UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 1:19-cv-21725-JLK

JAVIER GARCIA-BENGOCHEA,

Plaintiff,

vs.

CARNIVAL CORPORATION, d/b/a
Carnival Cruise Lines, a foreign corporation,

Defendant.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

Plaintiff Javier Garcia-Bengochea ("Dr. Garcia" or "Plaintiff") files this response in opposition to the motion for judgment on the pleadings (the "Motion," ECF No. 54)[1] filed by Defendant Carnival Corporation ("Defendant" or "Carnival"), as follows.

INTRODUCTION

Carnival's most recent filings attempt, unsuccessfully, to discredit and delegitimize Dr. Garcia and his family history. But the only credibility lost is Carnival's, and the Court should deny the Motion for three reasons. First, Carnival submits over 500 pages of foreign evidence and multiple expert affidavits that it wishes the Court to consider in adjudicating a motion governed under the Rule 12(b)(6) standard. The Court already admonished Carnival that evidence is improper at the pleading stage. (ECF No. 41 at pp. 9-10.) The Motion should be summarily denied for this reason alone. Second, Carnival's attack on Dr. Garcia's inheritance is meritless. Carnival's experts present an incomplete, simplistic, and misleading analysis of Costa Rican probate law. Plaintiff, in fact, inherited his claim and has standing to bring this case. And, third, Carnival requests the Court to construe the LIBERTAD Act, 22 U.S.C. § 6021 *et seq.* (the "Act"), in a manner that would both render Title III's cause of action a nullity and require dismissal of nearly all certified claimants. This interpretation contravenes prevailing Eleventh Circuit and Supreme Court precedent, and is incompatible with Congress' clearly expressed belief that "no court should dismiss a certification in an action brought under this title." J. Stmt. of Comm. of Conf. for LIBERTAD Act, 142 Cong. Rec. H1645-02 at H1661. The Court should reject Carnival's construction of 22 U.S.C. § 6082(a)(4)(B).

* * *

Dr. Garcia is a United States citizen who inherited a certification of the United States Government that Fidel Castro stole property from his American ancestor. The subject of his claim is commercial waterfront property in Santiago de Cuba (the

[1] All pincites to the Motion and other court filings refer to the file-stamped pagination found in the header of those documents.

"Subject Property"), that was confiscated from his family in 1960 by the Cuban Government. The claim comprises an 82.5% interest in the Subject Property, which Dr. Garcia inherited by virtue of the death of his cousins, brothers Alberto and Desiderio Parreño. In 1972, each brother possessed a claim to a 41.25% interest in the Subject Property. Because Alberto was a United States citizen, 32.5% of his claim was certified by the Foreign Claims Settlement Commission ("FCSC"). On his untimely death in 1972, and consistent with prevailing Treasury Department regulations,[2] Alberto effectively bequeathed his claim to Desiderio, giving Desiderio an 82.5% claim to the Subject Property. When Desiderio died in 2000, he effectively bequeathed that claim to Dr. Garcia, his cousin and godson.

Nearly sixty years after confiscation, Dr. Garcia is the personification of a Title III plaintiff. He has standing to bring this case and respectfully requests that the Court deny the Motion.

LEGAL STANDARD

"After 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). Such motions are "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). Courts, thus, "accept the facts in the complaint as true and view them in the light most favorable to the nonmoving party." *Ortega v. Christian*, 85 F.3d 1521, 1524 (11th Cir. 1996); *Millennium Labs., Inc. v. Aegis Sciences, Corp.*, No. 11-cv-20451, 2011 WL 4007862, at *1 (S.D. Fla. Sept. 8, 2011) (King, J.) (denying Rule 12(c) motion). Motions for judgment on the pleadings fail unless "no issues of material fact exist, and the movant is entitled to judgment as a matter of law." *Ortega*, 85 F.3d at 1524.

MEMORANDUM OF LAW

The Court should deny the Motion for three reasons. First, Carnival's filing—including the over 500 pages of foreign evidence and three affidavits, two of which are from purported experts on the law—is even more procedurally improper than

[2] *See* 31 C.F.R. § 250.4(b).

Carnival's earlier motion to dismiss, which was governed by the same standard applicable here and was denied for that very reason. Second, Carnival misstates the applicable Costa Rican law; Plaintiff, in fact, inherited his claim to the Subject Property, giving him standing to proceed with this case. And, third, Title III plaintiffs may sue on claims inherited after March 12, 1996, and Carnival's alternative construction will render the cause of action a nullity.

I. Carnival's Motion is Procedurally Improper.

Although nominally styled as a "Motion for Judgment on the Pleadings," it is apparent that Carnival is actually requesting summary judgment. Submitted with the Motion are over 500 pages of evidence and three affidavits, two of which are from purported experts who desire to teach the Court about how to interpret law. (*See* ECF Nos. 55-57.) But Carnival's Motion is governed by the same standard as a motion to dismiss, *Carbone*, 910 F.3d at 1350, meaning the Court should summarily deny Carnival's arguments for the same reasons they were denied previously by this Court. *See Garcia-Bengochea v. Carnival Corp.*, -- F. Supp. 3d -- , 2019 WL 4015576, at *4-*5 (S.D. Fla. 2019); *see also Perez v. Wells Fargo, N.A.*, 774 F.3d 1329, 1338 (11th Cir. 2014) ("But [Defendant's] characterization of its motion as a motion for judgment on the pleadings did not somehow change the nature of the relief that [Defendant] actually sought.").

