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

Case No. 1:19-cv-23588-BLOOM/Louis

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

MSC CRUISES (USA) INC. and
MSC CRUISES SA CO.

Defendants.

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT
AND INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

This case arises out of the untested and vague Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, 22 U.S.C. § 6021, *et seq.* (the "Act" or "Helms-Burton Act")—a statute which has laid dormant for 23 years. Title III creates a potential cause of action for U.S. citizens against any person, corporation, or foreign government that "traffics" in property previously belonging to a U.S. citizen that was confiscated by Fidel Castro's government in the 1960s. Defendants MSCC Cruises (USA) Inc. and MSC Cruises SA Co. (collectively, the "MSCC Defendants") did not, as a matter of law, violate Title III. The clear defects in the Complaint require that this Court dismiss this action for four critical reasons.

First, Plaintiff's lone allegation regarding how the MSCC Defendants purportedly "traffic[ked]" in Plaintiff's "property" is razor thin, constitutes impermissible group-pleading and fails to satisfy Rule 8(a)(2). Specifically, the Complaint parrots, without explanation, the broadest portion of the statutory definition of "trafficking" but fails to include *any* allegations about how the MSCC Defendants could have trafficked, either directly or indirectly, in the subject "property."

Second, Plaintiff's claim that the MSCC Defendants trafficked in Plaintiff's "property" also fails as a matter of law because the subject "property" is, as Plaintiff readily concedes, a 30-year leasehold interest to operate three piers in Havana *which expired in 2004*—more than a decade before the MSCC Defendants allegedly "trafficked" in the piers in question. Plaintiff's certified claim for this property is not implicated by its own allegations, which asserts that the MSCC Defendants did not "traffic" in (or otherwise interact with) the docks until December 2018.

Third, Title III violates the Due Process Clause of the Fifth Amendment of the U.S. Constitution because the MSCC Defendants did not have fair notice of Title III's ability to retroactively hold liable those who purportedly "trafficked" during the initial (and prolonged) Title

III suspension—which prevented Title III from becoming fully effective until recently—and after the federal government permitted cruise lines to travel to Cuba. Additionally, the term "traffics" is so broadly and vaguely defined that it will lead to arbitrary results based on each court's understanding of what tangential, remote conduct could result in liability.

Fourth, Title III's remedy provision and the award Plaintiff seeks in this case is oppressive, arbitrary and grossly disproportionate to the alleged conduct such that it also violates the Due Process Clause.

Accordingly, the MSCC Defendants should be dismissed.

BACKGROUND

In 1996, Congress enacted the Helms-Burton Act primarily to codify and expand economic sanctions against Cuba. *See* 22 U.S.C. § 6022(2). Title III was designed to deter U.S. and foreign companies from doing business with Cuba and thereby supporting the Cuban socialist regime. *See id.* § 6081(5). The Act, however, defines "traffics" broadly to not only include direct use or investment (*e.g.*, the sale, purchase, or transfer of confiscated property), but it also creates liability for anyone who "engages in a commercial activity using or otherwise benefiting from confiscated property" or otherwise is indirectly involved in a use of the subject property. *See id.* § 6023(13)(a).

From its inception, Title III was severely criticized by the international community, especially for Title III's supposed ability to hold foreign companies liable for the Cuban government's theft.[1] Concerns about its legal infirmities, however, were never resolved because

[1] *United States v. Brodie*, 403 F.3d 123, 129 (3d Cir. 2005) ("Numerous countries . . . reacted to the strengthening of the American Cuban embargo . . . by enacting countermeasures (often called 'blocking statutes' . . . ."). Congress too was concerned with the impact that the Act would have on the international stage. *See* H.R. REP. 104-202, at *53 (July 24, 1995) (dissenting legislators believed the bill would, "[d]amage our relations with our closest allies, friends and trading partners, in Europe, Japan, Canada, and Mexico," and "undermine U.S. leadership").

Title III never took full effect with the rest of the statute: President Clinton allowed the Act to become effective, but immediately suspended the right to action under Title III thereby leaving Title III ineffectual. Each subsequent President continuously suspended the right to action until, on May 2, 2019, President Trump allowed it to become "full[y]" effective for the first time:

> I'm announcing that the Trump administration will no longer suspend Title III. Effective May 2nd . . . the right to bring an action under Title III of the Libertad Act will be implemented in full.

U.S. DEPT. OF STATE, *Sec. of State Michael R. Pompeo's Remarks to the Press* (Apr. 17, 2019), available at https://www.state.gov/remarks-to-the-press-11/ (the "Pompeo Announcement").

During Title III's dormancy, however, the United States government (and in particular, the Executive Branch credited with suspending Title III's right of action) permitted U.S. citizens to lawfully travel to Cuba under certain circumstances. *See* 31 C.F.R. § 515.560(a). Specifically, on September 21, 2015, the Treasury Department approved a general license, which allowed the provision of "carrier services by vessel" to Cuba for the purpose of "engag[ing] and empower[ing] the Cuban people." *See* Cuban Assets Control Regulations, 80 FR 56915-01. Under this license, cruise lines were permitted to lawfully carry U.S. nationals to Cuba.

In its Complaint, Plaintiff Havana Docks Corporation alleges that the MSCC Defendants purportedly "traffick[ed]" in its "property" beginning "on or about December 10, 2018" – at a time when businesses did not have fair notice of Title III's purported retroactive effect (which the MSCC Defendants assert *infra* it does not have) when the federal government *allowed* cruise lines to travel to Cuba, and Title III's purported scope set forth by the vague concept of "traffic[king]." Plaintiff's allegations cannot stand as a matter of law and should be dismissed.

LEGAL STANDARD

Rule 8 requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although a complaint "does not need

detailed factual allegations," it must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (Rule 8(a)(2)'s pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"). "In the same vein, a complaint may not rest on 'naked assertion[s]' devoid of 'further factual enhancement.'" *Bellitto v. Snipes*, 221 F. Supp. 3d 1354, 1358–59 (S.D. Fla. 2016) (Bloom, J.) (quoting *Iqbal*, 556 U.S. at 678).

"On a Rule 12(b)(6) motion to dismiss, '[t]he moving party bears the burden to show that the complaint should be dismissed.'" *Sprint Sols., Inc. v. Fils–Amie*, 44 F. Supp. 3d 1224, 1228 (S.D. Fla. 2014) (internal citation omitted). This Court may consider the allegations in the complaint and documents referred to in the complaint that are central to the claim. *See Maxcess, Inc. v. Lucent Techs., Inc.*, 433 F.3d 1337, 1340 (11th Cir. 2005). This Court must accept the plaintiff's allegations as true and evaluate all plausible inferences derived from those facts in favor of the plaintiff. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012). "However, this tenet does not apply to legal conclusions, and courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Snipes*, 221 F. Supp. 3d at 1359 (quoting *Twombly*, 550 U.S. at 555). *See also* S.D. Fla. L. R. 7.1(a)(1).

