UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 19-CV-23591-BLOOM/Louis

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

NORWEGIAN CRUISE LINE HOLDINGS LTD.

Defendant.
_____/

NORWEGIAN'S REPLY IN SUPPORT OF
MOTION TO DISMISS AMENDED COMPLAINT

Defendant Norwegian Cruise Line Holdings Ltd. ("Norwegian"), through undersigned counsel, files this Reply in Support of its Motion to Dismiss Plaintiff's Amended Complaint (the "Motion," ECF No. 66).

INTRODUCTION

In its Motion, Norwegian demonstrates why, based on binding authority, Plaintiff's Amended Complaint (the "Amended Complaint") fails to state a claim. Absent from Plaintiff's Amended Complaint is a single allegation that ties any injury to Plaintiff to actions by Norwegian. In spite of failing to meet this threshold pleading requirement, Plaintiff asks this Court to award it over $400 million in damages (including treble damages and over sixty years of interest) under a statute that was continuously suspended for the twenty five years since it was first enacted, for conduct that was both ***licensed and actively encouraged*** by the United States Government, and which occurred before the potential cause of action was made effective. The United States Constitution takes care to prohibit such a suit in at least three ways.

First, Plaintiff lacks standing to sue under Article III of the United States Constitution because Plaintiff does not – and cannot – allege an injury-in-fact that is fairly traceable to Norwegian. ***Second***, applying Title III to Norwegian's pre-May 2019 operations in Cuba would violate the Ex Post Facto Clause because such application would be both retroactive and punitive. ***Third***, applying Title III to Norwegian's operations in Cuba also violates the Due Process Clause because at no point was Norwegian given fair notice of its potential liability under Title III for its operations in Cuba. Moreover, the retroactive application of Title III is not justified by any rational legislative purpose.

In its Opposition, Plaintiff resorts to inapplicable logic and arguments-in-lieu-of-allegations, which do cure the Amended Complaint's multiple deficiencies. *See generally*, Pl.'s Resp. Opp. to Def.'s Mot. to Dismiss Am. Compl., ECF No. 73. Accordingly, Norwegian's Motion should be granted and this action dismissed with prejudice.

ARGUMENT

I. Plaintiff Lacks Article III Standing

Plaintiff lacks Article III standing to bring this case. Plaintiff's Opposition attempts to avoid dismissal by arguing that: (1) Norwegian's position on standing would render Title III effectively unconstitutional (*see* Pl.'s Resp. at 6); (2) Plaintiff retains a legally protected interest in the Subject Property (*see* Pl.'s Resp. at 7); and (3) Norwegian somehow caused Plaintiff's alleged injury and such injury would be redressed by a favorable decision in this action (*see* Pl.'s Resp. at 11–12). None of

these arguments is valid.

First, in its Motion Norwegian does not argue that Title III is wholly or facially unconstitutional. This is a strawman. Norwegian's argument is that ***in this specific case*** Plaintiff does not plead an injury in fact that is fairly traceable ***to Norwegian***. *See* Mot. at 6–9. Plaintiff cannot allege that it has been injured in fact by Norwegian's alleged use of the Subject Property subsequent to its confiscation, as this Court has found that confiscation divested Plaintiff of whatever legally protected interest it had. *See infra* p. 3. The only other injury that Plaintiff alleges in its Amended Complaint is the confiscation. *See* Am. Compl. ¶¶ 9–10, 18, ECF No. 56. But that injury is traceable only to the Cuban Government. That such injury is the result of the independent action of a third-party is evident by the fact that even in the absence of Norwegian's alleged conduct, Plaintiff's property would remain confiscated. Plaintiff has, thus, failed to allege any injury that is fairly traceable ***to Norwegian***. *Kawa Orthodontics, LLP v. Sec'y, U.S. Dep't of the Treasury*, 773 F.3d 243, 247 (11th Cir. 2014) ("To establish causation, [plaintiff] must demonstrate its alleged injury is 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'").

