UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 19-CV-23591-BLOOM/Louis

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

NORWEGIAN CRUISE LINE HOLDINGS LTD.

Defendant.
_______________________________________/

NORWEGIAN'S MOTION FOR
CERTIFICATION FOR INTERLOCUTORY APPEAL

Defendant Norwegian Cruise Line Holdings Ltd. ("Norwegian"), through undersigned counsel and pursuant to 28 U.S.C. § 1292(b), files the following Motion for Certification for Interlocutory Appeal.

INTRODUCTION

This Motion concerns an Order entered in one of the first ever suits brought under Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (the "Act" or "Title III"). *See* Order, ECF No. 53. Now, a discrete legal question (though one with potentially broad application) on an issue of first impression within that Order forms the quintessential basis for certification for interlocutory appellate review under Section 1292(b). In particular, the Order meets the three requirements to qualify for leave under Section 1292(b) because (1) the Order involves a controlling question of law; (2) there is a substantial ground for difference of opinion among courts on that question, as shown by the history of this case itself; and (3) the immediate resolution of that question would materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b). While this Court earlier declined to certify ***a materially different*** question that Carnival Corporation presented in a related action, *see* Order, *Havana Docks Corp. v. Carnival Corp*., No. 19-cv-21724 (S.D. Fla. Oct. 8, 2019), ECF No. 56 (the "*Carnival* Case"), several developments since this Court's prior position on that request over seven months ago justify certification of the issue addressed in the Court's Order.

First, the question presented here is a pure legal question about the proper statutory interpretation of Title III, which has never before been subject to judicial scrutiny on the instant issue. Norwegian seeks review of the following question:

> Whether "Title III's plain language creates liability for trafficking in the broadly defined 'confiscated property' — i.e., in any property that was nationalized, expropriated, or otherwise seized by the Cuban Government . . . without the property having been returned or adequate and effective compensation [paid] — not in a particular interest in confiscated property," Order at 24-25, and "regardless of . . . when the trafficking took place." Order Mot. to Dismiss at 7, ECF No. 42.

This purely legal question controls the statutory scope of the liability provision in Title III and thus impacts this case as well as myriad others.

Second, there is substantial ground for difference of opinion on the issue because, among other reasons, this question has ***never*** been asked of or answered by any other court before. As a result, the portions of Title III that concern this issue have ***never*** been subject to another court's interpretation. Indeed, even this Court has – on the three separate occasions on which it has been presented with the issue – interpreted the relevant portions to Title III differently, and has each time come out with new insights. Norwegian respects that this was not an easy question for the Court, and it will not be for others as well. This is ***all the more reason*** why the constellation of related cases before this Court, and their inevitable progeny of similar Title III actions, would benefit from immediate appellate review.

Finally, as this Court has previously found, resolution of a question regarding which property must be trafficked in to sustain a cause of action under Title III would materially advance the ultimate termination of the litigation. *See* Order, *Carnival* Case, ECF No. 56 at 3-4 ("*Carnival* Order"). That same reasoning exists to this day, and thus that same finding equally applies here. Allowing for an interlocutory appeal would allow the Circuit Court to answer this threshold legal question at the outset and give the parties and the Court early clarity into a dispositive issue of law. Binding resolution by the Circuit Court would also have multiplying benefits: serving not only the simplification – if not the entire resolution – of this action, but also at least three other related cases before this Court and many future cases involving billions of dollars in alleged damages arising under Title III.

For these reasons, certification under Section 1292(b) is proper.

BACKGROUND

Plaintiff filed the first series of lawsuits ever under Title III, after the suspension on enforcement of that title was lifted. *See* 22 U.S.C. § 6021, *et seq.* This Act, which until May 2019 had been suspended since its enactment nearly twenty-five years ago in 1996, generally creates a cause of action for Americans who own claims to confiscated Cuban property. In particular, it provides that "any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who

owns the claim to such property[.]" 22 U.S.C. § 6082(a)(1)(A).[1]

I. The Court's Ruling in the *Carnival* Case

The first action Plaintiff filed in a series of related lawsuits was against Carnival Corporation ("Carnival"). *See generally* Complaint, *Carnival* Case, ECF No. 1. The Complaint against Carnival alleged substantially similar facts as those alleged in the instant case, except that the trafficking by Carnival allegedly began in May 2016. *See generally id.* On May 30, 2019, Carnival filed a Motion to Dismiss, arguing in relevant part that Plaintiff failed to state a claim under Title III because the Complaint and the Certified Claim attached as an exhibit indicated that Havana Docks Corporation ("Havana Docks") did not have an ownership interest in the Subject Property at the time Carnival allegedly began utilizing it. *See* Mot. to Dismiss, *Carnival* Case, ECF No. 17 at 11-15. Denying Carnival's Motion to Dismiss, this Court rejected the argument and agreed with Plaintiff that Carnival's interpretation conflated ownership of an interest in property and ownership of a certified claim to such property, noting that the Act does not contain any requirement that the trafficking occur during the time in which a claimant holds its interest in the property. *See* Order, *Carnival* Case, ECF No. 47 at 8.

