UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 19-cv-23965-COOKE/GOODMAN

JOSE RAMON LÓPEZ REGUEIRO,

Plaintiff,

v.

AMERICAN AIRLINES, INC., *et al.*,

Defendants.

_____ /

DEFENDANT AMERICAN AIRLINES, INC.'S MOTION TO DISMISS THE COMPLAINT AND SUPPORTING MEMORANDUM OF LAW

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REQUEST FOR HEARING

Defendant requests a hearing on this motion. The motion raises several fundamental questions about the meaning and application of Title III of the Helms-Burton Act. 22 U.S.C. § 6021 *et seq.* To decide the motion, the Court will need to decide whether a Title III plaintiff has standing to sue for damages based on use of real property when the plaintiff presently lacks any ownership interest in that property; and determine the meaning and scope of several of Title III's statutory preconditions to suit. And if the Court does not resolve the motion on those grounds, it will need to interpret the required elements of a Title III claim for trafficking in property confiscated by the Cuban government. These issues involve novel and controlling questions of law that must be fully resolved before the case can move forward, and whose resolution will materially advance the ultimate termination of the litigation. A hearing will enable the parties to sharpen the issues, clarify their positions, and address any unanswered questions, all of which will assist this Court in reaching an efficient resolution of the motion.

Defendant American Airlines, Inc. (American) hereby moves to dismiss Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), (2), and (6), for the reasons stated in the following memorandum of law.

INTRODUCTION

Plaintiff's lawsuit attempts to commandeer Title III of the Helms Burton Act of 1996 (HBA) to hold American liable for activities the HBA itself recognizes are lawful. For more than forty years, the United States government has permitted lawful travel to Cuba under regulations administered by the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC). *See* 31 C.F.R. §§ 515.572(a); 515.560. Treasury promulgated these regulations under statutory authority to establish the scope of lawful trade with Cuba. *See* 22 U.S.C. § 2370(a); 50 U.S.C. § 4305(b). Like countless individual travelers and numerous travel providers, American relies on these regulations to provide lawful travel services to Cuba. Plaintiff now claims that, despite this express authorization, another statute concerning Cuba—enacted decades after OFAC's first Cuba regulations, and expressly exempting "lawful travel" services—empowers him to sue American for using the José Martí International Airport (Airport) in Cuba. According to Plaintiff, the Airport rightly belonged to his alleged father, José Vilaboy, a Cuban citizen, through a Cuban company called Compañia de Aeropuertos Internacionales, S.A. (CAISA), before it was confiscated by the communist Cuban government in 1959. Plaintiff asserts that, as a result, he is entitled to damages under Title III of the HBA.

Plaintiff's claim fails as a matter of law. The HBA sought to foster democracy in Cuba in two ways: by weakening the Castro regime through economic pressure, and by supporting the Cuban people. Thus, Title I of the HBA codified the economic embargo against Cuba, 22 U.S.C. § 6032(h), and strengthened sanctions against the Castro government, *id.* §§ 6022(2), 6031-46; and Title III sought to limit that government's ability to profit from wrongfully confiscated property by establishing a private right of action for United States nationals against persons who traffic in property stolen by the Cuban government, *id.* §§ 6022(6), 6031-46. Title II, in contrast, sought to "assist the Cuban people" by establishing a "policy of the United States" to "support the self-determination of the Cuban people" and "provide the Cuban people with humanitarian, developmental, and other economic assistance." *Id.* §§ 6022(1), 6061(1), (4).

In balancing these goals, Congress took special care not to disrupt potential lines of direct contact between the American and Cuban people, which could in turn advance the democratic ideals described in Title II. Thus, while Title III created a cause of action against persons who "traffic[] in property … confiscated by the Cuban Government," *id.* § 6082(a)(1), Congress made clear that "traffics" does not include, for example, "the delivery of international telecommunication signals to Cuba," *id.* § 6023(13)(B)(i). Similarly—and most relevant here—Congress defined "traffics" to exclude "transactions and uses of property incident to lawful travel to Cuba," *id.* § 6023(13)(B)(iii)—thereby preserving OFAC's pre-existing authority to license travel and travel services to Cuba. Indeed, the HBA repeatedly recognizes and presumes the existence of lawful travel between Cuba and the United States. *See id.* §§ 6042, 6044, 6091(b)(2)(B)(iii).

Plaintiff's theory in this case would upend the balance Congress struck in the HBA and effectively strip OFAC of its ability to permit lawful travel to Cuba. On Plaintiff's theory, American companies could be haled into court and exposed to extraordinary litigation and discovery burdens—and the potential for massive liability—simply for relying on licenses issued by the United States government that enable lawful travel to Cuba. That is not the result Congress intended when it enacted Title III of the HBA, and it is not the law. By its terms, Title III does not apply to the provision of lawful travel services to Cuba. And, contrary to the conclusions of two other courts in this District, the HBA's text and statutory context make clear that Congress intended this protection of lawful travel services to circumscribe the Title III cause of action itself—not to be an affirmative defense that had to be proved by a defendant providing travel services pursuant to OFAC regulations.

