IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 19-cv-23965-MGC

JOSE RAMON LÓPEZ REGUEIRO

v.

AMERICAN AIRLINES INC. and
LATAM AIRLINES GROUP, S.A.,

defendants.
_____/

LÓPEZ-REGUEIRO'S OPPOSITION TO
AMERICAN AIRLINES' MOTION TO DISMISS THE COMPLAINT

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OTHER AUTHORITIES

America's Miami Hub, American Airlines, https://www.aa.com/content/images/aboutUs/newsroom/miami_fact_sheet.pdf (last visited Dec. 5, 2019) 1

American Airlines Becomes 1st US Carrier to Begin Cuba Cargo Service, American Airlines Cargo, https://www.aacargo.com/about/american-becomes-first-carrier-to-begin-cuba-cargo-service.html (last accessed Dec. 10, 2019) 18

American Airlines, http://aa.fltmaps.com/en (zoom into Cuba on map and select "Havana," then select "Show Destinations" hyperlink, and see "Departure Results List") (last accessed Dec. 5, 2019) 1

Flights to Cuba with American Airlines, American Airlines, https://www.aa.com/en-us/flights-to-cuba (last visited Dec. 5, 2019) 8

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Traveler, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/traveler (last visited November 15, 2019) 20

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INTRODUCTION

The motion to dismiss (the "Motion") [D.E. 28] filed by defendant American Airlines, Inc. ("American") is painfully silent on an issue of central importance to this case; it does not once mention that American transports commercial cargo on cargo flights, as well as passenger flights, to and from Jose Martí International Airport (the "Airport"), and it never argues any dismissal theory as to its cargo operations. Further, what defendant does argue about its passenger operations does not remotely support a dismissal of the complaint.

First, defendant's Motion relies on a radical rewriting of plaintiff López Regueiro's complaint, of which he, not the defendant, is the master. In defendant's version, "[p]laintiff's real complaint is that *Cuba*, rather than Plaintiff, receives the monetary benefit of activities at the Airport; and as with Cuba's alleged confiscation of the Airport, this alleged injury is traceable only to Cuba, not American." Motion to Dismiss ("MTD") at 4. Apart from absurdly implying that its own flights have no significance (even though they triggered the filing of this case), or that its own airplanes are being piloted by the Cuban government, this, quite obviously, is not plaintiff's claim. The complaint expressly alleges that defendant is unlawfully benefiting from its own use of the Airport. And, of course, Title III[1] authorizes just such a claim by a true owner against a trafficker.

Second, American—one of Miami-Dade County's largest private employers, which operates one of its ten world-wide hubs at Miami International Airport, from, to or through which it flies every flight it operates to or from the Airport[2]—argues that this Court cannot

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[1] Throughout, we refer to the LIBERTAD (or Helms-Burton) Act as "the Act" and to Title III of the Act as "Title III." *See* 22 U.S.C. § 6021, *et seq.*

[2] *See American's Miami Hub*, American Airlines, https://www.aa.com/content/images/aboutUs/newsroom/miami_fact_sheet.pdf (last visited Dec. 5, 2019), attached as **Exhibit A**; American Airlines, http://aa.fltmaps.com/en (zoom into Cuba on map and select "Havana," then select "Show Destinations" hyperlink, and see "Departure Results List") (last accessed Dec. 5, 2019), attached as **Exhibit B**. The Court may and should take judicial notice of American Airline's website. *See* Fed. R. Evid. 201(d) ("The court may take judicial notice at any stage of the proceeding."); *Goplin v. WeConnect, Inc.*, 893 F.3d 488, 491 (7th Cir. 2018) ("In any event, the district court did not violate the rules of judicial notice by reviewing WeConnect's website . . . . We note too that the statements at issue are WeConnect's own assertions, not potentially unfamiliar information posted on third-party websites."); *Doron Precision Sys., Inc. v. FAAC, Inc.*, 423 F. Supp. 2d 173, 179 n. 8 (S.D.N.Y.2006) ("For purposes of a 12(b)(6) motion to dismiss, a court

exercise personal jurisdiction over it. In flying passengers and commercial cargo between Miami and the Airport, American Airlines is trafficking in the Airport from this very District. Because defendant traffics from Florida and this District, it is subjected to personal jurisdiction in this case.

Third, to argue that López Regueiro lacks standing under Title III because he was not a U.S. citizen at the time the Airport was confiscated, or on March 12, 1996, defendant again asks the Court to rewrite Title III. Then, relying on its improper rewrite, defendant proposes an absurd result that would be contrary to Title III's expressly stated purpose. First, defendant asserts that Title III is no more than a redo of the claims process administered by the Foreign Claims Settlement Commission (the "FCSC") in the 1960s and again in 2006 (the "Programs"). Title III's legislative history says no: "It is the committee of conference's intent not to supplant or undermine the Foreign Claims Settlement process, but ***to provide an additional remedy*** for U.S. nationals through which they may take action to protect their claim to a confiscated property in Cuba." HR Rep. No. 104-468, at 58 (1996) (emphasis added). Then, defendant asserts that López Regueiro does not own a claim because the "property" confiscated was an interest in a Cuban corporation as opposed to the Airport itself. But another court of this District already rejected that argument because it ignores the purpose of Title III, and would require the Court to interpret Title III into this absurdity: that "one can traffic in a Cuban corporation's confiscated property with impunity as long as the Cuban Government not only took the property, but also nationalized the corporate entity itself, leaving only the individual shareholders behind to pursue any rights the corporation might have lost to the Castro regime." *Garcia-Bengochea v. Carnival Corp.*, Case No. 19-cv-21725-JLK at ECF No. 41, at 13 (King, J.).

Fourth, defendant demands dismissal on the theory that its conduct is saved as a matter of law by Title III's "incident to lawful travel" exception (the "Exception"). But the Exception is an affirmative defense, as two courts of this District already held, and determining whether the Exception applies is a fact-bound, fact-intensive inquiry.

For these compelling reasons, the Court should deny the Motion.

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may take judicial notice of information publicly announced on a party's website, as long as the website's authenticity is not in dispute and 'it is capable of accurate and ready determination.'") (quoting Fed. R. Evid. 201(b)).

LEGAL STANDARD

"In general, courts disfavor motions to dismiss and grant such motions in rare circumstances. *Wright v. King*, 2007 WL 80844, at *1 (M.D. Fla. 2007) (citing *Gasper v. La. Stadium and Expo. Dist.*, 577 F.2d 897, 900 (5th Cir. 1978). The rules require only a short and plain statement of (1) the grounds for the court's jurisdiction, (2) the claim showing that the pleader is entitled to relief, and (3) a demand for the relief sought. Fed. R. Civ. P. 8(a). To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," so as to "nudge[] [his] claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

While "a formulaic recitation of the elements of a cause of action will not do," *Twombly*, 550 U.S. at 555, "[t]o survive a 12(b)(6) motion to dismiss, the complaint does not need detailed factual allegations, but must give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010) (citing *Twombly*, 550 U.S. at 555, *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (internal quotations omitted)). Further, "[i]n deciding a Rule 12(b)(6) motion to dismiss, the court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff . . . ." *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1246 (11th Cir. 2016) (citing *Erikson v. Pardus*, 551 U.S. 89, 94 (2007)). A court may not resolve factual issues on a motion to dismiss, but may only decide questions of law. *Wright*, 2007 WL 80844, at *1 (citing *Kest v. Nathanson*, 216 So. 2d 233, 235 (Fla. 4th DCA 1968)). Finally, "in ruling on a motion to dismiss, the Court is constrained to review the allegations as contained within the four corners of the complaint and may not consider matters outside the pleading without converting the defendant's motion into one for summary judgment." *Crowell v. Morgan, Stanley, Dean Witter Servs. Co., Inc.*, 87 F. Supp. 2d 1287, 1290 (S.D. Fla. 2000).

