UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 19-cv-21725-KING

JAVIER GARCIA-BENGOCHEA,

Plaintiff,

v.

CARNIVAL CORPORATION d/b/a/ CARNIVAL CRUISE LINE, a foreign corporation,

Defendant.
_____/

CARNIVAL CORPORATION'S MOTION FOR JUDGMENT ON THE PLEADINGS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 2

I. ALBERT PARREÑO OWNED A CLAIM TO 32.5% OF THE SHARES IN LA MARITIMA, WHICH HE BEQUEATHED TO DESIDERIO PARREÑO IN 1972. 3

II. DESIDERIO PARREÑO SUBSEQUENTLY OWNED A TOTAL 82.5% INTEREST IN A CLAIM TO LA MARITIMA, WHICH HE ATTEMPTED TO BEQUEATH TO BENGOCHEA AFTER JANUARY 2000, BUT THE BEQUEST WAS INEFFECTIVE. 4

ARGUMENT 5

I. UNDER COSTA RICAN LAW, THE BEQUEST WAS INEFFECTIVE, AND THUS, BENGOCHEA DOES NOT OWN ANY "CLAIM" TO CONFISCATED PROPERTY . 6

A. The Determination of Costa Rican Law Controls the Effectiveness of the Bequest 6

B. Under Costa Rican Probate Law, Bengochea Never Acquired His Claim 8

II. EVEN IF THE BEQUEST WERE EFFECTIVE, BENGOCHEA'S CLAIM FAILS BECAUSE HE "ACQUIRE[D]" HIS "OWNERSHIP OF THE CLAIM" AFTER MARCH 12, 1996 10

A. Helms-Burton Requires a Plaintiff Suing Over Property Confiscated Before March 12, 1996 to Have Acquired Ownership of the Claim *Before* March 12, 1996 10

B. Bengochea's Claims Fail Because Bengochea Acquired His Claim, If At All, After March 12, 1996 14

III. THE WILLS AND PROBATE DOCUMENTS MAY BE CONSIDERED ON A MOTION FOR JUDGMENT ON THE PLEADINGS. 17

A. This Court May Take Judicial Notice of the Documents 17

B. The Documents Are "Central" to Benghochea's Claim and Are Properly Considered on a Motion for Judgment on the Pleadings 19

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Page(s)

Cases

Abdallah v. Int'l Lease Fin. Corp.,
2015 WL 1263141 (C.D. Cal. Mar. 9, 2015) 7

Allstate Ins. Co. v. Estate of Robert M. Levesque, 8:08-CV-2253-T33EAJ,
2010 WL 2978037 (M.D. Fla. July 19, 2010) 18

Animal Legal Def. Fund v. U.S. Dept. of Agric.,
789 F.3d 1206 (11th Cir. 2015) 12

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 5

Bailey v. Deutsche Bank Nat'l Tr. Co.,
2018 WL 6164336 (N.D. Ga. July 9, 2018) 20

Baloco ex rel. Tapia v. Drummond Co., Inc.,
640 F.3d 1338 (11th Cir. 2011) 7, 8

Bamert v. Pulte Home Corp.,
445 F. App'x. 256 (11th Cir. 2011) 19

Bankers Ins. Co. v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n,
137 F.3d 1293 (11th Cir. 1998) 5

BedRoc Ltd., LLC v. United States,
541 U.S. 176 (2004) 10

Berrylane Trading, Inc. v. Transp. Ins. Co.,
754 F. App'x 370 (6th Cir. 2018) 10

Biederman v. Cheatham,
161 So. 2d 538 (Fla. 2d DCA 1964) 7

Bonner v. City of Prichard, Ala.,
661 F.2d 1206 (11th Cir. 1981) 10, 11

Burnett v. Trans World Airlines, Inc.,
368 F. Supp. 1152 (D.N.M. 1973) 7

Carbone v. Cable News Network, Inc.,
910 F.3d 1345 (11th Cir. 2018) 5

Centauro Liquid Opportunities Master Fund, L.P. v. Bazzoni,
2016 WL 5719793 (S.D.N.Y. Sept. 30, 2016) 8

Chevron Mining Inc. v. United States,
863 F.3d 1261 (10th Cir. 2017) 13

Conn. Nat. Bank v. Germain,
503 U.S. 249 (1992)..... 10

Day v. Taylor,
400 F.3d 1272 (11th Cir. 2005) 19

de Fontbrune v. Wofsy,
838 F.3d 992 (9th Cir. 2016) 7

Douglas v. Bayview Loan Servicing, LLC,
CA 11-00495-KD-C, 2012 WL 345364 (S.D. Ala. Jan. 13, 2012) 18

El Paso Nat. Gas Co. LLC v. United States,
CV-14-08165-PCT-DGC, 2017 WL 3492993 (D. Ariz. Aug. 15, 2017) 13

Ellis v. Warner,
2017 WL 634287 n.3 (S.D. Fla. Feb. 16, 2017) 17

Freeman v. Alex Brown & Sons, Inc.,
73 F.3d 279 (10th Cir. 1996) 13

George v. People,
40 N.Y.S.2d 830 (N.Y. Sup. Ct. 1943) 13

Gubanova v. Miami Beach Owner, LLC,
12-22319-CIV, 2013 WL 6229142 (S.D. Fla. Dec. 2, 2013) 18

Harris v. Garner,
216 F.3d 970 (11th Cir. 2000) 14, 16

Horsley v. Feldt,
304 F.3d 1125 (11th Cir. 2002) 19

Hough v. Farmers Bank & Tr. Co. of Lancaster,
60 A.2d 11 (Pa. 1948) 13

IMS Internet Media Services, Inc. v. Hwei Chyun Lau,
2018 WL 2007044 (S.D. Fla. Jan. 12, 2018) 7

In re Hoerr,
04-82851, 2004 WL 2926156 (Bankr. C.D. Ill. Dec. 13, 2004) 11

In re Vann,
67 F.3d 277 (11th Cir. 1995) 12

Jordan v. Miami-Dade Cty.,
439 F. Supp. 2d 1237 (S.D. Fla. 2006) 3

Kenseth v. C.I.R.,
259 F.3d 881 (7th Cir. 2001) 13

Kirwan v. Garber,
366 F. Supp. 3d 818 (W.D. Tex. 2019)..... 16

Lewis v. Parker,
67 F. Supp. 3d 189 (D.D.C. 2014) 18

Lluis v. Bank of Am.,
2013 WL 12157852 (M.D. Fla. Apr. 8, 2013) 19, 20

LMS Commodities DMCC v. Libyan Foreign Bank, 1:18-CV-679-RP,
2019 WL 1925499 (W.D. Tex. Apr. 30, 2019)..... 7

Lockwood v. Beasley,
211 F. App'x. 873 (11th Cir. 2006) 19

Luxpro Corp. v. Apple Inc., C,
10-03058 JSW, 2011 WL 1086027 (N.D. Cal. Mar. 24, 2011)..... 17

Malleiro v. Mori,
182 So. 3d 5 (Fla. 3d DCA 2015) 7

Markland v. Insys Therapeutics, Inc.,
270 F. Supp. 3d 1318 (M.D. Fla. 2017) 17

Mike's Train House, Inc. v. Lionel, L.L.C.,
472 F.3d 398 (6th Cir. 2006) 17

Nationwide Mut. Ins. Co. v. Darden,
503 U.S. 318 (1992)..... 13

Neder v. United States,
527 U.S. 1 (1999)..... 13

Pardy v. United States,
548 F. Supp. 682 (S.D. Ill. 1982)..... 13

Peck v. Vandenberg,
30 Cal. 11 (1866) 13

Perez v. Wells Fargo N.A.,
774 F.3d 1329 (11th Cir. 2014) 5, 19

Poole v. Country Club of Columbus, Inc.,
129 F.3d 551 (11th Cir. 1997) 6

Portis v. Hill,
30 Tex. 529 (1868)..... 13

Reese v. Ellis, Painter, Ratterree & Adams, LLP,
678 F.3d 1211 (11th Cir. 2012) 3

