UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

HAVANA DOCKS CORPORATION,

Case No.: 19-cv-21724-BLOOM

Plaintiff,

vs.

CARNIVAL CORPORATION,

Defendant.
_____/

PLAINTIFF'S MOTION FOR LEAVE
TO FILE FIRST AMENDED COMPLAINT

Plaintiff Havana Docks Corporation ("Havana Docks") moves for leave to file a first amended complaint and states as follows.

INTRODUCTION

On January 3 and 7, 2020, respectively, the Court dismissed with prejudice two separate, but related, cases brought by Havana Docks against MSC Cruises ("MSC") and Norwegian Cruise Line ("NCL"). (*See Havana Docks v. MSC Cruises SA Co, et al.*, 19-cv-23588, D.E. 40 (the "*MSC* Case"); *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 19-cv-23591, D.E. 42 (the "*NCL* Case") (collectively, the "Dismissal Orders").) As demonstrated below, Havana Docks can state a claim against Defendant Carnival Corporation ("Carnival") under Title III and the Court's interpretation of that statute in the Dismissal Orders. Havana Docks, thus, respectfully requests leave to file a first amended complaint, attached as **Exhibit A**, that sets forth new factual allegations that give rise to a claim for relief under Title III.

First, as the Eleventh Circuit has made clear, Title III of the Cuban Liberty and Democratic Solidarity Act ("LIBERTAD Act") established a new statutory

remedy recognizing the certified claim owned by the former owners of confiscated property as the statutorily created property interest that is actionable under the LIBERTAD Act. *See Glen v. Club Mediterranee S.A.*, 450 F.3d 1251, 1255 (11th Cir. 2006) ("The Helms-Burton Act refers to the property interest that former owners of the confiscated property now have as ownership of a 'claim to such property.'"). If given an opportunity to amend, Havana Docks can allege facts showing its certified claim is not time-limited. The terms of the certified claim expressly state that the claim does not expire until "the date of settlement." (ECF No. 1-1 at 4, 13.) That date has not yet come.

Second, Havana Docks can factually allege that the concession did not "expire" by its terms in 2004, a factual finding the Dismissal Orders characterize as "undisputed." As an amended complaint would make clear, Havana Docks' concession agreement included a 99-year leasehold interest that was cut short by 44-years because of the confiscation by the Cuban Government, and thus did not expire. It was confiscated. Havana Docks' claim certified by the Foreign Claims Settlement Commission ("FCSC"), included the value of the loss of the remaining 44 years of the concession. Those 44-years of concessionary rights are property interests in the Subject Property that Havana Docks has never enjoyed and received no compensation for. They remain outstanding and can support a claim under Title III.

Third, the concession agreement, which the Court has not yet had the benefit of reviewing, and which terms would be alleged in the amended complaint, includes an indemnity right to be paid by the Cuban Government to Havana Docks that is expressly triggered by the expropriation. That unsatisfied indemnity right was not time-limited and was included in the valuation of the loss certified by the FCSC. The plain language of the LIBERTAD Act recognizes this type of unpaid debt as an obligation that attaches to the confiscated property. *See* 22 U.S.C. § 6023(4)(B)(ii) (defining the term "confiscated" to include "the failure of the Cuban Government to pay, on or after January 1, 1959-- . . . a debt which is a charge on property nationalized, expropriated, or otherwise taken by the Cuban Government." (emphasis added)). So too does Cuban law in effect at the time of expropriation. *See* Codigo Civil,

Title II, Art. 349 ("No one shall be deprived of his property, except by competent authority and with sufficient cause of public utility, always after the proper indemnity. If this requisite has not been fulfilled the judges shall protect, and in a proper case, replace the condemned party in possession.") (emphasis added). This right to indemnity is an outstanding interest in the Subject Property that is actionable under Title III, as Havana Docks will factually allege if permitted leave to file a first amended complaint.

Fourth, Havana Docks' certified claim recognizes ownership of property beyond the concession that was not addressed in the Dismissal Orders. If allowed to replead, Havana Docks will also allege facts to show that the FCSC certified a valuation for losses of property interests beyond the confiscated concession.