ARGUMENT

Title III provides that "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 a claim to such property for money damages . . . ." 28 U.S.C. §

6082(a)(1)(A). López Regueiro pleads, as he must, that (1) he is a United States national (2) who owns a claim to property that was (3) confiscated by the Cuban government on or after January 1, 1959, and (4) trafficked by the defendants within the last two years. Complaint ("Comp.") [D.E. 1] ¶¶ 2, 11-15, 16-19. Because López Regueiro has stated a claim on which relief may be granted, the Court should deny the Motion so this case may proceed.

I. López Regueiro Has Standing

In order to have standing to sue, or what defendant calls "Title III standing," a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Here, defendant argues that López Regueiro "has not alleged an invasion of a legally protected interest or any injury fairly traceable to [defendant]." MTD at 3. To do so, defendant argues that López Regueiro lacks "Article III standing" by rewriting the complaint as though it said the "real complaint is that *Cuba*, rather than Plaintiff, receives the monetary benefit of activities at the Airport; and as with Cuba's alleged confiscation of the Airport, this alleged injury is traceable only to Cuba, not [defendant]." MTD at 4. But the complaint never alleged any of this, let alone that defendant is responsible or liable for the confiscation of the Airport.

Instead, what López Regueiro does allege—plainly and briefly—is that American Airlines is liable for its own trafficking of the Airport. *See, e.g.,* Comp. at 2 ("López Regueiro sues defendants . . . for unlawful trafficking in his confiscated property in Cuba."); *Id.* ¶16 ("Ever since the confiscation—and continuing to this day—more than forty airlines and other businesses, including the defendants, have used the Airport to transport cargo and passengers."); *Id.* ¶19 (None ". . . . of the defendants . . . have ever paid—and the Vilaboy Family has never received—any compensation whatsoever for the trafficking of the Airport."); *Id.* ¶26 ("Defendants have trafficked in or benefitted from ongoing, unlawful trafficking in the Airport, by arriving and departing the Airport and using its facilities for cargo and passenger transport, in violation of Title III of the LIBERTAD Act.").

In any event, the Act and Title III do not concern claims against the Cuban government for its confiscation of all private property on the island.[3] Rather, Title III creates a distinct kind of claim, not for the original taking of property by the Cuban government, but for the subsequent use of property, i.e., trafficking, as the Committee Report notes to 22 U.S.C. § 6082 make clear:

> The purpose of this civil remedy is, in part, to discourage persons and companies from engaging in commercial transactions involving confiscated property, and in so doing to deny the Cuban regime of Fidel Castro the capital generated by such ventures and to deter the exploitation of property confiscated from U.S. nationals. The substitute puts would-be investors on notice that if they traffic in confiscated property of U.S. nationals after this provision becomes law, they may be held liable to the legitimate U.S. owners in U.S. courts.
>
> It is the committee of conference's intent not to supplant or undermine the Foreign Claims Settlement process, but to provide an additional remedy for U.S. nationals through which they may take action to protect their claim to a confiscated property in Cuba. The committee of conference expects that the existence of this remedy will make the recovery process less complicated because it will deter investment in and development of confiscated property in Cuba, thereby facilitating efforts by the rightful owners to reclaim, sell, or develop such property under the laws of a democratic Cuba.

HR Rep. No. 104-468, at 58 (1996).

The injury-in-fact under Title III alleged by López Regueiro is that defendant is trafficking in the Airport without his permission and without compensation to him. That injury is "fairly traceable" to defendant because it is flying its airplanes in and out of the Airport, an indisputable commercial use of the Airport.

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[3] Title III of the Act doesn't even mention compensation for confiscated property in Cuba. Title II does. *See* 22 U.S.C. § 6067 ("Settlement of outstanding United States claims to confiscated property in Cuba"). As the Conference Report notes, U.S. support for a transition government in Cuba under Title II (not Title III) is conditioned "on such government publicly committing itself, and taking appropriate steps to establish a procedure under its law or through international arbitration, to provide for the return of, or prompt, adequate, and effective compensation for, property confiscated by the Cuban Government on or after January 1, 1959." HR Rep. No. 104-468, at 56 (1996). Thus, the Act contemplates that some other law, perhaps one enacted by a future Cuban government—but not Title III—ultimately will be the basis for effectuating a return of, or compensation for, property confiscated by the Cuban government.

No case defendant cites supports its argument that Lopez Regueiro has not been injured in fact. Defendant relies on the inapposite *Raines v. Byrd*, 521 U.S. 811 (1997), *Spokeo, supra*, and *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) to argue that López Regueiro "cannot claim Article III standing by relying solely on the fact that Title III of the HBA gives United States nationals a right to sue persons who traffic in confiscated property." MTD at 3. But *Spokeo* involved a case where the plaintiff had failed to allege actual injury at all. *Spokeo*, 136 S. Ct. at 1550 ("Robins cannot satisfy the demands of Article III by alleging a bare procedural violation."). *Raines* dealt with a complete absence of allegations of an injury personal to the plaintiff. *Raines*, 521 U.S. at 829 ("appellees have alleged no injury to themselves as individuals . . . the institutional injury they allege is wholly abstract and widely dispersed, and their attempt to litigate this dispute at this time and in this form is contrary to historical experience."). And in *Summers*, the plaintiff did not allege any concrete injury, but only a "procedural injury" untied to any personal concrete interests. *Summers*, 555 U.S. at 497 ("Respondents argue that they have standing to bring their challenge because they have suffered procedural injury, namely, that they have been denied the ability to file comments on some Forest Service actions and will continue to be so denied. But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing.").

Here, as defendant concedes, López Regueiro has alleged a concrete, personal injury—that he has not been compensated for defendant's trafficking. MTD at 4 ("Plaintiff also alleges that [defendant] has injured him because he has not received 'any compensation whatsoever' for [defendant's] activities at the Airport. Compl. ¶ 19; *see also id.* at 2 (Plaintiff has not received 'a single penny in compensation' for use of the Airport)."). This, of course, is exactly what Title III concerns.

Finally, as to the last of the standing requirements, an award of damages to López Regueiro plainly will remedy defendant's failure to compensate him for its trafficking activity. Thus, it follows inexorably that López Regueiro's injury can be "redressed by a favorable judicial decision." *Spokeo,* 136 S. Ct. at 1547. In sum, Lopez Reguiero's damages claim meets the standing requirements for bringing a claim under Article III.

II. This Court Has Personal Jurisdiction Over American Airlines

American argues that the complaint did not adequately allege that the Court has personal jurisdiction over it. MTD at 5-6. This incredible assertion is destined to fail. The complaint alleges specific and general jurisdiction based on the facts that defendant "maintains and carr[ies] on continuous and systematic contacts with Florida, regularly transacts business within Florida, regularly avail[s] [itself] of the benefits of [its] presence in Florida, committed a tortious act in Florida, and caused injury in Florida by committing acts outside of Florida while engaging in solicitation in Florida." Comp. ¶ 6.[4] It further alleges that defendant engages in business in Florida because "'many of the flights destined for the José Martí Airport . . . depart from Miami International Airport.'" MTD at 5 (quoting Comp. ¶ 17). Defendant doesn't dispute these allegations, which are thus deemed true, but argues that they "establish[] neither purposeful availment nor relatedness." MTD at 5. This argument has no merit.

