UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:19-cv-23988-RNS

DANIEL A. GONZALEZ,

Plaintiff,

v.

AMAZON.COM, INC. a
Delaware Corporation, and
SUSSHI INTERNATIONAL, INC.,
a Florida Corporation d/b/a
FOGO CHARCOAL,

Defendants.
_____/

DEFENDANT AMAZON.COM, INC.'S MOTION TO DISMISS PLAINTIFF'S
COMPLAINT AND MEMORANDUM OF LAW

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 4

A. Plaintiff's Claim Under Helms-Burton, Title III 4

B. Allegations Pertaining To Amazon 4

C. The Farmland And The Charcoal 6

III. ARGUMENT 7

A. Plaintiff Fails To Plead Facts To Show Amazon "Knowingly And Intentionally" Trafficked In Confiscated Property 8

1. The Helms-Burton Scienter Requirement 8

2. Plaintiff's Allegations Are Insufficient To Show The Requisite Scienter Under Helms-Burton 10

B. Plaintiff Fails To Plead That Amazon Trafficked In The Farmland 15

C. Plaintiff Fails To Adequately Allege An Actionable Ownership Interest 18

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Almeida v. Amazon.Com, Inc.,
No. 04-20004-CIV, 2004 WL 4910036 (S.D. Fla. July 30, 2004), *aff'd*, 456 F.3d 1316 (11th Cir. 2006) 13

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....7, 19

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....7, 19

In re Chapman,
166 U.S. 661 (1897).....14

Demby v. Schweiker,
671 F.2d 507 (D.C. Cir. 1981).....16

DeMeo v. State Farm Mut. Auto. Ins. Co.,
639 F.3d 413 (8th Cir. 2011) 16

Finalca Casa De Bolsa, C.A. v. Bank of Am., N.A.,
No. 10-20306-CIV, 2010 WL 1540050 (S.D. Fla. Apr. 19, 2010).....11

Flores-Figueroa v. United States,
556 U.S. 646 (2009).....10

Garcia-Bengochea v. Carnival Corp.,
No. 19-cv-21725-JLK, 2019 WL 4015576 (S.D. Fla. Aug. 26, 2019).....15

Glen v. Club Mediterranee S.A.,
365 F. Supp. 2d 1263 (S.D. Fla. 2005) 16

In re Harbour E. Dev., Ltd.,
No. 10-20733-BKC-AJC, 2011 WL 45335 (Bankr. S.D. Fla. Jan. 6, 2011) 15

Havana Docks Corp. v. Carnival Corp.,
19-cv-21724 (S.D. Fla 2019), ECF No. 1 15

Massachusetts v. Morash,
490 U.S. 107 (1989).....14

McFadden v. United States,
135 S. Ct. 2298 (2015).....10

Owens v. Ronald R. Wolf & Associates, P.L.,
13-CV-61769, 2013 WL 6085121 (S.D. Fla. Nov. 19, 2013) 11

RJR Nabisco, Inc. v. United States,
955 F.2d 1457 (11th Cir. 1992) 16

Ruiz v. Experian Info. Sols., Inc.,
16-CV-25102, 2017 WL 1378242 (S.D. Fla. Apr. 14, 2017) 11, 12, 13

Tidwell v. S. Petro Holding LLC,
No. 2:19-CV-98-FTM-29UAM, 2019 WL 2173838 (M.D. Fla. May 20, 2019) 19

Torongo v. Roy,
176 F. Supp. 3d 1320 (S.D. Fla. 2016) 11

Universal City Studios v. Nissim Corp.,
14-CV-81344, 2015 WL 1124704 (S.D. Fla. Mar. 12, 2015).....11

Walton v. Hadley,
No. 13-CV-7907 ER, 2014 WL 3585525 (S.D.N.Y. July 10, 2014).....19

Zack v. Tucker,
704 F.3d 917 (11th Cir. 2013) 14

Statutes

22 U.S.C. § 6021(2) 17

22 U.S.C. § 6021(8) 17

22 U.S.C. § 6022(1) 17

22 U.S.C. § 6022(6) 14

22 U.S.C. § 6023(9) 9

22 U.S.C. § 6023(12) 6

22 U.S.C. § 6023(13) 2

22 U.S.C. § 6023(13)(A).....9, 15

22 U.S.C. § 6023(13)(A)(i).....10

22 U.S.C. § 6023(13)(B)(iv) 17

22 U.S.C. § 6023(15)(A).....18

22 U.S.C. § 6046.....1

22 U.S.C. § 6081(2) 16

22 U.S.C. § 6081(5) 8

22 U.S.C. § 6081(6) 8

22 U.S.C. § 6082(a) 4

22 U.S.C. § 6082(a)(1)(A) 2, 6, 8, 16, 18

22 U.S.C. § 6082(a)(4)(B) 18

22 U.S.C. § 6083(a)(1) 15

22 U.S.C. § 6085(c) 2

22 U.S.C. § 6091(a) 14

47 U.S.C. § 230(c)(1) 13

Other Authorities

31 C.F.R. § 515 14

142 Cong. Rec. H1742 (Mar. 6, 1996) 9

Fed. R. Civ. P. 12(b)(6) 1, 7

H.R. Rep. No. 104-202(I) (1995) 9, 18

H.R. Rep. No. 1645-02 (1996) 16, 19

Trade Control Laws, AMAZON.COM, https://sellercentral.amazon.com/gp/help/external/G201575280?language=en_US (last visited November 18, 2019) 4

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Amazon.com, Inc. moves to dismiss the Complaint filed by Plaintiff Daniel A. Gonzalez for failure to state a claim upon which relief can be granted.

