UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

JAVIER GARCIA-BENGOCHEA,

Plaintiff,

v. Civil Action No. 19-cv-21725

CARNIVAL CORPORATION d/b/a CARNIVAL CRUISE LINE, a foreign corporation,

Defendant.
_____/

CARNIVAL CORPORATION'S MOTION TO DISMISS THE COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

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U.S. citizens may lawfully travel to Cuba under certain circumstances. 31 C.F.R. § 515.560(a). When U.S. citizens choose to pursue this lawful travel to Cuba they must be transported there, and accordingly, transporting people to Cuba is also lawful. 31 C.F.R. § 515.560(c); *see also* 31 C.F.R. § 515.572(a)(1)-(4). Indeed, in September 2015, with the goal of "engag[ing] and empower[ing] the Cuban people," the Treasury Department approved a general license, which allowed the provision of "carrier services by vessel" to Cuba. *See* Cuban Assets Control Regulations, 80 FR 56915-01. Under this license, Carnival Corporation ("Carnival") has lawfully offered cruises to Cuba since 2016.

Despite Carnival's Cuba cruises being authorized by the Federal Government, Plaintiff contends that, in providing cruises to Cuba, Carnival has unlawfully trafficked in the docks in Santiago, which were expropriated by the Cuban Government in the 1960s. Plaintiff has brought suit under Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act. *See* 22 U.S.C. § 6021, *et seq.* (either the "Act" or "Helms-Burton"). That Act, which until May 2019 had been suspended since its enactment in 1996, provides a cause of action to Americans who own claims to confiscated Cuban property against persons who "traffic" in that property.

Helms-Burton has no application here. *First*, by its own terms, trafficking under Helms-Burton does not include uses of property "incident to lawful travel to Cuba." But that is exactly how Carnival used the docks in Santiago de Cuba; they were a means for one of Carnival's small vessels to transport guests lawfully traveling to Cuba, which was discontinued due to shallow water clearance. (See Argument I, below.) *Second*, Helms-Burton requires that a plaintiff actually own a claim to the property he or she claims is being "trafficked." Here, Plaintiff offers nothing to show that he owns a claim to the docks. Indeed, the document he attached to the Complaint is a claim certified for someone else. (See Argument II, below.)

Third, Helms-Burton requires the plaintiff to show that the property being trafficked is the same property that the plaintiff owns a claim to. But here, the property Plaintiff purports to own a claim over is not the docks Carnival is allegedly trafficking in; instead, it is stock in a Cuban company that owned the docks. Plaintiff does not—and cannot—allege that Carnival is trafficking in Cuban stock. (See Argument III, below.)

Carnival has no doubt that millions of Cuban-Americans have suffered severe harm at the hands of their former Government. But Helms-Burton was designed with the narrow intent to deter companies and individuals from investing in or exploiting confiscated property. The findings in the text of the Act make clear its focus by reciting that "[t]he Cuban Government is offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets some of which were confiscated from United States nationals." *See* 22 U.S.C. § 6081(5). The Act does not by its terms reach companies, such as Carnival, who are engaged in lawful travel. Because Plaintiff's claims against Carnival fail as a matter of law, the Complaint should be dismissed with prejudice.

ARGUMENT

"Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). Although this standard does not require "detailed factual allegations," "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678. Thus, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Nor does a complaint suffice if it

tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

Instead, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). "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." *Id.* The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

Here Plaintiff alleges that he is a United States national and the "rightful owner" of an "82.5% interest in certain commercial waterfront real property in the Port of Santiago de Cuba." (Compl. ¶ 6.) Plaintiff claims that the Cuban Government confiscated the property in 1960. Although Plaintiff does not explain exactly what his interest is, he alleges that he has come to own a certified claim from the Foreign Claims Settlement Commission (the "Commission"), which he attached to his Complaint. (Compl. ¶ 10 & Ex. A.)[1] The Commission decision explains that Albert J. Parreno "owned 1,300 shares of stock in La Maritima, S.A., a Cuban corporation which owned and operated docks and warehouses in Santiago de Cuba, Oriente Province, Cuba." (Compl. Ex. A at 3.) The Commission noted that "La Maritima, S.A. was organized under the laws of Cuba," and therefore, it was not a "national of the United States." (*Id.*) Nonetheless, the Commission valued Mr. Parreno's "ownership interest." (*Id.*) Plaintiff does not allege why or how he came to own Mr. Parreno's claim or, for that matter, any other interest in the docks.

[1] The Court can consider documents attached to a Complaint on a motion to dismiss. *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007).

I. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED BECAUSE HE HAS NOT AND CANNOT PLEAD THAT CARNIVAL TRAFFICKED IN CUBAN-CONFISCATED PROPERTY

Helms-Burton provides, among other things, a cause of action against people who traffic in the property of United States nationals that was confiscated by the Cuban government. 22 U.S.C. § 6082. Plaintiff alleges that Carnival is now "trafficking" in the confiscated property. (Compl. ¶¶ 12-14.) Specifically, Plaintiff alleges that in May 2016, Carnival "knowingly and intentionally commenced, conducted, and promoted its commercial cruise line business to Cuba using the Subject Property by regularly embarking and disembarking its passengers on the Subject Property." (Compl. ¶ 12.) Plaintiff makes no allegations regarding whether the travel is lawful. Plaintiff does not plead that the use of the dock is not incident to lawful travel or not necessary to the conduct of such travel.

