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

Case No. 19-cv-23965-MGC

JOSE RAMON LÓPEZ REGUEIRO

plaintiff

v.

AMERICAN AIRLINES INC. and
LATAM AIRLINES GROUP, S.A.,

defendants.
_____/

LÓPEZ REGUEIRO'S OPPOSITION TO
LATAM AIRLINES GROUP, S.A.'S
MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

In its Motion to Dismiss [D.E. 30] (the "Motion" or "MTD"), defendant LATAM Airlines Group, S.A., ("LATAM") argues (1) that this Court does not have personal jurisdiction over it, (2) that López Regueiro failed to state a claim under Title III of the Helms Burton Act ("Title III" of "the Act"), and that (3) Title III is unconstitutional on its face. These arguments have no merit, should be rejected, and the Motion should be denied.

First, the complaint alleges that defendant "operat[es], conduct[s], engag[es] in, [and] carr[ies] on a business venture in [Florida] [and] ha[s] an office . . . in [Florida]," Fla. Stat. § 48.193(1)(a)(1), and "commit[ed] a tortious act within [Florida]. Fla. Stat. § 49.193(1)(a)(1)-(2) (2019). Although defendant concedes that López Regueiro adequately alleged a *prima facie* case for specific personal jurisdiction under Florida's long-arm statute, it argues that this case does not arise from or relate to any of the alleged acts, because its activities in Florida do not now include direct passenger or cargo service to and from Jose Martí International Airport (the "Airport") in Havana, Cuba. MTD at 5-6. This argument is ill-founded. Defendant sells Floridians flights to or from the Airport through an interactive website where Floridians can research, purchase, and pay for those flights.[1] Declaration of Maria Paula Alvarez ("Alvarez Decl."), attached as **Exhibit A**. In addition to its point-of-sale website, which would alone support personal jurisdiction, the significant contacts with Florida, also set out in defendant's Exhibit A, leave no doubt that personal jurisdiction is proper.

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[1] On defendant's website, Floridians can book and pay for flights to and from the Airport with a connection. Moreover, defendant's website trumpets Havana as a destination and gives suggested trip plans for getting there. *See* Declaration of Maria Paula Alvarez ("Alvarez Decl."), attached as Exhibit A, at ¶¶ 3-6. We will learn in discovery whether defendant took steps to sanitize its website in response to this case being filed. In any event, the Court should take judicial notice of defendant's website cited to in Exhibit A. *See* Fed. R. Evid. 201(d) ("The court may take judicial notice at any stage of the proceeding."); *Goplin v. WeConnect, Inc.*, 893 F.3d 488, 491 (7th Cir. 2018) ("[T]he district court did not violate the rules of judicial notice by reviewing WeConnect's website . . . . We note too that the statements at issue are WeConnect's own assertions, not potentially unfamiliar information posted on third-party websites."); *Doron Precision Sys., Inc. v. FAAC, Inc.,* 423 F. Supp. 2d 173, 179 n. 8 (S.D.N.Y. 2006) ("For purposes of a 12(b)(6) motion to dismiss, a court may take judicial notice of information publicly announced on a party's website, as long as the website's authenticity is not in dispute and 'it is capable of accurate and ready determination.'") (quoting Fed. R. Evid. 201(b)).

Second, defendant argues that the complaint failed to state a claim under Title III for three reasons, none of which has any merit. Defendant first argues that López Regueiro failed to state a claim because he failed to allege that he was a U.S. citizen when the Airport was confiscated or, alternatively, on March 12, 1996. MTD at 7. But Title III doesn't require this, only that he be a "U.S. national" when the complaint was filed, which he was and is.

Defendant next argues that it can't figure out whether the property at issue relates to the Airport or to the shares of the corporation that owned the Airport. MTD at 8. This is no basis for dismissal of a title III claim based on defendant's trafficking of the Airport, and the fact the airport was confiscated from a Cuban corporation owned by López Regueiro's father is irrelevant. *See* Comp ¶ 15, 26, 28. Title III defines "property" to include future or contingent interests in property, and López Regueiro owns a *claim* to the Airport that he acquired through inheritance, even if it was stolen from a corporation owned by his father. *See Garcia-Bengochea v. Carnival Corp.*, Case No. 19-cv-21725-JLK at ECF No. 41.

Lastly, defendant argues that the complaint failed to allege that defendant "knowingly and intentionally" engaged in trafficking. MTD at 9. This is incorrect. The "knowing and intentional" language is part of the definition of "trafficking." Thus, when the complaint alleged that defendant has trafficked in the Airport, it necessarily alleged that the trafficking was "knowing and intentional." Moreover, this standard requires no more than awareness that the Airport stands on stolen property, a fact of which defendant was on notice as a matter of law.[2]

Third, defendant argues that Title III is unconstitutional on its face, arguing that it is void for vagueness and the damages it provides for trafficking are excessive. MTD at 11-15. The void-for-vagueness doctrine cannot apply because Title III's definition of "traffics"

[2]Only in a defendant's fantasy would a Title III claim require some sort of bad intent akin to an intentional tort. Title III is a strict liability statute with limited, enumerated, statutory defenses. To adequately allege that a trafficker acted "knowingly and intentionally" merely requires alleging volitional, not accidental or unintended, trafficking. The latter is conceivable, as in a case where a business bought and resold vinegar without knowing it was made in Cuba in a factory on confiscated property. This Court may (and should) take judicial notice of the fact that the Castro regime confiscated all real property in Cuba, including López Regueiro's property. A defendant transporting cargo and passengers to that property in Cuba is on notice that the Airport stands on confiscated property. This is all the Act requires.

provides a clear and objective method for deciding if a person has trafficked. Defendant's real quibble is that Title III reaches too many traffickers, but that does not make it vague, let alone impermissibly so. As for "excessive damages," Title III's damages provision is expressly tied to the value of trafficked property, which makes it inherently proportionate to the unlawful act of trafficking in that property. Title III's treble damages provision also is proportionate, and neither grossly excessive nor unjustified when a defendant continues to traffic after being put on notice of a true owner's intent to sue, as the Act requires. López Regueiro gave defendant express notice of his intent to sue, which gave defendant the choice and chance to avoid treble damages by ceasing its trafficking.

