UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:19-cv-23988-RNS

DANIEL A. GONZALEZ,

Plaintiff,

v.

AMAZON.COM, INC. a
Delaware Corporation, and
SUSSHI INTERNATIONAL, INC.,
a Florida Corporation d/b/a
FOGO CHARCOAL,

Defendants.
_____/

DEFENDANT AMAZON.COM, INC.'S MOTION TO DISMISS PLAINTIFF'S
AMENDED COMPLAINT AND MEMORANDUM OF LAW

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Defendant Amazon.com, Inc., pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves to dismiss with prejudice the Amended Complaint filed by Plaintiff Daniel A. Gonzalez for failure to state a claim upon which relief can be granted.

I. INTRODUCTION

The Court dismissed the initial Complaint because the alleged Title III claim suffered from two fundamental pleading defects: (a) Plaintiff did not have an actionable ownership interest in the farmland he alleges was confiscated by the Cuban government (the "Farmland"); and (b) Plaintiff failed to plead facts to show that Amazon knowingly and intentionally trafficked in the Farmland. The Court found the initial Complaint "woefully inadequate," and the Amended Complaint fares no better. For the same reasons, Plaintiff still fails to plead a viable Title III claim.

The Amended Complaint again fails to show that Plaintiff acquired an ownership interest in the Farmland as necessary to maintain a claim under Title III. By Title III's express terms, a plaintiff must "*acquire[] ownership*" of a claim to the confiscated property "*before March 12, 1996*." 22 U.S.C. § 6082(a)(4)(B) (emphasis added). The Court dismissed the initial Complaint because it did not allege *how or when* the Plaintiff acquired ownership of his claim, and only alleged that he owned the property by "operation of succession." The Amended Complaint similarly fails to allege how the Plaintiff "acquired" his ownership interest or that he acquired that ownership interest prior to March 12, 1996. To the contrary, the Amended Complaint alleges that the confiscated property was "passed" to the Plaintiff by his mother *in November 2016* or later without attaching any papers showing how any interest was passed to him. Plaintiff alleges he acquired such interest more than twenty years *after* March 1996. By the plain wording of the Act, Plaintiff cannot maintain a Title III claim, and for this reason alone, the Amended Complaint should be dismissed with prejudice.

The initial Complaint also failed to plead facts showing that somehow Amazon knowingly and intentionally trafficked in property confiscated by the Cuban government more than sixty years ago. The allegation that charcoal from the Farmland was being sold by an unknown third party on amazon.com was not sufficient to show knowing and intentional trafficking by Amazon. For an entirely implausible scienter theory, Plaintiff alleges Amazon trafficked "knowingly and intentionally" in charcoal beginning in *January 2017* based on a demand letter counsel sent to Amazon some two and half years *later* in *July 2019*. Obviously, any knowledge supposedly provided in July 2019 cannot be retroactively imputed to Amazon in January 2017. Plaintiff also conspicuously did not attach the demand letter to his Amended Complaint, leaving the Court to speculate about the facts, if any, that were allegedly conveyed to Amazon. As such, there still are no facts alleged in the Amended Complaint showing Amazon knew that charcoal sold on amazon.com came from confiscated property and that Amazon intentionally trafficked in any confiscated property.

Worse, the only allegation of activity after the July 2019 demand letter was allegedly sent does not relate to the charcoal product that Plaintiff previously alleged was "direct from farmers in Cuba." Plaintiff now alleges that a different charcoal brand advertised for sale on Amazon's Italian website is the charcoal in which Amazon currently traffics in violation of the Helms-Burton Act. But as before, the Amended Complaint alleges *no facts* to plausibly show that Amazon knew this different charcoal product sold on Amazon's Italian website came from the property allegedly confiscated by the Cuban government.

Plaintiff has failed to and cannot cure the fundamental pleading defects that led the Court to dismiss the initial Complaint. The Amended Complaint should likewise be dismissed, but this time with prejudice and without leave to amend.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Court Dismissed Plaintiff's Complaint.

