UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VR GLOBAL PARTNERS, L.P., Plaintiff, -against- PETRÓLEOS DE VENEZUELA, S.A., PDVSA PETRÓLEO, S.A., and PDV HOLDING, INC., Defendants.	Case No. 1:23-cv-05604-DLC

PLAINTIFF VR GLOBAL PARTNERS, L.P.'S
MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS THE AMENDED COMPLAINT

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INTRODUCTION

Plaintiff VR Global Partners, L.P. ("VR Capital" or "Plaintiff"), by and through the undersigned attorneys, respectfully submits this Memorandum of Law in Opposition to the Motion to Dismiss the Amended Complaint (the "Motion", ECF No. 40) filed by Defendants Petróleos de Venezuela, S.A. ("PDVSA"), PDVSA Petróleo, S.A. ("PDVSA Petróleo"), and PDV Holding, Inc. ("PDVH") (collectively, "Defendants" or "PDVSA Parties").

I. PRELIMINARY STATEMENT

The Amended Complaint (the "Complaint") lays out a detailed account of how the PDVSA Parties, later spearheaded by José Ignacio Hernández, Venezuela's former Special Attorney General, developed and maintained an ongoing scheme to defraud its bondholders via false and misleading public statements, sham litigation, and underhanded petitions to public officials.

This scheme began in 2016, when the PDVSA Parties offered a swap of notes set to mature in 2017 for senior secured notes due in 2020. ¶ 2.[1] From the beginning, the PDVSA Parties have publicly assured investors that they intended to honor their obligations under the 2020 Notes—for example, the offering documents contained an extensive discussion of the "Risk Factors" associated with the Notes, which did not indicate in any way that the Notes might be challenged as illegal or were subject to approval by the National Assembly. In the months leading up to the consummation of the Exchange Offer, Defendants provided numerous other assurances to prospective Noteholders, including that the Notes were governed by New York law. Relying on these statements, Plaintiff purchased Notes then worth $30 million.

Although the PDVSA Parties publicly paid interest on the Notes and declared that they intended to abide by the Notes' terms, the true intentions of Defendants were also recorded

[1] Citations to "¶ _" are citations to Plaintiff's Amended Complaint (ECF No. 35).

separately. In a memorandum from April 2019, Hernández detailed PDVSA's fraudulent legal strategy—outlining the plan to argue that the Exchange Offer was illegal because the pledge was a contract of national public interest not approved by the National Assembly purportedly in violation of the Venezuelan Constitution. The memorandum, however, admitted that the Notes were governed by New York law and, therefore, Venezuelan law was irrelevant. In a leaked audio recording, Hernández later explained that, as of the date of the memorandum, he required time to transform this tactic into an attack on the Notes' validity. Accordingly, the PDVSA Parties made payment on the Notes on April 27, 2019, all the while planning to initiate litigation to invalidate the Notes.

Six months later, the PDVSA Parties unleashed their public attempt to prevent payments to Noteholders. On October 15, 2019, the National Assembly passed a non-binding resolution declaring for the very first time that the Notes were invalid under the Venezuelan Constitution. Two weeks later, PDVSA defaulted on the Notes, failing to make required payments of principal and interest due on the Notes. The very next day, the PDVSA Parties commenced an action in the Southern District of New York, adopting the exact legal strategy Hernández had advocated for in his memo six months prior. Despite these frivolous public attacks on the validity of the Notes, the PDVSA Parties and their affiliates continued to reassure the public that the Notes were valid. In fact, as recently as March 30, 2023, PDVSA disseminated a public statement on its website reassuring investors of its "willingness to comply with the obligations derived from the bonds." ¶ 106.

Now, Defendants attempt to insulate themselves from liability by pointing the finger back and forth between the Maduro-controlled PDVSA and the Guaidó-controlled PDVSA, while at the same time asserting that neither speaks on behalf of Defendants. These assertions run afoul of the

relatively well-developed body of law in the Third Circuit regarding these fraudulent actors. *See OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, 73 F.4th 157, 176 (3d Cir. 2023) ("For the second time in five years, we conclude that PDVSA is the alter ego of Venezuela."). As other courts have already explained, PDVSA Parties cannot avoid liability by appointing a new board of directors or blaming a different administration. The Complaint alleges that the Maduro-controlled PDVSA developed a fraudulent scheme and never intended to repay Noteholders in full. When Guaidó assumed control of PDVSA in January 2019, Defendants did not immediately declare the Notes void. Instead, they followed Hernández's scheme. First, in April 2019, they bought time by making a scheduled interest payment, stating publicly that the Notes were valid, and outwardly asserting that the Guaidó Administration would not attempt to invalidate the Notes. Then, beginning in October 2019, they pivoted by engaging in a campaign of frivolous litigation and false statements to invalidate the Notes. As a result of this fraudulent scheme, including the dissemination of material misstatements, Plaintiff (a) purchased $30 million in Notes, and (b) held these Notes until the present, including between April 2019 and October 2019 when PDVSA had disseminated false statements, leading Noteholders to believe the Guaidó-controlled PDVSA would honor their obligations.

This Court should reject Defendants' attempt to avoid liability for an unlawful and coordinated fraudulent scheme by blaming a change in administration. Defendants ignore most of the facts alleged in the Complaint and mischaracterize those they acknowledge. Defendants' legal arguments, meanwhile, are built on overstated positions and inapposite cases. This Court should reject the attempt to portray Defendants' unlawful and coordinated behavior as the byproduct of political turnover and deny Defendants' Motion in its entirety.

II. BACKGROUND

A. The 2020 Notes and the Exchange Offer

In April 2007, October 2010, and January 2011, PDVSA, an oil and natural gas company established by the Venezuelan government to control all operations of the country's oil and natural gas reserves, issued over $9 billion of Notes due in April 2017 (the "2017 Notes"). *See* ¶ 30. PDVH, which is wholly owned by PDVSA, served as a guarantor of all the 2017 Notes.

After the issuance of the 2017 Notes, PDVSA's credit ratings declined substantially, which credit rating agencies attributed to the sustained decline in crude oil prices, among other factors. ¶ 33. Accordingly, in order to remain solvent with respect to the 2017 Notes, on September 16, 2016, PDVSA announced it would commence an exchange offer to refinance the 2017 Notes (the "Exchange Offer"). ¶ 38. As part of the Exchange Offer, PDVSA sought to convince 2017 Noteholders to exchange all of the remaining 2017 Notes for new notes due in 2020 (the "Notes"). ¶¶ 38-42, 44-46. In order to assure prospective purchasers that the Notes were a safe investment, PDVSA availed itself of a number of U.S.-based protections. For example, the Offering Circular and other documents related to the Exchange Offer were filed with the United States Securities and Exchange Commission ("SEC"). ¶ 38. In addition, the Notes were secured by a pledge by PDVH of 50.1% of the capital stock of Citgo Holding, a Delaware Corporation, which was held by the Collateral Agent in New York and located in a vault in New York. ¶ 41. The Notes were governed by New York Law. ¶¶ 54, 58. The Exchange Offer was negotiated in New York, and the parties to the Exchange Offer hired and relied upon legal and financial advisors based in New York. ¶ 38. The indenture agreement that governs the 2020 Notes (the "Indenture") provided that all payments of principal and interest due on the Notes are to be made in New York. ¶¶ 38-50, 54. The Transfer Agent, Law Debenture Trust Company of New York, was also located in New York. ¶¶ 2 n.2, 47.