On August 27, 2019, Havana Docks filed three additional actions under Title III against: (1) MSC Cruises SA Co. and MSC Cruises (USA) Inc. (collectively, "MSC") for trafficking that began in December 2018, *see generally* Complaint, *Havana Docks Corp. v. MSC Cruises SA Co.*, No. 19-cv-23588 (S.D. Fla. Aug. 27, 2019), ECF No. 1 (the "*MSC Cruises* Case"); (2) Royal Caribbean Cruises, Ltd. ("Royal Caribbean") for trafficking that began in April 2017, *see generally* Complaint, *Havana Docks Corp. v. Royal Caribbean Cruises, Ltd.*, No. 19-cv-23590 (S.D. Fla. Aug. 27, 2019), ECF No. 1 (the "*Royal Caribbean* Case"); and (3) Norwegian in this case, *see generally* Compl., ECF No. 1.

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[1] Notably, the Act defines trafficking carefully, stating that "the term 'traffics' ***does not include*** . . . transactions and uses of property ***incident to lawful travel to Cuba***, to the extent that such transactions and uses of property are necessary to the conduct of such travel." 22 U.S.C. § 6023(13)(B)(iii) (emphases added). By its terms, the Act does not apply to persons who did not knowingly and intentionally engage in "trafficking" as statutorily defined, including, specifically, the large class of persons who have scrupulously followed the laws and regulations that the United States enacted to govern travel to Cuba.

II. The Court Reconsiders the Reasoning Underlying Its Decision in the *Carnival* Case in Both the *Norwegian* Case and the *MSC Cruises* Case

Norwegian and MSC both moved to dismiss Plaintiff's Complaint, arguing in relevant part that Plaintiff's claim failed as a matter of law because Plaintiff's interest in the Subject Property was a leasehold interest that expired in 2004, and Plaintiff therefore could only assert a claim under Title III for trafficking that occurred prior to the expiration of its leasehold interest. *See* Mot. to Dismiss at 16-20, ECF No. 31 ("Norwegian's Motion to Dismiss"); Mot. to Dismiss, *MSC Cruises* Case, ECF No. 24 at 8-9 ("MSC's Motion to Dismiss").

In ruling on Norwegian and MSC's Motions to Dismiss, the Court found it necessary to reconsider its ruling in the *Carnival* case that denied Carnival's Motion to Dismiss. The Court determined that the issue regarding the nature of Plaintiff's time-limited underlying ownership interest was dispositive, reasoning that because the Certified Claim was predicated on Plaintiff's time-limited leasehold interest, Plaintiff could not, as a matter of law, state a claim for relief under the Act based on trafficking that occurred after Plaintiff's leasehold interest expired. *See* Order Mot. to Dismiss, *MSC Cruises* Case, ECF No. 40 at 10; Order Mot. to Dismiss at 10, ECF No. 42. The Court explained that any contrary result would improperly entitle Plaintiff to recover for trafficking in other property interests, thereby granting Plaintiff more rights to the Subject Property than it otherwise would have had by virtue of the confiscation. *See* Order Mot. to Dismiss, *MSC Cruises* Case, ECF No. 40 at 9; Order Mot. to Dismiss at 9, ECF No. 42. Thus, the Court granted Norwegian and MSC's Motions to Dismiss, dismissing both cases with prejudice. *MSC Cruises*, 2020 WL 59637, at *5; *Norwegian*, 2020 WL 70988, at *5.

Thus, the Court has already considered – and reconsidered – the basis for its decision to dismiss this case with prejudice. The Court held in both this case ***and*** in the *MSC Cruises* Case that Plaintiff could not state a claim under Title III based on allegations of trafficking that took place after Plaintiff's property interest in the subject Cuban property expired in 2004. Plaintiff nonetheless asked the Court ***for the fourth time*** to find that the fact that Plaintiff's property interest expired years before the alleged trafficking is legally irrelevant.

The Court then granted the Motion for Reconsideration, *see* Order, and again reconsidered the reasoning that led to it denying Carnival's Motion to Dismiss but then granting

Norwegian's Motion to Dismiss. Material to the Court's decision is a legal issue of great consequence not only to the slew of cruise line actions outlined above, but also to ongoing and future lawsuits looking to this Court for guidance on Title III: the question of the scope of Title III's liability provision. In particular, the Court reasoned that it "construed the liability provision of § 6082(a)(1)(A)" – which has never before been construed – "too narrowly." Order at 19.