This Court need not resolve these issues to dismiss Plaintiff's Complaint, because the Complaint suffers from numerous other fatal flaws: Plaintiff has failed to establish both that he has Article III standing to sue and that this Court has personal jurisdiction over American. And Plaintiff has also failed to adequately plead several statutory preconditions to suit. But if the Court does reach the merits, Plaintiff's claim should be dismissed for the additional reason that he has failed to adequately allege that American's provision of travel services to Cuba was unlawful, as required by the HBA.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim requires factual allegations that establish all "the material elements of a cause of action." *AFL-CIO v. City of Miami*, 637 F.3d 1178, 1186 (11th Cir. 2011). "Threadbare recitals," "conclusory statements," and mere "legal conclusions" "do not suffice" and are not accepted as true. *Iqbal*, 556 U.S. at 678. The allegations must "raise a right to relief above the speculative level," meaning that they must render the claim not merely "conceivable," but "plausible." *Bell Atlantic. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007).

ARGUMENT

I. PLAINTIFF'S CLAIM IS BARRED BY ESSENTIAL THRESHOLD REQUIREMENTS.

A. Plaintiff Does Not Establish Article III Standing.

As a threshold matter, Plaintiff's suit must be dismissed because he fails to adequately allege that he satisfies Article III's standing requirements. To plead standing, a plaintiff "must clearly … allege facts demonstrating" (1) an injury in fact that is (2) fairly traceable to the challenged conduct of the defendant and (3) likely to be redressed by a favorable judicial decision. *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal quotation marks omitted). An alleged injury is sufficient only if it amounts to "an invasion of a legally protected interest," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and it is insufficient to claim an "injury that results from the independent action of some third party not before the court," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976). Here, the Title III right of action alone cannot give Plaintiff standing, and Plaintiff has not alleged an invasion of a legally protected interest or any injury fairly traceable to American.

To begin, Plaintiff cannot claim Article III standing by relying solely on the fact that Title III of the HBA gives United States nationals a right to sue persons who traffic in confiscated property. The Supreme Court has repeatedly stated that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *Spokeo*, 136 S. Ct. at 1547-48; *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed

by statute."). Plaintiff thus bears the burden of showing that he "otherwise" has Article III standing based on an actual injury in fact that is fairly traceable to American. But he has not done so.

Plaintiff primarily alleges that the Cuban government confiscated the Airport, which his father purportedly owned, and he now purportedly owns. *See, e.g.*, Compl. ¶ 13 ("the communist Cuban government confiscated the Airport and CAISA, stealing the properties from Vilaboy, who was their rightful owner"); *id.* ¶ 25 (the Airport "was confiscated by the communist Cuban government"). But Plaintiff alleges only that the Cuban government, not American, confiscated the Airport. Any injury from the alleged confiscation is thus traceable only to Cuba, not American; and Plaintiff has no standing to sue American for "injury that results from the independent action of [Cuba]." *Simon*, 426 U.S. at 41-42.

Plaintiff also alleges that American has injured him because he has not received "any compensation whatsoever" for American's activities at the Airport. Compl. ¶ 19; *see also id.* at 2 (Plaintiff has not received "a single penny in compensation" for use of the Airport). But again, Plaintiff's real complaint is that *Cuba*, rather than Plaintiff, receives the monetary benefit of activities at the Airport; and as with Cuba's alleged confiscation of the Airport, this alleged injury is traceable only to Cuba, not American. Plaintiff's trouble begins with his concession that the Cuban government confiscated the Airport. *Id.* ¶¶ 13, 25. That confiscation extinguished any private ownership interests he may have had in the Airport. *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1255 (11th Cir. 2006) (rejecting argument that "the expropriations committed by the Cuban government failed to extinguish the ownership rights of those who owned the properties prior to the takings"). Former owners of confiscated property "may own a *claim* for compensation under U.S. law, but they do not *own* the expropriated [property] itself." *Glen v. Club Mediterranee S.A.*, 365 F. Supp. 2d 1263, 1270 (S.D. Fla. 2005). As a result, Plaintiff has no standalone "legally protected interest" in ongoing activities at the Airport. *Lujan*, 504 U.S. at 560. He cannot (for example) sue someone for trespassing on the premises (because he has no ownership interest in the Airport), *see Glen*, 365 F. Supp. 2d at 1270, or sue an airline for negligently damaging Airport facilities (because the airline does not owe him a duty).

Thus, any alleged injury to Plaintiff resulting from the loss of monetary benefits from ongoing activities at the Airport—to the extent it exists at all—can only exist as a derivative

of Cuba's alleged confiscation. As a result, any such injury is traceable only to Cuba's alleged confiscation of the Airport and subsequent retention of any revenue the Airport generates—not to American. *See, e.g.*, Restatement (Second) of Torts § 927 & cmts. m, o (1979) (providing for recovery of loss-of-use damages against the tortfeasor); *see also J&D Towing, LLC v. Am. Alternative Ins. Corp.*, 478 S.W.3d 649, 655 (Tex. 2016). Plaintiff has thus failed to allege any injury fairly traceable to American, and his Complaint must be dismissed for lack of standing.

B. Plaintiff Does Not Adequately Allege That This Court Has Personal Jurisdiction Over American.

The Complaint also suffers from a second threshold defect: failure to adequately plead that this Court has either "general" or "specific" personal jurisdiction over American. General jurisdiction is proper when the defendant is "at home" in the state in which the court sits. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). But a corporate defendant is virtually never "at home" other than in the states of its (1) incorporation and (2) "principal place of business." *Id.* And here, as Plaintiff himself alleges, American is incorporated in Delaware, and its principal place of business is in Texas—not Florida. Compl. ¶ 3.

