24-1176-cv

United States Court of Appeals

for the

Second Circuit

VR GLOBAL PARTNERS, L.P.,

Plaintiff-Appellant,

– v. –

PETRÓLEOS DE VENEZUELA, S.A., PDVSA PETRÓLEO, S.A., PDV HOLDING, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant VR Global Partners, L.P. states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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I. JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of New York had jurisdiction over this action under Securities Exchange Act Section 27 (15 U.S.C. § 78aa) and 28 U.S.C. § 1331. On April 8, 2024, the District Court issued its Opinion and Order (the "Opinion"), and entered its final Judgment in favor of Defendants Petróleos de Venezuela, S.A. ("PDVSA"), PDVSA Petróleo, S.A. ("PDVSA Petróleo"), and PDV Holding, Inc. ("PDVH") (collectively, "Defendants" or the "PDVSA Parties"). Plaintiff VR Global Partners, L. P. ("VR Capital" or "Plaintiff") filed a timely Notice of Appeal on April 29, 2024. This Court has jurisdiction under 28 U.S.C. § 1291.[1]

II. PRELIMINARY STATEMENT

This case concerns a years-long, well-documented and heavily litigated fraudulent scheme by Defendants-Appellees to intentionally default on bonds set to mature in 2020 (the "Notes" or the "2020 Notes"), thereby defrauding the Noteholders of billions of dollars—including $30 million owed to Plaintiff. In its 144-paragraph Amended Complaint, Plaintiff asserted claims for securities fraud under Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c) thereunder (17 C.F.R. § 240.10b-5), common law fraud, and aiding and abetting fraud.

[1] Documents in the Joint Appendix are designated as "A-__." All internal citations are omitted and emphases are added unless otherwise noted. All citations to "¶ __" are citations to the Amended Complaint (A-701-36; District Ct. Dkt. No. 35).

In response to Defendants' motion to dismiss, the District Court rejected Defendants' primary and secondary arguments and found that (1) Plaintiff had plausibly alleged a "domestic transaction" which is subject to Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and (2) Plaintiff's fraud claims were not time-barred. Then, in a mere three-paragraph discussion of the merits of Plaintiff's securities law claim, the District Court summarily held that the while the Amended Complaint may have plausibly alleged a scheme; the allegations only supported the existence of that scheme beginning in 2019. The Opinion goes so far as to assert that the Amended Complaint "pleads no facts to support" the theory that the PDVSA Parties acted with the intention of refusing to fulfill their repayment obligations under the 2020 Notes in 2016. (A-2160.) The allegations in the Amended Complaint belie such a bold assertion. Notably, the District Court completely disregarded the following allegations in the Amended Complaint:

- In a May 2016 resolution, the National Assembly (whose actions and statements can be imputed to the PDVSA Parties) asserted that for "contracts of national, state or municipal public interest concluded by and between the National Executive and foreign States or official entities or with companies not domiciled in Venezuela, the Constitution categorically mandates, without exception, the approval of the National Assembly" and that such approval is "a condition of the validity of the contract." (*See* A-2042-43.)[2]

[2] "A complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (internal quotations omitted).

- After issuing this May 2016 Resolution, National Assembly representatives downplayed its significance and assured analysts that they would not question the legality of the Exchange Offer, that they agreed with the interpretation of law that the Exchange Offer did not require the National Assembly's approval, and that the September 27, 2016 National Assembly Resolution had no binding force. (¶¶ 70-71.)

- In September 2016, the PDVSA Parties included an extensive discussion of the "Risk Factors" associated with the 2020 Notes in the offering documents accompanying the Notes. These "Risk Factors" did not mention the May 2016 Resolution and did not indicate in any way that the Notes might be challenged as illegal or were subject to approval by the National Assembly. (¶ 53.)

- On September 21, 2016, PDVSA's legal counsel opined that "[c]onclusively, the Exchange Offer, including the Pledge [of 50.1% of the capital stock of CITGO Holding Inc.], is not subject to the approval of the National Assembly as provided by article 150 of the Venezuelan Constitution." (¶ 72.)

- Between April 27, 2017 and April 27, 2019, PDVSA made scheduled interest payments to 2020 Noteholders. A memorandum by José Ignacio Hernández, Venezuela's Special Attorney General revealed that these interest payments were part of a "strategy" that he had "directed" to avoid paying the PDVSA Parties. (¶¶ 79, 81-82, 84, 86.)

- Guaidó, unequivocally speaking on behalf of PDVSA and supported by the National Assembly, publicly asserted that the issuance of the 2020 Notes was "absolutely fraudulent" at the time of issuance. (¶ 101.)

These allegations are more than enough to support an inference of scienter, and it was an error for the District Court to fail to even consider these facts. *See, e.g., Set Capital LLC v. Credit Suisse Group AG*, 996 F.3d 64, 80-83 (2d Cir. 2021) (vacating and remanding the district court's dismissal for failure to allege scienter in a securities fraud claim based on misstatements and omissions in offering documents);

New Orleans Emp's Ret. Sys. v. Celestica, Inc., 455 F. App'x 10, 15-16 (2d Cir. 2011) (reversing the district court's dismissal and holding that "[b]ecause plaintiffs adequately pleaded scienter under the PSLRA, the district court erred in dismissing the complaint for failure to state a claim.").

Due to the District Court's sparse analysis, it is unclear whether that Court overlooked the aforementioned allegations entirely or tacitly accepted the PDVSA Parties' argument that the Maduro and Guaidó regimes' conduct cannot be imputed to Defendants. In fact, the District Court completely disregarded case law in the Third Circuit Court of Appeals which establishes that *both* the Maduro and Guaidó regimes act as the alter ego of PDVSA. *See OI Eur. Grp. B.V. v. Bolivarian Republic of Venez.*, 73 F.4th 157, 176 (3d Cir. 2023), *cert. denied* 144 S. Ct. 549 (2024) ("For the second time in five years, we conclude that PDVSA is the alter ego of Venezuela"). Whether the District Court completely disregarded the allegations supporting an inference of scienter prior to 2019 or refused to accept the Third Circuit's analysis, its failure to address these allegations supporting an inference of scienter is reversible error.

III. ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in holding that Plaintiff failed to state a claim pursuant to Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c) thereunder? Specifically, did the District Court err in holding that Plaintiff's

securities fraud claim failed due to Plaintiff's failure to allege a scheme to defraud that existed as of the time Plaintiff purchased the 2020 Notes—*i.e.*, on or before August 2017?

2. Did the District Court err in dismissing Plaintiff's common law fraud claim based on Plaintiff's failure to allege a scheme to defraud that existed on or before January 2018?

3. Did the District Court abuse its discretion in denying Plaintiff leave to amend its Amended Complaint?

IV. SUMMARY OF THE CASE

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.

In 2013, following the death of President Hugo Chávez, his protégé, Nicolás Maduro, became President of Venezuela.[3] Maduro's administration was marked by sharp economic decline, hyperinflation, shortages in food and medical supplies,

[3] Although not necessary to the disposition of this appeal, Plaintiff offers a cursory summary of the relevant political background as context that may assist the Court. *See Jiménez v. Palacios*, 250 A.3d 814, 821 (Del. Ch. 2019), *aff'd* 2020 WL 4207625 (Del. July 22, 2020).

protests and civil insurrection. In late 2015, Venezuela held parliamentary elections and a coalition opposing Maduro, the Democratic Unity Roundtable (the "Opposition"), obtained a supermajority in Venezuela's legislature, the National Assembly. The 2015 parliamentary election spurred a constitutional crisis—after an attempt to use the judicial branch to disable the Opposition failed, Maduro convened a "National Constituent Assembly" packed with his supporters, which gave itself legislative powers and voted to put Opposition leaders on trial for treason. The Opposition-led National Assembly refused to subordinate itself to the National Constituent Assembly, leaving Venezuela with two parliamentary bodies which claimed to hold legislative power.[4]

It was against this political backdrop that the Exchange Offer occurred, and the PDVSA Parties' scheme to defraud bondholders began. After the issuance of the 2017 Notes, PDVSA's credit ratings had declined substantially, which credit rating agencies attributed to the sustained decline in crude oil prices, among other things, including the political instability in the country. (¶ 33.) On September 16, 2016, in

[4] In the 2018 presidential election, Maduro banned Opposition candidates from participating and claimed a victory. In January 2019, Maduro was sworn in for a second term as President. Shortly thereafter, the National Assembly declared Maduro's presidency illegitimate and named Opposition leader Juan Guaidó as Interim President, leaving Venezuela with two Presidents as well as two legislatures. *See, e.g.*, *Jiménez*, 250 A.3d at 821-25 (discussing the "two legislative bodies purporting to govern Venezuela" and Maduro and Guaidó's competing claims for recognition as the President of Venezuela). On January 23, 2019, the President Trump recognized Guaidó's presidency and declared the National Assembly "the only legitimate branch of government" and the Maduro regime "illegitimate."[4] (*See* ¶ 77.)

order to remain solvent with respect to the 2017 Notes, PDVSA announced it would commence an exchange offer to refinance the 2017 Notes. (¶ 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 2020 Notes. (*Id.*)

Politically, this made sense: with the largest proven oil reserves in the world, weak democratic institutions, and a prominent political elite, Venezuela is an archetypal petrostate. PDVSA, in its capacity as a state-owned oil company, accounts for over ninety percent of Brazil's total exports, and finances around two-thirds of the government's budget.[5] For Venezuela to default would have sent Venezuela deep into economic turmoil—a prospect that both Maduro and his Opposition wished to avoid. While Maduro needed the Exchange Offer to succeed in order to maintain his hold on power, for the Opposition the situation was more complicated: throughout 2016, the Opposition was pushing for a referendum to recall Maduro and hold a new Presidential election—an election their candidate would be likely to win. While the Opposition wanted to avert the economic catastrophe that would result from a default on the 2017 Notes, it also wanted to ensure that Maduro was not able to channel the financial flows from PDVSA to his exclusive political benefit.

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[5] *See* Amelia Cheatham & Diana Roy, *Venezuela: The Rise and Fall of a Petrostate*, COUNCIL ON FOREIGN RELATIONS (Dec. 22, 2023, 11:30 AM), https://www.cfr.org/backgrounder/venezuela-crisis.

On May 26, 2016, the National Assembly issued a Resolution stating that in contracts of national interest "the Constitution categorically mandates, without exception, the approval of the National Assembly." (*See* A-2042.) On September 27, 2016, the Opposition-controlled National Assembly passed another Resolution in which it stated that it "[c]ategorically reject[ed]" the pledge of the capital stock of Citgo Holdings. (¶ 43.) Through these Resolutions, the Opposition sought to hedge its position: on the one hand, if it was successful in recalling Maduro it could decide at its convenience whether to honor the 2020 Notes, or, if the financial burden became too onerous, repudiate them as unconstitutional; if, however, the Opposition was unsuccessful in challenging Maduro, it could declare the Exchange Offer unconstitutional when entered and repudiate Venezuela's obligations thereunder. In other words, it was not a unitary scheme, but a multifaceted strategy designed to anticipate multiple political contingencies.

Accordingly, in the months leading up to the Exchange Offer, National Assembly Opposition representatives reassured analysts at Torino Capital LLC ("Torino Capital") that they would not question the legality of the Exchange Offer, and that they agreed with the interpretation of law that the 2016 Exchange Offer was legal and did not require the approval of the National Assembly. (¶¶ 70-71.) At the same time, in order to induce prospective purchasers to tender their 2017 Notes and assure them that the 2020 Notes were a safe investment, PDVSA offered investors a

number of U.S.-based protections, including securing the 2020 Notes with 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. (¶¶ 4, 28, 41.) In addition, the offering circular and other documents related to the Exchange Offer were filed with the United States Securities and Exchange Commission ("SEC") and the indenture agreement that governs the 2020 Notes (the "Indenture") provided that the 2020 Notes were governed by New York Law. (¶¶ 38, 54, 58, 61.) Moreover, 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 also provided that all payments of principal and interest due on the 2020 Notes were to be made in New York (¶¶ 38-50, 54), and the transfer agent, Law Debenture Trust Company of New York, was 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. (¶ 46.) On October 27 and 28, 2016, 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 located in New York, owns 2020 Notes, which it purchased on the secondary market between August 2017 and January 2018. (¶¶ 15, 126.)

