No. 20-12407

United States Court of Appeals

for the

Eleventh Circuit

MARIO DEL VALLE; ENRIQUE FALLA; ANGELO POU,

Plaintiffs-Appellants,

CAROLINA FERNANDEZ, et al.,

Plaintiffs,

– v. –

TRIVAGO GMBH, a German Limited Liability Company; BOOKING.COM B.V., a Dutch Limited Liability Company; GRUPO HOTELERO CARIBE; CORPORACION DE COMERCIO Y TURISMO INTERNACIONAL CUBANACAN S.A.; GRUPO DE TURISMO GAVIOTA S.A.; RAUL DOE 1-5; MARIELA ROE 1-5; EXPEDIA, INC., et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA IN CASE NO. 1:19-CV-22619-RNS
ROBERT N. SCOLA, U.S. DISTRICT COURT JUDGE

BRIEF OF DEFENDANTS-APPELLEES BOOKING.COM B.V. AND BOOKING HOLDINGS INC.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CIP)

Appellees Booking.com B.V. and Booking Holdings Inc. file this Certificate of Interested Persons and Corporate Disclosure Statement, listing in alphabetical order the parties and entities interested in this appeal, as required by Rule 26.1 of the Federal Rules of Appellate Procedure ("***FRAP***") and Rule 26.1 of the Eleventh Circuit Rules ("***11th Cir. R.***"):

1. Aguila, M. Paula, Esq. (counsel for Plaintiffs–Appellants)
2. Akerman LLP (counsel for Defendants–Appellees Expedia Group, Inc., Hotels.com, L.P., Hotels.com GP, LLC, and Orbitz, LLC)
3. Arellano, Elena del Valle (former plaintiff and alleged owner of the claim to one of the allegedly confiscated properties)
4. Baker & McKenzie LLP (counsel for Defendants–Appellees Booking.com B.V. and Booking Holdings, Inc.)
5. Bloom, Hon. Beth (United States District Judge)
6. Booking Holdings, Inc. BKNG (Defendant–Appellee)
7. Booking.com B.V. (Defendant–Appellee)
8. Del Valle, Elena (sister of Plaintiff–Appellant Mario Del Valle and alleged owner of interest in one of the allegedly confiscated properties)
9. Del Valle, Mario (Plaintiff–Appellant)

10. Duffy, Michael A. (counsel for Defendants–Appellees Booking.com B.V. and Booking Holdings, Inc.)

11. Echevarria, Mario (former plaintiff and alleged owner of the claim to one of the allegedly confiscated properties)

12. Expedia, Inc., a Washington corporation (subsidiary of Expedia Group, Inc. and indirect parent company of Defendants–Appellees Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC)

13. Expedia Group, Inc. EXPE (Defendant–Appellee)

14. Falla, Enrique (Plaintiff–Appellant)

15. Falla, Laureano (former plaintiff and alleged owner of the claim to one of the allegedly confiscated properties)

16. Fernandez, Carolina (former plaintiff and alleged owner of the claim to one of the allegedly confiscated properties)

17. Fernandez, Luis (former plaintiff and alleged owner of the claim to one of the allegedly confiscated properties)

18. Fernandez, Mario (former plaintiff and alleged owner of the claim to one of the allegedly confiscated properties)

19. Hotels.com GP, LLC (Defendant–Appellee and parent of Defendant–Appellee Hotels.com)

20. Hotels.com L.P. (Defendant–Appellee)

21. HRN 99 Holdings, LLC (indirect subsidiary of Defendant–Appellee Expedia Group, Inc., and parent of Defendant–Appellee Hotels.com GP, LLC)

22. Law Office of Manuel Vazquez, P.A. (counsel for Plaintiffs–Appellants)

23. Mathy, Patricia (counsel for Defendants–Appellees Booking.com B.V. and Booking Holdings, Inc.)

24. McCutcheon, Michael C. (counsel for Defendants–Appellees Booking.com B.V. and Booking Holdings, Inc.)

25. Mestre, Jorge (counsel for Plaintiffs–Appellants)

26. Moreno, Hon. Federico A. (United States District Judge)

27. Olson, Kyle R. (counsel for Defendants–Appellees Booking.com B.V. and Booking Holdings, Inc.)

28. Orbitz, Inc. (parent of Defendant–Appellee Orbitz, LLC and indirect subsidiary of Defendant–Appellee Expedia Group, Inc.)

29. Orbitz, LLC (Defendant–Appellee)

30. Orbitz Worldwide, Inc. (indirect parent of Defendant–Appellee Orbitz, LLC and indirect subsidiary of Defendant–Appellee Expedia Group, Inc.)

31. Orbitz Worldwide, LLC (indirect parent of Defendant–Appellee Orbitz, LLC and indirect subsidiary of Defendant–Appellee Expedia Group, Inc.)

32. Perez, Lorayne (counsel for Defendants–Appellees Expedia Group, Inc, Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC)

33. Pou, Angelo (Plaintiff–Appellant)

34. Riccio, L Andrew S. (counsel for Defendants–Appellees Booking.com B.V. and Booking Holdings, Inc.)

35. Rivero Mestre LLP (counsel for Plaintiffs–Appellants)

36. Rivero, Andres (counsel for Plaintiffs–Appellants)

37. Rodriguez, Carlos A. (counsel for Plaintiffs–Appellants)

38. Rolnick, Alan (counsel for Plaintiffs–Appellants)

39. Scola, Hon. Robert N., Jr. (United States District Judge)

40. Scott Douglass & McConnico LLP (counsel for Defendants–Appellees Expedia Group, Inc, Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC)

41. Shank, David (counsel for Defendants–Appellees Expedia Group, Inc, Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC)

42. Sosa, Lolita (counsel for Defendants–Appellees Expedia Group, Inc, Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC)

43. Valle, Hon. Alicia O. (United States Magistrate Judge)

44. Vazquez, Manuel (counsel for Plaintiffs–Appellants)

45. Webre, Jane (counsel for Defendants–Appellees Expedia Group, Inc, Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure ("***FRAP***") and 11th Cir. R. 26.1, Appellee Booking.com B.V., a Dutch entity, states that 100% of its stock is owned by Booking Holdings Inc., a publicly held corporation.

Pursuant to Rule 26.1 FRAP and 11th Cir. R. 26.1, Appellee Booking Holdings Inc. states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock. Booking Holdings Inc. is a publicly held corporation with ticker symbol BKNG.

STATEMENT REGARDING ORAL ARGUMENT

Appellees Booking.com B.V. and Booking Holdings Inc. submit that oral argument is unnecessary in this case because it is a straightforward appeal concerning personal jurisdiction. This Court should affirm the district court's judgment without argument.

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STATEMENT OF THE ISSUES

Issue I: The first issue, reviewed *de novo*, is whether personal jurisdiction can be maintained over foreign defendants based on the accessibility of a website in Florida, under Sections 48.193(1)(a)(1) (the "doing business" section) and 48.193(1)(a)(2) (the "committing a tort" section) of the Florida long-arm statute and the Due Process Clause.

Issue II: The second issue is whether the district court abused its discretion by dismissing plaintiffs' Second Amended Complaint without granting a conditional request for jurisdictional discovery contained solely in the plaintiffs' response in opposition to a motion to dismiss.

Issue III: The third issue is whether the district court abused its discretion by dismissing the Second Amended Complaint without leave to amend where plaintiffs did not move the district court for leave to amend.

STATEMENT OF THE CASE

Appellees Booking.com B.V. and Booking Holdings Inc. (together, the "***Booking Appellees***") disagree with the statement of the case contained in the Opening Brief ("***Opening Brief***") of Appellants Mario Del Valle ("***Del Valle***"), Enrique Falla ("***Falla***"), and Angelo Pou ("***Pou***" and together with Del Valle and Falla, the "***Appellants***") filed on September 2, 2020, because it mischaracterizes the posture below and the district court order dismissing the case, and otherwise contains factual contentions that are not contained in the operative Second Amended Complaint. A proper statement follows.

A. Course of Proceedings Below

On June 24, 2019, Appellants Del Valle and Falla, along with nine other individual plaintiffs, commenced this Helms-Burton action in the U.S. District Court for the Southern District of Florida by filing a class action complaint (D.E. 1; SA. 1)[1] (the "***Original Complaint***") against Trivago GmbH, Grupo Hotelero Gran Caribe, Corporacion de Comercio y Turismo Internacional Cubanacan S.A., Grupo de Turismo Gaviota S.A., certain unnamed "Doe" defendants and Appellee Booking.com B.V. Appellants did not include the Original Complaint in Appellants' Appendix, so it is included in the Supplemental Appendix.

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[1] Citations to the record indicate "D.E. #" and, where applicable, followed by the page or paragraph number cited, as well as a parallel citation to Appellants' Appendix ("A. #") or, the Booking Appellees' Supplemental Appendix ("SA. #").

On July 1, 2019, Appellants Del Valle and Falla, along with one new individual plaintiff (Mario Echevarria), filed the first amended class action complaint (D.E. 5; A. 17) (styled as a "corrected" complaint) against the same defendants (the "***Corrected Complaint***"). The Corrected Complaint dropped the nine non-Appellant plaintiffs and added non-appellant plaintiff Echevarria.[2]

On January 17, 2020, more than 200 days after commencing the case, Appellants Del Valle and Falla filed their second amendment to the complaint (D.E. 15; A. 39) (styled simply as an "amended" complaint and herein referred to as the "***Amended Complaint***"). The Amended Complaint again altered the parties to the case, dropping plaintiff Echevarria and adding Appellant Pou. The Amended Complaint also dropped all defendants except for Appellee Booking.com B.V., and added Appellee Booking Holdings Inc., as well as Expedia, Inc., Hotels.com L.P., Hotels.com GP and Orbitz, LLC (together with Expedia Group, Inc., the "***Expedia Appellees***"). The Amended Complaint amended jurisdictional allegations (*Id.*, at ¶¶ 12, 21; A. 43, 44) and allegations related to Appellants' alleged inheritance of the Cuban property claims (*Id.*, ¶¶ 22-30; A. 44, 45).

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[2] In a later-filed Motion for Leave to Amend (D.E. 47; A. 68), Appellants stated that the Corrected Complaint was filed in order to "**correct[] scrivener's errors** in the originally-filed Class Action Complaint for Damages." (D.E. 47, at 2, n.2; A. 68) (emphasis added).

