UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 19-23965-civ-COOKE/GOODMAN

JOSE RAMON LÓPEZ REGUEIRO,

Plaintiff,

v.

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

Defendants.
_____/

DEFENDANT LATAM AIRLINES GROUP, S.A.'S MOTION TO DISMISS THE COMPLAINT AND MEMORANDUM OF LAW

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Defendant LATAM Airlines Group, S.A. ("LATAM") moves, under Federal Rules of Civil Procedure 12(b)(2) and 12 (b)(6), to dismiss the Complaint for Damages ("Compl.") (ECF No. 1) filed by plaintiff Jose Ramon López Regueiro ("Plaintiff").

Preliminary Statement

Plaintiff asserts a single, conclusory claim against LATAM and American Airlines, Inc. ("American") under the Cuban Liberty and Democratic Solidarity Act (Libertad) Act, 22 U.S.C. § 6021 *et seq.* (the "Act"). The Act – subject to definitions and limitations therein – grants a U.S. citizen who "owns a claim" to property that the Cuban government "confiscated" a cause of action for damages against persons that have "knowingly and intentionally" "trafficked" in such property. 22 U.S.C. § 6082.

Plaintiff alleges that he is the son of José López Vilaboy ("Vilaboy"), Compl. at 1, and that Vilaboy, through "his company" known as "CAISA," bought an airport in Cuba in 1952, began modernizing it, and renamed it José Martí Airport (the "Airport"). *Id*. ¶¶ 11-12. Plaintiff alleges that the Cuban government confiscated the Airport in 1959, after which Vilaboy and his family fled from Cuba and settled in the United States. *Id*. ¶ 13. Plaintiff alleges that Vilaboy died in 1989, *id*. at 2 n.1, and that Plaintiff is Vilaboy's sole heir and "the rightful owner of the Airport." *Id*. ¶ 15.

Plaintiff alleges that "in the decades since [the Airport] was confiscated, [it] has been expanded and modernized" and that, currently, "more that forty airlines and other businesses, including the defendants, have used the Airport to transport cargo and passengers." *Id*. ¶ 16. Plaintiff asserts that this alleged use of the Airport constitutes "trafficking" under the Act. *Id*. ¶¶ 1, 15, 22, 26-28.

The Complaint must be dismissed as to LATAM for three independent reasons.

First, the Court lacks personal jurisdiction over LATAM (Point I). It lacks *general* jurisdiction because LATAM is a Chilean corporation whose principal place of business is in Chile. *Id*. ¶ 4. LATAM maintains facilities and operates flights to and from Miami, but, under the Supreme Court's 2014 *Daimler* decision (discussed in Point I.B below), LATAM clearly is not "at home" in Florida such that the Court could assert general jurisdiction over it. The Court also lacks *specific* jurisdiction over LATAM because, for the Court to assert such jurisdiction under Florida's long-arm statute, Fla. Stat. § 48.193(1)(a), the cause of action

must *arise from* acts that LATAM performed *in Florida* (discussed in Point I.C below). Not only does Plaintiff not allege that LATAM performed any such acts in Florida, but, as shown in the accompanying declaration of Paola Penarete, neither LATAM nor its Florida-based subsidiaries have conducted any business or operations in Florida that involve passenger or cargo service to or from Cuba. Plaintiff's claim therefore does not arise from any Florida activities of LATAM, and the Court therefore cannot assert specific jurisdiction over LATAM.

Second, even if the Court had personal jurisdiction over LATAM (which it does not), Plaintiff fails to state a claim under Title III, because he does not sufficiently allege three essential elements of the claim: (a) that Plaintiff was a U.S. citizen as of March 12, 1996, the date the Act went into effect (Point II.B); (b) that Plaintiff "owns the claim" (Point II.C); and (c) that LATAM "knowingly and intentionally" engaged in acts that might otherwise constitute trafficking (Point II.D).

Third, Title III is unconstitutional on its face, in at least two respects. The Act's definition of "traffics" is hopelessly vague and, if applied literally, would ensnare countless defendants, even those with the slightest and most indirect connections to the Airport (Point III.B). Title III also imposes impermissibly excessive and punitive damages that have no relation to the actual use or profit by a particular defendant or to the actual harm sustained by a plaintiff (Point III.C). Thus, if the Court did not dismiss this action as to LATAM for lack of personal jurisdiction or for failure to allege essential elements of the claim, dismissal would be required on constitutional grounds.