Regisme v. Regisme,
No. 17-80849-CIV, 2017 WL 6388919 (S.D. Fla. Aug. 4, 2017) 17

Rodriguez v. United States,
480 U.S. 522 (1987)..... 12

Seneca Specialty Ins. Co. v. McMurtry,
13-61773-CIV, 2013 WL 12051725 (S.D. Fla. Dec. 13, 2013) 19

Shaev v. Claflin, C,
01-0009 MJJ, 2001 WL 548567 (N.D. Cal. May 17, 2001) 11

Shriners Hosps. for Crippled Children v. Zrillic,
563 So. 2d 64 (Fla. 1990)..... 11

Smith v. Bank of Am., N.A.,
2012 WL 13013586 n.2 (N.D. Ga. July 17, 2012)..... 20

Smith v. Zazzle.com, Inc.,
589 F. Supp. 2d 1345 (S.D. Fla. 2008) 12

Solis-Ramirez v. U.S. Dept. of Justice,
758 F.2d 1426 (11th Cir. 1985) 3

Taylor v. Charter Med. Corp.,
162 F.3d 827 (5th Cir. 1998) 18

Thomas v. Alcon Labs.,
116 F. Supp. 3d 1361 (N.D. Ga. 2013) 17

Trinidad Foundry & Fabricating, Ltd. v. M/V K.A.S. Camilla,
966 F.2d 613 (11th Cir. 1992) 7

Trustmark Ins. Co. v. ESLU, Inc.,
299 F.3d 1265 (11th Cir. 2002) 5

U.S. ex rel. Osheroff v. Humana Inc.,
776 F.3d 805 (11th Cir. 2015) 17

United States v. Jones,
29 F.3d 1549 (11th Cir. 1994) 18

United States v. Jordan,
915 F.2d 622 (11th Cir. 1990) 12

United States v. Laisure,
460 F.2d 709 (5th Cir. 1972) 10

United States v. Paulson,
204 F. Supp. 3d 1102 (S.D. Cal. 2016) 18

Universal Express, Inc. v. U.S. S.E.C.,
177 F. App'x. 52 (11th Cir. 2006) 17

Universal Health Servs., Inc. v. United States,
136 S. Ct. 1989 (2016) 14

Winn v. Schafer,
499 F. Supp. 2d 390 (S.D.N.Y. 2007) 8

Statutes

7 U.S.C. § 2324 12

11 U.S.C. § 1501 12

11 U.S.C. § 1503 12

15 U.S.C. § 637(a)(18)(B) 12

22 U.S.C. § 6082(a)(1) 1, 2

22 U.S.C. § 6082(a)(1)(A) 6, 19

22 U.S.C. § 6082(a)(4)(B) ..... *passim*

22 U.S.C. § 6082(a)(4)(C) 12

26 U.S.C. § 302(c)(2)(A)(ii) 12

35 U.S.C. § 4 12

43 U.S.C. § 544 12

California Evidence Code § 1330 16

Rules

Fed. R. Civ. P. 10(c) 3

Fed. R. Civ. P. 12(b)(6) ..... *passim*

Fed. R. Civ. P. 12(c) 5

Fed. R. Civ. P. 12(d) 5, 20

Fed. R. Civ. P. 44.1 ..... 7, 8

Fed. R. Civ. P. 56(a) 6

Fed. R. Evid. 201(b) 17

Fed. R. Evid. 803 16

Fed. R. Evid. 803(15) 16

Other Authorities

XII The Oxford English Dictionary (2d 3d. 1989) 11

142 Cong. Rec. H1645-02, H1660, 1996 WL 90487 ..... 14, 16

Black's Law Dictionary (5th ed. 1979) 11

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11 Vill. L. Rev. 323 (1966) 8

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In re Papacostas, Foreign Claims Settlement Comm'n, Claim No. IT 10251 (July 17, 1957) 11

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S.D. Fla. Loc. R. 7.1(c)(2) 20

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INTRODUCTION

The Helms-Burton Act ("Helms-Burton" or the "Act") allows U.S. nationals who own claims to Cuban-confiscated property to pursue a cause of action against people who traffic in that property. 22 U.S.C. § 6082(a)(1). Plaintiff Dr. Javier Garcia-Bengochea ("Bengochea") alleges that he owns a claim to stock of a Cuban company, La Maritima, S.A., that in turn owned Cuban waterfront property in which Carnival allegedly trafficked. In fact, Bengochea does not own *any claim at all*, and even if he does, his suit is barred because he acquired his claim after 1996, the operative year for acquiring actionable claims under Helms-Burton.

Carnival recently obtained and translated publicly-available, judicially-noticeable documents from the Costa Rican court system documenting the probate of the will of Desiderio Parreño, Bengochea's late cousin, in which Desiderio attempted to bequeath Bengochea the claim to the 82.5% interest in La Maritima on which Bengochea bases his Helms-Burton suit, as reflected in his own Rule 26 disclosures. These documents—which are both judicially noticeable and central to the allegations in the Complaint—irrefutably demonstrate two things, both of which are fatal to the suit here: (1) the bequest was ineffective under Costa Rican law; and (2) the bequest, made after 1996, cannot provide a basis for a suit under the Act.

First, under Costa Rican law, the bequest was ineffective because Bengochea did not appear in probate court to claim his inheritance within the ten-year limitations period. Accordingly, ***Bengochea does not own a claim at all***. Plaintiff's suit therefore falters on the most fundamental premise—he does not own a claim under the Act. Accordingly, under the plain text of the Act, Bengochea's claim must be dismissed with prejudice.

Second, even if the bequest were effective under Costa Rican law (which it was not), it did not occur until after Desiderio Parreño's death, making it insufficient to provide a valid cause of action under the Act. The text of Helms-Burton makes abundantly clear that for property confiscated before March of 1996 (as the property here was), any plaintiff must have acquired his or her claim to that property before March of 1996. It provides: "[i]n the case of property confiscated before March 12, 1996, a United States national may not bring an action under this section on a claim to the confiscated property *unless such national acquires ownership of the claim before March 12, 1996*." 22 U.S.C. § 6082(a)(4)(B) (emphasis added). Desiderio Parreño died on August 27, 2000, and thus Bengochea is ineligible—under the plain language of the Act—to bring a Helms-Burton action based on a property claim acquired from Desiderio. Put differently,

Bengochea acquired his claim, if at all, in 2000—far too late to bring a Helms-Burton suit. Thus, even if Bengochea owns a claim, his suit must be dismissed with prejudice.

BACKGROUND

Generally, Helms-Burton allows U.S. nationals who own claims to Cuban-confiscated property to pursue a cause of action against people who traffic in that property. 22 U.S.C. § 6082(a)(1). This case centers on Bengochea's allegation that he owns a claim to certain waterfront property in Santiago, which he alleges Carnival trafficked in. D.E. 1 ¶¶ 12, 13.