On October 24, 2016, PDVSA announced that holders with approximately $2.8 billion of 2017 Notes had exchanged their notes for 2020 Notes. On October 27 and 28, 2016, respectively, PDVSA and the various other parties to the agreement executed the Indenture and related documents in order to finalize the exchange. ¶¶ 33, 38-49. Plaintiff, an investment fund headquartered in New York, owns 2020 Notes, which it purchased on the secondary market between August 2017 and January 2018. ¶¶ 15, 126.

B. PDVSA Develops a Fraudulent Scheme to Avoid Honoring its Obligations with Respect to the 2020 Notes

From the beginning, PDVSA took the public stance that it intended to honor the 2020 Notes and that the 2020 Notes were valid and enforceable. For example, in the Offering Circular, PDVSA stated that "[t]he purpose of the Exchange Offer [was] to extend the maturities of and refinance the Existing Notes" and "to rearrange [its] debt profile." ¶ 52. The Offering Circular contained an extensive discussion of the "Risk Factors" associated with the Notes, which included various Venezuelan Constitutional requirements related to PDVSA, but did not include any indication that the Notes might be challenged as illegal or were subject to approval by the National Assembly. ¶ 53. In the months leading up to the consummation of the Exchange Offer, Defendants provided numerous other assurances to prospective Noteholders, including that the 2020 Notes were governed by New York law. ¶¶ 56-74.

Indeed, between October 2016 and April 2019, Defendants performed their obligations pursuant to the Exchange Offer. Defendants made principal payments on the 2020 Notes on October 27, 2017 and October 27, 2018, for a total of $1.684 billion paid in principal, and made interest payments on the 2020 Notes on April 27, 2017, October 27, 2017, April 27, 2018, October 27, 2018, and April 27, 2019, for a total $573,240,000 paid in interest. ¶ 79.

In 2018, Nicólas Maduro won reelection as President of Venezuela; however, the United States and certain other countries did not recognize the legitimacy of the 2018 election.[2] ¶ 75. On January 23, 2019, the United States recognized Juan Guaidó as the Interim President of Venezuela with the backing of the National Assembly. ¶ 77. In turn, Guaidó appointed PDVSA's Ad Hoc Board of Directors. ¶ 81.

Thereafter, PDVSA approved the April 2019 interest payment—meaning that PDVSA's Ad Hoc Board of Directors and eventually, the National Assembly itself, approved the April 2019 interest payment. ¶ 81.

As Plaintiff later learned, even as PDVSA prepared to make the April 2019 interest payment, its board was privately preparing a fraudulent legal strategy to repudiate the 2020 Notes. On April 15, 2019 José Ignacio Hernández, Venezuela's Special Attorney General and the architect and mastermind of PDVSA's fraudulent legal strategy, sent Guaidó a memorandum that stated that he had explored several options to intentionally avoid making the April payment, one of which involved arguing that the Exchange Offer was illegal because the underlying pledge of a stake in Citgo Holding as collateral was subject to "special controls" and had not been approved by the National Assembly. ¶ 84. On the same day, a PDVSA Director wrote to all members of the PDVSA board that "there is nothing else we can do but prepare to pay the interest, in the case that illegality can be demonstrated I do not think we would have the time and we would risk the shares of Citgo that have been compromised in this procedure." ¶ 83. In subsequently leaked audio Hernández explained that the PDVSA board both authorized payment and reassured investors as to the Notes' validity in April 2019 to stall any noteholder efforts to enforce and prepare for the

[2] On May 21, 2018, President Trump issued Executive Order 13835 ("E.O. 13835") prohibiting "the sale, transfer, assignment, or pledging as collateral" of any equity interest in any entity 50% or more owned by the Government of Venezuela, defined to include PDVSA. On July 19, 2018, OFAC issued a carve-out to E.O. 13835 that authorized all transactions and other dealings in the Notes that would otherwise have been prohibited by E.O. 13835. *See* ¶¶ 75-79.

October invalidity litigation. ¶ 89. Hernández developed this strategy in direct collaboration with World Bank President David Malpass, who had been Undersecretary of the Treasury for International Affairs in the Trump administration up until April 9, 2019. ¶¶ 82-89.

Despite this private plan to repudiate the 2020 Notes, the PDVSA Parties and their affiliates from the National Assembly continued to publicly reassure Noteholders that PDVSA intended to honor the Notes. On April 27, 2019, a representative from the National Assembly tweeted that "PDVSA does not require authorization from the [National Assembly] to issue debt." ¶ 85. On May 7, 2019, Hernández published a release in a Venezuelan newspaper affirming that the Notes were "valid and binding" under New York law, which, he opined, "is the applicable Law." ¶ 86. On May 15, 2019, the PDVSA board published a press release stating that the April 2019 payment was "absolutely necessary." ¶ 86-87.

C. PDVSA Defaults and Initiates Frivolous Litigation to Avoid Making Payments to 2020 Noteholders

On October 28, 2019, PDVSA failed to make payments of $841,882,250 of principal and $71,559,991.25 of interest due under the Notes, which constituted a default. ¶¶ 93-94. The following day, Defendants initiated a declaratory judgment action in the United States District Court for the Southern District of New York to invalidate the 2020 Notes. ¶ 97. *See also Petróleos de Venezuela, S.A., et al. v. MUFG Union Bank, N.A.*, 19-CV-10023 (S.D.N.Y. 2019). On October 16, 2020, the Court ruled against Defendants, concluding that New York law applied to the Notes, and that under New York law, the Notes were valid and enforceable. *See id.*, ECF No. 215 (Oct. 16, 2020). Defendants appealed to the Second Circuit and the appeal remains pending. *See* ¶¶ 98-103. Some holders of the Notes sought to foreclose on the collateral, Defendants pursued a number of means to prevent the foreclosure, including soliciting the U.S. Office of Foreign Assets Control (OFEC) and frivolously asserting that E.O. 13835 prohibited the transfer of shares of Citgo. ¶¶

104-05. One prominent affiliate of PDVSA, however, finally asserted the truth regarding the Notes. On October 16, 2020, Guaidó publicly asserted that the issuance of the Notes was "absolutely fraudulent." ¶ 101.

Nevertheless, Defendants largely persisted in concealing their plan to defraud Noteholders. As late as March 30, 2023, PDVSA issued a public statement announcing "its willingness to comply with the obligations derived from the bonds." ¶ 106. PDVSA made this statement in order to trick the Noteholders into believing that it would honor its obligations under the Notes, while at the same time PDVSA sought to regain access to the underlying collateral in Citgo. ¶¶ 106-09. This strategy was designed to confuse the 2020 Noteholders about the likelihood that they might one day obtain value for the Notes; its goal was delay them from exercising their rights with respect to the underlying collateral.

