UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 19-23591-CIV-BLOOM/LOUIS

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

NORWEGIAN CRUISE LINE HOLDINGS LTD.

Defendant.
_____/

NORWEGIAN'S REPLY IN SUPPORT OF MOTION TO DISMISS

Defendant Norwegian Cruise Line Holdings Ltd. ("Norwegian"), through undersigned counsel, files this Reply in Support of its Motion to Dismiss Plaintiff's Complaint (ECF No. 31).

INTRODUCTION

In its Motion to Dismiss, Norwegian demonstrates, based on binding authority from and within the Eleventh Circuit, why Plaintiff's Complaint fails to state a claim. Plaintiff's last-ditch effort to engage in unfounded policy arguments is of no moment where a statute, like the Helms-Burton Act (the "Act") here, says what it means without ambiguity. The Court should dismiss the Complaint with prejudice because (1) Plaintiff does not, and cannot, plausibly allege that Norwegian "***knowingly and intentionally***" "trafficked," or in this case, travelled unlawfully, as required to state a claim under the Act; (2) applying Title III to Norwegian would violate the Ex Post Facto Clause; (3) applying Title III retroactively violates the Due Process Clause; (4) the Act requires that a plaintiff actually own a claim to the property in which he or she claims a defendant is "trafficking" and the property Plaintiff claims was expropriated – a concession to run three piers in Havana, and the piers themselves – is not the property Plaintiff claims Norwegian is trafficking in because Plaintiff's time-limited concession expired in 2004, and at that point the piers reverted to the Cuban government.

ARGUMENT

I. Plaintiff Has Failed to Sufficiently Plead that Norwegian "Trafficked" in the Property Within the Meaning of the Act

Plaintiff has not made sufficient allegations concerning the scienter requirement under the statute, because Plaintiff cannot. Title III is not a strict liability statute. The Act cannot be "unknowingly and unintentionally" violated.[1]

A. *Plaintiff Has Failed to Plead the Required Elements Under the Act Because Plaintiff Does Not Plead That Norwegian Had Any Unlawful Intent*

Plaintiff failed to plead sufficient facts to create a plausible claim under the Act because there are no allegations regarding Norwegian's required state of mind that is: that Norwegian "**knowingly or intentionally**" engaged in prohibited trafficking (i.e., travelled unlawfully). The Act is clear that it is for the limited "Purposes" of protecting against "***wrongful*** trafficking," not

[1] This is a distinct requirement from the one Carnival argued, and the Court declined to apply, in a separate case before this Court. *See* Motion to Dismiss, *Havana Docks v. Carnival Corp.*, No. 1:19-CV-21724 (S.D. Fla. Aug. 26, 2019), ECF No. 17. There, Carnival asked the Court to find that Plaintiff had not sufficiently pled that Carnival's travel *was* unlawful. This argument focuses on conduct. *See id.* By contrast, here, Norwegian asks the Court to hold that Plaintiff failed to allege the proper scienter of Norwegian as required by the Act and case law. This argument focuses on state of mind.

all trafficking. 22 U.S.C. § 6022(6) (2019) ("To protect United States nationals against . . . the ***wrongful*** trafficking in property confiscated by the Castro regime."). To this end, Title III of the Act prohibits "trafficking" in confiscated property.

> (1) Liability for trafficking.--(A) Except as otherwise provided in this section, any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages . . . .

22 U.S.C. § 6082(a)(1)(A) (2019). The Act provides a very specific definition of trafficking:

> ***Except as provided in subparagraph (B)***, [a] person "traffics" in confiscated property if that person ***knowingly and intentionally—***
>
> (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
>
> (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
>
> (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.

Id. (emphasis added). Immediately after defining "trafficking," and calling back to the exception listed in subparagraph "(A)" and emphasized in bold above, the Act states that "the term 'traffics' ***does not include*** . . . 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." 22 U.S.C. § 6023(13)(B)(iii) (2019) (emphases added). Put simply, it is not a violation of the Act to knowingly and intentionally engage in lawful travel.

