UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUAN B. PUJOL MOREIRA, in his personal capacity, and as Personal Representative and Administrator of the ESTATE OF NIEVES PUJOL, a/k/a NIEVES MOREIRA MARTINEZ, MARIA JULIA PUJOL MOREIRA, INÉS MARIA PUJOL FAGET, as Personal Representative and Executor of the ESTATE OF ARCADIO JOAQUIN PUJOL IZQUIERDO, SARA L. PUJOL, as Personal Representative and Administrator of the ESTATE OF LAUREANO PUJOL ROJAS, LUIS R. PUJOL ROJAS, ANA H. FRAGA, LORENZO PÉREZ PUJOL, FRANCISCO PUJOL MENESES, PILAR M. PUJOL MENESES, and RAÚL PUJOL MENESES, Plaintiffs, v. SOCIÉTÉ GÉNÉRALE, S.A. and BNP PARIBAS, S.A., Defendants.	Civil Action No. 1:20-cv-9380-JMF-SN ORAL ARGUMENT REQUESTED

JOINT REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1), 12(b)(2) AND 12(b)(6)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(Continued)

Page(s)

Other Authorities

INTRODUCTION

Defendants' Moving Brief ("Br.") set forth multiple grounds independently mandating dismissal of the Amended Complaint ("AC"). To avoid dismissal, Plaintiffs must prevail on each of these points. In fact, their arguments fail on all of them. On standing, they are unable to explain how Defendants' actions caused them any harm at all. And on the merits, their contentions on every point sidestep the controlling statutory language. The AC should, accordingly, be dismissed.

I. PLAINTIFFS LACK ARTICLE III STANDING TO PURSUE THIS ACTION.

A. Plaintiffs Have Not Alleged An Injury-In-Fact That Is Fairly Traceable To Defendants' Alleged Conduct.

In asserting standing, Plaintiffs' principal argument is that they "suffer[ed] injuries when [Defendants] use[d], exploit[ed], and derive[d] benefits from their confiscated property." Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss the AC ("Opp.") 8. This conclusory assertion fails to explain how Plaintiffs' situation would be *any* different absent Defendants' alleged transactions, and thus how Plaintiffs suffered any real-world harm traceable to such actions. They merely contend, vaguely, that the alleged extensions of credit to BNC "'contributed to causing' the injuries that BNC inflicted" on Plaintiffs. Opp. 11. But Plaintiffs allege no facts showing that, but for Defendants' conduct, BNC would have returned the Banco Pujol assets or compensated Plaintiffs, which presumably is what Plaintiffs suggest. Nor could Plaintiffs make any such allegations, as they would be beyond speculative. *See Treiber v. Aspen Dental Mgmt., Inc.*, 635 F. App'x 1, 3 (2d Cir. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (injury allegations that are "wholly conclusory and unsupported by any facts" are insufficient to support standing).

Indeed, Plaintiffs do not allege any facts showing that Defendants used any Banco Pujol assets, and the AC fails to trace to Defendants any funds that were confiscated. *See* Br. 22-23; pages 10-13, *infra*. That makes this case very different from those Plaintiffs cite, in which defendants were alleged to have used the relevant property. Opp. 9. *Cf. Havana Docks Corp. v. Carnival Corp.*, No. 19-cv-21724, 2020 WL 5517590, at *4 (S.D. Fla. Sept. 14, 2020) (defendant cruise lines allegedly were "regularly embarking and disembarking [their] passengers on the Subject Property."); *Cueto v. Pernod Ricard*, No. 20-cv-20157 (S.D. Fla. Aug. 17, 2020), ECF No. 55 (defendants were dealing with "barrels and other materials" that had Conac Cueto "markings").

Glen v. Am. Airlines, Inc., No. 20-CV-482-A, 2020 WL 4464665 (N.D. Tex. Aug. 3, 2020) ("*Glen v. AA*"), further exposes Plaintiffs' failure to plead any facts showing that Defendants' alleged transactions with BNC caused them any actual harm. There, the former owner of confiscated hotels sued American Airlines, which earned commissions from a hotel booking website. *Glen v. AA*, 2020 WL 4464665, at *1. The court dismissed for lack of standing because:

> Defendant did not deprive plaintiff of the Properties or the profits he might make if he owned and operated hotels on the Properties. Instead, defendant merely does business with the Subject Hotels. It is unclear why plaintiff believes he should be entitled to defendant's commissions and is injured by not receiving such payment; *plaintiff would not be entitled to a portion of defendant's commissions even if he owned the Properties and operated the Subject Hotels.*

Id. at *2 (emphasis added). Here, Defendants are alleged to have lent money *to* BNC. Thus, just as in *Glen v. AA*, "[i]t is unclear why plaintiff[s] believe[] [they] should be entitled to defendant[s' interest payments on those loans] and [are] injured by not receiving such payment[s]; plaintiff[s] would not be entitled to a portion of defendant[s'] [interest] even if [they] owned [Banco Pujol]." *Id*. As in that case, Defendants here did not deprive Plaintiffs of

any payments to which they would have been entitled, even if they had an ownership interest in the Banco Pujol property (which as shown below, they do not). Thus, Plaintiffs fail to allege any real-world injury fairly traceable to Defendants' conduct.