III. STANDARD OF REVIEW

To survive a motion to dismiss for failure to state a claim, a complaint need only plead facts sufficient to state a claim for relief that is "plausible on its face." *Green v. Dep't of Educ. of City of New York*, 16 F.4th 1070, 1076–77 (2d Cir. 2021) (citation omitted). A claim is plausible on its face if the plaintiff's well-pled allegations permit the court "to draw the reasonable inference" that the defendant is liable for the conduct alleged in the complaint. *Charles v. Orange Cnty.*, 925 F.3d 73, 81 (2d Cir. 2019) (citation omitted). The court must "accept all factual allegations as true" and "draw all reasonable inferences in favor of the plaintiffs." *Melendez v. City of New York*, 16 F.4th 992, 1010 (2d Cir. 2021) (citation omitted). Although a plaintiff "must state with particularity the circumstances constituting fraud or mistake… [m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

IV. ARGUMENT

A. Federal Securities Law Applies to the PDVSA Parties' Fraudulent Conduct

Defendants spill much ink attempting to relitigate their failed theory that New York-based holders of 2020 Notes should not be afforded the protection of United States law despite Defendants' promises that principal and interest would be paid in U.S. dollars in New York, that New York law would govern the Notes, that collateral would be held in New York, and that the transfer agent, registrar and depository would all be based in New York. *See Petroleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, 495 F. Supp. 3d 257, 290-91 (S.D.N.Y. 2020). Defendants' unavailing argument that *Morrison v. National Australia Bank Ltd.,* 561 U.S. 247 (2010) bars Plaintiff's fraudulent scheme claim is belied by the allegations in the Complaint that Plaintiff is a New York investment firm that purchased New York-based Notes and continues to hold those Notes. *See* ¶¶ 2 n.2, 15, 17, 47; Ex. 2 at 63. The only inference to draw from these allegations is that title passed to Plaintiff in the United States.

This case is distinguishable from *Absolute Activist*, which involved *foreign* funds purchasing from U.S. companies, which made it unclear where irrevocable liability had occurred and if title had ever passed in the United States. *See Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 62, 70 (2d Cir. 2012). No such confusion exists for a domestic entity purchasing in the United States that continues to hold those Notes. Moreover, Plaintiff's allegations do not involve a transaction so divorced from the United States to elicit *Morrison*'s extraterritoriality concerns. To the contrary, Judge Failla has already held that "it is clear that New York is the center of gravity for the 2020 Notes." *Petroleos de Venezuela S.A.*, 495 F. Supp. 3d at 290-91.

1. Defendants' Argument that Plaintiff's Claims are "Predominantly Foreign" Ignores the Southern District's Recent Ruling and the Well-Pled Allegations in the Complaint

Defendants' argument that Plaintiff's securities fraud claim is "so predominantly foreign as to be impermissibly extraterritorial" is farfetched. ECF No. 40 ("Br.") at 1 (quoting *Parkcentral Global HUB Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014) (per curiam). In fact, Judge Failla has already struck down a similar argument in a detailed opinion in which she held that the Exchange Offer was a domestic transaction governed by New York law. *See Petroleos de Venezuela S.A.*, 495 F. Supp. 3d at 290-91 ("[I]t is clear that New York is the center of gravity for the 2020 Notes"). There, Defendants initiated litigation in this district regarding facts at issue in this case. *See Petroleos de Venezuela S.A.*, 495 F. Supp. 3d 257. After using the U.S. judicial system to avoid paying back Noteholders, Defendants now claim that they are not subject to U.S. law. This Court should follow Judge Failla's guidance in quickly rejecting the PDVSA Parties' deceptive techniques. *See id.* at 284-93 ("The choice of law analysis therefore overwhelmingly favors the application of New York….").

Clear judicial precedent from a sister court aside, Plaintiff has laid forth ample connections between Defendants' fraud and the United States (most, but not all, of which are New York-centric):

- The Notes are governed by New York law and contain a consent to the jurisdiction of New York courts, as well as a waiver of sovereign immunity, ¶¶ 31, 54;
- The Notes are payable in U.S. dollars, ¶ 31;
- Principal and interest are paid in the U.S., ¶ 31;
- The collateral for the Notes is located in the U.S., ¶ 41;
- Plaintiff is a U.S.-based private equity firm, which purchased Notes with $30 million in original principal value, ¶ 15;

- Defendant PDVH, the Collateral Agent, the Trustee, and the Transfer Agent, are all U.S. entities, ¶¶ 2 n.2, 18-20;

- The Exchange Offer was negotiated in the U.S. with reliance on U.S. legal and financial advisors and multiple offering documents were filed with the Securities and Exchange Commission, ¶ 38;

- Defendants' representatives sought to lobby the U.S. Treasury and OFAC not to foreclose on the collateral that backs the Notes, ¶¶ 12, 91, 92; and

- The Notes were the subject of a 2018 Executive Order by the President of the United States, ¶ 76.

This fact pattern is a far cry from the types of cases that are "so predominantly foreign as to render the claims impermissibly extraterritorial." *Prime Int'l*, 937 F.3d at 107. *See also In re Platinum & Palladium Antitrust Litig.*, 61 F.4th 242, 268 (2d Cir. 2023) (reversing the district court's determination that a securities fraud claim was "impermissibly extraterritorial" where the disputed conduct involved "both foreign and domestic activity").

2. Plaintiff Acquired 2020 Notes in Domestic Transactions

Defendants' reading of *Morrison* is far too restrictive. As this Court has previously explained, "[t]he problem with extending § 10(b) liability to the defendant in *Morrison* was that the facts of that case 'involve[d] no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still ha[d] live claims occurred outside the United States.'" *SEC v. Compania Internacional Financiera S.A.*, 11-CV-4904 (DLC), 2011 WL 3251813, at *6 (S.D.N.Y. July 29, 2011) (quoting *Morrison*, 561 U.S. at 273). Following *Morrison*, the Second Circuit explained that a plaintiff may allege a "domestic transaction" by raising a plausible inference that "(1) the transaction involved securities traded on a domestic exchange, (2) irrevocable liability was incurred in the United States, or (3) title was passed in the United States." *Arco Capital Corps. Ltd. v. Deutsche Bank AG*, 949 F. Supp. 2d 532, 541 (2d Cir. 2013). "It is sufficient for a plaintiff to allege facts leading to the plausible inference that ... the purchaser

incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security." *Giunta v. Dingman*, 893 F.3d 73, 79 (2d Cir. 2018) (internal quotations and citation omitted). As this Court has explained, once an over-the-counter purchaser "entered his order to purchase… stock, he no longer had the discretion to revoke acceptance, and title was transferred to him." *In re Poseiden Concepts Securities Litig.*, 13-CV-1213 (DLC), 2016 WL 3017395, at *12 (S.D.N.Y. May 24, 2016).

As noted above and alleged in the Complaint, Plaintiff is an investment fund headquartered in New York that purchased $30 million worth of Notes over the course of six months in over-the-counter transactions, and Plaintiff continues to hold these Notes. The Law Debenture Trust Company of New York, which records transfer of title, is the only Transfer Agent. *See* Ex. 2 at 63. These Notes are governed by New York law with interest and principal payable U.S. dollars in New York, and the Collateral Agent, Trustee, Transfer Agent, and other substantial Noteholders are also located in New York. The only reasonable inference to draw is that both title passed in the United States and the purchaser[3] incurred irrevocable liability for the Notes in the United States. *See U.S. v. Georgiou*, 777 F.3d 125, 137 (3d Cir. 2015) (holding *Morrison* satisfied where *at least one* of the disputed stocks were "bought or sold at [defendant's] direction from entities located in the United States").

