**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**Case No. 20-cv-25176-BLOOM/Otazo-Reyes**

ODETTE BLANCO DE FERNANDEZ *née*
BLANCO ROSELL, *et al.*

Plaintiffs,

v.

SEABOARD MARINE, LTD.,

Defendant.
_____/

**DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

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## I. INTRODUCTION

Plaintiffs' Opposition to Defendant's Motion to Dismiss (ECF No. 57, the "Opposition") makes clear that the Amended Complaint does not state a claim under Title III of the Helms-Burton Act for several reasons. *First* and foremost, a Title III action may be brought only by persons who own the claims to confiscated property alleged to have been trafficked in by a defendant. Plaintiffs' Opposition does not identify property confiscated by the Cuban Government that Seaboard allegedly trafficked in and to which Plaintiffs own a claim. This is fatal to stating a Title III claim. Plaintiffs argue that Seaboard trafficked in the Port of Mariel and the container terminal, but the Amended Complaint does not allege any such trafficking. Nor could it be alleged, because the Port of Mariel and the container terminal at the Port of Mariel did not exist at the time of the alleged confiscation, were not confiscated by the Cuban Government, and Plaintiffs do not own claims to those properties. To avoid dismissal of the Amended Complaint, Plaintiffs argue that Seaboard trafficked in the "concession" that was allegedly confiscated by the Cuban Government, but there are *no facts* alleged showing that Seaboard trafficked in the concession rights themselves, which were contingent and non-exclusive.

*Second*, ignoring the plain language of Title III, Plaintiffs' Opposition argues that they need not allege that Seaboard intentionally trafficked in confiscated property. That is wrong. Without a certified claim delineating the specific properties to which Plaintiffs own a claim, the facts alleged to show that Seaboard "trafficked" with the requisite scienter are not sufficient to satisfy the scienter element of a Title III claim. Most fundamentally, the document purportedly memorializing the confiscation (Resolution No. 436, the "Confiscation Order") and the document purportedly granting concession rights to Maritima Mariel (Decree 2367, the "Concession Decree") do not indicate that the Cuban Government confiscated any concession rights.[1] The

[1] Certified translations of the Concession Decree and Confiscation Order are attached as Exhibits A and B, respectively. The Court can consider the Confiscation Order and Concession Decree on a motion to dismiss because "they are central to the plaintiff[s'] claims and are undisputed." *Cuhaci v. Kouri Grp., LP*, No. 20-CV-23950, 2020 WL 7698954, at *2 (S.D. Fla.

Concession Decree provides that the concession rights reverted from Maritima Mariel (a company owned by the Rosell Siblings) to the Cuban Government if Maritima Mariel did not satisfy several preconditions, such as beginning to drain and dredge a portion of Mariel Bay within 18 months from the date the concession was granted. And the Confiscation Order does not state that any concession rights were confiscated by the Cuban Government. Moreover, the concession rights granted to Maritima Mariel were non-exclusive, such that they did not preclude third parties from engaging in any activity. As to the news sources identified in the Amended Complaint, Plaintiffs do not allege that the statements on Radio Marti and TV Marti identify the confiscated property and Seaboard is not alleged to have ever reviewed or known of them. Plaintiffs also advance an unpled theory that mere allegations in the initial Complaint gave Seaboard the requisite knowledge as to one shipment that occurred after the initial Complaint was filed. However, neither complaint identifies any confiscated property that Seaboard allegedly used during the one shipment to Cuba, much less that Seaboard intended to use or otherwise traffic in confiscated property.

*Third*, in the Opposition, Plaintiffs abandon the theory that Seaboard caused, directed, participated in, or profited from any alleged trafficking by non-party Seaboard Corporation. Plaintiffs' Opposition claims that Seaboard trafficked "through the ZEDM"—a special economic zone. Plaintiffs contend that the ZEDM trafficked in property confiscated by the Cuban government by "subsum[ing]" the concession and "incorporat[ing]" confiscated land. (Opp'n 19.) ZEDM allegedly "subsuming" a concession or "incorporating" land is not "trafficking" under Title III. The Opposition does not explain just how a special economic "zone" such as ZEDM could traffic. More critically, to allege trafficking through a third party under Title III, facts must be alleged that Seaboard caused, directed, participated in, or profited from the ZEDM's trafficking.