Fifth, Carnival trafficked in the Subject Property at various points between 1996 and 2004. In the Dismissal Orders, the Court did "not deprive Plaintiff of a remedy for trafficking" and "ensure[d] that persons like Plaintiff may recover for any trafficking of their confiscated property" that took "place between 1960 and 2004." (*Id.* at pp. 9-10.) As detailed below, Havana Docks can factually allege that Carnival trafficked in the Subject Property at numerous points between 1996 and 2004. Havana Docks requests leave to file a first amended complaint setting forth new allegations to support this theory of liability.

PROCEDURAL BACKGROUND

Havana Docks filed this case on May 2, 2019, asserting one count under Title III of the LIBERTAD Act against Carnival. (ECF No. 1.) The basis for the suit is Carnival's trafficking on certain commercial waterfront real property in the Port of Havana, Cuba, identified as the Havana Cruise Port Terminal (the "Subject Property"), that was confiscated from Havana Docks on October 24, 1960, by the Cuban Government. (*Id.*) In 1971, the FCSC certified the amount and validity of the claim by Havana Docks for the loss it incurred resulting from the confiscation of the properties included in the Subject Property ("Claim No.CU-2492"). (ECF No. 1-1.) By

its terms, Claim No. CU-2492 does not expire until "the date of settlement." (*Id.* at 4, 12, 13.)

Carnival moved to dismiss, arguing that Havana Docks did not have a property interest in the Subject Property at the time of the alleged trafficking acts. (ECF No. 17.) On August 28, 2019, the Court denied that argument, reasoning that Carnival incorrectly conflated a claim to property and a property interest, and that Havana Docks had sufficiently alleged ownership of a claim to the Subject Property. (ECF No. 47.) Carnival answered the Complaint and subsequently moved for leave to file a first amended answer and affirmative defenses out of time on November 14, 2019.[1] (ECF Nos. 50, 57.) Havana Docks did not oppose that motion, which the Court granted the same day. (ECF Nos. 57, 58.)

In two separate but related suits, Havana Docks sued MSC and NCL under Title III on August 27, 2019. MSC and NCL each moved to dismiss, arguing, like Carnival, that Havana Docks could not pursue its claims because it did not have a property interest in the Subject Property at the time of the alleged trafficking event. The Court granted both motions, reconsidering its prior interpretation of Title III in this case and dismissing Havana Docks' complaints against MSC and NCL with prejudice. (Dismissal Orders.) Three factual findings underpin both orders: that Havana Docks' claim only related to a time-limited concession; that Havana Docks' confiscated concession interest expired by its own terms in 2004; and that MSC and NCL did not begin trafficking in the Subject Property until after 2004. (*Id.* at pp. 6 n.1, 7, 10.) In its Dismissal Orders, the Court made clear that it is "not depriv[ing] Plaintiff of a remedy for trafficking" and "ensure[d] that persons like Plaintiff may recover for any trafficking of their confiscated property" that took "place between 1960 and 2004." (*Id.* at pp. 9-10.) Havana Docks can state claims against MSC and NCL under the Court's interpretation of Title III in the Dismissal Orders and has or

[1] The deadline to amend pleadings was August 13, 2019, which predated the Court's orders on the motions to dismiss in this case, the *MSC* Case and the *NCL* Case. (ECF No. 29 at p. 2.)

will timely moved for reconsideration and leave to file first amended complaints in those cases.

In light of the Dismissal Orders in the *MSC* Case and *NCL* Case, on January 7, 2020, Carnival filed a corrected[2] motion for reconsideration of the Court's earlier order denying its motion to dismiss. (ECF No. 65.) Havana Docks opposes that motion and filed its response brief on January 31, 2020. (ECF No. 71.) Discovery is presently stayed pending the Court's resolution of Carnival's motion for reconsideration. (ECF No. 69.)

Havana Docks can state a claim against Carnival under Title III and the Court's interpretation of that statute in the Dismissal Orders, prompting the instant motion for leave to file a first amended complaint.

LEGAL STANDARD

Rule 15 of the Federal Rules of Civil Procedure governs amendment to pleadings. Apart from initial amendments permissible as a matter of course, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id*. Generally, amendment should be given unless "(1) [] there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) [] allowing amendment would cause undue prejudice to the opposing party; or (3) [] amendment would be futile." *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001); *Foman v. Davis*, 371 U.S. 178, 182 (1962).