Specific jurisdiction is proper if the defendant purposely availed itself of the law of the forum state, and the plaintiff's claim "arise[s] out of or relate[s] to the defendant's contacts with the forum." *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017) (emphasis and alterations omitted). Here, Plaintiff's only allegation relevant to specific jurisdiction is that "[m]any of the flights destined for the [José Martí] Airport … depart from Miami International Airport." Compl. ¶ 17. But that allegation establishes neither purposeful availment nor relatedness.

To constitute "purposeful availment" sufficient for jurisdiction over an intentional tort claim, the alleged tort must have been "directly aimed at the forum." *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1220 n.28 (11th Cir. 2009); *see also*, *e.g.*, *Licciardello v. Lovelady*, 544 F.3d 1280, 1282, 1285 (11th Cir. 2008) (applying intentional tort framework to analyze specific jurisdiction over statutory claim). "[M]ere injury to a forum resident" is an insufficient connection. *Walden v. Fiore*, 571 U.S. 277, 290 (2014). But by Plaintiff's own telling, the alleged tort in this case—the unlawful trafficking—was "directly aimed" at the Airport in Cuba, not at the Miami International Airport in Florida.

Plaintiff has likewise failed to plead "relatedness." To satisfy this requirement, the plaintiff's claims must "arise out of or relate to" the defendant's contacts with the forum. *Aviation One of Fla., Inc. v. Airborne Ins. Consultants (PTY), Ltd.*, 722 F. App'x 870, 879 (11th Cir. 2018) (per curiam); *Bristol-Myers*, 137 S. Ct. at 1780. It is not enough for the contacts to be a "but-for" cause of the tort. *Oldfield*, 558 F.3d at 1222-23. Rather, there must be "a closer and more substantial causal relationship between the relevant contacts and the alleged tort," such that the defendant "should reasonably anticipate being haled into court there." *Fraser v. Smith*, 594 F.3d 842, 851, 852 (11th Cir. 2010). But an American plane's departure from a Florida airport is no more than a but-for cause of the "ongoing, unlawful trafficking in the Airport" of which Plaintiff complains. Compl. ¶ 26. And no airline would reasonably anticipate being haled into Florida court for alleged torts committed entirely in Cuba, merely because its planes departed from Florida. If it were otherwise, every airline would be subject to specific jurisdiction in the states from which its planes departed, in suits by non-passengers, for injuries occurring solely at the destination airport.[1]

II. PLAINTIFF DOES NOT SATISFY TITLE III'S PRECONDITIONS TO SUIT.

The Complaint also fails to satisfy four statutory preconditions to suit. The HBA provides that, "[i]n the case of property confiscated before March 12, 1996"—the HBA's date of enactment—"a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996." 22 U.S.C. § 6082(a)(4)(B). Plaintiff alleges that the Cuban government "confiscated the Airport and CAISA" "[i]n or around May 1959." Compl. ¶ 13. But Plaintiff has not sufficiently alleged that (1) he acquired ownership of his claim before March 12, 1996; (2) he was a U.S. national at the time he allegedly acquired ownership of his claim; (3) he has

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[1] In addition to or instead of the test used in many intentional-tort cases, the Eleventh Circuit may apply a "traditional purposeful availment analysis" that asks whether the defendant's contacts: "(1) are related to the plaintiff's cause of action; (2) involve some act by which the defendant purposefully availed himself of the privileges of doing business within the forum; and (3) are such that the defendant should reasonably anticipate being haled into court in the forum." *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1356-57 (11th Cir. 2013). As discussed above, American's contacts with Florida are unrelated to the cause of action, and are not such that American should reasonably anticipate being haled into Florida court for using an airport in Cuba.

a claim to the Airport; or (4) even if he has a claim to the Airport, the Airport was confiscated from a U.S. national and is therefore a proper subject of a Title III claim. Each of these defects independently requires dismissal.

First, Plaintiff has not sufficiently alleged that he "acquire[d] ownership of the claim before March 12, 1996." § 6082(a)(4)(B). Such ownership is a material element of the Title III right of action. *See* § 6082(a) (establishing liability to a United States national "who owns the claim"); § 6083 (governing "[p]roof of ownership of claims to confiscated property"). In an apparent attempt to satisfy this condition, Plaintiff claims that, "[a]s of the time of filing this lawsuit, [he] is the rightful owner of the Airport." Compl. ¶ 15. But alleging ownership of a claim at the time a lawsuit is filed is irrelevant. By the statute's own terms, it is Plaintiff's ownership of a claim "before March 12, 1996," that determines his ability to bring suit—and Plaintiff never alleges that he acquired his claim before that date. Beyond that, Plaintiff's bald assertion that he is "the rightful owner of the Airport," *id.*, is a "[t]hreadbare" and "conclusory statement[]," unsupported by any specific factual allegations, that "do[es] not suffice" to plead a central element of his Title III claim, *Iqbal*, 556 U.S. at 678.

Second, even assuming that Plaintiff had adequately pled that he acquired ownership of his claim before March 12, 1996, he does not allege that he was a United States national when he did so. The HBA does not permit "a United States national" to bring a Title III suit "unless *such national* acquires ownership of the claim before March 12, 1996." § 6082(a)(4)(B) (emphasis added). And as relevant here, the HBA defines "United States national" to mean "any United States citizen." § 6023(15)(A). The HBA therefore requires a section 6082(a)(4)(B) plaintiff to have been a U.S. citizen before March 12, 1996. This requirement was no slip of the congressional pen. Congress embedded a nearly identical requirement elsewhere in the HBA. In defining "property" for purposes of the HBA, for example, Congress included property used for residential purposes if "as of March 12, 1996 . . . the claim to the property is held by a United States national[.]" § 6023(12)(B). Similarly, Congress prohibited financing of transactions "involving any confiscated property the claim to which is owned by a United States national as of March 12, 1996." § 6033(a).