At bottom, defendant's Motion is a grab-bag of baseless assumptions, arguments and theories, many of which already have been rejected by other courts of this District. As more fully demonstrated below, this Court should deny the Motion and this case should proceed.

LEGAL STANDARD

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

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

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

DEFENDANT'S MOTION SHOULD BE DENIED

Title III provides that "any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns a claim to such property for money damages . . . ." 28 U.S.C. § 6082(a)(1)(A). López Regueiro pleads, as he must, that (1) he is a United States national (2) who owns a claim to property that was (3) confiscated by the Cuban government on or after January 1, 1959, and (4) trafficked by the defendants within the last two years. Complaint ("Comp.") [D.E. 1] ¶¶ 2, 11-15, 16-19. Because López Regueiro has stated a claim on which relief may be granted, the Court should deny the Motion, so this case may proceed.

I. THIS COURT HAS PERSONAL JURISDICTION OVER LATAM

To survive a motion to dismiss, a plaintiff must plead sufficient facts to establish a prima facie case of jurisdiction over the non-resident defendant. *Smith v. Trans–Siberian Orchestra*, 689 F.Supp.2d 1310, 1313 (M.D. Fla. 2010) (citing *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1214 n. 6 (11th Cir. 1999)); *Virgin Health Corp. v. Virgin Enters*. Ltd., 393 Fed. Appx. 623, 625 (11th Cir. 2010). The court must accept the facts alleged in a complaint as true, to the extent they are uncontroverted by a defendant's affidavits. *Consol. Dev. Corp. v. Sherritt*, Inc., 216 F.3d 1286, 1291 (11th Cir. 2000). If a defendant is able to refute allegations of personal jurisdiction through affidavits or other competent evidence, the plaintiff must substantiate its jurisdictional allegations through affidavits, testimony, or other evidence of its own. *Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1249 (11th Cir. 2000).

Defendant filed an affidavit that is insufficient to support its challenges to personal jurisdiction, including due process. *See Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006). Defendant concedes that it has extensive contacts with Florida. Defendant's Decl. at ¶ 6-8. Its only rebuttal statement, that it "has not conducted, and currently does not conduct, any business or operations in or from the State of Florida that involve either passenger travel or cargo transportation to or from [the Airport]" is too cute by half. *Id.* at ¶ 5. As Exhibit A shows, defendant has operated and currently operates an interactive website accessible to Florida residents, through which they can book and pay for flights to and from the Airport with a connection. Moreover, defendant's website trumpets Havana as a destination and gives suggested trip plans for getting there. *See* Alvarez Decl. at ¶¶ 3,4. We will learn in discovery whether defendant took steps to sanitize its website in response to this case being filed. In any event, defendant did not carry its threshold burden of rebutting the complaint's allegations, and its due process challenge was not activated and should not be reached. Even if it were, that challenge would lack merit.

"Florida's long-arm statute permits jurisdiction over non-residents under two circumstances. First, a non-resident submits itself to Florida's specific jurisdiction by performing any of the acts enumerated by the long-arm statute. Fla. Stat. §§ 48.193(1)(a)(1)–(9). Second, a non-resident submits itself to Florida's general jurisdiction by 'engag[ing] in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise . . . whether or not the [plaintiff's] claim arises from that activity.' Fla. Stat. § 48.193(2)." *Hinckle v. Continental Motors, Inc.*, 268 F. Supp. 3d 1312, 1322 (M.D. Fla. 2017). Here, López Regueiro has adequately alleged that the Court has specific personal jurisdiction over LATAM.

A. LATAM Is Facially Subject to Specific Jurisdiction Because It Performed the Acts Set Out in Fla. Stat. §§ 48.193(1)(a)(1) and (2)

Defendant does not (and cannot) argue that it is not "operating, conducting, engaging in, or carrying on a business venture in [Florida] or has an office . . . in [Florida]." Fla. Stat. § 48.193(1)(a)(1). Nor does it argue that it did not "commit a tortious act within [Florida]. Fla. Stat. § 49.193(1)(a)(2). Instead, defendant argues only that López Regueiro "fails to allege—and cannot plausibly allege—that his claim arises from LATAM's Florida-based activities . . . ." MTD at 6 (emphasis added). This assertion misstates the law of specific

jurisdiction, which requires that a claim arise from ***or relate to*** a defendant's contacts with the forum. *E.g., SEC v. Carrillo*, 115 F.3d 1540, 1544-45 (11th Cir. 1997) It is beyond dispute that López Regueiro's claim relates to defendant's contacts with Florida.

1. The Complaint Adequately Alleged that LATAM Is Transacting Business Within Florida and This District

"In order to establish that a defendant is 'carrying on business' for the purposes of the Long–Arm statute, the activities of the defendant must be considered collectively and show a general course of business activity in the state for pecuniary benefit." *Pathman v. Grey Flannel Auctions, Inc.*, 741 F. Supp. 2d 1318, 1323 (S.D. Fla. 2010) (quoting *Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1249 (11th Cir.2000)). While isolated activity, such as maintaining a merely informational, non-interactive website accessible in Florida may be insufficient, "[a]ctive internet solicitation may subject a defendant to personal jurisdiction." *Pathman*, 741 F. Supp. 2d at 1324; *accord Renaissance Health Pub., LLC v. Resveratrol Partners, LLC*, 982 So. 2d 739, 742 (Fla. 4th DCA 2008) (sales made to Florida residents through interactive websites were "sufficient to subject defendants to jurisdiction."). Here, as the defendant's declaration details, defendant has significant, continuous, and systematic contacts with Florida and this District. *See* Defendant's Decl. at ¶ 2-3 (admitting that defendant is registered to, and does, conduct business in Florida, maintains offices and other facilities in Florida, and operates cargo and passenger flights in Florida). In addition, defendant offers sales of flights to Florida residents through its interactive website, through which passengers can book and pay for flights into and out of the Airport. *See* Alvarez Decl. at ¶ 3.

