No. 20-12407

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Mario Del Valle, **Enrique Falla**, and **Angelo Pou**,
Plaintiffs–Appellants
v.
Expedia Group, Inc., **Hotels.com L.P.**, **Hotels.com GP, LLC**, **Orbitz, LLC**, **Booking.com B.V.**, and **Booking Holdings, Inc.**,
Defendants–Appellees

Appeal from the United States District Court
for the Southern District of Florida
Case No. 1:19-cv-22619-RNS

BRIEF OF APPELLEES EXPEDIA GROUP, INC., HOTELS.COM, L.P., HOTELS.COM GP, LLC, AND ORBITZ, LLC

David D. Shank
Jane Webre
SCOTT, DOUGLASS & MCCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
(512) 495-6300

Counsel for Appellees Expedia Group, Inc., Hotels.com, L.P., Hotels.com GP, LLC, and Orbitz, LLC

CERTIFICATE OF INTERESTED PERSONS

In accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2 and 26.1-3, counsel for Expedia Group, Inc., Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC (together, the "**Expedia Entities**") certifies that the following is a complete list of trial judges, attorneys, persons, associations, firms, partnerships, or corporations that have an interest in the outcome of this matter, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, or other identifiable legal entities related to a party:

1. Aguila, M. Paula, Esq. (counsel for Plaintiffs–Appellants)
2. Akerman LLP (counsel for Defendants–Appellees Expedia Group, Inc., Hotles.com, L.P., Hotels.com GP, LLC, and Orbitz, LLC)
3. Arellano, Elena del Valle (former plaintiff and alleged owner of the claim to one of the allegedly confiscated properties)
4. Baker & McKenzie LLP (counsel for Defendants–Appellees Booking.com B.V. and Booking Holdings, Inc.)
5. Booking Holdings, Inc. BKNG (Defendant–Appellee)
6. Booking.com B.V. (Defendant–Appellee)
7. Bloom, Hon. Beth (United States District Judge)
8. Del Valle, Elena (sister of Plaintiff–Appellant Mario Del Valle and alleged owner of interest in one of the allegedly confiscated properties)
9. Del Valle, Mario (Plaintiff–Appellant)

10. Duffy, Michael A. (counsel for Defendants–Appellees Booking.com B.V. and Booking Holdings, Inc.)

11. Expedia, Inc., a Washington corporation (subsidiary of Expedia Group, Inc. and indirect parent company of Defendants–Appellees Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC)

12. Expedia Group, Inc. EXPE (Defendant–Appellee)

13. Falla, Enrique (Plaintiff–Appellant)

14. Falla, Laureano (former plaintiff and alleged owner of the claim to one of the allegedly confiscated properties)

15. Fernandez, Carolina (former plaintiff and alleged owner of the claim to one of the allegedly confiscated properties)

16. Fernandez, Luis (former plaintiff and alleged owner of the claim to one of the allegedly confiscated properties)

17. Fernandez, Mario (former plaintiff and alleged owner of the claim to one of the allegedly confiscated properties)

18. Hotels.com GP, LLC (Defendant–Appellee and parent of Defendant–Appellee Hotels.com L.P.)

19. Hotels.com L.P. (Defendant–Appellee)

20. HRN 99 Holdings, LLC (indirect subsidiary of Defendant–Appellee Expedia Group, Inc, and parent of Defendant–Appellee Hotels.com GP, LLC)

21. Law Office of Manuel Vazquez, P.A. (counsel for Plaintiffs–Appellants)

22. Mathy, Patricia (counsel for Defendants–Appellees Booking.com B.V. and Booking Holdings, Inc.)

23. McCutcheon, Michael C. (counsel for Defendants–Appellees Booking.com B.V. and Booking Holdings, Inc.)

24. Mestre, Jorge (counsel for Plaintiffs–Appellants)

25. Moreno, Hon. Federico A. (United States District Judge)

26. Olson, Kyle R. (counsel for Defendants–Appellees Booking.com B.V. and Booking Holdings, Inc.)

27. Orbitz, Inc. (parent of Defendant–Appellee Orbitz, LLC and indirect subsidiary of Defendant–Appellee Expedia Group, Inc.)

28. Orbitz, LLC (Defendant–Appellee)

29. Orbitz Worldwide, Inc. (indirect parent of Defendant–Appellee Orbitz, LLC and indirect subsidiary of Defendant–Appellee Expedia Group, Inc.)

30. Orbitz Worldwide, LLC (indirect parent of Defendant–Appellee Orbitz, LLC and indirect subsidiary of Defendant–Appellee Expedia Group, Inc.)

31. Perez, Lorayne (counsel for Defendants–Appellees Expedia Group, Inc., Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC)

32. Pou, Angelo (Plaintiff–Appellant)

33. Riccio, Andrew (counsel for Defendants–Appellees Booking.com B.V. and Booking Holdings, Inc.)

34. Rivero Mestre LLP (counsel for Plaintiffs–Appellants)

35. Rivero, Andrés (counsel for Plaintiffs–Appellants)

36. Rodriguez, Carlos A. (counsel for Plaintiffs–Appellants)

37. Rolnick, Alan (counsel for Plaintiffs–Appellants)

38. Scola, Hon. Robert N., Jr. (United States District Judge)

39. Scott Douglass & McConnico LLP (counsel for Defendants–Appellees Expedia Group, Inc., Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC)

40. Shank, David (counsel for Defendants–Appellees Expedia Group, Inc., Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC)

41. Sosa, Lolita (former counsel for Defendants–Appellees Expedia Group, Inc., Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC)

42. Vazquez, Manuel (counsel for Plaintiffs–Appellants)

43. Webre, Jane (counsel for Defendants–Appellees Expedia Group, Inc., Hotels.com L.P., Hotels.com GP, LLC, and Orbitz, LLC)

Defendant–Appellee Expedia Group, Inc.[1] is a publicly held Delaware corporation that has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Defendant–Appellee Hotels.com L.P., a Texas limited liability partnership, is owned by HRN 99 Holdings, LLC, a New York limited liability company, and Hotels.com GP, LLC, a Texas limited liability company. Each of HRN 99 Holdings, LLC and Hotels.com GP, LLC is wholly owned by Expedia, Inc., a Washington corporation that is wholly owned by Expedia Group, Inc., a publicly held Delaware corporation. No publicly traded corporation owns 10% or more of Expedia Group, Inc.'s stock.

Defendant–Appellee Hotels.com GP, LLC,[2] a Texas limited liability company, is wholly owned by Expedia, Inc., a Washington corporation that is wholly owned by

[1] Plaintiffs initially misnamed defendant Expedia Group, Inc. by referring to it by its former name, "Expedia, Inc." (*See* App.042 ¶ 5.) Plaintiffs corrected this misnomer in their second amended complaint. (App.137 n.4.)

Expedia Group, Inc., a publicly held Delaware corporation. No publicly traded corporation owns 10% or more of Expedia Group, Inc.'s stock.

Defendant–Appellee Orbitz, LLC is a Delaware limited liability company, which is wholly owned by Orbitz, Inc., a Delaware corporation, which is wholly owned by Orbitz Worldwide, LLC, a Delaware limited liability company, which is wholly owned by Orbitz Worldwide, Inc. a Delaware corporation, which is wholly owned by Expedia, Inc., a Washington corporation. Expedia, Inc. is wholly owned by Expedia Group, Inc., a publicly held Delaware corporation. No publicly traded corporation owns 10% or more of Expedia Group, Inc.'s stock.

[2] Although Plaintiffs incorrectly omitted "LLC" when naming defendant Hotels.com GP, LLC in the case caption (*see* App.135), they correctly identified Hotels.com GP, LLC by its full name in the body of their complaint (App.138 ¶ 7).

STATEMENT REGARDING ORAL ARGUMENT

The Expedia Entities respectfully submit that oral argument would be helpful to the Court in deciding this appeal. While the personal jurisdiction issue does not involve any novel or unusual questions, the issues regarding standing and failure to state a claim present issues of first impression regarding the proper interpretation of the Helms-Burton Act. Though the Act was adopted in 1996, the private right of action in Title III was suspended until May 2019. As such, most courts have not yet addressed or resolved fundamental aspects of the statute's enforcement. This appeal presents one of the first opportunities for this Court to address certain of those issues.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS C-1

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 3

A. The Helms-Burton Act 3

B. The Original and First Amended Complaints 4

C. Plaintiffs' Second Amended Complaint 5

D. The District Court's Dismissal 8

E. Standards of Review 9

SUMMARY OF THE ARGUMENT 10

ARGUMENT 12

A. Lack of Personal Jurisdiction 12

1. Plaintiffs' allegations fail to satisfy Florida's long-arm statute. 14

2. Plaintiffs' allegations fail to satisfy due process. 21

3. Dismissal without jurisdictional discovery or leave to amend was appropriate 24

B. Lack of Subject-Matter Jurisdiction – No Article III Standing 27

C. Failure to State a Claim 31

1. Plaintiffs failed to plead ownership of an actionable claim. 32

2. Plaintiffs fail to adequately allege scienter. 37

3. The Lawful Travel Clause is an element of a claim for trafficking, and it bars Plaintiffs' claims.....39

4. The Properties were used for residential purposes and therefore do not come within the meaning of "property" under the Act. 44

CONCLUSION 47

TABLE OF AUTHORITIES

Cases

Access Now, Inc. v. Sw. Airlines Co.,
385 F.3d 1324 (11th Cir. 2004) 12

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

Aviation One of Fla., Inc. v. Airborne Ins. Consultants (PTY), Ltd,
722 F.App'x 870 (11th Cir. 2018).....24

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....31, 40

Benjamin v. CitiMortgage, Inc.,
No. 0:12-cv-62291-FAM, 2013 WL 1891284 (S.D. Fla. May 6, 2013).....39

Black Diamond Land Mgmt. LLC v. Twin Pines Coal Inc.,
707 F.App'x 576 (11th Cir. 2017).....32

Bochese v. Town of Ponce Inlet,
405 F.3d 964 (11th Cir. 2005) 27

Boyd v. Warden,
856 F.3d 853 (11th Cir. 2017) 9

Brisson v. Ford Motor Co.,
349 F.App'x 435 (11th Cir. 2009).....26

Bryant v. Dupree,
252 F.3d 1161 (11th Cir. 2001) 26

Bulpit, LLC v. DeCanio,
No. 2:13-cv-14119-KMM, 2013 WL 12126313 (S.D. Fla. June 7, 2013).....19

Burger King Corp. v. Weaver,
169 F.3d 1310 (11th Cir. 1999) 27

Butler v. Sukhoi Co.,
579 F.3d 1307 (11th Cir. 2009) 24

Carmel & Co. v. Silverfish, LLC,
No. 1:12-cv-21328-KMM, 2013 WL 1177857 (S.D. Fla. Mar. 21, 2013) 17, 18

Castillo v. Allegro Resort Mktg.,
603 F.App'x 913 (11th Cir. 2015) 13

Catalyst Pharms., Inc. v. Fullerton,
748 F.App'x 944 (11th Cir. 2018) 19, 20

Clover Sys., Inc. v. Almagran, S.A.,
No. 05-cv-22539, 2007 WL 1655377 (S.D. Fla. June 7, 2007) 18

Club Madonna, Inc. v. City of Miami Beach,
924 F.3d 1370 (11th Cir. 2019) 10

Diaz v. Rood,
851 So.2d 843 (Fla. 2d DCA 2003) 36

Diulus v. Am. Express Travel Related Servs. Co., Inc.,
823 F.App'x 843 (11th Cir. 2020) 24

Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury,
606 F.Supp.2d 59 (D.D.C. 2009) 43

