UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 1:19-cv-23591-BLOOM/LOUIS

HAVANA DOCKS CORPORATION,

Plaintiff,

vs.

NORWEGIAN CRUISE LINE HOLDINGS, LTD.,

Defendant.
_____ /

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION AND LEAVE TO AMEND, AND REQUEST FOR HEARING

NCL's construction of Title III, that a defendant must traffic on a plaintiff's original property interest, will bar suits on anything but claims to "present" interests in confiscated property. This interpretation is contrary to the plain text of the LIBERTAD Act, which authorizes suits on claims to *any* "*future*, or *contingent* right, *security*, or *other interest* therein, including any leasehold interest" in confiscated property. 22 U.S.C. § 6023(12)(A) (emphases added). Havana Docks directly raised this issue in its cases before this Court. **None of the defendants addressed it in their response briefs.** The Court should ask NCL how someone could traffic on a "future," "contingent" or "security" interest under NCL's interpretation of Title III.

I. The Court Should Reconsider its Order.

To begin, the issues raised in the Motion are not, as NCL states, "more appropriate for appeal." ("Opp.," ECF No. 48 at 2, 6.) This Court, like the Eleventh Circuit, is fully capable of assessing the pleadings and applicable authority. With that said, reconsideration of the Dismissal Order (ECF No. 42) is appropriate.

A. Reconsideration is Procedurally Proper.

"A post-judgment motion may be treated as made pursuant to either Fed. R. Civ. P. 59 or 60—regardless of how the motion is styled by the movant—depending on the type of relief sought." *Mays v. U.S. Postal Serv.*, 122 F.3d 43, 46 (11th Cir. 1997). "'While Rule 59(e) does not set forth any specific criteria, the courts have delineated three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice.'" *Waite v. All Acquisition Corp*. No. 15-cv-62359, 2016 WL 2346768, *3, **11-12 (S.D. Fla. Mar. 10, 2016) (Bloom, J.) (granting reconsideration of order on motion to dismiss to correct clear error, granting leave to amend and finding good cause to modify scheduling order), *reconsidered in part* 2016 WL 2346743, *3 (S.D. Fla. May 4, 2016) (correcting legal error), *reconsideration denied* 194 F. Supp. 3d 1298, 1320-21 (S.D. Fla. 2016), *aff'd* 901 F.3d 1307 (11th Cir. 2018), *cert. denied* 139 S. Ct. 1384 (2019); *see also* Fed. R. Civ. P. 60(b)(6). Reconsideration is necessary here to correct clear errors of law and fact.

First, the Dismissal Order did not accept Havana Docks' allegations of claim ownership and trafficking as true, made findings of fact on a motion to dismiss and without a factual record, and found those facts adverse to the plaintiff. *E.g., Andrews v. Scott*, 729 F. App'x 804, 809 (11th Cir. 2018) (on a Rule 12(b)(6) motion, "we accept plaintiff['s] version of the facts, even if her version is 'hotly disputed'"); *Page v. Postmaster Gen. & C.E.O. of U.S. Postal Serv.*, 493 F. App'x 994, 995, 997-98 (11th Cir. 2012) ("In adjudicating a motion to dismiss, the district court may not resolve factual disputes."); *cf. Bischoff v. Osceola Cty., Fla.*, 222 F.3d 874, 879 (11th Cir. 2000) (reversing dismissal order where "court referred to disputed questions of fact as undisputed and clearly disbelieved Plaintiffs' testimony").

Second, the factual findings that the concession "by its own terms expired in 2004" and the "property reverted to the Cuban Government by the terms of the concession itself" are contrary to binding precedent holding that expropriation extinguished all former interests in confiscated property (like the concession and Havana Docks' other former interests). (Dismissal Order at 6 n.1, 8); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 414-15 (1964); *Glen v. Club Mediterranee S.A.*, 450 F.3d 1251, 1254-57 (11th Cir. 2006) (Title III does not change existing law).

Third, the factual findings in the Dismissal Order are incorrect. The finding that the "claim certifies only a time-limited concession" is disputed by the terms of the certified claim. (*Compare* Dismissal Order at 9 *with* ECF No. 44-1 at ¶ 12.) Further, the concession, which was not before the Court until now, granted Havana Docks a number of rights in the Subject Property that did not "expire[] in 2004," a conclusion Havana Docks has always disputed, in any event. (Dismissal Order at 5.)

And fourth, as explained below and in the Motion, NCL's statutory interpretation is contrary to the plain text of Title III. For these reasons, Havana Docks has appropriately sought relief under Rules 59 and 60.