B. Plaintiffs Cannot Establish Standing On The Theory That Defendants Interfered With Their Property Interests.

Unable to allege actual injury, Plaintiffs argue that they suffered a theoretical harm from "the wrongful exploitation of th[e] confiscated property" (Opp. 9), pointing to "common-law principles" under which a person who interferes "with another person's property interests" is liable in restitution to the "rightful owners." *Id*. at 9-10. But Plaintiffs' argument fails because, *inter alia*, reliance on such principles requires an ownership interest in the confiscated assets—and Plaintiffs had no such interest in Banco Pujol at the time of the alleged trafficking.

The Supreme Court has long held that expropriation extinguishes all of the former owners' property rights. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 414-15 (1964) (Cuba's confiscation vested in Cuba the "property right in" and "dominion over" expropriated property). In *Glen v. Club Méditerranée, S.A*, 450 F.3d 1251, 1255 (11th Cir. 2006), the Eleventh Circuit, following *Sabbatino*, held in the context of Helms-Burton: "[Plaintiffs] arrive at the conclusion that Congress has established that the expropriations committed by the Cuban government failed to extinguish the ownership rights of those who owned the properties prior to the takings. We disagree." *Id*. The court explained that, although the Act condemns confiscations, "it does not proclaim them ineffective." *Id.*

Thus, the common-law doctrines Plaintiffs invoke (Opp. 9-10) have no application here. Doctrines like unjust enrichment require that the "defendant received something . . . which *belongs to the plaintiff*." *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 260 (S.D.N.Y. 2012) (emphasis added). For that reason, *Glen v. Club Méditerranée* affirmed dismissal of plaintiff's

unjust enrichment claim for defendant's alleged wrongful use of property confiscated by Cuba. 450 F.3d at 1254-55.[1] The same reasoning dispatches Plaintiffs' argument here.

C. Absent An Injury-In-Fact, The Act Does Not Create A Cognizable Injury.

Unable to identify a real-world harm or rely on common-law principles of harm, Plaintiffs ultimately rest standing on their argument that Congress "has the power to define injuries . . . that will give rise to a case or controversy where none existed before." Opp. 10. However, this power is limited, because Congress may create a statutory right of action only to redress an actual, concrete harm:

> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation.

Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016). Here, as set forth above, Plaintiffs fail to allege a real-world harm, because: (1) Plaintiffs cannot plausibly allege that Defendants "contributed" to the harms caused by BNC; (2) Plaintiffs cannot, and do not try to, connect any particular Banco Pujol assets to any of Defendants' alleged conduct in a manner that caused injury; and (3) common-law principles are inapposite because any ownership interest was extinguished upon expropriation. Plaintiffs thus lack standing. *Id.*; *Glen v. AA*, 2020 WL 4464665, at *2 (no injury in fact where "injury is based entirely on defendant's alleged violation of the substantive rights given to plaintiff by [Helms-Burton]").

Plaintiffs are not helped by Judge Bloom's three *Havana Docks* decisions, all virtually identical and ruling that there was sufficient injury because defendants supposedly interfered

[1] Other common law torts invoked by Plaintiffs are even further afield. Aiding and abetting conversion (Opp. 10) requires that the "the aider/abettor proximately caused the harm" due to the conversion. *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 345 (2d Cir. 2018). Defendants' alleged conduct here, decades after Cuba nationalized the property, cannot possibly satisfy that standard.

with "a statutorily constructed property interest" in the confiscated property. *See* Opp. 14 (citing S.D. Fla. cases by Havana Docks Corp. against three cruise lines). First, in those cases, unlike here, defendants were alleged to have used or benefited from a specific confiscated asset. Just as importantly, *Havana Docks* cannot be reconciled with the conclusion, recognized in *Glen v. Club Méditerranée*, that Helms-Burton does not displace *Sabbatino*;[2] and given *Thole v. U.S. Bank*, 140 S. Ct. 1615 (2020), and *Spokeo*, Plaintiffs cannot rely on the Helms-Burton cause of action to establish standing in the absence of a concrete injury.

II. THE AC FAILS TO STATE A CLAIM.

A. Plaintiffs Fail To Show That They May Sue After The Expiration Of Helms-Burton's Two-Year Statute Of Repose.

As shown in the Moving Brief (at 12-18), the statutory language and policy make clear that Section 6084 is a statute of repose—and Plaintiffs brought their claims outside the two-year repose period. Plaintiffs' response distorts the Act's text and disregards the statutory purpose.

1. Section 6084 Is A Statute Of Repose.

[2] Also unavailing is *Exxon Mobil Corp. v. Corporación CIMEX S.A.*, No. 19-CV-01277, 2021 WL 1558340 (D.D.C. Apr. 20, 2021), which Plaintiffs referenced in a recent letter to the Court. *See* Dkt. 50. The subject property in that case—a refinery and gas stations formerly owned by Exxon's subsidiary, Esso Standard Oil, S.A. ("Essosa")—was expropriated by Cuba in 1960, without compensation. *See id.* at *1-2. In its "trafficking" claim, Exxon sued the Cuban state-owned entities that actually "operate" Essosa's former assets. *See id.* at *3-4. Further—as the court's discussion of the FSIA shows—the court treated the defendants as "Cuba" itself (*id.* at *12) and as the "foreign sovereign" (*id., passim*). The Article III standing issue in *Exxon* was thus fundamentally different from that in the present case, because the acts of the Cuban state-owned defendants (and their alter ego) were directly traceable both to the confiscation and the state's refusal to pay compensation. Although the *Exxon* court's treatment of standing was brief (it did not discuss *Sabbatino* or *Club Méditerranée, S.A*), it did emphasize that a concrete injury-in-fact must be established, and its findings on injury and causation reflect these unique facts. *See id.* at *20-21 (citing ties to "Confiscated Property" and the Foreign Claims Settlement Commission's 1969 certification of Exxon's unsatisfied $71 million claim against Cuban government as evidencing the "injury"). By contrast, Defendants are not implicated in either Cuba's expropriation or its failure to pay compensation to Plaintiffs. Indeed, the *Exxon* court itself characterized the case as "novel." (*id.* at *1).