More specifically, Bengochea claims an "ownership interest" of shares in a Cuban corporation, La Maritima, S.A., which owned the waterfront property before it was taken by the Cuban government. *See* D.E. 1 ¶¶ 6, 10, 11; D.E. 1-1 at p. 3.[1] In total, Bengochea alleges that he owns a claim to an 82.5% interest in La Maritima, which corresponds to 3,300 shares, and which he claims entitles him to an 82.5% interest in a concession that La Maritima owned. *Id.*

Bengochea does not allege that he owned La Maritima stock at the time of its confiscation in 1960, and accordingly, cannot allege that he came to own a claim at the moment of confiscation. Rather, the Complaint alleges that at least the certified portion (32.5%) of the claim was owned by Albert Parreño in 1970. *See* D.E. 1 ¶ 10; D.E. 1-1. Publicly available records, taken together with the allegations in the Complaint, show that Bengochea never acquired any claim, but in any event, to the extent he acquired his claim (which corresponds to the alleged 82.5% interest in La Maritima), he did so after January 2000 by inheritance from his cousin, Desiderio Parreño.[2] While this Court accepted Bengochea's bare allegations of ownership in denying the motion to dismiss, the record is now clear—based on the pleadings and publicly available records—that there is no

[1] At the hearing on the motion to dismiss, Bengochea's counsel confirmed that the asset that Bengochea owned was shares in a Cuban corporation, which in turn owned the property in which Carnival allegedly trafficked. *See* Transcript of Hearing on Motion to Dismiss at 52 ("The formal ownership of the property was through a corporation."); *id.* at 55 ("La Maritima S.A. [is] the entity that owned the waterfront in Santiago.").

[2] At the hearing on the motion to dismiss, Bengochea's counsel confirmed that Bengochea acquired his claim via inheritance from Albert Parreño and Desiderio Parreño. *See* Hearing Tr. at 48 ("And, by the way, your Honor, to be clear, Dr. Garcia inherited the claims. He inherited the claims…. With regards to the claim that Dr. Garcia has, it's a claim through inheritance, he owns the claim."); *id.* at 50 ("And Dr. Garcia has had that claim, has had that assertion of a right to payment since the time the property was confiscated. He gets the claim, Your Honor, from the inheritance from his two cousins, Desiderio and Alberto Parreño."). This is also reflected in Bengochea's Rule 26 disclosures, recently received, which identified the wills as support for ownership of the claim.

claim here, and either as a matter of judgment on the pleadings or summary judgment—Bengochea's claim must be dismissed.

I. ALBERT PARREÑO OWNED A CLAIM TO 32.5% OF THE SHARES IN LA MARITIMA, WHICH HE BEQUEATHED TO DESIDERIO PARREÑO IN 1972.

As specifically alleged in the complaint, Albert Parreño ("Albert") owned 32.5% of the shares of La Maritima, and this claim was certified by the Foreign Claims Settlement Commission. *See* D.E. 1 at ¶ 10, D.E. 1-1 at p. 3 ("The Commission finds that claimant [Albert J. Parreño] owned 1,300 shares of stock in La Maritima, S.A., a Cuban corporation which owned and operated docks and warehouses in Santiago de Cuba, Oriente Prince, Cuba.").[3] The document further notes that there were a total of 4,000 outstanding shares of stock in La Maritima, D.E. 1-1 at p. 4—thus 1,300 shares equals a 32.5% interest.

Further, publicly-available records, namely, Albert's will dated July 5, 1966, and the related probate file demonstrating that the will was probated after Albert's death on June 20, 1972, show that Albert bequeathed this interest to his brother, Desiderio Parreño ("Desiderio"), a Costa Rican national. D.E. 52-2; Gray Decl. Exh. 1.[4] Albert's probated will states:

> I give, devise and bequeath to my said brother, DESIDERIO PARREÑO, all my rights to and under property held by me which has been confiscated by the Fidel Castro regime in Cuba, including, but not limited to, my shares in La Maritima S.A....

D.E. 52-2 at 3. Thus the Complaint, taken together with publicly available records, shows that Albert owned a claim to the 32.5% portion of the stake in La Maritima, S.A. that forms the basis of the certified portion of Bengochea's claim, and Albert bequeathed that interest to Desiderio on his death in 1972.

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[3] "Under Rule 10(c) Federal Rules of Civil Procedure, such attachments are considered part of the pleadings for all purposes, including a Rule 12(b)(6) motion." *Solis-Ramirez v. U.S. Dept. of Justice*, 758 F.2d 1426, 1430 (11th Cir. 1985). In other words, documents attached to a complaint are "treat[ed] … as part of the complaint for Rule 12(b)(6) purposes." *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1216 (11th Cir. 2012). "Attachments to a Complaint are to be considered in the same manner as the Complaint itself." *Jordan v. Miami-Dade Cty.*, 439 F. Supp. 2d 1237, 1240 (S.D. Fla. 2006).

[4] "Gray Decl." refers to the declaration of Corey P. Gray dated November 15, 2019, attached hereto.

II. DESIDERIO PARREÑO SUBSEQUENTLY OWNED A TOTAL 82.5% INTEREST IN A CLAIM TO LA MARITIMA, WHICH HE ATTEMPTED TO BEQUEATH TO BENGOCHEA AFTER JANUARY 2000, BUT THE BEQUEST WAS INEFFECTIVE.

Desiderio was a Costa Rican national, who in turn, held the remaining claim to the shares until at least 2000.[5] Desiderio's will, which was executed in 2000 in Costa Rica, demonstrates that as of 2000, Desiderio owned a claim to 3,300 shares (or 82.5% of the total 4,000 shares) of La Maritima. *See* Exhibit 1 to Answer, D.E. 52-1. In that 2000 will, Desiderio bequeathed those shares to Bengochea. The will provides that "Mr. Desiderio Parreño Velazquez, of legal age," appeared in a notary public office and bequeathed:

> ***[T]o his cousin and godchild Javier [G]arcia-Bengochea Bolivar***, of legal age, married, a doctor of medicine, a United States citizen, resident of one thousand two hundred one, Vandiveer Road, Jacksonville, Florida, thirty thousand two hundred ten United States of North America, ***whatever assets, property or rights in Cuba that were appropriated by the Communist government of Fidel Castro***, but that are the property of the testator and that could someday be recovered. These assets and rights include, inter alia, . . . ***three thousand three hundred registered shares of "La Maritima Sociedad Anónima,"*** concessions, dock, and warehouses in the port of Santiago de Cuba, one thousand five hundred shares of which were issued in the name of Maria Velásquez, widow of Parreño, already deceased, nine hundred in the name of Alberto Parreño Velásquez, already deceased, and nine hundred in the name of Desiderio Parreño Velásquez, who inherited the others upon the death of, respectively, his mother and brother . . . .

D.E. 52-1 at 4 (emphasis added). Accordingly, the will shows that in 2000, Desiderio owned the claim to 3,300 shares, or 82.5%, of La Maritima—the precise fraction that Bengochea alleges he owns a claim to in his complaint. Moreover, as described below, court records showing the administration of Desiderio's will demonstrate that the earliest date in which Bengochea could have taken ownership of the claim to these shares was at the time of Desiderio's death on August 27, 2000.[6]

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[5] Consistent with the allegations in Bengochea's Complaint, this 82.5% interest includes the certified portion of the interest (32.5%) that Desiderio inherited from Albert in 1972, as described above. *See* D.E. 1 at ¶¶ 6, 10, 11.

[6] *Accord* Memorial, Desiderio Xavier Parreño '38, *available at* https://paw.princeton.edu/memorial/desiderio-xavier-parreno-%E2%80%9938.

Thus, Bengochea's purported chain of title is clear. Consistent with the allegations in the Complaint, Bengochea, if he acquired his alleged ownership of a claim to the La Maritima stock at all, must have acquired it in 2000 by bequest from Desiderio.

But Bengochea never effectively acquired his claim from Desiderio. As explained more fully below, to receive a bequest under Costa Rican law—which governs the distribution of Desiderio's Costa Rican will—a legatee[7] must enter an appearance at the probate court, claim his or her bequest, and formally accept it. Bengochea never did that, and accordingly, he never acquired Desiderio's claim.