On March 23, 2020, the Expedia Appellees filed a motion to dismiss the Amended Complaint (D.E. 46; SA. 25) (the "***First Expedia Motion to Dismiss***"), (i) under Federal Rule of Civil Procedure ("***Fed.R.Civ.P.***") 12(b)(1) due to Appellants' lack of standing under Article III of the U.S. Constitution, (ii) lack of personal jurisdiction under Fed.R.Civ.P. 12(b)(2), and (iii) failure to state a claim under Fed.R.Civ.P. 12(b)(6). Appellants did not include the First Expedia Motion to Dismiss in Appellants' Appendix, so it is included in the Supplemental Appendix.

On March 26, 2020, Appellants filed a motion for leave to further amend the complaint (D.E. 47; A. 68) (the "***Motion for Leave***"). Appellants sought leave to amend in order to address Expedia's "arguments that plaintiffs lack standing to bring this action, that this Court lacks jurisdiction to hear it, and that plaintiffs have failed to state a claim . . . ." (*Id.*, at 2; A. 69). The District Court granted Appellants' Motion for Leave on March 27, 2020 (D.E. 49; A. 133).

On March 27, 2020, Appellants filed their third amendment to the complaint (D.E. 50; A. 135), the operative complaint that is at issue in this appeal (styled as the "second" amendment and referred to herein as the "***Second Amended Complaint***" or "***SAC***"). The SAC substituted Expedia Group, Inc. for former defendant Expedia, Inc. It also added further jurisdictional allegations (*Id.*, at ¶¶ 10, 12-16, 55, 60; A. 138-140, 147, 149) and allegations related to Appellants' alleged inheritance of

the Cuban property claims (*Id.*, at ¶¶ 20-33, 87; A. 141, 142, 153), among other revisions.

On April 10, 2020, the Booking Appellees filed the Motion to Dismiss (D.E. 52; A. 196), arguing (i) Appellants' lack of standing under Fed.R.Civ.P. 12(b)(1), as required by Article III of the U.S. Constitution, (ii) lack of personal jurisdiction over the Booking Appellees under Fed.R.Civ.P. 12(b)(2), and failure to state a claim under Fed.R.Civ.P. 12(b)(6). The Expedia Appellees filed a similar motion on the same date (D.E. 53; A. 226).

On May 1, 2020, Appellants filed an omnibus response in opposition to the Appellees' motions to dismiss (D.E. 64; A. 254) (the "***Response***"). In the Response, Appellants added new factual allegations (*see, e.g.*, *Id.*, at 18-19, A. 271, 272) not alleged in the complaint, as confirmed in the Opening Brief (*see* Opening Brief at 19, listing factors relevant to Florida long-arm jurisdiction analysis and citing D.E. 64 at 18; A. 271)—not the Second Amended Complaint). Appellants also suggested for the first time in the Response that "jurisdictional discovery would be warranted" "if the Court were to have any doubt about the sufficiency of defendants' Florida contacts (out of which this action arises)" (D.E. 64, at 23; A. 276), and "[i]f the Court deems jurisdictional discovery necessary," (*id.* at 26; A. 279). Plaintiffs, however, never filed a motion for jurisdictional discovery or served any such discovery on defendants at this time.

On May 15, 2020, the Booking Appellees filed their Reply (D.E. 69; A. 337) to Appellants' omnibus Response to the motions to dismiss. On the same date, the Expedia Appellees filed their reply (D.E. 70; A. 360).

On May 22, 2020, Appellants served Appellee Expedia Group, Inc. with requests for admission. Appellants did not serve any discovery requests on either of the Booking Appellees—at any time—during this case.

On May 22, 2020, the District Court executed the Order on the Motions to Dismiss (D.E. 71; A. 384) (the "***Order***"), granting Appellees' respective motions to dismiss for lack of personal jurisdiction. The Order was entered on the docket on May 26, 2020. This appeal followed on June 24, 2020. (D.E. 72; A. 392).

B. Statement of Facts

1. **The Helms-Burton Act**

Congress passed the Helms-Burton Act in 1996. Title III of the Act—subject to certain limitations and definitions—grants U.S. nationals who "own[ ] a claim" to "property" that was confiscated by the Cuban government the right to sue any person that "traffics" in such property for damages. 22 U.S.C. § 6082(a). The Act grants the President the ability to suspend the right to bring an action under Title III for successive six-month periods. 22 U.S.C. § 6085(c). Shortly after the Act was enacted, on March 12, 1996, and before Title III became effective, President Clinton suspended the right to bring an action under Title III and, thereafter, renewed the

suspension during the remainder of his presidency. Presidents Bush and Obama followed suit for each succeeding six-month period thereafter. President Trump continued the suspension, but only for a time. More than twenty years after the Act's passage, on May 2, 2019, the Trump administration permitted the suspension of the right to bring a Title III action to expire.

The private right of action is contained at Section 6082(a)(1)(A) of the Act, and provides, in pertinent part, as follows:

> Except as otherwise provided in this section, any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages

22 U.S.C. § 6082(a)(1)(A).

The Act defines the term "traffics" in Section 6021(13) in two parts. Subparagraph (A) describes three kinds of activities that constitute trafficking if done knowingly and intentionally, and without the authorization of the United States national who holds a claim to the property. 22 U.S.C. § 6023(13)(A). Subparagraph (B) lists four types of conduct that nevertheless do not constitute trafficking. 22 U.S.C. § 6023(13)(B). Among the conduct that specifically does *not* constitute trafficking are "transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel." 22 U.S.C. § 6023(13)(B)(iii).

Under the Act, "[i]n the case of property confiscated before March 12, 1996, a United States national may not bring an action . . . on a claim to confiscated property unless such national acquires ownership of the claim before March 12, 1996." 22 U.S.C. § 6082(a)(4)(B). Thus, in order to bring a claim under Title III of the Act regarding property confiscated before March 12, 1996, the statute requires that the plaintiff have acquired ownership of that claim before March 12, 1996. *Id.*

2. **Facts Alleged in the Complaint**

Appellants purported to bring a class action lawsuit against Appellees based on their claims that they are the "rightful owners" of claims to properties in Cuba that were confiscated by the Cuban Government during the Cuban revolution. (D.E. 50, at ¶¶ 19-42; A. 141-144). For example, according to the SAC, the so-called "Del Valle Property" was originally owned by Luis Del Valle Esnard. (*Id.*, at ¶ 19; A. 141). After a series of hereditary conveyances, when Mario Del Valle Sr. died in November of 1968, "his interest in the Del Valle Property was distributed to his children, including his son, plaintiff Mario Del Valle . . . ." (*Id.*, at ¶ 22). The Del Valle Property was allegedly confiscated by the Cuban government in the early 1960s, and (together with the Falla property, discussed below) developed into the Cuatro Palmas hotel by the Cuban government and Blue Diamond Hotels & Resorts, Inc. ("***Blue Diamond***"). (*Id.*, at ¶¶ 34-35; A. 142).

Appellants also allege that the so-called "Falla Property" was originally owned by Laureano Falla, together with his father-in-law, Eugenio Crabb. (*Id.*, at ¶ 24; A. 141). After a series of hereditary conveyances, in 2004, when Daisy Crabb Falla died, "her children, including her son Enrique Falla, inherited the entire interest to the Falla Property . . ." (*Id.*, at ¶ 27). The Falla Property was allegedly confiscated by the Cuban government in the early 1960s, and (together with the Del Valle property) developed into the Cuatro Palmas hotel by the Cuban government and Blue Diamond. (*Id.*, at ¶¶ 34-35).

Appellants further allege that the "Muniz Property," a finca located in Canasi, Cuba, was purchased by Marcelino Muniz and a business partner in 1910. (*Id.*, at ¶ 29). After Marcelino died in 1957, "his property was inherited by his only daughter Carmen Muniz, and on her passing in 2014, her interest to the property . . . was inherited by her three children, including Angelo Pou." (*Id.*, at ¶ 31). The Muniz Property was allegedly confiscated by the Cuban government "on or about 1959," and together with Blue Diamond, developed into the Memories Jibacoa Resort. (*Id.*, at ¶¶ 37-38; A. 143).

Appellants allege that each of the properties at issue have been "trafficked" by the Booking Appellees because reservations at the Cuatro Palmas and Memories Jibacoa could be made using the Booking.com website. (*Id.*, at ¶¶ 36, 39, 88).

3. **The Booking Appellees**

Booking Holdings Inc. is a Delaware corporation with its principal place of business in Connecticut. (*Id.*, at ¶ 9; A. 138). Booking.com B.V. is a Dutch limited liability company with its principal place of business in Amsterdam, the Netherlands. (*Id.*, at ¶¶ 9, 10; A. 138-139). Neither Appellee is registered to do business in Florida, or has an office in Florida.

Booking.com B.V. operates a website (booking.com) that offers travel-related services. (*Id.*, at ¶¶ 10, 60; A. 138-139, 149). Booking Holdings Inc. is a non-operating holding company and does not maintain or otherwise operate any website on which travel services are provided. (*Id.*, at ¶¶ 52, 55, 60; A. 147-149). Booking.com B.V. is a subsidiary of Booking Holdings Inc. (*Id.*, at ¶ 10; A. 138-139).

Booking.com B.V. operates the booking.com website and, as such, is considered a travel service provider under the Cuban Assets Control Regulations, 31 C.F.R. part 515 ("***CACR***"). (D.E. 52, at 12; A. 207. Consistent with the CACR's requirements, specifically § 515.572(b), and with specific licenses issued by the Office of Foreign Assets Control ("***OFAC***") at the U.S. Department of the Treasury under the authority of 31 C.F.R. § 515.572(c), the booking.com website only permits reservations to be completed at the Subject Hotels if the website user certifies that the underlying travel is to be completed in a category of travel that has been

authorized by OFAC. (*Id.*) These authorized categories of travel are enumerated in 31 C.F.R. § 515.560. (*Id.*) As such, all reservations made on, through or with any platform operated or offered by Booking.com B.V. are incident to lawful travel. (*Id.*)

4. **Discovery**

Appellants did not serve discovery, or move for leave to obtain discovery, from the Booking Appellees at any time while the case was pending for nearly a year in the district court. Appellants state several times in their Opening Brief that discovery was sought in other, "nearly identical" cases in which Appellants' counsel represent the plaintiffs, but it is undisputed that discovery was not sought in this case. Opening Brief at 4 n.1, 5 n.2, 7, 11, 14, 16, 26, 44, 46, 51.

