UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.

_____/

Case No. 19-cv-21724
BLOOM/MCALILEY

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

MSC CRUISES SA,
MSC CRUISES SA CO, and
MSC CRUISES (USA) INC.,

Defendants.

_____/

Case No. 19-cv-23588
BLOOM/LOUIS

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

ROYAL CARIBBEAN CRUISES, LTD.,

Defendant.

_____/

Case No. 19-cv-23590
BLOOM/LOUIS

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

NORWEGIAN CRUISE LINE HOLDINGS, LTD.,

Defendant.

_____/

Case No.: 19-cv-23591
BLOOM/LOUIS

PLAINTIFF HAVANA DOCKS CORPORATION'S
OMNIBUS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Havana Docks Corporation ("Havana Docks") moves for summary judgment in its favor as to its statutory standing and as to certain affirmative defenses raised by the Defendant cruise lines.

INTRODUCTION

The rights of property and liberty have long been intertwined. *See Glen v. American Airlines, Inc.*, 7 F.4th 331, 332-33 (5th Cir. 2021) ("The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom."). "Channeling that spirit," *id.*, Congress passed the LIBERTAD Act, 22 U.S.C. § 6021, *et seq.*, a law designed to restore liberty to the Cuban people by strengthening international sanctions against the communist government and deterring the exploitation of property wrongfully confiscated by the Cuban Government from United States nationals.

In furtherance of these goals, Title III of the LIBERTAD Act ("Title III") established a statutory cause of action allowing any United States national with a claim to property confiscated by the Cuban Government to sue any person who traffics in such property. *See id.* at § 6082(a)(1)(A). Havana Docks may avail itself of this cause of action. The undisputed evidence reflects that Havana Docks' property in Cuba was confiscated by the Cuban Government; that Havana Docks owns a claim to the confiscated property; that Havana Docks is a United States national; and that Carnival Corporation ("Carnival"); MSC Cruises SA Co., MSC Cruises (USA) Inc., and MSC Cruises SA (collectively, "MSC"); Royal Caribbean Cruises, Ltd. ("Royal"), and Norwegian Cruise Line Holdings, Ltd. ("Norwegian") (collectively, the "Defendants") trafficked in the confiscated property. Stated simply, the facts establishing Havana Docks' statutory standing and the Defendants' trafficking are not genuinely at issue.[1]

In response, the Defendants have collectively raised over 120 affirmative defenses. Chief among them is the claim that the Defendants' use of Havana Docks' confiscated property was

[1] Pursuant to the Court's Orders in *Havana Docks Corp. v. Carnival Corp.*, No. 19-cv-21724, ECF No. 289 ("*Carnival*"); *Havana Docks Corp. v. MSC Cruises, SA, et al.*, No. 19-cv-23588, ECF No. 176 ("*MSC*"); *Havana Docks Corp. v. Royal Caribbean Cruises Ltd.*, No. 19-cv-23590, ECF No. 106 ("*Royal*"); and *Havana Docks Corp. v Norwegian Cruise Line Holdings, Ltd.*, No. 19-cv-23591, ECF No. 193 ("*Norwegian*"), the elements of "trafficking," which are unique to each named Defendant, are addressed in Havana Docks' individual summary judgment motions.

"incident to lawful travel." This defense fails. The Defendants' travel to Cuba was not lawful under the LIBERTAD Act, a fact they were well aware of. And with respect to Defendants' remaining affirmative defenses, several have either been rejected by the Court in its previous orders, merely deny the elements of Havana Docks' claims (and so are not "affirmative" defenses at all), or are unsubstantiated by any record evidence. Accordingly, these defenses should be resolved in Havana Docks' favor.

BACKGROUND

Havana Docks' story began in 1917, the year it was incorporated to acquire a concession for the construction and operation of "docks and other works and buildings" along commercial waterfront real property in the Port of Havana, Cuba. (*See* Pls.' Omnibus Statement of Facts ("Omnibus SOF") at ¶¶ 1-2.) Shortly after its incorporation, Havana Docks assumed the debts and obligations of its predecessor in interest (the Port of Havana Docks Company), took possession and control of the existing structures (the San Francisco and Machina piers and the connected marginal building), and finished construction of the Havana Port Terminal (including the Santa Clara pier and the associated section of the marginal building). (*Id.* at ¶¶ 11-13, 17-19.) In September of 1934, the Cuban Government recognized the transfer of the concession to Havana Docks. (*Id.* at ¶ 20; Decree No. 2424 (*Carnival*, ECF No. 73-5, *MSC*, ECF No. 41-5; *Royal*, ECF No. 31-5; *Norwegian*, ECF No. 43-5) at 4-5.)

From that day forward, Havana Docks continuously occupied, used, and managed the Havana Port Terminal. It carried the "Concession, Piers, Equipment, Etc." on its annual financial statements as the company's principal assets. (*See* Omnibus SOF at ¶ 21.) Its primary source of income was derived from its operation of the piers, which included cruise passenger travel. (*Id.* at ¶¶ 22-23.) For a time, it leased the entirety of the Machina pier (and then the Santa Clara pier) to the United Fruit Company. (*Id.* at ¶ 16.) And it encumbered the property, executing an indenture for $1,600,000 worth of mortgage bonds in 1946 (and pledging its interests in the concession and the piers as collateral). (*Id.* at ¶¶ 24-25.)

Everything changed, however, with the rise of the Fidel Castro-led Cuban Government. In the fall of 1960, Castro embarked on a campaign designed to confiscate assets in Cuba held by United States nationals. (*See* Omnibus SOF at ¶ 27; Resolution No. 3 (*Carnival*, ECF No. 73-6; *MSC*, ECF No. 41-6; *Royal Caribbean*, ECF No. 31-6; *NCL*, ECF No. 43-6) at 7.) This included the assets of Havana Docks, which were physically seized on November 21, 1960. (*See* Omnibus

SOF at ¶ 30; Acta (*Carnival*, ECF No. 73-7; *MSC*, ECF No. 41-7; *Royal*, ECF No. 31-7; *Norwegian*, ECF No. 43-7), at 2.)

Although the confiscation shuttered Havana Docks' marine operations, it opened the page on a new chapter—the company's quest to obtain, maintain, and ultimately seek compensation for its losses under a claim certified by the Foreign Claims Settlement Commission (the "FCSC"). In this journey, the passage of the LIBERTAD Act marked a watershed moment. Though the right to bring an action under Title III was suspended, the statute took effect on August 1, 1996. As a result, private industry—including the cruise industry—were put on notice of Title III's existence. (*See* Omnibus SOF at ¶ 68.) Nonetheless, the Defendants proceeded to operate on the Havana Port Terminal without the authorization of Havana Docks.

When the United States Government signaled in early 2019 that it would lift the suspension of the right to bring an action under Title III, the Defendants launched an orchestrated effort to stave off the legal consequences of their actions. (*See* Omnibus SOF at ¶¶ 79-93.) Despite their efforts, the Department of State announced in April 2019 that the federal government would no longer suspend the right to bring an action under Title III. *See* https://www.state.gov/cuba-title-iii-faqs-libertad/. On May 2, 2019, that suspension was officially lifted. *See id.* As noted in Havana Docks' individual summary judgment motions, each Defendant cruise line that traveled cruised to Cuba and used the Havana Port Terminal derived hundreds of millions in revenue.

LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The moving party bears the initial burden of demonstrating that there is no genuine dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This requires a showing that the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Partial summary judgment may be granted on affirmative defenses where the plaintiff demonstrates, by a preponderance of the evidence, that the defendant cannot sustain the defenses. *See Reed v. Royal Caribbean Cruises, Ltd.*, 2021 WL 1348489, at *4 (S.D. Fla. Mar. 5, 2021); *Lebron v. Royal Caribbean Cruises, Ltd.*, 2018 WL 5098972, at *2 (S.D. Fla. Aug. 14, 2018), *report and recommendation adopted*, 2018 WL 5098870 (S.D. Fla. Aug 28, 2018).

ARGUMENT

I. The Undisputed Evidence Establishes Havana Docks' Statutory Standing.

To bring a claim for trafficking under Title III, Havana Docks must demonstrate that (a) the Cuban Government confiscated its property on or after January 1, 1959;[2] (b) it owns the claim to the confiscated property;[3] (c) it acquired its ownership of the claim before March 12, 1996;[4] and (d) the plaintiff is a United States national.[5] *See* 22 U.S.C. § 6082(a)(1)(A). Here, the record evidence admits of no genuine dispute as to any of these four elements.[6]

a. The Cuban Government Confiscated Havana Docks' Property After January 1, 1959.

There is no question that the Cuban Government confiscated Havana Docks' property and that it did so after January 1, 1959.

First, Title III's definition of "property" is exceptionally broad and includes "any property … whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest." 22 U.S.C. § 6023(12). The FCSC certified that, at the time its assets were confiscated, Havana Docks owned interests in the concession, the San Francisco, Machina, and Santa Clara piers and marginal building, fixtures, and equipment at the Havana Port Terminal. (*See* Certified Claim (*Carnival*, ECF No. 73-8; *MSC*, ECF No. 41-8; *Royal*, ECF No. 31-8; *Norwegian*, ECF No. 43-8) at 7.) The FCSC's certification is "conclusive proof of ownership of an interest in property," 22 U.S.C. § 6083(a)(1), so the Court's analysis can end there.