Plaintiff has not even attempted to establish that he meets this requirement. He asserts that he "is a United States citizen" as of today. Compl. ¶ 2. But he says nothing about when he became a U.S. citizen. This defect in his Complaint is fatal.

Third, Plaintiff has not established that he has a direct claim *to the Airport*, which is "the confiscated property" at issue here. § 6082(a)(4)(B). Plaintiff appears to allege that CAISA owned the Airport, and that his father owned CAISA shares. *See* Compl. ¶¶ 12-13. But under basic principles of corporate law, "[a]n individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets." *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003) (citing 1 W. Fletcher, Cyc. Corp. § 31 (rev. ed. 1999)); *see also* J. Cox & T. Hazen, Treatise on the Law of Corporations § 7:2 (3d ed. 2010). This means that (at most) Plaintiff acquired a claim to ownership of his father's CAISA shares, not the Airport. As a result, for purposes of Title III, Plaintiff holds (at most) a right of action regarding alleged trafficking in CAISA shares—not trafficking in the Airport.

This straightforward application of settled corporate law is supported by the fact that Congress drafted the HBA with corporate formalities in mind. For example, Congress defined "United States national"—the potential holder of a Title III right of action—to include any "legal entity which is organized under [domestic law], and which has its principal place of business in the United States." 22 U.S.C. § 6023(15)(B). Congress similarly defined "foreign national" to mean "any corporation, trust, partnership, or other juridical entity" not organized under domestic law. *Id.* § 6023(8)(B). Congress also referred to "shares of capital stock of nationals of the United States," *id.* § 1643m(b); "a corporate officer, principal, or shareholder with a controlling interest of an entity," *id.* § 6091(a)(3); and "entities which are 50 percent or more beneficially owned by United States citizens," *id.* § 6065(b)(2)(D). And, perhaps most significantly, in section 6023(1), Congress expressly incorporated by reference 28 U.S.C. § 1603(b), a provision that contains "indicia that Congress had corporate formalities in mind." *Dole Food Co.*, 538 U.S. at 474.

Congress's recognition of corporate formalities in the HBA parallels its similar recognition in the closely related context of the Foreign Claims Settlement Commission (Commission). *See* 22 U.S.C. § 1643b(a). The Commission has authority to resolve expropriation claims by U.S. nationals against the Cuban government. *Id.* The statutes governing those proceedings expressly recognize claims based on ownership interests in legal entities, and provide that the value of such claims is based on the ownership interests in the legal entities themselves—not the value of the underlying assets. *See id.* § 1643d(b), (d). These features of Commission proceedings are particularly relevant because Congress tied the

HBA to the Commission. Dozens of references to the Commission appear throughout the HBA, including in the Title III liability provisions, *id.* § 6082, and the proof-of-ownership provisions, *id.* § 6083; and Congress amended the International Claims Settlement Act through the HBA, *see id.* §§ 1643*l*, 1643m. It would make little sense to conclude that Congress intended corporate formalities to apply in Commission proceedings but not in Title III actions. *See In re Coffman*, 766 F.3d 1246, 1250 (11th Cir. 2014) (statutes *in pari materia* should be interpreted together, as though they were one law).

In *Garcia-Bengochea v. Carnival Corp.*, Judge King disagreed, holding principally that "there is no indication in [the HBA's] text that Congress was legislating with corporate formalities in mind." 2019 WL 4015576, at *5 (S.D. Fla. Aug. 26, 2019). But Judge King's opinion did not expressly consider the corporate-formalities provisions discussed above, or section 1643d. Judge King also suggested that, if a shareholder cannot be considered to own a claim to a company's property, that would "require the Court to delete the word 'claim' from the phrase 'owns the claim to such property,' and effectively rewrite Helms-Burton to cover only those plaintiffs who 'own such property.'" *Id.* at *6. Respectfully, that is incorrect. The statutory phrase "owns the claim to such property" does not change when corporate formalities are recognized; rather, the identity of the relevant owner changes depending on the property at issue. Here, for example, taking Plaintiff's allegations as true, CAISA owns the claim to the Airport, and Plaintiff (at most) owns a claim to CAISA shares. Judge King further found it "implausible" that Congress would have denied shareholders the ability to bring Title III claims that a nationalized company itself could not bring, because that would mean that "*no one*" could bring such claims. *Id.* But, as explained above, the HBA's corporate-formalities provisions and section 1643d clearly establish that Congress intended to preserve corporate formalities in Title III of the HBA. Moreover, according to Plaintiff's Complaint, Vilaboy decided to create CAISA as a Cuban corporation and purchase the Airport in CAISA's name, rather than purchasing the airport in his own name or incorporating CAISA elsewhere. Having taken advantage of the corporate form to limit his personal liability, and having chosen to incorporate under Cuban law, it is not implausible for Congress to have required Vilaboy (and his alleged heirs) to live with the consequences of those decisions.