I. INTRODUCTION

Plaintiff brings a claim under Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act ("Helms-Burton" or the "Act" or "Title III") against Amazon and Susshi International Inc. (dba "FOGO"). Amazon operates the online store at Amazon.com. Plaintiff claims that the image in the Complaint (Figure 1) showing a bag of charcoal being sold on Amazon.com sufficiently alleges that Amazon "knowingly and intentionally" trafficked in property confiscated by the Cuban Government. Based merely on the allegation that *an unknown third-party sold charcoal* on Amazon.com, which was described as "from independent farmers in Cuba," Plaintiff seeks to hold Amazon liable under Helms-Burton for *trafficking in the farmland* he claims the Cuban Government confiscated from his grandfather (the "Farmland").

Helms-Burton was enacted in 1996, shortly after the Cuban Government shot down two U.S. civilian private planes. *See* 22 U.S.C. § 6046 (Congressional findings condemning attack). The Act was enacted for four purposes: to strengthen international sanctions against the Castro Government (Title I), support a transition to a free and independent Cuba (Title II), protect property rights of United States nationals (Title III), and exclude from the United States aliens who have confiscated property of United States nationals or who traffic in such property (Title IV). Title III provides U.S. nationals with a private right of action against persons who traffic in confiscated property, but that right was suspended by President Clinton in July 1996, shortly after its enactment. The private right of action was subsequently suspended every six months thereafter

until May 2, 2019, when the current administration declined to renew the suspension. *See* 22 U.S.C. § 6085(c).

Title III of the Act provides a private cause of action only against persons who *knowingly and intentionally* traffic in *property confiscated by the Cuban Government*. *See* 22 U.S.C. §§ 6023(13), 6082(a)(1)(A). Because the Complaint fails to allege *facts* that Amazon knowingly and intentionally trafficked in any confiscated property, and because the charcoal that Amazon allegedly trafficked in was not confiscated by the Cuban Government, the Complaint should be dismissed for failure to state a claim. Plaintiff's claim also fails because the Complaint does not adequately allege that Plaintiff acquired his ownership interest before Helms-Burton was enacted on March 12, 1996, and that he was a United States national at that time, which are both necessary for Plaintiff to state his private right of action. Nor does Plaintiff allege facts as to how he acquired title to the Farmland, except to simply allege it was "by operation of succession." For each of the following three reasons, the Complaint should be dismissed.

First, Plaintiff fails to allege, as he must, any *facts* showing Amazon's scienter. Plaintiff claims to be the rightful owner of *land* that the Cuban Government confiscated, on which at some unknown point in time charcoal was allegedly produced. The Complaint only contains one image allegedly from Amazon.com of an unknown *third-party's* offer to sell charcoal, which the third-party seller described as charcoal from independent farmers in Cuba. The Complaint does not, however, allege a single fact to show that Amazon "knowingly and intentionally" trafficked in the *Farmland* (as opposed to the charcoal), which is an essential element for stating a claim under Title III. Nor could Plaintiff plead that fact in good faith, let alone prove it. The full extent of Amazon's alleged activity here is that it operates Amazon.com, where a bag of charcoal for sale appeared. But the image allegedly posted on Amazon.com makes no mention of the Farmland.

The Complaint fails to allege facts showing that Amazon had reason to know that the Farmland even existed, much less that the Farmland had been confiscated by the Cuban Government (if it was) and that Amazon *intentionally* trafficked in that confiscated property. Simply put, an image of a posting by an unknown third party to sell charcoal on the Amazon.com website is not a sufficient factual allegation to show Amazon knowingly and intentionally trafficked in the Farmland, which was not even mentioned in the alleged posting on Amazon.com.

Second, Plaintiff fails to allege that Amazon trafficked in the property that he alleges was confiscated by the Cuban Government, *i.e.*, the Farmland. While Plaintiff alleges that the Cuban Government confiscated the Farmland, Plaintiff does not allege that Amazon engaged in any activity, much less trafficking activity, involving that land. Instead Plaintiff seems to allege that Amazon trafficked in charcoal. Trafficking in charcoal, however, does not give rise to a claim under Title III because the charcoal was not the property allegedly confiscated by the Cuban Government. Additionally, the Complaint alleges that the charcoal in the image came from independent farmers, not the Cuban Government, and the use of confiscated property by Cuban people is not "trafficking" under the Act.