ARGUMENT

I. The Complaint Does Not Plausibly Allege How Each MSCC Defendant Could Be Liable Under Title III of the Helms-Burton Act

Plaintiff's Complaint, which contains only one bare allegation concerning the MSCC Defendants' alleged conduct, fails to state a claim under Rule 8 for at least two reasons: (1) Plaintiff's flimsy allegation (Compl. ¶¶ 14-15) does not include any "factual enhancement" and

instead, only parrots back the broadest language in the Act's definition of trafficking; and (2) Plaintiff engages in impermissible group-pleading.

First, the definition of "traffics" creates liability for a person who (i) owns an interest in confiscated property, (ii) "engages in a commercial activity using or otherwise benefitting from confiscated property" or (iii) "causes, directs, participates in, or profits from, trafficking . . . by another person." 22 U.S.C. § 6023(13)(A). Plaintiff's Complaint merely repeats the farthest-reaching language in formulaic fashion:

> [B]eginning on or about December 10, 2018, the Defendants *knowingly and intentionally commenced, conducted, and promoted their commercial cruise line business* to Cuba using the Subject Property by *regularly embarking and disembarking their passengers* on the Subject Property . . . ." and "*participated in and profited from the communist Cuban Government's possession of the Subject Property*. . .

Compl. ¶¶ 14-15 (emphasis added). Thus, Plaintiff fails to allege *how* the MSCC Defendants trafficked in the "Subject Property" and falls short of satisfying basic pleading requirements.

Further, Plaintiff conflates two different types of trafficking – direct and indirect – and consequently asserts an illogical (or at best, ambiguous) allegation. The Complaint does not plainly state whether the MSCC Defendants actually used the subject property themselves ("by regularly embarking and disembarking their passengers") or whether they "promoted," "participated in" and "profited from" "another person['s]" "embarking and disembarking" of passengers (and if so, whom). Compl. ¶¶ 14-15. Without more, the Complaint contains only a naked, legal conclusion—that both MSCC Defendants constitute "traffickers" in some way—which this Court must disregard. *See Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) ("[L]egal conclusions masquerading as facts will not prevent dismissal.").[2]

[2] *See also Farquharson v. Citibank, N.A.*, 664 F. App'x 793, 800 (11th Cir. 2016) (Plaintiffs' allegation that "'Bank[s] used . . . misleading representations . . . are also conclusory allegations

Second, even if the Complaint did adequately allege how the "Defendants" purportedly trafficked in the subject property—which it does not—Plaintiff impermissibly group-pleads both MSCC Defendants in violation of the *Twombly*/*Iqbal* standard. *See Lane v. Cap. Acquisitions & Mgmt. Co.*, No. 04-60602 CIV, 2006 WL 4590705, at *5 (S.D. Fla. Apr. 14, 2006) ("By lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, [Plaintiffs'] Complaint fails to satisfy the minimum standard of Rule 8.").[3]

Nowhere in the Complaint does Plaintiff distinguish the purported actions of these two entities. For example, Plaintiff does not identify which, if any, MSCC Defendant "used" Plaintiff's purported "property," or alternatively, which entity supposedly "promoted" and "profited from" another's use of the "property" (or if the direct trafficker was the other MSCC Defendant). Instead, Plaintiff grouped the entities together and attributed one, conclusory allegation against both. As a result, this pleading defect fails to provide both MSCC Defendants with "fair notice of the precise nature of the violation that is claimed against them." *Bentley v. Bank of Am., N.A.*, 773 F. Supp. 2d 1367, 1374–75 (S.D. Fla. 2011) (dismissing a TCPA claim on a motion to dismiss, finding that the complaint "simply lumps the Defendants together despite that they are separate and distinct legal entities"); *Pierson*, 619 F. Supp. 2d at 619-20 ("[W]ithout differentiation or some sort of

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that may not be considered for purposes of stating a claim under *Iqbal*."); *Hicks v. Wells Fargo Bank, Nat'l Ass'n for BNC Mortg. Loan Tr. 2007-4*, No. 8:17-CV-612-T-27-TGW, 2017 WL 3500407, at *2 (M.D. Fla. Aug. 15, 2017) ("Plaintiff's conclusory allegation that the Defendant is a "debt collector" as defined by 15 U.S.C. § 1692a(6) is insufficient to state a FDCPA claim.").

[3] *See also Pierson v. Orlando Reg'l Healthcare Sys., Inc.*, 619 F. Supp. 2d 1260, 1273–74 (M.D. Fla. 2009) ("The grouping of Defendants as 'Peer Review Defendants' does not afford these Defendants fair notice of the basis for the claims"; "no role is described at all beyond the bare labeling" and "without differentiation or some sort of description of actions that could provide 'fair notice' . . . the claims against the 'Peer Review Defendants' are not sufficiently pled."), *aff'd,* 451 F. App'x 862 (11th Cir. 2012).

description of actions that could provide 'fair notice' . . . the claims against the 'Peer Review Defendants' are not sufficiently pled.").[4]

In *Bentley*, the complaint impermissibly group-pled violations of the Telephone Consumer Protection Act (TCPA) and Federal Debt Collection Protection Act (FDCA). Plaintiff's TCPA claims failed Rule 8 scrutiny when he alleged "specific dates upon which he purportedly received calls," but did not identify "which Defendant made each call." *Id.* at 1374-75. As for the FDCPA claim, Plaintiff alleged that "Defendants 'knew they did not have a legal right to use such [debt] collection techniques,' without any specific factual allegations as to each Defendants' knowledge, much less what legal right was asserted and how that legal right somehow did not exist." *Id.* at 1373. Ultimately, the court found that the group-pleading made it "unclear to the Court" how each defendant violated the statutes, and dismissed both claims for "improperly lumping together defendants such that defendants d[id] not have fair notice of the precise nature of the violation that is claimed against them." *Id.* at 1373, 1374-75 ("[S]uch conclusory allegations are clearly insufficient under *Twombly*," and "he must treat each Defendant as a separate and distinct legal entity and delineate the conduct at issue as to each Defendant").

At least in *Bentley*, the Complaint pled specific instances of allegedly wrongful conduct ("calls" made to plaintiff and attempts to enforce "illegitimate debt"). By contrast, Plaintiff here not only fails to allege any specific trafficking conduct by either MSCC Defendant, but it also "improperly lumped Defendants together" such that neither MSCC Defendant could possibly have fair notice. Accordingly, Plaintiff's complaint fails under Rule 8.

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[4] *See, e.g., Eunice v. United States*, No. 12cv1635-GPC(BGS), 2013 WL 756168, at *3 (S.D. Cal. Feb. 26, 2013) ("Lumping all 'defendants' together and facts regarding the incident does not put a particular defendant on notice as to the grounds for the allegations."); *Tatone v. SunTrust Mortg., Inc.*, 857 F. Supp. 2d 821, 831 (D. Minn. 2012) ("A complaint which lumps all defendants together and does not sufficiently allege who did what to whom, fails to state a claim for relief").