B. NCL's Interpretation is Contrary to the Plain Text of Title III.

NCL's opposition to the Court's reconsideration of its Order is based entirely on mischaracterizations of Plaintiff's arguments in its Motion. First, Plaintiff never argued that "the Court improperly considered hypothetical situations in reaching its

decision." (Opp. at 9-10.) Plaintiff argued that MSC and NCL put forth hypothetical situations to arrive at conclusions untethered to the LIBERTAD Act's statutory scheme. (Mot. at 10-11.) Indeed, their use of hypotheticals to support the argument that a party must own a claim to a "present" interest in confiscated property would render unenforceable claims to "*future*, or *contingent* right[s], *securit[ies]*, or *other interest[s]* therein, including any leasehold interest[s]," all of which are expressly actionable under Title III's plain language. 22 U.S.C. § 6023(12)(A) (emphasis added); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'"). NCL does not address this substantial textual issue in its response.[1] Instead it proffers another hypothetical to demonstrate its belief—contrary to the Act's plain language—that a Title III plaintiff must own a claim to a "present" interest in confiscated property. (Opp. at 9 n.7.)

Second, Plaintiff does not argue "for a fourth time, that the Court should conflate the distinct, statutory concepts of 'claim' and 'property.'" (Opp. at 5.) In fact, Plaintiff has consistently argued the opposite: That Title III distinguishes between the claim to a property and an original property interest. (*See, e.g.*, ECF No. 36 at 2 ("[T]he Court should continue to decline to 'conflate a claim to a property and a property interest.'").) Plaintiff's original property interest (and, necessarily, those of every person who has standing to sue under Title III) was terminated by confiscation. (*See* Mot. at 7–8.) Requiring a person to have the original property interest to sue under Title III would eliminate the cause of action and be contrary to Eleventh Circuit and Supreme Court precedent. (*See id.*) As the Eleventh Circuit recognized, the claim to a property is the "property interest that former owners of confiscated property now have." *Glen*, 450 F.3d at 1255.

Third, Plaintiff never argued that the certified claim serves as conclusive proof

[1] Ignoring the plain language of the LIBERTAD Act, Norwegian has taken the position that permitting suits on claims to future interests would render Title III 'meaningless,' 'unworkable' and "absurd" (ECF No. 31 at 20 n.22), and argues that it could not have trafficked in Plaintiff's indemnity right, despite that right being a "security, or other interest" in the Subject Property, 22 U.S.C. § 6023(12)(A) (authorizing suits on claims to any "security, or other interest"). (Opp. at 21.)

that a Title III defendant trafficked in confiscated property. (Opp., at 7.) Trafficking is a separate element of the cause of action that Plaintiff will have to prove at trial. NCL's argument on this point is irrelevant to any of the issues presented in this case.

What Plaintiff needs to prove with respect to trafficking is that NCL trafficked on confiscated property that is subject to a claim without authorization of the claimholder. In other words, to prevail, Plaintiff must prove that (1) the Subject Property was confiscated by the Cuban Government, (2) NCL used or profited from the Subject Property, (3) the Subject Property is the subject of a claim (in this case, a certified claim), and (4) NCL did not obtain prior authorization from the claimholder. As Plaintiff explained, the certified claim is the FCSC's certification of losses resulting from the confiscation of the bundle of property interests relating to the Subject Property that existed in 1960. (Mot., at 9.) The certified claim provides notice of a present encumbrance on the Subject Property until such time as the claim is settled—a date which has not yet come. (*See id*. at 12.) NCL, notably, does not contest that Havana Docks' certified claim does not expire until "the date of settlement."

Fourth, Plaintiff does not ask this Court to "construe Havana Docks' concession as if it were a fee simple interest" and broaden Plaintiff's property rights. (Opp., at 10.) Plaintiff can only recover the value of the property interests that were confiscated, which do not include a fee simple interest. Thus, Plaintiff cannot present to a jury damages calculated as the value of a fee simple interest. If Plaintiff prevails, its damages will be limited to the value of its confiscated property interests at the statutory rate, *e.g.*, the value of the 44 remaining years on its concession, the right of payment under the indemnity provision to compensate Plaintiff for work performed on the Subject Property, and the other taken assets. *See* 22 U.S.C. § 6082(a)(1)(A)(i).

Fifth, NCL falsely argues that the "original terms of the concession" provided that it "expired in 2004." (Opp. at 9.) The "original terms of concession," which Havana Docks provided to NCL, granted a term of ninety-nine years—not a fixed end date. (ECF No. 43-4 at 4.) Nowhere in that document does the date "2004" appear.

