

**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/Louis**

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

ROYAL CARIBBEAN CRUISES, LTD.,

Defendant.

**Case No. 19-cv-23590
BLOOM/Louis**

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

NORWEGIAN CRUISE LINE HOLDINGS LTD.,

Defendant.

**Case No. 19-cv-23591
BLOOM/Louis**

**NOTICE OF FILING DEFENDANTS'
OMNIBUS DAUBERT HEARING PRESENTATION**

Defendant CARNIVAL CORPORATION, by and through its undersigned counsel, hereby files this Notice of Filing Defendants' Omnibus *Daubert* Hearing Presentation pursuant to the Court's instructions. On January 25, 2022, the Court heard argument on the Parties' *Daubert* motions. Following the Parties' presentations, the Court instructed that the Parties file their respective presentations on the docket for the Court's review. Based on the foregoing, Carnival files the attached presentation.

Dated: January 26, 2022

Respectfully submitted,

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Attorneys for Carnival Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 26, 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/ Stuart H. Singer
Stuart H. Singer

Defendants' Omnibus Consolidated *Daubert* Motion

Hearing on January 25, 2022
1:30 p.m.

**Dr. Spiller's opinions easily meet the
Daubert standard.**

Damages under Title III

(a) Civil remedy

(1) Liability for trafficking

(A) Except as otherwise provided in this section, any person that, after the end of the 3-month period beginning on the effective date of this subchapter, 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 for money damages in an amount equal to the sum of--

(i) the amount which is the greater of--

(I) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, plus interest;

(II) the amount determined under section 6083(a)(2) of this title, plus interest; or

(III) the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater; and

(ii) court costs and reasonable attorneys' fees.

(B) Interest under subparagraph (A)(i) shall be at the rate set forth in section 1961 of Title 28, computed by the court from the date of confiscation of the property involved to the date on which the action is brought under this subsection.

(2) Presumption in favor of the certified claims

There shall be a presumption that the amount for which a person is liable under clause (i) of paragraph (1)(A) is the amount that is certified as described in subclause (I) of that clause. The presumption shall be rebuttable by clear and convincing evidence that the amount described in subclause (II) or (III) of that clause is the appropriate amount of liability under that clause.

Damages under Title II: Multiple Ways to Calculate Damages

(a) Civil remedy

(1) Liability for trafficking

(A) ...money damages in an amount equal to the sum of--

(i) the amount which is the greater of--

(I) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, plus interest; **(THE FCSC's CERTIFIED CLAIM AMOUNT)**

(II) the amount determined under section 6083(a)(2) of this title, plus interest; or **(AN AMOUNT DETERMINED BY A SPECIAL MASTER)**

(III) the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater; and **(THE FAIR MARKET VALUE, EITHER AT THE TIME OF CONFISCATION OR AT THE CURRENT VALUE)**

(ii) court costs and reasonable attorneys' fees.

(B) Interest under subparagraph (A)(i) shall be at the rate set forth in section 1961 of Title 28, computed by the court from the date of confiscation of the property involved to the date on which the action is brought under this subsection.

(2) Presumption in favor of the certified claims

There shall be a presumption that the amount for which a person is liable under clause (i) of paragraph (1)(A) is the amount that is certified as described in subclause (I) of that clause. The presumption shall be rebuttable by clear and convincing evidence that the amount described in subclause (II) or (III) of that clause is the appropriate amount of liability under that clause.

Damages under Title III: Rebuttable Presumption

(a) Civil remedy

(1) Liability for trafficking

(A) ... money damages in an amount equal to the sum of--

(i) the amount which is the greater of--

(I) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, plus interest;

(II) the amount determined under section 6083(a)(2) of this title, plus interest; or

(III) the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater; and

(ii) court costs and reasonable attorneys' fees.

(B) Interest under subparagraph (A)(i) shall be at the rate set forth in section 1961 of Title 28

(2) Presumption in favor of the certified claims

There shall be a presumption that the amount for which a person is liable under clause (i) of paragraph (1)(A) is the amount that is certified as described in subclause (I) of that clause. The presumption shall be rebuttable by clear and convincing evidence that the amount described in subclause (II) or (III) of that clause is the appropriate amount of liability under that clause.

Plaintiff's interpretation of the "presumption" as a one-way ratchet is illogical.

(2) Presumption in favor of the certified claims

There shall be a presumption that the amount for which a person is liable under clause (i) of paragraph (1)(A) is the amount that is certified as described in subclause (I) of that clause. The presumption shall be rebuttable by clear and convincing evidence that the amount described in subclause (II) or (III) of that clause is the appropriate amount of liability under that clause.

- There would be no need for a "presumption," nor a "clear and convincing evidence" standard, if it were merely a mathematical exercise to determine which number is greater than the other.
- Plaintiff's interpretation would turn this into a presumption **against** certified claimholders: without this language in the statute, they could already have relied on the claim value if it were greater than the other two valuations—so under Plaintiff's interpretation, this language only raises the standard of proof for certified claimholders to use other valuations.
- Plaintiff's interpretation, if accepted, would also violate Due Process.



Dr. Spiller properly addresses each of the allowed valuation methods.

1. FCSC Value: Dr. Spiller explains why the FCSC's valuation is less appropriate than other methods, because the FCSC incorrectly valued the property. (a)(1)(A)(i)(I)
2. Value at time of confiscation: Dr. Spiller calculates the value of the property at time of confiscation, one of the allowed valuation methods and one which may be needed to rebut Plaintiff's evidence. (a)(1)(A)(i)(III)
3. Current value: Dr. Spiller calculates what the property's current value would be if, contrary to the Concession's terms, it were still in effect today. (a)(1)(A)(i)(III)

(i) the amount which is the greater of--

(I) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, plus interest;

(II) the amount determined under section 6083(a)(2) of this title, plus interest; or

(III) the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater;

Plaintiff offers four reasons for excluding portions of Dr. Spiller's work, all of which fail.

1. “First, his criticisms of the FCSC’s determinations are an impermissible exercise under Title III. No provision of Title III, including its damages framework, can be used to supersede, amend, or alter the FCSC’s determinations regarding the amount and ownership of a claim.”
2. “Second, because the amount of damages under Title III cannot be lower than the amount reflected in Havana Docks’ Certified Claim, Spiller’s 1960 valuation is irrelevant.”
3. “Third, because Title III defines fair market value as either a property’s current value or its value when confiscated, *whichever is greater*, the only relevant opinion is Spiller’s current valuation—\$46,300,457.”
4. “And, fourth, insofar as Spiller concludes that an income-based approach is the only “appropriate” method to value Havana Docks’ confiscated property, he conflates the cost-based approach—an accepted method of determining fair market value—with book value.”

(Pl.’s *Daubert* Mot. 5.)

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Dr. Spiller is not superseding, amending, or altering a certified claim— only opining that the claim here is not appropriate damages in this Title III action.

“First, his criticisms of the FCSC’s determinations are an impermissible exercise under Title III. No provision of Title III, including its damages framework, can be used to supersede, amend, or alter the FCSC’s determinations regarding the amount and ownership of a claim.” (Pl.’s *Daubert* Mot. 5.)

22 USC § 6083 (c) Rule of construction

Nothing in this chapter or in section 514 of the International Claims Settlement Act of 1949 shall be construed--

- (1)** to require or otherwise authorize the claims of Cuban nationals who became United States citizens after their property was confiscated to be included in the claims certified to the Secretary of State by the Foreign Claims Settlement Commission for purposes of future negotiation and espousal of claims with a friendly government in Cuba when diplomatic relations are restored; or
- (2)** as superseding, amending, or otherwise altering certifications that have been made under title V of the International Claims Settlement Act of 1949 before March 12, 1996.

Plaintiff is wrong that each expert can offer only *one* valuation method.

“Second, because the amount of damages under Title III cannot be lower than the amount reflected in Havana Docks’ Certified Claim, Spiller’s 1960 valuation is irrelevant.”

“Third, because Title III defines fair market value as either a property’s current value or its value when confiscated, *whichever is greater*, the only relevant opinion is Spiller’s current valuation—\$46,300,457.” (Pl.’s *Daubert* Mot. 5.)

- Because the Act allows multiple means of calculating damages—and because Plaintiff may seek to prove damages under any permitted method—Dr. Spiller properly analyzed each method, and can offer opinions challenging any valuation Plaintiff may seek to use (whether current value, value at time of confiscation, or FCSC valuation).
- Indeed, Plaintiff’s *own experts* also offer opinions different valuation methodologies (cost and income approaches), just to support their analysis of the current market value.
- Regardless, this is not a *Daubert* issue: it has nothing to do with reliability of Dr. Spiller’s methods, but only the instructions given to the jury about damages.

Plaintiff misunderstands Dr. Spiller's opinions as to book value and cost-approach value.

“And, fourth, insofar as Spiller concludes that an income-based approach is the only “appropriate” method to value Havana Docks’ confiscated property, he conflates the cost-based approach—an accepted method of determining fair market value—with book value.” (Pl.’s *Daubert* Mot. 5.)

- Dr. Spiller’s **Initial** Report offered opinions about various potential valuation approaches:
 - “Income-based approach,” using discounted cash flows;
 - “Relative valuation approach,” using stock prices or transaction information from comparable assets; and
 - “Cost-based approach,” using the historical “book value.”
 - » “The book value method measures the value of an asset by reference to the value recorded in the company’s financial statements. (Spiller Report, p.34 para. 61.)
- Dr. Spiller’s **Rebuttal** Report directly addressed the “cost approach,” using the “depreciated reproduction cost” as applied by Mr. Hentschel, and explained why it was inappropriate. (*E.g.*, Spiller Rebuttal Report, p. 17.)
 - On this point, though, Plaintiff does not even cite Dr. Spiller’s rebuttal report.

