UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 1:19-cv-23588-BLOOM/LOUIS

HAVANA DOCKS CORPORATION,

Plaintiff,

vs.

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

Defendant.
_____ /

PLAINTIFF'S OPPOSITION TO DEFENDANTS'
MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

Plaintiff Havana Docks Corporation ("Havana Docks") opposes the motion for certification for interlocutory appeal (the "Motion," ECF No. 58) filed by Defendants MSC Cruises (USA) Inc. and MSC Cruises SA Co. (collectively, "MSC") as they fail to satisfy their heavy burden to establish the statutory requirements under 28 U.S.C. § 1292(b).

INTRODUCTION[1]

MSC requests the Court to certify its Reconsideration Order (ECF No. 55) for immediate interlocutory appeal on the following question:

> Whether "Title III's plain language creates liability for trafficking in the broadly defined 'confiscated property' – i.e., in any property that was nationalized, expropriated, or otherwise seized by the Cuban Government . . . without the property having been returned or adequate and effective compensation [paid] – not in a particular interest in

[1] Havana Docks refers the Court to its prior orders in this case for a full description of the procedural history relevant to the Motion. (*See* ECF No. 55 at 1-3, 5-8.)

> confiscated property," and "regardless of . . . when the trafficking took place."

(Mot. at 2.)[2]

The Motion should be denied. MSC has failed to meet its heavy burden of satisfying each of the requirements for certifying an interlocutory appeal under 28 U.S.C. § 1292(b). First, MSC does not propose a controlling question of law. Rather, it proffers a case-specific question, the relevance of which is entirely contingent on disputed facts that do not sit "neatly" and "cleanly" atop the record. Second, there is no substantial dispute about the correctness of this Court's holding in the Reconsideration Order, which is securely anchored on binding precedent from the Eleventh Circuit in *Glen v. Club Mediterranee S.A.*, 450 F.3d 1251 (11th Cir. 2006) and the plain language of the LIBERTAD Act. In this respect, the Court correctly held that Title III creates liability for trafficking in confiscated property, not in a

---

[2] MSC's proffered question relies on language from the dismissal order that was vacated by this Court and, in any event, was never a holding of this Court. (*See* Mot. at 2, n.1 (quoting ECF No. 40 at 7 ("regardless of . . . when the trafficking took place.")).) That vacated order is not properly subject to appellate review. *See United States v. Sigma Int'l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002) (en banc) (vacated opinions "are officially gone. They have no legal effect whatever. They are void. None of the statements made in . . . them has any remaining force and cannot be considered to express the view of this Court."); *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1257 n.1 (11th Cir. 2003) ("A vacated decision has no effect whatever.").

Notably, the language that MSC quotes from the dismissal order is absent from the Reconsideration Order—the only order MSC seeks to certify for appeal. (*See* Mot. at 11.) Thus, it is not properly subject to interlocutory review for that additional reason. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204-05 (1996) (section 1292(b) applies to "orders" not cases, and "[t]he court of appeals may not reach beyond the certified order to address other orders made in the case."); *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1275 (11th Cir. 2020) (same).

Finally, because MSC did not seek appeal of the dismissal order within ten days of its entry, it is time-barred from seeking review of that order now. 28 U.S.C. § 1292(b) (motions to certify interlocutory appeals must be filed "within ten days after the entry of the order" sought to be appealed).

property interest that was necessarily extinguished by expropriation. And, third, the requested appeal would not materially advance (or advance at all) the ultimate termination of this litigation.

As such, Havana Docks respectfully requests that the Court deny the Motion.

LEGAL STANDARD

Requests for interlocutory appeals are disfavored in this Circuit. *Flying Cow Ranch HC, LLC v. McCarthy*, No. 19-cv-80230, 2019 WL 1258780, at *2 (S.D. Fla. Mar. 19, 2019) (Bloom, J.) ("Interlocutory review is generally disfavored for its piecemeal effect of cases."). A district court may only certify an order for interlocutory review if the moving party satisfies the requirements of 28 U.S.C. § 1292(b) "that: (1) the order presents a controlling question of law; (2) over which there is a substantial ground for difference of opinion among courts; and (3) the immediate resolution of the issue would materially advance the ultimate termination of the litigation." *Id.*; *see also Mamani v. Berzain*, 825 F.3d 1304, 1312 (11th Cir. 2016) (further requiring that the proffered question present "a pure question of law" that "was specified by the district court in its order").