ARGUMENT

I. The Court Lacks Personal Jurisdiction Over LATAM

A. Legal Standard: Personal Jurisdiction

"A plaintiff seeking the exercise of personal jurisdiction over a nonresident defendant bears the initial burden of alleging in the complaint sufficient facts to make out a *prima facie* case of jurisdiction." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009). Conclusory jurisdictional allegations are insufficient. *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1318 (11th Cir. 2006). When a plaintiff establishes a *prima facie* case of personal jurisdiction, if the defendant challenges jurisdiction "by submitting affidavit evidence in support of its position, the burden traditionally shifts back to the plaintiff to produce evidence supporting

jurisdiction." *United Techs.*, 556 F.3d at 1274 (internal quotation marks omitted). In any case, "the plaintiff bears the *ultimate burden* of establishing that personal jurisdiction is present." *Oldfield v. Pueblo De Bahia Lora, S. A.*, 558 F.3d 1210, 1217 (11th Cir. 2009) (emphasis added).

A court's analysis of whether it may exercise personal jurisdiction over a nonresident defendant under Florida law entails two steps. *First*, the court determines whether the exercise of personal jurisdiction is appropriate under Florida's long-arm statute, Fla. Stat. § 48.193; and *second*, if the long-arm statute is satisfied, the court determines whether the exercise of personal jurisdiction would violate the Due Process Clause. *United Techs.*, 556 F.3d at 1274*. See also Peruyero v. Airbus S.A.S.*, 83 F. Supp. 3d 1283, 1290 (S.D. Fla. 2014) (Cooke, J.) (same) (applying Fla. Stat. § 47.16, the predecessor of Fla. Stat. § 48.193).

The Florida long-arm statute, Fla. Stat. § 48.193, provides two bases for personal jurisdiction – specific and general. Subsection (1)(a) "lists acts that subject a defendant to *specific* personal jurisdiction – that is, jurisdiction over suits **that arise out of or relate to a defendant's contacts with Florida**," and subsection (2) "provides that Florida courts may exercise *general* personal jurisdiction – that is, jurisdiction over any claims against a defendant, **whether or not they involve the defendant's activities in Florida** – if the defendant engages in 'substantial and not isolated activity' in Florida." *Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1203-04 (11th Cir. 2015) (italics in original, bold emphasis added).

"The long-arm statute must be strictly construed; therefore, any doubts about the applicability of the statute must be resolved in favor of the defendant and against a conclusion that jurisdiction exists." *Peruyero*, 83 F. Supp. 3d at 1289.

In this case, the Court has neither general nor specific jurisdiction over LATAM, as shown below.

B. The Court Lacks *General* Jurisdiction Over LATAM

Florida's long-arm statute provides for general jurisdiction in Fla. Stat. § 48.193(2), which states: "A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity." To exercise general jurisdiction over LATAM, the Court must conclude that doing so comports

with due process, because the reach of Fla. Stat. § 48.193(2) "extends to the limits on personal jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment." *Carmouche*, 789 F.3d at 1204.

Plaintiff concedes that "LATAM is a Chilean corporation with [its] principal place of business in Las Condes, Chile." Compl. ¶ 4. In *Daimler AG v. Bauman*, 571 U.S. 117 (2014), the Supreme Court held that, with respect to a corporation, "the place of incorporation and principal place of business are [the] paradigm bases for general jurisdiction," because those are the places where it is regarded as being "at home." *Daimler AG*, 571 U.S. at 137 (internal quotation marks omitted). The Court rejected the plaintiff's argument that the Court "approve the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business,'" *id*. at 137-38, and stated that only in an "exceptional case" would a corporation be deemed to be at home "in a forum other than its formal place of incorporation or principal place of business." *Id*. at 139 n.19.

Daimler is, of course, binding on courts applying Fla. Stat. § 48.193(2). *See Carmouche*, 789 F.3d at 1204 (citing *Daimler* for the proposition that "a corporation's operations in a forum other than its formal place of incorporation or principal place of business will be so substantial and of such a nature as to render the corporation at home in that State only in exceptional cases") (internal quotation marks omitted). As the Eleventh Circuit panel explained in *Carmouche*, even if a foreign corporation engages in extensive business in the forum state, that is insufficient to establish general jurisdiction over it "unless the corporation's activities in the forum closely approximate the activities that ordinarily characterize a corporation's place of incorporation or principal place of business." *Id*. at 1205. The Eleventh Circuit recently reiterated this principle in *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1318 (11th Cir. 2018) (holding that Union Carbide, which neither was incorporated nor had its principal place of business in Florida, was not subject to the court's general jurisdiction, even though it did "significant business" in Florida" and was registered to do business in Florida as a foreign corporation).

Because LATAM is incorporated and has its principal place of business in Chile, as Plaintiff concedes, that it conducts business, maintains facilities, and is registered as a foreign corporation in Florida is insufficient, as a matter of law, for the Court to exercise general jurisdiction over it.