Courts in this District routinely apply the sliding scale first identified by the court in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) to determine the sufficiency of a defendant's internet contacts with Florida. *See, e.g., Pathman*, 741 F. Supp. 2d at 1325; *Foreign Imported Prods. & Pub., Inc. v. Grupo Indus. Hotelero, S.A.*, 2008 WL 4724495, at *7 (S.D. Fla. 2008); *Hartoy Inc. v. Thompson*, 2003 WL 21468079, at *4 (S.D. Fla. 2003). The *Zippo* sliding scale describes the minimum contacts that support personal jurisdiction:

> At one end of the spectrum are situations where a defendant clearly does business over the internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the internet, personal jurisdiction is proper. At the opposite

> end are situations where a defendant has simply posted information on an internet website which is accessible to users in a foreign jurisdiction. A passive website that does little more than make information available to those who are interested in it is not grounds for exercise [of] personal jurisdiction. The middle ground is occupied by interactive website where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.

952 F. Supp. at 1124.

Defendant's Florida contacts are at the "end of the spectrum" where jurisdiction exists because defendant "clearly does business over the internet." *Zippo*, 952 F. Supp. at 1124. Defendant's business is based on the sale of flights, including over the internet. "[C]learly[,] [defendant] does business over the internet" and enters into "contracts with residents of [Florida] that involve the knowing and repeated transmission of computer files over the internet . . . ." *Id*. Accordingly, "personal jurisdiction is proper." *Id.*

2. The Complaint Adequately Alleged that LATAM Committed a Tort in Florida and in This District

Under Fla. Stat. § 48.193(1)(a)(2), "a person, whether or not a citizen or resident of this state, who personally or through an agent" "commit[s] a tortious act within this state" "submits himself or herself . . . to the jurisdiction of the courts of this state . . . ." Fla. Stat. § 48.193(1)(a)(2). "Under Florida law, a nonresident defendant commits 'a tortious act within Florida' when he commits an act *outside* the state that causes *injury within Florida*." *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1353 (11th Cir. 2013) (quoting *Licciardello v. Lovelady*, 544 F.3d 1280, 1283 (11th Cir. 2008)) (emphasis in original). In *Mosseri*, the court held that "a trademark infringement on an Internet website causes injury and occurs in Florida by virtue of the website's accessibility in Florida." *Mosseri*, 736 F.3d at 1254 (citing *Lovelady*, 544 F.3d at 1283).[3]

The *Mosseri* court concluded that "we need not decide whether trademark injury necessarily occurs where the owner of the mark resides, as the Florida district courts have held, *because in this case the alleged infringement clearly also occurred in Florida by virtue of the*

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

website's accessibility in Florida." *Mosseri*, 736 F.3d at 1254 (citing *Lovelady*, 544 F.3d at 1283) (emphasis in original). In other words, the injury occurred in Florida not only because the plaintiff resided in Florida, but also because the website through which the defendant committed the tort was accessible in Florida. This case is no different—not only does López Regueiro reside in Florida, but the website through which defendant tortuously trafficked in the Property was accessible in Florida. Thus, this Court has personal jurisdiction over defendant under Fla. Stat. § 48.193(1)(a)(2).

Under Florida's long-arm statute, specific jurisdiction exists over a defendant "'where the cause of action arises from the doing of business in Florida . . . .'" *Nicolet, Inc. v. Benton*, 467 So. 2d 1046, 1049 (Fla. 1st DCA 1985) (quoting *Bloom v. A.H. Pond Co.*, 519 F. Supp. 1162, 1168 (S.D. Fla. 1981)). This requires only "some nexus or connection between the business that is conducted in Florida and the cause of action alleged." *Id.* That nexus is obvious here.

Under Title III, a defendant is subject to liability for trafficking if it "engages in a commercial activity using or ***otherwise benefiting from confiscated property*** . . . ." 22 U.S.C. 6023(13) (emphasis added). There is no question that this defendant is engaged in a commercial activity, namely operating cargo and passenger flights into and out of the Airport and that it has derived a direct benefit from operating those flights. As discussed above, defendant operates a website where passengers, including residents of Florida and of this District, can book flights, including flights into and out of the Airport.

In *SEC v. Carrillo,* 115 F.3d 1540 (11th Cir. 1997), the court analyzed whether the defendant's Florida contacts (the defendant was a Costa Rican corporation), which consisted in advertising securities in airline magazines, mailing investment materials, application forms, and stock certificates to U.S. investors, and maintaining bank accounts in the U.S. arose from, or were related to, the fraudulent securities scheme defendant was accused to carrying out. In finding that they did, the court held that "the alleged contacts are related to, or gave rise to, the causes of action because each of the contacts was a step by which the allegedly fraudulent scheme was carried out." *Id*. at 1544. "[B]y advertising, offering shares, and accepting payment in this country, [the defendant] did everything necessary to complete the offer and sales of the unregistered securities here." *Id*. at 1545. Here, defendant's contacts with Florida,

particularly its soliciting though its website, by advertising passenger and cargo transport to the Airport, "was a step by which" defendant trafficked in the Airport.

At this early stage in the litigation, López Regueiro is without knowledge of whether defendant sanitized its website or business practices in the two years prior to being sued, or the number of Florida residents that booked flights into or out of the Airport through defendant's website in those two years. If the Court were to have any doubt about the legal sufficiency of defendant's Florida contacts, jurisdictional discovery would be warranted. *E.g., Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) ("Resolution of a pretrial motion that turns on findings of fact—for example, a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2)—may require some limited discovery before a meaningful ruling can be made."). Such discovery would reveal: (1) the exact number of flights into or out of the Airport Florida residents booked on defendant's website, and (2) the nature in which defendant profited from those reservations.