Sixth, Plaintiff never argued that "it alone currently has, and has had at all times since 1996, the right to authorize 'trafficking' in the Havana piers." (Opp. at 9

n.7 (emphasis added).) Rather, Plaintiff has consistently argued that the plain language of Title III requires a defendant to obtain authorization from every owner of a claim to a given property to avoid liability. (Mot. at 11.) Plaintiff respectfully requests that the Court reconsider the Dismissal Order and reinstate this case.

II. Amendment is Proper.

Havana Docks should be granted leave to amend its complaint for the first time. "The burden on a party seeking to amend a pleading 'is minimal' under Rule 15." *Southpoint Condo. Assoc., Inc. v. Lexington Ins. Co.*, 2020 WL 639400, *6 (S.D. Fla. Feb. 11, 2020) (Bloom, J.); *Pioneer Metals, Inc. v. Univar USA, Inc.*, 168 F. App'x 335, 336 (11th Cir. 2006) (Rule 15 and *Foman* standards apply post-judgment through Rules 59 and 60). NCL argues that Havana Docks cannot meet this low threshold because the proposed amended complaint (the "PAC," ECF No. 44-1) is untimely and futile. (Opp. at 10-21). NCL is wrong. The PAC is timely and it states a claim under Title III and the Dismissal Order.[2]

A. There is No Undue Delay.

Contrary to NCL's argument, (Opp. at 14-16), there was no undue delay in filing the Motion. In the *Carnival* Case, Havana Docks alleged that it was the owner of a claim to the Subject Property and that Carnival trafficked in the Subject Property. (*Carnival* Case, ECF No. 1 at ¶¶ 6, 12, 13.) Accepting those allegations as true, the Court held that Havana Docks stated a Title III claim. (*Id.,* ECF No. 47 at 8-9.) Plaintiff sued NCL raising similar allegations that passed muster in the *Carnival* Case. In so doing, and in responding to NCL's motion to dismiss, Plaintiff justifiably believed that the same Court that found those allegations sufficient before would find the same here.

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[2] NCL also argues in a footnote that amendment will unduly prejudice it by requiring a response to new allegations. (Opp. at 14 n.14.) To the extent the argument is predicated on some "necessity to file a new motion to dismiss, [NCL] ignore[s] the fact that there is no requirement in the Federal Rules of Civil Procedure to file a motion to dismiss. [NCL] may respond to the amended complaint with an answer. . . . [T]here is no prejudice associated with the fact that the defendants intend to exercise their option to file a motion to dismiss." *In re Piedmont Office Trust, Sec. Litig.*, 2011 WL 13175190, *2 (N.D. Ga. Sept. 27, 2011).

In fact, that was the second order ever to directly construe the LIBERTAD Act and the first to address the legal issues touching on this case. Neither order placed Plaintiff on notice that its allegations might be legally or factually insufficient. Prior to those orders, no court had ever passed on the pleading standard for a Title III claim. *See Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510, 520 (7th Cir. 2015) ("The liberal standard of amending under Rule 15(a)(2) is especially important where the law is uncertain.").

Precedent from the Eleventh Circuit and other jurisdictions confirm that, under the unique procedural posture of this case, there was no undue delay in seeking amendment. In *Bryant v. Dupree*, a district court denied a motion to dismiss and also certified an interlocutory appeal of its order. 252 F.3d 1161, 1163-65 (11th Cir. 2001). On remand after the appeal, defendants renewed their motion to dismiss, to which the plaintiffs responded and requested leave to amend. *Id.* The district court, reversing its original position on the first motion to dismiss, dismissed the case with prejudice, reasoning that "plaintiffs already had been given notice of the possible deficiencies in their complaint." *Id.* at 1164. On appeal, the Eleventh Circuit reversed:

> On the contrary, in denying the original motion to dismiss, the district court stated that the plaintiffs' allegations . . . satisfied the heightened pleading requirement. Rather than indicating infirmities in the complaint, the district court's prior opinion created the exact opposite impression. . . . Furthermore, once the defendants renewed their motion to dismiss, the plaintiffs responded with their first request for leave to amend, which the district court denied. **<u>Accordingly, it cannot be said that the plaintiffs failed to correct defects of which they had notice</u>**. . . .
>
> <u>This reasoning ignores the fact that the district court earlier had found the complaint sufficient, thus justifying, until this court's opinion, the plaintiffs' belief that they did not need to include any further allegations in the Amended Complaint.</u>

Id. (emphases added). Denying leave to amend was therefore an abuse of discretion.