Section 6084 places an express and unambiguous two-year hard stop on when an action may be brought, which runs from the date of the last alleged wrongful conduct. Under *ANZ Securities*, such a statute is one of repose because it "runs from the defendant's last culpable act" and "not from the accrual of the claim." *Cal. Pub. Emps.' v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017). *See* Br. 13. The decisions Plaintiffs cite embrace the same distinction. *See, e.g.*, Opp. 32 (citing *CTS Corp. v. Waldburger*, 573 U.S. 1, 7-8 (2014) (statutes of limitations are "based on the date when the claim accrued," *i.e.*, "when the injury occurred or was discovered," whereas statutes of repose run "from the date of the last culpable act or omission of the defendant.")).

Plaintiffs try to avoid the conclusion that Section 6084 is a statute of repose by contending that its time-bar is supposedly tied to a plaintiff's "injury." Opp. 32. But Section 6084 says nothing about plaintiff's injury, addressing only the date that defendant's culpable conduct ("trafficking") "ceases." And Plaintiffs err in arguing that the date when wrongful conduct ends under the Act is the same as the date that the action accrues (Opp. 32); to the contrary, suit may be brought upon the *first* act of trafficking. *See* 22 U.S.C. § 6082(a)(1).[3]

Plaintiffs' remaining arguments are equally defective. ***First***, Plaintiffs assert that statutes of repose do not use the words "may not be brought" to bar claims (Opp. 32), but numerous statutes of repose do. *See, e.g.*, 15 U.S.C. § 78u-6(h)(1)(B)(iii)(I)(aa); 28 U.S.C. § 1658(b)(2).

[3] Plaintiffs' reliance (Opp. 33) on *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990), is misplaced because the statute it addressed, 15 U.S.C. § 78t-1, is one that the "SEC believes . . . is a statute of repose," *id.*, and that *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991) refers to as one of repose. The various statutes of limitation that Plaintiffs cite further prove Defendants' point because they are triggered by when the cause of action arose and do not mention when the defendant *ceased* its culpable conduct. *See e.g.*, 29 U.S.C. § 2617(c) (running from two years of when the "alleged violation" arose); 42 U.S.C. § 3613(a)(1)(A)(running from "occurrence" of "alleged discriminatory practice").

Second, Plaintiffs observe that Section 6084 does not use a "categorical" phrase, such as "in no event" (Opp. 33), but many statutes of repose do not. *See, e.g.*, 29 U.S.C. § 1113; 15 U.S.C. § 1635(f); 15 U.S.C. § 78t-1(b)(4). Nor do Plaintiffs have any answer to Defendants' showing that Section 6084 "'admits of no exception and on its face creates a fixed bar against future liability'" (Br. 13), which, under *ANZ Securities*, is a key feature of a statute of repose. ***Third***, although Plaintiffs argue that Section 6084 has too "short [a] fuse" to be a statute of repose (Opp. 33), they admit that Congress "sometimes" (*id*., and *see* Br. 15 n.7) enacts short statutes of repose; doing so made particular sense in Helms-Burton, where Congress thought that the Castro regime would likely fall—and the need for Helms-Burton litigation would end—in just a few years. *See* Br. 14.

Section 6084's purpose confirms the point. As Plaintiffs themselves acknowledge (Opp. 31, 33), Congress's goal was to create an incentive for potential *defendants* to cease trafficking "immediately." Plaintiffs offer no answer to Defendants' showing that only a statute of repose achieves that goal by providing the certainty of legal peace—unlike a statute of limitations, which (due to tolling) could leave defendants exposed, and liable for damages in undiminished amount, even if they cease trafficking. Br. 13-14.

2. Plaintiffs Fail To Show That Title III Includes An Exception To The Section 6084 Statute Of Repose.

Plaintiffs try to evade Section 6084's clear effect by arguing that Section 6085—which allows the President to suspend the Title III cause of action—somehow, *sub silentio*, suspends the running of the Section 6084 statute of repose. But Plaintiffs offer no basis for their contention that Section 6085, which by its terms applies only to "the right to bring an action," *also* somehow suspends the repose period. Nor could they—Section 6085 does not say it suspends the repose period; and that period runs, not from when "the right to *bring* an action" commences, but from when the wrongful conduct "ceased." Nor does Plaintiffs' strained conclusion follow from

the statutory structure. Even assuming that to "suspend" means "'[t]o ***temporarily*** keep (a person) from . . . exercising a right'" (Opp. 29 (citation omitted) (emphasis in original)), a suspension temporarily keeps a putative *plaintiff* from bringing suit, but it is the Act's separate repose provision, and not the suspension provision, that terminates *Defendants'* liability.[4]

Similarly, Plaintiffs are wrong to argue that because Sections 6085(c)(1) and (2) permit the Executive to "suspend" the right of action and then to "rescind" the suspension (Opp. 31-32), the formerly suspended right of action should continue—as if the suspension had not occurred—once the suspension is lifted. To the contrary, using precisely such language, Congress in Section 6085(c)(3) expressly exempted only already *pending* suits from the consequences of a Presidential suspension.[5] That contrast makes clear that Congress had no such intent regarding suits—like this one—that had not yet been filed when a suspension went into effect. *See* Br. 16.