ARGUMENT

Under Fed. R. Civ. P. 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014) (quotation omitted). Thus, "[j]udgment on the pleadings is appropriate when material facts are not in dispute and judgment can be rendered by looking at the substance of the pleadings and any judicially noticed facts." *Bankers Ins. Co. v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1295 (11th Cir. 1998). "A motion for judgment on the pleadings is governed by the same standard as a motion to dismiss under Rule 12(b)(6)." *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1350 (11th Cir. 2018). Thus to survive a motion for judgment on the pleadings, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

Alternatively, if this Court believes it is necessary to consider matters outside the pleadings, this Court may convert this motion to a motion for summary judgment, and allow Bengochea a "reasonable opportunity to present all the material that is pertinent to the motion." *See* Fed. R. Civ. P. 12(d). "When that conversion occurs, the district court must comply with the requirements of Rule 56. The district court is required to notify the parties that the motion has been converted, and give the parties 10 days in which to supplement the record." *Trustmark Ins. Co. v. ESLU, Inc.*,

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[7] A "legatee" is "Someone who is named in a will to take personal property; one who has received a legacy or bequest." Black's Law Dictionary (11th ed. 2019).

299 F.3d 1265, 1267 (11th Cir. 2002) (citations omitted). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Carnival has the initial "burden of showing the absence of a genuine issue of material fact," but once it has met that burden, "the burden shifts to [Bengochea] to present evidence sufficient to make a 'showing that the jury could reasonably find for that party.'" *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997). "A fact is material if, under applicable substantive law, it might affect the outcome of the case," and an issue is "genuine if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Id.*

Bengochea's claim fails under Helms-Burton because it is clear from the Complaint, combined with publicly-available, judicially-noticeable records that are central to the allegations in the Complaint, that Bengochea does not own any claim to any subject property at all because the bequest from his cousin Desiderio was ineffective under Costa Rican law. Further, even if the bequest were effective, then Bengochea would have "acquire[d] ownership" of his claim by inheritance in 2000. However, Helms-Burton requires that in order to pursue a claim based on property that was confiscated before March 12, 1996, that "ownership" interest must be "acquire[d]" ***before*** March 12, 1996. *See* 22 U.S.C. § 6082(a)(4)(B). It is undisputed that Bengochea acquired his interest, if any, after March 12, 1996, so his claims fail as a matter of law, and this Court should grant judgment on the pleadings.

I. UNDER COSTA RICAN LAW, THE BEQUEST WAS INEFFECTIVE, AND THUS, BENGOCHEA DOES NOT OWN ANY "CLAIM" TO CONFISCATED PROPERTY

A claim to ownership in shares of La Maritima forms the basis of Bengochea's Helms-Burton claim; Desiderio attempted to bequeath his claim to the shares of La Maritima on his death on August 27, 2000. This bequest, however, was not effective under Costa Rican law, and thus Bengochea does not own his claim at all. That is fatal to Bengochea's claim here because Helms-Burton requires a Plaintiff to "own the claim" that he or she asserts. 22 U.S.C. § 6082(a)(1)(A).

A. The Determination of Costa Rican Law Controls the Effectiveness of the Bequest

As an initial matter, because Desiderio was a Costa Rican national domiciled in Costa Rica when he passed, and executed a Costa Rican will, Costa Rican law determines whether the bequest were effective. "Probate of a will must be made primarily at the domicile of the decedent, the will

being governed by that law. Probate there is binding on all questions as to the legality of the will with regard to personal estate elsewhere…" *Biederman v. Cheatham*, 161 So. 2d 538, 543 (Fla. 2d DCA 1964) (quotation omitted); *accord Malleiro v. Mori*, 182 So. 3d 5, 7–8 (Fla. 3d DCA 2015) ("Without defining the term 'nonresident,' the Probate Code recognizes as valid a foreign will that does not comply with all of the formalities required of a resident's will, if the nonresident's will is valid under the laws of the state or country where executed."); Restatement (Second) of Conflict of Laws § 264 (1971) ("A will insofar as it bequeaths an interest in movables … is construed in accordance with the rules of construction that would be applied by the courts of the state where the testator was domiciled at the time of his death.").

Questions of foreign law are questions of law, capable of resolution at the pleading stage. Fed. R. Civ. P. 44.1; *LMS Commodities DMCC v. Libyan Foreign Bank*, 1:18-CV-679-RP, 2019 WL 1925499, at *3 (W.D. Tex. Apr. 30, 2019); *cf. Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152, 1156 (D.N.M. 1973) (noting that because Rule 44.1 makes clear that questions of foreign law are legal questions, courts can determine foreign law on summary judgment). For this reason, the Eleventh Circuit has noted that it is proper to resolve a question of foreign law "at the pleadings stage." *Baloco ex rel. Tapia v. Drummond Co., Inc.*, 640 F.3d 1338, 1349 n.14 (11th Cir. 2011) (citing *Trinidad Foundry & Fabricating, Ltd. v. M/V K.A.S. Camilla*, 966 F.2d 613, 615 (11th Cir. 1992) (considering affidavit from a solicitor of the Supreme Court of England and Wales at the pleadings stage)) .

"In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1.[8] Thus, "Rule 44.1 allows courts to consider a wide array of materials in order to ascertain foreign law." *IMS Internet Media Services, Inc. v. Hwei Chyun Lau*, 2018 WL 2007044, at *4 (S.D. Fla. Jan. 12, 2018) (citations omitted). The Ninth Circuit, exhaustively discussing Rule 44.1 and a Court's role in determining foreign law, recently held that "courts do not transgress the broad boundaries established by Rule 44.1 when considering foreign

[8] Carnival has simultaneously provided notice of its intent to rely upon foreign law as required by Rule 44.1.

legal materials—including expert testimony and declarations—at the pleading stage[.]" *de Fontbrune v. Wofsy*, 838 F.3d 992, 1000 (9th Cir. 2016).[9]

Consistent with Rule 44.1, attached to this motion are the affidavits of Esteban Aguero ("Aguero Aff."), an experienced Costa Rican lawyer and expert in Costa Rican law, and Keith Rosenn ("Rosenn Aff.") an emeritus professor of law at the University of Miami and an expert in Latin American law. This Court may consider Mr. Aguero's and Mr. Rosenn's views in determining issues of Costa Rican law. *See* Fed. R. Civ. P. 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony…"); *Baloco*, 640 F.3d at 1349 (approving of "relying on expert testimony to interpret foreign law"); *see also Winn v. Schafer*, 499 F. Supp. 2d 390, 396 n.28 (S.D.N.Y. 2007) (noting that courts may "consider a foreign law expert's opinion even on ultimate legal conclusions," even where such opinions would otherwise be inadmissible (citing Fed. R. Civ. P. 44.1 Advisory Committee Note)).

B. Under Costa Rican Probate Law, Bengochea Never Acquired His Claim

Under Costa Rican law, for a decedent's estate to validly transfer assets to someone else, a succession proceeding must be held before a judge or public notary whereby the beneficiary affirmatively accepts the inheritance. Aguero Aff. ¶¶ 7, 10; Rosenn Aff. ¶ 25. In that proceeding, anyone claiming an interest in the estate must appear to enforce their rights. Aguero Aff. ¶ 9 (citing Costa Rican Code of Civil Procedure Article 917).[10] To inherit property under a Costa Rican will, a beneficiary "must formally and timely become a party in the succession proceeding and accept the inheritance or legacy." Aguero Aff. ¶10. This rule of affirmative acceptance of inheritance is different from the law of the United States, and for good reason—the opportunity to disclaim debt. In many civil law countries, including Costa Rica, beneficiaries who inherit assets

[9] *Accord, e.g.*, *Abdallah v. Int'l Lease Fin. Corp.*, No. CV 14-06769, 2015 WL 1263141, at *12 (C.D. Cal. Mar. 9, 2015) ("[C]ourts typically rely on evidence proffered by the parties concerning the substance of that foreign law in ruling on a Rule 12(b)(6) motion to dismiss. This is because, if foreign law applies, it will govern whether a party has plausibly stated a claim for relief under Rule 8 and *Twombly/Iqbal*.") (collecting authority); *Centauro Liquid Opportunities Master Fund, L.P. v. Bazzoni*, No. 15 CV 9003-LTS-SN, 2016 WL 5719793, at *4 (S.D.N.Y. Sept. 30, 2016) ("The Second Circuit has, however, adjudicated substantive questions of foreign law under Federal Rule of Civil Procedure 44.1 in the context of a motion to dismiss") (collecting authority).