Plaintiff's contention that Norwegian's argument "would require this Court to effectively declare Title III unconstitutional," Pl.'s Resp. at 6, rests on the faulty premise that no plaintiff would "effectively" have standing to bring ***any*** Title III action should this Court find that it does not have standing in ***this*** action.[1] Not so. For instance, Plaintiff would presumably have standing to bring a Title III cause of action against an entity who was involved in the confiscation of the property. Norwegian is simply not that entity.

The Court should also reject Plaintiff's standing argument because Congress cannot create standing where there is none under Article III. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)) ("[I]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)) (reasoning that the "assumption that if respondents have no standing to sue,

[1] *See Thole v. U. S. Bank N.A*, 140 S. Ct. 1615, 1621–22 (2020) (holding that retirement plan participants had no standing despite their arguments that such a finding would mean that no one would "meaningfully" be able to regulate the retirement plan fiduciaries).

no one would have standing, is not a reason to find standing").

Second, Plaintiff's contention that it has alleged a legally protected interest in the Subject Property is misplaced. *See* Pl.'s Resp. at 7. As this Court has already found, Plaintiff's "certified claim is ***not*** an interest in the confiscated property itself; rather, it represents the dollar amount that the victim has suffered by being deprived of its property interests." Order at 18, ECF No. 53 (citing *Glen v. Club Mediterranee S.A.*, 365 F. Supp. 2d 1263, 1270 (S.D. Fla. 2005), *aff'd*, 450 F.3d 1251 (11th Cir. 2006)). In fact, in its Opposition Plaintiff accepts that the Eleventh Circuit has found that "[t]he Helms-Burton Act refers to the property interest that former owners of confiscated property ***now have as ownership of a 'claim*** to such property.'"[2] Perhaps for this reason, Plaintiff focuses its Opposition only on Norwegian's alleged invasion of Plaintiff's ***legally protected interest in its Certified Claim*** to the Subject Property.[3] *See* Pl.'s Resp. at 7–8.

In arguing that trafficking infringes on its Certified Claim, Plaintiff stresses that Title III affords claim holders a cause of action to sue for trafficking in the confiscated property. *See* Pl.'s Resp. at 8–9. But the existence of Title III does not affect the standing analysis. Alleging that Title III grants Plaintiff a statutory right to recover damages for trafficking in confiscated property and purports to authorize it to sue to vindicate that right ***does not automatically*** satisfy the injury in fact requirement. *Thole*, 140 S. Ct. at 1620 (quoting *Spokeo, Inc.*, 136 S. Ct. at 1549) ("This Court has rejected the argument that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'"). "Article III standing requires a concrete injury ***even in the context of a statutory violation***." *Id.* at 1620–21 (quoting *Spokeo*, 136 S. Ct., at 1549) (emphasis added).

Plaintiff cites *Guarisma v. Microsoft Corp.*, 209 F. Supp. 3d 1261, 1264–67 (S.D. Fla. 2016)

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[2] *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1255 (11th Cir. 2006) (emphasis added); *see* Pl.'s Resp. at 7.

[3] Beyond "memorializing the *value* of the property interest lost and to put other actors on notice of the victim's ***outstanding right to compensation*** based on the now-extinguished property interest taken," Order at 17 (emphasis added), this Court has not recognized – and Title III does not provide – that Plaintiff possesses the rights enumerated in its Opposition by virtue of its interest in the Certified Claim. *See* 22 U.S.C. § 6023(13)(A) (noting only that conduct "authoriz[ed] . . . [by] any United States national who holds a claim to the property" does not constitute trafficking, *not* that a claim holder has the right to authorize (or deny) use of the confiscated property in which it no longer has any interest); *id.* at § 2370(a)(2) (requiring only that "no assistance shall be furnished . . . to any government of Cuba . . . until the President determines that such government has taken appropriate steps . . . to return . . . or to provide equitable compensation" to citizens whose property was taken); *id.* at § 6065(b)(2)(D) (requiring that the President merely take into account the extent to which a government in Cuba is "taking appropriate steps to return" to citizens confiscated property); *id.* at § 6066(6) (defining a democratically elected government in Cuba as one that "has made demonstrable progress in returning" confiscated property); *id.* at § 6023(4)(A)(i) (defining confiscated property to include property seized by the Cuban Government); *id.* at § 6091(b)(1)(A)(i) (same).