B. The Exercise of Specific Jurisdiction over Defendant Comports with Due Process

When the legal requirements for specific jurisdiction are satisfied, as they are here, a court must then address whether the exercise of such jurisdiction would offend due process. In so doing, a court must ask "(1) whether [the] defendant has established sufficient 'minimum contacts' with the [forum state]; and (2) whether the exercise of this jurisdiction over [the] defendant would offend 'traditional notions of fair play and substantial justice.'" *Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1249 (11th Cir. 2000) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

If any defendant has purposefully availed itself of Florida and this District, LATAM surely has. As demonstrated above, defendant's argument that it "has not conducted, and currently does not conduct, any business or operations in or from the State of Florida that involve either passenger travel or cargo transportation to or from [the Airport]" is factually incorrect. Persons in Florida can book and pay for trips to the Airport on defendant's website, and defendant cannot deny that it regularly flies into and out of the Airport. *Cf.* Defendant's Decl. at ¶ 5. Defendant has substantial contacts with Florida that relate to this claim for trafficking in the Airport. As defendant's corporate representative admits, it "conducts and maintains[] operations and facilities in the State of Florida," which include "an office at 6500 NW 22nd Street, Miami, Florida 33122;" regular "flights for passenger travel and cargo

transportation to and from Miami International Airport;" and maintenance of "airport facilities" at MIA. *Id.* at ¶ 6. Defendant has a "registered agent in Florida for service of process," and it has "seven direct and indirect subsidiaries incorporated in Florida," of which [Defendant] is either sole shareholder or majority shareholder. *Id.* at ¶ 8. Defendant has not argued that none its planes that land here, are maintained or serviced here, are used in flights to and from the Airport. This is one of many facts that defendant's declaration leaves hidden, which will be illuminated in discovery. For present purposes, it is enough that defendant offers sales of flights to Florida residents through its interactive website, on which they can book and pay for flights in and out of the Airport. *See* Alvarez Decl. at ¶5. Defendant essentially argues that despite its extensive, systematic and continuous contacts with the forum, requiring forum residents to fly through a third country to the Airport so sanitizes its trafficking that it would offend due process to be sued here. It would not.

Collectively, these facts demonstrate that exercising personal jurisdiction over defendant would not offend due process. Defendant's contacts with Florida, as demonstrated by its corporate representative's declaration and Exhibit A, are so extensive that defendant "has purposefully availed himself of the privileges of doing business within the forum" and are of such a nature that defendant "should reasonably anticipate being haled into court in the forum." *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210 (11th Cir. 2009).

II. LÓPEZ REGUEIRO ADEQUATELY ALLEGED HIS TITLE III CLAIM

Defendant next argues that López Regueiro has failed to plead three essential elements of a Title III claim because: (1) he has not sufficiently alleged that he was a U.S. national at the time he acquired ownership of his claim; (2) he has not sufficiently alleged that he owns a claim to the Airport; and (3) he has not alleged that defendant acted "knowingly and intentionally." MTD at 6-11. Defendant is wrong in each instance because: (1) Title III does not require a plaintiff to plead that he was a U.S. national at any time other than the date of the filing of the complaint; (2) as another court of this District already has held, it is irrelevant that López Regueiro's interest in the Airport was indirect because Title III's definition of "property" to include future or contingent interests in property means that he owns a *claim* to the Airport; and (3) when López Regueiro alleged that defendant has "trafficked in the Airport," as that term is defined in 22 U.S.C. § 6023(13), he alleged, by definition, that the

trafficking was "knowing and intentional," and in any event, "knowing and intentionally" in the context of the Act means nothing more than acting "on purpose." Defendant was not sleepwalking when it trafficked in the Property, it's been on notice of its potential trafficking liability under the Act since 1996, when it was signed into law.

A. Title III Required Only That López Regueiro Be a U.S. National and Own the Claim at the Time He Filed This Action

Title III states that "Cuban nationals who became United States citizens after their property was confiscated" have a right of action under Title III. Defendant argues that López Regueiro had to allege that he was both a U.S. citizen and that he acquired his claim before March 12, 1996. *See* MTD at 7. Defendant's argument is squarely contradicted by Title III's plain language and legislative history.

To expose fundamental problems with defendant's argument, we must briefly discuss the claims process the FCSC administered in the late 1960s and again in 2006 (the "Programs").

The Programs' purpose was "to provide for the determination of the amount and validity of claims ***against the Government of Cuba*** . . . out of nationalization, expropriation, intervention, or other takings, or special measures directed against, property of nationals of the United States . . .." 22 U.S.C. § 1643 (emphasis added). To accomplish that purpose, the FCSC was to "certify to each individual who has filed a claim . . . the amount determined by the Commission to be the loss or damage suffered by the claimant . . . ." 22 U.S.C. § 1643f(a). Once the FCSC determined that a claimant had demonstrated ownership of the property and determined its value, the FCSC was to "certify to the Secretary of State such amount and the basic information underlying that amount, together with a statement of the evidence relied upon and the reasoning employed in reaching its decision." *Id*. It was then up to the U.S. Government to "espouse" those claims in any future settlement with a democratically-elected future Cuban government: "In the view of the committee of conference, only the current 5,911 claims certified by the FCSC should be espoused by the United States Government in any settlement with a future Cuban Government." HR Rep. No. 104-468, at 59 (1996). Notably, however, under the Programs, only U.S. nationals who were U.S. nationals on the date of the confiscation were eligible to file claims with the FCSC:

> A claim shall not be considered under section 1643b(a) of this title unless the property on which the claim was based was owned wholly or partially, directly or indirectly by a national of the United States on the date of the loss, and if considered shall be considered only to the extent the claim has been held by one or more nationals of the United States continuously thereafter until the date of filing with the Commission.

22 U.S.C. § 1643c(a).

Title III was not intended as a mere reiteration of the Programs—it was intended to provide a different form of relief to a broader class of plaintiffs. "It is the committee of conference's intent not to supplant or undermine the Foreign Claims Settlement process, but to provide an additional remedy for U.S. nationals through which they may take action to protect their claim to a confiscated property in Cuba." HR Rep. No. 104-468, at 58 (1996).

In contrast to the Programs, Title III provides a right of action to U.S. nationals who were not U.S. nationals at the time of the confiscation, but became U.S. nationals at some point before bringing a claim. It provides that: "actions may be brought . . . with respect to property confiscated before, on, or after March 12, 1996." 22 U.S.C. § 6082(a)(4)(A). "In the case of property confiscated before March 12, 1996, 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). In other words, a U.S. national may bring a claim under Title III if he or she acquired ownership of the claim before March 12, 1996. Notably, there is an exclusion in Title III for claims by U.S. nationals who were eligible to file claims with the FCSC but did not:

> In the case of a United States national who was eligible to file a claim with the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act of 1949 [22 U.S.C. 1643 et seq.] but did not so file the claim, that United States national may not bring an action on that claim under this section.