[10] A certified translation of the Costa Rican laws on which Mr. Aguero relies is attached to his report as Exhibit 8.

also inherit all debts of the testator, so inheritance is never automatic and beneficiaries must be given an opportunity to disclaim the inheritance to avoid inheriting debt. *See* Aguero Aff. ¶ 6 & n.1 (quoting Costa Rican Civil Code Article 521 ("The succession includes all the decedent's assets, rights ***and obligations***…" (emphasis altered))); Rosenn Aff. ¶ 28; *accord* George A. Pelletier, Jr. and Michael Roy Sonnenreich, *A Comparative Analysis of Civil Law Succession*, 11 Vill. L. Rev. 323, 330 (1966) ("The German law of successions allows for disclaimer of the succession, just as do all other Civil Law countries. The value of such disclaimer lies where the estate is insolvent, since, under the general principle of universal succession, the heir would otherwise be liable for the debts of the estate even if in excess of the assets.").

But Bengochea never appeared in Desiderio's probate proceeding. Desiderio's death certificate and will are in the publicly-available probate record of Desiderio's estate in the Sixth Civil Court of San Jose, Costa Rica. Aguero Aff. ¶¶ 3, 13-15.[11] Desiderio's will attempted to bequeath Desiderio's interests in La Maritima to Bengochea. *Id.* ¶ 15. The initial petition to open the succession proceedings *specifically listed* Bengochea as a legatee in the will. *Id.* ¶¶ 16, 17. Moreover, the judge's initial order required that all legatees, including Bengochea, be notified, Rosenn Aff. ¶¶ 15-16, and the judge further issued an order directing publication of the notice in the Judicial Bulletin, *id*. However, despite this notice, Bengochea *never* entered any appearance at the proceeding, either in person or through any representative or other means. Aguero Aff. ¶¶ 19-24. Thus, neither the final inventory of assets from the executor, nor the judge's final partition order contain any mention of Bengochea or the La Maritima assets, which makes sense because no assets or claims to assets passed to Bengochea. *Id.* ¶¶ 30-35.

Accordingly, under Costa Rican law, Bengochea did not actually take any assets under Desiderio's will—including any interest in, or claim to, La Maritima. Aguero Aff. ¶¶ 30-35; Rosenn Aff. ¶ 29-30. Moreover, the maximum statute of limitations for *any* claim or cause of action in Costa Rica is ten years. Aguero Aff. ¶ 35; Rosenn Aff. ¶¶ 29-30. Bengochea's cousin Desiderio died in 2000; it has been well over ten years from the probate proceeding, so any right or attempt by Bengochea to take ownership of the claim to La Maritima assets has been extinguished for years. Aguero Aff. ¶ 35; Rosenn Aff. ¶¶ 29-30. In other words, because Desiderio's ownership of the La Maritima assets (including the claim to those assets) were not

[11] A certified translation of the Costa Rican court probate record is attached to Mr. Aguero's report as Exhibit 7.

distributed within the ten-year limitation period, Bengochea does not, and cannot, own the assets or any claim to the assets. Aguero Aff. ¶ 35; Rosenn Aff. ¶¶ 29-30.

Thus, because Bengochea does not possess any ownership or rights to or other valid claim to the stock in La Maritima (which owned the Subject Property), he has no "claim" to the Subject Property, and his suit under the Act fails as a matter of law.

II. EVEN IF THE BEQUEST WERE EFFECTIVE, BENGOCHEA'S CLAIM FAILS BECAUSE HE "ACQUIRE[D]" HIS "OWNERSHIP OF THE CLAIM" AFTER MARCH 12, 1996

A. Helms-Burton Requires a Plaintiff Suing Over Property Confiscated Before March 12, 1996 to Have Acquired Ownership of the Claim *Before* March 12, 1996

Helms-Burton is clear that "[i]n the case of property confiscated before March 12, 1996, a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996." 22 U.S.C. § 6082(a)(4)(B). That provision means "what it says": for property confiscated before March 12, 1996—as was the property here (*see* Compl. ¶¶ 7-8)—a Helms-Burton plaintiff must have acquired ownership of his or her claim before March 12, 1996. *See Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). That interpretation flows naturally from Helms-Burton's text. Specifically, the plain meaning of the Act requires that a Helms-Burton plaintiff obtain the right to assert a claim to the confiscated property before March 12, 1996. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (noting that statutory interpretation begins with the text and "ends there as well if the text is unambiguous").

When Helms-Burton says that a plaintiff must have "acquired ownership" of his or her "claim" before March 12, 1996, it means that the plaintiff must have obtained ownership of the claim before that date. "Acquire" means "[t]o gain possession or control of; to get or obtain," ACQUIRE, Black's Law Dictionary (11th ed. 2019), "to get as one's own[,]" or "to come into possession or control of often by unspecified means." *Berrylane Trading, Inc. v. Transp. Ins. Co.*, 754 F. App'x 370, 376 (6th Cir. 2018) (quoting Acquire, MERRIAM-WEBSTER.COM, http://merriam-webster.com/dictionary/acquire (last visited Sept. 19, 2018)). Consistent with this broad meaning, binding Fifth Circuit precedent states that the word "acquired" includes gaining possession of property "by purchase, gift, or inheritance." *United States v. Laisure*, 460 F.2d 709,

712 & n.3 (5th Cir. 1972)[12] (noting that a weapon could be "acquired" "by purchase, gift or inheritance," and citing to Webster's definition of "acquire" relied on by the *Berrylane* court); *accord In re Hoerr*, 04-82851, 2004 WL 2926156, at *4 (Bankr. C.D. Ill. Dec. 13, 2004) ("property may be 'acquired' by purchase, by gift, by devise, or even by loan."). Likewise, the Florida Supreme Court has noted that "[i]t is commonly understood that acquire means to gain, obtain, receive, or to come into possession or ownership of property, and it '*[i]ncludes taking by devise*.'" *Shriners Hosps. for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990) (emphasis in original) (citing and quoting XII The Oxford English Dictionary (2d 3d. 1989) and Black's Law Dictionary (5th ed. 1979)); *see also Shaev v. Claflin*, C 01-0009 MJJ, 2001 WL 548567, at *6 (N.D. Cal. May 17, 2001) ("[S]ome shareholders may have acquired their stock by way of gift, inheritance, or some other means not involving a stock purchase."); *Descent*, Black's Law Dictionary (11th ed. 2019) (defining "descent" as "[t]he *acquisition* of real property by law, as by inheritance…" (emphasis added)); *Title*, Black's Law Dictionary (11th ed. 2019) (describing multiple types of titles that may be "acquired" by inheritance). Thus, when Helms-Burton says that a plaintiff must have "acquired ownership" of his or her "claim" before March 12, 1996, it means that the plaintiff must have obtained, by whatever means (including inheritance), ownership of the claim before that date.[13]