Indeed, "[t]here is a 'strong presumption against interlocutory appeals,'" and requests for such review "should be denied except in rare circumstances." *In re Checking Account Overdraft Litig.*, No. 09-MD-02036, 2010 WL 3377592, *2 (S.D. Fla. July 1, 2010) (quoting *Teblum v. Eckerd Corp. of Fla.*, No. 2:03-CV-495FTM33DNF, 2006 WL 1151816, at *4 (M.D. Fla. Apr. 28, 2006)). As a result, parties pursuing "interlocutory appeal" face "profound hurdles" to meet this "high threshold," and the Eleventh Circuit "admit[s] that '[m]ost interlocutory orders do not meet th[e] test.'"

Nat'l Union Fire Ins. Co. of Pittsburgh v. Tyco Integrated Sec. LLC, No. 13-CIV-80371, 2015 WL 11251735, at *1 (S.D. Fla. July 8, 2015) (Bloom, J.) (quoting *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1359 (11th Cir. 2008)).

The reason for this heavy burden, as the Eleventh Circuit has explained, is that interlocutory appeals are "inherently disruptive, time-consuming, and expensive." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000) (internal quotation marks omitted). Further, "[p]iecemeal appellate review has a deleterious effect on judicial administration. It increases the workload of the appellate courts, to the detriment of litigants and judges." *Id.* And "[b]ecause permitting piecemeal appeals is bad policy, permitting liberal use of § 1292(b) interlocutory appeals is bad policy." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004).

Only in the "exceptional case[]" may a district court certify a controlling question of law for interlocutory appellate review under 28 U.S.C. § 1292(b). *Id.* at 1256-57 (quoting Report of the Committee on Appeal from Interlocutory Orders of the District Courts, Sept. 23, 1953, reprinted in 1958 U.S.C.C.A.N. 5258, 5260-61). And while a district court's decision in this respect is "wholly discretionary,"[3] *OFS Fitel*,

---

[3] MSC cites dicta from the Seventh Circuit's opinion *Ahrenholz* for the proposition that district courts have a "duty" to grant interlocutory appeals if statutory criteria are met. (Mot. at 4 (quoting *Ahrenholz v. Bd. of Tr. of the Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000)).) But that is not the law of this Circuit. *OFS Fitel*, 549 F.3d at 1358 ("§ 1292(b) certification is wholly discretionary with both the district court and this court."). It is also notable that the petition for interlocutory appeal was denied in *Ahrenholz*, with Judge Posner observing that in that 19 months preceding that opinion:

> this court has received 31 petitions for interlocutory appeal under 28 U.S.C. § 1292(b) and has granted only six of them. . . . In several cases, however, including this one, we have been unsure whether the district court was using

549 F.3d at 1358, "[c]ertification is not an appropriate vehicle for early appellate review of hard cases." *Checking Account Overdraft Litig*, 2010 WL 3377592, at *2. Nor is the presence of a "question of first impression" generally "[]sufficient to yield a dispute ripe for interlocutory appeal." *Nat'l Union*, 2015 WL 11251735, at *3. Instead, the "Eleventh Circuit has made clear that the scope of interlocutory appeals is to be limited." *FXM, P.C. v. Gordon*, No. CIV.A.1:07CV1642, 2007 WL 3491274, at *2 (N.D. Ga. Nov. 6, 2007) (Carnes, J.).

MSC, as the party seeking certification, "bears the heavy burden" of establishing that each of the elements set forth in 28 U.S.C. § 1292(b) are satisfied, *Checking Account Overdraft Litig*, 2010 WL 3377592, at *2, and otherwise overcoming "[t]he strong presumption against interlocutory appeals," *Nat'l Union*, 2015 WL 11251735, at *2.