The Court concluded that the initial Complaint failed to allege facts showing Gonzalez "acquire[d]" an ownership interest in the Farmland and was a U.S. citizen prior to March 12, 1996, and that Amazon "knowingly and intentionally" trafficked in the property confiscated by the Cuban government. *Gonzalez v. Amazon.com, Inc.*, No. 19-CV-23988, 2020 WL 1169125, at *2 (S.D. Fla. Mar. 11, 2020) ("Dismissal Order"). In dismissing the Complaint, the Court recognized that because the Complaint alleged that the Cuban government confiscated the property before March 12, 1996, in order to bring a Title III action the Plaintiff must have acquired his ownership interest in the property before March 12, 1996. (*Id.*) The Court held "that Gonzalez did not sufficiently allege that he had an actionable ownership interest." (*Id.*) The Complaint did "not contain allegations demonstrating Gonzalez's ownership in compliance with" the statutory requirement that "[i]n the case of property confiscated before March 12, 1996, a United States national may not bring an action under [the Act] . . . unless such national acquires ownership of the claim before March 12, 1996." (*Id.* (quoting 22 U.S.C. § 6082(a)(4)(B)).)

The Court also recognized the import of Title III's scienter requirement, stating, "the only companies that will run afoul of [Title III] are those that are knowingly and intentionally trafficking in the stolen property of U.S. citizens." (*Id.* (quoting 142 Cong. Rec. H1724-04, at H1737 (Mar. 6, 1996).) At the hearing, the Court repeatedly implored Plaintiff's counsel to explain how Amazon could possibly have known that charcoal offered for sale on its website was supposedly from property confiscated by the Cuban government. *See, e.g.*, Mar. 10, 2020 Hr'g Tr., Ex. 1, at 29:14–17 ("Show me where within the four corners of your complaint anybody could plausibly conclude that Amazon had any idea that this charcoal was coming from confiscated property."). For this independent ground, the Court dismissed the Complaint because the formulaic recitation

of Title III's scienter element was "conclusory" and "legally insufficient to state a claim." *Gonzalez*, 2020 WL 1169125, at *2 (quoting Compl. ¶¶ 18, 19 ("The Complaint offers only conclusory allegations that the Defendants knowingly and intentionally trafficked in confiscated property. In paragraphs 18 and 19, Gonzalez alleges that the Defendants 'knowingly and intentionally commenced, conducted, and promoted the sale of marabu charcoal produced on the Subject Property' and that they 'knowingly and intentionally participated in and profited from the communist Cuban Government's possession of the Subject Property.'")). It is self-evident, as noted by the Court, that the alleged advertisement on amazon.com stating that the charcoal was produced in Cuba did not show that Amazon knew the property was confiscated by the Cuban government. (*Id.*)

While the Complaint did not plead facts to plausibly state a claim, the Court gave Plaintiff a chance to cure his flawed pleading "provided he complies with [the Dismissal O]rder, Federal Rule of Civil Procedure 8(a), and the *Iqbal*/*Twombly* standard." (*Id.* at *3.) Plaintiff, however, still fails to establish an actionable ownership interest and plead facts necessary to state a Title III claim; the Amended Complaint should be dismissed.

B. Plaintiff's Amended Complaint Fails To Plead Facts Sufficient To State A Claim For Relief Under Title III Of The Helms-Burton Act.

1. Plaintiff Still Fails To Allege Facts To Plausibly Show That He Acquired An Ownership Interest In The Farmland Prior To March 12, 1996.

Plaintiff's father allegedly inherited the Farmland in 1988 from Plaintiff's grandfather, and then Plaintiff's mother inherited the Farmland from the father in November 2016. (Am. Compl. ¶ 16.)[1] At some time after the Plaintiff's mother inherited the Farmland in November 2016, the

[1] Plaintiff attached to the Amended Complaint what he alleges is a "copy of the original deeds to the Subject property" reflecting his grandfather's purchase of the Farmland "from 1941 through 1952." (Am. Compl. ¶ 10; *id.* at Ex. A.) The "original deed," standing alone, does nothing

Amended Complaint alleges that she "chose to pass her ownership claim to the Subject Property to" Plaintiff. (*Id.* ¶ 16.) The Amended Complaint fails to allege *how* Plaintiff's mother "pass[ed] her ownership claim" to the Plaintiff and fails to attach any evidence showing what ownership interest passed to Plaintiff (who was one of four children) from his mother. (Am. Compl. ¶ 12.) More to the point, if ownership passed to Plaintiff it did so two decades after 1996.[2]

2. Plaintiff Still Fails To Allege Facts To Plausibly Show That Amazon Knowingly And Intentionally Trafficked In Confiscated Property.