5. **The Booking Appellees' Motion to Dismiss**

In their Motion to Dismiss, the Booking Appellees argued that dismissal was warranted for several reasons. *First*, pursuant to Fed.R.Civ.P. 12(b)(2), dismissal was warranted because the district court lacked general and specific personal jurisdiction over the Booking Appellees. In granting the motion, the district court held that plaintiffs failed to sufficiently allege general or specific jurisdiction over the Booking Appellees. (D.E. 71, at 3-7; A. 386-390). With regard to specific jurisdiction, the district court held that "Plaintiffs have not sufficiently alleged that the Court has specific jurisdiction over the Defendants under § 48.193(1)(a)(1)" and "the Court declines to find that the it has jurisdiction under [§ 48.193(1)(a)(1)]." (*Id.*,

at 4, 5). As to general jurisdiction, the district court held that "the Plaintiffs' allegation that the Defendants run a website that is accessible in Florida falls woefully short of the required allegations to establish 'substantial and not isolated activity within this state.'" *Id.*, at 6.

Second, the Booking Appellees sought dismissal under Fed.R.Civ.P. 12(b)(1) because the district court lacked subject matter jurisdiction due to plaintiffs' failure to plead an injury to meet the Article III standing requirements. Because the district court dismissed the case for lack of personal jurisdiction, it did not need to consider this alternative ground for dismissal.

Third, the Booking Appellees moved for dismissal under Fed.R.Civ.P. 12(b)(6) because Appellants failed to plausibly allege a cause of action under the Helms-Burton Act for three reasons: (i) failure to allege acquisition of a viable claim before the statutory bar date (the district court stated in a footnote that "it would be futile for Angelo Pou (and possibly for Enrique Falla) to amend their complaint because they do not appear to have actionable ownership interests." (*Id.*, at 8)), (ii) failure to allege the scienter element of a claim, and (iii) failure to allege that the Booking Appellees did not comply with the "Lawful Travel Clause." The

district court, however, did not engage in an analysis of the 12(b)(6) arguments and dismissed for lack of personal jurisdiction.[3]

C. Standard of Review

This Court reviews *de novo* the dismissal for lack of jurisdiction. *Diulus v. Am. Express Travel Related Servs. Co.*, No. 19-12640, 2020 U.S. App. LEXIS 25950, at *5 (11th Cir. Aug. 17, 2020) (citing *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 855 (11th Cir. 1990) (reviewing *de novo* a motion to dismiss for lack of personal jurisdiction)).

A district court's decision to deny jurisdictional discovery is reviewed for abuse of discretion. *Diulus*, 2020 U.S. App. LEXIS 25950, at *5 (citing *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1280 (11th Cir. 2009) (reviewing for abuse of discretion the denial of jurisdictional discovery)).

A district court's "refusal to grant leave to amend" is also reviewed for abuse of discretion. *Lawrence v. Bank of Am., N.A.*, 455 F. App'x 904, 906 (11th Cir. 2012) (citing *SFM Holdings Ltd v. Banc of Am. Sec., LLC*, 600 F.3d 1334, 1336 (11th Cir. 2010)).

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[3] To the extent this Court evaluates Appellants' case under Fed.R.Civ.P. 12(b)(6), the Booking Appellees hereby adopt the portion of the Expedia Appellees' brief dated November 2, 2020, addressing the Fed.R.Civ.P. 12(b)(6) grounds for dismissal, per FRAP 28(i) and 11th Cir Rule 28-1(f).

The Court is "obliged to consider standing *sua sponte*[.]" *AT&T Mobility, LLC v. NASCAR, Inc.*, 494 F.3d 1356, 1360 (11th Cir. 2007).

SUMMARY OF THE ARGUMENT

Even after no less than four attempts to plead their case, Appellants have failed to allege facts sufficient to establish personal jurisdiction over the Booking Appellees. Over the course of nearly a year, Appellants amended their complaint three times, including once in response to an earlier-filed motion to dismiss for lack of personal jurisdiction. Yet, upon the filing of the Bookings Appellees' motion to dismiss, Appellants did not attempt to amend their complaint and "failed to investigate, collect, and allege sufficient facts prior to responding to the motion to dismiss . . . ." (D.E. 71, at 7; A. 390). Nor did plaintiffs seek leave from the district court to serve jurisdictional discovery. Appellants now ask this Court to overlook their failure to take the necessary steps they believe would have demonstrated that personal jurisdiction exists over defendants. Appellants' request should be denied because there are no facts that can establish personal jurisdiction over the Booking Appellees in Florida.

For example, it is undisputed that the Booking Appellees have no physical presence in Florida and that none of their actions giving rise to the plaintiffs' claims—statutory claims for trafficking in *Cuban* real estate—occurred in Florida. Appellants rest their arguments exclusively on the fact that Booking.com B.V., a

Dutch entity with *no alleged U.S. presence*, operates a website through which users from almost anywhere in the world, including Florida, can make hotel reservations. Florida courts have repeatedly held, however, that the accessibility of a website in Florida does *not* give rise to personal jurisdiction. *See, e.g.*, *Storms v. Haugland Energy Grp., LLC*, No. 18-cv-80334, 2018 U.S. Dist. LEXIS 141122, at *22 (S.D. Fla. Aug. 17, 2018); (D.E. 71, at 4; A. 387) (". . . merely having a website accessible in Florida is not sufficient [to establish specific jurisdiction] . . . here, the only allegations provided in the Second Amended Complaint concern the Defendants' websites being accessible in Florida."). Appellee Booking Holdings Inc. is a non-operating stock holding company that also has *no presence whatsoever in Florida*, and none is alleged by Appellants. Instead of alleging any facts establishing a plausible nexus between the Booking Appellees and Florida, Appellants focus on *their own* contacts with the state. But plaintiffs' contacts with Florida are irrelevant to the jurisdictional analysis. *See Walden v. Fiore*, 571 U.S. 277, 290 (2014). Because Appellants have failed to meet their burden to plead a *prima facie* case for personal jurisdiction, this Court should affirm the district court's Order.

This Court should also affirm the district court's decision to reject Appellants' conditional request for jurisdictional discovery. *Henriquez v. El Pais Q'Hubocali.com*, 500 F. App'x 824, 830 (11th Cir. 2012). Significantly, Appellants did not seek discovery, jurisdictional or otherwise, from the Booking Appellees

during the year-long district court proceedings. Appellants make numerous references to "pending discovery requests" in the Opening Brief, yet *no such requests exist*. Further, Appellants' only purported "request" for jurisdictional discovery was buried in their Response to the motion to dismiss and, even then, expressly deferred to the district court's discretion to decide if it was necessary. It was not, and the district court properly exercised that discretion in dismissing the case without allowing Appellants jurisdictional discovery.

Finally, the district court's decision to dismiss the case without leave to amend should also be affirmed. Appellants had four opportunities to plead their case. Appellants revised their allegations numerous times during the 277 days from the filing of the Original Complaint on June 24, 2019, until the filing of the SAC on March 27, 2020. Indeed, Appellants sought and obtained leave of court to file the SAC *after* the Expedia defendants filed a motion to dismiss for lack of personal jurisdiction. *See* Motion for Leave (D.E. 47; A. 68). Faced with another jurisdictional challenge shortly thereafter, Appellants did not seek further leave to amend before they responded to the motions to dismiss. *Wagner v. Daewoo Heavy Industries Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) ("A district court is not required to grant a plaintiff leave to amend his complaint *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court.") Accordingly, the district court correctly

dismissed the SAC without leave to amend. For these reasons, and those explained more fully below, this Court should affirm the district court's Order in full.

ARGUMENT

A. The District Court Correctly Held That the Booking Appellees Are Not Subject to Specific Personal Jurisdiction.

In order to defeat a motion to dismiss for lack of jurisdiction under Fed.R.Civ.P. 12(b)(2), "the plaintiff must plead sufficient facts to establish a prima facie case of jurisdiction over the non-resident defendant's person." *Virgin Health Corp. v. Virgin Enters. Ltd.*, 393 F. App'x 623, 625 (11th Cir. 2010). "It is to be presumed that a cause lies outside [of the federal courts'] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). To establish specific jurisdiction under Florida law, a plaintiff must show both that the exercise of personal jurisdiction over the defendant is (i) authorized by Florida's "long-arm" statute and (ii) would comport with due process. *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1312 (11th Cir. 2018).

1. The district court correctly held that the Florida long-arm statute does not authorize specific personal jurisdiction over the Booking Appellees.

This Court commands that "[t]he Florida long-arm statute [be] strictly construed, and the person invoking jurisdiction under it has the burden of proving facts which clearly justify" jurisdiction. *Oriental Imps. & Exps., Inc. v. Maduro &*

Curiel's Bank, N.V., 701 F.2d 889, 891 (11th Cir. 1983). Section 48.193(1)(a) is the Florida long-arm statute's specific personal jurisdiction section. It requires that the plaintiff's claim arise from a non-resident defendant's Florida conduct. Fla. Stat. § 48.193(1)(a). This Court has recognized "that although the term 'arising from' is broad, it nevertheless 'requires a direct affiliation, nexus, or substantial connection to exist between the basis for the cause of action and the business activity.'" *Melgarejo v. Pycsa Pan., S.A.*, 537 F. App'x 852, 860 (11th Cir. 2013) (citing *Citicorp Ins. Brokers (Marine), Ltd. v. Charman*, 635 So. 2d 79, 82 (Fla. 1st DCA 1994)).

(a) Plaintiffs Failed to Establish Specific Personal Jurisdiction Under Fla. Stat. § 48.193(1)(a)(1).

Section 48.193(1)(a)(1) of the Florida Statutes provides, in pertinent part, as follows:

> A person . . . submits . . . herself . . . to the jurisdiction of the courts of [Florida] for any cause of action arising from any of the following acts:
>
> 1. Operating, conducting, engaging in, or carrying on a business . . . in [Florida] or having an office or agency in [Florida].

§ 48.193(1)(a)(1) Fla. Stat.