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Dec. 28, 2020). (Bloom, J.) (citing *Maxcess, Inc. v. Lucent Techn., Inc.*, 433 F.3d 1337, 1340 n.3 (11th Cir. 2005)). Here, Plaintiffs purport to quote or paraphrase from both the Confiscation Order and the Concession Decree throughout the Amended Complaint and the Opposition and their claims are based on those documents. (Am. Compl. ¶¶ 2–4, 68–70, 73–76, 78; Opp'n 1, 15–16, 18–20, 22–23.)

The Amended Complaint does not make any such factual allegations regarding Seaboard "trafficking through" ZEDM. Moreover, there are no factual allegations showing Seaboard *knowingly and intentionally* trafficked through the ZEDM. In other words, there are no allegations that Seaboard knew or had reason to know that the ZEDM engaged in any trafficking activity, much less that Seaboard intended to cause, direct, participate in, or profit from such activity.

*Lastly*, Plaintiffs do not dispute that to state a Title III claim they must have acquired their claims to confiscated property before March 12, 1996. Nor do they dispute that the thirteen individual Plaintiff heirs did not acquire their claims before March 12, 1996. Plaintiffs argue, however, that ownership interests obtained by an inheritance need not be obtained before the statutory cutoff to bring a Title III claim. Plaintiffs' argument has been unanimously rejected by the courts and lacks any statutory basis. As to the four estates that are Plaintiffs, they argue that the estates acquired their claims to the confiscated property when the Rosell Siblings allegedly did, but property does not become part of an estate until death. The Plaintiff heirs and Plaintiff estates' claims are barred as a matter of law.

## II. ARGUMENT

### A. Plaintiffs Fail To Plausibly Allege That Seaboard Trafficked In The "Confiscated Property"

In their 24-page Opposition, Plaintiffs do not identify where the Amended Complaint alleges the basic and fundamental elements of a Title III claim: the property Seaboard trafficked in that was confiscated by the Cuban Government and to which Plaintiffs have a claim. These factual allegations are essential to stating a claim for relief under Title III. (Mot. 6–7; Opp'n 14.) Plaintiffs' Title III claims fail here because there is no such confiscated property.

The Opposition suggests that the confiscated property at issue is the Port of Mariel or a "container terminal" at the Port of Mariel. (*See* Opp'n at 16 ("Seaboard engaged in commercial activity using or otherwise benefiting from the Port of Mariel and the container terminal").) Neither the Port of Mariel nor the container terminal were confiscated by the Cuban Government, and Plaintiffs do allege or argue otherwise. Nor could they. The Port and the container terminal

were *not constructed* until 2009 (Am. Compl. ¶ 85) and therefore could not have been confiscated in 1960 (*id.* ¶ 2). Moreover, Plaintiffs do not allege or argue that they own claims to the Port of Mariel or the container terminal, as they must to bring a Title III claim. As such, the Port of Mariel and container terminal cannot be confiscated property that is the basis of Plaintiffs' Title III claims.

Recognizing that the Port of Mariel and container terminal are not confiscated properties, Plaintiffs contend that they are not required to allege trafficking in confiscated property because "the trafficked property ha[s] changed since its confiscation." (Opp'n 16 (citing *Iglesias v Ricard*, 2020 U.S. Dist. LEXIS 164117, *26 (S.D. Fla. 2020)).) In *Iglesias*, however, the Cuban Government confiscated Conac Cueto, a company that produced and sold cognac, including its intellectual property and physical assets used in the production and sale of cognac, such as oak barrels and meters. *Iglesias* at *2. The defendant allegedly partnered with the Cuban Government to sell liquor made by the company, which was rebranded as Havana Club. *Id.* The court held that plaintiff had adequately alleged trafficking because "the intellectual property of the Conac Cueto *was used* in the production and sale of Havana Club brand and line of products" and "Defendant *used* Cueto property in its product distribution. *Id.* at 28–29 (emphasis added). For that reason, the court explained that even if the Havana Club had sold different liquor than Conac Cueto, plaintiff adequately alleged defendant trafficked in confiscated property by *using* the confiscated intellectual property and other confiscated assets. *Id* at 26. Here, Plaintiffs have not alleged that Seaboard used or otherwise trafficked in any allegedly confiscated property. Plaintiffs' Title III claims fail.