and *Wood v. J Choo USA, Inc.*, 201 F. Supp. 3d 1332, 1337–40 (S.D. Fla. 2016) (Bloom, J.), as well as Justice Thomas's concurring opinion in *Spokeo*, to support its contention that Plaintiff need not allege actual harm where Congress has created a private right and authorized plaintiffs to sue based on that right. *See* Pl.'s Resp. at 9–10. However, not only does the Supreme Court's recent opinion in *Thole* refute that argument, but this Circuit has also clarified that for an injury to be concrete, "[a] plaintiff must suffer some harm or risk of harm from the statutory violation to invoke the jurisdiction of a federal court." *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016) (rejecting the argument that plaintiff suffered a concrete injury as a result of defendant's alleged violation of statute that purportedly created substantive rights in plaintiff where plaintiff failed to allege a harm or material risk of harm caused by such violation because "[a] plaintiff must suffer some harm or risk of harm from the statutory violation"); *see also Tarr v. Burger King Corp.*, No. 17-23776-CIV, 2018 U.S. Dist. LEXIS 2176, at *8, *10 (S.D. Fla. Jan. 5, 2018) (explaining that *Guarisma* and *Wood* relied on standing principles abrogated in *Spokeo* and ultimately finding Plaintiff failed to "identify any *real* harm caused by" the alleged statutory violations (emphasis in original)).[4] Here, Plaintiff has failed allege a concrete injury to a legally protected interest.

Moreover, although Plaintiff argues that Norwegian's alleged "[t]rafficking infringed on [Plaintiff's certified] claim," Pl.'s Resp. at 8, such allegation is nowhere to be found in its Amended Complaint.[5] In apparent recognition of this pleading deficiency, Plaintiff argues that "this specific harm is embraced by the Amended Complaint's allegations of trafficking." Pl.'s Resp. at 8 n.6. But the only conduct Plaintiff alleges that Norwegian engaged in was trafficking in real property in the Port of Havana, Cuba. *See* Am. Compl. ¶¶ 6, 21 (alleging conduct occurring on the docks). This creates no specific legal injury because as explained, *see supra* p. 3, following the Cuban Government's confiscation, Plaintiff retained no interest in the Subject Property. Because Plaintiff fails to make

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[4] Specifically, the *Wood* opinion relies on *Guarisma*, which in turn relied on *Hammer v. Sam's E., Inc.*, 754 F.3d 492, 496 (8th Cir. 2014), an Eighth Circuit opinion decided before *Spokeo*. *See, e.g.*, *Wood*, 201 F.Supp.3d at 13377 (discussing *Guarisma* at length). The Eighth Circuit in *Hammer*, stated that "the actual-injury requirement may be satisfied *solely* by the invasion of a legal right that Congress *created*." *Hammer*, 754 F.3d at 496 (emphasis in original). Following the issuance of the *Guarisma* and *Wood* opinions that relied on *Hammer*, the Eighth Circuit recognized that "[i]n *Spokeo*, however, the Supreme Court rejected this absolute view and superseded our precedent in *Hammer* . . . a plaintiff cannot 'allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.'" *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) (citation omitted).

[5] To the extent that Plaintiff suggests that Title III's cause of action supports the United States' foreign policy goals, it is worth noting that Presidents have suspended the right to bring an action since the enactment of the statute until May 2019 as "necessary to the national interests of the United States and . . . a transition to democracy in Cuba." *See* 22 U.S.C. 6085(c)(1)(B).

sufficient plausible allegations of a cognizable injury, it remains unclear in what way – if any – Norwegian's alleged conduct could have invaded Plaintiff's interest in its Certified Claim.[6]

