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 CRUISE LINE HOLDINGS LTD.'S
INDIVIDUAL MOTION FOR SUMMARY JUDGMENT

Defendant Norwegian Cruise Line Holdings Ltd. ("Norwegian"), through undersigned counsel and pursuant to Federal Rules of Civil Procedure 56 and this Court's Order on Defendants' Motions to Set the Format and Length of Summary Judgment Motions and Statement of Facts (ECF No. 193), fully joins and incorporates herein Defendants' Omnibus Motion for Summary Judgment (the "Omnibus Motion," ECF No. 227), and additionally moves the Court for the entry of an Order granting summary judgment in Norwegian's favor on Plaintiff's sole claim in this action.

INTRODUCTION

This case arises out of the untested private right of action contained in Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, 22 U.S.C. § 6021, *et seq.* (the "Act" or "Helms-Burton Act") – a statute that until May 2019 laid dormant for over twenty years. Title III creates a potential cause of action for a "U.S. national" against any person, corporation, or foreign government that "traffics" – as that term is expressly defined and limited in the Act – in property previously belonging to such U.S. national that was confiscated by Fidel Castro's government more than sixty years ago. In this action, Plaintiff Havana Docks Corporation ("Plaintiff") alleges that Norwegian "trafficked" in Plaintiff's confiscated property when, between March 2017 and June 2019, Norwegian "embark[ed] and disembark[ed] its passengers on [the San Francisco Pier ("Pier 1") of the Havana Cruise Port Terminal (the "Terminal")]" and in doing so, "participated in and profited from" the Cuban Government's possession of said property. *See* Am. Compl. ¶¶ 21–22, ECF No. 56. Plaintiff's single-count Amended Complaint seeks to recover over half a billion dollars in damages from Norwegian because, over the course of two years, some of Norwegian's ships docked at the Terminal in Havana. And Plaintiff seeks to recover that same amount of damages in three other cases brought under the Act against various other cruise lines.

As set forth in the contemporaneously filed Omnibus Motion, there is really no reason why the Court need reach this individual motion at all. Instead, as a threshold measure, Norwegian (like the other cruise lines Plaintiff has sued) is entitled to summary judgment because (1) Plaintiff did not even own the Terminal but instead owned only a limited concession to operate a cargo-services business ***at*** the Terminal, and thus the Terminal is not "confiscated property" that Plaintiff can use as the basis of a Title III claim; (2) the cruise lines Plaintiff has sued are only alleged to have engaged in lawful travel that was fully authorized and expressly encouraged by the United States Government and exempt from the definition of trafficking under the Act; (3) Plaintiff does not have statutory standing to bring a Title III claim as it is not a "United States national" as

defined under the Act because its principal place of business is in Europe; and (4) even if Plaintiff could sue under the Act, Title III as applied here violates the United States Constitution by impermissibly imposing retroactive liability on conduct that was licensed and permitted by the United States Government and that is vastly disproportionate to Plaintiff's claimed damages.

But even if the Court is to venture beyond these compelling reasons to enter summary judgment in the cruise lines' favor, Norwegian is entitled to summary judgment on Plaintiff's claim for at least two additional reasons as well.

For one thing, Norwegian's alleged conduct is statutorily exempt from being considered "trafficking" at all. Title III contains an express safe harbor carve-out for all transactions or uses of confiscated property where such conduct is "incident to lawful travel to Cuba." *See* 22 U.S.C. § 6023(13)(B)(iii). The undisputed facts demonstrate that Norwegian's docking at Pier 1 and embarking and disembarking of passengers at the Terminal falls within this lawful travel exclusion for at least four reasons. First, the United States Government expressly authorized Norwegian and other cruise lines to provide passenger carrier services between the United States and Cuba from 2015 to June 2019 under regulations that took the form of "general licenses" and authorizations issued by the Department of Treasury Office of Foreign Asset Control ("OFAC") and the Department of Commerce's Bureau of Industry and Security ("BIS"). Indeed, considered against this backdrop, Plaintiff's claim is especially outrageous given that Norwegian's travel to Cuba was not only done pursuant to and in compliance with these licenses and authorizations, but was also ***encouraged*** as part of President Obama's intended foreign policy.[1] Thus, Norwegian's sailings to Havana constituted "lawful travel to Cuba." Second, it is undisputed that Norwegian

[1] *See, e.g.*, Presidential Policy Directive -- United States-Cuba Normalization, The White House (Oct. 14, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/10/14/presidential-policy-directiveunited-states-cuba-normalization ("The United States will continue to encourage people-to-people linkages through government and privately sponsored exchanges, including those involving educational, cultural, business, science, environment, technology, and sports. As permitted by law, we will continue to support the development of scheduled and chartered air service and maritime links, including ferries."); *Remarks by President Barrack Obama*, Havana, Cuba (March 21, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/03/21/remarks-president-obama-and-president-raul-castro-cuba-joint-press ("With last week's port security announcement, we've removed the last major hurdle to resuming cruises and ferry service — all of which will mean even more Americans visiting Cuba in the years ahead and appreciating the incredible history and culture of the Cuban people.")