Third, Plaintiff fails to sufficiently plead that he has the necessary ownership interest in the Farmland to file a claim for damages under Title III. To state a claim for relief under Helms-Burton, Plaintiff must allege he acquired a claim to the confiscated property (here the Farmland) *prior to* March 12, 1996 *and* was a United States national at the time he acquired that claim. Plaintiff also must allege facts to show how he acquired sufficient title or interest in the property. The Complaint fails to allege any such facts and instead alleges only that ownership of the Farmland was passed on to Plaintiff by "operation of succession." For this independent reason, the Complaint fails to state a claim for relief under Helms-Burton.

II. FACTUAL BACKGROUND

A. Plaintiff's Claim Under Helms-Burton, Title III

Plaintiff claims to be a United States national who is the "rightful owner" of an agricultural estate (the Farmland) that the Cuban Government confiscated in 1964. (Compl. ¶¶ 9–11, 15.) He claims that in violation of Title III, Amazon and FOGO "traffic[ked]" in property confiscated by the Cuban Government. (*Id.* ¶ 25.) He claims that Amazon, merely by operating Amazon.com, "knowingly and intentionally commenced, conducted, and promoted the sale of marabu charcoal produced on the" property solely because a third-party advertised the sale of charcoal purporting to be from Cuba. (*Id.* ¶¶ 18–19.) He alleges the same as to Defendant FOGO based on the advertisement of charcoal purporting to be from Cuba on FOGO's website. (*Id.*) For damages under Title III, Plaintiff seeks treble damages of the *fair market value of the confiscated property*. (*Id.* at 9, "Request for Relief"; *see* 22 U.S.C. § 6082(a).)

B. Allegations Pertaining To Amazon

Amazon is a Delaware corporation. It operates the online store found at Amazon.com. (*Id.* ¶¶ 2, 19.) Millions of third-party sellers post items for sale on Amazon.com. (*Id.* ¶ 19.) When placing items for sale on Amazon's website, such as the charcoal in Figure 1 of the Complaint, sellers are subject to Amazon's policy requiring sellers to comply with all applicable laws, including trade control laws of the United States, and prohibiting the sale of "items imported from or originating in" certain listed countries, including Cuba.[1]

Plaintiff alleges in conclusory fashion that Amazon "knowingly and intentionally participated in and profited from the communist Cuban Government's possession of the Subject

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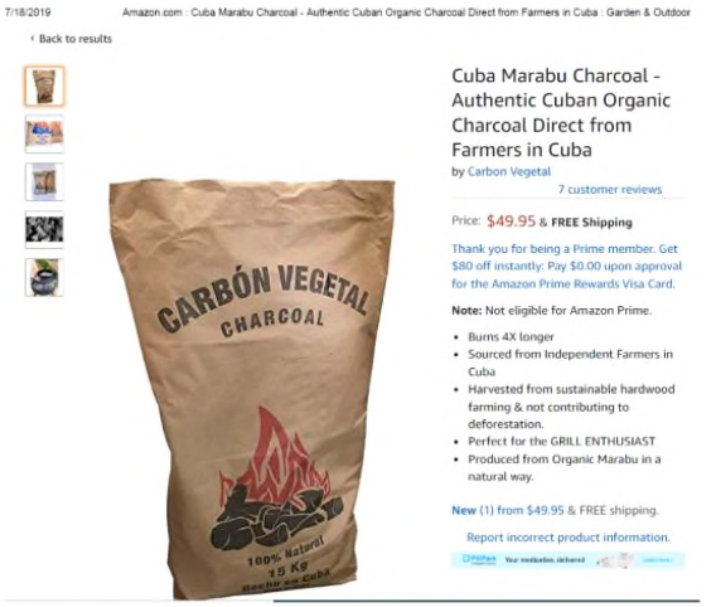
[1] *See Trade Control Laws*, AMAZON.COM, https://sellercentral.amazon.com/gp/help/external/G201575280?language=en_US (last visited November 18, 2019).

Property . . . ." (*Id.* ¶ 19.) But the *only* factual allegation of any act by or even relating to Amazon is the following image (purportedly a screenshot from Amazon.com) of a third-party offer for charcoal:



(*Id.* at 7, "Fig. 1" ("Figure 1").)[2] In addition to the name of the product (which is "Cuba Marabu Charcoal"), the Complaint quotes two marketing statements from the third-party's offer for the charcoal: that the charcoal is "Direct from Farmers in Cuba" and "sourced from independent farmers in Cuba." (*Id.* ¶ 19.) But that alone does not establish that the product is, in fact, charcoal from Cuba, much less from *confiscated* Cuban property, noting that it is the third-party seller, not Amazon, who chooses what claims and representations to make on its offer page for the sale of products.

[2] The Complaint also includes an image allegedly from FOGO's website, of what appears to be the same product. (Compl. at 7, "Fig. 2.")

Plaintiff does not and cannot allege any facts connecting the actual charcoal described in the seller's offer to the Farmland. Even if he had, Plaintiff has not and cannot plead any facts connecting Amazon to the Farmland, or any facts relating to Amazon's knowledge or intent to traffic in confiscated property.