First, the complaint adequately alleged (at ¶¶ 6, 17) that defendant is subject to specific jurisdiction under Fla. Stat. § 48.193(1)(a)(1) and (2), because López Regueiro's claim that defendant trafficked the Airport plainly and directly "arises out of" and "relates to" the business that defendant operates, and tortious acts defendant commits, in Florida, i.e., offering flights to and from the Airport to Florida residents through its website, and embarking and disembarking passengers and loading and unloading cargo headed to and from the Airport at MIA, and (b) the tortious acts. Fla. Stat. § 48.193(1)(a)(1)-(2) (2019).

Second, the complaint also adequately alleged (at ¶¶ 6) that defendant is subject to general jurisdiction under Fla. Stat. § 48.193(2) because of its extensive, systematic and continuous contacts with Florida and this forum, including the indisputable facts that it:

(a) operates one of its world-wide hubs at Miami International Airport ("MIA"), from which it has flown passengers and commercial cargo to and from the Airport;

(b) is one of the largest private employers in Miami-Dade County;

[4] We ask the Court to take judicial notice of the American Airlines Arena visible from the Wilkie D. Ferguson federal building. *See* Fed. R. Evid. 201(b) (allowing the Court to take judicial notice of "a fact that is not subject to reasonable dispute.").

(c) maintains and operates sizeable maintenance facilities and administrative offices in Miami; and

(d) operates an interactive website accessible to Florida residents through which they can book and pay for flights, including flights to and from the Airport.[5]

If anyone has purposefully availed itself of Florida and this District, American surely has.

Defendant cannot factually rebut these allegations, which means that personal jurisdiction exists unless it would offend due process, which it will not. "In specific personal jurisdiction cases, we apply the three-part due process test, which examines: (1) whether the plaintiff's claims 'arise out of or relate to' at least one of the defendant's contacts with the forum; (2) whether the nonresident defendant 'purposefully availed' himself of the privilege of conducting activities within the forum state, thus invoking the benefit of the forum state's laws; and (3) whether the exercise of personal jurisdiction comports with 'traditional notions of fair play and substantial justice.'" *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1355 (11th Cir. 2013) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73, 474–75 (1985), and collecting cases).

"The plaintiff bears the burden of establishing the first two prongs, and if the plaintiff does so, 'a defendant must make a compelling case' that the exercise of jurisdiction would violate traditional notions of fair play and substantial justice." *Mosseri*, 736 F.3d at 1355 (quoting *Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc.*, 593 F.3d 1249, 1267 (11th Cir. 2010)). Defendant attached no sworn statement to support any of its arguments about lack of personal jurisdiction, including due process. This is an immediate disqualifier. *See Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino,* 447 F.3d 1357, 1360 (11th Cir. 2006) (Once the plaintiff establishes a prima facie case of personal jurisdiction, the burden shifts to the defendant to "submit[] affidavits contrary to the allegations in the complaint . . . ."). The likely reason for defendant's failure to rebut these allegations is that it could not, in good faith, do so. In any event, because defendant did not meet its threshold burden, its argument cannot proceed.

Nonetheless, citing *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210 (11th Cir. 2009), defendant argues that López Regueiro has not shown that its systematic and

[5] *See Flights to Cuba with American Airlines*, American Airlines, https://www.aa.com/en-us/flights-to-cuba (last visited Dec. 5, 2019), attached as **Exhibit C**.

continuous contacts with Florida constitute "purposeful availment," on the notion that its trafficking was not "directly aimed at" Florida, but at the Airport. MTD at 5. This misstates the test. "*Oldfield* states in dicta in a footnote that the minimum contacts test applies in negligence cases and the 'effects test' applies in intentional tort cases . . . ." *Mosseri*, 736 F.3d at n. 11. "*Oldfield*, however, was a negligence case and did not state [that] the "effects test" is the exclusive test for intentional tort cases. Rather, it stated the 'effects test' applies only in intentional tort cases, a proposition with which we do not disagree." *Id*. The complaint adequately alleged "purposeful availment" because defendant's contacts with Florida—operating a hub at MIA, flying passengers and commercial cargo between MIA and the Airport, operating as the third largest private employer in Miami-Dade County, and operating extensive maintenance facilities and administrative offices in Miami—demonstrate that defendant "has purposefully availed himself of the privileges of doing business within the forum" and are of such a nature that defendant "should reasonably anticipate being haled into court in the forum." *See id*.

As for specific jurisdiction, Defendant mystifyingly argues that when it flies passengers and commercial cargo between the Airport and MIA, those activities are not related to its contacts with Florida. MTD at 6. How can that be? For defendant to use the Airport to land passengers and cargo, it must first put the passengers and cargo on its airplanes s*omewhere else*. When it chose to do so in Miami (or, conversely, to land here with passengers and cargo originating at the Airport), it chose to avail itself of this forum in the specific context of its trafficking. Defendant's argument makes no sense at all unless one follows the dictates of Humpty Dumpty.[6]

López Regueiro's trafficking claim plainly "relates to" and "arises out of" defendant's flying passengers and commercial cargo between MIA and the Airport. In *SEC v. Carrillo,* 115 F.3d 1540 (11th Cir. 1997), the Eleventh Circuit analyzed a defendant's Florida contacts (defendant was a Costa Rican corporation), which were advertising securities in airline magazines, mailing investment materials, application forms, and stock certificates to U.S. investors, and maintaining bank accounts in the U.S., to decide if they related to defendant's

[6] "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean-neither more nor less.'" Lewis Carroll, *Through the Looking–Glass* 57 (Cosimo, Inc. 2010).

alleged securities fraud. The court held that "the alleged contacts are related to, or gave rise to, the causes of action because each of the contacts was a step by which the allegedly fraudulent scheme was carried out." *Id*. at 1544. "[B]y advertising, offering shares, and accepting payment in this country, [the defendant] did everything necessary to complete the offer and sales of the unregistered securities here." *Id*. at 1545. Here, defendant's contacts with Florida, particularly its use of MIA as a hub, and as the starting and ending point for all of its flights between the U.S. and the Airport—"was a step by which" defendant trafficked in the Airport. By making MIA the origin or destination for ***all flights to and from*** the Airport, defendant "did everything necessary" to its trafficking. Its activities in this District enabled its trafficking in the Airport. *See id*., 115 F.3d at 1544.

Because the complaint adequately alleged personal jurisdiction under Florida's long-arm statute,[7] the burden shifted to defendant to "make a compelling case that the exercise of jurisdiction would violate traditional notions of fair play and substantial justice[,]" *Mosseri*, 736 F.3d at 1355, which defendant did not even attempt, and never could have demonstrated. Personal jurisdiction over defendant exists.

