UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 1:19-cv-22629-FAM

Diego Trinidad,

Plaintiff,

v.

Expedia, Inc.,

Defendant.

DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION, LACK OF SUBJECT MATTER JURISDICTION, AND FOR FAILURE TO STATE A CLAIM, AND MEMORANDUM OF LAW

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INTRODUCTION

Plaintiff Diego Trinidad ("Trinidad") claims that in the late 1950s his parents built a beach-front home in Varadero, Cuba, and that the Cuban government confiscated this home shortly after he and his parents fled Cuba in 1960. More than thirty years later, the home and several others near it were demolished to make way for the Barceló Solymar (the "Resort"), Trinidad alleges. More than a decade after that, and pursuant to general and specific licenses to provide services related to lawful travel to Cuba, Defendant Expedia, Inc.[1] ("Expedia")—an online travel company that did not even exist until almost fifty years after the communist revolution in Cuba—began to offer reservations at the Resort through its website.

Claiming to be the current heir to "the Property," Trinidad now sues Expedia—and only Expedia—for "trafficking" in the Property under Title III of the Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. § 6021 *et. seq.* ("Helms-Burton Act" or "Act"). Trinidad seeks damages from Expedia equaling three times the value of "the Property" that the Cuban government allegedly confiscated more than fifty years ago, plus attorneys' fees and costs.

This action must be dismissed for three independent reasons:

First, Expedia is not subject to personal jurisdiction in Florida. The only fact Trinidad alleges that attempts to connect Expedia or this case to Florida is that Expedia's website—through which travelers could book stays at the Resort—is accessible in Florida, just as it is in every other state. That allegation is wholly insufficient to establish personal jurisdiction, and Trinidad has therefore failed to meet his burden to plead a prima facie case for personal jurisdiction.

Second, even if Expedia were subject to personal jurisdiction in Florida, there is no subject matter jurisdiction because Trinidad lacks standing under Article III of the Constitution. Trinidad lacks constitutional standing because there is no nexus or causal connection between his alleged injury (i.e., the Cuban government's confiscation of the Property in the 1960s) and Expedia's chal-

[1] In March 2018, the Delaware corporation named as a defendant in this case changed its name to Expedia Group, Inc.

lenged conduct (i.e., offering reservations at a hotel that, according to Trinidad, was built partially on land where the Property once stood).

Third, even absent these twin jurisdictional defects, Trinidad's amended complaint should be dismissed because it fails to state a claim upon which relief can be granted. Trinidad fails to sufficiently plead that he owns an actionable claim to property under Title III, or that Expedia trafficked in that property. To the contrary, it is readily apparent that the opposite is true.

BACKGROUND

A. The Helms-Burton Act

Congress passed the Helms-Burton Act in 1996. Title III of the Act—subject to certain limitations and definitions—grants U.S. nationals who "own[ ] a claim" to "property" that was confiscated by the Cuban government the right to sue and recover damages from any person that "traffics" in such property. 22 U.S.C § 6082(a). The Act grants the President the right 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.

B. Trinidad and the Property

Trinidad alleges that his parents, Diego and Estela, "built a beachfront home" in Varadero, Cuba, that was located "just a couple hundred meters from the Hotel Internacional, between 72nd and 73rd street." (Am. Compl. 2.)[2] Trinidad identifies this beachfront home as "the Property," but he does not allege that his parents actually owned (or held some other property interest in) the home or the land on which it stood. (*Id.*)

[2] Notably, Trinidad's description of the home's location has changed since his original complaint. (*See* Class Action Compl. ¶ 17 ("In the early 1950's, [Trinidad's parents] built a beachfront estate in a prime location in Varadero approximately 300 meters west of the hotel now known as the Melia Internacional.").)

Trinidad alleges that he and his parents fled Cuba in 1960, and that the Cuban government confiscated the Property in the early 1960s after their departure. (*Id.* ¶¶ 9–10.) According to Trinidad, the Property and other nearby homes were demolished and the Resort was built in the late 1990s (*id.* at 2), partially where the Property once stood (*id.* ¶ 21).