Given the lack of guidance from any other court on this issue of first impression, and that Title III is no model in statutory drafting, this could not have been an easy issue to decide. Thus, because the Order involves this controlling question of law for which there is substantial difference of opinion, and an immediate appeal may completely eliminate a substantial portion, if not all, of Plaintiff's claim premised on the time-limited concession such that its resolution would materially advance the ultimate termination of the litigation, this issue meets all of the statutory requirements and should be certified for interlocutory review.

ARGUMENT

I. Interlocutory Appeal Under Section 1292(b) Is Warranted

Section 1292(b) allows a district court to certify an issue for interlocutory appeal when: (1) the challenged ruling involves a controlling question of law; (2) there is substantial ground for difference of opinion on the question, and (3) an immediate appeal may materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b).

Section 1292(b) is designed to facilitate interlocutory appeals when immediate "appeal may avoid protracted and expensive litigation . . . [and] where a question which would be dispositive of the litigation is raised and there is serious doubt as to how it should be decided." *Rodrigues v. CNP of Sanctuary, LLC*, No. 11-cv-80668, 2012 WL 12895255, at *2 (S.D. Fla. May 8, 2012) (granting motion for interlocutory appeal under 1292(b) on issue of "what clauses are permissible in an FLSA settlement agreement" under Fair Labor Standards Act statute where there were two conflicting district court orders). Consistent with the statute, courts in this Circuit do not hesitate to certify such questions where these requirements are met. *See id.*; *see also Grabein v. 1-800-Flowers.com, Inc.*, No. 07-cv-22235, 2008 WL 11417701, at *2 (S.D. Fla. Mar. 12, 2008) (granting motion to certify question for appeal on a "close question of statutory

interpretation upon which reasonable minds could differ" as Congress did not provide a sufficient definition for a material term under the statute); *Bastian v. United Services Auto. Ass'n*, 150 F. Supp. 3d 1284, 1296–97 (M.D. Fla. 2015) (citations omitted) (granting motion to certify question for appeal in a "case of first impression" where "there is enough room for interpretation [of Florida Statute] to provide 'substantial ground for difference of opinion'"); *Frye v. Ulrich GmbH & Co. KG*, No. 3:08-cv-158, 2010 WL 3172167, at *3 (M.D. Ala. Aug. 11, 2010) (granting motion to certify question for appeal where "there is minimal Eleventh Circuit case law").

Indeed, courts around the country agree that it is "the ***duty*** of the district court . . . to allow an immediate appeal to be taken when the statutory criteria [in § 1292(b)] are met." *Ormond v. Anthem, Inc.*, No. 1:05-cv-1908, 2011 WL 3881042, at *7 (S.D. Ind. Sept. 2, 2011) (granting certification and holding that, "[i]n the Court's view, cases like the present one are precisely what Congress had in mind when it passed § 1292(b). The issues are novel, purely legal, and potentially dispositive; reasonable minds could easily disagree on these difficult issues; a decision reversing the Order will obviate the need for a protracted and high-stakes trial . . . [and thus] the Court must grant interlocutory certification on the three issues set forth herein") (emphasis added); *see also Armstrong v. La Salle Bank, N.A.*, No. 01-cv-2963, 2007 WL 704531, at *6 (N.D. Ill. Mar. 2, 2007) (vacating prior judgment and transfer order and granting certification of question arising under the multidistrict litigation statute), *aff'd sub nom. Armstrong v. LaSalle Bank Nat. Ass'n*, 552 F.3d 613 (7th Cir. 2009).

Here as much as in any case – and now more than ever – all three factors support certification.

A. *The Challenged Ruling as to the Appropriate Scope of the Liability Provision of Title III Involves a Controlling Question of Law*

Courts in this district have held that

> [t]he requirement that a question be controlling is not read literally. It could not be, because it is never one hundred percent certain in advance that the resolution of a particular question will determine the outcome or even the future course of the litigation. Therefore a growing number of decisions have accepted the rule that a question is controlling, even though its decision might not lead to reversal

> on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants.

Rodrigues, 2012 WL 12895255, at *3 (internal quotations and citations omitted). "It is enough that the question is 'serious to the conduct of the litigation, either practically or legally.'" *Id.*

The Eleventh Circuit has explained that a controlling question of law may be established by showing the challenged ruling is "directly associated with the disposition of at least a claim, if not the entire case itself." *Harris v. Luckey*, 918 F.2d 888, 892 (11th Cir. 1990); *see also Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs.*, 86 F.3d 656, 659 (7th Cir. 1996) ("A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so."); 16 Charles Alan Wright and Arthur R. Miller, *Federal Practice & Procedure*, § 3930, (3d. ed.) ("There is no doubt that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment.").