ARGUMENT

In the Dismissal Orders, the Court clearly outlined the factual allegations necessary for Havana Docks to state a claim against Carnival under Title III: Carnival must have trafficked in the Subject Property "before [Havana Docks'] interest in the property expired." (Dismissal Order at pp. 8, 9.) As set forth below,

[2] The Court denied the original motion for reconsideration because Carnival did not attempt to confer with Havana Docks prior to filing it. (ECF Nos. 63, 64.)

Carnival trafficked in the Subject Property before Havana Docks' interest expired. Havana Docks, thus, can state a Title III claim against Carnival and respectfully requests leave to file a first amended complaint to allege these new factual allegations.

I. The Certified Claim is the Property Interest at Stake in This Litigation, and It is Actionable Under These Facts.

Havana Docks' certified claim is a property interest, created by federal law and recognized by the Eleventh Circuit, that has not expired and remains actionable under Title III. Thus, Havana Docks disputes the Court's factual findings in the Dismissal Orders that "the property interest at stake is a concession that expired in 2004" and that "the nature of [Plaintiff's] claim" is "time-limited." (Dismissal Orders at 5, 6.)

Title III is a unique statute creating a new statutory remedy, which was passed, in part, "to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime." 22 U.S.C. § 6022(6). The U.S. Supreme Court has long recognized that the legal effect of a foreign government's expropriation of property is to divest the traditional property interests of private persons and entities and vest those rights in the foreign government. *See Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309-10 (1918) (seizure of bullion by Mexico divested a U.S. citizen of title and ownership of the bullion); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 414-15 (1964) (Cuba's confiscation vested in Cuba the "property right in" and "dominion over" sugar expropriated by Cuba).

Recognizing the reality that attaching traffickers' liability to the use of current property interests would render the law unenforceable (because those traditional property law interests were necessarily extinguished by confiscation), Congress created a new cause of action for U.S. nationals, such as Havana Docks. *See* 22 U.S.C. §§ 6081(11), 6082(a)(1)(A); *Glen*, 450 F.3d at 1255 (expressly recognizing that the LIBERTAD Act provides a "new statutory remedy available [] to United States nationals who were victims of [Cuban Government] confiscations."). As Chief Judge Moore noted in *Glen*, Title III "do[es] not provide that those whose property was taken

by the Cuban government retain *legal title* to that property, but rather permits any U.S. national 'who owns a claim to such [confiscated] property for money damages' to sue those who traffic in such property." 365 F. Supp. 2d at 1269 (quoting 22 U.S.C. § 6082(a)(1)(A)) (emphasis in original).

The Eleventh Circuit affirmed in a published opinion, explaining that "the Helms-Burton Act does not proclaim the ineffectiveness of the Cuban expropriations." *Glen*, 450 F.3d at 1255. In so doing, it declined to speculate about what property interests the plaintiffs would have possessed 'but for confiscation,' and instead recognized the reality that expropriation extinguished all such interests and vested them in the Cuban Government. *Id.* (LIBERTAD Act did not establish ownership of confiscated property); *id.* at 1256 ("we hold that the Helms-Burton Act does not affect any change to the existing law" (citing *Sabbatino*, 376 U.S. at 428)). Giving meaning to the LIBERTAD Act's cause of action, the Eleventh Circuit then held that a "claim" is an interest in confiscated property and that Title III is the Congressionally-created mechanism for enforcing that interest. *Id.*

Thus, as *Glen* instructs, the fundamental premise underpinning the LIBERTAD Act's enforcement scheme is that a "United States national who <u>owns the claim to such property</u>" may sue under Title III. 22 U.S.C. § 6082(a)(1)(A) (emphasis added).[3] And, pursuant to the LIBERTAD Act, the Court is required to "accept as conclusive proof of ownership of an interest in property a certification of a claim to ownership of that interest that has been made by the [FCSC]." 22 U.S.C. § 6083(a)(1).