Congress meant what it said in Helms-Burton: any type of acquisition after March 1996 will bar a Helms-Burton claim. Context confirms this interpretation. In Subsection 4(B), Congress forbids Helms-Burton suits when a plaintiff acquired a claim related to a pre-1996 confiscation after 1996. Just below Subsection 4(B), Congress dealt with post-1996 confiscations. In Subsection 4(C), Congress provided that: "In the case of property confiscated on or after March 12, 1996, a United States national who, after the property is confiscated, *acquires ownership of a claim to the property by assignment for value*, may not bring an action on the claim under this

[12] Fifth Circuit caselaw prior to October 1, 1981 is binding in this Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

[13] This plain meaning of "acquire" also accords with the interpretation used by the Foreign Claims Settlement Commission, which noted that property could be acquired in succession proceedings. *See In re Papacostas*, Foreign Claims Settlement Comm'n, Claim No. IT 10251 (July 17, 1957), ("Under Greek civil law, property passes in succession to the heirs on the death of a person. Therefore claimant acquired ownership of the property on the death of her husband in 1941 . . . .").

section." 22 U.S.C. § 6082(a)(4)(C) (emphasis added). It is a "basic premise of statuary construction" that when "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.'" *In re Vann*, 67 F.3d 277, 281 (11th Cir. 1995) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1987)); *see also United States v. Jordan*, 915 F.2d 622, 628 (11th Cir. 1990). Accordingly, the fact that Congress chose to restrict Subsection 4(C) to acquisitions for value demonstrates that congress did not intend to so restrict Subsection 4(B).

Indeed, when Congress wants to exclude certain types of acquisitions from the scope of the broad term "acquire" it knows how to do it. For example, Congress has prohibited "[o]fficers and employees of the Patent and Trademark Office" from "acquiring, directly or indirectly, except by inheritance or bequest, any patent[.]" 35 U.S.C. § 4. Likewise, "[e]mployees of the Plant Variety Protection Office" cannot "acquire directly or indirectly, except by inheritance or bequest, any right or interest in any matters before that office." 7 U.S.C. § 2324. So too with lands in territories: Congress has broadly prohibited non-citizens from "acquir[ing] title to territorial lands, 11 U.S.C. § 1501, but Congress was specific that its prohibition "shall not prevent aliens from acquiring lands or any interests therein by inheritance . . . ." 11 U.S.C. § 1503.[14] These statutes strongly suggest that Congress meant what it said in Helms-Burton: any type of acquisition after March 1996 will bar a Helms-Burton claim. After all, "[w]here Congress knows how to say something but chooses not to, its silence is controlling." *Animal Legal Def. Fund v. U.S. Dept. of Agric.*, 789 F.3d 1206, 1217 (11th Cir. 2015); *accord Smith v. Zazzle.com, Inc.*, 589 F. Supp. 2d 1345, 1348 (S.D. Fla. 2008) (King, J.) (invoking same statutory presumption).

[14] *See also* 43 U.S.C. § 544 (Congress has prohibited "acquir[ing], own[ing,], or hold[ing]" certain types of "irrigable land . . . in excess of one hundred and sixty acres", with one exception: Land "acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgages, by inheritance, or by devise, may be held for five years and no longer after its acquisition"); 26 U.S.C. § 302(c)(2)(A)(ii) (in defining the constructive ownership of stock, Congress has exempted "distributee[s]" who did "not acquire any such interest (other than stock acquired by bequest or inheritance) within 10 years from the date of such distribution"); 15 U.S.C. § 637(a)(18)(B) (Congress has prohibited members of the Executive branch from "buying, selling, or receiving (except by inheritance) . . . any legal or beneficial ownership of stock or any other ownership interest or the right to acquire such interest" in small businesses enrolled in a special contracting program).

Reading the term "acquires" to include all forms of gaining possession, including by inheritance, is also consistent with the common law. After all, bequest, devise, and descent, were "all common law modes of acquisition[.]" *Peck v. Vandenberg*, 30 Cal. 11, 19 (1866); *see also George v. People*, 40 N.Y.S.2d 830, 833 (N.Y. Sup. Ct. 1943) ("It is well settled in this state that under the common law an alien, whether friend or enemy, may acquire land either by purchase or devise[.]"); *Hough v. Farmers Bank & Tr. Co. of Lancaster*, 60 A.2d 11, 12 n.1 (Pa. 1948) ("At common law there are but two modes of acquiring title to real estate—by descent and purchase.") (citation omitted); *Portis v. Hill*, 30 Tex. 529, 560 (1868) ("For, there are only two methods of acquiring title to real estate: either by the civil or common law, to wit, by descent, or succession, and by purchase."). Of course, "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder v. United States*, 527 U.S. 1, 21 (1999) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)).

Helms-Burton is also clear about what a plaintiff must have acquired before 1996: "ownership of the claim." This is a demanding requirement. It forecloses Helms-Burton causes of action based on expectancies or other relationships to the claim because "[t]he ordinary or natural meaning of 'owner' includes, at a minimum, a legal title holder." *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1273 (10th Cir. 2017); *accord El Paso Nat. Gas Co. LLC v. United States*, CV-14-08165-PCT-DGC, 2017 WL 3492993, at *2 (D. Ariz. Aug. 15, 2017); *see also* OWNERSHIP, Black's Law Dictionary (11th ed. 2019) ("Ownership" means "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others"). For that reason, guardians and next-friends, who are granted significant discretion to litigate claims, are not the owners of the claims because they do not sue in their own names. *E.g.*, *Freeman v. Alex Brown & Sons, Inc.*, 73 F.3d 279, 283 (10th Cir. 1996) (ward, not guardian, owns fraud claims); *Pardy v. United States*, 548 F. Supp. 682, 684 (S.D. Ill. 1982) ("[I]t is consistent to hold that because Mr. Pardy is the owner of the cause of action the statute of limitations must run, if at all, against him and not his guardian."). Indeed, even a significant pecuniary interest in a claim is not the same as ownership; after all, lawyers who accept contingency fee cases do not "acquir[e] ownership of [the] client's claim" even though the lawyer has an interest in the outcome of the claim. *Kenseth v. C.I.R.*, 259 F.3d 881, 884 (7th Cir. 2001).

Thus, when Helms-Burton says that a plaintiff must "acquire ownership" of his or her claim before March 1996, what the statute means is that in order to bring a claim, the plaintiff must have obtained the right to assert a claim in his or her own name for his or her own benefit before March 1996. "When the import of the words Congress has used is clear, as it is here, we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language." *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) (en banc) (collecting authority). Because this interpretation is compelled by the plain meaning of the Act, the Court need proceed no further. *Accord Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2002 (2016) ("[P]olicy arguments cannot supersede the clear statutory text.").

But in any event, this common-sense reading of the text is *consistent* with the Act's legislative history. Indeed, the drafters were clear that the purpose of subsection 4(B) was to ensure that "in the case of property confiscated before the date of enactment of this Act, the U.S. national had to have owned the claim to the property before the date of enactment in order to bring an action under this section." H.R. REP. 104-202, 40, 1996 U.S.C.C.A.N. 527, 545. That rule makes sense because, as Helms-Burton's Conference Report explains, Congress was concerned that Helms-Burton would incentivize transfers of claims, and therefore, barred new acquisitions "in part, to eliminate any incentive that might otherwise exist to transfer claims to confiscated property to U.S. nationals in order to take advantage of the remedy created by this section." 142 Cong. Rec. H1645-02, H1660, 1996 WL 90487. To remedy that problem, Congress adopted a strict no-new-acquisitions rule. *Id.*

In sum, there is no reason to doubt that Helms-Burton means what it says:

> In the case of property confiscated before March 12, 1996, a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996.