Evans v. United States,
504 U.S. 255 (1992) 35

Fish v. Kobach,
840 F.3d 710 (10th Cir. 2016) 43

Garcia-Bengochea v. Carnival Corp.,
No. 1:19-cv-21725-JLK, 2019 WL 4015576 (S.D. Fla. Aug. 26, 2019) 40

Garcia-Bengochea v. Carnival Corp.,
No. 1:19-cv-21725-JLK, 2020 WL 4590825 (S.D. Fla. July 9, 2020) 33, 34, 37

Garcia-Bengochea v. Norwegian Cruise Line Holdings,
No. 1:19-cv-23593-JLK, 2020 WL 5028209 (S.D. Fla. Aug. 25, 2020) 38

Gardner v. Mutz,
962 F.3d 1329 (11th Cir. 2020) 9

Glen v. Am. Airlines, Inc.,
No. 4:20-cv-482-A, 2020 WL 4464665 (N.D. Tex. Aug. 3, 2020) 31, 34, 37

Gonzalez v. Amazon.com, Inc. (*Gonzalez I*),
No. 1:19-cv-23988-RNS, 2020 WL 1169125 (S.D. Fla. Jan. 17, 2020).....34, 37, 38

Gonzalez v. Amazon.com, Inc. (*Gonzalez II*),
No. 1:19-cv-23988-RNS, 2020 WL 2323032 (S.D. Fla. May 11, 2020).....33, 37

Hinkle v. Cirrus Design Corp.,
775 F.App'x 545 (11th Cir. 2019).....25

Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.,
421 F.3d 1162 (11th Cir. 2005) 15, 16

In re Takata Airbag Prods. Liab. Litig.,
396 F.Supp.3d 1101 (S.D. Fla. 2019) 13

Kabbaj v. Obama,
568 F.App'x 875 (11th Cir. 2014).....26

Kawa Orthodontics, LLP v. Sec'y, U.S. Dep't of the Treasury,
773 F.3d 243 (11th Cir. 2014) 29

Layne v. Layne,
74 So.3d 161 (Fla. 1st DCA 2011).....36

Lemoine v. Wong,
No. 0:17-cv-60099-UU, 2017 WL 5127592 (S.D. Fla. Mar. 29, 2017) 15

Leones v. Rushmore Loan Mgmt. Servs., LLC,
No. 0:17-cv-61216-WPD, 2017 WL 6343622 (S.D. Fla. Dec. 11, 2017) 26

Madara v. Hall,
916 F.2d 1510 (11th Cir. 1990) 9, 12, 13

Majd-Pour v. Georgiana Cmty. Hosp., Inc.,
724 F.2d 901 (11th Cir. 1984) 24

McCullough v. Bd. of Regents,
623 F.App'x 980 (11th Cir. 2015) 40

Med. Transp. Mgmt. Corp. v. Comm'r,
506 F.3d 1364 (11th Cir. 2007) 35

Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n,
226 F.3d 1226 (11th Cir. 2000) 29

Michel v. NYP Holdings, Inc.,
816 F.3d 686 (11th Cir. 2016) 37

Mizzaro v. Home Depot, Inc.,
544 F.3d 1230 (11th Cir. 2008) 38

Monroe v. CitiMortgage, Inc.,
No. 8:07-cv-0066-SCB-TGW, 2007 WL 1560194 (M.D. Fla. May 29, 2007) 39

Muransky v. Godiva Chocolatier, Inc.,
No. 16-16486, 2020 WL 6305084 (11th Cir. Oct. 28, 2020) (en banc) 28, 30

Nat. Res. Def. Council, Inc. v. Thomas,
838 F.2d 1224 (D.C. Cir. 1988) 43

Oldfield v. Pueblo De Bahia Lora, S.A.,
558 F.3d 1210 (11th Cir. 2009) 21

Oxford Asset Mgmt., Ltd. v. Jaharis,
297 F.3d 1182 (11th Cir. 2002) 31

Pathman v. Grey Flannel Auctions, Inc.,
741 F.Supp.2d 1318 (S.D. Fla. 2010) 17

Quiller v. Barclays Am./Credit, Inc.,
727 F.2d 1067 (11th Cir. 1984) 42

RG Golf Warehouse, Inc. v. Golf Warehouse, Inc.,
362 F.Supp.3d 1226 (M.D. Fla. 2019) 15, 16

Richard Boyd Enters., Inc. v. Aquarium Pharm., Inc.,
No. 09-22301-CIV, 2010 WL 11448226 (S.D. Fla. Feb. 5, 2010) 23

RJR Nabisco, Inc. v. United States,
955 F.2d 1457 (11th Cir. 1992) 44

Ruhrgas AG v. Marathon Oil Co.,
526 U.S. 574 (1999).....27

Schaffer v. Weast,
546 U.S. 49 (2005).....41

Snow v. DirecTV, Inc.,
450 F.3d 1314 (11th Cir. 2006) 13

Spokeo, Inc. v. Robins,
136 S.Ct. 1540 (2016) 28, 30

Statton v. Fla. Fed. Jud. Nominating Comm'n,
959 F.3d 1061 (11th Cir. 2020) 31

Thole v. U.S. Bank N.A.,
140 S.Ct. 1615 (2020) 28, 30

Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.,
525 F.3d 1107 (11th Cir. 2008) 41

Trichell v. Midland Credit Mgmt., Inc.,
964 F.3d 990 (11th Cir. 2020) 28, 29, 30

United Techs. Corp. v. Mazer,
556 F.3d 1260 (11th Cir. 2009) .....passim

Wagner v. Daewoo Heavy Indus. Am. Corp.,
314 F.3d 541 (11th Cir. 2002) (en banc) 25, 26

Waite v. All Acquisition Corp.,
901 F.3d 1307 (11th Cir. 2018) 23

Walden v. Fiore,
571 U.S. 277 (2014) 12, 23

Whitmore v. Arkansas,
495 U.S. 149 (1990) 28

Williams Elec. Co., Inc. v. Honeywell, Inc.,
854 F.2d 389 (11th Cir. 1988) 19

Statutes

22 U.S.C. § 6022(1) 42

22 U.S.C. § 6022(6) 42

22 U.S.C. § 6023(12)(A) 34

22 U.S.C. § 6023(12)(B) 4, 44, 45

22 U.S.C. § 6023(12)(B)(i) 46

22 U.S.C. § 6023(12)(B)(ii) 47

22 U.S.C. § 6023(13)(A) 3, 37, 39

22 U.S.C. § 6023(13)(A)(ii) 37

22 U.S.C. § 6023(13)(B) 4, 39, 42

22 U.S.C. § 6023(13)(B)(iii) 2, 39

22 U.S.C. § 6023(13)(B)(iv) 46

22 U.S.C. § 6023(A) 2

22 U.S.C. § 6061(1) 42

22 U.S.C. § 6082 41

22 U.S.C. § 6082(a) 3

22 U.S.C. § 6082(a)(1)(A) 41, 44, 45

22 U.S.C. § 6082(a)(1)(A)(i) 3, 23, 32

22 U.S.C. § 6082(a)(3)(B) 42

22 U.S.C. § 6082(a)(4)(B) .....passim

22 U.S.C. § 6082(a)(5)(D) 45

22 U.S.C. § 6082(f)(2)(A) 45

22 U.S.C. § 6083(a)(2) 3

22 U.S.C. § 6085(c) 4

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995,
Pub. L. No. 104-114, 110 Stat. 785 (1996) 3

FLA. STAT. § 48.193 12

FLA. STAT. § 48.193(1)(a) 14, 17

FLA. STAT. § 48.193(1)(a)(1) 14, 15, 16, 18

FLA. STAT. § 48.193(1)(a)(2) 18, 19, 20

FLA. STAT. § 48.193(1)(a)(6) 14

FLA. STAT. § 48.193(2) 14

FLA. STAT. § 732.101(2) 36

Regulations

31 C.F.R. § 515.560(a) 42

31 C.F.R. § 515.572(a) 43

31 C.F.R. § 515.572(b) 40

Other Authorities

H.R. 927, 104th Cong. § 4(6), (7) 46

H.R. REP. NO. 104-468 (1996) (Conf. Rep.) 44

Incident to Employment, BLACK'S LAW DICTIONARY (11th ed. 2014) 43

Incident, MERRIAM-WEBSTER.COM 43

RESTATEMENT (THIRD) OF PROPERTY
(WILLS & DON. TRANS.) § 3.1 (AM. L. INST. 1999) 36

RESTATEMENT (THIRD) OF PROPERTY:
WILLS & DON. TRANS. § 2.1 (AM. L. INST. 1999) 36

RESTATEMENT (THIRD) OF PROPERTY:
WILLS & DON. TRANS. § 25.1 cmt. a (AM. L. INST. 2011) 35

RESTATEMENT (THIRD) OF PROPERTY:
WILLS & DON. TRANS. § 25.3 (AM. L. INST. 2011) 35

STATEMENT OF JURISDICTION

Plaintiffs Mario Del Valle, Enrique Falla, and Angelo Pou ("**Plaintiffs**") allege that the district court had jurisdiction pursuant to 28 U.S.C. § 1331 over their federal claims and that this Court has jurisdiction pursuant to 28 U.S.C. § 1291 over this appeal from a final judgment of dismissal. The Expedia Entities contend that this Court and the district court lack subject-matter jurisdiction over this action because Plaintiffs lack standing under Article III of the Constitution.

STATEMENT OF THE ISSUES

1. Whether the second amended complaint contains factual allegations as to each of the Expedia Entities sufficient to make out a *prima facie* case of specific personal jurisdiction under Florida's long-arm statute and the Due Process Clause.
2. Whether Plaintiffs lack standing under Article III of the Constitution and, thus, the federal courts lack subject-matter jurisdiction over this case.
3. As an alternative ground for affirmance, whether Plaintiffs failed to state a claim upon which relief can be granted under Rule 12(b)(6) because Plaintiffs failed to allege facts showing that
    a. Plaintiffs own "the claim[s]" to the allegedly confiscated properties and acquired ownership of those claims before March 12, 1996, as required by 22 U.S.C. § 6082(a)(4)(B);
    b. the Expedia Entities "knowingly and intentionally" engaged in or profited from commercial activity concerning confiscated property, as required by the Act's definition of *traffics*, 22 U.S.C. § 6023(A);
    c. the Expedia Entities engaged in conduct that falls outside the lawful-travel clause in the Act's definition of *traffics*, 22 U.S.C. § 6023(13)(B)(iii);
    d. the allegedly confiscated properties meet the Act's definition of *property*, which excludes most "real property used for residential purposes."

STATEMENT OF THE CASE

A. The Helms-Burton Act

In March 1996, President Clinton signed into law the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. §§ 6021-6091), commonly known as the Helms-Burton Act. Title III of the Act—subject to certain limitations and definitions—grants U.S. nationals who "own[ ] the claim" to "property" that was confiscated by the Cuban government the right to sue and recover statutory damages from any person who "traffics" in such property. 22 U.S.C. § 6082(a). The Act's definition of *traffics* covers an expansive range of conduct that not only includes transferring or holding an interest in confiscated property but also covers "engag[ing] in a commercial activity using or otherwise benefiting from confiscated property" and "caus[ing], direct[ing], participat[ing] in, or profit[ing] from" conduct that otherwise constitutes trafficking. *Id.* § 6023(13)(A). The statute purports to make one who commits such "trafficking" conduct liable not for the profits earned from the trafficking, nor the actual damages sustained by the plaintiff because of the trafficking. Instead, the Act imposes statutory damages equal to the value of the entire property. *Id.* §§ 6082(a)(1)(A)(i), 6083(a)(2).