Unsurprisingly, the Second Circuit has drawn similar inferences. *See Choi v. Tower Rsch. Cap. LLC*, 890 F.3d 60, 63, 67–68 (2d Cir. 2018) (finding it was "plausible that parties trading on the [Korean Exchange] night market incur irrevocable liability in the United States"); *Giunta*, 893 F.3d 76–77, 80 (agreement to invest in which some conversations took place over lunch meetings

[3] Given the aforementioned connections to New York, it is also reasonable to infer that the seller incurred irrevocable liability for some, if not most, of these trades.

and phone calls in Manhattan satisfied *Morrison*); *In re Petrobras Secs. Litig.*, 150 F. Supp. 3d 337 (S.D.N.Y. 2015) (U.S.-based buyer's purchase of over-the-counter bonds satisfied Morrison).

Defendants cherry-pick Plaintiff's allegations and suggest that the Court should determine whether each fact alleged, in isolation, is adequate to raise a plausible inference of a domestic transaction. *See* Br. at 10-11.[4] As this Court has explained, while some facts, such as the location of a broker dealer, may "not necessarily demonstrate where a contract was executed… [they] could be relevant." *In re Poseiden*, 2016 WL 3017395 at *9. While Defendants assert that Plaintiff has only "a hodgepodge of domestic-centric allegations," Br. at 10, Judge Failla has found that the "clear [] center of gravity" of the Notes is New York. *Petroleos de Venezuela S.A.*, 495 F. Supp. 3d at 291.

B. Plaintiff's Claims Are Timely

"The lapse of a limitations period is an affirmative defense that a defendant must plead and prove." *Staehr v. Hartford Financial Services Group, Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) (citing Fed. R. Civ. P. 8(c)(1)). A court may only consider timeliness on a motion to dismiss "[w]here the dates in a complaint show that an action is barred by a statute of limitations." *Cangemi v. United States*, 13 F.4th 115, 134 (2d Cir. 2021) (citation omitted); *see also Xechem Inc. v. Bristol-Myers Squibb Co*., 372 F.3d 899, 901 (7th Cir. 2004) ("Complaints need not contain any information about defenses and may not be dismissed for that omission.").

1. Plaintiff's Section 10b-5(a) and (c) Claims Are Timely

The Parties agree that Plaintiff's claim for securities fraud is subject to a two-year statute of limitations and a five-year statute of repose. Br. at 13; *see also* 28 U.S.C. § 1658(b); *CTS Corp.*

[4] The case law Defendants cite is also inapposite. *See Valentini v. Citigroup, Inc.*, 837 F. Supp. 2d 304, 323 (S.D.N.Y. 2011) (purchase of Swiss company's stock listed on a Swiss exchange, which was executed, cleared, and settled through a London-based platform); *Loginovskaya v. Batrachenko,* 764 F.3d 266, 275 (2d Cir. 2014) (contract was negotiated and entered into in Moscow).

v. Waldburger, 573 U.S. 1, 8 (2014). The Parties also agree that the statute of repose "begins to run without interruption once the necessary triggering event has occurred." Br. at 13; *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 107 (2d Cir. 2013). Defendants, however, misunderstand what constitutes a "triggering event" under the statute of repose, *id.*, and ignore Second Circuit precedent regarding the discovery rule. *See* Br. at 13-16.

Where, as here, a plaintiff alleges a fraudulent scheme, the statute of repose and statute of limitations do not begin to run until after the scheme has been complete. *SEC v. Xia*, 21-CV-5350, 2022 WL 17539124, at *13 (E.D.N.Y. Dec. 8, 2022) (SEC's claim was timely because the "statute of limitations did not begin to run [until] after the scheme was completed—when the final sale of the EB-5 investments occurred"); *Dekalb County Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 411 (2d Cir. 2016) (statute of repose "beg[an] to run on the date of the violation, which we consider to be the date of the defendant's last culpable act or omission"); *see also In re Teva Sec. Litig.*, 512 F. Supp. 3d 321, 335 (D. Conn. 2021), *reconsideration denied*, 17-CV-558, 2021 WL 1197805 (D. Conn. Mar. 30, 2021) (noting scheme liability allegations could protect plaintiffs from statute of repose defenses).

Courts in this circuit have agreed with *Teva* and explained that "the statute of repose first runs from the date of the last alleged misrepresentation regarding related subject matter." *In re Beacon Associates Litigation*, 282 F.R.D. 315, 324 (S.D.N.Y. 2012) (internal quotations and citation omitted). This position is consistent with longstanding rule that statutes of repose are "measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *CTS Corp.*, 573 U.S. at 8; *see also, e.g.*, *Dekalb County Pension Fund*, 817 F.3d 411 (statute of repose "beg[an] to run on the date of the violation, which we consider to be the date of the defendant's last culpable act or omission").

Defendants, relying on this Court's decision in *Bai v. TEGS Mgmt., LLC*, argue that a "cause of action accrues on date plaintiff purchased securities for purposes of Section 10(b)." *See* Br. 13-14; *Bai v. TEGS Mgmt., LLC*, 20-CV-4942 (DLC), 2022 WL 602711, at *7-8 (S.D.N.Y. Mar. 1, 2022).[5] Defendants' interpretation of *Bai* runs afoul of controlling precedent. *See, e.g., CTS Corp.*, 573 U.S. at 8 (noting longstanding rule that statutes of repose are "measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant."). Regardless, this is not the holding in *Bai*. There, this Court held that "Bai has failed to allege a fraudulent statement, omission, or act by any of the Defendants that could constitute a violation of [Section] 10(b) and Rule 10b-5 within the five year [repose] period prior to the filing of this action." *Bai,* 2022 WL 602711, at *8. Here, by contrast, Plaintiff has alleged numerous fraudulent statements and acts by Defendants within the repose period.

Specifically, Plaintiff has alleged an ongoing scheme, including multiple fraudulent acts which have occurred within five years of the filing of the initial complaint on June 29, 2023—some as recently as March 30, 2023. These include:

- On April 27, 2019, PDVSA making an interest payment on the Notes (¶ 79);
- On March 30, 2023, PDVSA disseminating a public statement stating that it was willing to comply with the obligations derived from the bonds, (*see* ¶ 106);
- On October 28, 2019, PDVSA defaulting on the Notes (*see* ¶¶ 7, 93);
- On May 15, 2019, representatives of PDVSA making public statements indicating their support continued payments of the Notes (¶ 87);
- On October 29, 2019, PDVSA initiating litigation to invalidate the Notes, (¶¶ 97-103).

[5] Because Defendants do not argue that Plaintiff's claims are untimely pursuant to section 10b-5's statute of limitations, Plaintiff does not address the statute of limitations here nor raise any equitable defenses. As discussed in section IV.B.1 above, Plaintiff has sufficiently alleged misconduct within the limitations period to make determination of this issue at the pleading stage improper. *See Cangemi*, 13 F.4th at 134; *Staehr*, 547 F.3d at 425.