Plaintiff's assertion that Dr. Spiller does not understand the difference between "book value" and "reproduction cost" is baseless.

- As stated in Dr. Spiller's rebuttal report:

I note that the "cost approach" that Mr. Hentschel evaluated refers to the "depreciated reproduction cost" approach, while in the Spiller Report I discussed the historical cost or "book value" approach.

(Spiller Rebuttal Report, p. 12 n.20.)

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The “book value” has been used in certified claims, which is why Dr. Spiller addressed it in his opening report.

From Plaintiff’s own certified claim, at pp. 4 - 5:

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.

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

Daubert Standard

“[E]xpert evidence may only be admitted “if it is both reliable and relevant.”

Rink v. Cheminova, Inc., 400 F.3d 1286, 1291 (11th Cir. 2005)
(citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993)).

Expert Testimony Must Be Reliable And Relevant

Standard: “Under Rule 702 and *Daubert*, district courts must act as ‘gatekeepers’ which admit expert testimony ***only if*** it is both **reliable and relevant.**” *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291 (11th Cir. 2005) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993))

Reliability: The Court must assess (1) “***whether the reasoning or methodology underlying the testimony is [] valid***” and (2) “whether that reasoning or methodology properly can be applied to the facts in issue.” *United States v. Frazier*, 387 F.3d 1244, 1261-62 (11th Cir. 2004)

- “The Eleventh Circuit has occasionally hinted that [the] methodology inquiry may be the most critical of the *Daubert* analysis.” *Dillon v. Sunbelt Rentals, Inc.*, 464 F. Supp. 3d 1333, 1338 (S.D. Fla. 2020)

Relevance: Expert testimony is only admissible if it “**assists the trier of fact**” by establishing “an ***appropriate ‘fit’*** with respect to the **offered opinion and the facts of the case.**” *McDowell v. Brown*, 392 F.3d 1283, 1299 (11th Cir. 2004)

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Excluding Plaintiff's Damages Experts Still Leaves Plaintiff with Ability to pursue damages based on value of property when confiscated

The Helms-Burton Act provides two alternatives for a plaintiff's damages:

6082(1)(A)(i)(III) the **fair market value** of that property, calculated as being **either the current value of the property, or the value of the property** when confiscated plus interest, whichever is greater.

22 U.S.C. § 6082 (emphases added); *see also* § 6082(a)(3)(C)(ii) (providing the possibility for “increased liability” as “3 times the amount determined applicable under paragraph (1)(A)(i).”).

All of Plaintiff's damages experts value the wrong property by ignoring the limitations of the concession.

Plaintiff did not own.

“[A]ny 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).

Plaintiff Proposes to Demolish Piers, Extend Piers, Dredge the Harbor, and Turn the Property into a Luxury Hotel, none of which are authorized in the Concession.

Picture of current property, from Pigna Report, Cover Page:




Pictures of properties supposedly comparable to Plaintiff's proposed hotel, from Hentschel Report pp. 61 – 63:



Plaintiff's rights were governed by Concession, which did not allow modifications of the Property.

- Plaintiff's Concession *precisely defined* how the Piers and Marginal Building would be constructed and *did not allow modifications*.

Year IV – No. 139 Havana, Thursday, December 14, 1905 Volume II – Page 4285

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[...]

PUBLIC WORKS DEPARTMENT

DECREE No. 467

1.- The works shall conform in all respects to the project submitted by the applicant, Mr. Sylvester Scovel, dated August 22, 1904, except as otherwise modified by the clauses below.

Defs.' Daubert Ex. A

Examples of Precise Specifications in Concession Documents

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		Price per copy – 10 CENTS	

[...]

PUBLIC WORKS DEPARTMENT

DECREE NO. 467

5.- As compensation and in payment for the occupation of this site and the inconvenience to general use caused by construction work, the concession holder undertakes:

(a) To freely assign to the State the building for the Customs Inspectors that is part of the project.

(b) To widen up to thirty-six (36) feet the entrance to the jetty, as shown in the plans of the project.

(c) To build on the jetty a twenty-four (24) feet wide street, paved in the same manner as all others in the project, running north to south on the jetty and separating it from the Customs Inspectors Department; the roof covering this street shall have a height of at least fifteen (15) feet.

26.- The concession holder shall commence the work within a term of four (4) months reckoned as of the date of the concession, and shall do the work in the order and within the terms set forth below:

(1) The new Custom Offices shall unfailingly be ready for occupancy in thirteen months.

(2) The Customs Inspectors Department in the steel-and-concrete building, with its parcel-handling electrical mechanism, shall all be ready for use in thirteen months.

(3) The sidings [*chuchos viajadores*] and the five southerly transverse sections of the steel-and-cement building that include a portion thereof six hundred and forty (640) feet long, from east to west, by eighty (80) feet wide, from north to south, with installed fixed rails for the “locohoists,” shall be ready for use in twenty-two (22) months.

Works were inspected for precise compliance with these details.

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[...]

PUBLIC WORKS DEPARTMENT

DECREE NO. 467

25.- Before commencing the work, the Head Engineer of the District shall, in the presence of the concession holder, review the works to be done according to the project, a certificate of said proceeding to be issued in triplicate; one of the copies, with the corresponding plan, shall be submitted to the Department of Public Works for its approval and, once this has been obtained, another copy shall be delivered to the concession holder and the third shall be kept in the files of the Public Works Office of the District.

28.- The Head Engineer of the Public Works District shall be in charge of inspecting the execution of the work and compliance with these conditions.

29.- The works having been completed, the Head Engineer shall make a detailed inspection thereof and, should he find that all the terms of the concession have been complied with and that said works are in perfectly serviceable condition, he shall so note for the record in a certificate to be issued in triplicate, one copy of which shall be forwarded to the Public Works Department for its approval, and once this has been obtained, the others shall be distributed in the manner indicated for the certificate of review of the project.

32.- This concession shall be terminated if the concession holder should default on any of these conditions, which are mandatory upon him, the consequences of such termination being those set forth in the General Public Works Act and its Rules and Regulations.

Any modifications required a new Concession and decree from the Government—with new but similarly precise specifications.

MINISTRY OF PUBLIC WORKS
DECREE No. 1022.
 Considering the file records for the concession to the Compañía del Puerto [Port Company], successor to Mr. Sylvester Scovel of a jetty in the port of this Capital.
 Whereas: after the legal procedures and by means of a public auction that was based on a construction plan presented by Mr. Sylvester Scovel and declared to be of public utility, and that concerned, first, the reduction of the approved fee schedule, and second the term of usufruct for the works, by Presidential Decree number 467 of November 29, 1905, published in the OFFICIAL GAZETTE on December 14, 1905, the Port Company, successor of Mr. Sylvester Scovel, was granted a concession to complete a jetty construction project in the port of Havana, adhering to the design presented by Mr. Sylvester Scovel on August 22, 1904, and to the conditions stated in said Decree.
 Whereas: The Port Company, having provided a bond in the fixed amount of \$165,000.00, and the concession instrument having been granted before a

Defs.' Daubert Ex. B

I RESOLVE:

That when the layout staking is done, that it be done in the manner indicated below, and that the construction of the works be carried out in the same way.

1. In place of a single pier of the extraordinary dimensions that was the object of the aforementioned concession, four jetties will be created in the following manner:

(A) — One pier in front of the Plaza de San Francisco, 213.00 meters long by 50.00 meters wide.

(B) — One pier in front of the Customs Office, 195.00 meters long by 50.00 meters wide.

(C) — One pier in front of Machina de [illegible], meters long by 50.00 meters wide.

(D) — One pier in front of the [illegible] Street, 133.00 meters long by 33.00 meters wide.

Piers (A) and (B) will have to be [missing] then and the (C) and (D) as the need for the service requires.

The clearance between jetties (A) and (B) will be 80.00 meters, between (B) and (C) 80.00 meters, between (D) and (A) 66.00 meters.

2. All the piers will be built of masonry, concrete or steel, or combination of these components, and rest on piles made of any of these materials, so as to allow the free flow of the tides below the piers, between them, and along the coastline.

3. On piers (A) and (B), and if necessary on pier (C), fireproof warehouses of two or more floors will be built, similar to those of the sole warehouse in the concession, until a capacity of no less than that of the aforementioned warehouse is attained.

4. In front of each jetty pier, with a width equal to one and a half times that of the jetty on each side, a road will be built that, starting from the sea line, reaches the fence that exists currently around the piers and where it does not exist, up to the buildings that enclose the pier area. When two piers are built, these roads will be connected between each of the jetties.

The retaining wall that will contain the solid land from the sea will be built where the concessionaire deems it most advisable, with the understanding that the rest of the road leading to the outer line the [illegible] current piers will be built in the same way, using the same materials and in the same condition as the jetty piers.

These roads will be paved with granite blocks so that once the jetties are completed and connected to each other, it will result in a broad thoroughfare, forming the coastal pier.

5. On this road the concessionaire will construct a building similar to the one on piers (A) and (B), connecting the second and subsequent floors with the former and leaving the space on the ground floor free for public traffic. These warehouses will be no more than 20 meters wide along their entire length parallel to the shoreline, built on iron columns with a clear height of at least 5.00 meters.