22 U.S.C. § 6082(a)(5)(A) (addition in original). By definition, persons who were U.S. nationals at the time of confiscation would have been eligible to file a claim with the FCSC. If, as defendant argues, only U.S. nationals who were U.S. nationals at the time of confiscation were allowed to bring claims under Title III, only persons with claims certified by the FCSC could bring such claims, which is not what Title III says. *Compare* 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 [FCSC] . . . .") *with* 22 U.S.C. § 6083(a)(2) ("If in an action under this subchapter a claim has not been so certified by the [FCSC], the court may appoint a special master, including the [FCSC], to make determinations regarding the amount and ownership of the claims.").

In cases where the court appoints the FCSC as a special master to "make determinations regarding the amount and ownership of the claims," Title III makes clear that those determinations do not transform a Title III claim into claim under the Programs, which are to be part of a negotiation process between the U.S. and a future, democratically-elected Cuban government:

> Nothing in this chapter . . . shall be construed . . . to require or otherwise authorize the claims of Cuban nationals who became United States citizens after their property was confiscated to be included in the claims certified to the Secretary of State by the [FCSC] for purposes of future negotiation and espousal of claims with a friendly government in Cuba when diplomatic relations are restored . . . .

22 U.S.C. § 6083(c)(1). The plain language of the statute, along with the committee notes make clear that, contrary to defendant's assertions, "Cuban nationals who became United States citizens after their property was confiscated" — possess a right of action under Tittle III, and when a court appoints the FCSC to determine the amount and ownership of a claim, it is not to be added to the number of claims certified by the FCSC through the Programs:

> The committee of conference recognizes the importance of a decision by the [FCSC] in certifying a claim and, accordingly, believes that no court should dismiss a certification in an action brought under this title. The committee of conference also notes the recognized special expertise of the FCSC in determining the amount and validity of claims to confiscated properties overseas. As such, the ''special master'' provision allows the court to call upon the FCSC's expertise for evidentiary purposes related to the right of action only. This provision is intended to make clear that such evidentiary determinations by FCSC do not constitute certification of property claims pursuant to title V of the International Claims Settlement Act of 1949 for purposes of United States Government espousal and future negotiation with a friendly government in Cuba. In the view of the committee of conference, only the current 5,911 claims certified by the FCSC should be espoused by the United States Government in any settlement with a future Cuban Government.

HR Rep. No. 104-468, at 59 (1996).

Finally, when Congress wants to limit a right of action to U.S. nationals as of a specific date, it knows how. *See, e.g.*, 28 U.S.C. § 1605(a)(7)(B) (repealed 2008) (Courts must decline

to hear claims if "neither the claimant nor the victim was a national of the United States . . . when the act occurred upon which the claim is based."); *accord Alejandre v. Republic of Cuba*, 996 F. Supp 1239, 1248 (S.D. Fla. 1997) (Appling an anti-terrorism exception to the Foreign Sovereign Immunities Act in an action by the family of one of the Brothers to the Rescue pilots the Castro regime murdered, stating that "section 1605(a)(7) imposes the following requirements: (1) the U.S. must have designated the foreign state as a state sponsor of terrorism . . . (2) the act must have occurred outside the foreign state; and (3) the claimants and victims must have been U.S. nationals at the time the acts occurred[,];" holding that the family of one of the murdered pilots who was not a U.S. national when shot down did not have a right action under that section). Title III includes no such language, which evidences clear congressional intent ***not to limit the right of action*** under Title III to those who were U.S. nationals on any date other than the date when they bring their action.

Defendant's related argument, that Title III only grants a right of action to persons who were U.S. nationals on or before March 12, 1996, is equally ill-founded. ***First***, López Regueiro did not allege that he became a U.S. national after March 12, 1996, only that he is a U.S. national at the time of filing. *See* Comp. ¶ 2 ("Jose Ramon López Regueiro is a United States citizen and a natural person who resides in Miami, Florida."). Thus, defendant's argument that he became a U.S. national after March 12, 1996, while irrelevant, would impermissibly require this Court to consider materials outside of the "four corners of the complaint." *Crowell v. Morgan, Stanley, Dean Witter Servs. Co., Inc.*, 87 F. Supp. 2d 1287, 1290 (S.D. Fla. 2000). ***Second***, Title III simply does not require that a plaintiff have been a U.S. national on or before March 12, 1996 (or at any other time other than when the action is filed). Defendant cites 22 U.S.C. § 6082(a)(4)(B), which states that "[i]n the case of property confiscated before March 12, 1996, 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). It does not require a Title III plaintiff to have been a U.S. national before March 12, 1996, only that such plaintiff have acquired the claim before March 12, 1996. To adopt defendants' interpretation, the Court would have to read additional language into the statute, which would violate one of the most basic canons of statutory interpretation: that courts are "not allowed to add or subtract words

from a statute." *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1224 (11th Cir. 2009).

In sum, the plain language of Title III, as well as its legislative history, compel the conclusion that U.S. nationals at the time of filing, even if they were not U.S. nationals at the time of confiscations or as of March 12, 1996, have a right of action under Title III.

B. López Regueiro Adequately Alleged Ownership of The Claim

The complaint alleges that "as of the time of filing this lawsuit, [López] Regueiro is the rightful owner of the Airport, which is stolen property that defendants are trafficking and benefiting from trafficking." Comp. ¶ 15. Defendant mystifyingly asserts that "there is no clear allegation concerning what the 'property' is." MTD at 8. Airport is a two-syllable word.

Title III defines "property" as "any property . . . whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest." 22 U.S.C. § 6023(12) (emphasis added). López Regueiro's interest in the Airport, even before his father's passing and López Regueiro's receipt of a present interest in the property, was a future or contingent interest in the Airport. "Plaintiff's ownership of the claim involves factual determinations that go beyond the four corners of the Complaint . . ." *Garcia-Bengochea v. Carnival Corp.*, Case No. 19-cv-21725-JLK at ECF No. 41, at 9. Because, "[i]n deciding a Rule 12(b)(6) motion to dismiss, the court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff . . . ." *Dusek*, 832 F.3d at 1246. López Regueiro has alleged at least a plausible inference that he obtained ownership of his claim before March 12, 1996. Accordingly, the Court cannot dismiss the Complaint on this basis.

