

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

**CASE NO.: 19-cv-21725-KING**

JAVIER GARCIA-BENGOCHEA,

Plaintiff,

v.

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

Defendant.

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**CARNIVAL CORPORATION'S REPLY BRIEF IN SUPPORT OF ITS  
MOTION TO DISMISS**

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Carnival Corporation (“Carnival”) moved to dismiss on three independent grounds. *First*, the definition of “trafficking” under Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, *see* 22 U.S.C. § 6021, et seq. (either the “Act” or “Helms-Burton”) requires a plaintiff to allege that the transactions and uses of the property were not incident to “lawful travel” to Cuba or not necessary for the conduct of such travel. Plaintiff studiously avoided pleading this and devotes the bulk of his brief to arguing that the definition of an element of the claim is in fact an affirmative defense. We show below that this is not so, but, in any event, based on Carnival’s OFAC license to travel to Cuba, this Court can determine on this motion that Plaintiff cannot state a claim. *Second*, Plaintiff failed to plead any facts supporting his claim that he owns a “claim.” As explained, Plaintiff does not defend his pleading, and therefore, dismissal is required. *Third*, even if Plaintiff owns a “claim,” the claim he owns is not to the docks themselves, but to stock. Plaintiff avers that he should be entitled to pursue an action against Carnival for “trafficking” in the Santiago docks, even though Plaintiff’s Complaint does not allege a claim over the docks, but that argument misreads the Act. Plaintiff’s arguments are not persuasive; accordingly, Carnival’s motion to dismiss should be granted.

### **ARGUMENT**

#### **I. PLAINTIFF’S CLAIM SHOULD BE DISMISSED BECAUSE HE HAS NOT AND CANNOT PLEAD THAT CARNIVAL TRAFFICKED IN CUBAN-CONFISCATED PROPERTY**

As Carnival explained in its motion to dismiss, Plaintiff’s claim should be dismissed for failure to plead what the statute requires—trafficking. (Mot. to Dismiss at 4-12.) Plaintiff agrees that trafficking is an element of his cause of action and that he must plead, and ultimately prove, that Carnival trafficked. 22 U.S.C. § 6082(a)(1). (Pl.’s Opp’n at 3.) That trafficking includes negating that the use was for “lawful travel” follows from Helms-Burton’s definition of trafficking, which provides:

(13) Traffics

(A) As used in subchapter III, and except as provided in subparagraph (B), a person “traffics” in confiscated property if that person knowingly and intentionally--

(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,

(ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or

(iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,

without the authorization of any United States national who holds a claim to the property.

(B) The term “traffics” does not include—

(i) the delivery of international telecommunication signals to Cuba;

(ii) the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated national;

(iii) 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; or

(iv) transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban Government or the ruling political party in Cuba.

22 U.S.C. § 6023(13). Plaintiff argues that it is sufficient for him to plead the first half of the definition, while ignoring the second. (Pl.’s Opp’n at 6-14.) Plaintiff’s argument is wrong because “lawful travel” is bound up in the statutory definition (*see infra* Part I.A), but in any event, it is clear from the Complaint and judicial notice of the OFAC license that Carnival’s use constitutes “lawful travel” (*see infra* Part I.B).

**A. Helms-Burton Requires a Plaintiff to Plead Trafficking, Which Requires Plaintiff Here to Address Lawful Travel**

“A defense which points out a defect in the plaintiff’s prima facie case is not an affirmative defense.” *In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988). That is true of the “lawful travel” exclusion from trafficking.

To begin with, Plaintiff misreads the structure of the statute. Plaintiff argues that “§ 6023(13)(A) is a broad prohibition against anyone who knowingly and intentionally ‘sells . . . manages . . . uses . . . confiscated property’ or ‘engages in a commercial activity using or otherwise benefitting from confiscated property’ without the authorization of any United States national who holds a claim to the property.” But Section 6023(13)(A) is not a prohibition against anything; it is simply part of a definition of the term “trafficking.” Thus, Plaintiff is flat wrong when he suggests that “Section 6023(13)(B) . . . includes four narrow exceptions to the general proscription.” Section 6023(13)(B) is not an exception to a “general proscription,” it is part of a definition.