A. Plaintiff failed to plead trafficking because it has not pled Carnival used property not incident to lawful travel

Helms-Burton provides a specific definition of trafficking:

> [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). The Act carves out from the definition of trafficking, "transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel." 22 U.S.C. § 6023(13)(B)(iii). To plead trafficking under the Act, it is not enough to plead that a defendant was using confiscated Cuban property, a plaintiff must go a step further and plead facts stating a plausible allegation that the use of the property was not incident to lawful travel. 22 U.S.C. § 6023(13)(B)(iii).

The requirement to plead facts necessary to meet the Act's definition of trafficking is an elementary matter of pleading a statutory cause of action. To plausibly plead a claim, a complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.'" *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282–83 (11th Cir. 2007) (quoting *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001)). Courts in this Circuit have routinely required a plaintiff pursuing a statutory claim to plead facts that plausibly meet the statutory definition. *See, e.g.*, *Arko Plumbing Corp. v. Rudd*, 13-CV-22434-UU, 2013 WL 12059615, at *3 (S.D. Fla. Sept. 26, 2013) (under Computer Fraud and Abuse Act, which has a statutory definition of "damage," "pleading a type of damage within the statutory definitions is an essential element" of the claim); *Brown v. Regions Mortg. Corp.*, 1:11-CV-3716-SCJ-ECS, 2012 WL 13013583, at *3 (N.D. Ga. Dec. 3, 2012) (to state a claim under Fair Debt Collection Practices Act, a plaintiff must "allege facts showing how [the] defendant meets the statutory definition of a 'debt collector'"), *report and recommendation adopted*, 2012 WL 13013984 (N.D. Ga. Dec. 31, 2012).

Plaintiff has not pled that Carnival's use of the docks was not "incident to lawful travel to Cuba," or not "necessary to the conduct of such travel." 22 U.S.C. § 6023(13)(B)(iii). (*See* Compl. ¶ 12.) Indeed, Plaintiff's allegations suffer the same flaw as the ones that were rejected by the Supreme Court in *Twombly*. Plaintiff has alleged facts that could be consistent with trafficking—he alleges that Carnival used the docks. That is not enough. He has done nothing to allege that trafficking actually occurred—he has said nothing about whether that use was "incident to lawful travel." *See Twombly*, 550 U.S. at 557 (plaintiff does not state a claim for illegal antitrust agreement by alleging facts showing parallel conduct, plaintiff must allege facts suggesting an actual agreement). Accordingly, because Plaintiff has failed to plead any facts suggesting that Carnival "trafficked" within the meaning of the Act, the Complaint should be dismissed.

B. Plaintiff cannot plead trafficking because Carnival's use of the Santiago Docks is necessary to lawful travel to Cuba

Even if Plaintiff had attempted to plead "trafficking"—which he has not—the attempt would fail because Carnival's use of the Santiago Docks was, as a matter of law, "incident to lawful travel to Cuba," and "necessary to the conduct of such travel," and accordingly, cannot be "trafficking" as defined by Helms-Burton. 22 U.S.C. § 6023(13)(B)(iii).

First, all of Carnival's cruises to Cuba were "lawful travel." Plaintiff alleges that Carnival "commenced, conducted, and promoted its commercial cruise line business to Cuba" beginning in May 2016. (Compl. ¶ 12.) At that time (and today) commercial cruise travel to Cuba was lawful.

The Office of Foreign Assets Control ("OFAC"), in the Department of the Treasury, is charged with regulating travel to Cuba. *See Martinez v. Republic of Cuba*, 10-22095-CIV, 2011 WL 13115432, at *3 (S.D. Fla. June 27, 2011), *report and recommendation adopted in part, rejected in part on other grounds*, 10-22095-

CIV, 2011 WL 13115471 (S.D. Fla. Aug. 26, 2011) ("Cuba-related travel transactions by persons subject to U.S. jurisdiction are prohibited unless authorized by OFAC."). Since 2015, OFAC has granted travel providers a general license, which allowed "[p]ersons subject to U.S. jurisdiction . . . to provide travel services in connection with travel-related transactions involving Cuba authorized pursuant to this part." 31 C.F.R. § 515.572(a)(1).[2] In doing so, American companies like Carnival were "authorized to provide carrier services to, from, or within Cuba in connection with travel or transportation," 31 C.F.R. § 515.572(a)(2)(i), and when those travel or carrier services were provided by a vessel, those companies were "authorized to provide lodging services onboard such vessels to persons authorized to travel to or from Cuba pursuant to this part during the period of time the vessel is traveling to, from, or within Cuba, including when docked at a port in Cuba." 31 C.F.R. § 515.572(a)(4). Because Carnival operated under an OFAC license, the travel-related services it provided were lawful. *Martinez*, 2011 WL 13115432, at *7 ("It is undisputed that the OFAC licensed Garnishees to provide travel services to Cuba and make payments associated therewith. The assets that Plaintiff seeks to garnish have thus been authorized for transfer to Cuba and are not subject to an across-the-board prohibition on transfer."); *Empresa Cubana Exportadora de*

[2] "A Court may take judicial notice of the rules, regulations and orders of administrative agencies issued pursuant to their delegated authority." *Sw. Ga. Fin. Corp. v. Colonial Am. Cas. & Sur. Co.*, 2009 WL 1410272, at *1 (M.D. Ga. May 19, 2009) (quoting *Int'l Bhd. of Teamsters v. Zantop Air Transp. Corp.*, 394 F.2d 36, 40 (6th Cir. 1968); *see Carter v. Am. Tel. & Tel. Co.*, 365 F.2d 486, 491 (5th Cir. 1966); *see also* 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number."). The Court may consider judicially noticed federal regulations on a motion to dismiss. *See* Fed. R. Evid. 201(d) ("The court may take judicial notice at any stage of the proceeding."); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1277-80 (11th Cir. 1999).