Importantly, however, the conduct described in the statute constitutes trafficking only if done "knowingly and intentionally." *Id.* § 6082(a). Indeed, this scienter requirement is just one of many limitations that Congress included in attempting to limit the Act's unprecedented scope. Those limitations include:

- Limiting actions based on property confiscated before the Act's enactment date, March 12, 1996, to U.S. nationals who already owned the claim to that property as of that date. *Id.* § 6082(a)(4)(B).
- Excluding, with limited exceptions, real property used for residential purposes from the Act's definition of *property* and thereby barring Title III actions based on claims to such real property. *Id.* § 6023(12)(B).
- Excluding from the definition of *traffics* four categories of desirable conduct, including transactions and uses of property incident and necessary to lawful travel to Cuba. *Id.* § 6023(13)(B).

In addition to these and other limitations, the Act also empowers the President to suspend the right of action in Title III for successive six-month periods. *Id.* § 6085(c). Immediately after the Act became effective on March 12, 1996, President Clinton suspended Title III's right of action and renewed the suspension during the remainder of his presidency. Presidents Bush and Obama did the same, as did President Trump for a time. But in 2019—more than twenty years after the Act's passage—the suspension of Title III was permitted to expire. This suit was among the first filed under the Act.

B. The Original and First Amended Complaints

On June 24, 2019, plaintiffs Mario Del Valle and Enrique Falla, along with nine other named plaintiffs, filed this case as a putative class action asserting causes of action for trafficking under the Helms-Burton Act against multiple defendants. (*See*

SA.1.)[3] A week later, Del Valle and Falla, along with Mario Echeverria, filed a "corrected" complaint that omitted all of the other original plaintiffs. (App.017-38.) The plaintiffs did not serve any of the defendants for months.

On January 17, 2020—more than six months after Del Valle and Falla filed their corrected complaint—they filed an amended complaint in which they added the Expedia Entities and Booking Holdings Inc. as defendants for the first time and dropped all of the original defendants except Booking.com B.V. (App.039-57.) The amended complaint also dropped Echevarria as a named plaintiff and added plaintiff Angelo Pou. (App.041-42.)

C. Plaintiffs' Second Amended Complaint

The Expedia Entities filed a motion to dismiss Plaintiffs' first amended complaint for lack of personal jurisdiction, lack of standing, and failure to state a claim. (*See* SA.25-50) Plaintiffs sought leave to replead to address those issues (App.068-132), and the district court granted them leave to file a second amended complaint (App.133). In the motion for leave, Plaintiffs sought to amend their pleading to "more clearly set out the factual and legal bases for their claims and to amend several allegations that were addressed in the Expedia Entities' Motion to Dismiss." (App.069.) Though the Second Amended Complaint was explicitly intended to address defects identified in the Expedia Entities' first motion to dismiss, the motion for leave made no mention of a need for discovery relating to personal jurisdiction or any other issue raised in the motion to dismiss. (*See id.*)

---

[3] Citations to the Supplemental Appendix of Defendants-Appellees Booking.com B.V. and Booking Holdings Inc. are formatted as "SA.[page number]."

The second amended complaint includes the following factual allegations: Plaintiffs Del Valle, Falla, and Pou each purport to be an heir to one of three properties in Cuba, which they term the Del Valle Property, the Falla Property, and the Muniz Property (collectively, the "Properties"). (App.136 nn.1-3.) Plaintiffs allege that the Cuban government confiscated the Properties from one or more of Plaintiffs' parents or grandparents shortly after the Cuban revolution in 1959 or the early 1960s. (App.142-43 ¶¶ 34, 37.) According to Plaintiffs, the Properties are now the sites of two hotels that the Cuban government developed together with Blue Diamond Hotels & Resorts, Inc.: the Starfish Cuatro Palmas, which purportedly sits partially on the Del Valle and Falla Properties, and the Memories Jibacoa Resort (the "**Resorts**"), which purportedly sits on the Muniz Property. (App.136-37.)

Plaintiffs assert that they acquired alleged interests in the properties through various means of succession. With respect to the Del Valle Property, Plaintiffs allege that Luis Del Valle Esnard "owned several parcels of beachfront property" in Varadero. (App.141 ¶ 19.) On Esnard's passing, "the parcels of beachfront property were distributed to his children,"[4] and one of those properties, the Del Valle Property, "was inherited by his son Mario Del Valle Sr.," who built a house on the property for his family in the late 1950s. (*Id.* ¶¶ 20-21.) Plaintiffs allege that on the passing of Mario Del Valle Sr. in 1968, "his interest in the Del Valle Property was distributed to his

[4] In the first amended complaint, Plaintiffs alleged that Mario Del Valle Sr. inherited the Del Valle Property "pursuant to a will." (App.043 ¶ 16.) Plaintiffs removed that allegation from the second amended complaint. (*See* App.141 ¶ 20.)

children, including his son, plaintiff Mario Del Valle, who inherited the interest to the Del Valle Property which is the subject of this action." (*Id.* ¶ 22.)

Regarding the Falla Property, Plaintiffs allege that Laureano Falla Sr., together with his father-in-law, Eugenio Crabb, owned the Falla Property, which they describe as "a parcel of land next to the Del Valle Property." (App.141 ¶ 24.) Plaintiffs allege that Falla Sr., like Luis Del Valle Esnard, "built a home for his family" on that parcel and that Daisy Crabb Falla, Eugenio's daughter and Falla Sr.'s wife, inherited Eugenio's interest in the property on Eugenio's passing. (*Id.* ¶ 26.) Falla Sr.'s interest in the property was allegedly "distributed to his wife and children" on Falla Sr.'s passing in 1977, but it was not until Daisy Crabb's death in 2004 that "her children, including her son Enrique Falla, inherited the entire interest to the Falla Property which is the subject of this action." (*Id.* ¶ 27.)

As for the Muniz Property, Plaintiffs allege that, in 1910, Marcelino Muniz and an unnamed business partner purchased a *finca* consisting of over two thousand acres of land in Canasi, Matanzas Province, Cuba. (App.142 ¶¶ 29-30.) Plaintiffs allege that, on the passing of Marcelino Muniz y Rodriguez in 1957, "his property" was distributed to his only daughter Carmen Muniz, and on her passing in 2014, Carmen's interest was inherited by her three children, including Pou. (*Id.* ¶ 31.)

According to Plaintiffs, decades after the Cuban government confiscated the Properties, the Expedia Entities began to offer travelers the ability to secure reservations at the Resorts through various websites. (App.143.) Claiming to be "rightful owners of the claim[s] to" the Del Valle Property, the Falla Property, and the Muniz Property, Plaintiffs sued the Expedia Entities for "trafficking" in confiscated property

under Title III of the Helms-Burton Act. (App.154-55.) Plaintiffs seek damages equal to three times the value of the Properties, plus attorneys' fees and costs.

D. The District Court's Dismissal

After Plaintiffs filed their second amended complaint, the Expedia Entities moved to dismiss the claims on the same grounds urged in their first motion to dismiss. (*Compare* SA.25-50 *with* App.226-54.) Specifically, the Expedia Entities moved to dismiss Plaintiffs' claims for: (1) lack of personal jurisdiction; (2) lack of standing; and (3) failure to state a claim under the Helms-Burton Act. (*See* App.227.) The Booking Entities also moved to dismiss Plaintiffs' claims on the same three grounds. (App.196-225.) Plaintiffs filed a lengthy omnibus response, with exhibits, in opposition to both motions to dismiss. (App.254-336.) At the time the response was filed, Plaintiffs' suit had been on file for almost eleven months. The response included a short statement regarding the potential relevance of additional discovery (App.276-77), but Plaintiffs did not contend that discovery was necessary to respond fully to the motions to dismiss, nor did they move the district court to defer ruling on the motions to dismiss to allow time to obtain discovery. Indeed, although Plaintiffs repeatedly refer to "pending jurisdictional discovery requests" in their brief, the only discovery Plaintiffs served in this matter was a single set of requests for admissions directed to just one of the defendants, Expedia Group, Inc., which Plaintiffs did not serve until seven days after the briefing closed on the defendants' motion to dismiss.[5]

[5] This sole set of discovery requests is neither mentioned nor included in the record because Plaintiffs never mentioned it in or attached it to any filing in the district court. The Expedia Entities identify the requests here only because none of Plaintiffs' re-

The district court granted the defendants' motions and dismissed Plaintiffs' case for lack of personal jurisdiction, holding that Plaintiffs failed to allege sufficient facts to establish a prima facie case of general or specific personal jurisdiction under Florida's long-arm statute. (App.384-91.) The district court further held that Plaintiffs were not entitled to jurisdictional discovery and dismissed the action without leave to amend. (App.389-91.) Having held that Plaintiffs' allegations do not satisfy the long arm statute, the district court did not address the defendants' other arguments concerning personal jurisdiction (i.e., whether the allegations also fail to satisfy due process) or the defendants' additional grounds for dismissal: lack of standing and failure to state a claim.

E. Standards of Review

This Court reviews a district court's order granting a motion to dismiss, including one for lack of personal jurisdiction, *de novo*. *Gardner v. Mutz*, 962 F.3d 1329, 1338 n.9 (11th Cir. 2020); *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990). A district court's decision to allow or deny jurisdictional discovery is reviewed for abuse of discretion. *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1280 (11th Cir. 2009). A district court's decision to deny leave to amend is also generally reviewed for abuse of discretion; however, where a district court denies leave to amend on the grounds of futility, the Court reviews that legal conclusion *de novo*. *Boyd v. Warden*, 856 F.3d 853, 864 (11th Cir. 2017).

---

peated references to "pending jurisdictional discovery requests" (*see, e.g.*, Appellants' Br. 3, 5, 7, 9, 11, 13, 14) note the timing or limited scope of those requests.

"Standing is a jurisdictional requirement that [the Court is] obligated to address *sua sponte*." *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1381 n.10 (11th Cir. 2019).

SUMMARY OF THE ARGUMENT

Plaintiffs' action suffers from two equally fatal jurisdictional defects. First, Plaintiffs failed to allege a prima facie case of personal jurisdiction under Florida's long-arm statute and the Due Process Clause. Plaintiffs' factual jurisdictional allegations amount the following: (i) the defendants operate interactive websites through which travelers from anywhere in the world, including Florida and every other U.S. state, can shop for and book hotel rooms, including at the Resorts in Cuba; and, (ii) "on information and belief," the defendants derive a "substantial part" of their business and revenue from unidentified "Florida offices." (App.139-40, ¶¶ 13-16.) As the district court correctly held, these allegations fall well short of establishing specific jurisdiction under Florida's long-arm statute. In any event, even if the long-arm statute allows jurisdiction based on such allegations, the Due Process Clause does not because Plaintiffs' cause of action does not arise out of or relate to those alleged contacts. Further, the district court was well within its discretion to dismiss the action without leave to amend and without ordering jurisdictional discovery because Plaintiffs did not request leave to amend, Plaintiffs had already amended their complaint twice (once specifically to address the issues raised in the defendants' motions to dismiss), and the defendants' motions did not present a factual dispute on personal jurisdiction.

Second, the federal courts lack subject-matter jurisdiction because Plaintiffs lack standing under Article III of the Constitution. Plaintiffs lack standing because they failed to allege facts showing that they suffered a concrete injury-in-fact, much less one that is causally connected to the Expedia Entities' allegedly offering reservations at the Resorts. Rather, Plaintiffs allege only a statutory violation, which the Supreme Court and this Court have squarely and recently held is not an injury-in-fact sufficient to confer standing. The district court could have dismissed Plaintiffs' claims for lack of standing, and this Court can and should affirm the dismissal on that basis.