Similarly, in *Perlman v. Bank of America, N.A.*, the Eleventh Circuit reviewed the district court's orders dismissing a case with prejudice, and denying a post-judgment motion under Rule 59. 561 F. App'x 810 (11th Cir. 2014). The Court

reversed in part. Judge Martin, concurring in part and dissenting in part,[3] observed:

> If this were a typical case, I would agree with the majority that the District Court did not abuse its discretion by rejecting [plaintiff's] abbreviated attempt to request leave to amend. . . .
>
> But this is not a typical case. When [defendant] filed its motion to dismiss the Amended Complaint, its second motion to dismiss filed in the District Court proceeding, [plaintiff] had no reason to believe that his aiding and abetting claims were in jeopardy of being dismissed. Indeed, the District Court had already denied [defendant's] challenge to the identical aiding and abetting claims when it moved to dismiss [plaintiff's] original complaint. In this circumstance, barring an intervening change in controlling law or a warning that the District Court was inclined to reverse itself, a plaintiff should not be expected to come forward with a formal request for leave to amend. **As a practical matter, it is unclear to me how we can expect a plaintiff to draft any amendment when the District Court has already affirmatively ruled that the very same pleadings were sufficient**.

Id. at 815 (citations omitted; emphases added). Judge Martin then explained:

> Because there had been no intervening change in controlling law or any indication that the District Court was planning to change its mind, [plaintiff] was likely shocked to learn that the same judge who had upheld his aiding and abetting claims just five months earlier now found them insufficient.

Id. (finding this was an "extraordinary circumstance" and remarking that plaintiff "would simply have no way of knowing how or why his complaint is insufficient"). Judge Martin then concluded that:

> [T]here was no danger that [plaintiff] was trying to get two bites at the apple because his first bite had already made its mark. As far as [plaintiff] was concerned, the District Court had already told him his aiding and abetting claims passed muster once, and so there was no need for him to think about how to shore up the insufficiencies in his complaint. Without the benefit of prognostication, [plaintiff] reasonably assumed that the District Court would reject [defendant's] second motion to dismiss in the same way it dismissed the first one. This is why

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[3] The majority affirmed the denial of leave to amend because the plaintiff improperly requested leave to amend in opposition to a motion to dismiss and through a jurisdictionally-barred Rule 59 motion. 561 F. App'x at 814-15. Neither issue is present here where Havana Docks has sought leave to amend through a timely, separate motion under Rules 59 and 60 and proposed amended complaint.

> I believe that a District Court should be required to grant leave to amend in this circumstance unless there is an intervening change in controlling law or the District Court otherwise provides notice that it is reconsidering its earlier ruling.
>
> For these reasons, I would hold that the District Court abused its discretion here by dismissing [plaintiff's] aiding and abetting claims with prejudice, and I would remand this case to the District Court to provide [plaintiff] with an opportunity to amend his aiding and abetting claims.

Id. at 816; *accord Eades v. Thompson*, 823 F.2d 1055, 1063 (7th Cir. 1987); *Mullin v. Balicki*, 875 F.3d 140, 153 (3d Cir. 2017).

Plaintiff reasonably relied on this Court's Order in the *Carnival* Case in not seeking amendment at an earlier stage of this case.[4] Amendment is therefore proper. *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 599 (5th Cir. 1981) ("[W]here the failure to include in the complaint a known theory of the case arises not from an attempt to gain tactical advantages but from a reasonable belief that the theory is unnecessary to the case, denial of leave to amend is inappropriate.").

Third, Plaintiff did not unduly delay or waive rights by not submitting evidence and facts outside the pleadings in responding to a motion to dismiss. To be sure, binding precedent would have precluded consideration of any evidence outside the four corners of the Complaint. *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009); *cf. Wilchombe v. TeeVee Toons, Inc.*, 2006 WL 1553939, *1 (N.D. Ga. June 2, 2006) ("A complaint need not, and indeed should not, plead evidence.").

B. Amendment Is Not Futile.

NCL's final argument is a futility challenge. Futility exists "when the 'complaint as amended is still subject to dismissal.'" *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999). In making this determination, the Court accepts

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[4] For this reason, the cases cited by NCL are inapposite (Opp. at 15 n.15). *See, e.g.*, *Horras v. Am Cap. Strategies, Ltd.*, 729 F.3d 798, 801, 805 (8th Cir. 2013) (district court "distributed a memorandum to both parties identifying its concerns about the complaint," but plaintiff did not seek amendment until after dismissal). Here, the Court's prior orders did not put Plaintiff "on notice" of any pleading deficiencies, *id.*; those orders, in fact, "created the exact opposite impression." *Bryant*, 252 F.3d at 1164. Thus, Plaintiff's reliance on them was not 'gamesmanship' or indicative of any "old sporting theory of justice" (Opp. at 14).

the PAC's allegations as true and does not resolve factual disputes. *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1126-27 (Fed. Cir. 2018) (futility finding reversed where proposed complaint's allegations, "taken as true, would directly affect the district court's" order and "at a minimum raise factual disputes underlying" that order); *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1341-42, n.13 (11th Cir. 2014) (same); *Southpoint Condo.*, 2020 WL 639400 at *6.