ARGUMENT

The Court should deny the Motion for three reasons. First, MSC does not propose a controlling question of law. Instead, the proffered question is inappropriately case-specific and rests on disputed facts that do not sit "neatly" and

---

> the correct standard. . . . [W]e think it may be useful to remind the district judges of this circuit of the importance of the careful application of the statutory test. . . .
>
> Unless all the[statutory] criteria are satisfied, the district court may not and should not certify its order to us for an immediate appeal under section 1292(b). To do so in such circumstances is merely to waste our time and delay the litigation in the district court, since the proceeding in that court normally grinds to a halt as soon as the judge certifies an order in the case for an immediate appeal.

Ahrenholz, 219 F.3d at 675-76.

"cleanly" atop the record. Second, there is no substantial grounds for difference of opinion that the Court correctly held that Title III of the LIBERTAD Act creates liability for trafficking in confiscated property, and not in a property interest that was necessarily extinguished by confiscation. And, third, an appeal would not materially advance the ultimate termination of this litigation.

Because MSC does not satisfy any of the requirements for section 1292(b) certification, its Motion should be denied.

I. MSC Does Not Propose a Controlling Question of Law.

MSC fails to identify a proper "controlling question of law," as it must to prevail on its Motion. 28 U.S.C. § 1292(b). In this Circuit, a "controlling question of law" is one which the Eleventh Circuit can decide "without having to delve beyond the surface of the record in order to determine the facts." *McFarlin*, 381 F.3d at 1258-59 ("what the framers of § 1292(b) had in mind is more of an abstract legal issue or what might be called one of 'pure' law, matters the court of appeals 'can decide quickly and cleanly without having to study the record.'"). Such a question must also have "general relevance to other cases in the same area of the law." *Id.* MSC's proffered question satisfies neither of these requirements.

Although MSC attempts to state an abstract question, in application, the proposed "controlling question of law" framed by MSC is not a proper one for interlocutory appeal. *See Drummond Co., Inc. v. Conrad & Scherer, LLP*, 885 F.3d 1324, 1336-37 (11th Cir. 2018) ("At first blush, the core issue" on appeal "appears to raise a purely legal question," but in actuality "the question posed here requires a

fact-specific inquiry" that is inappropriate for interlocutory appeal, and declining review). Appellate courts do not answer questions of law in the dark. *Gagliardi v. TJCV Land Trust*, 889 F.3d 728, 733 (11th Cir. 2018) ("We are not in the business of issuing advisory opinions that do not 'affect the rights of litigants in the case before' us or that merely opine on 'what the law would be upon a hypothetical state of facts.'"). Thus, even when a question is certified under section 1292(b), appellate courts are still obliged to ensure that the legal question is called for by the undisputed facts of a case to avoid issuing rulings that are impermissibly advisory. *Ray v. Edwards*, 725 F.2d 655, 658 (11th Cir. 1984) ("[F]or us to reach the legal question of whether Ray could prevail if that factual issue is resolved against him would be tantamount to issuing an advisory opinion. That, we cannot do," and denying section 1292(b) review). So, before addressing MSC's proposed question, the Eleventh Circuit would first have to assess whether that question is actually raised by the undisputed facts of this case. [4]

---

[4] In *Ray*, the Eleventh Circuit illustrated why factual disputes are to be avoided on interlocutory appeal:

> We agree with the district court that the issue, as framed, presents a question of first impression in this circuit, over which there could be substantial ground for difference of opinion. We hold, however, that the district court erred in finding that its ruling amounted to a *controlling* question of law "in the sense," stated the district court, "that it is determinative of plaintiff's claim in this count of his complaint."
>
> The district court overlooked the possibility that even if the standard put forward by appellants is correct, Ray might still be able to produce evidence showing that appellants were directly responsible for the disclosure of false, derogatory information. Such evidence would respond to the more limited legal theory proposed by appellants, thereby creating a factual issue such that the district court would not need to rule on Ray's broader legal standard. . . .
>
> We believe that evidence that appellants made false, derogatory statements to reporters about Ray at or near the time he was fired, coupled with appellants'

But, by any assessment of the facts of this case, it is clear that they are hotly disputed. For example, MSC's proposed question is only relevant to this case if Havana Docks' former interests in the Subject Property are found to have expired in 2004. In its Amended Complaint, Havana Docks alleges that the concession did not expire by its terms in 2004, that 44 years of concessionary rights remained at the time of confiscation in 1960, and that the certified claim consists of other property rights that have no time limitation, including an indemnity right for the value of the works constructed by Havana Docks on the Subject Property. (Am. Compl., ECF No. 56 at ¶ 12-20.)