Fourth, even if Plaintiff had established that he has a direct claim to the Airport that he acquired as a United States citizen before March 12, 1996, he has not established that the Airport is the proper subject of a Title III action, because he has not alleged that it was confiscated from a U.S. national. Section 6082(a)(4)(B) permits a plaintiff to sue on a claim to "confiscated property." The HBA generally defines "property" to include any real property and interest therein, § 6023(12)(A), and "confiscated" to refer to the Cuban government's expropriation and nationalization of property without providing compensation, § 6023(4). But despite that broad language, Congress also repeatedly emphasized that the HBA only covers property confiscated *from United States nationals*. *See* § 6022(3) (to provide for national security in the face of "theft of property *from United States nationals*" (emphasis added)); § 6022(6) ("to protect *United States nationals* against confiscatory takings" (emphasis added)); § 6081(2) ("[t]he wrongful confiscation or taking of property *belonging to United States nationals*" (emphasis added)); § 6081(5) ("property and assets some of which were confiscated *from United States nationals*" (emphasis added)); § 6081(6)(B) ("to protect the claims of *United States nationals who had property wrongfully confiscated*" (emphasis added)). Indeed, Congress's final express finding in Title III states that, "[t]o deter trafficking in wrongfully confiscated property, *United States nationals who were the victims of these confiscations* should be endowed with a judicial remedy in the courts of the United States." § 6081(11) (emphasis added). Consistent with that limitation, Title III is entitled "Protection of Property Rights of United States Nationals." Given this ample and clear textual evidence, it is unsurprising that the Eleventh Circuit has expressed doubt about whether property owned by Cuban nationals at the time of confiscation can be the subject of a Title III action. *See Glen*, 450 F.3d at 1255 n.3 (Cuban property "at issue in this litigation was owned by Cuban nationals at the time of its expropriation and thus may not be the proper subject of a trafficking claim under [Title III]").

On the facts as pleaded by Plaintiff, the Airport cannot be the subject of a Title III action. Plaintiff expressly alleges that Cuban nationals owned the Airport at the time of confiscation. Compl. ¶¶ 13, 20. The Airport was therefore not confiscated from United States nationals. Moreover, even if the Title III right of action could be interpreted to cover property confiscated from Cuban nationals who later became United States citizens, Plaintiff has not

alleged that his father ever became an American citizen. As a result, Plaintiff has not alleged that the Airport is the proper subject of a Title III action.

III. PLAINTIFF DOES NOT ADEQUATELY PLEAD THAT AMERICAN "TRAFFICS" IN CONFISCATED PROPERTY.

Even if this Court were to set aside the constitutional and statutory defects in Plaintiff's Complaint and reach the merits, dismissal would still be necessary because Plaintiff fails to plead the elements of a claim under Title III of the HBA.

A. Plaintiff's Complaint Does Not Plead The Trafficking Element of a Title III Claim.

Title III creates a cause of action against a defendant who "[1] traffics [2] in property [3] which was confiscated by the Cuban Government." 22 U.S.C. § 6082(a). A plaintiff must plead each of these material elements to state a claim. But Plaintiff fails to plead facts that, if proved, would satisfy the HBA's definition of "traffics."

As relevant here, "a person 'traffics' in confiscated property if that person knowingly and intentionally … engages in a commercial activity using or otherwise benefiting from confiscated property … without the authorization of any United States national who holds a claim to the property," unless that person engages in one of four categories of activity that Congress expressly chose not to prohibit—including "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." § 6023(13). Thus, by definition, a person does not "traffic" in confiscated property by lawfully traveling to Cuba or providing carrier services that facilitate that travel. Accordingly, a complaint seeking to plead "trafficking" under Title III of the HBA must plausibly allege that the defendant's "us[e]" of the confiscated property fits within Congress's definition of "traffics."

Plaintiff's Complaint does not satisfy this requirement. The Complaint fails to allege facts showing that American's use of the Airport is not "incident to lawful travel to Cuba" and "necessary to the conduct of such travel." § 6023(13)(B). Plaintiff's principal assertion is simply that American has "used the Airport" in connection with its flights to Cuba. Compl. ¶ 16. But that basic allegation does not even purport to establish that American's use of the airport was unlawful—particularly in the face of the OFAC regulations expressly permitting the provision of travel and carrier services to Cuba. *See* 31 C.F.R. §§ 515.572(a), 515.560(a). Plaintiff also cursorily alleges, "[o]n information and belief," that "defendants

transport cargo and passengers in violation of applicable Cuban Assets Control Regulations (CACR) promulgated by [OFAC]." Compl. ¶ 18. But a plaintiff's pleading obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Plaintiff provides *no* factual allegations about the putative circumstances under which American allegedly transported passengers and cargo in violation of OFAC regulations, or which regulations were allegedly violated. He does not even say whether the alleged OFAC violations were committed by the passengers or by American. His allegations are thus patently insufficient under *Iqbal* and *Twombly*.

B. Lawful Travel Is Not An Affirmative Defense.

It is no answer to these fatal pleading defects to say that lawful travel is an affirmative defense. The default rule in litigation is that plaintiffs must plead and prove "the essential aspects of their claims." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005). Defendants bear the burden of proving an affirmative defense only if Congress assigns them that burden. *Id.* (plaintiff bears burden "[a]bsent some reason to believe that Congress intended otherwise"). And whether Congress has done so is a question of legislative intent that must be resolved using the tools of statutory interpretation. *Id.*