The amended complaint states that Trinidad has lived in the United States for decades and is a United States citizen. (*Id.* ¶¶ 1, 11.) Trinidad alleges that he is the "current heir to the Property" (*id.* at 2 n.1) and inherited the Property after his parents died (*id.* at 2, ¶ 11). Although Trinidad does not state when his parents passed away, public records reveal that his mother died in 2008. (*See* Order Admitting Will to Probate and Appointing Personal Representative; Waiver of Priority, Consent to Appointment of Personal Representative, and Wavier of Notice and Bond.)[3]

C. Expedia and the Alleged Trafficking

Expedia is a Delaware corporation with its principal place of business in Washington. (Am. Compl. ¶ 2.) Trinidad describes Expedia as the corporate parent company for a number of brands that, together, maintain numerous "travel booking sites" that offer travelers the ability to book hotel rooms and other travel products and services. (*Id.* ¶¶ 17–21.) Trinidad alleges that U.S. residents, including those in Florida, could book stays at the Resort through Expedia's websites. (*Id.* at 2, ¶ 12.) Trinidad concedes, however, that Expedia removed the Resort from its website promptly after Trinidad sent it a written notice of his Title III claim concerning the Resort. (*Id.* at 2, n.2.)

ARGUMENT & AUTHORITIES

A. Lack of Personal Jurisdiction

Determining whether a non-resident defendant, such as Expedia, is subject to personal jurisdiction is a threshold issue that must be decided before any other matter. *Madara v. Hall*, 916 F.2d

[3] These documents are together attached as **Exhibit A**. Expedia requests that the Court take judicial notice of these documents under Federal Rule of Evidence 201(b)(2) and consider it in deciding this motion. *See, e.g.*, *Ellis v. Warner*, No. 15-10134-CIV, 2017 WL 634287, at *3 n.3 (S.D. Fla. Feb. 16, 2017) (considering probate documents on a motion to dismiss because courts "may take judicial notice of publicly filed documents…at the Rule 12(b)(6) stage" (citing *U.S. ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 811 n.4 (11th Cir. 2015) (district court properly took judicial notice of publicly filed documents in a state court proceedings)).

1510, 1513–14 (11th Cir. 1990) ("The court should have addressed the personal jurisdiction question first."). The analysis has two parts. *Id.* First, the Court must determine whether the Florida long-arm statute authorizes service of process over the nonresident defendant. *Slaihem v. Sea Tow Bahamas Ltd.*, 148 F. Supp. 2d 1343, 1349 (S.D. Fla. 2001) (citing *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 626 (11th Cir. 1996)). Second, if the long-arm statute is satisfied, then the Court must determine 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.

The Supreme Court has recognized two types of personal jurisdiction: specific and general. General personal jurisdiction—or "all purpose" jurisdiction—"permits a court to assert jurisdiction over a defendant based on a forum connection unrelated to the underlying suit." *Walden v. Fiore*, 571 U.S. 277, 284 n.6 (2014); *accord Madara*, 916 F.2d at 1516 n.7 ("General personal jurisdiction arises from a party's contacts with the forum state that are unrelated to the litigation."). Specific personal jurisdiction—or "case-linked" 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*, 571 U.S. at 284 n.6 (internal quotations and alterations omitted); *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.").

"A plaintiff seeking the exercise of personal jurisdiction over a nonresident defendant bears the initial 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). Conclusory allegations are insufficient to make out a prima facie case of personal jurisdiction. *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006). If the complaint lacks "properly pleaded facts" establishing a prima facie case, "a defendant wishing to properly challenge such a legally insufficient assertion of jurisdiction need not do anything more than file a simple (unsupported) motion" without affidavits or other materials. *Borislow v. Canaccord Genuity Group Inc.*, No. 9:14-cv-80134-KLR, 2014 WL 12580259, at *5 (S.D. Fla. June 27, 2014) (internal quotations omitted).

Here, Trinidad fails to meet his burden to plead sufficient facts to make out a prima facie case of personal jurisdiction. Trinidad makes only conclusory allegations regarding jurisdiction. Specifically, he alleges that Expedia "carries on continuous and systematic contacts with Florida, regularly transacts business within Florida, regularly avails itself of the benefits of its presence in Florida, and committed a tortious act within Florida." (Am. Compl. ¶ 4.) Despite these broad conclusory allegations, the only **facts** that Trinidad alleges concerning Florida are that (i) Trinidad lives there, and (ii) Expedia's hotel listings, including the listing of the Resort, were accessible to all U.S. residents, including Florida residents. (*Id.* ¶¶ 1, 12.) These allegations fall well short of establishing a prima facie case of either general or specific jurisdiction, and Trinidad's complaint should be dismissed under Rule 12(b)(2).