Title III therefore requires a court to look to the claim as certified, not to engage in a "but for" analysis to determine whether, but for the confiscation, the person would have a current, traditional property interest. Under Title III, <u>the certified</u>

[3] To state a *prima facie* case of trafficking under Title III, a plaintiff must allege ownership of a <u>claim</u>, not a current ownership of, or possessory interest in, the <u>property</u>. 22 U.S.C. § 6082(A). Applying its ordinary and natural meaning, the term "claim," in the context of Title III, refers to the assertion of a right to payment against "any person that . . . traffics in property which was confiscated by the Cuban Government . . . ." 22 U.S.C. § 6082(a)(1)(A).

claim is the property interest in confiscated property. It certifies losses resulting from the confiscation of the bundle of property interests relating to the Subject Property that existed in 1960 and were never realized due to expropriation.[4] And the evidence in the record, although limited at this stage, demonstrates that Havana Docks' certified claim has no time limit. The terms of the certified claim expressly state that the claim does not expire until "the date of settlement." (ECF No. 1-1, at 4, 13.) That date has not yet come.[5] The certified claim is still actionable.

In the Dismissal Orders, the Court, at the urging of MSC and NCL, considered hypothetical situations, engaged in "but for" analyses, and arrived at conclusions untethered to the LIBERTAD Act's statutory scheme. For example, MSC posited that under the Court's *Carnival* opinion, "a U.S. national with a future leasehold interest (that was never realized due to Castro's socialization of Cuba)[6] could theoretically

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[4] "Section 503(a) of the Act provides that the Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba arising since January 1, 1959 for losses resulting from the nationalization, expropriation, intervention or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States. Section 502(3) of the Act provides: The term 'property' means any property, right, or interest including any leasehold interest, and debts owed by the Government of Cuba or by enterprises which have been nationalized, expropriated, intervened, or taken by the Government of Cuba and debts which are a charge on property which has been nationalized, expropriated, intervened or taken by the Government of Cuba." (ECF No. 1-1, at 4, 5.)

[5] These claims were certified with the purpose—and hope—that they would one day be settled with a "friendly government in Cuba when diplomatic relations [] resumed." Department of Justice, *Section II, Complete of the Cuban Claims Program under Title V of the International Claims Settlement Act of 1949*, at 70, at https://www.justice.gov/sites/default/files/fcsc/docs/final-report-cuba-1972.pdf ("The stated purpose of the Congress in directing that the amounts of these losses be certified to the Secretary of State is to provide him with appropriate information which would be useful in future negotiation of a claims settlement agreement with a friendly government in Cuba when diplomatic relations are resumed.").

[6] MSC's reference to "Castro's socialization of Cuba" reflects a misunderstanding of what the totalitarian Castro regime has inflicted on Cuba and its people.

bring a Title III claim against a company that used the property (1) before any such future right became effective and (2) even if the fee simple property owner, who actually owns a present interest, were to authorize use of the property." (Mot. to Dismiss, *MSC* Case, ECF No. 24, at 10.) MSC declared that this would "invariably render[] the Act's definition of 'property' meaningless and unworkable." (*Id.*) In reality, MSC urged this Court to ignore the statutory language entirely because, in MSC's view, it is "meaningless and unworkable."

Despite MSC's protestations to the contrary, a person who owns a certified claim to a future interest that a defendant trafficked in would have a cause of action under Title III's plain language. The LIBERTAD Act's definition of "property" expressly includes "future, or contingent right, security, or other interest," "including any leasehold interest." 22 U.S.C. § 6023(12)(A). That a fee simple owner may authorize the defendant's use of the property does not immunize the defendant for liability under the LIBERTAD Act. (*See id.*) Under the plain language of Title III, the only person who may authorize the use of the confiscated property subject to a

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Unsurprisingly, those words—"Castro's socialization of Cuba"—are not found in the LIBERTAD Act. Rather, the LIBERTAD Act found:

> (2) At the same time, the welfare and health of the Cuban people have substantially deteriorated as a result of this economic decline and the refusal of the Castro regime to permit free and fair democratic elections in Cuba. (3) The Castro regime has made it abundantly clear that it will not engage in any substantive political reforms that would lead to democracy, a market economy, or an economic recovery. (4) The repression of the Cuban people, including a ban on free and fair democratic elections, and continuing violations of fundamental human rights, have isolated the Cuban regime as the only completely nondemocratic government in the Western Hemisphere. (5) As long as free elections are not held in Cuba, the economic condition of the country and the welfare of the Cuban people will not improve in any significant way. (6) The totalitarian nature of the Castro regime has deprived the Cuban people of any peaceful means to improve their condition and has led thousands of Cuban citizens to risk or lose their lives in dangerous attempts to escape from Cuba to freedom."

