UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO.: 1:19-CV-21725-JLK

JAVIER GARCIA-BENGOCHEA,

PLAINTIFF

vs.

CARNIVAL CORPORATION
A FOREIGN CORPORATION
DOING BUSINESS AS
CARNIVAL CRUISE LINES

DEFENDANT

Miami, Florida

July 31, 2019
Wednesday

Scheduled for 10:00 a.m.
10:02 a.m. - 12:20 p.m.

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DEFENDANT'S MOTION TO DISMISS
ORAL ARGUMENT

BEFORE THE HONORABLE JAMES LAWRENCE KING
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

ROBERTO MARTINEZ, ESQ.
STEPHANIE ANNE CASEY, ESQ.
Colson Hicks Eidson
255 Alhambra Circle
Penthouse
Coral Gables, Florida 33134

RODNEY MARGOL, ESQ.
Margol & Margol, P.A.
2029 North Third Street
Jacksonville Beach, Florida 32250

APPEARANCES (CONTINUED):

FOR THE DEFENDANT:
STUART HAROLD SINGER, ESQ.
EVAN EZRAY, ESQ.
Boies Schiller & Flexner
401 East Las Olas Boulevard
Suite 1200
Ft. Lauderdale, Florida 33301

GEORGE J. FOWLER, III, ESQ.
LUIS EMILIO LLAMAS, ESQ.
Jones Walker, LLP
201 South Biscayne Boulevard
#2600
Miami, Florida 33131

ALSO PRESENT:
JAVIER GARCIA-BENGOCHEA, Plaintiff

ARZIZA MARTINEZ, colleague of Martinez

MICHAEL CALVIN, Technician of Singer

STENOGRAPHICALLY
REPORTED BY:
GLENDA M. POWERS, FPR, CRR, FPR
Official Federal Court Reporter
United States District Court
400 North Miami Avenue
Miami, Florida 33128

(Call to the order of the Court:)

COURT SECURITY OFFICER: All rise.

COURTROOM DEPUTY: In the District Court of the Southern District of Florida;

The Honorable James Lawrence King presiding.

THE COURT: Thank you. Before you're seated, let me -- well, be seated, please. Thank you.

We have scheduled this morning a motion to dismiss the complaint filed by the defendant, Carnival Corporation, doing business as Carnival Cruise Lines, in the case of Javier Garcia-Bengochea versus Carnival.

The number of the case appears to be 19-Civil-21725. If I may have your appearances, please.

For the plaintiff, Mr. Martinez.

MR. MARTINEZ: Your Honor, good morning.

Bob Martinez with the law firm of Colson Hicks Eidson. I'm here on behalf of the plaintiff.

My law partner, Stephanie Casey, is also at counsel table; my co-counsel, Rodney Margol, is here with me; our client, Dr. Garcia-Bengochea.

Your Honor, if I may also point out my other colleague, Arziza Martinez, is in the first row.

THE COURT: Good morning. And you're welcome to have a seat, if there's one up there, or sit in the audience. Your colleague, she's welcome to sit in that seat in the jury box,

if she's more comfortable and can hear better.

MR. MARTINEZ: Thank you, Your Honor.

THE COURT: For the defense, Mr. Singer.

MR. SINGER: Stuart Singer on behalf of Carnival Corporation, Boies Schiller & Flexner.

Good morning, Your Honor.

THE COURT: Good morning.

MR. SINGER: With us is my colleague, Evan Ezray, from Boies Schiller & Flexner; our co-counsel, George Fowler and Luis Llamas, from the Jones Walker firm.

THE COURT: Good morning.

MR. SINGER: From Carnival Corporation, Heather Weeter, who is in-house counsel; and Arnaldo Perez, who is the general counsel of Carnival Corporation; and also, Michael Calvin, who is our case manager, who helps with the powerpoints and the technology we're hoping to use this morning.

THE COURT: All right. And your colleague in the back, if there's another chair over there, he's welcome over there, or wherever he's comfortable --

MR. SINGER: Thank you.

THE COURT: -- rather than sitting in the audience, if he wants to sit up there. All right.

We will be pleased to hear from Mr. Singer then, about Carnival Cruise Lines, on the merits of the motion. Yes.

MR. SINGER: Thank you, Your Honor.

We have a powerpoint that I hope to use in connection with my argument -- if I might approach -- we have a hard copy of that powerpoint for the Court's convenience.

THE COURT: The Marshal will hand it up to me, Marshal. Thank you.

Yes, sir. And please use the microphone, all of you. Thank you.

MR. SINGER: Thank you, Your Honor.

May it please the Court. There are three independently sufficient grounds on which this complaint should be dismissed.

(Brief interruption by the Court.)

THE COURT: I'm sorry, Mr. Singer. Take your time and start again.

MR. SINGER: Thank you, Your Honor.

There are three independent grounds on which the complaint should be dismissed which track the grounds set forth in our motion and memorandum.

The first is the fact that the plaintiff has failed to plead and cannot plead that Carnival trafficked within the meaning of the Helms-Burton Act because, here, uses of property which are incident to lawful travel are, under the statute, not trafficking.

Second, the plaintiff has failed to allege any facts which support the conclusion that he owns a claim; and, in fact, the document attached to the complaint show that someone

else, a gentleman by the name of Albert Parreno, owned the claim.

And third, the plaintiff has failed to allege that Carnival trafficked in his claimed property because the owner of the docks in Santiago is -- by the documents attached, again, to the complaint -- a Cuban company named La Maritima, S.A., and not the plaintiff.

And each of those three constitute independent grounds under Rule 12(b)(6) for dismissal of the complaint.

I'd like, with the Court's permission, to talk first about the issue of lawful travel.

And we've put on the screen -- and it's also page two of the book, whichever is more convenient to look at -- the relevant language that appears in the Helms-Burton Act with respect to the definition of what constitutes trafficking.

And the important issue here is that the language regarding "lawful travel" is not some separate exemption under the Act, where you have trafficking and then you have a separate section of the Act that says trafficking, which is pursuant to lawful travel, is a defense; rather, this is the very definition of what "trafficking" is.

And Congress wanted to be clear when it passed this statute that use of property in Cuba for lawful travel is not trafficking at all.

It's part of the very definition of "trafficking" and,

therefore, it is part of the element of the offense that the plaintiff is required to plead.

You cannot plead trafficking without addressing whether or not the use of the property was lawful. So there are two arguments related to this that I'd like to discuss here.

First, the argument that is made by the plaintiff in its response that this is really an affirmative defense that we, Carnival, are required to plead, rather than something that the plaintiff is required to plead.

And second, our argument that regardless of whether it is an element of the offense or, as they contend -- as we contend, an affirmative defense.

As the plaintiff contends, this Court can resolve that on a motion to dismiss because of judicial notice of the Code of Federal Regulation which provided the license under which Carnival and other cruise lines went to Cuba, and that that establishes as a matter of law that the travel was lawful.

I'd like to address the first one of those, the issue of whether lawful travel is an element of the offense or whether it is an affirmative defense.

As we've seen from the very statute itself, which, of course, is the starting point and, in most cases, the ending point of the analysis here, the term "traffic" simply doesn't include use of property that is incident to lawful travel to Cuba, and to the extent that such use is necessary to the

conduct of such travel.

There is no allegation in the complaint that suggests that Carnival's travel to Cuba is not lawful. There is no allegation in the complaint to suggest that the use of a dock facility is an incident to that travel and necessary to conduct that travel.

There is no suggestion that Carnival went down there before travel was lawful, because it did not. There's no suggestion that Carnival continued going down to Cuba after the law changed recently under President Trump. Carnival stopped those ships in the middle of the ocean.

The only time that there has been travel, as alleged in the complaint, is during a time period when it was completely lawful, and that's an element of the offense.

We believe that this is -- there's no case law under Helms-Burton, of course, Your Honor, this is the first case under the statute, but there are analogous statutes.

One of those is the Driver's Privacy Protection Act, where the Eleventh Circuit said that the plaintiff must plead that the use of certain information was an unauthorized use.

They didn't say that it was the burden of the defendant to come forward as an affirmative defense. They said that the plaintiff has to plead that it's an unauthorized use.

And the Eleventh Circuit ruling in Thomas is particularly important because it negates one of the arguments

that my colleague, Mr. Martinez, has raised in his papers that we should have to plead this because knowledge of whether the use is lawful is within Carnival's knowledge.

And the Court, in Thomas, said that isn't really the issue, the issue is the statute and all the times parties are called upon to, as a matter of pleading, plead things which the defendant may know more than the plaintiff about. And so the Thomas case is, we think, the most directly relevant authority here.

There's also cases from this district that have interpreted the Fair Debt Collection Practices Act, and those cases require a plaintiff to plead that a debt collector does not include a number of uses of information and acts to collect debts that are found in the definition of "debt collector," it's not sufficient to make a conclusory allegation, this Court has held in the Benjamin versus City Mortgage case and the other cases in our brief, and we think those are applicable here.

Now, the plaintiff has said it should look at the legislative history, too. Now, we don't think it's necessary given the statute, but if one does look at the legislative history -- and we have that at page six in the book and on the screen -- the committee of the conference which adopted Helms-Burton made clear that the definition of "traffics," as used in Title III, has been modified to remove any liability

for -- and I'm quoting -- "any activities related to lawful travel to Cuba."

So the committee -- and we're talking here legislative history -- didn't say that certain types of trafficking can be protected by an affirmative defense that the defendant could show.

It said, rather, that if activities are related to lawful travel to Cuba, then that's not trafficking at all, and there's no liability whatsoever for that. And we think that supports our position that this is something which the plaintiff was obligated to plead.

Now, Your Honor, even if the Court were to conclude that this was an affirmative defense, the case law -- and the parties have not disputed this -- indicate that when a defense is apparent from the face of the complaint dismissal is required, I think a proposition that this Court is familiar with.

Here, the plaintiff's allegations, along with the Code of Federal Regulations -- and there's no argument as to whether or not the Code of Federal Regulations is properly something this Court can take judicial notice of on a motion to dismiss -- that license, publicly available in the Code of Federal Regulations, establishes that the lawful travel clause applies here.

Now, again, looking at what the plaintiff concedes in

its papers. The plaintiff does not dispute that under the law at the time Carnival sailed travel to Cuba was lawful. It's not in their complaint, it's not in their papers. They really couldn't dispute that because that was the law.

The plaintiff does not dispute, as I said, the Court can consider the documents that made Carnival's travel lawful on this motion.

The plaintiff also does not dispute that the use of the docks was incident to that lawful travel. There's no allegation in the complaint that somehow a dock wasn't needed for that travel, or that the use of the dock wasn't necessary to conduct that travel.

So what we have here -- and this is a copy of the license, it's available -- and that license provided, quote:

That travel services in connection with travel-related transactions involving Cuba are authorized, and that you can 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, and cargo, as well as lodging services on the cruise ships.

Now, the only allegations in the complaint are completely covered by what Carnival was lawfully able to do, under what is called an "OFAC license" issued by the Department of the Treasury. And that is on page 11 of the book and on the

screen.

Your Honor, there's two allegations in the complaint.