22 U.S.C. § 6082(a)(4)(B). Since Bengochea's purported claim was acquired long after the operative date, his claim fails as a matter of law.

B. Bengochea's Claims Fail Because Bengochea Acquired His Claim, If At All, After March 12, 1996

Giving Helms-Burton its plain meaning, this is an easy case. Even assuming that Desiderio's bequest were effective (which it was not), Bengochea would have acquired ownership of his claim after March 12, 1996, and thus, his suit fails.

Plaintiff is suing on a claim related to property confiscated in 1960. D.E. 1 ¶ 8. Thus, to maintain a cause of action, he must have acquired his claim before March 12, 1996. 22 U.S.C. § 6082(a)(4)(B). But he did not. As demonstrated above, in January 2000, Bengochea's cousin, Desiderio, executed a will that left all of his Cuban property, including his shares in La Maritima S.A.—the property that underlies Bengochea's claim here—to Bengochea. Desiderio died on August 27, 2000. Accordingly, because Desiderio owned the claim to the shares in 2000, Plaintiff could not have timely acquired his claim.

Desiderio's will conclusively shows that Bengochea did not acquire his interest in a claim to La Maritima shares until after 1996. Indeed, the will demonstrates that as of January 25, 2000—the date of the will's execution—Desiderio (and not Bengochea) owned the claim to the shares. D.E. 52-1 at 4 (quoted in full above). Put simply, Desiderio's will shows that in 2000, when the will was executed, Desiderio owned the claim to 3,300 shares of La Maritima stock that underlie Bengochea's claim here. Indeed, the claim to the 3,300 shares that Desiderio attempted to bequeath to Bengochea exactly correspond to the 82.5% interest that Bengochea now alleges he holds. After all, the Foreign Claim Settlement Commission document that Bengochea attached to his Complaint—and which is therefore part of the Complaint—notes that La Maritima had 4,000 outstanding shares. D.E. 1-1 at 4 ("Since there were 4,000 shares of outstanding capital stock of the Cuban Corporation . . . ."). The 3,300 shares (and claim thereto) that Desiderio attempted to give to Bengochea at his death in August 2000 thus exactly match the 82.5% interest that Bengochea bases his suit on here. Indeed, the wills are the only documents identified by Plaintiff in his Rule 26 disclosure as supporting ownership of the claim. Gray Decl. Exh. 2. Accordingly, Bengochea's ownership interest, if any, was derived from Desiderio. But because

Desiderio's will plainly demonstrated that Bengochea acquired ownership of his claim after March 12, 1996 the Complaint must be dismissed.[15]

This result is compelled by the plain text of the statute, which as described above is unambiguous and thus ends the analysis. *Harris*, 216 F.3d at 976. But the result is, in any event, neither unfortunate nor harsh; rather, it was precisely the result that Congress intended under these circumstances.[16] Desiderio was a Costa Rican national. Aguero Aff. Ex. 7 at 18. His claims to Cuban assets confiscated by the Castro regime were not cognizable under Helms-Burton in his home country of Costa Rica, so he attempted to transfer them to his cousin Bengochea, a U.S. citizen, who could potentially pursue a Helms-Burton claim to recover for the value of these assets. But, as mentioned, Congress enacted the bar on transfers after the enactment of the law (March 1996) precisely because it wanted to "eliminate any incentive that might otherwise exist to transfer claims to confiscated property to U.S. nationals in order to take advantage of the remedy created by this section." 142 Cong. Rec. H1645-02, H1660, 1996 WL 90487. And in order to eliminate that incentive, Congress enacted a broad, prophylactic rule that "the U.S. national had to have owned the claim to the property before the date of enactment in order to bring an action under this section." H.R. REP. 104-202, 40, 1996 U.S.C.C.A.N. 527, 545. Bengochea was such a U.S. national, but he did not own the claim before the date of enactment; rather, his Costa-Rican-

[15] To the extent the rule of evidence even apply here, the statements in Desiderio's will concerning Desiderio's ownership of the property are excepted from the rule against hearsay under Fed. R. Evid. 803(15), which excepts: "A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose." *See also* Fed. R. Evid. 803 Adv. Comm. Note (noting that "similar provisions [to 803(15)] are contained in… California Evidence Code § 1330," which applies to "Evidence of a statement contained in… a will"); *Kirwan v. Garber*, 366 F. Supp. 3d 818, 831 n.4 (W.D. Tex. 2019) ("Because [the will] contains statements that affect an interest in property, it falls under an exception to hearsay. Fed. R. Evid. 803(15)."); David F. Binder, *Hearsay Handbook* § 23:1 (4th ed. Aug. 2019) ("An assertion in a document affecting an interest in property, such as a deed or a will, is excepted from the hearsay rule in the federal courts…").

[16] Indeed, by the time of Helms-Burton, it would have been clear to Congress that the Foreign Claim Settlement Commission had already determined that certain types of testamentary dispositions could have voided claims. For example, in *In re Jerko Bogovich*, the brothers, sisters, nephews, nieces, and testamentary heirs of Mr. Bogovic attempted to assert his claims before the Foreign Claims Settlement Commission because they had inherited the claims in Mr. Bogovic's will. FCSC Docket No. Y-1757. The Commission rejected the claims, finding that the claims could not be raised following inheritance by a foreign national. *Id*.

national cousin, Desiderio, owned the claim, and he (post-enactment) attempted to transfer the claim to Bengochea so that he could take advantage of Helms-Burton. This is the precisely the type of claim that Congress sought to preclude in enacting Section 6082(a)(4)(B).

III. THE WILLS AND PROBATE DOCUMENTS MAY BE CONSIDERED ON A MOTION FOR JUDGMENT ON THE PLEADINGS

This Court may properly consider the wills and related probate documents that conclusively demonstrate that Bengochea failed to acquire any interest in a claim to La Maritima, or alternatively, that he acquired his interest in La Maritima after August 27, 2000 at this stage in the litigation without converting Carnival's motion to a motion for summary judgment, for two independent reasons. *First*, the Court may take judicial notice of the probate records because they are matters of public record whose accuracy cannot be reasonably disputed. *Second*, the claims are essential to the determination of Plaintiff's claim.

A. This Court May Take Judicial Notice of the Documents

This Court may take judicial notice of the wills and probate records, which are matters of public record. *See* Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). "Public records are among the permissible facts that a district court may consider" "without converting a motion to dismiss into a motion for summary judgment." *Universal Express, Inc. v. U.S. S.E.C.*, 177 F. App'x. 52, 53 (11th Cir. 2006); *see also U.S. ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 812 (11th Cir. 2015) ("Courts may take judicial notice of publicly filed documents, such as those in state court litigation, at the Rule 12(b)(6) stage"); *Regisme v. Regisme*, No. 17-80849-CIV, 2017 WL 6388919, at *2 (S.D. Fla. Aug. 4, 2017) (taking judicial notice of full docket); *Thomas v. Alcon Labs.*, 116 F. Supp. 3d 1361, 1365 (N.D. Ga. 2013) ("The Court is permitted to take judicial notice of documents made publicly available by a government entity." (quotation omitted)). The same rule applies to foreign public records. *E.g.*, *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 411 (6th Cir. 2006); *Luxpro Corp. v. Apple Inc.*, C 10-03058 JSW, 2011 WL 1086027, at *3 (N.D. Cal. Mar. 24, 2011).