3. Plaintiffs Are Obligated To Allege Facts Showing That Defendants Engaged In Transactions With BNC During The Two Years Before This Suit.

Finally, Plaintiffs cannot circumvent Section 6084's time limit by contending that it is an affirmative defense, excusing them from alleging facts showing that they timely filed. Opp. 26-28. In fact, "the general congruence of opinion [is] that when the very statute which creates the cause of action also contains a limitation period, . . . the plaintiff must plead and prove facts showing that he is within the statute." *Mori v. Saito*, No. 10 CIV. 6465, 2013 WL 1736527, at *3 (S.D.N.Y. Apr. 19, 2013) (internal citation omitted); *Epstein v. Haas Sec. Corp.*, 731 F. Supp.

[4] The statute at issue in *Artis v. District of Columbia*, 138 S. Ct. 594, 598 (2018), on which Plaintiffs rely (Opp. 29), contains an *express* tolling provision; the Act does not. *See also ANZ Securities*, 137 S. Ct. at 2050 (example of statute of repose with legislative exception is 29 U.S.C. § 1113, which *expressly* states that "in the case of fraud or concealment" an "action may be commenced not later than six years after the date of *discovery*.").

[5] Plaintiffs misread Executive Branch materials referring to "irreversible liability" (Opp. 30); in context, they mean only that a suspension would not *itself* prevent liability from attaching.

1166, 1180 (S.D.N.Y. 1990) (same). That describes the statute here. And this principle applies with special force to a statute of repose, which "is not a limitation of a plaintiff's remedy, but rather defines the right." *P. Stolz Family P'ship. L.P. v. Daum*, 355 F.3d 92, 102 (2d Cir. 2004).[6] The cases Plaintiffs cite are off point: they are not statutes of repose, or do not even address statutes of limitations created by the same provision that gives rise to the action, or both.[7]

Plaintiffs get no further by arguing that the AC supposedly alleges wrongful conduct within the repose period. Opp. 27-28. That contention rests on the AC's passing reference to "continuing" or "ongoing" conduct. *Id*. at 27 (citing AC ¶¶ 53-55, 59). But courts routinely reject "conclusory terms [like] . . . ongoing . . . [a]s too vague to state a claim for relief that is not barred by the statute of limitations." *Chiu v. Au*, No. 03-CV-1150, 2005 WL 2452565, at *3 (D. Conn. Sept. 30, 2005); *see Broughton v. Livingston Indep. Sch. Dist.*, No. 08-CV-175-TH, 2009 WL 10707489, at *6 (E.D. Tex. June 11, 2009) (same). Unsurprisingly, Plaintiffs cite no case in which a court found a mere reference to "continuing conduct" sufficient to allege that actionable wrongs occurred many years after the last act actually identified in the complaint.

Plaintiffs' remaining efforts fare no better. ***First***, Plaintiffs contend that Defendants' alleged conduct in 2010 should be presumed to be ongoing (Opp. 27), but as courts routinely recognize, allegations about past conduct do not establish what is true today. *See Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 246 (1957) (stating "there is no suggestion that

---

[6] *See In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 23 F. Supp. 3d 203, 208 (S.D.N.Y. 2014) ("statute of repose . . . is a substantive element of the claim"); *MIG, Inc. v. Paul, Weiss, Rifkind, Wharton & Garrison, L.L.P.*, 701 F. Supp. 2d 518, 531 (S.D.N.Y. 2010) (statutes of repose are not affirmative defenses), *aff'd*, 410 F. App'x 408 (2d Cir. 2011).

[7] *See, e.g., Conn. Gen. Life Ins. Co. v. BioHealth Labs., Inc.*, 988 F.3d 127, 131-32 & n.2 (2d Cir. 2021) (Connecticut's general statute of limitations for actions in tort); *In re GSE Bonds Antitr. Litig.*, 396 F. Supp. 3d 354, 368 (S.D.N.Y. 2019) (statute of limitations for antitrust actions).

Schware was affiliated with the Communist Party after 1940—more than 15 years ago. We conclude that his past membership in the Communist Party does not justify an inference that he presently has bad moral character."); *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 563 (2d Cir. 2016). ***Second***, Plaintiffs point to BNC's existing office in Paris (Opp. 27), but at most that speaks to *BNC's* current actions, not Defendants'. ***Third***, Plaintiffs note that Defendants did not "say they would stop [trafficking]" after receiving Plaintiffs' Helms-Burton demand (Opp. 28), but a Helms-Burton notice does not call for a reply. *See U.S. ex rel. Parker v. McMann*, 308 F. Supp. 477, 482 (S.D.N.Y. 1969) (no adverse inference from silence by party that had no obligation to reply).[8]

B. Plaintiffs Fail To Allege That Defendants Engaged In Trafficking.

Plaintiffs' arguments that Defendants engaged in "trafficking" fail to identify *any* particular item of confiscated property that Defendants used (or the use of which benefited Defendants) in *any* particular transaction. Instead, their theory is that BNC received property confiscated from Banco Pujol; 40 years later, Defendants conducted transactions with BNC; and Defendants simply should be presumed to have benefited, in some undefined and nonspecific way, from the long-ago confiscated property. Opp. 15-19. That improbable theory is wrong, in several respects.