"The meaning of a statutory or constitutional provision, regulation, or common law doctrine," for example, is a prime example of a "controlling question of law." *Grabein*, 2008 WL 11417701, at *2. In this case, a keystone of the Court's analysis in its reconsideration of its earlier dismissal of this case with prejudice is the Court's legal interpretation of the scope of liability for trafficking under Title III. Specifically, Title III provides that "any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property[.]" 22 U.S.C. § 6082(a)(1)(A). The Court's reasoning in wrestling with the meaning of this provision demonstrates that this is a legal question which flows from the text of the statute. In particular, the Court expressly reasoned that it "construed the liability provision of § 6082(a)(1)(A)" – which has never before been construed – "too narrowly." Order at 19. The Court went on to hold:

> [L]imiting the meaning of "traffics in [confiscated] property" to trafficking only in the specific "interest in property for which a United States national has a claim certified" is contrary to the express language used in various parts of the Act. Instead, Title III's plain language creates liability for trafficking in the broadly defined "confiscated property" — i.e., in any property that was nationalized, expropriated, or otherwise seized by the Cuban Government to obtain ownership

> or control, without the property having been returned or adequate and effective compensation — ***not in a particular interest in confiscated property***.

Order at 25 (emphasis added).

The outcome of the action hinges significantly on this interpretation because finding otherwise could result in an entirely different outcome – namely, the dismissal of this case with prejudice. *See* Order Mot. to Dismiss at 10, ECF No. 42 (granting motion to dismiss ***with prejudice*** and holding that the issue regarding the nature of Havana Docks' time-limited underlying ownership interest was dispositive); Order Mot. to Dismiss, *MSC Cruises* Case, ECF. 40 at 10 (same). The labor required by the appellate court would be likewise purely legal and equally outcome-determinative. The question presented here is about the proper interpretation of the scope of liability for trafficking under Title III, which has never before been subject to any kind of judicial scrutiny regarding this issue.

This issue is analogous to one reviewed just over a month ago by the Eleventh Circuit on consideration under 1292(b) certification. *See Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1275 (11th Cir. 2020). In *Barrientos*, the court considered:

> Whether the TVPA [Trafficking Victims Protection Act] applies to work programs in federal immigration detention facilities operated by private for-profit contractors is a controlling question of law as to which there is substantial ground for difference of opinion.

Id. The Eleventh Circuit's review was, thus, limited to the abstract legal issue of the TVPA's application to certain classes of cases. *See id*. Here, the question is similarly about the scope of application of Title III to classes of cases where the interest in which a party is alleged to have trafficked in is not the same specific interest that was confiscated.

This case is also similar to one presented to the Eleventh Circuit in *Laperriere v. Vesta Ins. Group, Inc.*, which likewise sought to discern the contours of liability under the text of a statute and which was also certified under 1292(b). *See* 526 F.3d 715, 718 (11th Cir. 2008). There, the court framed the question as follows:

> This interlocutory appeal presents an issue of first impression in the circuit courts: whether, and to what extent, the proportionate liability scheme of section 21(D)(f) of the Securities Exchange Act of 1934 (the "Act"), enacted as part of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), amends section 20(a) of

> the Act, under which a person who controls a violator of the Act is "liable jointly and severally with and to the same extent" as that violator.

Id. As here, the court in *Laperriere* was called upon to determine who could be liable under the PSLRA in light of a larger statutory framework. Whereas in that case the court was tasked with getting to the root of what the Congress meant by "covered person" under the PSLRA, here Norwegian similarly seeks a closer inspection of the Congress's meaning of "such property" under Title III.

This pattern is consistent with other issues judges in this District have found appropriate for 1292(b) certification. In *Grabein*, for instance, the Court certified the question of whether "receipts provided electronically are sufficient to satisfy FACTA's mandate that the seller 'print' the consumer's credit/debit card expiration date on the receipt 'at the point of sale.'" *See, e.g., Grabein*, 2008 WL 11417701, at *2 (granting motion to certify question for appeal on a "close question of statutory interpretation upon which reasonable minds could differ"). The court struggled to discern from the text of the statute what Congress contemplated by the term "print," just as the Court and the parties here have wrestled with the term "property."

What all of these cases have in common with the present case is that they concern threshold issues as to who can state a claim against whom for what, when one interpretation of a statute appears to conflict with feasible interpretations of other aspects of the statute. Here, the Court's most recent broad interpretation of statutory liability under the Act, in particular the interpretation of what Congress meant when it used the term "property" in regard to liability for trafficking, has consequences that appear to contradict other portions of Title III. *See* Section B, *infra.*

Notably, the question Norwegian presents here is also materially different from the question that the Court previously declined to certify when raised by Carnival in another related action months before this Court first granted Norwegian's Motion to Dismiss, and before it then granted Plaintiff's Motion for Reconsideration. Specifically, Carnival first asked this Court to certify for appeal "whether Helms-Burton applies when the only alleged acts of trafficking occurred after the plaintiff's rights to the property would have expired on their own terms

independent of any confiscation." Mot. for Cert., *Carnival* Case, ECF No. 49 at 3. In doing so, Carnival explained that "Carnival never made any use of the docks whatsoever during the time that the concession would have lasted but for the Cuban government's confiscation of the property, and accordingly, did not traffic in the property that Plaintiff holds a claim to." *Id.* at 6. Thus, the Court found that Carnival was seeking to certify for review "whether the ***specific facts*** alleged by ***this particular Plaintiff*** states a claim under the Helms-Burton Act." *Carnival* Order at 4 (emphases added).