Plaintiff's Experts Assume That Modifications Were Permitted Under the Concession

FACTORS INFLUENCING USE OF THE SUBJECT PROPERTY

The concession and ancillary usufruct rights to be valued herein were initially granted by the Republic of Cuba in December 1905 by Decree 467 for a period of 50 years. The term was subsequently extended to 99 years by Decree 1944 in December, 1920. Under the provisions of the concession the concessionaire is responsible for all costs related to the operation, improvements and required equipment during the concession period. The State is not responsible for costs of any type during the concession period. There is no mention of any monetary compensation payable to the State during the concession period. The concessionaire has the obligation to maintain the property in good condition throughout the term of the concession. At the end of the concession, the concessionaire is required to surrender the premises to the State in good repair and serviceable condition. **Collectively, the concession decrees do not appear to contain any language or provisions that would prohibit any particular use of the Subject Property or any portion thereof.**

Hentschel Report at 16

Henstchel assumed rights to build a hotel

Q. Now, in the next sentence here, you say, Since the concession is silent with respect to permitted or prohibited uses, a conversion of the Marginal Building to hotel use would not be prohibited under the terms of the concession. Now, again, Mr. Hentschel, you are not a lawyer, right?

A. No.

Q. Were you instructed to interpret the concession in this way?

A. No.

Q. Yet, you made an interpretation of the rights that are available under this concession?

A. What this was, was a stipulation of an assumption, that's an assumption of the report.

Q. So you are not opining that this is true, you are just assuming that this is true for purposes of the report?

MR. MARTINEZ: Objection to the form of the question.

A. Yes, that would be an assumption of the report.

(Hentschel Depo. 146:19 - 147:19)

Pigna did not look at limits on rights to modify the property

Q. And did you undertake any valuation of the regulations or laws that they applied to that renovation work [on the Marginal Building]?

A. No. I did not do that work. Mr. Hentschel was responsible for that.

(Pigna Depo. 264:24-65:3).

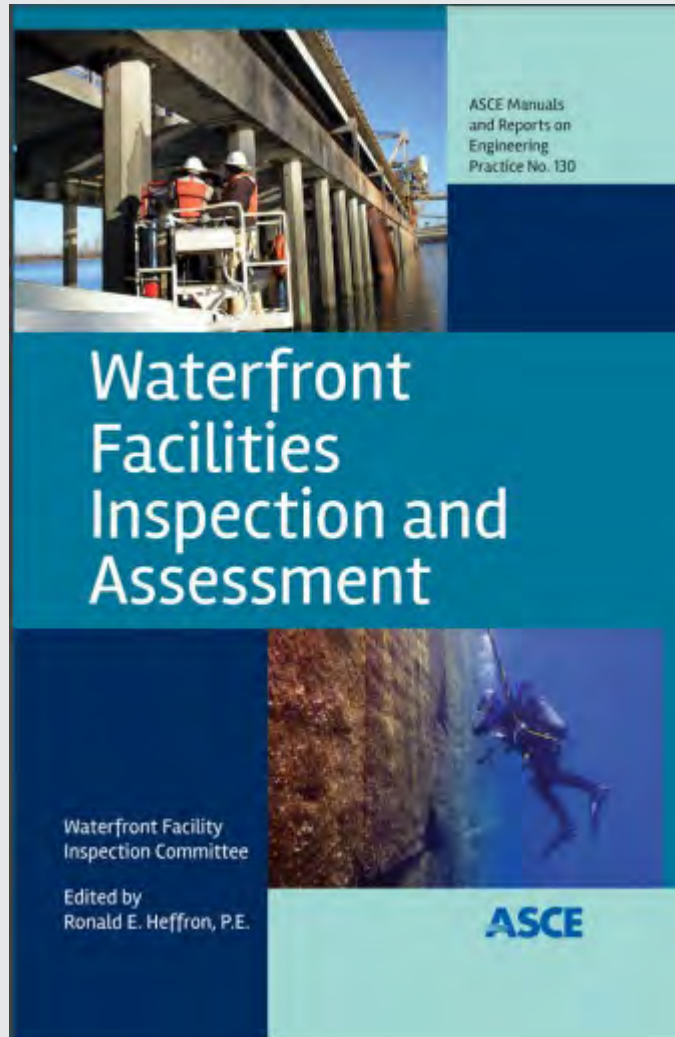
Defendants' expert, Ambar Diaz, shows the concession was limited

1. The scope and nature of the HDC concession did not authorize the type of construction works and uses featured in the HDC's Expert Reports. Havana Docks was never authorized to operate a cruise terminal or a hotel on the premises, but rather their concession was a State's grant of limited rights in State owned property and the State's consent was required for any changes or modifications.
2. There is no legal basis under Cuban law for the HDC Expert Reports' erroneous assumption that the concessionaries could conduct other activities and charge for other services in the premises, different from cargo services.
3. There is no legal basis under Cuban law for the HDC Expert Reports' erroneous assumption the concessionaire could build any structure on the premises other than those specifically authorized in the presidential decrees.

Diaz Rebuttal Report at 18 – 19.

**All of Plaintiff's damages expert opinions
ignored 61 years of deterioration.**

Marine Structures Deteriorate



“All structures deteriorate and are subject to environmental and external physical forces.”

WATERFRONT FACULTY INSPECTION COMMITTEE,
WATERFRONT FACILITIES INSPECTION AND ASSESSMENT at
3, (Ronald E. Heffron, P.E. eds. 2015), cited by the
Garlich Report

“For example, concrete generally deteriorates more rapidly in tropical environments where the concentration of chlorides in the seawater is higher.”

Id. at 111

The Terminal Suffered Deterioration

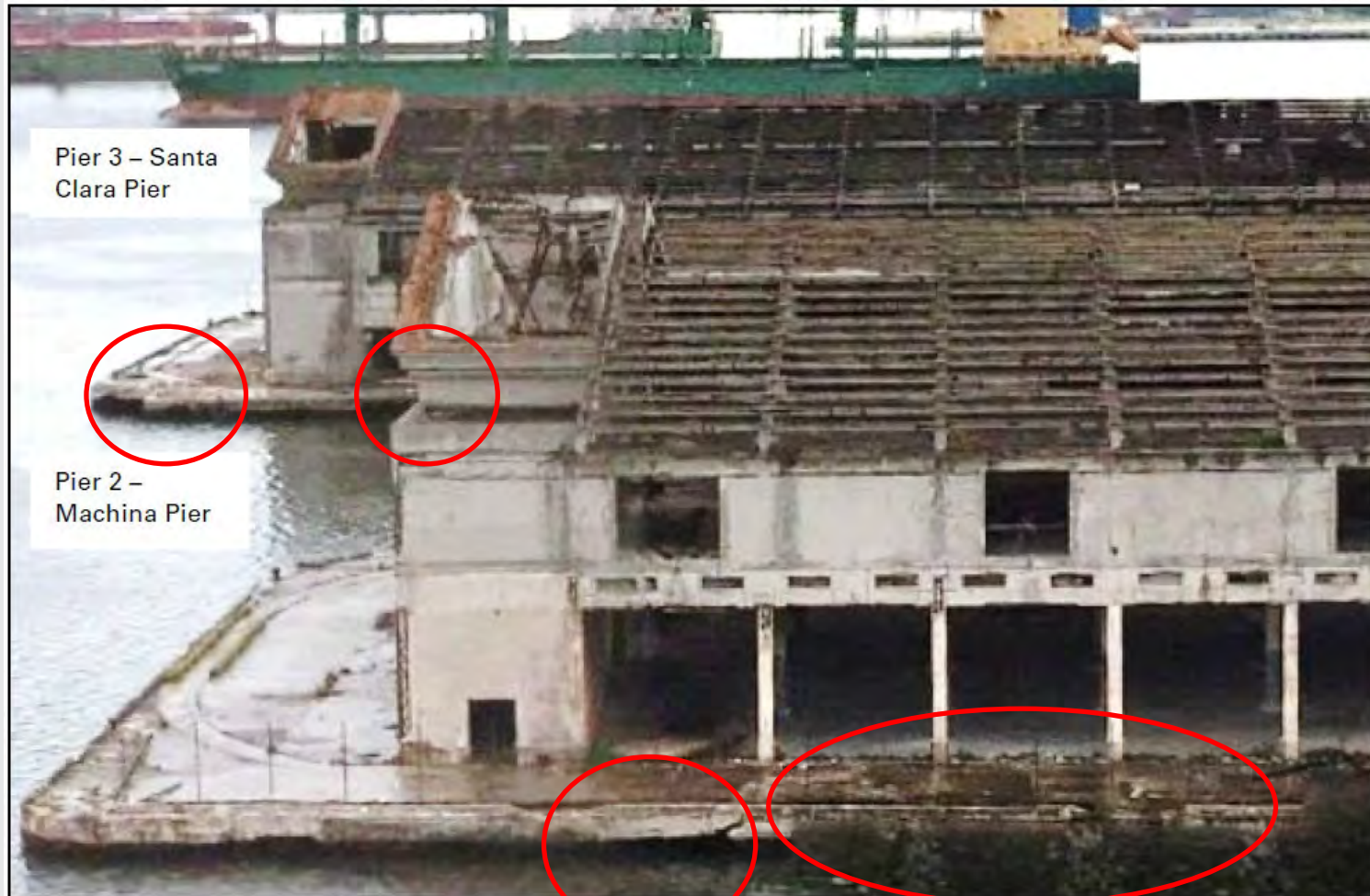


Figure 3 - The Machina and Santa Clara Piers (Firsov 2018), annotated by Collins Engineers, Inc.