One is that Carnival commenced, conducted, and promoted its commercial cruise line business to Cuba -- that's paragraph 12 -- and that it regularly embarked and disembarked its passengers on the subject property.

Both of those fall squarely in what the OFAC license allows. That license, provided as a matter of federal law, says that you can provide travel services in connection with travel-related transactions involving Cuba.

And so there is no allegation here that would take what they say Carnival has done -- provide cruise ship services to Cuba -- and take it outside the license that federal law has created.

Now, there is an argument which the plaintiff has made that a federal regulation cannot overrule a statute; and, of course, that is true. If the Helms-Burton Act did not say anything about lawful travel, then they would have a point in arguing that a federal regulation creating a license would conflict with the statute.

But that's not the situation here.

Here, the statute itself says that lawful travel is outside the scope of what constitutes trafficking, and the federal regulation says taking these cruise ships to Cuba -- to travel to Cuba is lawful.

So the regulation isn't inconsistent with the statute, it doesn't seek to, in some sense, overturn the statute, it works hand-in-hand with the statute in defining what is lawful travel, and the statute makes clear that lawful travel is not a violation.

So that is the first argument on which this Court should grant the motion to dismiss.

There are two others.

The second of those arguments relates to who owns the claim that Mr. Bengochea seeks to bring.

Now, Mr. Bengochea has made one conclusory allegation in his complaint -- and that is found in paragraph six of the complaint -- where he alleges that he is the rightful owner of an 82.5 percent interest in the waterfront real property at Santiago, Cuba.

Now, the plaintiff attaches to his complaint a Foreign Claims Settlement Commission document. This was, the Commission established separate and apart from the Helms-Burton Act, years before the Helms-Burton Act was adopted, to evaluate and quantify claims by people who claimed their property had been confiscated by the Cuban Government.

And the claim which the plaintiff attaches to his complaint is not in his name, but in the name of a different gentleman, Albert Parreno.

There is nothing alleged in the complaint as to how the

claim of Mr. Parreno is a claim that Mr. Bengochea has the right to come into federal court and to assert.

And before Carnival should be required to spend resources on discovery in this case, before the Court should have to spend additional resources on a case, the plaintiff is required to indicate how it has this claim which Mr. Parreno was found to own by a government body, and which the proof of that is attached to the very own complaint that the plaintiff has filed.

And we have in our motion gone even beyond that to indicate that Mr. Parreno's Will -- which the plaintiff also has not objected to the Court taking judicial notice of -- shows that this plaintiff, Mr. Bengochea, did not inherit a claim from Mr. Parreno.

In fact, that Will -- and we've excerpted on page 14 in the book, and it's on the screen -- was a Will by which Mr. Parreno's brother, Desiderio Parreno, received rights to and under property held to him which had been confiscated by the Fidel Castro regime, including, but not limited to, his shares in La Maritima, S.A., which is, as pled, we will see, is the owner of the real estate located in Cuba.

So on what basis does Mr. Bengochea come into this Court and allege that he, in fact, is the owner of this claim?

And I would note, this is in our brief -- it has not been addressed by the opposing party -- that Mr. Bengochea had

years ago filed a separate claim that was quickly dismissed --

THE COURT: Aren't you required -- and the Court required to take parts of a complaint well pled as true and correct, at this point --

MR. SINGER: Not if, Your Honor, those allegations --

THE COURT: -- at this point in the proceedings, that is, before discovery?

MR. SINGER: Your Honor, respectfully, I believe, while the Court can assume the correctness of facts that are pled, the conclusion of ownership of a claim is a legal conclusion that is governed by the Twombly test, that there has to be a plausibility to what has been pled.

And if I can refer the Court to two decisions.

THE COURT: That plausibility must be, of course, based on some factor that is usually developed in discovery or -- how, at this point, we're at the juncture where facts well pled in the document are assumed, for this point, at this time, as true and correct, and you're, I believe, commencing an argument that Mr. Bengochea can't prove what he has alleged.

The question here is not at that point, I think, it is, rather, that whether if it's well pled, if it states he is the owner, even though his statement may ultimately -- there may be a lack of any proof on it, it may never be proven, but at this point in time, can we get off into arguing what occurred in probate proceedings at some other time in New York many years

ago, or whatever, can we get into that, is my question?

MR. SINGER: I believe so, Your Honor, and I'd refer the Court to two cases which are in our briefs, and they're on page 16 of our argument exhibits, and it's on the screen.

One of those is a decision from this Court in 2008. It was a copyright case. Just like in this case, the plaintiff made a conclusory allegation that he owned a copyright.

But the documents attached to its complaint showed there was another owner, just like in this case, there are documents attached to Mr. Bengochea's complaint that shows it's Mr. Parreno who owns the claim.

THE COURT: All right. Tell me about the documents.

MR. SINGER: Okay. That document attached to the complaint is the finding of the Claim Settlement Commission.

It is a document which the plaintiff itself has brought into the complaint and, as the Court knows, the Court can consider documents attached to the complaint in connection with the allegations pled in the complaint.

That document says, and I'm quoting:

That the Commission finds that the claimant owned 1,300 shares of stock in La Maritima, a Cuban corporation, which owned and operated docks and warehouses in Santiago, Cuba.

It goes on to say that since La Maritima was organized under the laws of Cuba, does not qualify as a corporate national of the United States, which is something we'll come

back to in a moment in the third argument.

THE COURT: Are you relying on the Commission's finding, taken on the facts known to them at the time -- I'm sure in good faith, there's no suggestion of any impropriety -- but you're asking this Court to base its decision on, at least in part, this Commission finding.

Doesn't that go a little bit far afield in taking -- in standing up against the principle that facts well pled are taken as true, at this point?

So we've got the complaint saying that this plaintiff has an entitlement to a claim by virtue of ownership.

We have another document you want to consider. After discovery, there may be 20 documents, 100 documents, there may be two witnesses, 100 witnesses.

I mean, but right now, in posture, whoever is -- whether or not that statement in the complaint is accurate, or true, or provable, unless it is provable by attachments to the complaint that -- or approach the level of certainty beyond any conclusion of the fact asserted in the attachment to the complaint, I certainly can't consider it, I don't believe. You're saying that I can do that and -- it was totally, almost, an irrelevant question.

But I authored the copyright case, or patent case you were talking about, am I the one that said the words or not?

MR. SINGER: No. That was Judge Gold, I believe,

Your Honor.

THE COURT: Judge Gold?

MR. SINGER: Yes.

THE COURT: Okay. Thank goodness. I thought it was -- that's all right, it's irrelevant, it has nothing to do with you all. Go ahead.

All right, you see what my concern is --

MR. SINGER: I do.

THE COURT: -- in this phase of the argument?

Go ahead.

MR. SINGER: I do, Your Honor, and it's something we thought about in connection with presenting this on a motion to dismiss.

If they had pled facts to say, for example, that Mr. Bengochea had obtained ownership of the claim from Mr. Parreno in the following manner, then there would be some facts that the Court could defer to.

THE COURT: Why do they have to do that? Why can't they come in and say, the plaintiff, Mr. Bengochea, owns the claim or has ownership of stock that is the claim?

MR. SINGER: Because the --

THE COURT: It may be totally false. I don't suggest it is. But you understand, the pleading, at this point, don't you, as the opponent to those facts, have to show that it's so improbable, so outrageously crazy, almost, that I should just

dismiss it on that basis -- that part of it on that basis?

MR. SINGER: Well, it's required --

THE COURT: You're placing a lot of strength in the Commission's finding, which may ultimately be entitled to that if we were at summary judgment, if we were at the conclusion of plaintiff's case at trial on a Rule 50 motion, or something like -- there are places where your argument would be entirely reasonable, logical, that is to say, that we should then consider and weigh these, whether that document is or is not entitled to the weight that you suggest the Court should give it now to prove that the allegation -- the factual allegation in the complaint is totally untrue and just can't ever be proven. That's going further than I think we normally go in motions to dismiss.

We're looking at the facts of the complaint to determine if it's well pled, whether we agree with them or don't agree with them, I think.

Now, I'm sorry to talk so much, I'll quit.

But please, go ahead with your argument, that's where I'm concerned, of this aspect, going into what was before the Commission, sometimes they made it -- I'll admit, I'm sure they made it on accurate information. I don't suggest that it's wrong or -- I just don't -- I just fail to see where I am, at this point, in a position to judge the credibility of it.

MR. SINGER: Your Honor, first of all, it's helpful to

me to understand where -- you know, your concerns on the argument, and I will try to address those.

This is not a document we brought into the case. It is a document the plaintiff attached to its complaint. It is a document that the plaintiff says this is the source of 32.5 percent of its ownership rights that it seeks to recover here.

THE COURT: On a motion to dismiss, do they have to allege -- you would like for them to allege, you're suggesting they should have, you're suggesting that had you done it, you would have put in there the source, and that would help clarify all this, at this point.

The fact that they did not is not what we usually consider in summary judgment, it's by way of argument, it helps elucidate it, but really the question is whether or not the facts they did allege are adequate to enable them to go forward at this point, or not.

You're suggesting, no, that they should have gone ahead and traced the relationship and the other factors, which all of which they will, obviously, have to do all, I presume, if you're not successful this morning, if your motion is denied, but my -- well, all right.

As I've said, I tend to talk too much. I enjoy talking with good, experienced lawyers, as all the local lawyers know, and so forgive me.

It's probably -- I understand your position, I

understand your reliance on the Commission. I've read it. I've read your briefs, I understand that.

But please, go ahead with your argument.

MR. SINGER: Yes. Your Honor, if this was a -- we believe that the conclusion of ownership is a conclusion, it's not a fact. It is, whether someone owns a claim, is a conclusion based on facts. Here, no facts are pled.

THE COURT: Suppose they didn't say anything about ownership, they just say, I'm of Cuban background and, Judge, I just want you to tell me -- to interpret this law for me, we throw it out in a heartbeat.

Ask Joyce to bring me a cup with some water, please.

COURT SECURITY OFFICER: Yes, Judge.

THE COURT: Go ahead, sir.

MR. SINGER: Yes. Here, I'd like to just -- the test that the Supreme Court -- and I think the Supreme Court has become tougher on what the plaintiff has to plead, with the Twombly and with the Iqbal decisions, saying that:

A Court, on a motion to dismiss, should judge the plausibility of the claim in light of the information that's presented in the complaint.

Now, the information here, on the one hand, is a conclusory allegation by Mr. Bengochea that he owns the claim.

On the other hand, you have the following, which is set forth in our brief, you have the owned source of that claim

attached to the complaint, which is in the name of Albert Parreno. You have nothing to indicate how Mr. Parreno's claim is one that Mr. Bengochea can assert.

Secondly, we point out in our brief that Mr. Bengochea filed a prior suit against, I believe, the China Construction Company that was quickly dismissed; and in that suit he made the allegation that he obtained his interest as the result of the Will from inheritance from Mr. Parreno.

And we now have --

THE COURT: Isn't that a factor the Court -- and bring me a jug of water, all right.

(Brief pause in the proceedings.)

THE COURT: Isn't that, he pled -- oh, Mr. Parreno, somewhere else, in another document, in another tribunal, pled that he's the owner.