B. PDVSA's 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.) Indeed, the "Risk Factors" did not mention either the May or October 2016 National Assembly Resolutions. 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, that they would be secured by a pledge of 50.1% of the capital stock of Citgo Holding, and that all payments of principal and would be made in New York. (¶¶ 38-50, 54, 56-74.)

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.)

During the course of these payments, Venezuela descended into a constitutional crisis: Maduro won reelection as President of Venezuela in an election that was widely held to be illegitimate. (¶ 75.) After Maduro was sworn in, the U.S. announced its recognition of Interim President Guaidó as Venezuela's legitimate leader, and shortly thereafter the National Assembly passed a "Transition Statute" empowering him to appoint an ad hoc managing board of PDVSA. (¶¶ 77, 81.) Thereafter, PDVSA, through the Guaidó-appointed ad hoc board, approved the April 2019 interest payment, which was subsequently approved by the National Assembly itself. (¶ 81.)

However, as Plaintiff later learned, even as PDVSA continued to make interest payments, it documented its true intentions. In addition to the previously recorded May and September 2016 National Assembly Resolutions, representatives of the PDVSA Parties authored fraudulent legal strategies. On April 15, 2019 José Ignacio Hernández, Venezuela's Special Attorney General, 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.) Subsequently leaked audio explained that the PDVSA Board authorized payment and reassured investors as to the Notes' validity in April 2019 as part of a plan to stall Noteholder efforts to enforce and prepare for the October invalidity litigation. 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.*, et al., No. 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. (*See* ¶¶ 98-103.) Some holders of the Notes sought to foreclose on the collateral, and Defendants pursued a number of means to prevent the foreclosure, including soliciting the U.S. Office of Foreign Assets Control (OFAC) 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.

D. Plaintiff Initiates This Litigation

On June 29, 2023, Plaintiff filed a complaint against the PDVSA Parties alleging claims of fraud, violation of the Securities Act Section 17(a), violation of the Exchange Act Section 10(b) and Rule 10b-5 thereunder, aiding and abetting fraud, and for declaratory relief. (A-9-657.) On October 4, 2023, Defendants moved to dismiss. (A-658-98.) The following day, October 5, 2023, the District Court filed an order setting a deadline of twenty-one days for Plaintiff to file an amended complaint and providing a schedule for further briefing. (A-699-700.) In the order, the District Court cautioned Plaintiff that "[i]t is unlikely that plaintiff will have a further opportunity to amend." (*Id.*)

On October 25, 2023, Plaintiff filed an amended complaint re-alleging the same claims, but removing the claim for declaratory relief. (*See* A-701-36.) On November 29, 2023, Defendants renewed their motion to dismiss, and on January 30, 2024, the motion was fully briefed. (*See* A-1352-2141.) On April 8, 2024, the

District Court issued an opinion in which it found that Plaintiff's claims were timely and satisfied the jurisdictional requirements set forth in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), but ultimately concluded that Plaintiff had not alleged the existence of a fraudulent scheme contemporaneous with its purchase of the Notes. (*See* A-2142-66.) On the same day, the Clerk of Court entered a judgment against Plaintiff and closed the case.

Plaintiff appealed in a timely manner. (*See* A-2167.)

V. SUMMARY OF THE ARGUMENT

The District Court's cursory analysis of Plaintiff's claim for securities fraud ignored the allegations supporting an inference of scienter. The District Court neglected to consider multiple key allegations in Plaintiff's Amended Complaint and therefore erroneously concluded that Plaintiff "fail[ed] to plead a scheme to defraud existed as of the time the [P]laintiff purchased the 2020 Notes, which was on or before January 2018" and "fail[ed] to plead scienter with respect to that scheme." (A-2160-61.) Most importantly, the Opinion did not even mention the conduct of Venezuela's Opposition-controlled National Assembly and its agents, whose statements and actions should have been imputed to Defendants. In doing so, the District Court implicitly rejected (without even acknowledging) decisions from the District of Delaware and Third Circuit Court of Appeals and did not properly consider Plaintiff's allegations in support of the PDVSA Parties' motive and

opportunity to engage in a fraudulent scheme. Because the District Court neglected to properly consider these key allegations of fraudulent conduct, which were attributable to Defendants and which date back as far as 2016, it erred in dismissing Plaintiff's securities fraud claim. For the same reasons, the District Court erroneously dismissed Plaintiff's common law fraud claim. Finally, the District Court failed to provide Plaintiff with an adequate opportunity to amend its complaint in violation of the Federal Rules of Civil Procedure.

VI. STANDARD OF REVIEW

This Court reviews a district court's dismissal for failure to state a claim under Rule 12(b)(6) *de novo*. *Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 232 (2d Cir. 2014). 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). Even under the heightened pleading standard of Rule 9(b) and the PSLRA, the Second Circuit "do[es] not require the pleading of detailed evidentiary matter in securities litigation." *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72 (2d Cir. 2001), *cert. denied* 534 U.S. 1071 (2001).

VII. ARGUMENT

A. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S SECURITIES FRAUD CLAIM.

As relevant here, Rule 10b-5 of the Securities Exchange Act provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud, . . . or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

"To state a scheme liability claim, a plaintiff must show: "(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 Local 773 Pension Fund v. Danske Bank A/S, 11 F.4th 90, 91, 105 (2d Cir. 2021) (citation omitted). Although a plaintiff must plead "something extra beyond misstatements" to state a scheme liability claim, *SEC v. Farnsworth*, 692 F. Supp. 3d 157, 190 (S.D.N.Y. 2023) (cleaned up and citation omitted), scheme liability "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. S.E.C.*, 587 U.S. 71, 79 (2019) (cleaned up).