II. The Plain Language of Title III Necessitates Dismissal Because Plaintiff's Claim is In "Property" That Is Not Implicated in the Complaint

"Property" is defined in the Act, in part, as any real property or a "present, future, or contingent, right security, or other interest therein, including any leasehold interest." 22 U.S.C. § 6023(12)(A). Plaintiff asserts ownership of a certified claim as a result of its leasehold "interest in . . . certain commercial waterfront real property" (specifically, a 30-year concession that expired in 2004). *See Havana Docks Corp. v. Carnival Corp.*, 1:19cv2174-BB ("*Carnival*"), ECF No. 1-1 at 7, 9 ("The terms of the concession granted by the Cuban Government were to expire in the year 2004 . . . .") (attached as **Exhibit A**).[5] Plaintiff's "property" as defined in the Act, however, is not at issue in this Complaint. There are no allegations that MSCC Defendants ever trafficked in, profited from, or infringed upon the confiscated leasehold interest which expired in 2004.

A plain reading of the Act compels this conclusion. This Court held in *Carnival* that the Act "does not expressly make any distinction whether such trafficking needs to occur while a party holds a property interested in the property at issue" to be liable. *Carnival*, ECF No. 47 at 8. But Title III expressly states that any person who traffics in confiscated property shall only "be liable to any United States national *who owns the claim to such property.*" 22 U.S.C. § 6082(a)(1)(A). As a result, the Act does "expressly make [this] distinction," and here, the property in which the MSCC Defendants purportedly trafficked is not included within Plaintiff's alleged certified claim. Moreover, the Act also only creates liability if a person traffics "*without the authorization* of any United States national who holds a *claim to the property*." 22 U.S.C. § 6023(13)(A) (emphasis

[5] This document, which was attached to its complaint against Carnival, is central to Plaintiff's allegation that it owns a certified claim and therefore, does not convert this motion into one for summary judgment. *See Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005).

added). It would be illogical for the MSCC Defendants to ask Plaintiff, in 2018, for its permission to "traffic" in property to which it does not hold a claim (because its interest expired in 2004).

If Plaintiff had fee simple ownership or if it owned an interest ("present, future, or contingent") *that would have still existed* at the time of the alleged trafficking but for Castro's taking, it would potentially have the right claim. Plaintiff does not. The fact that the piers were confiscated by the Castro regime before Plaintiff's interest expired does not alter the fact that Plaintiff's ownership interest in the piers still ended before the MSCC Defendants purportedly "trafficked" in them. Thus, Plaintiff's past interest (and the claim based on that past interest) does not somehow give it authority to bring suit, and seek hundreds of millions of dollars, for trafficking in the property of *someone else*, such as a fee simple owner of the piers. To be sure, the International Claims Settlement Act—which empowered the FCSC to certify claims like Plaintiff's—contains a very similar definition of "property" as the Act. *Id.* § 1643a(3) ("'[P]roperty' means any property, right, or interest, including any leasehold interest . . . [which was] nationalized . . . or taken by [Cuba]"); *id.* § 1643b(a) (the FCSC shall determine the "validity of claims . . . for losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property *including any rights or interests therein*") (emphasis added). The claim certified by the FCSC, and which is the basis for this suit, is only for Plaintiff's time-limited interest in the property—not the real property itself—and Plaintiff could have only brought claims under the Act for trafficking in that concession while it existed.

III. Plaintiff's Complaint Raises Serious Due Process Violations That Require Dismissal

A. The MSCC Defendants Lacked Fair Notice of Trafficking in Plaintiff's Purported Claim Given Its Expiration

Even if this Court were to conclude that Plaintiff's certified claim grants it a right sue a "person" who purportedly trafficked in the Havana docks *ten years after* its property interest

expired, dismissal is nonetheless required on Due Process grounds. The Due Process Clause requires that persons receive "fair notice by providing 'an ascertainable standard of guilt [or liability]' sufficient to enable persons of ordinary intelligence to avoid conduct which the law forbids." *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1229 (11th Cir. 1982).[6]

The MSCC Defendants could not possibly have had "fair notice" of potential Title III liability if the Act allows a past property interest holder to sue a company *even if the current property owner* holds a claim or were to authorize the use. Applying this Court's interpretation of the Act in *Carnival*, a U.S. national with a future leasehold interest (that was never realized due to Castro's socialization of Cuba) could theoretically bring a Title III claim against a company that used the property (1) before any such future right became effective and (2) even if the fee simple property owner, who actually owns a present interest, were to authorize use of the property.[7] This invariably renders the Act's definition of "property" meaningless and unworkable.

Further, the definition of "traffics" is overly broad and without any discernible limits on its reach with respect to indirect traffickers. "Traffics" contains three prongs. The first prohibits a person from obtaining an interest in the property. 22 U.S.C. § 6023(13)(A)(i). The other two, however, are nearly limitless. A person "traffics" in property if they (1) "engage in a commercial activity[8] using or otherwise benefitting from confiscated property," or (2) "causes, directs,

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[6] The Due Process Clause's demand for fair notice, often applied to criminal statutes, applies to civil statutes under the same stringent standard where, as here, the punitive consequences of the civil statute "are qualitatively more severe" and demand a stronger "need for clarity." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212–13 (U.S. 2018); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498-99 (1982) ("The degree of vagueness that the Constitution [allows] depends in part on the nature of the enactment.").

[7] Although this hypothetical may not describe the precise situation alleged in this Complaint, the Court's broad conclusion in *Carnival* ensures that this hypothetical is possible under the Act.

[8] According to the Act, a "commercial activity" is unhelpfully defined under 22 U.S.C. § 1603 as "a regular course of commercial conduct or a particular commercial transaction or act."

participates in, or profits from, trafficking by another person, or otherwise engages in trafficking through another person." *Id.* § 6023(13)(A)(ii)-(iii). These actions must be done "knowingly," which is broadly defined to include those who either (i) act with knowledge that a property was confiscated or (ii) "hav[e] reason to know" that it was confiscated. *Id.* § 6023(9).

The trafficking prohibited in Title III lacks any discernible boundary, especially as applied to someone who "engage[s] in a commercial activity" that tangentially touches a subject property. A Federal court faced with claims under this newly-effective statute must determine—without meaningful guidance from the Act itself—what a "commercial activity" that is "otherwise benefitting from confiscated property" consists of, and the limits of how remotely[9] a person can "participate in" or "cause" the trafficking of another. But these terms are too abstract and lack any articulable criteria or standard. *See Miami–Dade Cty. v. Omnipoint Holdings, Inc.*, 811 So.2d 767, 769 (Fla.3d DCA 2002) (provision of Miami–Dade County Code on unusual uses was legally deficient because it lacked objective criteria for the County's zoning boards to use in their decision-making process). As a result, courts will drastically vary in determining whether a person is a "trafficker" and how attenuated a person can be to a commercial transaction.

