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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

BENJAMIN A. BUTZIN-DOZIER
CHRISTOPHER J. CLARK
CLARK SMITH VILLAZOR LLP
Attorneys for Plaintiff-Appellant
666 Third Avenue, 21st Floor
New York, New York 10017
(212) 377-0850

CP COUNSEL PRESS (800) 4-APPEAL • (330262)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT ON REPLY

Defendants in their Answering Brief,[1] like the District Court below, fail to address or consider the key factual allegations in the Amended Complaint that establish the requisite strong inference of scienter in support of Plaintiff's securities fraud claim. The District Court erred by failing to even consider these facts. Defendants also attempt without success to distinguish decisions from the District of Delaware and the Third Circuit Court of Appeals that have clearly held that the PDVSA is an alter ego of the Venezuelan government. In doing so, Defendants, like the District Court, did not consider actions of the National Assembly attributed to Defendants that further establish the strong inference of scienter in support of Plaintiff's securities fraud claim. The District Court erred by failing to follow or even address these relevant decisions from a sister circuit. For the same reasons, the District Court erroneously dismissed Plaintiff's common law fraud claim. There is no basis for revisiting, as Defendants urge, the District Court's decision that Plaintiff's claims are timely and that Plaintiff alleges a domestic transaction that is not predominantly foreign. Finally, the District Court abused its discretion in denying Plaintiff leave to amend.

---

[1] Defendant-Appellees' Answering Brief ("AAB"). Documents in the Joint Appendix are designated as "A-__." All citations to "¶ __" are citations to the Amended Complaint (A-701-36; District Ct. Dkt. No. 35).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S EXCHANGE ACT CLAIM.

A. The Amended Complaint Pleads Facts That Give Rise to a Strong Inference of Scienter.

1. Plaintiff's Allegations Are Not "Conclusory."

Defendants, like the District Court below, argue that Plaintiff's allegations regarding Defendants' scienter are conclusory without acknowledging or responding to the plethora of non-conclusory facts detailed in the Amended Complaint that give rise to the requisite strong inference of scienter.[2] (AAB_26-27; A-2161.) In doing so, both Defendants and the District Court completely ignore central allegations in the Amended Complaint—including statements by PDVSA representatives admitting that the issuances of the 2020 Notes was fraudulent—and disregard prior rulings by the District of Delaware and the Third Circuit.

These central allegations, ignored by both Defendants and the District Court below, demonstrate that PDVSA intended to deprive investors of the value of the 2020 Notes far before January 2018. For instance, Defendants, like the District

[2] Because Plaintiff does not rely on conclusory allegations in the Amended Complaint, Defendants' reliance on *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 120 (2d Cir. 1982) and *Silsby v. Ichan*, 17 F. Supp. 3d 348, 367 (S.D.N.Y. 2014) for the proposition that conclusory allegations cannot establish scienter is inapposite.

Court, do not even mention or take into account the following facts plead in the Amended Complaint that give rise to the requisite strong inference of scienter:

- 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 ("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, later revealed, these interest payments were part of the "strategy" that he had "directed" to avoid paying the PDVSA Parties. (*Id*.)

- 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. (¶¶ 97-109.)

- On October 16, 2020, **Interim President 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 (emphasis added).)

- 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.*, VR Br. at 3-4, quoting *Set Capital LLC* & *New Orleans*.)

The bald statement by President Guaidó, speaking on behalf of PDVSA and supported by the National Assembly, that the issuance of the 2020 Notes was "absolutely fraudulent," is alone sufficient to establish the requisite strong inference of scienter. (¶ 101.) To the extent the District Court discounted the weight of this admission because President Guaidó's statement was made later in time in October 2020, 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 another period); *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72 (2d Cir. 2001) (same).

Defendants acknowledge, as they must, that on September 16, 2016, PDVSA's legal counsel Hogan Lovells issued a legal opinion that the 2020 Notes' Exchange Offer was "not subject to the approval of the National Assembly." (AAB_30.) The 2016 Opinion Letters, and other similar evidence of the PDVSA Parties' deliberate efforts to hide the risk that the 2020 Notes might be challenged

as illegal or were subject to National Assembly approval, are all evidence of the PDVSA Parties scheme to defraud investors in the 2020 Notes that supports a strong inference of scienter. The Opinion Letters and the other pled facts listed above raise a plausible inference that the Defendants intended to defraud investors in the 2020 Notes as early as September 2016.

The District Court utterly ignored this fact evidence detailed in the Amended Complaint. Defendants do not ignore these facts in their Answering Brief, but instead incredibly argue that the Opinion Letters and other such evidence support the contrary inference that the PDVSA Parties were acting without fraudulent intent. (AAB_30.) But the PDVSA Parties' inconsistent and contrary statements about the legality of the 2020 Notes beginning as early as 2016 evidence an inference of scienter 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). President Guaidó's blunt and candid acknowledgement in October 2020 that the issuance of the Notes was "absolutely fraudulent" ties the scheme together to bring forward from 2016 to 2020 facts supporting the requisite strong inference of scienter that were utterly ignored by the District Court. (¶ 101.)

