

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JOHN S. SHEPARD FAMILY TRUST,
through John S. Shepard and Lawrence Jaffe,
as Co-Trustees,

Plaintiff,

v.

NH HOTELS USA, INC., NH HOTEL GROUP,
S.A., and JOLLY HOTELS U.S.A., INC.,

Defendants.

Civil Action No.: 19-cv-9026 (JSR)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

January 31, 2020

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Defendants NH Hotels USA, Inc. (“NH USA”), Jolly Hotels, USA, Inc. (“Jolly”) and NH Hotel Group, S.A. (“NH Spain”) (collectively, “Defendants,” and NH USA and Jolly together the “U.S. Defendants”) respectfully submit this Memorandum of Law in support of their motion to dismiss the Amended Civil Action Complaint, dated January 17, 2020 (“Compl.”) pursuant to Fed. R. Civ. P. 12(b)(1), (2), (5) and (6).¹

PRELIMINARY STATEMENT

Plaintiff brings its claim under Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act, 22 U.S.C. § 6082–6085, *et. seq.*, commonly known as the “Helms-Burton Act.” It should be dismissed in its entirety because the Court lacks personal jurisdiction over NH Spain and NH USA, the Amended Complaint fails to state a cause of action under the Helms-Burton Act and because Plaintiff lacks constitutional standing.

Although enacted in 1996, Title III of the Act was suspended since then by every presidential administration until May of 2019, *see* Compl. ¶ 4, and as far as Defendants are aware, this is the first lawsuit under the Helms-Burton Act to be brought in this district. With the suspension lifted Title III provides a limited right of action against individuals or entities that knowingly and intentionally “traffic” in (i.e., invest in, possess or use) property in Cuba that was “confiscated” (i.e., nationalized or otherwise expropriated) by the Cuban Government on or after January 1, 1959.²

¹ A copy of the Amended Complaint is attached as Exhibit A to the Declaration of David A. Shargel dated January 31, 2020 (“Shargel Decl.”).

² The word “confiscated” is used indiscriminately in the Helms-Burton Act to describe Cuban property expropriations ranging from agrarian reform initiatives to the nationalizations of industrial and commercial properties.

In response to the Helms-Burton Act the European Union (“EU”) promulgated a “blocking regulation,” Council Regulation (EC) No. 2271/96, asserting that the EU as a matter of sovereignty does not recognize the extraterritorial scope of the Helms-Burton Act. The regulation prohibits EU member state corporations such as NH Spain from complying with “any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex [the Helms-Burton Act] or from actions based thereon or resulting therefrom.” Council Regulation 2271/96, *Protecting Against the Effects of Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom*, 1996 O.J. (L 309) 1. In order to comply with the EU regulation, and at the same time protect its interests before the Court, NH Spain joins in this motion only as to the jurisdictional defenses presented.³

Those jurisdictional defenses include, among other things, the fact that NH Spain is incorporated in Spain and maintains its headquarters in Madrid, and thus is not “at home” in New York or the United States under the Supreme Court’s decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014). This is true regardless of any subsidiaries in the United States because their alleged presence here does not confer jurisdiction over the foreign parent. Jurisdiction is also lacking as to NH USA, which is a defunct entity that is similarly not at home in New York.

As to the Helms-Burton claim itself, Plaintiff, a Florida family trust, alleges that it holds a “certified claim” issued by the United States Foreign Claims Settlement Commission (“FCSC”) to “property in Cuba that was expropriated by the Fidel Castro regime in 1959, including a hotel which is in use today.” Compl. ¶ 2.

³ Nevertheless, if the U.S. Defendants prevail on their Rule 12(b)(6) and standing arguments, a dismissal of the Amended Complaint would apply to the identical claims asserted against NH Spain.

While the Amended Complaint provides scant details of the public records maintained by the Foreign Claims Settlement Commission, those records show that in late 1956, Julius J. (“Skip”) Shepard signed an agreement to manage a hotel to be built in Havana. He executed that agreement as president of a Cuban corporation he formed to operate the proposed hotel. Shepard’s Cuban company had the right to manage the hotel pursuant to a 20-year lease that was to begin on November 1, 1957, and end on October 31, 1977.⁴ The hotel was named the Capri and opened in late 1957. On January 1, 1959 the dictator Fulgencio Batista fled Cuba and U.S. tourism dried up overnight. Julius Shepard borrowed from a Cuban bank to keep the Hotel Capri open by pledging as security the shares in his Cuban company, which were forfeited when he defaulted on the loans. Insolvent, Shepard returned to the United States in mid-1960. On October 24, 1960, the Government of Cuba nationalized Shepard’s Cuban corporation pursuant to Resolution 3 of Law 851.⁵

The Amended Complaint confirms that Shepard had an ownership interest in an entity that briefly *operated* but never *owned* the Hotel Capri in Havana. *See* Compl. ¶ 20. An Amended Proposed Decision of the FCSC, attached as Exhibit 1 to the Amended Complaint, confirms this. *See* Compl. Ex. 1 at 2.⁶

⁴ *See* Shargel Decl. Ex. B.

⁵ This background information, derived from the files of the Foreign Claims Settlement Commission in Washington, DC, captioned *In the Matter of the Claim of Julius J. Shepard CU-3453*, is provided for the Court’s information and Defendants do not rely on it for purposes of their Rule 12(b)(6) motion.