Congress could have drafted Helms-Burton as Plaintiff postulates, perhaps by rewriting Section 6082 to read: “any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property,’ **except as provided in 22 U.S.C. § 6023(13)(B).**” But Congress did not do so.

Nearly every case Plaintiff relies on involves a free-standing exception found outside the statutory definition of the element of the offense in a criminal statute, and therefore, are unlike Helms-Burton.<sup>1</sup> Indeed, Plaintiff’s own cases draw the distinction between free-standing

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<sup>1</sup> Although Plaintiff points to a number of cases, few relate to statutory definitions. The ones that do are distinguishable. *United States v. Laroche*, 723 F.2d 1541 (11th Cir. 1984) based its holding on undisputed legislative history showing that Congress intended the exclusion to be a defense. *Id.* at 1543. Plaintiff admits that there is no “explicit” legislative history here. (Pl.’s Opp’n at 11.) More fundamental, *Laroche* is a criminal case. In the criminal context, the Government can sufficiently plead an indictment if it tracks the language of the statute. *Hamling v. United States*, 418 U.S. 87, 117 (1974). But that is not true in the civil context. In civil cases, a plaintiff must plead facts that plausibly show an entitlement to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). *United States v. Jackson*, 57 F.3d 1012 (11th Cir. 1995) piggybacked on *Laroche*, finding it “closely analogous” because it interpreted the same criminal statute, *Id.* at 1016-17, and is therefore, distinguishable for the same reasons as *Laroche*. More than that, *Laroche* and *Jackson* actually cut the wrong way for Plaintiff because the Court in both cases concluded that although the defendant bore the burden to come forward with some evidence, the Government bore the ultimate burden of proof, *Id.* at 1016-17, and if Plaintiff here bears the ultimate burden of proof, then he must plead facts showing a plausible entitlement to relief under the civil pleading standard. Last, *Oden v. Oktibbeha County*, 246 F.3d 458 (5th Cir. 2001), which Plaintiff rightly relegates to

exceptions and exclusions from definitions of elements. For example, in *United States v. Kloess*, 251 F.3d 941, 944 (11th Cir. 2001), the court found that a free-standing exclusion for “bona fide legal representation” found in 18 U.S.C. § 1515(c) was an affirmative defense. Importantly, however, the court did so only after finding that the provision was not “definitional.” *Id.* at 946 n.4. Accordingly, Plaintiff’s cases are not on point. (Pl.’s Opp’n at 8.)

While Plaintiff argues that statutory exceptions are often found to be affirmative defenses (Pl.’s Opp’n at 7-11), the “lawful travel” provision is not a statutory exception—it is part of the definition of an element. *See United States v. Pugh*, 1:15-CR-00116-NGG, 2015 WL 9450598, at \*8 (E.D.N.Y. Dec. 21, 2015) (distinguishing between elements, definitions of elements, and affirmative defenses). The Act’s “lawful travel” provision is found in the definition of trafficking, 22 U.S.C. § 6023(13), and the text makes clear that lawful travel defines the word “traffics.” In these circumstances, when a statutory definition of an element excludes conduct from the reach of a law, courts have not hesitated to require plaintiffs to plead and prove the element as they would any other, including by negating the definitional exception as needed to state a plausible claim.<sup>2</sup>

For example, in *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107 (11th Cir. 2008), the Eleventh Circuit considered whether the list of permissible uses of motor vehicle information contained in 18 U.S.C. § 2721(b) set out affirmative

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a footnote outside of his construction of the Act, contains essentially no textual or structural reasoning about why the Court placed the burden on the defendant, and is therefore, unhelpful in construction of this Act. *Id.* at 467.