Thus, unlike the plaintiff in *Spokeo* on remand, Plaintiff here leaves it to the Court's "imagination to understand how [Norwegian's alleged conduct] could be deemed a real harm" to any concrete interest vested in Plaintiff. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1117 (9th Cir. 2017); *see id.* at 1116 (reasoning that the Supreme Court's opinion in *Spokeo* "requires some examination of the *nature* of the specific alleged reporting inaccuracies to ensure that they raise a real risk of harm to the concrete interests that [the statute] protects"). Put simply, taking Plaintiff's allegation that Norwegian trafficked as true, as the Court must do in deciding this Motion, Plaintiff has not alleged in what way – if any – Norwegian's conduct actually harmed, or presents a material risk of harm to, any concrete interest vested in Plaintiff. In fact, like the plaintiffs in the recently-decided Supreme Court case *Thole*, if Plaintiff was to *lose* or *win* this lawsuit, the result would be the same – the Cuban Government would still maintain possession of the Subject Property, and Plaintiff would still have no ability to use the Subject Property.[7] This confirms Plaintiff's lack of Article III standing. *See Thole*, 140 S. Ct. at 1619 (finding the plaintiffs had no concrete stake in the suit because "the outcome of this suit would not affect their future benefit payments").[8]

Third, Plaintiff has not alleged in its Amended Complaint any "causal connection" between Norwegian's challenged conduct – i.e., embarking and disembarking its passengers on the Subject Property (Am. Compl. ¶ 21) – and Plaintiff's alleged injury – i.e., that "[t]he communist Cuban Government maintains possession and control of the Subject Property and has not paid any compensation to Plaintiff for its seizure" (Am. Compl. ¶ 9). Because Plaintiff's claimed injury was

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[6] It is well-settled that Plaintiff may not amend its Amended Complaint by making new factual assertions in its Opposition. *See, e.g.*, *Moody v. Ascenda USA Inc.*, No. 16-CV-60364-WPD, 2016 WL 4702681, at *5 (S.D. Fla. July 1, 2016) ("[I]n determining whether the Amended Complaint sufficiently alleges a concrete and particularized injury [for Article III standing], the Court will not consider Plaintiffs' claims . . . which are set forth in their response to the motion to dismiss . . . ."). Accordingly, the Court should disregard the Opposition's new suggestion that Plaintiff suffered an injury-in-fact by Norwegian's alleged trafficking in ***its claim*** to the Subject Property, as opposed to the Subject Property itself, *see* Pl.'s Resp. at 8, as this injury is neither set forth in its Amended Complaint nor supported the actual factual allegations in the Amended Complaint. *See Moody*, 2016 WL 4702681, at *5 (requiring that plaintiffs "amend the complaint with sufficient ***factual allegations*** to demonstrate that they each suffered a concrete and particularized injury due to the [alleged statutory] violations to satisfy the requirements set forth in *Spokeo*" (emphasis added)).

[7] To the extent that a plaintiff may be awarded damages for trafficking under the Act, "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vermont Agency of Nat. Res. v. U.S.* ex *rel. Stevens*, 529 U.S. 765, 772 (2000).

[8] Beyond Norwegian's alleged post-confiscation trafficking, the only other injury Plaintiff alleges – the actual confiscation of the Subject Property without compensation – is directly attributable to the Cuban Government's conduct, as discussed *infra* at 5. *See* Mot. at 8 n.5 (citing Am. Compl. ¶¶ 9–10, 18).

only and "directly caused by a third party who is not a party to the lawsuit, namely the [Cuban Government]," *Wehunt v. Ledbetter*, 875 F.2d 1558, 1567 (11th Cir. 1989), and would have occurred "regardless of" Norwegian's action, *Swann v. Sc'y Georgia*, 668 F.3d 1285, 1289 (11th Cir. 2012), Plaintiff lacks standing to bring this action against Norwegian.

Plaintiff fails to show that such a causal connection exists. Plaintiff instead attempts to avoid dismissal by arguing that its purported injury-in-fact is not the confiscation of the Subject Property, but rather that Norwegian's alleged trafficking injured Plaintiff by somehow infringing on its Certified Claim. *See* Pl.'s Resp. at 11. Once again, Plaintiff's Amended Complaint is devoid of factual allegations as to how Norwegian may have trafficked in Plaintiff's Certified Claim and as such, the Court should reject this argument. *See, e.g.*, *Moody*, 2016 WL 4702681, at *5. And with no injury traceable to Norwegian, there is no remedy that Norwegian could provide to redress such injury. Plaintiff's redressability argument is far from "likely" as would be required for Article III standing; indeed, it does not even rise to the level of being "speculative" which, in any event, would be insufficient. Redressability is ***impossible*** under the facts alleged.