In the Second Circuit, a plaintiff may establish scienter in one of two ways: by "alleging facts (1) showing that the defendants had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness." *New England Carpenters Guaranteed Annuity and Pension Funds v. DeCarlo*, 80 F.4th 158, 177 (2d Cir 2023) (citation omitted). "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.'" *S.E.C. v. Fiore*, 416 F. Supp. 3d 306, 323-24 (S.D.N.Y. 2019) (quoting *Emps.' Ret. Sys. of Gov't of the Virgin Islands v. Blanford*, 794 F.3d 297, 306 (2d Cir. 2015). As the Supreme Court has explained, the test is "whether *all* of the facts alleged, taken collectively" support a

strong inference of scienter, "not whether any individual allegation, scrutinized in isolation, meets that standard." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-24 (2007).

1. The District Court Made a Conclusory Assertion That the Amended Complaint Failed to Plead Facts Giving Rise to a Strong Inference of Scienter Without Even Addressing Many of the Key Factual Allegations

The District Court erroneously concluded that Plaintiff failed to allege a scheme to defraud that existed on or before January 2018—the time the Plaintiff purchased the 2020 Notes. (A-2160.) The District Court held that Defendants may have plausibly alleged a "scheme" insofar as PDVSA "paid the principal and interest on the [2020] Notes until late 2019"; however, it found that such a scheme did not plausibly begin until early 2019 when Hernández authored a memorandum detailing PDVSA's plan to "protect the Citgo stock from seizure while stopping payment on the 2020 Notes." (A-2160-61.) The District Court's analysis was far from comprehensive; rather, it summarily found that the Amended Complaint "pleads no facts to support this theory." (A-2160.) In doing so, the Opinion completely ignored certain allegations in the Amended Complaint—including statements by PDVSA representatives admitting that the issuances of the 2020 Notes was fraudulent—and disregarded prior rulings by the District of Delaware and the Third Circuit cited in the record before it.

The District Court failed to consider key allegations which indicated that PDVSA intended to deprive investors of the value of the 2020 Notes far before January 2018. For instance, the District Court did not even mention or take into account:

- On September 21, 2016, PDVSA's legal counsel from Hogan Lovells S.C. sent a memorandum to PDVSA opining that "[c]onclusively, the Exchange Offer, including the Pledge [of 50.1% of the capital stock of CITGO Holding Inc.], is not subject to the approval of the National Assembly as provided by article 150 of the Venezuelan Constitution." (¶ 72.) The opinion letters further opined without any qualification that the 2020 Notes, the Indenture, and the Pledge Agreement were legal, valid, and binding, and that the execution of these documents by Defendants was duly authorized. (¶ 73.)

- On September 27, 2016, following the announcement of the Exchange Offer, the National Assembly passed a resolution categorically rejecting the pledge of capital stock of Citgo Holding. (¶ 43.)

- From April 27, 2017 to April 27, 2019, PDVSA issued interest payments (and disseminated an announcement regarding that interest payment on May 15, 2019). ¶¶ 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.)

- On October 29, 2019, the PDVSA Parties initiated 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.)

- On October 16, 2020, **Guaidó, unequivocally speaking on behalf of PDVSA and supported by the National Assembly, publicly asserted that the issuance of the 2020 Notes was "absolutely fraudulent."** (¶ 101.)

- On March 30, 2023, Defendants disseminated a public statement on the PDVSA website announcing "its willingness to comply with the

obligations derived from the bonds" even though the PDVSA Parties were arguing (and continue to argue) that a foreclosure sale of CITGO shares should not proceed in federal court. (¶¶ 106, 114.)

- PDVSA petitioned 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.)

These allegations raise a plausible inference that Defendants intended to defraud the 2020 Noteholders as early as September 27, 2016. *See, e.g., Fiore*, 416 F. Supp. 3d at 323-24 (considering timing of stock trades, manipulative practices, and the fact that individual stood to make significant profits based on an inflated price of stock sufficient to establish an inferences of scienter); *Set Capital*, 996 F.3d at 80-83 (vacating and remanding the district court's dismissal for failure to allege scienter in a securities fraud claim based on misstatements and omissions in offering documents); *New Orleans*, 455 F. App'x at 15 (reversing the district court's dismissal and holding that "[b]ecause plaintiffs adequately pleaded scienter under the PSLRA, the district court erred in dismissing the complaint for failure to state a claim"); *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 99-102, 105 (2d Cir. 2001) (vacating and remanding the district court's dismissal where it "failed to draw all reasonable inferences in favor of the non-movant" with respect to the plaintiff's allegations regarding opportunity).

2. The District Court Erred in Refusing to Impute Conduct and Statements by the Maduro and Guaidó Regimes to the PDVSA Parties

The District Court avoided the agency issues at the heart of Plaintiff's claim. (*See* A-2160-61; *see also* A-2113-14; A-2117-19.) While Defendants have tried to assert that PDVSA cannot be held accountable for the statements made by either Maduro or the National Assembly, sister circuits have definitively held otherwise.

During the relevant time period, two opposing groups held authority to speak for PDVSA: the Maduro regime and the Opposition-controlled National Assembly, which supported Guaidó. In a 31-page decision, the District of Delaware explained how "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 Venez.*, 663 F. Supp. 3d 406, 433 (D. Del. 2023). At the same time, the District of Delaware concluded that "the relationship between the Maduro Regime and PDVSA in Venezuela is also an alter-ego relationship." *Id.* at 442. Finally, the District of Delaware and Third Circuit have repeatedly held that PDVSA is the alter ego of Venezuela. *Id.* ("For the second time in five years, we conclude that PDVSA is the alter ego of Venezuela"); *OI Eur. Grp. B.V.*, 73 F.4th at 170, 172 ("Considering the totality of Venezuela's control over PDVSA, it is clear PDVSA is Venezuela's alter ego."); *see also Crystallex International Corp. v. Bolivarian Rep. of Venezuela*, 932 F.3d 126, 152 (3d Cir. 2019) ("[I]f the relationship between Venezuela and PDVSA cannot satisfy the Supreme Court's extensive-