C. **The Farmland And The Charcoal**

According to the Complaint, the "confiscated property" is a 2,030 acre agricultural estate located in the province of Oriente, Cuba that Plaintiff's grandfather owned. (*Id.* ¶¶ 9–10.) The Cuban Government nationalized the Farmland in August 1964. (*Id.* ¶ 11.) Suggesting the Farmland was used for residential purposes, Plaintiff alleges his family was given seven days to leave the Farmland with only their personal belongings.[3] (*Id.*) He also alleges that the Cuban Government "maintains possession" of the Farmland. (*Id.* ¶ 12.) Plaintiff makes no allegation that Marabu charcoal was confiscated by the Cuban Government, or even that Marabu charcoal was on or produced from the Farmland when it was allegedly confiscated.

Plaintiff claims to be the "rightful owner" of the Farmland. (*Id.* ¶ 15.) Ownership of the Farmland was "passed on to" Plaintiff "[b]y operation of succession." (*Id.* ¶ 9.) Plaintiff does not allege *when* he became the rightful owner or that he was a United States national at that time. Nor does Plaintiff allege facts as to how he obtained title to or an interest in the Farmland, such as the line of succession of ownership of the Farmland. Allegations as to how the Plaintiff obtained his ownership interests in the Farmland are necessary to show that Plaintiff has a right under Title III to seek damages for the fair market value of the Farmland that allegedly was confiscated by the Cuban Government in 1964.

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[3] The Act excludes from the definition of "property" for which a defendant may be liable for trafficking in, "real property used for residential purposes." 22 U.S.C. § 6023(12); *see id.* § 6082(a)(1)(A).

Despite Plaintiff's allegations that the Cuban Government confiscated *the Farmland* and that he owns a claim to *the Farmland*, Plaintiff's only allegations relating to Amazon pertain to *charcoal*, not the Farmland. (*Id.* ¶ 18.) Regarding the charcoal, Plaintiff alleges only that it was offered for sale on Amazon.com and described by the seller as "Marabu charcoal" that is "Direct from Farmers in Cuba" and "Sourced from Independent Farmers in Cuba." (*Id* ¶ 19.) Figure 1 does not indicate on what land in Cuba the charcoal was farmed, much less that it was farmed on the Farmland or on any other property confiscated by the Cuban Government. Nevertheless, Plaintiff alleges that Amazon "knowingly and intentionally commenced, conducted, and promoted the sale of marabu charcoal produced on the" Farmland. (*Id.* ¶ 18.)

III. <u>ARGUMENT</u>

Pursuant to Rule 12(b)(6), a claim should be dismissed when the plaintiff "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, a pleading that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" will not survive dismissal. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint should be dismissed unless it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. "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." *Id.*

Applying these pleading rules here, the Complaint should be dismissed because Plaintiff only alleges the "threadbare recitals" of the elements necessary to state a claim for relief under Title III. Plaintiff has not pled facts and cannot plead facts showing three of the elements necessary

to state a claim for relief under Helms-Burton: (1) knowledge and intent by Amazon; (2) that Amazon trafficked in confiscated property; and (3) that Plaintiff has an actionable ownership interest under Title III.

A. Plaintiff Fails To Plead Facts To Show Amazon "Knowingly And Intentionally" Trafficked In Confiscated Property

1. The Helms-Burton Scienter Requirement

The private cause of action provided for in Helms-Burton was intended to deter investors from doing business with the Cuban Government. *See* 22 U.S.C. § 6081(5), (6). Congress sought to eliminate investment in Cuba because it "provides badly needed financial benefit . . . to the current Cuban Government and thus undermines the foreign policy of the United States." *Id.* To that end, Title III makes any person who "knowingly and intentionally" "traffics in property confiscated by the Cuban Government" liable to a United States national who owns a claim to the confiscated property:

> Liability for trafficking . . . Except as otherwise provided in this section, any person that, after the end of the 3-month period beginning on the effective date of this subchapter, 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). The Act is tailored to target investor behavior that can be deterred. For that reason, the definition of "traffics" is confined to knowing and intentional acts, as follows:

> [A] person *"traffics" in confiscated property* if that person *knowingly and intentionally—*
>
> (i) 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,
>
> (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
>
> (iii) 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).

Congress intended, as a matter of public policy, not to hold a party liable under the Act for trafficking in confiscated property alone; it must be done with specific knowledge and intent. Consistent with Congress's intent, Helms-Burton deters investors from providing resources to the Cuban Government, as opposed to punishing participants in commercial activity unaware of any connection to confiscated property. As Representative Robert Menendez, a co-sponsor of Helms-Burton, explained:

> The fact of the matter is that if you *know that that property was not legally yours*, and you are willing to buy it even though you know it was stolen from somebody else, *you are in receipt of stolen property*. If you want to do that, fine, then take the risk.

142 Cong. Rec. H1742 (Mar. 6, 1996) (emphasis added). Representative Benjamin Gilman[4] similarly explained:

> the only companies that will run afoul of this new law are those that are *knowingly and intentionally trafficking in the stolen property of U.S. citizens*.

Id. at 1737 (emphasis added).