This is not an issue of Norwegian attempting to obtain a legal ruling on a disputed issue of fact, as Plaintiff incorrectly frames it. *See* Pl.'s Resp. Opp'n Def.'s Mot. Dismiss 4, ECF No. 36. This is an issue of the sufficiency of Plaintiff's pleading. To plausibly plead a claim, a complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.'" *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282–83 (11th Cir. 2007) (quoting *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001)).[2]

[2] Courts in this Circuit have routinely required a plaintiff pursuing a statutory claim to plead facts that plausibly meet the statutory definition. *See, e.g.*, *Arko Plumbing Corp. v. Rudd*, 13-CV-22434-UU, 2013 WL 12059615, at *3 (S.D. Fla. Sept. 26, 2013) (under Computer Fraud and Abuse Act, which has a statutory

Here, to properly allege a statutory violation, Plaintiff must plausibly allege facts indicating that Norwegian's state of mind (rather than conduct) does not fall within the safe harbor within the definition of trafficking. *See infra* note 2. Plaintiff does nothing to dispute or distinguish the substantial body of authority Norwegian proffers on this point.[3] Indeed, as Plaintiff openly concedes through its Response (Resp. 5), and as is apparent from the face of Plaintiff's Complaint, Plaintiff's ***only*** allegation as to intent is that Norwegian "knowingly and intentionally commenced, conducted, and promoted its commercial cruise line business to Cuba using the Subject Property by regularly embarking and disembarking its passengers on the Subject Property." Compl. ¶ 13, ECF. 1. Tellingly, there can be no dispute that this allegation actually describes precisely the kind of lawful conduct allowed by the Act itself.[4] There is no statutory violation for intending to travel lawfully. Even trafficking in confiscated property is permitted when done pursuant to a lawful travel exception. Plaintiff makes every effort, cherry-picking favorable language on pleading standards, to fabricate an artificially lower bar to stating a claim. For instance, Plaintiff argues that the Federal Rules allow for facts to be alleged only "generally," or else, only upon "reasonable inference." Resp. 3-4. Yet, Plaintiff makes ***no allegations*** generally, inferentially, or otherwise as to Norwegian's required intent to ***not*** fall within the safe harbor of the Act, and therefore the actual knowledge and intent to engage in

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definition of "damage," "pleading a type of damage within the statutory definitions is an essential element" of the claim); *Brown v. Regions Mortg. Corp.*, 1:11-CV-3716-SCJ-ECS, 2012 WL 13013583, at *3 (N.D. Ga. Dec. 3, 2012) (to state a claim under Fair Debt Collection Practices Act, a plaintiff must "allege facts showing how [the] defendant meets the statutory definition of a 'debt collector'"), *rep. and rec. adopted*, 2012 WL 13013.

[3] *See, e.g.*, *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1192 n.12 (11th Cir. 2010) (holding that "[s]ection 559.72(9) of the Florida Consumer Collection Practices Act (FCCPA) requires a plaintiff to demonstrate that the debt collector defendant possessed *actual knowledge* that the threatened means of enforcing the debt was unavailable."); *Ruiz v. Experian Info. Sols., Inc.*, No. 16-CV-25102, 2017 WL 1378242, at *2 (S.D. Fla. Apr. 14, 2017) (dismissing action on account of Plaintiff's failure to allege facts sufficient to demonstrate knowledge or intent by the debt collector in order to state a cause of action under the FCCPA which requires actual knowledge that a debt is not legitimate in order to demonstrate a violation); *Owens v. Ronald R. Wolf & Associates, P.L.*, No. 13-CV-61769, 2013 WL 6085121, at *4 (S.D. Fla. Nov. 19, 2013) (dismissing cause of action under FCCPA for failure to state a claim because Plaintiff failed to allege the requisite knowledge and intent elements, i.e. that Defendant attempted to collect a debt it knew was illegitimate or intentionally asserted legal rights that it knew did not exist); *see also Torongo v. Roy*, 176 F. Supp. 3d 1320, 1324–25 (S.D. Fla. 2016) (dismissing cause of action under the Fair and Accurate Credit Transactions Act for failure to adequately plead defendant's knowing violation of the act); *Universal City Studios v. Nissim Corp.*, No. 14-CV-81344, 2015 WL 1124704, at *5 (S.D. Fla. Mar. 12, 2015) (dismissing cause of action for patent infringement because "[a] review of these claims show that Defendant has done nothing more than state that Plaintiffs have knowledge of the patent and an intent to infringe. These barebone allegations do not provide the Court with an adequate basis [to infer knowledge and intent]").

