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

Case No. 1:19-cv-23588-BLOOM/Louis

HAVANA DOCKS CORPORATION,

*Plaintiff*,

v.

MSC CRUISES (USA) INC. and
MSC CRUISES SA CO.

*Defendants*.

**REPLY IN SUPPORT OF DEFENDANTS'**
**MOTION TO DISMISS THE COMPLAINT**

## I. Plaintiff Does Not Plausibly Allege How Each Defendant Is Liable Under Title III

Plaintiff's conclusory pleading does not pass muster under the *Twombly-Iqbal* standard. Plaintiff fails to demonstrate how its Complaint provides any factual allegations that would enable Defendants to understand *how* the MSCC Defendants, as opposed to any other person or entity, allegedly "trafficked" in confiscated property. D.E. 34 ("Opp.") at 3-5. In its opposition, Plaintiff merely repeats its two, wholly conclusory "trafficking" allegations with no explanation of what specific *acts* Plaintiff alleges the MSCC Defendants committed within the scope of Title III. Opp. at 3 (citing Compl. ¶¶ 14-15). The MSCC Defendants have a basic right to understand from a threshold pleading what conduct they are alleged to have committed. *Winstead v. Lafayette Cty. Bd. of Cty. Commissioners*, 197 F. Supp. 3d 1334, 1339 (N.D. Fla. 2016) ("Rule 8(a)(2) . . . [requires] that defendants receive fair notice of what the claim is and on what grounds it is made.").

Instead, the Complaint alleges that the MSCC Defendants both directly "embark[ed] and disembark[ed]" from the docks *and* indirectly "participated in and profited from" another's use of the docks (Compl. ¶¶ 14-15), and then states that joint and several liability should attach for the "*same* trafficking event." *See* Opp. at 5, n.2-3 (emphasis added). At best, it is confusing and unclear how each entity directly used the docks but also "profited from" the other's use of the docks when the Complaint alleges it is the <u>same</u> use of the piers. The Complaint seems to treat the two as the "*same*" entity. *Id.*[1]

[1] For example, Plaintiff adds in its opposition allegations about the MSCC Defendants' affiliations, which were <u>not</u> in the Complaint. *See* Opp. at 5 ("Defendants are members of a privately-held, international conglomerate of cruising companies that operate globally through 'subsidiaries and joint ventures'"). Even if the Court could consider these new assertions, they do not shed light on how either MSCC Defendant operated and profited from different uses in the "same" event.

For the same reason, Plaintiff's defense of its group-pleading falls short. Plaintiff argues that a recent Eleventh Circuit opinion held that some group-pleading is permissible and therefore, the Complaint's references to "Defendants" is appropriate. *Id.* at 4-5. But that opinion only held that the use of "Defendants" was only appropriate "in light of the well-pleaded factual allegations" supporting the plaintiff's tortious interference claims. *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.*, 917 F.3d 1249, 1274 (11th Cir. 2019) (concluding that plaintiffs' detailed allegations which plausibly stated a claim against a group of unidentified "defendants" was sufficient to "give fair notice to [each] named defendant of the claims against it"). The MSCC Defendants do not take issue with the Complaint's use of the term "Defendants" and do not believe the lumping term itself deprives them of fair notice and potentially Due Process. *See* Opp. at 4-5. Rather, they take issue with the fact that the term itself makes little or no sense given that Plaintiff's paltry allegations regarding the "same" trafficking event(s) do not provide any discernible basis to identify what conduct *each* MSCC Defendants is alleged to have committed in violation of Title III. As a result, the Complaint fails Rule 8(a)(2).

## II. <u>The Complaint Does Not Implicate the Subject Property</u>

### A. The Plain Language of the Act Requires the Same Property Interest to be Both the Basis of a Certified Claim and the Property Being Trafficked In

Plaintiff conveniently ignores in its opposition that its certified claim is based on a leasehold interest which expired in 2004. Instead, Plaintiff focuses on the Court's *Carnival* opinion to argue that the MSCC Defendants are, like Carnival, conflating the ownership of a "claim" and of "property." *Id.* at 3 (quoting *Carnival Op.* at 8). But the *Carnival* opinion was premised on the notion that Carnival "d[id] not refute that the Plaintiff owns the claim to the Subject Property." *Carnival Op.* at 8. Here, however, the MSCC Defendants do dispute Plaintiff's

ownership in the "Subject Property"—if the "Subject Property" means any property interest beyond its time-limited concession.