III. López Regueiro Has Standing to Bring This Action Under Title III

Defendant argues that López Regueiro does not have standing for this Title III action on the theory that he failed to adequately allege: (1) that he acquired ownership of his claim

[7] Although defendant failed to mention it, the complaint also adequately alleged that defendant committed a tort within Florida. *See* Comp. ¶¶6, 17. Fla. Stat. § 48.193(1)(a)(2), provides that "a person, whether or not a citizen or resident of this state, who personally or through an agent" "commit[s] a tortious act within this state" "submits himself or herself . . . to the jurisdiction of the courts of this state . . . ." Fla. Stat. § 48.193(1)(a)(2). "Under Florida law, a nonresident defendant commits 'a tortious act within Florida' when he commits an act *outside* the state that causes *injury within Florida*." *Mosseri*, 736 F.3d at 1353 (quoting *Licciardello v. Lovelady*, 544 F.3d 1280, 1283 (11th Cir. 2008)) (emphasis in original). In *Mosseri*, the court held that "a trademark infringement on an Internet website causes injury and occurs in Florida by virtue of the website's accessibility in Florida." 736 F.3d at 1254 (citing *Lovelady*, 544 F.3d at 1283). "[W]e need not decide whether trademark injury necessarily occurs where the owner of the mark resides, as the Florida district courts have held, *because in this case the alleged infringement clearly also occurred in Florida by virtue of the website's accessibility in Florida*." *id.* (emphasis in original). This case is no different—not only does López Regueiro reside in Florida, but defendant's website, through which it solicited passengers and cargo to and from the Airport (i.e., defendant's trafficking), was accessible in Florida, and the flights departed and arrived at MIA. Thus, this Court also has personal jurisdiction over defendant under Fla. Stat. § 48.193(1)(a)(2).

before March 12, 1996; (2) that he was a U.S. national at the time he acquired ownership of his claim; (3) that he owns a claim to the Airport because his ownership was "indirect," through a Cuban company, and also that (4) the Airport was not confiscated from a U.S. national. MTD at 6-7. Defendant is wrong in each instance because: (1) the complaint adequately alleges that López Regueiro acquired his claim before March 12, 1996; (2) Title III does not require that a plaintiff have been a U.S. national at any time other than the date of the filing of the complaint; and (3) as another court of this District already held, it is irrelevant that López Regueiro's interest in the Airport was "indirect" because Title III's defines "property" to include future or contingent interests in property, meaning that he owns a *claim* to the Airport even if direct ownership of the Airport was by a corporation.

A. *López Regueiro Adequately Alleged That He Acquired Ownership of His Claim Before March 12, 1996*

The Complaint alleges that "as of the time of filing this lawsuit, [López] Regueiro is the rightful owner of the Airport, which is stolen property that defendants are trafficking and benefiting from trafficking." Comp. ¶ 15. It also alleges that "[o]n November 14, 1952, Vilaboy [López Regueiro's father], through his company Compañia de Aeropuertos Internacionales, S.A. ("CAISA") purchased the Airport . . . ." *Id.* ¶ 12. Defendant irrelevantly argues that "alleging ownership of a claim at the time a lawsuit is filed is irrelevant." MTD at 7.

Title III defines "property" as "any property . . . whether real, personal, or mixed, and any present, ***future, or contingent*** right, security, or other interest therein, including any leasehold interest." 22 U.S.C. § 6023(12) (emphasis added). López Regueiro's interest in the Airport, even before his father's passing and his receipt of a *present* interest in the property, was a *future* or *contingent* interest in the Airport, and validation of his interest is a factual inquiry that cannot be considered on this Motion. "Plaintiff's ownership of the claim involves factual determinations that go beyond the four corners of the Complaint . . ." *Garcia-Bengochea v. Carnival Corp.*, Case No. 19-cv-21725-JLK at ECF No. 41, at 9. Because, "[i]n deciding a Rule 12(b)(6) motion to dismiss, the court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff . . . ." *Dusek*, 832 F.3d at 1246,

López Regueiro has alleged a plausible inference that he obtained ownership of his claim before March 12, 1996.[8] Accordingly, the Court cannot dismiss the Complaint on this ground.

B. *Title III Required Only That López Regueiro Be a U.S. National at the Time of Filing This Action*

Title III states that "Cuban nationals who became United States citizens after their property was confiscated" have a right of action under Title III. 28 U.S.C. § 6083(c)(1). Nonetheless, defendant argues that only property confiscated from persons who were U.S. nationals at the time of the confiscation possess claims under Title III. *See* MTD at 6-7 ("Plaintiff has not sufficiently alleged that . . . (4) even if he has a claim to the Airport, the Airport was confiscated from a U.S. national and is therefore a proper subject of a Title III claim."). Defendants alternatively argue that López Regueiro has no right of action because he was not a U.S. national as of March 12, 1996. *Id*. at 7 ("the HBA therefore requires a section 6082(a)(4)(B) plaintiff to have been a U.S. citizen before March 12, 1996."). These arguments are squarely contradicted by Title III's plain language and legislative history.

To expose fundamental errors in defendant's arguments, we must briefly discuss the claims process the FCSC administered in the late 1960s, and again in 2006 (the "Programs").

The Programs' purpose was "to provide for the determination of the amount and validity of claims ***against the Government of Cuba*** . . . out of nationalization, expropriation, intervention, or other takings, or special measures directed against, property of nationals of the United States . . ." 22 U.S.C. § 1643 (emphasis added). To accomplish that purpose, the FCSC was to "certify to each individual who has filed a claim . . . the amount determined by the Commission to be the loss or damage suffered by the claimant . . . ." 22 U.S.C. § 1643f(a). Once the FCSC determined that a claimant had demonstrated ownership of the property and determined its value, the FCSC was to "certify to the Secretary of State such amount and the basic information underlying that amount, together with a statement of the evidence relied

[8] As the original owners of confiscated Cuban property pass (the confiscations occurred ***sixty years ago***) their descendants inherit their claims, as López Regueiro did here. To adopt defendant's theory would require reading a nonexistent "sunset" provision into Title III, which courts may not do. *E.g., Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1224 (11th Cir. 2009) (Courts are "not allowed to add or subtract words from a statute."). Further, such a construction would be inconsistent with Title III's purpose—to deter trafficking in confiscated Cuban property. It would mean that a trafficker's liability under Title III would depend on the fortuity of the original owner still being alive.

upon and the reasoning employed in reaching its decision." *Id*. It was then up to the U.S. Government to "espouse" those claims in any future settlement with a democratically-elected future Cuban government: "In the view of the committee of conference, only the current 5,911 claims certified by the FCSC should be espoused by the United States Government in any settlement with a future Cuban Government." HR Rep. No. 104-468, at 59 (1996). Notably, however, under the Programs, only U.S. nationals who were U.S. nationals on the date of the confiscation were eligible to file claims with the FCSC:

> A claim shall not be considered under section 1643b(a) of this title unless the property on which the claim was based was owned wholly or partially, directly or indirectly by a national of the United States on the date of the loss, and if considered shall be considered only to the extent the claim has been held by one or more nationals of the United States continuously thereafter until the date of filing with the Commission.

22 U.S.C. § 1643c(a).

Title III was not intended as a mere reiteration of the Programs—it was intended to provide a different form of relief to a broader class of plaintiffs. "It is the committee of conference's intent not to supplant or undermine the Foreign Claims Settlement process, but to provide an additional remedy for U.S. nationals through which they may take action to protect their claim to a confiscated property in Cuba." HR Rep. No. 104-468, at 58 (1996).