In line with Congress's intent to deter investment in Cuba, and as a matter of ordinary English grammar, the "knowingly and intentionally" requirement applies to all elements of "traffics," such that the "trafficker" must *know* or have reason to know that the property was confiscated and *intend* to traffic in that confiscated property.[5] The Supreme Court's interpretation of statutes with "knowingly" requirements shows that the "knowingly and intentionally"

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[4] Representative Gilman was Chairman of the House International Relation Committee, which prepared the House Report on Helms-Burton. *See* H.R. Rep. No. 104-202(I) (1995).

[5] The Act defines "knowingly" as "with knowledge or having reason to know." 22 U.S.C. § 6023(9).

requirement applies to the confiscated property. *See Flores-Figueroa v. United States*, 556 U.S. 646, 647, 657 (2009) (interpreting statute imposing heightened sentence for aggravated identity theft "if, during (or in relation to) the commission of [certain] other crimes, the offender '*knowingly* transfers, possesses, or uses, without lawful authority, *a means of identification of another person*'" to require "that the defendant knew that the means of identification at issue belonged to another person" (emphasis added)); *McFadden v. United States*, 135 S. Ct. 2298, 2303 (2015) (applying principal to scienter requirement in Controlled Substances Act and Controlled Substance Analogue Enforcement Act of 1986). In Title III, one definition of "traffics," for example, provides that a person "traffics" in confiscated property if the person knowingly and intentionally "sells, transfers . . . or otherwise disposes of confiscated property," which requires that the person knew or had reason to know that the property was confiscated and intended to sell, transfer, or otherwise dispose of the confiscated property. 22 U.S.C. § 6023(13)(A)(i). Therefore, to state a claim under Title III, Plaintiff must allege facts showing that Amazon knew or had reason to know that the property it was trafficking in was "confiscated property." And Plaintiff must also allege that, knowing that it was confiscated property, Amazon intended to sell or otherwise dispose of the confiscated property. But, as explained below, Plaintiff's Complaint falls well short of alleging any such facts.

2. Plaintiff's Allegations Are Insufficient To Show The Requisite Scienter Under Helms-Burton

The Complaint alleges the "knowingly and intentionally trafficking" element of a Title III cause of action by merely parroting the statutory language. It alleges in conclusory fashion that Amazon "knowingly and intentionally commenced, conducted, and promoted the sale of marabu charcoal" — property that, importantly, was *not* confiscated by the Cuban Government — and "knowingly and intentionally participated in and profited from the communist Cuban

Government's possession of the Subject property." (Compl. ¶¶ 18–19.) But causes of action that have elements of intent or knowledge require that the requisite scienter is not conclusorily pled. *See, e.g.*, *Ruiz v. Experian Info. Sols., Inc.*, 16-CV-25102, 2017 WL 1378242, at *2 (S.D. Fla. Apr. 14, 2017) (Scola, J.); *Owens v. Ronald R. Wolf & Associates, P.L.*, 13-CV-61769, 2013 WL 6085121, at *4 (S.D. Fla. Nov. 19, 2013) (dismissing cause of action under FCCPA for failure to state a claim because Plaintiff failed to allege facts establishing the requisite knowledge and intent elements).[6]

In *Ruiz*, the plaintiff submitted an application to rent an apartment that provided for liquidated damages in the event that the application was approved and the applicant did not sign a lease. 2017 WL 1378242, at *1. The plaintiff declined to execute a lease and the apartment complex demanded that plaintiff pay liquidated damages. *Id.* The plaintiff contested the damages since the apartment complex had denied the plaintiff's rental application. *Id.* The debt was assigned to Defendant Hunter. *Id.* Hunter attempted to collect the debt, which plaintiff then disputed in writing, and thereafter Hunter again attempted to collect the debt. *Id.* Plaintiff brought a claim under the Florida Consumer Collection Practices Act ("FCCPA"), "which states that those attempting to collect consumer debts are not permitted to: '[c]laim, attempt, or threaten to enforce a debt when such person *knows that the debt is not legitimate* . . . .'" *Id.* at *2 (quoting Florida

[6] *See also Torongo v. Roy*, 176 F. Supp. 3d 1320, 1324–25 (S.D. Fla. 2016) (dismissing cause of action for failure to plead "facts from which [the court] can infer that Defendant knowingly violated" the Fair and Accurate Credit Transactions Act); *Universal City Studios v. Nissim Corp.*, 14-CV-81344, 2015 WL 1124704, at *5 (S.D. Fla. Mar. 12, 2015) (dismissing cause of action for patent infringement because, "[a] review of these claims show that Defendant has done nothing more than state that Plaintiffs have knowledge of the patent and an intent to infringe. These barebone allegations do not provide the Court with an adequate basis [to infer knowledge and intent]."); *Finalca Casa De Bolsa, C.A. v. Bank of Am., N.A.*, No. 10-20306-CIV, 2010 WL 1540050, at *4 (S.D. Fla. Apr. 19, 2010) ("Under today's pleading standards, one would . . . be required to plead facts demonstrating the requisite intent").