[4] Norwegian's limited use of the subject docks is the quintessential example of the carefully tailored exception for "lawful travel" carved out by the U.S. Congress in the Act and actively allowed and encouraged by the U.S. Government. It strains credulity to reason otherwise.

unlawful travel and impermissible trafficking.

Again, Norwegian is not asking Plaintiff to negate the lawful travel exception, but rather to properly plead actual knowledge and intent as required by the plain language of the Act. Accordingly, Norwegian is not ensnared by Plaintiff's trap to equate this threshold pleading requirement to an argument about the propriety of adjudicating affirmative defenses when defects are evident on the face of a complaint – a different issue entirely – and neither should the Court be.

B. *The Only Plausible Allegations Demonstrate that Norwegian's Intent Was at All Times Lawful Pursuant to the Act's Safe Harbor*

Plaintiff's failure to sufficiently allege the requisite scienter is not remediable. It is on this basis that Plaintiff's cause of action should not only be dismissed, but dismissed ***with prejudice***. Plaintiff has not sufficiently pled, and cannot plead, that Norwegian knowingly and intentionally "trafficked," as that term is defined by the Act because the allegations and evidence, which the Court can review on this motion, establish that at all times Norwegian ***intended*** (an inquiry that is statutorily tethered to state of mind rather than conduct) to travel lawfully such that Norwegian falls within the safe harbor under the Act's lawful travel exception.[5]

The U.S. Office of Foreign Asset Control of the U.S. Department of the Treasury ("OFAC") "authorized" United States companies like Norwegian "to provide carrier services to, from, or within Cuba in connection with travel or transportation," 31 C.F.R. § 515.572(a)(2)(i) (2019), and when those travel or carrier services were provided by a vessel, those companies were "authorized to provide lodging services onboard such vessels to persons authorized to travel to or from Cuba pursuant to this part during the period of time the vessel is traveling to, from, or within Cuba, including when docked at a port in Cuba." 31 C.F.R. § 515.572(a)(4) (2019). Because Norwegian operated under an OFAC general license, the travel-related services it provided were, as a matter of law, lawful.[6] *Martinez v. Republic of Cuba*, No. 10-CV-22095,

[5] It is the Government at the time which determines whether travel is "lawful" or not. This is not an issue for either the Court or Plaintiff to decide. The Act does not direct retroactive application of the law, and it is well established that "[r]etroactivity is not favored in the law . . . [and] congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). In any case, Norwegian has been at all times compliant, and remains compliant with U.S. laws concerning travel to Cuba.

[6] Indeed, immediately following the shift in policy by the U.S. Government, imposing new restrictions on travel to Cuba in June 2019, Norwegian ceased travel to Cuba in full compliance with the new regulations.

2011 WL 13115432, at *7 (S.D. Fla. June 27, 2011), *rep. and rec. adopted in part, rejected in part on other grounds*, No. 10-CV-22095, 2011 WL 13115471 (S.D. Fla. Aug. 26, 2011) ("It is undisputed that the OFAC licensed Garnishees to provide travel services to Cuba and make payments associated therewith. The assets that Plaintiff seeks to garnish have thus been authorized for transfer to Cuba and are not subject to an across-the-board prohibition on transfer."); *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dept. of Treasury*, 606 F. Supp. 2d 59, 64 (D.D.C. 2009) (explaining that an OFAC general license, like the one Norwegian operated under, "broadly authorizes entire classes of transactions").

Norwegian only "***knowingly and intentionally***" engaged in the acts enumerated in the trafficking ***exceptions*** under 22 U.S.C. § 6023(13)(B) (2019). Since "[t]he term 'traffics' does not include . . . " those acts, which are not "trafficking" under 22 U.S.C. § 6023(13)(A) (2019), by definition, Plaintiff's Complaint does not plausibly allege that Norwegian violated the Act.