B. The Act's Initial, 23-Year Dormancy Further Prevented Fair Notice

In addition, the MSCC Defendants did not have "fair notice" of Title III liability because: (1) the Act and its legislative history reflect that Congress did not contemplate a scenario in which

[9] The Act's overly broad definition, coupled with this Court's interpretation of "property" in *Carnival*, raise significant issues of remoteness. Congress' express findings reflect an intention to limit the scope of Title III in a way that prevents recovery by a claimant where the trafficking that occurred was not at its expense. *See* 22 U.S.C. § 6081(2), (8) (Title III deters "exploitation of this property *at the expense of the rightful owner*," and was created because the international judicial system still "lacks fully effective remedies for . . . *unjust enrichment from the use of wrongfully confiscated property . . . at the expense of the right owners of the property"*) (emphasis added). *See also Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268-69 (1992) ("Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts.").

President Clinton could immediately suspend Title III preventing it from becoming fully effective; (2) the Trump Administration's 2019 rescission of the suspension reflected that it did not believe the Act imposed retroactive liability dating back to 1996; and (3) the Obama Administration's decision to permit carriers and travel service providers to conduct trade with and travel to and from Cuba caused cruise lines, such as the MSCC Defendants, to logically conclude that no retroactive liability would attach during the suspension if it were rescinded in the future.

1. Congress Did Not Contemplate or Address the Possibility of an Initial, Long-Term Deferment of Title III

Congress did not contemplate, and thus Title III did not address, when liability would first attach if Title III did not become fully effective until years after the statute was enacted. As demonstrated below, President Clinton's decision to initially suspend Title III defied Congress, constituted misuse of the suspension mechanism, and left a gap in the Act's scheme.

Under Title III, the date on which a person could be held liable was three months after the "effective date" of the Act, which was set to be August 1, 1996, unless suspended by the President. 22 U.S.C. §§ 6082(a)(1)(A), 6085(a)-(b). After the "effective date" passes, the potential for liability exists until a President determines "that a democratically elected government in Cuba is in power." *Id.* § 6082(h)(1)(B). While active, the President can suspend the right to sue in six-month periods if he or she determines a "suspension [(1)] is necessary to the national interests of the United States and [(2)] will expedite a transition to democracy in Cuba." *Id.* § 6085(c)(1)-(2).

The mechanism for delaying the immediate force of Title III was to suspend the *effective date* of the Act as a whole. *Id.* § 6085(b)(1). Suspension of only Title III, on the other hand, was a separate tool not meant to be applied immediately upon, or before, Title III's effective date, and was only to serve as a precursor to a transition democracy. To be sure, Congress expressly warned President Clinton that a suspension could not be invoked upon passage of the Act:

> In the judgment of the committee of conference, *under current circumstances the President could not in good faith determine the suspension of the right of action is either 'necessary to the national interests of the United States' or 'will expedite a transition to democracy in Cuba.'* In particular, the committee believes that is demonstrably not the case that suspending the right of action will expedite a transition to democracy in Cuba, inasmuch as *suspension would remove a significant deterrent to foreign investment in Cuba thereby helping prolong Castro's grip on power . . . .*

H.R. Rep. No. 104-468, 104th Cong., 2d Sess. 65-66 (1996) (hereinafter "Conf. Rept.") (emphasis added).[10] Thus, a suspension of Title III could only occur "after Title III [took] effect," and not before or concurrently therewith. *See id.* at 65 (emphasis added).

The main reason Title III suspension was not meant to be invoked upon passage of the Act was because Congress intended for the Act to *quickly* (and forcefully) deter foreign investment in Cuba and increase pressure on Castro's government. Indeed, once the "effective date" lapsed, a three-month grace period was created before liability attached to allow "persons who currently are 'trafficking' within the meaning of [T]itle III to wind down their activities in Cuba in order to avoid liability." *Id.* After the grace period, the timing for bringing Title III claims deonstrates that Congress expected most persons and companies to flee from doing business in Cuba within the first 4 to 5 years after the "effective date" of the Act (and Title III's operation). *See* 22 U.S.C. §§ 6082(a)(5)(C), 6084 (U.S. nationals holding the 5,911 certified claims could begin targeting businesses immediately; those with non-certified claims had to wait two years "after the Act's enactment," which was August 1998; and all claims were subject to a limitations period by which a claimant could sue two years "after the trafficking . . . ceased to occur"). *See also* Conf. Rept.

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[10] In fact, Congress only created a suspension authority "to afford the President flexibility to respond to unfolding developments in Cuba," and "specifically rejected a proposal made by the Executive branch that the President be permitted to suspend the right of action" without determining that the suspension will "expedite a transition to democracy in Cuba." Conf. Rept. at 65. In Congress's view, the second prong of the standard "should be the central element . . . and not just be one of many factors." *Id.* (emphasis added).

at 58, 62.[11] Thus, Congress intended that a President's use of the suspension authority be "unworkable"[12] so that Title III would become fully implemented, and remain in force until Castro was out of power.

None of what Congress intended, however, occurred. Congress's attempt to design an "unworkable" suspension authority failed. President Clinton—skeptical of unleashing Title III, particularly against the backdrop of severe criticism from other countries—found a loophole: he let the Act become "effective" on August 1, 1996 and, before Title III even came into effect, he preemptively suspended the right to bring an action. *See Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1255 (11th Cir. 2006) ("*When (or if)* the portion of Title III that allows private litigants to bring lawsuits becomes effective . . . .") (emphasis added); *Garcia-Bengochea v. Carnival Corp.*, 2019 WL 4015576, at *2 (S.D. Fla. Aug. 28, 2019) ("'Title III . . . has never effectively been applied.' That changed on April 17, 2019.'") (citation omitted).

As a result, the three-month grace period beginning in August 1996 never happened as Title III was suspended for the first six months after the effective date anyway. The supposed "effective date" of Title III came and went without causing companies to cease doing business with, or divest investments in, Cuba, thereby eviscerating Title III's very purpose. And although Presidents invoked the suspension authority for years on the basis that it would "expedite a

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[11] *Id*. at 58 ("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.").

[12] *Id*. at 45-46 (codifying the "clear congressional intent that [the Act] be enforced fully . . . and [failure to do so] provide[s] a basis for strict congressional oversight of the executive branch enforcement. . . . ."); Perl, Shoshana, *Whither Helms-Burton? A Retrospective on the 10th Year Anniversary* at 6, UNIV. OF MIAMI, (Feb. 2006), available at http://aei.pitt.edu/8171/1/perlfinal.pdf ("The waiver was purposely designed to be unworkable, but President Clinton nevertheless suspended Title III.").

transition to democracy in Cuba," no such transition has begun.[13] Indeed, the current administration rescinded the suspension by using the *exact same basis* that it (and previous administrations) had been using to implement and continue the suspension: that doing so would "expedite a transition to democracy in Cuba." 22 U.S.C. § 6085(d).