Alimentos y Productos Varios v. U.S. Dept. of Treasury, 606 F. Supp. 2d 59, 64 (D.D.C. 2009) (explaining that an OFAC general licenses, like the one Carnival operated under, "broadly authorizes entire classes of transactions").

Second, Carnival's use of the docks was "incident" to that "lawful travel." "Incident" means "[d]ependent on, subordinate to, arising out of, or otherwise connected with (something else, usu. of greater importance)." INCIDENT, Black's Law Dictionary (10th ed. 2014). Thus, a use of property is "incident to lawful travel" when the use of the property "arises out of" or is "otherwise connected with" the travel. *Comnet Wireless, LLC v. Benning Power Elecs., Inc.*, 14-CV-3424-JLK, 2016 WL 8578007, at *2 (D. Colo. Feb. 8, 2016) (describing costs of airfare to Denver as "expenses incident to travel"); *see also* 50 U.S.C. § 1702(b)(4) (defining "transactions ordinarily incident to travel to or from any country" to include "arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages"). That is precisely what Carnival's cruises use of the docks was: Carnival used the docks in connection with its Guests' travel—the docks were a means of getting the Guests to their lawful travel in Cuba. (Compl. ¶ 12 (alleging that Carnival "regularly embark[ed] and disembark[ed] its passengers on the Subject Property").)

Third, Carnival's use of the docks was "necessary to the conduct of such travel." This interpretation flows from the normal meaning of the word "necessary." "[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "As a basic rule of statutory interpretation," courts "read the statute using the normal meanings of its words." *Consol. Bank, N.A., Hialeah v. U.S. Dept. of Treasury*, Office of Comptroller of Currency, 118 F.3d 1461, 1463 (11th Cir. 1997).

Black's Law Dictionary notes that "necessary" "may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought." *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018) (quoting Black's Law Dictionary 928

(5th ed. 1979)). That makes sense because this ordinary usage of "necessary" is frequently used in the law. *Fish v. Kobach*, 840 F.3d 710, 734 (10th Cir. 2016) ("[C]ourts also have frequently interpreted "necessary" to mean something less than absolute necessity."); *Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1236 (D.C. Cir. 1988) ("[C]ourts have frequently interpreted the word 'necessary' to mean less than absolutely essential, and have explicitly found that a measure may be 'necessary' even though acceptable alternatives have not been exhausted." (internal citations omitted)); *Nat'l R.R. Passenger Corp. (Amtrak) v. 3.44 Acres More or Less of Land & Bldg. located at 900 2nd St. NE, Washington, DC 20002-3557*, 266 F. Supp. 3d 63, 68 (D.D.C. 2017) ("[F]or centuries the law has also recognized a broader understanding of necessity that does not imply indispensability."). For example:

- Justice Marshall famously held that "necessary" in the Necessary and Proper Clause does not require strict essentiality, but rather, requires means that are "convenient, or useful, or essential" to the end, *M'Culloch v. Maryland*, 17 U.S. 316, 413 (1819);
- A business expense is "necessary" within the meaning of the Tax Code if it is "appropriate and helpful," *C. I. R. v. Tellier*, 383 U.S. 687, 689 (1966); *accord CSX Corp. v. United States*, 909 F.3d 366, 370 (11th Cir. 2018) (Jordan, J., concurring); and
- The FTC can gather information "necessary" to its investigations in an ancillary investigation, if the need for the information "arise[s] reasonably and logically out of the main investigation." *F.T.C. v. Rockefeller*, 591 F.2d 182, 188 (2d Cir. 1979).

Thus, as a matter of ordinary usage, when Helms-Burton says that the use of property must be "necessary" to lawful travel, it means that the use must be important, helpful, or appropriate to the conduct of lawful travel to Cuba.

Context bolsters this interpretation. *Util. Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 321 (2014) (noting that statutory interpretation must take context into account). Helms-Burton does not require that the use of property at issue be "necessary" to "such lawful travel," rather it links necessity to "the conduct of" the travel. In this construction, necessary usually does not mean strictly essential. *See United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969) (the right to solicit customers in a given area is "necessary to the conduct" of a business even though the court did not consider whether the customers were essential to the business); *Mudge v. Stop & Shop, Inc.*, 162 N.E.2d 670, 672 (Mass. 1959) (stating that grocery carts are "necessary to the conduct" of grocery stores even though the court did not consider whether customers could move goods through the store by other means).