In any event, all of the undisputed evidence supports the FCSC's finding. As note above, Decree No. 2424 recognized the transfer of the concession to Havana Docks, and Havana Docks undisputedly operated and managed the Havana Port Terminal up until its confiscation in 1960, at which time 44 years remained on the concession. Havana Docks assumed the payment obligations for the then-existing structures (the San Francisco and Machina piers and the corresponding

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[2] 22 U.S.C. §§ 6023(4), 6082(a)(1)(A).

[3] 22 U.S.C. § 6082(a)(1)(A).

[4] 22 U.S.C. § 6082(a)(4).

[5] 22 U.S.C. §§ 6023(15), 6082(a)(1)(A).

[6] As noted above, the elements required to establish liability—that the defendant "trafficked" in the property and that the trafficking occurred after November 1, 1996—are addressed in Havana Docks' individual summary judgment motions.

portions of the marginal building), thereby paying for those works. (*See* Omnibus SOF at ¶ 12.) And through its own financing, Havana Docks constructed the Santa Clara pier, widened the existing piers to accommodate railroad tracks, and completed the marginal building. (*Id.* at ¶¶ 15, 17.) Finally, Havana Docks owned fixtures and equipment at the Havana Port Terminal, which were also confiscated. (*Id.* at ¶¶ 35, 37.) These interests easily satisfy Title III's "expansive" definition of property for purposes of liability. *See NCL*, 454 F. Supp. 3d 1259, 1275 (S.D. Fla. 2020); *MSC*, 455 F. Supp. 3d. 1355, 1370 (S.D. Fla. 2020).

Second, property is deemed "confiscated" under Title III if (1) a claimant's ownership or control of the property was "nationaliz[ed], expropriate[ed], or … seized" by the Cuban Government on or after January 1, 1959 without (i) "the property having been returned or adequate and effective compensation provided; or (ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure;" or (2) the Cuban Government failed 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[.]" 22 U.S.C. § 6023(4)(A) & (B). Both prongs are satisfied here.

27. Resolution No. 3, published on October 24, 1960, ordered the "nationalization by means of forced expropriation … [of] all properties and enterprises" in Cuba that were properties of United States nationals, including, specifically, the Havana Docks Corporation. (Resolution No. 3 (*Carnival*, ECF No. 73-6; *MSC*, ECF No. 41-6; *Royal Caribbean*, ECF No. 31-6; *NCL*, ECF No. 43-6), at 3). On November 21, 1960, the Cuban Government "appear[ed] in the offices of the Havana Docks Corporation" and seized "th[e] corporation . . . with all its assets and liabilities." (Acta (*Carnival*, ECF No. 73-7; *MSC*, ECF No. 41-7; *Royal*, ECF No. 31-7; *Norwegian*, ECF No. 43-7), at 2.) Such assets included the San Francisco Pier, Machina Pier, Santa Clara Pier, Marginal Building, the concession, fixtures, equipment, and related assets. (*See* Omnibus SOF at ¶¶ 21, 38.) And at no time since has the Cuban Government returned the property to Havana Docks or provided any (let alone prompt, adequate, and effective) compensation. (*See* Omnibus SOF at ¶ 31.) Though the FCSC recognized the confiscation of Havana Docks' assets and certified Havana Docks' losses (totaling $9,179,700.88, plus 6% interest), there has been no international claims settlement agreement or any other mutually accepted settlement procedure satisfying this claim. (*Id.* at ¶¶ 42-43.) And despite the concession's indemnity provision, which required the Cuban

Government to compensate Havana Docks for the "value of all works built" in the event of an expropriation, the Cuban Government has failed to pay this debt. (*Id.* at ¶ 31.)

In short, the undisputed evidence establishes that Havana Docks' assets qualify as "property" under Title III and that Havana Docks' former interests in that property were confiscated by the Cuban Government after January 1, 1959. To establish its statutory standing under this first element, Havana Docks need prove no more.

b. Havana Docks Owns a Claim to Its Confiscated Property.

The second statutory requirement—the ownership of a claim to confiscated property—is conclusively established by the undisputed record evidence.

On September 28, 1971, the FCSC certified Havana Docks' ownership interest in and claim to the Havana Port Terminal. (*See generally* Certified Claim (*Carnival*, ECF No. 73-8; *MSC*, ECF No. 41-8; *Royal*, ECF No. 31-8; *Norwegian*, ECF No. 43-8.) The Certified Claim, which has no time limit and has not expired,[7] itemized Havana Docks' property interests, including the concession, the piers, the marginal building, and equipment, all of which were confiscated by the Cuban Government. (*Id.* at 6.) Since that time, Havana Docks has been—and continues to be—the owner of the Certified Claim. (*See* Omnibus SOF at ¶ 40.) It has never sold it, abandoned it, used it as collateral, or otherwise disposed of it. (*Id.* at ¶ 41.)

Title III treats the existence of a such a certified claim as "conclusive proof of ownership of an interest in property[.]" 22 U.S.C. § 6083(a)(1). Insofar as statutory standing is concerned, the Court need only look to the Certified Claim to resolve whether Havana Docks "owns the claim to such property[.]" 22 U.S.C. § 6082(a)(1)(A). Simply put—it does.

c. Havana Docks Acquired its Certified Claim before March 12, 1996.

The third element requires Havana Docks to have acquired its claim to the confiscated property before March 12, 1996. *See* 22 U.S.C. 6082(a)(4)(B) (setting an acquisition date for confiscations that occurred before the enactment of the LIBERTAD Act). Quick work of this question can also be made by reference to the Certified Claim, which confirms that the FCSC's final decision was rendered on September 28, 1971. As the one and only owner of the Certified Claim, *see* Omnibus SOF at ¶¶ 40-42, the proof that Havana Docks acquired it before March 12, 1996 is beyond dispute.

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[7] *See NCL*, 454 F. Supp. 3d at 1272 (noting that "the Certified Claim did not place a temporal limitation on Plaintiff's claim that expired in 2004"); *MSC*, 455 F. Supp. 3d at 1367 (same).

d. Havana Docks is a United States National.

Finally, a plaintiff must establish that it is a United States national. *See* 22 U.S.C. § 6082(a)(1)(A) (imposing liability in favor of "any United States national who owns the claim[.]"). That Havana Docks—a United States corporation—is a United States national for purposes of Title III is an unremarkable proposition that is thoroughly established by the record evidence.

For starters, a determination of Havana Docks' nationality has already been made. Under the International Claims Settlement Act of 1949 (the "Claims Act"), the term "national of the United States" is defined as "a natural person who is a citizen of the United States" or "a corporation or other legal entity" that was organized under the laws of a state, if "natural persons who are citizens of the United States own, directly or indirectly, 50 per centum or more of the outstanding capital stock or other beneficial interest[.]" 22 U.S.C. § 1643a(1). As noted in the Certified Claim, at the time of confiscation, 97% of Havana Docks' outstanding capital stock was held by natural persons who were citizens of the United States. (*See* Certified Claim (*Carnival*, ECF No. 73-8; *MSC*, ECF No. 41-8; *Royal*, ECF No. 31-8; *Norwegian*, ECF No. 43-8) at 6.) Thus, the FCSC held that Havana Docks "is a national of the United States within the meaning of [the Claims Act]." *Id.*

This determination is conclusive. Title III contains a rule of construction directing that no provision shall be construed "as superseding, amending, or otherwise altering certifications that have been made under title V of the [Claims Act.]" 22 U.S.C. § 6083(c)(2). The FCSC's certification of Havana Docks' nationality—a finding without which the claim could not have been certified—should not be disturbed.

Moreover, Havana Docks continues to qualify as a United States national, both under the criteria of the Claims Act and the LIBERTAD Act. With respect to the former, all but one of Havana Docks' present shareholders are United States citizens. (*See* Omnibus SOF at ¶ 64.) And under Title III, Havana Docks qualifies as a United States national because it is both a United States citizen and a company incorporated under Delaware law with its principal place of business in the United States. *See* 22 U.S.C. § 6023(15) (defining a United States national as "(A) any United States citizen; or (B) any other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or any commonwealth, territory, or possession of the United States, and which has its principal place of business in the United States.").

Unlike the Claims Act, the plain language of § 6023(15)(A) does not restrict the term

"United States citizen" to a natural person. *Cf.* § 1643a(1)(A) (expressly defining a United States national as a "natural person who is a United States citizen"). Instead, the LIBERTAD Act defines the term "United States national" to mean "(A) any United States citizen; or (B) any *other* legal entity . . . [.]" § 6023(15) (emphasis added). Under a plain reading of this language, some "legal entit[ies]" must therefore qualify as "United States citizens." A contrary reading would fail to give effect to Congress' chosen words. *See, e.g., Reiter v Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). And it would render the word "other" superfluous, a disfavored result. *See Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1244 (11th Cir. 2009) (observing that courts are "not allowed to add or subtract words from a statute; we cannot rewrite it."). Given that (1) Havana Docks' nationality has already been determined by the FCSC, and (2) the word "other" must be given meaning, it stands to reason that, by virtue of being incorporated in a state (itself a test of citizenship), Havana Docks qualifies as a United States citizen under § 6023(15)(A).

