UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

Case No. 19-cv-21724
BLOOM/McAliley

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

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

Defendants.
_____/

Case No. 19-cv-23588
BLOOM/McAliley

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

ROYAL CARIBBEAN CRUISES, LTD.,

Defendant.
_____/

Case No. 19-cv-23590
BLOOM/McAliley

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

NORWEGIAN CRUISE LINE HOLDINGS LTD.,

Defendant.
_____/

Case No. 19-cv-23591
BLOOM/McAliley

DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

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Defendants Carnival Corporation d/b/a Carnival Cruise Line ("Carnival"), MSC Cruises S.A., MSC Cruises SA Co., and MSC Cruises (USA) Inc. (collectively, "MSC Cruises"), Royal Caribbean Cruises Ltd. ("Royal Caribbean"), and Norwegian Cruise Line Holdings Ltd. ("Norwegian") (collectively, "Defendants") submit the following Response to Plaintiff's Motion for Entry of Judgment ("Plaintiff's Motion") [ECF No. 444].

Plaintiff requests (in addition to attorneys' fees and costs that will be determined separately) the entry of a final judgment against each of the four-cruise line Defendants as follows: $109,671,180.90 against Carnival, and $109,848,747.87 against ***each*** of MSC Cruises, Royal Caribbean, and Norwegian. Plaintiff calculates these damages as being the full amount of its certified claim, plus interest, trebled. As outlined during the September 21st Status Conference ("Status Conference") [ECF No. 438], Defendants maintain that no judgment should issue in Plaintiff's favor,[1] and further maintain that Defendants should be allowed to demonstrate that any damages in this case should be substantially less than the nearly $440 million Plaintiff seeks to recover (that is, less than the full amount of the certified claim plus interest, trebled, from each Defendant).[2] But because the Court has ruled against these positions,[3] and as permitted by the Court at the Status Conference, Defendants will respond to the issues presented in Plaintiff's

[1] Defendants acknowledge this Court's contrary rulings on the Motions for Summary Judgment, "MSJ Order", ECF No. 367, and respectfully intend to challenge those rulings on appeal.

[2] Defendants acknowledge the Court's contrary rulings, expressed in the Court's *Daubert* Order, ECF No. 413 at 12–13, the Court's rulings on interest and one-satisfaction, ECF No. 428 and 429, and expressed again at the Status Conference. Defendants respectfully intend to challenge those decisions on appeal as well.

[3] To be clear, the argument set out in Section I.A., *infra*, concerning the certified-claim value, is one that the Court has not yet addressed, and as explained there, both adheres to the Court's prior rulings and the plain language of Title III. Thus, that argument should be accepted.

Motion and raise two additional arguments—that Plaintiff lacks standing under new controlling authority and that the damages Plaintiff seeks violate constitutional due process.

I. DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION

Plaintiff has "elect[ed] to calculate its damages based on the amount of its certified claim, plus interest." Mot. at 3. Thus, the Court must first determine what amount of the certified claim Plaintiff could recover before applying the applicable interest. According to Plaintiff, the amount of the certified claim is $9,179,700.88. *Id.* at 4. While the Foreign Claims Settlement Commission ("FCSC") did certify $9,179,700.88 to Plaintiff in 1960 as its "total" loss, that amount includes value allocated to "Securities," "Accounts receivable," and "Debt of the Cuban Government," none of which Defendants trafficked in or have been found liable for trafficking in. The Court found Defendants liable for trafficking only in Plaintiff's confiscated property—its Concession—therefore, Plaintiff could only ever recover the value of the Concession, which the FCSC certified the value to be $8,684,360.18.[4]

A. Plaintiff Improperly Seeks Judgment for the Value of Property in Which Defendants Were Not Even Alleged (Let Alone Found) to Have Trafficked

Through its Motion, Plaintiff seeks judgment based on the ***entire value*** of the claim certified to it by the FCSC (the "Claim"), plus interest. Mot. 2 ("Havana Docks seeks damages based on the amount certified to it by the FCSC, plus interest."). But in so doing, Plaintiff fails to acknowledge that the Claim includes line-items for property interests ***completely unrelated*** to the

[4] To be clear, even this $8,684,360.18 amount wildly overstates the appropriate amount of liability, since it includes the value of two piers, railroad tracks, and other real and personal property that Defendants did not traffic in, and which Plaintiff did not actually own. Defendants preserve the argument that the FCSC's valuation is not an appropriate measure of damages. In light of the Court's ruling against this argument, however, Defendants argue here that ***even accepting*** the FCSC's valuations, Defendants are not liable for trafficking in Accounts Receivable, Securities, and Debt of the Cuban Government, all of which were valued separately from the "Concession and tangible assets" in the FCSC's Final Decision.

property in which Defendants were alleged to have trafficked. To be clear, by this argument, Defendants are not challenging the validity of the findings of the FCSC either as to ownership or valuation.[5] But that does ***not*** mean that Plaintiff is entitled to a judgment that includes the valuations of property interests in which Defendants never trafficked—and indeed, in which Plaintiff never ***alleged*** trafficking, and in which the Court did not ***find*** Defendants to have trafficked.

Starting with the pleadings, in its Amended Complaint, Plaintiff alleges only that Defendants "us[ed] ***the Subject Property*** by regularly embarking and disembarking its passengers on the Subject Property without the authorization of Plaintiff," and separately that Defendants "participated and profited from the communist Cuban Government's possession of ***the Subject Property***." Am. Compl. ¶¶ 21, 22 (emphases added).[6] Notably, Plaintiff defines the "Subject Property" as "the Havana Cruise Port Terminal." Am. Compl. ¶ 6. And in the Court's Omnibus Order granting Plaintiff's Motion for Summary Judgment, the Court likewise found Defendants liable for "trafficking" under Title III specifically because Defendants "us[ed] the Terminal and

[5] Though Defendants do maintain that the FCSC's findings are flawed and, as a matter of statutory interpretation and due process, should be subject to challenge in this proceeding.

[6] Indeed, Plaintiff's own experts themselves characterized the property interest they were valuing only as rights to operate a port terminal. Pigna Report, 5 ("our indicative economic value assessment for certain defined assets, namely the usufructuary right of use of the improvements for the remaining term of 44 years for a concession for the operation of a marine terminal and related infrastructure known as the Sierra Maestra Terminal (the Terminal or SMT) in Havana."); Hentschel, 7 ("the rights and interests in the real estate and improvements have been conveyed and are controlled under the provisions of a concession agreement."). Moreover, they did so at Plaintiff's instruction. *See* Pigna, 5 ("per direction from Colson"); Hentschel, 7 ("under the instructions given to the appraise by Colson"). None of Plaintiff's experts valued any of the other line-item property interests included in the Claim.

one of its piers" and "contracted with Cuban entities . . . to dock at the Terminal." ECF No. 367 at 86–87. So Defendants were alleged and found to have "trafficked" ***only*** in the Terminal.

But as this Court acknowledged in its Omnibus Order on Summary Judgment, while the Final Certified Claim contains a line item for "Concession and tangible assets" (*i.e.*, the property in which Defendants were alleged and found to have trafficked), it ***also*** contains three additional unrelated line items of property: "Securities,"[7] "Accounts Receivable,"[8] and "Debt of the Cuban Government."[9] ECF No. 367 at 32.

		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	

FCSC Final Certified Claim, 2 (emphasis added).

Crucially, no one—not Plaintiff in its operative pleading or in its summary judgment briefs, not Plaintiff's experts in their valuations of the "Subject Property," and not the Court in its Omnibus Order granting summary judgment to Plaintiff on liability—even ***suggested*** that Defendants ever trafficked in securities, accounts receivable, or debt of the Cuban Government.[10]

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[7] The FCSC characterized these "Securities" as 1,000 shares of common stock of the Cuban Telephone Company.

[8] The FCSC characterized these "Accounts receivable" as amounts due to the Havana Docks Corporation when that enterprise was nationalized.

[9] The FCSC characterized this "Debt" as an amount due from the Cuban Government to Havana Docks Corporation for storage charges for unclaimed merchandise.

[10] In challenging the inclusion of these specific line items in a damages award, Defendants are not waiving their position, which was raised at the summary judgment stage, that there are other line items (and corresponding valuations) for other property for which there was no evidence

Indeed, it would have been impossible for Defendants to have trafficked in that intangible property anyway, given that Defendants docking their cruise ships at the Terminal had nothing to do with those securities, accounts, or debts.[11]

Title III provides a civil remedy for parties who "traffic" in certain property confiscated by the Cuban Government:

> Civil Remedy.-- (1) Liability for trafficking.--(A) Except as otherwise provided in this section, ***any person that***, . . . ***traffics in property which was confiscated by the Cuban Government*** on or after January 1, 1959, shall be liable to any United States national who owns the claim to ***such property*** . . . .

22 U.S.C. § 6082(a)(1)(A)(i) (emphases added). By this provision's express terms, the damages for trafficking in confiscated property are tied to the value of the certified claim for "such" property—not "all" the property. 22 U.S.C. § 6082(a)(1)(A)(i)(I-III).

Additionally, Title III specifically contemplates this scenario by providing that Courts may award damages for amounts less than a plaintiff's certified claim. *See* 22 U.S.C. § 6082(f)(2)(A)(i) ("[I]if the recovery in the action is less than the amount of the certified claim, the United States national may receive payment under a claims agreement described in clause (i) [*i.e.* settlement with the Cuban Government] but only to the extent of the difference between the amount of the recovery and the amount of the certified claim."). This Court has already ruled that parties such as Defendants cannot contest the amount of the property values certified by the FCSC. *See* ECF No. 413. Thus, the only manner in which this Court can give effect to this provision is to not

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or findings of trafficking, such as equipment, office furniture and fixtures, railroad tracks, and the Machina and Santa Clara piers.

[11] And this is no trifling issue. Due to the operation of interest over the significant period since the property's alleged confiscation, and on account of trebling, a judgment that includes these line items for property in which Defendants did not traffic would amount to millions of dollars in improper windfall (per cruise line) to Plaintiff.

award certain line items of the Final Certified Claim as a part of the penalty for "trafficking" under Title III. *See generally, Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted) (holding that it is a court's duty "to give effect, if possible, to every clause and word of a statute").

With any question of statutory interpretation, courts presume that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241–42 (1989) (further citations omitted); *see also Birnholz v. 44 Wall St. Fund, Inc.*, 880 F.2d 335, 341 (11th Cir. 1989), *certified question answered*, 559 So. 2d 1128 (Fla. 1990) ("Thus, the cardinal rule of statutory construction is that '[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'") (quoting *Streeter v. Sullivan*, 509 So. 2d 268, 271 (Fla. 1987)). By its express language, Title III does not allow a claimant to recover from a "trafficker" the value of confiscated property in which the trafficker is not alleged to have, did not, and could not have, trafficked.[12]

Aside from flowing from the plain text of Title III, this conclusion is also logical. *See A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1157 (S.D. Fla. 1998) ("It is a fundamental principle of statutory construction that, as between two possible interpretations, the Court must give the statute the interpretation that is logical and consistent with the statute as a whole."). In practice, there are numerous claims certified by the FCSC which include non-contiguous real

[12] For instance, if A, B, and C were hypothetically taken by the Castro government, then a claim holder could be entitled to compensation ***from the Castro Government*** for A, B, and C; but in the ***trafficking*** context, when a trafficker is only alleged to have trafficked in A but ***not*** B or C, it should not be that B and C can be part of the potential damages recoverable from the alleged trafficker just because it happened to be grouped in the same FCSC claim. Yet Plaintiff now seeks all of A, B, and C, in this case, though the Defendants were only found to have trafficked in A.

property interests as separate line items. *See, e.g.* Decision No. CU-2-001, attached as Ex. A (certifying three separate parcels of land)*;* Decision No. CU-6808, attached as Ex. B (certifying land interests in several geographically separate properties)*;* CU-5947, attached as Ex. C (certifying multiple residences and land in geographically separate areas). It would make no sense that a court, tasked with assessing damages for alleged trafficking in only ***one*** such piece of property, would award damages based on the value of ***other*** property in which a party is never alleged to have even trafficked. *See Dargan v. Federated Life Ins, Co.*, No. 22-CV-14284, 2022 WL 9510979, at *3 (S.D. Fla. Sept. 30, 2022) ("If possible, the courts should avoid a statutory interpretation which leads to an absurd result.") *rep. and rec. adopted*, 2022 WL 9426660 (S.D. Fla. Oct. 14, 2022).

