UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

HAVANA DOCKS CORPORATION,
Plaintiff,

v.

MSC CRUISES (USA) INC.,
MSC CRUISES SA CO. and
MSC CRUISES S.A.

Defendants.
_____/

MSC CRUISES' INDIVIDUAL MOTION FOR SUMMARY JUDGMENT
AND INCORPORATED MEMORANDUM OF LAW

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Defendants MSC CRUISES S.A. ("MSC Cruises S.A."), MSC CRUISES (USA) INC. ("MSCC USA"), and MSC CRUISES SA CO. ("MSCC SA Co.") (collectively, "MSC Cruises") fully join and incorporate herein the omnibus brief filed by four cruise lines in support of summary judgment (the "Omnibus Brief"), and additionally move for summary judgment under Fed. R. Civ. P. 56 for the reasons stated herein.

INTRODUCTION

This case is factually straightforward such that MSC Cruises cannot be found liable for "trafficking" as a matter of law. Quite simply, MSC Cruises is entitled to summary judgment because its cruises from the United States to Cuba were licensed, permitted, and actively encouraged by the U.S. Government and, therefore, fall squarely within the scope of "lawful travel" that is statutorily excluded from liability under 22 U.S.C. § 6023(13)(B)(iii). Indeed, in full compliance with validly issued licenses by the United States Government, MSC Cruises did precisely what President Barack Obama encouraged and directed in 2016:

> With last week's port security announcement, we've ***removed the last major hurdle to resuming cruises*** and ferry service — all of which will mean even more Americans visiting Cuba in the years ahead and appreciating the incredible history and culture of the Cuban people.[1]

And, on the heels of the President's statement, the State Department told Havana Docks Corporation ("HDC") that the cruise lines' travel to Cuba plainly fit within the "***clear exclusion in Title IV's definition of 'traffics'*** of transactions and uses of property incident to lawful travel to Cuba."

MSC Cruises is entitled to summary judgment for two reasons[2]: (1) MSC Cruises' docking at the Sierra Maestra Terminal (or Havana Cruise Port Terminal) (the "Terminal") is excluded

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[1] *Remarks by President Barack Obama*, Havana, Cuba (March 21, 2016), *available at* https://obamawhitehouse.archives.gov/the-press-office/2016/03/21/remarks-president-obama-and-president-raul-castro-cuba-joint-press.

[2] As threshold issues, MSC Cruises incorporates by reference the arguments in the Omnibus Brief, which demonstrates the fundamental problems at the heart of HDC's claims: (1) HDC did not even own the Terminal but instead owned only a limited concession to operate a cargo-services business *at* the Terminal, and thus the Terminal is not "confiscated property" to support a Title III claim; (2) all of the cruise lines used the Terminal as part of lawful travel to Havana that was permitted and encouraged by the U.S. Government, which is an absolute defense to claims of trafficking under the Act; (3) HDC lacks a principal place of business in the United States and thus lacks statutory standing; and (4) Title III as applied here violates the United States Constitution by

from the definition of trafficking because it was incident and necessary to "lawful travel to Cuba," and (2) HDC lacks any evidence to establish the necessary element of intent.

Lawful Travel. The undisputed facts demonstrate that MSC Cruises S.A.'s cruises to Cuba and docking at the Terminal constitute "lawful travel" for four main reasons. *First*, the United States Government authorized cruise carriers to sail between the United States and Cuba from 2015 to June 2019 under the General Licenses issued by the Department of Treasury Office of Foreign Assets Control ("OFAC"), provided that the cruise lines' passengers were traveling under one of the authorized travel purposes enumerated by OFAC. MSC Cruises S.A. sailed under the General Licenses and complied with OFAC's requirements when it conducted 25 voyages between Miami, Florida and Havana, Cuba between December 2018 and June 2019.

Second, it is undisputed that MSC Cruises S.A. docked at the San Francisco Pier ("Pier No. 1") of the Terminal each time it sailed to Havana to call port and unload passengers. This use of the Terminal was "incident to lawful travel" and therefore qualifies as excluded from liability.