Carnival knows this, but filed the Motion anyway. (*See* Mot. at p. 13 (quoting *Carbone*, 910 F.3d at 1350).) The reason is obvious.

By improperly submitting evidence beyond the four corners of the Complaint, Carnival hopes to force the conversion of this Motion into a motion for summary judgment under Rule 12(d), at a stage in the proceedings where Plaintiff has not yet had access to any discovery.[3] (Mot. at p. 28 (citing Fed. R. Civ. P. 12(d); S.D. Fla. L.R.

[3] Carnival's delay strategies in complying with discovery obligations are well documented in this district. *See, e.g.*, *Ledet v. Carnival Corp.*, No. 18-cv-24737, D.E. 115 at pp. 16-17 (S.D. Fla. Nov. 11, 2019) (Louis, Mag. J.) ("Carnival's conduct demonstrated bad faith" and ordering adverse inference for spoliation); *Terry v. Carnival Corp.*, 17-cv-21036-JLK, D.E. 224 at p. 4 (S.D. Fla. June 12, 2019) (Becerra, Mag. J.) (adverse inference for

7.1(c)(2)).) The Court, of course, is under no compulsion to oblige. *See* Fed. R. Civ. P. 12(d) (court may exclude matters outside the pleadings and deny request to convert Rule 12(c) motion); *McMahon v. Presidential Airways, Inc.*, No. 6:05-cv-1002-Orl-28GJK, 2008 WL 11430021, *2 (M.D. Fla. Nov. 6, 2008) ("Under a plain reading of Rule 12(d), a district court, at its discretion, may exclude the matters outside the pleadings and maintain the motion as a request for judgment on the pleadings," and denying conversion request) (citing 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1371 (3d ed. 2004) ("The district court remains free to refuse to accept materials outside the pleadings in order to keep the motion under Rule 12(c) rather than to convert it into a Rule 56 motion.")).

The Court should exclude Carnival's improper evidentiary submissions, (ECF Nos. 55-57), and deny the Motion for the same reasons it denied Carnival's motion to dismiss. *Garcia-Bengochea*, -- F. Supp. 3d -- , 2019 WL 4015576, at **4-5 ("Plaintiff adequately alleges that he owns a claim to the confiscated property."). Nothing in the pleadings has changed to dictate a different result.

II. Plaintiff Rightfully Inherited His Claim.

Dr. Garcia is the owner of a claim representing an 82.5% interest in a corporation and its property in the Port of Santiago de Cuba ("La Maritima, S.A.") that was confiscated by the Cuban Government on October 13, 1960, of which 32.5% of that claim was certified by the FCSC ("the certified claim"). (*See* ECF No. 1 at

---

violating Court order to produce documents); *Williford v. Carnival Corp.*, 2019 WL 2269155 (S.D. Fla. May 28, 2019) (Goodman, Mag. J.) (granting sanctions for spoliation); *Kartagener v. Carnival Corp.*, 380 F. Supp. 3d 1290, 1299 (S.D. Fla. 2019) (Louis, Mag. J.) (imposing sanctions for repeated failure to prepare corporate representatives for deposition); *Nelson v. Carnival Corp.*, 2019 WL 2205899, *3-*4 (S.D. Fla. May 9, 2019) (Louis, Mag. J.) (same); *Stewart v. Carnival Corp.*, 2019 WL 1440902 (S.D. Fla. Feb. 19, 2019) (Altonaga, J.) (reserving jurisdiction to "summarily deny" summary judgment motion for Carnival's "prejudicial delayed disclosure" of evidence); *Sosa v. Carnival Corp.*, 2018 WL 6335178 (S.D. Fla. Dec. 4, 2018) (Goodman, Mag. J.) (imposing sanctions for spoliation).

¶¶ 6, 7, 10; ECF No. 1-1 at pp. 3-6, 10-11.)[4] Dr. Garcia inherited his ownership to that 82.5% interest (including the certified claim) in 2000, upon the death of his cousin and godfather Desiderio Parreño through a legacy from Desiderio Parreño that was specifically described in his Last Will and Testament. (*See* Exhibit 24 to the Decl. of Andres Jesus Vargas Siverio ("Dr. Vargas") at ECF No. 60-24.)

Carnival has attempted to refute Dr. Garcia's inheritance of the claim through the filing of two affidavits, one from Esteban Agüero, a Costa Rican lawyer, and another from Keith Rosenn, an emeritus professor of law at the University of Miami. Neither of these individuals had any involvement in the drafting of the will or the Desiderio Parreño Probate Proceedings. But Mr. Agüero and Professor Rosenn nonetheless purport to instruct the Court on how it should interpret the laws of Costa Rica applicable to Dr. Garcia's inheritance from Desiderio Parreño.[5] Their instruction, of course, is not necessary, as "in issues of law before the court, there is one expert – the judge." *Puyeh v. Bascom Palmer Eye Institute*, No. 12-cv-23580, 2014 WL 11394983, at *5 (S.D. Fla. Aug. 4, 2014) (King, J.).

To provide the Court the authorities necessary to confirm Dr. Garcia's inheritance, Dr. Garcia has filed the declaration of Dr. Vargas. (*See* Vargas Decl., ECF No. 60.) Dr. Vargas is an attorney and was the Notary Public who prepared the Last Will and Testament of Desiderio Parreño and before whom Desiderio Parreño signed it. He also represented another legatee and appeared in the Desiderio Parreño Probate Proceedings in San Jose, Costa Rica. Dr. Vargas has been an attorney-at-law, notary public, and a member of the Bar of Costa Rica since 1985. He has practiced extensively in the areas of succession planning, trusts, and estates. Dr.