<sup>2</sup> *See Greenfield v. Criterion Capital Mgmt., LLC*, 15-CV-03583-PJH, 2016 WL 4425237, at \*8 (N.D. Cal. July 5, 2016) (“Even though the exemptions may technically be affirmative defenses, they can also be viewed as elements of the claim because they relate to the definition of ‘beneficial owner of more than ten percent of any class of equity securities registered pursuant to section 12 of the Act,’ and thus must be adequately pled.”); *Sanchez v. Abderrahman*, 10-CV-3641 CBA, 2012 WL 1077842, at \*5 (E.D.N.Y. Mar. 30, 2012) (“And even if the pleadings could satisfy the general definition of ‘debt collector,’ it is clear that the Board—pursuant to the ‘fiduciary obligation’ provision quoted above, 15 U.S.C. § 1692a(6)(F) (i)—and the individual members—as ‘officer[s] or employee[s] of a creditor,’ 15 U.S.C. § 1692a(6)(A)—are excluded from that definition.”); *Seese v. Bethlehem Steel Co.*, 74 F. Supp. 412, 416 (D. Md. 1947) (exceptions to statutory definition of compensable time must be pleaded because compensable time is an element).

defenses or defined the elements of Driver's Privacy Protection Act ("DPPA"). The plaintiff in *Thomas*, like the Plaintiff here, argued that the permissible uses were "exceptions," and therefore, the defendant should bear the burden of proof on them. *Thomas*, 525 F.3d at 1112. The Circuit disagreed and explained: "The DPPA plainly sets forth three elements giving rise to liability, the third of which is whether the subject act was *"for a purpose not permitted."* 18 U.S.C. § 2724(a) (emphasis added). The emphasized language does not frame the § 2721(b) enumerations as exceptions to a general norm." *Id.* Just as the DPPA required a plaintiff to plead and prove that the defendant's use was "for a purpose not permitted," *id.*, Helms-Burton requires a plaintiff to plead and prove trafficking. 22 U.S.C. § 6082(a)(1). Likewise, just as the DPPA *defined* which uses were permitted in a separate section of the statute, *Thomas*, 525 F.3d at 1112, Helms-Burton too defines trafficking in a separate statutory provision. 22 U.S.C. § 6023(13). Finally, just as the separate definition in the DPPA was not an affirmative defense, but an element to be proven by the plaintiff, so too must a Helms-Burton plaintiff prove trafficking. *Thomas*, 525 F.3d at 1112.

The treatment of claims brought under the Fair Debt Collection Practices Act ("FDCPA") shows this as well. The statutory definition of a "debt collector," which is an element of a claim under the FDCPA, includes a general definition and then a list of exclusions that the definition "does not include." 15 U.S.C. § 1692a(6)(A)-(F). Courts in this Circuit have routinely required plaintiffs to negate an exclusion from the definition of "debt collector," especially when the factual allegations raise the specter of the exclusion. That is because pleading that the defendant is a "debt collector" is an element of a plaintiff's claim and the exclusions are definitional. *See, e.g., Benjamin v. CitiMortgage, Inc.*, 12-62291-CIV, 2013 WL 1891284, at \*3 (S.D. Fla. May 6, 2013); *Moragon v. Ocwen Loan Servicing, LLC*, 617CV2028ORL40KRS, 2018 WL 3761036, at \*10 (M.D. Fla. June 22, 2018); *Linthicum v. Bank of Am.*, 8:15-CV-2825-T-17TBM, 2016 WL 1389981, at \*2 (M.D. Fla. Apr. 7, 2016).

Plaintiff's reading would also substantially change the definition of trafficking under the Act, which cuts against reading the "lawful travel" clause as an affirmative defense. *See Pioneer Centres Holding Co. Employee Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324,

1336 (10th Cir. 2017) *United States v. Outler*, 659 F.2d 1306, 1310 (5th Cir. 1981). As Plaintiff forthrightly admits, under his view of the Act, to prove a claim a plaintiff need only show that a defendant either (i) “otherwise acquires or holds an interest in confiscated property,” or (ii) “otherwise benefit[s] from confiscated property,” or (iii) “causes, directs, participates in, or profits from trafficking.” (Pl.’s Opp’n at 4.) But this seemingly-endless reading of trafficking would substantially expand the scope of the Act beyond both Congress’ text, *see* 22 U.S.C. 6023(13)(B) and its intent. (*See* Mot. to Dismiss (Dkt 17) at 2 (explaining that Congress did not want to stop lawful travel to Cuba).)