Third, MSC Cruises S.A.'s use of the Terminal was "necessary." In the event this Court interprets the lawful travel provision to mean that MSC Cruises S.A.'s use of the Terminal must have been strictly "necessary"—that is, having no other alternative—even under such an interpretation the undisputed facts nonetheless demonstrate that MSC Cruises S.A.'s use of the Terminal did not constitute "trafficking." It is undisputed that MSC Cruises S.A.'s smallest vessels could only feasibly sail to Havana, and within Havana, MSC Cruises S.A. was required by the Cuban Government to only call port by docking on the north side of Pier No. 1 at the Terminal. All other alternatives, including anchoring offshore in Havana or docking at another location in Havana, were not only prohibited but also infeasible. As a result, MSC Cruises S.A. did not commit trafficking.

Fourth, the undisputed facts compel a finding of no trafficking for all three MSC defendants. For less than a year, MSC Cruises S.A.'s American-based ticketing agent—MSC Cruises (USA) Inc. ("MSCC USA")—provided support services in connection with ticket sales for MSC Cruises S.A.'s cruises and thus, MSCC USA's actions were also incident to and necessary to lawful travel. And the other named entity, MSC Cruises SA Co. ("MSCC SA Co."), does not perform any corporate function and was not involved in these cruises in any way.

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impermissibly imposing retroactive liability on conduct that was licensed and permitted by the U.S. Government and that is vastly disproportionate to Plaintiff's claimed damages.

Lack of Intent. MSC Cruises also did not "traffic" because it did not use the Terminal with the requisite scienter. To establish trafficking, a Title III plaintiff must prove that a defendant "knowingly and intentionally" acquired, used, or otherwise benefited from property that was confiscated without the authorization of any U.S. national "who holds a claim to that property." 22 U.S.C. § 6023(13)(A). Here, the facts are undisputed that MSC Cruises did not know or have reason to know that by using the Terminal in 2018 or 2019 it was using "confiscated property" and that Plaintiff held a claim to that "confiscated property" after 2004. There simply is no evidence that MSC Cruises had any knowledge of HDC or its claimed interest in the property. And, any reasonable person who read the Certified Claim would have understood it to state that HDC only had an interest in the Terminal until 2004, at which point it must be returned to the *Cuban Government*—the owner of the pier. This includes, *inter alia*, (1) at one time, this Court's own understanding of the Claim when it dismissed HDC's complaint as a matter of law, and (2) HDC's own president's statements that HDC's interest may have "expired" or "run out." Thus, HDC cannot establish trafficking.

These issues are at the heart of this case and are ripe for summary judgment. Plaintiff has no evidence to demonstrate a necessary element of trafficking (intent), and the material facts with respect to lawful travel are not in dispute in this case: with the unambiguous encouragement of the Executive Branch, OFAC issued general authorizations to sail between the United States and Cuba, MSC Cruises S.A. docked at the Terminal in connection with those cruises, and it had no other option if it wanted to sail to Cuba as the United States Government authorized it to do. Accordingly, MSC Cruises is entitled to judgment as a matter of law.

STANDARD OF REVIEW

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Initially, it is the moving party's "burden to demonstrate the basis for its motion, and [it] must identify the portions of the record 'which it believes demonstrates the absence of a genuine issue of material fact.'" *Hornsby-Culpepper v. Ware*, 906 F.3d, 1302, 1311 (11th Cir. 2018) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the moving party meets this initial burden, the burden then shifts to the non-moving party to show that a genuine issue of material fact exists. *Id.* at 1311-12.

To establish a genuine dispute of material fact, the non-moving party must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." *A.L. ex rel. D.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1289 (11th Cir. 2018) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The non-moving party must produce sufficient evidence, going beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designating specific facts to suggest that a reasonable jury could find in the non-moving party's favor. *Shiver v. Chertoff*, 549 F.3d 1342, 1343 (11th Cir. 2008).

ARGUMENT

I. MSC Cruises Did Not "Traffic" Because Its Use of the Terminal Was Incident and Necessary to Lawful Travel

All of MSC Cruises' uses of the Terminal were incident and necessary to lawful travel to Cuba, and therefore excluded from the definition of "trafficking" under Title III. The Act expressly states: "[t]he term 'traffics' does not include … 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); *see also* CONF. REPT., 142 CONG. REC. H1645-02, H1656, *reprinted at* 1996 WL 90487 ("[t]he definition of 'traffics,' as used in Title III, has been modified to remove any liability for . . . *any* activities related to lawful travel to Cuba . . . .") (emphasis added). Here, the undisputed facts show that MSC Cruises was engaged in providing lawful cruise travel to Cuba, that the alleged conduct (embarking and disembarking passengers on the docks)[3] was incident to that travel, and that MSC Cruises S.A.'s use of the Terminal was necessary to such travel.