docked at Pier 1 in order to call port and unload passengers in Havana, Cuba. This use of the Terminal was thus "incident to lawful travel" and excluded from the Act's definition of "trafficking." Third, Norwegian's use of the Terminal was "necessary" for Norwegian's lawful travel. Even if the Court were to interpret the exclusion to mean that Norwegian's use of the Terminal must have been a result of having no alternative, which it should not, the undisputed facts nonetheless show that Norwegian had no alternative here, because the Cuban Government ***required*** Norwegian to dock at Pier 1 in order to call port in Havana. All other alternatives, including anchoring offshore in Havana or docking at another location in Havana Harbor, were prohibited. Fourth, and as a result, as the United States Government told Plaintiff: Norwegian's alleged conduct does not constitute trafficking.

Beyond this, there is yet another basis for summary judgment in Norwegian's favor. In order to satisfy the essential elements of its affirmative claim, Plaintiff must establish that Norwegian both "knowingly and intentionally" used Plaintiff's confiscated property. *See* 22 U.S.C. § 6082 (establishing liability for "trafficking"); *id.* § 6023 (defining trafficking). But all that Plaintiff can point to on this issue – Norwegian's knowledge in 2017 of the existence a Certified Claim regarding a time- and scope-limited concession previously held by Plaintiff – is objectively insufficient even to suggest, let alone establish, that Norwegian knew that when it docked at Pier 1 it was using ***Plaintiff's confiscated property***. At best, all that the Certified Claim objectively revealed (as this Court itself concluded earlier in this lawsuit) was that Plaintiff at one time held the rights to a "***concession*** granted by the Cuban Government" the terms of which "were to ***expire in the year 2004***, at which time the corporation had to deliver the piers to the government in good state preservation." *See* Am. Compl. Ex. A, at 5, ECF No. 56-1 (emphases added). Thus, because there is no record evidence on the essential element of Plaintiff's claim that Norwegian "knowingly and intentionally" used property that had been confiscated from Plaintiff, that claim must fail.

These issues are ripe for summary judgment. The essential facts are not in dispute: OFAC and BIS issued general licenses and authorizations allowing Norwegian to sail between the United States and Cuba, and Norwegian did precisely that between 2017 and 2019 pursuant to and in full compliance with such licenses and authorizations. All that is left is to apply the undisputed facts to the scope of Title III. At this point, it becomes clear as a matter of law that Norwegian's use of the Terminal falls squarely in the Act's recognized exclusion of activities which are "incident

to lawful travel to Cuba" and, in any event, that Norwegian did not "knowingly and intentionally" use property that had been confiscated from Plaintiff. Accordingly, Norwegian is entitled to summary judgment.

LEGAL STANDARD

Summary judgment must be granted when "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). Accordingly, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *McNeal-Hair v. LaHood*, No. 11-23461, 2013 WL 1788507, at *3 (S.D. Fla. April 26, 2013) ("Summary judgment is appropriate when there is no dispute as to any material fact and only questions of law remain.").

The moving party "shoulders the initial burden to demonstrate the absence of a genuine issue of material fact." *Penick v. Harbor Freight Tools, USA, Inc.*, No. 19-cv-23134, 2020 WL 6581606, at *4 (S.D. Fla. Nov. 10, 2020) (Bloom, J.); *see also Celotex*, 477 U.S. at 323. However, once the moving party satisfies its initial burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Pagazani v. Equifax Info. Servs., LLC*, No. 15-cv-61467, 2016 WL 7508251, at *3 (S.D. Fla. Feb. 17, 2016) (Bloom, J.) (citing *Ray v. Equifax Info. Servs., LLC*, 327 F. App'x 819, 825 (11th Cir. 2009) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986))); *Penick*, 2020 WL 6581606, at *3 ("The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which a jury could reasonably find for the [non-moving party]." (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986))). Indeed, if the nonmoving party's evidence is "merely colorable, or is not significantly probative, summary judgment may be granted." *Rubenstein v. Florida Bar*, 72 F.Supp.3d 1298, 1307 (S.D. Fla. 2014) (Bloom, J.) (quoting *Anderson*, 477 U.S. at 248). "[S]ummary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Corpofin, C.A. v. Santaella*, No. 96-1679, 2001 WL 36086785, at *1 (S.D. Fla. Jan. 22, 2001) (citing *Celotex*, 477 U.S. at 322).