Plaintiff also argues that the “lawful travel” provision must be an affirmative defense as a matter of “common sense,” because otherwise “any plaintiff seeking redress under the LIBERTAD Act” would have to “allege the negative.” Unsurprisingly, Plaintiff cites no supporting law. Congress often places the burden on a plaintiff to prove a negative. *See, e.g., Thomas*, 525 F.3d at 1112.

Plaintiff wrongly claims that the legislative history supports reading the lawful travel provision as an affirmative defense. The legislative history, as discussed in Carnival’s initial memorandum, shows that the lawful travel provision was added to Helms-Burton to “remove[] any liability for . . . any activities related to lawful travel.” 142 CONG. REC. H1645-02 at H1656. Treating the lawful travel provision as an affirmative defense is inconsistent with that goal because on Plaintiff’s theory a Helms-Burton plaintiff could establish a complete case for liability even when the “activities” they pointed to “related to lawful travel.” 142 CONG. REC. H1645-02 at H1656. That runs headlong into the legislative history, which was supposed to eliminate the prospect of liability for lawful travel.

Finally, Plaintiff claims that because Carnival is in a better position to prove that it lawfully travelled to Cuba, the “lawful travel” clause must create an affirmative defense. To begin, the rule Plaintiff cites “is far from being universal, and has many qualifications upon its application.” *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 60 (2005) (quoting *Greenleaf’s Lessee v. Birth*, 6 Pet. 302, 312 (1832)). For that reason, in *Thomas*, when faced with a statutory scheme much like

Helms-Burton, the Eleventh Circuit refused to apply it. *Thomas*, 525 F.3d at 1113-14. *Thomas* is not alone on this point; indeed “[v]ery often one must plead and prove matters as to which his adversary has superior access to the proof. Nearly all required allegations of the plaintiff in actions for tort or breach of contract relating to the defendant’s acts or omissions describe matters peculiarly in the defendant’s knowledge.” 2 J. Strong, *McCormick on Evidence* § 337, p. 413 (5th ed. 1999).

In addition, Helms-Burton was passed against the backdrop of lawful travel to Cuba. (Mot. to Dismiss at 10.) Indeed, the Office of Foreign Assets Control (“OFAC”), in the Department of the Treasury had regulated who could travel to Cuba for years before the passage of Helms-Burton. *Regan v. Wald*, 468 U.S. 222, 224 (1984). These regulations took the form of general licenses, published in the Code of Federal Regulations and Federal Register, which allowed for travel to Cuba. *Id.* at 225-267. These general licenses, which were anticipated by Helms-Burton’s lawful travel provision and continued after its passage, authorize lawful travel. 31 C.F.R. § 515.572(a)(1). At the pleading stage, therefore, all a plaintiff needs to do is compare the use of property that he or she claims constitutes trafficking within the meaning of Helms-Burton to the permitted forms of travel in the Code of Federal Regulations and Federal Register. Moreover, once a plaintiff satisfies the pleading standard, in the civil context, unlike the criminal cases Plaintiff relies on, “discovery tools, such as interrogatories, requests for admissions, and depositions, will reveal which enumerations may apply and where a plaintiff must accordingly aim its argument.” *Thomas*, 525 F.3d at 1114. Accordingly, there is little reason to believe that plaintiffs, in the proper case, will be unable to plead Helms-Burton claims if trafficking, including its full statutory definition, is construed to be an element.

To the contrary, the real risk to fairness would occur if Plaintiff’s atextual reading of the statute were adopted. After all, on Plaintiff’s reading, a Helms-Burton plaintiff needs to plead practically nothing to adequately allege “trafficking.” Such a low pleading threshold would impermissibly “relegate the motion to dismiss stage to something less than a speed bump.” *Thomas*, 525 F.3d at 1113 n.3. Accordingly, principles of fairness, far from aiding the Plaintiff,

support reading Helms-Burton as it was written and the Complaint must allege facts that plausibly state that Carnival trafficked, considering the full statutory definition of the term. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009).<sup>3</sup>