MSC apparently disputes these factual allegations. (*Compare id.*, *with* MSC's Opp. to Mot. for Recon., ECF No. 45 at 11-13, 16-19; *see also* ECF No. 49 at 6-8 (summarizing disputed allegations).) So, to find MSC's question has any relevance to this case, the Eleventh Circuit will first be required to disregard those well-pled facts at the pleading stage. And then it would have to "root[] through the record in search of facts" to assess the extent and nature of Havana Docks' confiscated interests in the

---

> denials of making any such statements, raises a significant factual issue sufficient to defeat summary judgment on count two. Therefore, for us to reach the legal question of whether Ray could prevail if that factual issue is resolved against him would be tantamount to issuing an advisory opinion. That, we cannot do.

Ray, 725 F.2d at 658 (emphasis in original); *see also Borskey v. Am. Pad & Textile Co.*, 296 F.2d 894, 895 (5th Cir. 1961) (on interlocutory appeal of separate, but related, cases arising from a helicopter crash, section 1292(b) petition denied where legal question rested on disputed facts, as appellate ruling "might call for an advisory academic opinion on facts that might never exist"); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 777 F.2d 598, 607-08 (11th Cir. 1985) (declining section 1292(b) review where proposed question was not "ripe" for appellate review and ruling "would be purely advisory").

Subject Property, and determine whether any of them expired in 2004. *McFarlin*, 381 F.3d at 1258.[5] Otherwise, the appellate court would be in danger of rendering an advisory opinion that has no bearing on the issues in this case, which is reason alone to deny interlocutory review. *Ray*, 725 F.2d at 658; *Church of Scientology*, 777 F.2d at 608; *Borskey*, 296 F.2d at 895. Because the question framed by MSC does not rest on undisputed facts and cannot be "decide[d] quickly and cleanly without having to study the record," it is not a "pure" and "controlling question of law" suitable for interlocutory review. *McFarlin*, 381 F.3d at 1258-59.

For these reasons, neither *Barrientos* nor *Laperriere*, cited in the Motion, support certification here. (Mot. at 8.) The appellant in *Barrientos* proposed a "controlling question of law" that only required the Eleventh Circuit to verify undisputed facts about "the nature of the parties" and "that the claims arise out of the operation of a work program required by [federal law]." *Barrientos*, 951 F.3d at 1275. By contrast, here, the factual allegations underlying MSC's proposed question are all disputed by MSC. Similarly, in *Laperriere*, the Eleventh Circuit was tasked to decide whether an amendment to the PSLRA implicitly repealed an earlier statutory enactment—a purely legal issue with broad-reaching application, unlike here. *Laperriere v. Vesta Ins. Grp., Inc.*, 526 F.3d 715, 719 (11th Cir. 2008).

---

[5] In reality, none of these interests expired in 2004 because they were confiscated in 1960. (ECF No. 41-8 (certifying that all of these interests were confiscated)); *see Howard v. City of Atlanta*, 2007 WL 3169707, at *3 (N.D. Ga. Oct. 25, 2007) ("'[T]he characteristic of the advisory opinion' is that the order is 'purely advisory when it is made and did not pass through the refining pressure of reality.'") (quoting *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1560 (11th Cir. 1988)).

Havana Docks also notes that MSC's representation that the Reconsideration Order "impacts this case as well as myriad others," (Mot. at 2, 9, 12), is directly contrary to MSC's representations to this Court at the March 9th hearing on Havana Docks' motion for reconsideration:

> **Mr. Baldridge**: And what I would tell you is this is not a wide-sweeping decision. This is an unusual situation, as counsel points out. . . . It's unusual because this is very limited to a leasehold interest situation. This isn't a wide-sweeping view of what happens to property under the Libertad Act. It's what happened in this case.