Accordingly, because Plaintiff cannot allege an injury in fact that is fairly traceable to Norwegian, the Amended Complaint must be dismissed for lack of subject matter jurisdiction.

II. <u>The Other Constitutional Arguments Support Dismissal as Well</u>

Though enacted in 1996, Title III did not become ***effective*** until 2019, when the President allowed the never-before-activated private right of action to become active. Applying its newly-activated right of action to conduct that took place ***before*** the right of action existed would violate both the Ex Post Facto and Due Process Clauses of the United States Constitution. To argue otherwise, Plaintiff resorts to formalisms and disparagement. Neither changes the analysis.

A. <u>*The Court Should Decide These Constitutional Issues*</u>

Plaintiff starts with an appeal to constitutional avoidance. It argues that this Court need not resolve the constitutional arguments because it alleged that Norwegian continued its cruise activities related to Cuba after the Title III right of action was activated. *See* Pl.'s Resp. at 13. This is wrong. Norwegian's Ex Post Facto and Due Process arguments share a basic, common point: There is a period of time for which liability under Title III cannot attach because, if it did, that would violate Norwegian's constitutional rights. The avoidance doctrine that Plaintiff invokes counsels against "reaching constitutional questions in advance of the necessity of deciding them." *Williamson v. Brevard Cty.*, 928 F.3d 1296, 1316 (11th Cir. 2019). But, deciding these questions ***is*** necessary here.

Even if, for example, Plaintiff were correct that it could bring a claim based on action taken after Title III's right of action was activated, that would narrow the scope of its claims and, the entire litigation.

But Plaintiff is not right that the date of activation controls the constitutional claims. The due process argument turns, in part, on the United States Government's encouragement and licensing of companies like Norwegian to conduct activities related to Cuba even after the right of action was activated. *See* Mot. at 17–18. As Norwegian has explained, the government specifically issued general licenses for businesses like Norwegian to conduct activities related to Cuba exactly like those to which Plaintiff now seeks to attach significant liability. *See id.* at 11 n.6. Whatever the "effective" date of Title III, the continued licensing of these activities beyond that date means that imposing liability on those activities would violate Norwegian's due-process rights.

B. *Imposing Liability on Norwegian Violates the Ex Post Facto Clause*

Title III was not activated – and thus had no force – until the suspension of its right of action was lifted on May 2, 2019. Then, and only then, could any plaintiff potentially sue a proper defendant under that provision. Imposing liability on Norwegian for activities conducted before that date would violate the Ex Post Facto Clause.

To argue that Title III's effective date has never been suspended, Plaintiff relies on two provisions granting the President suspension authority in Title III, *see* Pl.'s Resp. at 14–15, but Plaintiff draws the wrong conclusion. The first authorized the President to suspend the effective date set forth in 22 U.S.C. § 6085(a), August 1, 1996, for six-month periods. 22 U.S.C. § 6085(b). The second authorized the President to suspend the private right of action provision "[a]fter" it had "taken effect." *Id.* at § 6085(c)(1)-(2). This authority, by its terms, contemplates a period of time in which suits are authorized, followed by a period of time in which no suits can be brought because the right of action is suspended. *See id.* at § 6085(c)(3) ("The suspensions of actions under [6085(c)](1) shall not affect suits commenced before the date of such suspension . . . .").

By operation of these very provisions, then, Title III has never been made legally effective. In 1996, President Clinton stated that he was choosing not to invoke his authority under Section 6085(a) – to suspend the formal "effective date" – but to instead invoke his authority under Section 6085(c) to suspend the right of action as of that date. *See* President's Statement on Helms-Burton Waiver Exercise, 32 Weekly Comp. Pres. Doc. 1265 (July 16, 1996). The combined result of that decision

was – and continued to be through May 2, 2019 (and likely through August 2, 2020[9]) – the functional equivalent of a suspended effective date: no person could bring suit under Title III.