1. Trinidad fails to allege a prima facie case of general jurisdiction.

As an initial matter, Trinidad does not even cite the general-jurisdiction provision of Florida's long-arm statute—which applies to defendants who engage in "substantial and not isolated activity" within Florida, Fla Stat. § 48.193(2)—much less allege facts satisfying that provision. *See Fast SRL v. Direct Connection Travel LLC*, No. 1:17-cv-20900, 2018 WL 7822711, at *3 (S.D. Fla. Aug. 3, 2018) (identifying § 48.193(2) as the long-arm statute's general-jurisdiction provision). Rather, Trinidad relies only on provisions of the long-arm statute dealing with specific jurisdiction. (Am. Compl. ¶ 4 (citing Fla. Stat. §§ 48.193(1)(a)(1), (1)(a)(2))); *see Fast SRL*, 2018 WL 7822711, at *3. For that reason alone, Trinidad fails to make a prima facie case of general jurisdiction.

Trinidad's allegations are also insufficient to satisfy the due process requirements for general jurisdiction. A court may exercise general jurisdiction over a corporation only when the corporation's "affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (internal quotations omitted). As such, "only a limited set of affiliations with a forum will render a defendant amenable to [general] jurisdiction there." *Id.* at 137. For a corporation, "the paradigm forum for the exercise of general jurisdiction" is "the place of incorporation and principal place of business." *Id.* It is only "in

an exceptional case" that "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." *Id.* at 139. To satisfy that narrow exception, a defendant's activities in the forum state must "closely approximate the activities that ordinarily characterize a corporation's place of incorporation or principal place of business." *Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1205 (11th Cir. 2015).

Neither of the "paradigm all-purpose forums"—Expedia's place of incorporation or principal place of business—support general jurisdiction in Florida because, as Trinidad alleges, Expedia is a Delaware corporation with its principal place of business in Washington. (Am. Compl. ¶ 2.) And Trinidad fails to allege any facts establishing that Expedia carries on operations in Florida that so closely approximate its place of incorporation or principal place of business so as to render Expedia "at home" in Florida. As noted above, the only factual allegation purporting to connect Expedia's operations to Florida is that Florida residents (like all other U.S. residents) could access Expedia's listing of the Resort (like all other listings on Expedia's website). That Expedia's website is accessible in Florida falls well short of rendering Expedia "at home" there. Indeed, "[t]o hold otherwise would imply that defendants who maintain a website with nationwide access could submit themselves to jurisdiction anywhere in the country, which would violate traditional notions of fair play and substantial justice." *Neelu Aviation, LLC v. Boca Aircraft Maint., LLC*, No. 9:18-cv-81445-BB, 2019 WL 3532024, at *12 (S.D. Fla. Aug. 2, 2019).

Trinidad's remaining allegations concerning general jurisdiction—i.e., that Expedia "maintains and carries on continuous and systematic contacts with Florida, [and] regularly transacts business within Florida" (Am. Compl. ¶ 4)—are conclusory and, therefore, cannot establish a prima facie case. *See Snow*, 450 F.3d at 1320. Besides, even these conclusory allegations are insufficient. As just explained, "continuous and systematic contacts" with a forum state do not give rise to general jurisdiction unless they are "so continuous and systematic as to render [the corporation] essentially at home in in the forum state." *Daimler*, 571 U.S. at 138-39 (internal quotations omitted); *accord Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927 (2011) ("A corporation's continuous ac-

tivity of some sorts within a state…is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." (internal quotations omitted)).

2. Trinidad fails to allege a prima facie case of specific jurisdiction.

Trinidad's allegations are also insufficient to make out a prima facie case of specific jurisdiction under Florida's long-arm statute and the Due Process Clause.