The critical distinction between alleging trafficking in property confiscated by the Cuban Government (as required by Title III) and alleging trafficking in some related property is further crystalized by the *Havana Docks* cases before this Court (and tellingly unaddressed in the Opposition). In *Havana Docks*, the plaintiff had a certified claim to "waterfront real property in the Port of Havana, Cuba, identified as the Havana Cruise Port Terminal[,]" which the plaintiff "owned, possessed, managed, and used . . . from 1917 until the Cuban Government confiscated it

in 1960." *Havana Docks Corp. v. MSC Cruises SA Co.*, 484 F. Supp. 3d 1177, 1187 (S.D. Fla. 2020) (internal quotation omitted). The complaint alleged that the defendant cruise lines "us[ed] the [Havana Cruise Port Terminal] by regularly embarking and disembarking their passengers on the [Havana Cruise Port Terminal]. *Id.* Accordingly, this Court held that plaintiff adequately alleged trafficking in confiscated property to which the plaintiff owns a claim. *Id.* at 1191.

Here, Plaintiffs do not even argue that Seaboard trafficked in nearly all of the property that was allegedly confiscated by the Cuban Government. (Mot. at 8–9 (no trafficking in Maritima Mariel SA, the concession, Central San Ramón and Compañia Azucarera Mariel S.A., land near Mariel Bay, and unidentified roads, railways, buildings, and utilities); Opp'n at 14–19).) In their lengthy Opposition, there is just one sentence that purports to explain how Seaboard could have possibly trafficked in concession rights: Plaintiffs claim that "the ZEDM, Port of Mariel, and container terminal . . . exploit *the right to use and benefit* from the docks, warehouses, and port facilities at the Bay of Mariel . . . ." (Opp'n 16 (emphasis added).) This superficial explanation does not withstand simple scrutiny. First, Plaintiffs do not allege that the allegedly confiscated concession granted the right "to use and benefit from" docks, warehouses, or port facilities at Mariel Bay. Second, the ZEDM, the Port of Mariel and the container terminal are not Seaboard. If the ZEDM, the Port of Mariel, or the container terminal "exploit the right to use and benefit" from anything (to the extent it is even possible or coherent for a physical structure, such as a container terminal, to exploit a right to use and benefit), that would not constitute trafficking *by Seaboard*. Third, the docks, warehouses, and port facilities, are not the concession rights themselves nor property allegedly confiscated by the Cuban Government.

The Opposition appears to argue by implication that violating a concession right constitutes "trafficking" in a concession right (Opp'n 16), but that unpled theory fails, too. Plaintiffs have not alleged facts showing that Seaboard violated any rights held by Plaintiffs. The Amended Complaint alleges that the concession was to "plan, study, execute, maintain, and exploit public docks and warehouses in the Bay of Mariel Bay" (Am. Compl. ¶ 68), but there are no factual

allegations that Seaboard did any of those things. At most, Plaintiffs alleged that Seaboard's vessels "called" at the Port of Mariel.[2] Plaintiffs did not allege that the concession granted the right, much less the exclusive right, to dock in the Bay of Mariel.[3] It did not. The concession pertains to building and developing docks and warehouses—it did not grant an exclusive right to use of the Port of Mariel. (Ex. A, Certified Translation of Concession Decree, at 2 ("to rapidly carry forward the construction of docks and warehouses at the Port of Mariel . . . it is convenient that the State grant [Maritima Mariel] all the facilities to build said docks and warehouses . . . ."); *id.* (Maritima Mariel "ask[ed] for a concession for the construction of said docks and warehouses, dredging and improvement of the maritime-terrestrial zone . . . .").)

Even if Plaintiffs had alleged that Seaboard planned, studied, executed, maintained, or exploited a public dock or warehouse in Mariel Bay, that would not amount to a violation of the concession rights, because they were non-exclusive. Plaintiffs concede that the concession rights were "subject to any pre-existing concessions" but respond by arguing that Seaboard "made the word [non-exclusive] up." (Opp'n 18 & n.12.) The concession is clear: it was granted "without

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[2] The Opposition states without any argument or supporting authority that the Court can take judicial notice of the "meaning of 'to call'" based on its use on two websites. (Opp'n 22, n.15.) A "failure to submit any substantive briefing, or to cite to a single source of law in support of [a] request for judicial notice . . . is woefully inadequate . . . ." *Easterwood v. Carnival Corp.*, No. 19-CV-22932, 2020 WL 7042643, at *5 n.4 (S.D. Fla. Dec. 1, 2020) (Bloom, J.) Even if it were permissible to take judicial notice of the meaning of a word from a website that is not a dictionary, the phrase "to call" is not used on either webpage Plaintiffs cite, much less defined.