In contrast to the Programs, Title III provides a right of action to U.S. nationals who were not U.S. nationals at the time of the confiscation, but became U.S. nationals at some point before bringing a claim. It provides that: "actions may be brought . . . with respect to property confiscated before, on, or after March 12, 1996." 22 U.S.C. § 6082(a)(4)(A). "In the case of property confiscated before March 12, 1996, a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996." 22 U.S.C. § 6082(a)(4)(B). In other words, a U.S. national may bring a claim under Title III if he or she acquired ownership of the claim before March 12, 1996. Notably, there is an exclusion in Title III for claims by U.S. nationals who were eligible to file claims with the FCSC but did not:

> In the case of a United States national who was eligible to file a claim with the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act of 1949 [22 U.S.C. 1643 et seq.] but did not so file the claim, that United States national may not bring an action on that claim under this section.

22 U.S.C. § 6082(a)(5)(A) (addition in original). By definition, persons who were U.S. nationals at the time of confiscation would have been eligible to file a claim with the FCSC. If, as defendant argues, only U.S. nationals who were U.S. nationals at the time of confiscation were allowed to bring claims under Title III, only persons with claims certified by the FCSC could bring such claims, which is not what Title III says. *Compare* 22 U.S.C. § 6083(a)(1) ("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 [FCSC] . . . ."), *with* 22 U.S.C. § 6083(a)(2) ("If in an action under this subchapter a claim has not been so certified by the [FCSC], the court may appoint a special master, including the [FCSC], to make determinations regarding the amount and ownership of the claims.").

In cases where the court appoints the FCSC as a special master to "make determinations regarding the amount and ownership of the claims," Title III makes clear that those determinations do not transform a Title III claim into a claim under the Programs, which are to be part of a negotiation process between the U.S. and a future, democratically-elected, Cuban government:

> Nothing in this chapter . . . shall be construed . . . to require or otherwise authorize the claims of Cuban nationals who became United States citizens after their property was confiscated to be included in the claims certified to the Secretary of State by the [FCSC] for purposes of future negotiation and espousal of claims with a friendly government in Cuba when diplomatic relations are restored . . . .

22 U.S.C. § 6083(c)(1). The plain language of the statute, along with the committee notes, make clear that, contrary to defendant's assertions, "Cuban nationals who became United States citizens after their property was confiscated" possess a right of action under Title III, and when a court appoints the FCSC to determine the amount and ownership of a claims, it is not to be added to the number of claims certified by the FCSC through the Programs:

> The committee of conference recognizes the importance of a decision by the [FCSC] in certifying a claim and, accordingly, believes that no court should dismiss a certification in an action brought under this title. The committee of conference also notes the recognized special expertise of the FCSC in determining the amount and validity of claims to confiscated properties overseas. As such, the ''special master'' provision allows the court to call upon the FCSC's expertise for evidentiary purposes related to the right of action only. This provision is intended to make clear that such evidentiary determinations

> by FCSC do not constitute certification of property claims pursuant to title V of the International Claims Settlement Act of 1949 for purposes of United States Government espousal and future negotiation with a friendly government in Cuba. In the view of the committee of conference, only the current 5,911 claims certified by the FCSC should be espoused by the United States Government in any settlement with a future Cuban Government.

HR Rep. No. 104-468, at 59 (1996).

Finally, when Congress wants to limit a right of action to U.S. nationals as of a specific date, it knows how. *See, e.g.,* 28 U.S.C. § 1605(a)(7)(B) (repealed 2008) (Courts must decline to hear claims if "neither the claimant nor the victim was a national of the United States . . . when the act occurred upon which the claim is based."); *accord Alejandre v. Republic of Cuba*, 996 F. Supp 1239, 1248 (S.D. Fla. 1997) (Appling an anti-terrorism exception to the Foreign Sovereign Immunities Act in an action by the family of one of the Brothers to the Rescue pilots the Castro regime murdered, stating that "section 1605(a)(7) imposes the following requirements: (1) the U.S. must have designated the foreign state as a state sponsor of terrorism . . . (2) the act must have occurred outside the foreign state; and (3) the claimants and victims must have been U.S. nationals at the time the acts occurred[,];" holding that the family of one of the murdered pilots who was not a U.S. national when shot down did not have a right action under that section). Title III includes no such language, which evidences clear congressional intent ***not to limit the right of action*** under Title III to those who were U.S. nationals on any date other than the date when they bring their action.

Defendants' related argument, that Title III only grants a right of action to persons who were U.S. nationals on or before March 12, 1996, is equally ill-founded. ***First***, López Regueiro did not allege that he became a U.S. national after March 12, 1996, only that he is a U.S. national at the time of filing. *See* Comp. ¶ 2 ("Jose Ramon López Regueiro is a United States citizen and a natural person who resides in Miami, Florida."). Thus, defendants' argument that he became a U.S. national after March 12, 1996, while irrelevant, would impermissibly require the Court to consider materials outside of the "four corners of the complaint." *Crowell v. Morgan, Stanley, Dean Witter Servs. Co., Inc.*, 87 F. Supp. 2d 1287, 1290 (S.D. Fla. 2000). ***Second***, Title III simply does not require that a plaintiff have been a U.S. national on or before March 12, 1996 (or at any other time other than when the action is filed). Defendant cites 22 U.S.C. § 6082(a)(4)(B), which states that "[i]n the case of property

confiscated before March 12, 1996, a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996." It does not require a Title III plaintiff to have been a U.S. national before March 12, 1996, only that such plaintiff have acquired the claim before March 12, 1996. To adopt defendants' interpretation, the Court would have to read additional language into the statute, which would violate one of the most basic canons of statutory interpretation: that courts are "not allowed to add or subtract words from a statute." *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1224 (11th Cir. 2009).

In sum, the plain language of Title III, as well as its legislative history, compel the conclusion that U.S. nationals at the time of filing, even if they were not U.S. nationals at the time of confiscations or as of March 12, 1996, have a right of action under Title III.

C. *It is Irrelevant that López Regueiro Owned the Airport "Indirectly" Through a Cuban Corporation*

Defendant argues that López Regueiro does not own the Airport, but merely the owner of the Airport, Compañia de Aeropuertos Internacionales, S.A. ("CAISA"). MTD at 8. This argument already has been rejected by another court of this District and should be rejected here. *See Garcia-Bengochea v. Carnival Corp.*, Case No. 19-cv-21725-JLK at ECF No. 41, at 6-7. The complaint alleged that "[o]n November 14, 1952, Vilaboy [López Regueiro's father], through his company [CAISA] purchased the Airport from Pan Am for $1.5 million in cash and credits against Pan Am landing fees," and that "[i]n or around May 1959, the communist Cuban government confiscated the Airport and CAISA, stealing the properties from Vilaboy, who was their rightful owner." *Id.* ¶ 12-13. These allegations are legally sufficient, and would be legally sufficient even if the argument had to be made from the ground up.