The Terminal Suffered Deterioration



Figure 17 - Estimated Building Dimensions (Alamy - Stock Photos, Stock Images & Vectors 2008), annotated by Collins Engineers, Inc.

Marine Structures Deteriorate



“Not all distress is recognizable from above the water, nor can the extent and severity necessarily be determined.”

WATERFRONT FACULTY INSPECTION
COMMITTEE, WATERFRONT FACILITIES
INSPECTION AND ASSESSMENT at 4, FIG.
A-8, FIG. A-10 (Ronald E. Heffron,
P.E. eds. 2015)

**Hentschel's cost approach is inapplicable
and unreliable.**

The Three Valuation Approaches

- 1. The Cost Approach:** measures the value of a property by assessing the cost of reproducing that property.
- 2. The Income Approach:** measures net present value of the income that the property could generate after accounting for expenses.
- 3. The Fair Market Approach:** measures the most probable prices as of the valuation date based on comparable transactions.

Hentschel methodology confuses estimating cost of improvements to extract value from a concession with value of concession itself

ATTORNEYS' EYES ONLY

APPRAISAL REPORT

COMPLETE APPRAISAL OF

The concession, land, and improvements located at what is now known as
The Sierra Maestra Cruise Terminal located along the western portion of
Havana Bay, Havana, Cuba, as described in Certified Claim CU-2492
Of the Foreign Claims Settlement Commission

AS OF

March 1, 2021

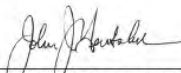
TRANSMITTED ON: March 19, 2021

FOR:

COLSON HICKS EIDSON
255 Alhambra Circle, Penthouse
Coral Gables, Florida 33134

BY:

JOHN J. HENTSCHEL CRE, MAI, FRICS
HENTSCHEL REAL ESTATE SERVICES LLC
3220 FIELDCREST WAY
ABINGDON, MARYLAND 21009


Hentschel Real Estate Services LLC
By: John J. Hentschel, CRE, MAI, FRICS
March 19, 2021

ATTORNEYS' EYES ONLY

i

ATTORNEYS' EYES ONLY

DESCRIPTION OF THE SUBJECT PROPERTY

The subject property includes the concession, land, and improvements (the Subject Property) located at what is now known as The Sierra Maestra Cruise Terminal (the Terminal or the SMT), located along the western portion of Havana Bay, as described in Certified Claim CU-2492 (Claim CU-2492) of the Foreign Claims Settlement Commission (FCSC), situated and lying in the city of Havana, Cuba along the Avenida del Puerto in a historic section of the city known as Havana Vieja (Old Havana).

Hentschel Report at 3

FACTORS INFLUENCING USE OF THE SUBJECT PROPERTY

The concession and ancillary usufruct rights to be valued herein were initially granted by the Republic of Cuba in December 1905 by Decree 467 for a period of 50 years. The term was subsequently extended to 99 years by Decree 1944 in December, 1920. Under the provisions of the concession the concessionaire is responsible for all costs related to the operation, improvements and required equipment during the concession period. The State is not responsible for costs of any type during the concession period. There is no mention of any monetary compensation payable to the State during the concession period. The concessionaire has the obligation to maintain the property in good condition throughout the term of the concession. At the end of the concession, the concessionaire is required to surrender the premises to the State in good repair and serviceable condition. Collectively, the concession decrees do not appear to contain any language or provisions that would prohibit any particular use of the Subject Property or any portion thereof.

For purposes of the current valuation of the property, it is assumed that the terms of the concession are considered to be in effect and operational as of the valuation date and for the remaining 44 years of its unexpired term which is assumed to begin on the valuation date.

Hentschel Report at 16

- The cost approach is not applicable to a time-limited concession.
- The cost approach is based on the **cost** of reproducing the structures of the Terminal which is applicable if Plaintiff **owned** those structures in fee simple. Plaintiff does not.
- Such an approach is not applicable for Plaintiff's 44-year concession.

Case 19-cv-23591 Document 453-1 Filed 07/26/22 Page 63 of 94

Hentschel picked the methodology that by his own admission yield the exact same value regardless of how many years remained on the concession.

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----- x
HAVANA DOCKS CORPORATION,
Plaintiff,
CASE NO.: 19-cv-23591
-against- BLOOM/LOUIS
NORWEGIAN CRUISE LINE HOLDINGS, LT
Defendant.
----- x

Zoom video conference deposition of
JOHN J. HENTSCHEL, taken pursuant to
notice, was held remotely, commencing
June 9, 2021, 10:05 a.m., before Leslie
Fagin, a Stenographic Court Reporter and
Notary Public in the State of New York.

MAGNA LEGAL SERVICES
320 West 37th Street, 12th Floor
New York, New York 10018
(866) 624-6221

Q. So if this **concession had only five years remaining on it**, how would that change your cost approach assessment?

A. It wouldn't have changed the cost approach assessment at all, **you would do the exact same thing.**

Q. Get the exact same number?

A. Probably **get the exact same number, yes.**

J. Hentschel Dep. Tr., 211: 11–19.

Q. According to the **cost approach method** here, you would have the same value of this right, **regardless of how many years remaining were left on this right to operate?**

A. Under your conditions, **yes.**

J. Hentschel Dep. Tr., 212: 11–16.

Using Hentschel's methodology, a concession with a 1-year term yields the exact same value as a concession with a 44-year term.

1-year Concession

Year IV – No. 139 Havana, Thursday, December 14, 1905 Volume II – Page 4285

GACETA OFICIAL

OF THE
REPUBLIC OF CUBA

SUBSCRIPTION POINTS		Subscription prices in American currency	
HAVANA, at the Printshop Administration, Obispo 35 P.O. Box 600 Telephone No: 675	ADVERTISEMENTS AND SUBSCRIPTIONS are received at the Administration from 7 to 10 in the morning and from 11 to 5 in the afternoon, every day except holidays.	HAVANA, per quarter \$3.00	OUTSIDE THE ISLAND, per quarter \$5.30
PROVINCES, at the houses of the respective agents.		PROVINCES, per quarter \$3.75	Subscriptions shall be paid in advance.
		Price per copy – 10 CENTS	

[...]

PUBLIC WORKS DEPARTMENT

DECREE No. 467

Value: \$232,560,000

VS

44-year Concession

Year IV – No. 139 Havana, Thursday, December 14, 1905 Volume II – Page 4285

GACETA OFICIAL

OF THE
REPUBLIC OF CUBA

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PROVINCES, at the houses of the respective agents.		PROVINCES, per quarter \$3.75	Subscriptions shall be paid in advance.
		Price per copy – 10 CENTS	

[...]

PUBLIC WORKS DEPARTMENT

DECREE No. 467

Value: \$232,560,000

Even an eleven million dollar dredging project has no effect on Hentschel's cost methodology.

CONFIDENTIAL

SUPPLEMENT TO

COMPLETE APPRAISAL OF

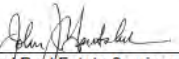
The concession, land, and improvements located at what is now known as The Sierra Maestra Cruise Terminal located along the western portion of Havana Bay, Havana, Cuba, as described in Certified Claim CU-2492 of the Foreign Claims Settlement Commission

AS OF
March 1, 2021

TRANSMITTED ON: May 18, 2021

FOR:
COLSON HICKS EIDSON
255 Alhambra Circle, Penthouse
Coral Gables, Florida 33134

BY:
JOHN J. HENTSCHEL CRE, MAI, FRICS
HENTSCHEL REAL ESTATE SERVICES LLC
3220 FIELDCREST WAY
ABINGDON, MARYLAND 21009


Hentschel Real Estate Services LLC
By: John J. Hentschel, CRE, MAI, FRICS

CONFIDENTIAL

- Hentschel initially omitted the necessary \$11,581,624 cost of dredging that would be required to support the larger cruise ships which his valuation depends.
- This discovery had **no effect** on the valuation produced by Hentschel's cost methodology.
- In other words, according to this bizarre methodology, the fair market value of this concession is the same whether or not a purchaser would need to spend over eleven million dollars to dredge the property before accepting cruise ships there—according to Hentschel, the market is simply indifferent to such costs under this methodology.

The cost of dredging that has been estimated and provided by PTC is tantamount to an improvement to the submerged land. Since the value of the land has not been reflected in the Cost Approach and is not a wasting asset that is subject to depreciation, **no change** would be warranted or required to the Cost Approach **related to the cost of dredging** the submerged land.

Hentschel Supp. at 2.

Whether or not the United States ever reopens cruising to Cuba has no effect on Hentschel's cost methodology.

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3 HAVANA DOCKS CORPORATION,
4 Plaintiff,
5 CASE NO.: 19-cv-23591
6 -against- BLOOM/LOUIS
7 NORWEGIAN CRUISE LINE HOLDINGS, LTD.
8 Defendant.
9 ----- x
10
11 Zoom video conference deposition of
12 JOHN J. HENTSCHEL, taken pursuant to
13 notice, was held remotely, commencing
14 June 9, 2021, 10:05 a.m., before Leslie
15 Fagin, a Stenographic Court Reporter and
16 Notary Public in the State of New York.
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New York, New York 10018
(866) 624-6221

Q. How would that **value change** if President Biden announced that he had **no intention of lifting the ban on U.S. travel to Cuba**?