A. MSC Cruises S.A.'s Use of the Terminal was Incident to Lawful Travel to Cuba

MSC Cruises S.A. conducted 25 cruises on the *Armonia* between the United States and Havana, Cuba between December 2018 and June 2019, all of which were made pursuant to the General Licenses authorizing cruise lines to provide carrier services to Cuba and allowing passengers to travel to Cuba for one of twelve enumerated purposes. *See* 31 C.F.R. § 515.565; 31

[3] To the extent that Plaintiff alleges that MSC Cruises committed trafficking by "profit[ing] from the communist Cuban Government's possession of the [Terminal]," D.E. 104 ¶ 24, it is undisputed that MSC Cruises S.A. did not profit from its cruises between the United States and Cuba. SUF ¶ 3.

C.F.R. § 515.572; 15 C.F.R. § 740.15; 15 C.F.R. § 746.2 (the "General Licenses"); *see also* SUF ¶¶ 1-2, 15. The General Licenses made it lawful to travel ***anywhere*** in Cuba, including Havana, without limitation (and without any reference to the Helms-Burton Act). *See* SUF ¶ 12; *see also* Omnibus Brief at II.B. MSC Cruises S.A. did not begin cruising to Cuba from Miami until more than three years after the General Licenses authorized such travel, and it ceased cruising to Cuba before the termination of those licenses. SUF ¶¶ 9-11, 13-14. And to ensure compliance with these General Licenses, as well as to facilitate the compliance of its passengers onboard, MSC Cruises S.A. structured its cruises to Cuba to comply with the terms of these General Licenses and all other regulations concerning travel to Cuba. SUF ¶¶ 11, 19-24.

The General Licenses allowed MSC Cruises S.A. to provide cruises to passengers who engaged in one of twelve enumerated activities, including people-to-people educational experiences consisting of a "full-time schedule of activities that enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people's independence from Cuban authorities, and result in meaningful interaction with individuals in Cuba." 31 C.F.R. § 515.565(b) (Nov. 9, 2017); SUF ¶ 11. MSC Cruises S.A. required each passenger to complete a travel declaration attesting compliance with the General Licenses and to certify under which of the 12 categories the passenger was traveling. SUF ¶ 21. MSC Cruises S.A. collected these affidavits prior to each passenger embarking on the *MSC Armonia* in Miami. *Id.* MSC Cruises S.A. developed a schedule of Havana shore excursions for its passengers that was "vetted" to ensure that "in every excursion" there was a "main element" of a "cultural exchange," such as a "social [community] project, historical [component], and/or just an interaction with the local people." SUF ¶ 24 (quoting Ex. 21 at 51:3-13, 85:24-86:15). MSC Cruises S.A. required all passengers to participate in these "people to people" educational shore excursions or, when and where permissible, self-certify that they had otherwise traveled in compliance with the General Licenses. SUF ¶ 23. MSC Cruises S.A. provided prospective passengers and guests with information on its website regarding the travel affidavits and OFAC travel requirements. SUF ¶ 20. And while on board the ship during cruises to Cuba, MSC Cruises S.A. educated its passengers through a Cuba-related presentation regarding the OFAC regulatory requirements, the customs and security checkpoints at the Terminal, and cultural monuments in Havana. SUF ¶ 22. In sum, MSC Cruises S.A.'s cruises were conducted pursuant to and in compliance with the General Licenses.

Because MSC Cruises S.A. consistently complied with all applicable regulations, the U.S. Government consistently concluded that its travel was lawful and never brought any enforcement action regarding its travel to Cuba. SUF ¶ 25-26, 28. Indeed, the State Department, with its expressly delegated authority for enforcing the Helms-Burton Act as provided in Title IV of that Act,[4] *told* HDC that cruise travel which used the Terminal plainly fit within the "***clear exclusion in Title IV's definition of 'traffics'*** of transactions and uses of property incident to lawful travel to Cuba." SUF ¶¶ 25-27; *see also* Omnibus SUF ¶ 28 (State Department officials and attorneys told HDC at least three times that commercial cruise lines' use of the Terminal was not trafficking). For this reason, the agency charged with enforcing the Helms-Burton Act chose not to take any action against any cruise line for cruises to Cuba. The definition of "trafficking" and the lawful travel exclusion in "Title IV" are, of course, the same definition and exclusion that apply in this Title III action. *Compare* 22 U.S.C. § 6091(b)(2)(B)(iii) *with* § 6023(13)(B)(iii) (identical exclusions for lawful travel).[5]