Finally, legislative history confirms that Congress used "necessary" in its ordinary sense. *See Truck Drivers Local 807, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Carey Transp. Inc.*, 816 F.2d 82, 89 (2d Cir. 1987) (considering legislative history to construe term "necessary"). The 1995 version of the Helms-Burton Act did not have a lawful travel carve out. H.R. REP. NO. 104-202(I), at 5, (1995), *reprinted in* 1996 U.S.C.C.A.N. 527, 0. In response, a number of Senators expressed concern that the Act would needlessly restrict Americans' ability to lawfully travel to Cuba. These concerns made sense because before Helms-Burton, a number of Presidents had allowed Americans to travel to Cuba. *See Regan v. Wald*, 468 U.S. 222, 224 (1984) (explaining that for five years OFAC allowed transactions incident to travel in Cuba). Thus, Senator Simon offered an amendment to the Bill that aimed to protect lawful travel. 141 CONG. REC. S15320-01, S15320, 1995 WL 614999. As he explained, Congress "should not restrict travel to any country unless security is threatened . . . ." *Id.* Senator Dodd echoed Senator Simon, explaining, "I think most of us believe that access and contact between peoples, particularly free people with the people who are living under a

dictatorship, has a tremendous impact, or can have a tremendous impact, to say that no one in this country to the one place throughout the entire globe could travel makes no sense at all." *Id.* Although Senator Simon's initial travel-related amendment failed, 141 CONG. REC. D1225-02, D1255, 1995 WL 615160, when Helms-Burton passed the House and the Senate in 1996, Congress had added the lawful travel carve out to the definition of trafficking. 142 CONG. REC. H1645-02, H1647, 1996 WL 90487. The Committee Report, which "next to the statute itself it is the most persuasive evidence of congressional intent," *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1462 (11th Cir. 1992), explains that the reason for adding the lawful travel carve-out was to "remove[] any liability for . . . any activities related to lawful travel." 142 CONG. REC. H1645-02 at H1656. The Committee Report thus makes clear that, consistent with the text of the carve-out, Helms-Burton is not meant to reach uses of property involved in lawful travel to Cuba.

This is consistent with Helms-Burton having been adopted with the intent of deterring foreign investors from purchasing or otherwise exploiting property that was wrongfully confiscated by the Cuban government with the hopes that cutting off this lucrative source of foreign investment would put pressure on the government to reform. However, the Act was never intended to punish or deter lawful travel to Cuba, and thus Congress specifically exempted lawful travel from the reach of the Act. 22 U.S.C. § 6023(13)(B)(iii).

This Court can determine that as a matter of law Carnival's use of the docks was necessary to the conduct of lawful travel. Quite simply, the use of a dock is important, helpful, and appropriate, for sea travel to Cuba. Indeed, the OFAC regulations specifically contemplate that a dock will be used when a vessel travels to Cuba, allowing a vessel operator to provide lodging services, "including *when docked at a port in Cuba*." 31 C.F.R. § 515.572(a)(4). As Plaintiff itself alleges,

docks are important to cruise travel because that is where passengers "embark[] and disembark[]." (Compl. ¶ 12.)

Accordingly, because Carnival's use of the docks was necessary for, and incident to, lawful travel to Cuba, Plaintiff cannot plead that Carnival "trafficked," and the case should be dismissed with prejudice.

II. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED BECAUSE HE FAILED TO PLEAD OWNERSHIP TO THE CONFISCATED PROPERTY

Plaintiff's claim also must be dismissed because he has failed to adequately plead sufficient facts to demonstrate that he owns a claim to the Santiago docks. Plaintiff instead makes only conclusory allegations of ownership in his pleading, allegations that are undermined by the documents Plaintiff attached to his own Complaint. Because Plaintiff must show, and ultimately prove, ownership to the allegedly confiscated property, his failure to do so warrants dismissal.

Plaintiff merely alleges that his is the "rightful owner" to a portion of the Santiago docks. (Compl. ¶ 6.) But Plaintiff's conclusory allegation of ownership is insufficient because the document attached to the Complaint as well as judicially-filed documents in the public record undermine Plaintiff's claim. *Brown v. S. Fla. Fishing Extreme, Inc.*, No. 08-20678-CIV, 2008 WL 2597938, at *2 (S.D. Fla. June 27, 2008) (looking to public documents to determine ownership). The claim Plaintiff attached to his Complaint is not in his own name; it was owned by Albert J. Parreno. (Compl. Ex. A.). Thus, to own the claim, Plaintiff would have needed to acquire it from Mr. Parreno. For this reason, when this same Plaintiff previously brought suit under Helms-Burton, he alleged that he "inherited an interest in said property from his cousin, Alberto J. Parreno, who died in 1972." *See* Complaint, *Bengochea v. China Communications Construction Company*, No. 3:17-cv-00137-BJD-JBT, at

¶ 8. That allegation is not true. Mr. Parreno's probated will, which this Court can consider on a motion to dismiss,[3] provides:

> I give, devise and bequeath to my said brother, DESIDERIO PARRENO, all my rights to and under property held by me which has been confiscated by the Fidel Castro regime in Cuba, including, but not limited to, my shares in La Maritima S.A., Terminal Saviera S.A. and Molinera Oriental S.A. (all Cuban corporations) and my interest in real estate located in Cuba.

(See Declaration of Corey P. Gray in Support of Carnival's Motion to Dismiss, Exhibit A ¶ FIFTH.) The publicly available documents thus offer no way to link the claim Plaintiff is bringing to the Plaintiff.[4] Accordingly, without any allegations of ownership, and with the public record contradicting that claim, Plaintiff's Complaint must be dismissed.