[3] Oddly, Plaintiffs also argue that Seaboard "does not challenge and therefore concedes that Plaintiffs allege that . . . Seaboard knowingly and intentionally directed . . . voyages to the Bay of Mariel where they called at the container terminal." (Opp'n 14–15.) It makes no sense to claim that by filing a motion to dismiss a defendant "concedes" an allegation. Worse, the Opposition concocts allegations, portraying four statements as quotations from the Amended Complaint. (*See* Opp'n 15 (single-spaced text indicating quoted material under Local Rule 5.1(a)(4).) Plaintiffs have not alleged that Seaboard made shipments "to the Bay of Mariel where they called at the container terminal." (*Compare* Opp'n 14–15, *with* Am. Compl. ¶ 91 ("When at the Port of Mariel, the Trafficking Vessels call at and/*or otherwise use, benefit, and profit from* the container terminal . . . ." (emphasis added).) Regardless, Seaboard's arguments for dismissal apply equally whether Plaintiffs allege that Seaboard called at the Port of Mariel or the container terminal.

prejudice to the ownership right of third parties . . . ." (Ex. A, at 8.) Ignoring the plain language in the concession, Plaintiffs insist without factual support that the rights granted to the Rosell Siblings were "superior rights to any previously granted rights" and that "Plaintiffs' authorization" would have been required to "exploit those rights." (Opp'n 19, 23.) But conveniently omitted from the Opposition is that each of Plaintiffs' purported "exceptional rights" (Am. Compl ¶ 69) *were limited to the purpose of carrying out the preconditions of the concession—they were not exclusive rights to plan, study, execute, maintain, or exploit public docks or warehouses in Mariel Bay*. (Ex. A, at 4–5 (preconditions listed in subsections (A), (B), and (C) of the First part, referred to in the Amended Complaint as "Section One").) For example, as to the "right of mandatory expropriation" (Opp'n 23), the Concession makes clear that the right is limited to "land that must be occupied for the work, uses, and services mentioned in Section One . . . ." (Am. Compl. ¶ 69(b).) Accordingly, Plaintiffs did not allege that the concession granted any exclusive right that Seaboard allegedly violated (or trafficked in).

Moreover, Plaintiffs have not adequately alleged that Maritima Mariel held any concession rights when its assets were confiscated. The Concession Decree required Maritima Mariel to (A) construct a maritime terminal; (B) drain, dredge, and fill-in part of Mariel Bay; and (C) engage in work to complete the aforesaid goals. (Ex. A, at 3–4.) Maritima Mariel's failure to begin that work within 18 months from the date of the concession forfeited any concession rights:

> [t]he concession shall be totally forfeited if the execution of any of the works referred to in letters A), B), and C) . . . do not start within the term of 18 months counted from publication of this Decree . . . and if they were not completed within the four years following the beginning of the same" or "if within a term of three years . . . said objectives were not initiated . . . .

(*Id.* at 5.) Because the confiscation allegedly occurred more than 18 months after the concession rights were granted,[4] Maritima Mariel did not hold any concession rights, and the Cuban Government did not confiscate any, unless and until Maritima Mariel timely began to satisfy the

[4] The concession was granted in August of 1955 (Am. Compl. ¶ 69) and the confiscation did not occur until September of 1960 (*id.* ¶ 2).

enumerated preconditions. Yet, there are no allegations that Maritima Mariel began the requisite work, such as draining, dredging, and filing in part of the Port of Mariel. Accordingly, Plaintiffs have not alleged facts showing that concession rights were confiscated from Maritima Mariel and therefore have not alleged facts showing that Plaintiffs have a claim to any concession rights.

Even if Plaintiffs had alleged that Seaboard violated their concession rights (they have not), *violating a right is not "trafficking" in a concession*. Under Title III, to "traffic" is to use or benefit from confiscated property by, for example, using confiscated land or using confiscated intellectual property. *See, e.g.*, *Iglesias*, 2020 U.S. Dist. LEXIS 164117, *28–29 (in selling liquor, defendant was allegedly "using the assets and intellectual property" confiscated by the Cuban Government to which plaintiff held a claim); *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 484 F. Supp. 3d 1215, 1224 (S.D. Fla. 2020) (alleging cruise line "regularly embark[ed] and disembark[ed] its passengers on the Subject Property"). Violating a concession right is neither using nor benefiting from or otherwise trafficking in a concession right. In other words, Plaintiffs do not allege (and the Opposition does not identify) any facts showing that Seaboard used, benefited from, or otherwise "trafficked" in the concession rights. (Mot. 8; Opp'n 14–19.)