In an attempt to satisfy Title III's scienter element, the Amended Complaint re-alleges the identical allegations that the Court explicitly held were conclusory and insufficient to state a claim: that Defendants "knowingly and intentionally commenced, conducted, and promoted the sale of marabu charcoal produced on the Subject Property" and that they "knowingly and intentionally participated in and profited from the communist Cuban Government's possession of the Subject Property." *Compare* Am. Compl. ¶ 27, *with Gonzalez*, 2020 WL 1169125, at *2.

In the initial Complaint, Plaintiff alleged that he "timely provided the Defendants with written notice by certified mail of Plaintiff's intent to commence this action with respect to the [Farmland] in accordance with 22 U.S.C. § 6082(a)(3)." (Compl. ¶ 22.) In his Amended Complaint, Plaintiff alleges that "on or about July 22, 2019, [he] sent Defendant Amazon written

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to show how the Plaintiff acquired his ownership interest and whether he acquired it prior to March 12, 1996. In addition, the "original deed" should be stricken from the record because it is a foreign language document without a translation into English. *See Macbeg De Occidente S.A. de C.V. v. Kaloti Metals & Logistics, LLC*, No. 12-CV-24050, 2013 WL 12145905, at *3 (S.D. Fla. June 25, 2013) ("Plaintiff must provide certified English translations" of foreign language documents attached to the complaint).

[2] Plaintiff alleges that he and his siblings "were born in Cuba and *lived on the subject property*." (Am. Compl. ¶ 12 (emphasis added).) The Act excludes "real property used for residential purposes" from the definition of "property" for which one may be liable for trafficking in under the Act. 22 U.S.C. § 6023(12)(B); *see id.* § 6082(a)(1)(A). Plaintiff does not have a viable Title III claim for the additional reason that the Amended Complaint alleges that he and his siblings used the Farmland for residential purposes.

notice by certified mail to cease and desist from trafficking in the Subject Property." (Am. Compl. ¶ 27.) Notably, the letter is not attached to either the Complaint or the Amended Complaint. And neither pleading alleges facts as to the content of the letter.

Plaintiff now alleges that it is a *different* charcoal product (pictured below) than alleged in the initial Complaint that is being advertised for sale on an Amazon website; this charcoal is allegedly being sold "in Italy" on Amazon's Italian website. (*Id.*); *compare* Am. Compl. ¶ 27 at "Fig. 1", *with* Compl. ¶ 19 at "Fig. 1".

Fig. 1

Amazon.com

(*Id.* ¶ 27 at "Fig. 1".)[3]

[3] Plaintiff alleges that Defendant Susshi International, Inc. d/b/a FOGO Charcoal sold a different charcoal product on its own website, not on any Amazon website. (Am. Compl. ¶ 27.)

III. ARGUMENT

Pursuant to Rule 12(b)(6), a claim should be dismissed when the plaintiff "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To state a claim, a plaintiff must "articulate 'enough facts to state a claim to relief that is plausible on its face.'" *Gonzalez*, 2020 WL 1169125, at *1 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A court must dismiss a plaintiff's claims if she fails to nudge her 'claims across the line from conceivable to plausible.'" (*Id.* (quoting *Twombly*, 550 U.S. at 570).)

Applying these pleading rules and standards here, the Amended Complaint should be dismissed with prejudice because Plaintiff again has not and cannot plead *facts* showing that (1) Plaintiff has an actionable ownership interest under Title III, and (2) Amazon knowingly and intentionally trafficked in confiscated property.