Defendant argues that López Regueiro is merely the owner of the owner of the Airport, Compañia de Aeropuertos Internacionales, S.A. ("CAISA"). MTD at 8. This argument already has been rejected by another court of this District, and should be rejected here. *See Garcia-Bengochea v. Carnival Corp.*, Case No. 19-cv-21725-JLK at ECF No. 41, at 6-7. The Complaint alleged that "[o]n November 14, 1952, Vilaboy [López Regueiro's father], through his company [CAISA] purchased the Airport from Pan Am for $1.5 million in cash and credits against Pan Am landing fees," and that "[i]n or around May 1959, the communist Cuban government confiscated the Airport and CAISA, stealing the properties from Vilaboy,

who was their rightful owner." Comp. ¶ 12-13. These allegations are legally sufficient, and would be legally sufficient even if the argument had to be made from the from the ground up.

Title III does not require López Regueiro (or his father) to have individually owned the Airport. It states that "any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national ***who owns the claim to such property*** for money damages . . . ." 22 U.S.C § 6082(a)(1)(A) (emphasis added). Further, Title III defines "property" as "any property . . . whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest." 22 U.S.C. § 6023(12). Based on those definitions, the court in *Garcia-Bengochea*, rejected the same argument made here:

> Carnival contends that this action must be dismissed because, as a matter of corporate law, Plaintiff does not own a 'direct interest' in the confiscated property.
>
> The Court is not persuaded. Based on the text, context, and purpose of Helms-Burton, Plaintiff plausibly alleges a claim to the confiscated property based on his stock ownership in La Maritima
>
> * * *
>
> Carnival's reading of the statute would require the Court to delete the word 'claim' from the phrase 'owns the claim to such property,' and effectively rewrite Helms-Burton to cover only those plaintiffs who 'own such property.' In other words, Carnival's interpretation would render the word 'claim' superfluous, which also weighs heavily against Carnival's argument.
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> * * *
>
> [A] 'claim' under Helms-Burton need not be based on direct property ownership as Carnival contends, but instead embraces *indirect* ownership as well.
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> * * *
>
> Indeed, under Carnival's interpretation, one can traffic in a Cuban corporation's confiscated property with impunity as long as the Cuban government not only took the property, but also nationalized the corporate entity itself, leaving only the individual shareholders behind to pursue any rights the corporation might have lost to the Castro regime. And because the Act applies to confiscations dating back to January 1959, there is a strong possibility that many of these corporations no longer exist or are unable to assert claims on their own behalf.

Garcia-Bengochea v. Carnival Corp., Case No. 19-cv-21725-JLK at ECF No. 41, at 5-6.

López Regueiro's claim obviously is not based on current "legal" ownership of the Airport or CAISA. After the unlawful confiscation of the Airport and CAISA, his father no

longer held legal title to his interest in CAISA, or in the Airport it had owned. However, at that time and ever since, his father—and later López Regueiro himself—owned a ***claim*** to CAISA, and to the Airport, through CAISA's ownership. *See Rhode Island Hosp. Tr. Co. v. Doughton*, 270 U.S. 69, 81 (1926) ("In the dissolution of the corporation, [the shareholder] may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the laws of its creation."). Thus, because Lopez Regueiro owns a claim to the assets of CAISA (including the Airport), he has the right to bring this claim under Title III. Defendant's argument is no different than Carnival's argument in the *Bengochea* action, and this Court should reject it, just as, and for the same reasons it was rejected by the *Bengochea* court.

Defendant further argues that López Regueiro failed to include information on his father's 2010 probate proceedings and whether his estate included the shares in CAISA. As Judge King held in *Bengochea:* "Plaintiff's ownership of the claim involves factual determinations that go beyond the four corners of the Complaint, as demonstrated by Carnival attaching a purported copy of Mr. Parreno's probated will to show that Plaintiff did not inherit the claim . . . . Such factual determinations are 'inappropriate in deciding a motion to dismiss." *Garcia-Bengochea*, Case No. 19-cv-21725-JLK at ECF No. 41 (quoting *Twin City Fire Ins. Co. v. Hartman, Simons & Wood. LLP*, 609 F. App'x 972, 977 (11th Cir. 2015)).

Lastly, Defendant states that "[b]ecause the alleged claim was not so certified, Plaintiff has 'the burden of establishing for the court that the interest in property that is the subject of the claim is not the subject of a claim so certified [by the FCSC].'" 22 U.S.C. § 6082(a)(5)(D). Yet, there is no such allegation in the Complaint." MTD at 9. But López Regueiro did allege that "[t]he Airport has not been the subject of a certified claim under Title V of the International Claims Settlement Act of 1949 (22 U.S.C. § 1643 *et seq.*). Comp. ¶ 21. It is unclear whether defendant misinterpreted the statute or misread the Complaint.

C. López Regueiro Adequately Alleged that Defendant's Trafficking Was "Knowing and Intentional"

Defendant also argues López Regueiro failed to adequately allege that defendant's trafficking was "knowing and intentional." MTD at 9-10. This is wrong as a matter of fact, as well as a matter of law and logic.

First, throughout his Complaint, López Regueiro alleges that defendant has trafficked in the Property. *See, e.g.*, Comp. at ¶ 2 ("José Ramón López Regueiro sues defendants American Airlines Inc. ("AA"), Latam Airlines Group, S.A. ("LATAM"), under the Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. § 6021, et seq. (the "LIBERTAD Act"), for unlawful trafficking in his confiscated property in Cuba."); *Id.* ¶ 15 ("As of the time of filing this lawsuit, Regueiro is the rightful owner of the Airport, which is stolen property that defendants are trafficking and benefitting from trafficking."); *Id.* ¶ 26 ("Defendants have trafficked in or benefitted from ongoing, unlawful trafficking in the Airport, by arriving and departing the Airport and using its facilities for cargo and passenger transport, in violation of Title III of the LIBERTAD Act."); *Id.* ¶ 27 ("Defendants have conducted this trafficking "without the authorization of any United States national who holds a claim to the property" (22 U.S.C. § 6023(13)) in violation of Title III of the LIBERTAD Act.").