Title III does not require López Regueiro (or his father) to have individually owned the Airport. It states that "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 <u>claim</u> to such property*** for money damages . . . ." 22 U.S.C § 6082(a)(1)(A) (emphasis added). Further, Title III defines "property" as "any property . . . whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest." 22 U.S.C. § 6023(12). Based on those definitions, the court in *Bengochea*, rejected the same argument made here:

> Carnival contends that this action must be dismissed because, as a matter of corporate law, Plaintiff does not own a 'direct interest' in the confiscated property.
>
> The Court is not persuaded. Based on the text, context, and purpose of Helms-Burton, Plaintiff plausibly alleges a claim to the confiscated property based on his stock ownership in La Maritima
>
> * * *
>
> Carnival's reading of the statute would require the Court to delete the word 'claim' from the phrase 'owns the claim to such property,' and effectively rewrite Helms-Burton to cover only those plaintiffs who 'own such property.' In other words, Carnival's interpretation would render the word 'claim' superfluous, which also weighs heavily against Carnival's argument.
>
> * * *
>
> [A] 'claim' under Helms-Burton need not be based on direct property ownership as Carnival contends, but instead embraces *indirect* ownership as well.
>
> * * *
>
> Indeed, under Carnival's interpretation, one can traffic in a Cuban corporation's confiscated property with impunity as long as the Cuban government not only took the property, but also nationalized the corporate entity itself, leaving only the individual shareholders behind to pursue any rights the corporation might have lost to the Castro regime. And because the Act applies to confiscations dating back to January 1959, there is a strong possibility that many of these corporations no longer exist or are unable to assert claims on their own behalf.

Bengochea v. Carnival Corp., Case No. 19-cv-21725-JLK at ECF No. 41, at 5-6.

López Regueiro's claim obviously is not based on current "legal" ownership of the Airport or CAISA. After the unlawful confiscation of the Airport and CAISA, his father no longer held legal title to his interest in CAISA, or in the Airport it had owned. However, at that time and ever since, his father—and later López Regueiro himself—owned a ***claim*** to CAISA, and to the Airport, through CAISA's ownership. *See Rhode Island Hosp. Tr. Co. v. Doughton*, 270 U.S. 69, 81 (1926) ("In the dissolution of the corporation, [the shareholder] may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the laws of its creation."). Thus, because Lopez Regueiro owns a claim to the assets of CAISA (including the Airport), he has the right to bring this claim under Title III. Defendant's argument is no different than

Carnival's argument in the *Bengochea* action, and this Court should reject it, just as, and for the same reasons the *Bengochea* court rejected it.

IV. The "Incident to Lawful Travel" Exception Is Not Applicable in This Case Because Defendants Are Not Engaging in Transactions and Uses of Property Incident to Lawful Travel to Cuba

Defendant argues that this case should be dismissed because its operation of cargo and passenger flights into and out of the Airport is "incident to lawful travel" and "necessary to the conduct of such travel." Defendants' theory is wrong for at least three reasons. ***First***, the operation of commercial cargo flights[9] or the carriage of cargo on passenger flights has absolutely nothing to do with "travel." Thus, the Exception could never apply to that trafficking. ***Second***, the Exception is an affirmative defense that López Regueiro is not required to refute, and which defendant bears the burden or pleading and proving. ***Third,*** the general license defendant claims authorizes its passenger flights does not give a blanket authorization to provide such services. That license prohibits tourist-related transactions[10] and requires meticulous compliance with other regulations regarding the persons to whom defendant can provide those services, and under what circumstances. Whether defendant has complied is a question of fact that cannot be resolved on a motion to dismiss. López Regueiro addresses each point in turn.

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[9] On June 1, 2018, defendant announced that it had become the first US carrier to begin Cuba cargo service. *American Airlines Becomes 1st US Carrier to Begin Cuba Cargo Service*, American Airlines Cargo, https://www.aacargo.com/about/american-becomes-first-carrier-to-begin-cuba-cargo-service.html (last accessed Dec. 10, 2019), attached as **Exhibit D** ("The airline now offers mail service, including correspondence, parcels and express mail, into and out of José Martí International Airport (HAV) in Havana, Cuba's capital city and leading commercial center.").

[10] Every day of the week, defendant violates the license it claims authorizes its trafficking by flying tourists to and from the Airport. The regulations supporting its license expressly prohibit defendant's transport of tourists. *See* 31 C.F.R. § 515.560(f) ("Nothing in this section authorizes transactions in connection with tourist travel to Cuba."). Discovery will confirm that much of defendant's trafficking has involved "tourist travel to Cuba."

A. *Defendants' Carriage of Cargo Into and Out of the Airport Vitiates Its Assertion of the "Incident To Lawful Travel Exception" Because Carriage of Cargo Is Neither Travel Nor Incident to Travel*

Defendant argues that Title III's "incident to lawful travel exception" (the "Exception") shields them from liability, despite their operation of cargo flights and carriage of cargo on passenger flights to and from the Airport. MTD at 11-12. This argument has no merit because cargo is not travel, and the transport of cargo never could be incident to (i.e., necessitated by) any kind of travel.[11] Thus, the Exception cannot shield defendant from liability as a matter of law, no matter what might be the merits of its argument as to passengers.

The Act defines "trafficking" as follows:

> 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.

22 U.S.C. § 6023(13)(A). From that definition, Congress excluded certain activities that otherwise would be "trafficking," including "transactions and uses of property incident to

[11] "Incident to" means "closely related to; resulting from; likely to happen because of," https://www.translegal.com/legal-english-dictionary/incident-to, or "[l]iable to happen because of; resulting from," as in "[i]t is true if and only if the first argument is incident to the second." https://www.lexico.com/en/definition/incident (both visited on Dec. 5, 2019). To illustrate, we note that office holders necessarily enjoy the emoluments of office, and those in lawful possession of real property necessarily possess a right to quiet enjoyment. These are situations where B is incident to A because possessing A necessarily means that one possesses B. To leave no doubt, Congress expressly added "necessary to" to the "incident to" language.

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) (the "Exception"). Although Title III does not define the term "travel," the ordinary dictionary definition of travel, along with the regulations on which defendants rely, 31 C.F.R. §§ 515.533 and 515.572, make clear that "travel" relates to the transport of passengers—people—and not cargo.

Travel is "the act of travelling" or "a journey especially to a distant or unfamiliar place," *Travel*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/travel (last visited November 15, 2019), and a "traveler" is "one who travels: such as one that goes on a trip or journey." *Traveler*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/traveler (last visited November 15, 2019). These definitions make clear that it is a person, not an object, like cargo, that travels.

Further, the regulations defendants rely on also make clear that "travel" is done by people, not cargo. *See* 31 C.F.R. § 515.572(b)(1) ("Persons subject to U.S. jurisdiction providing services . . . must retain for at least five years from the date of the transaction a certification from each customer indicating the section of this part that authorizes the ***person to travel*** . . . . In the case of a ***customer travelling*** under a specific license, the specific license number or a copy of the license must be maintained on file . . . .") (emphasis added); *compare* Note to 31 C.F.R. § 515.572 ("The following ***persons*** may be transported, directly or indirectly, between the United States and Cuba . . . .") (emphasis added), *with* 31 C.F.R. § 515.533 ("All transactions ordinarily incident to the ***exportation of items*** from the United States . . . to any person within Cuba are authorized . . . .") (emphasis added). In fact, 31 C.F.R. § 515.533 draws a distinction between "transactions ordinarily incident to the exportation of items from the United States," 31 C.F.R. § 515.533(a), and "travel-related transactions incident to exportation or reexportation," 31 C.F.R. § 515.533(c), and notes that the latter is authorized only if "the ***traveler's*** schedule of activities does not include free time or recreation in excess of that consistent with a full-time schedule." *Id*.

In sum, defendant's carriage of cargo to or from the Airport, whether on a cargo or passenger flight, is not and never could be "travel" or "incident to lawful travel." Consequently, defendant may not invoke the Exception at all, and its attempt to do so should be rejected for this reason, standing alone.