A. Plaintiff Does Not Have An Actionable Ownership Interest.

The plain language of Title III requires that *the plaintiff* must have acquired ownership of the claim before March 12, 1996. Under 22 U.S.C. § 6082(a)(4)(B), "[i]n the case of property confiscated before March 12, 1996, a United States national may not bring an action under [the Act] . . . unless such national acquires ownership of the claim before March 12, 1996." *Gonzalez*, 2020 WL 1169125, at *2 (quoting 22 U.S.C. § 6082(a)(4)(B)) (alterations in Dismissal Order). In the statute, "such national" refers to the "United States national," who may or may not bring an action under Title III (i.e., a potential plaintiff). 22 U.S.C. § 6082(a)(4)(B); s*ee also Havana Docks Corp. v. MSC Cruises SA Co.*, No. 19-CV-23588, 2020 WL 59637, at *3 (S.D. Fla. Jan. 6, 2020) (reasoning that ignoring the qualifying word "such" in interpreting separate provision of Title III, "would run afoul of basic canons of statutory interpretation"). Here, Plaintiff "may not bring an

action under" Title III, "unless [Plaintiff] acquire[d] ownership of the claim before March 12, 1996." *Gonzalez*, 2020 WL 1169125, at *2.

The reason Congress specifically required a plaintiff like Gonzalez to acquire an ownership interest *before* the enactment of Helms-Burton in 1996 was to prevent individuals from taking undue advantage of Title III by transferring their ownership interest in confiscated property to a United States citizen *after* the law's enactment. (Mar. 10, 2020 Hr'g Tr., Ex. 1, at 26:17–27:3.) Congress was concerned that, after the enactment of Helms-Burton, individuals who had an ownership interest in confiscated property would opportunistically transfer or assign those ownership interests to U.S. citizens, who would then bring a Title III cause of action. Congress enacted Helms-Burton to protect the property interests of United States citizens *as of* March 12, 1996, and thus the Act does not permit plaintiffs like Gonzalez from maintaining a private right of action under Title III unless they acquire the ownership interest in the property confiscated and were a U.S. citizen on or before March 12, 1996. (*Id.*)

Plaintiff allegedly acquired an ownership interest in the Farmland in November 2016 or later. (Am. Compl. ¶ 16.) Because Plaintiff does not allege that he acquired ownership of a claim to the Subject Property until 20 years *after* the March 12, 1996 statutory cutoff date, he does not have an actionable ownership interest. For this reason alone, Plaintiff's Amended Complaint should be dismissed with prejudice. In addition, Plaintiff fails to adequately allege facts to show how he acquired a claim to the Farmland. Plaintiff's only allegation regarding his ownership interest in the Farmland is the conclusory assertion that his mother "chose to pass her ownership claim to the Subject Property" to Plaintiff at some unspecified time in or after November of 2016.[4]

[4] This contradicts the allegation in Plaintiff's initial Complaint that he acquired the Farmland "by operation of succession." (Compl. ¶ 9.)

(Am. Compl. ¶ 16.) Plaintiff does not even attach any papers showing that a property interest was conveyed or "passed" to him. The amended pleading merely tracks the statutory language for the "ownership interest" requirement that a plaintiff must have to bring a Title III action. *Gonzalez*, 2020 WL 1169125, at *2 (citing *Twombly*, 550 U.S. at 557 (conclusory allegations cannot survive a motion to dismiss)). Because Plaintiff fails to allege facts showing *what* ownership interest he has in the Subject Property or *how* it was conveyed to him, the Amended Complaint should be dismissed.

B. Plaintiff Fails To Plead Facts To Show Amazon "Knowingly And Intentionally" Trafficked In Confiscated Property.

In the Dismissal Order, this Court reaffirmed the well-settled proposition that a plaintiff must plead facts to satisfy a scienter requirement and conclusory allegations of knowledge and intent are not sufficient. *Gonzalez*, 2020 WL 1169125, at *2 (citing *Twombly*, 550 U.S. at 557; *Ruiz v. Experian Information Solutions, Inc.*, 2017 WL 1378242, at *2 (S.D. Fla. Apr. 14, 2017) (Scola, J.)). Ignoring the Court's ruling, Plaintiff reasserts the *identical* conclusory allegations that the Court found "legally insufficient to state a claim." *Compare* Am. Compl. ¶ 27, *with Gonzalez*, 2020 WL 1169125, at *2. Like in the initial Complaint, Plaintiff's conclusory assertions fail to state a claim.