For all of these reasons, none of the line items of "Securities," "Accounts Receivable," and "Debt of the Cuban Government" should be included in any final judgment awarded to Plaintiff.[13]

B. Plaintiff's Interest Calculation Correctly Applies This Court's Interest Order

Without waiving objections to the determination of the applicable interest rate and the amount of the FCSC's valuation (as discussed above), Defendants do not challenge the method of mathematical interest calculation in Plaintiff's Motion. Plaintiff's method is consistent with this Court's holding that the applicable rate of interest is the weekly average 1-year constant maturity Treasury yield for each week over the period between the date of confiscation and the date Plaintiff brought each case against each Defendant. *See* Order Granting in part and Denying in part

[13] After interest and trebling, the "Securities," "Accounts Receivable," and "Debt of the Cuban Government," line items amount to $2,198,341.50, $3,596,746.35, and $122,817.51, respectively, as to Carnival, and $2,201,900.79, $3,602,569,77, and $123,016.29, respectively, as to MSC Cruises , Royal Caribbean, and Norwegian. Accordingly, should the Court enter a final judgment award to Plaintiff in the amount of the Certified Claim, plus interest, and trebled, such award should be reduced by $5,917,905.36 as to Carnival, and $5,927,486.75 as to MSC Cruises, Royal Caribbean, and Norwegian.

Defendants' Motion to Confirm Interest Calculation pursuant to 22 U.S.C. § 6082(a)(1)(B) ("Order on Interest") [ECF No. 428]. However, as discussed above, this method of calculation should not be applied to the entire value of the Final Certified Claim as a starting point and, thus, Defendants do not agree with the total amount of interest as calculated in Plaintiff's Motion.

II. PLAINTIFF LACKS ARTICLE III STANDING UNDER NEW CONTROLLING ELEVENTH CIRCUIT *EN BANC* AUTHORITY

As discussed during the Status Conference, the Eleventh Circuit's *en banc* decision in *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236 (11th Cir. 2022), warrants reconsideration of the Court's prior rulings on standing.[14] Based on *Hunstein*, the Court should find that Plaintiff lacks standing in this matter.

Hunstein is the most recent *en banc* decision from the Eleventh Circuit to address standing, and it demonstrates that Plaintiff cannot establish the bedrock requirement of its constitutional standing in this case. *Hunstein* holds that a plaintiff alleging an "intangible" injury (that is, a plaintiff who has not suffered physical harm or out-of-pocket financial loss caused by the defendant) under a new, statutory cause of action (like the Helms-Burton Act) must identify an analogous common-law tort action, and must further establish all the elements essential to liability under that common-law tort. *Id.* at 1241. For example, *Hunstein* involved a debtor's suit against a creditor, who sent information about his debt to a mail vendor, in violation of 15 U.S.C. § 1692c(b). *Id.* at 1240. The plaintiff there analogized his suit to one for the common-law tort of public disclosure, and the dissenters thought this analogy was close enough to support standing (as did the original panel majority). *Id.*

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[14] The Court undoubtedly has the ability (indeed, the obligation) to reconsider its prior rulings on standing. *Ligotti v. United Healthcare Servs., Inc.*, 542 F. Supp. 3d 1301, 1310 (S.D. Fla. 2021) ("We could always reconsider the summary judgment order under our inherent authority because 'a court's previous rulings may be reconsidered as long as the case remains within the jurisdiction of the district court.'") (quoting *Oliver v. Orange Cnty.*, 456 F. App'x 815, 818 (11th Cir. 2012)).

But the *en banc* majority rejected this reasoning, explaining that any such analogy required a more rigorous examination of the elements of the common-law action: if the plaintiff failed to establish "***an element*** from the common-law comparator tort," the analogy cannot support standing under Article III. *Id.* at 1245 (emphasis added). The *Hunstein* plaintiff failed to establish standing because, although his credit information was disclosed to a third party, that disclosure was insufficiently "public" to satisfy the elements of a public-disclosure tort. *Id.* at 1245–46. Citing the Restatement and common-law cases, the Court held that "[p]ublicity requires far more than what Hunstein has offered." *Id.* at 1246. Because the *Hunstein* plaintiff's statutory claim lacked this ***single element*** required under the claim's common-law analogue, the plaintiff lacked standing to pursue it.

Even the dissent in *Hunstein* agreed that common-law analogies are the only way to demonstrate standing for a plaintiff who is not tangibly injured. *Id.* at 1267 (Newsom, J., dissenting). The dissenting opinion recognized that the *en banc* majority opinion leaves almost no room for new causes of action:

> Under the majority's de facto perfect-match criterion, Congress has essentially no freedom to recognize new judicially enforceable rights. . . . Should Congress enact a statute that targets the same *kind* of harm that a common-law claim addressed, but permit protected parties to deviate even one *degree* from a single element of that common-law forebear, it will have overstepped its constitutional authority.

Id. at 1267–68. There is no doubt how this analysis applies here: the Helms-Burton Act unquestionably purported to create a "new judicially enforceable right[]" with no discernible "common-law forebear." *Id.* Indeed, Congress itself declared the Act's cause of action "unique." *See* H. REP. NO. 104-202(1), at 39 (1995) (recognizing that Title III's "right of action is unique").

This Court has already recognized that Article III requires the Plaintiff to demonstrate a "concrete" injury to have standing to bring this action. *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 484 F. Supp. 3d 1215, 1227–28 (S.D. Fla. 2020) (hereinafter "*NCL* Order").

In the Omnibus Order on the Motions for Summary Judgment, the Court quoted from the recent Supreme Court decision in *TransUnion*: "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III[.]" MSJ Order, ECF No. 367 at 154–55 (quoting *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021)).

But the Court—relying on *Glen v. American Airlines, Inc.*, 7 F.4th 331, 334 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 863 (2022), and *Sucesores de Don Carlos Nunez y Dona Pura Galvez, Inc. v. Societe Generale, S.A.*, 577 F. Supp. 3d 295 (S.D.N.Y. 2021)—held that "decisions after *TransUnion* persuasively explain that a LIBERTAD Act plaintiff still suffers an injury-in-fact." Both of these cases analogized the Title III cause of action to a common-law unjust enrichment claim. *See also NCL Order*, 484 F. Supp. 3d at 1228, 1230 (characterizing the action as remedying unjust enrichment).

Hunstein, however, rejects the close-enough-to-a-common-law-claim approach to standing applied in *Glen* and *Societe Generale*, and thus precludes a finding of standing here. Neither *Glen* nor *Societe Generale* found that a Title III plaintiff suffers a "tangible" injury, since the use of property that the plaintiff neither owns nor possesses cannot be said to cause physical harm or financial loss to that plaintiff. Instead, these cases classified Title III injuries as "intangible" and found "concreteness" by looking to the supposedly analogous cause of action for unjust enrichment—but neither court held that a Title III plaintiff could satisfy ***all*** the elements of common-law unjust enrichment. In fact, *Societe Generale* suggested the very opposite: the court held that the analogy was close enough even though Title III plaintiffs may ***not*** satisfy all the elements of common-law unjust enrichment. 577 F. Supp. 3d at 309 ("Defendants fault Plaintiffs for assertedly failing to satisfy an element recognized in one formulation of common-law unjust

enrichment . . . But *Spokeo* . . . does not require that a statutory claim have *identical elements to* claims rooted in such a traditional harm."). This "seems-close-enough" analysis is inconsistent with the rigorous, element-for-element approach demanded by the *en banc* Eleventh Circuit in *Hunstein*.

Plaintiff's suit is clearly different from unjust enrichment, because a key element of unjust enrichment is that the plaintiff conveyed a direct benefit to the defendant, *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1328 (11th Cir. 2012), and lost the time, effort, or expense related to that benefit.[15] Thus, courts frequently reject unjust enrichment claims where the plaintiff has not ***directly conferred*** a benefit on the defendant. *Marrache v. Bacardi U.S.A., Inc.*, 17 F.4th 1084, 1102 (11th Cir. 2021) ("At most, Marrache has alleged that he and the other class members conferred an ***indirect benefit*** to Bacardi and, as such, cannot satisfy the first element of an unjust enrichment claim against Bacardi.") (emphasis added); *Virgilio*, 680 F.3d at 1337.

Plaintiff, which does not possess any ownership interest in the property Defendants used, has not conferred any benefit on Defendants, directly or indirectly. *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1254 (11th Cir. 2006) (rejecting unjust enrichment claim based on alleged exploitation of plaintiff's confiscated Cuban property because plaintiff no longer owned the property). Moreover, in a claim for unjust enrichment, the plaintiff necessarily seeks the amount by which the defendant has been unjustly enriched. But under the Helms-Burton Act, the relief bears no relation to the defendant's gain—even a defendant who ***loses money*** by using the property may be liable for the three times the full value of the confiscated property in which a defendant

[15] "A claim for unjust enrichment has three elements: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant voluntarily accepted and retained that benefit; and (3) the circumstances are such that it would be inequitable for the defendants to retain it without paying the value thereof." *Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329, 1337 (11th Cir. 2012); *accord Pincus v. Am. Traffic Sols., Inc.*, 333 So. 3d 1095, 1097 (Fla. 2022).

"trafficked."

Because these key elements are lacking, the analogy to unjust enrichment cannot support standing under the holding of *Hunstein*—and absent this analogy, there is no basis for finding that Plaintiff's Title III intangible injury is a concrete injury for the purposes of standing. The only other injury that Plaintiff can point to is the Defendants' failure to pay it, but that is just another way of saying that Plaintiff has been injured because it has a cause of action allowing it to seek money from Defendants, which is not enough to support standing. Indeed, if it were, it would confer standing in virtually every case where the Supreme Court and the Eleventh Circuit has held the plaintiff lacked constitutional standing to bring a claim for money damages. Havana Docks has no right to compensation from Defendants that "can be said to 'exist in the real world,' ***independent of a new statutory cause of action***." *Hunstein*, 48 F.4th at 1245 (quoting *TransUnion*, 141 S. Ct. at 2205) (emphasis added). Defendants have no obligation to pay Havana Docks that is "independent of [the Title III] cause of action," so the fact that Defendants did not pay Havana Docks is not a financial injury that can support standing.

A contrary conclusion would nullify *Hunstein*, *TransUnion*, and all other cases finding a lack of standing in an action for money damages: ***all*** plaintiffs seeking money damages can assert that they have been "injured" by the defendant's failure to compensate them. The plaintiff in *Hunstein*, for example, could have argued that he was "injured" when the defendant failed to pay him before disclosing his information to a mail vendor. This circular reasoning confuses the concept of ***injury in fact*** with the ***right to compensation*** that flows from that injury: if there is no concrete injury in fact, Congress may not create standing by inventing a right to compensation for the plaintiff. *See Hunstein*, 48 F.4th at 1243 ("[T]he Supreme Court has cautioned that Congress 'may not simply enact an injury into existence, using its lawmaking power to transform something

that is not remotely harmful into something that is.'") (quoting *TransUnion*, 141 S. Ct. at 2205)); *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 465 (6th Cir. 2019) ("Congress cannot conjure standing by declaring something harmful that is not, by saying anything causes injury because the legislature says it causes injury.").