A. Under the cost approach, **it wouldn't change.**

Q. Would it change if Congress passed a law preventing future presidents from opening up Cuba to cruising?

A. **No, it would not under the cost approach.**

J. Hentschel Dep. Tr., 233: 19–234: 5.

Q. Sorry, you said there would be **no difference under the cost approach** to the value **if the U.S. were never to reopen cruising to Cuba**, right?

A. [U]nder the cost approach, **I don't think there would be a difference** because the physical components of the property would be the same.

Hentschel Dep. Tr., 235: 4–11.

Pigna's income approach is irreparably flawed and ignores essential costs.

The Helms-Burton Act Requires a “Fair Market Valuation,” Which Pigna Did Not Do. Pigna Only Performed a Flawed “Economic Valuation”

(III) the **fair market value** of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater; and

11 Q. And, Mr. Pigna, to you is an economic
12 valuation different than a fair market
13 valuation?

14 A. There's nuances to both, yes.

24 Q. And you're, in fact, trying to come up
25 with the fair market value of that property as
1 of, I believe, March 1, 2021, correct?

2 A. I'm doing an economic valuation of the
3 remaining 44-year term, and that is an input to
4 an appraisal report that's being -- that was
5 conducted by Mr. John Hentschel who is the
6 person who is appraising the subject property.

7 Q. And you were trying to come up with
8 the current value of that remaining 44 years
9 calculated as of March 1, 2021?

10 A. It was an economic valuation . . .

Pigna's Income Approach Is Irreparably Flawed

Plaintiff's primary valuation expert, Hentschel, admits that Pigna's method is less reliable than Hentschel's cost-based approach because Pigna's analysis has "weaker data inputs."

Pigna's Income Approach Is Irreparably Flawed

Pigna relies on vague and speculative estimates of market demand.

- a. Pigna's market analysis is largely rosy speculation that the United States will normalize relations with Cuba and therefore increase travel.
 - i. Pigna Dep. 262:4-8 ("Q. Okay. And then it [your opinion] likewise assumes that cruises from the U.S. to Cuba are permissible under U.S. law for the next 44 years? A. Yes.").
- b. This is not sufficient to demonstrate that market demand exists to support the envisioned luxury hotel complex.

Pigna's assessment ignores taxes.

- His analysis fails to account for Cuba's 35% tax rate on foreign corporations **at all**.
 - Pigna Dep. 241:24-42:8 (“Q. Your economic model or you financial -- economic valuation doesn't account for any payment by the concessionaire over the course of the next 44 years of any income taxes to the Cuban government, right? A. That's right. Q. And do you understand that the current tax rate in Cuba for foreign entities operating in that company is 35 percent? A. Yes, I do.”).
 - Pigna Dep. 277:11-18 (“Q. Let me ask it this way, Mr. Pigna. If you were looking to potentially purchase this 44-year concession right for some valuation, would you take into account whether or not you would have to pay as the port operator a 35 percent tax rate to the Cuban government for the next 44 years? A. Yes, I would.”).
- When this 35% tax rate is applied to Pigna's model, his valuation is reduced **by 80%**. (Spiller Rebuttal ¶ 57).
- Pigna's failure to consider real-world costs means his opinion is fundamentally unreliable. *See, e.g., Gastaldi v. Sunvest Resort Cmtys., LC*, 709 F. Supp. 2d 1299, 1304-06 (S.D. Fla. 2010) (finding a proffered expert's testimony to be unreliable because his opinion failed to consider implications of real-world decline in market prices).

Pigna's Income Approach Ignores Essential Costs

Pigna ignores Cuban government required profit-sharing.

Foreign investors in Cuba are required to engage in a joint venture with a Cuban state-owned enterprise.

Pigna acknowledges this fact and acknowledges that it is “relevant to an investor valuing an enterprise,” but he then completely fails to account for profit-sharing in his model.

Plaintiff experts incorrectly apply the highest and best use standard.

Plaintiff's Experts Fail to Correctly Apply the Highest and Best Use Standard

The Uniform Appraisal Standards establish that the highest and best use of a property must meet four requirements: such a use must be “(1) **physically possible**; (2) **legally permissible**; (3) **financially feasible**; and (4) must **result in the highest value.**”

Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1067 (9th Cir. 2010) (quoting Uniform Appraisal Standards for Federal Land Acquisitions); *United States v. Easements and Rights-of-Way Over a Total of 15.66 Acres of Land*, 779 F. App'x. 578, 580–82 (11th Cir. 2019) (discussing “fair market value” and “highest and best use” appraisal standards).

Case 1:19-cv-01174-SP Document 453-1 Entered on FLSC Docket 01/26/2021 Page 49 of 92

Legally Permissible: Plaintiff Only Possessed a Time-and-Scope Limited Concession Interest

- Plaintiff's property interests never included the right to modify the Piers or Marginal Building **in any way**.
- Thus, any valuation of Plaintiff's property interest that assumes the property **could** be changed necessarily assumes a legally impermissible use of Plaintiff's property..

Physically Possible: Plaintiff's Experts Merely Speculate

- Plaintiff assume the Cuban Government's proposed 55-room hotel and alleged plans to expand the Terminal's piers to claim that its own 320-room hotel and pier-expansion plan would be physically possible.

Financially Feasible: Plaintiff contradicts its own position on liability

- Plaintiff's damages experts argue that cruise passenger tourism in Cuba will increase in the future, while simultaneously arguing that Defendants are liable under the Act for trafficking because Plaintiff believes their cruises were tourism.

Reasonably Probable:

In no sense is the Plaintiff's valuation, based on false assumptions –and other experts, each of whose opinions are subject to flaws—reasonably probable.

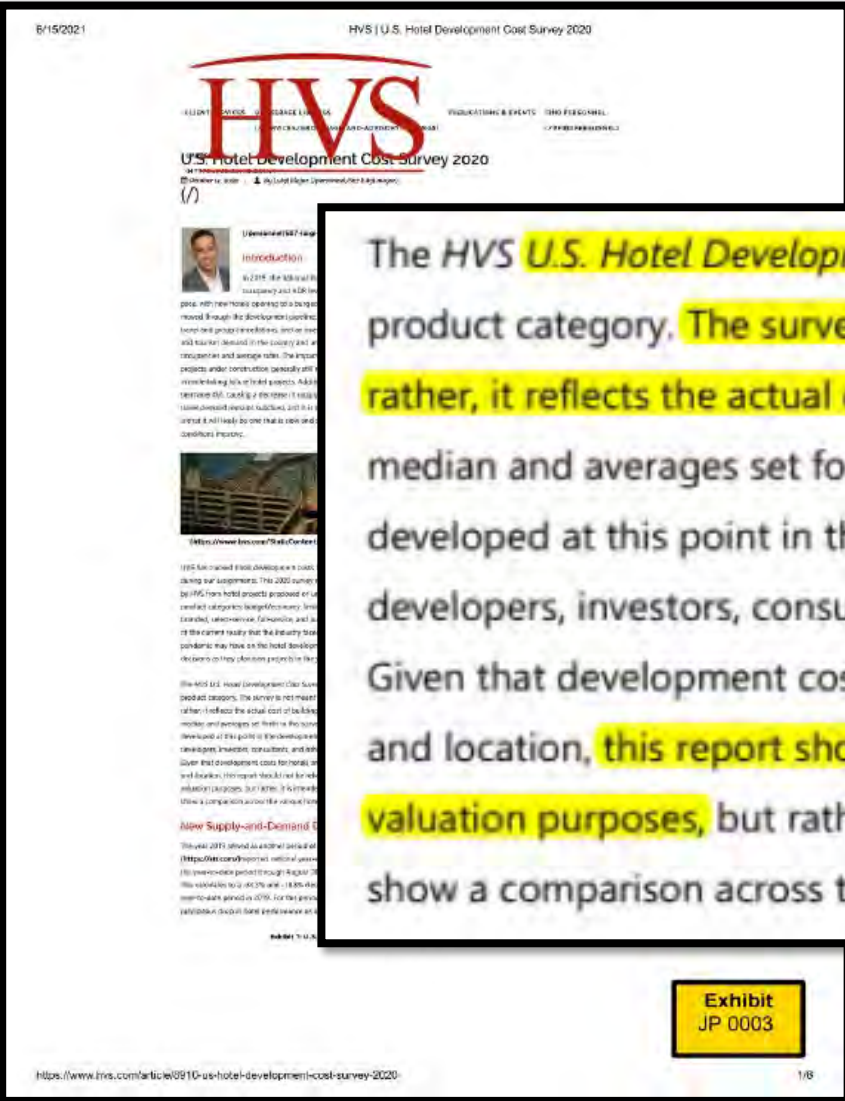
**The underlying opinions of Patton, Garlich,
and Deiters are error-ridden, speculative,
and unhelpful.**

James Patton

Patton's Testimony Is Not Reliable Or Relevant

1. Based on Unreliable and Irrelevant Sources
2. Conducted No Analysis of Cuban Building Regulations, Policies, Rules, or Codes
3. Cost Analysis and Projections are "Preliminary" and Incomplete

Patton's Testimony Is Based On Unreliable and Irrelevant Sources



The HVS **U.S. Hotel Development Cost Survey** sets forth averages of development costs in each defined lodging product category. The survey is not meant to be a comparative tool to calculate changes from year-to-year, but rather, it reflects the actual cost of building hotels across the United States in 2019. As will be discussed, the median and averages set forth in this survey are greatly affected by the types and locations of hotels being developed at this point in the development cycle. Our goal in sharing this publication is to provide a basis for developers, investors, consultants, and other market participants in evaluating hotel development projects. Given that development costs for hotels are dependent on a multitude of factors unique to each development and location, this report should not be relied upon to determine the cost for actual hotel projects or for valuation purposes, but rather, it is intended to provide support for preliminary cost estimates, as well as to show a comparison across the various hotel categories.