By contrast, the question being proffered now focuses on the text of the statute itself.[2] In fact, the question that Norwegian seeks this Court to certify for appeal has come up not only in the cruise line cases previously mentioned, but also in other unrelated Title III cases, which shows this to be an issue of law facing factually dissimilar cases. *See, e.g.*, Notice of Suppl. Authority, *Glen v. American Airlines, Inc.*, No. 19-cv-23994 (S.D. Fla. Apr. 15, 2020) (identifying this Court's Order as one that "resolves several issues of statutory construction under the Helms-Burton Act, including the scope of the private right of action for unlawful trafficking and property interests for which a plaintiff may bring a Helms-Burton Act claim," which "were raised by [Defendant] in its motion to dismiss and were addressed by Plaintiff in his responsive memorandum"); Reply to Mot. to Dismiss Am. Compl., *Sucesores de Don Carlos Nunez y Dona Pura Galvez, Inc. v. Societe Generale, S.A.*, No. 19-cv-21724 (S.D.N.Y. Jan. 1, 2020), ECF No. 41 at 22 ("On the face of the [Amended Complaint], Plaintiff has not alleged that [Defendant] trafficked in the specific property that Plaintiff alleges was confiscated, which is an essential element."); Memorandum of Law in Support of Defendant's Mot. to Dismiss, *John S. Shepard Family Trust v. NH Hotels USA, Inc.*, No. 19-cv-09026 (S.D.N.Y. Jan. 1, 2020), ECF No. 32 at 19-21 (citing to this Court's order dismissing Havana Docks' action against Norwegian with prejudice to support the proposition that plaintiff cannot state a claim "because the property

[2] In addition, if this Court has any qualms that the inquiry, as framed, requires more than a pure legal inquiry, this is remediable because the Circuit Court has the ability to narrow the scope of the certified issue as the *Barrientos* Court did just a few weeks ago. *See Barrientos*, 951 F.3d at 1275 ("[W]hile we 'may not reach beyond the certified order,' we 'may address any issue fairly included within the certified order.' That said, we think it appropriate to limit our review to the discrete and abstract legal issue the district court identified.")

interest it allegedly owned . . . is not the property in which Defendants are alleged to have trafficked"). This demonstrates that the inquiry is ***not*** case-specific, but something more abstract and broadly applicable.

For these reasons, the issue on appeal involves a controlling question of law.

B. *There Is Substantial Ground for Difference of Opinion on the Limited Issue of Whether This Court Appropriately Construed the Scope of the Liability Provision in Title III of the Helms Burton Act*

Courts routinely grant Section 1292(b) motions to allow appellate courts to resolve difficult issues of first impression, as they often present substantial grounds for differences of opinion. *See, e.g., Laperriere*, 526 F.3d at 719 (addressing an issue of first impression on certification under Section 1292(b)); *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1322 (11th Cir. 2001) (same); *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (holding that "[c]ourts traditionally will find that a substantial ground for difference of opinion exists where novel and difficult questions of first impression are presented"); *Bastian*, 150 F. Supp. 3d at 1296–97 (citations omitted) (granting motion to certify question for appeal in a "case of first impression" where "there is enough room for interpretation [of Florida Statute] to provide 'substantial ground for difference of opinion'"); *Frye v. Ulrich GmbH & Co. KG*, No. 08-cv-158, 2010 WL 3172167, at *3 (M.D. Ala. Aug. 11, 2010) (granting motion to certify question for appeal where "there is minimal Eleventh Circuit case law"); *Solutia Inc. v. McWane, Inc.*, No. 03-cv-1345, 2008 WL 11337774, at *1 (N.D. Ala. June 25, 2008) (finding substantial grounds for difference of opinion when "[n]either the Supreme Court nor the Eleventh Circuit Court of Appeals has answered this question"). Given that this is one of the first cases ever brought under Title III, this is such a case.