Finally, even if Havana Docks must establish its nationality under § 6023(15)(B), it has unequivocally done so. Since its commercial operations were confiscated in 1960, Havana Docks' business has been to maintain its corporate existence under the laws of Delaware; manage income-generating investments; maintain a corporate address; and hire, coordinate with, and pay outside professionals to manage its tax filings and pursue its rights under the LIBERTAD Act. (*See* Omnibus SOF at ¶¶ 44-58; Ex. 29.) Since 2011, these activities have been coordinated and executed from Lexington, Kentucky by Jerry Johnson, Havana Docks' current Vice President, Comptroller, Treasurer, and Secretary. Specifically, Johnson is responsible for:

- Managing Havana Docks' investments;
- Hiring and coordinating with Kentucky-based outside corporate counsel;
- Hiring, paying, and coordinating with Kentucky-based CPAs for the preparation of Havana Docks' IRS tax filings and its Delaware franchise tax filings;
- Hiring and coordinating with attorneys, lobbyists, and consultants to pursue Havana Docks' rights under the LIBERTAD Act, including (but not limited to) the instant actions;
- Maintaining Havana Docks' address, telephone, and corporate records;
- Maintaining Havana Docks' ledger and stockholder registry; and
- Recording and preparing the results of Havana Docks' annual meetings.

(*Id.* at ¶¶ 52-60.)

At bottom, whether Havana Docks' nationality is viewed through the lens of the Certified Claim, the Claims Act, or Title III, the result is the same—it is a United States national. Having established all four elements of Title III's statutory standing, the Court should grant summary judgment in Havana Docks' favor on those issues.

II. The Defendants' Cruises Were Not "Lawful Travel to Cuba."

Each of the Defendants has asserted 22 U.S.C. § 6023(13)(b)(iii) as an affirmative defense.[8] That section provides an exception to trafficking for "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.* According to the Defendants, their travel qualified as "lawful travel" because they traveled under general licenses promulgated by the Department of Treasury's Office of Foreign Assets Control ("OFAC") beginning in 2015. But there is a flaw in this logic. The LIBERTAD Act (and, later, the 2000 Trade Sanctions Reform and Export Enhancement Act) codified the regulations that made up the Cuban embargo as they existed on March 1, 1996. Neither cruises nor tourist travel were a form of "lawful travel" to Cuba in 1996 or 2000. Thus, as codified, the embargo did not permit cruise or tourist travel as a form of lawful travel to Cuba. It still doesn't. Given Congress's plenary power to regulate foreign commerce, and its decision not to relax the embargo's restrictions on travel and tourism to Cuba, the regulations issued by OFAC from 2015 through 2017 do not provide a defense to trafficking under the LIBERTAD Act.

To understand why requires a brief overview of the Cuba embargo and its regulatory framework.

a. The Relevant Statutory and Regulatory Framework.

Article I of the Constitution assigns to Congress the authority to regulate commerce with foreign nations. U.S. Const. Art. I, § 8, c. 3; *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1943 (2021) (Gorsuch, J., concurring) ("When it comes to responsibility in this area, the Constitution could not be clearer. It invests Congress with the power to . . . 'regulate Commerce with foreign Nations.'"). This power is "broad," "exclusive and plenary." *United States v. Baston*, 818 F.3d 651, 668 (11th Cir. 2016) (citations omitted).

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[8] *See Carnival*, Def. Nos. 1 & 2, ECF No 160 at 18; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. Nos. 1 & 2, ECF No. 115 at 16; *MSC Cruises S.A.*, Def. Nos. 1 & 2, ECF No. 133 at 15; *Royal*, Def. No. 1, ECF No. 59 at 5; *Norwegian*, Def. Nos. 1 & 2, ECF No. 107 at 14.

In 1963, pursuant to the Trading with the Enemy Act of 1917 ("TWEA"), 50 U.S.C. § 4301, *et seq.*, the Kennedy Administration promulgated the Cuban Assets Control Regulations, 31 C.F.R. § 515.101 *et seq.* ("CACR"), which are "administered and enforced by [OFAC]." *Odebrecht, Constr., Inc. v. Sec., Fla. Dep't of Trans.*, 715 F.3d 1268, 1276 (11th Cir 2003). "Broadly speaking, the regulations prohibit, unless specifically authorized, any dealing in any property in which Cuba or a Cuban national has an interest of any nature." *Odebrecht*, 715 F.3d at 1276; *see also Regan v. Wald*, 468 U.S. 222, 233-34 (1984) ("absent an explicit license, all transactions involving Cuban property are and, at all relevant times, have been prohibited").

Authorizations under the CACR take the form of (1) "'general licenses,' which permit classes or categories of transactions with Cuban nationals," or (2) "'specific' licenses, which require individualized determinations and approvals by OFAC." *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 120 n.1 (2d Cir. 2000) (citations omitted). "General licenses are contained within the Regulations whereas specific licenses are granted by the OFAC in response to requests." *Empresa Cubana del Tabaco v. Culbro Corp.*, 399 F.3d 462, 473 (2d Cir. 2005). These licenses are limited in scope, and "[n]o license or authorization contained in or issued pursuant to th[e CACR] shall be deemed to authorize any transaction prohibited by any law other than [TWEA], the Foreign Assistance Act of 1961, or any proclamation, order regulation or license issued pursuant thereto." 31 C.F.R. § 515.101(b) (citation omitted).

Over the years, Congress "has remained active in legislating with respect to Cuba." *Odebrecht*, 715 F.3d at 1276. In 1984, the Supreme Court recognized that "[i]f Congress had wished to freeze existing restrictions [on travel to Cuba], it could have easily done so explicitly." *Wald*, 468 U.S. at 236 ("The fact that it did not do so, but instead used the generic term 'authorities,' indicates that Congress intended the President to retain some flexibility to adjust existing embargoes."). In the years that followed, Congress enacted a series of statutes that did just that.

In 1992, Congress passed the Cuban Democracy Act ("CDA"), 22 U.S.C. § 6001, *et seq.*, which "ramped up economic sanctions against the Cuban government while simultaneously permitting humanitarian relief to the Cuban people." *Odebrecht*, 715 F.3d at 1276. As pertinent to this case, section 6004 of the CDA provides that "[e]xcept as specifically authorized by the Secretary of the Treasury, a vessel carrying . . . passengers to or from Cuba . . . may not enter a United States port." 22 U.S.C. § 6005(b)(2).

Four years later, Congress enacted the LIBERTAD Act, which codified into law the "economic embargo of Cuba," as it existed as of March 1, 1996, including "all restrictions" under the CACR, 31 C.F.R. Part 515. 22 U.S.C. § 6032(h); *Odebrecht*, 715 F.3d at 1277 ("One of the provisions of the [LIBERTAD] Act codifies the regulatory sanctions that were in place on March 1, 1996."). Importantly, the LIBERTAD Act defines the phrase "economic embargo of Cuba" to include "all restrictions on . . . travel to or from, Cuba" imposed under TWEA and CDA. 22 U.S.C. § 6023(7). With respect to the definition of "economic embargo of Cuba," the Committee Report to the LIBERTAD Act provides: "It is the intent of the committee that this definition be interpreted broadly, in part, in order to ensure that the suspension or termination of any economic sanctions on Cuba be pursuant only to the authority granted in section 204 of this Act." H.R. Conf. Rep. 104-468 ("Committee Rpt."), 1996 WL 97265, at *559 (Mar. 1, 1996). This codification preserved the embargo as it existed in 1996, "indefinitely" and constrains the executive branch by "prescrib[ing] certain conditions that must occur in Cuba before the President may lift the embargo" or suspend its enforcement. *Plummer*, 221 F.3d at 1308 n.6; *see also* 22 U.S.C. §§ 6032(h), 6064 - 6066.[9] Among the travel restrictions codified in the Act is the prohibition on tourist and recreational travel to Cuba.[10]

In 2000, Congress enacted the Trade Sanctions Reform and Export Enhancement Act ("TSRA"). Section 7209(b) expressly prohibits the executive branch from licensing "travel-related transactions" for travel to Cuba for "tourist activities." *Id.* § 7209(b); *see Emergency Coalition to*

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[9] *See also Havana Club*, 203 F.3d at 132 ("The LIBERTAD Act not only codified the economic embargo of Cuba . . . and strengthened its measures . . ., but also authorized the President to take steps to suspend the embargo only after determining that a 'transition government in Cuba is in power,' . . . and authorized the President to take steps to terminate the embargo only after determining that 'a democratically elected government in Cuba is in power'") (citations omitted); *United States v. Brodie*, 403 F.3d 123, 129 (3d Cir. 2005) ("Congress further strengthened the American Cuban embargo by enacting the LIBERTAD" which "mandates that the American Cuban embargo, including all restrictions imposed by the CACR, 'remain in effect' unless and until the embargo is suspended or terminated in accordance with statutory procedures.") (citations omitted); *Empresa Cubana*, 399 F.3d at 465; *Gen. Cigar Holds., Inc. v. Altadis, S.A.*, 205 F. Supp. 2d 1335, 1354 n.7 (S.D. Fla. 2002).

[10] *See, e.g.*, 31 C.F.R. § 515.416(b) (1996) (prohibiting "recreational travel; tourist travel; travel in pursuit of a hobby; general study tours"); *id.*, § 515.419(b) (1996) ("Transactions related to travel that is primarily tourist travel, including self-directed educational activities that are intended for personal enrichment, will not be licensed"); *id.*, § 515.560(a)(2), (b)(2) (1996) ("Nothing in this section authorizes transactions in connection with tourist travel to Cuba.").