Even absent these twin jurisdictional defects, the district court nevertheless could have dismissed Plaintiffs' suit for failure to state a claim under Rule 12(b)(6). Plaintiffs have not sufficiently alleged that they own an actionable claim in the Properties or that the Expedia Entities "knowingly and intentionally" engaged in activity involving "confiscated" property. Plaintiffs' claims are also barred by two of the Act's definitional exemptions: the lawful-travel clause in the Act's definition of *traffics*, and the residential-use provision in the Act's definition of *property*. These arguments were fully briefed below and are apparent from the record, and this Court may affirm the judgment on this basis if it finds that both personal and subject-matter jurisdiction exist.

ARGUMENT

A. Lack of Personal Jurisdiction

Although there are two types of personal jurisdiction—specific and general—only specific jurisdiction is at issue in this appeal.[6] Specific personal jurisdiction "depends on an affiliation between the forum and the underlying controversy (i.e., an activity or occurrence that takes place in the forum State and is therefore subject to the State's regulation)." *Walden v. Fiore*, 571 U.S. 277, 284 n.6 (2014) (cleaned up); *accord Madara*, 916 F.2d at 1516 n.7 ("Specific personal jurisdiction is founded on a party's contacts with the forum state that are related to the cause of action."); *see also* FLA. STAT. § 48.193 (authorizing exercise of personal jurisdiction for causes of action "arising from" any one of a list of Florida-related acts).

Determining whether non-resident defendants, such as the Expedia Entities, are subject to personal jurisdiction involves a two-part analysis. *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009). First, the court determines whether Florida's long-arm statute provides a basis for personal jurisdiction. *Id.* Second, if the long-arm statute is satisfied, then the Court determines whether the exercise of personal jurisdiction comports with due process. *Id.* "Only if both prongs of the analysis are satisfied may a federal or state court exercise personal jurisdiction over a nonresident defendant." *Madara*, 916 F.2d at 1514.

---

[6] The second amended complaint included an allegation of general jurisdiction (App.139 (citing FLA. STAT. § 48.193(2))), and the district court held that Plaintiffs' allegations fall "woefully" short of establishing general jurisdiction (App.389). Plaintiffs do not challenge that holding on appeal and, therefore, waived the issue. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004).

Plaintiffs bear the burden of "alleging in the complaint sufficient facts to make out a prima facie case of jurisdiction." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009). Where, as here, the defendant challenges the legal sufficiency of the plaintiff's jurisdictional allegations without submitting affidavits disputing those allegations, the court simply determines if the plaintiff's well-pleaded factual allegations, accepted as true, establish a prima facie case of personal jurisdiction. *See Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990) (noting that in analyzing personal jurisdiction "[t]he district court must accept the facts alleged in the complaint as true, to the extent they are uncontroverted by the defendant's affidavits"). Importantly, "conclusory allegations are insufficient to establish a prima facie case of jurisdiction." *Castillo v. Allegro Resort Mktg.*, 603 F.App'x 913, 916 (11th Cir. 2015); *see also Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1318 (11th Cir. 2006) (noting that, when a party relies "solely on vague and conclusory allegations" in a complaint, such allegations are "insufficient to establish a prima facie case of personal jurisdiction"); *In re Takata Airbag Prods. Liab. Litig.*, 396 F.Supp.3d 1101, 1142 (S.D. Fla. 2019) ("[C]ourts in the Eleventh Circuit have repeatedly declined to exercise specific jurisdiction over a nonresident defendant on the basis of generalized and conclusory allegations….").

Here, Plaintiffs' allegations are insufficient. As the district court correctly concluded, Plaintiffs' few factual allegations fail to satisfy Florida's long-arm statute. And even if Plaintiffs had satisfied the long-arm statute, Plaintiffs' allegations also fail to make out a prima facie case of personal jurisdiction that comports with the Due Process Clause.

1. Plaintiffs' allegations fail to satisfy Florida's long-arm statute.

Under Florida's long-arm statute, a party is subject to specific personal jurisdiction in the state "for any cause of action arising from any of" a list of Florida-related conduct. FLA. STAT. § 48.193(1)(a). Plaintiffs rely on two categories[7] of conduct from that list:

> 1. Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state; or
>
> 2. Committing a tortious act within this state.

FLA. STAT. § 48.193(1)(a)(1), (2).

The only factual allegations in the complaint that attempt to connect the Expedia Entities' alleged conduct to Florida are that (i) the defendants operate websites through which visitors can search for and book hotel reservations; (ii) the defendants promote those websites by automatically sending relevant follow-up emails to visitors based on search activity, engaging in search engine optimization efforts, and displaying banner advertisements; (iii) the Resorts were among the hotels offered on the defendants' website; (iv) the defendants' websites are accessible worldwide, including in Florida; and (v) on information and belief, a "substantial part" of the defendants' "business and revenue derives from their Florida offices." (App.139-140, ¶¶ 13-16.)

As the district court properly held, these allegations are insufficient to satisfy either of the long-arm provisions Plaintiffs rely on.

---

[7] Plaintiffs' complaint references a third category: "Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state…." FLA. STAT. § 48.193(1)(a)(6); (*see* App.139 ¶ 12). However, Plaintiffs included no argument concerning this provision in their opposition to the Expedia Entities motion to dismiss (*see* App.254-297), and their brief to this Court does not mention it either.

a. Plaintiffs failed to plead a prima facie case that the Expedia Entities were "carrying on a business" in Florida.

Plaintiffs' allegations are insufficient to establish that the Expedia Entities are "operating, conducting, engaging in, or carrying on a business" in Florida. FLA. STAT. § 48.193(1)(a)(1). When analyzing whether a party is "carrying on a business" in Florida, the Court considers "relevant, but not dispositive" factors including the presence and operation of an office in Florida, the possession and maintenance of a license to do business in Florida, the number of Florida clients served, and the percentage of overall revenue gleaned from Florida clients. *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162, 1167 (11th Cir. 2005).

That Florida residents, like residents anywhere else in the world, can access the Expedia Entities' websites, where users allegedly could search for and book reservations at the Resorts, does not constitute doing business in Florida under § 48.193(1)(a)(1). This Court has rejected the "contention that a company's physical location is rendered irrelevant in this electronic age," and confirmed that "state territorial boundaries remain relevant to jurisdictional inquiries." *Horizon*, 421 F.3d at 1167. Accordingly, courts in Florida have repeatedly rejected the notion that simply operating an interactive website accessible in Florida constitutes "carrying on a business or business venture" in Florida. *See RG Golf Warehouse, Inc. v. Golf Warehouse, Inc.*, 362 F.Supp.3d 1226, 1236 (M.D. Fla. 2019) ("[A]lthough Defendant operates an interactive website that is accessed daily by potential and actual Florida customers, the Court finds that only amounts to doing business as if in Florida, which is insufficient under the plain text of" § 48.193(1)(a)(1) (cleaned up)); *see also Lemoine v. Wong*, No. 0:17-cv-60099-UU, 2017 WL 5127592, at *4 (S.D. Fla. Mar. 29, 2017) ("[A] website accessible

in Florida, standing alone, is insufficient to satisfy Section 48.193(1)(a)(1)."). At most, such allegations amount to doing business "*as if* in Florida," which this Court has found insufficient. *Horizon*, 421 F.3d at 1167.

The complaint's references to "search optimization efforts," "follow-up emails," and "banner ads promoting designations in Cuba" (*see* Appellants' Br. 22-23; App.140 ¶ 15) do nothing to change this conclusion. As Plaintiffs' own allegations admit, there is nothing Florida-specific about any of these alleged activities; rather, these are efforts the defendants make to "promote their websites…on the internet, **including** to Floridians." (App.140 ¶ 15 (emphasis added).) That is, any user who visits the websites might see such banner ads or receive follow-up emails relevant to their searches. The fact that Floridians are among those users that can access the website does not transform such geographically neutral conduct into "doing business" in Florida or any other specific state.

Plaintiffs' allegation that a "substantial part of the [defendants'] business and revenue derives from their Florida offices" (App.140 ¶ 16) is equally insufficient. That conclusory allegation—wholly lacking in specificity regarding which of the defendants earned how much revenue from what customers through those supposed offices—is insufficient to state a prima facie case of "carrying on business" in Florida. *See Horizon*, 421 F.3d at 1167 (holding that "six Florida clients which accounted for, at most, less than five percent of [out-of-state defendant's] gross revenue" insufficient to support "doing business" jurisdiction); *RG Golf Warehouse*, 362 F.Supp.3d at 1236 (holding that the fact that seven percent of defendant's sales were made to Florida customers was insufficient to confer jurisdiction under § 48.193(1)(a)(1)). In any event, this

allegation is irrelevant because Plaintiffs did not allege that their cause of action "aris[es] from" any such business or revenue generated through these unidentified Florida offices, as required for specific jurisdiction under § 48.193(1)(a).

Nevertheless, Plaintiffs insist that "[s]pecific 'doing business' jurisdiction has been found on far less" than their allegations. (Appellants' Br. 23.) But even a cursory review of the cases they cite reveals that the contacts in those cases were much more significant than those alleged here. For example, in *Pathman v. Grey Flannel Auctions, Inc.*, the court found "doing business" jurisdiction where the out-of-state defendant traveled to Florida "several times a year to sell and consign auction items," sent catalogues to Floridians, made consistent calls to Florida residents for many years as reflected in a call-log, and 152 Floridians registered and bid in the defendant's auctions in a 2-year period. 741 F.Supp.2d 1318, 1324 (S.D. Fla. 2010). Those concrete factual allegations are not "far less" than the conclusory allegations in Plaintiffs' complaint.

The same holds true for all of the other cases Plaintiffs cite to this Court. *See, e.g.*, *Carmel & Co. v. Silverfish, LLC*, No. 1:12-cv-21328-KMM, 2013 WL 1177857, *3 (S.D. Fla. Mar. 21, 2013) (holding that defendant was doing business in Florida where it "sold its sunglasses in Florida hundreds of times, making up a noticeable portion of its total sales," "conducted 238 business transactions in Florida from 2005 to 2012," "an average of 7.9% of its sales has come from customers in Florida," from 2005 to 2012 it "advertised in Florida through an assortment of water sports related periodicals which have Florida subscribers," and it "participated in a water sports themed advertising video shot in Florida which focused on a water sports activity practiced in

Florida")[8]; *Clover Sys., Inc. v. Almagran, S.A.*, No. 05-cv-22539, 2007 WL 1655377, *4 (S.D. Fla. June 7, 2007) (finding personal jurisdiction where defendants "(1) have engaged in business activities with Plaintiff, a Florida corporation since December 1999; (2) made regular trips (two per year) into the forum to facilitate its business activities with Plaintiff; (3) transmitted thousands of electronic communications, including telephone calls, into Florida; (4) derived a substantial proportion (15%) of its total revenues from its relationship with Plaintiff in the forum; and (5) wired money on 101 occasions to Plaintiff's Florida based bank to effectuate the reconciliation of accounts and distribution of profits").

Doing business in Florida for purposes of § 48.193(1)(a)(1) requires specific allegations of actual, substantial business in the state, and Plaintiffs' complaint has none. The Expedia Entities are not subject to personal jurisdiction under that provision.

b. Plaintiffs failed to allege a prima facie case that the Expedia Entities committed a tort in Florida.