MR. SINGER: Mr. Bengochea pled --

THE COURT: Am I to judge that credibility and weigh that against the statement in the complaint that this, Mr. Ben -- this plaintiff says he's the owner, when the law says, we'll take the facts as true.

I've got a true one, and you want me to judge the credibility, weigh the credibility, apply it, to knock off the allegation as being untruthful.

And you may be entirely correct that I should get into judgments of credibility of attachments, but I think you'll

have to show me some good law on that.

This division has been one of those that has certainly taken the lead through the years in saying that complaints must state facts. But to state a claim on a claim that Mr. Jones owns the right to the claim is conclusory only in the respect that he says that in his complaint.

It's not the conclusory thing that, based upon all these documents, I conclude, and that would be conclusory. I'm agreeing with you on your interpretation about the conclusory nature. I don't like them, good lawyers don't like them, and don't -- I mean, they avoid that in their complaint.

But here we must try to look at this complaint in pretty strict consideration as to whether or not facts, facts, non-conclusory facts.

I don't think when someone says, I own a claim, that that is the type of conclusory fact that falls within the broad category of the types of things that were -- well, excuse me again, Mr. Singer, forgive me.

Mr. Singer, let me inquire, totally -- let me go off the record for one second.

MR. SINGER: Yes.

(Discussion held off the record.)

THE COURT: I do agree with you that they have to allege facts. They can't allege conclusions. Whether or not I own something or not is a conclusion, yes, it has the smell and

look of a conclusion, but not the type of conclusion we're talking about as distinguished from a fact, in my humble judgment. Whether that helps you or hurts you, I don't know.

But please go ahead, I'm interrupting your argument. I'll quit doing it.

MR. SINGER: You're the Court, Your Honor. We're here to try to help you, and I'm trying to help see if we can show that Mr. Bengochea, the plaintiff, he's got to know on what basis he obtained a claim from Mr. Parreno, if he did.

THE COURT: Why? In the complaint, he has --

MR. SINGER: Because the documents that he attached are inconsistent with it.

THE COURT: -- the documents in the complaint, why?

MR. SINGER: Well, again, because if you plead X and you attach a document that says not X, you should have to explain it.

I think that's why Judge Gold, in the case of Brown versus Florida Fishing Extreme, said that when the plaintiff said, "I own this copyright" -- same type of conclusory allegations we have here -- and attached a copyright registration form showing that someone else was the owner of the copyright, the Court said you've got to do more than that before you go forward and dismiss that case.

We also cited another case, Walton case, that's from outside this district, but -- which said that you can't just

come in there and say you own an allegedly stolen piece of art without pleading facts that make it plausible.

The Supreme Court's terminology in Twombly, that it be plausible that the conclusion of ownership is supportable before you get by motion the motion to dismiss stage. And it's something, which, if true, he should be easily able to do.

Now, I'd like to turn, with the Court's permission, to the third argument, which is independent for dismissal, and that is that what the record shows is that the dock here is owned -- or was owned by a Cuban corporation called "La Maritima," and the allegation here is based on the ownership of stock. Even if you accept that plaintiff owned the claim, the claim relates to stock in La Maritima.

Mr. Parreno is the one that said he had 32.5 percent stock and got a certified claim. Now, there's a conclusory ownership allegation by Mr. Bengochea with respect to 87 percent.

But there's no dispute in the record, as pled, and from matters this Court has before it, that what we're talking about here is the ownership of interest in La Maritima, a Cuban corporation, that, in turn, owned the stock and which was nationalized by Fidel Castro.

And that is important because -- for several reasons.

One, because, as the Court is aware, there's a difference between a shareholder making a claim relating to his

shares and a company making a claim relating to its corporate assets, such as the dock. And there's no basis under Helms-Burton by which an individual shareholder can come in here and assert a claim relating to La Maritima.

And the second reason that that's important is because La Maritima is not a U.S. National, it is a foreign corporation, a Cuban corporation.

And Congress, when they drafted Helms-Burton, they didn't say that all companies or all individuals who have claims relating to property confiscated by Cuba could bring a suit for trafficking. They specified it was U.S. Nationals who had a claim before the Act became effective.

And again, there's no dispute here that La Maritima is a Cuban corporation and would not be eligible to bring a suit under Helms-Burton.

Now, the arguments that appear to be made in response to that are not sufficient to justify denial of the motion to dismiss and exposing Carnival to a lot of unnecessary discovery on a claim that doesn't get anywhere as a matter of law.

On page 17 of the materials that we provided you, I quote what the plaintiff says in its brief, where they appear to be arguing that Helms-Burton allows anyone with a claim to confiscate a Cuban property to bring suit.

They say that on both pages 18 and 20 of their brief.

But that isn't what the statute says. The statute says

that any person that traffics in property confiscated by the Cuban Government shall be liable to any U.S. National who owns the claim to such property.

In the Eleventh Circuit, in the Glen versus Club Mediterranee case, made clear that this is a statute which deals with actions brought on a claim to the confiscated property against traffickers in the property.

It's not enough that you just have a claim and then you can go against any property that is in Cuba, there has to be a relationship with the property which was in Cuba that is being used -- that is being "trafficked" in -- is the property to which you have an ownership claim.

And here, the ownership claim is La Maritima.

And that is, you know, for example, again, the document attached to the complaint, page 18, talks about Mr. Parreno's ownership of 1300 shares of stock in La Maritima, a Cuban corporation, which owned and operated the docks.

And so a claim to the docks and a claim to any use of the docks after they were confiscated has to be a claim owned by the corporation.

You know, just as an example, Your Honor, if I owned shares in General Motors, and General Motors has a claim against some party, I can't run into this Court and say, I'm here to assert General Motors' claim.

And if I tried to do that as a derivative capacity --

and this is not a derivative suit, it hasn't been identified as such -- the claim would still be in the name of the corporation. And here, the corporation, La Maritima, does not, under the statute, have standing to bring such a claim because it is not a U.S. National; because it is a U.S. corporation.

That is exactly the kind of threshold issue we believe that the courts can and must deal with at the outset of a case.

And the proposition that shareholders do not have the rights to assert claims to underlying corporate property is well established. We cited the U.S. Supreme Court case of Rhode Island Hospital and Dole Food, that an individual shareholder does not own the corporation's assets.

And, in fact, there's a case that dealt with Cuban law which noted that property is held in the name of the corporation.

Now, what they say in their response is, well, maybe, if we get into discovery, we will learn that La Maritima was dissolved and its assets were distributed to the plaintiff.

That is not a basis on which you can get by the motion to dismiss, to speculate in your counsel's brief that, well, maybe the corporation was dissolved and the stock was distributed to the plaintiff.

There's no proof of that. There's no allegations of that in the complaint. There's nothing in the record that shows that. I mean, the Claims Commission found that the

company was nationalized, not that it was dissolved. So there is no basis in this case to support any grounds on which property owned by La Maritima, a Cuban company, can be the basis of a Helms-Burton claim.

And the plaintiff, when it says they need to seek discovery, is this discovery from themself? I mean, if the plaintiff obtains stock in the dissolution of La Maritima, then that's something the plaintiff would know and the plaintiff can allege.

What we have instead on the record is that this is a corporate asset of a Cuban company that cannot, under the statute, bring the claim.

So unless Your Honor has further questions, I'd like to reserve whatever additional time the Court might afford for rebuttal.

THE COURT: The language also touches upon something which may be unclear, of course, it may be covered in the argument of the defense -- or the reply of the plaintiff.

But when Cuban -- when the Cuban -- even phrasing the question shows whether it's relevant or not.

If the Cuban Government took property, a farm out in the country, a cattle farm, and gave it to -- and authorized some Cuban official to occupy it, to own it, use it, raise the cattle, whatever, Helms-Burton talks about who has the right to sue and who has not the right to sue, depending -- possibly

depending in some aspect as to who is -- who has the title of it now. I may be confusing some of the cases you cited with the facts of the complaint here, although I did read it.

Is that relevant? That's not relevant to your present argument on these two points?

MR. SINGER: No.

THE COURT: One way or the other, that may be something that might be relevant in a different case.

MR. SINGER: We don't think it's relevant to who owns the property now.

THE COURT: All right. You have covered it very, very well. Thank you.

MR. SINGER: Thank you, Your Honor.

THE COURT: All right. Mr. Martinez.

MR. MARTINEZ: Your Honor, may it please the Court. It's nice to be before the Court again, Your Honor.

Your Honor, I think it's fitting and historically appropriate that this case lands before the Court.

This is a case of first impression.

The two lawsuits that I filed were the first ones filed under Helms-Burton. As far as I know, this is the first hearing on a Helms-Burton matter, the Libertad Act.

And as I think the Court knows, the reason why the Libertad Act is a law is because of the Brothers To The Rescue case, because of the shoot-down. In fact, the actual statute

itself states that, at Section 60-46.

Congressman Diaz-Belart, on the floor of the House, when he was introducing the conference report to his members, said that the reason we're here today is in response to the shoot-down of the Brothers To The Rescue planes by the Cuban Government, so I think it's fitting that this case is before the Court -- this Court.

Your Honor, I think it's important to give the Court an idea what we're talking about, in terms of the property, and I would like to show the Court the actual photograph, the depiction of the property, if I might.

If I may, Your Honor, approach to here, please?

THE COURT: Marshal, can you help him a little bit.

MR. MARTINEZ: Let me give this to you, and I think it's --

THE COURT: Maybe Joyce needs to be in here, too, probably. Hold them up for me or something.

MR. MARTINEZ: Your Honor, for the record -- and I will file these so the record is clear -- I have given the Court three photographs. There's a photograph that has three piers.

THE COURT: Put them on that stand.

MR. MARTINEZ: Let me do it this way.

THE COURT: Mr. Singer, you have no objection, just for purposes of argument, it's not in evidence or anything.

MR. SINGER: I have no objection.

THE COURT: Go ahead.

MR. MARTINEZ: This is what we're talking about, Your Honor. This is the waterfront property owned by La Maritima Parreno, in Santiago, de Cuba, which, by the way, happens to be my hometown, that's where I was born and lived until I was age seven.

THE COURT: Give him the microphone, Joyce, please.

MR. MARTINEZ: Your Honor, this is the actual waterfront property that we're talking about owned by La Maritima Parreno. It's all outlined inside the red.

This is also a picture with the same waterfront property with ships on it. And the main pier is right here. This is the pier that Carnival uses when it's docked at the Santiago docks, the waterfront property owned by La Maritima Parreno. This is the actual pier itself. This is what we're talking about. This is the property, Your Honor.

Now, Your Honor, at this stage, as the Court has pointed out several times, we're here at the motion to dismiss stage, and I don't think there's any surprises to Carnival as to what this case is about or what we're alleging.

We have alleged in the complaint Carnival's liability -- the elements of the liability. And, Your Honor, that's found -- the actual elements of liability for violation of Title III is found at 6082 (a)(1)(A).

Let me just put this up on the board, Your Honor, okay.

Under Title 22 U.S.C., Section 6082 (a)(1)(A), what we have to show, whether any person, after the end of the three-month period, beginning on the effective date of this Subchapter -- and the Subchapter, the effective date was August 1st, 1996.