[8] Plaintiffs' argument that there is personal jurisdiction over Defendants for post-2010 "non-U.S. dollar" loans "occurring outside of New York" (Opp. 28) is deeply confused. Plaintiffs admit that their claim in this case relates to U.S. dollar transactions that Defendants cleared "through their New York branches." Opp. 28; AC ¶¶ 21-22. Any claim based on "non-U.S. dollar" facilities, "occurring outside of New York," would be a separate claim. Specific jurisdiction, however, must be alleged for "each claim." *Sunward Elec., Inc. v. McDonald*, 362 F. 3d 17, 24 (2d Cir. 2004). Plaintiffs fail to explain how personal jurisdiction for a claim alleging that U.S. dollars were cleared through New York from 2000-2010, can possibly establish jurisdiction for a separate claim based on supposed loans in a different currency, "occurring outside of New York" at a later time.

First, Plaintiffs say nothing about the statutory language under which one who traffics in particular confiscated property may be sued by a U.S. national "who owns the claim to *such property*." *See* Br. 4, 18-25 (internal quotations omitted); 22 U.S.C. §§ 6023(13)(A)(ii) (emphasis added), 6082(a)(1)(A). Moreover, Plaintiffs acknowledge that the statutory findings and legislative history all describe trafficking as involving particular and identifiable confiscated assets. Opp. 19; *see* Br. 4, 18-25.[9] As the Moving Brief (at 23) shows, the requirement that trafficking use particular confiscated assets is confirmed by contrasting the Act with embargo statutes that sanction doing business with Cuba in broader terms. Plaintiffs' response, that there is no "positive repugnancy" between the embargo statutes and the Act (Opp. 18), misses the point—which is not that the Act and the embargo statutes conflict, but rather that contrasting them reveals the Act's limited scope. *See Glen v. Club Méditerranée, S.A.*, 365 F. Supp. 2d 1263, 1271-72 (S.D. Fla. 2005) (recognizing that the embargo statutes give broad authority and do not provide a private right of action), *aff'd*, *Club Méditerranée, S.A*, 450 F.3d 1251 (11th Cir. 2006).

Second, Plaintiffs simply assume that *all* BNC transactions with *all* counterparties occurring at *any* time made use of assets confiscated from Banco Pujol. But at most, Plaintiffs have alleged that BNC absorbed all of Banco Pujol and then conducted generic "'banking operations'" (Opp. 16-17 (citing AC ¶¶ 39-40, 47-48)). From there, Plaintiffs jump to the unsupported conclusion that the transactions Defendants allegedly conducted with BNC used Banco Pujol property. *Id.* It would be a stretch to make even the first inference in this chain, that BNC *still held* any Banco Pujol assets (which comprised just over 1% of BNC's assets at the

[9] Plaintiffs get no support from *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 454 F. Supp. 3d 1259, 1277 (S.D. Fla. 2020). Opp. 15. *Havana Docks*, 454 F. Supp. 3d 1259, nowhere suggested that liability would be appropriate if the defendant did not physically use the particular dock that had been confiscated from the plaintiff.

time of the confiscation) four decades after the Cuban government's confiscation (when the Defendants allegedly engaged in transactions with BNC). And nothing in the AC supports the necessary *further* "inference"—*i.e.*, completely unsupported speculation—that BNC's alleged transactions *with the Defendants* made use of particular assets that had been confiscated from Banco Pujol 40 years before. Plaintiffs cite no authority supporting their contention that they are entitled to that compounded inference.

In fact, as demonstrated in the Moving Brief (at 22): BNC is a Cuban instrumentality with many sources of funds; BNC received many financial institutions' assets when Castro took power; BNC, which existed long before Castro's arrival, already had substantial assets of its own; and even at confiscation, Banco Pujol's assets constituted a tiny fraction of BNC's equity. Thus, even assuming that BNC still had specific assets from Banco Pujol in 2000-2010 (when Defendants allegedly dealt with BNC), the AC does not, and could not plausibly, allege that Defendants' transactions used *those* assets. This does not draw inferences against Plaintiffs (Opp. 19-20); it applies "common sense" to the implausible conclusions asserted in the AC.[10] *Iqbal*, 556 U.S. at 679. If such allegations were sufficient, every enterprise of every kind that did and

[10] Plaintiffs cannot bridge this gap by referring to *Simon v. Repub. of Hungary*, 812 F.3d 127, 147 (D.C. Cir. 2016), and *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 689 (7th Cir. 2012), which held that plaintiffs adequately alleged that governmental bodies held assets following historical confiscations. Opp. 20 n.3. *Simon* and *Abelesz* did not hold that a *third party's subsequent transactions with the government* can be presumed to have involved the confiscated assets. Indeed, the Second Circuit has held that even if a government is a bad actor, a defendant's interactions with it cannot be presumed to relate to the government's wrongful acts. *See Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013) (rejecting conclusion that money defendants transferred to Iran was used by Iran to fund terrorism, because Iran is a government with "many legitimate agencies, operations, and programs to fund"). Furthermore, *Freund v. Repub. of France*, 592 F. Supp. 2d 540, 559-60 (S.D.N.Y. 2008), *aff'd*, 391 F. App'x 939 (2d Cir. 2010), which states the view affirmed by this Circuit, declined to infer that specific confiscated assets were still in the state's hands, decades later. Plaintiffs' attempt to distinguish *Freund* on the ground that the defendant in that case had transferred the confiscated property to a third party is in error; the court (Judge Sullivan) did not rely on that rationale.

does business with Cuba *per se* engages in Helms-Burton trafficking. However, as shown in the Moving Brief (at 18-25), that is not what Congress wrote or intended—a point that Plaintiffs do not even try to refute.