C. The Court Lacks *Specific* Jurisdiction Over LATAM

Plaintiff alleges in conclusory manner that the Court has specific personal jurisdiction "over defendants" (LATAM *and* American) under three of the acts enumerated in Fla. Stat. § 48.193(1)(a):

> 1. Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency;
>
> 2. Committing a tortious act within this state; and . . .
>
> 6. Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
>
> a. The defendant was engaged in solicitation or service activities within this state; . . .

(Compl. ¶ 6).

None of these alleged bases for specific jurisdiction applies to LATAM for the fundamental reason that Plaintiff's Title III claim *does not arise from* any of the above alleged acts, or any other acts enumerated in Fla. Stat. § 48.193(1)(a). In introducing the nine enumerated acts, that section states:

> A person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for *any cause of action arising from any of the following acts:* [Emphasis added.]

All of the enumerated acts thus require a connection between the cause of action and defendant's conduct in Florida. *Hinkle v. Continental Motors, Inc.*, 268 F. Supp. 3d 1312, 1322 (M.D. Fla. 2017) ("Regardless of the enumerated act by which a plaintiff asserts specific jurisdiction, the complaint must allege a cause of action 'arising from' that enumerated act in Florida."); *Fast SRL v. Direct Connection Travel LLC*, No. 17-20900-CIV, 2018 WL 7822711, at *3 (S.D. Fla. Aug. 3, 2018) ("Specific jurisdiction requires a nexus between the alleged causes of action and [the defendant's] alleged business activities.") (citation and internal quotation marks omitted).

Plaintiff's only factual allegation that conceivably concerns personal jurisdiction is that "[d]efendants have trafficked" in the Airport "by arriving and departing the Airport [in

Havana] and using its facilities for cargo and passenger transport." Compl. ¶ 26.[1] Plaintiff does not allege that LATAM's alleged trafficking of the Airport is related in any way to any conduct by LATAM *in Florida*. The accompanying declaration of Paola Penarete, LATAM's Vice President for North America, Caribbean & Asia, confirms that none of LATAM's activities in Florida have involved passenger or cargo service to or from, or other use of, the Airport. Penarete Decl. ¶¶ 5-6, 10, attached and incorporated herein as **Exhibit A**.

Because Plaintiff fails to allege – and cannot plausibly allege – that his claim *arises from* LATAM's Florida-based activities, the Court lacks specific jurisdiction over LATAM.

II. The Complaint Fails to State a Claim Against LATAM

A. Legal Standard: Failure to State a Claim

Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Dismissal is warranted unless plaintiff can articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. 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) (citing *Twombly*, 550 U.S. at 556).

"[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements[,]" should not be accepted as true. *Iqbal*, 556 U.S. at 678; *see id.* at 663. "Mere labels and conclusions or a formulaic recitation of the elements of a cause of action will not do, and a plaintiff cannot rely on naked assertions devoid of further factual enhancement." *Franklin v. Curry*, 738 F.3d 1246, 1251 (11th Cir. 2013). "[I]f allegations are indeed more conclusory than factual, then the court does not have to assume their truth." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012). In sum, "[t]he plausibility standard 'calls for enough fact to raise a reasonable expectation that discovery will reveal

[1] Plaintiff's allegations in paragraphs 6 are not factual but, rather, merely parrot in conclusory fashion the Florida long-arm statute's text of the three enumerated acts that Plaintiff lists in paragraph 6.

evidence' of the defendant's liability." *Miyahira v. Vitacost.com, Inc.*, 715 F.3d 1257, 1265 (11th Cir. 2013) (citation omitted).

In this case, Plaintiff fails to plead three essential elements of a Title III claim.

B. Plaintiff Does Not Allege that He Was a U.S. Citizen as of March 12, 1996

Plaintiff alleges that he "is a United States citizen," Compl. ¶ 2, but does not allege *when* he became a citizen. Title III's civil remedy provision contains an "Applicability" subsection, 22 U.S.C. § 6082(a)(4), which states in relevant part:

> (B) 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. [Emphasis added.]

"United States national" is defined (for a natural person) as "any United States citizen." 22 U.S.C. § 6023(15). Plaintiff alleges that the Airport was confiscated in 1959. Compl. ¶ 13. Under the plain meaning of 22 U.S.C. § 6082(a)(4)(B), quoted above, Plaintiff "may not bring an action" under Title III unless he *both* was a U.S. citizen *and* acquired his claim before March 12, 1996. This is clear from Congress's description of this provision:

> . . . in the case of property confiscated before the date of enactment of this Act, *the U.S. national* had to have owned the claim to the property before the date of enactment in order to bring an action under this section.