Patton's Testimony Is Based On Unreliable and Irrelevant Sources



Patton's Testimony Is Based On Unreliable and Irrelevant Sources



Exhibit JP 0005

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- Not Listed in the Table of Contents for “Regional Intelligence”:
 - Cuba
 - The Caribbean
 - Latin America

Patton Conducted No Cost Analysis Of Any Cuban Building Regulations, Policies, Rules, Or Codes

Q: Did you **speak with anyone who had knowledge of the construct** – original construction of the marginal building at Sierra Maestra?

A: **No.**

J. Patton Dep. Tr., 73:17-20

Q: Did you **review any of the zoning regulations** in Cuba or Havana?

A: **No.**

J. Patton Dep. Tr., 74:6-9

Q: Did you **review any Cuban regulations, policies, rules, or codes** related to the development of the marginal building?

A: **They weren't available to us.**

J. Patton Dep. Tr., 74:6-9

Q: You **didn't review any laws or anything** outside of the UNESCO document to understand what the implications of that historic designation means?

A: **No, I did not.**

J. Patton Dep. Tr., 122:25-123:4

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3 VIDEOTAPED
4 DEPOSITION OF: JAMES PATTON
5 DATE TAKEN: FRIDAY, JUN
6 TIME: 10:00 A.M.
7 PLACE: BY VIDEOCONFERENCE
8 REPORTED BY: CARMEN THOMAS
9 PROFESSIONAL
10 NOTARY PUBLIC
11 *****
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Patton's Cost Analysis and Projections are "Preliminary" and Incomplete

Q: What **significance** does it have that this is just a **preliminary estimate**?

A: It has the significance that **it should not be relied on** for budgeting purposes. **It should not be relied on** for a detailed costing of the project. That **this is a preliminary**, and it's based on the schematic design, **not on a detailed construction drawings**.

J. Patton Dep. Tr., 189:13-190:02

Q: The very last sentence says, "Further investigation of development costs, such as **governmental fees, specific construction costs** based on **detailed construction drawings**, professional fees proposals, **utility services and associated costs**, would be subsequent elements." What do you mean by that?

A: Means that **the report I was charged to prepare was a preliminary** based on schematic as explained in the report, and that this is where, were the project to continue in the normal course of a development project, these additional costs and fees would have to be identified, and **what I am stating is that they have not been done yet**. **They should and would be done to refine the cost estimates**.

J. Patton Dep. Tr., 189:13-190:02

800-

Patton Acknowledges He Would Not Rely On The Methodology In His Report

Page 2

VIDEOTAPED

DEPOSITION OF: JAMES PATTON

Q: Would you perform a **\$118 million** renovation and conversion project **without as-builts**?"

A: **No.**

J. Patton Dep. Tr., 189:13-190:02

Michael Garlich

Garlich's Opinion

Garlich supplied design documents for potential renovation and construction at the Port.

Non-Exhaustive List of Grounds for Exclusion:

1. Garlich could not support his own methodological choices.
2. Garlich incorrectly assumes the property is in the exact same condition it was in at confiscation, ignoring 60+ years of deterioration.

Garlich Ignores 60 Years of Deterioration

structures to the end of the concession period. Note that for the purposes of this report and subsequent development of cost estimates, the condition of the structure is assumed to be the same in 2021 as it was in 1960. Colson directed Collins to disregard deterioration and changes in the condition of the structures that have occurred since 1960.²

Q. Have you been asked to make assume -- assumptions like that in the past? And by 'assumptions like that,' I mean assumptions that a structure has not deteriorated in approximately 60 years? . . .

A. I don't recollect that that specific situation has occurred in the past for us.

Deposition of Michael J. Garlich, June 25, 2021 at 99:3-10 (Exhibit "K")

Garlich admitted that "[t]he structure, in the real world, is going to continue to deteriorate."

Id. at 101:6-7

Garlich Service-Life Estimate Is Unreliable

Garlich's service-life estimate of the structures was based on an incomplete, non-comprehensive set of comparison service-life estimates for which no selection criteria exists.

Garlich could not meaningfully identify a single criteria used to select comparative examples from within Collins' purportedly expansive repository of data.

Garlich Deposition at 78:6-80:7

Michael Deiters

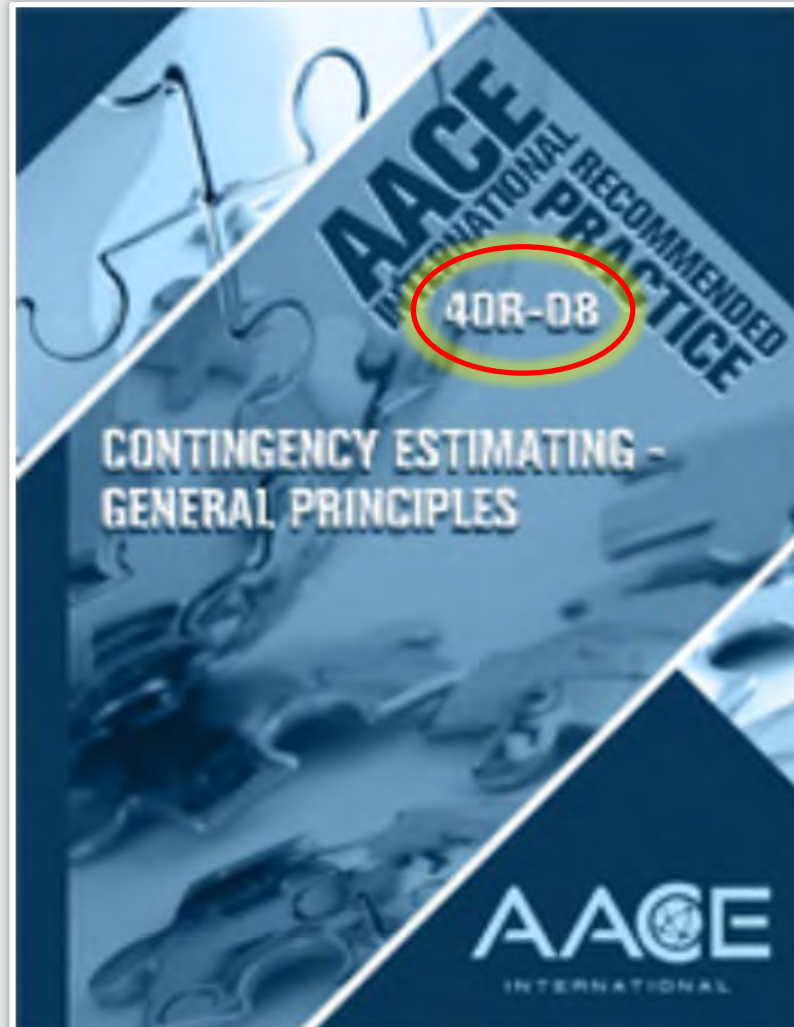
Deiters' Opinion

- Deiters provided cost estimates for the construction and maintenance of Garlich's already highly-speculative design documents.

Non-Exhaustive Grounds for Exclusion:

1. Deiters failed to employ his own methodology.
2. Deiters' "estimates" are so broad that they are not helpful to a finder of fact.

Deiters' Admitted he Did Not Employ His Own Methodology



Deiters claimed that he used industry-wide standards for his cost estimation that were developed by the Association for the Advancement of Cost Engineering (AACE) International.

Deiters Failed to Follow His Claimed Methodology

Deiters conceded, in granular detail, that he failed to apply AACE methodology:

- **He admitted he lacked the overwhelming majority of *required* deliverables for a “Class 4” estimate under AACE methodology, thereby making his purported accuracy range wholly unsupported under AACE guidelines.**
- **He admitted he failed to complete a required AACE “contingency calculation.”**
- **He admitted he failed to complete a required AACE “quantitative risk analysis.”**

The Eleventh Circuit Requires Deiters' Exclusion for Failure to Follow Methodology

McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1240 (11th Cir. 2005) (striking expert testimony where he “fail[ed] to follow the basic methodology that experts should follow in toxic tort cases”)

Chapman v. CNA Int'l, Inc., No. 19-10104-CIV, 2020 WL 8619577, at *5 (S.D. Fla. June 4, 2020) (excluding expert testimony regarding source of fire where the expert “conceded at his deposition that he did not employ the procedures outlined in NFPA 921 [National Fire Protection Association investigation standards] during his investigation.”)