"Florida's long-arm statute is to be strictly construed." *Serra-Cruz v. Carnival Corp.*, 1:18-CV-23033-UU, 2019 WL 4573377, at *2 (S.D. Fla. Sept. 18, 2019). Trinidad relies on the provisions in Florida's long-arm statute that provide for personal jurisdiction over a nonresident corporation "for any cause of action arising from" (1) "[o]perating, conducting, engaging in, or carrying on a business venture in [Florida] or having an office or agency in [Florida]" and (2) "[c]ommitting a tortious act within [Florida]." Fla. Stat. § 48.193(1)(a)(1)–(a)(2). Trinidad has not alleged facts giving rise to jurisdiction under either provision.

First, Trinidad does not allege any facts showing that Expedia is "operating, conducting, engaging in, or carrying on a business" in Florida. *Id.* § 48.193(1)(a)(1). Again, the only connection between Expedia and Florida[4] alleged in the amended complaint is that Florida residents could access Expedia's website. But "it is well settled that…maintaining a website accessible in Florida…is insufficient to satisfy Section 48.193(1)(a)(1)." *Storms v. Haugland Energy Grp., LLC*, No. 9:18-cv-80334, 2018 WL 4347603, at *8 (S.D. Fla. Aug. 17, 2018) (internal quotation marks omitted), *report and recommendation adopted,* No. 9:18-cv-80334-BB, 2018 WL 4347604 (S.D. Fla. Sept. 4, 2018); *accord 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).").

Second, even if merely maintaining a website accessible in Florida did constitute "carrying on a business" in Florida, Trinidad's allegations still fail because Trinidad's cause of action does not

[4] Plaintiff also alleges that he is a Florida resident. But injury to a Florida resident "is not a sufficient connection to the forum to give rise to personal jurisdiction." *Walden*, 571 U.S. at 290. "Rather, it is **the defendant's conduct** that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Id.* at 285 (emphasis added).

"arise out of" the accessibility of the website in Florida. Both of the long-arm provisions on which Trinidad relies apply only where the plaintiff's cause of action arises out of the defendant's Florida contact. Fla. Stat. § 48.193(1)(a). Thus, under § 48.193(1)(a)(1), there must be "a nexus between the alleged causes of action and [the defendant's] alleged business activities [in Florida]." *Fast SRL*, 2018 WL 7822711, at *5. Likewise, for personal jurisdiction to attach under § 48.193(1)(a)(2), the defendant must have "committed a substantial aspect of the alleged tort in Florida," such 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) (internal quotations and alterations omitted).

Trinidad bases his Title III cause of action on the allegation that Expedia trafficked "in the Resort…by offering, for economic benefit, reservations at the Resort." (Am. Compl. ¶ 26.) Assuming (without conceding) that merely offering reservations at the Resort constitutes trafficking under Title III, the fact that residents in Florida (like those in all other states) were among those that could make such reservations is hardly essential to Trinidad's cause of action. Indeed, the location of potential travelers has no bearing on the merits of Trinidad's cause of action at all and, therefore, cannot support specific jurisdiction under the Florida long-arm statute.

For the same reason, Trinidad's allegations fail to show a prima facie case for specific jurisdiction under the Due Process Clause. For the exercise of specific jurisdiction to comport with due process, "the defendant's contacts with the forum must relate to the plaintiff's cause of action or have given rise to it." *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1220 (11th Cir. 2009); *Madara*, 916 F.2d at 1517. A cause of action "arises out of or relates to" a defendant's activity in a state "only if the activity is a 'but-for' cause of the tort." *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1314 (11th Cir. 2018), *cert. denied sub nom. Waite v. Union Carbide Corp.*, 139 S. Ct. 1384 (2019). As just explained, Trinidad's theory of liability rests merely on the fact that Expedia offered reservations for the Resort. That Florida residents were among those who could book such reservations is not a but-for cause of Trinidad's cause of action; indeed, the residency of travelers has nothing to do with Expedia's alleged liability at all.

Because Trinidad has not alleged facts giving rise to personal jurisdiction (whether general or specific) under either the Florida long-arm statute or the Due Process Clause, the Court should dismiss this case for lack of personal jurisdiction under Rule 12(b)(2). *See Borislow*, 2014 WL 12580259, at *5.

