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

Case No. 19-cv-22620-FAM

MARIO ECHEVARRÍA,
CONSUELO CUEVAS, and
CARMEN FLORIDO,

Plaintiffs,

v.

EXPEDIA GROUP, INC., HOTELS.COM L.P., HOTELS.COM GP, LLC, ORBITZ, LLC, BOOKING.COM B.V., BOOKING HOLDINGS INC.,

Defendants.
_____/

PLAINTIFFS' OMNIBUS[1] OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

[1] Defendants have filed two separate, 20-page motions. To conserve judicial and party resources, plaintiffs address both motions in this omnibus response, for which they requested 20 additional pages by prior motion.

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INTRODUCTION

In separate Motions to Dismiss, defendants Booking Holdings Inc. and Booking.com B.V. (the "Booking defendants"[2]), and Expedia Group, Inc., Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC (the "Expedia defendants"[3]) (jointly, the "defendants"), demand dismissal of the Amended Complaint for Damages (D.E. 116) ("Am Comp." or "complaint"), *inter alia*, for plaintiffs' lack of so-called "constitutional standing" to bring their claim, on the notion that there is no causal connection between plaintiffs' injury and defendants' trafficking. *See* Expedia MTD at 6-10; Booking MTD at 12-15. This is a rank mischaracterization of Title III of the Helms-Burton Act, 22 U.S.C. § 6021, *et. seq.* ("Title III" of "the Act"), not to mention Article III of the U.S. Constitution. The express language of Title III and the operative complaint make clear that plaintiffs' injury in this case is not the Cuban government's theft of their property on Cayo Coco, Cuba (the "Property").

In their motions, defendants admit that they trafficked in the Pullman Cayo Coco (the "Trafficked Hotel"), which was built on the Property.[4] Expedia MTD at 1 ("More than fifty years after the Cuban government allegedly confiscated the Property, certain subsidiaries of defendant Expedia Group, Inc. . . . began to offer travelers the ability to secure reservations at the Pullman Cayo Coco through web-based systems . . . ."); Booking MTD at 4 ("[T]he booking.com website only permitted reservations to be completed at the Pullman Cayo Coco . . . ."). Plaintiffs' injury—indeed the sole focus of Title III and this action—is defendants' trafficking (including benefitting from others' trafficking) in the Property, ***which these defendants have admitted***.

In addition to an ill-conceived "constitutional standing" argument, defendants argue that the complaint fails to allege a prima facie case for "doing business" long-arm jurisdiction under Fla. Stat. § 48.193(1)(a)(1), despite its easily proven allegations that defendants and their agents have offices in Florida with hundreds of employees, are registered to do business in Florida, are registered as sellers of travel in Florida, and do business in Florida every day of the year,

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[2] Plaintiffs cite the Booking defendants' Motion to Dismiss (D.E. 119) as the "Booking MTD."
[3] Plaintiffs cite the Expedia defendants' Motion to Dismiss (D.E. 118) as the "Expedia MTD."
[4] The statutory definition of "trafficking" in this case expressly includes "engag[ing] in a commercial activity ***using or otherwise benefiting*** from confiscated property." 22 U.S.C. § 6023(13)(A)(ii) (emphasis added). Running a business that books rooms in hotels built on confiscated property constitutes "benefitting from confiscated property" as a matter of law.

including actively marketing the Trafficked Hotel to Florida residents (using, *inter alia*, emails sent to targeted Floridians to promote trafficking in the Trafficked Hotel and their locale), and enticing Florida residents to use their interactive websites, through which Floridians can—and do—reserve and pay for rooms at the Trafficked Hotel.

The complaint also adequately alleged long-arm jurisdiction over defendants for committing a tort in Florida, under Fla. Stat. § 48.193(1)(a)(2). Like trademark infringement or a FDUTPA violation, trafficking that violates the Act is a statutory tort that occurs wherever trafficking occurs. The complaint adequately alleges that trafficking occurred and is occurring in Florida, a nexus with Florida that defendants have admitted.[5]

Defendants place unwarranted reliance on a dismissal order in *Del Valle v. Trivago,* 2020 WL 2733729 (S.D. Fla. May 26, 2020). That order was ill-founded and is under appeal for dismissing the action based on a mystifyingly myopic reading of the complaint's jurisdiction allegations.[6] The allegations here are materially different, far more detailed, and discovery already has confirmed that defendants are subject to personal jurisdiction.

The complaint's legally sufficient allegations of long arm jurisdiction shifted the burden to defendants to factually rebut them. *E.g., Cable/Home Commc'n Corp. v. Network Prods., Inc.*,

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[5] We demonstrate below that the complaint's Title III claim is legally sufficient, requiring denial of defendants' 12(b)(6) motion. Because it adequately alleged long-arm jurisdiction for "committing a tort in Florida," further inquiry into "doing business" jurisdiction is moot. Even if that weren't so, defendants' discovery responses would settle the matter, demonstrating such a high volume of case-related Florida contacts that no sales to Floridians would have been necessary. But defendants made substantial sales to Floridians, leaving no doubt that "doing business" personal jurisdiction exists, and due process is satisfied.

[6] The *Del Valle* order (on appeal) overlooked extensive, legally sufficient long-arm jurisdiction allegations, as well as numerous decisions in and out of this District where courts held that a nonresident's operation of an interactive website to solicit and make sales to forum-state residents supports personal jurisdiction in a case arising from, or related to, those activities. The *Del Valle* order (on appeal) also included dicta suggesting purported inheritance issues as to two of the three plaintiffs. Such issues were not presented, briefed or analyzed in *Del Valle*, and could not have supported dismissal of the action, because the lead plaintiff there, like the one of the plaintiffs here, owned his claim on the Act's effective date and was lucky enough to outlive its suspension period. Defendants' attempt to rewrite the Act improperly discriminates in favor of corporations, i.e., giving eternal life to Exxon's claim (along with indirect ownership to anyone who buys Exxon shares today), but would bar claims directly owned by real people who inherited them during the Act's suspension period from family members who weren't lucky enough to outlive it. We will address defendants' ill-conceived and impermissible interpretation of the Act in related cases where certain plaintiffs inherited their claims during the suspension period.

902 F.2d 829, 856 (11th Cir. 1990) (applying *Venetian Salami Co. v. Parthenais,* 554 So. 2d 499, 500 (Fla. 1989)). Defendants couldn't factually rebut plaintiffs' long-arm allegations and didn't even try. Because defendants failed to rebut legally sufficient allegations of doing business and committing a tort in Florida, they are subject to personal jurisdiction unless they lack minimum contacts. *See id.* at 857-58. However, conceding the jurisdictional allegations also conceded minimum contacts, because the complaint alleged far more extensive contacts than due process requires. Defendants bet the farm on an argument that the complaint's allegations were legally insufficient, which was not a good bet. A host of cases applying § 48.193 have gone forward on far less than is alleged here.

Defendants also argue that: (1) plaintiffs have not adequately alleged that their parents owned, and they now own, a claim to the Property; (2) plaintiffs did not acquire their claim to the Property before March 12, 1996, despite the fact that Title III's definition of "property" includes future or contingent interests in real property; and (3) defendants' trafficking (including benefitting from others' trafficking) is not actionable, on the theory that it is "incident to lawful travel," despite the plain meaning of the statutory language and the fact that every court to address this issue has held this to be a fact-bound, affirmative defense that a defendant must plead and prove, which is incapable of resolution on a motion to dismiss. As we more fully demonstrate below, plaintiffs' complaint is legally sufficient, and the Motions should be denied.

LEGAL STANDARD

"In general, courts disfavor motions to dismiss and grant such motions in rare circumstances." *Wright v. King*, 2007 WL 80844, at *1 (M.D. Fla. 2007) (citing *Gasper v. La. Stadium and Expo. Dist.*, 577 F.2d 897, 900 (5th Cir. 1978)). Rule 8(a) of the Federal Rules of Civil Procedure requires a complaint to contain (1) a "short and plain statement of the grounds for the court's jurisdiction . . . ," (2) "a short and plain statement of the claim showing that the pleader is entitled to relief," and (3) a demand for the relief sought . . . ." Fed. R. Civ. P. 8(a). To withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must allege "enough facts to state a claim to relief that is plausible on its face," so as to "nudge[] [its] claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although "a formulaic recitation of the elements of

a cause of action will not do," *Twombly*, 550 U.S. at 555, "[t]o survive a 12(b)(6) motion to dismiss, the complaint does not need detailed factual allegations, but must give the defendant ***fair notice of what the plaintiff's claim is and the grounds upon which it rests***." *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010) (citing *Twombly*, 550 U.S. at 555; *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (internal quotations omitted) (emphasis added)).

Further, "[i]n deciding a Rule 12(b)(6) motion to dismiss, the court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff." *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1246 (11th Cir. 2016) (citing *Erikson v. Pardus*, 551 U.S. 89, 94 (2007)). Finally, a court may not resolve factual issues on a motion to dismiss, but may decide only questions of law. *Wright*, 2007 WL 80844, at *1 (citing *Kest v. Nathanson*, 216 So. 2d 233, 235 (Fla. 4th DCA 1968)). "In ruling on a motion to dismiss, the Court is constrained to review the allegations as contained within the four corners of the complaint and may not consider matters outside the pleading without converting the defendant's motion into one for summary judgment." *Crowell v. Morgan, Stanley, Dean Witter Servs. Co., Inc.*, 87 F. Supp. 2d 1287, 1290 (S.D. Fla. 2000).

DEFENDANTS' MOTIONS SHOULD BE DENIED

Title III provides that "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 a claim to such property for money damages . . . ." 28 U.S.C. § 6082(a)(1)(A). Accordingly, plaintiffs alleged that (1) they are United States nationals, (2) who own claims to Property that were (3) confiscated by the Cuban government on or after January 1, 1959, and (4) were trafficked by the defendants within the last two years. Plaintiffs adequately alleged each of these elements. Am Comp. ¶¶ 2-4, 32-52, 54-59.

Nonetheless, defendants demand that this case be dismissed, *first* for plaintiffs' alleged lack of so-called "constitutional standing" to bring their claim, and *second*, on the notion that they are not subject to personal jurisdiction, even though (a) they do business in Florida every day, (b) operate offices with hundreds of Florida employees, that (c) target Floridians to solicit and sell reservations at Cuban hotels, including the Trafficked Hotel, using "microtargeting" capabilities, and (d) communicate directly both with Floridians who book stays at Cuban hotels and the hotels themselves about those reservations. All these allegations were well-pleaded, and defendants did not (and could not) rebut them, which might explain why they didn't even try.

Defendants' *third* theory is that plaintiffs inadequately alleged that their parents owned, and they now own, a claim to the Property, which they did not allege acquiring before March 12, 1996, even though plaintiffs set out a detailed line of succession for the Property establishing the ownership of their claim to the Property that pre-dates the Act, which is all the Act required. *Fourth*, defendants argue that plaintiffs inadequately alleged that their trafficking was "knowing and intentional," despite plaintiffs' repeated allegation of just that, and the mooting of that allegation by defendants' acknowledgment that they received plaintiffs' pre-suit notice of intent to sue them for trafficking.[7] *Finally*, defendants argue that their trafficking is "incident to lawful travel" as a matter of law, even though every court to address the issue has held that this is an affirmative defense that cannot be considered on a motion to dismiss. Plaintiffs address each argument in turn below.