Third, Plaintiffs do not improve their position by arguing that Banco Pujol's assets made BNC "a more stable, less risky, and more desirable counterparty." Opp. 7, 17, 20; AC ¶¶ 40, 48. The allegation that property confiscated 40 years earlier (and even then allegedly was only 1.3% of BNC's equity) made BNC "less risky" decades later is both impermissibly conclusory and implausible. *See Freund*, 592 F. Supp. 2d at 559-60. Further, if Plaintiffs' theory were accepted, *all* Cuban enterprises were rendered less risky as a consequence of property confiscations and *everyone* doing business with such a Cuban enterprise has engaged in trafficking. But the plain language of the Act refutes this boundless view; it defines trafficking through an extensive list of verbs that prohibit specific types of conduct (all involving confiscated property) that would be rendered superfluous if Congress intended trafficking to mean simply engaging in transactions with Cuba. As shown in the Moving Brief (at 23-25), had Congress wanted to premise Helms-Burton liability on doing business with Cuba, it knew how to say that—and chose not to.[11]

C. Plaintiffs Fail To Allege That Defendants Acted "Knowingly And Intentionally."

Plaintiffs' assertion that they adequately allege scienter fails. A defendant must have "knowingly *and* intentionally" engaged in conduct that constitutes trafficking. 22 U.S.C. §

[11] Plaintiffs *expressly* contend the Act establishes doing-business liability. Opp. 16. But the materials they cite—passing statements made on the floor of Congress by the Act's *opponents*—are the least probative form of legislative history. *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) (explaining that "floor statements by individual legislators rank among the least illuminating forms of legislative history"). In contrast, statements that appear in the enacted legislative findings (as well, of course, in the legislative text) and that were made by the Act's sponsors tie trafficking to the use of specific confiscated property. Br. 19-25.

6023(13)(A) (emphasis added). But Plaintiffs maintain that they need not show that Defendants intended their conduct to encompass the elements of trafficking (Opp. 20-23), offering an interpretation that effectively would read the express scienter terms out of the Act.

First, Plaintiffs argue that "[a]s a grammatical matter . . . 'intentionally' [is] most naturally read to modify only the verbs that follow [it]," so that scienter is not necessary as to "every single fact relevant to liability." Opp. 20. Under that view, a defendant need only intend to act. Opp. 23. But that is not so. "As a matter of ordinary English grammar, 'knowingly' [or, as here, intentionally] is naturally read as applying to *all* the subsequently listed elements." *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) (emphasis added); *see also United States v. Bronx Reptiles, Inc.*, 217 F.3d 82, 86 (2d Cir. 2000) (scienter "refers to all three of the phrases that follow: '[1] caus[ing] or permit[ting] any wild animal or bird to be transported [2] to the United States . . . [3] under inhumane . . . conditions.'"); *Glen v. AA*, 2020 WL 4464665, at *5.

Here, that principle means that scienter applies to all the elements of trafficking, including confiscation without compensation. Section 6023(13)(A) applies the Act's scienter requirement to "confiscated property," which under Section 6023(4) excludes property for which "effective compensation [was] provided" or when "the claim to the property [was] settled[.]" *Id.* at § 6023(4)(A). The scienter requirement thus extends to the Act's definition of confiscation (which excludes property for which Cuba has made settlement payments)—as has been held by every court to consider the issue. *See Glen v. Trip Advisor*, No. 19-1809-LPS, 2021 WL 1200577, at *10 (D. Del. Mar. 30, 2021) (myriad courts have interpreted statutes with specific scienter requirements as applying to "*all the elements* listed in the statute") (extending intent requirement to confiscation element); *Gonzalez v. Amazon.com, Inc.*, No. 19-23988, 2020 WL

1169125, at *2 (S.D. Fla. Mar. 11, 2020) ("*Gonzalez I*") (same).[12] As the court held in *Glen v. AA*, 2020 WL 4464665, at *5:

> Plaintiff . . . asserts that "knowingly and intentionally" modify only the verbs found in numerals (i) - (iii) of § 6023 (13) (A) and that a defendant need not have realized that property was confiscated in order for the listed activity involving such property to constitute "trafficking" under the Act. Doc. 56 at 26-28. The court disagrees.

That conclusion is further supported by the Act's policy: unless the Act requires that the defendant consciously intended that its transactions would use confiscated assets, it would not distinguish unwitting actors from culpable ones. *See id.* Plaintiffs' contrary position, under which persons who engage in transactions involving Cuba do so "at their peril" (Opp. 21), misunderstands the point of a scienter requirement.[13]

Second, Plaintiffs are incorrect that their scienter allegations need only meet a "reason to know" standard because under the definition of "knowingly," "[a]ctual knowledge is not required." Opp. 23. Trafficking requires that the defendant act both "knowingly *and intentionally*." 22 U.S.C. § 6023(13)(A) (emphasis added). Congress's use of "intentionally" was deliberate, *compare with* another section of Helms-Burton, 22 U.S.C. § 6033 (prohibiting acts done "knowingly," but not "intentionally"), and must be given effect. As for the meaning of

[12] The cases Plaintiffs cite (Opp. 21)—to suggest that scienter does not reach all the elements of trafficking—hold that a statutory scienter requirement should be applied to shelter "otherwise law-abiding conduct," *United States v. Chin*, 981 F.2d 1275, 1281 (D.C. Cir 1992), *United States v. LaPorta*, 46 F.3d 152, 158 (2d Cir. 1994), which, under the Act, include transactions involving property as to which Cuba *has* made settlement payments.