The result of this initial suspension misuse is a fundamental breakdown in the Act's purpose. Although Title III may have been nominally "effective," it was never operational until now and the threat of liability (that was supposedly created when the "effective date" passed) never attached. It is axiomatic that persons can only have fair notice of *actual* liability when there is a live mechanism by which a person can sue and recover based upon that liability.[14]

Here, however, that mechanism—22 U.S.C. § 6085—never became live. Without a cause of action, no person can be held "accountable" and plaintiff's "power" to command performance did not exist, and therefore, each plaintiff had (or at the very least, reasonably believed they had) "immunity" from Title III. *Id*. Regardless of where blame lies for rendering Title III ineffectual (until 2019)—presidential misuse of suspension authority, Congressional drafting failures, or any other reason—the outcome is the same: suspending Title III immediately rendered the Act

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[13] U.S. EMBASSY IN CUBA, *Sr. State Dep't. Official Press Briefing*, April 17, 2019 (hereinafter "April 17, 2019 State Dept. Briefing") ("Cuba shows no sign that it will achieve democracy in the near future . . . [a]nd even under a new leader in Cuba, nothing has fundamentally changed. . . . Twenty-two years of suspending Title III has failed to advance the goal set forth by the legislation in the first place."), available at https://cu.usembassy.gov/telephonic-press-briefing-cuba/.

[14] *See, e.g.*, Black's Law Dictionary (11th ed. 2019) (defining "liability" as "[t]he quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment") (emphasized added); William R. Anson, *Principles of the Law of Contract* 9 (Arthur L. Corbin ed., 3d Am. ed. 1919) ("[T]he term 'liability' is the correlative of *power* and the opposite of *immunity*. In this case society is not yet commanding performance [or imposing penalties], but it will so command if the possessor of the power does some operative act. If one has a power, the other has a liability.") (italics in original).

toothless and left companies, such as the MSCC Defendants, to believe that liability would not retroactively attach once Title III finally became fully "effective." *See Glen*, 450 F.3d at 1255.

2. The Trump Administration Rescinded the Suspension without Applying Retroactive Liability

In addition, the Executive branch's comments this past year when it rescinded the suspension for the first time suggest it too does not understand Title III to create liability for acts committed before it became fully effective. In April 2019, when the Trump Administration declared that Title III would be implemented "[f]or the first time," Secretary Pompeo notably did *not* say that claimants would be able to bring lawsuits against those who *previously* trafficked in confiscated property since 1996; rather, he exclusively used the present tense, encouraging companies currently "trafficking" in Cuba to cease doing so because they could now be subject to liability:

> For the first time, claimants will be able to bring lawsuits against *persons trafficking* in property that was confiscated by the Cuban regime. Any person or company *doing business in Cuba should heed this announcement* . . . . Those *doing business* in Cuba should fully investigate whether they are connected to property stolen in service of a failed communist experiment.

Pompeo Announcement (emphasis added)[15] *See also* U.S. DEP'T. OF STATE, *Cuba: Title III FAQs*, ("It is possible that you may now be able to pursue an action in U.S. courts under Title III against a person *who is trafficking* in the confiscated property to which you hold a claim."), available at https://www.state.gov/cuba-title-iii-faqs-libertad/ (emphasis added); April 17, 2019 State Dept.

[15] Adding further uncertainty to Title III, the Trump Administration has unilaterally shaped the scope of Title III despite no Congressional authority to do so. On March 4, 2019, Secretary Pompeo announced a limited, 30-day suspension of Title III "with [one] exception" that allowed a right of action against companies identified on the "State Department's List of Restricted Entities." *See* U.S. DEPT. OF STATE, *Media Note from Office of the Spokesperson* (March 4, 2019), available at https://www.state.gov/secretary-enacts-30-day-suspension-of-title-iii-libertad-act-with-an-exception/. Under Title III, there are no "exceptions" nor is there an explicit provision giving the President discretion to pick and choose which claims can be pursued; nevertheless, he did. In so doing, the President has signaled that he can shape the scope of Title III, and the State Department's declarations make clear it believes Title III liability is limited only to those who *prospectively* traffic as of the date Title III became fully effective on May 2, 2019.

Briefing ("[O]f course any European company, any American company, any company around the world that *traffics in property* that was confiscated by the regime does have the possibility of being hit by this legislation.") (emphasis added). The only plausible reason Secretary Pompeo would have encouraged companies to "investigate" whether they were trafficking in confiscated property at that time was so they could determine whether they could avoid liability before May 2, 2019; if liability retroactively attached, there would have been no reason to investigate.

This understanding is not limited to the Executive branch. Senator Marco Rubio, a champion of the Act, also reveals Congress' similar understanding that companies could avoid liability if they were "to get out" before Title III finally became fully effective. *See* Sen. Marco Rubio (@marcorubio), TWITTER, Jan. 16, 2019 at 6:45 pm ("Todays waiver of Title III of Helms-Burton for only 45 days instead of the customary 180 days & the accompanying warning, is a strong indication of what comes next. If you *are trafficking* in stolen property in #Cuba, *now would be a good time to get out*.") (emphasis added). Retroactive liability was, and is, plainly not contemplated under Title III.

3. The MSCC Defendants Were Uniquely Led to Believe Liability Would Not Be Retroactive

The MSCC Defendants also lacked fair notice of liability because the Federal government granted cruise lines permission through an OFAC license to do business in (and travel to) Cuba.[16] The juxtaposition of this reality against Plaintiff's claim is striking: the Federal government *invited* cruise companies to do business with Cuba—during a time that the administration also reported to Congress that keeping Title III suspended would "expedite" a

[16] *See supra* at 3. *See also Lamb v. ITT Corp.*, No. 8:09CV95, 2010 WL 376858, at *5 (D. Neb. Jan. 26, 2010) ("The Regulations prohibit transactions involving Cuba except when 'specifically authorized by the Secretary of the Treasury . . . OFAC had considerable discretion to authorize otherwise prohibited transactions by way of licenses.").

transition of power in Cuba—and when that suspension was rescinded *on the exact same basis*, those companies who went to Cuba under a government license would have to face liability for having done so. This is not fair notice.

Notably, this argument differs from an argument that the MSCC Defendants engaged in "lawful travel" which would exempt them from liability. The distinction is critical: under that defense—which this Court has held to be an affirmative defense[17]—this Court would potentially have to grapple with a factual issue as to whether the MSCC Defendants' purported use of the subject property was "*necessary* to the conduct of such [lawful] travel." 22 U.S.C. § 6023(13)(B)(3). By contrast, if this Court determined at that stage that their alleged use of the subject property was not "necessary" and the MSCC Defendants were not exempt from liability, the MSCC Defendants nonetheless still lacked "fair notice" that their authorized travel could eventually subject them to Title III liability if the suspension was rescinded.

In sum, it would vitiate due process for this Court to conclude that the MSCC Defendants had fair notice of potential liability under Title III for alleged trafficking that occurred *before* Title III became fully effective and after they only purportedly trafficked in confiscated property at the invitation of the government.