THE COURT: Just a moment. Go back and repeat that.

MR. MARTINEZ: Sure.

THE COURT: Maybe that microphone will help.

MR. MARTINEZ: A different microphone?

THE COURT: All right. You put a placard up that seems to reflect 22 --

MR. MARTINEZ: Okay, Your Honor. So, 6082 of Title 22 -- I don't think it's working too well, Your Honor. I'm afraid this is static.

THE COURT: All right, it never fails.

(Discussion held off the record regarding technology.)

THE COURT: Counsel need to see what the documents are, whatever you need to do to see it, Mr. Singer, walking up here to look at it, or whatever.

MR. SINGER: Thank you. He has given us copies.

MR. MARTINEZ: I have provided to them -- these are identical copies, Your Honor. I have given one to Mr. Fowler, one to Mr. Singer, and there's one for the Court, so the Court doesn't have to strain their eyes.

THE COURT: Thank you very much. Oh, good, this is

much better. You placed on the pop-up gadget there a copy of 22 U.S.C., Section 6082.

MR. MARTINEZ: Right.

THE COURT: All right, go ahead.

MR. MARTINEZ: And this is what sets forth the liability -- the elements of liability for trafficking confiscated property claimed by U.S. Nationals.

This is what we're supposed to allege to show liability by Carnival, and we've met that, Your Honor.

Under (a)(1)(A), it says:

Except as otherwise provided in this section, any person that, after the end of the three-month period, beginning on the effective date of this Subchapter -- and that three-months period began on November 1st, 1996 -- traffics in property which was confiscated by the Cuban Government on or after January 1st, 1959, shall be liable to any U.S. National who owns the claim to such property for money damages.

That's liability. That's the liability that we have to allege and we've alleged in the complaint, Your Honor, and we've alleged it -- let me give the Court an extra copy of the complaint.

For the Court's ready-reference, I've given you a copy of the complaint. And we've alleged -- I'm sure the Court has that, but in case the Court wants that for ready-reference.

THE COURT: No, thank you, I have it right here in

front of me.

MR. MARTINEZ: Okay. And we've alleged that, Your Honor. We've alleged those elements of liability in paragraph 7, 8, 9.

7, 8, 9 sets forth Cuba's confiscation of subject property, follows the elements of the section that I just read to the Judge, 8 and 9 continue that.

It's also included in paragraphs 12 through 16 in detail. In fact, there's a caption "Carnival's trafficking in the confiscated subject property." -- 12, 13, 14, 15, 16.

And then, again, we allege it in paragraph 19. It's all in there. At this stage in the complaint, we have made all the allegations that are necessary to establish liability on behalf of Carnival. There's no surprises here to Carnival. They're on notice. It satisfies Rule 8.

Now, there are three issues which Carnival raises.

The first issue is that plaintiff failed to plead -- that Carnival used the property not incident to lawful travel and cannot plead it because the use of the docks is necessary to lawful travel.

The second issue that they raise, they say that plaintiff failed to plead ownership to the confiscated property. They actually call it that in their motion to dismiss and in their argument, although, they have changed it a little bit in the argument as the case progresses.

But, candidly, Your Honor, in fairness to the defendant, and in fairness to us, and in fairness to the Court, this is a case of first impression. This statute has never been litigated before.

And the third issue that they raise is that plaintiff failed to plead a claim to the property trafficked by Carnival.

So I'd like to take this one at a time.

The first issue, as to whether or not we were required to put in there the so-called "lawful travel exception."

Now, we have -- both sides have used a lot of ink in our filings, going over a lot of cases as to whether or not that element -- the element of the lawful travel -- needs to be included in the liability or not.

And, frankly, Your Honor, I think that the clearest guidance as to what is an affirmative defense is, really, one need look no further than a decision that you wrote just a few years ago in the case of Lozada versus Norwegian Cruise at 296 F.R.D. 2013.

And I have a copy here for the Court, and I'm going to hand a copy to Mr. Singer.

And that case, the reported opinion that I've handed the Court dealt with the issue of whether something was an affirmative defense and whether it sufficed to satisfy what's required under the rules to allege an affirmative defense.

And, Your Honor, what you stated was, frankly, it

wasn't ground-shaking, in fact, it didn't set new grounds. You were just basically reciting the law.

And here's what you said, in headnotes one, two and three, you said, quote:

An affirmative defense is a defense which admits the essential facts of a complaint and sets up other facts in justification or avoidance.

That's an affirmative defense. We've been taught that since law school. Basically -- an affirmative defense, basically, goes something like this:

Yes, you're right, we did all of that, that was confiscated property, confiscated by the Cubans after January 1st, 1959; and yes, we used that property; but do you know what, we have a reason for using -- are justified in using it.

And they say that they're justified in using it, they say, because they have a general license that allows them to undertake lawful travel if the use of the property is incident to that lawful travel and if it is necessary to the conduct of such travel.

Well, they have facts as to whether they complied with all of that. They say they travel under a general license. Well, the issue is, among others -- and I'll get to it later -- did they comply with it?

They say that, under this exception, that what they -- their use of the dock was incident to lawful travel.

How do I know that? That's a question of fact.

They say that it was also necessary to the conduct of such travel. I don't agree with that. In fact, I dispute all that, including the fact that the license that they had allows them to engage in lawful travel. I dispute all that.

And we have evidence that will show that it wasn't necessary for them to use those docks. These big cruise ships, Your Honor, they go all over the world, in the Caribbean and in the Mediterranean -- but now I'm getting into facts -- and they don't go to the port, they anchor.

And we have evidence we'll present to that effect, that it wasn't necessary. These ships are, essentially, a floating island. They're self-sufficient. They don't need a port.

They don't need to use the docks in Santiago or in Havana. So, Your Honor, that which is found in 6023 13(B), the exception, are really parts of an affirmative defense.

Let me put that up for the Court.

So the definition I'm putting up for the Court is Title 22 -- and I've given the Court a board -- Title 22 U.S.C., Section 6023 -- under the "definitions" section -- this is 13(A). This defines "traffic," what "traffic" is.

And we've alleged in our complaint that they've engaged in traffic, as set forth in 13(A). We've also alleged -- as it says on the bottom -- that they did it without the authorization of any U.S. National who holds a claim to the

property. We've alleged all that.

Now, what they want us to do is they want us to also include in our complaint, as an element of the case -- or the complaint -- that, no, do you know what, you have to allege a negative, and you have to prove a negative.

Well, that's nonsense, Your Honor, but that's what they want us to do. You'll see that the exceptions are found in a different part of the definition of traffics.

And it set forth these -- the term "traffics" does not include, under 13(B), the following. And they actually want us to put in there -- according to their thinking -- that we have to allege in our complaint dealing with this issue.

By the way, they were not involved in the delivery of telecommunications signals to Cuba, according to their thinking, we have to allege all this.

And also, they were not involved in the trading or holding of a dock. And then, according to them -- and this is the key one -- they say that we have to put in our complaint that trafficking -- they were not using the property in the manner that was lawful, and that it wasn't incident to the lawful use, and it wasn't necessary to the conduct of such travel. They're saying we have to put all that in there.

That's a question of fact, as to whether or not, in fact, it was incident, was it necessary, and did they comply with the license. You don't just have a license, you have to

comply with a license. And all those are all issues of fact, those are affirmative defenses.

Your Honor, that's information -- and one of the things that the Court's looked at, to determine whether something should be alleged as an element, as opposed to an affirmative defense, is that who has the better access to the proof. With regards to those issues, there's no question that in this case, the entity or the party that has better access to those facts at this stage, before discovery, is Carnival. They're the ones who know whether or not they complied with the license.

And, by the way, the recordkeeping requirements are extensive, and they're the ones who are going to have to prove that the use of that port was incident to that, quote/unquote, lawful use, and they're going to have to also prove that it was necessary. Those are facts that are going to need to be discovered during the discovery process.

Now, with regards to the general license, let me put up something for the Court, because I want the Court to understand this. I want to put up -- let me make sure I have the right board -- right.

So this is the so-called "general license." I'm putting up on the board the 31 C.F.R., Section 515.572, effective November 9th, 2017. They're saying that they're traveling under that general license.

And, by the way, Your Honor, it's a little confusing,

but I think Your Honor's familiar, generally, with the Cuban Assets Control Regulations, affectionately known as the "CACRs." There are two types of licenses.

You have a general license, which means that if you qualify under a provision of the statute under "general license," then that's a general license; other than that, it's a specific license, which you actually have to get specifically from OFAC. I'm simplifying it, but that's generally the process.

What they say is, as of 2015 -- actually, as of 2015 is what they allege. But anyway, this C.F.R. that's posted up on the board says effective November 2017. They say, We have a general license and we qualify as a provider of travel services.

These are only the titles of the subsections, there's more to it, but these are the titles. This is a description of what goes afterwards, under A1, A2, A3, A4, and A5.

Now, under the general license exception they have certain requirements of reports and recordkeeping, and they're extensive, they're very extensive. And they're included here, Your Honor, under Subsection (b) of 515.572.

So they're the ones, they say, We have a lawful license under the general license provision to provide these services to travelers to go to Cuba.

Well, maybe -- I don't concede it -- but did they

comply with it? Did they comply with all these recordkeeping requirements? That's a question of fact.

The other thing, Your Honor, on this issue of whether or not the lawful travel license is lawful, I want to put this before the Court, because I don't want to waive this argument -- and there is a split -- I have to be candid with the Court -- there's a split of opinion among the scholars as to whether or not this license was, in fact, lawful, whether it had a statutory basis.

They say that the general license provided in 2015 was published in the Federal Register -- and I'm putting it up on the board -- 80 Federal Register 56915-01, and this is a description of the travel and related services general license.

And it says here: Carrier service by vessel and certain lodging services. OFAC is amending Section 515.572 to authorize persons subject to U.S. jurisdiction to provide carrier services by a vessel, et cetera.

Now, that was promulgated, not by statute; that was OFAC making that announcement. And I want to show the Court what Helms-Burton said, because Helms-Burton is a statute, the Libertad Act is a statute, and that regulation cannot trump a statute, a statute that's basic law.

And I don't want to concede this point, Your Honor, because there is a dispute among scholars as to whether that general license was, in fact, issued pursuant to statutory

authority.

And if you look at -- I put up on the board, and the defense has the mini of this -- I put up on the board a poster that includes the codification of the economic embargo as set forth in the Helms-Burton law.

And under Section 6032 of Helms-Burton, it says:

Codification of Economic Embargoes. The economic embargo of Cuba, as in effect on March 1st, 1996, including all restrictions -- all restrictions -- under Part 515 of Title 31, C.F.R, shall be in effect on March 12th, 1996, and shall remain in effect, subject to Section 6064 of this title.

And the conference report -- which is listed underneath -- by the way, the conference report -- not the committee report, which they have said that is actually the most authoritative comment on the statute besides the actual statute -- the conference report is the most authoritative document that's on the statute as to meaning of the statute.