Title III provides that "any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property[.]" 22 U.S.C. § 6082(a)(1)(A). Under a plain reading of that language, it is Norwegian's (and this Court's prior) position that the Act requires not only that the plaintiff "own a claim to such property," but also that the defendant "traffics" in that ***specific*** "property." Title III says as much stating that "claim" in the context of Title III refers to

the assertion of a right to payment against "any person that . . . ***traffics in property which was confiscated by the Cuban Government*** . . . ." 22 U.S.C. § 6082(a)(1)(A) (emphasis added).

In its Order, the Court reconsidered its prior positions and concluded that it "construed the liability provision of § 6082(a)(1)(A)" – which has never before been construed – "too narrowly." Order at 19. The Court went on to hold:

> [L]imiting the meaning of "traffics in [confiscated] property" to trafficking only in the specific "interest in property for which a United States national has a claim certified" is contrary to the express language used in various parts of the Act. Instead, Title III's plain language creates liability for trafficking in the broadly defined "confiscated property" — i.e., in any property that was nationalized, expropriated, or otherwise seized by the Cuban Government to obtain ownership or control, without the property having been returned or adequate and effective compensation — ***not in a particular interest in confiscated property***.

Order at 25 (emphasis added).

Respectfully, reasonable jurists might differ on this difficult question. It is Norwegian's position, and the prior position of this very Court when it previously dismissed this action with prejudice, that this contrary view – that so long as Plaintiff owns a claim, it does not matter what property was actually trafficked in – impermissibly untethers the claim from the underlying property interest, as it would read "the qualifying words 'such' and 'that' out of the liability imposing language and conclusiveness of certified claims language, respectively" out of the statute, as this Court previously cautioned. Order Mot. to Dismiss at 6, ECF No. 42. This is because the Act ***first*** requires a person to traffic in property which was "confiscated by the Cuban Government" and ***second*** requires a United States national to "own[] the claim to ***such*** property." *See id.* Accordingly, a party should only be liable for trafficking in the specific property to which another party owns a claim.

Norwegian does not dispute that Plaintiff owns a claim to some defined set of property. In fact, elsewhere, Title III delineates exactly how a Court knows ***what*** confiscated property is subject to be the basis for recovery where it explains the scope of a "claim." Under Title III, a "claim" is proof that a U.S. national used to own a property interest that was stolen, and serves as a vehicle to recover for trafficking in that underlying, confiscated property interest. Section 6083 of Title III sets forth the effect of holding a certified claim: it requires a court to accept "as

conclusive proof" (a) that a plaintiff owned the confiscated property interest(s) identified in the claim and (b) the certified value of each confiscated interest. 22 U.S.C. § 6083(a)(1). Norwegian does not dispute that the "claim" at issue (here, the Certified Claim) is the recognition of the value of a former property interest.[3] But, Section 6083 does not say anything about a certified claim also serving "as conclusive proof" that a named defendant in a Title III suit ***trafficked in the particular confiscated property interest*** underlying that claim. So the issue becomes whether a plaintiff can allege unlawful trafficking under the Act in any property that was expropriated generally, even if the trafficking was not coextensive with the specific interests that were confiscated.

It is Norwegian's position, and this Court's prior position, that Plaintiff's claim under Title III should not extend beyond the property rights it held at confiscation. *See* Order on Mot. to Dismiss at 7 (reasoning that "accepting Plaintiff's argument ignores the fact that the claim in this case is limited by its own terms because the claim could relate to nothing more than the time-limited concession that Plaintiff had at the time of confiscation by the Cuban Government"). A ruling otherwise leads to anomalous consequences antithetical to Title III's design. For instance, under Plaintiff's and the Court's most recent theory, both it and another entity later in possession of the property after its concession expired in 2004 would have an interest under Title III – a set of facts incompatible with Title III's text.[4] *See* Order on Mot. to

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[3] To be clear, the dispute is not about whether Plaintiff has a claim to some confiscated property. Norwegian and this Court have previously recognized that Plaintiff may theoretically recover for trafficking in the confiscated concession alleged to have occurred *prior* to its expiration in 2004 from an entity not covered under one of the enumerated exceptions to Title III. *See* Reply Supp. Mot. Dismiss at 9, ECF No. 41; Order on Mot. to Dismiss at 10, ECF No. 42. But there are no such allegations here. Further, Plaintiff's right to recover some value on that claim under Helms-Burton is not wholly lost – and its efforts to secure a certified claim are still meaningful – if it can allege trafficking that occurred during the period overlapping with the scope of its certified claim. Specifically, its claim entitles it to a place in the U.S. Government's eventual negotiation and settlement of its citizens' claims against Cuba. *See* 22 U.S.C. § 6067 ("Settlement of outstanding United States claims").

[4] For instance, should the Cuban Government have awarded a subsequent concession with rights extending from 2004-2016, then confiscated that concession before its expiration, under Plaintiff's theory, both Plaintiff and the new concessionaire would have concurrent rights to recover from any post-2004 traffickers – and both would possess those rights in perpetuity. But, under the terms of the statute, only one person holds a claim to a single bundle of rights at a time.