---

[4] Alberto Parreño, a United States citizen and cousin of Dr. Garcia, owned 1,300 shares out of a total of 4,000 shares of La Maritima, S.A., representing a 32.5% interest, at the time it was confiscated. (ECF No. 1-1 at p. 4.) There is no dispute that Alberto Parreño effectively bequeathed this 32.5% interest on his death in 1972 to his brother Desiderio Parreño. (*See* Mot. at p. 11.)

[5] Some of the undersigned know Professor Rosenn and respect his many years of distinguished teaching at the University of Miami. But, with all due respect to Professor Rosenn, he is not a probate lawyer or a member of the Bar of Costa Rica. Nor is he an expert on the laws of Costa Rica, much less an expert on the laws of succession in that country.

Vargas conducted an exhaustive examination of the court file obtained by his law firm of the Desiderio Parreño Probate Proceedings, a certified copy of which he has attached as Exhibit 2 to his declaration. (ECF No. 60-2.) Dr. Vargas' declaration provides extensive citations to legal authorities along with translated copies of those authorities, in full, to allow the Court to read and determine for itself the issues of law applicable to Dr. Garcia's inheritance.

Dr. Vargas' declaration rebuts and disputes numerous conclusions presented by Carnival that are material to the issue of Dr. Garcia's inheritance of his legacy from Desiderio Parreño, including:

> The plain reading of Article 917 of the Civil Procedure Code, which Mr. Agüero cites in paragraph 9, is that "the inheritance will pass to whomever corresponds" unless a person makes as an appearance to assert a better or equal right to an inheritance, not that the inheritance will not be passed to whomever it corresponds if that heir does not make an appearance. This interpretation is consistent with the judge's order of January 1, 2001 (Exhibit 22), which can be paraphrased as follows: Whereas notice was published and whereas no one contested the named heirs and legatees, said legatees are declared the legatees and said heirs are declared the sole and universal heirs. No one entered an opposition after notice was published; accordingly, the inheritance passed to Dr. Javier Garcia-Bengochea.

(*See* Vargas Decl. at ¶ 31.) Further,

> I do not agree with Mr. Agüero's statement in paragraphs 10, 11 and 27 that an heir or legatee must make an appearance. As I explained earlier, a person claiming or pretending to claim the status of heir or legatee or having the right to be declared as such is not required to make an appearance at the proceedings unless he or she is contesting the inheritance and those heirs and legatee do not waive their right to an inheritance simply because they did not formally accept the inheritance or the legacy. *See* paragraphs 19 to 23 *supra.* As a legatee whose legacy was not contested, Dr. Javier García-Bengochea did not need to appear and accept his legacy.

(*Id.* at ¶ 32.)

After a thorough examination of the court file of the Desiderio Parreño Probate Proceedings, of which he appeared as counsel representing another legatee, Dr.

Vargas provides the following conclusion regarding Dr. Garcia's inheritance of his legacy:

> I conclude, based on my examination of the will of Desiderio Parreño and the Desiderio Parreño Probate Proceedings that, under the laws of Costa Rica at the time of Desiderio Parreño's death and of the administration of the Desiderio Parreño Probate Proceedings, that Javier García-Bengochea Bolivar inherited his legacy by operation of law at the time of the death of Desiderio Parreño and was not required to do anything further, including accepting the legacy.
>
> Specifically, the legacy included: ". . . any goods, properties or rights in Cuba appropriated by Fidel Castro's communist government but which are the property of the testator and may some day be recovered. These properties and rights include, among others . . . three thousand three hundred registered shares of 'La Maritima, Sociedad Anonima,' concessions, docks and warehouses in the Port of Santiago de Cuba; of which fifteen hundred shares were issued in the name of the late Maria Velásquez, the widow of Parreño; nine hundred under the name of the late Alberto Parreño Velásquez; and nine hundred under the name of Desiderio Parreño Velásquez, who inherited the others upon the deaths, respectively, of his mother and his brother, who made their wills in his favor . . ."

(*Id.* at ¶¶ 41-42.)

This specific legacy bequeathed by Desiderio Parreño to his legatee Dr. Garcia represents the claim for the 82.5% interest in La Maritima that Dr. Garcia is pursuing in this lawsuit, of which 32.5% is the certified claim that Desiderio Parreño inherited from his brother Alberto Parreño, the cousin of Dr. Garcia and a United States citizen at the time of confiscation.

III. Section 6082(a)(4)(B) Does Not Bar Plaintiff's Inheritance of a Title III Claim After March 12, 1996.

For its final argument, Carnival contends that it is not liable to anyone for trafficking in the Subject Property because Plaintiff inherited his claim in 2000, upon the death of his cousin, Desiderio Parreño. (Mot. at pp. 18-25.) Specifically, Carnival argues that "this is an easy case" because, in its opinion, section 6082(a)(4)(B) requires Plaintiff to have inherited his claim "before March 12, 1996." (*Id.* at pp. 18, 22.) This issue, however, is not as simple as Carnival suggests.

Carnival's interpretation requires the Court to review selected words in Title III in a vacuum, without consideration of the Act as a whole and the context and purpose of the law. Indeed, as used in section 6082(a)(4)(B), the term "acquires" is ambiguous with respect to its application to transfers of claims by operation of law, *e.g.* inherited claims. And the context of Title III confirms that section 6082(a)(4)(B) was not intended to bar recovery on inherited claims.