**B. Even If the Lawful Travel Clause is Considered an Affirmative Defense, Dismissal is Warranted**

But even if trafficking is an affirmative defense, Plaintiff’s claim would still fail because the affirmative defense “is apparent on the face of the complaint.” (Pl.’s Opp’n at 14.) Plaintiff alleges that Carnival “knowingly and intentionally commenced, conducted, and promoted its commercial cruise line business to Cuba using the Subject Property by regularly embarking and disembarking its passengers on the Subject Property.” (Compl. ¶ 12.) Plaintiff has pleaded no facts to suggest that Carnival’s travel was unlawful and more than that does not dispute that any of the elements of the lawful travel affirmative defense (assuming it is one) are evident from the Complaint:

- He does not dispute that at the time Carnival sailed, travel to Cuba was lawful; (Mot. to Dismiss at 6-7 (citing 31 C.F.R. § 515.572));
- He does not dispute that the Court can consider the documents that made Carnival’s travel lawful on a motion to dismiss (Mot. to Dismiss at 7 n.2);
- He does not dispute that Carnival’s use of the docks was incident to that lawful travel (Compl. ¶ 12); and
- He does not dispute that Carnival’s use of the docks was necessary to the conduct of that travel. (Compl. ¶ 12.)

These concessions fully allow the Court to apply the lawful travel clause at the motion to dismiss stage.

Instead of contesting the core of Carnival’s position, Plaintiff raises three other arguments against application of the lawful travel provision at this stage. None is persuasive. *First*, Plaintiff contends that there are fact issues preventing application of the OFAC license at this stage because

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<sup>3</sup> Even if Plaintiff is correct that lawful travel is an affirmative defense, it does not follow that Carnival must bear the burden of persuasion. As Plaintiff’s own cases show, “[w]here affirmative defenses are created through statutory exceptions, the ultimate burden of persuasion remains with the prosecution . . .” *Laroche*, 723 F.2d at 1543. Thus, under *Laroche*, Plaintiff would maintain the burden of persuasion on the lawful travel provision.

the license is not pleaded in the Complaint and apparently, “Plaintiff has yet to see” the license. (Pl.’s Opp’n at 15.) But Plaintiff does not dispute that the Court can take judicial notice of and consider the Code of Federal Regulations on the motion to dismiss, and accordingly, the Court can consider the license. (Mot. to Dismiss at 7 n.2.) Nor does it matter that Plaintiff claims to have not seen the license. Carnival’s argument is that its travel is lawful pursuant to a general license found in the Code of Federal Regulations. (Mot. to Dismiss at 7.) If Plaintiff has not seen it, it is only because he has not bothered to look.

*Second*, Plaintiff claims that a federal regulation authorizing travel to Cuba “does not supplant federal law or insulate an entity from the enforcement of federal law.” (Pl.’s Opp’n at 13.) While a regulation cannot supersede a statute, that is not what is happening here. Simply put, Helms-Burton does not create a cause of action for “lawful travel”; and therefore, a regulation that authorizes such “lawful travel” is not in any way inconsistent with the Helms-Burton Act. Indeed, it is well-recognized that OFAC can regulate travel to Cuba consistent with the embargo. *See Martinez v. Republic of Cuba*, 10-22095-CIV, 2011 WL 13115432, at \*3 (S.D. Fla. June 27, 2011), *report and recommendation adopted in part, rejected in part on other grounds*, 10-22095-CIV, 2011 WL 13115471 (S.D. Fla. Aug. 26, 2011) (“Cuba-related travel transactions by persons subject to U.S. jurisdiction are prohibited unless authorized by OFAC.”). The Helms-Burton Act recognizes that by regulation there could be lawful travel to Cuba and specifically provides that “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” are not prohibited by the Act. 22 U.S.C. 6023(13). Thus, Carnival’s license is in perfect harmony with the Act.

*Third*, Plaintiff postulates that there may be fact issues around whether Carnival “violate[d] the law while sailing.” (Pl.’s Opp’n Br. at 16.) But that argument both misunderstands the pleading standard and fails to follow the plain text of the lawful travel provision. To begin, it is well established that once “allegations of [a] plaintiff’s complaint erect[] the affirmative defense[,] it [is] his duty[,] in order to extricate himself therefrom[,] to plead any exceptions upon which he relied.” *Zurich Am. Ins. Co. v. Amerisure Ins. Co.*, 9:16-CV-81393, 2017 WL 366232, at \*7 (S.D.