ARGUMENT

I. Norwegian Did Not "Traffic" Because Its Alleged Use of the Terminal Was Incident to Lawful Travel to Havana and Necessary to the Conduct of Such Travel[2]

Under the Act, the definition of "traffics" "does not include . . . transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel." 22 U.S.C. § 6023(13)(B)(iii); *see also* CONF. REPT., 142 CONG. REC. H1645-02, H1656, *reprinted at* 1996 WL 90487 ("The definition of 'traffics,' as used in Title III, has been modified to ***remove any liability for . . . any activities related to lawful travel to Cuba***.") (emphasis added). In other words, Congress carefully excluded conduct ***just like*** Norwegian's from liability under the Act. The undisputed facts show that Norwegian's alleged use of the Terminal was (1) lawful under the general licenses and authorizations issued by OFAC and BIS, in effect during March 2017 through June 5, 2019: 31 C.F.R. § 515.565, 31 C.F.R. § 515.572, 15 C.F.R. § 740.15, and 15 C.F.R. § 746.2 (the "General Licenses and Authorizations"); (2) incident to those General Licenses and Authorizations; and (3) necessary to the conduct of that lawful travel. Indeed, if this Court were to find that Norwegian's conduct was ***not*** exempt from having constituted "trafficking" under the Act, it is hard to imagine what conduct possibly could be. *See, e.g.*, *Branch Banking & Tr. Co. v. Carrerou*, 730 F. App'x 869, 871 (11th Cir. 2018) ("[C]ourts should avoid construing a statute in a manner that renders a portion of the statute meaningless.") (internal quotation marks and citation omitted).

A. Norwegian's Travel to Havana Was Lawful Because It Was Licensed and Authorized by the United States Government

Norwegian's voyages to Havana, Cuba constituted "lawful travel to Cuba." It is undisputed that Norwegian began sailing "between the United States and Cuba" in March 2017, well ***after*** the OFAC licenses and BIS authorizations first provided authorization for cruise carrier travel to Cuba. *See* Statement of Undisputed Material Facts ("SUMF") Nos. 4–7. And it is also undisputed that Norwegian ***stopped*** cruising to Cuba when BIS revoked the License Exception Aircraft, Vessels and Spacecraft (AVS) in Section 740.15(d) of the Export Administration Regulations on June 5,

[2] Norwegian incorporates by reference the arguments set forth in Section I the Omnibus Motion filed by all cruise line Defendants sued by Plaintiff concerning the lawful travel exclusion.

2019. SUMF No. 8; 84 Fed. Reg. 25986 (June 5, 2019) ("This rule amends paragraph (d)(6) to remove passenger and recreational vessels from eligibility for temporary sojourn to Cuba.").

Between these dates, all of Norwegian's voyages to Havana were lawfully pursuant to and in full compliance with the General Licenses and Authorizations. SUMF Nos. 15, 20. Shortly before these regulations were enacted, Norwegian applied for specific licenses from OFAC and BIS so that it could provide passenger carrier services from the United States to Cuba. SUMF Nos. 1–2. BIS, in fact, granted Norwegian's application before BIS amended its regulations. SUMF No. 3. Norwegian's OFAC application was pending when the OFAC and BIS regulations took effect such that OFAC responded to Norwegian's application informing Norwegian that the intervening regulatory changes meant there was no need to grant Norwegian a specific license from the contemplated operations. SUMF No. 4. Thus, in light of its policy "not to grant specific licenses authorizing transactions for which the provisions of a general license apply," OFAC closed Norwegian's application without action. SUMF Nos. 4–5.

To ensure compliance with the terms of the General Licenses and Authorizations, which authorized travel to ***anywhere*** in Cuba,[3] as well as to facilitate the compliance of its passengers onboard, Norwegian implemented a robust compliance program. SUMF No. 16. For example, Norwegian created an operations manual designed to standardize legal compliance protocols on its voyages to Cuba. SUMF No. 17. The OFAC general licenses allowed Norwegian to provide carrier services to passengers who engaged in one of twelve enumerated activities, including people-to-people educational experiences consisting of a "full-time schedule of activities that enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people's independence from Cuban authorities, and result in meaningful interaction with individuals in Cuba." 31 C.F.R. § 515.565(b) (Nov. 9, 2017). To that end, Norwegian required

[3] It is important to note that nothing in the General Licenses and Authorizations limited ***where*** in Cuba cruise carriers could travel – and indeed, when President Obama made one of his most express statements about re-authorizing cruise voyages to Cuba, he was physically ***in Havana***. *Remarks by President Barrack Obama*, Havana, Cuba (March 21, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/03/21/remarks-president-obama-and-president-raul-castro-cuba-joint-press ("With last week's port security announcement, we've removed the last major ***hurdle to resuming cruises and ferry service*** — all of which will mean even more Americans visiting Cuba in the years ahead and appreciating the incredible history and culture of the Cuban people.") (emphasis added). Cruise voyages to the Cuban capital obviously figured prominently in the Executive Branch's foreign-policy goals.

each and every passenger to sign a travel affidavit certifying under penalty of perjury that they would be travelling to Cuba pursuant to and in compliance with categories of OFAC-licensed travel before that passenger ever stepped foot on a vessel scheduled to dock in Cuba. SUMF No. 18. Norwegian likewise educated passengers via multiple touchpoints about their individual responsibility to abide by OFAC's regulatory requirements, as well as to avoid transactions with any entities on the "Cuba Restricted List," as Norwegian itself did at all times as well. SUMF Nos. 18–19. Finally, just as Norwegian did not begin cruising to Cuba until after the United States Government issued the general license allowing cruise carrier services to Cuba, Norwegian stopped sailing to Cuba as soon as the regulations were amended to end commercial cruise carrier services to Cuba, which amendments were effective June 5, 2019. SUMF No. 8; 84 Fed. Reg. 25992 (June 5, 2019) (addressing the amendment to the OFAC regulations); 84 Fed. Reg. 25986 (June 5, 2019) (addressing the amendment to the BIS regulations).