C. Title III's Oppressive and Excessive Penalty Violates Due Process

Title III provides for claims against traffickers for the value of the property at the time of confiscation, plus interest, as well as the possibility of treble damages and legal fees, irrespective of the amount of economic benefit derived by the person being held liable. This is incongruous with the Act's congressionally-stated purpose to compensate U.S. nationals and "to deter

[17] *See Carnival*, ECF No. 47 at 7. Although they do not raise it here, the MSCC Defendants preserve this defense in the event they choose to raise it a later juncture.

trafficking in wrongfully confiscated property" in a way "that would deny traffickers any profits from economically exploiting Castro's wrongful seizures." 22 U.S.C. § 6081(11).

"The Due Process Clause of the Fourteenth Amendment prohibits imposing 'grossly excessive or arbitrary punishments' on civil defendants." *Brown v. R.J. Reynolds Tobacco Co.*, 113 F. Supp. 3d 1233, 1238 (M.D. Fla. 2015) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003)).[18] The Supreme Court has, for a century, 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); *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 962 (8th Cir. 2019) (applying this standard as "still good law," and reducing the "shockingly large" fixed statutory award ($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' lack of injury from the calls).

Here, Title III's remedy is punitive, not compensatory, and creates arbitrary penalties. Congress does not offer any justification – nor can it – for a scenario in which a company could be held liable for the fair value of property stolen 60 years ago for, theoretically, as little as one indirect, trafficking incident more than 50 years after it was stolen.[19] To be sure, a Title III plaintiff, such as Havana Dock Corp., does not seek an award based on an amount tied to the supposed "profits" a defendant gained from trafficking. In fact, contrary to Congress' expressly

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[18] *See also Hudson v. United States*, 522 U.S. 93, 103 (1997) ("Due Process . . . protect[s] individuals from sanctions which are downright irrational."); *Chicago & N.W. Ry. Co. v. Nye-Schneider-Fowler Co.*, 260 U.S. 35, 44 (1922) ("[P]enalties or fees must be . . . reasonably sufficient to accomplish their legitimate object and . . . the imposition of penalties or conditions that are plainly arbitrary and oppressive and 'violate the rudiments of fair play . . . .'").

[19] The arbitrariness of this right of action is further demonstrated by the fact that a claimant's ability to be compensated for confiscated property disappears the moment the U.S. government believes the Cuban government ceases to be socialist. *See* 22 U.S.C. § 6082(h)(B).

stated finding, profits are not part of the equation at all. Here, Plaintiff seeks over $500 million (which is the purported value of its certified claim with compounded interest and trebled) from the MSCC Defendants,[20] in addition to similar claims against other cruise lines in related cases. *See* Compl. ¶ 17. It can hardly be reasoned that, if Plaintiff is successful in each of its suits, a multi-billion dollar windfall to Plaintiff is the proper remedy to either (1) compensate it for an expired leasehold interest in part of the docks or (2) "deny traffickers any profits" earned specifically from the "trafficking." Congress intended for Title III to provide an immediate deterring effect, not a multi-decade suspension resulting in the exponential growth of potential claims. *See Williams*, 251 U.S. at 66–67; *Nye-Schneider-Fowler Co.*, 260 U.S. at 44.[21] Punishing a company for purportedly trafficking in 2018 by making it liable for the value of the property stolen by a third-party more than fifty years ago is an arbitrary and oppressive penalty.

Thus, any award under Title III fails to serve its Congressionally-stated purpose, imposes a grossly disproportionate penalty, and violates MSCC Defendants' due process rights.

CONCLUSION

For the foregoing reasons, Plaintiff's complaint should be dismissed.

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[20] The Complaint suggests that Plaintiff does not seek damages jointly from both MSCC Defendants. Because this Complaint is the only related action thus far which names multiple, affiliated entities for potentially the same trafficking event, it is even more important that Plaintiff not be allowed to group-plead the acts that allegedly create liability.

[21] *See* Phil Peters, CUBA RESEARCH CTR. (Dec. 13, 2018), available at https://www.cubastandard.com/analysis-activating-title-iii-of-helms-burton/ ("[The Act] is not really about satisfying property claims . . . [T]he law's authors aimed to damage Cuba's economy at a time when it was 'vulnerable to international economic pressure' . . . To that end, lawsuits and property claims are just a convenient tool.").

Dated: October 11, 2019

Respectfully submitted,

/s/ J. Douglas Baldridge
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Counsel for MSCC Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2019, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ J. Douglas Baldridge

EXHIBIT A

Colson Hicks Eidson
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FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON, D.C. 20579

IN THE MATTER OF THE CLAIM OF

HAVANA DOCKS CORPORATION

Claim No CU -2492

Decision No. CU -6165

Under the International Claims Settlement Act of 1949, as amended

Counsel for claimant: Davis Polk & Wardwell
by Douglas M. Galin, Esquire

Appeal and objections from a Proposed Decision entered April 12, 1971. Oral hearing requested.

Oral argument September 15, 1971 by Douglas M. Galin, Esquire

FINAL DECISION

The Commission issued its Proposed Decision on this claim on April 21, 1971, certifying that claimant suffered a loss of $7,669,420.88 within the scope of Title V of the International Claims Settlement Act of 1949, as amended, resulting from actions of the Government of Cuba.

Claimant, through counsel, objected to the Proposed Decision, and requested an oral hearing which was held on September 15, 1971. In support of the objections claimant submitted an affidavit of John C. Hover, a member of counsel's firm.

In the objections, claimant stated that the concessions and dock facilities had a higher value than the amount determined by the Commission, and that an item of $10,280.00 for handling charges was improperly denied.

Full consideration having been given to claimant's objections, the supporting affidavit, counsel's argument at the hearing, and the entire record, the Commission now finds that in view of the considerable

increase of land values along the Havana waterfront between 1934 and 1960, the value of claimant's concession and tangible assets should be increased from $7,184,360.18 to $8,684,360.18.

Regarding the appraisal of Luis Parajon who valued the above properties at $16,180,000.00, the Commission holds that this appraisal cannot be relied upon to the exclusion of other evidence of record because, inter alia, it does not specify the size and value of the land and improvements thereon separately and individually; and because its findings are based on generalities, not appropriate in this type of evaluation of valuable improved real property.

The Commission further considered claimant's objections with respect to the item of $10,280.00 for handling charges, and finds that these are, in fact, storage charges for unclaimed merchandise, due and payable by the Government of Cuba, and that they should be included in the loss, which is restated as follows:

		Date of Loss
Concession and tangible assets	$8,684,360.18	October 24, 1960
Securities	184,005.70	August 6, 1960
Accounts receivable	301,055.00	October 24, 1960
Debt of Cuban Government	10,280.00	October 24, 1960
Total loss	$9,179,700.88	

The interest at the rate of 6% per annum will be included in the instant case as follows:

FROM	ON
August 6, 1960	$ 184,005.70
October 24, 1960	8,995,695.18

Accordingly, the Certification of Loss in the Proposed Decision is set aside; the following Certification of Loss will be entered; and the remainder of the Proposed Decision, as amended herein, is affirmed.