In contrast, the statutory interpretation advanced by Carnival is incompatible with the text and purpose of the Act, as well as its congressional intent. Under Carnival's theory, individual claimants—the overwhelming majority of claim owners—will be barred from recovering under the Act. Tethering the enforceability of Title III to the death of original claim holders, as Carnival urges this Court to do, would render the cause of action a nullity—a result strongly disfavored under Eleventh Circuit and Supreme Court precedent. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007); *Medberry v. Crosby*, 351 F.3d 1049, 1061 (11th Cir. 2003).

Finally, Plaintiff's interpretation of section 6082(a)(4)(B) comports with long-standing Supreme Court precedent permitting takings claims to transfer "by operation of law," including through inheritance.

A. Section 6082(a)(4)(B) is Silent Concerning Claims Transferred by Inheritance.

Carnival urges this Court to cherry pick selected portions of the statutory text without consideration of the surrounding provisions and the purpose of the statutory scheme. But, "[t]he Supreme Court has described statutory construction as 'a holistic endeavor.'" *Wachovia Bank, N.A. v. United States*, 455 F.3d 1261, 1266-67 (11th Cir. 2006) (quoting *Koon Buicks Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004)). And reading Title III as a whole, it is clear that section 6082(a)(4)(B), including its use of the term "acquires," does not encompass claims transferred by operation of law after March 12, 1996, such as those passed through inheritance.

A word may be unambiguous in some contexts but nonetheless be ambiguous within a particular statutory setting. *See id.* at 1267 ("A word is not a crystal,

transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.") (quoting *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.)); *Helvering v. Reynolds*, 313 U.S. 428, 433 (1941) (term "acquisition" was ambiguous as used in tax code). That is the case here.[6] The term "acquires" in section 6082(a)(4)(B) is ambiguous with respect to its application to transfers of claims by operation of law, *e.g.* inherited claims. The ambiguity derives from the practical reality of how claims are passed from one generation to another.

To begin, "[t]he text of [Title III] does not define the term ['acquires'] or contain any language suggesting that" it encompasses inheritance. *McCarthy v. Bronson*, 500 U.S. 135, 139 (1991). And whereas the traditional understanding of the word "acquires" connotes an affirmative action taken to obtain property, to inherit is to simply receive; it is a passive concept. *Compare* Black's Law Dictionary (10th ed. 2014) (defining "acquire" to mean "To gain possession or control of; to get or obtain."); Oxford Dictionary *available at* https://www.lexico.com/en/definition/acquire (last visited Dec. 10, 2019) (defining "acquire" to mean to "Buy or obtain (an asset or object) for oneself") *with* Black's Law Dictionary (10th ed. 2014) (defining "inherit" to mean "To receive (property) by bequest or devise.").

Yet the context of Title III confirms that section 6082(a)(4)(B) was not intended to bar recovery on inherited claims. *United States v. DBB, Inc.*, 180 F.3d 1277, 1283 (11th Cir. 1999) (courts "should 'consider the purpose, the subject matter and the condition of affairs which led to [a statute's] enactment, and so construe it as to effectuate and not destroy the spirit and force of the law'"). Confiscation occurred 36 years prior to the Act's passage in 1996, at a time when many original claimants had already died and their claims had passed to their heirs. Congress is thus reasonably presumed to have known that Title III would be largely enforced by the heirs of

---

[6] In every statutory interpretation, "the first step is to determine whether the statutory language has a plain and unambiguous meaning by referring to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Bautista v. Star Cruises*, 396 F.3d 1289, 1295 (11th Cir. 2005).

deceased claimants, both in 1996 and going forward. *See Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) (reciting the "well-settled presumption that Congress understands the state of existing law when it legislates").

This understanding is reflected in the text of Title III. The Act's definition of "Property" closely mirrors that of the International Claims Settlement Act of 1949 (the "ICSA"). *Compare* 22 U.S.C. § 6023(12)(a) *with id.* § 1643a(3). But in drafting Title III, Congress expanded that definition to permit recovery on "future" or "contingent rights" in confiscated property. *Id.* § 6023(12)(a). This was a conscious legislative choice. It evidences an intent to depart from FCSC precedent under the ICSA barring certification of inheritance interests,[7] by permitting heirs of claimants to vindicate inherited "future" or "contingent" rights under Title III.

Moreover, prevailing Treasury regulations, in force since the 1960s, have long recognized the rights of heirs of deceased claimants to recover on certified claims by way of inheritance. Under 31 C.F.R. § 250.4(b)(2), "successors in interest" of a certified claimant, including their "legatees or heirs as determined by an appropriate court by the law of [the deceased's] residence," may inherit certified claims. As demonstrated in Section II, *supra* pp. 5-8, Plaintiff is such a "successor in interest." He inherited the claim and all rights that accompany it. Congress is presumed to have understood that certified claims, like Plaintiff's, do not die with their owners and to have drafted Title III in recognition of that fact. *Bowen*, 487 U.S. at 896.

B. Carnival's Interpretation of Section 6082(a)(4)(B) Will Render Title III a Nullity.

In discerning a statute's meaning, courts must ensure that the chosen construction "produces a substantive effect that is compatible with the rest of the law." *Wachovia*, 455 F.3d at 1268 (quoting *Koons*, 543 U.S. at 60); *Crandon v. United*

---

[7] *See* Foreign Claims Settlement Commission, *Section II Completion of the Cuban Claims Program Under Title V of the International Claims Settlement Act of 1949* at p. 76(m) (denying certification of inherited rights because "such rights do no vest until the moment of death") *available at* https://www.justice.gov/sites/default/files/fcsc/docs/final-report-cuba-1972.pdf.

States, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy").

To that end, courts should not lightly assume that Congress intended to enact a statute that "serve[s] no function at all" and is "a complete dead letter." *Medberry v. Crosby*, 351 F.3d 1049, 1060-61 (11th Cir. 2003); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 63-65 (2012) (describing the "Presumption Against Ineffectiveness"). Accepting Carnival's interpretation of section 6082(a)(4)(B) will ensure this result for Title III.[8]

Tethering the enforceability of Title III to the death of original claim holders, as Carnival urges this Court to do, will render the cause of action a nullity. Take, for example, certified claimants. Completed in 1972, the FCSC's Cuba Claims Program certified 5,913 claims of United States nationals.[9] Of those claims, 5,014, or approximately 85%, were certified to individuals and not corporations. Feinberg, *supra* n. 9. People die, and so have virtually all of the original certified claimants. Interpreting section 6082(a)(4)(B) to prohibit the passive inheritance of claims after March 12, 1996, would disenfranchise approximately **85%** of certified claimants.[10] Considering the priority treatment afforded to certified claimants under Title III, imputing such an intent to Congress is simply implausible. *See, e.g.,* 22 U.S.C. §§

---

[8] *See also DBB, Inc.*, 180 F.3d at 1283 (courts should not construe ambiguous statutes to produce absurd results); *id.* at 1281 (courts should not construe unambiguous statutes to produce absurd results); *Rubin v. Islamic Rep. of Iran*, 138 S. Ct. 816, 824 (2018) (canon against surplusage).

[9] (*See* Richard E. Feinberg, *Reconciling U.S. Property Claims in Cuba: Transforming Trauma into Opportunity*, Brookings Institute, Latin America Initiative (December 2015) at p. 19 *available at* https://www.brookings.edu/wp-content/uploads/2016/07/Reconciling-US-Property-Claims-in-Cuba-Feinberg.pdf; *see also* Foreign Claims Settlement Commission, Cuba Program, Index of Commission Decisions, *available at* https://www.justice.gov/fcsc/claims-against-cuba.).

[10] This number is likely conservative. It does not include the corporate certified claimants that closed from 1960 (confiscation) to 1996 (date of enactment), or closed, merged, reincorporated or changed names after March 12, 1996, all of which would appear to bar recovery under Carnival's interpretation of section 6082(a)(4)(B).

6082(a)(2), (a)(3)(A), (f)(2)(B); *id.* § 6083(a)(1); *see also* 142 Cong. Rec. H1645-02 at H1661 ("The committee of conference . . . believes that no court should dismiss a certification in an action brought under this title.").

This concern is not just theory. Indeed, the Court need look no further than the dockets of other cases pending in this district to illustrate the grave implications for Title III that would flow from prohibiting inheritance of claims after March 12, 1996. As of the date of this response, to the undersigned's knowledge twenty lawsuits have been filed under the LIBERTAD Act. Fourteen are brought by individual claimants. Responses have been filed in six of these cases (including this case). And in each of those cases, every Defendant has sought dismissal on the basis that the claim was inherited after March 12, 1996. (*See Trinidad v. Expedia, Inc.*, 19-cv-22629, D.E. 35 at p. 20 (S.D. Fla. Nov. 25, 2019) (Moreno, J.); *Gonzalez v. Amazon.com, Inc.*, 19-cv-23988, D.E. 13 at pp. 6-8, D.E. 14 at pp. 18-19 (S.D. Fla. Nov. 19, 2019) (Scola, J.); *Lopez Regueiro v. American Airlines Inc.*, 19-cv-23965, D.E. 28 at pp. 6-7, D.E. 30 at pp. 7-8 (S.D. Fla. Nov. 26, 2019) (Cooke, J.); *Garcia Bengochea v. Norwegian Cruise Lines Holdings, Ltd.*, 19-cv-23593, D.E. 26 at pp. 17-19 (S.D. Fla. Oct. 11, 2019) (King, J.); *Garcia Bengochea v. Royal Caribbean Cruises, Ltd.*, 19-cv-23592, D.E. 18 at Aff. Def. 2 (S.D. Fla. Oct. 4, 2019) (King, J.); *see also Sucesores de Don Carlos Nunez y Dona Pura Galvez, Inc. v. Societe Generale, S.A.*, 19-cv-22842, D.E. 29 at pp. 36-38 (S.D. Fla. Oct. 29, 2019) (Gayles, J.).) Congress could not possibly have intended to bar individual claimants—who comprise 85% of certified claimants and virtually all uncertified claimants—from recovering under Title III.

The Court should reject Carnival's interpretation of section 6082(a)(4)(B), which "would reduce the number of potential plaintiffs to almost zero, rendering [Title III] a dead letter." *United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007) (Thomas, J., for unanimous Court) (citing *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 475 (1911) ("We must have regard to all the words used by Congress, and as far as possible give effect to them.")). Otherwise Title III will "never be used or applied" and "[a]ll of Congress's time and effort in enacting [it] . . . would have been a complete waste." *Medberry*, 351 F.3d at 1061. It is implausible to ascribe to our

legislature such a "pointless" exercise. *Id.*; *Res. Trust Corp. v. Miramon*, 22 F.3d 1357, 1361-62 (5th Cir. 1994) ("[I]t simply makes no sense that Congress would establish a cause of action in one sentence and then render it a nullity in the next.").[11]

This is particularly so considering Congress actually drafted Title III with an end date in mind. That date was decidedly not the death of the last claim owner. Congress provided that rights granted under Title III "shall cease" upon a Presidential determination "that a democratically elected government in Cuba is in power." *Id.* § 6082(h)(1)(B). Thus, Congress intended Title III to terminate then—not once the last claim holder dies. Carnival's interpretation of section 6082(a)(4)(B) will render superfluous section 6082(h)(1)(B)'s termination clause, and the Court should decline such a construction of the Act. *Rubin*, 138 S. Ct. at 824 ("one of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant").