Thus, MSC Cruises S.A.'s cruises between Miami and Cuba constituted "lawful travel to Cuba" and, as explained in the Omnibus Brief, docking at the Terminal to disembark and process passengers was "incident to" (or "related to") both MSC Cruises S.A.'s and its passengers' "lawful travel." SUF ¶ 18; *see also* Omnibus Brief II.C.

B. MSC Cruises S.A.'s Use of the Terminal Was Necessary to Lawful Travel to Cuba

Having lawfully travelled to Cuba and having used the Terminal "incident to" MSC Cruises S.A.'s lawful travel to Cuba, the only remaining element is whether MSC Cruises S.A.'s use of the Terminal was "necessary to the conduct of such travel." As explained in the Omnibus Brief, "necessary" does *not* mean having no other alternative—rather, it means that the use must be important, helpful, or appropriate to the conduct of the lawful travel at issue. Omnibus Brief at II.D. However, under any interpretation of "necessary"—even a strict interpretation meaning 'no other alternative'—MSC Cruises S.A.'s use of the Terminal was "necessary" for two interrelated reasons: (1) Havana was the only port in Cuba that combined (a) mandatory customs, immigration, and screening facilities, with (b) the physical ability for MSC Cruises S.A.'s cruise ships to

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[4] 22 U.S.C. § 6091(a).

[5] The Government's interpretation of this definition is entitled to respect and deference in this litigation. *See, e.g.*, *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 255 (1995).

navigate and dock; and (2) the Cuban government only authorized MSC Cruises S.A. to dock its ships at the north side of Pier No. 1 at the Terminal. *See* SUF ¶¶ 16-18, 30-32, 36. Simply put, not only was use of the Terminal important, helpful, and appropriate to MSC Cruises S.A.'s lawful travel—which is enough to establish 'necessity'—MSC Cruises S.A. had no other alternative to conduct lawful travel besides using Pier No. 1 at the Terminal in Havana. The Cuban Government mandated it.

1. MSC Cruises S.A. Could Only Sail to Havana

First, to sail to Cuba at all, MSC Cruises S.A. could **only**, and did only, sail to Havana. SUF ¶¶ 16-18, 32. While other cruise ships were able to dock at or anchor offshore of the Cuban ports of Cienfuegos and Santiago de Cuba—the other two ports which possessed mandatory customs, immigration, and passenger processing capacity for cruise passengers—MSC Cruises S.A.'s fleet of ships physically could not do so. SUF ¶¶ 29, 41-43. The evidence is undisputed that MSC Cruises S.A.'s smallest vessel—the *Armonia*—was too long (in length) to maneuver in the smaller waterway channels and harbors of those other cities in Cuba. *Id.* The *MSC Armonia* is 275 meters (901 feet) long and is the smallest vessel in terms of length, tonnage, and passenger capacity in MSC Cruises S.A.'s global fleet of cruise ships. SUF ¶ 29. And the *Armonia* was over 45 meters (148 feet) longer than the largest vessel from another cruise line that traveled to Cienfuegos or Santiago de Cuba. SUF ¶ 43. This is no coincidence. Evidence from three other cruise lines unequivocally demonstrates their similar understanding, based on their own technical analyses and discussions with the Cuban Government, that their larger vessels could not feasibly access those ports due to the ports' size limitations. SUF ¶ 42. Indeed, other cruise lines, such as Royal Caribbean, Norwegian, and Carnival each had cruise ships longer than 250 meters—still at least 25 meters *shorter* than the *Armonia*—which did not, and could not, sail to other Cuban ports, and therefore, those companies were required to operate even smaller vessels in order to travel to all three Cuban cities. SUF ¶¶ 29, 42-43 (citing Ex. 62 (summary chart identifying cruise ship lengths by port visited). Therefore, the evidence is undisputed that for MSC Cruises S.A. to conduct lawful cruises to Cuba as the U.S. Government authorized and encouraged it to do, Havana—and, as demonstrated below, the Terminal within Havana—was the only option.