In sum, Norwegian's voyages to Havana constituted "lawful travel to Cuba" because all such voyages were conducted pursuant to and in compliance with the General Licenses and Authorizations.

B. Norwegian's Alleged Use of Pier 1 to Dock Vessels and to Embark and Disembark Passengers in Havana, Cuba, Was Incident to Its Authorized Travel to Havana, Cuba

The Act's lawful travel exclusion applies where the transactions and uses of confiscated property are "incident" to lawful travel to Cuba. *See* 22 U.S.C. § 6023(13)(B)(iii).

As explained in the Omnibus Motion, "incident" means "dependent upon, appertaining or subordinate to, or accompanying something else of greater or principal importance, something arising or resulting from something else of greater or principal importance." INCIDENT, Black's Law Dictionary (6th ed. 1990); *see also Paresky v. United States*, 995 F.3d 1281, 1285 (11th Cir. 2021) (citation omitted) (explaining that one way to examine the plain meaning and ordinary meaning of a statute is "by looking at dictionaries in existence around the time of enactment"). Thus, Norwegian's use of Pier 1 was "incident to lawful travel" so long as the use of that property "arose out of" or was "otherwise connected with" Norwegian's lawful travel to Havana, Cuba. *Comnet Wireless, LLC v. Benning Power Elecs., Inc.*, No. 14-cv-3424, 2016 WL 8578007, at *2 (D. Colo. Feb. 8, 2016) (describing costs of airfare to Denver as "expenses incident to travel"); *see also* 50 U.S.C. § 1702(b)(4) (defining "transactions ordinarily incident to travel to or from any

country" to include "arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages").

And that is precisely what Norwegian's use of the Terminal was: docking at Pier 1 at the Terminal and using its terminal building to disembark and process passengers arose out of and was tightly connected with – and thus clearly "incident to" – Norwegian's "lawful travel" to Havana, Cuba. SUMF Nos. 9, 33–37, 42.

C. Norwegian's Alleged Use of Pier 1 to Dock Vessels and to Embark and Disembark Passengers in Havana, Cuba, Was Necessary to Its Authorized Travel to Havana, Cuba

Plaintiff's sole allegations as to Norwegian's alleged "trafficking" are that between March 2017 and June 2019, Norwegian "regularly embark[ed] and disembark[ed] its passengers on the [Terminal]" and in doing so, "participated in and profited from" the Cuban Government's possession of said property. *See* Am. Compl. ¶¶ 21–22.[4] This, Norwegian's sole-alleged use of the Terminal, is not "trafficking" as defined in the Act because having lawfully traveled to Havana, Norwegian's use of the Terminal was "necessary to the conduct of such travel."

As set forth the Omnibus Motion, the term "necessary" within the meaning of the Act does ***not*** mean having no other alternative. *See* Omnibus Motion at Section (II)(D)(i). Rather, as courts have recognized for more than two hundred years, "necessary" means something that is "convenient, or useful, or essential" to the relevant end. *McCulloch v. Maryland*, 17 U.S. 316, 388 (1819) (interpreting the term "necessary" as used in the Constitution's Necessary and Proper Clause); *see also United States v. Comstock*, 560 U.S. 126, 134 (2010) ("Chief Justice Marshall emphasized that the word 'necessary' does not mean 'absolutely necessary.'"). Indeed, interpreting that term to mean something akin to "absolutely necessary" would be contrary to constructions of that term that courts have utilized across an array of statutory settings. *See, e.g.*, *Fish v. Kobach*, 840 F.3d 710, 734 (10th Cir. 2016) ("[C]ourts also have frequently interpreted "necessary" to mean something less than absolute necessity."); *Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1236 (D.C. Cir. 1988) ("[C]ourts have frequently interpreted the word 'necessary' to mean less than absolutely essential, and have explicitly found that a measure may

[4] *See Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1313, 1315 (11th Cir. 2004) (finding that the summary judgment stage, plaintiff is limited to the claims in her complaint and "may not amend her complaint through argument in a brief opposing summary judgment").

be 'necessary' even though acceptable alternatives have not been exhausted." (internal citations omitted)). But even if the word "necessary" in this particular statute required some greater showing than has been recognized by courts since the time of Chief Justice Marshall's decision in *McCulloch*, Norwegian's use of the Terminal would satisfy that standard because, as set forth below, it is undisputed that the Cuban Government required – without a single exception – Norwegian to dock at the Terminal when Norwegian's ships called in Havana.