(ECF No. 54, Hr'g Tr. at 64:5-11.) The issue MSC frames is, by its own admission, "case-specific," *Mamani*, 825 F.3d at 1312-13, and not "general[ly] relevan[t] to other cases in the same area of the law," *McFarlin*, 381 F.3d at 1259; *Flying Cow Ranch HC, LLC*, 2019 WL 1258780, at *3 ("A question of law is 'controlling' 'only if it may contribute to the determination, at an early stage, of a wide spectrum of cases.'" (citation omitted)). (*See also* "*Carnival* Op.," *Havana Docks Corp. v. Carnival Corp.*, 19-cv-21724, D.E. 56 at 4-5 (S.D. Fla. Oct. 8, 2019) (Bloom, J.) (denying Carnival's request for certification of this issue because it was "case-specific").)[6]

---

[6] The question posed by MSC does not implicate the three Title III cases cited in the Motion. (Mot. at 9.) The *John S. Shepard Family Trust v. NH Hotels USA, Inc.* case was voluntarily dismissed on February 26, 2020, meaning any appeal of the Reconsideration Order would not affect it. No. 19-cv-9026, D.E. 41 (S.D.N.Y. Feb. 26, 2020). In *Sucesores de Don Carlos Nunez y Dona Pura Galvez, Inc. v. Societe Generale, S.A.*, the property at issue is confiscated equity in a bank, and whatever interest plaintiff had in that equity before confiscation did not have a temporal component. No. 20-cv-00851 (S.D.N.Y. Feb. 4, 2020). Moreover, *Sucesores* was transferred to the Southern District of New York, where *Shepard* was also pending, so an opinion of the Eleventh Circuit on MSC's proposed question would not be determinative of either of those cases, in any event. Finally, in *Glen v. American Airlines*, the plaintiff's former interest in the confiscated property was not temporally limited. No. 19-cv-23994 (S.D. Fla.) (Altonaga, J.).

For these reasons, MSC has failed to propose a "neat," "clean," "pure" and "controlling question of law," and its Motion should be denied.

II. There are No Substantial Grounds for Difference of Opinion.

There are no substantial grounds for difference of opinion in the Court's holding that Title III creates liability for trafficking in confiscated property, not in a property interest that was necessarily extinguished by expropriation.

The Eleventh Circuit has held that a "substantial ground for difference of opinion" does not exist where the appellate court is in "complete and unequivocal" agreement with the district court. *McFarlin*, 381 F.3d at 1258 (quoting *Burrell v. Bd. of Trustees of Ga. Military College*, 970 F.2d 785, 788-89 (11th Cir. 1992)). Moreover, questions of first impression or an absence of binding authority on an issue, without more, are insufficient to demonstrate a substantial ground for difference of opinion. *Nat'l Union*, 2015 WL 11251735, at **2-3 (citing *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996)); (*Carnival* Op., at 5 (denying Carnival's request for certification of this issue and holding "that the 'novelty' of this case, standing alone, does not warrant section 1292(b) certification")); *Garcia-Bengochea v. Carnival Corp.*, No. 19-cv-21725, 2019 WL 7945691, at *2 (S.D. Fla. Sept. 26, 2019) ("The Court also disagrees with Carnival's argument that an immediate appeal is warranted because this case involves issues of first impression under Helms-Burton.") (citing *Checking Account Overdraft Litig*, 2010 WL 3377592, at *3).

The Court correctly held that Title III creates liability for trafficking in confiscated property, not in a property interest that was necessarily extinguished by

expropriation. (Reconsideration Order at 16-19, 24-25.)[7] The Court's interpretation of Title III in this respect fully comports with the plain language of the Act and the Eleventh Circuit's published opinion in *Glen*. (*Id.* at 16-27); *Glen v. Club Mediterranee S.A.*, 450 F.3d 1251 (11th Cir. 2006). In *Glen*, the Eleventh Circuit recognized that the LIBERTAD Act provides a "new statutory remedy available [] to United States nationals who were victims of [Cuban Government] confiscations," and under the Act, the ownership of a claim by the former owners to such confiscated property is the "property interest that former owners of confiscated property now have." 450 F.3d at 1255.