For the same reason, *Hunstein* requires reconsideration of the Court's holding that "[t]he use of Havana Docks' property without its authorization constitutes a tangible injury." MSJ Order at 155. After all, the Court already concluded that Havana Docks has no ownership rights in the property Defendants used (the Havana Cruise Port Terminal), since that property was confiscated by Cuba in 1960. *Havana Docks Corp. v. MSC Cruises SA Co.*, 455 F. Supp. 3d 1355, 1368 (S.D. Fla. 2020) ("[T]he reasoning in *Glen I* and *Glen II* stands for the notion that the Cuban Government's confiscation of property ***extinguished any ownership rights*** of those who owned the property prior to the expropriation." (emphasis added)).[16] Indeed, *Glen* holds that the

[16] This also negates any analogy to a cause of action for trespass. *Glen*, 450 F.3d at 1254 (rejecting trespass claim based on alleged exploitation of plaintiff's confiscated Cuban property because plaintiff no longer owned the property). In actions for trespass, the common law recognized that a mere unauthorized entry on real property could constitute an injury—but only to the person actually in possession of that property. *E.g.*, *Sky Four Realty Co. v. State*, 512 N.Y.S.2d 987, 989 (N.Y. Ct. Cl. 1987); *Sadler v. Alabama Great S. R. Co.*, 204 Ala. 155 (Ala. 1920); *Conner v. President of New Albany*, 1 Blackf. 88, 1820 WL 897 (Ind. 1820); Restatement (Second) of Torts § 158; Blackstone, Vol. 2, Chp. 12, § 276; *see also Nunnelee v. United States*, 573 F. App'x 886, 887 (11th Cir. 2014). The idea is that an unauthorized entry constitutes an intangible but "real" injury to the possessor's right to enjoy exclusive possession. *See Sky Four*, 512 N.Y.S.2d at 989. But, for the same reason, an owner of property ***without*** possession cannot maintain an action for trespass, and cannot recover against an intruder without showing some harm ***beyond the trespass itself***. *Id.* ("As Prosser has noted, the owner [without possession] is not without remedy, but he must show more than the trespass, namely permanent harm to the property of such sort as to affect the value of his interest."). This is true even if the current possessor is there wrongfully, in which case, the true owner can bring an action for ejection against that person—but not against third parties using the property with the wrongful possessor's consent. *See id.* Since Havana Docks neither owns nor possesses the Havana Cruise Port Terminal, "an element from the common-law comparator tort is completely missing," and thus the analogy to trespass must fail. *Hunstein*, 48 F.4th at 1245.

Helms-Burton Act did not give plaintiffs a property right in the confiscated property, only a cause of action to seek compensation. 450 F.3d at 1254–55. Thus, the only remaining interest Plaintiff possesses is a purely statutory "right to compensation." *MSC*, 450 F. Supp. 3d at 1369. Under *Hunstein*, a mere statutory right to demand compensation from a defendant cannot, standing alone, establish a "concrete" injury to satisfy Article III.

III. THE DAMAGES PLAINTIFF SEEKS ARE UNCONSTITUTIONALLY EXCESSIVE UNDER THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE

The Due Process Clause of the Fifth Amendment prohibits statutory damages that are grossly disproportionate to the wrong committed by the defendant and the harm suffered by the plaintiff.[17] As Judge Jordan put it at oral argument in *Bengochea*, there are "all sorts of constitutional due process problems [with] holding Defendants liable—regardless of culpability—for the entire amount of the taking no matter what their involvement is in trafficking these days." Oral Argument at 53:36,[18] *Bengochea v. Carnival Corporation*, No. 20-12960.[19] For at least two

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[17] The Court previously held that a Fifth Amendment excessiveness argument is a post-trial issue to be addressed after a damages award. ECF No. 394, Order on Defendants' Motion for Clarification of the Court's March 21, 2022 Omnibus Order on Motions for Summary Judgment, at 3 ("…Defendants may properly raise their Fifth Amendment excessiveness and disproportionality arguments should damages be awarded."). Consistent with the Court's prior rulings, Defendants' due process arguments are ripe for adjudication.

[18] *Available at* https://www.ca11.uscourts.gov/oral-argument-recordings?title=&field_oar_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=2021&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D=10&page=3

[19] Judge Jordan also presented a hypothetical to counsel for Dr. Garcia-Bengochea in which someone stole a car, then lent that car to his friend who drove the car for a few days to make money as an Uber driver. Judge Jordan asked if the original car owner would have a claim against the friend Uber driver for the entire value of the car, to which Dr. Garcia-Bengochea's counsel responded "yes," which prompted Judge Jordan to reply, "that seems very odd to me." Oral Argument at 54:47–56:02, *Bengochea v. Carnival Corporation*, No. 20-12960.

independent reasons, the $439,217,424.51 in damages sought by Plaintiff is unconstitutionally excessive in violation of the Due Process Clause.[20]

First, by allowing a plaintiff to recover the full value of a certified claim (plus interest and trebling) from ***any*** defendant who "traffics" in confiscated property in ***any way***, the Helms-Burton Act's measure of damages effectively holds everyone who ever uses confiscated property liable for the full extent of the Cuban Government's confiscation. Regardless of whether this measure of damages would be proportionate as applied to that original act of confiscation, it is plainly disproportionate in a case in which a defendant "trafficked" in confiscated property merely by making use of it for a limited period of time. This measure flouts the elementary due-process principle that a wrongdoer's liability should be proportionate to its own culpability.

Second, the damages sought by Plaintiff in this case are plainly disproportionate to both the wrong allegedly committed by each of the Defendants and the actual damages suffered by Plaintiff under the facts of this case. In cases involving unauthorized ***use*** of property, actual damages are ordinarily equal to the reasonable fee for using that property (or the fair-rental value for the time of use). In this case, Plaintiff seeks to recover $439,217,424.51—far in excess of the actual amounts paid to the port operator during Defendants' use of the property, which was at best ***closer to $22 million*** (*see* Section III.A., *infra*), which means that the ratio between statutory and actual damages approaches 21:1. That disparity is intolerable in a case involving no malice or deceptive acts, physical injury (or even a risk of physical injury), or other egregious misconduct, and in which Defendants cruised to Cuba with licenses and encouragement from the Government.

[20] Defendants maintain that any such award would violate the Excessive Fines Clause of the Eighth Amendment as well, and preserve this argument for appeal, but acknowledge this Court's contrary ruling in the Order on the Motions for Summary Judgment.

For more than a century, Supreme Court precedent has held that a statutory penalty violates the Due Process Clause if "the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66–67 (1919); *see also Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915) (invalidating statutory penalties against a telephone company totaling $6,300 for disconnecting a customer who failed to pay her bill because the amount was "so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law"); *Missouri Pac. R. Co. v. Tucker*, 230 U.S. 340, 351 (1913) (invalidating $500 statutory penalty for a $3.02 overcharge as "grossly out of proportion to the actual damages"). The principle that penalties must be proportional to the culpability of the offender and the harm done to the victim "is deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284 (1983). It is reflected "in legal codes from ancient times through the Middle Ages." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 491 (2008). The Magna Carta, for example, guaranteed that "[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof." § 20, 9 Hen. III, ch. 14, in 1 Eng. Stat. at Large 5 (1225).

The Supreme Court's punitive-damages precedents reaffirm that due process prohibits damages awards that are "grossly disproportional to the gravity of . . . defendant[s'] offense," *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434 (2001), regardless of "whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).[21]

[21] Indeed, the Supreme Court's earlier statutory-damages decisions provided the doctrinal foundation of its more recent punitive-damages cases. *See Gore*, 517 U.S. at 575 (citing *Williams* as a basis of the principle that damages "wholly disproportioned to the offense" are

The principles of *Gore* and other punitive-damages cases are equally applicable to statutory measures of damages. *See Wakefield v. ViSalus, Inc.*, --- F.4th ----, 2022 WL 11530386, at *8–12 (9th Cir. Oct. 20, 2022) (holding that *Gore*'s requirements of "reasonableness and proportionality to the violation and injury" apply with "heightened constitutional importance" when statutory damages have a predominantly punitive function); *Parker v. Time Warner Ent. Co, L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (recognizing that the Due Process Clause requires reduction of a statutory-damages award when statutory damages are "so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages—yet ones that are awarded as a matter of strict liability, rather than for the egregious conduct typically necessary to support a punitive damages award"); *Montera v. Premier Nutrition Corp.*, --- F. Supp. 3d ---, 2022 WL 3348573, at *5 (N.D. Cal. Aug. 12, 2022) (applying methodology of punitive-damages precedents to assess whether penalty was excessive and by how much damages should be reduced in light of the "punitive" focus of the statute). In particular, the first two *Gore* guideposts—the reprehensibility of the defendant's conduct and the proportionality of the portion of the award that constitutes a penalty to the portion that compensates the plaintiff for actual injuries—correspond to the inquiries into whether statutory damages are "wholly disproportioned to the offense," *Williams*, 251 U.S. at 66–67, or "grossly out of proportion to the actual damages." *Tucker*, 230 U.S. at 351.

Applying these principles, numerous courts have invalidated statutory penalties that violate the principle of proportionality. In *Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019), for

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unconstitutional); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453–55 (1993) (citing *Williams*, *Danaher*, and other statutory-damages cases as the basis of the principle that "arbitrary and oppressive" penalties "violate the Due Process Clause"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 12 (1991) (relying on *Williams*, *Danaher*, and *Tucker*).

example, the Eighth Circuit applied the principle of *Williams* to affirm the district court's invalidation of a $1.6 billion statutory-damages award imposed under the Telephone Consumer Protection Act ("TCPA") and reduction of the award to $32 million. Observing that the award was "shockingly large," the court concluded that the award violated the Due Process Clause because defendant's conduct was not sufficiently grave because it "plausibly believed it was not violating the TCPA," and "the harm to the [plaintiffs] was not severe" enough to justify the award. *Id.* at 962–63. *See also Wakefield*, 2022 WL 11530386, at *8–12 (vacating and remanding statutory-damages award where district court failed to "apply the *Williams* test . . . to determine the constitutionality" of statutory damages).

In *Montera*, the Northern District of California ruled that an award of $91,436,950 in statutory damages available under New York deceptive-practices and false-advertising statutes was "wholly disproportionate to the offense and obviously unreasonable" under *Williams* and reduced the award to $8,312,450. 2022 WL 3348573, at *5–6. And in *Maryland v. Universal Elections, Inc.*, 862 F. Supp. 2d 457 (D. Md. 2012), the court reduced the statutory damages requested by the plaintiff from $10,424,550 to $1,010,000 even though the damages requested by plaintiffs were well below the award "exceed[ing] one hundred million dollars" that a strict application of the statutory formula for calculating damages would have allowed—and despite the fact that defendant had "knowingly violated the TCPA with the express purpose of suppressing the votes of a minority group" through misleading robocalls. *Id.* at 464–66.[22]

[22] *See also Golan v. Veritas Ent., LLC*, 2017 WL 3923162, at *4 (E.D. Mo. Sept. 7, 2017); *DirecTV, Inc. v. Gonzalez*, 2004 WL 1875046, at *4 (W.D. Tex. Aug. 23, 2004) ("[I]t may be that a statutory damages provision that grossly exceeds any actual damages would violate due process."); *In re TransUnion Corp. Privacy Litig.*, 211 F.R.D. 328, 350–51 (N.D. Ill. 2002) (denying certification of putative class under Fair Credit Reporting Act because "approval of a class action could result in statutory minimum damages of over $19 billion, which is grossly disproportionate to any actual damage").

Under these principles, the Act's statutory-damages formula is unconstitutional as applied to acts of "trafficking" that occur when someone "uses" confiscated property, "engages in commercial activity using or otherwise benefitting from confiscated property," or "causes, directs, participates in, or profits from trafficking," 22 U.S.C. § 6023(13)(A)(i–iii); and plainly unconstitutional as applied to the facts of this particular case. Each of these independent grounds for invalidation of the damages award is set forth in turn.

A. Title III Damages Are Excessive for a Defendant Who Only "Uses" the Property

The Act's damages formula for alleged acts of "trafficking" that involve only the "use" of confiscated property generates wholly disproportionate statutory damages because it creates a harsher-than-retributive scheme in which a "trafficker" is punished well beyond an amount commensurate with even having personally confiscated the claimholder's property. Due Process mandates penalties "proportionate to the wrong committed," *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003), and, in particular, "proportionate to the amount of harm to the plaintiff." *Id.* at 426 (2003). *See Wakefield*, 2022 WL 11530386, at *9 (holding that statutory damages "that are 'so severe and oppressive' as to no longer bear any reasonable or proportioned relationship to the 'offense'" violate due process (quoting *Williams*, 251 U.S. at 67)); *Golan*, 930 F.3d at 963 (holding statutory penalty was disproportionate because conduct was not extremely blameworthy and "the harm to [plaintiffs] was not severe").

The Act's measure of damages, however, does not even attempt to track the gravity of the defendant's act or the harm actually suffered by the plaintiff as a result of the defendant's actions. Instead, it is designed to impose a penalty tethered only to the ***original acts of confiscation*** perpetrated by the Cuban Government (or a comparable total and permanent deprivation of property). A measure of damages that is disproportionate by design is "so plainly arbitrary and

oppressive as to be nothing short of a taking of its property without due process of law," and cannot be tolerated by the Due Process Clause. *Danaher*, 238 U.S. at 491.