Dismiss at 9 ("Otherwise Defendant is 'trafficking' in confiscated property for which someone else would properly own a claim.").

As the proceedings in this very case regarding this issue show, in this case of first impression there are significant grounds for disagreement. *See Lipton v. Documation, Inc.*, 590 F. Supp. 290, 291–92 (M.D. Fla. 1982), *aff'd*, 734 F.2d 740 (11th Cir. 1984) (certifying issue as there was "substantial ground for difference of opinion" on scope of "fraud on the market" theory under Securities Exchange Act).[5] Even absent the fact that this issue has never been previously considered, there remain substantial questions about the meaning of Title III. *See Washburn v. Beverly Enterprises-Georgia, Inc.*, No. 106-051, 2007 WL 9700927, at *1 (S.D. Ga. Jan. 8, 2007) (finding factor met when party raised "substantial questions" about order). Indeed, even this hard-working Court that has – on the three separate occasions in which it has been presented with the issue – thoughtfully considered it has each time come out with new insights. Norwegian respects that this was not an easy question for the Court. To be sure, much

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And the right to recover for trafficking can only extend against those who trafficked in the specific property to which the owner has an interest, which in the case of a time-limited interest requires that the trafficking occur during the time of the limited interest in that property.

[5] The issues raised in this case have proven difficult and debatable. In such circumstances, Courts have repeatedly found reasonable grounds for disagreement for the purposes of § 1292 certification. *See Winter v. United Parcel Serv., Inc.*, No. 214CV10555, 2016 WL 11214560, at *1 (E.D. Mich. Jan. 12, 2016) (granting certification for interlocutory appeal where the court's order granting plaintiff's motion for reconsideration of a prior order granting dismissal "involves a controlling question of law as to which there is substantial ground for difference of opinion"); *Unger v. United States*, No. 90 CIV. 0384, 1994 WL 90358, at *1 (S.D.N.Y. Mar. 16, 1994)) (granting certification for interlocutory appeal where "it is obvious that reasonable minds could differ as to whether or not [the Court is] now correct in reconsidering [its earlier] decision"); *Flying Tiger Line, Inc. v. Cent. States, Sw. & Se. Areas Pension Fund*, No. CIV.A. 86-304, 1986 WL 14904, at *2 (D. Del. Dec. 4, 1986) (certifying for interlocutory appeal where the "Court [] found the issues raised in Count I to be extremely difficult; indeed, the Court wrote two opinions before resolving the issue"). In fact, another appellate court astutely observed that when a district court requires multiple orders to settle a given legal issue, the issue is sufficiently debatable, explaining: "Certainly the instant case involves an order over which a difference of opinion might exist since it took two district court opinions to arrive at a decision." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754–55 (3d Cir. 1974) (observing, in finding that permission to appeal under Section 1292(b) was properly granted to review an order granting class certification, that "there can be little difficulty over the criterion of difference of opinion as to correctness of the order" being appealed because "[t]he likelihood is remote that a district judge would make [a § 1292(b)] certification frivolously with respect to his own order").

thought and consideration went into the Court's various rulings on these issues, including its most recent Order. But this is ***all the more reason*** why the group of related cases before this Court, and their inevitable progeny of similar Title III actions, would benefit from appellate review.[6]

For these reasons, there is substantial ground for difference of opinion on the issue for appeal, and the question should be certified.

C. *Immediate Appeal Would Materially Advance Ultimate Termination of the Instant Action, Various Other Pending Cases in This Court, as Well as Future Actions Relying on This Court's First Impression Order*

Immediate appeal will also "materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), because if Norwegian is correct, such resolution would "avoid protracted and expensive litigation." *Rodrigues*, 2012 WL 12895255, at *3 (granting motion for interlocutory appeal under 1292(b) on issue of "what clauses are permissible in an FLSA settlement agreement" under Fair Labor Standards Act statute where there were two conflicting district court orders). Indeed, if the Circuit Court decides the question presented here in Norwegian's favor, that determination would dispose of every aspect of the case dealing with Plaintiff's time-limited concession. Given that it is not clear what (if anything) would remain of the case once that issue is resolved, it also has the potential to "dispose of the entire case." *Washburn*, 2007 WL 9700927 at *1 (decision on an issue can materially advance litigation if it would avoid trial); *In re Pacific Forest Products*, 335 B.R. 910, 924 (S.D. Fla. 2005) (granting certification for appeal and reasoning that this prong is met when, "a decision on the merits will clarify the issue for other bankruptcy litigants, and otherwise 'preclude the need for further