- PDVSA's legal strategist working in direct collaboration with the former U.S. Undersecretary of the Treasury to buy time for PDVSA to initiate litigation (¶¶ 84, 89); and

Each of these allegations represents a "culpable act or omission" by Defendants within the repose period. *CTS Corp.*, 573 U.S. at 8. Accordingly, Plaintiff's claims are timely.

Defendants' statute of limitations argument fails both on its face and because it is not appropriate for the court to engage in a fact-intensive inquiry at this stage. The determination of when a plaintiff could have with reasonable diligence discovered a fraud is a question of fact and therefore not appropriately disposed of at the pleading stage. *Meyer v. Seidel*, 21-2221, 2023 WL 8816145, at *11-14 (2d Cir. 2023) (concluding that the district court improperly concluded that a plaintiff should reasonably have known of a defendant's fraud); *see also Katz v. Goodyear Tire & Rubber Co*., 737 F.2d 238, 243 n.2 (2d Cir. 1984) ("[W]here the statute of limitations operates as an affirmative defense[,] ... issues of fact as to the application of that defense must be submitted to the jury."). Defendants argue that Plaintiff had knowledge of the fraudulent scheme in October 2019. Br. at 15-16. Although Defendants filed their frivolous complaint in October 2019, Plaintiff was unaware of other aspects of the fraudulent scheme, such as the April 2019 memorandum by Hernández detailing their litigation strategy, which had not yet been disclosed. Further, the fraudulent scheme continued *after* October 2019, with the dissemination of false and misleading statements and other deceptive acts as recently as March 2023, and Plaintiff could not possibly have alleged these facts at the time. Defendants' statute of limitations defense fails because such a determination would require a fact-intensive analysis of when Plaintiff had constructive knowledge of the *entire fraudulent scheme*, which could not have been earlier than March 2023.

2. Plaintiff's Common Law Fraud Claims Are Timely

Under New York law, the statute of limitations for an action based on fraud is "*the greater* of six years from the date the cause of action accrued or two years from the time the plaintiff . . .

discovered the fraud, or could with reasonable diligence have discovered it." *Cammarato v. 16 Admiral Perry Plaza, LLC*, 189 N.Y.S.3d 615, 617 (2d Dep't 2023) (quoting CPLR 213(8)). "A tort claim accrues as soon as the claim becomes enforceable, *i.e.*, when all elements of the tort can be truthfully alleged in a complaint." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 140 (2009) (internal quotations and citation omitted). Plaintiff filed the initial complaint on June 29, 2023. Therefore, the statute of repose extends to June 29, 2017. Plaintiff purchased the Notes from August 2017 through January 2018 (*see* ¶¶ 110, 126); therefore, Plaintiff could not have brought a claim until this date because Plaintiff could not have pled reliance on *any* of Defendants' false statements until after June 29, 2017.

C. Plaintiff Has Adequately Alleged that Defendants Engaged in a Fraudulent Scheme in Violation of Section 10(b) of the Exchange Act & Rule 10b-5(a) and (c)

To survive a motion to dismiss, a plaintiff must allege facts demonstrating that "(1) that the defendant committed a deceptive or manipulative act, (2) in furtherance of the alleged scheme to defraud, (3) with scienter, and (4) reliance." *Plumber & Steamfitters Loc. 773 Pension Fund v. Danske Bank A/S*, 11 F.4th 90, 105 (2d Cir. 2021) (citations omitted).

1. Plaintiff Has Adequately Alleged Deceptive or Manipulative Acts in Furtherance of the Scheme

Defendants assert that the Complaint does not allege that Defendants have committed a deceptive or manipulative act. In doing so, they misstate federal pleading standards, mischaracterize the allegations in the Complaint, and ignore recent district court decisions that have determined that PDVSA acts as the alter ego of Guaidó.

Although misstatements and omissions alone are not sufficient to constitute a scheme, "something extra beyond misstatements" will suffice. *SEC v. Farnsworth*, 22-CV-8226 (KPF), 2023 WL 5977240, at *18 (S.D.N.Y. Sept. 14, 2023) (cleaned up and citation omitted). As the Supreme Court recently explained, the scheme liability theory "capture[s] a wide range of

conduct" and may be invoked where a defendant engages in an "artful stratagem or a plan devised to defraud an investor." *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101 (2019).

Plaintiff has alleged the creation and dissemination of fraudulent misstatements and omissions along with other deceptive conduct that combine to form an "artful stratagem." *Lorenzo*, 139 S. Ct. at 1101. Hernández's April 15, 2019 memorandum outlined a strategy explaining how Defendants planned to argue that the Exchange Offer was illegal under Venezuelan law and that Hernández intended to collaborate with world leaders to buy time for Defendants to initiate litigation. *See* ¶¶ 7, 79, 84, 89, 87, 93, 97-103, 106. Then, Defendants executed this exact strategy. Specifically, the Complaint alleges that Defendants engaged in the following conduct in furtherance of the fraudulent scheme:

- On April 27, 2019, issuing an interest payment (and disseminating an announcement regarding that interest payment on May 15, 2019), along with a statement that the interest payment was "absolutely necessary as part of the strategy to control and protect PDVSA's assets abroad." ¶¶ 87, 115. As Hernández's memorandum dated April 15, 2019 revealed, these interest payments were part of the "strategy" that he had "directed" to avoid paying the PDVSA Parties, ¶¶ 89, 115, and, as an email one of PDVSA's Directors sent to its Board on the same day stated, "there is nothing else we can do but prepare to pay the interest, in the case that illegality can be demonstrated I do not think we would have the time and we would risk the shares of Citgo that have been compromised in this procedure." ¶ 83.

- On March 30, 2023, disseminating a public statement on the PDVSA website announcing "its willingness to comply with the obligations derived from the bonds" even though the PDSA Parties were arguing (and continue to argue) that a foreclosure sale of CITGO shares should not proceed in federal court. ¶¶ 106, 114.

- On October 16, 2020, Guaidó, speaking on behalf of Defendants, publicly asserted that the issuance of the Notes was "absolutely fraudulent." ¶ 101.

- Petitioning foreign leaders, including representatives from OFAC and the U.S. Treasury Department, to delay foreclosure on the collateral underlying the 2020 Notes while publicly reassuring investors that it intended to fulfill its obligations under the 2020 Notes. ¶¶ 12, 89, 91, 92, 105.

- On October 29, 2019, initiating frivolous litigation in New York that stalled in court for years all the while publicly reassuring investors that it intended to fulfill its obligations under the 2020 Notes. ¶¶ 97-106.

These statements also create a strong inference of scienter on the part of the PDVSA Parties by showing that Defendants had "knowledge of facts or access to information contradicting their public statements." *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000).

a. Defendants Cannot Avoid Liability by Distancing Themselves from Guaidó and Hernández and Blaming the Previous Board of PDVSA

Defendants brazenly assert that Guaidó and Hernández are "Venezuelan officials operating in their official government capacities," and thus their statements and conduct cannot be attributed to Defendants. Br. at 19-20. Similar to their treatment of Judge Failla's decision, *see supra* § A.1, Defendants completely disregard recently published federal case law. As the Delaware District Court has made clear, "the Guaidó Government exercises such extensive direction and control over PDVSA in the U.S. as to render PDVSA the alter ego of Venezuela." *OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, 19-CV-290, 2023 WL 2609248, at *21 (D. Del. Mar. 23, 2023); *OI Eur. Grp.*, 73 F.4th at 176 ("For the second time in five years, we conclude that PDVSA is the alter ego of Venezuela"). Given the Third Circuit's recent holding, statements and actions made by Guaidó and Hernández can undoubtedly be attributed to Defendants.

