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SENT VIA CM/ECF

David J. Smith
Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

In Re: *Del Valle et al. v. Expedia Group, Inc. et al.*, No. 20-12407
Supplemental Letter Brief Responding to Brief of the United States as Amicus Curiae

Dear Mr. Smith:

Pursuant to the Court's April 15, 2022 Order, we submit this supplemental letter brief on behalf of defendants–appellees Expedia Group, Inc., Hotels.com LP, Hotels.com GP, LLC, and Orbitz, LLC (collectively, the "Expedia Appellees") in response to the Brief of the United States as Amicus Curiae. Counsel for defendants–appellees Booking.com B.V. and Booking Holdings Inc. (collectively, the "Booking Appellees" and, together with the Expedia Appellees, "Appellees") have reviewed this letter and join it.

In answering the six questions that the Court posed in its December 20, 2021 Order, the United States' brief discusses two aspects of the Helms-

Burton Act (the "Act") relevant to this appeal: (1) the date-of-acquisition requirement in 22 U.S.C. § 6082(a)(4)(B) (*see* U.S. Br. 16–29), and (2) the lawful-travel clause in the Act's definition of *traffics*, 22 U.S.C. § 6023(13)(B)(iii) (*see* U.S. Br. 30–38). We address each issue in turn.

A. The Date-of-acquisition Requirement

Appellees agree with the United States' position on the date-of-acquisition requirement, which mirrors Appellees' own arguments on that issue. (*See* Expedia Appellees' Br. 33–37; Booking Appellees' Br. 50–51.) The United States correctly argues that (i) the "United States national" referred to in 22 U.S.C. § 6082(a)(4)(B) is the plaintiff bringing the suit, not the person from whom the property was confiscated (U.S. Br. 18–22); (ii) the plain meaning of *acquires*, as used in 22 U.S.C. § 6082(a)(4)(B), includes inheritance (*id.* at 23–28); (iii) even if *acquires* did not include inheritance, even a person who inherited a claim to property before March 12, 1996, would not have acquired the claim at all and, thus, would still not be able to bring a Helms-Burton action (*id.* at 25 n.4); and (iv) the President's ability to suspend the right of action under Title III has no effect on the application of the date-of-acquisition requirement (*id.* at 28–29). Appellees have nothing to add to the United States' analysis on this issue.

B. The Lawful Travel Clause

For a cause of action to proceed past the pleadings stage, a plaintiff must plead **all elements** of said action. *See Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282-83 (11th Cir. 2007) (It is "necessary that a complaint contain…**all the material elements** necessary to sustain a recovery under some viable legal theory." (emphasis added)); FED. R. CIV. P. 12(b)(6). Accordingly, in this Title III case, Plaintiffs must plead all elements of "trafficking" as defined in the statute. Title III of the Act grants U.S. nationals who "own[] the claim" to "property" that was confiscated by the Cuban government the right to sue and recover damages from any person who "traffics" in such property. 22 U.S.C. § 6082(a). The definition of "traffics" is split into two parts. 22 U.S.C. § 6023(13). Subparagraph (A) describes three types of activities related to confiscated property that, if done knowingly and intentionally, constitute trafficking. 22 U.S.C. § 6023(13)(A). Subparagraph (B) lists four categories of conduct that expressly **do not** constitute trafficking, including "transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel." *Id.* § 6023(13)(B)(iii) (the "Lawful Travel Clause").

Because the Lawful Travel Clause is part of the definition of *traffics*, and trafficking is an essential element of a Title III claim, plaintiffs must plead that the clause does not apply. *C.f., Benjamin v. CitiMortgage, Inc.*, No. 12-cv-62291-FAM, ECF No. 18 (S.D. Fla. May 6, 2013). Plaintiffs, however, failed to plead any facts showing that Appellees' alleged conduct falls outside the Lawful Travel Clause, and thus, constitutes trafficking. Instead, Plaintiffs argued that the Lawful Travel Clause is an affirmative defense, shifting the burden of proof to Appellees. As Appellees explained below and in their briefing to this Court, the clause is not an affirmative defense. Even if it was, dismissal for failure to state a claim would be appropriate because it is apparent on the face of the complaint that Appellees' alleged conduct fits squarely within the clause. While the district court did not reach this issue (or any other Rule 12(b)(6) ground for dismissal) in its order dismissing the case, the issue was fully-briefed below and, thus, presents an alternative ground on which this Court can affirm the judgment.