22 U.S.C. § 6021 (2) – (6).

certified claim without incurring liability is the "U.S. national who holds a claim to the property." 22 U.S.C. § 6023(13).

Why would Title III require a person to obtain authorization from the owner of the claim (and not simply the owner of all current property interests) to avoid liability? The answer is that Congress drafted Title III to give victims of Castro's confiscations rights to the property stolen from them, and to deter trafficking in confiscated property by these joint venture partners of the Cuban Government to "protect the claims of U.S. nationals" and to deny "badly needed financial benefit" to the Cuban Government. 22 U.S.C. §§ 6081 (5), (6) & (11). Title III makes clear that the certified claim remains actionable until "a democratically elected government in Cuba is in power," 22 U.S.C. § 6082 (h)(1), and it provides notice of an encumbrance on the property to all the world that they use the property at the risk of facing liability under Title III if they do not obtain authorization from the owner of the certified claim. 22 U.S.C. §§ 6023 (13)(A) and 6082 (a)(1).[7]

Finally, this plain reading of the LIBERTAD Act does not "impermissibly broaden[] Plaintiff's property rights." (Dismissal Orders, at 7.) As discussed above, Title III requires the Court to look to the certified claim, which provides the amount and validity of the claim for the losses resulting from the confiscation of property as determined and certified by the FCSC. The certified claim acts much like a judgment lien: it attaches to the property and provides notice to the world of the existence of the claim. A defendant who chooses to use the confiscated property without

[7] In addition to general notice by means of codification of the law, notice was also expressly provided in the Federal Register and by the Clinton Administration. *See, e.g.*, 22 U.S.C. § 6082(a)(8) (directing the Attorney General to "prepare and publish in the Federal Register a concise summary of the provisions" of the LIBERTAD Act); Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. 24955–57 (May 11, 1996); William J. Clinton, Statement of Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995 (July 16, 1996) ("I will allow Title III to come into force. As a result, all companies doing business in Cuba are hereby on notice that by trafficking in expropriated American property, they face the prospect of lawsuits and significant liability in the United States. This will serve as a deterrent to such trafficking, one of the central goals of the LIBERTAD Act.").

authorization from the owner of the certified claim, takes the risk that it will face liability up to the amount of the certified claim, trebled. 22 U.S.C. §§ 6082 (a)(1) & (a)(3). Carnival had notice of Havana Docks' certified claim and chose to take the risk. It must now face liability.

If permitted leave to file a first amended complaint, Havana Docks will factually allege that its certified claim is the property interest in the Subject Property that is at issue in this case.

II. The Concession Includes a Bundle of Interests That Never Expired.

Havana Docks does not concede—and has never conceded—that Havana Docks' claim "relates to nothing more than the time-limited concession Plaintiff had at the time the property was confiscated by the Cuban Government." (Dismissal Orders, at 7.)[8] This is not an undisputed fact. (*See id*. at 5.) Havana Docks should be permitted an opportunity to amend to rebut that position. It is disputed.

First, Havana Docks' 99-year concession did not "by its own terms expire in 2004." (Dismissal Order, at 6, n.1.) It never expired. It was confiscated. As Havana Docks explained in its opposition to Carnival's motion to dismiss, (ECF No. 33 at 20-23), the legal effect of the Cuban Government's expropriation of the Subject Property in 1960 was to extinguish all property rights previously held by Havana Docks and immediately vest all rights to that property in the Cuban Government. *See e.g.*, *Sabbatino*, 376 U.S. at 414-15 (Cuba's confiscation vested in Cuba the "property right in" and "dominion over" sugar expropriated by Cuba). The property rights governed by the concession, therefore, did not "revert[] to the Cuban Government by