Plaintiff surmises that President Clinton's view that the effect of his action was to allow liability to attach in 1996 but then to suspend any remedies controls the constitutional question. It does not. *See* Pl.'s Resp. at 14. To start, President Clinton's statement does not answer the constitutional question of retroactivity. And even if he had, "[t]he federal Judiciary does not . . . owe deference to the Executive Branch's interpretation of the Constitution." *Pub. Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988). What matters for the purpose of whether a statute operates retroactively is whether it "attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269–270 (1994). That is what the 2019 lifting of the suspension did: It made the right of action available – and thus liability possible – for the very first time. Plaintiff offers no case that deemed a law not to be retroactive when the entire purpose of the law – to create a cause of action – did not have any force until a later-in-time action allowed it to take effect.

Plaintiff repeatedly cites *Weaver v. Graham*, 450 U.S. 24 (1981), emphasizing its reference to the importance of acts completed before an "effective date" on retroactivity inquiries. Pl.'s Resp. at 14–15. But consider the consequences of Plaintiff's formalism. Imagine if Congress enacted a criminal statute, gave it an effective date of a few months after the day of passage, and enacted the same suspension provisions as in Title III. Under Plaintiff's reasoning, if the effective date had functionally been suspended for decades – as Title III has been here – and a President later decided to lift that suspension, a person could be convicted and imprisoned without violating the Ex Post Facto clause. That is not how the Constitution works. *See Weaver*, 450 U.S. at 36 (finding a Florida statute void as applied to the petitioner on Ex Post Facto grounds).

Along with its retroactivity, Title III is penal in nature. Plaintiff concedes through silence that Title III contains a scienter requirement, a factor that weighs in favor of deeming a statute to be penal. *See* Mot. at 13. Plaintiff concedes, *see* Pl.'s Resp. at 16, that Title III was enacted to "deter" certain activities in relation to Cuba. 22 U.S.C. § 6081(11). Plaintiff argues that, even so, its remedial purpose outweighs that deterrent one. But the congressional findings that Plaintiff relies on show otherwise: Read together, they evince a desire to deter interactions with Cuba to further the United States Government's foreign policy goals. *See id.* at § 6081(5) (noting that the Cuban Government

[9] *See* 22 U.S.C. § 6082(a)(1)(A) (limiting liability to persons who "traffic" in confiscated property "after the end of the 3-month period beginning on the effective date of this subchapter").

was advertising investment in confiscated property); *id.* at § 6081(6) (noting that this would provide the Cuban Government with "badly needed" revenue). So do Title III's remedies, which deem the remedy to be the ***largest*** of three potential remedies, provide for ***treble*** damages, and permit recovery against ***multiple*** defendants, allowing a plaintiff to recover ***twice, three times,*** even an ***unlimited*** amount of times over. *See* Mot. at 15–16. Title III's remedies go beyond what would be needed to remedy any past harms, which further confirms the Act's penal nature. *Cf. United States v. Halper*, 490 U.S. 435, 449 (1989), abrogated on other grounds by *Hudson v. United States*, 522 U.S. 93 (1997) (deeming a follow-on civil penalty to be punishment within the meaning of the Double Jeopardy Clause "where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused").

The penal nature of these remedies is clear on the face of Title III and is even clearer as-applied in this case. All of Plaintiff's alleged damages are non-compensatory. The damages alleged are not related to the actual harm Plaintiff suffered sixty years ago – the alleged confiscation. Norwegian's use of the port is entirely unconnected to this alleged harm, and to the damages arising out of it. This is true for any Title III claim where the defendants had nothing to do with the alleged harm, but it is particularly true here, where Plaintiff has already brought four suits for treble damages against different defendants – claiming ***twelve-times*** above the value of the amount of the harm determined by the Foreign Claims Settlement Commission. Plaintiff implies that treble damages are always compensatory, but there is a reason it leaves this for a footnote. *See* Pl.'s Resp. at 16 n.10. The very case on which Plaintiff relies states that issue "defies general formulation." *Alea London Ltd. v. Am. Home Servs., Inc.*, 638 F.3d 768, 777 (11th Cir. 2011). And that case's conclusion that the treble damages there were not punitive turned on "the relatively small amount of statutory damages available" – ***$500*** – and the need "to encourage victims" of a minor nuisance – junk mail – to sue. *Id.* at 778. *Alea London* has no bearing here.