By relying on this "conflat[ion]" argument, Plaintiff ignores the plain language of the Act which establishes that these two terms are intertwined concepts that must, in fact, relate to the *same* "property" interest. Because U.S. nationals no longer own "property" in Cuba,[2] the Act gives those aggrieved persons a "claim" recognizing the loss and value of that *former property interest*:

> [A]ny 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 <u>to such property</u>** for money damages . . ."

22 U.S.C. § 6082(a)(1)(A) (emphasis added). The Act is clear that each "claim" is linked to a specific property interest. *Id.* The key phrase—"such property"—unambiguously refers back to the <u>same</u> property interest mentioned earlier in the sentence, *i.e.*, the property interest that was being trafficked in. *See Glen v. Club Mediterranee S.A.*, 365 F. Supp. 2d 1263, 1269 (S.D. Fla. 2005) ("Title III permits any U.S. national 'who owns a claim to <u>such</u> [confiscated] property for money damages' to sue those who traffic in <u>such</u> property.") (emphasis added). Plaintiff's own cited authority readily confirms this interpretation:

> The [Act] refers to the property interest that former owners of confiscated property now have as ownership of a "claim to such property." 22 U.S.C. § 6082(a)(1)(A).

*Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1255 (11th Cir. 2006) (quoted in Opp. at 8).

Here, Plaintiff's "claim to such property" is a certified claim "to" its confiscated time-limited, leasehold interest, or "concession." Mot. Ex. A at 6, 7, 9 (the FCSC certified a claim for "<u>the value of claimant's concession</u>" "granted by the Government of Cuba [which] it owned and operated at the entrance of the harbor of Havana" and which was "<u>set to expire in the year 2004,</u>

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[2] Plaintiff incorrectly asserts that the MSCC Defendants "ignore[] reality" and believe that a Title III plaintiff must still own the subject property to own a claim. Opp. at 7.

at which time [Plaintiff] had to deliver the piers to the government") (emphasis added). Thus, for Plaintiff to state a viable Title III action based on its certified claim for the "concession," the MSCC Defendants would have to have "trafficked" in that time-limited concession during the existence of that interest, *i.e.*, 1960-2004. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331–32 (2002) ("An interest in real property is defined by . . . its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest.") (citing Restatement of Prop. §§ 7-9 (1936)) (emphasis added).

### B. The Subject Property of the Certified Claim—the "Concession"—Is Not The Property That Was Allegedly Trafficked in by the MSCC Defendants

Because the specific, former property interest upon which Plaintiff's certified claim is based did not extend beyond 2004 (and had no value after 2004), it cannot be the same "property" in which the MSCC Defendants allegedly trafficked (since there acts were years later beginning in December 2018). Reaching this conclusion is not conflating the concepts of "claim" and "property" as Plaintiff suggests—it is the application of the facts as alleged in the Complaint to the plain reading of the Act.[3] The "Subject Property" of this suit, the "concession" interest, is not the same "property" that was purportedly trafficked in.

If Plaintiff were permitted to recover for trafficking committed outside the temporal scope of its former property interest, this Court would have to impermissibly read the operative word "such" out of 22 U.S.C. § 6082(a)(1)(A). *See Thomas v. Crosby*, 371 F.3d 782, 786 (11th Cir. 2004) (applying "the canon of statutory construction against reading any provision (even any word) of a statute so as to make it superfluous"). Disregarding the plain meaning by rendering the

[3] Plaintiff agrees that, under the Helms-Burton Act, U.S. nationals own "a claim to a given property." Opp. at 10. For Plaintiff to state that it owns a claim for a "stolen dock" is unsupported, unspecific, and misleading. *Id*. at 11.

word "such" superfluous would vitiate the requirement that the subject "property" be both the property interest (1) which was confiscated from the plaintiff and (2) is subsequently trafficked in.