C. Established Takings Precedent Permits Claims to Transfer "By Operation of Law."

Plaintiff's interpretation of section 6082(a)(4)(B) comports with long-standing Supreme Court precedent permitting takings claims to transfer "by operation of law," including through inheritance. Because of the dearth of authority interpreting Title III, Plaintiff directs the Court to the well-established body of case law interpreting the Anti-Assignment Act as instructive to this analysis. *See Erwin v. United States*, 97 U.S. 392, 396-97 (1878); *United States v. Shannon*, 342 U.S. 288, 292 (1952).

For almost 150 years the Supreme Court has read an exception into the Anti-Assignment Act, 31 U.S.C. § 3727 (formerly 31 U.S.C. § 203), to permit the transfer of claims against the United States Government to another "by operation of law." *Erwin*, 97 U.S. at 397 (debtor's taking claim against the government passed by operation of law to creditor in bankruptcy). This is so, despite "[t]he language of the [Anti-Assignment Act], 'all transfers and assignment of any claim upon the United

[11] *F.D.I.C. v. Bates*, 42 F.3d 369, 372 (6th Cir. 1994) (same); *Res. Trust Corp. v. Gallagher*, 10 F.3d 416, 420 (7th Cir. 1993) (same).

States, or any part thereof, or any interest therein,' [being] broad enough (if such were the purpose of Congress) to include transfers by operation of law, or by will." *Goodman v. Niblack*, 102 U.S. 556, 560 (1880). Nevertheless, the Supreme Court has repeatedly excluded from the ambit of the statute the transfer of claims passing to heirs, devisees, and others by operation of law because such transfers are "not within the evil at which the statute aimed." *Erwin*, 97 U.S. at 397; *Seaboard Air Line Ry. v. United States*, 256 U.S. 655, 657 (1921).

"That interpretation has, for nearly a century [and a half], exempted all transfers by operation of law from the prohibition of" the Anti-Assignment Act. *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366, 375-76 (1949). This includes "transfers by will," as "justified by analogy to transfers by intestacy, which are exempt from the statute as being transfers by operation of law." *United States v. Shannon*, 342 U.S. 288, 292 (1952); *Webster v. United States*, 90 Fed. Cl. 107, 116 (2009) ("It has been deemed unwise to distinguish between transfers by will and transfers by intestacy for purposes of the Anti-Assignment Act."). As a result, recipients of claims transferred "by operation of law" are not denied "standing in" federal court. *Erwin*, 97 U.S. at 397; *Webster*, 90 Fed. Cl. at 116-17 (plaintiff had standing to sue under inherited partial interest in takings claim).

This doctrine remains good law today.[12] *See, e.g., United States v. Kim*, 806 F.3d 1161, 1170 (9th Cir. 2015) ("Despite the Anti–Assignment Act's plain language,

---

[12] Transfers "by operation of law" are also judicially implied exceptions to contractual anti-assignment clauses. *See Imperial Enters., Inc. v. Fireman's Fund Ins. Co.*, 535 F.2d 287, 291-93 (5th Cir. 1976) (insurance policy's anti-assignment provision did not bar transfers by operation of law, holding that "we interpret the policy in the insured's favor and so as to avoid a forfeiture, since the statutory merger caused no increase in the risks or hazards incurred by Fireman's Fund. Thus, it is our conclusion that the no-assignment clause should not be applied ritualistically and mechanically to forfeit coverage in these circumstances."); *Nat'l Am. Ins. Co. v. Jamison Agency, Inc.*, 501 F.2d 1125, 1128-30 (8th Cir. 1974) ("While it does not apply directly to this case, the existence of this exception for transfer by operation of law points once again to the fact that courts will not slavishly follow the rule against assignments without consent when the reason for that rule does not exist in the particular situation."); *Loomis v. Vernon Mut. Fire Ins. Co.*, 111 N.W. 2d 443, 444-45 (Wisc. 1961) ("Thus, our court in prior decisions has recognized that the words 'legal representatives' may, where appropriate, be given a construction that will embrace heirs, devisees and legatees. In our

the Supreme Court has carved out equitable exceptions to its application, noting that the Act 'must be interpreted in the light of its purpose'" to "not frustrate the ends to which the prohibition was directed. For instance, the Anti-Assignment Act will not void assignments that arise by operation of law, voluntary transfer by will, or general assignments for the benefit of creditors.") (quotation and citations omitted); *Webster*, 90 Fed. Cl. at 116 ("The inheritance [of the takings claim], whether by will or by intestacy, qualifies as an assignment by operation of law and falls outside of the Anti-Assignment Act's prohibition on assignment of claims.").