### B. Plaintiffs Fail To Plausibly Allege That Seaboard "Knowingly And Intentionally" Trafficked

The Opposition gets Title III's scienter requirement wrong. Plaintiffs argue that there is *no scienter requirement* because the word "scienter" is "nowhere mentioned in the Helms-Burton Act" and that "the intent standard is 'knowledge'" alone. (Opp'n 24, n.17.) That flatly ignores Title III's plain language. Title III explicitly requires that a defendant traffic "knowingly *and intentionally*." 22 U.S.C. § 6023(13)(A) (emphasis added). Indeed, courts dismiss Helms-Burton claims for lack of "scienter." *See, e.g.*, *Glen v. Am. Airlines, Inc.*, No. 4:20-CV-482-A, 2020 WL 4464665, at *4-5 (N.D. Tex. Aug. 3, 2020) (section titled "Plaintiff failed to plead facts to show scienter"); *Glen v. Trip Advisor LLC*, No. CV 19-1809-LPS, 2021 WL 1200577, at *9 (D. Del. Mar. 30, 2021) (section titled "Scienter"); *Gonzalez v. Amazon.com, Inc.*, No. 19-23988-CIV, 2020 WL 2323032, at *1 (S.D. Fla. May 11, 2020) (noting prior dismissal for failure to "sufficiently

allege the scienter . . . element[]"), *aff'd*, 835 F. App'x 1011 (11th Cir. 2021). Plaintiffs desperately attempt to read out the intent requirement because there are no allegations showing that Seaboard trafficked "knowingly *and* intentionally" in confiscated property.

One reason Plaintiffs fail to allege scienter is because they do not have a certified claim, unlike the plaintiff in the *Havana Docks* cases. (Mot. 13–14.) Unable to address the implications of the absence of a certified claim, the Opposition attacks a "certified claim" strawman in a section titled "an FCSC certified claim is not a prequisite [SIC] to pursuing an HBA claim." (Opp'n 20.) It is not that a certified claim is a prerequisite to bringing a Title III claim; it is not. But having a certified claim supports the scienter requirement because the certification specifically delineates the claimant's various property interests. (Mot. 10 n.6; *id.* at 13–14.) In *Havana Docks*, the plaintiff's certified claim identified all property interests confiscated by the Cuban Government to which the plaintiff held a claim. *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 454 F. Supp. 3d 1259, 1273 (S.D. Fla. 2020). Here, without a certified claim, Plaintiffs argue that Seaboard should have known what property was confiscated because it "is evident in the terms of the 70-year concession." (Opp'n 20.) Plaintiffs' argument fails for several reasons.

First, to understand what property the Cuban Government allegedly confiscated one must look to the Confiscation Order. (*See* Am. Compl. ¶¶ 2–4.) Even if Seaboard knew of the Confiscation Order (which Plaintiffs do not allege), it does not identify any confiscated property that Plaintiffs argue or allege Seaboard trafficked in. (*See generally*, Ex. B, Certified Translation of Confiscation Order.) Rather, the Confiscation Order states that, with certain exceptions, the Cuban Government confiscates the property and assets of the Rosell Siblings and their companies, including Maritima Mariel. It does not state that the Cuban Government confiscated any concession rights, and it certainly does not state that the Cuban Government confiscated the Port of Mariel or container terminal, which were not built at the time.

Second, the Confiscation Order could not have put Seaboard on notice that the Cuban Government confiscated any concession rights because, as discussed in Section II.A., Maritima

Mariel's concession rights were *contingent* on the company satisfying certain preconditions. There are no allegations that Maritima Mariel satisfied any preconditions and thereby held concession rights at the time of confiscation. And there certainly are no allegations that Seaboard should have somehow known that Maritima Mariel did so. As such, the Concession Decree hardly makes "evident" that the Cuban Government confiscated any concession rights from the Rosell Siblings.

Third, the concession rights to plan, study, execute, maintain, or exploit a public dock or warehouse in Mariel Bay were *non-exclusive*, as discussed in Section II.A. As such, Seaboard could not have known that calling at the Port of Mariel amounted to using the concession rights (it did not). And there certainly are no factual allegations that Seaboard *intended* to use or benefit from the concession rights.