What the conference report said is that the Committee of Conference modified the definition of "Economic Embargo of Cuba" to include all statutes or regulations -- all of them -- related to trade, travel, and transactions involving Cuban assets imposed under Section 620(a) of the Foreign Assistance Act of 1961, Section 5(b) of the Trading With the Enemy Act, Cuban Democracy Act of 1992, Section 902 of the Food Security Act of 1985, or any other provisions of law.

"Any other provisions of law," this is the key.

It is the intent of the committee that this definition be interpreted broadly, in part, in order to insure that the suspension -- suspension -- modification, or termination of any economic sanctions on Cuba be pursuant only to the authority granted in Section 204 of this Act.

Now, I apologize, Your Honor, for working my way through this, but it's dealing with different regs and different statutes, so I need to show you what is Section 6064. This is, again, from Helms-Burton.

And I'm putting up on the board a poster captioned "Codification of Economic Embargo of Cuba," Section 6064. And it says, "Termination of Economic Embargo of Cuba - Presidential Actions":

Upon submitting a determination to the appropriate congressional committee, under Section 6063, et cetera, of this Title, that a transition Government in Cuba is in power, the president, after consultation with the Congress, is authorized to suspend the economic embargo of Cuba and to suspend the right of actions created under 6082 of this Title.

Now, that has never happened. That has never happened.

Now, there's another provision of the Helms-Burton, but basically, it requires -- it's very detailed, under 6064, that basically requires the executive to make a presentation to Congress when they're modifying the embargo, and they've never

done that.

So, I want to make -- and the reason I'm saying this, Your Honor, at this stage -- and frankly, we're going into arguments that are probably more germane in a motion for summary judgment -- and that is that the general license cannot immunize Carnival from violation of a statute, Title III, and it cites no law that an OFAC license immunizes Carnival from a Title III liability. A license cannot override a statute.

Now, issue number two. They say that the complaint should be dismissed -- and they said this in their motion -- because he failed to plead ownership to the confiscated property.

Now, they seem to have modified their argument, but if you look at the motion to dismiss, this is what we responded to. Their motion to dismiss, under caption two --

THE COURT: Mr. Martinez, I think it would be helpful -- Marshal, can you help Mr. Martinez move that placard back to the podium there in the center of the courtroom, just drag the whole thing. Thank you.

MR. MARTINEZ: Thank you.

THE COURT: No, no, I'm sorry. Move it so you can read it, but I want you to use the podium, then the court reporter who's having difficulty hearing you, and the Court, and the counsel can hear what you're saying.

And you can drag it close to you so that you can point

to it, or refer to it, by using the microphone from the podium will help tremendously.

MR. MARTINEZ: Thank you, Your Honor.

THE COURT: We are now on -- at the point --

MR. MARTINEZ: Issue number two.

THE COURT: -- for the record here.

MR. MARTINEZ: Sorry, Your Honor.

THE COURT: You're at the point where you're talking about issue two raised by the defense on the question of a claim, whether or not the facts of the complaint are sufficiently alleged to sustain or to demonstrate --

MR. MARTINEZ: Right.

THE COURT: -- to the defendants what they have to defend against, the issues, and cover the elements set forth in Helms-Burton and these other statutes and documents. So we're talking now about issue two as to whether or not a claim has been stated. Go ahead.

MR. MARTINEZ: That's correct, Your Honor, and thank you for framing it that way. That's correct, Your Honor. We're dealing with whether or not we've made the right allegations, sufficient allegations.

And the second issue that they raised -- and this is the way it was presented to us when they filed the motion to dismiss. And I have -- the poster that I'm putting up here is -- basically, copies the Title of Section 2 of their motion,

in the first paragraph.

And the Title of Section 2 of their motion is, plaintiff's complaint should be dismissed because he failed to plead ownership to the confiscated property.

Now, and you can see, the last sentence -- the last sentence of paragraph one -- plaintiffs must show and ultimately prove ownership of the allegedly confiscated property. His failure to do so warrants dismissal.

Now, actually, what the -- we actually allege that. We actually allege that in paragraph one to the complaint, Your Honor.

We allege that Mr. Bengochea is a citizen and resident of Florida. We've also alleged, in paragraph six, that he's a National, and he was the rightful owner of 82.5 percent interest in a certain commercial waterfront real property in the Port of Santiago, deCuba, identified specifically by the Republic of Cuba as La Maritima and Terminal Naviera, the subject property. We've alleged that in paragraph six.

And we've also alleged that he owned the claim. We also alleged that he owned the claim in paragraph 10, in paragraph 11, and in paragraph 19.

So these -- whether or not the defendant claims that the complaint is deficient because if he didn't plead ownership or he didn't plead of the property or ownership of the claim.

We actually pled them both. We've pled that he owned

the property, the subject property. We've also pled that he owned the claim, certified and uncertified claim.

As the Court knows, under Title III, in Section 6083, it's perfectly appropriate to have both a certified claim and an uncertified claim. They're both claims. And Dr. Garcia-Bengochea is the owner of both, and he's made that allegation.

And, by the way, Your Honor, to be clear, Dr. Garcia inherited the claims. He inherited the claims. It was not the intent of Helms-Burton, Your Honor, to allow the Cuban Government to run out the clock on old Cubans, like me, or Dr. Garcia's relatives, or on U.S. Nationals, that owned property in Cuba, to let them die, so the Cuban Government could one day traffic in the confiscated property with impunity. That's not the intention of Helms-Burton at all, Your Honor.

With regards to the claim that Dr. Garcia has, it's a claim through inheritance, he owns the claim. The claim arose when the property was confiscated, whether it was certified or not.

And for example, Your Honor, what we say in our papers is that a claim -- and the word "claim" is not defined in Helms-Burton. But a "claim," Your Honor, is really nothing more than an assertion of a right to a payment.

And the Court can look, if the Court wishes, we made

that argument, but we didn't cite to this section, but the Court can look, if it wishes, to the bankruptcy code, at 11 U.S.C., Section 1015(a):

The "claim" means the right to payment -- an assertion of the right to payment, whether reduced to judgment, whether liquidated, whether unliquidated, whether contingent, or whether it has matured.

And that's what he has here, he has a claim, and he owned the claim, and he owned the claim from the time the property was confiscated back in 1960.

The definition that you find in Helms-Burton, I think, is helpful on this point. The definition of "property" -- I'm putting up on the board another poster, and this one has two sections of Helms-Burton.

I want to direct the Court's attention to the bottom part, and this is the definition of "property" under Helms-Burton. It's a very expansive definition of "property," under Section 6023. And Helms-Burton defines "property" to include the following:

The term "property" means any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right -- contingent right -- security, or other interest in, including any leasehold interest. Any interest.

That definition of "property" under Helms-Burton I, think, supports our argument that the claim that he has here, which is an assertion of a right to a payment, is perfectly allowed under Helms-Burton law.

Your Honor, a few years ago I submitted a claim in connection with another family that I represented that had a judgment under the anti-terrorism law -- the Judge is very familiar with -- and it's a claim that I submitted, not to the Claims Settlement Commission, but I submitted it to Mr. Feinberg, Ken Feinberg, who was appointed special master to administer a fund for victims of terrorism. It was funded primarily from the settlement in the bank, BNP Paribas.

And it's a claim. We put in a claim. And I put in a claim for different family members. And what it was, was I asserted in that paper to Mr. Feinberg a right to get payment. It was an assertion of a right to get payment. He reviewed it back and forth, and I had to prove it. But that's what a claim is, a claim is an assertion of a right to payment.

And Dr. Garcia has had that claim, has had that assertion of a right to payment since the time the property was confiscated. He gets the claim, Your Honor, from the inheritance from his two cousins, Desiderio and Alberto Parreno.

There's no disputing about that. There's no hiding it. The complaint that they filed from the lawsuit that was

dismissed says that, it's a matter of public record, and that's how he gets his claim. And that's perfectly legitimate, Your Honor. And certainly, there's nothing in Helms-Burton that says that it was intended to disallow an inheritance.

There are a lot of people that have rights to file these claims, by virtue of Cuba's action, by virtue of their inheritance, because frankly, their grandparents, their parents have passed away, have passed away. And it's not the intention -- it wasn't the intention of Helms-Burton to let the Cuban Government run out the clock.

The fact that this is a very broad statute, and I just copied here one section of the statute with regards to findings, under Section 6081, and what it says under Helms-Burton, Section 6081, is that Congress makes the following findings. This is under Section 11:

To deter trafficking in wrongfully confiscated property, U.S. Nationals -- Dr. Garcia is one -- who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers -- such as Carnival, or whoever else is using stolen property -- any profits from economically exploiting Castro's wrongful seizures.

There is no surprise to Carnival that Dr. Garcia, the plaintiff, is pursuing the claim, and they know how he's pursuing the claim to the Santiago docks that was used by

Carnival.

Issue number three, they say that plaintiff failed to allege that he owned a claim to the property being trafficked. Well, as it pertains to allegations, as it pertains to allegations, we have alleged that he owned the waterfront property, that's the subject property, and that's in paragraph six, 12 and 13.

"Subject property" is defined as the waterfront and "real" property in the Port of Santiago, and that's the same property that Carnival has used, that they have trafficked in. So, we've alleged that.

Now, they say, Well, all he had, if anything, was a claim to the shares, a claim to the shares of Maritima, and Maritima was the one that actually owned the waterfront property.

But if you look at the definition of "property," again back to Helms-Burton, Section 6023, the term "property" is very broad, to include any interest, any interest whatsoever.

The formal ownership of the property was through a corporation. But if they're coming in here and telling you that the Cuban Government was allowed to seize all these corporations, and there's no right, there's no remedy under Helms-Burton because they did it, technically, through the corporation and they got the fruits of all their assets and, therefore, the Cuban Government can get away with this with

impunity. Well, that's not the intention of Helms-Burton, as reflected in 6081(11).

Your Honor, if I may, one last thing -- I think I got it here. This is the -- this is an English translation of a portion of the Gaceta Oficial. Now, as I think the Court knows --

THE COURT: Please, repeat that into the microphone so I can hear it, yeah.

MR. MARTINEZ: I apologize, Your Honor. This is a poster of the Gaceta -- G-A-C-E-T-A -- Oficial -- the Official Gazette. And I think the Court knows, from hearing many cases of this in South Florida over the last couple decades, that in the case of a civil law country, such as Cuba, the government publishes its official actions in these types of gazettes.

And this is the gazette that is actually listed in our complaint. This is the way in which the Cuban Government, through edict, announced that they were confiscating a lot, a lot of property, either owned through corporations or individually.

It's a brutal example of a totalitarian state stealing property. And I just got back from touring the beaches in Normandy, and it brings home the fact that what was happening in Cuba 60 years ago is the same thing that happened in Europe in the middle part of last century, and that happened in Eastern Europe with the Soviet Union, this is a brutal

undertaking -- it's a brutal example of an undertaking by the totalitarian regime just to steal property.

Here's what it says in Article One:

The nationalization through compulsory expropriation is provided for all industrial and commercial enterprises -- all of them -- as well as the factories -- just to be clear, we're not just talking about the enterprises, the legal entity, the Cuban Government throws in there -- as well as the factories -- the warehouses, depots, and all other properties and rights that are part thereof owned by the following physical or legal persons.