In November of 2015, about a year and a half before Norwegian began providing passenger carrier services to Cuba, several Norwegian executives traveled to Cuba as part of a trip sponsored by the Wharton School of the University of Pennsylvania to meet with Cuban officials to explore opportunities for United States-law-compliant travel. SUMF No. 30. During that trip, Norwegian had discussions with the Cuban Government about the potential use of different ports in Havana, Cuba to disembark and embark its passengers. SUMF No. 31. Specifically, Norwegian requested that it be allowed to use the Port of Mariel as a cruise port, but the Cuban Government denied that request. SUMF No. 32.

Then, in early 2017, Norwegian began its voyages to Cuba pursuant to the General Licenses and Authorizations. SUMF Nos. 7, 15. And as with many ports around the world which are run by governments, including the Port of Miami, the Cuban Government had the sole authority to determine where a ship could anchor or dock, including in Havana, Cuba. SUMF No. 28. In this regard, at all times relevant to Norwegian's travel, Aries S.A. ("Aries") was the entity, acting on behalf of the Cuban Government, that was responsible for berthing operations in Havana, Cuba, including authorizing where in Havana a vessel could dock and embark and disembark passengers. SUMF No. 29.

In connection with Norwegian's lawful travel to Havana, Aries informed Norwegian, in writing and orally, that the ***only*** pier where Norwegian could dock in Havana was Pier 1 at the Terminal. SUMF Nos. 33, 36–37. Indeed, Aries' berthing agreement with Norwegian, which authorized Norwegian to dock and disembark and embark passengers in Havana, expressly identified the "Terminal de Cruceros de la Habana" (*i.e.*, the Terminal) as the ***only*** location at which Norwegian's vessels were to dock, rendering it a legal requirement. SUMF No. 33. Moreover, Aries also informed Norwegian that the ***only*** pier at the Terminal at which Norwegian could dock was Pier 1– which thus not surprisingly is the ***only*** pier in Havana that Norwegian used. SUMF Nos. 9, 33.

Separately, Empresa Consignataria Mambisa ("Mambisa"), sometimes also referred to as "Servimar," is the entity that was responsible for port agency services to Norwegian in Havana from March 2017 through June 2019. SUMF Nos. 34. And Mambisa was entirely in line with Aries on these issues. For example, Mambisa similarly informed Norwegian, in writing, that the only pier where Norwegian could dock in Havana was Pier 1. SUMF No. 35. Mambisa also instructed Norwegian that the only pier that Norwegian could dock at was the sole pier that Norwegian ever used in Havana – Pier 1. SUMF No. 9, 35–36.

Thus, while Norwegian did consider other places of possible disembarkation, the Cuban Government refused to accommodate Norwegian's requests for permission to dock its ships at nearby port facilities, such as the Port of Mariel. SUMF No. 37. And this was the case for the entire passenger carrier vessel industry: each of the other cruise line defendants in the three other cases that Plaintiff has brought under the Act received the same response from the Cuban Government. *See* Omnibus Motion at Section (II)(D)(iii).

Nor were there any other non-berthing alternatives to conduct Norwegian's lawfully-permissible travel to Havana. *See* Omnibus Motion at Section (II)(D)(ii) (explaining that the phrase "such travel" means the conduct of lawful travel to any place in Cuba to which Norwegian was permitted to travel, Havana included). In addition to looking into other port facilities in Havana or other cities nearby, in 2017 Norwegian also sent to Cuba's then-Vice Minister of Transportation and then-Minister of Tourism a proposal to anchor its vessels in Havana Harbor and "tender" passengers ashore (the "2017 Anchoring Proposal"). SUMF No. 38. A couple of months later, the President of Aries rejected the 2017 Anchoring Proposal and informed Norwegian that anchoring and tendering was ***not*** allowed in Havana Harbor. SUMF No. 39. But Norwegian did not then simply drop its efforts to secure permission to anchor-and-tender. To the contrary, in the fall of 2018, Norwegian made a ***second*** anchoring-and-tendering proposal to the Cuban Government (the "2018 Anchoring Proposal"). SUMF 40. But despite this second request, Norwegian never received a response. SUMF Nos. 41.

But even if the Cuban Government would have allowed anchoring and tendering in Havana Harbor, Norwegian's use of Pier 1 and Terminal ***still*** would have been "necessary" to its lawful travel. This is because the Cuban Government required all passengers disembarking in Havana to go through immigration, customs, and a medical screening, and these activities could ***only*** take

place at the Terminal.[5] SUMF Nos. 39 (responding to Norwegian that "*the mode that you propose in the port of Havana anchored and operated by tender launch boats is not authorized by the maritime authorities, nor do we have the infrastructure in the Sierra Maestra pier that [sic] our only current property for providing this service*") (emphasis in original) (English translation), 42. Thus, even if Norwegian's repeated requests for permission to anchor in Havana Harbor had been granted, Norwegian still would have been required to tender its passengers to the Terminal.