The Act renders unauthorized users of subject properties liable for the greater of "the amount, if any, certified to the claimant by the FCSC under the International Claims Settlement Act of 1949 [22 U.S.C. § 1621 *et seq.*], plus interest" 22 U.S.C. § 6082(a)(1)(A)(i)(I), or "the fair market value of that property," 22 U.S.C. § 6082(a)(1)(A)(i)(III), with trebling when the plaintiff holds a certified claim, *id.* § 6082(a)(3). The logic of this formula effectively measures damages—even for a single instance of "using" the property—by the amount that the original confiscator—the Cuban Government—would owe for the confiscation, going so far as to treble that amount for certified claims. Restatement (Third) of Foreign Relations Law § 712 cmt.d (1987) (measure of compensation for taking of property in violation of international law is "the full value of the property"). And it does so regardless of how temporary or how minor the use of the property is, regardless of whether the plaintiff has already received the exact same damages in a prior case challenging other acts of trafficking carried out by a different defendant, and regardless of the fact that the actual expropriations were perpetrated long ago by the Cuban Government. This measure of damages effectively proceeds as though every single act of "trafficking" that ever occurs repeats the original confiscation of the Cuban Government in full.

Imposing a harsher punishment actually tethered to a different and more serious offense by the Cuban Government violates the principle that penalties should be "proportionate to the wrong committed," *State Farm*, 538 U.S. at 426, and punishes these Defendants for acts "[they] did not commit and had no intention of committing," thereby violating the principle that the "punishment must be tailored to [the defendant's] personal responsibility." *Enmund v. Florida*, 458 U.S. 782,

801 (1982). *Cf. Tison v. Arizona*, 481 U.S. 137, 149 (1987) (A punishment that is not "directly related to the personal culpability of the . . . offender" constitutes "excessive retribution").

And the Act's measure of damages does more than merely "create[] the possibility of multiple punitive damages awards for the same conduct." *State Farm*, 538 U.S. at 422. To the contrary, it provides that every defendant who "traffics" in confiscated property at any point in time must pay in full for what the Cuban Government did when it confiscated the property—regardless of whether the plaintiff already has been or will be fully compensated for the value of the confiscated property on another claim against a different defendant. The damages generated by this measure do not "bear any reasonable or proportioned relationship to the 'offense'" and thus violate due process. *Wakefield*, 2022 WL 11530386, at *9.

In cases in which, as here, a defendant "traffics" by simply using confiscated property, the awards mandated by the Act's expropriation-based damages formula are especially "grossly out of proportion to the actual damages." *Tucker*, 230 U.S. at 351. Even if Plaintiff could be said to have suffered a "concrete" injury caused by Defendants' "use", *contra* Section II, *supra*, the only plausible measure of that injury is what Plaintiff could have fairly and reasonably charged Defendants for permission to use the property. *Cf.* D. Dobbs, *Law of Remedies* § 5.8(2) (remedy for mere temporary possession is the "fair rental value" for the time possessed); *see also Baatz v. Columbia Gas Transmission, LLC*, 929 F.3d 767, 776–77 (6th Cir. 2019); *Beck v. Northern Nat. Gas Co.*, 170 F.3d 1018, 1024 (10th Cir. 1999) (holding fair rental was the measure of damages for the use of subterranean geological formation to store natural gas). That measure would at least bear some relationship to a real-world concept: the amount a claimholder ***would*** have been able to charge if it still had an interest in (and right to exclude Defendants from) the confiscated property itself. *But see Glen*, 450 F.3d at 1254–55 (holding that the Helms-Burton Act does not give

claimholders an ownership interest in their confiscated property and rejecting attempt to bring trespass action on such property).

Here, there is ample evidence of what Defendants paid to use the property, and it is far less than the $439,217,424.51 Plaintiff seeks. That amount is less than $22,118,335.86—the amount of money Defendants paid to Aries, the port operator during the time of the alleged trafficking, to use the Terminal. *See* Plaintiff's Notice of Filing Summary Judgment Motion Presentations, ECF No. 346-7 (Carnival paid Aries $2,605,429.34, NCL paid Aries $3,215,617.23, Royal Caribbean paid Aries $6,982,902.88, and MSC Cruises paid Mapor $9,314,386.41, only a portion of which were indirect payments to Aries[23]); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 49(3) (2011) ("Enrichment from the receipt of nonreturnable benefits is measured by (a) the value of the benefit in advancing the purposes of the recipient, (b) the cost to the claimant of conferring the benefit, (c) the market value of the benefit, or (d) a price the defendant has expressed a willingness to pay . . . .").

Aries is the state-owned company serving as the port operator of the Terminal, and thus Aries is the entity that Defendants paid for usage of the Terminal. *See* Expert Report of Pablo Spiller, Mar. 19, 2021 (hereinafter "Spiller Report"), at 24 n.43, ECF No. 225-4. Indeed, Aries has far more control over the Terminal than Plaintiff ever had under its concession; if Plaintiff still had its concession interest, it could not reasonably charge more than Aries for use of the Terminal. *See* Expert Report of James Leonard, Apr. 16, 2021, (hereinafter "Leonard Report"), ECF No. 222-16 at 5–6 (discussing what expenses paid by the cruise lines would be revenue for the terminal

[23] The portion MSC Cruises paid to Mapor included payments for other services to other entities, not just payments to Aries for the operation of the port. Therefore, this amount does not accurately represent what MSC Cruises paid for port operator services, but nevertheless does not take away from the argument the amount MSC Cruises paid for port services is much less than Plaintiff seeks in damages from MSC Cruises.

operator and acknowledging that many expenses are paid to other entities such as the government or port authority agencies "unrelated to the terminal operator").[24] Even if the Court were to consider the payments Defendants made to other entities at the port, such as "Mambisa (a State-owned company that acted as port agent for Carnival, Royal Caribbean and Norwegian) and MAPOR (a privately owned company that was port agent for MSC Cruises)" on top of those payments paid to Aries, Plaintiff could seek just over $30 million collectively across all four cruise-line Defendants, which is far less than the $440 million Plaintiff requests in its Motion. Spiller Report at 24 n.43; *see* ECF No. 346-7; Mot. 8.[25]

Critically, the Due Process analysis has nothing to do with the revenues or profits Defendants earned from cruising, which has no relevance under either the statutory framework of Helms Burton or the Due Process Clause. After all, Title III ***does not*** contemplate disgorgement of profits; its treble-damage formula applies even if Defendants lost money in their cruises. And even if disgorgement of profits were available as a remedy, such relief would be considered ***punitive*** rather than ***compensatory*** relief (and thus would increase the proportion of a statutory penalty that ***does not*** constitute actual damages). The Supreme Court has repeatedly indicated that

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[24] Plaintiff did not challenge Leonard's report, and he was never excluded as an expert in this matter.

[25] Carnival paid $5,388,512.43 total to Aries and Mambisa compared to the $109,671,180.90 Plaintiff is requesting from Carnival; MSC Cruises paid $9,314,386.41 total to Aries and Mapor compared to the $109,848,747.87 Plaintiff is requesting from MSC Cruises; Norwegian paid $5,040,004.67 total to Aries and Mambisa compared to the $109,848,747.87 Plaintiff is requesting from Norwegian; and Royal Caribbean paid $10,566,532.88 total to Aries and Mambisa compared to the $109,848,747.87 Plaintiff is requesting from Royal Caribbean.

Moreover, MSC Cruises respectfully maintains that the Court erred in ruling that "Cuba-to-Cuba" cruises operated by MSC Cruises—i.e., cruises that did not touch the United States—were properly alleged to be part of this case. When considering only those US to Cuba cruises that were actually alleged by Plaintiff, MSC Cruises paid at most $2,596,211.88 for the use of the Terminal (including port operation and other services, as discussed above) for US to Cuba cruises.

disgorgement is not a form of compensatory relief, but instead "a 'limited form of penalty,'" *Liu v. SEC*, 140 S. Ct. 1936, 1943 (2020) (quoting *Tull v. United States*, 481 U.S. 412, 424 (1987)), designed to strip a defendant of profits not because they were obtained at the expense of the plaintiff, but based on the principle that "the wrongdoer should not profit 'by his own wrong,'" *id.* (quoting *Tilghman v. Proctor*, 125 U.S. 136, 145–46 (1888)); *see also Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017) (holding disgorgement remedy in SEC enforcement "is a penalty" and generally "is not compensatory"). Moreover, even if Defendants' profits were somehow relevant, there is no evidence that they remotely approached the hundreds of millions of dollars Plaintiff seeks.[26] This is precisely the type of award that is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 67; *Moore v. Equitrans, L.P.*, 27 F.4th 211, 220–21 (4th Cir. 2022) (limiting damages for trespass to "reasonable rental damages" and noting that absent from damages principles "is any notion that the plaintiff may profit from the defendant's use of the land" or that plaintiff is "entitled to the value of the trespass" to the defendant); *Reck*, 170 F.3d at 1024 (denying unjust-enrichment recovery of profits gained from storing natural gas in subterranean formation under plaintiffs' land because there was "no indication that, but for [defendant's] actions of storing gas in the . . . formation, profits gained as a result would have gone to the landowners").

Finally, the Act's measure of damages cannot be rationalized as necessary to secure adequate deterrence or general compliance with federal policy regarding sanctions on Cuba—

[26] To the extent the Court were to consider profits, MSC Cruises, for example, had negative profits and lost €6,391,000 on its U.S-Cuba cruises and lost €63,571,000 on its Cuba-to-Cuba cruises. As for Norwegian, Plaintiff's proposed damages award of $110 million is more than ***five times*** Norwegian's Havana-sailings profits. *See* ECF No. 221-29, at NCLH_23591-00581051. Indeed, in its three years of sailings to Cuba, Norwegian's net profit even arguably associated with its days at port in Havana was just $25,139,622 – a figure ***dwarfed*** by Plaintiff's requested $110 million in damages from Norwegian.

which is why the use of confiscated property here occurred only with the encouragement, and under the licensure, of the United States Government. Given "the President's constitutionally vested role as the nation's authority in the field of foreign affairs," the Executive should have flexibility in determining both the optimum level of deterrence and the appropriate means of using sanctions to bring democratic change to Cuba. *United States v. Plummer*, 221 F.3d 1298, 1309–10 (11th Cir. 2000). The Act's measure of damages imperils that flexibility by authorizing ruinous penalties in ***private*** suits that are not subject to any Executive oversight. As a result, the awards dictated by the Act's measure of damages are "wholly disproportioned to the prohibited conduct (and its public importance) and greatly exceed any reasonable deterrence value." *Wakefield*, 2022 WL 11530386, at *10.

B. <u>The Act's Measure of Damages Is Unconstitutional as Applied to This Case</u>

As applied to the facts of this case, the grossly excessive character of the Act's measure of damages independently violates due process. Plaintiff seeks $439,217,424.51 in statutory damages. In itself, that "is a shockingly large amount," *Golan*, 930 F.3d at 962, when compared with any attempt to measure Plaintiff's actual losses attributable to Defendants' use (such as by comparing against a fair-market fee for using the Terminal).

The judgment plaintiff seeks is an outlier both in size and in relation to the wrongs alleged. Indeed, the requested judgments, if granted, would be among the largest judgments ever entered in this District, and orders of magnitude larger than judgments entered against defendants who were found to have recklessly or deliberately caused ***the loss of life***. For example, Magistrate Judge Louis recently entered final judgment of $24,250,000 in compensatory and punitive damages in favor of victims of Argentina's 1972 Trelew Massacre who brought suit under the Torture Victim Protection Act. *Camps v. Bravo*, No. 20-cv-24294 (S.D. Fla. July 26, 2022) (ECF No. 158). The jury found the defendant "liable for the extrajudicial killing" of three individuals and the attempted

killing of a fourth. *Id*. (ECF No. 153). Like the instant case, *Camps* also involved a federal statute under which plaintiffs sought to redress wrongs inflicted by a foreign government over half a century ago, but, in contrast, the *Camps* defendant was the actual killer rather than wholly unaffiliated private companies, and the bad acts involved torture and murder (defendant was alleged to have executed unarmed political prisoners after torturing them for a week). The $24,000,000 judgment against the *Camps* defendant is approximately five percent (5%) of what plaintiff seeks here, where no life was lost, where defendants did not commit the 1960 expropriation, and where the purported damages were accrued by a shell corporation that has existed only on paper for the last 60 years.