control requirement, we know nothing that can."). On appeal of the District of Delaware's decision, the Third Circuit rejected PDVSA's argument that "changes in Venezuela's government" altered the analysis of whether Venezuela is PDVSA's alter ego. *OI Eur. Grp. B.V.*, 73 F.4th at 163, 170, 172. Rather, it concluded that "the actions of both the Guaidó and Maduro governments [constitute] as the totality of the sovereign conduct of Venezuela," and therefore "[c]onsidering the totality of Venezuela's control over PDVSA, it is clear PDVSA is Venezuela's alter ego." *Id.* at 170, 172. Because the National Assembly's speech and conduct should properly be imputed to the Bolivarian Republic of Venezuela (just as the Maduro-controlled Executive Branch's must), and Venezuela in turn wholly owns PDVSA, the National Assembly's actions should not be discounted in any analysis of whether Defendants acted fraudulently.

In their briefing in support of their motion to dismiss, Defendants challenged Plaintiff's contention that "alleged statements by the Guaidó Government, Hernández, and the Maduro regime (after it was declared illegitimate) all are attributable to Defendants under an alter ego theory." (A-2134.) Defendants argued that "Plaintiff has failed to establish how prior rulings that PDVSA is Venezuela's alter ego for the purpose of attachment to satisfy judgments against the Republic (each of which examines a limited pertinent time period) dictates that every statement made by Venezuela is attributable to PDVSA here." (*Id.*) Defendants'

argument is internally inconsistent and fatally flawed. Although the District Court of Delaware's determination that PDVSA is Venezuela's alter ego is time-bound, that is because it is also highly fact-dependent. *See OI Eur. Grp. B.V.*, 663 F. Supp. 3d at 412-13 (analyzing the evidentiary record). For purposes of a motion to dismiss, where all inferences must be drawn in Plaintiff's favor, the fact that a sister Court of Appeals has affirmed twice four years that PDVSA is Venezuela's alter ego should have been sufficient.

3. Plaintiff Has Alleged Strong Circumstantial Evidence of Conscious Misbehavior or Recklessness

"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.'" *Fiore*, 416 F. Supp. 3d at 323–24 (quoting *Blanford*, 794 F.3d at 306). The PDVSA Parties' inconsistent statements evidence strong circumstantial evidence of at least recklessness insofar as Defendants had "knowledge of facts or access to information contradicting their public statements." *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000), *cert. denied* 531 U.S. 1012 (2000).

Plaintiff alleges fraudulent conduct by the Opposition beginning in 2016, which the District Court completely ignores. In 2016, the National Assembly was

bent on removing Maduro from power and was in the process of seeking to have him recalled in order to hold democratic elections. As set forth above and in more detail in the Amended Complaint, the National Assembly passed two resolutions that indicate the Opposition was laying the groundwork to defraud investors. On May 26, 2016, the National Assembly passed a resolution stating that, "[i]n relation to contracts of national . . . public interest . . . the Constitution categorically mandates, without exception, the approval of the National Assembly." (A-2042); *see also Petróleos de Venezuela, S.A., et al. v. MUFG Union Bank, N.A.*, 19-CV-10023 (S.D.N.Y. 2019). The May 26 Resolution also "warn[ed] that any activity carried out by an organ that usurps the constitutional functions of another public authority is null and void and shall be considered non-existent," and "contracts of national . . . public interest concluded . . . without the approval of the National Assembly . . . , shall be null and void in their entirety." (A-2044.) Then, on September 27, 2016, the National Assembly passed a second resolution in which it categorically rejected the pledge of capital stock of Citgo Holding in the Exchange Offer. (¶ 43.) These two resolutions laid the groundwork for the precise strategy Hernández outlined in his April 2019 memorandum to Interim President Guaidó—*i.e.* to claim that the Exchange Offer was illegal because the 50.1% pledge of PDVH's interest in Citgo Holding as collateral was a pledge of public assets subject to "special controls," and because the pledge was a contract of national public interest that had not been

approved by the National Assembly, in violation of Article 150 of the Venezuelan Constitution. (*See* ¶ 84.)

At the same time, the Opposition was preparing to publicly claim the Notes were invalid, Maduro-affiliated spokespeople were assuring investors that the 2020 Notes were governed by New York law and secured with shares of Citgo. Even worse, the National Assembly itself took inconsistent positions. At the same time the Opposition-backed National Assembly passed resolutions laying the legal groundwork necessary to attempt to repudiate the Exchange Offer, the Opposition was assuring investors that the Exchange Offer was a sound investment. Specifically, Opposition representatives assured analysts at Torino Capital—who in turn communicated these assurances to investors—that they would not question the legality of the Exchange Offer, that they agreed that the Exchange Offer did not require the National Assembly's approval, and that the September 27, 2016 National Assembly Resolution had no binding force. (¶¶ 64, 65.) In other words, the Opposition was simultaneously making assurances to investors intended to induce them to participate in the Exchange Offer *and* laying the legal groundwork to prevent them from deriving any value from the 2020 Notes. Again, the Court never addressed these allegations. (A-2142-66.)

Finally, the Court completely disregarded an admission by a representative of PDVSA that fraudulent conduct occurred. (*Id.*) To the extent the District Court

discounted certain statements because they were made later in time, this was error under Second Circuit precedent. *See Iowa Pub. Emps.' Ret. Sys. v. MF Global, Ltd.*, 620 F.3d 137, 143 n.13 (2d Cir. 2010) (allegations of scienter in one period can support an inference of similar circumstances in a subsequent period); *Scholastic,* 252 F.3d at 72 (same). Most notably, Guaidó (the National Assembly-backed leader of Venezuela and highest-ranking representative of PDVSA) admitted that the issuance of the 2020 Notes was fraudulent. (¶ 101.) It is hard to imagine what could constitute more incriminating evidence of fraud than such an admission; yet the District Court never even mentions the confession. (*See* A-2142-66.)