Finally, as with many ports around the world, Cuban port authority officials ensured compliance with these governmental requirements through highly-regulated protocols. And such protocols likewise illustrate the "necessity" of Norwegian having used Pier 1at the Terminal. For instance, pilotage was compulsory for vessels assigned to dock in Havana, Cuba. SUMF No. 43. This meant that Cuban pilots would board the vessel and the vessel would be helmed by the Cuban pilots (rather than Norwegian's ship captains) as they navigated to Pier 1 at the Terminal. *See id.* In other words, it was not Norwegian's captains who actually docked the vessels at Pier 1; they were not even allowed to do so.

Thus, under any construction of the word "necessary," Norwegian's use of the Terminal was "necessary to the conduct of such travel."

D. Despite Plaintiff's Best Efforts to Establish Otherwise, the United States Government Disagreed that Norwegian's Voyages to Havana, Cuba Constituted Anything Other than "Lawful Travel"

The United States Government is the sole arbiter of whether an entity has violated an applicable General License or Authorization. And in this regard, at ***no point*** did the United States Government even suggest, let alone conclude, what Plaintiff is asking to be found in this action: that Norwegian's use of the Terminal fell within the scope of "trafficking" under the Act. To the contrary, the United States Government repeatedly and unequivocally agreed that cruise line carrier services to Cuba – and specifically cruise lines that openly used the Terminal to stop in Havana – fell within the "lawful travel" exclusion to the definition of trafficking.

And Norwegian's voyages to Cuba were anything but surreptitious. Not only did Norwegian openly advertise its provision of passenger carrier services to Havana, but Norwegian kept the United States Government updated about such services. By way of example, Norwegian's

[5] This is true regardless of whether the passengers had already gone through such processes earlier at another port in Cuba. SUMF No. 42.

Senior Vice President and General Counsel sent a letter in 2017 to the Office of Foreign Assets Control setting forth – in detail – Norwegian's position, practice, and understanding of its compliance requirements for people-to-people travel to Cuba:

[redacted]

SUMF No. 21 (quoting NCLH_23591-00091308 at NCLH_23591-00091308–09). And not ***once*** did Norwegian receive any communication or other information suggesting that the United States Government disapproved of any of Norwegian's operations. SUMF No. 26.

In addition, Plaintiff itself, both directly and indirectly via its agent and lobbyists, ***repeatedly*** tried to get the United Stated Government to impose penalties under the Helms-Burton Act for the same conduct it now alleges in this action to be unlawful "trafficking." SUMF No. 22 (making a formal request to impose penalties upon the cruise lines for trafficking under Title IV of the Helms-Burton Act (citing HDC 017218 at HDC 017219–20); *see also* SUMF Nos. 23–25.[6] But the Government's response was clear and simple: "[A]s previously discussed, given the ***clear***

[6] That Plaintiff requested that the United States Department of State invoke Title IV of the Helms-Burton Act, which requires the denial of visas of persons who traffic in confiscated property to which a U.S. national owns a claim, rather than Title III of the Act, is of no moment. *See* 22 U.S.C. § 6091(a); *see also* SUMF Nos. 22–23. Title IV's lawful travel exclusion uses language ***identical*** to that contained in Title III. *See* 22 U.S.C. § 6091(b)(2)(B)(iii) ("The term 'traffics' does not include . . . transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel.")

exclusion in Title IV's definition of 'traffics' of transactions and uses of property incident to lawful travel to Cuba, we are not currently pursuing Title IV actions in relation to commercial cruise lines." SUMF No. 27 (emphasis added). And this was not the only time that the United States Government rebuffed Plaintiff's attempts to have the United States Government impose penalties against the cruise lines under the Act. SUMF Nos. 26–27. This Court should defer to these repeated and considered determinations by State Department officials that the lawful travel exemption applies to the conduct at issue. The opinions of the State Department ordinarily are "entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Republic of Austria v. Altmann*, 541 U.S. 677, 701–02 (2004). After all, the President (via the State Department) exercises considerable authority in the realm of foreign affairs, *see, e.g.*, *Bank Markazi v. Peterson*, 578 U.S. 212, 1328–29 (2016), especially when, as here, the President is acting pursuant to an express authorization of Congress, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).[7]

In short, despite being acutely aware of Norwegian's operations concerning the provisions of passenger services to Havana, Cuba, the United States Government ***never*** imposed any penalty under the Helms-Burton Act or even so much as notified Norwegian that it was violating any applicable United States law or regulation for any alleged "trafficking" in the Terminal. SUMF No. 26. This remained so even after the Trump Administration, which ultimately activated Title III for the first time in history, took office. And even then, Norwegian did not stop providing passenger carrier services to Havana because the United States Government imposed any penalties

[7] To avoid entanglement in foreign policy matters that are properly the province of the political branches, courts have consistently upheld and deferred to determinations by the President and the State Department with regard to the viability of claims touching on matters of foreign relations. *See, e.g.*, *Zivotofsky v. Kerry*, 576 U.S. 1 (2015) (affirming State Department's policy regarding listing of "Jerusalem" as birth place on passport, despite contrary statute, because of President's powers over foreign relations); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("[T]his Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities."); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (affirming presidential determination to settle private claims against Iranian assets). As part of his foreign policy, President Obama made the considered judgment to authorize and encourage Defendants to sail their vessels to Cuba, and the State Department implemented that policy in part by repeatedly confirming that the lawful travel exemption in 22 U.S.C. 6023(13)(B)(iii) covers the voyages to Cuba at issue in this case. This Court should defer to – not interfere with – those foreign-policy judgments.