I. Even If "Constitutional Standing" Were Not a Canard, Plaintiffs Would Have it, and They Plainly Have Standing to Bring this Case Under Title III of the Act

Defendants argue that plaintiffs lack "Article III standing" to bring this action. Expedia MTD at 5-9; Booking MTD at 12-15. This theory demonstrates a fundamental misunderstanding of both Article III[8] and Title III. Plaintiffs' Title III injury is not the Cuban government's confiscation of the Property. Plaintiffs' injury—indeed the sole focus of Title III—is defendants' ***trafficking*** in the Property. Even if Title III required alleging some "causal connection" between trafficking and something else (it doesn't), it wouldn't be confiscation of the Property.

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[7] We pause to note one of defendants' arguments about the Act, that a Title III claim requires some sort of bad intent akin to an intentional tort. It does not. Title III provides a strict liability, statutory tort claim with limited, enumerated, statutory defenses. To adequately allege that a trafficker acted "knowingly and intentionally" merely requires alleging volitional, not accidental or unintended, trafficking. The latter is conceivable, for example, if a business bought and resold vinegar without knowing it was made in Cuba, where the communist Castro regime confiscated the real property on which the factory stood. This Court may (and should) take judicial notice of the fact that the Castro regime confiscated all real property, including plaintiffs' Property. A defendant booking rooms in a hotel built on the Property may not plausibly claim it didn't know that the hotel stands on confiscated property. This is all the Act requires.

[8] The Court should reject defendants' attempt to use "standing" as a bootstrap to magically transform a Rule 12(b)(6) motion into an attack on subject matter jurisdiction. Article III says nothing about "standing." Its "case and controversy" requirement gave rise to judge-made justiciability rules including standing, ripeness and mootness. None of them have anything to do with jurisdiction in a federal question case. Only in a diversity case does jurisdiction relate to standing, because diversity of citizenship must exist when the case is filed.

As a general matter, standing for federal question jurisdiction requires that a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Defendants argue that the complaint fails to satisfy the first and second elements of this test.[9] Expedia MTD at 6; Booking MTD at 13. To do so, defendants grossly mischaracterize plaintiffs' claim as if it were based on the Cuban government's confiscation of the Property, and not defendants' trafficking in the Property, which is plainly and expressly what the Act targets and the complaint alleges.

Defendants cannot seriously dispute that plaintiffs adequately alleged "an invasion of a legally protected interest." Title III expressly makes trafficking in confiscated property a "legally-protected interest" for which it expressly provides a remedy: "To deter trafficking in wrongfully confiscated property, United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro's wrongful seizures." 22 U.S.C. § 6081(11). The express language of Title III does not and cannot support defendants' argument that plaintiffs' injury is not defendants' admitted trafficking, but rather the Cuban government's confiscation of the Property, for which plaintiffs do not—and cannot—seek redress under Title III. That said, plaintiffs respond as follows:

First, what plaintiffs actually alleged is that defendants are liable for their trafficking in the Property. *E.g.*, Am Comp. at 2 ("Together, the Cuban government, the Expedia Defendants, and the Booking Defendants have exploited and benefitted from the Cuevas Heirs'[10] property for decades without their consent and without paying Cuevas Heirs any compensation whatever. The Cuevas Heirs now sue to right the defendants' unlawful trafficking in their property and for just compensation."); *id*. ¶ 59 ("The Cuevas Heirs have been injured in Florida by defendants' trafficking in the Trafficked Property without the permission of, and without paying compensation to, the Cuevas Heirs ."); *id*. ¶ 93 ("The defendants have knowingly and intentionally used or benefitted, directly or indirectly, from the confiscated Cuevas Property by

[9] There's no such thing as a "causation element" of standing, either. That an injury be "fairly traceable" to defendants' challenged conduct does not equate to cause in fact or proximate cause, except on defendants' wish list.

[10] Plaintiffs Mario Echevarría, Consuelo Cuevas, and Carmen Florido were defined in the complaint as the "Cuevas Heirs". Am Comp. at fn. 1.

soliciting and selling, for economic benefit, reservations at the Trafficked Hotel, which constitutes trafficking that violates Title III of the Libertad Act.”).

Second, Title III does not, and cannot, provide any recourse to plaintiffs for the Cuban government’s confiscation of the Property in Cuba. Further, Title II of the Act, and not Title III, concerns claims for confiscation of property in Cuba. *See* 22 U.S.C. § 6067 (“Settlement of outstanding United States claims to confiscated property in Cuba”). Title III’s purpose and remedy have nothing to do with anything the Cuban government did or does, except for the predicate fact of its having confiscated the Property, a fact that this Court may (and should) judicially notice. Title III is solely aimed at traffickers (like these defendants) who use or benefit from property that was confiscated. Thus, the injury in fact that plaintiffs alleged is—and only can be—defendants’ trafficking in the Property without plaintiffs’ permission and without compensating them. That injury is both “fairly traceable” to defendants and the proximate result of defendants’ trafficking in the Property.

Third, defendants wholly fail to address the self-evident fact that a favorable judicial decision awarding damages to plaintiffs is intended to, and obviously will, redress defendants’ failure to compensate plaintiffs for trafficking in the Property. As such, plaintiffs’ injury unquestionably can be “redressed by a favorable judicial decision.” *Spokeo*, 136 S. Ct. at 1547. In sum, defendants’ “Title III standing” argument is meritless and should be rejected.

In arguing that plaintiffs suffered no concrete harm, defendants rely on *Glen v. Am. Airlines, Inc.*, 2020 WL 4464665 (N.D. Tex. Aug. 3, 2020), but ignore the more recent decision in *Havana Docks Corp. v. Carnival Corp.*, 2020 WL 5517590, at *8 (S.D. Fla. Sept. 14, 2020), in which a court of *this District* declined to follow the earlier Texas decision. The *Havana Docks* court held that “allegations of profiting from the use of property that was expropriated without obtaining consent or paying adequate compensation to the original owner is sufficient concrete harm for standing purposes.” *Havana Docks*, 2020 WL 5517590, at *8. That decision in a related case was correct and should be endorsed here.

Finally, defendants seek support from *Muransky v. Godiva Chocolatier, Inc.*, 2020 WL 6305084 (11th Cir. Oct. 28, 2020). That quest will prove fruitless. While noting that bare allegations of statutory violations often are insufficient to demonstrate standing on federal question claims, *Muransky* held that standing exists where the alleged statutory violations caused a type of harm historically recognized as actionable. *Id.* at *6.

In addition to adequately alleging defendants' Title III violation and an actual, concrete, remediable injury resulting from it, the complaint expressly alleged actual injury from defendants' trafficking of the stolen Property without seeking plaintiffs' consent or compensating them for that trafficking. American courts have long recognized that such infringement of a person's property rights is actionable as unjust enrichment. *Havana Docks*, 2020 WL 5517590, at *7. On the precise point in question, that court held that in enacting Title III, Congress sought to provide an effective remedy for a historically recognized property right, and to prevent "the subsequent unjust enrichment and economic exploitation of that property by foreign investors at the expense of the rightful owners." *Id*.

The *Muransky* court stated that "[t]he fit between a traditionally understood harm and a more recent statutory cause of action need not be perfect." *Muransky*, 2020 WL 6305084, at *11. In this case it very nearly is. Plaintiffs alleged "the kind of injury that 'has traditionally been regarded as providing a basis for a lawsuit.'" *Id.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)).

II. This Court Has Specific Jurisdiction Over Defendants Because This Action Arises from Business They Regularly Conduct in Florida and a Tort They Committed Here, and Minimum Contacts Exist

Defendants argue that the complaint does not allege a prima facie case for specific jurisdiction over them. Expedia MTD at 13-15; Booking MTD at 9-12. This argument is baseless, because the complaint adequately alleges that this case arises from two specific-jurisdiction provisions of the Florida long-arm statute—doing business in Florida and committing a tort in Florida, pursuant to Fla. Stat. §§ 48.193(1)(a)(1) and 48.193(1)(a)(2). Defendants failed even to try to contradict those allegations, which stand unrebutted. Also standing unrebutted are plaintiffs' "minimum contacts" allegations of far more forum-related activity than due process requires. Defendants placed a longshot bet on arguing that the complaint failed to adequately allege personal jurisdiction, knowing they couldn't rebut the factual allegations, and couldn't prevail on minimum contacts if that issue were reached.

We show below that both grounds for long-arm jurisdiction, as well as minimum contacts, were adequately alleged, and pause for a word on minimum contacts. Despite much confusion and mischief in internet-era decisions, the due process touchstone for "minimum contacts" remains "whether there was 'some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits

and protections of its laws.'" *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 924 (2011) (quoting *Hanson v. Denckla*, 357 U.S. 235, 258 (1958)); *accord Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985). The complaint's detailed allegations of defendants' (1) Florida contacts and purposeful availment, and (2) the relationship and connection of defendants' contacts to plaintiffs' claim, are legally sufficient (and corroborated by defendants' initial discovery responses). In short, the complaint satisfies applicable law, including a somewhat incoherent line of "website" decisions, as well as Circuit and District precedent.

A. The Complaint Adequately Alleged That Defendants Carry on Business in Florida from Which This Action Arises

The complaint adequately alleged that defendants do business in Florida from which this action arises under Fla. Stat § 48.193(1)(a)(1). That is all the Florida long-arm statute requires to trigger a minimum contacts analysis, unless a defendant can rebut the "doing business" allegations. Defendants never could have done so, and didn't even try.

"In order to establish that a defendant is '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." *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162, 1167 (11th Cir. 2005). "Factors relevant, but not dispositive, to this analysis include [1] the presence and operation of an office in Florida . . . [2] the possession and maintenance of a license to do business in Florida . . . [3] the number of Florida clients served . . . and [4] the percentage of overall revenue gleaned from Florida clients." *Id*. (internal citations omitted).

The complaint adequately alleged each of these "relevant but not dispositive" factors:

> a. Defendants maintain Florida offices from which hundreds of employees work and from which they contact Florida residents and Cuban hotels regarding reservations booked on defendants' websites. For example, Expedia Group has a 19,000 square feet office in the Bank of America 33-story tower at 701 Brickell Avenue for one of its divisions (not a separate corporation, but a division of itself), Expedia Group Media Solutions. That office has had over one hundred (100) employees during the relevant time and offers marketing services relating to Latin America that permit the "geo-target[ing]" of digital ads "to origin cities in Florida," as more fully described below. Similarly, defendant Booking Holdings is registered to do business in Florida as its wholly-owned subsidiary Booking.com (USA) Inc., which maintains Miami offices at 801 Brickell Avenue and in Orlando at 8529 South Park Circle, where it has customer service centers with Florida employees whose relevant activities include receiving calls from Floridians about the Trafficked Hotel.