Courts have on occasion inferred that Congress intends to shift the burden to defendants when it allows them to prove a "justification" for or "exemption" from liability "under a special exception to the prohibitions of a statute." *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *see also McKelvey v. United States*, 260 U.S. 353, 357 (1922) (same principle for criminal cases). But any inference drawn from the fact that a statute creates an "exception" to its prohibitions "is only one interpretive aid among several that should be applied." *United States v. Prentiss*, 256 F.3d 971, 979 (10th Cir. 2001) (en banc). That is why numerous cases have declined to find that provisions that could be construed as "exception[s] to the prohibitions of a statute" are affirmative defenses. *See, e.g.*, *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1110 (11th Cir. 2008) (plaintiff must prove that disclosure of personal motor vehicle information does not come within any of 14 exceptions under the Driver Privacy Protection Act (DPPA)); *Prentiss*, 2256 F.3d at 974 (for crime committed in Indian country, prosecution must negate exception for offenses "committed by one Indian against the person or property of another

Indian"); *United States v. Vuitch*, 402 U.S. 62, 68 (1971) (for abortion offense, prosecution must negate exception for procedures "necessary for the preservation of the mother's life or health"). The touchstone of the inquiry thus remains congressional intent. Various indicators of intent can support a conclusion that a statutory carve-out is an element of a claim. And if a statute is ultimately "silent as to who bears the burden of proof, [courts] resort to the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Thomas*, 525 F.3d at 1110.

Here, two key features of the HBA compel the conclusion that the absence of "lawful travel" is an integral component of the "trafficking" element of a Title III claim that a plaintiff must plead and prove. *First*, "traffics" is plainly a material element of a Title III cause of action, and the lawful-travel provision is part of the definition of "traffics" that appears in a separate section—not part of any proviso listing exceptions to or exclusions from the cause of action itself. *Second*, Title III must be interpreted in light of, and reconciled with, the broader statutory framework governing trade with Cuba, through which Congress has authorized travel and the provision of travel services to Cuba. And in light of that framework, Congress cannot reasonably be understood to have shifted the burden to defendants to prove lawful travel under Title III.

First, "traffics" is one of the material elements of the Title III cause of action: a plaintiff must plead and prove that the defendant "traffics in property which was confiscated by the Cuban government." 22 U.S.C. § 6082(a)(1). There is no reference in this liability provision to any exclusion or carve-out from the term "traffics." It is only elsewhere, in the separate definitions section, that Congress defined "traffics" to include certain conduct and exclude other conduct like "lawful travel." 22 U.S.C. § 6023(13). This suggests that Congress intended to require plaintiffs to plead that the defendant's conduct fits within the defined meaning of "traffics" as a whole.

Consistent with this conclusion, the Eleventh Circuit has held that where, as here, an element is a "straightforward" part of an offense, the burden of pleading and proving that element rests with the plaintiff, even if doing so requires the plaintiff to negate applicable statutory carve-outs. In *Thomas*, the court analyzed the Driver Privacy Protection Act (DPPA), which sets forth three elements of a cause of action for misusing personal information contained in the records of state motor vehicles departments. 525 F.3d at 1111.

One element is that the defendant's alleged conduct was "not permitted" by a separate provision of the statute that generally prohibits disclosure of such information, but enumerates fourteen exceptions to this broad prohibition. *Id.*; *see also* 18 U.S.C. § 2721. The court concluded that the plaintiff, not the defendant, bore the burden of proving the "not permitted" element, because that element was a "straightforward" part of the elements of the offense. 525 F.3d at 1111. So too here: the "traffics" element is a straightforward part of a Title III claim, even if it refers to a separate section that lists prohibited conduct and carves out some permitted activities.

Moreover, the "lawful travel" exception to "traffics" closely tracks other exclusions that are "so incorporated with the language defining the offence that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted." *Prentiss*, 256 F.3d at 974, 979 (quoting *United States v. Cook*, 84 U.S. 168, 173-74 (1872)); *see also Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1336 & n.8 (10th Cir. 2017). In *Prentiss*, for example, the court analyzed a federal statute that created federal criminal liability for arson and other crimes committed in "Indian country," but provided an exception for crimes committed by "one Indian against … another Indian." 256 F.3d at 979. Even though "the exception [was] set forth in a subsequent … section of the statute," the court concluded that "the Indian/non-Indian statuses of the victim and the defendant are essential elements of the crime of arson in Indian country," and thus had to form part of the government's affirmative case. *Id.* at 979-80. As in *Prentiss*, the concept of "traffics" cannot be accurately described if the statutory carve-outs, including for lawful travel, are omitted.[2] The "lawful travel" carve-out is an integral part of the definition of "traffics" itself: "[t]he term 'traffics' *does not include*" uses of property incident to lawful travel, 22 U.S.C. § 6023(13)(B) (emphasis added). The statute does not provide that otherwise-unlawful trafficking is permissible if it relates to lawful travel; rather, it says that if a use of property is incident to lawful travel, it is not trafficking in the first place.

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[2] Indeed, one of the other statutory carve-outs from the HBA's definition of "traffics," which permits "transactions and uses of property by a person who is both a citizen . . . and a resident of Cuba," § 6023(13)(B), closely resembles the exception at issue in *Prentiss*.

The HBA also lacks any of the evidence suggestive of an affirmative defense found in other cases. For example, in *Morton Salt*, the Supreme Court noted that the Clayton Act included a provision expressly "impos[ing] the burden of showing justification" for price discrimination on defendants. 334 U.S. at 45; *see* 15 U.S.C. § 13(b). And the accompanying Senate Report expressly stated that defendants would have "the burden of showing" that such discrimination was justified. 334 U.S. at 45. Here, in contrast, the HBA contains no express provision and no legislative history instructing, much less suggesting, that Congress intended defendants to bear the burden of proving lawful travel. Given this silence, the default presumption is that the burden falls on plaintiffs. *Thomas*, 525 F.3d at 1110.