⁶ In 1964 Congress amended the Foreign Claims Settlement Act of 1949 to establish a Cuba claims program. The legislation gave specific authorization to the Foreign Claims Settlement Commission (“FCSC” or “the Commission”) to determine “the amount and validity of claims by nationals of the United States against the Government of Cuba . . . for losses resulting from the nationalization, expropriation, intervention, or other taking of . . . property . . . owned . . . by nationals of the United States.” Cuban Claims Act, Pub. L. No. 88-666, 78 Stat. 1110 (1964) (*codified* as amended at 22 U.S.C. § 1643 (1964) *et seq.* Commission has conducted programs involving such countries as China, Ethiopia, Bulgaria, Hungary, Romania, Iran, Czechoslovakia, the Soviet Union, Vietnam,

Plaintiff's claim rests entirely on the allegation that, in 2014, Defendants, collectively and including the U.S. Defendants, "began conducting and operating a business using the Property as the NH Capri La Habana Hotel" and therefore are engaged in "trafficking" under Title III of Helms-Burton. *See* Compl. ¶ 29. The allegation fails to state a claim under Rule 12(b)(6) for at least two reasons.

First, Plaintiff is statutorily ineligible to seek Title III damages because the Amended Complaint concedes that Plaintiff acquired ownership of a claim to expropriated property in Cuba after March 12, 1996, the statutory cut-off for acquiring claims. Plaintiff admits that it acquired its purported Title III claim sometime in 2001. *See* Compl. ¶ 22.

Second, the Amended Complaint does not allege that Defendants ever trafficked in, profited from or infringed upon the property that Plaintiff's certified claim is based upon a lease to operate the Hotel Capri that expired in 1977. Recent Helms-Burton Act decisions that have granted motions to dismiss confirm that Plaintiff's certified claim cannot, as a matter of law, extend beyond the property interest that existed at the time of expropriation in Cuba. In this case, that property interest is a long-expired lease that Defendants are not alleged to have trafficked in.

The Amended Complaint should also be dismissed because Plaintiff lacks standing under Article III of the United States Constitution. Plaintiff has not met its burden of demonstrating an injury fairly traceable to the alleged conduct of the Defendants. There is simply no alleged or even inferable connection between Plaintiff's injury—the expropriation by the Government of Cuba of

and the German Democratic Republic—as well as Cuba. *See generally* U.S. For. Claims Settlement Comm'n, Annual Report, at 32-33 (1990). Each of the Commission's claims programs, apart from Cuba so far, has ended eventually in a bilateral lump-sum settlement agreement negotiated and implemented by the U.S. Department of State. *Pro rata* distributions were then made to claimants from the agreed lump sum tendered by the expropriating nation under the claims settlement.

a Cuban company’s lease—and the conduct alleged against the Defendants, which amounts to no more than that, in 2014, Defendants collectively began “conducting and operating a business using [the Hotel Capri].” Compl. ¶ 29. Absent a causal connection between conduct and injury a Plaintiff lacks standing.

Accordingly, Defendants respectfully request that the Amended Complaint be dismissed in its entirety.

STATEMENT OF FACTS

I. PLAINTIFF’S ALLEGATIONS

According to the Amended Complaint, “Julius J. Shepard owned a one hundred percent (100%) ownership interest in Compania Hotelera Shepard, S.A., which operated the Hotel Capri located in Havana, Cuba.” Compl. ¶ 20. “The hotel property was unlawfully confiscated by the Castro regime on or about January 1, 1959.” *Id.* Thereafter, Plaintiff alleges that “Julius J. Shepard pursued and was awarded Claim No. CU-0407 certified by the FCSC under the International Claims Settlement Act of 1949, as amended, dated April 30, 1969, for damages suffered as a result of the actions of the Government of Cuba.”⁷ Compl. ¶ 21.

Plaintiff attached the Amended Proposed Decision of the FCSC to the Complaint, but fails to include the original FCSC decision, which provides details of the factual basis of Plaintiff’s

⁷ Plaintiff alleges that Shepard was “awarded” a certified claim for “damages” (\$2,033,959.17) suffered as a result of the actions of the Government of Cuba. *See* Compl. ¶ 21. However, a certified claim is not an “award.” In its Amended Proposed Decision in the Shepard matter the FCSC explicitly stated that “[t]he statute [establishing the Cuba program at the FCSC] does not provide for the payment of claims against the Government of Cuba. The Commission is required to certify its findings to the Secretary of State for possible use in future negotiations with the Government of Cuba.” *See* Compl. Ex. 1. Far from making an “award,” the FCSC’s task was to assess Julius Shepard’s claim, as well as those of more than 6,000 other U.S. claimants seeking to receive a measure of compensation from a future bilateral U.S. – Cuba claims settlement negotiated by the U.S. Department of State.

certified claim. That decision, submitted with this motion, makes clear that the “property” giving rise to the certified claim was only a stock interest in Compania Hotelera Shepard, S.A. which, in turn, “operat[ed] the Hotel Capri de Havana, Havana, Cuba under a twenty-year lease dated December 1, 1957” Shargel Decl. Ex. B (FCSC Proposed Decision) at 5.⁸