II. <u>Applying Title III to Norwegian Would Violate the Ex Post Facto Clause</u>

A law violates the Ex Post Facto Clause when it is retroactive – when it "attaches new legal consequences to events completed before its enactment," *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269-70 (1994) – and when it is penal – when it "provides for sanctions so punitive as to transform" it into a "criminal penalty," *United States v. Ward*, 448 U.S. 242, 249 (1980). Plaintiff, tellingly, does not dispute that Title III's cause of action is penal.[7] Instead, Plaintiff's response (Resp. 9-12) rises and falls with whether applying Title III to Norwegian is retroactive.

It is. Plaintiff first contends that Title III is not retroactive because its "effective date" was never suspended. Resp. 10-11. According to Plaintiff, only the "right to bring an action" under Title III had been suspended for over 20 years. Resp. 11. That is semantics. The ability to bring a cause of action is ***how*** Title III is effective. *Cf. Liability*, Black's Law Dictionary (11th ed. 2019) (defining liability as "[t]he quality, state, or condition of being legally obligated or accountable"). Perhaps for that reason a Court in this District has already explained that "***Title***

Tariro Mzezewa, *Cruises to Cuba Are Abruptly Canceled, After New Travel Ban*, N.Y. Times, June 5, 2019, https://www.nytimes.com/2019/06/05/travel/cuba-cruise-travel-ban.html.

[7] Norwegian explained at length how Title III is effectively penal in nature. *See* Mot. 11-14. Plaintiff's response is silent on this point. *See Bailey v. Carnival Corp.*, 369 F. Supp. 3d 1302, 1311 n.3 (S.D. Fla. 2019) (dismissing plaintiff's negligent hiring and retention claims on the basis that plaintiff failed to address defendant's argument regarding them such that the court found plaintiff abandoned these claims); *Decosta v. ARG Res., LLC*, No. 12-23482-CV, 2012 WL 12865835, at *3 (S.D. Fla. Dec. 7, 2012) (citing *Hooper v. City of Montgomery*, 482 F. Supp. 2d 1330, 1334 (M.D. Ala. 2007)) ("Failure to respond to arguments regarding particular claims in a motion to dismiss is a sufficient basis to dismiss such claims as abandoned or by default.").

III became effective for the first time on May 2, 2019." *Garcia-Bengochea v. Carnival Corp.*, No. 1:19-CV-21725-JLK, 2019 WL 4015576, at *1 (S.D. Fla. Aug. 26, 2019) (emphasis added).

And in any event, whether Plaintiff can bring an action under Title III is exactly what this case is about: The question here is whether allowing Plaintiff to ***bring an action***, now, against Norwegian for its pre-May 2019 activities is "attach[ing] new legal consequences" to its earlier activities. *Landgraf*, 511 U.S. at 270; *see* Mot. Dismiss 10-16. Plaintiff's rephrasing of the question is no answer at all.

Here's why: the Ex Post Facto Clause "places limits on the sovereign's ability to use its lawmaking power to ***modify bargains*** it has made with its subjects." *Lynce v. Mathis*, 519 U.S. 433, 440 (1997) (emphasis added). If the government wants to impose new penal consequences on a certain activity – that is, change the terms of the deal – "fundamental fairness" demands "notice and fair warning." *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001). These fairness principles are not thwarted by careful drafting: "[E]ven if a statute merely alters penal provisions *accorded by the grace of the legislature*, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." *Weaver v. Graham*, 450 U.S. 24, 30-31 (1981).