H.R. Rep. No. 104-202, at 40 (1995), *reprinted in* 1996 U.S.C.C.A.N. 527, 545 (emphasis added). It is also consistent with the "Findings" that Congress included as part of Title III, which created the claim that Plaintiff asserts. These Findings included:

> (2) The wrongful confiscation or taking of property *belonging to United States nationals* by the Cuban Government . . . .
>
> (6) This "trafficking" in confiscated property . . . undermines the foreign policy of the United States – . . . (B) to protect the claims *of United States nationals* who had property wrongfully confiscated by the Cuban Government. . . .
>
> (11) To deter trafficking in wrongfully confiscated property, *United States nationals* who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States . . . .

22 U.S.C. § 6081 (emphasis added).

Congress's intent, expressed in both the statute's text and its Congressional report, is that the right of action was created only for persons who *were United States nationals* when they acquired their ownership interest in the confiscated property *before March 12, 1996*.

C. Plaintiff Fails to Sufficiently Allege His Ownership of the Claim

Another of the essential elements of a Title III claim is that the plaintiff "owns the claim" to the confiscated property. 22 U.S.C. § 6082(a)(1)(A) (a person who traffics in confiscated property "shall be liable to any United States national *who owns the claim to such property* . . .") (emphasis added). Plaintiff's allegations about the ownership of the claim are threadbare, conclusory, contradictory, and even misleading, and therefore do not plausibly state a claim.

First, there is no clear allegation concerning what the "property" is. On one hand, Plaintiff alleges that the property is the Airport itself. Compl. ¶ 15 ("Regueiro [Plaintiff] is the rightful owner of the Airport, which is stolen property that defendants are trafficking and benefitting from trafficking."). On the other hand, Plaintiff alleges that his father, Vilaboy, purchased the Airport in 1952 "through his company Compañia de Aeropuertos Internacionales, S.A. ('CAISA')." *Id*. ¶ 12. Based on this allegation, his father did not own the Airport but, rather, presumably owned *shares* in a company that owned the Airport. Plaintiff does not allege whether Vilaboy owned all or a percentage of CAISA's shares.

Next, Plaintiff alleges, rather abstrusely, that he is Vilaboy's sole heir. He defines "Vilaboy Family" as meaning his father, Vilaboy, until his death in 1989, and as meaning Plaintiff thereafter. *Id*. at 2 n.1. And, Plaintiff claims that only he "is the rightful owner of the Airport." *Id*. ¶ 15. These allegations are, at minimum, misleading. Public records in the Miami-Dade County court proceeding on the estate of Vilaboy show that Plaintiff was declared "heir of one-half of Decedent's estate."[2] Vilaboy's wife, Carmen Bagur, survived

[2] *See* Order on Petition for Determination of Heirs, *In re: Estate of Jose Ramon Lopez Vilaboy*, No. 10-0494 CP 01 (Fla. 11th Cir. Ct. Nov. 30, 2010), at 1, attached and incorporated herein as **Exhibit B**. The Court may take judicial notice of these publicly filed probate records under Fed. R. Evid. 201(b). *See, e.g.*, *Markland v. Insys Therapeutics, Inc.*, 270 F. Supp. 3d 1318, 1323 (M.D. Fla. 2017) (taking judicial notice of "publicly filed probate records" in evaluating motion to dismiss).

Vilaboy (who died in 1989), but, at the time of the probate proceeding in 2010, her whereabouts were not known. The probate court therefore ordered that "her half-share of the decedent's estate in any future probate proceedings shall be placed in the court's register." Ex. B at 1.

The probate proceedings do not reflect, and Plaintiff does not allege, whether Vilaboy's estate, one-half of which Plaintiff inherited, included any Cuba-related assets, such as shares in CAISA, which, Plaintiff alleges, owned the Airport at the time it was confiscated. Nor does Plaintiff allege that Vilaboy still owned, when he died in 1989, whatever shares in CAISA he owned at the time the Cuban government confiscated the Airport 30 years earlier, in 1959.

These pleading deficiencies regarding Plaintiff's supposed ownership of the claim are especially glaring because Plaintiff's claim was not certified by the Foreign Claims Settlement Commission ("FCSC"). Compl. ¶ 20. If it had been so certified, that would be "conclusive proof of ownership of an interest in property." 22 U.S.C. § 6083(a)(1). Because the alleged claim was *not* so certified, Plaintiff has "the burden of establishing for the court that the interest in property that is the subject of the claim is not the subject of a claim so certified [by the FCSC]." 22 U.S.C. § 6082(a)(5)(D). Yet, there is no such allegation in the Complaint.

In sum, the Complaint fails to sufficiently allege either what the confiscated property is – the Airport or shares in CAISA? – or the basis on which Plaintiff alleges that he "owns the claim to such property."