[8] To support the finding that this is an undisputed fact, the Court quotes the following language from the certified claim: "The terms of the concession granted by the Cuban Government were to expire in the year 2004, at which time the corporation had to deliver the piers to the government in good state of preservation." (Dismissal Order, at 5.) (emphasis added). The use of the subjunctive "were" (as opposed to the future tense, "will") is critical. In this case, the use of the verb in the subjunctive mood expresses a "condition[] contrary to fact." Bryan A. Garner, *Garner's Modern English Usage* 868 (4th ed. 2016) (providing the example: "<if I were king> (where the indicative would be am)"). This language in fact recognizes the reality that Havana Docks' concession never expired because it was confiscated.

the terms of the concession itself." (Dismissal Orders, at 8.) The concession, along with the other properties identified in the certified claim, was taken from Havana Docks and vested in the Cuban Government in 1960, as a result of the confiscation.

Second, the concession agreements, which the Court did not have the benefit of reviewing prior to entering the Dismissal Orders, granted Havana Docks a term of 99 years for the use and improvement of, construction upon, operation, and management of the Subject Property; it did not impose a fixed termination date of 2004. (ECF No. 73-4 at p. 4.) Havana Docks used, operated, and made significant improvements on the Subject Property from 1905 until 1960, when it was confiscated by the communist Cuban Government. Thus, when the Subject Property was confiscated, Havana Docks still had a balance of 44 years of concessionary rights remaining; those 44 years of concessionary rights still remain outstanding, and Havana Docks has never been indemnified by anyone for the loss of that property interest. As a result, under Cuban law in force at the time of the confiscation in 1960, Havana Docks still retains, to this day, a reversionary interest of 44 years remaining in the Subject Property (i.e., a future or contingent possessory right). *See, e.g.,* Codigo Civil, Title II, Art. 349 ("No one shall be deprived of his property, except by competent authority and with sufficient cause of public utility, always after the proper indemnity. If this requisite has not been fulfilled <u>the judges shall protect, and in a proper case, replace the condemned party in possession</u>.") (emphasis added).

Third, the concession expressly granted to Havana Docks the contractual right to be indemnified for the value of the work constructed by it on the Subject Property in the event of expropriation, which is another property interest that is not time-limited:

> *Seventh:* If during the continuance of the concession the works may be expropriated by virtue of Article 50 of the Law of Ports, the government or its departments will indemnify the concessionary to the value of the work constructed by it, including the Custom House Inspectors Department and the wharf on the north side of the pier, but not the value of the machinery, rolling stock, equipment and apparatus referred to in the preceding clause, in case the concessionary may decide to remove them.

(ECF No. 73-3 at p. 5.) This indemnity right gave Havana Docks an interest in the Subject Property that was not time-limited. *See also* Codigo Civil, Title II, Art. 349.

As an express term of the concession, the indemnity right was included in the valuation of the loss certified by the FCSC and remains unpaid. The LIBERTAD Act expressly contemplates this type of property interest and recognizes such an unpaid debt as an obligation that attaches to the confiscated property, as would a mechanic's lien: the LIBERTAD Act defines the term "confiscated" to include "the failure of the Cuban Government to pay, on or after January 1, 1959-- . . . a debt <u>which is a charge on property</u> nationalized, expropriated, or otherwise taken by the Cuban Government." 22 U.S.C. § 6023(4)(B)(ii) (emphasis added); *see also* 22 U.S.C. § 6023(12)(A) (defining "property" to include "any property. . . whether real, personal, or mixed, and <u>any</u> present, <u>future, or contingent right, security, or other interest therein</u>, including any leasehold interest" (emphases added)).

In a first amended complaint, Havana Docks would allege facts demonstrating that its concession to the Subject Property granted rights that did not expire in 2004.