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

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

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), *aff'd*, 73 F.4th 157 (3d Cir. 2023), *cert. denied* 144 S. Ct. 549 (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. *OI Eur. Grp. B.V.*, 73 F.4th at 176. ("For the second time in five years, we conclude that PDVSA is the alter ego of Venezuela"); *id.* at 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."). Because the National Assembly's speech and conduct should properly be imputed to the 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.

Defendants argue that "'[T]he maker' of a statement in an Exchange Act case 'is the person or entity with *ultimate authority* over [that] statement,'" quoting a footnote in the Supreme Court's decision in *Janus*. *Janus Capital Group v. First Derivative Traders,* 564 U.S. 135, 143 n.6 (2011) (emphasis added). (AAB_31.) *Janus* is distinguishable. It involved the question of whether an investment adviser could be held liable for false statements in certain of its client mutual funds' prospectuses. The Supreme Court found that the investment adviser had assisted in preparing the prospectuses, but because the client mutual funds had "ultimate control over the content of [the] statement[s]," *Janus,* 564 U.S. at 143, it was the funds and not the investment advisor who were liable for any misstatements. *See id.* at 142. The Supreme Court specifically noted that the mutual funds belonged to "a separate legal entity owned entirely by mutual fund investors" and were therefore entirely legally separate from the investment advisor. *Id.* at 138. PDVSA, by contrast, is *wholly-owned* by the Republic of Venezuela, which—as the Third Circuit twice

affirmed—controls PDVSA. *See, e.g.*, *Crystallex International Corp.*, 932 F.3d at 152 ("[I]f the relationship between Venezuela and PDVSA cannot satisfy the Supreme Court's extensive-control requirement, we know nothing that can.").

Defendants, erroneously relying on the footnote in *Janus*, then assert that statements made by the National Assembly and individual legislators "cannot be imputed to the PDVSA Parties" because neither had direct responsibility over PDVSA in 2016. (AAB_31.) 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 in four years that PDVSA is Venezuela's alter ego should have been sufficient to find that the statements made by the National Assembly are further evidence in support of the requisite strong inference of scienter. The District Court erred in failing to follow or even address these decisions.

B. The Amended Complaint Adequately Pleads a Deceptive and Manipulative Act.

Defendants further argue that this Court can separately affirm the District Court's dismissal because the Amended Complaint does not adequately allege that "the PDVSA Parties committed a deceptive or manipulative act apart from their alleged misstatements in 2016." (AAB_36-38.)

First, the District Court did not address this argument in its decision below, so Plaintiff respectfully requests that before ruling on the issue, this Court should remand this issue to 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."). It is well settled that this Court generally "does not consider an issue not passed upon below." *United States v. Gomez*, 877 F.3d 76, 92 (2d Cir. 2017) (internal quotation marks omitted.

Should this Court consider this issue, the Amended Complaint alleges both fraudulent misstatements and omissions and conduct that combine to form an "artful stratagem" that is most plainly illustrated in the Amended Complaint by Hernández's April 15, 2019, memorandum and his directives to the National Assembly, as detailed in paragraphs 7, 79, 84, 87, 89, 93, 97-103. Hernández's memorandum outlined a strategy whereby Defendants would argue that the Exchange Offer was illegal under Venezuelan law while collaborating with world leaders to buy time to initiate litigation. Defendants executed this "artful stratagem" by making interest payments for years, and then publicly repudiating the validity of the 2020 Notes in court and other forums. This is precisely the kind of "artful stratagem or a plan devised to defraud an investor" that the Supreme Court has held constitute deceptive or manipulative acts in furtherance of a scheme. *Lorenzo v. S.E.C.*, 587 U.S. 71, 79 (2019) (internal quotations and citation omitted).

C. The Amended Complaint Adequately Alleges Reliance and Loss Causation.

Defendants further argue that this Court can separately affirm the District Court's dismissal because the Amended Complaint does not adequately allege reliance or loss causation. (AAB_38-43.)

Again, because the District Court did not address these arguments in its decision below, Plaintiff respectfully requests that before ruling on these issues, this Court should remand them to the District Court to consider in the first instance. *See Absolute Activist*, 677 F.3d at 71 (remanding arguments that "the district court did not consider . . . in the first instance.").

1. The Amended Complaint Adequately Alleges Reliance.

However, even if the Court decides to consider the Defendants' arguments on reliance, the allegations pleaded in the Amended Complaint are more than sufficient. As discussed in Plaintiff's Opening Brief, Plaintiff alleges reliance pursuant to the fraud-on-the-market theory. (VR Br. at 33-34.) Plaintiff has alleged that the Notes are liquid and traded on an efficient market (absent the fraudulent scheme perpetrated by Defendants) with moderate volume. (¶¶ 110-11.) It has further alleged that the offering documents were filed with the SEC (¶ 38), and that the Notes were followed by various analysts from established credit rating agencies, including Torino Capital (¶¶ 33, 50). These allegations are more than sufficient to

raise a "reasonable inference" that the Notes are traded in an efficient market—Plaintiff need show no more at the pleading stage.