B. No Constitutional Standing

The Court should also dismiss this case under Rule 12(b)(1) because Plaintiff lacks standing under Article III of the United States Constitution ("Article III"). "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) (quotations and alterations omitted). The "irreducible constitutional minimum" of standing under Article III consists of three elements: (1) an actual or imminent injury, (2) causation, and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Failure to establish any one of these standing elements deprives the court of subject-matter jurisdiction to hear the suit. *Id.* Because Article III standing is a constitutional limitation on the jurisdiction of federal courts, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

Trinidad fails to satisfy the second, causation element of constitutional standing. In order to satisfy the causation element at this stage in the litigation, a plaintiff must allege a "nexus" or "causal connection" between the plaintiff's injury and the defendant's conduct. *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Florida*, 641 F.3d 1259, 1265 (11th Cir. 2011); *Wehunt v. Ledbetter*, 875 F.2d 1558, 1567 (11th Cir. 1989). That is, the plaintiff must demonstrate that "[his] 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.'" *Kawa Orthodontics, LLP v. Sec'y, U.S. Dept. of the Treasury*, 773 F.3d 243, 247 (11th Cir. 2014) (quoting *Lujan* 504 U.S. at 560). Thus, a plaintiff lacks standing when an "independent source" caused the plaintiff to suffer injury. *See, e.g.*, *Swann v. Sec'y, Georgia*, 668 F.3d 1285, 1288 (11th Cir. 2012).

Here, Trinidad has not alleged any "causal connection" between Expedia's challenged conduct—i.e., "offering, for economic benefit, reservations at the Resort" (Am. Compl. ¶ 26)—and his alleged injury—i.e., that "the Cuban government confiscated the Property from the Trinidad Family" without paying compensation (*id.* ¶¶ 9, 14). Expedia "played no role" in bringing about Trinidad's alleged injury. *Kawa*, 773 F.3d at 247. Indeed, that injury occurred at least fifty years **before** Expedia's alleged conduct (and almost forty years before Expedia came into existence), and was caused by the actions of the Cuban government and other third parties. Because Plaintiff's claimed injury was "directly caused by a third party who is not a party to the lawsuit," *Wehunt*, 875 F.2d at 1567, and would have occurred "regardless of" Expedia's action, *Swann*, 668 F.3d at 1289, Trinidad lacks standing to bring this action against Expedia.

C. Failure to State a Claim

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). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level," *id.*, meaning that a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678. And 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]," *Twombly*, 550 U.S. at 555 (quotation omitted).

1. Trinidad fails to plead ownership of an actionable claim to confiscated property under Title III.

Title III grants a cause of action only to U.S. nationals who own a claim to property confiscated by the Cuban government on or after January 1, 1959. 22 U.S.C. § 6082(a)(1)(A). Further, if

the property in question was confiscated before the Act's enactment date, March 12, 1996, Title III limits the cause of action only to those who acquired ownership of a claim to the property before the enactment date. 22 U.S.C. § 6082(a)(1)(A), (4)(B).[5] Here, Trinidad's factual allegations fall well short of making out a plausible Title III claim for multiple reasons.

For starters, Trinidad fails to sufficiently allege that "the Property" underlying his claims constitutes "property" under the Act. The Act defines *property* as "any property…, and any…interest therein, including any leasehold interest." 22 U.S.C. § 6023(12)(A). But the definition also expressly states that *property* does not include "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) is occupied by a Cuban government or political-party official. *Id.* § 6023(12)(B).

Trinidad defines "the Property" as "a beachfront home" that his parents built in Varadero, Cuba. (Am. Compl. 2.) He does not allege that his parents owned the home or the land on which it stood, or that they held any other property interest in the home or land. The mere allegation that his parents "built" the home does not give rise to a reasonable inference that they owned a property interest in the home or the land. After all, it is equally reasonable to infer that a relative or related entity owned the property and merely permitted Trinidad's parents to build a home on it and reside there during their lifetimes.

Additionally, even if Trinidad had alleged that his parents owned the Property or held some other type of property interest in it, Trinidad fails to allege that the Property was used for anything other than "residential purposes" both at the time it was allegedly confiscated and as of March 12, 1996. Indeed, Trinidad's description of the Property as "a beachfront **home**" allows no inference other than that it was used for residential purposes by Trinidad's parents. And nothing in the amended complaint suggests that the home was used for any other purpose before it was allegedly demolished and the Resort was built in the late 1990s. (*See* Am. Compl. 2.) Therefore, "the Proper-

[5] This requirement applies here because Trinidad alleges that the Cuban government confiscated "the Property" in the early 1960s. (Am. Comp. ¶ 9.) For property confiscated on or after the enactment date, Title III provides a cause of action only to those who did not acquire ownership of a claim to that property through an assignment for value. 22 U.S.C. § 6082(a)(4)(C).

ty" is not "property" under the Act unless, as of March 12, 1996, it was the subject of a certified claim or was occupied by a Cuban official. 22 U.S.C. § 6023(12)(B). Trinidad fails to plead either circumstance—in fact, he specifically alleges that the Property is **not** the subject of a certified claim. (Am. Compl. ¶ 16.)