C. *Imposing Liability on Norwegian Violates the Due Process Clause*

The United States Government encouraged – indeed, licensed – the activity for which Plaintiff seeks to hold Norwegian liable. That, combined with the lack of any right of action under Title III for twenty-three years, means Norwegian lacked constitutionally sufficient notice that it could be subject to liability under Title III. *See* Mot. at 17 (outlining requirement of clear notice before imposition of severe penalties). Plaintiff's claims thus violate Norwegian's due process right to fair notice before the potential imposition of liability.[10] Plaintiff has no response to the fact that the very activities for which

[10] Plaintiff also resorts to mischaracterizations, suggesting that Norwegian's four-page due process argument somehow did not "adequately develop" that argument. Pl.'s Resp. at 18. The suggestion that

it seeks to hold Norwegian liable were encouraged. As Norwegian explained, the United States Government ***licensed*** these activities and officials as highly ranked as the President deemed this kind of commercial contact with Cuba necessary to further the foreign policy interests of the United States. *See* Mot. at 11–12 & n.6-8. These government authorizations did not encourage these activities with a "caveat" that they would be done on penalty of astronomical liability.

Plaintiff instead posits that Norwegian's argument relies on facts not alleged in its Amended Complaint. *See* Pl.'s Resp. at 17. But Norwegian's due process argument does not turn on its falling within a statutory exemption. It turns instead on the argument that in light of the text of the statute and the regulations, the public-record licensing decisions of the United States Government, and the public statements of its officials, Norwegian did not have fair notice that it might be subject to liability for doing what the United States Government ***encouraged*** it to do. *See* Mot. at 19.

That leaves only Plaintiff's argument that – at the very least, according to Plaintiff – the lifting of the suspension gave Norwegian the notice that due process requires. *See* Pl.'s Resp. at 18–21. But even after this date, the United States Government continued to authorize these activities related to Cuba and did not amend the authorizations for lawful travel until June 5, 2019, at which point Plaintiff does not dispute Norwegian abruptly ceased travel.[11] And, as discussed, even if the lifting of the suspension was the requisite constitutionally-sufficient notice, that would eliminate liability against Norwegian for any activities before that date. *See supra* at 7-8.

Finally, Plaintiff's claim violates Norwegian's due process rights for another reason: The retroactive application of Title III penalties is not "justified by a rational legislative purpose." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). As explained, Plaintiff's claim involves retroactive application of Title III because it did not take effect until the suspension was lifted. And the sheer scale of the potential liability, combined with the lack of any proportionality backstop, or even the ability to apportion liability among defendants means that the penalties impose a burden that far outweighs the amount that would be needed to address any harms Plaintiff suffered.

CONCLUSION

For the foregoing reasons, as well as those set forth in Norwegian's Motion, the Court should enter an Order granting the Motion and dismissing this action with prejudice.

Norwegian provided "no authority," *id.*, is rebutted by the actual brief: The motion to dismiss discusses the general due-process framework and applies it to the novel facts of Title III, a statute that lay dormant from the date of its enactment until twenty-three years later. That Plaintiff has nothing to say in response supports the case for dismissal.

[11] *See* Restricting the Temporary Sojourn of Aircraft and Vessels to Cuba, 84 Fed. Reg. 25,986, 25,986–89 (June 5, 2019) (codified at 15 C.F.R. pts. 740 and 746); Cuban Assets Control Regulations, 84 Fed. Reg. 25,992, 25,992 (June 5, 2019) (codified at 31 C.F.R. pt. 515).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2020, the foregoing was filed with the Clerk of Court using CM/ECF, which will serve a Notice of Electronic Filing on all counsel of record.

By: */s/ Allen P. Pegg*

Allen P. Pegg