D. Plaintiff Fails to Allege that LATAM Acted "Knowingly and Intentionally"

A person "traffics" in confiscated property only if it "*knowingly and intentionally*" engages in activity described in the Act's definition of "traffics." 22 U.S.C. § 6023(13)(A) (emphasis added). The Act defines "knowingly" to mean "with knowledge or having reason to know," 22 U.S.C. § 6023(9), but does not define "intentionally."

Plaintiff does not allege that LATAM acted *either* knowingly *or* intentionally. The words "knowingly" and "intentionally," or other forms thereof, do not appear in the Complaint. Plaintiff does not allege *any* state of mind by LATAM. He merely alleges in conclusory fashion that LATAM "trafficked" in the Airport. Compl. ¶¶ 1, 15, 26-28.

Plaintiff cannot cure this deficiency because he cannot plausibly allege – as a matter of law – the required element that LATAM acted "knowingly and intentionally." *First*, Plaintiff alleges that the "Vilaboy Family was not eligible to file a claim with the [FCSC] . . . because they were not U.S. citizens at the time the Airport was confiscated," Compl. ¶ 20, and, therefore, the Airport "has not been the subject of a certified claim" by the FCSC, *id*. ¶ 21. Thus, there is no public record, such as the public record of the 8,821 certification decisions issued by the FCSC, which LATAM might have searched (assuming LATAM reasonably could have been required to do so) to determine whether any claim existed with respect to the Airport.[3]

Second, the Act grants a civil remedy for trafficking *only* in favor of any "United States national" that "owns the claim" to property that was "confiscated" – that is, for which the Cuban government did not compensate the pre-nationalization owner.[4] Even if LATAM reasonably could have been expected to assume that substantially *all* property in Cuba (including the Airport) was nationalized by the Cuban government beginning in 1959, there was no reasonable way for LATAM to determine whether the Airport's pre-nationalization owners received compensation, or were U.S. nationals at the time of the confiscation, or thereafter became U.S. nationals, and, if so, when. Absent such knowledge, or reasonable means to obtain it, LATAM could not *knowingly or intentionally* have engaged in conduct that would subject it to trafficking liability under the Act. Although Plaintiff alleges, again in conclusory manner, that "*defendants* [plural] continue to traffic" after Plaintiff provided notice to them more than 30 days before commencing this action, Compl. ¶ 28 (emphasis added), he does not so allege *specifically* as to LATAM, and, as discussed above, Plaintiff has not sufficiently alleged that LATAM "trafficked" in the Airport, either before or after it received the 30-day notice.

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[3] *See* Completed Programs – Cuba," U.S. DEP'T OF JUSTICE, https://www.justice.gov/fcsc/claims-against-cuba (U.S. Department of Justice's website on the Cuba foreign claims settlement programs) (last visited Nov. 25, 2019) (the FCSC certified 5,913 claims and denied 2,908 claims). The Cuba program certification decisions are listed, can be accessed and (since mid-2019) can be searched via links on the cited webpage.

[4] *See* 22 U.S.C. § 6082(a)(1)(A) [civil remedy provision]; 22 U.S.C. § 6023(15) [definition of "United States national"]; and 22 U.S.C. § 6023(4) [definition of "confiscated"].

As Plaintiff has not alleged, and cannot plausibly allege, that LATAM *knowingly and intentionally* violated the Act's civil remedy provision, the claim against it must be dismissed.

III. Title III, if Applied to LATAM, Would Violate Its Constitutional Due Process Rights

A. Title III Is Impermissibly Vague on its Face

The void-for-vagueness doctrine guarantees that persons have "fair notice" of the conduct that a statute makes unlawful. *Papachristou v. Jacksonville,* 405 U.S. 156, 162 (1972). *See also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly").

Although the void-for-vagueness doctrine traditionally has been applied to *criminal* statutes, the Supreme Court has clarified that the doctrine also applies to *civil* remedies, at least where the remedy imposed by the statute is severe. *Sessions v. Dinaya*, 138 S.Ct. 1204, 1212-13 (2018) (applying the doctrine to invalidate the *civil* remedy of deportation). *See also id*. at 1228-29 (Gorsuch, J., concurring) (noting that "today's civil laws regularly impose penalties far more severe that those found in many criminal statutes," *id*. at 1229, and that the Due Process Clause requires "fair notice" of what the law demands in civil cases no less than in criminal cases, *id*. at 1228). The potentially ruinous civil remedy imposed by Title III (as discussed in the next section) clearly is sufficiently severe that the "fair notice" standard of the void-for-vagueness doctrine applies in this case.