[6] Further, "[t]he level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case." Wright et al., *Federal Practice & Procedure* § 3930. *See id.* ("[P]roceedings that threaten to endure for several years depend on an initial question of jurisdiction, limitations, or the like, certification may be justified at a relatively low threshold of doubt.") This question is of significance as it resolves both the largest issue in this case and the core issue in *at least three* other related cases before this Court. *See*, *e.g.*, *Carnival* Case; *Royal Caribbean* Case; *MSC Cruises* Case.

appeals of this type which delay the bankruptcy proceedings'").[7]

To conclude as much, the Court need look no further than the impact of the position it took when it first reconsidered this issue, which led to the dismissal with prejudice of this action. *See* Order Mot. to Dismiss at 10, ECF No. 42 (granting motion to dismiss ***with prejudice*** and holding that the issue regarding the nature of Havana Docks' time-limited underlying ownership interest was dispositive and reasoning that because the Certified Claim was predicated on Plaintiff's time-limited leasehold interest, Havana Docks could not, as a matter of law, state a claim for relief under the Act based on trafficking that occurred after Plaintiff's leasehold interest expired); Order Mot. to Dismiss, *MSC Cruises* Case, ECF No. 40 at 10 (same).

In effect, an appellate court ruling on this dispositive issue would prevent years of burdensome discovery and litigation on the core concession right central to this case because this case will (and already has begun to) involve extensive and lengthy international discovery. *See In re Managed Care Litig.*, No. 00-1334, 2002 WL 1359736, at *1 (S.D. Fla. Mar. 25, 2002) (certification of immediate appeal order based on "extent to which additional time and expense

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[7] The certified question need not dispose of the entire case, even though it may here. The Eleventh Circuit has routinely accepted 1292 certifications that raise non-wholly-dispositive issues. *E.g.*, *Laperriere*, 526 F.3d at 718 (accepting 1292 certification to decide damages questions); *Tucker v. Fearn*, 333 F.3d 1216, 1218 (11th Cir. 2003) (accepting 1292 certification to decide whether the plaintiff could recover loss of society damages under maritime law even though the plaintiff also asserted other damages claims); *Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248, 1252-53 (11th Cir. 2003) (accepting 1292 certification to determine whether district court had subject matter jurisdiction over absent class members whose claims fell below the jurisdictional threshold even though some members claims exceeded the jurisdictional threshold); *Johnson v. City of Fort Lauderdale*, 148 F.3d 1228, 1229 (11th Cir. 1998) (accepting 1292 certification to consider scope of Section 1983 claims even though the plaintiff also asserted claims under Title VII); *Perez-Perez v. Hanberry*, 781 F.2d 1477, 1479 (11th Cir. 1986) (accepting 1292 certification to determine whether counsel could be appointed to represent excludable alien in habeas proceedings). This is because it is black letter law that "the issue need not . . . be dispositive to be a 'controlling question.'" *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 702 n.10 (5th Cir. 1961). That makes sense textually because "'[c]ontrolling' does not mean 'dispositive.'" *LNC Investments, Inc. v. First Fid. Bank*, No. 92-cv-7584, 2000 WL 461612, at *3 (S.D.N.Y. Apr. 18, 2000). For that reason, courts both in this Circuit and across the country have certified questions that would materially advance, but not terminate, the cases before them. *See, e.g.*, *Sea Pines of Virginia, Inc. v. PLD, Ltd.*, 399 F. Supp. 708, 712 (M.D. Fla. 1975) ("While the order will not be dispositive of the entire action, it will dispose of the right of the plaintiff to proceed on the theory embodied in Count 1. The issue on which the motion turns, therefore, presents a controlling question of law within the provisions of 28 U.S.C. § 1292(b)).

may be saved by the appeal"). And, this is as persuasive a ground in this case as any because the impact of the resolution of the instant question has multiplying benefits. It not only resolves dispositive issues to the present action, but does so in at least three other separate cases pending in this Court, as well as other cases involving potentially billions of dollars in damages arising under Title III, each relying on this Court for guidance. *See*, *e.g.*, *Carnival* Case; *Royal Caribbean* Case; *MSC Cruises* Case. Indeed, this question will apply to any party that will ever endeavor to assert a claim for liability based on any interest less than a full, fee-simple ownership interest in confiscated property under Title III.

Because all three requirements are met, this Court should certify this action for appeal.

CONCLUSION

For the foregoing reasons, the Court should enter an Order granting this Motion and amending its Order of reconsideration to certify it for interlocutory appeal.

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to Local Rule 7.1(a)(3), undersigned counsel for Norwegian certify that they have conferred with opposing counsel, and Plaintiff opposes the relief sought herein.

Respectfully submitted,

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CERTIFICATE OF SERIVCE

I hereby certify that on April 24, 2020, the foregoing was filed with the Clerk of Court using CM/ECF, which will serve a Notice of Electronic Filing on all counsel of record.

By: */s/ Allen P. Pegg*
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