The property interest certified by the FCSC constitutes “conclusive proof” of the nature and scope of Plaintiff’s property interest under Title III of the Helms-Burton Act. *See* 22 U.S.C. § 6083(a)(1) (“In any action brought under this subchapter, the court shall accept as conclusive proof of ownership of an interest in property a certification of a claim to ownership of *that interest* that has been made by the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act of 1949.”) (emphasis added). As described below, Title III plaintiffs are bound by the Commission’s decision as to the actual property interest expropriated by the Government of Cuba. Plaintiff is therefore statutorily estopped from asserting in a Title III action ownership of a claim to the hotel itself, as it does in the Amended Complaint. *See* Compl. ¶ 31 (“Defendants knowingly and intentionally continue to traffic in *the Property* to which Plaintiff owns the certified Claim . . . by operating the NH Capri La Habana Hotel and engaging in commercial transactions involving the use of *the Property*.”) (emphasis added). Plaintiff does not allege—because it cannot—that Defendants “trafficked” in Shepard’s sole certified property interest in Cuba: a lease that expired in 1977.

According to the Amended Complaint, Julius Shepard died on July 12, 2001, and pursuant to his will the certified claim then “passed to the Julius J. Shepard Revocable Trust, established May 24, 1991, and was then distributed to Plaintiff.” Compl. ¶ 22.

⁸ The Court may take judicial notice of FCSC decisions. *See Van Beneden v. Al-Sanusi*, 12 F. Supp. 3d 62, 71 (D.D.C. 2014) (taking judicial notice of FCSC decisions).

II. FACTS CONCERNING DEFENDANTS' JURISDICTIONAL DEFENSES

NH Spain is a corporation organized under the laws of Spain with its principal place of business in Madrid, Spain. *See* Shargel Decl. ¶ 4, Ex. C. There are 362 NH hotels in 29 countries around the world. *Id.* ¶ 5, Ex. D. Only one of those hotels is in the United States—the NH New York Jolly Madison Towers, which is owned by defendant Jolly. *Id.* ¶ 6, Exs. E, F.

NH Spain does not own, operate or manage, directly or indirectly, any other hotels in the United States and it does not have any branches, corporate offices or other facilities in New York or the United States. *Id.* ¶ 7. Further, NH Spain is not licensed to do business in New York, and it does not have a registered agent for service of process in New York or elsewhere in the United States. *Id.* ¶ 8.

NH USA is a dormant subsidiary of NH Spain. *Id.* ¶ 9. NH USA was originally incorporated under the laws of the State of Texas in 1998 under the name “Mexican Hotels Corporation,” and changed its name in 2001. *Id.* NH USA ceased business operations several years ago, in late 2014. The last meeting of its Board of Directors was held in 2014, and the last employees separated from the company in 2015. Since that time, NH USA has not owned or leased any property in the United States and it has not engaged in any business activities. *Id.* ¶ 10.

According to the Affidavit of Service, Plaintiff attempted to serve NH Spain by serving NH USA, via the New York Secretary of State, “as its agent.” *See Id.* ¶ 11. No attempt has been made to directly serve NH Spain.

ARGUMENT

I. NH SPAIN AND NH USA ARE NOT SUBJECT TO PERSONAL JURISDICTION IN NEW YORK

A. Legal Standard

“A plaintiff bears the burden of demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit.” *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010). However, “conclusory non-fact-specific jurisdictional allegations or a legal conclusion couched as a factual allegation will not establish a *prima facie* showing of jurisdiction.” *SPV OSUS Ltd. v. UBS AG*, 114 F. Supp. 3d 161, 167 (S.D.N.Y. 2015) (citation internal quotation marks and omitted).

B. There Is No Personal Jurisdiction Over NH Spain

1. There Is No General Jurisdiction

In *Daimler AG v. Bauman*, 571 U.S. 117 (2014), the Supreme Court held that general jurisdiction may be exercised over a defendant only in circumstances where the defendant’s affiliations with the State are “so continuous and systemic as to render it essentially at home in the forum State.” 571 U.S. 117, 139 (2014). “[O]ther than in an exceptional case, a corporation will be subject to all-purpose jurisdiction only in its place of incorporation and its principal place of business.” *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 103 (S.D.N.Y. 2015) (citing *Daimler*, 571 U.S. at 139 n.19) (internal quotation marks omitted). This is not an “exceptional case.”

Moreover, *Daimler* “expressly cast doubt on previous Supreme Court and New York Court of Appeals cases that permitted general jurisdiction on the basis that a foreign corporation was doing business through a local branch office in the forum.” *SPV OSUS*, 114 F. Supp. 3d at 168 (quoting *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014)). In *SPV OSUS*, this

Court held that defendants, foreign corporations incorporated in Switzerland and Luxembourg, with principal places of business in their corresponding countries of incorporation, did not have the continuous and systemic contacts that would render defendants “essentially at home” in New York so as to permit the exercise of general jurisdiction. *Id.* In *SPV OSUS* the Court noted that a defendant—who had offices in New York, conducted business in New York, had a registered agent in New York, and had been the subject of many lawsuits in New York courts—merely had contacts that amounted to “a substantial, continuous, and systemic course of business, which the Supreme Court expressly held to be insufficient in *Daimler*” to establish general jurisdiction. *Id.*

A similar lack of jurisdiction exists here, where Plaintiff acknowledges that NH Spain is a corporation organized under the laws of Spain with its headquarters in Madrid. *See* Compl. ¶ 16. Further, of the 362 NH hotels around the world, there is only one in the United States, which is not owned by NH Spain. *See* Shargel Decl. ¶ 6. Accordingly, under *Daimler*, NH Spain’s contacts with New York are not “so substantial and of such a nature as to render [it] at home” in New York. Therefore there is no general jurisdiction over NH Spain. *See SPV OSUS*, 114 F. Supp. 3d at 168.

