UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

Case No. 19-cv-21724
BLOOM/McAliley

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

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

Defendants.
_____/

Case No. 19-cv-23588
BLOOM/Louis

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

ROYAL CARIBBEAN CRUISES, LTD.,

Defendant.
_____/

Case No. 19-cv-23590
BLOOM/Louis

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

NORWEGIAN CRUISE LINE HOLDINGS LTD.,

Defendant.
_____/

Case No. 19-cv-23591
BLOOM/Louis

MOTION FOR RECONSIDERATION OF TWO ASPECTS OF COURT'S ORDER ON DEFENDANTS' MOTION TO CONFIRM INTEREST CALCULATION PURSUANT TO 22 U.S.C. § 6082(a)(1)(B)

Defendants Carnival Corporation, MSC Cruises SA, MSC Cruises SA Co., MSC Cruises (USA), Inc., Royal Caribbean Cruises, Ltd., and Norwegian Cruise Line Holdings, Ltd. (collectively, the "Defendants") respectfully move for reconsideration of two aspects of the Court's Order on Defendants' Motion to Confirm Interest Calculation. (D.E. 428) (the "Interest Order"). In support of this Motion, Defendants submit this memorandum of law.

INTRODUCTION

Defendants respectfully seek reconsideration of two aspects of the Court's Order on Defendants' Motion to Confirm Interest Calculation:

1. Applicable Interest Rate: While Defendants continue to believe that the correct interest rate is determined as of the "week preceding[] the date of judgment," as is stated in the plain language of 28 U.S.C. § 1961(a), Defendants submit that the Court's reasoning in the Interest Order would require application of the interest rate for the week the Complaint in each action was filed, rather than applying multiple rates over the 1960 – 2019 period.
2. Rebuttable Presumption: Defendants submit that 22 U.S.C. § 6082(a)(2) establishes a Rebuttable Presumption that "the amount for which a person is liable under clause (i) of paragraph (1)(A)" is the value of the property trafficked in as set forth in the certified claim ***plus interest***, and that the Court's contrary reading (which neither party advocated for) produces untenable results that are incompatible with the text and intent of the statute, and requires the jury to compare apples and oranges when assessing present-day values against decades-old values from the time of confiscation.

In seeking reconsideration on these two narrow issues, Defendants do not waive or abandon the arguments and positions raised in their Motion to Confirm Interest Calculation (D.E. 398).

ARGUMENT

I. The Court's reasoning supports application of interest as of the week the Complaint was filed.

As this Court's Interest Order explains, interest under Title III is determined by 22 U.S.C. § 6082(a)(1)(B), which states:

> Interest under subparagraph (A)(i) shall be at the rate set forth in section 1961 of title 28, computed by the court from the date of confiscation of the property involved to the date on which the action is brought under this subsection.

In turn, 28 U.S.C. § 1961 provides a rate in paragraph (a), stating:

> Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding[] the date of the judgment.

28 U.S.C. § 1961(a).

Interpreting these two provisions, the Court's Interest Order held that the interest rate for Title III litigation should not be determined using "the calendar week preceding the date of the judgment," despite what is written in the statute. The Court reasoned that doing so would "conflate pre-filing interest and prejudgment interest," because it would "tether the applicable interest rate to a judgment that has not yet been rendered." Interest Order at 7. The Court further wrote that doing so would make it impossible to determine interest before trial, as contemplated by 22 U.S.C. § 6082(a)(2). *Id.* at 8–9. Instead, the Court determined that "the proper rate to be applied" in Title III cases "is the weekly average 1-year constant maturity Treasury yield for each individual week over the period between the date of confiscation and the date Plaintiff brought each of these actions against each Defendant." *Id.* at 9. Notably, this rate is not the one advanced by either Plaintiff or

Defendants, or specified in the statute. *Id.* at 9 & n.5 (explaining that the Court would not apply the "effective rate" proffered by Plaintiff).

Defendants respectfully request that the Court reconsider this final conclusion, since the Court's concerns do not require departing so dramatically from the single, fixed-rate approach mandated by the plain text of § 1961(a). Instead, the Court's reasoning should lead to application of the interest rate of the week that the complaint was filed in a given action. Such an approach would avoid "conflat[ing] pre-filing interest and prejudgment interest," as it would "tether the applicable interest rate" to the date the case was filed, rather than "a judgment that has not yet been rendered." Interest Order at 7. The approach also harmonizes with the Rebuttable Presumption of § 6082(a)(2), because the interest rate would be fixed on the date the Complaint is filed, allowing parties to compute interest well before any determination must be made about the Presumption. *See* Interest Order at 8–9.