The Supreme Court also has declared that a statute may be challenged as *facially* invalid for vagueness even if some conduct clearly falls within the statute's prohibitions. In *Johnson v. United States*, 135 S.Ct. 2551 (2015), a convicted felon challenged as facially vague a clause in a criminal statute that provided for more severe punishment if the crime "involves conduct that presents a serious potential risk of physical injury to another." 135 S.Ct. at 2555. The Government argued that the clause was not facially vague because "there will be straightforward cases under the . . . clause . . . [that] clearly pose a serious potential risk of physical injury to another." *Id*. at 2560. Justice Scalia, for the Court, rejected that argument, stating:

> [A]lthough statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague

> provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.

Id. at 2560-61 (emphasis in original).[5]

Like the crime defined in *Johnson*, the definition of "traffics" set forth in Title III is vague on its face. As defined, "traffics" includes engaging in any "commercial activity using or otherwise benefiting from confiscated property . . . *by another person*, or . . . *through another person*." 22 U.S.C. § 6023(13)(A)(ii)-(iii) (emphasis added). This definition encompasses a virtually limitless number of actors. With respect to the Airport at issue in this case, it encompasses, not only the "dozens of airlines" that, Plaintiff alleges, currently use the Airport (Compl. at 1; *see id.* ¶ 16), but also companies or individuals that, for example: pave or repair the runways; operate newsstands, gift shops or cafés at the Airport; provide cleaning services; operate taxi, bus, or other transportation services; operate tour companies; or place advertisements at the Airport.

But it would not stop with these actors, all of which at least "touch" the Airport in some manner, even if inconsequentially. The Title III cause of action as defined also reaches any person that supplies goods or services, directly or indirectly, to them, such as: cement, steel, and hardware companies that supply Airport maintenance and construction contractors; farmers and agricultural processing companies that supply food served at the Airport; oil companies and refineries that, through the world's stream of commerce, supply jet fuel to the Airport; computer software companies whose products are used in the Airport's air traffic control facilities; and so on.

The Title III civil remedy thus potentially would reach countless numbers of persons, many of which have merely an incidental or minimal connection to the Airport, and many of which (the indirect suppliers, for example) never even set foot on the Airport, or in Cuba. Each of them, nevertheless, could be alleged to be profiting "by" or "through" others from the sale of its products or services in any way connected, directly or indirectly, with the Airport.

Title III's definition of "traffics" thus is impermissibly vague on its face.

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[5] Given this holding by the Supreme Court in 2015, the Eleventh Circuit's statement in its 2009 decision, *Harris v. Mexican Specialty Goods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009), that "a facial challenge will succeed only if the statute could never be applied in a constitutional manner" (internal quotation marks and citation omitted), is no longer tenable.

B. Title III Would Impose Impermissibly Excessive and Punitive Damages

Title III's damages provision, § 6082(a)(1)(A)(i), also is impermissibly excessive and punitive in several respects and could not constitutionally be applied to LATAM (even if LATAM operated flights to or from the Airport, which it does not do; *see* Penarete Decl. ¶¶ 5-6, 10).

First, the measure of damages (before trebling) is based, not on any profit or other benefit derived by the trafficker, or actual damage sustained by the claimant, but rather on the *value of the property*. A single airline, for example, that made a single landing and departure from the Airport, thus using only a portion of the facilities on a single day, if thereby deemed a "trafficker," would be liable for *the entire value of the Airport*.[6]

A *second* draconian feature of the damages provision is that, at claimant's option, the damages are the value at the time of confiscation *plus about 60 years of interest*. *See* 22 U.S.C. § 6082(a)(1)(A)(i)(III). The hypothetical airline that used the Airport on a single day would bear the exponential growth in value resulting from interest accruing over six decades.[7]

A *third* onerous feature is that the Act does not expressly provide for or contemplate contribution among multiple traffickers in the same property. Therefore, a single plaintiff could, potentially, sue and recover *the entire value of the property* from *each* of a series of "traffickers" – persons allegedly "using" and "profiting" from the Airport – from any number of the dozens of airlines currently using the Airport, to the gift shop operator or taxi driver,

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[6] By analogy, consider a statute that provided that a trespasser is liable for the value of the property on which it trespasses. If so, a small property owner whose tree, at the edge of his property line, fell on an adjoining 1,000-acre farm would be liable for the entire value of the farm.

[7] To illustrate the exponential effect of accruing interest over such a long period, *see* the complaint in another case in this district alleging a Title III claim, *Havana Docks v. MSC Cruises (USA) Inc.*, No. 19-cv-23588 (S.D. Fl. Aug. 27, 2019), at ECF No. 1, ¶ 17. The plaintiff in that case alleges that its claim, which the FCSC certified in the amount of $9.2 million (rounded) as of 1960, amounts, with interest, to $167.7 million (rounded) *before trebling*, and over $503 million after trebling. (The cited FCSC's certification decision is as an exhibit to another related complaint, in *Havana Docks v. Carnival Corp.*, No. 19-cv-21724 (S.D. Fl. May 2, 2019), at ECF No. 1-1.)

and even to the farmer in another continent whose produce is used to prepare food served at an Airport café.