Moreover, the existence of a subsidiary in the United States cannot serve as a basis for personal jurisdiction over NH Spain. *See Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 226 (2d Cir. 2014) (“Even assuming [the domestic subsidiaries’] New York contacts should be imputed to Çukurova, they do not shift the company's primary place of business (or place of incorporation) away from Turkey.”); *Hecklerco, LLC v. YuuZoo Corp., Ltd.*, 252 F. Supp. 3d 369, 375 (S.D.N.Y. 2017) (“Although YuuZoo may have subsidiaries in New York, that does not ‘render it essentially at home’ here.”).

2. There Is No Specific Jurisdiction

Plaintiff also asserts specific personal jurisdiction over NH Spain pursuant to NY CPLR § 302(1) and (4) by making “conclusory, non-fact-specific . . . allegations” that NH Spain transacts business in New York. *See SPV OSUS*, 114 F. Supp. 3d at 167. Nowhere does Plaintiff specify how NH Spain “transacts any business within the state [of New York] or contracts anywhere to supply goods or services in the state.” Nor does Plaintiff specify how NH Spain directly “owns, uses or possesses any real property situated within the state.”

Even if Plaintiff could meet the burden of pleading fact specific allegations, jurisdiction under CPLR 302(a)(1) requires “a substantial relationship between the transaction and the claim asserted.” *Deutsche Bank Sec., Inc. v. Montana Bd. Of Investments*, 7 N.Y.3d 65, 71 (2006). Specific jurisdiction under CPLR 302(a)(4) likewise “requires a relationship between the property and the cause of action sued upon.” *Lancaster v. Colonial Motor Freight Line, Inc.*, 581 N.Y.S.2d 283, 288 (N.Y. App. Div. 1991). Even if NH Spain’s extremely limited contacts with New York could support a basis for specific jurisdiction (they cannot), such contacts have no relationship to the conduct in Cuba that forms the basis of Plaintiff’s Helms-Burton claims. *See* Compl. ¶¶ 9, 29.

3. There Is No Jurisdiction Over NH Spain Pursuant to Fed. R. Civ. P. 4(k)(2)

Plaintiff also asserts personal jurisdiction over NH Spain pursuant to Fed. R. Civ. P. 4(k)(2). *See* Compl. ¶ 9. However, jurisdiction under Rule 4(k)(2) still must be “consistent with the United States Constitution and laws.” *Freeplay Music, LLC v. Nian Infosolutions Private Ltd.*, No. 16-CIV-5883-JGK-RWL, 2018 WL 3639929, at *12 (S.D.N.Y. July 10, 2018). Plaintiff must therefore meet the “heavy burden” set forth in *Daimler* where general jurisdiction will only be found in an “exceptional case.” *Id.* (citing *Daimler*, 571 U.S. at 139 n.19). Just as general jurisdiction is lacking in New York, NH Spain likewise does not have contacts “so continuous,

substantial, and of such a nature as to render [NH Spain] ‘at home’ in the United States.” *Id.* at *14; *see also Porina v. Marward Shipping Co. Ltd.*, 521 F.3d 122, 128 (2d Cir. 2008) (general jurisdiction under Rule 4(k)(2) requires courts to “examine a defendant’s contacts with the forum state over a period that is reasonable under the circumstances”).

Finally, there is no specific jurisdiction over NH Spain under Rule 4(k)(2) because the Cuba-based conduct alleged by Plaintiff does not arise out of or relate to NH Spain’s limited contacts with the United States. And even assuming Plaintiff was somehow injured in this country by NH Spain’s activity in Cuba, “the mere occurrence of plaintiffs’ injury in the United States does not satisfy minimum contacts for Rule 4(k)(2).” *TAGC Mgmt., LLC v. Lehman*, No. 10-CIV-06563-RJH, 2011 WL 3796350, at *6 (S.D.N.Y. Aug. 24, 2011). The alleged conduct of NH Spain in Cuba is in no way related to its contacts with the United States. Accordingly, there is no specific jurisdiction over NH Spain pursuant to Rule 4(K)(2).

4. Principles Of International Comity Should Be Considered In Assessing Jurisdiction Over NH Spain

The Due Process Clause imposes limits on the exercise of personal jurisdiction over foreign defendants. Even if a statutory requirement is met, “the exercise of personal jurisdiction must comport with constitutional due process principles.” *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 327 (2d Cir. 2016). In part those limits rest on comity concerns. The Supreme Court has emphasized that “[g]reat care and reserve should be exercised [by the Judicial Branch] when extending our notions of personal jurisdiction into the international field,” *Asahi Metal Indus. Co. v. Super Ct.*, 480 U.S. 102, 115 (1987) (internal quotation marks omitted), and it has underscored the importance of international comity in determining whether personal jurisdiction may be exercised over a foreign defendant. *See Daimler*, 571 U.S. at 142 (“Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of

courts in California would not accord with the “fair play and substantial justice” due process demands.”).