Because this Court's holding is firmly grounded in the LIBERTAD Act's plain language and binding appellate precedent, there can be no "substantial dispute about the correctness" of it. *McFarlin*, 381 F.3d at 1258-59. By all accounts, on the question at issue here, the Eleventh Circuit is in "'complete and unequivocal' agreement with the district court." *Id.*; *compare* Reconsideration Order at 18 ("[I]n lieu of its property interest in the remaining 44 years of the concession to the Subject Property, which the Cuban Government confiscated, Plaintiff now owns an interest only in the Certified Claim, which reflects the right to compensation for the value of loss Plaintiff sustained due to the expropriation."), *with Glen*, 450 F.3d at 1255 ("By paraphrasing and taking language from this section out of context, the Glens arrive at the conclusion that Congress has established that the expropriations committed by the Cuban government failed to extinguish the ownership rights of those who owned the

[7] Havana Docks will not recite to the Court its extensive and thoughtful analysis in the Reconsideration Order, which is well known by it.

properties prior to the takings. We disagree."); *see also Heat Techs., Inc. v. Papierfabrik August Koehler Se*, 2019 WL 3430477, at *2 (Fed. Cir. July 18, 2019) ("[W]hile this court has not directly addressed the issue," there was no substantial ground for difference of opinion because "our prior cases compel the conclusion reached by the district court.").

By contrast, the statutory interpretation advanced by MSC rests on the untenable premise that Castro's confiscation failed to extinguish former rights to expropriated property—a contention rejected by both the Eleventh Circuit in *Glen* and the Supreme Court in *Sabbatino*. *Glen*, 450 F.3d at 1255; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 414-15 (1964). "Because [MSC] ha[s] presented no authority in support of th[e] premise" that Havana Docks' concession survived expropriation in 1960, continued to run for 44 years and then expired by its terms in 2004—"which is necessary to [MSC's] position on the question [it] proffer[s] as controlling"—MSC "ha[s] failed to carry [its] burden of establishing that as to this question 'there is substantial ground for difference of opinion.'" *McFarlin*, 381 F.3d at 1263.

As such, the Motion should be denied.

III. Certification Will Not Materially Advance the Ultimate Termination of the Litigation.

In its Motion, MSC argues that a reversal on appeal "would dispose of every aspect of the case dealing with Plaintiff's time-limited concession." (Mot. at 11-12.) This argument is predicated entirely on MSC's belief that Havana Docks owned nothing more than a former concession to the Subject Property that expired in 2004.

But MSC is legally and factually incorrect, and, as a result, resolution of the question posed by MSC would not "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). This requirement "means that resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin,* 381 F.3d at 1259. Neither result would obtain here, even if an appeal was resolved in MSC's favor.

To begin, an appeal would not materially advance this litigation because Havana Docks' former concession to the Subject Property did not expire in 2004. It was confiscated in 1960. (Reconsideration Order at 18-19; Am. Compl. at ¶ 15; ECF No. 41-8.) Reversal on appeal would not change that fact. *Sabbatino*, 376 U.S. at 414-15; *Glen*, 450 F.3d at 1255; (Reconsideration Order at 16-19.) And, at a minimum, to the extent MSC disputes that the concession was confiscated, resolution of that critical factual issue would be inappropriate at this stage of the proceedings on interlocutory appeal. *See Nice v. L-2 Commc'ns Vertex Aerospace LLC*, 885 F.3d 1308, 1312-13 (11th Cir. 2018) (section 1292(b) review denied where facts underlying proposed question were disputed and the "issue [wa]s neither neat nor clean from any vantage point in the record."). Because MSC's legal argument is contingent on an incorrect premise that is contrary to both Eleventh Circuit precedent and the reality of confiscation (and a disputed issue of fact), the requested appeal would not materially advance the termination of this litigation.