In fact, "Booking.com's Orlando office is now the company's largest office outside of its Amsterdam base;"

b. The Booking Defendants' Orlando call center provides support for Booking's operations with respect to Cuban hotels, including pre- and post-booking contact with clients and hotels;

c. Expedia Media Solutions, Expedia Group's marketing division based in *Miami,* designs, implements, and provides metrics on marketing and solicitation, including the use of "micro-targeting," through which it can pinpoint and direct marketing and solicitation to particular geographic areas, down to city level. Expedia touts its ability to do so in Florida;

d. Defendants do substantial business every day of the year in Florida, including marketing, research, solicitation, sales and customer service aimed at Floridians;

e. Defendants communicate with hotels in Cuba from Florida, including with the Trafficked Hotel, regarding reservations booked on defendants' websites;

f. Each of the Expedia Defendants is registered with the Florida Department of State to do business in Florida and has been for more than twenty years;

g. The Booking Defendants' subsidiaries and agents, Booking.com Customer Service Center (USA) Inc. and Booking.com (USA) Inc.,[11] have been registered with the Florida Department of State to do business in Florida for nearly a decade;

h. Defendants Expedia Group, Inc., Hotels.com LP, Orbitz, LLC and Booking Holdings are registered with the Florida Department of Agriculture and Consumer Services (FDACS) to do business in Florida;

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[11] The Booking defendants argue that the documents plaintiffs submitted to support these allegations relate to a "non-party" named Booking.com (USA), Inc. *See* Booking MTD at 5, n. 4. They fail to mention that this "non-party" is both a wholly-owned subsidiary of defendant Booking Holdings and the instrumentality through which it does business in Florida, which its Florida Division of Corporations registration (No. ST32150) confirms. *See* Am Comp. ¶ 9. Agency-based personal jurisdiction exists here because the parent entity exercises operational control over the subsidiary. *E.g., Hard Candy, LLC v. Hard Candy Fitness, LLC*, 106 F. Supp. 3d 1231, at 1241 (S.D. Fla. 2015). Agency-based jurisdiction also exists because the subsidiary has no independent purpose for existence and conducts business solely for the parent. *See Meier v. Sun Int'l Hotels, Ltd.,* 288 F.3d 1264, 1273 (11th Cir.2002). Thus, for the subsidiary to be more than a "mere instrumentalit[y]," it must have "separate corporate interests of its own," and it may not "function[ ] solely to achieve the purpose of the dominant corporation," unlike Booking.com (USA), which is both controlled by Booking Holdings and the instrumentality through which Booking Holdings does business in Florida. *Id*.

i. Expedia "has been a longtime partner with the Florida Chamber of Commerce" and "has a home here in Florida and has supported economic growth related to tourism;"

j. Booking.com also is a partner with the Greater Miami Convention & Visitors Bureau ("GMCVB") serving as its booking engine, and helping the GMCVB achieve record-breaking revenues during the first six months of partnership;

k. Booking Holdings is registered in Florida as a "seller of travel," and its registration states that it is "doing business as" its agent-subsidiaries;

l. Defendants receive significant revenues from their activities in Florida.

Am Comp. ¶ 15

The complaint also expressly alleged that defendants earned Florida revenue when Floridians "booked a substantial number of stays at the Trafficked Hotel through defendants' websites." *Id*. ¶ 26 (a). The complaint specifically alleged the numbers of reservations made by Floridians through defendants' websites between November 2017 and June 2019. *Id.*

Specific jurisdiction has been found on far less than was alleged here. In *Clover Systems, Inc. v. Almagran, S.A.*, the defendant was found to be carrying on a business or business venture in Florida. 2007 WL 1655377, at *4 (S.D. Fla. 2007). The court considered important the fact that defendant "transmitted thousands of electronic communications, including telephone calls, into Florida." *Id*. Here, defendants conduct active, successful marketing campaigns targeting Floridians for sales of reservations at the Trafficked Hotel. Those sales were made, which alone renders defendants' continuing disputation of personal jurisdiction frivolous.

Defendants sold reservations at the Trafficked Hotel to Floridians in Florida. Those sales are (and must be) legally sufficient for personal jurisdiction. Further, those sales arose from massive marketing efforts that defendants conduct, and aim at Floridians, in Florida. Examples include:

- Defendants' continuous and systematic efforts to solicit Florida sales are concrete and quantifiable. For example, between November 2017 and June 2019 alone, the Booking Defendants sent

  a. [redacted information] emails to Floridians who searched for hotels in Varadero between November 2017 and June 2019 alone; and

b. [redacted information] emails to Floridians who searched for hotels located in Cayo Coco, the Cuevas Property, between November 2017 and June 2019. Am Comp. ¶ 16;

- Defendants use their sophisticated websites to send follow up "you forgot something" emails to Floridians who browse hotels in Cuba on defendants' websites, but do not make reservations, soliciting and urging them to make reservations, including reservations at the Trafficked Hotel. For example, between October 2017 and June 2019 alone, the Booking Defendants sent [redacted information] emails to Floridians who abandoned carts that included hotels in Cuba, including the Trafficked Hotel. *Id*. ¶ 17;

- Defendants send direct correspondence to persons whom defendants know are located in Florida. *Id*. ¶ 18;

- Defendants directly target Floridians for advertising, for example, through Expedia Group Media Solutions, using its touted ability to micro-target by geographic area; *Id*. ¶ 19;

- Defendants also target Floridians directly for advertising, for example, through Expedia Local Expert, through its more than 100 concierge service spots located in Orlando, Florida. *Id*. ¶ 20;

- Floridians who have "registered to receive newsletters and other communications on the Booking.com B.V. website, have received communications from Booking.com B.V." *See* Booking.com B.V.'s discovery response at paragraph 39, attached as Exhibit J. *Id.* ¶ 21;

- Defendants configure their landing pages (web pages that users see upon entering defendants' websites) for Floridians who have searched for hotels in Cuba, including, on information and belief, the Trafficked Hotel, so that they direct users to these and other Cuban hotels related to their search. *Id.* ¶ 22; and

- By "configur[ing] their landing pages . . . for Floridians who have searched for hotels in Cuba, including, on information and belief, the Trafficked Hotel, so that they direct users to these and other Cuban hotels related to their search." *Id*. ¶ 22.

Defendants' Florida sales, as well as their Florida marketing and advertising efforts support a finding of personal jurisdiction. *E.g., Carmel & Co. v. Silverfish, LLC*, 2013 WL 1177857, at *3 (S.D. Fla. 2013). In *Silverfish*, the court asserted "doing business" long-arm jurisdiction over a California defendant. *Id.* at *4. The defendant's Florida contacts consisted of using a website to sell sunglasses to customers in Florida. *Id.* at *3. Silverfish advertised its products using search engines and identifying keywords. When potential customers used those

keywords as search terms, Silverfish advertisements would pop up. That was it. Because the claim related to defendant's advertising of the website and customers' searching for sunglasses, the defendant was subject to "doing business" jurisdiction. Here, Plaintiffs alleged in far more detail how defendants target, promote and sell reservations at the Trafficked Hotel to Floridians.

Preliminary discovery in this case confirms what plaintiffs alleged—that defendants sold reservations at the Trafficked Hotel to Floridians. Both defendants' initial responses admitted this, and both defendants produced charts reflecting their sales to Floridians. The record already demonstrates that defendants do business in Florida from which this case arises. Defendants' entire business is based on their sale of hotel reservations on their websites. If it weren't for sales on their websites, defendants would have no businesses at all. The complaint adequately alleged "doing business" long-arm jurisdiction over defendants.

Further, defendants failed even to shoulder, let alone carry, their burden of factually rebutting the complaint's well-pleaded allegations. *E.g., Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006) (When a complaint alleges a *prima facie* case for personal jurisdiction, the burden shifts to the defendant to "submit[] affidavits contrary to the allegations in the complaint."). Defendants could not in good faith rebut the complaint's "doing business in Florida" allegations, which may explain their failure even to try.

Defendants cite *RG Golf Warehouse, Inc. v. Golf Warehouse, Inc.*, 362 F. Supp. 3d 1226 (M.D. Fla. 2019), and *Lemoine v. Wong*, 2017 WL 5127592 (S.D. Fla. 2017), to argue that merely having a website accessible in Florida does not support "doing business" long-arm jurisdiction. Neither case sheds light on this one, where the complaint did not allege "merely having a website," but that (1) defendants' entire business is the sale of reservations on their websites, (2) such sales were made in Florida, and (3) included sales of reservations at the Trafficked Hotel.

In *RG Golf Warehouse*, unlike here, the plaintiff did not allege that the defendant even maintained an office in Florida or advertised to and solicited Florida customers. 362 F. Supp. 3d at 1236. The fact that that the defendant operated an interactive website, by itself, was held insufficient to find "doing business" long-arm jurisdiction under § 48.193(1)(a)(1). *Id.*

In *Lemoine*, unlike here, the complaint's jurisdictional allegations were rebutted by a defendant's affidavit. 2017 WL 5127592 at *3, *5. Further, although *Lemoine* held that a website accessible in Florida, standing alone, was insufficient under § 48.193(1)(a)(1), it and the cases it

cites involved defendants that did not actively solicit business in Florida. *Id.* In dispositive contrast, the complaint here expressly alleged that defendants actively solicit business in Florida through emails and follow-up emails sent to targeted Floridians, which expressly promote defendants' websites and solicit sales of reservations at the Trafficked Hotel, and that defendants made such sales. Am Comp. ¶¶ 16-22, 25-27.

Defendants' reliance on the recent order in *Del Valle v. Trivago,* 2020 WL 2733729 (S.D. Fla. May 26, 2020) also is misplaced. That order is on appeal because the court dismissed the action after ignoring the complaint's "doing business" allegations, as well as numerous decisions in and out of this District holding that a nonresident's operation of an interactive website to solicit and make sales to forum-state residents supports personal jurisdiction in a case arising from those activities.[12] Moreover, the allegations here are materially different, far more detailed, and discovery already has confirmed that defendants are subject to personal jurisdiction, because they sold reservations at the Trafficked Hotel to Floridians in Florida as part of their massive and successful marketing efforts to do just that.

Defendants fail to face the facts and, with blinders on, offer the Court a blindfold, arguing that "merely" operating a website accessible to Floridians where Floridians can book reservations at the Trafficked Hotel does not satisfy Florida's long-arm statute. They cite no case where a nonresident defendant actually ***made sales*** in the forum state without subjecting itself to personal jurisdiction in an action arising from those sales. Because these defendants do business in Florida from which this action arises, they are subject to personal jurisdiction under Fla. Stat. § 48.193(1)(a)(1) unless minimum contacts are lacking. But they aren't lacking. In this case, where defendants' massive Florida marketing and sales activities resulted in sales, there can be no doubt that minimum contacts exist, as we further demonstrate in Section II (C), below.

B. The Complaint Adequately Alleged That Defendants Committed a Tortious Act in Florida, Which Defendants Failed to Rebut

Defendants also are subject to long-arm jurisdiction for committing a tort in Florida under Fla. Stat. § 48.193(1)(a)(2)—which they did every day by trafficking in the Property.

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[12] The Expedia defendants incorrectly allege that the complaint failed to allege claims arising from their Florida contacts under § 48.193(1)(a)(1). *See* Expedia MTD at 15. This is nonsense. Trafficking under the Act is expressly defined to include benefiting from trafficking in confiscated property, which is exactly what the complaint accurately alleged that defendants did every hour of every day. 22 U.S.C. § 6023(13)(A)(ii). Query if there ever could be a more obvious example of trafficking than offering to rent or sell confiscated property.