Statute § 559.73(9)) (emphasis added). This Court granted Hunter's motion to dismiss for failure to state a cause of action because the Complaint failed to satisfy the essential knowledge element for a FCCPA claim by failing to allege *facts* showing the Defendant had *knowledge* that the debt was not legitimate. *Id.* at *2–3. The Court stated that "[a]t most, the Plaintiff has alleged facts sufficient to demonstrate that Hunter knew that the debt was disputed, but he has failed to allege facts sufficient to demonstrate, even circumstantially, that Hunter actually knew that the debt was illegitimate." *Id* at *2.

Like in *Ruiz*, once the "formulaic recitation" of the elements for a Title III cause of action are stripped from Plaintiff's Complaint, the scant factual allegations remaining that relate to Amazon fail to show the requisite scienter, *i.e.*, that Amazon knew that the property was confiscated and that Amazon intended to sell property confiscated by the Cuban Government. The only remaining allegation is Figure 1 — an image of a third-party's offer to sell *charcoal* on Amazon.com — and a single paragraph with allegations quoting two marketing statements in Figure 1.[7] (Compl. ¶ 19; *see id.* at 7, "Fig. 1.") Those two marketing statements in the description of the product in Figure 1 state that the charcoal is "Direct from Farmers in Cuba" and "sourced from independent farmers in Cuba." (*Id.* ¶ 19, quoting Fig. 1).) These bare-bone references to charcoal sourced from independent farmers in Cuba (even if true) do not state facts that Amazon knew the Farmland was "confiscated property" or that Amazon intended to sell any confiscated property.

While third-party sellers post products for sale on Amazon.com with descriptions of the product, like in Figure 1, the statements describing the charcoal being sold "from Cuba" (if true)

[7] The Complaint also contains one paragraph in the "Parties" Section alleging Amazon's corporate status. (Compl. ¶ 2.)

are *not* statements made by Amazon and, in any event, say nothing of *knowing and intentional trafficking by Amazon*.[8] As this Court held in *Ruiz*, an allegation that the debt was disputed does not sufficiently allege that defendant knew the debt was illegitimate; here, an allegation the charcoal was marketed as being from independent farmers in Cuba does not sufficiently allege that Amazon knew the charcoal was from property confiscated by the Cuban Government. In other words, disputed debt is not necessarily illegitimate (see *Ruiz*) just as Cuban farmers do not all necessarily farm on confiscated property. To satisfy the scienter requirement of a Title III cause of action, Plaintiff must allege facts showing that Amazon knew or had reason to know that the charcoal came from confiscated property, as opposed to other land in Cuba. No such facts are alleged.

There is a critical distinction between knowing that a product is from Cuba and knowing that a product is from *confiscated property* in Cuba. To only require a defendant to know that a product is from Cuba, and not specifically from property confiscated by the Cuban Government, would undermine the scienter required by Congress for a Title III private right of action. The result would be to vastly expand liability under Helms-Burton way beyond what Congress intended by covering anyone who bought or sold (or, as in the instant Complaint, merely operated a store facilitating the sale of) *any product* that the person had reason to know came from Cuba. Congress could have easily written the law to subject anyone to liability who knowingly and intentionally traffics in *any* Cuban property (as opposed to confiscated Cuban property), but it chose not to. Congress made it clear that it was targeting only *confiscated* property, not *any* property: "The

[8] Under the Communications Act of 1934, Amazon may not be treated as the publisher or speaker of the marketing statements contained on the Figure 1 image which was provided by a third-party seller. *Almeida v. Amazon.Com, Inc.*, No. 04-20004-CIV, 2004 WL 4910036, at *3 (S.D. Fla. July 30, 2004) (citing 47 U.S.C. § 230(c)(1)), *aff'd*, 456 F.3d 1316 (11th Cir. 2006).

purpose[] of this chapter is… to protect United States nationals *against confiscatory takings* and the wrongful trafficking *in property confiscated by the Castro regime*." 22 U.S.C. § 6022(6) (emphasis added).

If the Act only required a person to have reason to know the property came from Cuba (and not confiscated by the Government), it could make *any* person who, for example, purchased or sold Cuban rum, Cuban cigars, or Cuban coffee in the United States liable under Title III because that person would "have reason to know" that the product comes from Cuba. In fact, the United States Government regulates Cuban products outside of the context of confiscated property. *See e.g.*, Cuban Assets Control Regulations, 31 C.F.R. § 515. If this Court allows a Title III claim to be stated by the plaintiff merely by alleging that the defendant knew he or she was trafficking in *any* property from Cuba, as compared to the confiscated property, this Court would be making policy decisions and writing laws on what activity is actionable for "trafficking" under Helms-Burton; courts are not, of course, permitted to do any such thing. The Court should reject a reading of the statute that would lead to results that are absurd and contrary to the legislative intent, like this.[9] *See Zack v. Tucker*, 704 F.3d 917, 925 (11th Cir. 2013) ("nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion" (citing and quoting *In re Chapman*, 166 U.S. 661 (1897))).

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[9] Reading the scienter requirement to apply to each element of "traffics" also avoids an absurdity that would result from enforcement of Title IV of Helms-Burton. *See Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) ("in expounding a statute, we [are] not ... guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") Any alien who "traffics" in confiscated property, a claim to which is owned by a United States national, can be excluded from the United States under 22 U.S.C. § 6091(a). The Court should not read the statute to allow for the exclusion from the United States of aliens who unintentionally trafficked in confiscated property.