Finally, the trebling provision – which applies (a) automatically, if the claim was certified by the FCSC, or (b) if not so certified, then if the plaintiff gave written notice to the defendant at least 30 days before filing the action and the defendant did not cease trafficking during that period, 22 U.S.C. § 6082(a)(3) – is entirely punitive and adds to the already punitive and onerous nature of the pre-trebling measure of damages. And, a successful claimant is also entitled to recover its reasonable attorneys' fees and court costs. 22 U.S.C. § 6082(a)(1)(A)(ii).

The statute's arbitrary measure of damages, based on a property's "value" rather than any benefit to the alleged trafficker, conflicts with the purpose of Title III as stated in its "findings," which is to "deny traffickers any *profits* from economically exploiting Castro's wrongful seizures." 22 U.S.C. § 6081(11) (emphasis added).

The damages provision, if applied to LATAM, would violate its constitutional due process rights and is also facially invalid. The Supreme Court has long held that a civil remedy fixed by Congress violates due process where "the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919). This standard is "still good law." *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 962 (8th Cir. 2019) (applying the standard and reducing a "shockingly large" fixed statutory award of $1.6 billion for class TCPA violations based on defendant-caller's belief that it was complying with an unsettled statutory scheme and the class's lack of injury from the calls).

The Supreme Court also repeatedly has held that the Due Process Clause of the Fourteenth Amendment places substantive as well as procedural limits on punitive damages awards in civil cases.[8] *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("it is well established that there are procedural and substantive constitutional

[8] While the Fourteenth Amendment's Due Process Clause is applicable to the states, the same principle applies in federal cases under the Fifth Amendment's Due Process Clause. *See Malinski v. People of State of New York,* 324 U .S. 401, 413 (1945) (Frankfurter, J., concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.")

limitations on these [punitive damages] awards") (citing other Supreme Court cases so holding). As the Court stated in *State Farm*, "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id*. at 417.

In *State Farm* and the other Supreme Court cases it cites, the Court reviewed punitive damages already awarded by a jury. In this case, there is no need to await an actual award of damages because the statute, Title III, *mandates* a measure of damages that, on its face, is impermissibly excessive and punitive. And, as it is the *only* remedy that Title III provides, its constitutional invalidity means that the Title III civil remedy, as a whole, is invalid.

Conclusion

The Court should dismiss the Complaint as to LATAM because the Court lacks personal jurisdiction over LATAM. If the Court dismisses on this ground, as it should, it need not consider any the other grounds, each of which independently also warrants dismissal: (a) that Plaintiff fails to sufficiently plead *facts* concerning when he became a U.S. citizen, the property in question, or that he "owns the claim" to such property; (b) that he fails to plead at all that LATAM "knowingly and intentionally" engaged in conduct that might otherwise constitute "trafficking"; and (c) that Title III is unconstitutional in that the definition of "traffics" is vague and therefore void on its face, and its mandatory damages provision is impermissibly excessive and punitive.

Request for Hearing

Pursuant to Local Rule 7.1(b), LATAM's counsel respectfully requests a 30-minute hearing on this motion. There is no precedential law relating to the Act, the elements required to state a claim under Title III, or the constitutionality of Title III. Thus, LATAM's counsel believes that it may be helpful for the Court to hold a hearing on the issues raised herein.

Dated: November 26, 2019

Respectfully submitted,

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Attorneys for Defendant LATAM Airlines Group, S.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 26th day November 2019 via e-mail on all CM/ECF registered users entitled to notice in this case.

By: */s/ Naim S. Surgeon*
Naim S. Surgeon

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 19-23965-civ-COOKE/GOODMAN

JOSE RAMON LÓPEZ REGUEIRO,

Plaintiff,

v.

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

Defendants.
_____/

DECLARATION OF PAOLA PENARETE IN SUPPORT OF LATAM AIRLINES GROUP, S.A.'S MOTION TO DISMISS

Pursuant to 28 U.S.C. § 1746, I, Paola Penarete, declare as follows:

1. I am the Vice President for North America, Caribbean & Asia of LATAM Airlines Group, S.A. Inc. ("LATAM"). I have personal knowledge of the facts stated below, I am competent to testify concerning these matters, and I am authorized to make this declaration on behalf of LATAM.