For a defendant to qualify as "'carrying on business' for the purposes of the long-arm statute, the activities of the defendant must be considered collectively and show a general course of business activity in the state for pecuniary benefit." *Future*

Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1249 (11th Cir. 2000). The district court here properly recognized that, for specific jurisdiction to exist over a defendant under Section 48.193(1)(a)(1), "[t]here must be a direct affiliation, nexus, or substantial connection between the basis for the cause of action and the business activity." (D.E. 71, at 3; A. 386) (citing *Brunner v. Tex. A&M Univ. 12th Man Found.*, No. 15-60581-CIV-DIMITROULEAS/S, 2015 U.S. Dist. LEXIS 197064, at *9 (S.D. Fla. June 23, 2015)). More than mere engagement in *some* form of business in the forum is required. (*Id.*)

(i) Booking.com B.V.

Appellants failed to satisfy the Section 48.193(1)(a)(1) standard as to Booking.com B.V. Each of the four complaints in this case contained only vague and conclusory statements about Appellee Booking.com B.V.'s conduct in Florida. For example, Appellants alleged that the Booking.com B.V. website "ha[s] worldwide reach on the internet and [is] fully accessible in Florida," and that defendants "solicit and accept reservations from U.S. residents, including Florida residents." (D.E. 50, at ¶¶ 12-13, 36, 39; A. 139, 143). These allegations are "insufficient to establish a prima facie case of personal jurisdiction" over Appellee Booking.com B.V. *See Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1318 & n3 (11th Cir. 2006) (allegations merely tracking the long-arm statute are conclusory and insufficient to establish a prima facie case); *In re Takata Airbag Prods. Liab. Litig.*,

396 F. Supp. 3d 1101, 1142 (S.D. Fla. June 20, 2019) ("courts in the Eleventh Circuit have repeatedly declined to exercise specific jurisdiction over a nonresident defendant on the basis of generalized and conclusory allegations . . . .").

Appellants argue that they "alleged far more" contacts with Florida. A close look at the SAC, however, demonstrates that the only purported connection between defendants and Florida alleged in the complaint relate to Floridians' access to Booking.com's website, and are summarized as follows: (1) the accessibility of the website "booking.com" in Florida (as in every other state and most countries in the world),[4] (2) the booking of reservations is "offered to visitors, including Florida and other U.S. residents," (3) Florida residents "can book accommodations in Cuba," and (4) that the Booking Entities "solicit and accept reservations from U.S. residents, including Florida residents." (D.E. 50, at 5¶¶ 13, 14, 15, 36, 39; A. 139, 140, 143). These allegations, even if true, are not enough to authorize jurisdiction under the long-arm statute, because "it is well settled that . . . maintaining a website accessible in Florida . . . is insufficient to satisfy Section 48.193(1)(a)(1)." *Storms*, 2018 U.S. Dist. LEXIS 141122, at *22 (internal quotation marks omitted). *See also Fraser v. Smith*, 594 F.3d 842, 847 (11th Cir. Jan. 21, 2010) (while "the maintenance of a website is, in a sense, a continuous presence everywhere in the world," defendant's

[4] *See* (D.E. 50, at ¶ 13; A. 139) ("They have worldwide reach on the internet and are fully accessible in Florida.")

"Florida contacts in aggregation" are "insufficient to afford the Florida courts jurisdiction over claims totally unrelated to those contacts," and that plaintiffs' claims do not arise from the defendant's solicitation activities in Florida under Section 48.193(1).) (internal citation omitted); *accord RG Golf Ware-house, Inc. v. Golf Warehouse, Inc.*, 362 F. Supp. 3d 1226, 1236 (M.D. Fla. Jan. 24, 2019) ("[A]lthough Defendant operates an interactive website that is accessed daily by potential and actual Florida customers, the Court finds that only amounts to doing business *as if in* Florida, which is insufficient under the plain text of [Section 48.193(1)(a)(1)]." (emphasis added and internal quotations omitted)); *Lemoine v. Wong*, No. 17-cv-6099, 2017 U.S. Dist. LEXIS 221513, at *10 (S.D. Fla. Mar. 29, 2017) ("[A] website accessible in Florida, standing alone, is insufficient to satisfy Section 48.193(1)(a)(1).").

Apart from the operation of a website accessible in Florida (insufficient to establish personal jurisdiction alone), Appellants have no meaningful factual allegations to connect the Booking Appellees to Florida. For example, Appellants cite paragraph 16 of the SAC in support of the proposition that the Booking Appellees "have offices in Florida from which they operate their business of selling travel[.]" Opening Brief at 21. Paragraph 16 actually states as follows: "On information and belief, a substantial part of the Expedia and Booking.com Entities' business and revenue derives from their Florida offices." (D.E. 50, at ¶ 16; A. 140).

The paragraph does not state that the Booking Appellees have Florida offices. There are no other allegations, factual or conclusory, that could lead to a plausible inference that the Booking Appellees have an office in Florida.[5]

Appellants next cite paragraph 15(b) of the SAC in support of the proposition that the Booking Appellees "send direct communications to Floridians." Opening Brief at 21. The text of the paragraph 15(b) actually states as follows: "The . . . Booking.com Entities promote their websites—and their interactive capabilities for the booking hotel rooms at Cuban hotels, including the Trafficked Hotels—on the internet, including to Floridians, in the following ways: . . . b. Through their follow-up emails to Floridians who have searched for the Trafficked Hotels or other geographically proximate hotels." (D.E. 50, at ¶ 15(b); A. 140). This allegation is insufficient to establish personal jurisdiction for two reasons. *First*, it relates to the alleged promotion of a website to existing users of that website. Plaintiffs' Helms-Burton Act claims arise from the defendant's "trafficking," which, among other limitations and requirements, requires "benefiting from confiscated property." 22

[5] Appellants make certain factual allegations for the first time in the Response that should be disregarded because they were not pled in any of the complaints. *Bruhl v. PriceWaterhouseCoopers Int'l*, No. 03-23044-KAM, 2007 U.S. Dist. LEXIS 21885, at *4 (S.D. Fla. Mar. 27, 2007) (plaintiff may not supplant allegations made in the complaint with new allegations raised in response to a motion to dismiss); *Walker v. City of Orlando*, No. 07-651-PCF, 2007 U.S. Dist. LEXIS 46129, at *5-6, *13 (M.D. Fla. Jun. 26, 2007) (same).

U.S.C. § 6023(13)(A)(ii). Promoting a website is not the equivalent of "benefiting from confiscated property" and therefore cannot form the basis for asserting personal jurisdiction.[6] *Second*, Appellants frame this allegation as sending "direct communications to Floridians," yet the allegation itself indicates that if a Floridian received an email, it was because the Floridian first contacted Booking.com B.V.

Appellants also cite paragraphs 36, 39 and 58 of the SAC for the proposition that the Booking Appellees "made sales of reservations, including at the Resorts, to Floridians." Opening Brief at 21. Those cited paragraphs actually state, in pertinent part, as follows: "Floridians *could* reserve vacation packages at the [hotels] from the . . . Booking.com Entities' websites . . . . The . . . . Booking.com Entities solicit and accept reservations from U.S. residents, including Florida residents." (D.E. 50, at ¶¶ 36, 39; A. 143). "On information and belief, many of the Booking.com Entities' customers (including customers from Florida) travel to Cuba, and to the Trafficked Hotels in particular[.]" (*Id.*, at ¶ 58; A. 149).[7] Together, these allegations indicate

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[6] *Cf. with* SAC (D.E. 50, at ¶ 60; A. 149) (alleging that the Booking Appellees were "benefitting from the Trafficked Hotels *by receiving commissions or other fees for the booking* of the Trafficked Hotels.")

[7] Jurisdictional allegations made "on information and belief" are to be disregarded because "the Court's jurisdiction is not genuinely in dispute. *Cortazar v. CA Ventures, LLC*, 2019 U.S. Dist. LEXIS 139286, at *9 (S.D. Fla. Aug. 15, 2019) ("[A]llegations in the Complaint, made 'upon information and belief,' simply do not nudge her claim that Defendant subjected itself to Florida long-arm jurisdiction across the line from conceivable to plausible.").

that Florida residents *could* make reservations at the subject hotels in Cuba, the Booking Appellees *would* accept those reservations, and that the people who use booking.com *might* travel to the subject hotels (though not necessarily after using the booking.com website to make the reservation). These allegations are equivocal or conclusory and do not state that the Booking Appellees actually "made sales of reservations . . . at the Resorts . . . to Floridians," as Appellants argue in their brief. Opening Brief at 21. Without something more, the district court was correct to dismiss plaintiffs' claims.

Appellants' authorities are also inapposite. For example, *Carmel & Co. v. Silverfish, LLC*, No. 1:12-cv-21328-KMM, 2013 U.S. Dist. LEXIS 39824 (S.D. Fla. Mar. 21, 2013), concerned trademark infringement, where "Plaintiff's cause of action specifically concern[s] customers who might be searching [online] for Plaintiff's sunglasses." *Id.*, at *10. The plaintiff's claim arose from the mere presentation of the advertisement on the website accessible in Florida because that act qualifies as infringement, rather than some other additional act occurring in Florida. Here, Appellants' claims require far more than ad placement and do not arise solely from an online presence in Florida. Another of Appellants' authorities, *Pathman v. Grey Flannel Auctions, Inc.*, 741 F. Supp. 2d 1318 (S.D. Fla. 2010), is similarly irrelevant. Opening Brief 20-21. In *Pathman*, the district court reasoned that the defendant "traveled to the state frequently and greatly benefitted financially

as a result. Importantly, *Plaintiff's cause of action arises out of these same trips and dealings*." *Id*. at 1326 (emphasis added). No similar facts have been pleaded here.

In *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162 (11th Cir. 2005), another case relied upon by Appellants, this Court held that even in the age of electronic commerce, the states' territorial boundaries continue to be essential to any jurisdictional inquiry. The Court's conclusion in this regard is instructive here:

> [W]hile the advances of the electronic age have undoubtedly facilitated the practice of interstate and global commerce, they cannot nullify the explicit requirements of the Florida Long-Arm statute. Because Kass physically performed all its work from its California offices, it cannot be argued that its remote access to Horizon's files constituted 'conducting business' in Florida as defined in Fla. Stat. ch. 48.193(1)(a).