on it, or because the private cause of action in Title III was abruptly activated, but rather did so because the Trump Administration revoked the License Exception Aircraft, Vessels and Spacecraft in Section 740.15(d) of the Export Administration Regulations on June 5, 2019. SUMF No. 8. In strict compliance with the regulations that initially legally permitted vessel carriers services like Norwegian's, and then ultimately prohibited them, Norwegian has not since provided passenger carrier services to Cuba. SUMF No. 8.

Accordingly, Norwegian is entitled to summary judgment because all of Norwegian's alleged activities at the Terminal fall within the "clear exclusion" to trafficking. SUMF No. 27 ("[G]iven the clear exclusion . . . we are not currently pursuing Title IV actions in relation to commercial cruise lines.").

II. There Is No Evidence that Norwegian Knowingly and Intentionally "Trafficked" in Any Confiscated Property

Even if Norwegian's sailings to Havana were somehow not within the lawful travel exclusion of Title III, Norwegian is nonetheless entitled to summary judgment because Plaintiff cannot establish another essential element of its affirmative claim: that Norwegian "***knowingly and intentionally*** . . . use[d] . . . ***confiscated property*** . . . without the authorization of any United States national who holds a claim to the property." 22 U.S.C. § 6023(13)(A) (emphases added).[8] A plain reading of this element confirms that this is a two-pronged, conjunctive standard: Norwegian must have both (1) known (or had reason to know) of the confiscated property and (2) intentionally used or otherwise engaged in trafficking activity on that confiscated property while knowing it was confiscated and without the authorization of the United States national who holds claim to the confiscated property.

This element does not merely require Plaintiff to prove that Norwegian knowingly and intentionally "embark[ed] and disembark[ed] its passengers on the [Terminal]." *See* Am. Compl. ¶¶ 21–22. Instead, a plain reading of the Act requires that a defendant (1) know that the property was confiscated by the Cuban government and (2) intend that the property be the subject of their conduct. *See Gonzalez v. Amazon.com, Inc.*, No. 19-23988, 2020 WL 1169125, at *2 (S.D. Fla.

[8] To be clear, this argument concerns what the objective evidence does not show in terms of Norwegian's alleged "knowing and intentional" use of Plaintiff's "confiscated property," which Plaintiff itself put at issue by bringing this action and on which Plaintiff sought (and received) extensive discovery. It does not concern Norwegian's subjective belief in the legality of its conduct.

Mar. 11, 2020) (dismissing action and holding that plaintiff failed to state claim under Title III Act because the complaint "does not demonstrate that the Defendants ***knew the property was confiscated by the Cuban government nor that it was owned by a United States citizen***" (emphasis added)); *Glen v. Trip Advisor LLC*, --- F.Supp.3d ---, 2021 WL 1200577, *10 (D. Del. Mar. 30, 2021). Most recently, the court in *Trip Advisor* found

> persuasive the analyses of numerous other courts that have interpreted statutes having specific knowledge requirements as ***requiring knowledge of all the elements listed in the statute***. Also persuasive are the recent decisions of other courts concerning the scienter requirement of the Helms-Burton Act in particular, which have reached the same conclusion as the Court does now.

Id. (emphasis added).

Plaintiff's theory is that Norwegian had "constructive knowledge of Plaintiff's publicly available certified claim" since 1972 and/or "actual knowledge of Plaintiff's certified claim" since February 11, 2019 when Plaintiff sent Norwegian a letter informing it of Plaintiff's Certified Claim. *See* Am. Compl. ¶¶ 23–24. However, both Plaintiff's "constructive knowledge" and "actual knowledge" theories fail because there are no facts in the record that could demonstrate that Norwegian possessed the requisite scienter to prove Norwegian committed any "trafficking" in Plaintiff's "confiscated property" when Norwegian docked and disembarked and embarked passengers at the Terminal. To the contrary, the undisputed facts establish the opposite: it could be no more apparent to Norwegian than it was to this Court, at earlier stages, that any property rights Plaintiff held in Cuba could have extended beyond 2004.

It is undisputed that Norwegian first learned of Plaintiff's existence and its Certified Claim in February 2017. SUMF No. 10. In a letter Norwegian sent to OFAC that month, Norwegian referenced the Certified Claim but advised OFAC that there was no basis to conclude that any of the piers at the Terminal were property within the scope of the Certified Claim. *See* SUMF No. 12 (explaining to OFAC that there was [redacted]. Nor could Norwegian reasonably be expected to conclude otherwise. In light of the United States Government's express regulatory regime for travel and encouragement for travel to Havana as a matter of foreign policy, *see* Omnibus Motion at Section (II)(D)(iv); in light of the undisputed terms of Plaintiff's time- and scope-limited concession, SUMF No. 11 (extending the term of the concession to "ninety-nine

years ***reckoned as of the date of the concession*** [*i.e.*, as of 1905]") (emphasis added); and in light of the Certified Claim's language stating that the terms of the "concession granted by the Cuban Government . . . ***were to expire in the year 2004***, at which time the corporation had to deliver the piers to the government in good state preservation," Am. Compl. Ex. A (emphasis added), there is no way to conclude on this record that Norwegian "knew" and "intended" that it would be using Plaintiff's "confiscated property" when Norwegian docked at Pier 1 of the Terminal between March 2017 and June 2019. SUMF Nos. 7–8.