[13] Plaintiffs do not dispute that they fail to meet the additional requirement, recognized in *Gonzalez I*, that they must allege "that the Defendants knew the property was confiscated by the Cuban government [and] *that it was owned by a United States citizen*." 2020 WL 1169125 at *2 (emphasis added). Plaintiffs' only response is that "Section 6023 nowhere says a trafficker must know … that the owner was a 'U.S. citizen at the time of confiscation.'" Opp. 22. But Section 6022(13) says just that; it requires that defendants "intentionally" engage in trafficking conduct "without the authorization of any United States national who holds a claim to the property."

"intentionally," Plaintiffs have no answer to the two Helms-Burton decisions—*Glen v. AA*, 2020 WL 4464665, at *6 and *Gonzalez I*, 2020 WL 1169125, at *2—holding the Act to require that the defendant have *intended* confiscated property to be the subject of its commercial behavior. *See* Br. 26.[14]

Third, Plaintiffs fail to meet the foregoing intent standard, arguing only that the Court can "infer" that "Defendants had *reason to know* that BNC was trafficking in Banco Pujol property." Opp. 24 (emphasis added). As just noted, that is not sufficient to establish intent. Indeed, allegations like those in the AC and repeated in Plaintiffs' brief—*i.e.*, "Banco Pujol was confiscated pursuant to public Cuban laws" (Opp. 24-25)—do not satisfy even a "reason to know" standard: "The general knowledge that some properties in Cuba were confiscated more than sixty years ago does not equate to constructive knowledge that the specific Subjected Properties involved in this case were confiscated. If it were otherwise, the knowledge element would be automatically satisfied for essentially any property located in Cuba, a proposition that is not consistent with the statute." *Glen v. Trip Advisor*, 2021 WL 1200577, at *10.[15]

Cueto v. Pernod Ricard (Opp. 25), is wholly consistent with the requirement that intent to engage in transactions with confiscated property is necessary. There, plaintiffs specifically

[14] Plaintiffs argue "intent" means "acting notwithstanding the foreseeable consequences." Opp. 23. But the decision they cite says "the requisite intent exists '[w]hen it is clear that a scheme, viewed broadly, is necessarily going to injure.'" *AUSA Life Ins. Co. v. Ernst & Young*, 206 F.3d 202, 220-21 (2d Cir. 2000) (citation omitted). And in the context here, acts are "necessarily going to injure" only when the defendant intends to deal with property that it is aware was confiscated without compensation; otherwise, the conduct at issue would be innocuous.

[15] Plaintiffs rely on *Garcia-Bengochea v. Norwegian Cruise Line Holdings Ltd.*, No. 19-cv-23593, 2020 WL 5028209, at *2 (S.D. Fla. Aug. 25, 2020) for the proposition that "Plaintiff need not allege specific facts showing [defendant's] state of mind," but plaintiffs cannot evade the Second Circuit requirement that "[the] plaintiff[] must still plead the events which they claim give rise to an inference of" intent or knowledge. *Devaney v. Chester*, 813 F.2d 566, 568 (2d Cir.1987).

alleged that "the [particular] barrels and other materials [that Defendants dealt with] had Cognac [sic] Cueto markings and other signage," and thus carried the very markings and signage associated with property known to be confiscated. First Amended Complaint ¶ 36, *Pernod Ricard*, No. 20-cv-20157 (S.D. Fla. Apr. 6, 2020), ECF No. 22.[16]

D. Plaintiffs Fail To Show That Domestic Takings Are Actionable.

Plaintiffs' argument that the Act allows suit even when the subject property was confiscated from Cuban citizens misreads the language and distorts the policy of Helms-Burton.

First, the natural reading of the Act's express purpose—*i.e.*, to address "the wrongful confiscation or taking of property *belonging to United States nationals* by the Cuban Government," 22 U.S.C. § 6081(2) (emphasis added); *see also* 22 U.S.C. §§ 6022(3), (6), 6081(10)—is to address property of U.S. nationals at the time of seizure. *See* Br. 30-31.[17] Plaintiffs try to avoid this plain language by pointing to a different section, Section 6082(a)(1)(A)—which addresses who may now sue—observing that it is phrased in the present tense (*i.e.*, "United States national who owns the claim"). Opp. 34-35. But the verb "owns" in the provision applies, not to the property that was confiscated, but rather to "*the claim*"—*i.e.*, in order to sue, a plaintiff must currently own "the claim." *Id.* The section that Plaintiffs rely on does nothing to support Plaintiffs' argument that at the time of confiscation the property could have been owned by a non-U.S. national.

[16] Likewise, the cruise-line decisions Plaintiffs cite alleged that the defendants disembarked their ships on the particular confiscated property, supporting an inference that defendants knowingly and intentionally trafficked in such property. *Cf. Havana Docks Corp. v. MSC Cruises SA CO.*, No. 19-cv-23588, 2020 WL 5367318, at *3, *7 (S.D. Fla. Sep. 9, 2020) (defendant "regularly embark[ed] and disembark[ed]" on the confiscated property); *Norwegian Cruise Line Holdings*, 2020 WL 5028209, at *2 (same).

[17] For example, if a statute prohibited taking lunches from school children, it would prohibit taking lunches from persons who were school children at the time of the taking.