Trafficking in violation of title III, like other statutory torts, subjects the trafficker to long-arm jurisdiction for committing a tort in Florida. *See, e.g., Koch v. Royal Wine Merchants, Ltd.*, 847 F. Supp. 2d 1370, 1380-81 (S.D. Fla. 2012) (FDUTPA violation); *Foreign Imported Prods. & Pub. Inc. v. Grupo Indus. Hotelero S.A.,* 2008 WL 4724495, at *6 (S.D. Fla. 2008) (federal Copyright Act violation); *Keim v. ADF MidAtlantic, LLC*, 199 F. Supp. 3d 1362, 1367 (S.D. Fla. 2016) (TCPA violation). These allegations are legally sufficient, stand unrebutted, and require no discovery on this motion, let alone "proof." Courts may hold mini-trials on "doing business" allegations, but not on "tort in Florida" allegations, which would be improper, because a complaint's allegations must be taken as true on a motion to dismiss. *See id.*

Title III of the Act subjects a defendant to liability for trafficking if it "knowingly and intentionally . . . engages in a commercial activity using or otherwise benefiting from confiscated property." 22 U.S.C. § 6023(13).[13] As demonstrated above, the complaint accurately and adequately alleged that defendants are intentionally engaged in commercial activity, acting as travel agents and selling room reservations at the Trafficked Hotel. It also alleges that they derive a direct benefit from advertising, facilitating and selling room reservations at the Trafficked Hotel.[14]

Further, the amended complaint expressly alleges that defendants trafficked the Property in Florida. *E.g.,* Am Comp. ¶ 18 ("Defendants send direct correspondence to persons whom defendants know are located in Florida."); *id*. ¶ 16 ("Defendants use sophisticated internet marketing systems to target and solicit Floridians[15] to make reservations at hotels built on stolen property in Cuba."); *id*. ¶ 17 ("Defendants use their sophisticated websites to send follow up "you forgot something" emails to Floridians who browse hotels in Cuba on defendants' websites, but do not make reservations, soliciting and urging them to make reservations, including, on

[13] As noted above, "knowing and intentionally" in the context of the Act means no more than acting "on purpose." Defendants were not sleepwalking when they trafficked in the Property.
[14] Plaintiffs allege that defendants use three profit models: a merchant model; an agency model; and, for the Expedia defendants, an advertising model. Am. Comp. ¶¶ 34, 40. Under the merchant and agency models, defendants receive commissions and other revenue for facilitating the booking of hotel rooms. *Id.* Under the advertising model, defendants "offer travel and non-travel advertisers access to a potential source of incremental traffic and transactions through our various media and advertising offerings on trivago and transaction-based websites." *Id.* ¶ 34.
[15] "Floridian," as used in the complaint, means a person who provided defendants with a zip code for a home or billing address in Florida, visited their websites from an IP address located in Florida, or whom defendants otherwise were able to determine was located in Florida.

information and belief, reservations on the Trafficked Hotel."); *id.* ¶ 19 ("Defendants directly target Floridians for advertising, for example, through Expedia Group Media Solutions, using its touted ability to micro-target by geographic area."); *id.* ¶ 20 ("Defendants also target Floridians directly for advertising through Expedia Local Expert, through its more than 100 concierge service spots located in Orlando, Florida."); *id.* ¶ 22 ("Defendants configure their landing pages (web pages that users see upon entering defendants' websites) for Floridians who have searched for hotels in Cuba, including, on information and belief, the Trafficked Hotel, so that they direct users to these and other Cuban hotels related to their search."); *id.* ¶ 23 (Floridians can readily access defendants' websites and are able to book hotel accommodations in Cuba at more than 6,500 hotels, including the Trafficked Hotel."); *id.* ¶ 24 ("Having located a hotel in Cuba on one of the defendants' websites, a Floridian is readily able to determine whether hotel rooms are available on the preferred dates, at what price and with what features. If Floridians do not reserve a room after browsing defendants' websites, the defendants will target them and send emails with other hotel options in Cuba, including the Trafficked Hotel. For example, on July 19, 2019, after Manuel Vazquez, a Floridian, searched on Booking.com for hotels in Cienfuegos, Cuba, the Booking Defendants sent him an email inviting him to look at other hotels in Cienfuegos: 'Manuel, Cienfuegos is calling your name.'"); *id*. ¶ 26(a); ("Floridians have booked a substantial number of stays at the Trafficked Hotel through defendants' websites").

The discovery to date corroborates these allegations, which defendants wholly ignored. The complaint adequately alleged that plaintiffs' injury results from defendants' advertising, facilitating, and selling room reservations at the Trafficked Hotel, which constitutes trafficking under Title III. That injury is suffered in Florida no matter where defendants were located in directing their trafficking. "Under Florida law, a nonresident defendant commits 'a tortious act within Florida' when he commits an act *outside* the state that causes *injury within Florida*." *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1353 (11th Cir. 2013) (quoting *Licciardello v. Lovelady*, 544 F.3d 1280, 1283 (11th Cir. 2008)) (emphasis in original). *Mosseri* held that "a trademark infringement on an Internet website causes injury and occurs in Florida by virtue of the website's accessibility in Florida." *Id.* at 1354.[16] The court stated that "we need not

[16] Trademark and copyright infringement, like strict product liability and trafficking under the Act, is wrongful conduct that does not require a showing of "bad intent," but nonetheless subjects the actor to "tortious act" long-arm jurisdiction.

decide whether trademark injury necessarily occurs where the owner of the mark resides, as the Florida district courts have held, *because in this case the alleged infringement clearly also occurred in Florida by virtue of the website's accessibility in Florida*." *Id.* (emphasis in original). In other words, the injury occurred in Florida not only because plaintiffs live in Florida, but also because the websites through which defendants committed the tort were accessible in and aimed at Florida.

This case is no different. Plaintiffs reside in Florida and the websites through which defendants tortiously trafficked in the Property were accessible in and targeted at Florida, and through those websites, defendants in fact made sales to Floridians of reservations at the Trafficked Hotel.[17] Defendants' admissions that they sold reservations at the Trafficked Hotel to Floridians corroborate plaintiffs' allegation that they committed a tort in Florida. Nothing more was required. But defendants also sent direct correspondence to persons whom defendants knew were located in Florida. When Floridians researched reservations at Cuban hotels, including the Trafficked Hotel, but did not make reservations, defendants sent them "you forgot something" emails, urging them to make reservations and suggesting other attractions and hotels in the area. *See* Am Comp., Ex. A. Even without any sales in Florida, plaintiffs' allegations of solicitations in Florida would support a Title III claim and tortious act jurisdiction over defendants, because the solicitations also amount to trafficking. The confirmed sales erase even the possibility of doubt.

District precedent also makes clear that defendants' tortious conduct occurred in Florida under § 48.193(1)(a)(2). *Hartoy v. Thompson* states that "[t]he Eleventh Circuit . . . interpreted the long-arm statute to mean that a defendant who commits a tort that causes injury in Florida is subject to personal jurisdiction under [former] subsection (1)(b) *no matter where the act that caused the injury was actually completed."* 2003 WL 21468079, at *2 (S.D. Fla. 2003) (emphasis added). "The Florida Supreme Court has made explicit that a defendant's physical presence is not required to commit a tortious act in Florida." *Foreign Imported Prods. and Pub. Inc. v. Grupo Indus. Hotelero S.A.*, 2008 WL 4724495, at *6 (S.D. Fla. 2008) (citing *Wendt v. Horowitz*, 822 So. 2d 1252, 1260 (Fla. 2002)). Specifically, "'committing a tortious act' in

[17] Despite arguing here that their websites are "merely accessible" by Floridians, the Expedia defendants, through their Miami-based Expedia Media Solutions subsidiary, elsewhere tout their ability to "micro-target" their marketing by geographic area, including Florida cities. Discovery confirmed that defendants did just that in trafficking the Property to Floridians.

Florida under [former] section 48.193(1)(b) can occur through the nonresident defendant's telephonic, electronic, or written communications into Florida, as long as the plaintiff's cause of action arises from the communications." *Pathman v. Grey Flannel Auctions Inc.*, 741 F. Supp. 2d 1318, 1324 (S.D. Fla. 2010) (Isolated activity, such as maintaining a merely informational, non-interactive website accessible in Florida might be insufficient, but "[a]ctive internet solicitation may subject a defendant to personal jurisdiction."); *accord Renaissance Health Pub., LLC v. Resveratrol Partners, LLC*, 982 So. 2d 739, 742 (Fla. 4th DCA 2008) (Sales made to Florida residents through interactive websites were "sufficient to subject defendants to jurisdiction.").

Defendants' interactive websites are not merely informational. The amended complaint alleged that through defendants' websites, travelers, "including, in large part . . . Floridians," may book online stays at the Trafficked Hotel. Am Comp. ¶ 38. It further alleged that defendants use their interactive websites to send "follow-up emails to Floridians who have searched for the accommodations in Cuba, including the Trafficked Hotel, or other geographically proximate hotels." *Id*. ¶ 25(b).

Similarly, in *Foreign Imported Prods.*, 2008 WL 4724495, at *6, the plaintiff alleged that the defendant had posted plaintiff's copyrighted material on its website, which was accessible to Florida residents. The court found "tort in Florida" long-arm jurisdiction "[b]ecause Plaintiff has alleged that the website is the site of the copyright infringement and is accessible in Florida." *Id*. The court clarified that "the Eleventh Circuit has made clear that ***a defendant's tortious conduct on a website accessible in Florida subjects the defendant to § 48.193[(a)(1)(2)]***." *Id*. (citing *Licciardello*, 2008 WL 4531668, at *2 (emphasis added)). The complaint adequately alleged that defendants carry out their trafficking through the offer and sale of reservations at the Trafficked Hotel, that "Floridians could reserve vacation packages at the Trafficked Hotel from the defendants' websites," and that "defendants solicit and accept reservations at the Trafficked Hotel including, in large part, from Floridians." Am Comp. ¶ 38.

In sum, the complaint adequately alleged that defendants have committed a tort in Florida by engaging in "tortious conduct on a website accessible in Florida," which "the 11th Circuit has made clear . . . subjects the defendant to § 48.193[(1)(a)(2)]." *Foreign Imported Prods.*, 2008 WL 4724495, at *6. Defendants' websites are accessible to Floridians, their marketing is aimed at making sales to Floridians. They made those sales, and their trafficking has caused injury to plaintiffs in Florida. Tortious act jurisdiction under § 48.193(1)(a)(2) was adequately alleged.

C. Minimum Contacts Exist and Due Process is Satisfied

Asserting long-arm jurisdiction over a nonresident defendant under Florida law requires allegations that satisfy a provision of Fla. Stat. § 48.193, plus allegations that demonstrate a defendant's "minimum contacts" with Florida, such that suing the defendant in Florida satisfies basic notions of fair play and substantial justice. *E.g., Cable/Home Commc'n Corp. v. Network Prods., Inc*., 902 F.2d 829, 856 (11th Cir. 1990) (applying *Venetian Salami Co. v. Parthenais,* 554 So. 2d 499, 500 (Fla. 1989)). The due process burden is not high and is easily met here.