Because courts can consider public records on a motion to dismiss, courts have regularly and explicitly taken judicial notice of publicly available probate records similar to those here. *See, e.g.*, *Markland v. Insys Therapeutics, Inc.*, 270 F. Supp. 3d 1318, 1323 (M.D. Fla. 2017) (taking

judicial notice of "publicly filed probate records" in evaluating motion to dismiss); *Ellis v. Warner*, 2017 WL 634287, at *3 n.3 (S.D. Fla. Feb. 16, 2017) (considering probated will on a motion to dismiss because "[c]ourts may take judicial notice of publicly filed documents. . . at the Rule 12(b)(6) stage"); *United States v. Paulson*, 204 F. Supp. 3d 1102, 1108 (S.D. Cal. 2016) ("Judicial notice of the Probate Court documents is appropriate, as documents publicly available and not subject to reasonable dispute") (collecting cases); *Lewis v. Parker*, 67 F. Supp. 3d 189, 195 n.6 (D.D.C. 2014) ("Since these [probate court documents] are public documents filed on a court docket, the Court may take judicial notice of such documents without converting the motion to one for summary judgment.") (collecting cases).

When taking judicial notice of court records, a court can use those records to "recognize[] the 'judicial act' that the order represents[.]" *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994). In other words, courts may consider judicial records to the extent they are not subject to reasonable dispute, but "a court cannot take judicial notice of the ***factual findings*** of another court." *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830 (5th Cir. 1998) (emphasis added) (citing *Jones*). Thus, for example, in *Gubanova v. Miami Beach Owner, LLC*, 12-22319-CIV, 2013 WL 6229142, at *2 (S.D. Fla. Dec. 2, 2013) (Rosenbaum, J.), the Court took judicial notice of Florida probate records to establish, on a motion to dismiss, that the plaintiff had received authorization to sue. *See also Douglas v. Bayview Loan Servicing, LLC*, CA 11-00495-KD-C, 2012 WL 345364, at *3 (S.D. Ala. Jan. 13, 2012) (taking judicial notice of probate records to show that loan assignments had occurred), *report and recommendation adopted*, 2012 WL 345363 (S.D. Ala. Feb. 1, 2012); *Allstate Ins. Co. v. Estate of Robert M. Levesque*, 8:08-CV-2253-T33EAJ, 2010 WL 2978037, at *1 (M.D. Fla. July 19, 2010) (taking judicial notice of state court records for the purpose of "recognizing the judicial act that the case[s] represent").

The same rationale applies here. Because these probated wills and related files are publicly-available judicial documents whose authenticity cannot be reasonably questioned, this Court should take judicial notice of them and consider them in deciding this motion. Moreover, under well-worn Eleventh Circuit law, the Court can consider the New York and Costa Rican probate records to "recognize the judicial act" that the orders represent. *Jones*, 29 F.3d at 1553. That is, the Court can look to the final orders from the New York and Costa Rican probate proceedings to determine whether Bengochea appeared in the proceedings, what assets were distributed in those proceedings, and thus, whether Bengochea received any property rights after

each proceeding. These facts are apparent from the judicial record itself, rather than factual findings of the Court that could be subject to reasonable dispute, and accordingly, are subject to judicial notice.

B. The Documents Are "Central" to Benghochea's Claim and Are Properly Considered on a Motion for Judgment on the Pleadings

This Court may also consider the documents for an additional, independent reason. "[O]n a motion for judgment on the pleadings, documents that are not a part of the pleadings may be considered, as long as they are central to the claim at issue and their authenticity is undisputed." *Perez*, 774 F.3d at 1340 n.12; *see also Seneca Specialty Ins. Co. v. McMurtry*, 13-61773-CIV, 2013 WL 12051725, at *1 (S.D. Fla. Dec. 13, 2013) (citing *Horsley v. Feldt*, 304 F.3d 1125, 1133-34 (11th Cir. 2002) ("The Court may . . . consider documents . . . attached to the answer if they are central to the plaintiff's claim and undisputed"). Documents are "central" to a claim where they are "a necessary part" of the claim, *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005), and where "it would be impossible for the District Court to evaluate properly . . . a crucial issue" without considering the document, *Bamert v. Pulte Home Corp.*, 445 F. App'x. 256, 267 (11th Cir. 2011). Put differently, in making this determination, courts have "considered whether the plaintiff would have to offer the document to prove his case." *Lockwood v. Beasley*, 211 F. App'x. 873, 877 (11th Cir. 2006).

Here, in order to prevail on his claim for liability under Helms-Burton, Bengochea must prove that he is a "United States national who owns the claim to such property." 22 U.S.C. § 6082(a)(1)(A). This is a necessary element of the claim, rather than an affirmative defense. *See* Order Denying Carnival Corporation's Motion to Dismiss, D.E. 41, at 9 ("The Helms-Burton Act also requires the plaintiff to show that he 'owns the claim' to the confiscated property."). Thus Plaintiff must present evidence establishing his ownership of the claim, which will necessarily include the wills and probate records. Indeed, Bengochea listed both wills in his Rule 26(a)(1)(A)(ii) disclosures. Gray Decl. Exh. 2. The wills and probate files are "central" to his claim because "it would be impossible for the District Court to evaluate properly" the issue of whether Bengochea owns a claim to confiscated property without these documents, and he will eventually "have to offer the document[s] to prove his case." *Bamert*, 445 F. App'x at 267; *Lockwood*, 211 F. App'x at 877. For this reason, courts in this Circuit routinely consider documents establishing ownership to be "central" to claims that turn on whether the plaintiff is the

rightful owner. *See, e.g.*, *Lluis v. Bank of Am.*, 2013 WL 12157852, at *2 (M.D. Fla. Apr. 8, 2013) ("In this case, the Second Warranty Deed, at the very least, is central to Plaintiff's claim as title ownership is necessary for stating a claim to quiet title.")[17]; *Smith v. Bank of Am.*, N.A., 2012 WL 13013586, at *3 n.2 (N.D. Ga. July 17, 2012) ("[T]he ownership and validity of the assignment of Plaintiffs' mortgage is central to Plaintiffs' claim for a declaration that Defendants cannot foreclose on the Property."); *Bailey v. Deutsche Bank Nat'l Tr. Co.*, 2018 WL 6164336, at *2 (N.D. Ga. July 9, 2018) (considering publicly-filed deed given that "Deutsche Bank's ownership of the Property is central to Plaintiffs' claims").

Thus, on two independent grounds, the Court can consider the wills and probate files now, making judgment on the pleadings proper.

However, in the alternative, however, if this Court disagrees that it can consider the probated wills and related documents at this stage in the litigation, either on judicial notice or as "central" to the complaint, Carnival respectfully requests that this Court elect to convert this motion to a motion for summary judgment under Fed. R. Civ. P. 12(d) and set an expedited briefing schedule to give Bengochea "a reasonable opportunity to present all the material that is pertinent to the motion," without prejudice to Carnival's ability to file a motion for summary judgment following discovery. *Cf.* S.D. Fla. Loc. R. 7.1(c)(2) (prohibition on multiple motions for summary judgment "not triggered when, as permitted Fed. R. Civ. P. 12(d), the Court elects to treat a [12(c)] motion… as a summary judgment motion"). Bengochea plainly does not need additional discovery on the issue; he, not Carnival, possesses all the documents necessary to show that he owns his claim and when he acquired such ownership. Moreover, Bengochea has already revealed in his Rule 26 initial disclosures that it is the very wills at issue in this motion on which he bases his ownership of a claim to the subject property. The facts relevant to decide this motion, whether as a motion for judgment on the pleadings or as a motion for summary judgment, are not disputed.

CONCLUSION

For the foregoing reasons, Carnival respectfully requests that the Court grant its Motion for Judgment on the Pleadings and dismiss Plaintiff's claim with prejudice.

[17] The court also took judicial notice of the documents, which were publicly filed, as alternative grounds for consideration of the document as "central" to the complaint. *Lluis*, 2013 WL 12157852 at *2 n.1.

Dated: November 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record via the court's CM/ECF System on November 15, 2019.

By:*/s/ Stuart H. Singer*
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