This is the gazette in which the Cuban Government announced we're going to takeover a lot of properties, including this one. And this one is here, Your Honor, in Group Z -- and it's listed as number 12 -- La Maritima, S.A.

And then under Article Two, which is right below it -- right below it --

THE COURT: Now, I'm so sorry -- you've stepped away.

MR. MARTINEZ: Yes.

THE COURT: This is the Gazebo --

MR. MARTINEZ: Gaceta Oficial.

THE COURT: -- where the Cuban Government stated that we're going to takeover Group Z, as it's listed number 12 -- La Maritima, S.A., and the article which is right below it.

My question to you is, for heaven's sakes, are you

pointing at something that is the property in this case?

MR. MARTINEZ: Yes, it is. Yes, it is.

THE COURT: So what this document purports to show, at least in part, is that this property was -- this property involved in this port was confiscated by the Cuban regime at the time?

MR. MARTINEZ: Yes, Your Honor.

THE COURT: Okay.

MR. MARTINEZ: And the Cuban regime -- by the way, there are other groups. I just copied the pertinent portions of the Gaceta that deals with Group Z, which is where the subject property is listed as number 12.

So there are other groups, A through Z. And after Z, there's another article, and the article says:

Therefore, all property rights and shares of the enterprises listed in Article One, which includes La Maritima, S.A. -- the entity that owned the waterfront in Santiago - are adjudicated in favor of the Cuban state.

The Cuban state now owns them.

All of their assets -- but it continues:

All of their assets and liabilities being transferred thereto and consequently the state is declared to be subrogated in place and to the extent of their physical or legal persons owning the aforementioned enterprises.

The reason I put this up here, Your Honor, is to show

that when they confiscated the waterfront property, they confiscated the legal entity and they confiscated anything that the legal entity owned, everything.

And that is, frankly, Your Honor, that's the way the Helms-Burton defines "property." It isn't just the legal entity -- who owns the legal entity, it's the legal entity and any interest that anybody associated with the legal entity has.

That's the definition of "property."

I think, Your Honor, I probably have exceeded my time, and I've tried the Court's patience. You're always very --

THE COURT: I didn't set any times on either side, so don't worry about it.

MR. MARTINEZ: You're always very generous with the lawyers, Your Honor.

But again, just to go back to where we started. We're at the complaint stage. This is a case of first impression.

Carnival cannot possibly be surprised as to what the allegations are, or what Dr. Garcia is seeking, or what their liability might be, or what their defenses are.

There are really very little surprises here.

If you look at the four corners of the complaint, we've complied with the requirements of Rule 8, and we've complied with the requirements of the Supreme Court in Iqbal.

We've alleged the property that was confiscated, when it was confiscated, after January 1st of 1959.

We have alleged that Carnival trafficked in that property, and that it did so knowingly and intentionally.

We have alleged that Carnival did not seek authorization from Dr. Garcia, or anybody else who might hold a claim to that property before using it, before trafficking.

And we have alleged that Dr. Garcia owns certified and uncertified claims to the property, including the property itself.

That is more, more than is required by Rule 8 to satisfy the requirements to plead our case at this stage of the proceedings, Your Honor.

Thank you very much.

THE COURT: Thank you. Would you wait just one second.

Thank you, Mr. Singer.

Thank you, Mr. Martinez.

(Brief pause in the proceedings.)

THE COURT: Yes, Mr. Singer.

MR. SINGER: Thank you, Your Honor.

And I'd also thank you for the extensive time that you've provided both Mr. Martinez and myself to address these issues.

We do agree on one thing, that this is an issue of first impression under the Helms-Burton Act.

But I'd like to note that since Mr. Martinez talked about the purpose of the Act, that the findings of the Act

itself -- as we've quoted in our brief -- made clear that it was to deal with the fact that Cuban Government was offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets, some of which were confiscated from United States Nationals.

That was what the Act was directed at, trying to deal with what were, generally, foreign companies coming into Cuba, forming joint ventures and investments.

The Act was not intended to deal with companies that would - if you had travel to Cuba - for lawful travel. And that's why there is, in the very conference report that Mr. Martinez agrees is a authoritative source, the statement that we have excluded lawful travel from what constitutes a definition of "trafficking."

And that goes directly to the first of the arguments that we've presented for Your Honor's consideration, that they have to plead that this was not lawful travel. That's an element of the offense.

Now, Mr. Martinez referred Your Honor to a case that you wrote, the Lozada versus Norwegian Cruise Line case, and quoted the first sentence of the discussion under legal standards. I think a copy of the case was provided to Your Honor by Mr. Martinez.

And he quoted the fact that an affirmative defense is

an offense which admits the essential elements or facts of a complaint and sets up other facts in justification or avoidance.

But he did not go on to read the second sentence, which I would like to read, which says, quote:

A defense which points out a defect in the plaintiff's prima facia case is not an affirmative defense.

And that's what we're dealing here with, a defect in a prima facia case, because the prima facia case involves trafficking and how Congress has defined "trafficking."

Now, Mr. Martinez said he had no objection to my using a couple of his charts, and I'd like to do that for a moment.

THE COURT: All right.

MR. SINGER: The charts which I have up are 22 U.S.C. 6023, Subsection 13, the definition of what it means to "traffic."

And even though these are put on separate charts by the plaintiff, they're all one definition of what "traffics" involves, because part A, which Mr. Martinez says they plead, says: Except as provided in Subparagraph B, a person traffics in confiscated property.

So you can't ignore Section B. Section B is part of the very definition of what it means to traffic, it is incorporated into the definition of traffic, and that's the element of the offense.

And it is Section B which defines "trafficking" as not including -- in Subsection 3 -- transactions and uses of property incident to lawful travel.

So this is not some affirmative defense set up separately in this statute. This comes from the very definition of what it means to traffic, and you haven't pled trafficking unless you address the issue of lawful travel.

Now, with respect to whether or not the travel is lawful, there's been, essentially, two issues which the plaintiff has raised.

One is whether there are facts regarding lawful travel. Well, they haven't pled any facts. They've thrown up arguments as to, Well, maybe it wasn't necessary to use the docks because you could anchor out in the middle of the bay, leaving aside they haven't pled that.

Leaving aside that "necessary," as we've shown, going all the way to M'Culloch versus Maryland, was defined by the Supreme Court, doesn't mean that it was essential, just that it was useful. And if it's useful to use a dock, then it falls within what's necessary for the purpose of lawful travel.

The issue of anchoring --

THE COURT: See, there's one of the real troubling points in all of this. You have to have an understanding of what Congress intended in Helms-Burton.

Well, your last statement states it better than I could

do it, hypothetically. But let's see. The specification doesn't mean it was a certainty. It just means it was usefully maintained to pull into a dock, makes it what is necessary under the "trafficking" definition.

See, it's asking courts and lawyers to consider and determine sort of hypothetically, and you say -- perhaps it was -- I don't know where it was raised, but I do remember when you said that -- some reference may have been made in the pleadings that you all -- the arguments you all made, or it may have been from some provision of these documents that you've put up on these placards and included in the defense book here.

But there's a reference to this, just taking this one little isolated situation, somewhere in all these pleadings, which you all have prepared, which I've read and considered, it talks about, Well, is it necessary or incidental to trafficking to actually pull in and disgorge -- or disembark people from a ship at a fixed dock or on a piece of land attached to Cuba, in this case.

What about ships that anchor just offshore and take boats and take 20 people at a time, or something, back and forth and dump them out on the beach. And you all are asking me to -- or somebody, I don't mean you are -- asking me to start thinking about -- we take all those things into account -- and I don't have any difficulty with just assuming that at somewhere down the road summary judgment, or some other

phase of the pleadings, looking at all that and feeding it into what does "necessary and incidental to trafficking" mean, hypothetically, or argumentatively, vis-a-vis being in the words when it talks about the telephone trafficking back and forth, for example, and using this by analogy to this situation and what you all are describing as a first-impression case.

And the difficulty with that -- and this is what I am telling you, you say you don't mind and appreciate my telling you what's in my mind -- it's not to argue with you, but it's to see what -- I don't like to argue with bright lawyers, I sometimes lose those arguments.

MR. SINGER: I would think very rarely, Your Honor.

THE COURT: The Appellate Court tells me.

Hypothetical, nothing, but in the last few months, I've been getting about two opinions a week or every two weeks.

The Appellate Court, since they have full strength are writing a lot more opinions, it seems to me, than they used to, they have, and for good reason. All right. Aside from that, I've gone off on my own tangent here. Let's go on.

But a lot of this is -- these are good examples and good suggestions, and there's nothing wrong with these suggestions in your briefs and arguments, but deciding them when, it seems to me, the guiding principle, the guiding star here in deciding motion to dismiss is facts well pled and -- in part, you're suggesting in your argument, well, here these

other people decided this -- and whatever document we were looking at, at the time, whether it was the history of the case, or the statement of the Commission, or a couple of other statements about this Cuban confiscation years ago, to determine the meaning of "trafficking."

Well, I guess, if I were to pose this in one straightforward question, it might encompass some or all of that discussion I just had with both of you. I'm bringing it up, a person, a judge deciding whether or not parking -- anchoring a mile offshore and taking in, in ship-owned, small craft boats, 10, 20, 30 people at a time and dumping them out on the beach is necessary, or isn't, depending on your point of view, vis-à-vis using a dock to let them walk down the gangway, or gang plank, and step on to firm land and walk into a terminal where -- or a area where people gather to board and leave a building.

And all that, you say, Judge, interpret it this way, and he'll say, interpret it that way, and this and that. And it seems to me that it's taking the Court beyond, perhaps, where it should be at this point to say, Do the facts, in paragraphs 6, 11, 13, state -- stated it well enough, coherently enough, concisely and properly enough, to be stating a fact which then puts the defense on notice of what they've got, the position and what they've got to defend, and so on;

Or does it not -- and Judge, you can determine that by

comparing it, thinking about those boats running back and forth to the beach, or the big ship pulling right up to the concrete dock in the terminal, all of which, or some of which, you're drawing upon these other Commission findings and other things, to say that while that statement of, quote, fact, unquote, in paragraph six, or 12, or 13, really isn't one if you give this finding of this Commission about sort of being necessary to the -- getting the people from the deck of the ship to the main land, is looked at in one way or the other.

It's in a case that is the first time that you all suggest anyone's looked at it is far too significant, I think, to leave it to that type of analysis by simple -- at the level of one judge, district judge, or magistrate, or something, as opposed to some hard facts, maybe.

All I'm saying is you're injecting a lot -- both of you are injecting a lot of things in here that require me to interpret 22 U.S.C. in section this, section that, and all that, when the direct principle that I've always thought we should -- the judge should deal with is whether, taken as true, now, is it conclusory? -- a lot of this is.

But is there another way to state it that's not conclusory, i.e., I, plaintiff, Mr. Jones, owned stock in the corporation. Now, lawyers don't know any other way -- part of, of course, another argument -- outcome of this could be a dismissal of -- certainly leave to amend, and you're suggesting

things that should be there and should not be.

It's very good argument both of you are making. But it seems to me you're expecting, or demanding, more of what a trial court -- or a trial court should be getting into without being able to make findings of fact.