As with the "doing business" basis, Plaintiffs failed to make out a prima facie case of personal jurisdiction over the Expedia Entities on the grounds that they committed a tort in Florida. *See* FLA. STAT. § 48.193(1)(a)(2). For the tort provision to apply, the defendant must have "committed a substantial aspect of the alleged tort in Florida," so that the defendant's Florida activities "were essential to the success of the

[8] Plaintiffs' description of *Carmel* verges on an outright misrepresentation to the Court. Notwithstanding the detailed business activities recited in the opinion, Plaintiffs contend: "the defendant sold sunglasses to Floridians on its website, using search engines and keywords to capture potential customers who used those keywords as search terms. **Nothing more was alleged**." (Appellants' Br. 23 (emphasis added).)

tort." *Williams Elec. Co., Inc. v. Honeywell, Inc.*, 854 F.2d 389, 394 (11th Cir. 1988) (cleaned up). Further, in "cases where the Eleventh Circuit applied [§ 48.193(1)(a)(2)] to foreign torts causing injury within Florida, that conduct was directed at Florida residents, corporations, or property, and the harm was felt exclusively or primarily in Florida." *Bulpit, LLC v. DeCanio*, No. 2:13-cv-14119-KMM, 2013 WL 12126313, at *5 (S.D. Fla. June 7, 2013). Although Plaintiffs allege that Floridians could access the Expedia Entities' websites allegedly promoting Cuba-related offerings (App.140 ¶¶ 13-15), they make no allegations suggesting that the Expedia Entities' conduct was directed or targeted at Florida, much less that the alleged harm was felt exclusively or primarily in Florida.

Nor do the allegations here come anywhere near satisfying the standard for committing a tort in Florida through use of a website. This Court has confirmed that actual, specific allegations regarding the elements of a tort allegedly committed through a website are critical, and conclusory allegations will not suffice. *See Catalyst Pharms., Inc. v. Fullerton*, 748 F.App'x 944 (11th Cir. 2018). In *Catalyst*, an out-of-state defendant published allegedly defamatory statements on a website, and the complaint alleged that the defendant "published such false and defamatory Statements in Florida to [plaintiff] **and to third parties in Florida**." *Id.* at 946 (emphasis added); *see also id.* at 947 (complaint alleged that "[s]tatements were accessed by [plaintiff] **and others in Florida**" (emphasis added)). The complaint, however, "provided no further details about the third parties who it claimed to have accessed these statements." *Id.* at 946. After reiterating that a plaintiff cannot meet its burden to plead a prima facie case of personal jurisdiction with "[v]ague and conclusory allegations," *id.*, this Court held

that the plaintiffs' allegations "do not point to any facts showing the statements were accessed in Florida," *id.* at 947. Factual allegations demonstrating that actual Florida residents accessed the material were required, and conclusory allegations that unnamed "third parties in Florida" did so are insufficient.

The complaint here suffers from the same defect as the complaint in *Catalyst*: It alleges generally that Florida residents *can* book hotel rooms in Cuba through the Expedia Entities' websites (App.140 ¶¶ 13-15), but it provides no further detail about any Florida residents who Plaintiffs allege have actually done so. Such vague and conclusory allegations are insufficient to make out a prima facie case that the Expedia Entities committed a tort in Florida.

This Court's opinion in *Mosseri* does not support a different result. That case involved a claim for trademark infringement by sales of counterfeit goods on an interactive website. 736 F.3d at 1354. There were allegations that the defendant "was selling counterfeit and infringing Louis Vuitton products and goods into the Southern District of Florida," and there was evidence of a specific sale of counterfeit goods through the website that was shipped to Florida. *Id.* The Court held that those allegations and evidence were sufficient to support long-arm jurisdiction for committing a tort in Florida, because trademark infringement occurs when the counterfeit goods are made available for sale on the website; the tort is complete just by the offer. *Id.* *Catalyst* makes clear that result is unique to trademark infringement, and extending *Mosseri* to "say that mere accessibility is enough to establish a prima facie case that [a tort] 'occurred within' Florida under § 48.193(1)(a)(2), [] would be at odds with the Florida Supreme Court's holding in *Internet Solutions*." 748 F.App'x at 947.

Committing a tort in Florida thus requires something more than merely making matter accessible on a website. It requires specific allegations that essential elements of the tort were actually completed in Florida. There are no such allegations here, and dismissal was proper.[9]

2. Plaintiffs' allegations fail to satisfy due process.

Even if Plaintiffs' allegations could satisfy Florida's long-arm statute, Plaintiffs still fail to establish a prima facie case of personal jurisdiction that comports with due process because none of the Expedia Entities' supposed Florida contacts give rise to Plaintiffs' claims. Under the Due Process Clause, a court may exercise specific jurisdiction over a non-resident defendant only when the plaintiffs' cause of action "arises out of or relates to" the defendant's contacts with the forum state. *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1222 (11th Cir. 2009). A cause of action "arises out of or relates to" the defendant's forum contacts only where the forum contacts are a but-for and foreseeable cause of the plaintiff's cause of action. *Id.* at 1223. And a defendant's forum contacts cannot be a but-for or foreseeable cause of the plaintiff's cause of action if the cause of action would be the same absent those forum contacts.

[9] Dismissal for lack of personal jurisdiction under the long-arm provision would be proper even if there had been some factual allegation regarding specific Florida residents who booked a hotel room at one of the resorts in Cuba through one of the Expedia Entities' websites. For § 48.193(1)(a)(2) to apply, the defendant must have "committed a substantial aspect of the alleged tort in Florida," so that the defendant's Florida activities "were essential to the success of the tort." *Williams Elec. Co., Inc. v. Honeywell, Inc.*, 854 F.2d 389, 394 (11th Cir. 1988) (cleaned up). The most essential aspect of Plaintiffs' claims, however, is in Cuba, and the fact that travelers book rooms on Resorts built on property confiscated from Plaintiffs' ancestors there.

But that is precisely the case here. According to Plaintiffs, the Expedia Entities trafficked in confiscated property under Title III by "offering, for economic benefit, reservations at the [Resorts]." (App.155 ¶ 88.) Plaintiffs do not allege that the Expedia Entities engaged in any contacts with Florida in order to offer reservations at the Resorts through their websites. To the contrary, Plaintiffs admit that each of the Expedia Entities is organized and has its principal place of business in other states. (App.138 ¶¶ 5-8.) And although Plaintiffs make the vague, conclusory allegation that the defendants derive "significant" business and revenue from unidentified "Florida offices" (App.139 ¶ 16), the complaint contains no allegations connecting those supposed offices or the revenue allegedly derived from them to Plaintiffs' cause of action.

Plaintiffs' cause of action likewise does not arise from the fact that Florida residents, like the residents of any other state, could access the Expedia Entities' websites and book reservations at Resorts. Plaintiffs' cause of action would be no different if the websites were somehow accessible only in Texas, or Georgia, or every other state except Florida. That being so, the accessibility of the websites in Florida is not a but-for or foreseeable cause of Plaintiffs' cause of action.

Having failed to plead facts supporting a prima facie case of jurisdiction that comports with due process, Plaintiffs attempt to rely on assertions that they did not plead. In particular, Plaintiffs repeatedly assert that the Expedia Entities actually sold reservations at the Resorts to Florida residents. Of course, Plaintiffs may not rely on such unpleaded assertions to satisfy their "burden of alleging **in the complaint** sufficient facts to make out a prima facie case of jurisdiction." *United Techs.*, 556 F.3d at 1274 (emphasis added); *see also Richard Boyd Enters., Inc. v. Aquarium Pharm., Inc.*, No.

09-22301-CIV, 2010 WL 11448226, at *3 (S.D. Fla. Feb. 5, 2010) ("[T]he Court restricts its 12(b)(2) analysis to whether Boyd Enterprises has alleged sufficient facts to make out a prima facie case of personal jurisdiction **within the four corners of the Complaint**." (emphasis added)). And, in any event, it would make no difference if Plaintiffs had included that allegation in their complaint because neither Plaintiffs' theory of liability nor its theory of damages depends in any way on whether the Expedia Entities sell a single reservation to a Florida resident. (*See* App.155 ¶¶ 88-89); 22 U.S.C. § 6082(a)(1)(A)(i).

Moreover, a Florida resident's decision to book hotel reservations through the Expedia Entities' website (App.139, ¶ 13) cannot subject the Expedia Entities to specific jurisdiction without some allegation that the Expedia Entities specifically targeted or sought to develop and exploit a market there. *See Walden*, 571 U.S. at 285. "[I]t is the **defendant's** conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over [the defendant]." *Id.* (emphasis added). For similar reasons, the fact that Plaintiffs are Florida residents cannot give rise to personal jurisdiction. *Id.* ("[M]ere injury to a forum resident is not a sufficient connection to the forum."); *accord Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1316 (11th Cir. 2018).

Because Plaintiffs' cause of action does not arise out of or relate to any jurisdictionally relevant connections between the Expedia Entities and Florida, exercising personal jurisdiction over the Expedia Entities does not comport with due process and the district court's dismissal should be affirmed.

3. Dismissal without jurisdictional discovery or leave to amend was appropriate.

Plaintiffs also urge that the district court abused its discretion by dismissing this case without permitting jurisdictional discovery and without leave to amend. This Court's precedent squarely forecloses this argument.

First, the district court properly denied Plaintiffs' hedged request for jurisdictional discovery. A district court does not abuse its discretion by denying jurisdictional discovery if "the complaint was insufficient as a matter of law to establish a *prima facie* case that the district court had jurisdiction." *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009); *accord Diulus v. Am. Express Travel Related Servs. Co., Inc.*, 823 F.App'x 843, 849 (11th Cir. 2020) (quoting *Butler*). This makes sense because jurisdictional discovery is appropriate only when there is a genuine **factual** dispute about personal jurisdiction. *See Aviation One of Fla., Inc. v. Airborne Ins. Consultants (PTY), Ltd*, 722 F.App'x 870, 878 (11th Cir. 2018) ("Jurisdictional discovery is appropriate when there is a dispute about the 'facts that would support [the plaintiff's] allegations of jurisdiction.'" (quoting *Majd-Pour v. Georgiana Cmty. Hosp., Inc.*, 724 F.2d 901, 903 (11th Cir. 1984))). It is only if a plaintiff satisfies its initial burden to plead a prima facie case of personal jurisdiction that the court considers any factual dispute presented by the parties' affidavits. And where, as here, the defendant does not submit any affidavits, there can be no factual dispute at all.

Plaintiffs also never formally moved for jurisdictional discovery. Instead, Plaintiffs buried a hedged reference to discovery in their opposition, stating that "jurisdictional discovery would be warranted" "if the Court were to have any doubts about the sufficiency of defendants' Florida contacts." (App.276.) This Court routinely upholds

district court decisions denying such "requests" for jurisdictional discovery. *See United Techs.*, 556 F.3d at 1280-81 (affirming denial of jurisdictional discovery where the plaintiff "never formally moved the district court for jurisdictional discovery but, instead, buried such requests in its briefs as a proposed alternative to dismissing [the defendant] on the state of the current record"); *Hinkle v. Cirrus Design Corp.*, 775 F.App'x 545, 550 (11th Cir. 2019). Denial of such requests is especially appropriate where the plaintiff has not undertaken diligent efforts to obtain jurisdictional discovery. *See United Techs.*, 556 F.3d at 1280-81. Although Plaintiffs' brief includes numerous references to supposedly pending jurisdictional discovery requests (*see, e.g.*, Appellants' Br. 3, 5, 7, 9, 11, 13, 14), the only discovery Plaintiffs served before the case was dismissed was a single set of requests for admission directed to a single defendant, Expedia Group, Inc., that Plaintiffs did not serve until after the briefing closed on the defendants' motions to dismiss.[10]

Second, the district court did not abuse its discretion by dismissing this case without granting Plaintiffs leave to amend. "A district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc). There is no dispute that Plaintiffs are represented by counsel and never filed a motion to amend nor requested leave to amend in the district court.