Second, shifting the burden to defendants to plead lawful travel would upend the longstanding statutory framework governing Cuban trade, creating needless conflict between the HBA and other statutes through which Congress has authorized the President to permit lawful travel to Cuba. There is no indication whatsoever that Congress intended such a result. Indeed, *avoiding* that possibility is the logical reason why Congress decided to "remove any liability" for "lawful travel" by carving it out from the definition of "traffics" when it enacted the HBA. H.R. Rep. No. 104-468, at 44 (1996). This statutory context distinguishes the HBA from other cases in which courts concluded that Congress intended a statutory exception to be treated as an affirmative defense.

The statutory framework dates back to at least 1961, when Congress delegated to the President "broad authority" to establish the boundaries of a trade embargo against Cuba that would (among other things) restrict the scope of lawful travel to Cuba. *Regan v. Wald*, 468 U.S. 222, 225 & n.1 (1984) (citing Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a); Trading With the Enemy Act of 1917 (TWEA), 50 U.S.C. § 4305(b)). For decades, under Congressional authority delegated in TWEA and other statutes, OFAC has regulated trade with Cuba and travel to Cuba under the CACR. *Id.* at 226 & n.2; *see* 31 C.F.R. pt. 515.

Starting in 1977, the regulations provided a "general license" authorizing certain travel to Cuba. *Regan*, 468 U.S. at 227; *see* 42 Fed. Reg. 25499-500 (May 18, 1977). Subsequent Presidential administrations expanded and contracted the authority for lawful travel—all pursuant to authority delegated by Congress. *See Regan*, 468 U.S. at 229 (amendments in 1982 "curtail[ed] the general license permitting travel-related economic transactions"). When Congress enacted the HBA in 1996, the regulations authorized travel to Cuba by U.S.

Government officials, journalists, and persons "traveling to visit close relatives in Cuba." 60 Fed. Reg. 54196 (Oct. 20, 1995). Today, the regulations authorize travel to Cuba for 12 enumerated purposes, such as journalism, education, religious activities, and specified humanitarian projects. 31 C.F.R. § 515.560. With respect to airlines, the current regulations also authorize travel companies "to provide travel services in connection with travel-related transactions involving Cuba," *id.* § 515.572(a)(1), and "to provide carrier services to, from, or within Cuba in connection with travel or transportation, directly or indirectly, between the United States and Cuba of persons, baggage, or cargo," *id.* § 515.572(a)(2)(i). These regulations—authorized by Congress and the President—establish the lawfulness of providing "carrier services" between the United States and Cuba. Countless travelers and their travel providers have relied on these regulations to engage in lawful travel.[3]

It would have been senseless for Congress to authorize travel to Cuba for, e.g., family visits and educational, religious, and humanitarian purposes, while at the same time permitting plaintiffs to sue for damages based on that very same lawful travel. By the same token, it would have made no sense for Congress to allow HBA plaintiffs to drag defendants into court, subject them to onerous discovery, and force them to prove that they were traveling lawfully, while at the same time authorizing the President to permit lawful travel, and allowing the public to rely on regulatory designations of lawfulness. Indeed, given the backdrop of statutes and regulations permitting lawful travel to Cuba, if Congress had truly intended to shift the burden to travel providers, one would have expected a clear statement to this effect in the HBA, or at minimum some congressional debate about, or reference to, the issue. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 63 (2004) ("an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill"). But neither the text of the HBA nor its legislative history contains any such statement or discussion.

In interpreting a statute, courts should harmonize it with related statutory schemes. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 665 (2007) (adopting

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[3] Like OFAC, the U.S. Department of Transportation has also authorized American to provide "scheduled passenger services to Havana." DOT, Order 2016-8-38, at 2, Dkt. DOT-OST-2016-0021 (Aug. 31, 2016).

interpretation of related statutes that "harmonizes the statutes"); *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1351 (S.D. Fla. 2016) ("statutes relating to the same subject matter should be construed harmoniously"). The way to harmonize the HBA with TWEA and the CACR is to recognize that Congress intended to preserve lawful travel to Cuba and therefore carved it out of the HBA altogether, leaving the burden on plaintiffs to plead and establish that a defendant's travel was unlawful, and thus a potential basis for liability under the Act. That understanding gives full effect to the President's statutory authority to permit lawful travel, and enables the public to rely on OFAC regulations without being subjected to the harassment of discovery in meritless lawsuits—but still leaves plaintiffs able to recover for legitimate claims under the HBA, appropriately assigning them the default burden of pleading all elements of their claim.

C. *Garcia-Bengochea* and *Havana Docks* Were Wrongly Decided.

As noted earlier, two courts in this District recently concluded that the HBA's lawful-travel provision is an affirmative defense. *See Garcia-Bengochea*, 2019 WL 4015576; *Havana Docks Corp. v. Carnival Corp.*, No. 19-cv-21724 (S.D. Fla. Aug. 28, 2019) (Dkt. 47). Respectfully, these conclusions were mistaken. To begin, neither court even discussed the statutory context within which the HBA was enacted—let alone confronted the fact that holding lawful travel to be an affirmative defense would be inconsistent with other parts of the statutory framework governing trade with Cuba.