Trinidad also fails to adequately allege that he "owns a claim" to the Property, or the nature of that purported claim. Trinidad claims that he inherited the Property after his parents died (Am. Compl. 2, ¶ 11), and that he is "the current heir to the Property" (*id.* at 2 n.1). But these are merely "legal conclusion[s] couched as a factual allegation," *Twombly*, 550 U.S. at 555, and Trinidad does not allege any **facts** from which one could reasonable infer that conclusion. Because he fails to allege what type of property interest (if any) his parents held in the Property, he fails to allege what he supposedly inherited. Nor does he allege how he supposedly inherited the Property.

In any event, even if Trinidad's conclusory allegation of inheritance sufficed to plead that he owns a claim to property under Title III, he still fails to allege that he acquired ownership of that claim before the Act's enactment date. *See* 22 U.S.C. § 6082(a)(4)(B). To the contrary, Trinidad's allegations and facts subject to judicial notice affirmatively show that he acquired ownership of his claim (if at all) years after the enactment date. Specifically, Trinidad alleges that he inherited his claim only after both his father and his mother had died. (Am. Compl. ¶ 11 ("On the passing of Diego Cosme Trinidad Valdez **and his wife**, the property…was inherited by [Trinidad]." (emphasis added)).) Although Trinidad omits the dates of his parents' deaths from his complaint, public records reveal that Trinidad's mother died on July 17, 2008. (*See* Ex. A.) Based on Trinidad's own allegations, then, he did not inherit his claim to the property until at least 2008. Therefore, he "may not bring an action" under Title III. 22 U.S.C. § 6082(a)(4)(B).

2. Trinidad fails to adequately plead trafficking.

Trinidad falls similarly short in pleading trafficking. The Act's definition of *traffics* has two parts. Subparagraph (A) describes three kinds of activities that constitute trafficking if done knowingly and intentionally, and without the authorization of any United States national who holds a

claim to the property. 22 U.S.C. § 6023(13)(A). Subparagraph (B), which immediately follows, then lists four types of conduct that nevertheless **do not** constitute trafficking. *Id.* § 6023(13). Among the conduct that specifically 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) (herein after "Lawful Travel Clause"). Trinidad's allegations fail under both parts of the definition.

a. Trinidad fails to allege Expedia acted knowingly and intentionally.

To adequately plead trafficking, Trinidad must allege facts that give rise to a reasonable inference that Expedia knowingly and intentionally engaged in conduct described in subparagraph (A) of the Act's definition. 22 U.S.C. § 6023(13)(A); *see 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."). Trinidad claims that Expedia trafficked in confiscated property under Title III by "offering, for economic benefit, reservations at the Resort," which, according to Trinidad, partially sits where the Property once stood. (Am. Compl. ¶ 26.) Yet, Trinidad fails to include even conclusory allegations that Expedia knowingly and intentionally trafficked in confiscated property when it listed the Resort on its website. The amended complaint does not even contain the words *knowingly* or *intentionally*.

Nor does Trinidad allege any facts that could support a reasonable inference that Expedia knowingly and intentionally committed trafficking. The only allegation in the amended complaint that even touches on Expedia's state of mind is the nonsensical assertion that Expedia somehow demonstrated "guilty knowledge" when it removed the Resort from its website after it received Trinidad's notice of intent to add Expedia as defendant to this action. (Am. Compl. ¶ 21 n.3.) This "heads I win, tails you lose" is absurd. If a defendant's decision to cease alleged trafficking conduct after receiving a notice of a Title III claim constitutes evidence of intent, then the safe harbor Congress created to insulate defendants who do just that from treble damages would be meaningless. *See*

22 U.S.C. § 6082(a)(3)(B) (imposing treble damages only on persons who continue trafficking more than 30 days after receiving a notice of intent to sue the person for such trafficking).

b. The Lawful Travel Clause defeats Trinidad's claim.