The Court's retroactivity inquiry therefore does not depend on whether Title III's "effective date ha[d] . . . been suspended" or whether the right to bring an action ***under*** Title III had been suspended. Resp. 10. ***Either*** suspension is the suspension of a "penal provision[ ]" through an act of Executive "grace." *Weaver*, 450 U.S. at 30. And when analyzing the retroactive nature of the lifting of such a suspension, this Court should look to that lifting's ***effects***. *See id.* at 31. These effects exemplify a retroactive modification of a bargain. *See* Mot. 10-12. Title III's cause of action lay dormant for over 20 years. During that timeframe, no party could bring a cause of action under Title III against Norwegian for its Cuba operations, which in any event did not commence until March 2017. As of May 2019, a party could bring such an action for that ***same*** timeframe. That is the definition of retroactivity.

Plaintiff next suggests that President Clinton's 1996 comments put Norwegian on notice of potential Title III liability for actions taken 20 years later. *See* Resp. 10-11. But nearly 25 years of biannual suspensions buried any notice that one-off statement may have afforded companies such as Norwegian. *See* Mot. 12. And Title III contains no guidelines on why, how, or when the Executive should suspend, or cease suspending, Title III. President Clinton's single,

generic statement from decades ago simply has no notice value when compared to the mountain of suspensions that accrued like clockwork over the intervening 23 years.

And that is not even taking into account the fact Norwegian's activities were ***licensed*** by the United States Government – a point on which Plaintiff's Opposition is entirely mute. *See* Mot. 10-11. In December 2014, the Obama Administration began normalizing diplomatic relations with Cuba. *See id.* at 12. In 2015, the Obama Administration actively encouraged companies to invest in Cuba. *See* Felicia Schwartz, *Obama Administration Encourages U.S. Businesses to Forge Cuba Links*, W.S.J. (Nov. 6, 2015). In 2016, the Obama Administration set forth specific priority objectives to normalize U.S.-Cuba relations. *See* The White House, Presidential Policy Directive – United States-Cuba Normalization (Oct. 14, 2016).[8] ***This*** is the backdrop against which Norwegian, in March 2017, began operating out of the ports at issue. *See* Compl. ¶ 13. And by that point, the Obama Administration's new Cuba policy drained President Clinton's one-off statement of any remaining notice value.

That same license defuses Plaintiff's contention that Norwegian's post-May 2019 activities in Cuba subject it to Title III liability. *See* Resp. 12. As Norwegian explained in its motion to dismiss (Mot. 9), in 2015 OFAC granted travel providers a general license to "provide travel services in connection with travel-related transactions involving Cuba authorized pursuant to this part." 31 C.F.R. § 515.572(a)(1) (2019). Norwegian's *licensed* operations in Cuba were lawful and preempt any Title III liability. *See Martinez*, 2011 WL 13115432, at *7 ("It is undisputed that the OFAC licensed Garnishees to provide travel services to Cuba and make payments associated therewith. The assets that Plaintiff seeks to garnish have thus been authorized for transfer to Cuba and are not subject to an across-the-board prohibition on transfer."); *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dept. of Treasury*, 606 F. Supp. 2d 59, 64 (D.D.C. 2009) (explaining that an OFAC general license, like the one Norwegian operated under, "broadly authorizes entire classes of transactions"). But ***as soon as*** the Trump Administration revoked this license, Norwegian ceased its Cuba operations. *See* Tariro Mzezewa, *Cruises to Cuba Are Abruptly Canceled, After New Travel Ban*, N.Y. Times, June 5, 2019.[9] Indeed, Norwegian's absolute compliance with the law is evidenced by Norwegian's ceasing operations while a cruise ship was "en route to Havana." *Id.* Far from

[8] *Available at* https://bit.ly/2qoJZpo.

[9] *Available at* https://nyti.ms/36t8abP.

warranting discovery, this news article shows that there was no point at which Norwegian operated in Cuba without a license and thereby subjected itself to potential Title III liability by "***knowingly or intentionally***" engaging in prohibited trafficking.