In its brief, the United States declined the Court's invitation to opine on whether the Lawful Travel Clause bars Plaintiffs' action. However, the United States did provide an interpretation of the clause informed by its

regulatory context. That interpretation and regulatory context further support Appellees' contention, based on the statutory text and legislative history, that offering hotel reservations through their online platforms falls squarely within the scope of the Lawful Travel Clause. To the extent the United States suggests that Plaintiffs need not plead facts regarding the Lawful Travel Clause, we disagree. Plaintiffs must plead each aspect of the definition of "traffics."

1. Appellees' online hotel booking transactions are "ordinarily incident" and "necessary to" lawful travel.

Plaintiffs have argued that, under the Lawful Travel Clause, a transaction or use of property is "incident to" and "necessary to the conduct of" lawful travel only if the travel cannot be accomplished without that transaction or use. That is, Plaintiffs urge that *necessary* means "absolutely necessary." (*See* App.288–90.) Plaintiffs suggest that the mere existence of alternatives to a particular transaction incident to lawful travel renders that transaction not "necessary." For example, Plaintiffs argued below that booking a hotel through Appellees' websites is not "necessary" to travel to Cuba because one could always book the same hotel through a travel agent. (*See* App.290.) Plaintiffs even go so far as to argue that, under their interpretation, travelers—including those who are there on terms explicitly endorsed

by their home government—could never stay in a hotel at all because other types of accommodations are available. (App.288 ("[T]raveling to Cuba does not necessitate or require staying in a hotel.").) And one district court even adopted this extreme position in a different Helms-Burton case. *See Havana Docks Corp. v. Carnival Corp.*, No. 19-CV-21724, 2022 WL 831160, at *77 (S.D. Fla. Mar. 21, 2022) (holding that providing licensed transportation to Havana is not "necessary to" lawful travel to Cuba because transportation could be provided to different cities in Cuba). But such a strict interpretation defies logic and would swallow the Lawful Travel Clause whole because alternatives exist to practically every travel-related transaction.

This interpretation is not only illogical but also contrary to the stated intent of Congress. (Expedia Appellees' Br. 42–43; App.251.) Notably, when the Congressional conference committee described the purpose of the clause, the committee made clear that it did not interpret *necessary* in the overly strict manner that Plaintiffs propose and the court in *Havana Docks* held: "The definition of 'traffics,' as used in Title III, has been modified to remove any liability for…any activities **related to** lawful travel to Cuba." H.R. REP. NO. 104-468, at 44 (1996) (Conf. Rep.), reprinted in 1996 U.S.C.C.A.N. 558, 559, 1996 WL 97265 (emphasis added).

In its brief, the United States further undermines Plaintiffs' argument by interpreting the Lawful Travel Clause in its regulatory context. OFAC has issued general licenses authorizing certain transactions related to travel to Cuba for twelve types of activities, 31 C.F.R. §§ 515.560(a), (c), and the provision of travel services in connection with those travel-related transactions, *id.* § 515.572(a)(1). Further, and importantly, OFAC's regulations generally authorize "[a]ny transaction ordinarily incident to a licensed transaction and necessary to give effect thereto." *Id.* § 515.421(a). As the United States explains, the Lawful Travel Clause implicitly invokes this regulatory regime when it references transactions "incident" and "necessary to the conduct of" lawful travel. (U.S. Br. 33.) That regulatory context, like the legislative history, further undermines the overly narrow interpretation that Plaintiffs urge here and that the court in *Havana Docks Corp. v. Carnival Corp.*, No. 19-CV-21724 (S.D. Fla. March 21, 2022) erroneously accepted.

OFAC's regulations do not use *necessary* in the narrow sense that Plaintiffs urge. To the contrary, as the United States' brief points out, examples in the regulations demonstrate that *absolute necessity* is not required. (U.S. Br. 35.) For example, the regulations state that a general license to

import certain goods from Cuba would authorize funds transfers or payments that are ordinarily incident to the importation, "**including payments made using online payment platforms**." 31 C.F.R. § 515.421(b)(2) (emphasis added). That is, even though payment via online payment platforms is not strictly necessary to complete a licensed import transaction—after all, payments could be made by other means—online payments are nevertheless "ordinarily incident" and "necessary to give effect" to the licensed import transaction within the meaning of the CACR. (U.S. Br. 35.) By the same token, even though using one of Appellees' online booking platforms is not strictly necessary to book a hotel room—after all, as Plaintiffs note, a traveler could book the room through a travel agent, by phone, or the hotel's own website (App.290)—online bookings through Appellees' websites are nevertheless "ordinarily incident" and "necessary" to licensed (*i.e.*, lawful) travel under the CACR. And because the Lawful Travel Clause invokes the regulatory meaning (U.S. Br. 33), offering hotel bookings through online platforms is within the scope of the clause and, thus, not trafficking under Title III.