2. I have been employed by LATAM since March 2000 and have held the above mentioned position since September 2019. Previously, I served in the following positions at LATAM: Area Sales Manager (2000-2003); Senior Sales Manager (2003-2005); Corporate Segment Sales Manager, North America (2005-2007); Sales Director – Online & Direct Channels, North America (2007-2009); Sales Director – North Region – North US & Canada (2009-2012); Senior Sales Director – Northeast US & Canada (2012-2016); Senior Sales Director – Online Travel Agency, Northeast US & Canada (2017-2019).

3. I am generally familiar with the nature and scope of LATAM's business and operations, both in Chile and abroad.

4. LATAM is a corporation organized under the laws of Chile. Its principal place of business is in Santiago, Chile.

5. LATAM has not conducted, and currently does not conduct, any business or operations in or from the State of Florida that involve either passenger travel or cargo transportation to or from José Martí International Airport in Havana, Cuba (the "Havana Airport").

6. LATAM has conducted and maintained, and currently conducts and maintains, operations and facilities in the State of Florida, as follows: (a) it has maintained and maintains an office at 6500 NW 22nd Street, Miami, Florida 33122; (b) it has operated and operates flights for passenger travel and cargo transportation to and from Miami International Airport; and (c) it has maintained and maintains airport facilities. None of LATAM's operations or facilities in the State of Florida, however, have involved or currently involve passenger travel or cargo transportation to or from the Havana Airport (or to or from anywhere else in Cuba).

7. LATAM is registered in Florida as a "foreign profit corporation" and has designated a registered agent in Florida for service of process on LATAM.

8. LATAM has seven direct or indirect subsidiaries incorporated in Florida, none of which has conducted or conducts any business or operations involving passenger travel or cargo transportation to or from the Havana Airport. They are as follows:

(a) LATAM is the sole shareholder of Professional Aviation Services Inc. ("PASI"), which provides passenger check-in and related services at Miami

International Airport. PASI in turn is the sole shareholder of Cargo Handling Airport Services LLC ("CHAS") and Professional Air Cargo Services LLC ("PACS"), both of which provide cargo and warehouse services in or near that airport.

(b) LATAM is the majority shareholder of Prime Airport Services Inc. ("Prime"), which previously provided cargo-related services in Miami but is not currently providing such services. Prime in turn is the sole shareholder of LAN Cargo Repair Station, LLC ("LCRS"), which operates a maintenance repair facility for certain LATAM aircraft at Miami International Airport, Bldg. 754, 5900 NW 18th Street, Miami, FL 33126.

(c) LCRS in turn is the sole shareholder of Maintenance Service Experts LLC and Professional Airline Maintenance Services, LLC, both of which provide personnel services to LCRS.

9. Each of the seven LATAM-affiliated Florida corporations named above is a corporate entity separate from LATAM.

10. Neither LATAM nor any of its seven Florida affiliates has conducted or conducts any business or operations involving passenger travel or cargo transportation to or from the Havana Airport.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to my knowledge. Executed in Santiago, Chile.

Dated this 25 day of November, 2019.

Paola Penarete

Exhibit B

FILED FOR RECORD
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CLERK, CIRCUIT & COUNTY CTS.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

PROBATE DIVISION

CASE NO.: 10-0494 CP 01

FORD

IN RE: ESTATE OF

JOSE RAMON LOPEZ VILABOY

Deceased.

_____/

ORDER ON PETITION FOR DETERMINATION OF HEIRS

THIS CAUSE having come before the Court upon the Petition for Determination of Heirs pursuant to Florida Statutes §733.105 filed by JOSE RAMON LOPEZ REGUEIRO, the natural born son of Decedent JOSE RAMON LOPEZ VILABOY, and the Report of Guardian ad Litem issued by Lawrence Levy, Esq., it is hereby

ORDERED AND ADJUDGED that the Report of Guardian ad Litem issued by Lawrence Levy, Esq. is hereby APPROVED and ADOPTED by the Court. Accordingly, it is further

ORDERED AND ADJUDGED that the decedent's sole descendant, JOSE RAMON LOPEZ REGUEIRO, a resident of Miami-Dade County, residing at 6770 Indian Creek Drive, Miami Beach, Florida 3314, be and the same is hereby DECLARED heir of one-half of the Decedent's estate. It is further

ORDERED AND ADJUDGED that the Decedent's surviving wife, CARMEN BAGUR, be and the same is hereby DECLARED heir of one-half of the Decedent's estate. Because the whereabouts of CARMEN BAGUR are unknown, her half-share of the Decedent's estate in any future probate proceedings shall be placed in the court's register.

DONE AND ORDERED in Chambers in Miami, Florida, this 30 day of November, 2010.

GERALD HUBBART
CIRCUIT COURT JUDGE

GERALD D. HUBBART
CIRCUIT JUDGE

cc: Alicia Otazo-Reyes, Esq.
Lawrence Levy, Esq.