2. The Cuban Government Required MSC Cruises S.A. to Use Pier No. 1 at the Terminal in Havana

Within Havana, there were no alternatives to call port and carry passengers ashore beyond the Terminal. The Omnibus Brief makes clear that there is only one place in Havana where cruise

passengers may embark and disembark. Omnibus Brief II.D.iii; Omnibus SUF ¶¶ 22-26. Indeed, it is undisputed that the Cuban Government **required** the *Armonia* to dock port-side at Pier No. 1 of the Terminal. *Id.*; SUF ¶¶ 30-31, 36-39. Aries Transportes S.A., the entity acting on behalf of the Cuban Government that was responsible for operating all Cuban ports, including the berthing operations in Havana, informed MSC Cruises S.A., in writing and orally, that the ***only*** pier where MSC Cruises S.A. could dock was Pier No. 1 at the Terminal. SUF ¶¶ 30-32, 35-37. Indeed, Aries' berthing agreement with MSC Cruises S.A., which authorized MSC Cruises S.A. to dock and disembark and embark passengers in Havana, expressly identified the "Cruise Terminal in Havana" as the ***only*** location at which MSC Cruises S.A.'s vessels were to dock, rendering it a legal requirement. SUF ¶ 32 (citing Exs. 40 at 2, 45 at 2). This was no mere suggestion: before sailing into the harbor, it was "compulsory" for Cuban pilots to physically board each cruise ship and guide the ship to the Terminal. SUF ¶ 38 (quoting Ex. 48); *see also* Omnibus SUF ¶ 24. It is undisputed that *every* cruise line sailing to Havana was told the same thing by the Cuban Government: the Havana Cruise Port Terminal is the *only* place in Havana where cruise passengers may embark and disembark. SUF ¶ 37; *see also* Omnibus SUF ¶¶ 23, 26.

Notably, MSC Cruises S.A. tried to find alternative places to dock within Havana; however, no alternatives were permitted by the Cuban Government. SUF ¶ 33-34. For example, when MSC Cruises S.A. performed its initial technical investigation into cruise operations to Cuba, MSC Cruises S.A. went so far as to offer to Aries (1) to construct an additional mooring point (known as a "dolphin") at Pier No. 1 of the Terminal to allow for more secure berthing of longer vessels, and (2) as a temporary solution until the mooring was constructed, erect a tent or similar enclosure at a commercial container terminal in Havana—located across the Havana bay from the Terminal—which had *no* buildings or structures to allow the Cuban Government to conduct the customs, immigration, medical screening and other cruise passenger processing that the Cuban Government (like all governments) mandates for any temporary visitors seeking to enter the country. *Id.* But the Cuban Government rejected both offers, and MSC Cruises S.A. was instructed to sail into the Terminal as it existed. SUF ¶ 35. MSC Cruises S.A. was even required to train the Cuban pilots how to maneuver MSC Cruises S.A.'s vessels in the harbor to dock at the Terminal safely because it was the only authorized way to sail to Havana.[6] *See* SUF ¶ 38 (citing

[6] Although HDC's theory of liability in this case is limited to MSC Cruises S.A's cruises that traveled between the United States and Cuba (*see* D.E. 104 ¶ 23 (alleging trafficking for

Ex. 43). Numerous other cruise lines also asked the Cuban Government to dock at other facilities in or nearby Havana, including the commercial container terminal piers, but the Cuban Government did not authorize any of their requests either. SUF ¶ 37. And, Plaintiff itself is not aware of any viable alternatives for MSC Cruises S.A. to have sailed to Havana, other than using Pier No. 1 at the Terminal. SUF ¶ 44.

Nor were there any *non-berthing* alternatives to conduct MSC Cruises S.A.'s lawful travel to Havana. *See* Omnibus Brief at II.D.iii. In addition to looking into other port facilities in Havana, MSC Cruises S.A. was told repeatedly by Aries and Cuban authorities that it was prohibited from anchoring offshore either outside or within the Havana harbor and carrying passengers ashore by tender launch boats. SUF ¶ 39; Omnibus SUF ¶ 23. But, even if MSC Cruises S.A. had been allowed to anchor offshore in Havana, MSC Cruises S.A.'s use of the Terminal ***still*** would have been "necessary" to its lawful travel. This is because the Cuban Government required all passengers disembarking in Havana to go through immigration, customs, and a medical screening, and these activities could ***only*** take place at the Terminal. SUF ¶ 40; Omnibus SUF ¶¶ 25.