As in *Erwin* and its progeny, here, prohibiting inheritance of claims after March 12, 1996, "is not within the evil at which the statute aimed." *Erwin*, 97 U.S. at 397. In fact, such a prohibition will greatly promote the evil for which Title III was enacted to prevent. Congress drafted Title III to deprive Cuba of "badly needed financial benefit" derived from "trafficking in confiscated property" in order to "protect the claims of United States nationals" and "bring democratic institutions to Cuba." 22 U.S.C. § 6081(6). None of these purposes are furthered by interpreting section 6082(a)(4)(B) to bar nearly every claimant from enforcing Title III's civil remedy due to an ancestor's untimely death. As explained above, such an interpretation would render the Act toothless. Without any plaintiffs to enforce Title III, there would be nothing to "deter" traffickers from "exploiting Castro's wrongful seizures." 22 U.S.C. § 6081(11). The communist Cuban Government and its *American* business partners, like Carnival, would profit with impunity from property stolen from American citizens, without any recourse to the heirs of those victims and the claims they hold certifying that loss. To promote that result, is to promote "the evil at which the statute aimed." *Erwin*, 97 U.S. at 397.

---

opinion, when the words appear in fire insurance policies whose forms are prescribed by statute, they do include heirs, devisees and legatees. This must have been the legislative intent, as we cannot believe that it would favor forfeiture through inadvertence.").

The Supreme Court, with the support of a prevailing Treasury regulation, has also fashioned an exception for transfers occurring "by operation of law" to the Revenue Act of 1926's broad imposition of stamp taxes on transfers of stock. *United States v. Seattle-First Nat. Bank*, 321 U.S. 583, 586 (1944).

Consistent with federal takings precedent and legislative purpose, the Court should interpret section 6082(a)(4)(B) to permit transfers "by operation of law" and enable heirs of deceased claimants to vindicate familial rights under Title III.

IV. Section 6082(a)(4)(B) Does Not Apply to Certified Claims.

Should the Court find that section 6082(a)(4)(B)'s acquisition date bars inheritance of claims after March 12, 1996, the Court should nonetheless find that section inapplicable to certified claims. Such an interpretation is compelled by the text of the statute and Congress' clearly stated intent for section 6082(a)(4)(B) and certified claimants.

A. The Plain Meaning Permits Recovery on the Certified Claim.

Under the plain text of the statute, section 6082(a)(4)(B) does not require a certified claim be acquired before March 12, 1996. That is because that provision refers to uncertified claims only.

"In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Throughout Title III, when Congress refers to the rights of certified claimants, it speaks with clarity and specificity, consistently qualifying the word "claim." For example, in section 6082(a)(5), which directly follows section 6082(a)(4), Congress referred to "claim[s] certified" or "claims so certified" by the FCSC in paragraphs (C) and (D). 22 U.S.C. § 6082(a)(5)(C), (D). In contrast, Congress did not qualify the word "claim" when referring to uncertified claims in those same paragraphs. *See id.* Nor did it when discussing uncertified claims in paragraphs (A) and (B) of that section, instead simply referring to them as "claim[s]." *Id.* § 6082(a)(5)(A), (B). This naming convention appears elsewhere in Title III. *See, e.g., id.* § 6083(c)(1) (distinguishing between uncertified "claims" and "claims certified"); *compare id.* § 6083(a)(1) ("Conclusiveness of certified claims") *with id.* § 6083(a)(2) (permitting referral of uncertified claims to FCSC for determination of "amount and ownership of the claim"). Thus, consistent with its usage in Title III, when Congress limited section

6082(a)(4)(B) to acquisition of a "claim" after March 12, 1996, it did so only with respect to uncertified claims. *Utility Air Reg. Grp. v. E.P.A.*, 573 U.S. 302, 320-21 (2014) ("One ordinarily assumes that identical words used in different parts of the same act are intended to have the same meaning").

This interpretation of Title III is further compelled by "the logical relation of [Title III's] many parts." *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1192 (11th Cir. 2019) (quoting Scalia & Garner, *Reading Law* § 24 at 167). Congress prioritized certified claimants in drafting Title III, affording them many unique rights and protections that are unavailable to uncertified claimants. For example, in the calculation of damages, there is a "[p]resumption in favor of the [amount of the] certified claim[]." 22 U.S.C. § 6082(a)(2). Certified claimants are also entitled trebled damages simply because they own such a claim. *Id.* § 6082(a)(3)(A). Certified claimants were not required to wait two years before filing suit under Title III. *Id.* § 6082(a)(5)(C). Certified claimants are entitled to exclusive enforcement rights in their certified interests. *Id.* § 6082(a)(5)(D). Certified claimants also receive priority payment from any future common-pooled assets. *Id.* § 6082(f)(2)(B). And ownership of a certified claim is "conclusive proof" of an interest in confiscated property. *Id.* § 6083(a)(1). None of these special rights are available to uncertified claimants. The Court should interpret section 6082(a)(4)(B) in line with these congressionally drawn distinctions between certified and uncertified claims.

B. Certified Claims Recover Under Clearly Expressed Legislative Intent.

A "clearly expressed legislative intention" can supplant statutory language "to the contrary." *Consumer Prod. Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Congress drafted Title III "recogniz[ing] the importance of a decision by the Foreign Claims Settlement Commission in certifying a claim and, accordingly, believe[d] that no court should dismiss a certification in an action brought under this title." 142 Cong. Rec. H1645-02 at H1661. In line with this clearly expressed legislative intent, section 6082(a)(4)(B) does not apply to certified claims.