Even so, Plaintiffs argue that the allegation that Seaboard operated one vessel to the Port of Mariel a few weeks after the initial Complaint was served "defeats Seaboard's claims." (Opp'n 21–22.) The operative complaint does not allege that the initial Complaint's allegation provided Seaboard with the requisite knowledge. Nor could it. The initial Complaint does not identify the Port of Mariel (or the container terminal) as property confiscated by the Cuban Government and to which Plaintiffs own a claim. (*See generally* ECF No. 1.)

As to the few publications in Cuba that Plaintiffs claim gave Seaboard notice, Plaintiffs do not dispute that there are no allegations that Seaboard reviewed or considered those documents. They merely allege that *they were published*. (Mot. 14; Opp'n 22–23.) More fundamentally, Plaintiffs do not dispute that the article from 1960 in the Cuban Revolucion newspaper and a statement in 2019 on Radio Marti and TV Marti in Cuba do *not even identify what property was confiscated* by the Cuban Government. (*Id.*)[5] The publications and broadcasts did not give Seaboard, or anyone else, notice of any particular property confiscated by the Cuban Government.

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[5] Plaintiffs' cases are inapposite. (*See* Opp'n 23–24.) In *Iglesias*, the court held that in doing business with the Cuban Government, defendant came into possession of barrels and other materials with markings of the confiscated property, which gave defendant reason to know that the property was owned by Cuban citizens. *Iglesias*, 2020 U.S. Dist. LEXIS 164117 at *29. Plaintiffs

Likewise, Plaintiffs maintain that alleging they sent a "notice letter" before filing suit imputes some knowledge to Seaboard. (Opp'n 14.) Plaintiffs, however, do not allege the contents of the letter, nor does the Opposition provide any details. (Mot. 14; Opp'n 24.) Allegations of "the date[] and means by which" the letter was sent (Opp'n 24) are woefully inadequate to show what, if any, knowledge Seaboard could have gained from the letter or that Seaboard intentionally trafficked in confiscated property.

At bottom, even if Seaboard somehow knew or had reason to know that the Cuban Government confiscated the Rosell Siblings' property (it did not and had not), there are no allegations showing that Seaboard "knowingly and intentionally" used, benefited from, or otherwise trafficked in that confiscated property. At most, Plaintiffs allege that Seaboard "called at" the Port of Mariel. But there are no allegations that the Port of Mariel was confiscated property or, even if it were, that Seaboard should have known that.

### C. Plaintiffs' Conclusory Allegations Of "Trafficking" By Non-Parties Do Not Serve As A Basis For A Claim Against Seaboard

Plaintiffs have abandoned their argument that Seaboard "trafficked" through the actions of non-party Seaboard Corporation. (*Compare* Am. Compl. ¶ 107, *with* Opp'n at 20 n.13.) Instead, Plaintiffs attempt to manufacture a "trafficking" theory through the activity of an economic zone—the ZEDM. To sufficiently allege trafficking through a third-party, Plaintiffs must allege facts showing the third-party (1) trafficked and (2) that Seaboard "cause[d], direct[ed], participate[d] in, or profit[ed] from" the third-party's trafficking activity. 22 U.S.C. § 6023(13)(A)(iii); (Mot. 11). The Opposition demonstrates that Plaintiffs have alleged neither.

First, the Opposition does not identify any alleged trafficking by the ZEDM that could be the basis for a violation by Seaboard. Plaintiffs argue that the "70-year [c]oncession [was]

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cite *Garcia-Bengochea* as an example of a case that "found . . . publications sufficient to defeat [a] Motion[] to Dismiss" (Opp'n 23–24), however, it involves no allegations regarding any publications. *See generally Garcia-Bengochea v. Norwegian Cruise Line Holdings Ltd.*, 19-cv-23593, U.S. Dist. LEXIS 154293 (S.D. Fla 2020).

subsumed by the ZEDM" and that "Plaintiffs' family's confiscated land w[as] incorporated in the ZEDM." (Opp'n 19.) "*Subsuming*" a right and *incorporating* land are not "trafficking," as defined in Title III. *See* 22 U.S.C. § 6023(13)(A)(i)–(ii); *see supra* Section II.A. There is no allegation that the ZEDM used, benefited from, or otherwise "trafficked" in the concession rights or land.