Defend Educ. Travel v. United States, 498 F. Supp. 2d 150, 165 (D.D.C. 2007), *aff'd*, 545 F.3d 4 (D.C. Cir. 2008). The term "tourist activities" is defined as:

> any activity with respect to travel to, from, or within Cuba that is not expressly authorized in subsection (a) of this section, in any of paragraphs (1) through (12) of section 515.560 of title 31, [CFR], or in any section referred to in any of such paragraphs (1) through (12) (as such sections were in effect on June 1, 2000).

22 U.S.C. § 7209(b). This statutory language revokes the executive branch's authority to license transactions for travel to Cuba beyond those authorized by 22 U.S.C. § 7209(a) or the licenses listed 31 C.F.R. § 515.560(a), as they existed on June 1, 2000.[11] *Id*. Tourist travel to Cuba was prohibited under the CACR on June 1, 2000.[12]

Nonetheless, between 2015 and 2016, OFAC substantially amended and relaxed the CACR restrictions. On January 16, 2015, OFAC removed the specific license requirement for all authorized forms of travel to Cuba and permitted those forms of travel by general license. 80 Fed. Reg. 2291-01 at 2291, 2015 WL 188402 (Jan. 16, 2015). OFAC also created a general license for so-called "people-to-people travel." *Id.* at 2297; 31 C.F.R. § 515.565(b) (Jan. 16, 2015). This

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[11] In 2003, the Director of OFAC explained to the Senate Foreign Relations Committee that:

> TSRA also restricts the President's discretionary authority to authorize travel-related transactions to, from, or within Cuba. Under section 910 of the TSRA, that authority is restricted to travel-related transactions related to activities . . . expressly authorized in paragraphs (1) through (12) of section 515.560 of title 31, Code of Federal Regulations, or in any section referred to in any of such paragraphs (1) through (12) (as such sections were in effect on June 1, 2000). Any activity falling outside of these twelve categories is defined in this section of the TSRA as tourism and may not be the basis for issuing a license. . . .
>
> Tourism, in whatever form, is both inconsistent with current policy and prohibited by section 910 [7209] of the TSRA.

Stmt. of R. Newcomb, Director, OFAC, Dep't of Treasury, Testimony to Senate Foreign Relations Committee, 2003 WL 22286806 (October 2, 2003); *see also* TSRA Conf. Rpt., 146 Cong. Rec. H9681-03, 2000 WL 1509720, at *H9705 (Oct. 11, 2000) ("This section requires the Secretary of Treasury to promulgate regulations to authorize travel to, from, or within Cuba for the commercial export sale of agricultural commodities. Aside from this expansion in permissible travel transactions, tourist activities in Cuba are not authorized.").

[12] *See* 31 C.F.R. §§ 515.560(g) ("Nothing in this section authorizes transactions in connection with tourist travel to Cuba"), 515.564(c) (prohibiting "recreational travel; tourist travel; travel in pursuit of a hobby; research for personal satisfaction," etc.), 515.565(c) ("Transaction related to activities that are primarily tourist-oriented, including self-directed educational activities that are intended only for personal enrichment, are not authorized").

license purported to authorize "travel-related transactions set forth in § 515.560(c)" and others that are "directly incident to educational exchanges not involving academic study pursuant to a degree program." *Id.* The license imposed a number of requirements on organizations that undertook to sponsor "people to people" travelers to Cuba.[13] The "people to people" general license was deleted from the CACR on June 5, 2019. 31 C.F.R. § 515.565(b) (June 5, 2019), 84 Fed. Reg. 25992-01, 2019 WL 2355767 (June 5, 2019). At all times from 2015 through 2019, the CACR prohibited tourist travel to Cuba.[14]

On January 16, 2015, OFAC also removed the specific license requirement in section 515.572 for vessels seeking to provide carrier services to Cuba. *Id.* § 515.572(a) (Jan. 15, 2015); 80 Fed Reg. 2291-01, 2015 WL 188402 (Jan. 16, 2015). Later that year, on September 21, 2015, OFAC generally authorized persons "subject to U.S. jurisdiction" to "provide carrier services to, from, or within Cuba" by vessel "in connection with travel or transportation between the United States and Cuba or persons . . . authorized pursuant to" the CACR. *Id.* § 515.572(a)(2), (4) (Sep. 21, 2015); 80 Fed. Reg. 56923, 2015 WL 5475063 (Sep. 21, 2015).

b. Defendants' Travel to Cuba was Not Lawful Under the LIBERTAD Act.

The phrase "lawful travel to Cuba" under § 6023(13)(B)(iii) means the authorized travel to Cuba that existed on March 1, 1996 and was codified in the LIBERTAD Act. The meaning of "lawful travel to Cuba" under the LIBERTAD Act is plain and does not include cruise travel to

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[13] Among these requirements were that "[e]ach traveler has a full-time schedule of educational exchange activities that will result in meaningful interaction between the traveler and individuals in Cuba," and that the "exchanges take place under the auspices of an organization" subject to U.S. jurisdiction that accompanies "each group traveling to Cuba to ensure that each traveler has a fulltime schedule of educational exchange activities." 31 C.F.R. § 515.565(b)(1), (3), (4) (Jan. 16, 2015). This "people to people" license was amended on March 16, 2016 to, among other things, remove the requirement that the travel take place "under the auspices of an organization." *Id.*, § 515.565(b), (c) (Mar. 16, 2016). This requirement was later reimposed through subsequent amendments issued on November 9, 2017. *Id.*, § 515.565(b)(1), (4) (Nov. 9, 2017).

[14] *See* 31 C.F.R. §§ 515.560(f) (2015 – present) ("Nothing in this section authorizes transactions in connection with tourist travel to Cuba."), 515.564(a)(ii), (b)(iii) (Jan. 16, 2015 – Oct. 17 2016) (prohibiting "recreational travel, tourist travel, travel in pursuit of a hobby, or research for personal satisfaction only"), 515.565(c) (Jan. 16, 2015 – Mar. 15, 2016) ("Transaction related to activities that are primarily tourist-oriented, including self-directed educational activities that are intended only for personal enrichment, are not authorized pursuant to this section."), 515.565(c) (Mar. 16, 2016 – present) ("Transactions related to activities that are primarily tourist-oriented are not authorized pursuant to this section.").

Cuba. The text of the statute speaks directly on the issue. *See, e.g.*, *In re BFW Liquidation, LLC*, 899 F.3d 1178, 1188 (11th Cir. 2018) ("The starting point in statutory interpretation is the language of the statute itself."); *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1738 (2020) ("Court[s] normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."). As noted above, the LIBERTAD Act codified into law the regulatory travel restrictions to and from Cuba that existed on March 1, 1996. 22 U.S.C. §§ 6023(7), 6032(h). The effect of this codification was to expressly define by statute—and set a ceiling on—the permissible forms of travel to Cuba under United States law.[15] *See Wald*, 468 U.S. at 236 (stating, of TWEA: "If Congress had wished to freeze existing restrictions [on travel to Cuba], it could easily have done so explicitly."). The 1996 CACR authorized very specific and limited forms of travel to Cuba, and nothing in the 1996 CACR "authorize[d] transactions in connection with tourist travel to Cuba," with some of the types of travel listed "prohibited except specifically licensed." *Id.* § 515.560(b)(2).

None of the Defendants' cruises were "lawful travel to Cuba" under the LIBERTAD Act, and the cruise lines cannot point to any record evidence to prove otherwise. Moreover, for the reasons stated in Havana Docks' individual motions for summary judgment, the Defendants' travel to Cuba was tourism—and therefore unlawful—as a matter of law. And to the extent Defendants rely on OFAC's subsequent issuance of general licenses for expansive "people-to-people" travel, such regulations are void because they exceed the statutory restrictions imposed by the LIBERTAD Act and TRSA. *See Util. Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 326 (2014) ("Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always give effect to the unambiguously expressed intent of Congress.") (internal

[15] *See* Stmt. of Rep. L. Diaz-Balart, 142 Cong. Rec. H1724-04, 1996 WL 96304, at *H1725 (Mar. 6, 1996) ("The conference report codifies, it puts into law, the existing embargo against Cuba, much of which exists only in regulations and miscellaneous executive orders. It will now take an act of Congress to modify the embargo, and no President will be able to weaken the embargo unless a democratic transition is underway in Cuba. . . . The importance of codifying—putting into law—the embargo, cannot be over-emphasized."); Stmt. of Sen. B. Dole, 142 Cong. Rec. S1510-02, 1996 WL 92888, *S1510 (Mar. 5, 1996) ("[T]he Helms-Dole-Burton Libertad bill codifies all regulations implementing the embargo on Cuba. This will ensure no more mixed signals will be sent from the United States—the Cuban embargo stays in place until a transition to government is in place."); Committee Rpt., 1996 WL 97265, at *561 ("It is not the intent of [§ 6032(h)] to prohibit executive branch agencies from amending existing regulations to tighten economic sanctions on Cuba or to implement the provisions of this Act.").

quotations omitted).

c. The Cruise Industry Understood that the LIBERTAD Act Prohibited Cruise Travel to Cuba.

Not only does the text of the LIBERTAD Act prohibit cruise travel to Cuba, but the record evidence establishes that the cruise lines well understood their travel to Cuba was prohibited by that law.

For example, in a December 2014 internal memorandum, Royal recognized that "[w]hile President Obama is committed to a more open relationship with Cuba, his authority lies primarily in restoring diplomatic relations. The prohibition on cruise vacations to Cuba is controlled by Congress which must lift the trade embargo that has been in place since 1962." (*See* Omnibus SOF at ¶ 72.)