The complaint extensively and adequately alleged that defendants are subject to "doing business" and "tortious act" long-arm jurisdiction for trafficking the Property in Florida through soliciting, advertising, marketing and selling reservations at the Trafficked Hotel to Floridians. Moreover, initial discovery has confirmed those allegations, which defendants failed to dispute.

Because defendants failed even to attempt to rebut the complaint's jurisdictional allegations, which are legally sufficient, the only remaining question is whether due process would be offended by asserting personal jurisdiction over these defendants, in this case, on these claims. It plainly would not be. The Supreme Court long ago recognized that a defendant's purposeful availment of the privilege of doing business in Florida satisfies due process. *Burger King*, 471 U.S. at 473-74. The complaint (and factual record to date) leaves no doubt that these defendants have done just that, registering and conducting business in Florida every hour of every day of the year, targeting Floridians for marketing and selling reservations at the Trafficked Hotel, and reaching into Florida by sending Floridians follow-up emails until and after sales are made. *See, e.g., Walden v. Fiore*, 571 U.S. 277, 285 (2014) ("[I]t is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over [the defendant]"). Defendants themselves reached into the forum state—purposefully availing themselves of the privilege of doing the business at issue in Florida—where they have been authorized and doing business for many years. *See World-Wide Volkswagen Corp. v Woodson*, 444 U.S. 286, 297 (1980). The volume of defendants' case-related contacts far exceeds that which has been sustained in leading cases. ***One simply may not market and sell products and services to Floridians without reasonably expecting to be sued in Florida on claims arising from or related to those activities.***

Moreover, intentional torts also support the exercise of personal jurisdiction over a nonresident defendant who has no other contacts with the forum. *See Licciardello*, 544 F.3d at

1285 (citing *Calder v. Jones*, 465 U.S. 783, 790 (1984)). Defendants' Title III claims are intentional, statutory torts, committed in Florida.

The complaint's allegations also satisfied this Circuit's three-part, due process test, which asks: (1) whether the plaintiff's claims 'arise out of or relate to' at least one of the defendant's contacts with the forum (*see* Am Comp. ¶¶ 16-27) (trafficking in Florida by marketing, soliciting and sending emails to Florida; selling reservations in Florida; and accepting payment from customers in Florida)); (2) whether the nonresident defendant 'purposefully availed' himself of the privilege of conducting activities within the forum state (*see id.* ¶¶ 15-27 (having offices in Florida, and sending direct email communications into Florida soliciting business that resulted in sales in Florida), thus invoking the benefit of the forum state's laws; and (3) whether the exercise of personal jurisdiction comports with "traditional notions of fair play and substantial justice" (defendants never as much as hinted that they would be burdened by litigating in Florida).

Further, because defendants traffic the hotels by advertising and selling reservations in Florida, Florida has a strong interest in hearing the case and protecting consumers from unlawful trafficking. Moreover, plaintiffs, who are Florida residents, have an undeniable interest in litigating the case in their chosen forum in their home state. *E.g., Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1355-58 (11th Cir. 2013) (quoting *Burger King*, 471 U.S. at 472-73).

At bottom, these defendants solicited, marketed, and made sales to Floridians on websites designed and intended to make those sales. They are physically present in Florida with offices and hundreds of employees and conducted the business activity in Florida that gives rise to this action. Their due process objection is frivolous. Personal jurisdiction exists.

III. The Booking Defendants and Expedia Defendants Are Subject to General Jurisdiction Because of Their Substantial and Not Isolated Activity in Florida

Based on defendants' voluminous, ongoing, daily business activity in Florida, the complaint alleged that they are subject to general jurisdiction under Fla. Stat. § 48.193(2) because of their "continuous and systematic" business activity here. Am Comp. ¶ 12. "Substantial and not isolated" is the Florida Long-Arm Statute's equivalent of this general jurisdiction standard. *See Caiazzo v. Am. Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011); Fla. Stat. § 48.193(2). In connection with sales through an online website, Florida courts hold that general jurisdiction focuses largely on whether the total sales in Florida are *de minimis* when compared to sales in other states. *Organic Mattresses, Inc. v. Envtl. Res. Outlet, Inc.*, 2017 WL 5665354, at *9 (S.D. Fla. 2017) (citing *Caiazzo*, 73 So. 3d at 260 ("Florida cases have found

'continuous systematic business contacts' to confer general jurisdiction where a nonresident defendant's activities are extensive and pervasive, in that a significant portion of the defendant's business operations or revenue derived from established commercial relationships in the state.")); *accord Magwitch, LLC v. Pusser's West Indies Ltd.*, 200 So. 3d 216 (Fla. 2d DCA 2016).

Initial discovery already revealed that defendants' Florida revenue is hardly *de minimis* when compared to other states. It shows that a substantial portion of defendants' total U.S. revenue comes from Florida. In fact, the limited discovery so far produced by the Expedia defendants shows that a significant percentage of their total U.S. reservations at the Trafficked Hotel were made by Floridians, which strongly suggests that their total Florida sales or revenue will be "a significant portion of their business operations or revenue." *Organic Mattresses,* 2017 WL 5665354, at *97. Those sales and substantial revenue from Florida are driven by an extensive, ongoing, and sophisticated sales effort involving direct email solicitations and geo-targeting marketing campaigns, which constitute "substantial and not isolated" or "continuous and systematic" commercial activity. *See, e.g., Northwestern Aircraft Capital Corp. v. Stewart*, 842 So. 2d 190, 195 (Fla. 5th DCA 2003) (general jurisdiction found where defendants advertised and solicited business in Florida through print advertising and the internet, and "they have, and continue to conduct and derive revenue from, on-demand charter operations into and out of Florida carrying Florida residents into and out of the state."); *Woods v. Nova Companies Belize Ltd*., 739 So. 2d 617, 620-21 (Fla. 4th DCA 1999) (general jurisdiction found based on defendant's "selling approximately eighteen percent of its product to Florida importers, moving nearly all of its product through the state, purchasing equipment and supplies from Florida suppliers, utilizing storage facilities in Florida, and establishing essential business relationships in this state, all within its ongoing commercial relationship with Florida.").

Defendants have offices and many employees in Florida, conduct substantial internet sales in Florida, continuously solicit business from Florida through serial emails to Florida residents, maintain business relationships with numerous Florida vendors, and target Florida through geo-targeted marketing campaigns. There is nothing "random, fortuitous, or attenuated" about asserting general jurisdiction over these defendants, because they have deliberately and purposefully availed themselves (on a large scale), of the benefits of doing business in Florida. *See Garris v. Thomasville–Thomas County Humane Society, Inc.*, 941 So. 2d 540, 547-48 (Fla. 1st DCA 2006) (general jurisdiction found where defendant directed significant

advertising at residents of Florida ("targeting the populous Florida 'market'"), solicited donations from Floridians, and had ongoing relationship with several Florida organizations).

Complete responses to initial discovery in this case will show that defendants have numerous subsidiary and affiliated business relationships in Florida. General jurisdiction exists when a foreign defendant's agency relationship with a Florida-based defendant is such that the Florida entity is "the entit[y] through which the [foreign defendant] conduct[s] business activity in Florida." *Meier v. Sun Int'l Hotels*, 288 F.3d 1264, 1272 (11th Cir. 2002). In *Meier*, foreign defendants that owned and operated the Atlantis hotel had Florida subsidiaries that solicited and coordinated hotel reservations, marketed the hotel, and provided accounting services to the hotel. *Id*. at 1272-73. In finding general jurisdiction, the court held the foreign defendants' affiliated Florida corporations were mere "instrumentalities." *Id*. at 1273. The court also noted that the foreign defendants maintained and staffed several Florida phone numbers on their website, held seven bank accounts in Florida, and staffed a Ft. Lauderdale attorney. *Id*. at 1274, n. 13. Similarly, in *Universal Caribbean Est. v. Bard*, the Fourth DCA asserted general jurisdiction over a foreign defendant based, in part, on that defendant's agency relationship with a Florida company. 543 So. 2d 447 (Fla. 4th DCA 1989). The Florida defendant was in business "as a tour operator solely for [the foreign defendant's] resort." *Id*. at 448. The two companies jointly advertised and promoted their joint business operations, with the tour operator stating that it was an agent for "our own hotel," and the foreign defendant making trips to Florida to meet with the tour operator. *Id*. In considering all the facts "as a whole," the court held that the foreign defendant "engage[d] in substantial activity in [Florida] through Limited." *Id*. at 448.

These defendants' activities satisfy the requirements of section 48.193(2), and consequently satisfy the due process requirements of minimum contacts. *See, e.g., Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408 (1984); *Venetian Salami,* 554 So. 2d at 502.

IV. Plaintiffs Possess and Adequately Alleged Actionable Claims

Defendants next argue that plaintiffs failed to allege two purported elements of a Title III claim because they did not plausibly allege that they were U.S. nationals and acquired ownership of their claims prior to March 12, 1996. This theory is wholly inapplicable to plaintiff Echevarría, who was both a U.S. national and became owner of his claim prior to that date. *See* Am Comp ¶¶ 2, 41-48, 51. Thus, this theory could not support dismissing the action even if it

had merit. But it has no merit, and does not support dismissing the claims of plaintiffs Cuevas and Florido, either.

First, Title III requires only that plaintiffs allege that they are U.S. nationals on the day they file a complaint. It states that "a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996." 22 U.S.C. § 6082(a)(4)(B). Nowhere in Title III is there any requirement for a plaintiff to have been a U.S. national at any time prior to filing, let alone before March 12, 1996. To adopt defendants' interpretation, the Court would have to read into the Act words that aren't there, which would violate a basic canon of statutory interpretation: courts are "not allowed to add or subtract words from a statute." *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1224 (11th Cir. 2009). Thus, the dates on which plaintiffs Florido and Cuevas became U.S. nationals are irrelevant, because they, like Echevarría, were U.S. nationals when they commenced this action.

Second, as noted, Title III states that a U.S. national may not bring an action unless "such national acquires ownership of the claim before March 12, 1996." 22 U.S.C. § 6082(a)(4)(B). As we demonstrate below, "ownership" of a claim under the Act includes "future or contingent" rights, such as those possessed by children of persons who owned claims to confiscated property on March 12, 1996. Plaintiffs Cuevas and Florido were alive on March 12, 1996, when they stood to (and eventually did) inherit their parents' claims to the Property, through lines of succession that the complaint also alleged.[18] Am Comp. ¶¶ 41-51.

The complaint further alleged that "[p]laintiffs' predecessors continuously owned, possessed and used the Cuevas Property in Cuba until the communist Cuban government confiscated it on August 16, 1960." Am Comp. ¶ 34. It also alleged that "[p]laintiffs never abandoned their legitimate interests in and claim to the Cuevas Property," and that "[s]ince its confiscation, and as of the time of filing this lawsuit, the Cuevas family and subsequently the Cuevas Heirs have been the rightful owners of the claim to the Cuevas Property." *Id*. ¶¶ 39, 51.