These allegations accepted as true and "taken collectively… give rise to a strong inference" that the National Assembly and its agents engaged in an intentional schemed to defraud investors as early as 2016. *Blanford*, 794 F.3d at 309 (quoting *Tellabs*, 551 U.S. at 323). The District Court made no mention of these key allegations and erroneously failed to consider them in its Opinion.

4. The District Court Ignored Plaintiff's Allegations Supporting Motive and Opportunity

The District Court also failed to consider allegations that established Defendants' scienter via motive and opportunity to commit fraud. The law is clear that motive and opportunity—in and of itself—is sufficient to establish scienter. *See Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 170 (2d Cir. 2000) (observing that a "[c]omplaint need only plead scienter by alleging either motive and opportunity, *or*

conscious or reckless misbehavior"); *In re Shanda Games Ltd. Sec. Litig.*, No. 18-cv-2463-ALC, 2019 WL 11027710, at *7 (S.D.N.Y. Sep. 30, 2019) (finding scienter based on motive alone). "[M]otive for scienter can 'be shown by pointing to the concrete benefits that could be realized from one or more of the allegedly misleading statements or nondisclosures; opportunity could be shown by alleging the means used and the likely prospect of achieving concrete benefits by the means alleged.'" *Blanford*, 794 F.3d at 309 (quoting *S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 108 (2d Cir. 2009)).

Plaintiff alleged that Defendants had a motive to commit the fraud—to avoid paying the $7.1 billion principal due under the 2017 Notes. (*See* ¶ 39.) 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.) With the 2017 Notes coming due, PDVSA needed a way to avoid paying the principal, so they exchanged notes due in 2017 for notes due in 2020. (*See*, *e.g.*, ¶ 79 ("Between October 2016 and April 2019, Defendants accepted the benefit of the Exchange Offer – the surrender of the exchanged 2017 Notes").) At the same time, the Opposition was pushing for a referendum to recall Maduro and hold a new election, and Maduro appeared willing to employ any means necessary to maintain power (but had not yet resorted to reconstituting the government to serve his ends). In this uncertain climate, both the National Assembly and Maduro had a

strong motive to prepare for various political contingencies: If Maduro was successfully recalled and a democratic election held—which the Opposition would likely win—it would want to avert the economic catastrophe that would follow if the Exchange Offer failed and Venezuela defaulted on the 2017 Notes. At the same time, both administrations wanted to preserve their ability to challenge the 2020 Notes' validity by claiming the National Assembly had declared them invalid. In essence, both the National Assembly and Maduro-controlled government wanted to ensure relative economic stability in the short term via the Exchange Offer, while maintaining the ability to later repudiate the Exchange Offer. The National Assembly and Maduro, therefore, had a clear motive to assure investors that Exchange Offer was a safe investment, while simultaneously laying the groundwork to challenge the validity of that investment down the road.

Defendants engaged in clear efforts to deceive potential purchasers, and eventual holders, of the 2020 Notes, including Plaintiff, which constitute ample opportunity to raise a strong inference of scienter. In the Second Circuit, conduct and statements which contradict public statements evidence an opportunity to commit fraud. *Blanford,* 794 F.3d at 308. In *Blanford*, this Court addressed public statements by Green Mountain Coffee Roasters Inc., including assurances that Green Mountain was maintaining "appropriate inventory levels" and was "not building any excess inventories." *Id.* at 306. This Court held that allegations that inventory was

actually "stuffed to the rafters" and that Green Mountain hid this overstocked inventory from auditors constituted ample evidence of intent to deceive the public. *Id.* at 308.

Here, Plaintiff points to various contradicting statements, which indicate that the Opposition was playing both sides from the very beginning. For example, José Guerra, one of the National Assembly deputies who authored the May 2016 National Assembly Resolution tweeted in April 2019 that "PDVSA does not require authorization from the [National Assembly] to issue debt." (¶¶ 10, 85.) Such a statement—while consistent with the public position held by the Maduro and Guaidó regimes up until this point—is completely at odds with the May 2016 National Assembly Resolution which Guerra authored. Similarly, despite asserting in the May 2016 National Assembly Resolution that contracts of national interest required approval by the National Assembly, National Assembly representatives also assured analysts at Torino Capital, who in turn communicated these assurances to investors, including Plaintiff, that they would not question the legality of the Exchange Offer, that they agreed with the interpretation of law that the Exchange Offer did not require the National Assembly's approval, and that the September 27, 2016 National Assembly Resolution had no binding force. (¶ 70.) These contradicting "efforts to deceive" constitute ample opportunity to defraud investors, including Plaintiff. *Blanford,* 794 F.3d at 308.

The District Court did not address any alternative explanation for Defendants' shifting positions in 2016 and thereafter. The District Court's cursory analysis of the allegations supporting scienter did not reconcile the 2016 National Assembly Resolutions with the Opposition's statements to Torino Capital or subsequent public statements reassuring the public that the National Assembly would abide by the terms of the 2020 Notes. Plaintiff has alleged a cogent motive by the National Assembly and Maduro regime to defraud the Noteholders by making assurances that would induce them to participate in the Exchange Offer, while they simultaneously laid the groundwork to nullify the 2020 Notes if it became politically expedient. Accordingly, because Plaintiff alleges facts that raise a cogent inference of Defendants' scienter, while Defendants offer no non-fraudulent explanation for the same allegations, Plaintiff's allegations are "at least as compelling as" Defendants' explanation for the same facts. *Tellabs*, 551 U.S. at 324. The District Court therefore erred in dismissing Plaintiff's allegations as "entirely conclusory." (A-2161.)

5. The Amended Complaint Adequately Pleads a Deceptive and Manipulative Act, Reliance, and Loss Causation

The District Court did not address Defendants' arguments that the Amended Complaint does not adequately plead a deceptive and manipulative act, reliance, and loss causation. Plaintiff respectfully submits that this Court should remand these issues for the District Court to consider in the first instance. *See Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 71 (2d Cir. 2012) (remanding

arguments that "the district court did not consider . . . in the first instance"). However, even if the Court should see fit to consider these issues in the first instance, the Amended Complaint adequately pleads these elements for the following reasons (which Plaintiff explained in more detail in its Opposition to Defendants' Motion to Dismiss the Amended Complaint (A-2087-2124)).