Fla. Jan. 20, 2017) (quoting *Marsh v. Butler Cty.*, 268 F.3d 1014, 1022 (11th Cir. 2001), *abrogated on other grounds by Twombly*, 550 U.S. at 561-63); accord *Kincheloe v. Farmer*, 214 F.2d 604, 605 (7th Cir. 1954). For example, when a plaintiff’s complaint “erects” a limitations defense, the complaint will be dismissed unless the plaintiff alleges facts to support tolling. *E. g.*, *Brown v. Montgomery Surgical Ctr.*, 2:12-CV-553-WKW, 2013 WL 1163427, at \*11 (M.D. Ala. Mar. 20, 2013).

More than that, Plaintiff is just wrong that it would matter if Carnival “violate[d] the law while sailing.” The lawful travel provision provides that “transactions and uses of property incident to lawful travel to Cuba,” are not trafficking “to the extent that such transactions and uses of property are necessary to the conduct of such travel.” 22 U.S.C. § 6023(13). Thus, the focus of the provision is not on whether Carnival violated the law while sailing, the question is whether the “travel to Cuba” was lawful. That analysis does not require any further examination of whether the federal government should have issued the OFAC license allowing travel to Cuba. As Carnival explained in its motion to dismiss, at the time it sailed “American companies like Carnival were ‘authorized to provide carrier services to, from, or within Cuba in connection with travel or transportation[.]’” (Mot. to Dismiss at 7 (quoting 31 C.F.R. § 515.572(a)(2)(i).) Far from contesting this analysis, Plaintiff appears to concede that at the time Carnival sailed, travel to Cuba was lawful. That resolves the applicability of the lawful travel provision.

Accordingly, and as Carnival explained in its motion to dismiss, even if the lawful travel provision is an affirmative defense, dismissal with prejudice would still be warranted.

## **II. PLAINTIFF FAILS TO PLEAD THAT HE OWNS A CLAIM**

Plaintiff has utterly failed to address Carnival’s argument that he failed to sufficiently plead ownership of a claim. Indeed, Plaintiff curiously devotes substantial briefing to the incorrect notion that Carnival is requiring Plaintiff to plead a current ownership interest in property. Carnival does not dispute that after confiscation by the Cuban government, a claimant no longer owns legal title to his or her property. *See Glen v. Club Mediterranee S.A.*, 365 F. Supp. 2d 1263, 1269-70 (S.D. Fla. 2005). But present legal title to property in Cuba is irrelevant to Plaintiff’s Helms-Burton Act

claim. What is dispositive is that Plaintiff has failed to plausibly allege *facts* showing that *he owns any claim* to confiscated property.

Plaintiff's Complaint makes two relevant allegations: *First*, that he is the "rightful owner of an 82.5% interest in certain commercial waterfront real property in the Port of Santiago de Cuba." (Compl. ¶ 6.) *Second*, that the Foreign Claims Settlement Commission has certified his claim to a portion of his "ownership interest in the Subject Property." (Compl. ¶ 10.) Plaintiff attaches to his Complaint a Commission certification in the name of Albert Parreno that certifies, among other things, Mr. Parreno's claim to 32.5% of the stock of La Maritima, S.A., a Cuban corporation.

But as Carnival explained in its motion to dismiss, and as Plaintiff does not dispute with any law, these allegations are wholly insufficient. (Mot. to Dismiss at 12-15.) For one, Plaintiff's allegation that he is the "rightful owner" to an "interest" in the Santiago docks is a pure conclusion. But a plaintiff is required to offer more than conclusory allegations of ownership; he or she must set forth sufficient facts that plausibly establish he or she owns a claim to confiscated property. *See Walton v. Hadley*, 13-CV-7907 ER, 2014 WL 3585525, at \*4 n.17 (S.D.N.Y. July 10, 2014); *Brown v. S. Fla. Fishing Extreme, Inc.*, No. 08-20678-CIV, 2008 WL 2597938, at \*2 (S.D. Fla. June 27, 2008). This is particularly important in the Helms-Burton context where ownership of a claim is an element of the claim and the statute places stringent restrictions on claim ownership. *See, e.g.*, 22 U.S.C. § 6082(a)(4)(B) (restricting ability to bring a Helms-Burton case when claim ownership was acquired after March 12, 1996); 22 U.S.C. § 6082(a)(5) (creating restrictions on the ability to bring a Helms-Burton case based on circumstances of claim ownership); 22 U.S.C. § 6083 (detailing how claim ownership is to be proved). Further, the certified claim Plaintiff attached to his Complaint does not make his conclusory allegations more plausible. Quite the opposite actually. The claim is plainly owned by Albert J. Parreno, which undercuts Plaintiff's claim of ownership. Plaintiff pleads no facts showing how he came to "own" Mr. Parreno's claim.