[10] *See supra* note 5.

Thus, under the straightforward rule the en banc Court set out in *Wagner*,[11] the district court did not abuse its discretion when it granted the motions to dismiss without sua sponte granting Plaintiffs leave to amend.

Even if Plaintiffs had requested leave to amend, the district court would have been well within its discretion to deny it. Plaintiffs had already amended their complaint multiple times and did so most recently for the express purpose of "amending several allegations that were addressed in the Expedia Entities' [first] Motion to Dismiss." (App.070.) A district court is not required to permit a plaintiff to amend when "there has been…repeated failures to cure deficiencies by amendments previously allowed." *Kabbaj v. Obama*, 568 F.App'x 875, 879 (11th Cir. 2014) (quoting *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001)). The Expedia Entities' first motion to dismiss detailed how the jurisdictional allegations in the first amended complaint were deficient. (SA.37-41.) Plaintiffs had every opportunity to correct those deficiencies in the second amended complaint. They failed to do so and failed to request leave to amend either before or after the district court entered its order of dismissal. They

[11] Plaintiffs argue that this Court subsequently "limited *Wagner*'s reach," citing this Court's unpublished decision in *Brisson v. Ford Motor Co.*, 349 F.App'x 435 (11th Cir. 2009). (Appellants' Br. 36.) Of course, a panel decision (much less an unpublished panel decision) cannot narrow or modify a ruling of the en banc Court. In any event, this Court has continued to apply the *Wagner* rule faithfully, even in cases where the district court expressly denies leave to amend sua sponte in the dismissal order. *See Leones v. Rushmore Loan Mgmt. Servs., LLC*, No. 0:17-cv-61216-WPD, 2017 WL 6343622, at *3 n.2 (S.D. Fla. Dec. 11, 2017) (granting motion to dismiss and sua sponte denying leave to amend), *aff'd*, 749 F.App'x 897 (11th Cir. 2018) (holding that the district court did not abuse its discretion in denying leave to amend because plaintiff was represented by counsel, did not seek leave to amend when confronted with the motion to dismiss, and did not seek relief under Rules 59(e) or 60(b)(6) to seek leave to amend after the district court entered its order).

cannot now claim that the district court erred by declining to sua sponte give them another opportunity to do what they already failed to do before.

In any event, any amendment would be futile. *See Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999) ("[D]enial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal." (cleaned up)). As explained in the sections that follow, Plaintiffs' complaint is subject to dismissal on multiple additional grounds that cannot be cured by amendment.

B. Lack of Subject-Matter Jurisdiction – No Article III Standing

Lack of personal jurisdiction is not the only jurisdictional defect in this case; Plaintiffs also lack standing under Article III of the Constitution. "Standing is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005) (cleaned up). Although a court confronted with challenges to both subject-matter jurisdiction and personal jurisdiction should "in most instances" resolve subject-matter jurisdiction first, "there is no unyielding jurisdictional hierarchy" and courts may choose to first resolve "a straightforward personal jurisdiction issue presenting no complex question of state law." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578, 587 (1999). The district court chose to address personal jurisdiction first and dismissed the case on that basis. This Court likewise has the discretion to affirm the dismissal for lack of personal jurisdiction, or to address subject-matter jurisdiction first and dismiss the case on that basis. The Expedia Entities respectfully submit that the Court should choose the latter option and dismiss this case based on lack of standing because resolution of the standing issue in this case will more broadly ad-

vance Helms-Burton jurisprudence and likely impact other Helms-Burton cases pending in this Circuit.

Article III of the Constitution "grants federal courts the 'judicial Power' to resolve only 'Cases' or 'Controversies.'" *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy," *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016), and is "perhaps the most important of the jurisdictional doctrines," *Muransky v. Godiva Chocolatier, Inc.*, No. 16-16486, 2020 WL 6305084, at *4 (11th Cir. Oct. 28, 2020) (en banc). To have constitutional standing, a party must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Spokeo*, 136 S.Ct. at 1547. Or, "[i]n plainer language, the plaintiff needs to show that the defendant harmed him, and that a court decision can either eliminate the harm or compensate for it." *Muransky*, 2020 WL 6305084, at *4.

The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing standing. *Spokeo*, 136 S.Ct. at 1547. At the pleading stage, the plaintiff must "clearly and specifically set forth facts" that "plausibly and clearly" demonstrate standing. *Muransky*, 2020 WL 6305084, at *4 (citing *Thole v. U.S. Bank N.A.*, 140 S.Ct. 1615, 1622 (2020); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Conclusory allegations are insufficient. *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)). Courts may not "'imagine or piece together an injury sufficient to give [a] plaintiff standing when it has demonstrated none,' and…are powerless to 'create jurisdiction by embellishing a

deficient allegation of injury.'" *Id.* (quoting *Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n*, 226 F.3d 1226, 1229-30 (11th Cir. 2000)).

Here, Plaintiffs failed to allege any facts establishing that they suffered an injury-in-fact, much less one caused by the Expedia Entities. To plead injury-in-fact, "[a] plaintiff needs to plead…an injury that is concrete, particularized, and actual or imminent, rather than conjectural or hypothetical." *Id.* at *5. "A concrete injury must be de facto—that is, it must be real, and not abstract." *Trichell*, 964 F.3d at 996-97 (cleaned up). The only event mentioned in the complaint that could possibly constitute a concrete injury to anyone is the Cuban government's alleged confiscation of the Properties. (App.142-43 ¶¶ 34, 37.) But Plaintiffs admit that "the complaint's 'alleged injury' plainly is not the Castro regime's confiscation of the Properties." (App.267.) And for good reason. Plaintiffs' do not purport to have owned any interest in the Properties at the time of confiscation (App.141-43 ¶¶ 22, 27, 31, 40-42), and there is no dispute that the Expedia Entities did not cause the confiscation of the Properties or the alleged construction of hotels on the Properties, *see Kawa Orthodontics, LLP v. Sec'y, U.S. Dep't of the Treasury*, 773 F.3d 243, 247 (11th Cir. 2014) ("[The plaintiff] must demonstrate its alleged injury is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." (cleaned up)).

Plaintiffs argue that they have nevertheless adequately alleged standing because "Title III expressly makes trafficking in confiscated property a 'legally protected interest'" and they have "alleged…that defendants are liable for their trafficking in the Properties." (App.268.) This argument fails. "[A] party does not have standing to sue

when it pleads only the bare violation of a statute." *Muransky*, 2020 WL 6305084, at *1; *accord Thole*, 140 S.Ct. at 1620-21 ("Article III standing requires a concrete injury even in the context of a statutory violation." (quoting *Spokeo*, 136 S.Ct. at 1549)). Although Congress may elevate concrete harms to the status of legally cognizable injuries, "this is a limited authority to provide legal process relating to actual harms, not a blanket power to authorize suit in the absence of harm: Congress 'cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Muransky*, 2020 WL 6305084, at *5 (quoting *Spokeo*, 136 S.Ct. at 1548).

Put simply, to establish standing in the context of a statutory violations, it is not enough to allege merely that the defendant violated the statute; the plaintiff must also plausibly and clearly plead that the alleged statutory violation caused a direct harm or a risk of future harm. *Id.* at *6; *accord Trichell*, 964 F.3d at 996 (plaintiffs lacked standing despite alleged violations of the Fair Debt Collection Practices Act); *Thole*, 140 S.Ct. at 1620-21 (plaintiffs suffered no injury-in-fact even though ERISA expressly affords them a statutory cause of action, noting that "the cause of action does not affect the Article III standing analysis"). Plaintiffs do not make any such allegations. Indeed, nothing in Plaintiffs' complaint suggests that their circumstances would be different in any way had the Expedia Entities never offered reservations at the Resorts. The Resorts would still stand where they stand today, and Plaintiffs, by their own allegations, would still lack possession and legal ownership of the Properties. As a result, Plaintiffs lack standing, and the federal courts therefore lack subject-matter jurisdiction. *See Glen v. Am. Airlines, Inc.*, No. 4:20-cv-482-A, 2020 WL 4464665, at *2-

3 (N.D. Tex. Aug. 3, 2020) (holding that plaintiff lacked Article III standing in Helms-Burton case against defendant for offering reservations at hotels allegedly located on confiscated property in Cuba).

C. Failure to State a Claim

Even if Plaintiffs could overcome the twin jurisdictional defects in this case, the Court should nevertheless affirm the judgment because Plaintiffs fail to state a claim upon which relief can granted. *Statton v. Fla. Fed. Jud. Nominating Comm'n*, 959 F.3d 1061, 1065 (11th Cir. 2020) ("We may affirm the judgment below on any ground supported by the record, regardless of whether it was relied on by the district court."). Under Rule 12(b)(6), 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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). While the Court must accept a plaintiff's well-pleaded facts as true, it need not accept "conclusory allegations, unwarranted deductions of fact[]," *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002), or "legal conclusion[s] couched as…factual allegation[s]," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

As the Expedia Entities explained in their motion to dismiss below, Plaintiffs failed to plead facts showing that (1) they own actionable claims to the Properties, (2) the Expedia Entities "knowingly and intentionally" engaged in a transaction concerning confiscated property; (3) the Expedia Entities' conduct falls outside the Act's lawful travel clause, and (4) the Properties are "property" under the Act.

1. Plaintiffs failed to plead ownership of an actionable claim.

To have a cause of action under Title III of the Helms-Burton Act, a plaintiff must own "the claim" to property confiscated by the Cuban government. 22 U.S.C. § 6082(a)(1)(A). Where, as here, the property at issue was allegedly confiscated before March 12, 1996 (the Act's enactment date), Congress limited the Title III cause of action to U.S. nationals who already owned the claim to the property as of that date. *Id.* § 6082(a)(4)(B). Plaintiffs fail to adequately alleged that they own the claims to the Properties at all, much less that they acquired them before March 12, 1996.

First, Plaintiffs allege that each of them is "one of the living heirs" to the Properties, and that they "inherited" their interests in the Properties and "subsequently" became "rightful owners of the claim[s] to" the Properties. (App.141-43 ¶¶ 22, 27, 31, 40-41). But these are legal conclusions couched as factual allegations. *See Iqbal*, 556 U.S. at 678; *Black Diamond Land Mgmt. LLC v. Twin Pines Coal Inc.*, 707 F.App'x 576, 580 (11th Cir. 2017) (holding that the plaintiff failed to adequately allege that it owned certain timber and mineral rights because, beyond a conclusion of ownership, "the Complaint contains no factual support for the allegation that the resources at issue are actually owned by Plaintiff"). Plaintiffs' complaint lacks **factual** allegations from which one could draw a reasonable inference that the Plaintiffs inherited and now own the claims to the Properties.

For example, Del Valle alleges that an interest in the Del Valle Property was "distributed to" his father's children, including Del Valle himself, but he fails to describe the "interest in the Del Valle Property" that he allegedly inherited, and how it compares to the interest that others retained or inherited. (App.141 ¶ 22.) Nor does

he allege any facts from which one could conclude that he actually inherited anything at all. He does not allege whether his father left a will or died intestate, or where his father lived at the time of his death. He does not state whether his mother was still alive at the time. The same is true of the allegations regarding Falla's and Pou's alleged ownership and inheritance; the complaint contains only conclusions without any factual support. (App.141 ¶¶ 22, 27; App.143-44, ¶¶ 41-42.) Plaintiffs have therefore failed to sufficiently allege that they own the claims to the Properties, as required under Title III.