421 F.3d at 1167-1168 (internal citations omitted). This Court declined to find specific jurisdiction over the defendant under Section 48.193(1)(a)(1), despite multiple telephonic and electronic communications into Florida, *with the plaintiff*, pursuant to an agreement between the parties. Here, Appellants make equivocal and conclusory allegations about the possibility of Florida residents (not plaintiffs) accessing and making reservations on the Booking.com B.V. website. These are insufficient allegations to confer personal jurisdiction over the Booking Appellees. *See Parker v. Century 21 J. Edwards Real Estate*, 183 Fed. Appx. 869, 870-871 (11th Cir. 2006) (defendant did not engage in "'a business or business venture' for

purposes of Florida's long-arm jurisdiction" when it only advertised or solicited business in Florida over its globally accessible website) (citing *Travel Opportunities, Inc. v. Walter Karl List Mgmt., Inc.*, 726 So. 2d 313, 314 (Fla. Dist. Ct. App. 1999)); *Mamani v. Berzaín*, 654 F.3d 1148, 1156 (11th Cir. 2011) (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009) and *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).

(ii) Booking Holdings Inc.

With regard to Appellee Booking Holdings Inc., Appellants offered so little in the way of factual allegations that it is difficult to even begin to analyze whether this court can exercise jurisdiction over it. As a stock holding company, Booking Holdings Inc. has *no* relevant contacts with Florida, and none are alleged. Appellants attempt to circumvent this fact by pleading that, "[o]n information and belief, Booking.com B.V., the operator of the Booking.com website, acts as an agent of its 100% owner Booking Holdings Inc. . . . ." (D.E. 50, at ¶ 60; A. 149). Even if that were true (it is not), "a foreign parent corporation is not subject to the jurisdiction of a forum state merely because a subsidiary is doing business there." *See Meier ex rel. Meier v. Sun. Intern. Hotels, Inc.*, 288 F.3d 1264, 1272 (11th Cir. 2002); *see also Consol. Dev. Corp. v. Sherritt*, 216 F.3d 1286, 1293-94 (11th Cir. 2002) ("[I]t is well established that as long as a parent and a subsidiary are separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the

other."); *Vogt v. Greenmarine Holding, LLC*, No. 1:01-CV-0311, 2002 U.S. Dist. LEXIS 21013, at *27-28 (N.D. Ga. Feb. 20, 2002) ("agency is not the appropriate analysis when considering the relationship of a holding company and its subsidiary" because "holding companies are investment companies for the purpose of diversifying risk[;] they do not conduct the same business as their subsidiaries and their relationship cannot be viewed as one of agency" (citing *Doe v. Unocal Corp.*, 248 F.3d 915, 929 (9th Cir. 2001)). As Appellants correctly state in the SAC, "Booking Holdings does not conduct any of [the travel-related] business itself . . . ." (D.E., at ¶ 60; A. 149). Accordingly, the district court correctly held that the Florida long-arm statute does not authorize jurisdiction over Appellee Booking Holdings Inc.

(b) Plaintiffs Fail to Establish Specific Personal Jurisdiction Under § 48.193(1)(a)(2).

Section 48.193(1)(a)(2) of the Florida Statutes provides, in pertinent part, as follows:

> A person . . . submits . . . herself . . . to the jurisdiction of the courts of [Florida] for any cause of action arising from any of the following acts:
>
> 2. Committing a tortious act within this state.

§ 48.193(1)(a)(2) Fla. Stat. The statute "expressly requires that the tort be committed in Florida." *Prunty v. Arnold & Itkin LLP*, 753 F. App'x 731, 735 (11th Cir. 2018) (citing *Casita, L.P. v. Maplewood Equity Partners L.P.*, 960 So.2d 854, 857 (Fla. 3d DCA 2007)).

Here, Appellants have not alleged that a tort was committed in Florida. Instead, Appellants "bring a Helms Burton claim, alleging that the Defendants trafficked in their confiscated property, *which occurred in Cuba*." Order (D.E. 71, at 5; A. 388) (emphasis added).

(i) Statutory claims are not tort claims.

The SAC is a one-count complaint for a violation of the Helms-Burton Act. Under Florida law, "statutory claims are not tort claims." *Rizack v. Starr Indem. & Liab. Co. (In re Grandparents.com, Inc.)*, 614 B.R. 625, 633 (Bankr. S.D. Fla. 2020) (citing *Citizens Property Ins. Corp. v. Perdido Sun Condominimium Ass'n, Inc.*, 164 So.3d 663 (Fla. 2015) (statutory bad faith action is not a tort)). Florida courts have held that a statutory cause of action is not a tort for purposes of authorizing personal jurisdiction under the long-arm statute. *Brown v. Nova Info. Sys.*, 903 So.2d 968, 969 (Fla. Dist. Ct. App. 2005) ("fraudulent conveyance claim [under the Florida Uniform Fraudulent Transfer Act] has been held not to be a tort for purposes of establishing personal jurisdiction under section 48.193(1)(b) [now 48.193(1)(a)(2)]."). An alleged violation of the Helms-Burton Act is, thus, also not a tort for purposes of establishing jurisdiction under the long-arm statute, so the district court's Order should be affirmed.

(ii) Even if a Helms-Burton violation were a tort claim, no tort was committed in Florida.

Even if it were a tort for purposes of the long-arm statute, Appellants nevertheless failed to show how any tort was committed *in Florida*. The district court's Order is supported by the plain language of the Act. "Trafficking" under the Act consists of "using or otherwise benefiting from confiscated property." 22 U.S.C. § 6023(13)(A)(ii). "Confiscated" means the "nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property, on or after January 1, 1959." 22 U.S.C. § 6023(4)(A). "Trafficking," thus, cannot be directed at Florida, or any other State. Instead, "trafficking" is tied to real property in Cuba, the foundation of Appellants' claims.

In support of their personal jurisdiction argument, Appellants point to their allegation that "appellees used their websites to sell reservations *to Floridians in Florida*." Opening Brief, at 20 (emphasis in original). Yet the alleged tort is a violation of a federal statute for profiting from property in Cuba, not that Floridians could book hotel rooms in Cuba from Florida.

Moreover, whether the alleged tort occurred in Florida is subject to the "significant relationships test" of § 145 of the Restatement (Second) of Conflict of Laws used by Florida courts "to decide in which state a cause of action arose . . . ." *Kramer v. Piper Aircraft Corp.*, 868 F.2d 1538, 1540 (11th Cir. 1989) (citing *Bates*

v. Cook, Inc., 509 So.2d 1112 (Fla. 1987)). Section 145 sets forth four contacts to be considered by the Court:

> (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.

Digioia v. H. Koch & Sons, Div. of Wickes Mfg. Co., 944 F.2d 809, 812 (11th Cir. 1991) (citing Restatement, § 145). In deciding which state "has the 'most significant relationship' to a particular issue, a court must . . . examine the facts and circumstances presented in each particular case." *Id.*, at 812-13 (citing *Judge v. American Motors Corp.*, 908 F.2d 1565, 1568 (11th Cir. 1990)).

Under the significant relationships test, the alleged Helms-Burton violation has the most significant relationship with Cuba or the Netherlands, not Florida. *First*, the alleged injury occurred in Cuba, the location of the confiscated property that the Booking Appellees are alleged to have trafficked. *See* 22 U.S.C. §§ 6023(4)(A) and (13). Alternatively, because "trafficking" is defined as, *inter alia*, "engag[ing] in a commercial activity using or otherwise benefiting from confiscated property," 22 U.S.C. § 6023(13)(ii), any benefit received by Appellee Booking.com B.V. would be in the Netherlands, the location from which it operates the booking.com website. (D.E. 50, at ¶ 10; A. 138). *Second*, the conduct alleged is the acceptance of reservations for Cuban hotels made on the Booking.com B.V. website, which

conduct occurs almost anywhere in the world. (*Id.*, at ¶ 13; A. 139). Appellants do not allege that the cause of action arose from any conduct in Florida that would be in any way different from conduct outside of Florida. *Third*, Appellee Booking.com B.V. is a Dutch entity with its principle place of business in Amsterdam, and Booking Holdings Inc. is a Delaware corporation headquartered in Connecticut. (*Id.*, at ¶¶ 9, 10). Appellants are Florida residents, though the alleged class consists of "[a]ll U.S. nationals[.]" (D.E. 50, at ¶ 62). *See also Digioia*, 944 F.2d at 813 (where plaintiff was domiciled in Florida and defendant corporations were based in California and Delaware, "the domicil of the parties is inconclusive because both states have interest in the litigation.") *Finally*, there is no relationship between the parties. The test demonstrates that *Florida does not have the most significant relationship* to the alleged tort, so the injury did not occur in Florida.

Appellants do not offer a plausible factual allegation establishing that a tort was committed in Florida or that they suffered an injury in Florida. Appellants nevertheless urge the Court to assume their alleged injury occurred in Florida and then apply common law developed in strikingly different contexts (such as infringement of intellectual property rights) to this case. In *Louis Vuitton Malletier, S.A. v. Mosseri*, for example, this Court noted in relation to trademark infringement that, "[f]or purposes of § 48.193(1)(a)(2), the issue is whether [defendant's] tortious acts caused injury in Florida." 736 F.3d 1339, 1354 (11th Cir. 2013). *Mosseri*

involved the sale of infringing handbags to purchasers in Florida from websites operated by counterfeiters. Relying on *Licciardello v. Lovelady*, 544 F.3d 1280 (11th Cir. 2008) and other decisions, this Court found "that Louis Vuitton's trademark claims allege 'tortious acts' for purposes of Florida's long-arm statute." *Mosseri*, 736 F.3d at 1353. The reasoning is clear. Section 43(a) of the Lanham Act prohibits use of another's trademark that is "likely to cause confusion" among the public. 15 U.S.C. § 1125(a)(1)(A). Merely displaying another's trademark on a website related to goods that are not those of the trademark owner is likely to cause confusion among the public, so the injury occurs when the infringing mark is displayed.

To extend the rules for trademark infringement to the Helms-Burton Act defies logic. Whereas the mere display of an infringing product on a website accessible in Florida causes injury to the trademark owner and the public, *see Licciardello*, 544 F.3d 1280, "trafficking" under the Helms-Burton Act requires the actual use of Cuban property, which necessarily occurs in Cuba. *See* 22 U.S.C. §§ 6023, 6082.