In an effort to side-step Norwegian's valid Constitutional challenge, Plaintiff urges this Court to avoid the constitutional question by allowing discovery to proceed under its flawed legal theory. But the avoidance-of-constitutional-doubt doctrine is a method of construing statutes, not managing a docket. *See Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1242 (11th Cir. 2015) ("[B]efore holding that a statute violates the Constitution we therefore look to "reasonable" alternative constructions."). It is also appropriate where there is another way to conclusively resolve the case. *See, e.g.*, *Williamson v. Brevard Cty.*, 928 F.3d 1296, 1316 (11th Cir. 2019) (not reaching some constitutional claims after vacating on *other* constitutional claims); *Santamorena v. Georgia Military Coll.*, 147 F.3d 1337, 1343 (11th Cir. 1998) (not reaching constitutional prong of qualified immunity analysis because the asserted constitutional right was not clearly established).[10] It is not a tool to allow plaintiffs to kick the can down the road in the hopes of unlocking discovery. The Court has all of the tools and information it needs to definitively resolve this question and it should do so here.

In short, allowing this cause of action to proceed would be a retroactive application of a penal law. When Norwegian took the actions at issue in this case, it was not subject to liability under Title III. Now, according to Plaintiff it is. And as Plaintiff does not dispute, that liability is penal in nature. The Court should therefore dismiss this case as unconstitutional under the Ex Post Facto Clause.

III. <u>Applying Title III Retroactively Violates Due Process</u>

For similar reasons, applying Title III to Norwegian's pre-May 2019 activities in Cuba would violate due process. *See* Mot. 16. Retroactive application of a statute violates the Due

[10] Plaintiff's citation to *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000), is inapposite. First of all, Plaintiff's characterization of that case is off-base. *Siegel* concerned the 2000 presidential election Florida recounts. *Id.* at 1168-69. Specifically, it was an appeal from the denial of a preliminary injunction. *Id.* at 1169. But "Plaintiffs' request on appeal . . . . represent[ed] a petition for permanent relief." *Id.* at 1171 n.2. Supreme Court precedent laid out a series of factors governing when appellate courts can convert appeals of denials of preliminary injunctions into hearings on the merits. *Id.* Based on those factors – which included considering whether there was a "largely incomplete" factual record—the court denied Plaintiffs' request. *Id.* The court was not holding that "the constitutional question was not ripe" (Resp. 12-13), but rather that it would be inappropriate, as an appellate court, to convert a preliminary proceeding into one on the merits. Such is not the case here. But even if *Siegel* were relevant, it would not be helpful to Plaintiff. The factual record here is *not* "largely incomplete." The court here has every piece of information it needs to determine whether allowing this cause of action to proceed against Norwegian is constitutional: whether this cause of action is retroactive, and whether it is penal. *See supra* pp. 5-8.

Process Clause where such retroactive application of a statute is not "justified by a rational legislative purpose." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

Plaintiff does not advance a ***single*** "rational legislative purpose" supporting this cause of action. That is because there is none. Title III's deterrent value was overrun by biannual suspensions running over 20 years. The penalties it imposes – conceded by Plaintiff to be penal in nature – are so disconnected from any actual damages they might cause to plaintiffs as to be irrational. *See* Mot. 16. Norwegian had nothing to do with the original confiscation of the property. There is no required connection to or nexus between Norwegian's action and Plaintiff's damages. And there is no way to apportion the damages award among other potentially liable parties. *See id.*

Plaintiff instead rests its due-process argument on this cause of action ***not*** being retroactive. *See* Resp. 10-12. That is wrong. *See supra* pp. 5-8. Because applying Title III to Norwegian ***would*** be a retroactive application of a law, and because that retroactive application is justified by no rational legislative purpose (*see* Mot. 16), this action violates due process. For this reason as well, this Court should dismiss this case with prejudice.

IV. Plaintiff Has Failed to Allege Norwegian <u>Trafficked in Property to Which Plaintiff Owns a Claim</u>

To state a claim, Plaintiff must allege it owns a claim to confiscated property that was trafficked by Norwegian. But Plaintiff owns a claim only to a time-limited property interest in the Havana docks that expired in 2004, ***thirteen years*** before Norwegian began using those docks. Plaintiff does not have a claim based on confiscated property that was never trafficked by Norwegian.