Because there was no alternative place for cruise passengers lawfully traveling to Havana to embark and disembark in Havana, it is undisputed that using the Terminal was both incident and necessary to lawful travel and thus, as the Government told HDC, MSC Cruises S.A.'s use of the Terminal clearly fits within the lawful travel exclusion.

C. MSCC USA and MSCC SA Co. Also Did Not Commit Any Trafficking

Plaintiff has also named as defendants in this lawsuit two of MSC Cruises S.A.'s U.S.-based affiliates, MSCC USA and MSCC SA Co. These companies have not committed any trafficking and therefore are also entitled to summary judgment.

It is undisputed that neither of these entities was involved in cruise operations and that they did not directly sail to, operate, pay for, or otherwise use the Terminal. SUF ¶ 5-8. Neither entity "engaged in a commercial activity" and "benefit[ted] from" docking at the Terminal. Specifically, MSCC USA is a Delaware corporation with its office in Fort Lauderdale, Florida, and is a wholly owned subsidiary of MSC Cruises S.A. SUF ¶ 4. MSCC USA also had no involvement in MSC Cruises S.A.'s cruise operations. SUF ¶ 7. In fact, its only role was to provide support services

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cruises "from Miami to Cuba")), MSC Cruises S.A. was similarly required by the Cuban Government to use Pier No. 1 of the Terminal in Havana for its cruises which sailed to Havana prior to December 2018, which did not travel to the United States or involve the United States in any way. SUF ¶¶ 35-36.

within the United States to facilitate cruise tickets sold by MSC Cruises S.A. SUF ¶ 5. And MSCC USA did not benefit from any use of the Terminal either because MSCC USA did not earn *any* revenues from those ticket sales. SUF ¶ 6. MSCC USA's compensation was fixed and determined solely on a cost-plus basis by its parent company, MSC Cruises S.A., meaning it made no difference for MSCC USA's revenue whether zero, one, or thousands of cruise packages for voyages which sailed from the U.S. to Cuba were sold. SUF ¶¶ 5-6. And MSCC SA Co. is an inactive Florida corporation which has *never* had any employees, office and has *never* performed any business activities. SUF ¶ 8. Thus, MSCC SA Co. was also not involved in *any* activities relating to the cruises to Cuba or to the use of the Terminal. SUF ¶ 8. There simply are no facts demonstrating any direct "trafficking" by either of these entities.

Second, to the extent HDC attempts to construe its theory of liability to include that these entities trafficked *indirectly through* their parent company's (MSC Cruises S.A.) docking at the Terminal, this theory has never been pled. After HDC conducted discovery into the two American entities' roles in cruise operations, it sought leave to file a second amended complaint because the "Florida-based wholly-owned subsidiaries of MSC Cruises S.A. are taking the position that they did not 'operate' cruises to Cuba but rather their parent company, MSC Cruises SA, did." D.E. 99 at 1-2. In that operative complaint, HDC did not alter its threadbare allegations that all MSC Cruises defendants committed trafficking "by regularly embarking and disembarking their passengers" and by "participat[ing] in and profit[ing] from the communist Cuban Government's possession of the [Terminal]." D.E. 104 ¶¶ 23-24. Thus, it continued to limit its theory to a *direct* trafficking theory premised on operating cruises from the United States to Cuba and using the Terminal. MSC Cruises has set forth the undisputed evidence that the American entities did not participate in, profit from, or use the Terminal, and thus, cannot be held liable. To the extent HDC now attempts to argue that either of these American entities could be held liable for trafficking in an *indirect* way, HDC must be foreclosed from doing so at this late stage. *See Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) (holding that the plaintiff could not raise a new claim in response to motion for summary judgment that was not pled in the complaint); *O'Brien v. NCL (Bahamas) Ltd.*, 288 F. Supp. 3d 1302, 1306 n.3 (S.D. Fla. 2017) (same and collecting cases); *Pycsa Panama, S.A. v. Tensar Earth Techs., Inc.*, 625 F. Supp. 2d 1198, 1254 (S.D. Fla. 2008) ("A complaint cannot be amended merely by raising new facts and theories in plaintiffs' opposition papers, and hence such new allegations and claims should not be

considered in resolving the motion for summary judgment."). And in any event, such a theory fails because the use of the Terminal by MSC Cruises S.A. falls within the clear lawful travel exclusion to trafficking for the reasons set forth in the Omnibus Brief and above.