The Eleventh Circuit Requires Deiters' Exclusion for Failure to Help a Jury

AACE INTERNATIONAL RECOMMENDED PRACTICE
56R-08

COST ESTIMATE CLASSIFICATION SYSTEM – AS APPLIED IN ENGINEERING, PROCUREMENT, AND CONSTRUCTION FOR THE BUILDING AND GENERAL CONSTRUCTION INDUSTRIES

AACE INTERNATIONAL

ESTIMATE CLASS	Primary Characteristic	Secondary Characteristic		
	MATURITY LEVEL OF PROJECT DEFINITION DELIVERABLES Expressed as % of complete definition	END USAGE Typical purpose of estimate	METHODOLOGY Typical estimating method	EXPECTED ACCURACY RANGE Typical variation in low and high ranges at an 80% confidence interval
Class 5	0% to 2%	Functional area, or concept screening	SF or m ² factoring, parametric models, judgment, or analogy	L: -20% to -30% H: +30% to +50%
Class 4	1% to 15%	or Schematic design or concept study	Parametric models, assembly driven models	L: -10% to -20% H: +20% to +30%
Class 3	10% to 40%	Design development, budget authorization, feasibility	Semi-detailed unit costs with assembly level line items	L: -5% to -15% H: +10% to +20%
Class 2	30% to 75%	Control or bid/tender, semi-detailed	Detailed unit cost with forced detailed take-off	L: -5% to -10% H: +5% to +15%
Class 1	65% to 100%	Check estimate or pre bid/tender, change order	Detailed unit cost with detailed take-off	L: -3% to -5% H: +3% to +10%

Table 1 – Cost Estimate Classification Matrix for Building and General Construction Industries

Deiters' Cost Estimate Accuracy Range is Too Broad to Help a Finder of Fact

- Deiters has a *greater than* \$620,000,000 “accuracy range” for his damages model.
- A trier of fact would be completely on its own to pick a number within (*or outside!*) that \$620,000,000 damages range.



A “Pick-a-number, any-number” Damages Model must be Excluded

The proponent of expert testimony “always bears the burden” to show its expert meets “the basic requirements—qualification, reliability, and **helpfulness.**”

– *Frazier*, 387 F.3d at 1260

Under *Frazier*, the Eleventh Circuit requires exclusion of the “pick-a-number, any-number” damages model provided by Dieters because it is unhelpful in educating a jury on what damages it should allocate.

**Azel's irrelevant and inflammatory opinions
should be excluded.**

Azel's report is irrelevant to any fact or legal issue in this case.

Q. So I'm having a little trouble understanding what exactly is the purpose of your opinion. How are you going to help the jury or the judge in this case better understand this case?

...

A. Yes, sir. It's not up to me on how someone is going to read it. **My assignment, as I have -- I have said on a number of occasions and the introduction of my paper, was to describe for a reader, perhaps not familiar with Cuba and the Cuban social economic milieu in 1959, 1960, 1961 what that was, and that is the goal and the objective of my report.** How it's interpreted is way outside of my field of expertise, sir.

(Azal Depo. 34:21 – 35:13)

Case 1:19-cv-01724-JE Document 453-1 Entered on FLSD Docket 01/25/2022 Page 7 of 94

Azel's testimony is intended to inflame passions without assisting the jury in resolving any disputed issue.

“A **particularly gruesome terror technique** was the broadcast to the entire nation of **Jacobin-style trials** in which perceived opponents were taken before military courts and summarily convicted with the population yelling “Paredon” (to the execution wall), and then **expeditiously executed by a firing squad.**”

(Azal Report p.6)

Case 1:19-cv-01774-JB Document 453-1 Entered on FLSD Docket 01/25/2022 Page 78 of 94

Azel's testimony is intended to inflame passions without assisting the jury in resolving any disputed issue.

“One particularly gruesome execution I remember distinctly was that of Col. Cornelio Rojas on January 7, 1959. ... **His wife and daughter, who had not been notified of his arrest, learned of his execution as they watched it on television.** His death by firing squad was repeatedly shown on Cuba’s national television. **The ghastly film shows Col. Rojas’ hat flying off his head as the bullets smashed his skull scattering brain matter on the execution wall.** The final image is a **close up of the Colonel’s face with the top of his head shattered by bullets.** This execution and others were repeatedly shown on television, creating a terrifying impact on the population.”

(Azal Report p.8)

Case 1:19-cv-01724-JE Document 453-1 Entered on FLSD Docket 01/25/2022 Page 79 of 94

Azel's testimony is intended to inflame passions without assisting the jury in resolving any disputed issue.

“In February 1960 **bombs exploded in government offices**. In March several **arson activities in Matanzas** province sought to damage Cuba's sugar crop. In July, the car of Jose Pardo Llada, a prominent pro-Castro radio broadcaster, was **attacked by machine gun** by one of the clandestine groups. In short, **bombs exploded almost every night, underground groups attacked police patrols, buildings were set on fire, and the country was once again on a warpath.**”

(Azal Report pp. 14 – 15)

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Azel's testimony is intended to inflame passions without assisting the jury in resolving any disputed issue.

“In October, a small group of men with military backgrounds staged a failed anti-Castro raid on Navas Bay in Cuba’s Oriente Province. Several Cubans in the group were tried and given lengthy prison terms, but **three American participants, Bobby Fuller, Anthony Zarba, and Allen Dale Thompson were executed by firing squad.** The U.S. State Department described the proceeding as a ‘**Roman Circus atmosphere.**’ In the same month another American, William Morgan, who had fought with Castro against Batista and had risen to the rank of comandante, was arrested. He was later summarily tried and executed in 1961.”

(Azal Report pp. 14 – 15)

Plaintiff devotes just two paragraphs to defending Azel, neither of which are persuasive.

IV. Azel's Opinions Are Relevant and Helpful.

Finally, the Defendants seek the exclusion of Azel's testimony as inflammatory and having "no relevance whatsoever." Mot. at 27. Though Azel provides a broad historical background, he also explains that the Cuban Government's confiscations were tantamount to acts of political retaliation against the United States that were directed towards its citizens. *See* Azel Report at 16-18. Indeed, he describes these acts as a "campaign of aggression and terror targeting the United States[.]" Azel Report at 3. These statements are not offered to inflame the passions of the jury. Rather, Azel's testimony supports the notion that the confiscations lacked a legitimate public purpose, were discriminatory, and failed to provide any compensation, and so were illegal under international law. *See Sabbatino*, 376 U.S. at 429; *see also* 22 U.S.C. § 6081(2) (finding the confiscations "wrongful."). Azel's testimony is accordingly relevant to Havana Docks' contention that its damages should be calculated in accordance with the principles of *Chorzow*, which require the consequences of wrongful taking to be wiped away. *See McDowell v. Brown*, 392 F.3d 1283, 12908-99 (11th Cir. 2004) (noting that relevant testimony "logically advances a material aspect of the proposing party's case" and "fits" the disputed fact).

This analysis applies equally to Azel's explanation of Cuban Law 88, which threatens anyone who provides information in support of Title III actions with criminal prosecution and a potential 20-year prison sentence. *See* Azel Report at 25. This testimony is relevant to rebut the Defendants' ill-founded attacks on Havana Docks' valuation experts based on their "failure" to travel to Cuba and physically inspect the Havana Port Terminal (and subject themselves to criminal action in a hostile nation). And though Azel is not a Cuban lawyer (and is not purporting to offer a legal opinion), he can certainly offer insights "beyond the understanding and experience of the average citizen." *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985). As such, his testimony concerning Law 88 is helpful.

CONCLUSION

1. "Azel's testimony is accordingly relevant to Havana Docks' contention that its damages should be calculated in accordance with the principles of *Chorzow*, which require the consequences of wrongful taking to be wiped away."
2. "This analysis applies equally to Azel's explanation of Cuban Law 88, which threatens anyone who provides information in support of Title III actions with criminal prosecution and a potential 20-year prison sentence."

Azel cannot be used to educate the jury about the legal decision in *Chorzow*.

- Title III has detailed statutory provisions regarding damages, and that statute, not *Chorzow*, controls damages in this action.
 - Unlike *Chorzow*, Title III does not involve an action against the appropriating government.
 - Unlike *Chorzow*, Title III does not “require the consequences of wrongful taking to be wiped away,” but instead provides *treble damages*, giving the Plaintiff *more* than the value of the property either currently or at time of confiscation.
- Regardless, whether damages should be calculated according to *Chorzow* or Title III is not a question for the jury, and thus not an appropriate subject of expert testimony.
 - “Plaintiff correctly notes that the Court – not a jury – determines the law ...”

(DE 416, Report & Recommendation on Pl.’s Mtn. to Preclude Testimony of A. Diaz, at p.3)

Azel is not qualified to offer opinions about Cuban law, including Law 88.