Because Appellants failed to plead that the Booking Appellees committed a tortious act within Florida as a matter of law, their claims must be dismissed regardless of the fact that plaintiffs live in the state. *See Vallejo v. Narcos Prods., LLC*, No. 18-23462-KMM, 2019 U.S. Dist. LEXIS 198109, at *5-6 (S.D. Fla. June 14, 2019) (no basis for personal jurisdiction over defendant under § 48.193(1)(a)(2)

where plaintiff lived in Florida, such that "the effects of [the alleged tort] would be felt in Florida"); *Tavakoli v. Doronin*, No. 18-21592-CMA, 2019 U.S. Dist. LEXIS 43188, at *15 (S.D. Fla. Mar. 18, 2019) ("[P]laintiff must demonstrate that the nonresident defendant committed a substantial aspect of the alleged tort in Florida.") (internal citation and quotation omitted). As a result, personal jurisdiction over the Booking Appellees under Section 48.193(1)(a)(2) does not exist, and the Order should be affirmed.

(c) Appellants' claims do not "arise from" any of the Booking Appellees' alleged actions in Florida.

The Florida long-arm statute requires that the plaintiff's claim "arise from" defendant's acts in Florida. *See* § 48.193(1)(a) ("A person . . . submits . . . herself . . . to the jurisdiction of the courts of this state for any cause of action *arising from* . . . ." (emphasis added)). While "the term 'arising from' is somewhat broader than the concept of proximate cause, under Florida law there must nevertheless be some direct affiliation, nexus or substantial connection between the cause of action and the activities within the state." *Schuster v. Carnival Corp.*, 2011 U.S. Dist. LEXIS 126455, at *11 (S.D. Fla. Feb. 3, 2011) (declining to exercise jurisdiction under Florida long-arm statute where Texas defendant reserved rooms on a cruise ship through a non-Florida-based travel agency and arranged entertainment for cruise participants) (internal citations and quotations omitted).

Appellants' cause of action hinges upon the allegation that the Cuban hotels at issue are being "trafficked" by the Booking Appellees. (D.E 50, at ¶¶ 40-42; A. 143-144). Assuming *arguendo* that merely offering reservations at the Cuban hotels constitutes "trafficking" under Title III of the Helms-Burton Act, the fact that residents in Florida—like those in every other state—could make such reservations is hardly essential to Appellants' cause of action. Indeed, the residency of potential travelers has no bearing on the merits of Appellants' cause of action at all and, therefore, cannot support specific jurisdiction under the Florida long-arm statute.

2. **The district court correctly held that exercising specific personal jurisdiction over the Booking Appellees would not comport with due process.**

To establish specific jurisdiction, a plaintiff must also show that the exercise of personal jurisdiction over the defendant would comport with due process. *Waite*, 901 F.3d at 1312. "[T]he Due Process Clause imposes a more restrictive requirement than does Florida's Long-Arm Statute." *Melgarejo*, 537 F. App'x at 859 (citation omitted)). Consequently, a finding that jurisdiction is not available under Florida's long-arm statute "compels the conclusion that jurisdiction is not appropriate under the Due Process clause." *Brunner*, 2015 U.S. Dist. LEXIS 197064, at *12 (discussing general jurisdiction). Here, the district court held that, because the Florida long-arm statute did not authorize jurisdiction over the Booking Appellees,

it was unnecessary for it to engage in a due process analysis. (D.E. 71, at 2-5; A. 385-388).

If this Court engages in the due process analysis, it should conclude that the Booking Appellees are not properly subject to personal jurisdiction. In specific jurisdiction cases, this Court "appl[ies] the three-part due process test." *Mosseri*, 736 F.3d at 1355. "First, the defendant must have contacts related to or giving rise to the plaintiff's cause of action." *Fraser*, 594 F.3d at 850. "Second, the defendant must, through those contacts, have purposefully availed itself of forum benefits." *Id.* And, "[t]hird, the defendant's contacts with the forum must be such that it could reasonably anticipate being hauled into court there." *Id. See also, Future Tech*, 218 F.3d at 1250-51; *Argos Glob. Partner Servs., LLC v. Ciuchini*, 446 F. Supp. 3d 1073, 1090 (S.D. Fla. 2020).

(a) Appellants' claims do not arise out of or relate to the Booking Appellees' contacts with Florida.

For the exercise of specific jurisdiction to comport with due process, "the defendant's contacts with the forum must relate to the plaintiff's cause of action or have given rise to it." *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1220 (11th Cir. 2009); *Madara*, 916 F.2d at 1517. A cause of action "arises out of or relates to" a defendant's activity in a State "only if the activity is a 'but-for' cause of the tort." *Waite*, 901 F.3d at 1314. That Florida residents happened to be among those who could book reservations on Booking.com's website is not a "but-for"

cause of plaintiffs' cause of action. If a plaintiff's claim would be the same whether or not the defendant engaged in any in-state activity, then the defendant's "*suit-related* conduct" has not "create[d] a substantial connection with the forum State," even if it has non-suit-related contacts with that State. *Walden*, 571 U.S. at 284 (emphasis added).

Appellants assert that they "reside in the Southern District of Florida," (Opening Brief at 10), but a plaintiff's residence is not considered by the court in determining personal jurisdiction. *See Walden*, 571 U.S. at 290. Indeed, the *Walden* court noted that "mere injury to a forum resident is not a sufficient connection to the forum," and that "[r]egardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State." *Id.*

Appellants also argue that their Helms-Burton Act claims are "intentional torts committed in Florida, which, standing alone, constitute minimum contacts." Opening Brief at 31. Appellants cite no authority for this proposition. To establish "a defendant's contacts in intentional tort cases, the Eleventh Circuit requires a showing [that] 'the defendant: (1) committed an intentional tort (2) that was directly aimed at the forum, (3) causing an injury within the forum that the defendant should have reasonably anticipated." *Argos*, 446 F. Supp. 3d at 1090 (citing *Oldfield*, 558 F.3d at 1221 n.28). Appellants fail to make this showing. Instead, the allegations in

the SAC demonstrate that the Booking Appellees: (1) did not commit an intentional tort;[8] (2) committed no conduct directly aimed at Florida; and (3) did not cause an injury in Florida, let alone one that could be reasonably anticipated.

(b) Maintaining a website accessible in Florida does not equate to "purposeful availment."

The second prong of the due process minimum contacts test is whether "the nonresident defendant 'purposefully availed' himself of the privilege of conducting activities within the forum state, thus invoking the benefit of the forum state's law." *Aviation One of Fla., Inc. v. Airborne Ins. Consultants (PTY), Ltd.*, 722 F. App'x 870, 879 (11th Cir. 2018) (citing *Mosseri*, 736 F.3d at 1355). The Supreme Court has made clear that "minimum contacts" must be "the defendant's *suit-related*" contacts. *Walden*, 571 U.S. at 284 (emphasis added). The defendant must *itself* reach out and make contact with the forum—that is, the defendant must purposefully avail

[8] Appellants fail to even allege that the Booking Appellees knew the Cuban properties on which the hotels sit were confiscated, or that the Booking Appellees intended to engage in any proscribed conduct as to confiscated property. However, "trafficking," under the Helms-Burton Act, requires plaintiffs to allege facts that give rise to a reasonable inference that defendants "knowingly and intentionally" engaged in conduct described in subparagraph (A) of the Act's definition of *traffics*. 22 U.S.C. § 6023(13)(A); *see also Gonzalez v. Amazon.com, Inc. et al*, No. 19-cv-23988 2020 U.S. Dist. LEXIS 82296, at *3 (S.D. Fla., May 11, 2020) (granting dismissal (in part) because plaintiff "did not sufficiently allege that the Defendants knowingly and intentionally trafficked in the property"); *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016) ("*Iqbal* itself directly held that malice and other degrees of intent are subject to the plausibility pleading standard.").

itself of the forum. *See World-Wide Volkswagen Corp. v Woodson*, 444 U.S. 286, 297 (1980).

Appellants argue that, "solicitations and sales to Floridians of reservations at the Resorts . . . satisfy internet era decisions involving claims arising from nonresidents' use of websites." Opening Brief at 31-32. Appellants also alleged in the SAC in conclusory fashion that the Booking Appellees "regularly transact business within Florida." (D.E. 50, at ¶ 12; A. 139). These allegations are insufficient to qualify as purposeful availment. Indeed, the majority of Appellants' allegations connecting Booking.com B.V.'s[9] conduct to Florida is merely the type of "stream of commerce" theory of personal jurisdiction that the Supreme Court has rejected. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 930 n.6 (2011) ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales."); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 882-83 (2011) ("[I]t is not enough that [a] defendant might have predicted its goods will reach the forum," but rather must engage in conduct "purposefully directed toward the forum."). Indeed, a

[9] As set forth above, Booking Holdings Inc. is a non-operating holding company and any allegations in the complaint related to a website or travel-related service must necessarily relate to Booking.com B.V. as the owner and operator of the booking.com website. *See, e.g.*, (D.E. 50, at ¶¶ 10, 60; A. 138, 139, 149); Opening Brief n.27.

"defendant's transmission of goods permits the exercise of jurisdiction *only where the defendant can be said to have targeted the forum*[.]" *Id.* (emphasis added). Plaintiffs do not allege that defendants targeted Florida any more than they targeted any other state—or country—where the Booking.com B.V. website may be *accessed.* (D.E., at ¶ 13; A. 139). Plaintiffs' due process arguments should be rejected for this reason alone.

Appellants rely on the Western District of Pennsylvania decision in *Zippo Mfg. Co. v. Zippo Dot Com Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), to argue that "a defendant's internet sales in the forum satisfy minimum contacts." Opening Brief at 32. Appellants' reliance on allegations pertaining to the purportedly "interactive" nature of the Booking.com B.V. website should be disregarded by the Court. *See* (D.E. 50, at ¶ 13, 15; A. 139, 140). *Zippo* adopted a sliding scale test for personal jurisdiction that the Eleventh Circuit "has declined to adopt . . . and instead utilizes the customary personal jurisdiction analysis for analyzing personal jurisdiction over out-of-state websites." *Tobinick v. Novella*, No. 9:14-CV-80781, 2015 U.S. Dist. LEXIS 8085, at *28-29 n.14 (S.D. Fla. Jan. 23, 2015), *citing Mosseri*, 736 F.3d at 1350 n.10. The Supreme Court has made clear that a "sliding scale approach . . . resembles a loose and spurious form of general jurisdiction [and] is thus difficult to square with this [Supreme] Court's precedent[]." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1776 (2017) (discussing California's sliding-scale

approach to personal jurisdiction and reiterating that, "[f]or a court to exercise specific jurisdiction over a claim there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State."). Florida Courts, too, analyze "the nature of the alleged wrongful acts and their link to Florida to determine if minimum contacts existed." *Caiazzo v. Am. Royal Arts Corp.*, 73 So.3d 245, 254 (Fla. 4th DCA 2011) (analyzing *Renaissance Health Pub., LLC v. Resveratrol Partners, LLC*, 982 So.2d 739, 742 (Fla. 4th DCA 2008)).