Indeed, rather than defending his conclusory pleading, Plaintiff makes the remarkable claim that he might discover how he owns his own claim in discovery. (Opp'n Br. at 24-25.)

Putting aside that Plaintiff claims to need discovery from himself (apparently to determine if he inherited the shares from Mr. Parreno or from La Maritima at dissolution)—that is just not how pleading works. To the contrary, “[a]s the Supreme Court has noted . . . ‘the doors of discovery’ do not unlock ‘for a plaintiff armed with nothing more than conclusions.’” *Carter v. DeKalb Cty.*, 521 F. App’x 725, 728 (11th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678-79). “Rather, discovery follows ‘the filing of a well-pleaded complaint. It is not a device to enable the plaintiff to make a case when his complaint has failed to state a claim.’” *Id.* (quoting *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997)). Thus, at the outset, Plaintiff needs to plead facts showing that he owns a claim; he has not done so, and accordingly, dismissal is required.

### **III. PLAINTIFF HAS FAILED TO PLEAD THAT HE OWNS A CLAIM TO PROPERTY TRAFFICKED BY CARNIVAL**

Even if Plaintiff’s Complaint is generously viewed to have adequately alleged ownership of some claim, he has failed to allege that Carnival trafficked in the property to which he owns a claim. The only claim mentioned in the Complaint is a claim to a percentage of La Maritima stock. But even if Plaintiff owns that claim—and he has not said how—the fact remains that Plaintiff has not pleaded that Carnival trafficked in that stock.

Rather than dispute that the property a plaintiff owns a claim to must be the same property the defendant traffics in (*see* Mot. to Dismiss at 16-18), Plaintiff attempts to draw a distinction between ownership of a “claim” to property and ownership of property itself. But that discussion entirely misses the point. Even if Plaintiff owns a claim to certain property (stock) that was confiscated by the Cuban government, Plaintiff cannot sustain a Helms-Burton case unless he alleges Carnival trafficked in the confiscated property. Put differently, ownership of just any claim is insufficient to sustain Plaintiff’s Helms-Burton Act claim. Plaintiff must allege that he owns a claim to confiscated property in which Carnival trafficked. *See Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1255 (11th Cir. 2006) (“When (or if) the portion of Title III that allows private litigants to bring lawsuits becomes effective, actions brought pursuant to the new statutory scheme

would be actions brought ‘on a claim to *the confiscated property*’ against traffickers *in the property.*’ (emphasis added)). He has not done so.

Plaintiff attached the Parreno claim certification to his Complaint, which, despite Plaintiff’s contentions to the contrary, “is part of the pleading for all purposes.” Fed. R. Civ. P. 10(c). The International Claims Settlement Act empowers the commission to certify only the amount and validity of claims for losses resulting from the confiscation of property from nationals of the United States. 22 U.S.C. § 1643b(a); *see also* 22 U.S.C. § 1643c(a). The attached certification makes clear that La Maritima, “owned and operated docks and warehouses in Santiago de Cuba,” and that as a Cuban corporation, it could not receive a claim certification for its property. (Dkt. 1-1 at 4.) Parreno, as a U.S. national, could only certify a claim for his ownership interest in the corporation. *See id.*; *see also* 22 U.S.C. § 1643d (regarding claims based on ownership interests in a corporation). Indeed, the Commission could thus certify as a claim only the stock interest belonging to the U.S. shareholder.