Comity concerns are especially important here, because the activation last year of Title III resulted in negative diplomatic reactions from NH Spain’s home country.⁹ As an element of its sovereign foreign policy Spain supports the participation of its corporate sector in Cuba’s economy.¹⁰ The statute’s marked deviation from established tenets international law was recognized by the U.S. Department of State upon its review of Senator Helms’ proposed legislation. In a submission to Congress the Department said:

“The LIBERTAD bill would be very difficult to defend under international law...The civil remedy created by the LIBERTAD bill would present an unprecedented extra-territorial application of U.S. law that flies in the face of important U.S. interests. Under international law and established state practice, there are widely-accepted limits on the jurisdictional authority of a state to ‘prescribe,’ i.e., to make its law applicable to the conduct of persons, as well as to the interests of persons in things. . . . Asserting jurisdiction over property located in a foreign country and expropriated in violation of international law would not readily meet the international law requirement of prescription because it is difficult to imagine how subsequent ‘trafficking’ in such property has a ‘substantial effect’ within the territory of the United States.”

⁹ As reported by the *New York Times*, “in his decision [to authorize Title III lawsuits], Trump brushed aside vigorous protests by European leaders who brought their objections to Washington. . . . Spain’s Foreign Minister met with [National Security Advisor] Mr. Bolton, and other European officials pressed Secretary of State Mike Pompeo, arguing that such a move would harm their businesses as well as the Cuban people.” Peter Baker, *To Pressure Cuba, Trump Plans to Lift Limits on American Lawsuits*, N.Y. TIMES, Apr. 16, 2019, <https://www.nytimes.com/2019/04/16/us/politics/trump-cuba-lawsuits.html>. Spain’s Minister of Industry, Commerce and Tourism was also quoted as saying that “[a]s long as there are measures by the United States that threaten the interests of Spanish companies, the government will support the Spanish companies.” *Madrid to Back Spanish Firms Operating in Cuba Against U.S. Lawsuits*, EFE, May 7, 2019, <https://www.efc.com/efe/english/world/madrid-to-back-spanish-firms-operating-in-cuba-against-us-lawsuits/50000262-396592>.

¹⁰ See, e.g., Republic of Spain and the Republic of Cuba On The Promotion and Reciprocal Protection Of Investments, Spain-Cuba., art. XI(2), May 27, 1994, I.C.S.I.D. “[e]ach Contracting Party shall, insofar as possible, promote investments in its territory by investors of the other Contracting Party and shall allow such investments in compliance with its legislation.”

Legal Considerations Regarding Title III of the Libertad Bill, 141 Cong. Rec. S15106-01 (1995) (Submission by the US Dep't of State).

The State Department's invocation of public international law in its reaction to the lawsuit provision of the Helms Burton Act is pertinent to the role of the Judicial Branch in construing and applying Title III. The U.S. Supreme Court has consistently held that public international law is part of the law of the United States, *see The Paquete Habana*, 175 U.S. 677, 700 (1900), and that "an Act of Congress ought never to be construed to violate the law of nations if any other construction remains," *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). Defendants respectfully request that the Court assess personal jurisdiction over NH Spain through a due process lens that takes into account international comity considerations grounded in international law.

C. There Is No Personal Jurisdiction Over NH USA

1. There Is No General Jurisdiction

As described above, NH USA is a corporation organized under Texas law that previously maintained its principal place of business in Texas. *See* Shargel Decl. ¶¶ 9, 10. However, NH USA ceased operations in 2014, and has not had a headquarters or administrative offices since then. *Id.* ¶ 10. NH USA has no employees or operations in the United States or elsewhere. *Id.* Under these circumstances, NH USA cannot be said to be "at home" in New York. Further, although the company is currently registered with the Secretary of State of New York, this fact, demonstrating only that the entity has not fully been formally dissolved, does not confer general jurisdiction over NH USA because "[a]fter *Daimler*, . . . the mere fact of being registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business." *Chatwal Hotels*, 90 F. Supp. 3d at 105.

Even if NH USA were still an active corporation, it would not be subject to general jurisdiction in New York because there are no allegations that would permit the exercise of general jurisdiction over NH USA under the strict requirements of *Daimler*.

2. There Is No Specific Jurisdiction

Although the Amended Complaint does not appear to invoke New York's long arm statute in support of specific jurisdiction over NH USA, it likewise would not apply because NH USA is a defunct entity that does not transact business or own property in New York. Accordingly, Plaintiff's claims against NH USA should be dismissed for lack of personal jurisdiction.

II. NH SPAIN HAS NOT BEEN PROPERLY SERVED

Under Fed. R. Civ. P. 12(b)(5), a party may move for dismissal of a complaint where the summons and complaint have not been properly served. *See George v. Professional Disposables Int'l, Inc.*, 221 F. Supp. 3d 428, 432 (S.D.N.Y. 2016). "Once a defendant challenges the sufficiency of service of process, the burden of proof is on the plaintiff to show the adequacy of service." *George*, 221 F. Supp. 3d at 432; *see also Khan v. Khan*, 360 Fed. Appx. 202, 203 (2d Cir. 2010). Additionally, where a defendant is organized under the laws of a country that is a signatory to the Hague Convention, service must be made in accordance with its requirements. *See In re Teligent, Inc.*, Nos. 01-12974 (SMB), 03-3577, 2004 WL 724945, at *3 (Bankr. S.D.N.Y. Mar. 30, 2004).