Helms-Burton only provides a cause of action to United States nationals who "who own[] the claim" to confiscated property. 22 U.S.C. § 6082(a)(1)(A). The plain language of the Act makes clear that ownership is a fundamental element of a claim under the Act. *See United States v. Silva*, 443 F.3d 795, 798 (11th Cir. 2006). Indeed, the Act itself recognizes that a plaintiff must prove ownership and provides intricate rules for doing so. *See* 22 U.S.C. § 6083 (titled "Proof of ownership of claims to confiscated property"). And the Congressional findings in support of Title III emphasize ownership: "The wrongful confiscation or taking of property

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[3] *Ellis v. Warner*, 15-10134-CIV, 2017 WL 634287, at *3 n.3 (S.D. Fla. Feb. 16, 2017) (considering probated will on a motion to dismiss because "[c]ourts may take judicial notice of publicly filed documents. . . at the Rule 12(b)(6) stage."); *United States v. Paulson*, 204 F. Supp. 3d 1102, 1108 (S.D. Cal. 2016) (same); *Lewis v. Parker*, 67 F. Supp. 3d 189, 195 n.6 (D.D.C. 2014) (same).

[4] On this point, we note that Albert Parreno's claim passed to his brother Desiderio Parreno. Desiderio appears to have passed away in 2000 in Costa Rica. *See* Memorial, Desiderio Xavier Parreno '38, *available at* https://paw.princeton.edu/memorial/desiderio-xavier-parreno-%E2%80%9938. Thus, if Plaintiff traces his title to Desiderio's will, he would have acquired the claim too late to bring suit.

belonging to United States nationals by the Cuban Government, and the subsequent exploitation of this property at the expense of the *rightful owner* . . . ." 22 U.S.C. § 6081(2) (emphasis added). Thus, to plead a Helms-Burton claim, a plaintiff must allege facts demonstrating ownership. *Stephens, Inc.*, 500 F.3d at 1282–83 (to survive a motion to dismiss plaintiff must allege facts supporting all "material elements" of their claim).

Beyond making sense as a matter of general pleading, requiring a plaintiff to plead ownership makes particular sense in the Helms-Burton context because the Act places limits on which types of owners can bring claims. Specifically, Helms-Burton provides that if a plaintiff, like Plaintiff here, seeks to sue on property confiscated before 1996, the plaintiff must have "acquire[d] ownership of the claim before March 12, 1996." 22 U.S.C. § 6082(4)(B). Moreover, Helms-Burton provides that if a person, "was eligible to file a claim with the Foreign Claims Settlement Commission . . . but did not so file the claim," then that person "may not bring an action on that claim under this section." 22 U.S.C. § 6082(5)(a). Only if a plaintiff pleads ownership at the outset can a defendant test the legal sufficiency of that "owner" bringing claims.

When ownership is an essential element of a claim, courts have been clear that to state a claim, a plaintiff must allege facts supporting ownership. For example, in *Walton v. Hadley*, 13-CV-7907 ER, 2014 WL 3585525, at *4 n.17 (S.D.N.Y. July 10, 2014), the counter-claim plaintiff alleged that he was the owner of a "valuable piece of fine artwork," which had been sold by the counter-claim defendant. *Id.* at *1. The counter-claim plaintiff brought suit, seeking to quiet title of the artwork and for the sale proceeds to be released to him. *Id.* at *2. The court dismissed the counterclaim for failure to plead ownership. *Id.* at *4. As the Court explained:

> [I]n cases involving stolen artwork, it may be difficult for the true owner to come forward with much by way of

> factual support for his ownership claims. That said, *Twombly* and *Iqbal* make clear that a plaintiff or counterclaimant must satisfy the plausibility standard before being permitted to take discovery. Thus, [Counter-claim Plaintiff's] argument that his conclusory assertion of ownership is enough to move the case beyond the pleading stage is unavailing.

Id. at *4 n.17. Compelling reasons require a plausible allegation of ownership before a suit proceeds. As the *Walton* Court explained, without a plausible allegation of ownership, a plaintiff could "assert an ownership claim against anyone" based only on "loose speculation." *Id.* at *4.

Similarly, in *Brown v. S. Fla. Fishing Extreme, Inc.*, the plaintiff failed to state a cause of action because he failed to sufficiently plead ownership. 2008 WL 2597938, at *2. There, the plaintiff made "conclusory alleg[ations]" that he was "the owner of the copyrights at issue." *Id.* The Court did not accept the "conclusory allegations." *Id.* Instead, it dismissed the claim because documents attached to the Complaint and in the public record demonstrated that the Plaintiff did not own the copyright. *Id.*

So too here, Plaintiff's only allegation of ownership is that he is the "rightful owner" of the Subject Property. (Compl. ¶ 6.) He does nothing more; for example, he does not allege, when, how, or from whom he acquired ownership. Without any facts, Plaintiff's conclusory allegation is insufficient to establish ownership. *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) ("[I]f allegations are indeed more conclusory than factual, then the court does not have to assume their truth."); *Brown*, 2008 WL 2597938, at *2 (discounting conclusory allegations of ownership).

III. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED BECAUSE THE PROPERTY HE ALLEGES HE HAS A CLAIM TO IS NOT THE PROPERTY HE CLAIMS CARNIVAL TRAFFICKED IN

Even if Plaintiff had pleaded "trafficking" and "ownership" his claims should be dismissed because Plaintiff has not alleged that Carnival "trafficked" in the property he owned. Helms-Burton requires that a plaintiff show that the property being trafficked is the same property the plaintiff owns a claim to. This requirement flows directly from the language of the Act. Again, the cause of action in Helms-Burton 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 the claim to such property* for money damages . . . ." 22 U.S.C. § 6082 (a)(1)(A) (emphases added). The section refers to property twice: *first*, it requires a person to traffic in property which was confiscated by the Cuban Government and *second* it requires a United States national to "own[] the claim to *such* property." "Such" means "of the type previously mentioned." *DeMeo v. State Farm Mut. Auto. Ins. Co.*, 639 F.3d 413, 416 (8th Cir. 2011). Thus, when Helms-Burton refers to owning a claim to "such property," it is referring to the property previously mentioned; that is, the trafficked property. Accordingly, to state a claim under Helms-Burton a plaintiff must allege that he or she owns a claim to the precise property being trafficked.

Plaintiff's claim falters on that obligation because the property he allegedly owns is not the docks Carnival is allegedly trafficking in. Plaintiff claims to own "an 82.5% interest in certain commercial waterfront real property in the Port of Santiago de Cuba identified specifically by the Republic of Cuba as La Maritima and Terminal Naviera." (Compl. ¶ 6.) In support, Plaintiff affixed a certified Foreign Claims Settlement Commission decision to his Complaint. The certified claim, however, makes clear that Plaintiff does not own a direct interest in the

waterfront property. (Compl. Ex. A at 2-3.) Instead, the claim concerns stock in a Cuban company, which in turn owned the docks. (*Id.*) As the Commission explained, it was "La Maritima, S.A.," and not Albert Perreno "which owned and operated docks and warehouses in Santiago de Cuba." (Compl. Ex. A at 3.)

Plaintiff does not allege that Carnival is trafficking in La Maritima stock, and thus, his claim must fail because he has not alleged that he owns a claim to the property being trafficked. Plaintiff cannot cure the deficiency because, for two independent reasons, he has no way to plausibly claim an ownership interest in the claim to the docks.

First, as a shareholder, Albert Parreno (and Plaintiff himself because his claim, to the extent he has one, is derived from Mr. Parreno's) cannot claim rights in underlying corporate assets. It is well-established that "[a] corporation and its stockholders are generally to be treated as separate entitles." *Burnet v. Clark*, 287 U.S. 410, 415, (1932). Elementary corporate law holds that "[t]he owner of the shares of stock in a company is not the owner of the corporation's property." *Rhode Island Hosp. Tr. Co. v. Doughton*, 270 U.S. 69, 81 (1926); *accord Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003) ("An individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets."); James D. Cox & Thomas Lee Hazen, Treatise on the Law of Corporations § 7:2 (3d) ("Corporate property is owned by the corporation as a distinct legal person; its shareholders have only an indirect interest in the assets and business."); 1 Fletcher Cyc. Corp. § 31 (rev. ed. 1999) ("The property of the corporation is its property and not that of the shareholders as owners."). This analysis has been applied to pre-Revolution Cuban companies. *See Nielsen v. Sec'y of Treasury*, 424 F.2d 833, 841 (D.C. Cir. 1970) (looking to pre-Castro Cuban law and noting that the corporation, not the shareholders, owned corporate property). Indeed, for this reason, when Mr. Parreno brought a claim for the property he lost to Cuban nationalization, the Commission

did not attempt to value the Santiago docks (after all Mr. Parreno did not own the docks) but rather valued the "ownership interest" in La Maritima, S.A.. (Compl. Ex. A at 3.)

The same is true here. However Plaintiff frames his claim, at most he owns a claim to stock in a Cuban company that owned the Santiago docks. As a matter of corporate law, Plaintiff does not own a claim to the docks themselves. Accordingly, Plaintiff cannot bring a claim related to Carnival's alleged trafficking in the docks. 22 U.S.C. § 6082(a)(1)(A).

Second, Plaintiff cannot bring a claim on behalf of La Maritima because the company is not a United States national capable of bringing a Helms-Burton claim. Helms-Burton only allows United States nationals to bring suit. 22 U.S.C. § 6082(a)(1)(A). But here, as the Commission explained, La Maritima, S.A. was not (and is not) a United States national. (Compl. Ex. A at 3 ("Since La Maritima, S.A. was organized under the laws of Cuba, it does not qualify as a corporate "national of the United States[.]").) *See also*, 22 U.S.C. § 6023(15)(B) (defining United States National as "any other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or any commonwealth, territory, or possession of the United States, and which has its principal place of business in the United States."). Accordingly, La Maritima cannot bring a Helms-Burton claim.[5]

Thus, because Plaintiff cannot plausibly assert a claim of ownership over the property he claims Carnival is trafficking in, Plaintiffs' Complaint must be dismissed with prejudice.

[5] Bringing the claim derivatively on behalf of La Maritima would not solve this problem because derivative claims are brought in the name of the corporation, 12B Fletcher Cyc. Corp. § 5908, and here the corporation cannot bring the claim.

CONCLUSION

For the foregoing reasons, Carnival respectfully requests that the Court dismiss Plaintiff's claim with prejudice.

Dated: May 30, 2019

Respectfully submitted,

By: *s/ Stuart H. Singer*

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STATEMENT REGARDING ORAL ARGUMENT

This is the first case brought under Helms Burton. Carnival believes oral argument may be helpful to the Court in resolving the issues raised in this motion to dismiss.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record via the court's CM/ECF System on May 30, 2019.