Those courts' analysis of the HBA's text was also flawed. Both courts relied heavily on the fact that HBA's definition of "traffics" is divided into two paragraphs, the first of which states that, "except as provided" in the second, certain conduct shall constitute trafficking, and the second of which lists certain excluded conduct. *See Garcia-Bengochea*, 2019 WL 4015576, at *3; *Havana Docks*, Dkt. 47 at 4. But the fact that a statute labels something an "except[ion]" is not dispositive of whether Congress intended to create an affirmative defense. *See supra* at 12-13. And in the case of the HBA, Congress's decision to bifurcate the definition of "traffic" does not evince a "clear intent" to shift the burden to defendants to prove lawful travel. *Garcia-Bengochea*, 2019 WL 4015576, at *3; *Havana Docks*, Dkt. 47 at 4. As discussed earlier, the exclusion of lawful travel from "traffic[king]" appears in the definition of "traffics" itself, not as an exception to the statute's liability provision. There is thus no basis to infer that Congress intended the full definition of "traffics" to be anything other than

an element of a plaintiff's affirmative case. Moreover, the DPPA—which *Thomas* concluded did *not* create an affirmative defense—contains the very same phrase and is structured identically to the HBA in this respect. *See* 18 U.S.C. § 2721(a) (prohibiting disclosure of personal information "except as provided in subsection (b)").

The two courts attempted to distinguish *Thomas* by reasoning that, while the HBA "frames the travel provision as an exception to otherwise unlawful conduct," the DPPA only describes "lawful conduct that must be negated by the plaintiff to state a claim." *Garcia-Bengochea*, 2019 WL 4015576, at *3; *Havana Docks*, Dkt. 47 at 6-7. In fact, however, the DPPA contains a broad *prohibition* on disclosure of personal information, followed by a section enumerating permissible uses, and a separate liability provision that references the concept of "permissible uses." 18 U.S.C. §§ 2721(a)-(b), 2724. The HBA, similarly, contains a definitional provision setting forth particular uses of confiscated property that constitute trafficking, followed by a section enumerating certain uses that do not constitute trafficking, and a separate liability provision that references "trafficking." The HBA and the DPPA are thus structurally similar, and *Thomas* is fully on point.

The two courts also suggested that lawful trafficking is an affirmative defense because it "requires proof of new facts." *Garcia-Bengochea*, 2019 WL 4015576, at *3; *Havana Docks*, Dkt. 47 at 5. But the Eleventh Circuit rejected that argument in *Thomas*, noting that the Supreme Court has been "cautious in its application" of the idea that courts should not require litigants to establish facts within the knowledge of their adversary. 525 F.3d at 1113. The *Thomas* court concluded that facts establishing that a defendant had not used personal information for one of the permissible purposes listed in the DPPA were not "so peculiarly within the knowledge of the defendant as to cause a shifting of the burden of proof." *Id.* The same is true of the exclusions from the HBA's definition of "traffics." Indeed, a plaintiff need only read the OFAC regulations to learn that they authorize carriers to provide lawful travel to Cuba.

D. It Is Apparent From the Face of the Complaint That the Actions Plaintiff Challenges Were Incident to Lawful Travel.

Finally, even if lawful travel were an affirmative defense, a "claim that is facially subject to an affirmative defense … may be dismissed under Rule 12(b)(6)" if the defense is apparent from the facts alleged, coupled with the governing law. *LeFrere v. Quezada*, 582

F.3d 1260, 1263 (11th Cir. 2009) (reaching qualified-immunity defense on motion to dismiss); *see also, e.g.*, *Kadiyala v. Pupke*, 2019 WL 1491735, at *2 (S.D. Fla. 2019) (dismissing claim on motion to dismiss based on statute of limitations defense).

Plaintiff's Complaint is facially subject to the "lawful travel" provision in the HBA's definition of "traffics." That provision applies to "uses of property incident to lawful travel to Cuba, to the extent that such … uses of property are necessary to the conduct of such travel." 22 U.S.C. § 6023(13)(B). As explained above, the CACR establishes that "[p]ersons subject to U.S. jurisdiction are authorized to provide" travel and carrier services in connection with travel to Cuba otherwise authorized by OFAC. 31 C.F.R. § 515.572(a)(1), (a)(2)(i). The basis for Plaintiff's claim is that when American flies to Cuba, it uses "José Martí International Airport, … Cuba's main domestic and international airport." Compl. at 1. It is plain on the face of the Complaint that such use of the airport is pursuant to the OFAC regulation described above, and is thus "incident" and "necessary" to "the conduct of [lawful] travel" to Cuba. Plaintiff cannot plausibly claim otherwise.

Garcia-Bengochea incorrectly rejected this argument on grounds that the OFAC regulation is "outside the four corners of the Complaint." 2019 WL 4015576, at *4. But administrative regulations are public laws and, like any statute or reported case, are subject to judicial notice. *See* 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed."). Nor does it matter that the OFAC regulation is not cited in the Complaint. In cases addressing limitations defenses, for example, courts do not ask whether the complaint cites the relevant limitations period; they merely ask whether the relevant factual allegation in the "complaint shows on its face that the limitation period has run." *AVCO Corp. v. Precision Air Parts, Inc.*, 676 F.2d 494, 495 (11th Cir. 1982). Finally, the conclusion in *Havana Docks*, Dkt. 47 at 8, that lawful travel is an "issue of fact in dispute" is inapplicable here because, as explained above, Plaintiff has failed to plausibly allege that American's use of the airport is not incident to lawful travel.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice.

Date: November 26, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 26, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record for the parties.

/s/ Ricardo H. Puente
Ricardo H. Puente