Second, Plaintiffs identify no allegation of activity by Seaboard that amounts to trafficking "through the ZEDM." Plaintiffs point to five purported allegations in the Amended Complaint (Opp'n 19–20),[6] but glaringly absent from those "allegations" is any activity whatsoever *by Seaboard*, much less any activity causing, directing, participating in, or profiting from ZEDM's alleged trafficking. Plaintiffs alleged that Seaboard's vessels "called at" the Port of Mariel, but Plaintiffs do not claim that "calling at" the Port of Mariel amounts to "cause[ing], direct[ing], participate[ing] in, or profit[ing] from" trafficking by the ZEDM. 22 U.S.C. § 6023(13)(A)(iii). Critically, as to the allegation that the ZEDM incorporated land, there are no allegations that any activity by Seaboard involved that land. Indeed, that land is alleged to be "southeast, south, and west of Mariel Bay," not part of Mariel Bay. (Am. Comp. ¶ 72.) That is plainly insufficient to state a viable Title III claim and dooms Plaintiffs' theory.

Lastly, the Opposition does not address, and therefore concedes,[7] that there are no allegations showing Seaboard's scienter as to trafficking through the ZEDM. There are no facts alleged to show that *Seaboard knew* or had reason to know that the ZEDM trafficked in confiscated property and that Seaboard intended to cause, direct, participate in, or profit from that activity. (Mot. 12.) For this additional and independent reason, Plaintiffs have failed to allege that Seaboard trafficked through the ZEDM.

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[6] The Opposition misstates the allegations in the Amended Complaint. Plaintiffs have not alleged that they "owned the 70-year Concession to exploit all of Mariel Bay." (Opp'n 19.) According to the Amended Complaint, the concession was to "plan, study, execute, maintain, and exploit public docks and warehouses in the Bay of Mariel Bay." (Am. Compl. ¶ 68.)

[7] *See Anderson v. Branch Banking & Tr. Co.*, 119 F. Supp. 3d 1328, 1345 (S.D. Fla. 2015) (Bloom, J.) (collecting cases).

### D. The Inheritor Plaintiffs Do Not Have An Actionable Ownership Interest

The thirteen heirs and the four estates of the Rosell Siblings that are Plaintiffs may not pursue Title III claims because they acquired any claims to the confiscated property after March 12, 1996. The Opposition concedes that the estates and the heirs of the deceased Rosell siblings may not both bring Title III claims. (*See* Opp'n at 13 (arguing, in the alternative, that the heirs may pursue claims).) The claims of the heirs and estates should be dismissed, but at a minimum, the heirs' claims must be dismissed.[8]

#### 1. The Heirs Do Not Have An Actionable Ownership Interest

Plaintiffs do not dispute what Title III clearly states: to bring a claim under Title III, the plaintiff must have acquired ownership of a claim to the confiscated property before March 12, 1996. (Opp'n at 13.) Plaintiffs do not allege or argue that the heirs acquired claims to the confiscated property before March 12, 1996. (*Id.*) That is dispositive.

The Opposition implies that there is an exception to this requirement for inheritances, misreading *Gonzalez*, and ignoring the plain language of the statute and other cases on point. In *Gonzalez*, Mr. Gonzalez's mother inherited a claim to property when Mr. Gonzalez's father died, later passing that ownership claim to Mr. Gonzalez. *Gonzalez v. Amazon.com, Inc.*, 835 F. App'x 1011, 1012 (11th Cir. 2021). The Opposition imagines that by acknowledging that the mother acquired an "ownership claim" when the father died after March 12, 1996, the Eleventh Circuit implicitly held that she *acquired a Title III claim*. Plaintiffs here, however, fail to recognize the distinction between owning a claim to property and a legal claim under Title III. The mother inherited a claim to property when the father died—not a Title III claim. *See Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1255 (11th Cir. 2006) ("The Helms–Burton Act refers to the property interest that former owners of confiscated property now have as ownership of a 'claim to

[8] All federal actions "must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17. According to the Amended Complaint, the Rosell Siblings' alleged property claims either passed to the estates or to the heirs, not both. (*See, e.g.*, Am. Compl. ¶¶ 21–33.)

such property.'"). To have a Title III claim, the mother must have acquired the claim to confiscated property before March 12, 1996, just as the Eleventh Circuit held Mr. Gonzalez was required to.