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

Although misstatements and omissions alone are not sufficient to constitute a scheme, "something extra beyond misstatements" will suffice. *Farnsworth*, 692 F. Supp. 3d at 190 (S.D.N.Y. 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*, 587 U.S. at 78.

Plaintiff has alleged both fraudulent misstatements and omissions and conduct that combine to form an "artful stratagem" that is most plainly illustrated by Hernández's April 15, 2019 memorandum and his directives to the National Assembly. *Lorenzo*, 587 U.S. at 78; (*see also, e.g.,* ¶¶ 7, 79, 84, 89, 87, 93, 97-103, 106.) Plaintiff alleges that Hernández's memorandum, which 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. Defendants executed this exact

strategy—first, by making interest payments for years; then, by publicly repudiating the validity of the 2020 Notes in the judiciary and other forums. As set forth in more detail above, Defendants' conduct, including but not limited to the dissemination of false and misleading statements, was in furtherance of the scheme outlined in the Hernández memorandum. These statements demonstrate that Defendants had "knowledge of facts or access to information contradicting their public statements." *Novak*, 216 F.3d at 308.

b. Plaintiff Adequately Alleged Reliance

Plaintiff has adequately alleged 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) (citation omitted), 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." 544 F.3d at 481(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.) At a minimum, the question of the market price of the 2020 Notes raises a factual issue that requires expert evidence and a hearing. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 272 (2014) ("market efficiency is a matter of degree," and thus "a matter of proof" of the extent of price impact).

c. Plaintiff 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). Outside of the stock drop context (as is the case here), courts in the Second 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). Plaintiff's loss causation is straightforward because it can point to a written memorandum in which Defendants detail their plan to defraud Noteholders of the interest and principal payments due pursuant to the Notes. (¶ 116.) *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.)

6. For the Reasons Stated in the District Court's Opinion, Plaintiff Has Plausibly Alleged that the Purchase of 2020 Notes is a Domestic Transaction

There is little doubt that Plaintiff plausibly alleged a domestic transaction. The District Court rejected Defendants' primary argument in support of its motion to dismiss the Amended Complaint, which relied on *Morrison* to assert that Plaintiff's claims under the federal securities laws should be dismissed because it arose out of an extraterritorial transaction. (A-2149-50.) As the District Court explained, 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) (citation omitted).

As set forth in the Amended Complaint, Plaintiff has alleged ample connections between Defendants' fraud and the United States (most, but not all, of which are New York-centric):

- The transfer agent is located in New York, (¶¶ 2 n.2, 47);
- 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 SEC, (¶ 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).

These allegations are more than sufficient to "plausibly plead[] that the purchase of the 2020 Notes is a domestic transaction subject [to] § 10(b) and Rule 10b-5." (A-2150.)

B. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S COMMON LAW FRAUD CLAIM.

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. 2006). The District Court did not perform an independent analysis of Plaintiff's common law fraud claim. Rather, it concluded that "[f]or the same reasons already given in connection with the § 10(b) claim, the [Amended Complaint's] first claim[6] of common law fraud is dismissed." (A-2162.) The Court further noted that the Amended Complaint "fails to plead with sufficient particularity the existence of a scheme that began with the issuance of the 2020 Notes in 2016, or the defendants' scienter with respect to that scheme." (*Id.*) As discussed above, however, the District Court failed to consider multiple key allegations which indicate that both the Opposition-controlled National Assembly—whose conduct should properly be imputed to PDVSA—and PDVSA itself were actively laying the groundwork to defraud Plaintiff as early as 2016. Specifically, the District failed to consider, *inter alia*, the May and October 2016 National Assembly resolutions, the failure of the offering circular to mention these resolutions, and the Opposition's assurances to

[6] The District Court also considered Plaintiff's common law fraud claim, raised in the alternative, premised on Defendants' post-2019 assertions that the 2020 Notes are invalid. (*See* A-2162-64.) Plaintiff does not raise that claim in this appeal.

Torino Capital. Just as Plaintiff's federal claim should have withstood Defendants' motion to dismiss, so too should its common law claim, which is predicated on the same facts. Accordingly, the Court should vacate the District Court's judgment and remand Plaintiff's common law claim to be considered by the District Court.

C. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF LEAVE TO AMEND ITS AMENDED COMPLAINT.

Leave to amend should be "freely give[n] ... when justice so requires." Fed. R. Civ. P. 15(a)(2). "The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith." *Pasternack v. Shrader*, 863 F.3d 162, 174 (2d Cir. 2017) (internal quotation marks omitted). "Complaints dismissed under Rule 9(b) are 'almost always' dismissed with leave to amend." *Id.* "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, *etc*.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The District Court erred in denying Plaintiff leave to amend. It did not conclude that amendment would be futile,[7] nor did it provide "good reason" such as

[7] To the extent the District Court's denial of leave to amend can be construed as a determination that amendment would be futile, the Court should review the District Court's denial *de novo*. *See*

prejudice or bad faith. *See AEP Energy Servs. Gas Holding Co. v. Bank of America*, 626 F.3d 699, 725 (2d Cir. 2010). Rather, the District Court denied Plaintiff leave to amend for three reasons: (1) Plaintiff had already "amended its complaint in response to the defendants' prior motion to dismiss," and (2) did "not identif[y] how further amendment would address the deficiencies in the [Amended Complaint], for instance," by (3) "filing a proposed second amended complaint." (A-2165.) This ruling constituted an abuse of discretion.