II. MSC Cruises Did Not Traffic Because HDC Cannot Establish Intent

Even if MSC Cruises S.A.'s sailings to Havana were somehow not within the lawful travel exclusion of Title III, MSC Cruises is nonetheless entitled to summary judgment because HDC cannot establish that MSC Cruises acted with the requisite *scienter* to prove "trafficking." HDC bears the burden of proving scienter, namely that MSC Cruises "*knowingly and intentionally* . . . use[d] . . . confiscated property . . . without the authorization of any United States national who holds a claim to the property." 22 U.S.C. §6023(13)(A) (emphasis added).[7] A plain reading of this scienter element confirms that this is a two-pronged, conjunctive standard: MSC Cruises must have both (1) known (or had reason to know) of the confiscated property and (2) *intentionally* used or otherwise engaged in trafficking activity on that confiscated property *while knowing* it was confiscated and without the authorization of the United States national who holds a claim to the confiscated property.

This scienter element does not merely require HDC to prove that MSC Cruises knowingly docked at the Terminal. Instead, a clear and plain reading of the statutory definition of "trafficking" requires that a defendant "must know that the property was confiscated by the Cuban government and intend that the property be the subject of their commercial behavior." *Glen v. Am. Airlines, Inc.*, No. 4:20-cv-482-A, 2020 WL 4464665, at *6 (N.D. Tex. Aug. 3, 2020), *vacated on other grounds*, 7 F.4th 331 (5th Cir. 2021). The statutory definition also requires that a defendant know that a "United States national . . . holds a claim to the property" and intentionally traffic in that property anyway "without [its] authorization." 22 U.S.C. §6023(13)(A); *see also Gonzalez v. Amazon.com, Inc.*, No. 19-23988-Civ-Scola, 2020 WL 1169125, at *2 (S.D. Fla. Mar. 11, 2020) *aff'd* 835 F. App'x 1011 (11th Cir. 2021) (plaintiff failed to state claim under the Act because the complaint "does not demonstrate that the Defendants <u>knew the property was confiscated by the Cuban government nor that it was owned by a United States citizen</u>") (emphasis added); *Glen v. Trip Advisor LLC*, No. 19-1809-LPS, 2021 WL 1200577, *10 (D. Del. Mar. 30, 2021). Most recently, the court in *Trip Advisor* found

[7] "The term 'knowingly' means with knowledge or having reason to know." 22 U.S.C. § 6023(9).

> persuasive the analyses of numerous other courts that have interpreted statutes having specific knowledge requirements as requiring knowledge of all the elements listed in the statute. Also persuasive are the recent decisions of other courts concerning the scienter requirement of the Helms-Burton Act in particular, which have reached the same conclusion as the Court does now.

Id. (emphasis added).

HDC's theory is that MSC Cruises had "constructive knowledge of Plaintiff's publicly available certified claim" since 1972 and/or "actual knowledge of Plaintiff's certified claim" since February 11, 2019 when Plaintiff sent MSC Cruises a letter referencing HDC's Certified Claim. *See* Sec. Am. Compl., D.E. 104 ¶¶ 25-26. It is undisputed that MSC Cruises first learned of HDC's existence and its Certified Claim on or about February 11, 2019, when it received a letter from HDC's attorney. SUF ¶ 45. However, both HDC's "constructive knowledge" and "actual knowledge" theories fail because no reasonable person reading the Certified Claim would know or have reason to know that the Cuban Government confiscated anything belonging to HDC that extended beyond 2004.

The Certified Claim certified the value of HDC's "concession and tangible assets," and states that "[t]he terms of the concession granted by the Cuban Government [to HDC] were to expire in the year 2004, at which time the corporation had to deliver the piers to the government in good state of preservation." *See* D.E. 104-1 at 3, 9. MSC Cruises S.A. operated cruises from Miami to Havana between December 10, 2018 and June 5, 2019. SUF ¶ 13. The Certified Claim would not give anyone reading it knowledge, or reason to know, that the Cuban Government confiscated any property interest belonging to HDC that extended—or would have extended—beyond 2004. There were no Court decisions or other guidance existing before 2018 or during the sailing period that provided, or even suggested, that using the Terminal in 2018 could constitute trafficking in light of the Certified Claim's statement that HDC's concession was to expire in 2004, at which time HDC was required to deliver the piers to the Cuban Government.