Second, even if Plaintiffs alleged facts (rather than bare conclusions) demonstrating that they inherited and now own the claims to the respective Properties, Falla and Pou fail to state a cause of action under Title III because they do not allege that they acquired ownership of the claims to the Falla and Muniz Properties before March 12, 1996. *See Gonzalez v. Amazon.com, Inc.* (*Gonzalez II*), No. 1:19-cv-23988-RNS, 2020 WL 2323032, at *2 (S.D. Fla. May 11, 2020). Under Title III, in "the case of property confiscated before March 12, 1996, a United States national may not bring an action…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). Thus, for property allegedly confiscated before March 12, 1996, the plaintiff "must already own the claim to the confiscated property on March 12, 1996 when the Act was passed." *Gonzalez II*, 2020 WL 2323032, at *2; *accord Garcia-Bengochea v. Carnival Corp.*, No. 1:19-cv-21725-JLK, 2020 WL 4590825, at *3-4 (S.D. Fla. July 9, 2020); *Glen*, 2020 WL

4464665, at *3-4; *Gonzalez v. Amazon.com, Inc.* (*Gonzalez I*), No. 1:19-cv-23988-RNS, 2020 WL 1169125, at *2 (S.D. Fla. Jan. 17, 2020).[12]

Here, because Plaintiffs allege that the Cuban government confiscated the Properties well before the Act's March 12, 1996 enactment date, they must also allege facts demonstrating that they owned the claims to those Properties before March 12, 1996. Yet, Pou and Falla's allegations affirmatively establish the opposite. Pou alleges that he inherited his claim to the Muniz Property after his mother died in 2014 (App.142 ¶ 31), and Falla admits that he inherited "the entire interest in the Falla Property which is the subject of this action" after his mother's passing in 2004 (*id.* ¶ 27). Thus, based on their own allegations, Pou's and Falla's claims must be dismissed.

In their brief to this Court, as in their briefing below, Plaintiffs attempt to abandon their inheritance theory of ownership altogether in favor of a new, half-baked theory that contradicts their own allegations and has no basis in law. Noting that the Act's definition of *property* includes a "future…or contingent right" in property, 22 U.S.C. § 6023(12)(A), Plaintiffs argue that they owned future or contingent rights in the Properties "at birth" and that those rights merely "vested" on the post-1996 dates of inheritance. (Appellants' Br. 39-40; *see also* App.282.) Of course, the notion that Plaintiffs, as their parents' children, always owned a claim to the Properties directly contradicts their allegations that they inherited their interests in the Properties

[12] The district courts' dismissals in *Gonzalez* and *Garcia-Bengochea* are on appeal to this Court, Nos. 20-12113, 20-12960 (11th Cir.), and the dismissal in *Glen* is on appeal to the Fifth Circuit, No. 20-10903 (5th Cir.).

when their parents died (App.141-42 ¶¶ 22, 27, 31) and "**subsequently**" became the "rightful owners of claims to" the Properties (App.143-44 ¶¶ 40-42 (emphasis added)).

More fundamentally, Plaintiffs' new "at birth" theory has no basis in law. When Congress uses a legal term in a statute, the term is "presumed to have its common-law meaning." *Evans v. United States*, 504 U.S. 255, 259 (1992); *accord Med. Transp. Mgmt. Corp. v. Comm'r*, 506 F.3d 1364, 1368-69 (11th Cir. 2007). The terms *future* and *contingent* have well-established meanings in property law, and they do not include an expectation of inheritance. "A future interest is a **present ownership interest** in property, even though the owner's right to possession or enjoyment is postponed until some time in the future…." RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 25.1 cmt. a (AM. L. INST. 2011) (emphasis added). And a "contingent" interest is simply a type of future interest that might not take effect in possession or enjoyment because of a condition precedent or other limitation on the conveyance. *Id.* § 25.3 cmt. f.[13] Future interests arise when they are created, not in the future when or if the right to possession or enjoyment matures. *Id.* § 25.1 cmt. a. For example, if A conveys a property to B during B's life, and then to C after B's death, then C owns a contingent future interest in the property as of the date of conveyance, even though C will not enjoy possession or use of the property until B dies, and might not ever enjoy possession or use if C dies before B. *Id.* § 25.3 cmt. g, illus. 2.

[13] The other type of future interest is a "vested" future interest, which is certain to take effect in possession or enjoyment. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 25.3 (AM. L. INST. 2011).

A potential heir's expectation of inheritance, however, is not a future or contingent right to property because it is not a property right at all. "[T]he possibility that a person will inherit property from an ancestor is but an **expectancy** and **not an interest in property**." *Layne v. Layne*, 74 So.3d 161, 164 (Fla. 1st DCA 2011) (emphasis added) (quoting *Diaz v. Rood,* 851 So.2d 843, 845 (Fla. 2d DCA 2003)); *see also* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 2.1 (AM. L. INST. 1999) ("Before the decedent's death, a potential heir has no property interest but merely an 'expectancy' (an inchoate interest) in the decedent's intestate estate."). "While a descendant may expect or hope to inherit, neither a present **nor future interest in property** actually exists in the absence of a conveyance." *Layne*, 74 So.3d at 164 (emphasis added) (quoting *Diaz*, 851 So.2d at 845). And it is only after a decedent's death that an interest in the decedent's property is conveyed to the decedent's heirs or devisees, as the case may be. *See* FLA. STAT. § 732.101(2) ("The decedent's death is the event that vests the heirs' right to the decedent's intestate property."); RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 3.1 (AM. L. INST. 1999) ("A will does not become operative until the testator's death to transfer property.").

Because nothing in the Act's language suggests that Congress intended to depart from the established meaning of future and contingent rights in property, any hopes or expectations that Plaintiffs had of one day inheriting interests in the Properties are not "future…or contingent right[s]" in the Properties. As a result, Plaintiffs are left with the theory they actually pleaded in their complaint, i.e., that they are "heirs" to the Properties, that they "inherited" claims to the Properties "[o]n the passing" of their parents, and that Plaintiffs "subsequently" became "rightful owners of

claim[s]" to the Properties. (App.136 nn.1-3, 141-44 ¶¶ 22, 27, 31, 40-42.) And because plaintiffs Falla and Pou allege they acquired their claims in 2004 and 2014, respectively, Plaintiffs failed to plead that they acquired the claims before March 12, 1996, as required to have Title III cause of action, and their claims must be dismissed. 22 U.S.C. § 6082(a)(4)(B).; *Gonzalez II*, 2020 WL 2323032, at *2; *Garcia-Bengochea*, 2020 WL 4590825, at *4.

2. Plaintiffs fail to adequately allege scienter.

To plead trafficking, Plaintiffs must allege facts giving rise to a reasonable inference that the Expedia Entities "knowingly and intentionally" engaged in one of the three categories of conduct related to confiscated property described in subparagraph (A) of the Act's definition. *See* 22 U.S.C. § 6023(13)(A); *Gonzalez I*, 2020 WL 1169125, at *2; *Glen*, 2020 WL 4464665, at *5-6; *see also Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016) ("*Iqbal* itself directly held that malice and other degrees of intent are subject to the plausibility pleading standard."). Plaintiffs' theory rests on the second category of conduct: "engag[ing] in a commercial activity…benefiting from confiscated property," 22 U.S.C. § 6023(13)(A)(ii). Specifically, Plaintiffs allege that the Expedia Entities "knowingly and intentionally used or benefitted, directly or indirectly, from the confiscated properties by offering, for economic benefit, reservations at the [Resorts]." (App.155 ¶ 88.) But Plaintiffs' conclusory assertion that the Expedia Entities acted "knowingly and intentionally" is insufficient to plead knowledge or intent. *See Gonzalez I*, 2020 WL 1169125, at *2 ("The Complaint offers only conclusory allegations that the Defendants knowingly and intentionally trafficked in confiscated

property.").[14] Plaintiffs do not allege any **facts** showing that the Expedia Entities "knew the property was confiscated by the Cuban government nor that it was owned by a United States citizen." *Id.*

In an effort to salvage this issue, Plaintiffs alleged that the Expedia Entities acted knowingly and intentionally because they supposedly continued to promote the Resorts on their websites after receiving letters from Plaintiffs' counsel that purportedly put them on notice "of plaintiffs' intent to commence an action…unless the Expedia…Entities ceased to traffic on plaintiffs' properties." (App.144 ¶ 44.) As an initial matter, receiving a letter from a plaintiff's attorney containing unsubstantiated allegations about a claim to a particular property in Cuba does not render any subsequent activity involving that property "knowing and intentional" trafficking. But even if such a letter could render any subsequent activity regarding the identified property "knowing and intentional," the letters that Plaintiffs' counsel sent do not even identify the hotels that the Expedia Entities were allegedly trafficking in. (*E.g.*, App.166.) Further, the letters do not mention Pou at all, nor the location of his property or the

[14] One district court recently held that conclusory recitations of the Act's scienter requirement were sufficient because Rule 9(b) permits a plaintiff bringing a fraud claim to allege intent, knowledge, and other states of mind "generally." *Garcia-Bengochea v. Norwegian Cruise Line Holdings*, No. 1:19-cv-23593-JLK, 2020 WL 5028209, at *2 (S.D. Fla. Aug. 25, 2020) (citing *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230 (11th Cir. 2008)). In *Iqbal*, however, the Supreme Court squarely rejected the notion that Rule 9(b) permits a party to rely on conclusory recitations of intent. *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009). Rather, Rule 9(b) "merely excuses a party from pleading discriminatory intent under [the] **elevated** pleading standard" that applies to all other elements of a fraud claim. *Id.*

name of the hotel that allegedly sits on it. Thus, even under Plaintiffs' flawed construct, the letters do not pass muster.

3. The Lawful Travel Clause is an element of a claim for trafficking, and it bars Plaintiffs' claims.

The Act's definition of *traffics* has two parts. Subparagraph (A) describes three types of activities related to confiscated property that, if done knowingly and intentionally, constitute trafficking. 22 U.S.C. § 6023(13)(A). Subparagraph (B) then lists four categories of conduct that do not constitute trafficking. *Id.* § 6023(13)(B). Among the conduct that does not constitute trafficking is "transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel." *Id.* § 6023(13)(B)(iii) (the "Lawful Travel Clause").

Because the Lawful Travel Clause is part of the definition of *traffics*, and trafficking is an essential element of a Title III claim, Plaintiffs must plead facts showing that the Expedia Entities' actions fall outside the Lawful Travel Clause. *See, e.g., Benjamin v. CitiMortgage, Inc.*, No. 0:12-cv-62291-FAM, 2013 WL 1891284, at *3 (S.D. Fla. May 6, 2013) (dismissing FDCPA claim where plaintiff failed to allege that defend-ant bank did not fall within exception to definition of "debt collector"); *Monroe v. CitiMortgage, Inc.*, No. 8:07-cv-0066-SCB-TGW, 2007 WL 1560194 at *2 (M.D. Fla. May 29, 2007) (same).

The only allegation Plaintiffs offer relating to the Lawful Travel Clause is the conclusory assertion, made "[o]n information and belief," that many of the Expedia Entities' customers travel to Cuba, and to the Resorts in particular, for tourism, which

Plaintiffs state "is not a permitted purpose of travel to Cuba under the U.S. Treasury Department regulations." (App.146 ¶ 50.) But a plaintiff cannot save a deficient conclusory allegation by slapping the phrase "on information and belief" in front of it. Rather, in order to satisfy the *Twombly* plausibility standard, the plaintiff must allege facts that make the asserted belief plausible. *See McCullough v. Bd. of Regents*, 623 F.App'x 980, 983 (11th Cir. 2015) (affirming dismissal where plaintiff failed to support allegation made on "information and belief" with enough facts to make that allegation plausible under *Twombly*). Plaintiffs offer no facts to support their contention that many of the Expedia Entities' customers travel to Cuba or the Resorts for "tourism" or any unlawful purpose. Moreover, federal regulations control the lawful travel inquiry by requiring travel service providers like the Expedia Entities to collect and maintain certifications from travelers indicating their category of lawful travel. *See* 31 C.F.R. § 515.572(b). Because Plaintiffs never allege that the Expedia Entities failed to collect certifications for any guests who booked stays at the Resorts or the bookings otherwise fall outside the Lawful Travel Clause, they fail to adequately plead trafficking.