Where Florida Courts have considered *Zippo*, they considered the "active" and "passive" aspects of a website as a part of the analysis, but *not the entire analysis*. *See Internet Solutions Corporation v. Marshall*, 39 So.3d 1201, 1216 n. 11 (Fla. 2010). Florida courts have generally embraced the view that the traditional personal jurisdiction analysis, whether general or specific, does not fundamentally change when the Internet is involved in the controversy. *Caiazzo*, 73 So. 3d at 255.

Therefore, the mere operation of a website that can be accessed *anywhere* is insufficient to establish personal jurisdiction over a defendant. *See Mosseri*, 736 F.3d at 1357 ("We are not saying that the mere operation of an interactive website alone gives rise to purposeful availment *anywhere* the website can be accessed.") (emphasis in original); *Goforit Entm't LLC v. Digimedia.com L.P.*, 513 F. Supp. 2d 1325, 1330 (M.D. Fla. Aug. 10, 2007) (dismissing case for lack of personal

jurisdiction where defendants' business generates revenue from every state because "the fact that Defendants' websites are equally accessible everywhere does not establish targeting of Florida"). If a plaintiff's claim would be the same whether the defendant engaged in any in-state activity, then the defendant's "*suit-related* conduct" has not "create[d] a substantial connection with the forum State," even if it has non-suit-related contacts with that State. *Walden*, 571 U.S. at 284 (emphasis added).

Here, Appellants' case is based on the allegations that the Booking Appellees (a Dutch entity and a Connecticut-based entity) received a purported economic benefit from reservations made at two hotels in Cuba. The SAC does not properly allege, however, that a Helms-Burton Act violation arose from any of the Booking Appellees' alleged contacts with Florida. Accordingly, defendants' alleged "suit-related conduct" unambiguously fails to create "a substantial connection with the forum State." *Walden*, 571 U.S. at 284. Indeed, the SAC does not allege that any part, let alone a substantial part, of the challenged conduct occurred anywhere in Florida. Instead, Appellants allege that the Booking.com website was merely accessible to Floridians to make hotel reservations in Cuba (D.E., at ¶ 13; A. 139) or their jurisdictional allegations were made "on information and belief" (*Id.*, at ¶¶ 16, 55, 58, 60)—inadequate allegations on which the Court could not rest jurisdiction.

(c) Exercising personal jurisdiction over the Booking Appellees would not comport with traditional notions of fair play and substantial justice

If the plaintiff establishes the first two prongs of the minimum contacts test, 'a defendant must make a 'compelling case' that the exercise of jurisdiction would violate traditional notions of fair play and substantial justice.'" *Mosseri*, 736 F.3d 1339, 1355 (citing *Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc.*, 593 F.3d 1249, 1267 (11th Cir. 2010)). If Appellants had satisfied their burden—they did not—the exercise of jurisdiction over the Boking Appellees in this case would violate the traditional notions of fair play and substantial justice.

Appellants rely on *Kumbrink v. Hygenic Corp.*, No. 15-Civ-23530-COOKE/TORRES, 2016 U.S. Dist. LEXIS 131348 (S.D. Fla. Sep. 26, 2016), for the proposition that due process is served simply because the Booking.com B.V. website is accessible in Florida and because they claim to have alleged that actual sales were made in Florida. Opening Brief at 34. Appellants, however, misstate the holding in *Kumbrink*. That case involved a suit for trademark infringement arising from defendant's display of infringing products on its website and sales of those products in Florida. Following *Licciardello*, the *Kumbrink* court held that the accessibility of a website displaying infringing products was sufficient to authorize *the Florida long-arm statute's specific jurisdiction*. *Kumbrink*, 2016 U.S. Dist. LEXIS 131348, at *5. *Kumbrink did not hold* that the *due process test* was satisfied on those facts. In the

three-prong due process analysis, the *Kumbrink* court questioned whether the exercise of jurisdiction would violate traditional notions of fair play and substantial justice, reasoning that, "litigating in Florida is a burden on Defendant. Defendant's principal place of business is in Ohio, not Florida. In fact, Defendant does not have any offices in Florida." *Id.*, at *7. Rather than decide personal jurisdiction, the district court granted the defendant's motion to transfer venue and left the question of jurisdiction open.

Kumbrink demonstrates that the exercise of personal jurisdiction over the Booking Appellees would not comport with traditional notions of fair play and substantial justice. Neither Booking Appellee has its principle place of business in Florida, is registered to do business in Florida or has an office in Florida. *See* SAC (D.E. 50, at ¶¶ 9, 10; A. 138-139). Simply put, litigating in Florida is a burden on the Booking Appellees, and the exercise of personal jurisdiction over them would violate traditional notions of fair play and substantial justice.

3. **Appellants have waived general personal jurisdiction on appeal.**

While Appellants *alleged* general jurisdiction over the Booking Appellees before the district court under § 48.193(2), (D.E. 50, at ¶ 12; A. 139), and the district court declined to exercise general jurisdiction over the Booking Appellees (D.E. 71, at 6; A. 389), Appellants have not raised the issue on appeal. By failing to raise the issue on appeal Appellants have waived the argument. *Access Now, Inc. v. Sw.*

Airlines Co., 385 F.3d 1324, 1330 (11th Cir. 2004) ("[T]he law is by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed.").

B. The District Court Properly Dismissed the Case Without Waiting for Appellants to Decide Whether to Take Jurisdictional Discovery.

This Court should affirm the district court's decision to not "defer ruling on the pending motions to dismiss" in order to allow Appellants to take jurisdictional discovery for at least three reasons. (D.E. 71, at 6; A. 389). *First*, Appellants had already amended the complaint four times over the course of 10 months, yet "failed to investigate, collect, and allege sufficient facts prior to responding to the motion to dismiss." (*Id.* at 6-7; A. 389-390). *Second*, Appellants' failure to properly request jurisdictional discovery—opting instead to "bury their request in their Omnibus Response" brief—was procedurally improper. (*Id.*) *Finally*, there was no genuine factual dispute concerning personal jurisdiction because no party submitted affidavit or declaration evidence either in support of, or in opposition to, the exercise of personal jurisdictional over defendants. (*Id.* at 7; A. 390).

1. Appellants never served discovery on the Booking Appellees.

Appellants never served discovery on the Booking Appellees. Appellants' failure to diligently pursue jurisdictional discovery is fatal to their argument that the district court's dismissal was an abuse of discretion. *See Henriquez*, 500 F. App'x at 830 (citing *Mazer*, 556 F.3d 1260, 1280-81 (11th Cir. 2009) ("a district court does

not abuse its discretion in dismissing the plaintiff's action for lack of personal jurisdiction, even before jurisdictional discovery occurs, when the plaintiff has not diligently pursued such discovery despite the opportunity to do so")).

2. **Appellants' "request" for leave to conduct discovery in its Response was improper.**

Appellants failed to seek jurisdictional discovery from the district court. Appellants suggest in their Response, without seeking leave, "jurisdictional discovery would be warranted" "if the Court were to have any doubt about the sufficiency of defendants' Florida contacts (out of which this action arises)." (D.E 64, at 23; A. 276). Further, Appellants simply left it to the district court's discretion whether jurisdictional discovery would be appropriate: "[i]f the Court deems jurisdictional discovery necessary." (*Id*. at 26; A. 279).

Because Appellants' only "request" to take jurisdictional discovery was "buried . . . in its [motion to dismiss response] brief[]," the request was improper. *See Mazer*, 556 F.3d at 1280-81. This Court has "upheld similar decisions to deny 'requests' for jurisdictional discovery," where, as here, a party "buried such requests in its briefs, instead of presenting them in a motion." *Hinkle v. Cirrus Design Corp.*, 775 F. App'x 545, 550 (11th Cir. 2019) (district court did not abuse its discretion in denying "request" for jurisdictional discovery "given the . . . request was made . . . as an alternative to the granting of the Defendants' motion to dismiss") (internal citation and quotations omitted); *see also Cortazar*, 2019 U.S. Dist. LEXIS 139286,

at *10; *Mother Doe I v. Maktoum*, 632 F. Supp. 2d 1130, 1146 (S.D. Fla. 2007) ("The 'requests' for jurisdictional discovery contained in Plaintiffs' memoranda in opposition to Defendants' Motion to Dismiss are not a substitute for the issuance of discovery requests or the filing of a formal motion to take discovery."). Because Appellants failed to diligently and properly seek jurisdictional discovery, the district court did not abuse its discretion in denying Appellants' informal request for it.

Appellants' reliance on *Rd. Space Media, LLC v. Miami-Dade Cty.*, No. 19-21971-Civ-Scola, 2020 U.S. Dist. LEXIS 99657 (S.D. Fla. Apr. 23, 2020), is inapt. *First*, in *Rd. Space Media*, unlike here, the defendant supplied extrinsic evidence to "challenge the Plaintiff's standing and redressability allegations," such that the plaintiff asserted that it should be afforded "an opportunity for discovery" to counter the defendants' evidence. *Id.*, 2020 U.S. Dist. LEXIS 99657, at *3. *Second*, the district court's analysis in *Rd. Space Media* was specific to the context of *subject matter* jurisdiction. *Id.* (distinguishing *Mazer* and *Henriquez* because they "addressed jurisdictional discovery in the context of personal jurisdiction"); *see also* Opening Brief 48-49. *Third*, unlike the authorities cited in *Rd. Space Media* and quoted by Appellants, jurisdictional discovery as to the Booking Appellees was *not* pending at the time of the district court's dismissal in this case. Opening Brief at 49-50. Indeed, the holding in *Rd. Space Media* was expressly premised on the fact that

discovery requests had been served by the plaintiff, which was not the case here. *Id.*, at *4 (internal quotations omitted).

