September 2, 2020, I electronically filed this document with the Clerk of Court using CM/ECF. I also certify that this document is being served today on all counsel of record by transmission of Notices of Electronic Filing generated by CM/ECF.

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