This argument does not incorrectly conflate a claim to property and a property interest, as Plaintiff argues. The issue is much simpler than that. Norwegian does not dispute that Plaintiff may have a valid cause of action under the Act against an entity alleged to have illegally trafficked in the property to which Plaintiff owns a claim before its time-limited concession would have expired in 2004. *See Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1255 (11th Cir. 2006) ("When (or if) the portion of Title III that allows private litigants to bring lawsuits becomes effective, actions brought pursuant to the new statutory scheme would be actions brought 'on a claim ***to the confiscated property***' against traffickers ***in the property***." (emphasis added)). There is no dispute – or, importantly for this Motion, allegation – that Norwegian is not that entity. But, when the property now forming the basis of the claim that Plaintiff owns was

nationalized by the Cuban government in October 1960, Plaintiff did not own a fee simple interest in the docks which would allow a claim against a defendant who trafficked in the property at any point in the future. According to the Foreign Claims Settlement Commission, Plaintiff was granted a concession in 1934 to operate three piers in the Port of Havana, and ***the concession expired in 2004***.[11] *See Havana Docks Corp. v. Carnival Corp.*, No. 19-CV-21724, Compl. Ex. A (ECF No. 1-1 at 7, 9).[12] Even without wrongful confiscation by the Cuban government, the property would not have belonged to Plaintiff at the time Norwegian used the property incident to lawful travel to Cuba. Any interpretation otherwise would read the entire definition (let alone the concept) of "property" out of the Act, granting a plaintiff the right to recover compensation for trafficking in property interests that it never owned. As Norwegian even more fully articulates in its Motion to Dismiss, ownership of some claim to a confiscated property interest does not entitle a Plaintiff to recover for any trafficking in other property interests, regardless of whether they were confiscated from Plaintiff or not.[13]

CONCLUSION

For the foregoing reasons, as well as those set forth in Norwegian's Motion to Dismiss, the Court should grant the Motion and dismiss this action with prejudice.

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[11] Additionally, the Act requires this Court to "accept as conclusive proof of ownership of an interest in property a certification of a claim to ownership of that interest that has been made by the Foreign Claims Settlement Commission under Title V of the International Claims Settlement Act of 1949." 22 U.S.C. § 6083(a)(1) (2019). Necessarily then, the nature of the interest certified by the Commission would control regardless of the allegations pleaded in Plaintiff's Complaint.

[12] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1277-80 (11th Cir. 1999); *see also, Lee v. Jones*, No. 3:17-CV-656, 2017 WL 7038415, at *2 (N.D. Fla. Dec. 22, 2017) ("The doctrine of judicial notice permits a judge to consider its own court dockets.").

[13] An interpretation otherwise would lead to absurd results. *See* Mot. 19 (explaining why Plaintiff's reading of the Act "makes no sense"). The Act protects all interests in property—including future interests—from trafficking. *See* 22 U.S.C. § 6023(12)(A) (2019). The Act, however, also contemplates that claim owners may authorize conduct that would otherwise be deemed trafficking. *See* 22 U.S.C. § 6023(13) (". . . *without the authorization* of any United States national who holds a claim to the property." (emphasis added)). To illustrate how an interpretation otherwise would make the Act unworkable, consider that if instead of reverting back to the Cuban government, the temporary interest Plaintiff owned in the docks reverted back to another U.S. national on its expiration in 2004. That U.S. national would certainly own a claim to the docks for his or her confiscated future property interest. Now assume that the U.S. national authorized Norwegian to make use of the docks for cruises in 2017. Plaintiff's interpretation of the Act would permit Plaintiff to bring a suit under the Act against Norwegian despite the fact that the person who, but for the confiscation, would have held legal title to the docks in 2017, authorized Norwegian to use his or her property. Both individuals own "claims," which under Plaintiff's view is sufficient to state a cause of action, although those claims relate to two very different property interests. The only way to avoid such absurdly conflicting results is to recognize that a plaintiff must own a claim to *the* property interest that is being trafficked. This also makes sense because a single claim of one bundle of rights can and should only be legitimately owned by one person or entity.

Dated: November 15, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019, the foregoing was filed with the Clerk of Court using CM/ECF, which will serve a Notice of Electronic Filing on all counsel of record.

By: */s/ Allen P. Pegg*
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