Congress enacted Title III to fulfill its "obligation to its citizens to provide protection against wrongful confiscations by foreign nations and their citizens, including the provision of private remedies." 22 U.S.C. § 6081(10). In doing so, it created an avenue for the enforcement of two types of U.S. interests in confiscated Cuban property: certified and uncertified claims. These two classes of Title III plaintiffs reflect a clear intent to vindicate American interests in confiscated Cuban property. Congress, on the other hand, was equally clear that Title III was not to serve as a remedy for the rest of the world to recover for harm caused to it by Fidel Castro and the Cuban Government. Section 6082(a)(4)(B) was enacted to bolster Title III's nationality requirement, but legislative history makes clear that that section does not apply to certified claims.

Claim certification by the FCSC was only available to individuals and companies that were United States nationals at the time of confiscation. *See* 22 U.S.C. § 1643c(a). Accordingly, when the FCSC certified a claim, it certified that Fidel Castro stole property from a U.S. citizen. Certified claims are proof-positive of that fact. *See* 22 U.S.C. § 6083(a)(1). Thus, as demonstrated above, Title III was drafted to prioritize certified claimants in the recovery process.

But, by 1996, it was clear that the claims certification process did not capture a substantial percentage of American interests in confiscated Cuban property. From 1959 (when Fidel Castro took power) to 1996 (when the Act passed), an estimated 1,088,000 Cubans fled to the United States.[13] "By 1997, more than half of all foreign-born Cubans in the United States had become U.S. Citizens." Duany, *supra* n.13, at p. 90 (citing U.S. Bureau of the Census, 1997 Current Population Survey). This sizable population of Americans, however, was unable to obtain certification by the FCSC because they were not United States nationals at the time of confiscation. 22 U.S.C. § 1643c(a). This was unacceptable to Congress. These were American citizens

[13] Jorge Duany, *Cuban Communities in the United States: Migration Waves, Settlement Patterns and Socioeconomic Diversity*, POUVOIRS DANS LA CARAIBE 11:1999 p. 71, *available at* https://journals.openedition.org/plc/464?lang=en.

whose interests in confiscated property were deserving of protection by the United States Government. So, Congress drafted the Act to permit naturalized Cuban-Americans to recover under Title III on the basis of an uncertified claim. *See, e.g.*, 22 U.S.C. § 6082(a)(5)(C). Congress was clear that Title III was to protect American interests in confiscated property.

Title III, however, is not an avenue for foreigners to recover on foreign interests in confiscated property. In drafting the Act, Congress took care to avoid turning federal courts into a forum for the world to air its grievances with the Cuban Government. It did this in two ways. The first was by limiting recovery to "United States national[s] who own[] the claim" to confiscated property. 22 U.S.C. § 6082(a)(1). Title III's civil remedy, thus, is only available to plaintiffs who are United States nationals. But Congress was concerned that foreigners would circumvent the nationality requirement by purposefully relocating to the United States post-enactment. So it drafted a second measure in section 6082(a)(4)(B) to prevent that result. That section provides that for:

> [P]roperty 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). Congress intended this provision:

> [T]o 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. It is not the committee's intent that the right of action be available to persons or entities that would relocate to the United States for the purpose of using this remedy. Entities that are incorporated in the United States after the date of enactment cannot use the remedy with respect to property confiscated before the date of enactment, inasmuch as such entities could have not have owned the claim to confiscated property on the date of enactment because they did not then exist.

142 Cong. Rec. H1645-02 at H1660. The intent is clear: Section 6082(a)(4)(B) was to bolster Title III's nationality requirement and prohibit recovery on claims to foreign interests in confiscated Cuban property.

But nothing in Title III's text, purpose or legislative history supports an interpretation of section 6082(a)(4)(B) that brings certified claims within its purview. To the contrary, the committee report makes clear that Congress never intended certified claims to be subject to the March 12, 1996, acquisition date. Such claims are quintessentially American—they certify that "the property on which the claim was based was owned wholly or partially, directly or indirectly by a national of the United States on the date of the loss." 22 U.S.C. § 1643c(a). And because the FCSC only certified claims of United States nationals, there was never a need to disincentivize the "transfer [of certified] claim to confiscated property to U.S. nationals." 142 Cong. Rec. H1645-02 at H1660. Certified claims survive death, 31 C.F.R. § 250.4(b), and "protect[ing]" them is "the foreign policy of the United States." 22 U.S.C. § 6081(6). Applying section 6082(a)(4)(B) to prohibit an American citizen, like Plaintiff, from inheriting a certified claim from his family after March 12, 1996, would not serve the intent of that section. In fact, dismissing a certified claim under those circumstances would be contrary to the "clearly expressed legislative intent" that "no court should dismiss a certification in an action brought under this title." 142 Cong. Rec. H1645-02 at H1661; *GTE*, 447 U.S. at 108; *see also F.B.I. v. Abramson*, 456 U.S. 615, 632 (1982) (rejecting construction of FOIA that, "while plausible on the face of the statute, lacks support in the legislative history and would frustrate the purposes of" the Act).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Carnival's Motion for Judgment on the Pleadings.

Dated: December 16, 2019.

Respectfully submitted,

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

By: s/ Roberto Martínez
Roberto Martínez
Florida Bar No. 305596
bob@colson.com
Stephanie A. Casey
Florida Bar No. 97483
scasey@colson.com
Zachary A. Lipshultz
Florida Bar No. 123594
zach@colson.com
Aziza F. Elayan-Martínez
Florida Bar No. 92736
aziza@colson.com

- and -

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

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

Attorneys for Plaintiff Javier Garcia-Bengochea

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Court. I also certify that the foregoing document is being served this 16th day of December, 2019, on all counsel of record or pro se parties either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ Roberto Martínez
Roberto Martínez