A. Service Has Not Been Made In Accordance With The Hague Convention

There is no dispute that Plaintiff did not attempt service through the Hague Convention. NH Spain is a Spanish company that is not registered to do business in New York and does not have a registered agent for service of process in New York. Service of process on NH Spain must therefore comply with the requirements of the Hague Convention. *See In re Teligent, Inc.*, 2004 WL 724945, at *3 (recognizing that Spain is a signatory to the Hague Convention and that service

of process upon a company incorporated in Spain must therefore meet the requirements of the Convention).

B. Plaintiff May Not Accomplish Service Upon NH Spain By Serving NH USA

Courts have recognized exceptions to service under the Hague Convention where (1) the plaintiff “alleges sufficient facts to make a prima facie showing that [a subsidiary] is the foreign parent’s general agent in New York or (2) is so dominated by the foreign parent as to be a ‘mere department’ of the parent.” *Int’l Cultural. Prop. Soc’y. v. Walter de Gruyter & Co.*, No. 99 Civ. 12329, 2000 WL 943319, at *1 (S.D.N.Y. July 6, 2000); *see also United Merchandise Wholesale, Inc. v. IFFCO, Inc.*, 51 F. Supp. 3d 249, 260 (E.D.N.Y. 2014). Neither exception applies here.

First, as to the agency exception, “[t]he mere presence of a subsidiary in New York does not establish the parent’s presence in the state.” *J.L.B. Equities, Inc. v. Ocwen Fin. Corp.*, 131 F. Supp. 2d 544, 549 (S.D.N.Y. 2001). Rather, to accomplish service on a foreign parent under an agency theory, “the plaintiff must show that the subsidiary does all the business which the parent corporation could do were it here by its own officials.” *Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 184 (2d Cir. 1998). Stated another way, the subsidiary’s activities must be of “meaningful importance” to the parent company. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, No. 12 CIV. 8435 AJN, 2013 WL 4647194, at *10 (S.D.N.Y. Aug. 29, 2013). To make this determination, courts look to “whether the parent would have to enter the market directly if the subsidiary was absent because the market is too important to the parent’s welfare.” *Meteoro Amusement Corp. v. Six Flags*, 267 F. Supp. 2d 263, 270 (N.D.N.Y. 2003).

Here, even after Plaintiff was made aware of this issue in pre-motion correspondence and had a subsequent opportunity to amend its pleading, the Amended Complaint does not contain a single allegation supporting the notion that service upon NH Spain may be made upon NH USA as its agent. Instead, the Amended Complaint contains only the conclusory allegation that “all three

Defendants maintain their principal office at the same address, share the same officers, directors, employees and/or agents.” Compl. ¶ 18. Leaving aside the inaccuracy of this allegation, it is not sufficient to render proper service on NH USA, as NH Spain’s agent.

To the contrary, given that there is only one NH-branded hotel in the United States, which is not owned by NH USA in any event, the activities of NH USA cannot be described as “meaningfully important” to NH Spain when compared to the remaining 361 hotels around the world. Therefore it cannot be the agent of NH Spain for the purpose of qualifying for the agency exception to service of process under the Hague Convention.¹¹

Second, NH USA cannot be considered a “mere department” of NH Spain. A subsidiary is a “mere department” of its foreign parent for the purpose of service of process only if the following factors are established: “(1) common ownership; (2) the subsidiary’s financial dependency on the parent; (3) the degree to which the parent corporation interferes in the selection and assignment of the subsidiary’s executive personnel and fails to observe corporate formalities; and (4) the degree of control exercised by the parent.” *C3 Media & Mktg. Grp. V. Firstgate Internet, Inc.*, 419 F. Supp. 2d 419 (S.D.N.Y. 2005) (internal quotation marks omitted).

Plaintiff does not make any allegations in its Complaint that would support a finding that NH USA is a “mere department” of NH Spain.¹² Furthermore, while there may be common ownership between Defendants, because NH USA is a wholly-owned indirect subsidiary of NH Spain, allegations of common ownership alone are not sufficient to establish that a subsidiary is the “mere department” of its foreign parent. *See Xerox State & Local Solutions, Inc. v. Xchanging*

¹¹ While Plaintiff does not allege that service upon Jolly Hotels USA, Inc., as NH Spain’s agent, would be proper, the result would be the same had Plaintiff attempted to serve Jolly under an agency theory.

¹² Nor are there any allegations that Jolly is a “mere department” of NH Spain for purposes of service.

Solutions (USA), Inc., No. 13 Civ. 3472, 2013 WL 4050747, at *1 (S.D.N.Y. Aug. 6, 2013) (holding although a subsidiary was wholly-owned by the parent, the “mere department” test was not met as the remaining three factors had not been established).

Nor can Plaintiff satisfy the remaining elements of the “mere department” analysis. NH USA has been dormant since at least 2014 and, with no operations, is not financially dependent on NH Spain. NH USA also has no employees, so Plaintiff cannot establish that NH Spain interferes in the selection and assignment of NH USA executive personnel. Furthermore, given that it has been dormant for years, NH USA has no operations that can be controlled by NH Spain. Absent these additional elements, there can be no finding that NH USA is a “mere department” of NH Spain. *See Xerox*, 2013 WL 4050747, at *1; *see also Kaufman v. Luzurn*, No. 95 Civ. 3316 (RPP), 1996 WL 79322, at *3 (S.D.N.Y. Feb. 23, 1996) (stating it would be persuasive evidence that a subsidiary was not a mere department of its parent if the subsidiary were defunct).