A “claim” is not divorced from the legal interest in property that was owned at the time of confiscation. The scope of a claim extends only so far as a claimant’s property interest extended at the time of confiscation. Helms-Burton’s cause of action requires that the property trafficked in be the same property that was confiscated by the Cuban Government and the same property that the U.S. national plaintiff owns the claim to. (Mot. to Dismiss at 16 (explaining the importance of the phrase “such property” in Helms-Burton).) Moreover, when proving ownership of a claim, Helms-Burton draws an equivalence between a claim and the former ownership of that property interest: “In any action brought under this subchapter, the court shall accept as conclusive proof of *ownership of an interest in property* a certification of a claim to ownership of that interest that has been made by the Foreign Claims Settlement Commission . . . .” 22 U.S.C. § 6083(a)(1) (emphasis added).

The property interest underlying Plaintiffs claim is an ownership interest in La Maritima Corporation, the ownership of stock. Plaintiff has pleaded no facts showing that he owns a claim to a property interest in the Santiago docks. Nor has he pleaded any facts demonstrating that

Carnival has trafficked in La Maritima stock. To the contrary, he pleads that Carnival used the docks themselves. (Compl. ¶ 12-13.)

Plaintiff's contrary statutory arguments miss the point. Carnival is not attempting to omit the word "claim" from the statute. (Opp'n to Mot. to Dismiss at 19-20.) But as noted above, a "claim" must be derived from an ownership interest in property that was confiscated by the Cuban government, and Plaintiff had no such interest in the docks. La Maritima did, and for the reasons stated in Carnival's original motion, shareholders have no property interest in the corporation's property. (Mot. to Dismiss at 17-18.) For Helms-Burton liability to arise, a defendant must have trafficked in the confiscated property interest, and a plaintiff must own a claim to the trafficked, confiscated property. This flows from the statutory text, which provides: "[A]ny person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property . . . ." 22 U.S.C. § 6082(a)(1)(A). The property interest in which Carnival is alleged to have trafficked is not the property interest confiscated by the Cuban government from Plaintiff (or, more accurately, Mr. Parreno).

Plaintiff's interpretation would seemingly read the entire definition of property out of the statute, granting a plaintiff the right to recover compensation for trafficking in property interests he or she never owned. Plaintiff's position seems to be that he need only own some claim to a confiscated property interest and Helms-Burton entitles him to recovery for any trafficking in associated property interests, regardless of whether they were confiscated from Plaintiff or not. But that cannot be right, especially because Plaintiff concedes that "property" as defined in Helms-Burton refers to an interest-specific view of property that views a piece of "property" as the "specific, finite, property rights" associated with it. (Mot. to Dismiss. at 12-13.)

Moreover, Plaintiff's any-claim-will-do approach will permit plaintiffs to circumvent the Act's limiting of recovery to U.S. nationals. *See* 22 U.S.C. § 6082(a)(1)(A). Under Plaintiff's approach, simply owning a claim to a foreign corporation's stock would allow Plaintiff to recover

under Helms-Burton from a defendant who trafficked in the corporation's property, when the corporation itself is prohibited from seeking such a recovery to vindicate its property interests. *See Glen*, 450 F.3d at 1255 n.3 (“[W]e do note that the Varadero property at issue in this litigation was owned by Cuban nationals at the time of its expropriation and thus may not be the proper subject of a trafficking claim under the statute.”).

In sum, to bring his case under Helms-Burton, Plaintiff must own a claim to confiscated property that was trafficked by Carnival. But Plaintiff has failed to adequately allege ownership of any claim. And to the extent any claim can be discerned from Plaintiff's Complaint, it is not a claim to the Santiago docks—the property in which Carnival allegedly trafficked—but instead a claim to stock in foreign corporation. Plaintiff simply has not alleged that he owns a claim to confiscated property that was ever trafficked by Carnival. Accordingly, Plaintiff's Complaint must be dismissed with prejudice.

### **CONCLUSION**

For the foregoing reasons, Carnival respectfully requests that Plaintiff's complaint with prejudice.

Dated: July 8, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record via the court's CM/ECF System on July 8, 2019.

By: *s/ Stuart H. Singer*  
Stuart H. Singer