III. The FCSC Certified the Valuation of the Losses for Other Confiscated Property Rights Beyond the Concession.

If permitted leave to amend, Havana Docks will also allege facts to show that the FCSC certified property interests beyond the confiscated concession, and that those other property interests are not time-limited.[9] (Dismissal Orders, at 7; *see also*

[9] The Complaint alleges that Plaintiff "is the rightful owner of an interest in and claim to certain commercial waterfront real property in the Port of Havana, Cuba identified specifically by the Republic of Cuba ('Cuba') as the Havana Cruise Port Terminal (the 'Subject Property'). (Compl. ¶ 6.) It does not underpin Plaintiff's cause of action to the concession alone. Indeed, as itemized in the certified claim, Plaintiff's interest in that commercial waterfront real property extends beyond the concession itself. Plaintiff can amend its complaint to add that itemized list of interests, as well as the indemnification interests granted by the concession. Plaintiff is filing contemporaneously with this motion a Notice of Filing attaching documents, some of which were obtained from the FCSC through the Freedom of Information Act, that illustrate the nature of Havana Docks' certified claim to the Subject Property.

id. at 6 n.1, 9.) The FCSC provided an itemized listing of the property interests that it certified in the claim, as follows:

> Upon consideration of the entire record, the Commission finds that the valuation most appropriate to the property and equitable to the claimant is that shown in the Balance Sheet for the year ended 1959, supported by the Trial Balance for December 31, 1958. These financial statements reflect the following book values adopted by claimant corporation:

Land and Concession	$ 2,000,000.00
San Francisco and Machina Piers	4,758,829.00
Santa Clara Pier	2,110,845.00
Equipment	419,056.00
Office Furniture and Fixtures	90,616.00
Railroad Tracks	22,883.00
Total	$ 9,402,229.00

(ECF No. 1-1, at 9.) After taking into account amortization, depreciation, accrued interest, and other adjustments, the FCSC's final decision certified the loss at "Nine Million One Hundred Seventy-nine Thousand Seven Hundred Dollars and Eighty-eight Cents ($9,179,700.88) with interest thereon at 6% per annum from the respective dates of loss to the date of settlement." (*Id*. at 4.)

The certified claim does not certify that any of the additional property interests that form the Subject Property were time-limited at the time of the confiscation. In fact, by the express terms of the concession, Havana Docks was contractually entitled to be indemnified by the Cuban Government as a result of the expropriation for the value of that work constructed by it on the Subject Property.

IV. Carnival Trafficked in the Subject Property at Various Points Between 1996 and 2004.

In the Dismissal Orders, the Court adopted a construction of the LIBERTAD Act that would "not deprive Plaintiff of a remedy for trafficking" by "ensur[ing] that

persons like Plaintiff may recover for any trafficking of their confiscated property" that took "place between 1960 and 2004." (Dismissal Order at pp. 9-10.) Carnival trafficked in the Subject Property at various points between 1996 and 2004. For this additional reason, Havana Docks can state a Title III claim against Carnival under the Court's interpretation of the LIBERTAD Act in the Dismissal Orders. If granted leave to file a first amended complaint, Havana Docks would factually allege this theory of liability.

As alleged in Havana Docks' proposed first amended complaint, Carnival trafficked in the Subject Property between 1996 and 2004. From April 1996 until June 2001, Carnival owned a 26% to 30% interest in Airtours Plc ("Airtours"). Micky Arison ("Arison"), Carnival's present chairman and former chief executive officer, and Howard Frank ("Frank"), Costa's present chairman and Carnival's former chief operating officer and vice chairman, sat on Airtours' board of directors during this time. From approximately 1998 and through at least 2001, Airtours trafficked in the Subject Property by knowingly and intentionally operating cruises to Havana, Cuba, using the Subject Property to embark and disembark its passengers. "On June 1, 2001 [Carnival] sold [its] investment in Airtours plc which resulted in a nonoperating net gain of approximately $100 million and net cash proceeds of approximately $492 million." (Carnival Corporation, Second Quarter 2001 Form 10-Q (July 13, 2001).) Carnival knowingly and intentionally caused, directed, participated in, and/or profited from Airtours' trafficking in the Subject Property, and otherwise engaged in trafficking in the Subject Property through Airtours from approximately 1998 through 2001. *See* 22 U.S.C. § 6023(13)(A)(iii).