Under the Lawful Travel Clause, trafficking does not include "transactions or 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." 22 U.S.C. § 6023(13)(B)(iii). Because the Lawful Travel Clause is part of the definition of *traffics*, and trafficking is an essential element of a Title III claim, Trinidad must plead facts showing that Expedia's 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) (Moreno, J.) (dismissing FDCPA claim where plaintiff failed to allege that defendant 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). Trinidad has not even attempted to do so. For that reason alone, he fails to adequately allege trafficking.

To be sure, two judges in this district 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 as to which the defendant bears the burden of proof. *See Garcia-Bengochea v. Carnival Corp.*, No. 1:19-cv-21725, 2019 WL 4015576, at *3–4 (S.D. Fla. Aug. 26, 2019) (King, J.); *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 (Bloom, J.). Expedia respectfully disagrees with those rulings and their underlying analysis, which this Court is not bound by[6] and should not follow. The statutory construction of Helms-Burton 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,

[6] Indeed, in explaining its holding, the court in *Garcia-Bengochea* opted not to follow this Court's analysis in *Benjamin*, finding it "unpersuasive."

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 the same section. Indeed, the statutory language shows that § 6082 is precisely where any such exceptions would appear. 22 U.S.C. § 6082(a)(1)(A) ("Except as otherwise provided in **this section**…." (emphasis added)). But Congress instead 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. Thus, the Court should not treat the Lawful Travel Clause as an affirmative defense. *See Thomas*, 525 F.3d at 114 ("In the end, where Congress does not squarely address the question, where the statute's structure and language do not suggest a shift of the burden to defendant (through use of statutory exceptions, for example), and where plaintiffs are not peculiarly at a disadvantage in the discovery of necessary facts, we will not shift the burden of proof, or any element thereof, to the defendant.").

In any event, even if Congress had made the Lawful Travel Clause an affirmative defense, the clause still bars Trinidad's claim because it is apparent on the face of his amended complaint that Expedia's alleged conduct fits squarely within the clause. *See Quiller v. Barclays American/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); *cf. Jones v. Bock*, 549 U.S. 199, 215 (2007) ("If the allegations…show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim.").

Trinidad alleges that Expedia offered stays at the Resort to U.S. residents through its website. (Am. Compl. 2, ¶ 12.) This allegation, taken as true, shows that the Lawful Travel Clause bars Trinidad's claims because offering U.S. residents hotel reservations in Cuba is "incident to" and "necessary to the conduct of" lawful travel to Cuba. *See* 22 U.S.C. § 6023(13)(B)(iii).

To start, there can be no dispute that U.S. residents may lawfully travel to Cuba. 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, religious activities, and public performances, among others). Indeed, federal regulations authorize Expedia, 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"); *see Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dept. of Treasury*, 606 F. Supp. 2d 59, 64 (D.D.C. 2009) (the "general license" contained in the Cuban embargo regulations, 31 C.F.R. 515, subpart E, "broadly authorizes entire classes of transactions").

Nor can there be any question 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. 25, 2019); *see also Incident to employment*, BLACK'S LAW DICTIONARY (11th ed. 2014) (defining *incident to employment* as "[a] risk that is **related to** connected with a worker's job duties" (emphasis added)). And courts consistently have construed *necessary* broadly to mean "useful" or "convenient." *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); *see also M'Culloch v. Maryland*, 17 U.S. 316, 413 (1819) (holding that "necessary" in the Necessary and Proper Clause does not require strict essentiality, but rather requires means that are "convenient, or useful, or essential" to the purpose in question).[7]

[7] And even if there was any doubt about the broad meaning of those terms, the Act's legislative history eliminates it. In explaining the need for the Lawful Travel Clause, the Committee Report, which

Hotel lodging in Cuba is both related to and convenient or useful to travel to Cuba. Indeed, lawful travel to Cuba by U.S. residents lacking family in Cuba would be largely impossible without it. Even Trinidad's own pleadings prove the point. Trinidad's amended complaint references the word *travel* seventeen times across its eight pages, and repeatedly acknowledges the interconnectedness of travel and lodging. It even describes Expedia as a "**travel** platform" that maintains "**travel** booking sites" and provides "**travel** products and services." (Am. Compl. ¶¶ 17–21 (emphasis added).)