If a Title III plaintiff were not limited to recover against only those who trafficked in its confiscated property interest, then the logical extension of such a finding is that any Title III plaintiff whose claim is based on a leasehold interest could recover for any trafficking in the underlying physical property, at *any* time. Such a result is clearly not called for under the Act. Moreover, as explained in Section V, *infra*, if Plaintiff could recover for trafficking that occurred on someone else's property, Title III could not possibly be compensatory in nature.

### C. The Fact That No Certified Claim Covers Trafficking in the Havana Piers in 2018 Is Not A Legally Valid Basis to Expand the Scope of Plaintiff's Claim

Assume, *arguendo*, that the fee simple owner of the Havana piers was not the pre-Castro Cuban government, but instead was a U.S. citizen named Blackstone. Both Blackstone and Plaintiff could have received FCSC-certified claims for their confiscated property interests. If the MSCC Defendants' alleged trafficking occurred in 2003 and Title III was fully effective then, both Blackstone and Plaintiff could sue the MSCC Defendants for the value of their claims because they trafficked in *both* property interests. But, if the trafficking occurred in 2018, as the Complaint alleges here, *only Blackstone* could recover under its certified claim.[4] That the fee owner was the Cuban government, and not Blackstone, does not change this outcome. As another example, if the pre-Castro owner of the Havana piers had issued a separate, time-limited concession to a third-party (other than Plaintiff) that was set to begin immediately after Plaintiff's concession expired in 2004, then under Plaintiff's theory, Plaintiff would still be entitled to recover for *any* trafficking

[4] Plaintiff also claims that the MSCC Defendants' position requires reading the Act to mean a defendant must obtain "authorization" from the *current* owner (Cuban government) to avoid Title III liability. This, too, is nonsensical. We agree that the person providing authorization is the claimholder. In 2018, this was <u>not</u> the Plaintiff.

that occurred post-2004 even though *someone else* had a property interest for that time period.

These scenarios illustrate that Plaintiff has no "claim to" a post-2004 property interest. 22 U.S.C. § 6082(a)(1)(A). And the fact that the fee simple owner of the piers was the Cuban Government is not a basis to expand Plaintiff's claim beyond "the value of [its] concession." Such a ruling would contravene the well-established rules of property. *See Tahoe Reg'l Planning Agency*, 535 U.S. at 331–32 (2002); *United States v. Causby*, 328 U.S. 256, 261 (2002) ("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken").[5]

To avoid any confusion, the MSCC Defendants do not contend that Plaintiff could not recover on its claim because it was not a fee simple owner of the piers.[6] Instead, the MSCC Defendants' position is narrower and unique to this Plaintiff: because Plaintiff's certified claim is "to" a leasehold interest which expired in 2004, the alleged trafficking would have to have occurred before 2004 for Plaintiff to pursue that claim under Title III. Had it not been for the suspension of Title III, Plaintiff could plausibly have had eight years after the effective date of the Act (1996-2004) to pursue a claim against a person who trafficked in the property *in that time period*. Thus, it seems Plaintiff's qualm for the legal deficiency in its Complaint is with those Presidents who suspended the Act thereby preventing a claim from being pursued during that time, and not with

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[5] In an analogous situation, compensation for takings by the U.S. government recognize the distinction between time-limited "leasehold interests" and fee interests. *Cf. First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304, 319 (1987) ("The United States has been required to pay compensation for leasehold interests" it takes from citizens); *United States v. Petty Motor Co.*, 327 U.S. 372, 380 (1946) (compensation for a leasehold interest taking required computing the value for the "remainder of the term of the Petty Motor Company's lease").

[6] For example, if Plaintiff's "concession" was a 99-year lease that extended through the present, Plaintiff's claim would be capable of prosecution under Title III today.

the MSCC Defendants' plain reading of the Act. The MSCC Defendants empathize with Cuban-Americans for their plight, but this does not grant Plaintiff a larger claim than it possesses.