Two district judges have previously declined to dismiss claims against a cruise ship company based on the plaintiffs' failure to allege conduct outside the Lawful Travel Clause, concluding that the clause is an affirmative defense on which the defendant bears the burden of proof. *See Garcia-Bengochea v. Carnival Corp.*, No. 1:19-cv-21725-JLK, 2019 WL 4015576, at *3-4 (S.D. Fla. Aug. 26, 2019); *Havana Docks Corp. v. Carnival Corp.*, No. 1:19-cv-21724-BB, slip op. at 7-8 (S.D. Fla. Aug. 28, 2019), ECF No. 47. The Expedia Entities respectfully disagree with those rulings. A proper con-

struction of the Helms-Burton Act makes clear that Congress intended the Lawful Travel Clause to be an element of the civil remedy—not an affirmative defense.

"The touchstone for determining the burden of proof under a statutory cause of action is the statute itself." *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1110 (11th Cir. 2008) (citing *Schaffer v. Weast*, 546 U.S. 49, 56 (2005)). "When a statute is silent as to who bears the burden of proof, we resort to 'the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.'" *Id.* (quoting *Schaffer*, 546 U.S. at 56). This default rule does not apply, however, to special exceptions to a statute's prohibitions or "general norms." *Id.* at 1112-13. Although "Congress is adept at drafting general norms that provide for exceptions, and frequently does so," *id.*, it did not do so with the Lawful Travel Clause.

Had Congress intended to place the burden of proof for the Lawful Travel Clause on defendants, it could have written it as an exception to Title III's liability-creating provision (i.e., its "general norm"), § 6082(a)(1)(A), by putting it in that section. Indeed, the statutory language shows that § 6082 is precisely where any such exceptions would appear. *See* 22 U.S.C. § 6082(a)(1)(A) (beginning with, "Except as otherwise provided in this section…."). But Congress included the Lawful Travel Clause in the Act's definition of *traffics*, which is not in Title III at all, much less in its liability-creating section. By doing so, Congress indicated its intent to make the Lawful Travel Clause part of the plaintiff's claim, not an affirmative defense.

Treating the Lawful Travel Clause as an affirmative defense would also upend the careful balance that Congress struck between limiting the Cuban government's ability to profit from wrongfully confiscated property and supporting the self-

determination of the Cuban people. *See* 22 U.S.C. §§ 6022(1) & (6), 6061(1). While Congress created the cause of action in Title III to serve the former interest, it made sure not to target the Cuban people or disrupt potential lines of communication between the American and Cuban people that could foster a transition to democracy in Cuba. Thus, *traffics* does not include the delivery of telecommunications signals to Cuba, activity related to lawful travel to Cuba, or activity by innocent Cuban citizens in Cuba. *Id.* § 6023(13)(B). If these carveouts are interpreted as affirmative defenses, then any Title III plaintiff could drag anyone engaged in such conduct into federal court, forcing them to go through discovery and cease their lawful conduct until they ultimately prove that their conduct does not fit the definition of *traffics*, lest they face the prospect of paying damages equal to triple the value of the allegedly confiscated property. *See id.* § 6082(a)(3)(B). That would seriously undermine the Act's effort to maintain positive interactions with the Cuban people.

In any event, even if Congress had made the Lawful Travel Clause an affirmative defense, the clause still bars Plaintiffs' claim because it is apparent on the face of the complaint that defendants' alleged conduct fits squarely within the clause. *See Quiller v. Barclays Am./Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir. 1984) (A "complaint may be dismissed under Rule 12(b)(6) when its own allegations indicate the existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint."), *aff'd and reinstated on reh'g*, 764 F.2d 1400 (11th Cir. 1985) (en banc).

To start, there is no dispute that U.S. residents may lawfully travel to Cuba. *See* 31 C.F.R. § 515.560(a) (authorizing U.S. persons to travel to Cuba for a variety of reasons, including family visits, official government business, professional research, reli-

gious activities, and public performances, among others). Indeed, during the relevant time period, federal regulations authorized the Expedia Entities, by general license, to provide travel-related services to those U.S. persons lawfully traveling to Cuba. 31 C.F.R. § 515.572(a) ("Persons subject to U.S. jurisdiction are authorized to provide travel services in connection with travel-related transactions involving Cuba authorized pursuant to this part")[15]; *see Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 606 F.Supp.2d 59, 64 (D.D.C. 2009) (the "general license" contained in 31 C.F.R. 515, subpart E, "broadly authorizes entire classes of transactions").

Nor is there any dispute that offering hotel lodging in Cuba is both "incident to" and "necessary to the conduct of" such lawful travel. *Incident to* means simply "relating to." *Incident*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/incident (last visited Nov. 2, 2020); *see also Incident to Employment*, BLACK'S LAW DICTIONARY (11th ed. 2014) (defining incident to employment as "[a] risk that is related to or connected with a worker's job duties"). The term *necessary* has consistently been construed broadly to mean "useful" or "convenient." *See, e.g., Fish v. Kobach*, 840 F.3d 710, 734 (10th Cir. 2016) ("[C]ourts also have frequently interpreted 'necessary' to mean something less than absolute necessity…."); *Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1236 (D.C. Cir. 1988) (same).

[15] These regulations were amended on September 24, 2020, to prohibit providing lodging at any property listed on a new Cuba Prohibited Accommodations List, which includes the Resorts.

If there were any doubt about the broad meaning of those terms, the Act's legislative history eliminates it. The congressional conference committee report—which, "next to the statute itself [] is the most persuasive evidence of congressional intent" and "deserve[s] great deference by courts," *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1462 (11th Cir. 1992)—paraphrased the Lawful Travel Clause as "remov[ing] any liability for…any activities related to lawful travel to Cuba." H.R. REP. NO. 104-468, at 44 (1996) (Conf. Rep.), reprinted in 1996 U.S.C.C.A.N. 558, 559, 1996 WL 97265. Congress itself thus interpreted "incident to" and "necessary" as meaning nothing more than "related to."

Hotel lodging in Cuba was undeniably related to the conduct of lawful travel to Cuba at the time the Expedia Entities' allegedly offered reservations at the Resorts. Indeed, lawful travel to Cuba would be largely impossible without it. Regardless of whether the Lawful Travel Clause is an element of a plaintiff's Title III cause of action or an affirmative defense, it bars Plaintiffs' claim here.

4. The Properties were used for residential purposes and therefore do not come within the meaning of "property" under the Act.

Title III grants a cause of action to U.S. nationals who own a claim to confiscated "property." 22 U.S.C. § 6082(a)(1)(A). The Act's definition of *property* expressly excludes "property used for residential purposes unless, as of March 12, 1996," (i) the claim to the property is certified under the International Claims Settlement Act of 1949 or (ii) the property is occupied by a Cuban government or political-party official. 22 U.S.C. § 6023(12)(B). Plaintiffs fail to allege that the Properties were used for anything other than "residential purposes" at the time they were allegedly confiscated.

Indeed, Plaintiffs' allegation that both the Del Valle Property and the Falla Property contained a "house" or a "home" (App.141 ¶¶ 21, 24), allows no inference other than that they were used for residential purposes. And although Plaintiffs allege that the Muniz Property was used "primarily for raising cattle" (App.136), the complaint contains no allegations suggesting that it was not also used for residential purposes. Absent allegations that the Properties were not used for residential purposes at the time they were confiscated, the Properties are not "property" under the Act unless, as of March 12, 1996, they were the subject of a certified claim or were occupied by a Cuban official. 22 U.S.C. § 6023(12)(B). Plaintiffs fail to plead either circumstance, and in fact, they specifically allege that the Properties are **not** the subject of a certified claim. (App.144 ¶ 46.)

Plaintiffs argued below that the residential-use provision applies only to property currently used for residential purposes, but the language of the provision in the context of the Act as a whole makes plain that the provision refers to the use of property at the time the property was confiscated. The provision uses the past-tense term *used*, showing that it refers to a property's use at some time in the past. When the Act refers to conduct or circumstances at the time of trafficking or suit, it uses the present tense. For example, Title III imposes liability on any person who "traffics" (not "trafficked") in property, 22 U.S.C. § 6082(a)(1)(A), imposes burdens on a person "bringing" an uncertified claim, *id.* § 6082(a)(5)(D), and limits damages available to a person that "brings" (not "brought") a certified claim, id. § 6082(f)(2)(A). If Congress intended to limit the residential-use provision to real property that one "uses" for res-

idential purposes, or property that "is used," "is currently used," or "is now used" for residential purposes, it would have done so in the same way it did in other provisions.

Nor was the residential-use provision intended to avoid imposing liability on innocent Cuban people who currently live on such properties, as Plaintiffs urged below. The Act includes a separate provision that excludes "transactions and uses of property by a person who is both a citizen of Cuba and resident of Cuba" (other than Cuban government or party officials). 22 U.S.C. § 6023(13)(B)(iv). This exclusion would insulate any current residential use of any property by innocent Cuban families, which would make the express residential-use provision a nullity unless it serves a different purpose.

The residential-use provision likely was meant to limit the number of Title III suits based on uncertified claims to property. As initially drafted, the Act did not include any exclusions in the definition of property (or trafficking for that matter). H.R. 927, 104th Cong. § 4(6), (7) (as introduced in the House, Feb. 14, 1995). Such a broad right of action threatened to burden the federal courts with thousands of lawsuits over uncertified claims—no matter how large or small. One way that Congress addressed this concern was by excluding most uncertified claims to residential properties. After all, determining the ownership and value of claims to individual residential properties confiscated or abandoned decades earlier would impose heavy financial and administrative burdens relative to the value of such claims. By contrast, because certified claims—for which ownership and value have already been determined—do not impose those burdens, Congress included an exception for such claims in the residential-use provision. *See* 22 U.S.C. § 6023(12)(B)(i). Similarly, Congress included an ex-

ception for property occupied by Cuban government and ruling-party officials because the goal of punishing the Cuban government justified whatever financial and administrative burden such claims (likely to be few in number) might impose. *See id.* § 6023(12)(B)(ii).

Viewing the terms and the context of the Act as a whole, the only reasonable interpretation of the residential-use exception is that it refers to the use at the time of confiscation. Because Plaintiffs' Properties were used for residential purposes at the time they were confiscated, Plaintiffs failed to plead their claims to the Properties are claims to "property" under the Act.

CONCLUSION

For these reasons, the Expedia Entities respectfully request that the Court affirm the judgment dismissing this case without leave to amend.

Dated: November 2, 2020

Respectfully submitted,

SCOTT DOUGLASS & MCCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
(512) 495-6300 – Phone
(512) 495-6399 – Fax

By: _____

David D. Shank
dshank@scottdoug.com
Jane Webre
jwebre@scottdoug.com

Counsel for Defendants–Appellees Expedia Group, Inc, Hotels.com, L.P., Hotels.com GP, LLC, and Orbitz, LLC

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 12,882 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2019 in Garamond, 14-point font.

David Shank

CERTIFICATE OF SERVICE

I certify that on November 2, 2020, a copy of this documents was filed through CM/ECF with the United States Court of Appeals for the Eleventh Circuit, and served via Notice of Docket Activity:

David Shank