Then, on April 1, 2015, Norwegian's President and CEO, Frank del Rio, publicly declared:

> [T]oday, no cruise line that is American-based – certainly not a publicly traded company like Norwegian – can routinely go to Cuba with tourists. Tourism is still illegal under today's set of rules and policies and guidelines. And it would be difficult for us to have a ship with 4,000 tourists – people let's call them – show up in Havana and call that people-to-people travel. That would be a stretch of the – of the rules.
>
> . . .
>
> They [the Cuban Government] have built at least five important berthing facilities since 1995 that are significantly underutilized. So all indications point that if the embargo were to be lifted, which is a necessary step to do anything else, that business could be transacted.
>
> . . .
>
> Until the – my perspective is – and for my three brands – until Congress officially repeals Helms-Burton, even if OFAC were to – even if you can go backdoor through OFAC, it wouldn't be the proper thing to do, and I don't think you can do it on a sustained basis. Maybe you can do 50 folks at a time, but to run a business, you have to bring thousands of people at a time on an ongoing basis. I don't think that backdoor or that loophole, if you will, would work on a sustained basis.

(*See* Omni SOF at ¶ 73.)

Consistent with these public statements, after the United States Government indicated that it was considering allowing lawsuits under Title III, the Defendants embarked on an extensive effort to lobby for a change in the law to immunize their conduct from liability in this lawsuit. Through Cruise Lines International Association ("CLIA"), the industry's centralized lobbying arm led by these same Defendants, they set a "goal" of "[e]nsur[ing] that legal claims under Title III

cannot be made against cruise lines" and identified that the "Overall Strategic Position" of the industry was to "work behind the scenes with key leaders on Capitol Hill" to "clarify whether the lawful travel exemption [under Title III] applies to ports and/or that trafficking does not apply to port users." (Omnibus SOF at ¶ 80.)

The next month, and days after the Defendants received a notice letter from Havana Docks (which they all ignored), the most senior executives of the four Defendants sent a letter to then-Secretary of State Pompeo requesting an "enabling order policy or rule" to "clarify the lawful travel exclusion [under Title III] applies to cruise ships calling at Cuban ports." (*Id.* at ¶ 87.)

After no clarification issued, on April 17, 2019 Carnival's Chairman, Micky Arison, sent a personal plea to then-President Trump with whom he met in the Oval Office:

> I wanted to follow up on our discussion regarding Cuba. The news is reporting that Title III of Helms Burton, the Cuba lawsuit ban, will be fully lifted today. If there are no exceptions or clarifications, we would be subject to significant legal liability for our use of the Ports. We do not own the ports or even manage them, but because we use them, we could be deemed as "trafficking" in confiscated property and the potential penalty to my company alone would be over $600 million.
>
> Fortunately, there is an exemption from legal claims involving business that is incidental to lawful travel to Cuba. While it might appear that such an exemption would protect cruise lines from legal claims, lawful travel is not defined. We have requested language to clarify that lawful travel includes current cruise operations in any guidance or regulations that should accompany the policy change. Pam Bondi and Brian Ballard have been working with your staff but it is unclear if any clarification will be included tomorrow. If there is any opportunity to clarify the travel exemption applies to the cruise industry, I would be grateful.

(*Id.* at ¶ 91.)

Later that day, the executive branch announced that lawsuits under Title III could be filed on May 2, 2019, and that "[t]here will not be any exemptions."[16]

As noted in the Havana Docks' individual motions for summary judgment, all of the Defendants continued to use and engage in commercial activities at the Havana Port Terminal until late May or early June 2019.

III. The Court Has Already Ruled on Several of the Defendants' Affirmative Defenses.

Beyond their lawful travel defense, the Defendants raise numerous other common defenses,

[16] Special Briefing, Office of the Spokesperson, Assistant Sec. for W. Hemisphere Affairs Kimberly Breier (April 17, 2019), *available at* https://2017-2021.state.gov/briefing-with-assistant-secretary-for-western-hemisphere-affairs-kimberly-breier/index.html.

several of which have already been considered—and rejected—in the Court's previous orders. Because these defenses have been resolved, the Defendants should not be permitted a second opportunity to raise them at trial. *See Affiliati Network, Inc. v. Wanamaker*, 2019 WL 7376766, at *6-7 (S.D. Fla. Nov. 25, 2019), *aff'd*, 847 F. App'x 583 (11th Cir. 2021) (granting summary judgment on affirmative defenses that were foreclosed by the court's prior rulings); *Cf. United States Commodity Futures Trading Comm'n v. U.S. Bank, N.A.*, 2014 WL 294219, at *6 (N.D. Iowa Jan. 27, 2014) (striking affirmative defense of failure to state a claim where the court previously ruled on the issue). Summary judgment should be granted in Havana Docks' favor on these defenses.

a. The Court Has Determined that the *Ex Post Facto* Clause Does Not Apply.

Each Defendant contends that Havana Docks' claim is barred by the *Ex Post Facto* Clause because it seeks to penalize the cruise lines for conduct occurring before Havana Docks' Title III cause of action came into effect.[17] The Court has already disposed of this argument.

As this Court has identified, there is a crucial distinction between the statutory provisions allowing the president to "either suspend the effective date of Title III *or* to suspend the right to bring an action under Title III[.]" *MSC*, 484 F. Supp. 3d 1177, 1199 (S.D. Fla. 2020) (citing 22 U.S.C. §§ 6085(b), (c)) (emphasis added); *NCL*, 484 F. Supp. 3d 1215, 1235 (S.D. Fla. 2020) (same). President Clinton did not suspend the effective date of Title III; rather, he suspended the right to bring an action under Title III, an "entirely separate" decision. *MSC*, 484 F. Supp. 3d at 1198; *NCL*, 484 F. Supp. 3d at 1234. Thus, Title III took effect on August 1, 1996, and liability for trafficking attached as of November 1, 1996 (three months after the effective date). *MSC*, 484 F. Supp. 3d at 1199 (citing 22 U.S.C. §§ 6085(a), 6082(a)(1)(A)); *NCL*, 484 F. Supp. 3d at 1235 (same). President Clinton made this clear in a statement on 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." William J. Clinton, Statement of Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995 (July 16, 1996). Having thus

[17] *See Carnival*, Def. No. 6, ECF No. 160 at 19; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 6, ECF No. 115 at 17; *MSC Cruises S.A.*, Def. No. 6, ECF No. 133 at 16; *Royal*, Def. No. 10, ECF No. 59 at 6; *Norwegian*, Def. No. 4, ECF No. 107 at 14.

received fair warning of their potential liability, the consistent suspension of the right to bring an action bears no relation to the Defendants' *Ex Post Facto* Clause defense. *See Hock v. Singletary*, 41 F. 3d 1470, 1471-72 (11th Cir. 1995) ("The Ex Post Facto Clause operates … as a means of assuring that an individual will receive fair warning of criminal statutes and the punishments they carry.").

Given the Court's prior rulings, the Defendants should not have "a second bite" at this defense. *See United States Commodity Futures Trading Comm'n*, 2014 WL 294219, at *6; *Wanamaker*, 2019 WL 7376766, at *6-7. Summary judgment is therefore warranted on this defense.

b. The Court Has Found that Title III Does Not Apply Retroactively and That the Defendants Had Fair Notice of Their Potential Liability.

In a similar vein, the Defendants assert as a common defense the retroactive effect of Title III and their reasonable reliance on the Act's continued suspension.[18] In its prior orders, the Court rejected these arguments in tandem.

With respect to retroactivity, the Court again noted the distinction between the suspension of Title III and the suspension of the right to bring an action under Title III. *See MSC*, 484 F. Supp. 3d at 1200-01; *NCL*, 484 F. Supp. 3d at 1235. Because neither the effective date of Title III nor the section imposing liability for trafficking were suspended, no due process retroactivity concerns were implicated. Instead, at all times since Title III's effective date, potential liability for trafficking has "remained intact and in force." *MSC*, 484 F. Supp. 3d at 1201; *NCL*, 484 F. Supp. 3d at 1237.

The Court also (correctly) rejected the notion that a cruise line could lack fair notice of liability owing to the continued suspension of the right to bring an action under Title III. Regardless of whether an action could be brought under Title III, the cruise lines were "on notice of Title III's existence from the time it became law in 1996" and had a corresponding "obligation to familiarize [themselves] with the mandates of Title III, especially once [they] began operating in Cuba." *MSC*, 484 F. Supp. 3d at 1201 (citing *United States v. Locke* 471 U.S. 84, 108 (1985) (fair notice of a

[18] *See Carnival*, Def. No. 4, ECF No. 160 at 18; *MSC Cruises (USA) & MSC Cruises SA Co.*, Defense No. 4, ECF No. 115 at 16; *MSC Cruises S.A.*, Def. No. 4, ECF No. 133 at 15; *Royal*, Def. Nos. 11 & 26, ECF No. 59 at 6, 9; *Norwegian*, Def. No. 21, ECF No. 107 at 18. Carnival, the MSC entities, and Norwegian assert multiple defenses under the umbrella of "Due Process," whereas Royal lodges its due process defenses individually.

legislature's alteration of substantive rights is satisfied by "enacting a statute, publishing it, and … affording a reasonable opportunity" for those affected "to familiarize themselves with the general requirements imposed and to comply with those requirements."); *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982) (same); *N. Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1985) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted … and when that procedure is not unreasonable or arbitrary there are no constitutional imitations relieving them from conforming to it."); *NCL*, 484 F. Supp. 3d at 1237-38 (same).