B. *The "Incident to Lawful Travel" Exception Is an Affirmative Defense That López Regueiro Was Not Required to Refute in His Complaint, As to Which Defendant Bears the Burden of Pleading and Proof*

Because defendant cannot plausibly argue that the Exception ever could apply to its transport of cargo (on cargo flights or passenger flights), it may not invoke the Exception at all. But even if that were not so, defendant's attempt to obtain dismissal because the complaint failed to allege a negative—that the Exception does not apply—would be unavailing. Defendant argues that the complaint failed to allege and demonstrate that its trafficking in the Airport was not "incident to lawful travel" and was "not necessary to the conduct of such travel." MTD at 11-12. Defendant's argument is based on the false premise that the inapplicability of the Exception is an element of the cause of action. It is not.

Two courts of this District already have held that the Exception is a fact-bound affirmative defense which a defendant must plead and prove. *See Garcia-Bengochea v. Carnival Corp.*, Case No. 19-cv-21725-JLK at ECF No. 41, at 6-7 ("Based on the text and structure of Helms-Burton, the Court holds that the lawful travel exception is an affirmative defense to trafficking that must be established by Carnival, not negated by Plaintiff."); *Havana Docks Corp. v. Carnival Corp.*, Case No. 19-cv-21724-BB at ECF No. 47, at 5 ("Based on the language of the Libertad Act, the Court agrees with the Plaintiff that the 'lawful travel exception' is an affirmative defense to trafficking . . . Therefore, this exception must be established by Carnival and Plaintiff was not required to negate this exception in its Complaint."). There is little that defendant can say about these persuasive decisions except to assert that they were wrong. *See* MTD at 17-18. But those decisions were not only correct, but on point and persuasive. The same conclusion would be compelled, even if the issue had to be argued from the ground up.

"An affirmative defense 'admits to the complaint, but avoids liability, wholly or partly, by new allegations of excuse, justification, or other negating matters.'" *Boigris v. EWC P&T, LLC*, 2019 WL 5457072, at *2 (S.D. Fla. 2019) (quoting *Adams v. Jumpstart Wireless Corp.*, 294 F.R.D. 668, 671 (S.D. Fla. 2013)); *accord Losada v. Norwegian (Bahamas) Ltd.*, 296 F.R.D. 688, 690 (S.D. Fla. 2013) (same); *VP Props. & Devs. LLLP v. Seneca Specialty Ins. Co.*, 645 Fed. App'x. 912, 916 (11th Cir. 2016) (same). "Plaintiffs are not required to negate an affirmative defense in their complaint." *Padilla v. Porsche Cars N. Am., Inc.*, 391 F. Supp. 3d 1108, 1112 (S.D. Fla. 2019) (Moreno, J.) (quoting *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir.

2004)) (internal quotes and citations omitted); *accord Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 93 (2008) (The burden of establishing an affirmative defense rests with the "one who claims its benefits"—the defendant.). Accordingly, a plaintiff is not required to plead the non-existence of an affirmative defense. *Cunningham v. Yellowstone Capital LLC*, 2016 WL 11163899, at *2 (S.D. Fla. 2016); *Manfred v. Bennet Law, PLLC*, 2012 WL 6102071, at *2 (S.D. Fla. 2012) (In a TCPA action, "prior express consent is an affirmative defense, not an element of the claim[,]" and "Plaintiff need not plead that he did not give his prior express consent.").

Moreover, "[t]he touchstone for determining the burden of proof under a statutory cause of action is the statute itself." *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1110 (11th Cir. 2008). Where a statute "exempt[s] otherwise illegal conduct by reference to a further item of proof . . . the burden of persuasion falls on the 'one who claims its benefits.'" *Meacham*, 554 U.S. at 93 (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)). In this case, the Exception is a statutorily-created exception to liability under Title III. It carves out a limited, specific category of lawful conduct from trafficking: "transactions and uses of property incident to lawful travel 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)). This is hardly unique. Other statutory schemes have employed the same structure, which support the conclusion that the Exception is an affirmative defense.

For instance, the Telephone Consumer Protection Act ("TCPA") prohibits the use of certain technologies to make calls, with an exception for a specific category of lawful conduct (calls made for emergency purposes or with the prior express consent of the called party):

> It shall be unlawful for any person within the United States, or any person outside of the United States if the recipient is within the United States . . . [t]o make a call ***(other than a call made for emergency purposes or made with the prior express consent of the called party)*** using any automatic telephone dialing system or an artificial or prerecorded voice . . . .

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). In *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014), plaintiff alleged a TCPA violation, and defendant argued consent. The 11th Circuit held that the consent exception was an affirmative defense, and accordingly, that the burden was on the defendant to establish that the exception applied. *Id*. at 1253.

Similarly, in *Meacham*, the U.S. Supreme Court addressed an exemption to the Age Discrimination in Employment Act (the "ADEA"). The Court noted that the "ADEA's

general prohibitions against age discrimination . . . are subject to a separate provision . . . creating exemptions for employer practices otherwise prohibited under [various subsections of the ADEA]." *Meacham,* 554 U.S. at 91 (internal quotes and citations omitted). The Court found that "[g]iven how the statute reads, with exemptions laid out apart from the prohibitions (and expressly referring to the prohibited conduct as such), it is no surprise that we have already spoken of the BFOQ and RFOA provisions as being among the ADEA's 'five affirmative defenses.'" *Id*. (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985)). The Court cited the "familiar principle that 'when a proviso . . . carves out an exception out of the body of a statute or contract those who set up such an exception must prove it.'" *Meacham,* 554 U.S. at 91 (quoting *Javierre v. Central Altagracia*, 217 U.S. 502, 508 (1910)).

With respect to Title III, Congress laid out the field of prohibited conduct in its definition of when a person "traffics" in confiscated property:

> 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.

22 U.S.C. § 6023(13)(A). In a different Section, Congress set out an exception for a discrete, limited set of acts that, absent an exception, would be unlawful under Section 6023(13)(A):

> (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)(B). As Judge King recently held, "[b]y using the phrase 'except as provided in subparagraph (B)" immediately before describing the conduct that constitutes trafficking, Congress expressed a clear intent to make the travel provision an *exception* to unlawful trafficking. *Garcia-Bengochea*, Case No. 19-cv-21725-JLK at ECF No. 41, at 6-7.

Just as in *Osorio* and *Meacham*, Section 6023(13)(B) "exempt[s] otherwise illegal conduct by reference to a further item of proof," i.e., provides an affirmative defense, and "the burden of persuasion falls on the 'one who claims its benefits." *Meacham*, 554 U.S. at 93. The Exception is an affirmative defense that López Regueiro was not required to negate. The Court should deny the Motion to Dismiss and allow this case to proceed.

C. *Even If Defendant Were Authorized to Operate Passenger Flights Into and Out of the Airport Under the "Incident to Lawful Travel" Exception, It Would Remain a Question of Fact Whether Defendant Complied With All Requirements Imposed by OFAC, Rendering the Issue Incapable of Resolution on a Motion to Dismiss*

In section IV(A) above, we demonstrated that defendant's carriage of cargo to and from the Airport on cargo and passenger flights never could be "incident to lawful travel" as a matter of law, which bars defendant even from raising the affirmative defense of the Exception. In section IV(B), we demonstrated (as two other courts of this District have held) that even if the Exception conceivably might be raised, it is a fact-bound, affirmative defense that defendant must plead and prove, which may not be raised at this stage of the proceedings. The question whether a defendant's trafficking is in fact incident to lawful travel, and is in fact necessary to the conduct of such travel cannot be resolved on a motion to dismiss.