## III. The Helms-Burton Act's Definition of "Traffics" is Facially Vague

The Act's definition of "traffics" is ambiguous because the portions of the definition that constitute indirect use (*i.e.*, "engages in a commercial activity . . . benefitting from confiscated property") preclude anyone from knowing what it means to "traffic" in property. Plaintiff does not substantively respond to this argument, and instead merely repeats in tautological fashion that its conclusory allegations of direct and indirect trafficking fall within this statutory definition. *See* Opp. at 11. Engaging in a commercial activity tangentially related to a confiscated property (especially property with international impressions, such as harbors and airports) lacks a "core meaning" and fails to provide businesses and persons with a "standard of conduct" to avoid. *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1228 (11th Cir. 1982); Mot. at 9-11.[7]

## IV. The MSCC Defendants Had No Fair Notice of a Retroactive Effect, if Any Exists

Due to President Clinton's misuse[8] of the suspension authority, persons did not have "fair notice" that liability could attach for actions committed *before* Title III became fully effective. Plaintiff recites the legislative history (also set forth in the Motion) only to belabor the undisputed point that the effective date of the Act elapsed back in 1996. *See* Opp. at 13. But Plaintiff once again misses the mark. It criticizes the MSCC Defendants for a lack of authority supporting their

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[7] The MSCC Defendants do not contend that the term "property" is void for vagueness. *See* Opp. at 9-10. The term is clearly defined and refers to a specific property interest, "including any leasehold interest" like the former "concession" upon which its certified claim is based. 22 U.S.C. § 6023(12). Rather, the MSCC Defendants argued in their Motion that the term "property," as enacted, would be "meaningless" if this Court permitted Plaintiff to recover for trafficking in a property interest in which it never had an interest. *See supra* at 4-6.

[8] Congress warned President Clinton that invoking the Title III suspension authority immediately would be improper. D.E. 24 ("Mot.") at 12-13.

claim that there was no fair notice of liability during Title III's suspension (1996-2019). Of course, there is no such authority because this statute presents a novel legal framework. Moreover, none of the cases Plaintiff cites (for the proposition that liability attaches after an effective date) are on point and do not address a statutory scheme with a suspension mechanism. In fact, Plaintiff omitted the entirety of a quote which strongly states that persons are on notice of a Congressionally-implemented scheme after its effective date *unless* that scheme is "unreasonable or arbitrary." *Id*. at 12 n.6; *Texaco, Inc. v. Short*, 454 U.S. 516, 532 n.25 (1982) (when a procedure is unclear, there are "constitutional limitations relieving [persons] from conforming to it").

Here, the passing of Title III's effective date in 1996 was only one of two necessary events to create the potential for liability under Title III: the other fundamental component—a cause of action—had not become effective. Congress explicitly instructed the President that "suspending the right of action" would not further the Act's goals. *See* Mot. at 14. President Clinton did so anyway, conveying hollow words suggesting that companies would be on notice in 1996 and they could "face the prospect of lawsuit and significant liability." Opp. at 12 (quoting the "Clinton Stmt"). The immediate suspension, however, ensured this was not the case, and the Congressional scheme was implemented incorrectly such that an arbitrary and unclear gap in the scheme arose. *See Weaver*, 450 U.S. at 31 ("This argument fails to acknowledge that it is the effect, not the form, of the law that determines whether it is *ex post facto*.") (emphasis added).

Plaintiff's reference to the statutory procedures only further proves this point. *See* Opp. at 13-14 n.7. It is true that a President's ability to terminate Title III does not prevent pending suits from being resolved. *Id.* But suppose, for example, that the initial Title III suspension continued until a President terminated the cause of action this year under 22 U.S.C. § 6082(h)(1)(B) (allowing for termination upon Presidential determination that "a democratically elected government in Cuba

is in power."). In that scenario, despite the effective date being "established" in 1996 and President Clinton's claim that an immediate threat of liability existed, a mechanism to hold an alleged trafficker accountable would have never existed.[9] Even if this Court concludes that Title III does retroactively impose liability dating back to 1996, this Court may still find that cruise lines (which Plaintiff alleges the MSCC Defendants are) did not have *fair notice* of liability before May 2, 2019.