Thus, 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 Trinidad's claim here.

CONCLUSION

The Court should dismiss this case under Rule 12(b)(2) because Trinidad fails to allege facts making out a prima facie case for personal jurisdiction. Barring that, the Court should dismiss this case under Rule 12(b)(2) for lack of subject matter jurisdiction because Trinidad does not have constitutional standing. And even absent these twin jurisdictional defects, the Court should still dismiss this case under Rule 12(b)(6) because Trinidad's amended complaint fails to state a plausible claim under Title III.

"next to the statute itself it is the most persuasive evidence of congressional intent," *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1462 (11th Cir. 1992), paraphrased the clause as "remov[ing] any liability for…any activities **related to** lawful travel." 142 CONG. REC. H1645-02 at H1656 (emphasis added). Congress itself thus interpreted "incident to" and "necessary" as meaning nothing more than "related to."

Dated: November 25, 2019

Respectfully submitted,

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EXHIBIT A

IN THE CIRCUIT COURT FOR MIAMI-DADE COUNTY,
FLORIDA PROBATE DIVISION
IN RE: ESTATE OF

File No. 12-4731

ESTELA GARCIA-MESANA TRINIDAD
Deceased.

Division CP 01

ORDER ADMITTING WILL TO PROBATE AND APPOINTING PERSONAL REPRESENTATIVE

The instrument presented to this court as the last will of Estela Garcia-Mesana Trinidad, deceased, having been executed in conformity with law, and made self-proved by the acknowledgment of the decedent and the affidavits of the witnesses, made before an officer authorized to administer oaths and evidenced by the officer's certificate attached to or following the will in the form required by law, and no objection having been made to its probate, and the court finding that the decedent died on July 17, 2008, and that Fernando A. Cuervo Othon, a/k/a Fernando A. Cuervo, a/k/a Fernando Alberto Cuervo Othon is entitled and qualified to be personal representative, it is

ADJUDGED that the will dated December 5th, 2003, and attested by Dottie C. Mcleod, Ana C. Chavarria, and Deborah R. Waks as subscribing and attesting witnesses, is admitted to probate according to law as the last will of the decedent, and it is further

ADJUDGED that Fernando A. Cuervo Othon is appointed personal representative of the estate of the decedent, and that upon taking the prescribed oath, and filing designation and acceptance of resident agent, letters of administration shall be issued.

ORDERED on June 5, 2013.

Acting in the Absence of Judge Michael A. Genden

JUDGE BERNARD S. SHAPIRO

Circuit Judge

THE PERSONAL REPRESENTATIVE SHALL PLACE ALL LIQUID ASSETS IN A DEPOSITORY DESIGNATED BY THE COURT PURSUANT TO THE F.S. 69.031 THIS IS A FROZEN ACCOUNT WHICH MEANS THAT NO FUNDS CAN BE WITHDRAWN WITHOUT ORDER OF THE COURT

NO SALE OF ANY ASSETS WITHOUT SPECIAL ORDER OF COURT

THIS ESTATE MUST BE CLOSED WITHIN 12 MONTHS IF NOT CONTESTED.

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IN THE CIRCUIT COURT FOR MIAMI-DADE COUNTY, FLORIDA

PROBATE DIVISION

IN RE: ESTATE OF

File No. 12-4731

ESTELA GARCIA-MESANA TRINIDAD

Division CP 01

Deceased.

WAIVER OF PRIORITY, CONSENT TO APPOINTMENT OF PERSONAL REPRESENTATIVE, AND WAIVER OF NOTICE AND BOND

The undersigned, Diego J. Trinidad, whose address is 8942 SW 212 Terrace, Cutler Bay, FL 33189, and who is a beneficiary of the estate of Estela Garcia-Mesana Trinidad, deceased, hereby waives the right to act as personal representative of the estate; consents to the appointment of Fernando A. Cuervo Othon as the personal representative of the estate; waives service of Notice of Administration upon the undersigned; and requests that the personal representative not be required to post bond or security.

Signed on 5-15, 2013.

Diego Trinidad

Diego J. Trinidad

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