At best, NCL's futility arguments raise a number of factual challenges that are "inappropriate for determination at this stage." *Southpoint*, 2020 WL 639400, at *6. For example, NCL disputes Plaintiff's factual allegation that its 99 year "concession never expired by its terms" in 2004 because "it was confiscated by the Cuban Government" in 1960. (*Compare* PAC at ¶ 15 *with* Opp. at 16-18). If nothing more, this factual dispute precludes a finding of futility. *Perez*, 774 F.3d at 1341-42, n.13.

NCL also argues that the terms of the certified claim contradict Plaintiff's assertion that the concession did not expire in 2004, and quotes to one line in the certified claim that states that the terms of the concession "were to expire in the year 2004." (Opp. at 16.) But, as Plaintiff has noted, the use of the subjunctive here plainly recognizes the reality that the concession never expired because it was confiscated. (Mot. at 15 n.7.) NCL does not respond to this argument. NCL follows by making the absurd claim that Plaintiff's reversionary interest of 44 years in the concession is a property interest that has not been confiscated. That argument does not merit serious consideration: It reveals, at best, NCL's ignorance of even the most basic facts about the nature of the communist Cuban regime and its confiscation of the Subject Property. The reversionary interest is a future or contingent right that was confiscated without just compensation. Relatedly, NCL's contention that the outstanding 44 years of concessionary rights were not "tolled" after expropriation and instead continued to run and expired in 2004 (Opp. at 16-17) is contrary to the allegations of the PAC (PAC at ¶ 15) and the text of the concession itself, which granted a term of years—not a fixed end date (ECF No. 43-4 at 4).

Moreover, NCL's argument that United States law, not Cuban law, governed the concession is incorrect, but, in any event, irrelevant. Under Cuban law or United

States law, that indemnity right attaches to taken property and does not expire until just compensation is paid. *Fulcher v. United States*, 632 F.2d 278, 284-85 (4th Cir. 1980) (en banc) (condemned party's "equitable lien" on taken property is discharged only by payment of just compensation); *United States v. Herring*, 750 F.2d 669, 672-73 (8th Cir. 1984) (same); 22 U.S.C. § 6023(4) (recognizing "a debt that is a charge on property nationalized, expropriated, or otherwise taken by the Cuban Government"); Codigo Civil, Title II, Art. 349 ("No one shall be deprived of his property, except by competent authority and with sufficient cause of public utility, always after the proper indemnity. If this requisite has not been fulfilled the judges shall protect, and in a proper case, replace the condemned party in possession.").

To that end, NCL also argues that Plaintiff's indemnity right "expired in 2004" (Opp. at 20), despite Plaintiff's well-pled allegation to the contrary (PAC at ¶ 17), the indemnity clause imposing no temporal limitation for payment (ECF No. 43-3 at 5), and both Cuban and federal takings law providing the opposite, *Fulcher*, 632 F.2d at 284-85; *Herring*, 750 F.2d at 672-73; Codigo Civil, Title II, Art. 349.

NCL then argues that the FCSC never valued this indemnity right. (Opp. at 19.) This too is directly contrary to Plaintiff's allegation that this right was "certified by the FCSC" as a term of the concession (PAC at ¶ 17) and valued as the worth of the San Francisco, Santa Clara and Machina Piers (*id.* at ¶¶ 12, 14, 17), *i.e.* the 'works built or constructed by' Havana Docks and its predecessor-in-interest (*id.* at ¶ 17; ECF No. 43-3 at 5, ¶ 7 (granting indemnification for those works, including "the dock on the north side of the jetty")).

These factual disputes, collectively and independently, preclude a finding of futility. *Perez*, 774 F.3d at 1341-42, n.13; *Southpoint*, 2020 WL 639400 at *6. Moreover, the 44 years of outstanding concessionary rights, the indemnity right, and all the other rights identified in the PAC, are certified interests in the Subject Property that were confiscated from Havana Docks and have not expired. They are actionable under Title III and the Dismissal Order, and amendment is not futile.

Havana Docks respectfully requests that the Court reinstate this case and grant it leave to file a first amended complaint.

DATED: March 6, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Court. I also certify that the foregoing document is being served this 6 March 2020, on all counsel of record or pro se parties either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ Roberto Martínez
Roberto Martínez