Critically, and unlike two cases brought under Title III that have advanced past the motion to dismiss stage, Plaintiff has not alleged that he has a certified claim of an ownership interest in the Farmland. *See* 22 U.S.C. § 6083(a)(1) (courts shall accept as proof of an ownership interest in property the certification by the Foreign Claims Settlement Commission of a claim to that ownership interest). In those two cases brought against Carnival Corporation, the plaintiffs alleged that they had an ownership interest that was certified by the Foreign Claims Settlement Commission (as a matter of public record) in confiscated property in Cuba where Carnival regularly embarked and disembarked its cruise passengers. *Garcia-Bengochea v. Carnival Corp.*, No. 19-cv-21725-JLK, 2019 WL 4015576, at *1–2 (S.D. Fla. Aug. 26, 2019); Complaint, *Havana Docks Corp. v. Carnival Corp.*, 19-cv-21724 (S.D. Fla 2019), ECF No. 1 ¶¶ 6, 11–12. But here, Plaintiff does not allege facts to show that anyone had reason to know that the Cuban Government confiscated the Farmland in 1964 (assuming, for the purposes of this 12(b) motion, that it did), much less that Amazon, who had no involvement with the Farmland, knew that it had been confiscated. Thus, there is no factual allegation suggesting that Amazon acted with any knowledge or intent related to the Farmland. For this reason, Plaintiff fails to state a claim under Title III.

B. <u>Plaintiff Fails To Plead That Amazon Trafficked In The Farmland</u>

To be liable under Title III, a person must traffic in the particular *property that was confiscated by the Cuban Government* and to which a plaintiff owns a claim. *See* 22 U.S.C. § 6023(13)(A) (defining "traffics" in terms of the defendant's conduct regarding the "confiscated property"); *In re Harbour E. Dev., Ltd.*, No. 10-20733-BKC-AJC, 2011 WL 45335, at *3 (Bankr. S.D. Fla. Jan. 6, 2011) ("Title III of the Act was intended to grant U.S. nationals a private right of action to bring suit in a U.S. federal court against persons who 'traffic' in *their* confiscated property in Cuba.") (emphasis in original). Title III provides that a person who "*traffics in property which*

was confiscated by the Cuban Government . . . shall be liable to any United States national *who owns the claim to such property . . . .*" 22 U.S.C. § 6082(a)(1)(A) (emphasis added). "Such property" refers to the "traffic[ked] in property" referenced in the first clause. *See Glen v. Club Mediterranee S.A.*, 365 F. Supp. 2d 1263, 1269 (S.D. Fla. 2005) ("Title III permits any U.S. national 'who owns a claim to such [confiscated] property for money damages' to sue those who traffic in such property.") (alteration in original); *see also DeMeo v. State Farm Mut. Auto. Ins. Co.*, 639 F.3d 413, 416 (8th Cir. 2011) ("The plain meaning of the modifier 'such' is, 'of the type previously mentioned.'" (quoting New Oxford American Dictionary 1738 (3d ed. 2010))). Thus, Plaintiff must traffic in the property actually confiscated by the Cuban Government and he must own a claim to the trafficked property to state a claim under Title III.

The requirement that the defendant traffic in the property that was confiscated serves the Congressional purpose of deterring the exploitation of confiscated property. 22 U.S.C. § 6081(2). Congress specifically intended to limit liability under Helms-Burton to commercial activity involving the confiscated property. *See* H.R. Rep. No. 1645-02, at 1660 (1996), 1996 WL 90487 ("Conference Report") (Referencing the private right of action under Title III, the Conference Report states, that "[t]he purpose of this civil remedy is, in part, to discourage persons and companies from engaging in commercial transactions *involving* confiscated property." (emphasis added).)[10] Stated otherwise, unless the commercial activity involves the confiscated property for which the Plaintiff owns a claim, there is no available private right of action under Helms-Burton.

[10] "Indications of congressional intent contained in a conference committee report deserve great deference by courts because 'the conference report represents the final statement of terms agreed to by both houses, [and] next to the statute itself it is the most persuasive evidence of congressional intent.'" *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1462 (11th Cir. 1992) (quoting *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981)).

The property, however, that Plaintiff seems to allege Amazon trafficked in was the charcoal reflected in Figure 1 of the Complaint. But charcoal was not confiscated by the Cuban Government, nor is it alleged to have been. And Plaintiff does not allege to own a claim to personal property that is the charcoal depicted in Figure 1 of the Complaint. Unable to plead that the charcoal was confiscated by the Cuban Government, Plaintiff alleges the property confiscated to be the 2,030 acres of land his grandfather purchased. Fatal to the Complaint, however, is that it alleges no facts showing that Amazon trafficked in *that property* — the Farmland. Indeed, Amazon did not engage in any commercial activity involving the 2,030 acres of land Plaintiff's grandfather purchased and was supposedly confiscated by the Cuban Government. Plaintiff cannot plead Amazon trafficked in property that the Cuban Government confiscated, thus the Title III claim fails.