Defendants then move the other direction and attempt to distinguish the Maduro-controlled PDVSA Parties and the "Ad-Hoc Board of PDVSA." Br. at 19-20. Once again, Third Circuit case law belies Defendants' argument. *See OI Eur. Grp.*, 73 F.4th at 172-75 (explaining the economic and managerial control that Maduro continues to wield over PDVSA and the Ad Hoc Board). Regardless, this argument relies on the ridiculous premise that a corporation may abdicate its prior agreements and responsibilities with every board transition. Obviously, a corporation cannot escape liability by replacing its board of directors or president. To hold otherwise would mean that any company could simply appoint a new board when faced with claims of malfeasance. In this context, the National Assembly took over Venezuela (for U.S. law purposes) subject to the same

contractual and legal obligations as Maduro, including its prior violations of those same obligations. In turn, the National Assembly-appointed board of PDVSA took over PDVSA subject to the same contractual and legal obligations as the previous board.

Defendants take this premise a step further and argue that statements made by *the current President of PDVSA*, which PDVSA has disseminated to the public on its website, cannot be attributed to PDVSA. *See* Br. at 20. Defendants cite *Jimenez v. Palacios* for the proposition that the National Assembly is the only legitimate governing body of the PDVSA Parties. 250 A.3d 814 (Del. Ch. 2019); *see* Br. at 20. In *Jimenez*, however, the Chancery Court of Delaware held only that the Ad-Hoc Board appointed by Guaidó was now valid—it did not hold that the previous Maduro-controlled board of PDVSA was *never* validly appointed or that another board of PDVSA could not be appointed in the future. *Cf. Jimenez,* 250 A.3d at 831 ("*At present*, therefore, it cannot be disputed that Guaidó is the voice of Venezuela's sole effective government as recognized by the U.S. President.") (emphasis added).

At bottom, Defendants argue that no one—even the current President of PDVSA—can speak on their behalf. This cannot be true. Instead, pursuant to the Third Circuit's explicit holding, Plaintiff has adequately alleged that PDVSA board members and Venezuelan officials, including Guaidó, Maduro, and Hernández, acted and spoke on behalf of PDVSA. *See generally OI Eur. Grp.*, 73 F.4th 157; ¶ 84 (describing Hernández's role in the Guaidó Administration).

b. Defendants' Misstatements and Fraudulent Conduct Constitute Collateral and Extraneous Misrepresentations

Defendants' argument that Plaintiff's fraud claim is one in the same as a claim for breach of contract relies on a misstatement of law. It is true that "a contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations," *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609, 616 (S.D.N.Y. 2003),

however, Defendants ignore that "it is also well settled that an action for fraud can be maintained on the basis of allegations that a party made a collateral or extraneous misrepresentation that served as an inducement," *id.* (internal quotations and citations omitted)*; see also Capital Mgmt. Select Fund Ltd. v. Bennett*, 680 F.3d 214, 226 (2d Cir. 2012) ("[A]lthough [c]ontractual breach, in and of itself, does not bespeak fraud, it may constitute fraud where the breaching party never intended to perform its material obligations under the contract.") (internal quotations and citations omitted). The cases Defendants cite in support are inapposite. *See Papa's–June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1162 (S.D.N.Y. 1996) (observing that the plaintiff "d[id] not allege that [the defendant's] fraudulent representations were collateral to the [contract]"); *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 19 (2d Cir. 1996) (plaintiff alleged "little more than intentionally-false statements by [the defendant] indicating his intent to perform under the contract,"). The PDVSA Parties have not simply defaulted on the Notes, they have stolen the money paid to secure bonds pursuant to a memorandum documenting their plan and refused to pay it back *for years now*.

As set forth above, the Complaint alleges multiple "collateral [and] extraneous misrepresentation[s]" that served to prevent Plaintiff from obtaining value for the Notes. *Astroworks, Inc.,* 257 F. Supp. 2d at 616 (declining to dismiss a fraud claim because at the pleading stage "it is impossible to know which promises comprised the agreement and which were collateral").

c. Noerr-Pennington *Does Not Immunize Defendants' Conduct*

Defendants have not met their burden of establishing that the *Noerr-Pennington* doctrine applies, and even if the doctrine applies, their conduct falls within the sham exception.

The *Noerr-Pennington* doctrine traditionally immunizes parties from antitrust liability for injuries resulting from government action prompted by the parties' petitioning activities, but it

does not apply to conduct that is "(1) 'objectively baseless' and (2) intended to cause harm to the defendant 'through the use [of] governmental process . . .'" *T.F.T.F. Capital Corp. v. Marcus Dairy, Inc.*, 312 F.3d 90, 93 (2d Cir. 2002) (citations omitted). The party that invokes the doctrine bears the burden of demonstrating that it applies. *In re Elysium Health-Chromadex Litig.*, 354 F. Supp. 3d 330, 335 (S.D.N.Y. 2019).

Here, Defendants' conversations with the U.S. Treasury Department and OFAC demonstrate their scienter in perpetrating a scheme to defraud the Noteholders. Plaintiff's reliance on these conversations to support its claim that Defendants acted fraudulently therefore does not implicate the *Noerr-Pennington* doctrine. Moreover, even if the Court did find *the Noerr-Pennington* doctrine relevant to its analysis of Defendants' fraudulent scheme, Defendants' actions are not immunized because they fall within the doctrine's "sham" exception. As elaborated in Hernández's memorandum, Defendants' petitioning activity was intended to delay the Noteholders' ability to foreclose on the collateral that backed the Notes, not to affect any policy aim or governmental action. *See* ¶¶ 12, 84, 89, 92. When Defendants' efforts failed, *see* ¶ 12, they commenced frivolous litigation in order to further delay foreclosure, *see* ¶ 84. Such disingenuous and abusive practices are not entitled to immunity. *See, e.g.*, *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (observing that immunity will not apply to lobbying that "is a mere sham to cover what is actually nothing more than an attempt to interfere" with a competitor); *Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*, 707 N.Y.S.2d 647, 654 (App. Div. 2000) (refusing to apply *Noerr-Pennington* where petitioning the government was intended "to preclude or delay its competitor's access to governmental processes."); *Hamilton v. Accu-tek*, 935 F. Supp. at 1317 (E.D.N.Y. 1996) (explaining that "efforts to influence government are not protected where they" involve "unethical means").

This Court should not extend immunity to allegations going to scienter, nor should it immunize the frivolous litigation and discussions between OFAC, the U.S. Treasury and Defendants that the PDVSA Parties used to execute their fraudulent scheme depriving legitimate investors, including Plaintiff, of millions of dollars.