[18] The Act was expressly drafted to protect the rights of real people, and prohibit their claims from dying with them, by defining "ownership" of a claim to include "future or contingent" rights, such as those possessed by heirs of persons with claims to confiscated property on March 12, 1996. If this were not so, the Act would perversely give eternal life to claims of corporations such as Exxon (in which an indirect interest may be acquired by a share purchase today) but leave the direct claims of real people to die with them in the 25 years since the Act's passage.

Nonetheless, Defendants persist in arguing that the complaint is "devoid of any plausible facts establishing that plaintiffs own a claim to the property at issue, much less that they acquired such a claim prior to March 12, 1996." Booking MTD at 16. They also argue that plaintiffs' allegation that they are "the rightful owners of the claim to the Cuevas Property[,]" (Am Comp. ¶ 51), "is at best a 'legal conclusion[ ] couched as a factual allegation,' not a fact from which one could reasonably infer that plaintiffs owns an actionable claim to the property." *Id.* at 17.[19]

Plaintiffs adequately alleged their ownership interests under the Act. Title III expressly defines property to mean "any property . . . whether real, personal, or mixed, and any present, ***future, or contingent right,*** security, or other interest therein, including any leasehold interest." 22 U.S.C. § 6023(12)(A) (emphasis added). This definition makes clear that plaintiffs, whose parents owned the Property that the communist Castro regime confiscated, had "future or contingent rights" and actionable interests in the Properties when Title III was enacted.

In August 2019, two early decisions in pending, related cases expressly held and confirmed that this is all the Act requires. Defendants' persistence in ignoring those decisions should end here and now. "First, the plain language of the Act states that 'any person . . . that traffics in property which was confiscated by the Cuban Government . . . shall be liable to any United States national who owns the claim to such property.'" *Havana Docks Corp. v. Carnival Corp.*, 2019 WL 8895241, at *4 (S.D. Fla. 2019) (Bloom, J.) (citing 22 U.S.C. § 6082(A)). The Act does not provide when trafficking has to occur, only that it occur while a party holds a claim to the property, and the complaint herein plainly alleged that plaintiffs have held claims to the Property since they were born. The *Havana Docks* court might as well have been responding to these defendants when it held that the defendant there had "incorrectly conflate[d] a claim to a property and a property interest." *Id*. at *4.

Defendants' argument was expressly rejected a second time in August 2019, in the related case of *Garcia-Bengochea v. Carnival Corp*., 407 F. Supp. 3d 1281, 1289 (S.D. Fla. 2019) (King, J.). The court there held that "[b]ased on contemporary dictionary definitions, Congress would have understood that a claim to confiscated property is substantially broader than a direct interest in such property." *Id*. at 1289. In sum, plaintiffs adequately alleged legally sufficient, actionable claims under Title III.

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[19] We are in federal district court in 2021, not 1821. No bill of particulars was necessary, and plaintiffs' ownership of their claims was more particularly alleged than notice pleading requires.

Title III's 23-year "suspension period" from Defendants mistakenly rely on the 11th Circuit's recent decision in *Gonzalez v. Amazon.com*, 2021 WL 510234 (11th Cir. Feb. 11, 2021), which supports the correct conclusion that Title III claims may be inherited after March 12, 1996 by persons who owned a future or contingent interest on that date. In *Gonzalez,* plaintiff's mother inherited her claim to confiscated property in 2016, then assigned it to her son, whose Title III action was dismissed because he did "not allege that he inherited the property before 1996" a dismissal the 11th Circuit affirmed *per curiam*, in an opinion that gives useful guidance here in two important respects. *Id* at *2.

First, in affirming dismissal, *Gonzalez* noted that plaintiff's grandfather owned the claim until he died in 1988, when it passed to plaintiff's father, who owned it on March 12, 1996. *See* 2021 WL 510234, *1. The plaintiff's father could not assert the claim before he died in 2016 because of presidential "suspension" of Title III for almost 23 years, until May 2, 2019.[20] When plaintiff's father died in 2016, he left the claim to the plaintiff's mother, who "chose to give her ***ownership claim*** to the plaintiff" by assignment. 2021 WL 510234, at *1 (emphasis added).

Here, plaintiff Echevarría owned his claim and was a US National on Title III's March 12, 1996 "record date," so his claim (and this case) cannot be dismissed on authority of *Gonzalez*, period, full stop. As for plaintiffs Florido and Cuevas, they, like Mrs. Gonzalez, had "future or contingent" interests in the Property on the record date and inherited their "ownership claims" during the suspension period. Proper construction of Title III's plain language supports the assertion of claims inherited during the suspension period.

Second, if and to the extent the Court might believe it insufficient that plaintiffs Florido and Cuevas owned "future or contingent interests" on the record date and inherited their present

[20] This unique "suspension period" also barred Mr. Echevarría from filing this case when Title III was passed, even though he then owned his claim and was a US national. Unlike the *Gonzalez* plaintiff's father, however, Echevarría was lucky enough to outlive the suspension period and still be alive today. This is doubtless why the *Gonzalez* court suggested equitable tolling to postpone, until the suspension was lifted, what we might call the March 12, 1996 "record date" for claim ownership. Further, in referring to Mrs. Gonzalez' inherited claim as "an ownership claim," *Gonzalez* also suggests that her claim, inherited during the suspension period, was actionable without more, and her son's claim would have been actionable through equitable tolling (which he did not assert). *See* 2021 WL 510234, at *1. If and to the extent this Court believes it was not enough that plaintiffs Cuevas and Florido, like Mrs. Gonzalez, had a "future or contingent" claim on the record date, and inherited a present "ownership claim" during the suspension period, plaintiffs expressly assert that presidential suspension of Title III for 23 years supports equitable tolling of the record date until the suspension was lifted on May 2, 2019.

"ownership claims" during the suspension period, *Gonzalez* expressly suggests that presidential suspension of Title III for almost 23 years supports tolling of the record date until the suspension period ended on May 2, 2019.

Equitable tolling is "used in the interests of justice to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when *equitable circumstances have prevented a timely filing*." *Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1134 (Fla. 1988) (emphasis added). Equitable tolling applies, *inter alia*, when plaintiffs have been prevented from asserting their rights. *See, e.g., Osbourne v. United States*, 164 F.2d 767, 769 (2d Cir. 1947) (Internment by enemy during war prevented filing suit against the U.S.); *Miller v. Marsh*, 766 F.2d 490, 493 (11th Cir.1985) (sexual harassment claim tolled by plaintiff's pursuit of back-pay remedy in other forum); *Frabutt v. New York, Chicago & St. Louis R.R. Co.*, 84 F. Supp. 460 (W.D. Pa. 1949) (War suspended limitations periods for claims against "alien enemies."). The *Osborne* court relied on *Hanger v. Abbott,* 73 U.S. 532 (1867), where the limitations period for a suit on a debt owed before the Civil War was equitably tolled in an action brought after the war, noting that the "plaintiff's rights and remedies had been suspended, as the courts had not then been open to the parties." *Osbourne*, 164 F.2d at 768.

As or more extreme than *Osbourne* and *Hanger* is this case's presentation of circumstances where plaintiffs' rights and remedies had "been suspended" and "the courts" had "not then been open to the parties," because of the express presidential suspension of Title III for almost 23 years until May 2, 2019. ***Nobody*** could bring a Title III action during that suspension period, which prevented Echevarría from bringing his claim until he did, and prevented Cuevas' and Florido's parents from bringing their claims during their lifetimes. We have demonstrated that Title III contemplated this, that Echevarría's claim has stood from the record date until now, and the "ownership claims" that Cuevas and Florido inherited during the suspension period (like Mrs. Gonzalez) are actionable without more.

That said, if the Court were to have any doubts on this point, principles of equitable tolling should be applied to prevent Title III's suspension period from wiping out the personal claims of people who were prevented from bringing them by that suspension period, whether

they owned them on the record date or inherited them during the suspension period.[21] Equitable tolling of the record date should be applied to prevent that improper result.

V. The "Incident to Lawful Travel" Exception Is Not Applicable Because Defendants Are Not Engaging in Transactions and Uses of Property That Are Incident and Necessary to Lawful Travel

Defendants also argue for dismissal on the theory that booking rooms at the Trafficked Hotel is "incident to lawful travel" and is "necessary to the conduct of such travel." *See* Expedia MTD at 20; Booking MTD at 19, 20. Defendants are wrong for at least four reasons. ***First***, in providing online booking services for the Trafficked Hotel, defendants are not engaging in "transactions and uses of property" at all. ***Second***, the "incident to lawful travel" exception is an affirmative defense and factual issue that defendants bear the burden of pleading and proving, which cannot be resolved on a motion to dismiss. ***Third,*** defendants' motion fails to (and could not) demonstrate that trafficking is "necessary to the conduct of [lawful] travel" as a matter of law. ***Fourth***, the general license defendants claim authorizes their trafficking does not give them blanket permission to provide hotel reservation services, prohibits the sale of services relating to "tourist travel," requires strict, meticulous compliance with other laws and regulations regarding when and to whom defendants may provide such services, and raises a question of fact as to whether defendants complied, which also cannot not be resolved on a motion to dismiss.

A. *The "Incident to Lawful Travel" Exception Does Not Apply to Defendants' Online Booking Activities Because Those Activities Did Not Involve Transactions in and Uses of Confiscated Property*

The Act defines "trafficking" as follows:

> As used in subchapter III, and except as provided in subparagraph (B), a person 'traffics' in confiscated property if that person knowingly and intentionally—

[21] Title III cannot equitably grant immortality to the claims of corporations, but bar the claims of real people who inherited their claims during the suspension period. To decide that plaintiffs Cuevas and Florido may purchase Exxon shares today and acquire an indirect interest in Exxon's claim, yet have no right to pursue their own personal claims, cannot be squared with the Act's statutory language and purpose, let alone principles of fundamental fairness. Moreover, where the plaintiff is a corporation, even a family-owned, closely-held corporation, courts have been uninterested in knowing whether anyone bought or inherited shares during the suspension period, because the plaintiff is immortal, even though its owners are not. *E.g., Havana Docks Corp. v. Carnival Corp.*, WL 8895241 (S.D. Fla. 2019). Congress did not intend for Title III to protect entities (whose owners may change daily) without also protecting real people (whose ownership interests are inherited when they die). Equitable tolling is a proper means for preventing this.

> (i) Sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
>
> (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
>
> (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,
>
> without the authorization of any United States national who holds a claim to the property.

22 U.S.C. § 6023(13)(A). From that definition, Congress excluded certain activities that otherwise would have been considered "trafficking," including "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) (the "Exception").

Plaintiffs did not allege that defendants have transacted in and used ***any*** property in Cuba, let alone the Property at issue. Plaintiffs alleged that defendants have trafficked in the Property by "soliciting and selling, for economic benefit, reservations at the Trafficked Hotel." Am Comp. ¶ 93. Defendants have provided online booking services. They have not "used" the Property. "Use" means "[t]he application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted." Black's Law Dictionary (11th ed. 2019). Plaintiffs did not allege, and defendants do not contend, that defendants have any legal or possessory interest in the Property that would entitle them to "apply" or "enjoy" the Property in any respect. Neither did plaintiffs allege, nor defendants contend, that defendants transacted in or used the Property at any time. Accordingly, this exception is wholly inapplicable to defendants' trafficking, which does not involve transactions in and use of the Property at all.