The Certified Claim would not give anyone reading it knowledge, or reason to know, that the Cuban Government confiscated any property interest belonging to Plaintiff that extended – or would have extended – beyond 2004. There were no Court decisions or other guidance existing before or during the sailing period that provided, or even suggested, that using the Terminal in 2017-2019 could constitute trafficking in light of the Certified Claim's statement that Plaintiff's concession was to expire in 2004, at which time Plaintiff was required to deliver the piers to the Cuban Government.

Moreover, Plaintiff's February 11, 2019 letter similarly does not give Norwegian sufficient reason to know it was using confiscated property to which a U.S. national holds a claim. SUMF No. 14. Plaintiff's letter only stated that HDC asserted "rights" in the Terminal – but did not, for example, assert that it was the owner of the property at the Terminal. The letter does not state from whom the property was taken and instead refers to the Certified Claim which again states that Plaintiff's rights to operate at the Terminal were set to end in 2004. Therefore, even though Norwegian had knowledge of the existence of the Certified Claim on or about February 2017, such knowledge falls well short of the intent required to prove the "knowingly and intentionally" element of a Title III claim: nothing gave Norwegian constructive or actual knowledge that in March 2017 – June 2019 it was using confiscated property or that a U.S. national held a claim to confiscated property post-2004.

Indeed, this Court's own dismissal Order, although later withdrawn, should suffice to establish why Norwegian could not possibly have "known" and "intended" to encroach upon property rights that were, by their terms, slated to expire in 2004. The Court itself – when presented with this issue of first impression in the quartet of Havana Docks cases – issued three different sets of Orders over of a period of eight months based on the ***same*** information (the Certified Claim) Norwegian had before it when it sailed to Havana. First, the Court ruled that the

time-limited nature of Plaintiff's concession did not affect whether trafficking could occur after 2004. *See Havana Docks Corp. v. Carnival Corp.*, No. 19-21724-CIV-BLOOM (S.D. Fla.) (D.E. 47). Then, the Court reconsidered and ruled that "because the Certified Claim was predicated on Plaintiff's time-limited leasehold interest, Havana Docks could not, as a matter of law, state a claim for relief under the Act based on trafficking that occurred after Plaintiff's leasehold interest expired." *See* Order on Mot. to Dismiss, ECF No. 42 (granting motion to dismiss). Last, the Court reconsidered again and ruled that its initial ruling was correct, allowing this case to proceed past the pleading stage. *See generally* Order, ECF No. 53.

Moreover, the undisputed evidence demonstrates that it was not just Norwegian or the Court in this case who might reasonably read the Certified Claim and believe Plaintiff's property interest in the Terminal expired in 2004. Plaintiff's own President, Mickael Behn, who is the great-grandson of Plaintiff's founder, expressed to a shareholder that the Certified Claim is not [redacted] SUMF No. 13. And this is no historical sentiment either; Mr. Behn expressed this in ***2018***, shortly before Plaintiff sent Norwegian its letter referring to the contents of the Certified Claim. *Id.* All of this shows that there simply is no factual or legal basis upon which to premise a determination that anyone could know or have reason to know from reading the Certified Claim that the Cuban Government confiscated anything belonging to Plaintiff that extended beyond 2004.

But even if Norwegian could be shown to have known that the Certified Claim referenced a property interest that could have existed post-2004, Plaintiff cannot demonstrate the second prong of the scienter element: Plaintiff has no evidence that Norwegian intentionally docked at the property knowing that it was confiscated property. Plaintiff engaged in extensive and wide-ranging discovery in an effort to factually prove its claim. That discovery involved, among other things, Norwegian producing nearly 600,000 pages of documents, Plaintiff taking ten separate fact-witness depositions, and Norwegian answering more than 20 interrogatories (excluding subparts) and over 200 requests for admission. Yet even after all of that unearthing of the facts, there is no evidence to which Plaintiff can point to establish that Norwegian "intentionally" trafficked in Plaintiff's "confiscated property," and thus summary judgment should be entered. *See, e.g.*, *Corpofin*, 2001 WL 36086785, at *1 ("[S]ummary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element essential

to that party's case and on which that party will bear the burden of proof at trial.") (citing *Celotex*, 477 U.S. at 322).

CONCLUSION

For the foregoing reasons and in the Omnibus Motion, the Court should enter an Order granting this Motion and entering summary judgment in Norwegian's favor.

Dated: September 20, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021, 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