3. The Complaint Adequately Alleges Facts Giving Rise to an Inference of Defendants' Scienter

Defendants argue that the Complaint fails to satisfy Rule 9(b)'s requirement that a plaintiff allege facts giving rise to a "strong inference" of scienter. Br. at 20-22. Although Defendants summarily address the dissemination of fraudulent statements and material omissions and fraudulent conduct that occurred in 2019 and later, the crux of Defendants' scienter-based argument relates to the statements accompanying the 2016 Exchange Offer. That strategy makes sense because Hernández's April 2019 memorandum details the PDVSA Parties' fraudulent scheme to avoid paying Noteholders, such as Plaintiff, the principal and interest they were owed.

"A false statement was made with the requisite scienter if it was made with the 'intent to deceive, manipulate, or defraud.'" *SEC v. Sourlis*, 851 F.3d 139, 144 (2d Cir. 2016) (quoting *SEC v. Obus*, 693 F.3d 276, 286 (2d Cir. 2012)). "Circumstantial evidence can support an inference of scienter in a variety of ways, including where defendants '(1) benefitted in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor." *SEC v. Fiore*, 416 F. Supp. 3d 306, 323–24 (S.D.N.Y. 2019) (internal citations omitted); *Shields v. Citytrust Bancorp, Inc.*, 25 F. 3d 1125, 1128 (2d Cir. 1994).

First, Plaintiff alleges that Defendants had a clear motive to commit the fraud—the scheme allowed the PDVSA Parties to avoid paying the $7.1 billion principal due under the 2017 Notes

when the entities were in a bind for cash. *See* ¶ 39. With the 2017 Notes coming due, Defendants needed a way to avoid paying the principal, so they exchanged notes due in 2017 for notes due in 2020. *See*, *e.g.*, ¶¶ 33, 79 ("Between October 2016 and April 2019, Defendants accepted the benefit of the Exchange Offer – the surrender of the exchanged 2017 Notes.").

Second, regarding fraudulent statements and deceptive conduct that occurred from April 2019 and later, Defendants barely argue that the Complaint fails to adequately allege that Defendants acted with a reckless disregard for the truth insofar as they knew facts or had access to information suggesting that their public statements were not accurate. *See* Br. at 21-22 (addressing statements made at the time of the Exchange Offer only). Regardless, as set forth in Section C.1 above, the Complaint specifically alleges that the PDVSA Parties had "knowledge of acts or access to information contradicting [their] public statements" for Defendants' deceptive conduct and misstatements and omissions from April 2019 forward. *Novak*, 216 F.3d at 308.

Third, in addition to the contemporaneous false and materially misleading reassurances from the PDVSA Parties that make up the fraud from April 2019 forward, Guaidó himself asserted that the issuance of the 2020 Notes was "absolutely fraudulent." ¶ 79. Defendants argue that "asynchronous statements are wholly insufficient to establish a 'strong inference' of scienter" in the instant case. Br. at 22. Defendants' reliance on *Diesenhouse* is misplaced, however, because it involved paradigmatic "fraud by hindsight," by which a plaintiff's allegations of fraud hinge on subsequent information set forth in disclosure statements. *Diesenhouse v. Soc. Learning & Payments, Inc.*, No. 20-CV-7436, 2022 WL 3100562, at *2 (S.D.N.Y. Aug. 3, 2022). Here, Guaidó was not wrong; he admitted that the issuance of the Notes was fraudulent. *Cf. Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 191–92 (S.D.N.Y. 2010) ("It is not 'fraud by hindsight' when statements . . . were false and misleading when made.").

Third, likely realizing that the Complaint provides detailed descriptions of the contemporaneous misstatements disseminated by the PDVSA Parties and straightforward admissions of fraud, Defendants raise an alternate theory. Br. at 22-23. Defendants argue that the Maduro-controlled PDVSA initiated the Exchange Offer and claimed the bonds were legal, while the Guaidó-controlled PDVSA "categorically reject[ed]" the defining feature of the Exchange offer at all times. *Id.* Defendants are simply wrong. The National Assembly-approved board of PDVSA, and the National Assembly itself, approved the April 2019 interest payment. ¶ 81. When the National Assembly assumed control of PDVSA in January 2019, it did not immediately declare the Notes void. Instead, it followed Hernández's guidance to a tee—buying time by initially making a scheduled interest payment in April 2019 and demonstrating that it would not attempt to invalidate the Notes, then engaging in a campaign of frivolous litigation and false statements beginning in October 2019 and continuing through the present day.

Even if Defendants were factually correct (they are not), recent Third Circuit decision contradicts their position. *See OI Eur. Grp.*, 73 F.4th 157. In that decision, the court held that (1) "the actions of both the Guaidó and Maduro governments as the totality of the sovereign conduct of Venezuela," and, in turn, (2) "[c]onsidering the totality of Venezuela's control over PDVSA, it is clear PDVSA is Venezuela's alter ego." *OI Eur. Grp.*, 73 F.4th at 170, 172. In reality, Maduro continues to wield "significant control" over PDVSA, *id.* at 172, and this Court should reject Defendants' attempt to insulate themselves from liability by asserting that the former regime is responsible for the PDVSA Parties' fraudulent conduct.

4. Plaintiff Has Adequately Pled Reliance Based on the Fraud-On-The-Market Doctrine

Plaintiff has adequately established reliance pursuant to the fraud-on-the-market theory. In an efficient market, "an investor's reliance on any public material misrepresentations ... may be

presumed for purposes of a Rule 10b–5 action." *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 481 (2d Cir. 2008), *abrogated on other grounds by Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013). Where a defendant has "(1) publicly made (2) a material misrepresentation (3) about stock traded on an impersonal, well-developed (*i.e.*, efficient) market, investors' reliance on those misrepresentations may be presumed." *Id.* (internal citations omitted). Whether a market is open and developed is a question of fact. *In re Initial Public Offering Securities Litig.*, 544 F. Supp. 2d 277, 297 (S.D.N.Y. 2008).

Plaintiff has alleged that the Notes are traded on an efficient market (absent the fraudulent scheme perpetrated by Defendants) with moderate volume, ¶¶ 110-11, which Defendants do not appear to challenge.[6] VR Capital has alleged reliance insofar as the market is open and developed, and it (a) suffered a detriment because it purchased $30 million in Notes at an inflated price based on Defendants' fraudulent misrepresentations, and (b) held the Notes and marked them down when Defendants engaged in public, frivolous litigation in October 2019.[7] This is sufficient under the fraud-on-the-market doctrine.

Defendants also assert that Plaintiff is a sophisticated investor and, therefore, should have investigated public information. If Plaintiff had investigated, Defendant asserts, it would have discovered that the National Assembly had previously declared that the Constitution requires

[6] Although Defendants assert that Defendants' allegations regarding reliance are conclusory, the only case they cite in support does not relate to the fraud-on-the-market doctrine. Br. at 23 (citing *Lutin v. New Jersey Steel Corp.*, 93-CV-6612, 93-CV-4695, 1996 WL 636037, at *7 (S.D.N.Y. Nov. 1, 1996)). Even *Lutin*, which is 27 years old and interprets West Virginia law, however, is distinguishable. There, the plaintiff alleged only that "Plaintiffs, the public, customers and suppliers justifiably relied upon such fraudulent misrepresentations," without alleging the resultant economic detriment to plaintiff. *Id.*

[7] Plaintiff's alternative theory of reliance is that VR Capital held the Notes between April 15, 2019 (when Hernández authored his memorandum) and October 24, 2019 (when OFAC delayed the Noteholders' authorization to foreclose on the collateral underlying the Notes) in justifiable reliance on the National Assembly-appointed Ad Hoc Board of PDVSA paying interest in April 2019 and publicly stating that the Notes were governed by New York law even though the PDVSA Parties intended to assert that the Notes were governed by Venezuelan law at the time those statements were made.

approval by the National Assembly of any contract of national interest. Relatedly, and in connection with the fraud-on-the-market doctrine, Defendants argue that if the market for Notes is efficient, it would have incorporated the news that the National Assembly had passed a resolution categorically rejecting the Exchange Offer.