Finally, and as noted in Havana Docks' individual summary judgment motions, each of the Defendants admit that they knew of the LIBERTAD Act since 1996 and that they continued to operate cruises to Cuba that docked at the Havana Port Terminal *after* May 2, 2019, the date the suspension of the right to bring an action under Title III was lifted. Thus, it is undisputed that the cruise lines did not rely—let alone reasonably rely—on the suspension of the right when they used the Havana Port Terminal. So far as the Defendants contend that the application of Title III is retroactive and in violation of their rights to fair notice and reasonable reliance, the Court's prior orders—and the undisputed facts—have resolved this issue in Havana Docks' favor.

c. The Court Has Ruled that the Federal Government's Supposed Encouragement of Travel to Cuba Does Not Constitute a Lack of Fair Notice.

The Court has likewise dispensed with the defense of the federal government's supposed encouragement of travel to Cuba.[19] Even if the inception of each Defendant's' Cuba travel was traced to the Obama Administration's encouragement of expanded Cuba relations, the Court has determined it is "of no moment" because the "decision to operate in Cuba *by trafficking in the Subject Property* … was independent from the encouragement it received from the federal government." *MSC*, 484 F. Supp. 3d at 1200 n.7 (emphasis in original).

Throughout the time the Defendant cruise lines traveled to Cuba, Title III remained in effect, including the potential imposition of liability for trafficking in confiscated property. Had the Defendants wished to avoid liability, they could have taken care not to "conduct [their]

[19] *See Carnival*, Def. No. 4, ECF No. 160 at 18; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 4, ECF No. 115 at 16; *MSC Cruises S.A.*, Def. No. 4, ECF No. 133 at 15; *Norwegian*, Def. No. 21, ECF No. 107 at 18. Though not explicitly stated in its affirmative defenses, Royal contends that it has raised this defense. *See* Resp. to Plf.'s Mot. to Compel, *Royal*, ECF No. 91 at 7 ("[A]s the Twenty-Sixth Affirmative Defense asserts, the United States Government serially suspended Title III and encouraged cruises to Cuba.").

operations on property that was confiscated by the Cuban Government or by obtaining Plaintiff's consent." *Id.* This argument has been rejected, and summary judgment on the associated defenses should be granted.

d. The Court Has Ruled that Liability for Trafficking Extends Beyond 2004.

The Defendants also raise the duration of the concession as a defense, claiming that their trafficking occurred after Havana Docks' underlying interest in the Subject Property expired.[20] This, too, is a proposition the Court has properly rejected.

In the *NCL* Reconsideration Order, the Court analyzed this issue at length and ultimately concluded that the relevant time period during which liability could attach for trafficking in Havana Docks' confiscated property did not end in 2004. *See NCL*, 454 F. Supp. 3d at 1271-72. This was so for two reasons. First, the concession itself reflects that the term was for 99 years, and not a term that expired on a date certain. *Id.* This is consistent with the text of the Certified Claim, which states that "the terms of the concession *were* to expire in the year 2004[,]" not that the term *did* expire. *Id.* at 1271 (quoting from the Certified Claim). In addition, the Certified Claim encompasses interests beyond the concession (such as equipment and fixtures) which are not time limited. *Id*.

Second, and more importantly, Havana Docks' Title III causes of action are not predicated on its ownership of the Havana Port Terminal itself (the Cuban Government's wrongful confiscation extinguished Havana Docks' property interests). *Id.* at 1274. Instead, its Title III actions are predicated on its ownership of the Certified Claim *to* the confiscated property, a key distinction. *See id.*; *see also Glen v. Club Mediterranee S.A.*, 365 F. Supp. 2d 1263, 1269-70 (S.D. Fla 2005), *aff'd*, 450 F.3d 1251 (11th Cir. 2006) ("Titles III and IV of the Helms-Burton Act, do not provide that those whose property was taken by the Cuban Government retain *legal title* to that property …. Titles III and IV simply imply that [claimants] may own a *claim* for compensation under U.S. law[.]") (emphasis in original). To blur this distinction and cap the relevant time period in 2004 would, as the Court observed, "nullif[y] Title III entirely[.]" *NCL*, 454 F. Supp. 3d at 1274.

Thus, the question of whether Havana Docks can recover for trafficking involving the Subject Property after 2004 has been answered—it can. *Id.*

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[20] *See Carnival*, Def. No. 14, ECF No. 160 at 20; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 13, ECF No. 115 at 18; *MSC Cruises S.A.*, Def. No. 13, ECF No. 133 at 17; *Royal*, Def. No. 2, ECF No. 59 at 5; *Norwegian*, Def. No. 12, ECF No. 107 at 16.

e. The Court Has Found that Havana Docks Stated a Claim for Relief.

Finally, each Defendant has raised Havana Docks' failure to state a claim as an affirmative defense.[21] But the merits of this defense—which is not a true affirmative defense, *see In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988)—have already been rejected by the Court in its orders denying the Defendant cruise lines' motions to dismiss and granting Havana Docks' motions for reconsideration.[22] Because the Court has already ruled on this issue, and because "an assertion that a pleading fails to state a claim is not a valid affirmative defense," *Birren v. Royal Caribbean Cruises, Ltd.*, 336 F.R.D. 688, 697 (S.D. Fla. 2020) (Bloom, J.), summary judgment is warranted. *See Affiliati Network*, 2019 WL 7376766, at *6 (granting summary judgment on the defense of failure to state a claim, which the court previously rejected when denying defendants' motion to dismiss).

IV. Five of the Defendants' Affirmative Defenses Are Merely Denials.

"[M]erely labeling what is otherwise a denial of an element of plaintiff's prima facie case as an affirmative defense does not preclude the entry of summary judgment." *United States v. Marder*, 2016 WL 5404303, at *14 (S.D. Fla. Sep. 23, 2016) (citing *In re Rawson Food Serv., Inc.*, 846 F.2d at 1439 ("A defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense.")). Here, four of the Defendants' common affirmative defenses are merely denials, and so may be disposed of on summary judgment. *See, e.g.*, *Lopez v. Allstate Fire & Cas. Ins. Co.*, 2015 WL 5320916, at *3 (S.D. Fla. Sep. 14, 2015) (granting summary judgment to plaintiff on affirmative defenses that "were actually denials" and collecting cases).

a. The Defendants' Assertion that They Did Not Knowingly Engage in Trafficking Is a Denial.

Under Title III, a person "traffics" in confiscated property if such trafficking[23] is done "knowingly and intentionally." 22 U.S.C. § 6023(13)(A). "[K]nowingly," in turn, is defined as

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[21] *See Carnival*, Def. No. 15, ECF No. 160 at 20; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 14, ECF No. 115 at 18; *MSC Cruises S.A.*, Def. No. 14, ECF No. 133 at 17; *Royal*, Def. No. 28, ECF No. 59 at 9; *Norwegian*, Def. No. 13, ECF No. 107 at 16.

[22] Royal did not move to dismiss, but instead filed a motion for judgment on the pleadings, which was likewise denied.

[23] Those actions which constitute trafficking are set forth in 22 U.S.C. § 6023(13)(A).

"knowledge or having reason to know." *Id.* at § 6023(9). In other words, an action under Title III requires proof that a person know (or should know) that property was confiscated by the Cuban Government and "intend that such property be the subject of their commercial behavior." *Glen v. American Airlines, Inc.*, 2020 WL 4464665, at *6 (W.D. Tex. Aug. 3, 2020), *rev'd on other grounds*, 7 F.4th 331. Accordingly, a defendant's knowledge and intent to traffic is an element of Havana Docks' prima facie case. *See Carnival*, 2021 WL 2587134, at *2 (S.D. Fla. June 22, 2021) (McAliley, Mag. J.) ("Havana Docks must prove, as elements of its claim, that Carnival knowingly and intentionally trafficked[.]").

Despite being an element of a Title III violation, each Defendant cruise line pled a lack of intent as an affirmative defense.[24] But a defect in a plaintiff's prima facie case, especially one concerning scienter, is not an affirmative defense. *See In re Rawson*, 846 F.2d at 1439; *see also Hernandez v. Cty. of Monterey*, 306 F.R.D. 279, 290 (N.D. Cal. 2015) (affirmative defense in a § 1983 action that a county did not have a policy or practice which would amount to "deliberate indifference" only "negate[d]" the plaintiff's contentions). Because the Defendant's lack of intent defense merely challenges an element of Havana Docks' case, it may be resolved on summary judgment. *Marder*, 2016 WL 5404303, at *14.

b. The Defendants' Assertion that They Did Not Traffic in All of the Property Certified by the FCSC is a Denial.

For the same reason, the defense that the Defendants did not traffic in all of the property that is subject to the Certified Claim fails as an affirmative defense.[25] As a part of Havana Docks' prima facie case, it must establish that each Defendant trafficked in the property subject to the Certified Claim. *See* 22. U.S.C. § 6082(a)(1)(A). As it is an affirmative element of Havana Docks' case, a defense which points out a lack of trafficking in that property is a denial.