First, the District Court's denial of leave to amend violated Rule 15 of the Federal Rules of Civil Procedure, which allows a plaintiff to amend its complaint once as a matter of course. *See* Fed. R. Civ. P. 15(a)(1)(B). Any further amendments may be made with the court's permission, and permission should be given "freely . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). Plaintiff exercised its right to amend as a matter of course when it filed an amended complaint on October 25, 2023, twenty-one days after Defendants filed their motion to dismiss. *See* Fed. R. Civ. P. 15(a)(1)(B) (providing that a plaintiff may amend its complaint as a matter of course "21 days after service of a motion under Rule 12(b)"). In the scheduling order that preceded that filing, the District Court stated that it was "unlikely that

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Smith v. Hogan, 794 F.3d 249, 253 (2d Cir. 2015), *cert. denied* 580 U.S. 1019 (2016) ("While ordinarily, [the Second Circuit] review[s] denial of leave to amend under an 'abuse of discretion' standard, when the denial of leave to amend is based on a legal interpretation, such as a determination that amendment would be futile, a reviewing court conducts a *de novo* review." (cleaned up and citation omitted).)

[P]laintiff will have a further opportunity to amend." (*See* A-699.) This order contradicted Rule 15's direction that amendment be given freely as "justice so requires"—particularly since, having not yet reviewed Plaintiff's Amended Complaint, the District Court had no way of knowing whether further amendment would be appropriate. Moreover, when it dismissed Plaintiff's Amended Complaint, the District Court did not analyze whether further amendment would be futile[8] or indicate any other good reason for denial of amendment such as bad faith, undue delay, or undue prejudice to Defendants. *See Bensch v. Est. of Umar*, 2 F.4th 70, 81 (2d Cir. 2021) (observing that a district court may exercise its discretion to deny leave to amend for "for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party") (internal quotation marks omitted).[9] Plaintiff did not seek amendment in bad faith or to prejudice Defendants (and Defendants did not argue as much (A-2138-39 (arguing that Plaintiff should be denied leave to amend because it "has already amended its Complaint and has not identified what future amendment it would propose that would state a legally viable

[8] Amendment would not have been futile: Not only did Plaintiff's Amended Complaint contain critical allegations that the District Court overlooked, but had Plaintiff had notice of the manner in which its pleadings were deficient, it could have provided additional relevant allegations evincing a scheme that predated January 2018.

[9] *See also Foman*, 371 U.S. at 182 (directing that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits…'").

claim")), nor would granting Plaintiff leave to amend cause undue delay because the original complaint was filed just seven months before the parties fully briefed the motion to dismiss, and related litigation has been pending in the Southern District of New York since 2019. (*See, e.g.*, ¶ 97); *see also Petróleos de Venezuela, S.A., et al. v. MUFG Union Bank, N.A.*, et al., No. 19-CV-10023 (S.D.N.Y. 2019).

Second, Plaintiff could not have "identified how further amendment would address the deficiencies in the [Amended Complaint]," (A-2165) because Defendants' motion to dismiss did not provide notice regarding the specific purported deficiencies which the District Court determined were fatal. While Defendants did move to dismiss the original complaint, that briefing primarily focused on whether the allegations in the original complaint (1) satisfied *Morrison*, (2) had been brought within the five-year statute of repose, and (3) fulfilled the substantive requirements of Rules 10b-5(a) and (c). (*See* A-658-98.) Plaintiff did not have notice of the argument that the District Court would ultimately find dispositive—that the Complaint had purportedly failed to allege facts supporting a "scheme to defraud that existed as of the time the [P]laintiff purchased the 2020 Notes, which was on or before January 2018." (A-2160.) The District Court's decision held that the *timing* of Plaintiff's fraud allegations was insufficient to satisfy Rules 10b-5(a) and (c) because the only plausible allegations evincing a scheme to defraud occurred in early 2019 or later. The specific issue of the timing of

Defendant's fraudulent scheme was not addressed by either party and, therefore, Plaintiff had no way of knowing that it needed to amend its allegations of scienter pre-dating 2019. Because the dispositive issue had not even been raised when Plaintiff was afforded an opportunity to amend its complaint, Plaintiff should have been freely granted leave to amend.

The District Court also erroneously concluded that Plaintiff "fail[ed] to plead scienter with respect to th[e] scheme, among other things." (A-2161.) Here too the District Court abused its discretion. Given the complex nature of the claims at issue in this case (as indicated, *inter alia*, by the questions this Court certified to the Court of Appeals in a related litigation[10]) and the heightened pleading standard imposed by Rule 9, the District Court should, at minimum, have provided Plaintiff an opportunity to amend. *See Pasternack*, 863 F.3d at 175 (vacating the district court's denial of leave to amend since plaintiff "presented his proposed securities-fraud claims to the district court a single time" and district courts "typically grant plaintiffs at least one opportunity to plead fraud with greater specificity when they dismiss under Rule 9(b)").

Finally, to the extent the District Court's denial of leave to amend was based on Plaintiff's failure to include a proposed second amended complaint, this too was an abuse of discretion. Neither the Federal Rules, the Southern District's local rules,

[10] *See Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, N.Y.3d 462 (2024).

nor the Court's individual rules require a Plaintiff to attach a proposed amended complaint when requesting leave to amend. Moreover, as discussed above, since Plaintiff received no notice from the District Court or Defendants of the manner in which its pleadings were deficient, it would have had no way of tailoring its amended pleading to address those deficiencies. At the very least, this Court should reverse and remand with instructions to the District Court to afford Plaintiff with an opportunity to amend its Complaint.

VIII. CONCLUSION

The Court should reverse the District Court's order and this Court should rule that the Amended Complaint adequately alleges facts supporting a strong inference of scienter. In the alternative, this Court should grant Plaintiff leave to amend its Amended Complaint.

Dated: June 28, 2024
New York, New York

/s/ Christopher J. Clark

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CERTIFICATE OF COMPLIANCE

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SPECIAL APPENDIX

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SPA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

VR GLOBAL PARNTERS, L.P.,

Plaintiff,

-against-

23 **CIVIL** 5604 (DLC)

JUDGMENT

PETROLEOS DE VENEZUELA, et al.,

Defendants.

----------X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated April 8, 2024, the defendants' November 29, 2023 motion to dismiss the FAC is granted; accordingly, the case is closed.

Dated: New York, New York

April 8, 2024

RUBY J. KRAJICK

Clerk of Court

BY: K. mango

Deputy Clerk