See, I'm more comfortable, I sleep better at night if I've read over a draft of my opinion that I've done, or that you all may have submitted to me to look at, or if I can -- I really, really, really -- this judge, and I'm confident all my colleagues would do the same thing, is make sure the facts are correct and that their opinion is based upon the findings of fact.

But at this level, it's got to be based upon the finding of fact as alleged with the presumption that if, while it's stated in the English or Spanish language, whatever we're dealing with, it states things that are not just -- Well, Judge, imagine the boat/ship is two miles offshore and they're running the -- you see, that's a long-worded way of asking -- if I had it down to one sentence, that might be helpful to understand clearly the defense point of view here.

MR. SINGER: We think, Your Honor, that one sentence might be that, at a minimum, the plaintiff should have to re-plead to allege what the statute requires in trafficking and to address lawful use and to also address the ownership issues.

THE COURT: But then, factually, how is that not in

this complaint?

MR. SINGER: Well, factually, there is --

THE COURT: Because you all are arguing the legal theories, all of which I don't find any fault with your legal analysis on a lot of this stuff, but we hear -- what I think I hear you saying, that the defense feels that to determine trafficking the compliant should allege to be entitled to the exceptions in the thing -- in the statute, Helms-Burton, that it was -- or maybe was not -- necessary to bring the big, gigantic cruise ship with -- I'm making this up -- 2,000, 5,000 people on board to a place where they could walk on a hard ground. In other words, I think that's too wordy a way, you could phrase it better.

But how do we -- is that a turning point or one of the turning points that they should have to allege that the ship either -- the big ship, Majesty of the Seas -- I made that up -- 5,000 people pour in there, they're going to be there eight hours, and pour back, and they should have to allege that, under necessity, under traveling, that the big ship, Majesty, pulled up to the dock and off-loaded into this nice terminal, or whatever they call it -- what is that auditorium where people get their tickets and go and then board the ship, what is that big terminal or disembarkation hall, or whatever it's called. All right.

Are you saying -- is the defense saying that I should

have to find, at least mentally, that that was necessary for the big ship to do that in order to find under the trafficking concept that without that proof they can't make a claim?

MR. SINGER: Well, let me -- if I might, Your Honor -- say a few words about this concept that plaintiff's counsel has introduced, because it's not in the complaint, that they could bring a ship in -- and you're right, these are ships with thousands of passengers -- drop anchor and somehow get those passengers off the ship and on to shore without using a dock, which is, frankly, preposterous.

THE COURT: You're saying that can't be done?

MR. SINGER: It cannot be done, for a variety of reasons.

THE COURT: I hate to abuse you with a personal reference and, certainly, I won't let that control, but I've gotten onto a cruise ship and been bussed -- if that's the word -- to shore, or up to a dock, or whatever.

I think there's one cruise line that advertises where they own an island somewhere, and we go to our own -- go with us because we own an island, we can take you off and put you there, or something.

I don't mean to -- but all I'm saying is, an argument can be made to fit trafficking, to fit the ability to make a claim that if they had to allege that was or wasn't necessary, why is it necessary to pull the big ship in and throw houser

around the big concrete steel block and tie it up?

I watch them do it all the time in Key West when I go down there and hold court. In fact, it's -- you know, when I'm getting out of the room, I just looked out, here comes a big ship, I sometimes watch it when they get there early enough, whatever, I'm saying. So I see them doing it both ways, and we all know they do, but I mean, I'm not saying -- what I see wouldn't matter one way or the other.

But why must one side allege that it's got to be done that way in order to be, or not be, trafficking under Helms-Burton?

MR. SINGER: Well, they have to allege whatever their contention is going to be as to why the use wasn't lawful, because that's part of the --

THE COURT: They say that they have a ship, that the property that they claim they own, or that they talk about, the docks -- I'm not sure under Helms-Burton which way they go, do they say it is necessary or not?

You're saying it is necessary for trafficking, or it is not, which way do you go to?

MR. SINGER: Our argument, Your Honor, is that the use of the dock which is at issue here is necessary for the lawful travel to Cuba.

THE COURT: Is necessary.

MR. SINGER: And it's necessary because even if you

were to use tenders, these little ships to get people off of the big cruise ship, you just don't dump those people on a beach. That tender pulls into the same dock. Those people have to get off of the tender, they have to be processed as having the appropriate papers to enter.

THE COURT: Let me give you a little hypothetical, which just occurred to me, which is probably ridiculous, as soon as I tell you about it, you'll point that out.

An airplane flies passengers from the island, lands on the airport in Havana, disembarks on hard ground. What if the airplane is doing that, disembarks at an airport -- if there is one that is not on Cuba -- look at Dominican Republic and Haiti, they land on one side, disembark, they walk over, they go -- is it necessity, or is it not necessary -- and see, the necessity, is it dependent upon things like where the plane lands, the boat lands?

MR. SINGER: We don't think it is, Your Honor.

We don't think -- either now or later -- you have to make judgments that the only way passengers could get off the ship would be through docking, although, the facts will show -- if we get into discovery -- that that is, in fact, a requirement in order to be able to travel to that port, that you couldn't just use tenders; and even if you use tenders, those people then use that port --

THE COURT: Suppose they landed on the beach --

MR. SINGER: -- to get off the tender at the facility.

THE COURT: Suppose the airplane landed at a running slip in the jungles two miles past the border -- if they could do that -- these are hypotheticals --

MR. SINGER: Yes.

THE COURT: -- and they're probably crazy, but that's what Helms-Burton seems to be. Well, that's one that --

MR. SINGER: I don't think the Court --

THE COURT: -- you all are suggesting that it was essential for a party to prove or allege. Well, I think you've made your point clear that it is essential, they've got to do it and, therefore, it's exempt. All right.

MR. SINGER: Your Honor, if I could add one more point on this issue --

THE COURT: Please do.

MR. SINGER: -- is that this is why we think the term "necessary" has been in case law not defined as being "essential."

Our burden is not going to be -- and we think, in fact, it's going to be the plaintiff's burden to disprove lawful use, because it's part of the element.

But the issue of "necessary" does not require a determination by the Court that the only way that you can get passengers off of a boat is to use the dock.

The definition of "necessary" is what is useful.

That's the U.S. Supreme Court and many other cases which we've cited in our brief, and they have not engaged on at all. So that's why the Court is not going to have to make a determination as to whether or not issues of tendering will work.

THE COURT: Well, what is useful -- well, hey, an argument can be made everything is useful, or everything is not, it's the same argument. It's just -- it's such an imperious focus on --

MR. SINGER: It is.

THE COURT: -- if we'd -- if you'd just argue this to a jury, or to me, you'd be arguing, Judge, the proof shows that on July 21st the ship pulled into the dock, and it did this, it did that, you know, we'd have all of that before -- and, therefore, that is necessary. It was necessary then, they proved it was necessary. Wasn't it -- all right, I'm sorry. I'm doing exactly what I promised you I wouldn't do, is interrupt your argument.

Please go ahead and finish.

MR. SINGER: Your Honor, the issue here is simply, let them put forth, if they think that the reason it's not necessary is because of tendering, let them plead that, but they haven't done that. We don't think as a matter of law that that suffices.

I'd like to address the issue of ownership in both the

second and third -- oh, before I do that, one passing point.

The issue that he raised regarding the Embargo Act, that is not something which deals with OFAC licenses. He is suggesting that the Department of the Treasury was not authorized to provide travel. That's not something which -- first of all, this Court can -- is supposed to determine under a private suit under Helms-Burton.

And secondly, on the face of that validly enacted regulation Carnival's travel to Cuba was lawful, and the statute and the committee report we cite makes clear that lawful travel to Cuba was intended to be outside of Helms-Burton.

Those are the only issues the Court needs to look at. This has not involved questions of the embargo.

Now --

THE COURT: But it's what they've got to allege, which gets back -- that's what we're talking about.

MR. SINGER: Yes.

THE COURT: All right.

MR. SINGER: So our point, to summarize on one, is because this is part of the definition of "trafficking," the issue of lawful use, they should be required to plead and let's see what argument they present there.

On the second argument, which is the issue that they don't own the claim or the property, that Mr. Bengochea's

assertion of that is a conclusion, the issue of the claim that was submitted to the Commission is not just some piece of evidence.

The very chapter which sets up the rights to bring these claims says that:

In any action brought the Court shall accept as conclusive proof of ownership of an interest in property, a certification of a claim of ownership to that interest made by the Foreign Claims Settlement Commission.

So that is why they attached it to their complaint. And it is conclusive that Mr. Parreno, Albert Parreno, is the one who owned that claim.

You now have the assertion made from this podium, but not in the pleadings, that Mr. Bengochea acquired a legal interest to pursue that claim by inheritance. That's not pled.

And the public Will of Mr. Albert Parreno, in fact, gave those rights to Desiderio Moreno, his brother. And that's in the record, and there's been no objection to the Court taking judicial notice of that.

So more is required, under Twombly and Iqbal, to make it plausible that Mr. Bengochea owns the claim, than simply counsel saying at podium he inherited it. Let them plead it. Let them show when it occurred, because if it was after 1996, then under the statute there's no ability to bring a claim, so that we can engage on that issue.

And those are not facts discovery is needed. If he inherited this, and how he inherited it, and when he inherited that, that is exactly the kind of information that the plaintiff would know.

And he is required, in the light of the fact that one document attached to his complaint, which the government says is conclusive on issues of ownership, says it's Albert Parreno, not Bengochea, who owned the shares in this company.

Now, the third argument, they have not really come to grips on.

THE COURT: Normally, you'd just deny that, that's all you have to do, that claim, if you're answering, if you were filing an answer. All you have to do, really, is say, paragraph six, or whatever it is, is denied.

Then the burden's on him to prove it, so he has to prove his statement, if it's well pled, I own the shares in this property. And how do I get into all this other stuff at this stage about the people, or the persons, or cousins, or brothers, and whoever that died, and inheritance.

He says he owns it. He may be totally wrong. He may be totally wrong, maybe -- well, it may be proven, totally, totally wrong for a lot of reasons.

But it's a claim. We're talking about a claim against the defendant because of the confiscation by the Cuban Government. And a claim, he asserts, I am the lawful owner of

the claim, and he goes ahead and puts in his statement that it's -- whatever it is -- 15, or 32, or 87, I don't know, there are different amounts here, different parts of the shares of the company.

And at the time the company was going viable -- I think this is in the complaint -- it was owned by the -- it was owned and operated by a company, and it's a Cuban name, which whatever the name of it is, and these are shares and the shares is -- and there it is, that's what I'm claiming.

And it's -- I'm exercising the right of that company to make a claim for reimbursement of the property the company owned at the time of the confiscation.

And that, I allege, is my proof of -- the plaintiff, what he has alleged is the ownership of the shares.

MR. SINGER: What Your Honor is --

THE COURT: Now, are you saying that the shares are eliminated -- and you all have cited me a whole lot of stuff here. Tell me that theory once, just briefly, in a couple sentences again, about your position on it.

MR. SINGER: Yes, Your Honor.

And what Your Honor has just stated is far more than what they have pled in the complaint, where he just pleads ownership.