By:*/s/ Stuart H.Singer*
Stuart H. Singer, Esq.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

JAVIER GARCIA-BENGOCHEA,

Plaintiff,

v. Civil Action No. 19-cv-21725

CARNIVAL CORPORATION d/b/a CARNIVAL CRUISE LINE, a foreign corporation,

Defendant.
_____/

DECLARATION OF COREY P. GRAY IN SUPPORT OF CARNIVAL CORPORATION'S MOTION TO DISMISS THE COMPLAINT

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I, Corey P. Gray, declare:

1. I am Counsel with the law firm of Boies Schiller Flexner LLP and am duly licensed to practice in Florida and before this Court.

2. I respectfully submit this declaration in support of Carnival's motion to dismiss and have personal knowledge of the matters set forth herein.

3. Attached hereto as Exhibit A to this declaration, is a true and correct copy of the Last Will and Testament of Albert J. Parreno, dated July 5, 1966, which was obtained from the County of New York Surrogate's Court file on May 29, 2019.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

Dated: May 30, 2019

By: /s/ *Corey P. Gray*

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Exhibit A

I, ALBERT J. PARRENO, residing in New York, New York, do make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and testamentary dispositions by me at any time heretofore made.

FIRST: I direct that all my estate, inheritance, succession and transfer taxes, of whatever jurisdiction, together with interest and penalties thereon if any, paid by my Executrix by reason of my death with respect to any property included in my estate for such tax purposes, whether or not passing under this Will, shall be paid out of my residuary estate and shall not be apportioned.

SECOND: I hereby expressly decline to exercise any power or powers of appointment I may have at the time of my death over any property, and nothing contained in this Will shall be construed as exercising any such power or powers of appointment.

THIRD: I give and bequeath the sum of Ten Thousand Dollars ($10,000) to my brother, DESIDERIO PARRENO, now residing in Madrid, Spain, if he survives me.

FOURTH: I give and bequeath to PRINCETON UNIVERSITY, for its library, and to the JOHN CARTER BROWN LIBRARY of Brown University any ten items as each such library shall select from my collection of rare books and manuscripts. In selecting their respective ten items, I direct that the Librarian of each said library shall consult with the other. All other books and manuscripts from my collection I direct my Executrix to sell at auction in New York or London, or otherwise to dispose of as she shall determine in her complete discretion, except as otherwise provided in Paragraph SIXTH hereof, the proceeds being added to my

AJP

residuary estate.

FIFTH: I give, devise and bequeath to my said brother, DESIDERIO PARRENO, all my rights to and under property held by me which has been confiscated by the Fidel Castro regime in Cuba, including, but not limited to, my shares in La Maritima S.A., Terminal Naviera S.A. and Molinera Oriental S.A. (all Cuban corporations) and my interest in real estate located in Cuba.

SIXTH: All the rest, residue and remainder of the property, real and personal and wheresoever situated, which I may own at the time of my death or to which I may then be or may thereafter become entitled, including any property hereinbefore mentioned but not effectually disposed of, I give, devise and bequeath to my wife, FREDERICA PARRENO, if she shall survive me.

If my said wife shall predecease me, I dispose of my residuary estate as follows:

A. I give and bequeath my collection of rare books and manuscripts to PRINCETON UNIVERSITY, for its library, and to the JOHN CARTER BROWN LIBRARY of Brown University, in as nearly equal shares as may be practicable, division among them to be as they may agree after consultation by their respective Librarians or, failing agreement, to be made by my Executor, whose decision shall be conclusive. In the event any of the items in the collection are not desired by either of these libraries I direct my Executor to sell at auction or otherwise dispose of such items, adding the proceeds therefrom, if any, to my residuary estate.

AJP

B. The remainder of my residuary estate I give, devise and bequeath as follows:

(1) One-half to my said brother, DESIDERIO PARRENO, if he survives me.

(2) Four-tenths to PRINCETON UNIVERSITY, to be used for the Latin American collection of its said library.

(3) One-tenth to my first cousin, JOSE PARRENO, presently residing in Elmhurst, Queens, New York, if he survives me.

If either of the two aforesaid individuals predecease me, I direct that his share be divided between the remaining beneficiaries in the same proportion as designated above. If both of said individuals predecease me, I direct that all of the property passing under this subparagraph go to PRINCETON UNIVERSITY, to be used as aforesaid.

SEVENTH: Should any of the persons named or designated herein die either simultaneously with me or so that it is difficult to determine who predeceased the other, I direct that such person shall be deemed not to have survived me, and the provisions of this Will based on such contingency shall take effect accordingly.

EIGHTH: In addition to the general powers vested by law in executors, I specifically authorize and empower the Executrix hereof with respect to all property at any time held by her hereunder as follows:

(a) To continue to hold any property, real or personal, in the form in which it may be at the time of my death or of the receipt thereof by her for such time as she may deem proper or desirable, and she shall not be liable for any loss resulting from so doing nor for failure to diversify.

AJP

(b) To litigate, compromise, submit to arbitration, or settle, any claim in favor of or against me or my estate.

(c) To pay, as soon as may be convenient after my death, all my just debts, including the expenses of my last illness which I direct shall be paid out of my estate, all funeral expenses and expenses of the administration of my estate, including ancillary administration wherever the same may be required.

(d) To convert, exchange, sell at public or private sale, or otherwise dispose of, any securities or other property at any time held by her upon such terms and conditions and on credit or otherwise as she shall deem advisable.