At the pleading stage, "[a] court's review . . . is limited to the four corners of the complaint," *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009), and it may not consider extrinsic evidence. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003). In conducting its review, a court "must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff . . . ." *Dusek*, 832 F.3d at 1246. An

affirmative defense may be raised in a Rule 12(b)(6) motion to dismiss for failure to state a claim, but only if the defense is apparent on the face of the complaint." *Hudson Drydocks Inc. v. Wyatt Yacht Inc.*, 760 F.2d 1144, 1146 n.3 (11th Cir. 1985). In other words, an affirmative defense cannot be considered on a motion to dismiss unless "the complaint affirmatively and clearly shows the conclusive applicability of the defense to bar the action." *Scott v. Merchants Ass'n Collection Div., Inc.*, 2012 WL 4896175, at *2 (S.D. Fla. 2012) (quoting *Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1274-75 (11th Cir. 2004)) (internal quotes omitted). We demonstrated above that the Exception cannot apply to this action as a matter of law, let alone conclusively bar this action, and that even if it could apply, defendant would have to prove it after pleading it as an affirmative defense.

Defendant nonetheless argues that because OFAC granted it a general license to provide travel services, all of its trafficking in the Airport has been "incident to lawful travel" and this case should be dismissed. Nonsense. While it is true that OFAC issued defendant a general license to provide travel services under 31 C.F.R. § 515.572(a)(1), that license does not provide a blanket authorization to provide travel services without restrictions and conditions.

Moreover, defendant's license is unlawful and invalid. 31 C.F.R. § 515.101 provides that "no license or authorization contained in or issued pursuant to this part shall be deemed to authorize any transaction prohibited by any law other than the Trading With the Enemy Act, 50 U.S.C. App. 5(b), as amended, the Foreign Assistance Act of 1961, 22 U.S.C. 2370, or any proclamation, order, regulation or license issued pursuant thereto." The license defendant relies on, which purports to authorize transactions (defendant's trafficking) that are prohibited by a federal statute (Title III), is thus invalid and ineffective.

But even if this license were not invalid, defendant violates it every day, by flying tourists to and from the Airport, which is expressly prohibited by the regulations that authorize its license. *See* 31 C.F.R. § 515.560(f) ("Nothing in this section authorizes transactions in connection with tourist travel to Cuba."). Much of defendant's trafficking involves "tourist travel," which (like its carriage of cargo) vitiates its attempt to invoke the Exception as a matter of law. But even if this were not so, the question whether defendant's trafficking was incident and necessary to lawful travel would remain a fact-bound inquiry incapable of resolution on a motion to dismiss.

Travel to Cuba by persons subject to U.S. jurisdiction is only permitted for twelve very specific purposes:

> The travel-related transactions listed in paragraph (c) of this section may be authorized by either a general license or on a case-by-case basis by a specific license for travel related to the following activities . . . :
>
> (1) Family visits:
>
> (2) Official business of the U.S. government, foreign governments, and certain intergovernmental organizations;
>
> (3) Journalistic activity;
>
> (4) Professional research and professional meetings;
>
> (5) Educational activities;
>
> (6) Religious activities;
>
> (7) Public performances, clinics, workshops, athletic and other competitions, and exhibitions;
>
> (8) Support for the Cuban people;
>
> (9) Humanitarian projects;
>
> (10) Activities of private foundations or research or educational institutes;
>
> (11) Exportation, importation, or transmission or information or informational materials; and
>
> (12) Certain export transactions that may be considered for authorization under existing Department of Commerce regulations and guidelines with respect to Cuba or engaged in by U.S.-owned or -controlled foreign firms.

31 C.F.R. § 515.560(a). Persons providing travel services authorized by OFAC in Section 515.572 are required to keep detailed records of any and all such transactions:

> (b) Required reports and recordkeeping.
>
> (1) Persons subject to U.S. jurisdiction providing services authorized pursuant to paragraphs (a)(1) through (a)(4) of this section must retain for at least five years from the date of the transaction a certification from each customer indicating the section of this part that authorizes the person to travel or send remittances to Cuba. In the case of a customer traveling under a specific license, the specific license number or a copy of the license must

> be maintained on file with the person subject to U.S. jurisdiction providing services authorized pursuant to this section.
>
> (2) The names and addresses of individual travelers or remitters, the number and amount of each remittance, and the name and address of each recipient, as applicable, must be retained on file with all other information required by § 501.601 of this chapter. These records must be furnished to the Office of Foreign Assets Control on demand pursuant to § 501.602 of this chapter.

31 C.F.R. § 515.572(b).

Even if the affirmative defense of the Exception were available, despite defendant's carriage of cargo and transport of tourists, defendant would have to plead and prove that its license itself was not barred by federal law, and that it complied with each and every requirement, condition, and limitation of that license as to each and every passenger on each and every flight into and out of the Airport.[12] Because this is a fact-intensive inquiry requiring significant discovery, it is incapable of resolution until after defendant pleads the affirmative defense of the Exception and discovery is had, and the Motion to Dismiss should be denied.

CONCLUSION

Defendant's Motion to Dismiss throws every argument it has against the wall. None of them stick. For all the reasons above set forth, the Court should deny the Motion to Dismiss and this case should proceed.

Dated: December 10, 2019

Respectfully submitted,

RIVERO MESTRE LLP
2525 Ponce de Leon Blvd., Suite 1000

[12] For this additional reason, defendant's assertion that the Complaint is "facially subject to the 'lawful travel' provision in the HBA's definition of 'traffics'" is ill-founded. *Cf.* MTD at 19. Defendant merely states (incorrectly) that the complaint should have alleged non-applicability of the Exception, then proclaims that "[i]t is plain on the face of the Complaint that such use of the airport is pursuant to the OFAC regulation described above, and is thus 'incident' and 'necessary' to 'the conduct of [lawful] travel' to Cuba." *Id.* Talk is cheap, and this is mere *ipse dixit*. Even if defendant's carriage of cargo did not bar the Exception as a matter of law, even if its license were not prohibited by 31 C.F.R. § 515.101, and even if its thousands of tourist-related transactions did not vitiate that license, the question whether defendant complied with all the conditions of its license still would require discovery after denial of the Motion.

Coral Gables, Florida 33134
Telephone: (305) 445-2500
Facsimile: (305) 445-2505
E-mail: arivero@riveromestre.com
E-mail: jmestre@riveromestre.com
E-mail: arolnick@riveromestre.com
E-mail: crodriguez@riveromestre.com

By: /s/ Andrés Rivero
ANDRÉS RIVERO
Florida Bar No. 613819
JORGE A. MESTRE
Florida Bar No. 88145
ALAN H. ROLNICK
Florida Bar No. 715085
CARLOS A. RODRIGUEZ
Florida Bar No. 0091616

MANUEL VAZQUEZ, P.A.
2332 Galiano St., Second Floor
Coral Gables, Florida 33134
Telephone: (305) 445-2344
Facsimile: (305) 445-4404
E-mail: mvaz@mvazlaw.com

By: /s/ Manuel Vazquez
MANUEL VAZQUEZ
Florida Bar No. 132826

CERTIFICATE OF SERVICE

I certify that on December 10, 2019, I electronically filed this document with the Clerk of the Court using CM/ECF. I also certify that this document is being served today on all counsel of record by transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/ Andrés Rivero
ANDRÉS RIVERO