As discussed above, trafficking under Title III "relates to offending conduct in the broad

[24] *See Carnival*, Def. No. 13, ECF No. 160 at 20; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 12, ECF No. 115 at 18; *MSC Cruises S.A.*, Def. No. 12, ECF No. 133 at 17; *Royal*, Def. No. 21, ECF No. 59 at 8; *Norwegian*, Def. No. 11, ECF No. 107 at 16. Note that Carnival withdrew this "defense," *see Carnival*, ECF No. 279 at 4, ECF No. 283 at 11:5-16, but it remains pled by the other three Defendant cruise lines.

[25] *See Carnival*, Defense No. 8, ECF No. 160 at 19; *MSC Cruises (USA) & MSC Cruises SA Co.*, Defense No. 8, ECF No. 115 at 17; *MSC Cruises S.A.*, Defense No. 8, ECF No. 133 at 18; *Royal*, Defense No. 2, ECF No. 59 at 6; *Norwegian*, Defense No. 6, ECF No. 107 at 15.

concept of 'confiscated property'—i.e., in *any property* that was nationalized, expropriated, or otherwise seized by the Cuban Government"—without authorization from the United States national owning the claim to the property. *De Fernandez v. Seaboard Marine, Ltd.*, 2021 WL 3173213, at *5 (S.D. Fla. Jul. 27, 2021) (emphasis added). Title III's liability provision, which is distinct from its damages provision, imposes liability based on this expansive concept, one which "is not limited solely to the interest Plaintiff originally owned in the Subject Property." *MSC*, 455 F. Supp. 3d at 1374.

With Title III's definition of trafficking so understood, summary judgment should be granted on this defense.

c. The Defendants' Assertion that Havana Docks' Claims Cannot Proceed Based Upon an Indemnity Right Is a Denial.

In a similar vein, each Defendant contends that Havana Docks' claims are barred because it cannot establish an indemnity right. Again, Title III broadly defines confiscated property to include the Cuban Government's repudiation, default, or failure to pay "a debt which is a charge on [confiscated] property[.]" 22 U.S.C. § 6023(4)(B)(ii). Because the confiscation of the Havana Port Terminal without compensation (and in violation of the concession's indemnification provision) comprises an element of Havana Docks' claims, this defense is merely a denial and may be disposed of on summary judgment.

d. The Defendants' Assertion That Havana Docks Cannot Prove Causation Is a Denial.

The Defendants also contend that Havana Docks' claims are barred because it has either failed to plead or cannot prove causation.[26] As to the former, the Court's denials of the Defendants' motions to dismiss (and, in the case of Royal, its motion for judgment on the pleadings) are dispositive of whether Havana Docks has satisfied its pleading requirements. And with respect to Havana Docks' ability to prove causation, i.e., that the Defendants trafficked in confiscated property to which Havana Docks owns a claim, this is an element of each case which the Defendants have merely denied. As a mislabeled affirmative defense, summary judgment should be entered in Havana Docks' favor.

[26] *See Carnival*, Def. No. 18, ECF No. 160 at 21; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 17, ECF No. 115 at 19; *MSC Cruises S.A.*, Def. No. 17, ECF No. 133 at 18; *Royal*, Def. No. 29, ECF No. 59 at 9; *Norwegian*, Def. No. 16, ECF No. 107 at 17.

e. The Defendants' Assertion That Havana Docks Does Not Have Article III Standing Is a Denial.

Finally, each Defendant raises Havana Docks' lack of Article III standing as a defense.[27] But there is no question that Havana Docks possesses Article III standing. In prior rulings, the Court concluded that Havana Docks possessed Article III standing because Title III recognizes a particular, legally protected interest (Havana Docks' Certified Claim to the Subject Property), the violation of which is concrete and traceable to the Defendants (who were unjustly enriched by trafficking in the Subject Property without Havana Docks' authorization), and which can be redressed through compensatory damages. *See NCL*, 484 F. Supp. 3d at 1227-31; *MSC*, 484 F. Supp. 3d at 1191-95. This Court's analysis has subsequently been adopted in Title III cases throughout the country, including by the Fifth Circuit Court of Appeals. *See Glen v. American Airlines, Inc.*, 7 F.4th at 336 (quoting the Court's *NCL* Order and finding the plaintiff's allegation that American was "unjustly enriched by doing business with the entities that now occupy the properties that were wrongly taken from him" was a traceable injury); *N. Am. Sugar Indus. Inc. v. Xinjiang Goldwind Science & Tech. Co., Ltd.*, 2021 WL 3741647, at *4-5 (S.D. Fla. Aug. 24, 2021) (Gayles, J.) (quoting the Court's *MSC* Order and concluding that plaintiff's Title III claim satisfied Article III's concrete and traceability prongs); *Glen v. Trip Advisor LLC*, 2021 WL 1200577, at *6 (D. Del. Mar. 30, 2021) (citing *NCL*, *MSC*, and *Carnival* orders and finding that Title III plaintiffs have Article III standing).

What was apparent at the pleading stage is a matter of undisputed fact now. As discussed above, Havana Docks owns a legally protected interest—its claim to the Havana Port Terminal—that has been certified by the FCSC. As noted in Havana Docks individual summary judgment motions, the Defendants have trafficked in the property without Havana Docks' consent or approval, each deriving hundreds of millions in revenue from cruises to Cuba that docked at the Havana Port Terminal. And a favorable decision, namely, a finding that the Defendants are liable for trafficking, will trigger money damages to compensate Havana Docks for its injuries. *See* 22

[27] *See Carnival*, Def. No. 16, ECF No. 160 at 20; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 15, ECF No. 115 at 19; *MSC Cruises S.A.*, Def. No. 15, ECF No. 133 at 17-18; *Royal*, Def. No. 13, ECF No. 59 at 7; *Norwegian*, Def. No. 14, ECF No. 107 at 16.

U.S.C. § 6082(a)(1)(A); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555 at 561 (1992) (requiring a showing that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.") (internal quotation marks and citation omitted).

Its Article III standing established, Havana Docks is entitled to summary judgment on this defense.

V. Defendants' Remaining Common Defenses Fail as a Matter of Law.

Partial summary judgment may be granted on affirmative defenses upon a showing, by a preponderance of the evidence, that the defendant cannot maintain the defenses. *See Lebron*, 2018 WL 5098972 at *2. As explained below, the Defendant cruise lines have asserted several affirmative defenses which are either unsupported by record evidence or fail as a matter of law.

a. Havana Docks' Claims Are Not Barred by Article II; Nor Has Congress Impermissibly Applied United States Law to Extraterritorial Conduct.

The Defendants contend that Article II bars Havana Docks' claims insofar as they seek to impose liability for foreign policy decisions made by the Executive Branch.[28] Similarly, they insist that Havana Docks' claims are barred because Title III results in the extraterritorial application of United States law to a foreign government.[29] Both fail as a matter of law and fact.

As discussed above, the Constitution vests Congress with "a broad, 'exclusive[,] and plenary' power to regulate commerce with foreign nations." *United States v. Davila Mendoza*, 972 F.3d 1264, 1269-70 (11th Cir. 2020) (quoting *Bd. of Trs. of Univ. of Ill. v. United States*, 289 U.S. 48, 53 (1933)). This includes the regulation of extraterritorial conduct if such conduct has a "substantial effect" on commerce between the United States and other countries. *See Batson*, 818 F.3d at 668-69 (holding that 22 U.S.C. § 1596(a)(2), which granted extraterritorial jurisdiction over sex trafficking, was based on Congress's "rational" conclusion that such conduct, even if occurring "exclusively overseas," substantially affected international commerce). In passing Title III, Congress made a similar determination, finding that the Cuban Government's confiscations "undermine[d] the comity of nations, the free flow of commerce, and economic development." 22

[28] *See Carnival*, Def. No. 7, ECF No. 160 at 19; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 7, ECF No. 115 at 17; *MSC Cruises S.A.*, Def. No. 7, ECF No. 133 at 16; *Royal*, Def. No. 19, ECF No. 59 at 8; *Norwegian*, Defense No. 5, ECF No. 107 at 15.

[29] *See Carnival*, Def. No. 5, ECF No. 160 at 19; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 5, ECF No. 115 at 17; *MSC Cruises S.A.*, Def. No. 5, ECF No. 133 at 16; *Royal*, Def. No. 9, ECF No. 59 at 8; *Norwegian*, Def. No. 3, ECF No. 107 at 14.

U.S.C. § 6081(2).

Whatever foreign policy decisions the executive branch may have made, those decisions do not have the force of law, nor can the executive branch invade Congress's power to regulate international commerce. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). Just as importantly, Title III does not impose liability based on any such policy decision, nor does it seek to impose liability based on the actions of a foreign government. Rather, it imposes liability based on *the Defendants'* trafficking in confiscated property, deriving unjustified profits at the expense of United States nationals and providing a "badly needed financial benefit" to the Cuban Government. *See* 22 U.S.C. § 6081(6).

As a rational exercise of Congress's power to regulate foreign commerce, and one which does not risk imposing United States law on a foreign government, the Defendant cruise lines' defenses fail. Summary judgment should be granted as a matter of law.

b. The Use of the FCSC's Findings Do Not Violate Due Process

Each Defendant contends that the use of the FCSC's findings in these actions violates their due process rights because they had no opportunity to be heard during the adjudication of Havana Docks' Certified Claim,[30] and because the Certified Claim is being used for a different purpose than originally intended.[31] Both arguments fail as a matter of law.