Q. ... You don't have a bachelor's, master's, or Ph.D. in Cuban law or Cuban history, do you?

A. I do not, sir. And I am not sure that that exists in the United States. But I do not.

Q. Okay. You don't have a law degree from Cuba, do you?

A. I am not a lawyer, sir.

Q. So your testimony here today is not going to be about legal opinions?

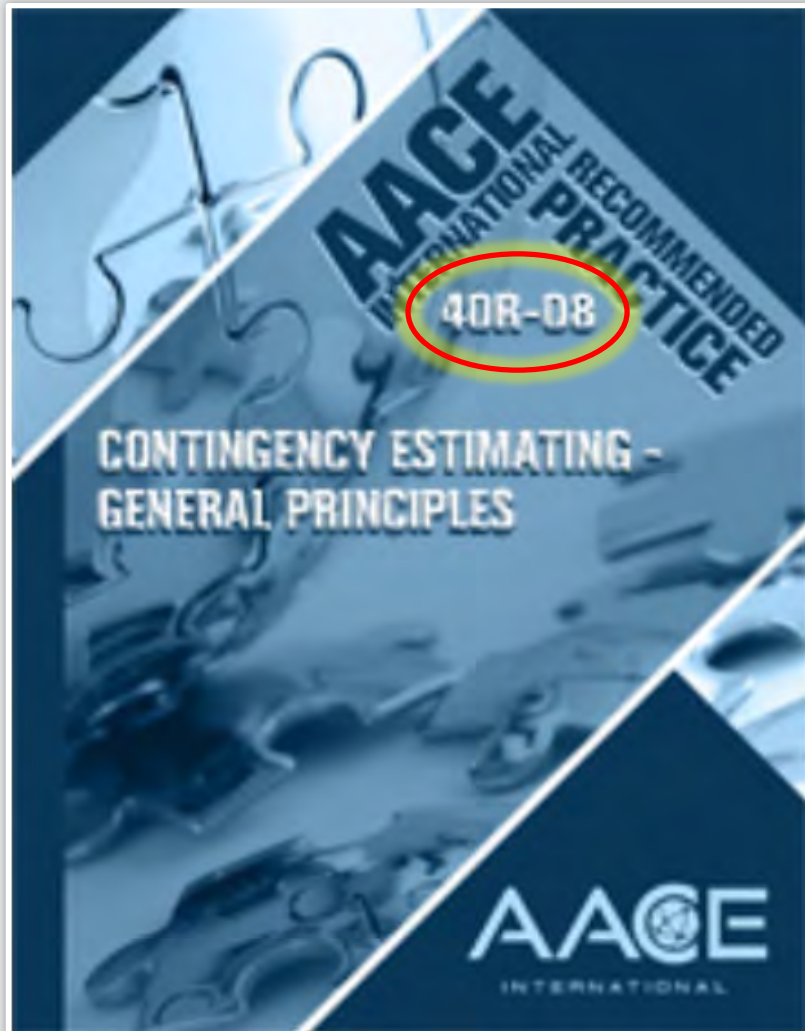
A. Absolutely not, sir.

(Azal Depo. 24:1 – 10.)

Deiters Rebuttal Slides

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Other Ways Deiters Failed to Follow Methodology – Contingency Calculation



Deiters failed to make a contingency calculation as required by AACE's 40R-08.

Q. It continues to say that, instead, AACE has recommended practices that address contingency determination and risk analysis methods, for example, [Recommended Practice] RP 40R-08. . . .

A. Yes, I see that.

Q. Did you rely on 40R-08 when preparing your contingency calculation?

A. No, I did not.

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Other Ways Deiters Failed to Follow Methodology – Quantitative Risk Analysis



Deiters failed to prepare a quantitative risk analysis under 56R-08 to determine his estimate's probability distribution.

- Q. . . . Individual estimates should always have their accuracy ranges determined by a quantitative risk analysis study that results in an estimate probability distribution.
- A. **Correct.**
- Q. And you testified that you didn't prepare one, correct?
- A. **No, we did not prepare a quantitative risk analysis. That is correct.**

Deiters' Deliverables Actually Fall into an ACE Class 5

CLASS 5 ESTIMATE	
<p>Description: Class 5 estimates are generally prepared based on very limited information, and subsequently have wide accuracy ranges. As such, some companies and organizations have elected to determine that due to the inherent inaccuracies, such estimates cannot be classified in a conventional and systemic manner. Class 5 estimates, due to the requirements of end use, may be prepared within a very limited amount of time and with little effort expended—sometimes requiring less than an hour to prepare. Often, little more than proposed building type, location, functional space building requirements (SF or m2), and number of stories are known at the time of estimate preparation.</p>	<p>Estimating Methodology: Class 5 estimates generally use stochastic estimating methods such as area factors and other parametric and modeling techniques. For example, historical unit prices or functional use unit prices driven.</p> <p>Expected Accuracy Range: Typical accuracy ranges for Class 5 estimates are -20% to -30% on the low side, and +30% to +50% on the high side, depending on the construction complexity of the project, appropriate reference information and other risks (after inclusion of an appropriate contingency determination). Ranges could exceed those shown if there are unusual risks.</p>
<p>Maturity Level of Project Definition Deliverables:</p>	<p>Alternate Estimate Names, Terms, Expressions, Synonyms:</p>

Description:

Class 5 estimates are generally prepared based on very limited information, and subsequently have wide accuracy ranges. As such, some companies and organizations have elected to determine that due to the inherent inaccuracies, such estimates cannot be classified in a conventional and systemic manner. Class 5 estimates, due to the requirements of end use, may be prepared within a very limited amount of time and with little effort expended—sometimes requiring less than an hour to prepare. Often, little more than proposed building type, location, functional space building requirements (SF or m2), and number of stories are known at the time of estimate preparation.

Deiters' Cost Estimates are primarily based on estimated square feet or estimated vertical linear feet.

Q. In your estimate for fire 17 protection finishes and electrical, all of those estimates in your report are based on square footage, correct?

A. Correct.

Q. Your plumbing estimates are based on square feet, correct?

A. Correct.

Id. at 105:16-20; 108:18-20

Quantity	UO
15.00	EA
91,050.00	SF
91,050.00	EA
91,050.00	SF
95,906.00	SF (ion)
91,050.00	SF
91,050.00	SF
91,050.00	SF , 40th annual editi
91,050.00	SF (ion)
91,050.00	SF (ion)
91,050.00	SF
91,050.00	SF annual edition, un
91,050.00	SF
91,050.00	SF (ion)
182,100.00	SF

Why Does this Matter?

ESTIMATE CLASS	<p style="text-align: center;">EXPECTED ACCURACY RANGE</p> <p style="text-align: center;">Typical variation in low and high ranges at an 80% confidence interval</p>
Class 5	<p>L: -20% to -30%</p> <p>H: +30% to +50%</p>
Class 4	<p>L: -10% to -20%</p> <p>H: +20% to +30%</p>

- This matters because under the AACE guidelines and methodology he purports to follow, his estimate should be assigned, *at best*, a -30 to +50 percent accuracy range at an 80% confidence interval.
- This means that the damages figure Plaintiff purports to submit to a finder of fact could be “off” by more than **-\$232,800,000** to more than **+\$388,000,000**.

Even a “Class 4” Estimate Cannot Help a Trier of Fact

- Even the Class 4 Estimate, like a Class 5 estimate, also requires a trier of fact to pick a number from an impossibly huge range.



Deiters Used a Department of Defense Military Installation “Multiplier” based on Guantanamo Bay

Q. Would the construction of a commercial pier in Havana be subject to United States military protocol? ...

A. No.

Q. Does your analysis attempt to take 19 into account the difference in regulations or policies that would apply in building a U.S. military project abroad and a civilian project abroad?

A. I don't distinguish anything between those two.

Q. Are you aware that the Cuban government regards the United States presence in Guantanamo Bay as an illegal occupation?

A. No, I am not.

Q. Do you believe the cost multiplier for Guantanamo Bay takes into account that belief?

A. I don't know, I don't want to speculate.

Q. Given that this multiplier is for military construction and installation, why did you use it for a commercial civilian construction project?

A. At this stage of the project, when there is not much information, these types of factors are used throughout DoD [Department of Defense] to create budgets for the construction projects at their very inception . . .

June 21, 2012, Deposition of Michael Deiters at 53:15-17; 53:25-54:8; 70:18-24; 74:3-17; 74:18-75:4

Ignoring the Embargo, Deiters' Prices for Materials and Labor are Based on Imports from Miami

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Q. I'm looking at the first full paragraph. In the third sentence you have written, Pricing for labor and materials is expected to be similar across much of Cuba due to the overall risk environment, shortage of materials produced in the country, and labor and subsistence costs. Much of the material needs to be imported from Miami as well as skilled labor. Do you see that part, Mr. Deiters?

A. Yes.

Q. When you say the word material, are you referring to construction material?

A. Yes. Construction materials.

Q. Can you import materials and labor from Miami to Cuba with the embargo in place?

A. I am not aware of that. I really don't have an opinion on that at the moment.

Deiters Uses a Cuban Tax Rate for Materials he Imagines would be Purchased in Miami and Brought to Cuba

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Q. If much the materials will be purchased in the United States, why do you use a 10 percent Cuban sales tax for everything?

A. There will be sales tax paid, that 10 percent if it was all coming from Miami would be a different rate, there could be some things purchased locally.

Q. You said in your opinion much of the materials are coming from Miami. Wouldn't it be more appropriate to use the 7 percent sales tax that's present in Miami?

A. Miami sales tax, thinking back on it, could have been a more accurate assumption. But that's what we went with at the beginning and we kept that ever since.

Deiters Fails to Account for Import Duty and Transportation Costs

Q. Does your estimate account for duty and taxes on shipped materials?

A. We have accounted for sales tax. We don't have the duties broken out, necessarily. I don't have that as a detailed line item in my estimates.

Q. Do you account for costs for transportation from the port of call for those materials?

A. Yes, yes.

Q. Can you show me in your report where you account for that, please?

A. Well, I don't have that specifically broken out, but we do account for that on occasion. Sorry, are you referring to once they are delivered to Havana and then transferred to the job site?

Q. Sure. Yes. From whatever port of call materials come into in Cuba, you know, that's designated for cargo. In other words, you can't just drop off the materials you need right at the pier, right. So do you have, in your estimate, transportation costs from the port of call to the construction site as part of your estimate?

A. No, I don't have that broken out.

Id. at 63:19-64:22.

Deiters Ignores Program Management and Environmental Management Costs

Q. You do not have a markup for environmental management, correct?

A. Correct.

Q. Just to be clear, you do not have a markup for program management, correct?

A. Correct.

Id. at 86:5-9; 86:13-17