For an example of a contemporaneous judgment of similar magnitude to what Plaintiff seeks here, the Northern District of Ohio recently entered a $650,600,000 judgment against opioid dispensers in favor of two Ohio counties to fund an abatement plan in the wake of the opioid crises. *In re: National Prescription Opiate Litigation (Track 3)*, No. 17-md-2804 (N.D. Ohio, Aug. 22, 2022) (ECF No. 4614). Notably, the jury found defendants liable for "intentional and/or illegal conduct" which caused "diversion of [] opioids into the illicit market," *id.* at ECF No. 4176, and the judgment held the pharmacies partially "responsible for their role in the opioid epidemic, which has killed half a million Americans since 1999."[27]

Here, by contrast, each Defendant's alleged wrongful conduct consisted of mooring ships at a pier, yet Plaintiff seeks a judgment similar in size to one awarded against those found liable for contributing to a public health crisis. When the injury does not involve that loss of health or life, courts frequently refuse to award damages in the hundreds of millions. *See, e.g., Diaz v. Tesla,*

[27] https://www.washingtonpost.com/nation/2022/08/18/cvs-opioid-lawsuit-walgreens-walmart-ohio/

--- F. Supp. 3d ---, 2022 WL 1105075, at *25 (N.D. Cal., Apr. 13, 2022) (reducing on Due Process grounds an excessive punitive damages award of $130,000,000 to $13,500,000 in an employment discrimination case, not allowing the defendant's "wealth . . . to justify an otherwise unconstitutional award.") (internal quotations omitted).

1. Plaintiff Suffered No Actual Loss Because It Never Had an Interest in The Terminal That Would Have Been Violated by Defendants' Use of It

Even a use-value measure based on the price Defendants paid to access the Terminal dramatically overstates Plaintiff's actual damages—and vastly understates the extent to which the award sought by Plaintiff is excessive. As confirmed by the "unrebutted expert testimony from Ambar Diaz," ECF No. 367 at 105, Plaintiff never owned the Terminal. Plaintiff previously possessed a time limited Concession, defined in a series of Cuban administrative Presidential Decrees (the "Decrees"), granting it a non-exclusive right to operate a business at the Terminal, and that business was limited to providing cargo services. *See* Expert Report of Ambar Diaz, Esq., Mar. 19, 2021 (hereinafter "Diaz Report"), at 4–5, ECF No. 235-1. Plaintiff did not have a monopoly to provide services at the Piers. Plaintiff did not have rights to operate a passenger terminal or to exclude others from doing so, or even to prevent passenger ships (such as cruise lines) from docking at the Terminal. *Id.* The Cuban government could have allowed other entities to provide similar services at the Piers. *Id.* Indeed, "[i]f the Concession were still in effect today [which it is not because it expired in 2003], cruise lines and other vessels could use the Piers without any legal obligation to contract with or use the services of Havana Docks." *Id.* As a result, Plaintiff's genuine actual damages are equal to $0, and the nearly half-billion dollars Plaintiff seeks represents an award that is wildly "out of proportion to the actual damages." *Tucker*, 230 U.S. at 351.

Critically, accepting these conclusions—which follow directly from the unrebutted, and unchallenged, testimony of Ambar Diaz, the only expert in this case on issues of Cuban law and interpretation of the Concession documents[28]—does not in any way undermine the FCSC's determinations, which ***did not*** rely on a finding that Plaintiff had the right to provide passenger services or monopolize the pier. Indeed, the Certified Claim evaluated Havana Docks' ***cargo*** business:

> 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.

Certified Claim, Proposed Decision, at 2. Nothing in the FCSC's findings suggests that Plaintiff had or would have had the right to charge Defendants for operating cruises (which involve passenger rather than cargo services) at the Terminal, even if Plaintiff still possessed the limited interest it held prior to confiscation.

Similarly, examining the nature of Plaintiff's concession is consistent with this Court's earlier rulings, which held that the precise scope of Plaintiff's property interest was irrelevant for

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[28] The scope of Plaintiff's concession interest should be determined by applying Cuban law, not federal common law. While most issues in this case are properly resolved by federal statutes and Common law, the Restatement (Second) of Conflicts of Laws (applicable in federal-question cases) provides that different issues may be governed by different state laws within a single case. Restatement (Second) of Conflict of Laws § 145 (1971) (explaining that "courts have long recognized that they are not bound to decide all issues under the local law of a single state," and thus different questions may be governed by different laws in a single case). Under the Restatement, Cuba plainly has the most significant relationship to the interpretation of a Spanish-language concession issued in Cuba, by the Cuban Government, using powers conferred by Cuban public law, to govern an entity's rights in Cuban public property. *See* Restatement (Second) of Conflict of Laws §§ 6, 223 & 224; *see also Karaha Bodas Co., L.L.C. v. Peruashaan Pertambangan Minyak Dan Gas Bumi*, 313 F.3d 70, 85–88 (2d Cir. 2002) (concluding, under Second Restatement approach, that Indonesian law governed property interests that were defined by Indonesian law).

determining ***liability*** but necessarily relevant for assessing ***damages***:

> Any recovery for the trafficking alleged in this action would not . . . entitle Plaintiff to recover compensation for an interest in the Subject Property that it did not own, nor would it effectively treat Havana Docks' interest as a fee simple interest. . . . [T]he issue of the amount of compensation that Plaintiff is entitled to recover in this case is entirely distinct from the issue of the trafficking that creates liability under the Act. . . .
>
> . . . The liability provision, on the other hand, imposes liability for trafficking in the more broadly defined "confiscated property" — a term that, as discussed above, is not limited solely to the interest Plaintiff originally owned in the Subject Property. Thus, consistent with established takings principles under property law, which require payment of just compensation for the property interest taken, any recovery Plaintiff obtains pursuant to the Certified Claim in this case would be for the value of its confiscated property interests, not for the value of any other interests in the Subject Property that Havana Docks did not own.

Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd., 454 F. Supp. 3d 1259, 1278–79 (S.D. Fla. 2020). That holding is even more applicable now, to the question of whether the statutory remedy under the Helms-Burton Act is ***constitutionally permissible*** under the Due Process Clause.

Interpreting § 6083(a)(1) to eliminate judicial review of ownership determinations essential to constitutional claims and defenses would render that provision unconstitutional. *See Clark v. Martinez*, 543 U.S. 371, 382 (2005) (When "choosing between competing plausible interpretations of a statutory text," courts must presume "that Congress did not intend the alternative which raises serious constitutional doubts."). The Constitution is "the supreme Law of the Land," and supersedes any conflicting federal statutory command. U.S. Const., Article VI, cl. 2. And because "Article III vests the judicial power of the United States 'in one Supreme Court, and in such inferior Courts as the Congress may . . . establish,'" *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018), "Congress cannot 'confer the Government's 'judicial power' on entities outside Article III," *id.* (quoting *Stern v. Marshall*, 564

U.S. 462, 484 (2011). And "where constitutional rights are at stake," "the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Gonzalez v. Carhart*, 550 U.S. 124, 165 (2007) (*quoting Crowell v. Benson*, 285 U.S. 22, 60 (1932)). If § 6083(a)(1) were read to strip Article III courts of all power to review FCSC determinations of ownership in reviewing a constitutional claim or defense, that provision would violate the separation of powers by assigning a necessary element of the Article III "judicial power"—the ability to decide constitutional claims and defenses—exclusively to the FCSC, an agency within the Executive branch. And finally, treating the FCSC's determination as conclusive in evaluating Defendants' due-process claim would violate the bedrock principle that a party cannot be bound by an earlier tribunal's adjudication of an issue when that party was neither represented nor had the opportunity to participate in the earlier proceeding, especially when a statutory scheme permitting nonparty preclusion would eliminate "any practicable opportunity" to contest government action "on federal constitutional grounds." *Richards v. Jefferson Cnty.*, 517 U.S. 793, 802-803 (1996).

2. Plaintiff's Damages Request Is Grossly Disproportionate Even if Plaintiff Had Owned an Interest in the Terminal

Aside from and independent of Ms. Diaz's analysis, however, it is clear that the damages in this case would be excessive even if measured against the amounts each Defendants paid for using the property. Here, the ratio of statutory-to-actual damages is approximately 21:1. This is plainly impermissible: the Supreme Court and the Eleventh Circuit have held "that a ratio greater than 4:1 between punitive and compensatory damages will likely be close to the line of constitutional impropriety," and that when "the plaintiff has received a substantial compensatory damages award, then a lesser ratio as low as 1:1 may reach the outer limits of the due process guarantee." *Williams v. First Advantage LNS Screening Sols. Inc.*, 947 F.3d 735, 754–55 (11th

Cir. 2020); *see also State Farm*, 538 U.S. at 425. The same principles apply in determining whether statutory damages are "grossly out of proportion to the actual damages." *Tucker*, 230 U.S. at 351; *see also Montera*, 2022 WL 3348573, at *6 (reducing statutory-damages award in part because "the ratio of the statutory damages [was] immense as compared to the actual damages").

No circumstances here, moreover, would support such proportion of punitive damages. The Supreme Court's punitive-damages caselaw identifies five factors relevant to determining whether conduct is sufficiently reprehensible to warrant punishment through damages in excess of actual damages: "(1) whether the harm caused was physical, rather than economic; (2) whether the defendant's conduct 'evinced an indifference to or a reckless disregard of the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether 'the conduct involved repeated actions or was an isolated incident'; and (5) whether the harm resulted from intentional malice, trickery, or deceit, or mere accident.'" *First Advantage LNS Screening Sols. Inc.*, 947 F.3d at 749 (quoting *State Farm*, 538 U.S. at 419). The same factors are relevant in assessing the constitutional reasonableness of a statutory award where, as here, that award operates as a retributive penalty. *See Montera*, 2022 WL 3348573, at *5–6 (assessing statutory damages under *State Farm* reprehensibility criteria because of the punitive aim of the statute); *see also Cooper Indus., Inc.*, 532 U.S. at 432 (explaining that punitive damages "operate as 'private fines' intended to punish the defendant and deter future wrongdoing."). None of these factors are present here.

The first three factors—physical harm, reckless disregard for health and safety, and financial vulnerability—are non-existent here. Plaintiff is a legal entity and has never alleged a physical injury. (If it sustained any injury, that injury was purely economic.) Nothing in Defendants' conduct manifested an indifference to or a reckless disregard of health or safety. And

Plaintiff is not financially vulnerable—it is a corporation that exists almost exclusively for the purpose of maintaining the claim for damages it asserts here. *See* ECF No. 367 at 25, 102–03; *Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470, 487 (6th Cir. 2007) (holding business was "not financially vulnerable, as its business model requires it vigilantly to sue on its copyrights").

The fourth factor—whether the conduct was repeated or was an isolated incident—does not show reprehensibility, either. Defendants' actions constituted a single, isolated course of conduct. That course of conduct included multiple discrete acts of docking at the Terminal, but "[t]he repeated conduct factor 'require[s] that similar reprehensible conduct be committed against various different parties rather than repeated reprehensible acts within the single transaction with the plaintiff.'" *Bridgeport Music*, 507 F.3d at 487 (quoting *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 1000 (6th Cir. 2007) (quotation marks and citation omitted)) (holding multiple infringements of the same copyright in different songs did not constitute repeated conduct). Repeated acts within a single course of conduct are not evidence that the Defendant is a "recidivist" who may thus "be punished more harshly than a first offender" without offending the Due Process Clause, *State Farm*, 538 U.S. at 423, so they are irrelevant in examining whether a penalty is "disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 66–67.