Second, in discounting international law when determining the existence of a "claim" under Helms-Burton, Plaintiffs argue that the term "claim" is supposedly untethered to any legal standard and merely denotes "'a demand for something rightfully or allegedly due'" or "'a right or title to something.'" Opp. 36 (citations omitted). But Plaintiffs fail to explain how it is possible to determine whether a "right or title to something" exists without considering whether the demand states a valid cause of action. Indeed, the "ordinary, contemporary meaning" of "claim" is the one that is consistent with the common law meaning. *See Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 101 (2011). Under the common law, "[t]he word claim denotes 'the aggregate of operative facts which give rise to a right enforceable in the courts.'" *See Gottesman v. Gen. Motors Corp.*, 401 F.2d 510, 512 (2d Cir. 1968). And that includes doctrines of international law, including the domestic takings rule. Br. 31.

Moreover, as stated in the Moving Brief (at 32-33), Helms-Burton explicitly indicates that international law sets the standards for a "claim" because a Title III cause of action may be premised on an underlying "claim" certified by the FCSC, which must be consistent with international law. Plaintiffs miss the point in responding that "the term 'claim'" is not limited "to only claims 'recognized in' FCSC decisions." In recognizing a claim under the Act, a court must apply the same international law rules that the FCSC applies; otherwise, one statutory word ("claim") will have two meanings, contravening fundamental rules of statutory construction (*see Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007)) and resulting in similarly situated claimants being treated differently.

E. Plaintiffs Fail To Show That The Estate Plaintiffs Satisfy The Requirements Necessary To Sue Under Helms-Burton.

Plaintiffs fail to refute Defendants' showing that the Estate Plaintiffs do not "own" the Helms-Burton claims—the decedents' heirs do, (Br. 36-37)—and that Title III creates a cause of

action only for those who "own" a claim to confiscated property. *See* 22 U.S.C. § 6082(a)(1)(A). Plaintiffs ignore Florida law in arguing that the claims were never inherited by the heirs, but rather have sat, uninherited, with the estates for the last 15 to 20 years. Contrary to Plaintiffs' argument, nothing in Florida law says that the immediate vesting of assets with decedents' heirs—required by Fla. Stat. § 732.514 and Fla. Stat. § 732.101—is held in abeyance pending the "administration" of the estate. Rather, when Florida courts, such as *In re Est. of Slater*, 437 So. 2d 1110, 1112 (Fla. Dist. Ct. App. 1983), on which Plaintiffs rely, state that "property owned by an intestate decedent descends at death directly to the heirs *subject to* the administration of the estate," they mean that, if an estate has obligations (*e.g.*, paying tax), property already vested with heirs is "subject to" the estate's claims. *Id.* (emphasis added); *Ray v. Rotella*, 425 So. 2d 94, 96 (Fla. Dist. Ct. App. 1982) (estate vests with heirs "subject to possible divestment . . . during the administration of the estate" if necessary "for the payment of debts and taxes").

Moreover, Plaintiffs concede (as did the Estate Plaintiffs' personal representatives years ago) that there has been "*complete* distribution" of all property the estate previously held. Br. 36-38. Accepting Plaintiffs' assertion that they only recently "discovered claims to Banco Pujol under the Helms-Burton Act" (Opp. 39), their argument that the claims were not inherited is a non-sequitur. It also is contrary to Florida law, which does not condition inheritance of property on the personal representatives' state of mind. Fla. Stat. § 732.514 and Fla. Stat. § 732.101.[18]

[18] Nor is there a factual issue to resolve, contrary to Plaintiffs' contention. Opp. 39 n.13. First, Laureano Pujol Rojas died intestate given that he has an administrator, not an executor. AC ¶ 10; Br. 37 n.19. Second, the Estate of Mr. Pujol Izquierdo cannot now suggest that due to an unsatisfied condition in his will, it might hold claims that Florida law otherwise vests with his heirs (*see* Fla. Stat. § 732.514), as it was incumbent on the Estate to allege such facts, because ownership of the claim is an element of the right of action. *See* 22 U.S.C. § 6082(a)(1).

Further, to the extent that the Estate Plaintiffs maintain that they have now come to own the claims, they cannot meet the Act's March 12, 1996 cut-off date, because they necessarily acquired the claims from the heirs after the decedents died and thus long after March 12, 1996. Plaintiffs argue that the Estate Plaintiffs should be exempted from the cut-off based on a purported policy argument they profess to glean from legislative history. *See* Opp. 39-40. But as *Glen v. Trip Advisor* explained when rejecting that argument, "legislative history can never defeat unambiguous statutory text." 2021 WL 1200577, at *9 (quoting *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1750 (2020)). In any event, Plaintiffs omit the crucial words that preceded the legislative history they purport to quote—"in part"—and thus ignore that Congress had multiple motivations for the cut off.

CONCLUSION

For the reasons above, the AC should be dismissed with prejudice under Rules 12(b)(1), 12(b)(2) and 12(b)(6).

Respectfully submitted,

Dated: New York, New York
May 10, 2021

MAYER BROWN LLP

/s/ Steven Wolowitz
Steven Wolowitz
Alex Lakatos
Michelle J. Annunziata
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 506-2500
swolowitz@mayerbrown.com
alakatos@mayerbrown.com
mannunziata@mayerbrown.com

Attorneys for Defendant Société Générale, S.A.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

/s/ Carmine D. Boccuzzi, Jr.
Carmine D. Boccuzzi, Jr.
One Liberty Plaza
New York, New York 10006
Tel: (212) 225-2508
Fax: (212) 225-3999
cboccuzzi@cgsh.com

Attorneys for Defendant BNP Paribas, S.A.