THE COURT: Okay, good. What paragraph of the complaint do you say does not allege that the Cuban company

owned it and the shares, and it's at?

MR. SINGER: Paragraph six of the complaint is where they make a bare allegation of ownership.

THE COURT: All right. I'll review -- I will look at paragraph six. All right.

MR. SINGER: And that allegation is at odds with what the claim attached to their document says.

It's paragraph six, just says he's the rightful owner of an interest in the property. And the Foreign Claims Settlement Commission document, which is to be authoritative, shows that that's Albert Parreno.

And from this podium, but not in the complaint, there's an assertion that Mr. Bengochea acquired that by inheritance. Well, let him plead that and let him plead when he acquired that.

THE COURT: Now, where is -- is that attachment Exhibit A you're referring to or what?

MR. SINGER: Yes, it's Exhibit A to the complaint.

THE COURT: All right. Where in Exhibit A are you referring to the actual ownership as being different from paragraph six?

MR. SINGER: If we --

THE COURT: I'm sorry, I thought you had it in front of you. That's all right.

MR. SINGER: I do have it here. I wanted to cite more

than what we are --

THE COURT: That's all right, that's all right. I'll read it. I'm sorry. Go ahead, sir.

MR. SINGER: Yes.

THE COURT: And let me stop interrupting you, please, I really will. Go ahead.

MR. SINGER: The very claim which is attached to the complaint is styled, In the Matter of the Claim of Albert Parreno. And in that it specifically says that Albert Parreno has a claim -- this is, if you look at page --

THE COURT: I have it in my hand, I'm looking at it, I'm reading it, the style of the case.

MR. SINGER: So this is a claim brought by Parreno, and in this it talks about his interest is being that of 32.5 percent stock of La Maritima, which is the owner of the dock, so...

THE COURT: All right. So you're saying that there's a dispute in the -- between the allegations in Exhibit A --

MR. SINGER: Yes.

THE COURT: -- and this document dated September 16th, 1970, being allegedly from the Foreign Claims Settlement Commission of the United States. All right.

MR. SINGER: Right. And page three of that says that the Commission finds that claimant -- claimant is Albert Parreno -- owned 1300 shares of stock in La Maritima, a Cuban

corporation, which owned and operated docks in Santiago, Cuba.

There's no dispute that's been raised about that, and this is attached to the complaint, it's also a document of which judicial notice can be taken.

And in that situation, just like Judge Gold did in the copyright case, it is incumbent on the plaintiff to plead facts, not just a conclusion that's implausible, that says that Bengochea now owns that claim. And that they have not done.

And the assertion that was made here --

THE COURT: Excuse me for interrupting. We're back to the same old thing, whether I give -- weighing credibility to documents that the plaintiff attached to the complaint which seemed to have a differing viewpoint than one part of the part that he asserted in his complaint to -- and that I should make a decision as to which one, irrespective of the concept of well pled, is taken as true or correct.

And you're asking me to balance the weight to be given to this Commission ruling and statement, and the matters stated therein, which you've stated correctly, I'm not saying -- well, that is sufficient to make a finding that the complaint on the claim does not state a cause of action as pled and dismiss; on that, I'm prepared to make a ruling.

And the ruling I'm making -- in the midst of all the arguments are pretty well complete -- on that, I believe that the complaint, as stated on the claim aspect, which is item

number two of the defense submission, that the complaint does, in fact, taken in the light that is true, and so on, under the cases cited, I believe, does make a proper claim under the -- that meets the requirements of Helms-Burton.

This is a tentative ruling. I reserve the right to change this as I draft the order I'm going to draft.

However, that's my tentative ruling on item two.

Let me ask you to move on with that announcement of sort of a tentative conclusion, or a tentative conclusion, to item three.

MR. SINGER: Item three deals with a legal issue. And as the Court is aware, legal issue can be dealt with on motions to dismiss.

And that legal issue is, simply, there's no dispute that the owner of the dock was La Maritima, a Cuban corporation.

And a shareholder, unless one is bringing a shareholder derivative suit, simply cannot bring a claim regarding a loss of property in a corporation in which that individual owns shares. They have not disputed that.

The only thing they raise in their papers was speculation that discovery could be useful because perhaps the corporation was dissolved and somehow the assets of the corporation, or the stock of the corporation, was somehow distributed in a way that would create standing.

Again, that is pure speculation.

What the record shows is that the company was nationalized, but the company was a Cuban company that owned stock -- or excuse me -- that owned the docks.

And there is no basis under the law in which a Cuban company can bring a Helms-Burton claim, because it is limited to U.S. Nationals and, therefore, they have not pled that there is trafficking in property which is owned by the plaintiff, because the docks are owned by a Cuban company.

Helms-Burton was not a law which said that all companies and all owners of property wherever located have a cause of action. This was for U.S. Nationals, who, as of the effective date of the statute, had ownership of property -- could show that they had a property interest at the time of confiscation that they owned.

Now, that argument has not been dealt with.

And we think that on that basis the Court can and should dismiss the complaint, because this is not a claim by a U.S. National. It is a claim by a Cuban company that owned the property and the docks.

THE COURT: Is this a fair statement of your argument, that the plaintiff has not alleged facts in the complaint, which taken in the light as true, would permit, under the law, under Helms-Burton and the other cases in law, a claim to be filed by or/and upon the sole issue of stock ownerships in a

Cuban corporation?

MR. SINGER: That involves --

THE COURT: I think that's a fair statement.

MR. SINGER: I think it is, Your Honor.

THE COURT: Let me say, I think that is. You don't have to answer it. But all right, okay.

That's where you are on that point. Good.

What else?

MR. SINGER: Your Honor, I think that that covers the issues which have been raised by counsel in connection with the issues that are before you.

THE COURT: All right. Thank you very much.

I'm sure in the normal course of events, and you may have run into this in state court, or elsewhere, that there are a lot of things that Mr. Singer raises that Mr. Martinez would just be frothing at the mouth to get up and tell me his client's viewpoint.

But I'd really like to give you the time that you need, but limited to opening and closing in that, so I'm going to cut him off.

You can have a seat, Mr. Singer.

MR. SINGER: Thank you, Your Honor.

THE COURT: The other thing that I would like for the plaintiffs to furnish for me would be a complete set on paper of these placards that you've used, and I'll ask you to give a

copy of that to the defendant, Mr. Singer, that simply those -- you gave me a few of those that were printed out and they were helpful. I don't have them all, I think.

So I'm going to ask the plaintiffs to make sure that I have a copy of -- a hard copy, paper copy, of the big placards that you've used.

I have the notebook that the defendant corporation, Mr. Singer, furnished that's similar to that. I think that covers everything I need from there, from the defense.

I try not to do what I'm now about to suggest, but I predicate the statement I'm about to make with the question I'm going to ask at the end, which is, would this be an undue hardship or burden on the lawyers, that's where I'm headed with this.

The other thing I'm about to say is that it, perhaps, would be helpful to me -- or I think it would be helpful to me to have some sort of draft opinion from each of you on the three issues you've argued and raised.

I don't need it, but again, it might be helpful, but it's a lot of work, and I don't want to impose it on you, and so I'm not really going to ask you to do it or insist that you do it.

I could phrase it this way, if either one of you wanted or chose to do something like that, or if you both agreed that you would do it, and didn't mind doing it, I really am not

looking to impose a tremendous amount of work on you people, I don't like to do that.

MR. SINGER: I know that I am, and I suspect that my friend, Mr. Martinez, is as well, more than happy to provide a proposed opinion that would reflect the arguments we've made here.

THE COURT: Based along the arguments that you've made here, and we've talked about the three points, I've talked to you about a tentative view on one of the points, and you can -- well, again, this isn't a -- you know, a motion or response or a reply, it isn't anything like that that I have in mind, and I'm not talking about a massive -- I just read a 40-page opinion out of the Court of Appeals that -- well, in any event, I'm not talking about that sort of thing.

MR. MARTINEZ: Glad to do it, Your Honor.

THE COURT: I'm really reluctant to -- this is my job, this is what I'm supposed to do, but given the fact of the uniqueness of the nature of the case, it's a case of first impression, apparently, I accept that from you. All right.

Well, then, and I don't -- I suppose I'm not -- let me suggest, 20 or 30 days for you to do, 30 days for you to do, each of you, to do something like that?

MR. SINGER: 30 days would be fine, Your Honor.

MR. MARTINEZ: 30 days.

THE COURT: No more. I'm not -- this isn't a big focus

thing. All right. I will expect that.

Now, there's a question because we now, it looks like we've spent about two or two-and-a-half hours in the argument, an awful lot of which was -- I consumed, it wasn't your fault at all, but my talking or questions with you.

The question is whether or not I will need a record, and I think it would be helpful. Now, young lady, I don't want to embarrass you, you can whisper to me. Turn around and look at me and talk to me. Don't even say it out loud.

Come here, turn around. I want to ask you something.

(Discussion held off the record between The Court and the Official Court Reporter.)

THE COURT: All right then. One of you remarked to something I wrote several decades ago, or in your opinions over the decade -- over a couple of decades or something.

It's actually been five decades, that's a long time for these opinions, and you all are -- as you should -- calling back my attention, some are a little embarrassing, Judge, you held the other way.

It doesn't happen all the time or even often, but it's -- what and over the years we've had a lot -- we've had problems with lawyers needing and using, and the courts, a copy of the transcript. But they've gotten much more, or at least this young lady, has gotten very much -- shortened the time, to my surprise here. But she says that she can get this in -- did

you say about a week or two? She said a week. All right.

And it will be a final copy. It won't be a rough draft. So, I'm going to ask her to prepare a copy for the Court in final draft form, which she'll do in a week or 10 days, and she has told me she can furnish a copy to each of you, if you wish it, in that same time frame.

With that time frame, why don't we suggest that we make what you're going to submit to me, some drafts, a period after you get this. And should we -- we were originally saying, I think, you tell me 20 or 30 days -- the same 20 or 30 days.

MR. MARTINEZ: We're in agreement, 30 days from the time we get the transcript.

THE COURT: All right then, that's what we will do then. Now that doesn't mean, I caution you a little bit -- off the record here.

(Discussion held off the record between The Court and counsel.)

MR. MARTINEZ: For fairness to both sides, do you want us to submit it at the same time?

THE COURT: Oh, yes.

MR. MARTINEZ: Okay. Then we'll --

THE COURT: It's just an exchange, it's nothing anybody has to respond to.

MR. MARTINEZ: Good.

THE COURT: It's just an aid to the Court is all it is,

like the transcript of your argument will certainly be an aid to the Court.

MR. SINGER: Your Honor, would it be helpful if --

THE COURT: The procedure is, we're looking at getting those aids to the Court, the Court drafting an opinion, getting an opinion out in, hopefully, about 30 days, maybe 40, I don't know. Okay.

MR. SINGER: Thank you very much.

COURTROOM DEPUTY: All rise.

(Proceedings concluded at 12:20 p.m.)

C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

August 5th, 2019

Glenda M. Powers
GLENDA M. POWERS, RPR, CRR, FPR
United States District Court
400 North Miami Avenue, 08S33
Miami, Florida 33128

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