Lest there be any doubt, courts have unanimously held that plaintiffs that acquire a claim to confiscated property by inheritance must have done so before March 12, 1996. *See, e.g.*, *Glen v. Trip Advisor LLC*, No. CV 19-1809-LPS, 2021 WL 1200577, at *9 (D. Del. Mar. 30, 2021); *Glen v. Am. Airlines, Inc.*, No. 4:20-CV-482-A, 2020 WL 4464665, at *4 (N.D. Tex. Aug. 3, 2020); *Garcia-Bengochea v. Carnival Corp.*, No. 1:19-CV-21725-JLK, 2020 WL 4590825, at *4 (S.D. Fla. July 9, 2020); *see also Herederos de Roberto Gomez Cabrera, LLC, v. Teck Res. Ltd.*, No. 20-21630-CIV, 2021 WL 1648222, at *5 (S.D. Fla. Apr. 27, 2021) ("The statute makes no distinctions with respect to the method of acquiring the claim"). As Judge King explained (and the Opposition ignored), "the plain meaning of the term 'acquire,' [is] broad enough to cover the inheritance at issue . . . ." *Garcia-Bengochea*, 2020 WL 4590825, at *4; (Mot. at 15).

Even if the word "acquires" somehow were construed not to include inheritances, the claims by the heirs would still be barred. In that case, the heirs never acquired ownership of the claim to confiscated property. *Glen v. Am. Airlines, Inc.*, No. 4:20-CV-482-A, 2020 WL 4464665, at *4 (N.D. Tex. Aug. 3, 2020) ("If the Act's definition of 'acquires' does not include inheritance, plaintiff never 'acquire[d] ownership of the claim'"). The statute, the case law, and logic all dictate that the heirs do not have an actionable Title III claim because they did not acquire their claims to confiscated property before March 12, 1996.[9]

### 2. <u>The Estates Do Not Have An Actionable Ownership Interest</u>

The requirement that a plaintiff must acquire ownership of a claim before March 12, 1996 also bars the claims of the estates of the deceased Rosell Siblings. Plaintiffs seek to avoid this

[9] Plaintiffs request that the Court take judicial notice of an amicus brief submitted in another case. (Opp'n 7 n.4.) However, a "court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Easterwood*, 2020 WL 7042643, at *6 (internal quotation omitted). The fact of such litigation is not at issue here.

requirement, arguing that federal law dictates that Title III claims survive death. Plaintiffs contend that if Title III "does not have *explicit provisions* regarding survivorship, then federal common law is applied to determine if the federal cause of action survives death," relying on *United States v. NEC Corp.* (Opp'n at 7 (emphasis added).) However, *NEC Corp.* actually states that courts look to the *intent* of the statute—not strictly "explicit provisions." *United States v. NEC Corp.*, 11 F.3d 136, 137 (11th Cir. 1993) ("In the absence of expressed *contrary intent*, the survival of a federal cause of action is a question of federal common law." (emphasis added)); *see also Peklun v. Tierra Del Mar Condo. Ass'n*, 119 F. Supp. 3d 1361, 1369 (S.D. Fla. 2015) (Bloom, J.) (finding an "expressed contrary intent" as to FHA). Here, Congress expressed its intent that those who acquire ownership of a claim to confiscated property after March 12, 1996 may not bring a Title III claim.

Plaintiffs argue that the estates acquired claims to confiscated property before March 12, 1996 because the estates "maintain[ed] the original acquisition date [by the Rosell Siblings] of the confiscated property." (Opp'n at 3.) But the caselaw is clear that property does not become part of an estate until the death of the decedent. (Mot. at 16); *see also Sharps v. Sharps*, 214 So. 2d 492, 495 (Fla. 3rd DCA 1968) (applying rule). Plaintiffs identify no caselaw to the contrary.[10] Because the estates did not acquire claims to the confiscated property before March 12, 1996, they cannot bring Title III claims.

## III. <u>CONCLUSION</u>

For the foregoing reasons, the Court should dismiss Plaintiffs' Amended Complaint for failure to state a claim upon which relief can be granted.

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[10] Plaintiffs fail to distinguish Seaboard's cases. They argue that *Depriest* "makes clear that . . . there is no transfer between the decedent and the estate or the personal representative." (Opp'n 4.) The case says the opposite: "When decedent died . . . the car became an asset of his estate." *Depriest v. Greeson*, 213 So. 3d 1022, 1025 (Fla. 1st DCA 2017). Plaintiffs argue "*Hamel* is not applicable" because it "involved the transfer of homestead property" which does not pass to a personal representative. (Opp'n at 5 n.2.) But Seaboard has not argued that ownership claims passed to personal representatives; rather they became part of the estates upon death, after 1996.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of May, 2021, the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

*s/ Robert M. Brochin*
Robert M. Brochin