Carnival also trafficked in the Subject Property through Costa Cruises, its wholly owned subsidiary. In June 1997, Carnival acquired a 50% interest in Costa, with Airtours acquiring the other 50% interest in Costa. Due to Carnival's ownership of 26 – 30% interest in Airtours, Carnival directly and indirectly acquired a 63 – 65% interest in Costa at that time, making it part of Carnival's affiliated cruise operations. (Carnival Corp. Year 2000 Form 10-K (Feb. 28, 2001).) On September 29, 2000, Carnival acquired the remaining 50% interest in Costa from Airtours. (Carnival

Corporation Year 2000 Form 10-K (Feb. 28, 2001).) Upon acquiring Costa in 1997, two Carnival executives were appointed to Costa's Board of Directors: Arison, Carnival's present chairman and former chief executive officer; and Frank, Costa's present chairman and Carnival's former chief operating officer and vice chairman. In the months after its acquisition of Costa, Carnival recorded income of $9 million related to its interests in Costa. After November 1, 1996, Costa trafficked by knowingly and intentionally renovating, expanding and managing the Subject Property under a joint venture and concession agreement with the communist Cuban Government. During this time period, Costa also trafficked by knowingly and intentionally operating its commercial cruise business to Havana, Cuba, using the Subject Property to embark and disembark its passengers. Carnival knowingly and intentionally caused, directed, participated in, and/or profited from Costa's trafficking in the Subject Property, and otherwise engaged in trafficking in the Subject Property through Costa. *See* 22 U.S.C. § 6023(13)(A)(iii).

Plaintiff therefore requests leave to file a first amended complaint to factually allege that Carnival trafficked in the Subject Property between 1996 and 2004.

V. Good Cause Exists to Grant this Motion.

The deadline to amend pleadings in this case was August 13, 2019. (ECF No. 29.) Where, as here, a pretrial deadline to amend pleadings has passed, a party "must first demonstrate good cause under Rule 16(b) before [a court] will consider whether amendment is proper under Rule 15(a)." *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998). Havana Docks submits that good cause exists to permit leave to file a first amended complaint.

Before the Dismissal Orders, the Court's orders denying Carnival's motions to dismiss and to certify an interlocutory appeal were the only direct judicial treatment of the legal question at issue here. (ECF No. 47 at 8-9 (denying Carnival's motion to dismiss); ECF No. 56 at 5 (order denying Carnival's motion to certify interlocutory appeal, finding no substantial ground for difference of opinion).) Those orders were also among the only judicial treatment of Title III, generally. Thus, Havana Docks reasonably believed it had plead a claim for relief under Title III and relied on the

Court's prior orders in this case in not seeking amendment at an earlier stage of litigation.

This motion was filed four weeks after the Dismissal Orders. Havana Docks diligently pursued amendment, which required the development of legal strategy to ensure consistency among Havana Docks' four cases before this Court, factual research into the scope and extent of Carnival's pre-2004 trafficking in the Subject Property, and intermittent absences by Havana Docks' counsel due to personal and familial medical needs. It is also notable that when Carnival moved out-of-time to amend its answer and affirmative defenses on November 14, 2019, Havana Docks did not oppose that motion, which the Court granted, ostensibly finding good cause. (ECF Nos. 57, 58.) Havana Docks submits that good cause exists here as well and that it should be afforded the same opportunity to amend.

VI. Amendment is Proper Under Rule 15.

Havana Docks should be provided the opportunity to amend its pleading—for the first time—to allege additional facts the Court has not considered that address certain findings made in the Dismissal Orders, to clarify the scope of the certified claim and to factually allege Carnival's trafficking between 1996 and 2004. Leave to amend is appropriate, as none of the *Foman* factors—*e.g.* bad faith, prejudice, dilatoriness, failure to cure, futility—are present. *Foman*, 371 U.S. at 182; *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) ("It is the well-established policy of the federal rules that the plaintiff is to be given every opportunity to state a claim.").

CONCLUSION

For the foregoing reasons, Havana Docks respectfully requests that the Court grant it leave to file the first amended complaint attached as **Exhibit A.**

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to Southern District of Florida Local Rule 7.1, undersigned counsel certifies that they have conferred with counsel for Carnival on January 30th and 31st, 2020, regarding the relief requested in this motion and since the proposed amended complaint had not yet been finalized and available to be presented to Carnival's counsel for its review, counsel were unable to resolve the issues raised in the motion.

DATED: February 3, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Court. I also certify that the foregoing document is being served this 3rd day of February, 2020, on all counsel of record or pro se parties either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ Roberto Martínez
Roberto Martínez