Moreover, applying the single interest rate in effect at the time of filing is consistent with the approach of § 1961(a)—incorporated in Title III—which contemplates the use of only a single interest rate that is then applied over a period of time. Specifically, in the post-judgment context governed by § 1961(a), interest for every week between the date of judgment and the ultimate date of collection is set at a single, fixed rate of interest, based on the single rate in effect at the time of judgment. In the context of pre-filing interest, the closest analogous approach is to use the single, fixed rate of interest in effect at the time the suit was brought. By contrast, the multiple-rate approach adopted by the Court in the Interest Order has no analogue in § 1961(a), and results in a highly burdensome calculation involving thousands of different weekly interest rates. Finally, caselaw also supports the use of the rate from the week the Complaint was filed, at least in the context of prejudgment interest. *E.g.*, *Am. Home Assur. Co. v. Weaver Aggregate Transp., Inc.*, 89

F. Supp. 3d 1294, 1310 (M.D. Fla. 2015) (citing *Bel–Bel Intern. Corp. v. Cmty. Bank of Homestead*, 162 F.3d 1101, 1110 (11th Cir.1998)); *see also Venture Indus. Corp. v. Autoliv ASP, Inc.*, 196 Fed. Appx. 894 (Fed. Cir. 2006) ("In this case, the proper date to calculate prejudgment interest is the date of filing the complaint").

II. <u>The Rebuttable Presumption is based on the certified claim with interest.</u>

As this Court's Interest Order recognized, Title III creates a Rebuttable Presumption in favor of certified claims, stating:

> **Presumption in favor of the certified claims**
>
> There shall be a presumption that the amount for which a person is liable under clause (i) of paragraph (1)(A) is the amount that is certified as described in subclause (I) of that clause. The presumption shall be rebuttable by clear and convincing evidence that the amount described in subclause (II) or (III) of that clause is the appropriate amount of liability under that clause.

22 U.S.C. § 6082(a)(2). In the Interest Order, however, the Court held that the Rebuttable Presumption establishes that "the amount for which a person is liable" is the amount of the certified claim *without* interest (Interest Order at 5–6)—even though § 6082(a)(1)(A)(i)(I) plainly contemplates that the certified claim amount should be awarded *with* interest. Neither party argued in support of this result; indeed, the Court recognized that both parties believed that any jury would need to be informed of interest in this case to apply the Rebuttable Presumption. Interest Order at 4. Defendants respectfully request that the Court reconsider this ruling, which is inconsistent with the plain text and intent of the statute. The reasons are several.

First, the statutory text establishes a Rebuttable Presumption that "the amount for which a person is liable under clause (i) of paragraph (1)(A) is the amount that is certified ***as described in*** subclause (I) of that clause." § 6082(a)(2) (emphasis added). The phrase "as described in" modifies the preceding text, calling not for "the amount that is certified," but rather, "the amount that is certified as described in [§ 6082(a)(1)(A)(i)(I)]," which plainly includes interest: "the amount, if

any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, ***plus interest***." 22 U.S.C. § 6082(a)(1)(A) (emphasis added). Indeed, looking only to the "amount that is certified" fails to give effect to the phrase "as described in subclause (I)," contrary to the text of the statute. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (finding it is a court's duty "to give effect, if possible, to every clause and word of a statute") (citations omitted); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (citation omitted).

Thus, the presumptive amount is "as described in subclause (I)," and the Court need not (indeed, should not) look further than the full, plain text of subclause (I), including the phrase "plus interest." *See United States v. Silva*, 443 F.3d 795, 797–98 (11th Cir. 2006) ("If the statute's meaning is plain and unambiguous, there is no need for further inquiry"); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (where "the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (internal quotation marks and citation omitted).

Second, interpreting § 6082(a)(2) as creating a presumption of liability without interest is inconsistent with multiple other damages provisions of Title III, under which measures of present value are compared against measures of past value ***only after adding interest to the past value***, thereby accounting for the time value of money. *See* A. Scalia & G. Garner, Reading Law 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible"); *F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959) (holding for statutory interpretation of a legislative scheme, the Court's "task is to fit, if possible, all parts into an harmonious whole").

For example, under § 6082(a)(1)(A)(i)(III), the factfinder must compare "the current value of the property" against "the value of the property when confiscated plus interest." This sensibly includes interest in the past value before comparing it against the present value. The certified claim, of course, is a different way of measuring the value of the property when confiscated (it certifies the claimant's loss as a result of the confiscation), and there is no logical reason why Congress would have wanted that particular value to be compared differently than the one in subclause (III).