Finally, Defendants did not use the Terminal out of "malice, trickery, or deceit." *State Farm*, 538 U.S. at 419. There is no evidence of malice (nor could there be), and Defendants did not use any form of fraud, trickery, or deceit to access the Terminal. Based on all of the evidence in the record, the most this Court has said is that "Defendants did not use the Terminal by mistake or accident" but "voluntarily and intentionally traveled to Havana and used the Terminal," and that Defendants had access to facts that "would lead a reasonable person to conclude that using the

Terminal may constitute trafficking under the LIBERTAD Act." ECF No. 367 at 94–95. But the Eleventh Circuit has held that far more is required to show malice for punitive-damages purposes: "malice" requires an "intent to harm Plaintiff," not merely a finding that the defendant "acted willfully" or "a showing of recklessness." *First Advantage LNS Screening Sols. Inc.*, 947 F.3d at 754; *see also Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1066 (10th Cir. 2016) (holding "failure to correct known problems" with furnaces risking exposure of "all of the complex's tenants to CO poisoning" did not establish malice because there was no finding that defendant "acted with the intent to harm" plaintiff); *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 365 (6th Cir. 2005) ("While the district court's holdings do not support a finding that [defendant's] actions were a product of mere accident, as the court stated that a reasonable juror might have found that the actions were reckless, the findings certainly do not support a finding of intentional malice, trickery, or deceit."); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1336 (11th Cir. 1999) (affirming ruling that "'deliberate indifference' did not constitute severe 'reprehensibility' under *BMW*."). Here, acting with the encouragement of the United States Government in a historic re-opening of relations with Cuba, Defendants provided cruise travel to Havana; they did not act with some malice or intent to harm Plaintiff.

Punitive-damages precedents hold that in the absence of all or almost all of the factors indicative of reprehensible conduct, the Due Process Clause bars ***any*** award of punitive damages. *State Farm*, 538 U.S. at 419 ("[P]unitive damages ***should only be awarded if*** the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." (emphasis added)); *Chicago Title*, 487 F.3d at 1001 (holding no award of punitive damages would be constitutional where "the only factor present [was] that [defendant] acted with malice," there "were no physical injuries or

threat to personal safety," and plaintiff "was not a financially vulnerable victim"). The same principles should apply here, because the "statutory damages no longer serve purely compensatory or deterrence goals" and the damages are "gravely disproportionate to and unreasonably related to the legal violation committed." *Wakefield*, 2022 WL 11530386, at *10–11.

At minimum, it is inappropriate to award damages that exceed a 1:1 ratio between purely statutory damages and actual damages. *See, e.g.*, *Epic Sys. Corp. v. Tata Consultancy Services Ltd.*, 980 F.3d 1117, 1141–42, 1144–45 (7th Cir. 2020) (reducing award below a statutory cap on punitive damages to a 1:1 ratio where defendant abused consultancy relationship to steal thousands of proprietary documents and three factors were established due to substantial unjust-enrichment award); *Morgan v. New York Life Ins. Co.*, 559 F.3d 425, 442–43 (6th Cir. 2009) (reversing and ordering district court to reduce award with a 1.67:1 ratio to 1:1 ratio or lower when plaintiff established repeated acts of age discrimination); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602–03 (8th Cir. 2005) (reversing and reducing to 1:1 ratio despite evidence that defendant sold cigarettes that "were extremely carcinogenic and extremely addictive—substantially more so than other types of cigarettes," sales "occurred repeatedly over the course of many years despite American Tobacco's knowledge that the product was dangerous," defendant "actively misled consumers about the health risks" and the harm caused was "a most painful, lingering death following extensive surgery").

In sum, the damages sought by Plaintiff and contemplated by the Helms-Burton Act violate basic due-process requirements. The Due Process Clause does not tolerate statutory-damages measures that are wholly disproportionate to the defendant's offense and the plaintiff's actual damages. But the Act's measure of damages is designed to punish "traffickers" for a wrong they did not commit—the expropriation of the property itself—and both as a general rule and as applied

to the facts of this case, this method of calculating damages yields statutory awards that have no relationship whatsoever to the plaintiff's actual injury. For these reasons, Plaintiff's request for wildly excessive damages must be rejected, and any award issued in this case must conform to the constitutionally permissible ratio of actual-to-statutory damages.

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's cases against the four cruise line Defendants for lack of standing. Alternatively, the Court should find that the damages Plaintiff seeks are unconstitutionally excessive or, at a minimum, reduce the underlying Claim amount by the value of the property interests in which Defendants were neither alleged nor found to have trafficked.

Dated: November 4, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 4, 2022, the foregoing was filed with the Clerk of Court using CM/ECF, which will serve a Notice of Electronic Filing on all counsel of record.

By:/s/ *Allen P. Pegg*
Allen P. Pegg

EXHIBIT A

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of	
STARWOOD HOTELS & RESORTS WORLDWIDE, INC.	Claim No. CU-2-001
	Decision No. CU-2-001
Against the Government of Cuba	

Counsel for Claimant: Lawrence E. Levinson, Esquire
DLA Piper Rudnick Gray Cary US LLP

PROPOSED DECISION

This claim against the Government of Cuba is based upon the alleged nationalization or other taking of real and personal property in Cuba owned by the claimant's subsidiary, Radio Corporation of Cuba.

Under subsection 4(a) of Title I of the International Claims Settlement Act of 1949 ("ICSA"), as amended, the Commission has jurisdiction to

> receive, examine, adjudicate, and render a final decision with respect to any claim of . . . any national of the United States . . .included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

22 U.S.C. 1623(a)(2002).

By letter to the Chairman of the Commission dated July 15, 2005 (the "Referral Letter"), the Secretary has referred for adjudication by the Commission a category of claims of United States nationals against the Government of Cuba, defined as property claims that:

a. would have been eligible under the Cuban Claims Program (22 U.S.C. § 1643 et seq.) but for the fact that they did not arise by the time of the filing deadline of May 1, 1967, provided that they were not otherwise adjudicated by the Commission prior to the completion of the Cuban Claims Program;

b. arise on or before the date of publication of a *Federal Register* notice by the Commission concerning the . . . referral;

c. are determined in accordance with the provisions of the Cuban Claims Program to the extent that such provisions are not inconsistent with 22 U.S.C. § 1623, and where such inconsistency exists, in accordance with the provisions of 22 U.S.C. § 1623;

d. are not claims for disability or death as provided under 22 U.S.C. § 1643b(b);

e. are submitted [to the Commission] within six months of the *Federal Register* notice; and

f. are determined by the Commission within twelve months of the *Federal Register* notice.

On August 11, 2005, the Commission duly published notice in the Federal Register announcing the commencement of its Second Cuban Claims Program pursuant to the referral by the Secretary of State. 70 F.R. 46890 (August 11, 2005). Thereafter, on August 19, 2005, the Commission received from claimant's counsel a completed Statement of Claim and accompanying exhibits laying out the elements of the claimant's claim. Subsequently, on January 23, 2006, and February 24, 2006, the Commission received further submissions from the claimant describing and documenting its claim in greater detail.

According to the record now before the Commission, this claim is based on the uncompensated nationalization or other taking by the Cuban government of two large parcels of land in the vicinity of the José Martí International Airport near Havana, Cuba, and a third parcel east of Havana near the ocean. The land was originally acquired and owned by the Radio Corporation of Cuba ("RCC"), a wholly owned Cuban subsidiary of International Telephone and Telegraph ("ITT"), which was broken up and sold off in 1998, with the portion comprising RCC being acquired by the present claimant. In addition, claimant asserts that RCC owned bank accounts in Havana holding approximately 77,000 Cuban pesos which were lost as part of the government seizure of the company's property in 2003. A portion of the claim is said to have arisen in 1968, when the Castro regime seized some 425,000 square meters of land adjacent to the airport for extension of the airport runway, and the remainder assertedly arose in 2003, when the regime seized RCC and ordered its dissolution.

The Commission previously found ITT to be a United States national in the Commission's First Cuban Claims Program. *Claim of INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION against Cuba*, Claim No. CU-2615, Decision No. CU-5013 (1970). According to the present claimant's (Starwood's) Statement of Claim, it was organized under the laws of the State of

Maryland on March 27, 1980, and from September 30, 2003, until the filing of this claim in August 2005, at least 90 percent of it shares of stock was owned by nationals of the United States. In addition, documentation in the file indicates that well over 50 percent of the claimant's stock was owned by United States nationals from 1998 to 2003. Further, the Commission determined in its East German claims program that ITT qualified as a United States national during a period which included the years 1968 to 1981. *Claim of INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION against the German Democratic Republic*, Claim No. G-2401, Decision No. G-3164 (1981).

Turning more specifically to the factual details of the claim, the record reflects that RCC was established by ITT in Cuba in 1922 and in 1929 was granted a concession for the purpose of facilitating commercial telephone and telegraph communications between Cuba and the United States and other countries. As sites for the antennas and other equipment and apparatus required for conducting its communications business, it eventually acquired three tracts of land,[1] described as follows:

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[1]The record also reflects that RCC owned and occupied a fourth parcel of real property consisting of an office building at 508 Avenida Salvador Allende.(formerly Avenida Carlos III). Although this property was originally included in its claim, claimant has advised the Commission that it does not wish to press a claim for the seizure of that property, or the personal property contained therein.

1. A tract identified as "Cabañas" consisting of 1,207,818 square meters (about 298.4 acres), acquired in 1946 and adjacent to what is now known as José Martí International Airport, on which RCC operated a radio receiving station.

2. A tract identified as "Finca Margarita" consisting of 880,000 square meters (about 217.4 acres), also acquired in 1946 and located some 22 miles from Havana, about 4.5 miles from José Martí International Airport, on which RCC operated a transmitting station.

3. A tract identified as "Guanabo" consisting of 18,733 square meters (about 4.6 acres), acquired in 1955 and located some 15 miles from Havana, about ½ mile from the coast, on which RCC operated an over-the-horizon radio station.

In addition, the record reflects that RCC owned several bank accounts in Cuba with a balance of 77,066.95 Cuban pesos as of May 31, 2003.

According to the claim file, claimant's subsidiary RCC ended the last of its communications operations in 1992, after Hurricane Andrew destroyed a receiving station in Florida City, Florida, to which RCC had been transmitting. However, the Cuban government allowed the company to continue to exist, with an office in Havana to which several employees reported for work each day, until one day in late September 2003, when Cuban law enforcement authorities seized the office and

ordered the company's dissolution. The record indicates that this was completed on September 30, 2003.

Based on its review of the evidence and information submitted, the Commission finds that the claimant's predecessor, ITT, was a United States national at all times relevant to this claim, that it was the sole owner of the Cuban company RCC, that RCC owned approximately 425,000 square meters of land which was part of the "Cabañas" tract adjacent to the José Martí International Airport outside Havana, and that this land was nationalized or otherwise taken by the Cuban government, without payment of compensation, during the year 1968. For lack of a precise date, the Commission will deem the taking of the property to have occurred as of January 1, 1968. The Commission further finds that the present claimant succeeded to ownership of the portion of ITT's assets consisting of RCC's claim for the resulting loss of this property through acquisition of its interest in ITT in 1998. Accordingly, claimant is entitled to compensation for the taking of the 425,000 meters of land here in question, dating from January 1, 1968.

Additionally, the Commission finds that RCC owned 782,818 square meters of land consisting of the remainder of the tract known as "Cabañas" near José Martí International Airport outside Havana, Cuba, along with a tract of land measuring 880,000 square meters known as "Finca Margarita" and located some 22 miles from

Havana, about 4.5 miles from José Martí International Airport, and a tract of land consisting of 18,733 square meters known as "Guanabo" and located some 15 miles east of Havana, about ½ mile from the ocean, and that the present claimant succeeded to ownership of these three tracts of land, as well as RCC's bank account, when it acquired RCC from ITT in 1998. Further, the Commission finds that in September 2003 the Cuban government seized the offices of RCC and ordered the dissolution of the company, which was completed on September 30, 2003, and that as a result, the three tracts and RCC's bank account were also nationalized or otherwise taken by the Cuban government, without payment of compensation, as of September 30, 2003. Accordingly, the claimant is entitled to compensation for the loss of the property as of that date.

Turning to the question of the value of the tracts of land and bank account on the dates of loss, claimant has not assigned a separate value to the portion of the Cabañas tract taken in 1968, but instead has listed the entire tract of approximately 1.2 million square meters at a value of $36,000,000, or $30 per square meter, as of 2003. As for Finca Margarita and Guanabo, claimant asserts that the values of the respective tracts were $30 per square meter and $40 per square meter in 2003. These figures are said to represent the value of the land alone; whatever structures

or other improvements that may still exist on the tracts are not considered to have any value.