Second, Title III defines trafficking as when a person

knowingly and intentionally—

(iv) Sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,

(v) engages in a commercial activity using or otherwise benefiting from confiscated property, or

(vi) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,

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

22 U.S.C. § 6023(13)(A) (emphasis added). The "knowing and intentional" language is a part of the definition of "trafficking." Thus, when López Regueiro alleges that defendant has "trafficked in the Airport" López Regueiro, by definition, has alleged that the trafficking was "knowing and intentional."

Third, defendant was on express notice since 1996 that it faced "the prospect of lawsuits and significant liability" for its trafficking, which would be "established irreversibly during the suspension period" of Title III:

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

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

Fourth, the complaint alleged, and defendant has admitted, that López Regueiro provided the notice letter attached as **Exhibit C** more than thirty days before filing this action, which expressly notified defendant that it was about to be sued for trafficking. Notwithstanding the notice, defendant continued to traffic after receiving that notice, which alone would dispose of defendant's argument, even if Title III required more than merely volitional conduct (it doesn't). *See* Comp. ¶ 28.

In sum, the complaint adequately alleged that defendant's conduct was knowing and intentional.

III. TITLE III DOES NOT VIOLATE THE CONSTITUTION

Defendant's last swipe at the complaint is to argue that Title III is impermissibly vague and provides for excessive damages in violation of the Due Process Clause. MTD at 11-15. Neither argument has merit.

A. The Void-for Vagueness Doctrine does not Apply

"The void-for-vagueness doctrine reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984). The analysis of whether a statute is impermissibly vague, however, depends on whether the challenged statute imposes a civil or criminal penalty. Where a statute imposes a civil, rather than criminal, penalty for its violation, a less-strict vagueness test is applied. *Haynes v. Kohl's Dep't. Stores, Inc.*, 391 F. Supp. 3d 1128, 1136 (S.D. Fla. 2018) (citing *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1310-1311 (11th Cir. 2009) ("The Supreme Court has warned against the mechanical application of vagueness doctrine, emphasizing that an economic regulation is subject to a less strict vagueness test and there should be greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.") (internal quotes omitted)). *Accord Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982) ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.") (citing *Barenblatt v. United States*, 360 U.S. 109, 137 (1959) (Black, J., with whom Warren, C.J., and Douglas, J., joined, dissenting) ("For obvious reasons, the standard of certainty required in criminal statutes is more exacting than in noncriminal statutes.")); *Winters v. New York*, 333 U.S. 507 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.").[4]

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[4] Defendant cites *Sessions v. Dinaya*, 138 S. Ct. 1204, 1212-13 (2018) to argue that "the [void-for-vagueness] doctrine also applies to *civil remedies*, at least where the remedy imposed by the statute is severe." MTD at 11 (emphasis in original). In that case, the "remedy" provided by the statute was deportation, which is inherently far more "severe" than any form of damages, because it involves coercion by the state and a defendant's liberty interest, not mere money. Recognizing the severity of this supposed "civil remedy," Justice Kagan, concurring, stated that "in view of the grave nature of deportation, the most exacting vagueness standard must apply." *Id.* at 1209. Justice Kagan also noted that "deportation is a particularly severe penalty which may be of greater concern to a convicted felon than any potential jail sentence." *Id.*

Defendant argues that "Title III's definition of 'traffics' is impermissibly void on its face," on the notion that "[t]he Title III civil remedy thus potentially would reach countless numbers of persons, many of which have merely an incidental or minimal connection to the Airport, and many of which (the indirect suppliers, for example) never set foot on the Airport, or in Cuba." MTD at 12. This argument reveals that Defendant merely mouthed the words 'impermissibly vague" while complaining that Title III might visit potential liability on too many "incidental" traffickers. We may safely assume that none of those hypothetical defendants own an airline that flies hundred-million-dollar airplanes into and out of the Airport on a regular basis. Moreover, as discussed above, Title III does not provide a remedy for unknowing or unintended trafficking, by virtue of its definition of "traffics." *See* 22 U.S.C. § 6023(13). To be sure, Title III does reach—as Congress intended—a wide range of traffickers of confiscated property in Cuba, for numerous reasons that Congress stated at length in the Act and its legislative history. That fact does not render it impermissibly vague.

The cases that defendant cites are distinguishable. In *Johnson v. U.S.*, the Supreme Court analyzed a criminal statute, the Armed Career Criminal Act of 1984, which applied a sentence-enhancer for defendants who had three or more convictions for a "violent felony." 135 S. Ct. 2551, 2555 (2015). The statute defined a "violent felony," in part, as a crime that "is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." *Id.* at 2555-2556 (emphasis in original). In applying this "residual exception," courts were required to apply a "categorical approach" which required courts to ask whether any particular crime was one "that presents a serious potential risk of physical injury to another," not with respect to the particular facts of that case, but rather in the "ordinary course" of the commission of that crime. *Id.* at 2557. The Court held that the statute was unconstitutionally vague for two reasons: (1) because "it leaves grave uncertainty about how to estimate the risk posed by a crime" due to the endless iterations of particular crimes, and (2) because it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558.

(citing *Jae Lee v. United States*, 137 S. Ct. 1958, 1968 (2017) (internal quotes omitted)). Even to cite it in this case is ludicrous, where the only remedy is money damages, and decades of Supreme Court precedent dictate that a "less strict vagueness test" be applied.

In dispositive contrast, Title III is a civil statute that provides an ordinary civil remedy—money damages—and "a less-strict vagueness test is applied." *Haynes*, 391 F. Supp. 3d at 1136. And the mere fact that it provides for treble damages doesn't render it "vague," either. Pursuant to Title III, a trafficker may avoid being subject to liability for treble damages by compensating the true owner of confiscated property or ceasing to traffic in it after receiving notice of intent to sue and before suit is filed. Further, Title III's definition of "traffics," while broad, does not require any *ad hoc*, subjective determinations as to the character of a trafficker's actions or knowledge, unlike the statute in *Johnson*. To the contrary, Title III's definition of "traffics" provides a clear and objective standard for determining whether a person has trafficked, and is not a statute where "[persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Roberts* 468 U.S. at 629. Defendant's void-for-vagueness argument has not should be rejected.