CERTIFICATION OF LOSS

The Commission certifies that HAVANA DOCKS CORPORATION suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of Nine Million One Hundred Seventy-nine Thousand Seven Hundred Dollars and Eighty-eight Cents($9,179,700.88) with interest thereon at 6% per annum from the respective dates of loss to the date of settlement.

Dated at Washington, D. C.,
and entered as the Final
Decision of the Commission

SEP 28 1971

Lyle S. Garlock, Chairman

Theodore Jaffe, Commissioner

CU-2492

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON, D.C. 20579

IN THE MATTER OF THE CLAIM OF

HAVANA DOCKS CORPORATION

Claim No. CU-2492

Decision No. CU- 6165

Under the International Claims Settlement Act of 1949, as amended

Counsel for claimant: Davis, Polk & Wardwell
By Peter H. Madden, Esq.

PROPOSED DECISION

This claim against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, was presented by HAVANA DOCKS CORPORATION for $9,915,879.00, based upon the asserted ownership and loss of its assets nationalized by the Government of Cuba.

Under Title V of the International Claims Settlement Act of 1949 [78 Stat. 1110 (1964), 22 U.S.C. §§1643-1643k (1964), as amended, 79 Stat. 988 (1965)], the Commission is given jurisdiction over claims of nationals of the United States against the Government of Cuba. Section 503(a) of the Act provides that the Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba arising since January 1, 1959 for

> losses resulting from the nationalization, expropriation, intervention or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States.

Section 502(3) of the Act provides:

> The term 'property' means any property, right, or interest including any leasehold interest, and debts owed by the Government of Cuba or by enterprises which have been

nationalized, expropriated, intervened, or taken by the Government of Cuba and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba.

Section 502(1)(B) of the Act defines the term "national of the United States" as a corporation or other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or the Commonwealth of Puerto Rico, if natural persons who are citizens of the United States own, directly or indirectly, 50 per centum or more of the outstanding capital stock or other beneficial interest of such corporation or entity.

The record shows that in 1917 claimant corporation was organized under the laws of the State of Delaware. Claimant's Vice-President and Assistant Comptroller stated that at all times between August 14, 1917 and the presentation of the claim, more than 50 percent of the outstanding capital stock of all classes has been owned by persons who were United States nationals, and that at the time of filing the claim, of 35,505 outstanding shares of stock of HAVANA DOCKS CORPORATION only 1,003 or approximately 3% of the total outstanding shares were held by persons who were not nationals of the United States. The Commission therefore holds that claimant is a national of the United States within the meaning of Section 502(1)(B) of the Act.

Claimant states that on the basis of a concession granted by the Government of Cuba, it owned and operated, at the entrance of the harbor of Havana three piers: the "San Francisco", "Machina" and "Santa Clara" linked with a large marginal building. The piers and buildings were used for warehousing purposes, cargo deposits, and for merchandise provisionally stored pending Customs clearance. Each pier consisted of a two-story concrete building with an apron equipped with platforms, and a double railroad track to permit direct unloading of cargo from ships to railroad cars and vice versa. All official port authorities were located within the

marginal building, such as the Customs House of Havana, the Inspector General of the Port, the Immigration Department and other governmental agencies. Elevators, escalators, portable cranes, tractors, trailers, fork lift trucks, and other port and dock equipment were part of claimant's installations on the piers and in the warehouses, which were located in the center of harbor activities of the port of Havana.

Based upon the record, the Commission finds that on September 7, 1934, claimant HAVANA DOCKS CORPORATION obtained from the Government of Cuba the renewal of a concession for the construction and operation of wharves and warehouses in the harbor of Havana, formerly granted to its predecessor concessionaire, the Port of Havana Docks Company; that claimant acquired at the same time the real property with all improvements and appurtenances located on the Avenida del Puerto between Calle Amargura and Calle Santa Clara in Havana, facing the Bay of Havana; that in June, 1946, the property was encumbered with a mortgage in favor of certain bondholders for the amount of $1,600,000.00 in accordance with Public Instrument of June 1, 1946, recorded in Havana on July 25, 1946; and that claimant corporation also owned the mechanical installations, loading and unloading equipment, vehicles and machinery, as well as furniture and fixtures located in the offices of the corporation.

The record further shows that the Cuban assets of claimant corporation were nationalized by Resolution No. 3, published in the Official Gazette of October 24, 1960, pursuant to Law No. 851 of July 6, 1960, and that the facilities of the company were physically occupied by agents of the Cuban Government on November 21, 1960. Accordingly, the Commission finds that the Cuban assets of HAVANA DOCKS CORPORATION were nationalized by the Government of Cuba on October 24, 1960.

Claimant states that the corporation suffered the following losses:

Land and Concession	$ 2,000,000.00
Buildings	6,892,557.00
Personal property, equipment, etc.	595,315.00
Securities (1000 common stock shares of Cuban Telephone Company)	100,000.00
Debts owed by nationalized enterprises and by the Government of Cuba.	328,007.00
	$ 9,915,879.00

In support of this valuation of losses claimant submitted, among other things, the following evidence:

(1) Trial balance as of December 31, 1958;

(2) Balance sheets for the years 1956, 1957, 1958 and 1959;

(3) Auditor's report as of December 31, 1958;

(4) An evaluation of the properties by Mr. Louis Parajon, a civil engineer and former professional appraiser in Cuba; and

(5) An inventory of the equipment, furniture and fixtures as of December 31, 1959.

The Act provides in Section 503(a) that in making determinations with respect to the validity and amount of claims and value of properties, rights, or interests taken, the Commission shall take into account the basis of valuation most appropriate to the property and equitable to the claimant, including but not limited to fair market value, book value, going concern value or cost of replacement.

The question, in all cases, will be to determine the basis of valuation which, under the particular circumstances, is "most appropriate to the property and equitable to the claimant". This phraseology does not differ from the international legal standard that would normally prevail in the evaluation of nationalized property. It is designed to strengthen that standard by giving specific bases of valuation that the Commission shall consider.

The record contains a report of the Office of the Property Register of Havana which shows that in 1928, the concession, then owned by the Port of Havana Docks Company, had an assessed market value of $600,000.00, and that a subsequent assessment established the value of the concession at $5,000,000.

Upon consideration of the entire record, the Commission finds that the valuation most appropriate to the property and equitable to the claimant is that shown in the Balance Sheet for the year ended 1959, supported by the Trial Balance for December 31, 1958. These financial statements reflect the following book values adopted by claimant corporation:

Land and Concession	$ 2,000,000.00
San Francisco and Machina Piers	4,758,829.00
Santa Clara Pier	2,110,845.00
Equipment	419,056.00
Office Furniture and Fixtures	90,616.00
Railroad Tracks	22,883.00
Total	$ 9,402,229.00

The record indicates that the pier properties are stated at values appraised as of December 31, 1920, plus subsequent additions at cost. The terms of the concession granted by the Cuban Government were to expire in the year 2004, at which time the corporation had to deliver the piers to the government in good state of preservation. The equipment, office furniture were acquired more recently and are stated at cost. The appraiser, Louis Parajon states in his report that in 1960 the concession, real property, office and general equipment had a value of $16,180,000.00 after depreciation, which is considerably more than what the claimant describes as the loss.