In support of these value figures, claimant has submitted, among other things, an extensive affidavit by Mr. Jose C. Duarte da Silveira, who served as an executive, and later Overseas Area General Manager, with ITT from 1950 to 1994 and since then has worked as a consultant for ITT and Starwood. Mr. Duarte states that he developed a comprehensive familiarity with RCC and its assets and operations which continued up to as recently as 2003 when he last visited Cuba and inspected RCC's facilities. In addition, he states that he consulted extensively with land value experts in Puerto Rico to corroborate and refine his appraisals of the three RCC tracts here in issue. Further, under date of February 24, 2006, claimant's counsel has provided a report by claimant's corporate staff discussing the results of a survey it conducted of the values of broadly comparable land in Costa Rica, the British Virgin Islands, St. Kitts, St. Maarten, Puerto Rico, the Bahamas, the Turks and Caicos, and Cancun, Mexico, as well as an article from the June 6, 2002, issue of the magazine *Caribbean Business*[2] on the value of vacant land in Puerto Rico.

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[2]"From Deficit to Surplus: A Cash-Strapped, Tax-Hungry Government Sits on More than $7 Billion of Idle Real Estate that Could Make Budget Deficits Disappear Overnight," by Marialba Martinez

Subsection 4(a)(2)(B) of Title I of the ICSA provides:

> In determining the value of a claim under international law, the Commission shall award the fair market value of the property as of the time of taking by the foreign government involved . . ..

22 U.S.C. 1623(a)(2)(B)(2002).

Based on comparisons with other claims involving vacant land that were adjudicated in its First Cuban Claims Program,[3] the Commission finds that the 425,000-square-meter portion of the Cabañas tract had a value of $1.00 per square meter, or $425,000.00, as of the taking date of January 1, 1968. As for the land taken in 2003, the Commission is satisfied from its review of Mr. Duarte's affidavit and the recently submitted studies that the three tracts had values at the time of the taking that were at least equal to the figures asserted by the claimant. Accordingly, the Commission finds that as of September 30, 2003, the remaining 782,818 square meters of the Cabañas tract had a value of $23,484,540.00, and that the Finca Margarita and Guanabo tracts had respective values of $26,400,000.00 and $749,320.00 as of that date. Accordingly, claimant is entitled to compensation in the principal amount of $425,000.00, dating from January 1, 1968, and to compensation in the principal amount of $50,633,860.00, dating from September 30, 2003. Lastly, based on the Cuban Government's own well-known contention that the exchange

[3]E.g., Claim of BURRUS MILLS against Cuba, Claim No. CU-0548, Decision No. CU-4234 (1969).

rate between the Cuban peso and the United States dollar was 1:1 in 2003,[4] the Commission finds that RCC's bank account had a value of $70,066.95 as of September 30, 2003, and that claimant is entitled to compensation in that amount for the account's loss as of that date.

INTEREST

Consistent with its decisions in the First Cuban Claims Program, the Commission further finds that claimant is entitled to interest on the amounts to which it has been found entitled herein, at the rate of 6 percent from the dates of loss to the date of settlement. *Claim of LISLE CORPORATION against Cuba*, Claim No. CU-0644, Decision No. CU- 0267 (1967).

CERTIFICATION OF LOSS

The Commission certifies that STARWOOD RESORTS AND HOTELS WORLDWIDE, INC., suffered a loss, as a result of actions of the Government of Cuba, within the scope of the Secretary of State's Referral Letter of July 15, 2005, and the International Claims Settlement Act of 1949, as amended, in the principal amount of Four Hundred Twenty-Five Thousand Dollars ($425,000.00), with interest thereon at 6 percent per annum from January 1, 1968, and in the principal amount of Fifty Million Seven Hundred Three Thousand Nine Hundred Twenty-Six

[4]See, e.g., Central Intelligence Agency World Factbook, 2004, p.143 (based on information available as of January 1, 2004).

Dollars and Ninety-Five Cents ($50,703,926.95), with interest thereon at 6 percent per annum from September 30, 2003.

Dated at Washington, DC and
entered as the Proposed
Decision of the Commission

MAR 0 2 2006

Mauricio J. Tamargo, Chairman

Jeremy H. G. Ibrahim, Commissioner

This decision was entered as the Commission's
Final Decision on APR 07 2006

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after service or receipt of notice of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. 509.5 (e) and (g) (2005).

EXHIBIT B

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

IN THE MATTER OF THE CLAIM OF

CHARLES EDWARD SARGENT
ROSABEL GILBERT SARGENT

Claim No. CU-2328

Decision No. CU - 6808

Under the International Claims Settlement Act of 1949, as amended

Counsel for claimants: Henry T. Downey, Esq.

PROPOSED DECISION

This claim against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, in the amount of $119,565.00 was presented by CHARLES EDWARD SARGENT and his wife ROSABEL GILBERT SARGENT, based upon the asserted loss of real and personal property. Claimants have been nationals of the United States since birth.

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 504 of the Act provides, as to ownership of claims, that

> (a) A claim shall not be considered under section 503(a) of this title unless the property on which the claim was based was owned wholly or partially, directly or indirectly by a national of the United States on the date of the loss and if considered shall be considered only to the extent the claim has been held by one or more nationals of the United States continuously thereafter until the date of filing with the Commission.

Claimants state that they suffered losses based upon the following property:

(1) An inherited interest in a farm, known as Finca "La Canoa", located near Camaguey, Cuba;

(2) Land in the suburban section known as Reparto Kohly, Municipality of Marianao, near Havana;

(3) An interest in two building lots, situated at Santa Amelia, and six building lots situated at Reparto Ermita;

(4) Equipment, accessories and a bank account belonging to The Phillips School, at Marianao;

(5) Furniture, furnishings and jewelry located at claimant's residence at No. 2857 Avenida 49, Reparto Kohly, Marianao; and

(6) Bonds of the Havana Biltmore Yacht and Country Club and of the Grand Lodge of Masons of Cuba.

In support of the claim, claimants submitted affidavits, excerpts from the Cuban Official Gazette, correspondence and other documentation.

The individual items of the claim are discussed under separate headings below.

(1) Finca "La Canoa"

The record shows that Olivia Molina, mother of claimant ROSABEL GILBERT SARGENT owned a one-third interest in land measuring 63 Cuban caballerias (or 2,089.08 acres), located near the town of Magarabomba, province of Camaguey; that Olivia Molina died intestate in 1939 and that ROSABEL GILBERT SARGENT and three other children of the deceased inherited the property of their mother; and that ROSABEL GILBERT SARGENT thus became the owner of a one-twelfth interest in the aforesaid property.

The record further shows that a substantial part of the Finca "La Canoa" was leased to the Florida Industrial Corporation of New York, operator of the Baragua Sugar Mill; and that the corporation together with the Baragua Sugar Mill and with all their appurtenances were nationalized by the Government of Cuba

pursuant to the provisions of Law 851 by Resolution No. 1 published in the Official Gazette of August 6, 1960. The Commission, therefore, finds that the farm Finca "La Canoa" was nationalized by the Government of Cuba on August 6, 1960.

The value of the farm remains to be determined. 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 the standard by giving specific bases of valuation that the Commission shall consider.

The evidence submitted by the claimants shows that approximately 17 caballerias of the Finca "La Canoa" consisted of land cultivated for the production of sugar cane, and approximately 46 caballerias were used as pastures, for cattle raising and hog feed. The Commission has determined in previous claims (see Claim of the Estate of Charles R. Burford, Deceased, Claim No. CU-0092) that farms of this type in the central part of Cuba had the following land values: cane land $7,000 per caballeria, pasture land $5,000 per caballeria and undeveloped land $2,000 per caballeria. The Commission therefore finds that at the time of taking, the land of the Finca "La Canoa" had the following value:

17 caballerias sugar cane land		$119,000.00
46 caballerias pasture land		230,000.00
	Total	$349,000.00

and that the one-twelfth interest inherited by ROSABEL GILBERT SARGENT was worth $29,083.33. Accordingly, the Commission concludes that ROSABEL GILBERT SARGENT suffered a loss in that amount.

A claim is also asserted for the loss of additional interests in the farm property assertedly inherited in 1965 from claimant's aunt Julia Olivia and in 1966 from claimant's uncle Roberto Olivia. However, no evidence has been submitted and nothing in the record shows that at the time of the loss Julia Molina and Roberto Molina were nationals of the United States, as required by Section 504 of the Act (supra). In the absence of such evidence the claim for additional losses in excess of the loss of the aforementioned inherited one-twelfth interest must be and it is hereby denied.

(2) Land in Marianao

The record shows that CHARLES EDWARD SARGENT was the record owner of a land parcel described as building lots Nos. 10 and 11 of block No. 3, situated on Bellavista Street in the section known as Reparto Kohly, Municipality of Marianao, Havana, measuring 539.32 square meters, part of which he acquired by purchase in 1953 and part in 1957.

Under the community property law in Cuba, property acquired during marriage by one or both spouses from the funds of marriage partnership, or from the industry, salary or work of either of the spouses, or the fruits thereof (but not property acquired by inheritance) belongs in equal parts to both spouses. (See Claim of Robert L. Cheaney and Marjorie L. Cheaney, Claim No. CU-0915). The Commission, therefore, concludes, that the above land in Marianao was owned jointly by CHARLES EDWARD SARGENT and ROSABEL GILBERT SARGENT in equal shares.

This land was subject to Cuban Law 989 published in the Official Gazette of December 6, 1961, which effected confiscation of all goods, chattels, real estate, rights, shares, stock, bonds, securities, and other property of persons who left Cuba. Claimants left Cuba in 1960 and the Commission concludes that the land parcel in question was taken by the Government of Cuba on December 6, 1961.

The evidence before the Commission shows that at the time of taking vacant land in the section known as Reparto Kohly had an average value of $25.00 per square meter. Accordingly, the Commission finds that at the time of taking claimants' land was worth $13,483.00 and that each claimant suffered a loss in the amount of $6,741.50.

(3) Building Lots at Santa Amelia and Reparto Ermita

Claimants state that they owned certain land sold by the Compania Territorial Santa Amelia S.A. consisting of two building lots. The evidence submitted by the claimants shows that claimants had purchased these lots on an instalment plan, and that they had paid on account $5,621.28. After having left Cuba, they discontinued further payments, and the Commission finds that claimants' interest in these two lots was taken by the Government of Cuba under the provisions of Law 989 on December 6, 1961.

Since claimants owned the said building lots jointly, each of them suffered a loss of $2,810.64.

Claimants further state that they owned six building lots situated at the Reparto Ermita. No evidence whatsoever has been submitted in support of this portion of the claim and nothing in the file indicates that claimants, in fact, owned these six building lots.

The Regulations of the Commission provide:

> The claimant shall be the moving party and shall have the burden of proof on all issues involved in the determination of his claim. (FCSC Reg. 45 C.F.R. §531.6(d)(1970).)

The Commission finds that claimants have not met the burden of proof with respect to the claim based upon the six building lots at Reparto Ermita and this portion of the claim is therefore denied.

(4) The Phillips School

The record shows that claimants were the owners of a private educational institution known as The Phillips School (Colegio Phillips), located at No. 2842 Avenida 49, Reparto Kohly, Marianao. It consisted of an elementary (grammar) and secondary (high school) division. Claimants state that the equipment for approximately 1,000 students consisted of desks, lab facilities, classroom equipment, dining room facilities, air conditioning machinery, filing cabinets, typewriters, adding machines, an intercom system, musical equipment (three pianos), instruments for a school band, sport equipment for baseball, basketball and other sport activities, a large library and the like. Claimants further

state that the school had a bank account at the Trust Company of Cuba, Almendares branch office, with a balance of $11,000 at the time of nationalization of the school.

On June 6, 1961, the Government of Cuba published a Law in its Official Gazette which nationalized as of that date all centers of instruction operated by private entities, as well as all properties, rights and interests therein. Accordingly, the Commission finds that The Phillips School was nationalized by the Government of Cuba on June 6, 1961.

Claimants state that the equipment of the school represented an investment of $36,000.00. The Commission finds that this sum represents the original cost of the school equipment and material acquired from 1948 to 1959, and that at the time of nationalization the value of the equipment and material had depreciated by 25% or $9,000, resulting in a value of $27,000 to which is added a bank account of $11,000.00 an aggregate value of $38,000.00.