Defendants' argument is flawed for several reasons. *First*, the National Assembly's public statement did not trigger any duty on Plaintiff to inquire further because it never asserted that the Notes themselves required National Assembly approval. A plaintiff has no duty to investigate misstatements unless a "cursory glance" would prompt further inquiry. *See Field v. Mans*, 516 U.S. 59, 69-76 (1995) (discussing the standard for reliance on fraudulent misstatements). PDVSA made payments on the Notes for *three years* after the National Assembly passed the non-binding resolution (while PDVSA's representatives repeatedly assured the public of the Notes' validity). Then, even when the Guaidó took control, PDVSA made interest payments. *Second*, neither Plaintiff nor the market could have discovered non-public information even with the most diligent investigations. *See In re Salomon Analyst AT&T Litigation*, 350 F. Supp. 2d 455, 476 (S.D.N.Y. 2004) (media reports on the fraudulent conduct did not require investigation because "defendants' vigorous contemporaneous denials" coupled with the lack of discovery "made any attempt at further inquiry by private defendants futile"). Although the market price of the Notes may have encompassed the potential that the National Assembly would declare that the Notes were invalid at the time of the Exchange Offer, the public could not assess the private statements made between and among members of PDVSA—including Hernández—in developing a complex fraudulent scheme by which Defendants would attempt to invalidate the Notes or otherwise withhold payment due to 2020 Noteholders. *Third*, Plaintiff's argument that the National Assembly had always publicly categorically rejected the Exchange Offer and the validity of the Notes is belied

by the misleading statements and deceptive acts from April and May 2019, including the authorization by the National Assembly of the interest payments.

5. Plaintiff Has Adequately Pled Loss Causation

Loss causation is "the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff." *Emergent Cap. Inv. Mgmt., LLC v. Stonepath Grp., Inc*., 343 F.3d 189, 196–97 (2d Cir. 2003). Although Defendants properly state this general principle, they misapply traditional stock drop cases to the current action.

Outside of the stock drop context, courts in this circuit ask, "whether the injury…is the natural and probable consequence of the defrauder's misrepresentation or ... [whether] the defrauder ought reasonably to have foreseen that the injury was a probable consequence of his fraud." *Amusement Indus., Inc. v. Stern*, 786 F. Supp. 2d 758, 777 (S.D.N.Y. 2011) (citation omitted) (holding allegations that defendants' misleading statement induced plaintiff to enter into an agreement to pay $13 million resulted in a loss of $13 million adequately pled loss causation).

Plaintiff's loss causation is straightforward— Hernández wrote a memorandum in which Defendants detail their plan to defraud Noteholders of the interest and principal payments due pursuant to the Notes. ¶ 116; *see Amusement Indus*., 786 F. Supp. 2d at 777. Plaintiff has alleged that it purchased the 2020 Notes for $30 million in original principal amount between August 2017 and January 2018. *See* ¶ 15. Plaintiff has lost the full amount of this investment because Defendants have refused to pay the principal or interest amount unequivocally due to Noteholders and have engaged in a fraudulent scheme to attempt to render the Notes invalid. *See* ¶ 116.

D. Plaintiff Has Adequately Alleged Common Law Fraud

The parties agree that the elements of common law fraud under New York law are "substantially identical" to federal securities law. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 446 F. Supp. 2d 163, 195 (S.D.N.Y. July 20, 2006) (citation

omitted). State law claims, however, are subject to a less stringent statutes of repose and limitations, *see supra* § IV.B.2, and are not required to meet the "domestic transaction" standard set forth in *Morrison*, *see Barron v. Helbiz, Inc.*, 21-278, 2021 WL 4519887, at *2.

The Southern District has already considered multiple discrete litigations arising from facts alleged here, *see, e.g.*, *Petroleos de Venezuela S.A.*, 495 F. Supp. 3d 257; *Dresser-Rand Co. v. Petroleós de Venezuela, S.A.*, 439 F. Supp. 3d 270 (S.D.N.Y. 2020), and, in the interest of judicial economy, convenience, and fairness, this Court should exercise supplemental jurisdiction over the remaining common law fraud claim if it dismisses the federal laim. *See* 28 U.S.C. § 1367(c), (c)(3).

E. Plaintiff Has Adequately Alleged Aiding and Abetting Fraud

To state a claim for aiding and abetting fraud, a plaintiff must plead (1) facts showing the existence of a fraud, (2) defendant's knowledge of the underlying fraud, and (3) that the defendant provided substantial assistance to advance the fraud's commission. *See Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292 (2d Cir. 2006).

As discussed above, Plaintiff has alleged the existence of an underlying fraud. With respect to Defendants' knowledge, PDVSA, PDVSA Petróleo, and PDVH are all parties to the documents that governed the Exchange Offer, ¶ 28, and are responsible for the misstatements contained in the offer documents. In addition, the three entities, inter alia, drafted and disseminated the March 23, 2023 public statement assuring Noteholders that they would honor the Notes. ¶ 106. As to substantial assistance, in addition to the above, PDVSA, PDVSA Petróleo, and PDVH jointly initiated the declaratory judgment action, ¶ 97, which as discussed above, was part of a fraudulent scheme to prevent the Noteholders from accessing the collateral and recouping any value for the Notes. Accordingly, Plaintiff has stated a claim for aiding and abetting fraud as to each of the three Defendants. *See, e.g.*, *S.E.C. v. Hwang*, 22-CV-3402 (JPO), 2023 WL 6124041, at *18 (S.D.N.Y. Sept. 19, 2023) (concluding that a defendant's "active role in directing and supervising …

misrepresentations, toward the larger goal of deceiving [the fraud victim's] counterparties" were sufficient to support an aiding and abetting fraud claim); *Tahari v. Narkis*, 190 N.Y.S.3d 16, 20 (1st Dept. 2023) (affirming an aiding and abetting fraud claim asserted in the alternative based on a defendant's false representations that "proximately caus[ed] the harm on which the primary liability [wa]s predicated").

F. If Necessary, Plaintiff Seeks Leave to Amend

The Federal Rules prescribe that leave to amend "shall be freely given when justice so requires." *Forman v. Davis,* 371 U.S. 178, 182 (1962), *see also* Fed. R. Civ. P. 15(a). Plaintiff thus respectfully request leave to amend to add more detailed allegations regarding any element the court may determine is currently insufficient.

CONCLUSION

For the foregoing reasons, the Defendants' Motion (ECF No. 40) should be denied in its entirety.

Dated: January 9, 2024
New York, New York

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