Plaintiff also claims that if it were to show that the MSCC Defendants "continued to traffic" in the piers after the suspension was lifted on April 2, 2019, this issue would be moot. Opp. at 14. This, however, ignores the entirety of the MSCC Defendants' fair notice argument (of which retroactivity is only one part) and the unique situation of cruise lines. Cruise lines were encouraged to initiate contact and begin travelling to Cuba *because of* the government's issuance of a general license, which continued to exist past April 2, 2019 until "June 2019." *Id.* Thus, cruise lines, such as the MSCC Defendants, did not have fair notice of Title III liability for their contact with Cuba both because of (1) the unclear retroactive effect on Title III liability due to presidential misuse of the suspension authority, and (2) the Federal government's inducement of the cruise lines to initiate travel to Cuba by way of the OFAC general license. *See* Mot. at 17-18.

## V. The Act's Damages Provision is Facially Unconstitutional

The MSCC Defendants do not concede liability, and if it is imposed in this case, the MSCC Defendants reserve the right to raise an as-applied excessive damages claim. At this stage, however, the Act's statutory remedy for Title III claims is facially unconstitutional under Plaintiff's interpretation (and the Court's in its *Carnival* opinion). If the Court applies its reading

[9] That the public was on notice of FCSC-certified claims (including Plaintiff's claim) is not the same as having notice of liability for infringing on those claims through a cognizable cause of action. In any event, being on notice of a certified claim for the value of an expired concession does not put companies on notice of a valid claim for trafficking in the piers after 2004.

of the Act in *Carnival* here too, then a Title III plaintiff could receive damages based on the value of a property interest *it never had to begin with.* An award based on that logic is punitive.[10]

If it were "remedial," an award would only be limited to the ill-gotten "profit[s]" earned from the trafficking. 22 U.S.C. § 6081(8), (11). But the potential damages are not limited to an unjust enrichment-type theory. Instead, the Act (if this Court continues with this interpretation) not only permits a Title III plaintiff to recover the fair value of the property interest (plus 60 years' worth of interest)[11] from a single company that did not steal the property for one "traffic[king]" event, but it permits that same plaintiff to recover for *someone else's* confiscated property too. The only purpose of imposing the full value of a certified claim on a defendant even when that defendant did not traffic in the property underlying the claim is to deter any economic activity in Cuba, and strongly punish those who do. *See* Mot. at n.21. A punitive penalty that is not tied to the value of the trafficking or the unlawful conduct can only be on its face "arbitrary" and unconstitutionally "oppressive." *Id.* at 19-20.

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[10] Plaintiff claims *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301 (11th Cir. 2009) "forecloses" a due process argument based on an excessive damages provision without stating why. *Harris* rejected the argument that the Fair Credit Reporting Act (FCRA) was excessive on its face because its statutory damages range was compensatory given that plaintiffs could also seek actual damages against the person causing the FRCA violation. Here, a Title III plaintiff with a certified claim receives, at minimum, actual damages (value of stolen property) from a defendant who may traffic in the stolen property once, not from the thief himself. *Harris* is inapposite.

[11] Plaintiff cites to legislative history to support its contention that the Title III award provision creates a "proportionate" remedy. *See* Opp. at 18. But the remedy is only "proportionate" if it compensates property owners for "exploitation of [stolen] property at the expense of <u>the rightful owner</u>" of the specific former property interest in which the alleged trafficking occurred. 22 U.S.C. § 6081(8). *See also Lopez v. ML #3, LLC*, 607 F. Supp. 2d 1310, 1313 (N.D. Fla. 2009) ("[A] statute should be interpreted consistently with its explicitly stated purposes") (citing *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350–351 (1943)). Moreover, Congress found this remedy to be proportional <u>in 1996</u> – it would be speculative and presumptuous to assume Congress felt the same way when each award accumulated interest over more than two decades (exponentially increasing each total award).

Dated: November 15, 2019

Respectfully submitted,

/s/ J. Douglas Baldridge
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of November, 2019, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ J. Douglas Baldridge