Accordingly, each claimant suffered a loss, as a result of actions of the Cuban Government in the amount of $19,000.00.

(5) Home Furniture and Furnishings

Claimants state that they owned furniture and furnishings, as well as jewelry located at No. 2837 Avenida 49, Reparto Kohly, Marianao. The furniture and furnishings consisted of a dining room, living room, bedroom and accessories.

The Commission finds that this property was taken by the Government of Cuba under the provisions of Law 989 (supra) on December 6, 1961.

Claimants submitted a detailed list of the personal property indicating that the value of the furniture, furnishings and personal effects was $13,000 and the value of jewelry $2,000.

The Commission finds that $13,000 represents the cost of furniture, furnishings and personal effects and that at the time of taking its value had depreciated by 25%, resulting in a net value of $9,750.00. The value of the jewelry in the amount of $2,000 is not affected by depreciation. The Commission, therefore, concludes, that the total value of the property discussed under this heading was $11,750.00 and that each claimant suffered a loss of $5,875.00.

(6) Bonds

Claimants state that CHARLES EDWARD SARGENT owned a $2,000 Series B bond of the Havana Biltmore Yacht and Country Club and $500.00 5% bonds of the Grand Lodge of Masons of Cuba.

The record shows that CHARLES EDWARD SARGENT was a member in good standing of the Havana Biltmore and Yacht Club. The Commission records, however, do not show that this Club ever issued bonds designated Series B. On the other hand, the records indicate that the Club issued stock certificates designated Series B, the ownership of which was coupled with the right of membership in the Club, but with no rights in the physical assets of the Club. The Commission has held that the membership right also constitutes property within the meaning of Section 502(3) of the Act and that upon intervention of the Club by the Government of Cuba on March 19, 1960, such members, if otherwise qualified, suffered a loss within the meaning of the Act (see Claim of Robert J. Macaulay and Maria Agnes Macaulay, Claim No. CU-0311). The Commission has further held that the value of such membership at the time of intervention was the cost of the membership. In the absence of evidence as to such cost in the instant claim, the Commission finds that the value of the membership was $500.00 and that each claimant suffered a loss in the amount of $250.00.

The claim based upon the 5% bonds of the Grand Lodge of Masons of Cuba is a creditor's claim against a Cuban entity. The record does not show that the Grand Lodge of Masons of Cuba was nationalized, expropriated, intervened or taken by the Government of Cuba; nor that the bonds were a charge upon property which has been nationalized, expropriated, intervened or taken by the Government of Cuba. In the absence of such evidence, this portion of the claim cannot be considered and it is hereby denied.

Recapitulation

The losses are summarized as follows:

Property	Date of Loss	Amount
	CHARLES EDWARD SARGENT	
Land in Marianao	December 6, 1961	$ 6,741.50
Land Santa Amelia	December 6, 1961	2,810.64
The Phillips School	June 6, 1961	19,000.00
Household goods & jewelry	December 6, 1961	5,875.00
Biltmore Club membership	March 19, 1960	250.00
	Total	$34,677.14
	ROSABEL GILBERT SARGENT	
Finca "La Canoa"	August 6, 1960	$29,083.33
Land in Marianao	December 6, 1961	6,741.50
Land Santa Amelia	December 6, 1961	2,810.64
The Phillips School	June 6, 1961	19,000.00
Household goods & jewelry	December 6, 1961	5,875.00
Biltmore Club membership	March 19, 1960	250.00
	Total	$63,760.47

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 this case it is so ordered, as follows:

FROM	ON
	CHARLES EDWARD SARGENT
March 19, 1960	$ 250.00
June 6, 1961	19,000.00
December 6, 1961	15,427.14
	$34,677.14
	ROSABEL GILBERT SARGENT
March 19, 1960	$ 250.00
August 6, 1960	29,083.33
June 6, 1961	19,000.00
December 6, 1961	15,427.14
	$63,760.47

CERTIFICATION OF LOSS

The Commission certifies that CHARLES EDWARD SARGENT 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 Thirty-Four Thousand Six Hundred Seventy-Seven Dollars and Fourteen Cents ($34,677.14) with interest at 6% per annum from the respective dates of loss to the date of settlement; and

The Commission certifies that ROSABEL GILBERT SARGENT 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 Sixty-Three Thousand Seven Hundred Sixty Dollars and Forty-Seven Cents ($63,760.47) with interest 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

SEP 8 1971

Lyle S. Garlock, Chairman

Theodore Jaffe, Commissioner

NOTICE TO TREASURY: The above-referenced securities may not have been submitted to the Commission or if submitted, may have been returned; accordingly, no payment should be made until claimant establishes retention of the securities or the loss here certified.

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

NOTICE: Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. 531.5(e) and (g), as amended (1970).)

EXHIBIT C

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

IN THE MATTER OF THE CLAIM OF

HAROLD GOTTLIEB
and
MARGARITA GOTTLIEB

Claim No. CU -2022

Decision No. CU 5947

Under the International Claims Settlement Act of 1949, as amended

PROPOSED DECISION

This claim against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, in the amount of $94,316.00, was presented by HAROLD GOTTLIEB and MARGARITA GOTTLIEB based upon the asserted loss of certain real and personal property in Cuba. Claimants, husband and wife, have been nationals of the United States since birth and July 12, 1960, respectively.

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.

Claimants assert the following losses:

1.	Furnished apartment house at 3rd-A Street, between 172d and 174th Streets, Marianao, Havana, Cuba	$ 29,908.00
2.	Apartment house at 174th Street, between 1st and 2d Streets, Marianao, Havana, Cuba	25,908.00
3.	House at 132 - 172d Street, Marianao, Havana, Cuba	17,500.00
4.	Land at Carretera de Bauta, Santa Cruz, Cuba	12,000.00
5.	Furniture, fixtures, air conditioners, etc. at the house in item 3 above	2,000.00
6.	Personal effects at the above house	4,000.00
7.	Standard Service Station at Autopista del Mediodia, Marianao, Havana, Cuba	3,000.00
	Total	$ 94,316.00

Improved Real Properties

The evidence includes a copy of claimants' joint affidavit of December 29, 1965, and a copy of an affidavit of April 15, 1966 from Dr. J. Hevia, Jr., claimants' former Cuban attorney, which affidavits were submitted in support of claimed tax deductions. It further appears that claimants were allowed tax deductions for their Cuban losses. Reports from abroad fail to support claimants' assertions concerning ownership of the three items of improved real property in question. However, Dr. Hevia's affidavit recites as follows on the basis of personal knowledge as a Cuban attorney who had access to the deeds to the properties:

a. that claimants jointly owned the two apartment houses claimed herein (Items 1 and 2); and

b. that claimants jointly owned the house (Item 3).

Based upon the foregoing, the Commission finds that claimants jointly owned the said two apartment houses and the house. Claimants state that these improved real properties were taken by the Government of Cuba on October 14, 1960 pursuant to the Urban Reform Law.

On October 14, 1960, the Government of Cuba published in its Official Gazette, Special Edition, its Urban Reform Law. Under Article 2 of this law the renting of urban properties and all other translations or contracts involving transfer of the total or partial use of urban properties was outlawed. The law covered residential, commercial, industrial and business office properties (Article 15). The Commission finds in the absence of evidence to the contrary that the three improved real properties herein were within the purview of the Urban Reform Law and were taken by the Government of Cuba on October 14, 1960. (See Claim of Henry Lewis Slade, Claim No. CU-0183, 1967 FCSC Ann. Rep. 39.)

As noted above, claimants assert that the two apartment houses had values of $29,908.00 and $25,908.00, respectively; and that the value of their private house was $17,500.00. Dr. Hevia's affidavit of April 15, 1966 sets forth that each of the two apartment houses had a value of $24,000.00; and that the house was acquired at a cost of $15,000.00 and that claimants improved the property at a cost of approximately $2,000.00. It appears from claimants' statements of February 28, 1969 that they improved the apartment house on 3rd Street (Item 1) by the addition of a water tank, water pump, and fence; and that they furnished the three apartments therein, the total cost of which was about $6,000.00. The other apartment house (Item 2) was also improved by a water tank, water pump, and fence, but the three apartments therein were not furnished.

On the basis of the entire record, the Commission finds that claimants' valuations are fair and reasonable. Accordingly, the Commission finds that on October 14, 1960, the date of loss, the furnished apartment house on 3rd Street (Item 1) had a value of $29,908.00; the apartment house on 174th Street (Item 2) had a value of $25,908.00; and the house on 172d Street (Item 3) had a value of $17,500.00, aggregating $73,316.00. Therefore, the value of each claimant's one-half interest therein was $36,658.00.

Land

Claimants assert that they jointly owned certain land in Santa Cruz, Cuba, having an area of 8,000 square yards and costing $12,000.00. However, claimants have submitted no evidence in support of their assertions although the Commission on several occasions suggested the submission of such documentation.

It is noted that Dr. Hevia's affidavit of April 15, 1966, concerning ownership of the two apartment houses and the residence, contains no reference to any other properties.

The Regulations of the Commission provide:

> The claimant shall be the moving party and shall have the burden of proof on all issues involved in the determination of his claim. (FCSC Reg., 45 C.F.R. §531.6(d) (1969).)

The Commission finds that claimants have failed to sustain the burden of proof with respect to the portion of their claim based upon land in Santa Cruz, Cuba. Accordingly, this portion of the claim is denied.

Furniture, Furnishings and Personal Effects

Based upon the evidence of record, the Commission finds that claimants jointly owned certain furniture, furnishings and personal effects maintained at their private home (Item 3) in Marianao, Havana, Cuba. The Commission further finds that these items of personal property were taken by the Government of Cuba on October 14, 1960, when the house was taken.

Claimants have submitted a copy of an itemized list of the personal property that accompanied their claim for tax deductions. That list sets forth the asserted fair market value of the items on the list.

In response to Commission inquiries concerning the approximate dates of acquisition and the approximate costs of the items of personal property, claimants stated that they had purchased them in 1956 and had used them only for about three years until sometime in 1959 when they left Cuba. Claimants state that their assertions in this respect were accepted by the Internal Revenue Service.

Upon consideration of the entire record, the Commission finds that claimants' valuations are fair and reasonable. Accordingly, the Commission finds that the aggregate value of the furniture, furnishings and items of personal effects on October 14, 1960, the date of loss, was $6,000.00. Therefore, the value of each claimant's one-half interest therein was $3,000.00.

Standard Service Station

Claimants assert the loss of $3,000.00 based on a Standard Service Station at Autopista del Mediodia, Marianao, Havana, Cuba. No evidence has been submitted in support of this portion of the claim.

The Commission suggested the submission of appropriate evidence in this respect. Claimants' response under date of February 28, 1969 was that they had turned over all such documentation to an unnamed third party. Apparently, therefore, no evidence in support of this portion of the claim is available.

The Commission finds that the record is insufficient to warrant favorable action with respect to the portion of the claim based upon a Standard Service Station. Accordingly, this portion of the claim is denied.

RECAPITULATION

Claimants' joint losses on October 14, 1960 are summarized as follows:

Item of Property	Amount
Furnished apartment on 3rd Street	$ 29,908.00
Apartment house on 174th Street	25,908.00
House on 172d Street	17,500.00
Personal property in the residence	6,000.00
Total	$ 79,316.00

Therefore, each claimant sustained a loss in the amount of $39,658.00.

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
HAROLD GOTTLIEB	October 14, 1960	$39,658.00
MARGARITA GOTTLIEB	October 14, 1960	$39,658.00

CERTIFICATION OF LOSS

The Commission certifies that HAROLD GOTTLIEB 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 Thirty-nine Thousand Six Hundred Fifty-eight Dollars ($39,658.00) with interest thereon at 6% per annum from October 14, 1960 to the date of settlement; and

The Commission certifies that MARGARITA GOTTLIEB 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 Thirty-nine Thousand Six Hundred Fifty-eight Dollars ($39,658.00) with interest thereon at 6% per annum from October 14, 1960 to the date of settlement.

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

NOV 10 1970

Lyle S. Garlock, Chairman

Theodore Jaffe, Commissioner

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

NOTICE: Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. §531.5(e) and (g), as amended, 32 Fed. Reg. 412-13 (1967).)

CU-2022