Once the "formulaic recitation" of the scienter element for a Title III cause of action is stripped from the Amended Complaint, the scant factual allegations remaining that relate to Amazon fail to show the requisite scienter, i.e., that Amazon knew the Farmland was confiscated by the Cuban government, knew a product from the Farmland was advertised on Amazon's website, and intended to traffic in the Farmland. The only remaining allegations are that Plaintiff sent Amazon a letter two months prior to initiating this lawsuit and that Amazon's website "in Italy" advertises a Cuban charcoal product. (Am. Compl. ¶ 27.)

Plaintiff's *sole* allegation concerning the letter is that "on or about July 22, 2019, [he] sent Defendant Amazon written notice by certified mail to cease and desist from trafficking in the Subject Property." (*Id.*) This conclusory allegation contains no facts showing that the letter informed Amazon of what supposed "trafficking" conduct it was engaging in or what the "Subject Property" is. This single allegation does not show, as it must, that a letter (not attached to the pleading) plausibly gave Amazon reason to know that a particular product on its website came from property confiscated by the Cuban Government. Because Plaintiff sent Amazon a letter to cease and desist from trafficking generally "does not demonstrate that [Amazon] knew the property was confiscated by the Cuban government." *Gonzalez*, 2020 WL 1169125, at *2.

The letter Plaintiff references in his Amended Complaint appears to be a settlement demand letter that was sent to Amazon as a necessary statutory pre-requisite to be eligible for an increased damages award under Title III. (Am. Compl. ¶ 30); *see* 22 U.S.C. § 6082(a)(3)(B) (requiring a claimant to provide a notice letter 30 days prior to filing suit). Plaintiff's attempt to repurpose the statutorily required letter is ill-conceived and unfair. Title III is meant to deter investors from knowingly doing business with the Cuban government. To that end, the Act requires scienter so that unknowing participants in commercial activity are not subject to liability for "trafficking." (ECF No. 14 at 8–10.) Plaintiff obviously cannot convert Amazon into a knowing trafficker by sending a generic demand that Amazon "cease trafficking." But the Amended Complaint alleges nothing more.

The allegations in the Amended Complaint about the demand letter do not contain facts imputing knowledge to Amazon that a particular product on its website came from the Farmland *and* that the Farmland had been confiscated by the Cuban government. Moreover, given the timing of the alleged letter, these allegations cannot demonstrate that Amazon knowingly and

intentionally trafficked in the Farmland beginning in January 2017. Plaintiff alleges that the letter was sent "on or about July 22, 2019"—more than *two years after* Plaintiff alleges that Amazon began "knowingly and intentionally" trafficking in the Subject Property. (Am. Compl. ¶ 27 ("*beginning on or about January 5, 2017* . . . Amazon.com and FOGO Charcoal, knowingly and intentionally . . .") (emphasis added).) Whatever Plaintiff's 2019 letter said, it did not somehow retroactively impute knowledge to Amazon.

The only allegation concerning conduct after July 22, 2019 is that Amazon's website "in Italy" advertises a different product than the charcoal on amazon.com that Plaintiff alleged came from the Farmland. (Am. Compl. ¶ 27.) The Amended Complaint does not allege that this different charcoal product came from the Farmland, much less any facts to show that Amazon knew it came from Farmland. As already noted by this Court, the fact that a charcoal product allegedly came from Cuba "does not demonstrate that the Defendants knew the property was confiscated by the Cuban government." *Gonzalez*, 2020 WL 1169125, at *2. Similarly, charcoal allegedly advertised as Cuban on Amazon's website in Italy (or anywhere else) also does not show that Amazon knew that charcoal came from confiscated property.