(e) To mortgage, partition, release, exchange, grant options with respect to, sell at public or private sale, and convey without Court order any and all real estate or interest therein at any time owned by my estate, at such times, and upon such terms, and in such manner as she may deem advisable; and to join with co-owners in the carrying out of any of the above powers.

(f) To abandon any property, real or personal, which she may deem worthless or not of sufficient value to warrant keeping or protecting, or to convey any such property for a nominal consideration or without consideration so as to prevent the imposition of any liability by reason of the continued ownership thereof.

(g) To invest and reinvest any funds at any time held by her in such manner as she may deem advisable, including the purchase of shares or interests in common trust funds, mutual funds, pools, syndicates, joint ventures and the like, without limitation to investments legal for fiduciaries, and irrespective of the proportion that such property or property of a similar character held bears to the total value of all investments held and irrespective of whether the same be expected to produce income; also to hold any funds uninvested or on deposit with one or more savings banks or other depositories, with or without interest, and whether or not such deposit be insured, for such periods as she may deem advisable.

(h) To pay to herself at any time and from time to time without Court order the amount of any personal claims against me.

(i) To have and to exercise with respect to any property held by her hereunder all the rights, powers and privileges which an individual owner would have, including, but without intending hereby to limit the above grant in any manner, power to give proxies; to pay assessments and other sums which she may deem advisable for the protection of any property held by her; to participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, liquidations or other capital readjustments of any corporation or entity and in connection therewith to deposit securities with or transfer title to any property to any protective or other committee or depositary under such terms as she may deem advisable; to exercise or sell stock subscription or conversion rights; to surrender for exchange, upon such terms and conditions as she shall deem proper, any securities or other property for other securities or property of like or different nature, whether of the same or a different corporation, company or association; and to accept and retain any securities or other property received through the exercise of any of the foregoing powers.

(j) To register any securities or other property in the name of any nominee, whether or not the nominee of a bank, trust company or private banker, or to hold securities unregistered or in bearer form.

AJP

(k) To borrow money for the purpose of paying taxes or for any other purpose in connection with the administration of my estate and to secure any or all amounts so borrowed by mortgage or pledge of any property, real or personal, at any time forming a part of my estate.

(l) To appoint or employ such agents and assistants, such investment or tax counsel or advisors, and such custodian of any or all of the assets of my estate as she may deem advisable.

(m) To transfer all or any part of the assets of my estate from any state of the United States or any foreign country to any other state or country and to administer my estate in any state or country in which she may deem it desirable to do so for the purpose of preserving, safe-guarding or enhancing the same or for convenience of administration.

(n) To elect to claim as deductions on one or more of the income tax returns of my estate, rather than on federal or state estate tax returns, all or any part of any items which by law may be deducted from either.

(o) To join with my widow in the execution and filing of joint income tax returns for the year in which my death shall occur and, if the same shall not have been filed at the time of my death, for the year prior thereto, and to pay the full amount of the tax shown on such returns to be due, provided that no such payment shall exceed the amount for which I would be liable if returns were filed for me as a single person for the period or periods covered by such returns. Also for gift tax purposes to execute consents to the treatment of all gifts made by my wife prior to my death as having been made one-half by me and to pay the tax due from me as a result thereof and to pay any tax attributable to my wife by reason of her consent to the treatment of gifts made by me prior to my death as having been made one-half by her.

(p) To distribute all or any part of my estate wholly or in part in kind.

(q) To execute and deliver any and all instruments necessary, proper or convenient in connection with the exercise of any one or more of the foregoing powers.

NINTH: I appoint my wife, FREDERICA PARRENO, to be Executrix of this Will. If she shall for any reason fail to qualify or cease to act, I appoint MINER D. CRARY, JR. as Executor hereof. If at any time there shall be no individual acting or qualified to act as Executor hereof, I appoint FIRST NATIONAL CITY BANK to be sole Executor hereof.

AJP

TENTH: I direct that no person at any time acting as Executor hereof shall be required to give bond for the faithful performance of his, her or its duties as such in any jurisdiction in which called upon to act.

ELEVENTH: No person at any time acting as Executor hereof shall be required to render annual or other periodic accounts unless requested to do so by an adult residuary legatee. Any account rendered by my Executor or by the personal representative of a deceased Executor, which is approved in writing by each adult, irrespective of whether any such person be also one of such Executors, shall be binding upon all persons then or thereafter interested in my estate and shall constitute a release and discharge to my Executor.

TWELFTH: Any person at any time acting as Executor is hereby authorized, acting in his or her own right as an individual, to become the purchaser at public or private sale of any asset of my estate or of any property held for a minor at the fair market value thereof as freely as though he or she were not then acting in such fiduciary capacity.

IN WITNESS WHEREOF, I have hereunto set my seal and have subscribed these presents and do publish and declare the same as and for my Last Will and Testament in the presence of the witnesses attesting the same at my request this 5th day of July, One Thousand Nine Hundred and Sixty-six.

ALBERT J. PARRENO (SEAL)

SUBSCRIBED, SEALED, PUBLISHED and
DECLARED by ALBERT J. PARRENO,

the Testator above named, as and for his Last Will and Testament, in our presence, and we, at his request, in his presence, and in the presence of one another, have hereunto subscribed our names as witnesses this 5th day of July, 1966.

David R. Lindskog	residing at	300 East 71st Street New York, N. Y.
Edward E. Kable	residing at	109 West 75th St New York, N. Y.
Alfred S. Goldfield	residing at	315 W. 70 St. New York, N. Y.