The regulatory context also undermines Plaintiffs' contention that transactions concerning the Subject Hotels could never be "incident" and

"necessary to" lawful travel because the hotels "are all-inclusive beach vacation resorts designed for, and catering to, tourists." (Appellants' Br. 54.)[1] Although Plaintiffs failed to explain what makes the Subject Hotels "designed for" tourists, their argument assumes that a hotel may only be appropriate for tourism or for permitted travel, but not both. The CACR provides no support for such a dichotomy. To the contrary, the regulations make clear that individuals traveling for a permitted purpose were entitled to "free time" and "recreation," provided it was not in excess of that consistent with a full-time schedule. *E.g.*, 31 C.F.R. § 515.574(a)(3) (2021)[2] (authorizing travel-related transactions intended to provide support for the Cuban people, provided that "[t]he traveler's schedule of activities does not include free time or recreation in excess of that consistent with a full-time schedule"). Thus, a person lawfully traveling to Cuba could stay in a beachfront

[1] Notably, this argument finds no support in Plaintiffs' pleadings. The only allegation in Plaintiffs' complaint concerning tourism is the conclusory assertion, made on information and belief, that many of Appellees' customers "travel to Cuba, and to the [Subject Hotels] in particular, for tourism." (App.146 ¶ 50; App.149 ¶ 58.) Plaintiffs failed to plead any facts to support this conclusory allegation, much less facts concerning the nature of the hotels or their guests.

[2] The version of the CACR in force when Appellees offered reservations at the Subject Hotels contained the same provisions. *E.g.*, 31 C.F.R. § 515.574(a)(2) (2017).

resort and even use the resort's amenities, provided that the person still maintained a full-time schedule related to the permitted purpose of travel.

More fundamentally, Plaintiffs' argument appears to assume that a traveler's hypothetical adherence to OFAC's regulations while in Cuba affects whether the hotel-booking transactions using Appellees' platforms are protected by the Lawful Travel Clause. This too finds no support in the regulations, statutes, or case law. As the United States' brief points out (U.S. Br. 37), Appellees' obligations under the CACR are to collect a certification from each customer indicating the lawful purpose for their travel, *see* 31 C.F.R. § 515.572(b)(1). Appellees required such certifications as a condition of booking accommodations in Cuba, and Plaintiffs' complaint contains no allegations to the contrary. (*See* Expedia Appellees' Br. 40; Booking Appellees' Br. 10.) Whether particular travelers sufficiently adhered to their declared purpose of travel or otherwise complied with regulations governing their own travel in Cuba cannot transform Appellees' lawful conduct in providing licensed online booking services into unlawful trafficking.

2. Plaintiffs bear the burden to plead and prove trafficking, which includes the Lawful Travel Clause.

The United States is incorrect to suggest that Plaintiffs are relieved from pleading and proving that Appellees' alleged conduct meets the entire

definition of *traffics*, including the Lawful Travel Clause. (U.S. Br. 37.) Congress placed the Lawful Travel Clause in the definition of the term *traffics*, making it an element of that term. 22 U.S.C. § 6023(13)(B). Congress **did not** place the Lawful Travel Clause in Title III's liability-creating section, *id.* § 6082, which is where the statute indicates any true exceptions to liability are found, *see Id.* ("Except as otherwise provided in this section"); (Expedia Appellees' Br. at 41). The result of placing the clause in the definition of *traffics* is to make it a required element of a Title III claim that Plaintiffs were required to plead. To follow the United States' suggestion to the contrary would contravene this Court's precedent, the structure of Title III, and the purpose of the Lawful Travel Clause.

"The touchstone for determining the burden of proof under a statutory cause of action is the statute itself." *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1110 (11th Cir. 2008) (citing *Schaffer v. Weast*, 546 U.S. 49, 56 (2005)). "When a statute is silent as to who bears the burden of proof, we resort to 'the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.'" *Id.* (quoting *Schaffer*, 546 U.S. at 56). As explained in Appellees' briefing, although Congress may override this presumption by creating special exceptions to a

statute's prohibitions or "general norms," *id.* at 1112–13, it did not do so with the Lawful Travel Clause. (*See* Expedia Appellees' Br. 39–42.)

Fortunately, Congress explained why the Lawful Travel Clause was placed in the definition of *traffics*: to "remove **any liability** for…**any activities** related to lawful travel to Cuba." Conf. Rep. at 44 (emphasis added). Similarly, Congress intended to remove from liability under the Act three other categories of transactions listed alongside the Lawful Travel Clause in Subparagraph (B) of Section 6023(13). (*See* Expedia Appellees' Br. 41–42.) Relieving plaintiffs of the burden to plead and prove that a defendant's alleged conduct meets the **entire** definition of *traffics*, including the Lawful Travel Clause, would thwart the purpose of Subparagraph (B). (*See* Expedia Appellees Br. 41–42.)