Third, and relatedly, creating a Rebuttable Presumption without interest produces results that are plainly inconsistent with the statutory intent. *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (rejecting a statutory interpretation that "would produce an absurd and unjust result which Congress could not have intended") (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)). As described above, for example, the interpretation unfairly requires comparing a property's current value against its prior value at the time of confiscation—perhaps six decades earlier—without interest to account for the passage of time, which is akin to comparing apples and oranges with little instructive benefit. *Timken Co. v. United States*, 630 F. Supp. 1327, 1337 (Ct. Int'l Trade 1986) (resolving an ambiguity in statutory interpretation by adopting the interpretation that "is most likely to ensure that the [entity] 'makes the fair value comparison on a fair basis—comparing apples with apples.'") (citing *Smith-Corona Group v. United States*, 713 F.2d 1568, 1578 (Fed.Cir.1983)); *In re 7th Ave. Rest. Grp. Holdings, LLC*, 2007 WL 4355981, at *5 (Bankr. S.D.N.Y. Dec. 12, 2007) (rejecting a contract interpretation of language regarding a formula's application on the basis "its literal application leads to absurd results that the parties could not have intended" by "mixing apples and oranges" in a comparison of financial interests).

Worse, if interest were ignored for purposes of the Rebuttable Presumption, the jury would be unable to fairly evaluate the apples-to-apples comparison of two confiscation-era values. After

all, as this Court explained, "in a case in which a plaintiff seeks to prove the fair market value calculated at the time of confiscation, a jury *would* be required to know the amount of interest." Interest Order at 8. In this scenario, the jury would "be tasked with determining whether the value of the property in which Defendants are alleged to have trafficked, when confiscated plus the amount of pre-filing interest is greater than the amount of the certified claim" without interest. *Id.* In other words, the jury would be presented with two measurements of the value at the time of confiscation: one with interest, and the supposedly "presumptive" value without interest. This gets the analysis backwards: the proper comparison between two confiscation-era values would either include or omit interest for *both* such values, whereas a proper comparison between the present value and the confiscation-era value would incorporate interest in the latter, to account for the passage of time. The Interest Order's interpretation thus results in comparisons of inapposite amounts that would be neither reasonable nor instructive for a jury, and should be avoided. *Smith-Corona Group*, 713 F.2d at 1578 ("One of the goals of the statute is to guarantee that the administering authority makes the fair value comparison on a fair basis—comparing apples with apples… We do not believe that the statute requires the Secretary to compare both apples and oranges with only apples. Rather, it expressly requires a fair comparison.").

Additionally, the Interest Order's interpretation establishes that, in all cases involving a certified claim, the Plaintiff must overcome a rebuttable presumption that the "amount for which a person is liable" under § 6082(a)(1)(A)(i)(I) ***does not*** include interest. Under the Court's interpretation, if the presumption is not rebutted, then by definition, the defendant is liable for the presumptive amount—which does not include interest.[1] This appears to be in conflict with the

[1] Indeed, under this interpretation, the plaintiff could never be awarded the amount in subclause (I), the certified claim plus interest. Either the plaintiff successfully rebuts the presumption and is awarded the amount described in subclause (II) or (III); or the plaintiff does not successfully rebut

plain text of § 6082(a)(1)(A)(i)(I), which contemplates that, in at least some cases, defendants would be liable for the amount of the certified claim plus interest, which is impossible under the Court's interpretation.

In short, § 6082(a)(2) must be understood to establish a presumption that the amount of liability is the amount of the value of the property trafficked in as set forth in the certified claim ***plus interest***, just as described in 6082(a)(1)(A)(i)(I), and therefore any jury in this matter must be told of this amount when determining whether the presumption has been rebutted. A contrary interpretation, which neither side advocated for in their briefing on the Motion to Confirm Interest Calculation, is at odds with the text of the statute and produces results that are irreconcilable with the plain language and intent of the Helms-Burton Act.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant this Motion for Reconsideration and order (1) that the interest rate be set at a rate equal to the weekly average 1-year constant maturity Treasury yield for the calendar week the complaint was filed; and (2) that § 6082(a)(2) establishes a presumption that the amount of liability is the value of the property trafficked in as set forth in the certified claim ***plus interest***, and that amount should be disclosed to any jury in this matter before determining whether the presumption has been rebutted.

Dated: September 16, 2022

Respectfully submitted,

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the presumption and is awarded the value of the certified claim without interest. This interpretation leaves no scenario in which the plaintiff may be awarded the amount as described in subclause (I).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 16, 2022, 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/ *Stuart H. Singer*
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