IV. <u>CONCLUSION</u>

For the foregoing reasons, the Court should dismiss with prejudice Plaintiff's Amended Complaint for failure to state a claim upon which relief can be granted.

Dated: April 17, 2020

Respectfully submitted,

/s/ Robert M. Brochin

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2020, I electronically filed the foregoing with the Clerk of the Court through the CM/ECF system, which will send a notice of electronic filing to counsel for all parties of record.

/s/ Robert M. Brochin
Robert M. Brochin

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-23988-CV-SCOLA

DANIEL A. GONZALEZ,

Plaintiff(s),

vs.

AMAZON.COM,INC., and
SUSSHI INTERNATIONAL, INC.,

Defendant(s).

Miami, Florida

March 10, 2020

MOTION TO DISMISS
BEFORE THE HONORABLE ROBERT N. SCOLA, JR.
UNITED STATES DISTRICT JUDGE

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should I have known if there's a license to the plaintiffs, plead whether there was a license or not what those exceptions are, how or when somebody passed away, how --

THE COURT: Let me ask a question. If the grandfather owned the property, never left Cuba --

MR. CUETO: Yes, Your Honor.

THE COURT: -- never been to the United States, died in 1997, and then your client inherited the property. I won't say how he got it. Let's assume he obtained ownership in 1997. Would he be entitled to sue under Helms-Burton Act?

MR. CUETO: I believe so, and I think there's other briefs in other cases that are addressing this point --

THE COURT: How? Because under the Helms-Burton Act, doesn't the owner of the property have to have been a U.S. national as of 1996?

MR. CUETO: Well, the argument --

THE COURT: What was happening is Cuba was advertising to other countries and other entities, hey, come to our country. We are going to let you buy these properties. And the United States said, whoa, wait a minute, it's one thing to try and get this back from Castro. It's another thing to have Spain and Brazil and Germany and other multinationals going in and buying the property, and then when Cuba falls and is a democracy, the United States citizens go back.

So wasn't it designed to, as of the date of the Helms

Act, to allow U.S. to claim, not somebody who stayed in Cuba until 2007 and now came to the United States and wants to pursue the claim?

MR. CUETO: The problem with the statute, and the plaintiffs do not believe the intent of the statute was for it to expire necessarily and for the Title 3 to be suspended for 25 years, necessarily that means that people would die out eventually and the statute would expire. And clearly that wasn't congress's intent, to enact a statute that by its very definition would expire after a certain amount of time because there is no claimants left.

THE COURT: Okay. That's a different question. I'm not saying it expired. But it doesn't start, okay, unless the person who owns the property was a U.S. national on March 12, 1996.

So don't you have to allege that the grandfather or your client or somewhere -- you just said your client got it by succession which seems to me that maybe his parents got it, then he got it, which could have been going on over several different episodes over the years. Doesn't somebody who owned it have to have been a U.S. national as of March 12, 1996?

MR. CUETO: I believe so, Your Honor.

THE COURT: Okay. So why don't you have to allege that?

MR. CUETO: Well, Your Honor, I think, again going

or what their relationship was to your client at the time?

MR. CUETO: I don't know for certain, Your Honor.

THE COURT: Okay. Go ahead.

MR. CUETO: As to the first point, the defendants allege that, again, we just discussed that about the ownership of the claim, whether it was before 1996 or not I don't think is, right at this moment, relative for pleading. I believe it's generally we are allowed to plead that.

Regarding Rule 9, scienter requirement, I believe Rule 9 allows the plaintiff to allege generally that they had knowingly confiscated -- trafficked in that property.

THE COURT: So point to me -- let's forget FOGO for a second. Let's assume you are only suing Amazon. We are only focusing on Amazon. Show me where within the four corners of your complaint anybody could plausibly conclude that Amazon had any idea that this charcoal was coming from confiscated property.

MR. CUETO: Well, that's why we added figure 1 and figure 2 where both the language --

THE COURT: Hold on. Figure 1. Hold on a second.

MR. CUETO: -- both of them say they are derived from Cuba property.

THE COURT: Cuba property that was seized pursuant to the Helms-Burton Act?

MR. CUETO: Well, confiscated property. I think it's