3. **Jurisdictional discovery is unnecessary where no findings of fact are required.**

Even if Appellants had properly sought jurisdictional discovery from the district court, jurisdictional discovery is improper where, as here, the resolution of the jurisdictional question does not require additional findings of fact. *See RMS Titanic, Inc. v. Kingsmen Creatives, Ltd.*, 579 F. App'x 779, 790 (11th Cir. 2014). The district court properly followed *Lowery v. Alabama Power*, 483 F.3d 1184, 1216 (11th Cir. 2007) in declining to reserve ruling on the motions to dismiss to permit Appellants to seek jurisdictional discovery. (D.E. 71, at 6-7; A. 389-390). Indeed, this Court held in *Lowery* that when ruling on a motion to dismiss, a court "look[s] only to the facts as alleged in the complaint" and need not "reserve ruling on the motion to dismiss in order to allow the plaintiff to look for what the plaintiff should have had - but did not - before coming through the courthouse doors." 483 F.3d at 1216.

Moreover, the district court correctly held that "there is no genuine factual dispute concerning personal jurisdiction because none of the parties submitted affidavit or declaration evidence in support of, or in opposition to, the exercise of personal jurisdiction over the Defendants." (D.E. 71, at 7; A. 390). Under these circumstances, the district courts in this Circuit routinely find that jurisdictional

discovery is not warranted. *See Takata*, 396 F. Supp. 3d at 1157 ("there is no genuine factual dispute concerning personal jurisdiction because none of the parties submitted affidavit or declaration evidence"); *Westchester Fire Ins. Co. v. Vector Aerospace*, No. 16-23189-FAM, 2017 U.S. Dist. LEXIS 158169, at *7 (S.D. Fla. Sep. 26, 2017) ("Jurisdictional discovery is ordered where there is a dispute concerning jurisdictional facts."). The district court did not abuse its discretion by dismissing the case without allowing jurisdictional discovery.

C. The District Court's Dismissal Without Leave to Amend was Proper.

Appellants erroneously contend that they should be granted another opportunity to amend their complaint because the case was "dismissed . . . on the first motion to dismiss submitted for decision below." Opening Brief at 51. Not only is this statement false (*see* the First Expedia Motion to Dismiss filed before the Motion for Leave), but Appellants were already afforded *multiple* opportunities to amend, as evidenced by the four complaints they filed before the District Court. *See* (D.E. 47; A. 68). Even more, despite not seeking leave to amend, the district court considered whether a further amendment of the complaint would be appropriate and determined it would be futile.

1. **Appellants were afforded multiple opportunities to amend.**

Appellants' reliance on *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991), which was overruled by *Wagner*, 314 F.3d at 542, is inapt. Appellants cite to

language in *Bank* stating that "a plaintiff must be given *at least one chance to amend* the complaint before the district court dismisses the action with prejudice." Opening Brief at 36. (emphasis added). Here, Appellants *were* granted "at least one chance to amend" by the district court. *See* Motion for Leave (D.E. 47; A. 68). Next, Appellants rely on *Brisson v. Ford Motor Co.*, 349 F. App'x 433 (11th Cir. 2009) but it is also inapposite. Plaintiffs in that case were permitted to amend because they conclusively demonstrated that they *could* comply with the pleading requirements in that case—unlike here, where despite four attempts, Appellants have been unable to plead jurisdiction over the Booking Appellees or state a claim for relief.

Moreover, Appellants never requested leave to further amend the complaint. Failure to do so is fatal to their argument that leave to amend should have been granted. *See Wagner*, 314 F.3d at 542 ("A district court is not required to grant a plaintiff leave to amend his complaint *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court."). Pursuant to the Federal Rules of Civil Procedure, a request for a court order must be made by motion, in writing (unless made during a hearing or at trial), and must "state with particularity the grounds for seeking the order and the relief sought." Fed.R.Civ.P. 7(b)(1). Further, a "motion for leave to amend should either set forth the substance of the proposed amendment or attach a copy of the proposed amendment." *Avena v. Imperial Salon & Spa, Inc.*, 740 Fed.

App'x 679, 683 (11th Cir. 2018) (internal citation omitted). Appellants failed to comply with these requirements, despite having previously done so (*see* Motion for Leave), and were not entitled to further amendment of their complaint. *See Newton v. Duke Energy Florida, LLC*, 895 F.3d 1270, 1277 (11th Cir. 2018) ("[W]here a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly."); *Avena.*, 740 Fed. App'x at, 683 ("[W]e've rejected the idea that a party can await a ruling on a motion to dismiss before filing a motion for leave to amend.").

2. **The district court correctly noted that further amendment would be futile.**

Under Title III of the Helms-Burton Act, "[i]n the case of property confiscated before March 12, 1996, a United States national may not bring an action . . . on a claim to confiscated property unless such national acquires ownership of the claim before March 12, 1996." 22 U.S.C. § 6082(a)(4)(B). In order to bring a claim under Title III of the Act regarding property confiscated before March 12, 1996, the statute requires that the plaintiff have acquired ownership of that claim before March 12, 1996. *Id*. Here, Appellants alleged that the Cuban properties they claim to have inherited were confiscated by the Cuban government prior to March 12, 1996. (D.E. 50, at ¶¶ 34, 37; A. 142-143). Thus, Appellants were required to adequately allege that they acquired their "claims" to Cuban property before the statutory bar date.

Appellants failed to make that allegation, despite four attempts to do so. Indeed, the district court stated in a footnote that "it would be futile for Angelo Pou (and possibly for Enrique Falla) to amend their complaint because they do not appear to have actionable ownership interests." Order (D.E. 71, at 8; A. 395). As such, even if Appellants had sought leave to amend the complaint a fifth time, such amendment would be futile. *Glen v. Am. Airlines, Inc.*, No. 4:20-cv-482-A, 2020 U.S. Dist. LEXIS 138148, at *4 (N.D. Tex. Aug. 3, 2020), (district court denied Helms-Burton Act claim where, "even if he had standing to sue defendant, his claim would nonetheless be dismissed for failure to state a claim upon which relief may be granted" because Plaintiff did not acquire property at issue before statutory bar date); *Gonzalez*, 2020 U.S. Dist. LEXIS 82296, at *2-3 (Helms-Burton claim dismissed because plaintiff did "not allege that he inherited the property before 1996 (and instead allege[d] that he inherited it sometime after November 2016)."); *Garcia-Bengochea*, No. 1:19-cv-21725-JLK, ECF 120 at 6-9 (Helms-Burton Act claim barred under § 6082(a)(4)(B) because plaintiff did not acquire claim to property until after 1996 statutory bar date); *Garcia-Bengochea v. Royal Caribbean*, No. 19-cv-23592-JLK (S.D. Fla. Oct. 15, 2020) (same).

This Court lacks subject matter jurisdiction because Appellants cannot establish Article III standing. *See* (D.E. 52, at 20-22; A. 215-217); (D.E. 69, at 15-17; A. 351-353). Appellants argue that their "injury" arises under the Helms-Burton

Act. (D.E. 64, at 14; A. 267) ("Plaintiffs' injury—indeed the sole focus of Title III—is defendants' ***trafficking*** in the Properties.") (emphasis in original). Article III of the Constitution is not concerned, however, with the statutory grounds for a cause of action. It requires a concrete injury, not a statutory violation, to be adequately alleged by the plaintiff. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). Yet Appellants failed to plausibly allege any concrete injury. This Court recently confirmed what *Spokeo* made clear: merely pleading a statutory violation is insufficient to establish a concrete injury under Article III. *See Muransky v. Godiva Chocolatier, Inc.*, Nos. 16-16486, 16-16783, 2020 U.S. App. LEXIS 33995, at *36 (11th Cir. Oct. 28, 2020). Appellants here, like *Muransky*, ask this Court "to abandon [its] judicial role by merging the ordinary steps in the analysis—concluding that because the statute protects a concrete interest, any violation automatically threatens that interest and thus supports standing. Although that approach would simplify [the Court's] job, it is inconsistent with *Spokeo* and with what the Constitution demands of us." *Id.*, at *35. Further, the Northern District of Texas came to the same conclusion in *Glen*, a similar Helms-Burton Act case. There, the court dismissed with prejudice the Helms-Burton claim because plaintiff lacked Article III standing for failure to allege any concrete injury. The plaintiff argued that American Airlines offered Cuban hotels on its website, which allegedly amounted to a "violation of the substantive rights given to plaintiff by the Act." *Glen*, No. 4:20-CV-482-A, 2020 U.S. Dist.

LEXIS 138148, at *5-6. The court disagreed, and held that plaintiff had no concrete injury, even if Congress created a statutory right to bring suit. *Id.*, at *6-7. Appellants are in an identical position here. As such, any further amendment would be futile because Appellants do not have standing.[10]

Fed.R.Civ.P. 15(a)(2) provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Nevertheless, "a district court need not grant even a *pro se* plaintiff leave to amend where amendment would be futile." *Dragash v. Fed. Nat'l Mortg. Ass'n*, 700 F. App'x 939, 946 (11th Cir. 2017) (citing *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007)). Dismissal without leave to amend is even more "justified by futility when the complaint as amended is still subject to dismissal." *Mickens v. Tenth Judicial Circuit*, 181 F. App'x 865, 875 (11th Cir. 2006) (internal citation omitted). Here, Appellants amended their complaint three times, once with leave of court. The factual allegations on which the complaints must rely in order to have standing and state a claim are solely within Appellants' personal knowledge, *i.e.*, the existence of an injury in-fact, and whether and when they acquired their claims to the Cuban property. Appellants' repeated failure to adequately allege their claims demonstrates that even with another try, they could

[10] The Booking Appellees adopt that portion of the Expedia Appellees' brief dated November 2, 2020 addressing standing, per FRAP 28(i) and 11th Cir Rule 28-1(f).

not set forth facts to support their claims. A further amendment would be futile. *Id.*, 181 F. App'x at 875-76 (citing *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1022 (11th Cir. 2001) (*en banc*)). Additionally, Appellants' "repeated failure to cure deficiencies by amendments previously allowed," itself supports dismissal without further leave to amend. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). This Court should therefore affirm the district court's dismissal without leave to amend because it was a proper exercise of the court's discretion.

CONCLUSION

For the foregoing reasons, the district court's order dismissing the Booking Appellees for lack of personal jurisdiction should be affirmed.

Dated: November 2, 2020

Respectfully submitted,

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Dated: November 2, 2020

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CERTIFICATE OF SERVICE

I CERTIFY that on November 2, 2020, this Brief of Appellees Booking.com B.V. and Booking Holdings Inc. was served on all counsel of record using CM/ECF.

/s/ Michael A. Duffy
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