Moreover, Havana Docks possessed a number of rights in the Subject Property that can support a claim under MSC's interpretation of Title III.[8] First, Havana Docks' concession granted a term of 99 years—not a fixed end date of 2004—and forty-four years of concessionary rights remained in 1960, the date of confiscation. (Reconsideration Order at 15 ("In fact, Havana Docks' concession agreement reflects that Plaintiff was granted a 99-year leasehold interest, not a leasehold interest ending on a date certain.").) Second, the concession granted Havana Docks the non-temporal right to indemnification for the value of the works constructed by it on the Subject Property in the event of expropriation. (ECF No. 41-4 at 5.) And, third, the certified claim recognizes a number of property rights beyond the concession that were not time limited. (Reconsideration Order at 16 ("[T]hese additional property interests reflected in the Certified Claim, such as the ownership interests in fixtures and equipment, are not time limited.").) None of these rights expired in 2004. And all of these rights were confiscated from Havana Docks, and certified and valued by the Foreign Claims Settlement Commission. Thus, even under MSC's interpretation, they are actionable under Title III. As a result, an appeal would not "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *McFarlin,* 381 F.3d at 1259.

In fact, certification would not advance this litigation at all. Even if the question were resolved in MSC's favor on appeal, the case would still have to be

[8] These interests were described in detail in Havana Docks' briefing on its motion for reconsideration. (ECF Nos. 42, 49.) For the purposes of brevity, Havana Docks adopts and incorporates by reference those briefs here.

remanded for discovery and trial on Havana Docks' confiscated property interests in the Subject Property. And, of course, if the question posed by MSC were resolved in Havana Docks' favor, the case would likewise be remanded for discovery and trial on the certified claim. So, either way, an appeal would not dispense with this case—or even a claim or a party to this case—and "would [not] serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin,* 381 F.3d at 1259 (citing *Ashmore v. N.E. Petrol. Div.*, 855 F. Supp. 438, 440 (D. Me. 1994) (§ 1292(b) appeal inappropriate where the same parties and issues would remain in district court regardless of resolution of issues on appeal)); *see also id.* at 1262 ("Resolution of one claim out of seven would do too little, if anything, to 'materially advance the ultimate termination of the litigation.'").

Far from that, piecemeal appellate review here would serve only to encumber the Eleventh Circuit, increase litigation costs and needlessly delay the ultimate resolution of this case, without even the prospect of more efficiently administering this action on remand.[9] *Prado-Steiman*, 221 F.3d at 1276 (piecemeal appeals are "inherently disruptive, time-consuming, and expensive"); *McFarlin,* 381 F.3d at 1259 ("Because permitting piecemeal appeals is bad policy, permitting liberal use of § 1292(b) interlocutory appeals is bad policy."); *OFS Fitel*, 549 F.3d at 1358-59 ("§

[9] "Piecemeal appellate review has a deleterious effect on judicial administration. It increases the workload of the appellate courts, to the detriment of litigants and judges. It requires the appellate courts to consider issues that may be rendered moot if the appealing party ultimately prevails in or settles the case. It undermines the district court's ability to manage the action. And it creates opportunities for abuse by litigants seeking to delay resolution of a case by raising with the appellate court objections to the scope of an order that should have been raised first with the district court itself." *Prado-Steiman*, 221 F.3d at 1276.

1292(b) sets a high threshold for certification to prevent piecemeal appeal. . . . Most interlocutory orders do not meet this test.”).[10]

Because certification would not materially advance the ultimate outcome of this litigation, Havana Docks respectfully submits that the Motion should be denied.[11]

---

[10] Havana Docks notes that certification was denied by the appellate court in almost every district court opinion cited in the Motion. *See Rodrigues v. CNP of Sanctuary, LLC*, No. 11-cv-80668, 2012 WL 12895255 (S.D. Fla. May 8, 2012), *cert. denied* 523 F. App'x 628 (11th Cir. 2013); *Bastian v. United Services Auto. Ass'n*, 150 F. Supp. 3d 1284, 1296–97 (M.D. Fla. 2015), *cert. denied* No. 15-90034-B (11th Cir. Feb. 29, 2016); *Frye v. Ulrich GmbH & Co. KG*, No. 3:08-cv-158, 2010 WL 3172167, at *3 (M.D. Ala. Aug. 11, 2010), *cert. denied* No. 10-90021-D (11th Cir. Oct. 27, 2010); *Solutia Inc. v. McWane, Inc.*, No. 03-cv-1345, 2008 WL 11337774, at *1 (N.D. Ala. June 25, 2008), *cert. denied* No. 08-90011-J (11th Cir. Sept. 2, 2008); *Winter v. United Parcel Serv., Inc.*, No. 214CV10555, 2016 WL 11214560, at *1 (E.D. Mich. Jan. 12, 2016), *cert. denied* No. 16-0101 (6th Cir. Mar. 4, 2016); *Unger v. United States*, No. 90 CIV. 0384, 1994 WL 90358, at *1 (S.D.N.Y. Mar. 16, 1994), *cert. denied* (2d Cir. Apr. 1, 1994) (*see* Dist. Ct. D.E. 46, 48); *Washburn v. Beverly Enterprises-Georgia, Inc.*, No. 106-051, 2007 WL 9700927, at *1 (S.D. Ga. Jan. 8, 2007), *cert. denied as moot* No. 07-90001-B (11th Cir. June 14, 2007); *In re Managed Care Litig.*, No. 00-1334, 2002 WL 1359736, at *1 (S.D. Fla. Mar. 25, 2002), *cert. denied* No. 02-90016-C (11th Cir. May 10, 2002).