B. *Plaintiffs Were Not Required to Allege That Defendants' Trafficking Was Not Incident to Lawful Travel*

Defendants demand dismissal because plaintiffs failed to allege a negative—that the "incident to lawful travel exception" does ***not*** apply, i.e., that defendants' online booking of room reservations at the Trafficked Hotel (defendants' trafficking) was ***not*** "incident to lawful travel" and "not necessary to the conduct of such travel." This argument is based on a faulty premise—that the elements of this Title III claim include the *inapplicability* of this exception. Two courts of this District have rejected this notion, holding that the exception is an affirmative defense which a defendant must plead and prove. *Garcia-Bengochea v. Carnival Corp.*, 407 F.

Supp. 3d 1281, 1287 (S.D. Fla. 2019) ("Based on the text and structure of Helms-Burton, the Court holds that the lawful travel exception is an affirmative defense to trafficking that must be established by Carnival, not negated by Plaintiff."); *Havana Docks Corp. v. Carnival Corp.*, Case No. 19-cv-21724-BB at ECF No. 47, at 5 ("Based on the language of the Libertad Act, the Court agrees with the Plaintiff that the 'lawful travel exception' is an affirmative defense to trafficking . . . Therefore, this exception must be established by Carnival and Plaintiff was not required to negate this exception in its Complaint.").

"An affirmative defense 'admits to the complaint, but avoids liability, wholly or partly, by new allegations of excuse, justification, or other negating matters.'" *Boigris v. EWC P&T, LLC*, 2019 WL 5457072, at *2 (S.D. Fla. 2019) (quoting *Adams v. Jumpstart Wireless Corp.*, 294 F.R.D. 668, 671 (S.D. Fla. 2013)); *accord Losada v. Norwegian (Bah.) Ltd.*, 296 F.R.D. 688, 690 (S.D. Fla. 2013) (same); *VP Props. & Devs. LLLP v. Seneca Specialty Ins. Co.*, 645 Fed. App'x. 912, 916 (11th Cir. 2016) (same). In other words, "[p]laintiffs are not required to negate an affirmative defense in their complaint." *Padilla v. Porsche Cars N. Am., Inc.*, 391 F. Supp. 3d 1108, 1112 (S.D. Fla. 2019) (quoting *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (internal quotation marks omitted)); *accord Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 93 (2008) (The burden of pleading and proving an affirmative defense rests with the "one who claims its benefits"—the defendant.). Accordingly, a plaintiff is not required to allege the non-existence of an affirmative defense. *Cunningham v. Yellowstone Capital LLC*, 2016 WL 11163899, at *2 (S.D. Fla. 2016); *accord Manfred v. Bennet Law, PLLC*, 2012 WL 6102071, at *2 (S.D. Fla. 2012) (In a Telephone Consumer Protection Act ("TCPA") case, "prior express consent is an affirmative defense, not an element of the claim[,]" and accordingly, "[p]laintiff need not plead that he did not give his prior express consent.").

Where a statute "exempt[s] otherwise illegal conduct by reference to a further item of proof . . . the burden of persuasion falls on the 'one who claims its benefits.'" *Meacham*, 554 U.S. at 93 (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)). We here deal with a statutory exception to liability under Title III for a limited, specific category of lawful conduct ("transactions and uses of property incident to lawful travel to the extent that such transactions and uses of property are necessary to the conduct of such travel") from otherwise unlawful conduct ("trafficking"). *See* 22 U.S.C. § 6023(13)(B). This is far from unique, as other statutory

schemes employ the same structure, which also compels concluding that the exception is an affirmative defense.

For instance, the TCPA makes using certain calling technology unlawful, except for calls made for emergency purposes or with the prior express consent of the called party:

> It shall be unlawful for any person within the United States . . . [t]o make a call ***(other than a call made for emergency purposes or made with the prior express consent of the called party)***.

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). In *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014), plaintiff alleged a TCPA violation and defendant argued consent. The 11th Circuit held that the consent exception was an affirmative defense and, accordingly, that the burden was on the defendant to plead and prove that it applied. *Id*. at 1253.

Similarly, in *Meacham*, the U.S. Supreme Court addressed an exemption to the Age Discrimination in Employment Act (the "ADEA"). The Court noted that the "ADEA's general prohibitions against age discrimination . . . are subject to a separate provision . . . creating exemptions for employer practices otherwise prohibited under [various subsections of the ADEA]." *Meacham*, 554 U.S. at 91 (internal quotes and citations omitted). The Court found that "[g]iven how the statute reads, with exemptions laid out apart from the prohibitions (and expressly referring to the prohibited conduct as such), it is no surprise that we have already spoken of the BFOQ and RFOA provisions as being among the ADEA's 'five affirmative defenses.'" *Id*. (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 11, 122 (1985)). The Court cited the "familiar principle that 'when a proviso . . . carves out an exception out of the body of a statute or contract ***those who set up such an exception must prove it***.'" *Meacham*, 554 U.S. at 91 (quoting *Javierre v. Central Altagracia*, 217 U.S. 502, 508 (1910) (emphasis added)).

In Title III, Congress listed the prohibited acts in its definition of trafficking:

> As used in subchapter III, and except as provided in subparagraph (B), a person 'traffics' in confiscated property if that person knowingly and intentionally—
>
> (i) Sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
>
> (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
>
> (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,

> without the authorization of any United States national who holds a claim to the property.

22 U.S.C. § 6023(13)(A). Congress then set forth an exception for a discrete, limited class of lawful conduct which, but for the Exception, would be prohibited by Section 6023(13)(A):

> (i) the delivery of international telecommunication signals to Cuba;
> (ii) the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated national;
> (iii) 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; or
> (iv) transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban Government or the ruling political party in Cuba.

22 U.S.C. § 6023(13)(B). As Judge King recently held, "[b]y using the phrase 'except as provided in subparagraph (B)' immediately before describing the conduct that constitutes trafficking, Congress expressed a clear intent to make the travel provision an *exception* to unlawful trafficking." *Garcia-Bengochea v. Carnival Corp.*, 407 F. Supp. 3d 1281, 1287 (S.D. Fla. 2019).

Just as in *Osorio* and *Meacham*, Section 6023(13)(B) "exempt[s] otherwise illegal conduct by reference to a further item of proof" (i.e., provides an affirmative defense), and "the burden of persuasion falls on the one who claims its benefits." *Meacham*, 554 U.S. at 93. Title III's "incident to lawful travel" exception is an affirmative defense that plaintiffs were not required to negate, and defendants' contrary theories are wholly without merit.

C. *Even If the Incident to Lawful Travel Exception Were Not an Affirmative Defense (It Is), and Even If it Could Be Raised on a Motion to Dismiss (It Can't), Defendants' Trafficking Is Not "Necessary to the Conduct Of [Lawful] Travel"*

Defendants proclaim that offering hotel lodging in Cuba is both incident to and necessary to the conduct of' such lawful travel. Expedia MTD at 20; Booking MTD at 19, 20. It is not. The plain meaning of "incident to" is "necessitated by" or "required by," in the sense that you can't have one without the other. Even if the Exception were not an affirmative defense that cannot be resolved on a motion to dismiss, it would remain indisputable that ***traveling to Cuba does not necessitate or require staying in a hotel, let alone booking a hotel room on defendants'***

websites.[22] This is doubtless why Congress added the necessity requirement, even though careful drafting has not prevented defendants from arguing that necessity means mere convenience.

Moreover, the word "necessary" in Title III was not intended to, and does not, mean anything less than something that "by reason of the nature of the thing . . . cannot be done without: that must be done or had: absolutely required: essential, indispensable." *See id*. (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1510-11 (1961)).

The OFAC regulations defendants rely on to argue that their trafficking is "incident to lawful travel" are exceptions to a general proscription on trade and economic activity with Cuba—the Embargo. Congress made clear in the Act that the Embargo was to persist and be strengthened. *See* 22 U.S.C. § 6032(c) ("The President shall instruct the Secretary of the Treasury and the Attorney General to enforce fully the Cuban Assets Control Regulations set forth in part 515 of title 31, Code of Federal Regulations."); 22 U.S.C. § 6032(c) ("The economic embargo of Cuba . . . including all restrictions under part 515 of title 31, Code of Federal Regulations, shall be in effect on March 12, 1996, and shall remain in effect, subject to section 6064 of this title."); 22 U.S.C. § 6031(2) ("[T]he President should advocate, and should instruct the United States Permanent Representative to the United Nations to propose and seek within the Security Council, a mandatory international embargo against the totalitarian Cuban Government pursuant to chapter VII of the Charter of the United Nations.").

Courts should construe the "necessary to the conduct of such travel" language of 22 U.S.C. § 6023(13)(B)(iii) in a way that gives effect to the other provisions of the Act, quoted above, which require strict enforcement of the Embargo. *See, e.g., In re Coffman*, 766 F.3d 1246, 1250 (11th Cir. 2014) (applying the canon that related statutes are to be read *in para materia* and 'are to be interpreted together, as though they were one law"). Thus, there is little doubt that in using the word "necessary," Congress meant it in the "rigorous sense," i.e., something that "by

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[22] Incident to" and "incident" are defined as "closely related to; resulting from; likely to happen because of," or "[l]ikely to happen because of; resulting from," as in "the changes incident to economic development" and "[i]t is true if and only if the first argument is incident to the second." *Incident to*, Translegal, https://www.translegal.com/legal-english-dictionary/incident-to (last visited Mar 4, 2021); *Incident*, Lexico, https://www.lexico.com/en/definition/incident (last visited Mar 4, 2021). To illustrate, we note that office holders necessarily enjoy the emoluments of office, and those in lawful possession of real property necessarily possess a right to quiet enjoyment. These are situations where B is incident to A because possessing A necessarily means that one possesses B.

reason of the nature of the thing . . . cannot be done without: that must be done or had: absolutely required: essential, indispensable." *Fish*, 840 F.3d at 734 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1510-11 (1961)). Reading the Act as a whole makes clear that Congress did not mean merely useful or convenient when it said necessary. Finally, there is no doubt that this argument is not ripe, because the Exception is an affirmative defense.

To illuminate the issue when it does become ripe, we note that the overarching purpose of the Act, and the necessary conclusion that the word "necessary" in Title III is meant in the "rigorous sense," together demonstrate that defendants' trafficking is not "necessary to the conduct of [lawful] travel." 22 U.S.C. § 6023(13)(B)(iii). One wishing to stay at the Trafficked Hotel can (1) call the Trafficked Hotel and arrange it, (2) book it on Accor's website, (3) go to the Trafficked Hotel and book the stay in person, or (4) book it through a travel agent. Absent defendants' trafficking, persons would have many other ways to arrange a stay at the Trafficked Hotel. As a matter of logic, then, defendants' trafficking simply cannot be held "necessary to the conduct of [lawful] travel" under 22 U.S.C. § 6023(13)(B)(iii).[23] Thus, even if the Exception were not an affirmative defense (it is), and even if it were proper to raise at this point in the proceeding (it isn't), defendants' trafficking is not "necessary to the conduct of [lawful] travel," and does not implicate this exception. For this reason, too, the Court should deny the Motions.