Because NH USA is neither an agent nor a mere department of NH Spain, service of process may not be properly made upon it via NH USA.

III. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Legal Standard

A claim must be plausible on its face if it is to survive a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Conclusory statements, or “formalistic recitation[s] of the elements of a cause of action,” will not suffice to survive a Rule 12(b)(6) motion. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “Furthermore, where a conclusory allegation in the complaint is contradicted by a document attached to the complaint, the document controls and the allegation is not accepted as true.” *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 146–47 (2d Cir. 2011).

B. Plaintiff’s Action Is Precluded Because It Acquired The Certified Claim After Enactment Of Helms-Burton Statute

Plaintiff alleges that Julius Shepard’s claim “passed” to a revocable trust after his death in 2001, and then to Plaintiff. Compl. ¶ 22. By that allegation Plaintiff concedes that it cannot meet the Helms-Burton Act’s strict requirements for the timely acquisition of a Title III-based claim.

The Act provides that “[i]n the case of property confiscated before March 12, 1996 [the date of the Act’s enactment], a United States national *may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996.*” 22 U.S.C. § 6082(a)(4)(B) (emphasis added).¹³ Congress was clear that the purpose of this provision was to ensure that “the U.S. national must have owned the claim to a

¹³ The word “acquire” means “[t]o gain possession or control of; to get or obtain,” Acquire Definition, *Black’s Law Dictionary* (11th ed. 2019), available at Westlaw; “to get as one’s own” or “to come into possession or control of . . .” *Berrylane Trading, Inc. v. Transp. Ins. Co.*, 754 F. App’x 370, 376 (6th Cir. 2018). *See also* “ownership,” defined as “[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others.” Ownership Definition, *Black’s Law Dictionary* (11th ed. 2019), available at Westlaw.

property before the date of enactment in order bring an action under Title III.” H.R. Rep. 104-202, at 40, 59 (1996).

Here, Plaintiff acquired its claim approximately five years after Title III’s unequivocal cut-off date, alleging that “Julius J. Shepard died on July 12, 2001. Pursuant to [his] last will and testament, the Claim passed to the Julius J. Shepard Revocable Trust established May 24, 1991 and then was distributed to the Plaintiff.” Compl. ¶ 22. However, an expectancy does not constitute an ownership interest. “Before the decedent’s death, a potential heir has no property interest but merely an ‘expectancy’ (an inchoate interest) in the decedent’s intestate estate.” Restatement (Third) of Property § 2.1 (Am Law Inst. 1999). Under Florida law, “[w]hile a descendant may expect or hope to inherit, neither a present nor future interest in property actually exists in the absence of a conveyance.” *Layne v. Layne*, 74 So. 3d 161, 164 (Fla. 1st DCA 2011) (quoting *Diaz v. Rood*, 851 So. 2d 843, 845 (Fla. 2nd DCA 2003)). It is only upon death that an interest in the decedent’s property is converted to the decedent’s heirs or devisees. *See* FLA. STAT. § 3.1 (1999) (“A will does not become operative until the testator’s death to transfer property.”)

Thus, Plaintiff is simply not within the limited class of persons and entities authorized to bring suit under Title III of the Helms-Burton Act, because, by its own admission, it did not acquire ownership of a claim to a confiscated Cuban property before March 12, 1996.

C. The Complaint Fails To Plead That Defendants Trafficked In Property In Which Plaintiff Had An Ownership Interest As Certified By The U.S. Foreign Claims Settlement Commission

Plaintiff’s Helms-Burton claim also fails because the property interest it allegedly owned—a 20-year lease that expired decades ago—is not the property in which Defendants are alleged to have trafficked. Title III is clear that “any person that traffics *in property which was confiscated by the Cuban Government* . . . shall be liable to any United States national who owns the claim to *such property*.” 22 U.S.C. § 6082(a)(1)(A) (emphasis added). To be liable for trafficking under

Title III a defendant must have trafficked in a property interest in Cuba that was actually owned by the plaintiff. *See Glen v. Club Méditerranée S.A.*, 365 F. Supp. 2d 1263, 1269 (S.D. Fla. 2005), *aff'd*, 450 F.3d 1251 (11th Cir. 2006) (observing that “Title III permits any U.S. national ‘who owns a claim to *such [confiscated] property* for money damages’ to sue those who traffic in *such property*”) (quoting 22 U.S.C. § 6082(a)(1)(A)) (brackets in original) (emphasis added).

Certifications by the Foreign Claims Settlement Commission are tied to specific property interests and courts in Title III actions are required to “accept as *conclusive proof* of ownership of an interest in property a certification of a claim to ownership of *that interest* that has been made by the . . . Commission” 22 U.S.C. § 6083(a)(1) (emphasis added). Plaintiff’s claim can extend only so far as its property interest did at the time of the Cuban Government’s expropriation as that property interest was certified by the Commission. In this case, Plaintiff’s property interest terminated in 1977 when the lease belonging to Shepard’s Cuban company expired.