B. Title III's Damages Provisions Comport with the Due Process Clause

Finally, Defendant assails Title III's measure of damages: "the fair market value of th[e] property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater." 22 USC § 6082(a)(1)(A)(i)(III). Defendant argues that "Title III's damages provision . . . is impermissibly excessive and punitive in several respects and could not constitutionally be applied to LATAM." MTD at 13 (which appears to morph this argument into an "impermissibly vague," as-applied challenge). The gist of defendant's argument is that: (1) defendant could be subject to liability for the entire value of the airport even if it only ever made one flight (it didn't) using only a portion of the Airport; (2) defendant could be liable for 60 years of interest if López Regueiro elects to take the confiscation-era value of the Airport; (3) defendant cannot seek contribution from other traffickers; and (4) Title III's treble damages provision is punitive. None of these arguments has any merit, whether considered as a facial or "as applied" challenge. López Regueiro first addresses the compensatory damages aspect of 22 USC § 6082(a)(1)(A)(i)(III), then addresses the treble damages portion of Title III—22 U.S.C. § 6082 (a)(3).

1. Statutory Compensatory Damages

For the last 134 years, the U.S. Supreme Court has afforded legislatures wide deference in their determinations of the appropriateness of statutory damages:

> [T]he power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.' Nor does giving the penalty to the aggrieved passenger require that it be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state.

St. Louis, I.M. & S Ry Co. v. Williams, 251 U.S. 63, 66 (1919) (quoting *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 523 (1885); citing *Marvin v. Trout*, 199 U.S. 212, 225 (1905)). In fact, where Congress provides statutory damages, the U.S. Supreme Court has held that such a provision "takes the matter out of the ordinary rule with respect to abuse of discretion." *Douglas v. Cunningham*, 294 U.S. 207 (1935); *see Broad Music, Inc. v. Star Amusements, Inc.*, 44 F.3d 485, 487 (7th Cir. 1995) (The standard for reviewing an award of statutory damages within the allowed range is even more deferential than the abuse of discretion standard.). Statutory damages "transcend the [constitutional] limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 66-67.

The question whether statutory damages are unconstitutional has arisen most often in the context of the Copyright Act, which provides that a copyright owner is entitled to elect its actual damages or statutory damages between $750 and $30,000 from the infringer of a copyright. 17 USC § 504 (c) (those damages may be increased in certain situations). In *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 108-109 (1919), the Supreme Court detailed the history of the original Copyright Act's statutory damages and, in increasing a damages award, explained that "in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy . . . ." Similarly, in *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F3d 574, 586-588 (6th Cir. 2007), the court found no due process violation in a statutory damages award and doubted the applicability of the Supreme Court's punitive damages due-process analysis to statutory damages. At least one court within this Circuit has relied on *Zomba* in fixing an award of statutory damages. *See All About Network, LLC v. York*, 2013 WL

12387590 (M.D. Fla., 2013) (relying on *Zomba Enterprises* in determining the appropriate statutory damage amount) (adopted by 2013 WL 12387585, at *1 (M.D. Fla., 2013)).

Here, Title III provides that a trafficker in confiscated property is subject to liability for the fair market value of the property, calculated as either the current value or the value when confiscated plus interest, whichever is greater. 22 USC § 6082(a)(1)(A)(i)(III). These are what might be termed statutory compensatory damages, triggered by actual injury and tied to the value of the property. They are not mere statutory damages based on what a legislature thinks a violation is worth. If Congress has "wide latitude of discretion" to set mere statutory damages, it can have no less discretion here, and Title III's damages are not "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 66-67. Because the damages are tied to the value of the trafficked property, they cannot be wholly disproportionate to the offense of trafficking in that property.

Defendant citers *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 955 (8th Cir. 2019), a case where plaintiffs brought a class action under the Telephone Consumer Protection Act ("TCPA") because defendant called them twice—plaintiff answered neither call—and left two answering machine messages. At trial the jury found defendant liable for $1,621,246,500—the statutory award of $500 per call times the 3,242,493 calls defendant made in total—but the trial court reduced the award to $32,424,930—$10 per call. *Id.* at 957. Plaintiffs appealed and the court, applying the due process analysis applicable to punitive damages (not to statutory compensatory damages), held that because the award was wholly disproportionate to the "intangible injury" claimed by the plaintiffs—namely, receipt of two answering machine messages—the original award would violate the Due Process Clause. *Id.* at 963. Defendant's reliance on *Golan* is misplaced because that court applied the wrong standard to statutory damages, *see Zomba*, 491 F.3d at 587, and because the actual injury that Title III seeks to remedy—a defendant's trafficking in confiscated property without compensation to or permission from the rightful owner—is not mere "intangible injury." Title III's statutory compensatory damages pass constitutional muster.

2. Treble Damages

Title III also provides that a trafficker is subject to liability for treble damages if it continues trafficking after receiving notice of a plaintiff's intent to sue more than 30 days before it is sued. 22 USC § 6082(a)(3). Defendant relies on punitive damages cases, not any

cases holding treble damages improper. That said, punitive damages are constitutional provided they are not "grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Defendant solely relies on *State Farm* to argue that Title III's punitive damages are unconstitutional. MTD at 14-15. However, unlike Title III's treble damages, the punitive damages awarded in *State Farm* were 145 times greater than the compensatory damages. *State Farm*, 538 U.S. at 429. Far from implying that a 3-1 ratio would be unconstitutionally unreasonable, the *State Farm* court stated that a 9-1 ratio (***three times*** Title III's treble damages provision) would be the upper constitutional limit for punitive-damages awards. *Id* at 425.

Moreover, important statutes providing for treble damages have been upheld as constitutional. *See, e.g., Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972) (upholding the constitutionality of the Sherman Act's treble-damages provision); *U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d 364 (4th Cir. 2015) (holding that the False Claims Act's treble damages provision did not violate the Due Process Clause). In sum, Title III's treble-damages provision is not grossly excessive or arbitrary with regard to defendant's knowing and intentional trafficking, particularly where defendant could have avoided, but chose to continue trafficking, after receiving notice that it was about to be sued.

CONCLUSION

For all the reasons above set forth, the Court should deny the Motion to Dismiss and this case should proceed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 10, 2019, I electronically filed this document with the Clerk of the Court using CM/ECF. I also certify that this document is being served today on all counsel of record by transmission of Notices of Electronic Filing generated by CM/ECF.

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