Moreover, HDC's February 11, 2019 letter similarly does not give MSC Cruises sufficient reason to know it was using confiscated property to which a U.S. national holds a claim. HDC's letter only stated that HDC asserted "rights" in the Terminal—but did not, for example, assert that it was the owner of the property at the Terminal—and asserted the Terminal "was taken without compensation by the government of the Republic of Cuba on November 21, 1960." The letter does not state *from whom* the property was taken and instead refers to the Certified Claim, which again states that HDC's rights to operate at the Terminal were set to end in 2004. Therefore, even

if MSC Cruises had actual knowledge, or had reason to know, of the existence of the *Certified Claim*, such knowledge falls well short of the *intent* required to prove the "knowingly and intentionally" element of a Title III claim: nothing in either HDC's February 11, 2019 letter or the Certified Claim gives MSC Cruises constructive or actual knowledge that in 2018 it was using confiscated property or that a U.S. national held a claim to confiscated property post-2004.

Indeed, this Court itself—when presented with this issue of first impression in the quartet of Havana Docks cases—issued three contradictory sets of orders over of a period of eight months. First, the Court ruled that the time-limited nature of HDC's concession did not affect whether trafficking could occur after 2004. *See Havana Docks Corp. v. Carnival Corp.*, No. 19-21724-CIV-BLOOM (S.D. Fla.) (D.E. 47). Then, the Court reconsidered and ruled that "because the Certified Claim was predicated on Plaintiff's time-limited leasehold interest, Havana Docks could not, as a matter of law, state a claim for relief under the Act based on trafficking that occurred after Plaintiff's leasehold interest expired." *See* D.E. 40 (granting motion to dismiss). Lastly, the Court reconsidered again and ruled that its initial ruling was correct. *See* D.E. 55.

Moreover, the undisputed evidence demonstrates that it was not just MSC Cruises or the Court in this case who might reasonably read the Certified Claim and believe HDC's property interest in the Terminal expired in 2004. HDC's own president, Mickael Behn, who is the great-grandson of HDC's founder, expressed to a shareholder that the Certified Claim is not "clear-cut" as to whether the "waterfront lease" "expired" or had "run out." SUF ¶ 46. And this is no historical sentiment either; Mr. Behn expressed this in 2018, around the same time MSC Cruises S.A. began sailing from the United States to Cuba and shortly before HDC sent its letter referring to the contents of the Certified Claim. *Id.* All of this shows that there simply is no factual or legal basis upon which to premise a determination that anyone could know or have reason to know from reading the Certified Claim that the Cuban Government confiscated anything belonging to HDC that extended beyond 2004.

But even if MSC Cruises could be shown to have known that the Certified Claim referenced a property interest that could have existed in 2018, HDC cannot demonstrate the second prong of the scienter element: HDC has no evidence that MSC Cruises intentionally docked at the property knowing that it was confiscated property. Plaintiff engaged in extensive and wide-ranging discovery that involved, among other things, MSC Cruises producing nearly 80,000 pages of documents, Plaintiff taking eight separate fact-witness depositions, and MSC Cruises answering

more than 35 interrogatories (excluding subparts) and 130 requests for admission. Yet even after all discovery, there is no evidence to which Plaintiff can point to establish that MSC Cruises "intentionally" trafficked in Plaintiff's "confiscated property," and thus summary judgment should be entered. *See, e.g.*, *Corpofin, C.A. v. Santaella*, No. 96-1679, 2001 WL 36086785, at *1 (S.D. Fla. Jan. 22, 2001) ("[S]ummary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.") (citing *Celotex*, 477 U.S. at 322).

As a result, HDC cannot demonstrate that MSC Cruises possessed the intent required to prove that MSC Cruises committed any trafficking. Summary judgment should be entered in favor of MSC Cruises.

CONCLUSION

For all of the reasons set forth above and for those set forth in the Omnibus Brief, MSC Cruises is entitled to summary judgment.

Dated: September 20, 2021

Respectfully submitted,

/s/ J. Douglas Baldridge

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021, MSC Cruises' Individual Motion for Summary Judgment and Incorporated Memorandum of Law was filed with the Clerk of Court using the Court's CM/ECF system, which will serve a Notice of Electronic Filing on all counsel of record.

/s/ J. Douglas Baldridge