[11] The Supreme Court recognizes the importance of the “screening procedure” tasked to district courts under section 1292(b), which “serves the dual purpose of ensuring that [interlocutory] review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals”:

> We also recognize that such savings may be nullified in practice by indulgent extension of the amendment to inappropriate cases or by enforced consideration in Courts of Appeals of many ill-founded applications for review. The problem, therefore, is to provide a procedural screen through which only the desired cases may pass, and to avoid the wastage of a multitude of fruitless applications to invoke the amendment contrary to its purpose. . . .
>
> . . . Requirement that the Trial Court certify the case as appropriate for appeal serves the double purpose of providing the Appellate Court with the best informed opinion that immediate review is of value, and at once protects appellate dockets against a flood of petitions in inappropriate cases. . . . [A]voidance of ill-founded applications in the Courts of Appeals for piecemeal review is of particular concern. If the consequence of change is to be crowded appellate dockets as well as any substantial number of unjustified delays in the Trial Court, the benefits to be expected from the amendment may well be

CONCLUSION

Ultimately, certification under section 1292(b) is the "rare exception" to the general principle that appeals be conducted after final judgment. *McFarlin*, 381 F.3d at 1264. The operative question remains whether a defendant has overcome "[t]he strong presumption against interlocutory appeals." *Nat'l Union*, 2015 WL 11251735, at *2. Here, MSC has failed to meet that heavy burden: As set forth above, none of the section 1292(b) factors are met. MSC has not proposed a proper, controlling question of law. There is no substantial ground for difference of opinion that the Court correctly construed Title III in line with its plain language and the Eleventh Circuit's opinion in *Glen*. And resolution of the requested appeal would not materially advance (or advance at all) the ultimate termination of this litigation.

As a result, Havana Docks respectfully requests that the Court deny the Motion.

Dated: May 7, 2020.

Respectfully submitted,

COLSON HICKS EIDSON, P.A.
255 Alhambra Circle, Penthouse
Coral Gables, Florida 33134
Telephone: (305) 476-7400
Facsimile: (305) 476-7444
E-mail: eservice@colson.com

By: s/ Roberto Martínez
Roberto Martínez, Esquire
Florida Bar No. 305596

---

outweighed by the lost motion of preparation, consideration, and rejection of unwarranted applications for its benefits.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 474-75, n.25 (1978), *superseded by rule on other grounds* (quoting H.R. Rep. No. 1667, 85th Cong., 2d Sess., 5-6 (1958)).

bob@colson.com
Stephanie A. Casey, Esquire
Florida Bar No. 97483
scasey@colson.com
Zachary Lipshultz
Florida Bar No. 123594
zach@colson.com
Aziza F. Elayan-Martínez, Esquire
Florida Bar No. 92736
aziza@colson.com

- and -

MARGOL & MARGOL, P.A.
2029 3rd Street North
Jacksonville Beach, Florida 32250
Telephone: (904) 355-7508
Facsimile: (904) 619-8741

Rodney S. Margol, Esquire
Florida Bar No. 225428
Rodney@margolandmargol.com

Attorneys for Plaintiff Havana Docks Corporation

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 7th day of May, 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