Recent Title III decisions involving leasehold interests are squarely on point. In *Havana Docks Corp. v. MSC Cruises SA Co.*, No. 19-CV-23588, 2020 WL 59637, at *1 (S.D. Fla. Jan. 6, 2020), the plaintiff alleged that defendant, a cruise company disembarking passengers, trafficked in docks on Havana’s waterfront to which plaintiff held a certified claim. Following an examination of the language of Title III, the court held that, “if the [property] interest at issue is a leasehold, following the plain language of the statute, *a person would have to traffic in the leasehold in order for that person to be liable to the owner of the claim to the leasehold.*” *Id.* at 3.

The court went on to say:

Any other interpretation of the Act would require the Court to ignore the definition of ‘property,’ and the qualifying words ‘such’ and ‘that’ out of the liability imposing language and conclusiveness of certified claims language, respectively—which would run afoul of basic canons of statutory interpretation. As a result,

Plaintiff's claim can only extend as far as its property interest at the time of the Cuban Government's wrongful confiscation.

Id.

In *Havana Docks*, the court found—based upon the allegations of the complaint and the “conclusive proof” afforded by Title III to claims certified by the FCSC—that plaintiff's interest in the subject property was limited to a leasehold interest that expired in 2004. *See id.* at *2; *see also id.* at 3 (“[T]he property interest in this case is time-limited by its terms, and the claim that Plaintiff owns is a claim covering the time-limited interest, which expired in 2004.”). Defendants’ alleged “trafficking” did not begin until 2018. The court therefore dismissed the action, concluding that “Defendants could only ‘traffic’ in Plaintiff’s confiscated property if they undertook one of the prohibited activities before Plaintiff’s interest in the property expired. Otherwise Defendants are ‘trafficking’ in confiscated property for which someone else would properly own a claim.” *Id.* at *4. The same result was reached in *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, No. 19-CV-23591, 2020 WL 70988, at *2 (S.D. Fla. Jan. 7, 2020) (adopting the reasoning of *MSC Cruises* and finding that “Plaintiff fails to state a claim as a matter of law[] where the allegedly unlawful conduct took place after Plaintiff’s concession in the subject property expired”).

The rationale of both *Havana Docks* decisions applies with equal force here. Plaintiff's leasehold interest in the Hotel Capri expired thirty-seven years before Defendants were alleged to have trafficked in the property “beginning in January, 2014.” Compl. ¶ 29 Plaintiff cannot therefore state a claim upon which relief can be granted.

IV. PLAINTIFF LACKS CONSTITUTIONAL STANDING

This case should also be dismissed under Fed. R. Civ. P. 12(b)(1) because Plaintiff lacks standing under Article III of the U.S. Constitution. A plaintiff bears the burden of proving the three elements of standing: (1) an injury in fact; (2) that is fairly traceable to the challenged conduct of

the defendant; and (3) that is likely to be redressed by a favorable judicial decision. Failure to plead any one of the three elements of standing deprives a court of subject matter jurisdiction to hear the suit. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103–04 (1998); *Disability Advocates, Inc. v. New York Coalition for Quality Living, Inc.* 675 F.3d 149, 157 (2d Cir. 2012). Because Article III standing is a constitutional limitation on the jurisdiction of federal courts, “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016).

In this case, Plaintiff fails to meet the second “fairly traceable” prong of the Article III standing test because it has not pleaded any connection between an injury and Defendants’ alleged actions. Instead of alleging an injury that is “fairly traceable” to Defendants, Plaintiff asserts variously that it was injured when the Hotel Capri “was unlawfully confiscated by the Castro regime” in 1959. *See* Compl. ¶ 20; *see also id.* ¶ 23 (“ . . . on or about January 1, 1959, the Government [of Cuba] required large numbers of military troops to occupy and stay at the [Hotel Capri] without any compensation to plaintiff.”); *id.* ¶ 2 (“ . . . property was expropriated by the Fidel Castro Regime in 1959, including a hotel which is in use today”); *id.* ¶ 23 (“The communist Cuban Government confiscated and seized ownership and control of [the Hotel Capri.]”). At every juncture it is the Cuban Government that is alleged to have caused the unspecified injury for which Plaintiff seeks millions of dollars in damages from the Defendants.¹⁴ Plaintiff does not allege that any activity in Cuba undertaken by any Defendant has harmed it. Absent such a causal connection

¹⁴ The punitive nature of the damages sought by Plaintiff is remarkable. In addition to the amount of the certified claim, \$2,033,959.17, Plaintiff seeks treble damages plus pre-judgment interest running from July 1, 1959, despite its recognition that no defendant had any purported involvement in the Hotel Capri until 2014.

between an action and an injury, Plaintiff's case fails as a matter of law. *See Lujan*, 504 U.S. at 560.

Under no principle of law or equity should Defendants be compelled to compensate Plaintiff for the acts of third parties, such as a Cuban military unit and a foreign government. The Helms-Burton Act's cause of action may only be construed justly if it is read in conformity with Article III of the Constitution to provide a cause of action solely to those who allege standing to sue based on an articulated and demonstrated causal connection between a defendant's conduct and a plaintiff's injury. *See United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."). Defendants respectfully submit the Court should dismiss the Complaint in this case pursuant to Rule 12(b)(1) for lack of standing and therefore lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their Motion to dismiss the Amended Complaint with prejudice.

Dated: New York, New York
January 31, 2020

Respectfully submitted,

/s/ Robert L. Muse_____

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