D. *Even If the Exception Could Allow Defendants to Provide Online Booking Services (It Cannot), Whether Defendants Complied with OFAC Requirements is a Question of Fact That Cannot Be Resolved at This Stage of the Case*

Even if the "incident to lawful travel" exception were not an affirmative defense and could properly be raised on a motion to dismiss, and even if the definition of this exception somehow could be wrapped around defendants' trafficking in the abstract, their Motions still would require denial. Defendants violated their OFAC license every hour of every day, by selling room reservations to tourists, which is expressly prohibited by the regulations that authorize their license. *See* 31 C.F.R. § 515.560(f) ("***Nothing in this section authorizes transactions in connection with tourist travel to Cuba***.") (emphasis added). The Trafficked Hotel is an all-inclusive beach vacation resort designed for, and catering to, tourists. Virtually all

[23] As noted above, staying at the Trafficked Hotel ***at all*** is not "necessary to the conduct of [lawful] travel," and defendants have not attempted to argue that it is. Travelers to Cuba can choose from a wide range of accommodations, including private homes and other properties. It cannot be said that travel to Cuba requires staying at any hotel, including the Trafficked Hotel.

of defendants' trafficking involved "tourist travel," which vitiates their attempt to invoke the lawful travel Exception as a matter of law. But even if this were not so, the question whether defendants' trafficking was incident and necessary to lawful travel would remain a fact-bound inquiry incapable of resolution on a motion to dismiss.

On this Rule 12(b)(6) motion, the "court's review . . . is limited to the four corners of the complaint." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009). Extrinsic evidence may not be considered. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003). A court must accept all factual allegations in the complaint as true and take them in the light most favorable to plaintiff. *E.g., Dusek*, 832 F.3d at 1246. An affirmative defense cannot be considered on a motion to dismiss unless "the complaint affirmatively and clearly shows the conclusive applicability of the defense to bar the action." *Scott v. Merchants Ass'n Collection Div., Inc.*, 2012 WL 4896175, at *2 (S.D. Fla. 2012) (quoting *Jackson v. Bellsouth Telecomms*., 372 F.3d 1250, 1274-75 (11th Cir. 2004) (internal quotes omitted)).

The Exception is an affirmative defense that defendants must plead and prove, and it may not be considered on these Motions unless it can bar this case as a matter of law, which it cannot. Nonetheless, defendants argue that merely because they had a general license from OFAC to provide travel services, all their activities have been "incident to lawful travel" and this case should be dismissed. As a threshold matter, the licenses defendants rely on are unlawful and invalid. 31 C.F.R. § 515.101 provides that "no license or authorization contained in or issued pursuant to this part shall be deemed to authorize any transaction prohibited by any law other than the Trading With the Enemy Act, 50 U.S.C. App. § 5(b), as amended, the Foreign Assistance Act of 1961, 22 U.S.C. § 2370, or any proclamation, order, regulation or license issued pursuant thereto." The licenses that defendants claim authorize their trafficking, which are prohibited by a federal statute (Title III), are thus invalid and ineffective.

But even if that were not the case, the Expedia defendants' theory that all their activities have been "incident to lawful travel" is demonstrably false, because Expedia admittedly violated its OFAC license at least 2,221 times and in June 2019 paid $325,406 to OFAC in settlement. *See Enforcement Information for June 13, 2019* https://home.treasury.gov/system/files/126/20190612_expedia.pdf (last visited on July 2, 2020). With respect to the Booking defendants, while plaintiffs have not yet discovered OFAC

violations, one thing remains clear—the Booking defendants booked stays ***for tourists*** at the Trafficked Hotel in violation of OFAC regulations.

Although OFAC issued purported general licenses to provide travel services under 31 C.F.R. § 515.572(a)(1), those licenses, even if they had been valid, were subject to strict restrictions and conditions that defendants violated every hour of every day. Travel to Cuba by persons subject to U.S. jurisdiction is permitted for twelve purposes, none of which is tourism. *See* 31 C.F.R. § 515.560(a). OFAC could not have been clearer in stating that tourist travel is unlawful and outside the scope of defendants' licenses. 31 C.F.R. § 515.560(f) ("***Nothing in this section authorizes transactions in connection with tourist travel to Cuba***.") (emphasis added). Discovery will confirm that ***virtually all*** of defendants' trafficking involved "tourist travel to Cuba." In short, ***defendants never have been engaged in trafficking that could be held incident and necessary to lawful travel, because they always have been booking rooms for tourists***.

Further, anyone that provides travel services purportedly authorized by OFAC in § 515.572 is required to keep detailed records of all such transactions:

> (b) Required reports and recordkeeping.
>
> (1) Persons subject to U.S. jurisdiction providing services authorized pursuant to paragraphs (a)(1) through (a)(4) of this section must retain for at least five years from the date of the transaction a certification from each customer indicating the section of this part that authorizes the person to travel or send remittances to Cuba.
>
> (2) The names and addresses of individual travelers or remitters, the number and amount of each remittance, and the name and address of each recipient, as applicable, must be retained on file with all other information required by § 501.601 of this chapter.

31 C.F.R. § 515.572(b).

If defendants wish to invoke the affirmative defense of the "incident to lawful travel" exception, they will have to plead and prove their compliance with every requirement, condition, and limitation incident to (that is, necessitated by) their OFAC licenses. This, defendants will be unable to do, because of their daily sale of room reservations to tourists, as well as 2,221 licensing violations for which Expedia was fined. But even if defendants never had sold room reservations to tourists and never had violated their licenses, attempting to prove this affirmative defense would involve a fact-intensive inquiry requiring significant discovery that could not occur at this stage of the case. This is another reason why defendants' Motions should be denied.

E. *Plaintiffs Adequately Alleged That Defendants' Trafficking Was "Knowing and Intentional"*

Defendants argue that plaintiffs failed to adequately allege that their trafficking was "knowing and intentional," as if Title III claims required bad intent. Expedia MTD at 18, 19; Booking MTD at 17-18. They do not. As shown above, this is a strict liability cause of action, a statutory tort with limited statutory defenses. It merely requires that trafficking not occur accidentally or unintentionally, in other words, that the trafficker acted volitionally or "on purpose." The complaint adequately alleged that defendants did just that.

First, the complaint repeatedly alleged that defendants have trafficked in the Property. *See, e.g.*, Am Comp. at 2 ("The Cuevas Heirs now sue to right the defendants' wrong of unlawful trafficking in their property"); *id.* ¶ 1 ("The Cuevas Heirs sue the Expedia and Booking Defendants under the Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. § 6021, et seq. (the 'Libertad Act'), for unlawful trafficking in the confiscated Cuevas Property in Cuba."); *id*. ¶ 31 ("Thus, since the Libertad Act's enactment in 1996, Defendants have been on notice that trafficking in property confiscated by the communist regime without the authorization of the owner of a claim to such property and without compensation would subject them to liability for unjust enrichment and for the unauthorized economic exploitation of that property. The Libertad Act was enacted to provide an effective remedy for this infringement of a person's property rights, which historically has been actionable as unjust enrichment."); *id*. ¶ 62 ("In addition to directly benefitting from the Cuevas Property by receiving commissions or other fees for the booking of the Trafficked Hotel , the Expedia defendants also derive an indirect benefit from the Trafficked Hotel by receiving advertising revenues driven by or related to their offering of the Trafficked Hotel ."); *id* ¶¶ 66, 77 ("In addition to directly benefitting from the Cuevas Property by receiving commissions or other fees for the booking of the Trafficked Hotel, the [ ] defendants also derive an indirect benefit from the Trafficked Hotel by receiving advertising revenues driven by or related to their offering of the Trafficked Hotel."); *id*. ¶ 93 ("The defendants have knowingly and intentionally used or benefitted, directly or indirectly, from the confiscated Cuevas Property by soliciting and selling, for economic benefit, reservations at the Trafficked Hotel, which constitutes trafficking that violates Title III of the Libertad Act."); *id*. ¶ 95 ("The Cuevas Heirs, in compliance with 22 U.S.C. §§ 6082 (a)(3)(B) and (a)(3)(D), gave notice to the defendants more than 30 days before joining them as defendants in this action.

Notwithstanding this notice, the defendants continued to knowingly and intentionally traffic in the Trafficked Hotel after receiving the notice.")

Second, "Knowing and intentional" is part of the definition of "trafficking." *See* 22 U.S.C. § 6023(13)(A). Thus, when the complaint alleged that defendants have trafficked in the Trafficked Hotel, it necessarily alleged trafficking that was "knowing and intentional." Plaintiffs also expressly alleged that defendants' trafficking was knowing and intentional. Am Comp. ¶ 57 ("Neither the Cuevas Heirs nor any other U.S. national who may have had a claim to the property, if any, ever authorized the Cuban government or the defendants to traffic in the Cuevas Property at any time."); *id*. ¶ 95 ("The Cuevas Heirs, in compliance with 22 U.S.C. §§ 6082 (a)(3)(B) and (a)(3)(D), gave notice to the defendants more than 30 days before joining them as defendants in this action. Notwithstanding this notice, the defendants continued to knowingly and intentionally traffic in the Trafficked Hotel after receiving the notice.").

Third, defendants were on express notice since 1996 that they faced "the prospect of lawsuits and significant liability" for trafficking that would be "established irreversibly during the suspension period" of Title III:

> I will allow Title III to come into force. ***As a result, all companies doing business in Cuba are hereby on notice that by trafficking in expropriated American property, they face the prospect of lawsuits and significant liability in the United States.***
>
> * * *
>
> Our allies and friends will have a strong incentive to make real progress because, ***with Title III in effect, liability will be established irreversibly during the suspension period and suits could be brought immediately when the suspension is lifted***. And for that very same reason, foreign companies will have a strong incentive to immediately cease trafficking in expropriated property, the only sure way to avoid future lawsuits.

President's Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, 32 Weekly Comp. Pres. Doc. 1265 (July 16, 1996) (G.P.O. authenticated version available at www.govinfo.gov/content/pkg/WCPD-1996-07-22/pdf/WCPD-1996-07-22-Pg1265.pdf). *See* Am Comp., Ex. P. President Clinton's statement rendered defendants' conduct knowing and intentional as a matter of law.

Fourth, the complaint alleged, and defendants have admitted, that plaintiffs provided notice letters on August 7, 2019, which expressly notified defendants that they were about to be sued for trafficking. *See* Am Comp., Ex. Q. The complaint alleges, and defendants admit, that they continued to traffic after receiving notice, which alone would dispose of defendants'

"intent" argument, even if Title III required more than merely volitional conduct (it doesn't). In sum, the complaint adequately alleged that defendants' conduct was knowing and intentional.

CONCLUSION

For all the good and sufficient reasons set forth above, the Court should deny defendants' Motions to Dismiss.

Dated: March 4, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 4, 2021, I electronically filed this document with the Clerk of the Court using CM/ECF. I also certify that this document is being served today on all counsel of record by transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/ Andrés Rivero
ANDRÉS RIVERO