The Commission is aware that from 1920 to 1960 real property prices in Havana had increased, and that the values expressed in prices of the year 1920 may not have been realistic in 1960. The Commission, however, notes

that during the prior years claimant corporation allowed for depreciation of the real property and amortization of the concession approximately 1-1/2 per cent per year; and that nothing was added to show any appreciation of the property.

The Commission, therefore, concludes that it would be equitable and appropriate to consider as basic the year 1934 when HAVANA DOCKS CORPORATION obtained the concession for the operation of the docks; to deduct from that year up to the year 1960 one per cent (1%) yearly for amortization of the concession and for the depreciation of the buildings; and further deduct 25% from the stated value of the equipment, furniture and fixtures for wear and tear, assuming that most equipment was in operation during an average time of five years, when it was taken by the Government of Cuba.

The Commission finds that the amount of $2,000,000 includes not only the value of the concession but also the value of the land and of the piers alongside the property which, in the opinion of the Commission, had a value of $1,000,000 in the year 1960.

Amortization and depreciation is therefore applicable as follows:

(a) 1% per year from 1934 to 1960, or 26% on the following values:

Concession	$ 1,000,000	
San Francisco and Machina Piers .	4,758,829	(structures only)
Santa Clara Pier	2,110,845	(structures only)
Railroad Tracks	22,883	
Total	$ 7,892,557	
26% thereof		$ 2,052,064.82

(b) 25% from the value of the equipment, office furniture and fixtures of $509,672 . . . . . 127,418.00

Total depreciation $ 2,179,482.82

As stated above, the real property was encumbered with a mortgage of $1,600,000 in favor of certain bondholders, but the balance sheet for the year ended December 31, 1959 shows that this funded debt has been reduced to a balance of $38,386.00 as of that date. Consequently, from the value

of the property of		$ 9,402,229.00
must be deducted for depreciation	$ 2,179,482.82	
and the balance of the funded debt	38,386.00	2,217,868.82
resulting in the net value of the tangible property, including concession, of		$ 7,184,360.18

The Commission further finds that claimant corporation was the owner of 1,000 shares of common stock of the Cuban Telephone Company. The Commission has held that the Cuban Telephone Company was nationalized on August 6, 1960 by Resolution No. 1 published by the Government of Cuba pursuant to Law 851, and that the loss sustained by the holders of common stock shares amounted to $184.0057 per share. (See Claim of International Telephone & Telegraph Corporation, Claim No. CU-2615.) Accordingly, claimant suffered a loss as the owner of 1,000 common stock shares in the aggregate amount of $184,005.70.

The Commission further finds that the amount claimed of $328,007 for debts owed by nationalized enterprises and by the Cuban Government, included a debt of $99,097 due from the Government of Cuba, and accounts receivable of $218,630 due to claimant corporation from trade enterprises nationalized, expropriated or intervened by the Government of Cuba. The Commission, therefore, concludes that claimant is entitled to an additional certification of losses for accounts receivable in the amount of $317,727.00.

The Commission does not deduct liabilities of United States corporations and other entities, except for taxes due to the Cuban Government. (See Claim of Simmons Company, Claim No. CU-2303, 1968 FCSC Ann. Rep. 77.) In the present claim the record shows that taxes accrued at the end of 1959 due to the Cuban Government amounted to $16,672.00.

Therefore, from the sum of accounts receivable of	$317,727.00
the tax indebtedness of	16,672.00
is deducted, leaving a net amount of receivables of	$301,055.00

Included in the debt claim is also an amount of $10,280.00 for handling charges, but the evidence does not disclose that this amount was due from

enterprises nationalized, expropriated, intervened or taken by the Government of Cuba, or that the amount was a charge on property which was nationalized, expropriated, intervened or taken by the Cuban Government, as required by Section 502(3) of the Act. Accordingly, the claim for $10,280.00 for handling charges is denied.

Summarizing, claimant corporation suffered the following losses within the meaning of Title V of the International Claims Settlement Act of 1949, as amended:

		Date of loss
Loss of concession and tangible assets	$7,184,360.18	October 24, 1960
Loss of securities	184,005.70	August 6, 1960
Loss of accounts receivable	301,055.00	October 24, 1960
Total loss	$7,669,420.88	

The Commission has decided that in certifications of loss on claims determined pursuant to Title V of the International Claims Settlement Act of 1949, as amended, interest should be included at the rate of 6% per annum from the date of loss to the date of settlement (see Claim of Lisle Corporation, Claim No. CU-0644) and in the instant case it is so ordered as follows:

FROM	ON
October 24, 1960	$7,485,415.18
August 6, 1960	184,005.70

CERTIFICATION OF LOSS

The Commission certifies that HAVANA DOCKS CORPORATION suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of Seven Million Six Hundred Sixty-Nine Thousand Four Hundred Twenty Dollars and Eighty-Eight Cents ($7,669,420.88) with interest thereon at 6% per annum from the respective dates of loss to the date of settlement.

Dated at Washington, D. C.,
and entered as the Proposed
Decision of the Commission

APR 21 1971

Lyle S. Garlock, Chairman

Theodore Jaffe, Commissioner

The statute does not provide for the payment of claims against the overnment of Cuba. Provision is only made for the determination by the ommission of the validity and amounts of such claims. Section 501 of the tatute specifically precludes any authorization for appropriations for ayment of these claims. The Commission is required to certify its indings to the Secretary of State for possible use in future negotiations ith the Government of Cuba.

OTICE: Pursuant to the Regulations of the Commission, if no objections e filed within 15 days after service or receipt of notice of this posed Decision, the decision will be entered as the Final Decision of ie Commission upon the expiration of 30 days after such service or receipt f notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. 31.5(e) and (g), as amended (1970).)

CU-2492

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

HAVANA DOCKS CORPORATION, *Plaintiff*, v. MSC CRUISES (USA) INC. and MSC CRUISES SA CO. *Defendants*.	Case No. 1:19-cv-23588-BB Judge Beth Bloom

[PROPOSED] ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS

THIS MATTER is before the Court on Defendants MSC Cruises (USA) Inc.'s and MSC Cruises SA Co.'s Motion to Dismiss the Complaint (the "Motion").

UPON CONSIDERATION of the Motion, Plaintiff's opposition thereto, and the record as a whole in this matter, it is

ORDERED, that that the Motion be, and the same is, GRANTED; and it is further

ORDERED, that the Complaint be dismissed with prejudice.

DONE and ORDERED in Chambers this _____ day of October, 2019.

_____
HONORABLE BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to counsel of record