The first defense is purely procedural. But the central meaning of procedural due process is unambiguous: "[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (citations omitted); *accord Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Explicit in this principle is the requirement that a party possess a right or interest that is to be affected. *See Roth*, 408 U.S. at 569 ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."); *Mathews*, 424 U.S. at 335 (identifying three factors for use in analyzing procedural due process,

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[30] *See Carnival*, Def. No. 4, ECF No. 160 at 18-19; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 4, ECF No. 115 at 17; *MSC Cruises S.A.*, Def. No. 4, ECF No. 133 at 15-16; *Royal*, Def. No. 4, ECF No. 59 at 6; *Norwegian*, Def. No. 21, ECF No. 107 at 18.

[31] *See Carnival*, Def. No. 28, ECF No. 160 at 23; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 20, ECF No. 115 at 20; *MSC Cruises S.A.*, Def. No. 20, ECF No. 133 at 19; *Royal*, Def. No. 18, ECF No. 59 at 8. Note, Norwegian does not raise this issue as a due process defense.

the first of which requires that a "private interest [] will be affected by official action[.]"); *see also Greene v. Lindsey*, 456 U.S. 444, 450–51 (1982) (concluding that continued residency in leasehold property is a "significant interest in property" subject to due process protection)

At the time the FCSC was adjudicating Havana Docks' claim, the Defendants had no right or interest at stake which was affected by the FCSC's actions. As stated in the text of the Claims Settlement Act, the purpose of the Cuba claims program was limited to determining "the amount and validity of claims against the Government of Cuba" stemming from the nationalization or expropriation of "property of nationals of the United States[.]" 22 U.S.C. § 1643. The Defendant are neither United States nationals nor is there any indication they owned any property interest confiscated by the Cuban Government, let alone in the Havana Port Terminal. Stated simply, it would stretch the concept of due process too thin to think that they somehow had a right to be heard during the determination of Havana Docks' claim.

Moreover, using the FCSC's findings in these actions does not offend due process because the findings are neither required for, nor dispositive of, the ultimate issue—whether the Defendant cruise lines are liable for trafficking. *Cf. B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 38, 152 (2015) (observing that the risk of a *pro forma* suit based on issue preclusion is limited to situations where "exhausting an administrative process is a prerequisite to suit in court[.]") Title III treats certain findings in a certified claim—if so made—as conclusive proof of certain facts, *see, e.g.*, 22 U.S.C. § 6083(a)(1), but those findings are not a prerequisite to suit. *See* 22 U.S.C. § 6082(a)(2) (permitting an action under Title III even if the subject claim "has not been so certified" by the FCSC). And those findings—even when used in a Title III action—do not determine a party's liability, i.e., whether it has trafficked in confiscated property.

Insofar as the Defendants argue that the money damages remedy of Title III deprives them of a property interest cognizable under the Due Process Clause, that purported deprivation cannot occur without a finding of liability. The Defendants have an opportunity to be fully heard before a finding of liability is made—it is now. Their due process arguments accordingly fail.

c. The Act of State Doctrine is Inapplicable to These Actions.

Each Defendant contends that Havana Docks' Title III actions are barred by the act of state

doctrine, [32] a judicially-created rule that precludes United States courts from passing on the validity of a foreign sovereign's actions taken within its own territory. *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1253 (11th Cir. 2006). This doctrine is inapplicable in the context of a Title III claim for two reasons.

First, Title III "explicitly forecloses use of the act of state doctrine as a defense to causes of action for liability for trafficking." *Id.* at 1256 (citing 22 U.S.C. § 6082(a)(1)(6) ("No court of the United States shall decline, based upon the act of state doctrine, to make a determination on the merits in an action brought under paragraph (1).")). Havana Docks has not brought any cause of action other than for trafficking under Title III. Its claims accordingly fall squarely with the "clear language forbidding application of the [act of state] doctrine[.]" *Id.*

Second, even if § 6082(a)(1)(6) did not expressly forbid the application of the act of state doctrine, Title III does not require a court to determine that the underlying confiscation by the Cuban Government was invalid. *See id.* at 1256 ("While the statute condemns these confiscations as 'wrongful,' it does not proclaim them ineffective."). Instead, Title III implicitly acknowledges the validity of the Cuban Government's actions by granting a party the ability to bring a cause of action based only on its ownership of a *claim* to the property. *See Glen I*, 365 F. Supp. 2d at 1269-70.

On both accounts, the act of state doctrine defense fails as a matter of law.

d. Havana Docks' May Maintain Separate Actions Against Each Defendant.

The Defendants claim that Title III's election of remedies provision prohibits Havana Docks from bringing more than one of the instant four actions as they are all based on the same "subject matter."[33] The Defendants' interpretation lacks merit.

Section 6082(f)(1)(A) provides that any party who brings a Title III claim "may not bring any other civil action or proceeding under the common law, federal law, or the law of any of the several States … that seeks monetary or nonmonetary compensation by reason of the same subject

[32] *See Carnival*, Def. No. 19, ECF No. 160 at 21; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 18, ECF No. 115 at 19; *MSC Cruises S.A.*, Def. No. 18, ECF No. 133 at 18; *Royal*, Def. No. 16, ECF No. 59 at 7; *Norwegian*, Def. No. 17, ECF No. 107 at 17.

[33] *See Carnival*, Def. No. 17, ECF No. 160 at 20-21; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 16, ECF No. 115 at 19; *MSC Cruises S.A.*, Def. No. 16, ECF No. 133 at 18; *Royal*, Def. No. 14, ECF No. 59 at 7; *Norwegian*, Def. No. 15, ECF No. 107 at 16.

matter." The Defendants take this to mean that Havana Docks could sue only one of them, even if they were each independently trafficking on (and profiting from) their individual use of the confiscated property. But this interpretation runs contrary to the statutory text and Congress's intent.

The Conference Committee's joint explanatory statement specifically addressed the election of remedies provision:

> In this context, the term 'same subject matter' refers not to the original confiscation of the property, but rather to trafficking in the property. This section is intended to prevent persons from bringing separate actions against the same defendant or defendants *under both [22 U.S.C. § 6082(a)(1)(A)] and under a common law tort theory.*

H.R. REP. 104-468, at 61-62 (1996), 1996 WL 90487, at *H1654 (Mar. 4, 1996) (emphasis added).

This makes clear that unless Havana Docks were bringing actions against the Defendants under Title III *and* some other law (be it federal common law, state common law, or another statute), § 6082(a)(1)(A) does not bar its individual actions based on each Defendant's discrete trafficking. And a reading of § 6082(a)(1)(A) that permits Havana Docks to pursue claims against different defendants based on different actions is entirely consistent with other statutes that use the same phrase. *See, e.g.*, *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (finding that "by reason of the same subject matter," in the context of the Federal Tort Claims Act ("FTCA"), "is a reference to [a claim's] factual provenance and not the character of the claim"); *Estate of Tretadue ex rel. Aguilar v. United States*, 397 F.3d 840 (2005) (interpreting the phrase's use in the FTCA to mean "arising out of the same actions, transactions, or occurrences").

Accordingly, this defense fails as a matter of law.

e. Mickael Behn Is Not an Indispensable Party to These Actions.

Finally, the Defendants contend that Havana Docks' claims are barred because it has failed to join an indispensable party—Havana Docks' President Mickael Behn.[34] But, there is no record evidence capable of creating a genuine issue of fact on this point.

Rule 19 of the Federal Rules of Civil Procedure sets forth a two-part test for determining

[34] *See Carnival*, Def. No. 21, ECF No. 160 at 21; *MSC Cruises (USA) & MSC Cruises SA Co.*, Def. No. 11, ECF No. 115 at 18; *MSC Cruises S.A.*, Def. No. 11, ECF No. 133 at 17; *Royal*, Def. No. 15, ECF No. 59 at 7; *Norwegian*, Def. No. 22, ECF No. 107 at 18-19.

whether a party is indispensable. *See* Fed. R. Civ. P. 19(a)(1)-(2). "The first question is whether complete relief can be afforded in the present procedural posture, or whether the nonparty's absence will impede either the nonparty's protection of an interest at stake or subject parties to a risk of inconsistent obligations." *City of Marietta v. CSX Transp., Inc.*, 196 F.3d 1300, 1305 (11th Cir. 1999). Here, the Court need go no further than the first prong as Havana Docks is the only indispensable party. The property confiscated by the Cuban Government formerly belonged to Havana Docks; only Havana Docks filed a claim with the FCSC for the Subject Property; the Certified Claim was adjudicated in Havana Docks' favor; and Havana Docks is the United States national who owns the Certified Claim.

The only contrary evidence the Defendants can point to is correspondence stating that "Michael Sosthenes Behn personally and as President of Havana Docks Corporation [] has rights over [the Havana Port Terminal]." *See, e.g.*, Ex. 47 at 1. But a single sentence does not an indispensable party make. In short, there is no record evidence capable of satisfying the Defendants' burden (under either Rule 19 or Rule 56) of demonstrating that Mickael Behn is an indispensable party.

CONCLUSION

Based upon the foregoing, Havana Docks requests that the Court grant partial summary judgment in its favor regarding its statutory standing and as to the affirmative defenses discussed above.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed under seal with the Clerk of the Court. I also certify that the foregoing document will be served on the 20th day of September, 2021, on all counsel of record or pro se parties via electronic mail.

By: s/ *Roberto Martínez*
Roberto Martínez