In addition, Plaintiff fails to allege that Amazon "trafficked" in confiscated property because "traffics," as defined in the Act, does *not* include "transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban Government or the ruling political party in Cuba." 22 U.S.C. § 6023(13)(B)(iv). Congress defined "traffics" in Helms-Burton to be a transaction or use of confiscated property not by the Cuban *people* but by the Cuban *Government*. Indeed, Congress repeatedly expressed in Helms-Burton its dual-purpose in improving living conditions for the Cuban people while denying resources to the Cuban Government. *See, e.g.*, 22 U.S.C. § 6021(2) ("the welfare and health of the Cuban people have substantially deteriorated"); *id.* § 6021(8) ("[t]he consistent policy of the United States towards Cuba . . . has sought to keep faith with the people of Cuba, and has been effective in sanctioning the totalitarian regime"); *id.* § 6022(1) (a purpose of the Act is "to assist the Cuban people in regaining their freedom and prosperity"). Plaintiff's Complaint, however,

alleges that the charcoal comes from "independent farmers" in Cuba, not the Cuban Government. (Compl. ¶ 19.) The activity alleged in the Complaint of selling charcoal from Cuban *farmers* cannot be "trafficking" under the Act, and for this additional reason, Plaintiff fails to state a claim under Title III.

C. Plaintiff Fails To Adequately Allege An Actionable Ownership Interest

To bring an action under Title III the Plaintiff must show that he "owns the claim to" confiscated property. 22 U.S.C. § 6082(a)(1)(A). And with respect to "property confiscated before March 12, 1996, a United States national may not bring an action under [Title III] . . . unless such national acquires ownership of the claim before March 12, 1996." *Id.* § 6082(a)(4)(B).[11] The plain meaning of Title III requires that for property confiscated before March 12, 1996, a Helms-Burton plaintiff must have acquired ownership of the claim to that property before March 12, 1996 and must have been a United States national at that time. Here, Plaintiff alleges that the property was confiscated before March 12, 1996 (Compl. ¶ 11), but does not allege that he acquired an ownership interest in the Farmland prior to March 12, 1996 and that he was a United States national when he acquired the ownership interest. Based on the plain language of Title III, Plaintiff has failed to state a claim.

The plain meaning of the text is consistent with Helms-Burton's legislative history. Congress made clear that "in the case of property confiscated before the date of enactment of this Act, the U.S. national had to have owned the claim to the property before the date of enactment in order to bring an action under this section." H.R. Rep. No. 104-202, at 40 (1995), *reprinted in*

[11] The Act defines a "United States national" to mean "any United States citizen." 22 U.S.C. § 6023(15)(A).

1996 U.S.C.C.A.N. 527, 545. Congress explained its intent in establishing these essential requirements:

> these provisions are intended, in part, to eliminate any incentive that might otherwise exist to transfer claims to confiscated property to U.S. nationals in order to take advantage of the remedy created by this section. It is not the committee's intent that the right of action be available to persons or entities that would relocate to the United States for the purpose of using this remedy.

Conference Report at 1660, 1996 WL 90487. Congress clearly intended that there is a private right of action only for persons who were United States nationals when they acquired their ownership interest in the confiscated property before March 12, 1996. Plaintiff's pleading ignores these essential elements of a Title III claim.

In addition, Plaintiff fails to adequately allege facts to show that he "owns a claim" to the Farmland. Plaintiff's only allegation regarding his ownership interest in the Farmland is the conclusory assertion that the ownership interest in the Farmland purchased by his grandfather was passed on to Plaintiff "[b]y operation of succession." (Compl. ¶ 9). But Plaintiff must allege facts, rather than legal conclusions, sufficient to state a claim to relief that is plausible on its face under *Twombly* and *Iqbal*. *See Tidwell v. S. Petro Holding LLC*, No. 2:19-CV-98-FTM-29UAM, 2019 WL 2173838, at *2 (M.D. Fla. May 20, 2019) ("unsupported, conclusory allegations of ownership fail to state a claim"); *Walton v. Hadley*, No. 13-CV-7907 ER, 2014 WL 3585525, at *4 (S.D.N.Y. July 10, 2014) ("Defendant's argument that his conclusory assertion of ownership is enough to move the case beyond the pleading stage is unavailing."). Plaintiff alleges no facts of how he came to obtain the ownership interest in the Farmland transferred from Plaintiff's grandfather to Plaintiff. For example, Plaintiff fails to allege the line of succession of ownership of the Farmland, whether an interest in the Farmland was devised to him, or by whom it was devised. Accordingly, Plaintiff fails to plead facts to state a cause of action under Title III, and for this reason too Plaintiff's claim fails.

IV. CONCLUSION

For the foregoing reasons, Amazon requests that the Court dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted.

Dated: November 19, 2019

Respectfully submitted,

/s/ Robert M. Brochin

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2019, I electronically filed the foregoing with the Clerk of the Court through the CM/ECF system, which will send a notice of electronic filing to counsel for all parties of record.

/s/Robert M. Brochin
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