The United States does not join issue with Appellees' arguments on this point. Indeed, the United States claims to take no position on whether the Lawful Travel Clause is an element of Plaintiffs' action or an affirmative defense. (*Id.* at 37–38.) The United States nevertheless states that, in its view, "a plaintiff does not bear the burden to plead specific allegations that would establish that the defendant's travel-related transactions were not 'incident to lawful travel.'" (*Id.* at 37.) According to the United States, because

OFAC regulations require Appellees to collect and retain travelers' certifications identifying the lawful purpose of their travel, the applicability of the Lawful Travel Clause "involves facts that are uniquely in the defendant's possession" and, thus, "it is unlikely that a plaintiff would have sufficient knowledge to allege in good faith…that a defendant's transaction was not incident to lawful travel." (*Id.* at 38.) While Plaintiffs have not alleged that Appellees failed to collect the required certifications from travelers, evidence on that point is not so "uniquely" in Appellees' possession that Plaintiffs are relieved from their obligation to plead such facts plausibly establishing all elements of trafficking.

To be sure, courts ordinarily "will 'not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.'" *Thomas*, 525 F.3d at 1110 (quoting *Schaffer*, 546 U.S. at 60). But this rule "'is far from being universal, and has many qualifications upon its application.'" *Id.* (quoting *Schaffer*, 546 U.S. at 60). A defendant's having superior access to proof is neither peculiar nor unique and, therefore, insufficient to shift the burden of proof. *Id.* ("[V]ery often one must plead and prove matters as to which his adversary has superior access to the proof." (quoting 2 J. STRONG, MCCORMICK ON EVIDENCE § 337, p. 413 (5th ed. 1999))). Rather, to

justify shifting the burden to the defendant, this Court requires that the facts giving rise to the issue must be so peculiarly within the defendant's knowledge that placing the burden on the plaintiff would "unreasonably require[]" the plaintiff "to speculate about whether defendants intend to assert [a statutory defense] and could cause unfair surprise at trial." *Id.* at 1113 (quoting *Jackson v. Seaboard Coast Line R. R.*, 678 F.2d 992, 1013 (11th Cir. 1982)).

Here, the facts underlying the applicability of the Lawful Travel Clause are not uniquely or peculiarly in Appellees' possession. As the United States rightly points out, whether the online hotel reservations in question were transactions ordinarily incident and necessary to lawful travel to Cuba turns largely on whether travelers certified that their travel complied with the CACR. As Appellees noted in their motion-to-dismiss briefing, Plaintiffs merely needed to visit one of Appellees' websites to discover that reservations at hotels in Cuba could only be completed if the traveler certified that the travel met one of the authorized categories under the CACR. (*See* App.358.) And even if that were not the case, the facts relevant to the Lawful Travel Clause certainly are not so peculiarly in Appellees' possession so as to "unreasonably require" Plaintiffs "to speculate about whether defendants

intend to assert" the clause and cause unfair surprise at trial. *See Thomas*, 525 F.3d at 1113. To the contrary, Plaintiffs have been well aware of the issue from the outset and even specifically reference it in their complaint. (*See* App.149 ¶ 58 (alleging that visiting the Subject Hotels is "not lawful travel").)

* * * * * *

The United States is correct that Plaintiffs who purport to have inherited their claims after March 12, 1996, are barred from bringing a Helms-Burton action. The United States is also correct in its interpretation of the scope of the Lawful Travel Clause. It is clear that the regulatory context and legislative history undermine the overly-strict and illogical interpretation of the clause that Plaintiffs urge. The United States is incorrect, however, to suggest that Plaintiffs are relieved from pleading and proving that Appellees' alleged conduct meets the entire definition of *traffics*, including the Lawful Travel Clause.

Sincerely,

David D. Shank
Counsel for the Expedia Appellees

cc: All counsel of record

CERTIFICATE OF COMPLIANCE

This letter brief complies with the page limit set forth in this Court's April 15, 2022 Order because it contains fewer than 20 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This letter brief complies with the 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 proportionally spaced typeface using Microsoft Word 2019 in Avenir LT 45 Book, 14-point font.

David D. Shank

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-2(b), I hereby certify that the Expedia Appellees are not aware of any persons or entities having an interest in the outcome of these appeals in addition to those already identified in prior briefs.

David D. Shank