Defendants argue at length that reliance based on the fraud-on-the-market theory is misplaced because the market for the 2020 Notes was not efficient. (AAB_38-40.) In doing so, Defendants never contest that it is well-established that whether a market is efficient, open and developed is a question of fact that requires expert evidence and a hearing, and therefore not suitable for dismissal on the pleadings. *See In re Initial Public Offering Securities Litig.*, 544 F. Supp. 2d 277, 297 (S.D.N.Y. 2008) (whether a market is efficient is a question of fact); *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").

Defendants raise no serious challenge to Plaintiff's allegations supporting reliance based on a fraud-on-the-market theory other than to assert that they are "threadbare and conclusory." (AAB_40.) However, at the pleading stage, district courts routinely accept allegations considerably more sparse than those here since it is well settled in this circuit that market efficiency is a question of fact. *See, e.g.*, *Nw. Biotherpeutics, Inc. v. Canaccord Genuity LLC*, No. 22-CV-10185, 2023 WL 9102400, at *36 (S.D.N.Y. Dec. 29, 2023), *adopted* 2024 WL 620648 (S.D.N.Y. Feb. 14, 2024) (accepting "largely conclusory" allegations of market efficiency); *In re Merrill Lynch Auction Rate Sec. Litig.*, 704 F. Supp. 2d 378, 395 (S.D.N.Y. 2010),

aff'd, 671 F.3d 120 (2d Cir. 2011) (whether a market is efficient "normally should not be decided on a motion to dismiss"); *In re Initial Public Offering Securities Litig.*, 544 F. Supp. at 297 ("whether the relevant market[] [is] efficient is a question of fact to be resolved at trial.").

Defendants also imply that Plaintiff's allegations do not satisfy the factors set forth in *Cammer v. Bloom*, 711 F. Supp. 1264, 1285-87 (D.N.J. 1989), and are therefore insufficient. However, the Second Circuit has expressed skepticism about using the "Cammer factors" in "securities cases arising from the sale of debt instruments"—such as the instant case. *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 211 (2d Cir. 2008). Finally, Defendants argue that because "concerns about the validity of the 2020 Notes were well within the public discourse at the time of the Exchange Offer … the market for the 2020 Notes, by definition, would have incorporated those concerns into its price." (AAB_40.) However, Defendants provide no support for the implication that detailed information about Venezuelan legislative activities or other relevant developments was picked up by the global news media or absorbed by the market—and in any case, it would be improper for the Court to draw such an inference in Defendants' favor at the pleading stage.

2. The Amended Complaint Adequately Alleges Loss Causation.

Should this Court address the issue, Plaintiff has also adequately alleged loss causation. As discussed in Plaintiff's Opening Brief, 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 its 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* ¶¶ 116-17.) These allegations supporting loss causation are more than sufficient to survive a motion to dismiss.

Defendants imply that because Plaintiff does not allege *precisely* "how much VR Global allegedly lost on its investment" its allegations are insufficient. (AAB_41-42.) But loss causation need not be pleaded with particularity. *See, e.g.*, *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 183, 187 (2d Cir. 2015) (reversing the district court, observing that a plaintiff's burden when pleading loss causation "is not a heavy one" and that "the vast majority of courts in this district have required that loss causation only meet the notice requirements of Rule 8"). Plaintiff's allegations are more than sufficient to create a reasonable inference that Defendants' conduct caused its loss—particularly given that "[l]oss causation is a fact-based inquiry." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 174 (2d Cir. 2005).

Defendants' reliance on *Lentell* to argue that the market was already aware of the dispute over the validity of the 2020 notes by the time Plaintiff purchased them is misplaced. In *Lentell*, the court observed that the case was "sharply distinguishable from cases in which some or all of the risk that materialized was clearly concealed by a defendant's misstatements or omissions"—which is precisely the case here. *Id.* at 177. Defendants' reliance on *Monroe County Employees Retirement System v. YPF S.A.*, is also inapposite. 15 F. Supp. 3d 336 (S.D.N.Y. 2014). In *Monroe*, the court found that (1) discussions of Argentina's possible nationalization of the defendant energy company were extensively reported in the media, and (2) that the energy company's share price dropped ten percent after this announcement (but before the nationalization had happened), the subsequent drop when the nationalization actually occurred "likely represented the materialization of a known risk, rather than the disclosure of a concealed one." *Id.* at 358. Here, however, there are no allegations that would support an inference that any risk was "known" at the time Plaintiff purchased the 2020 Notes.

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

For the reasons set forth in Plaintiff's Opening Brief, the Court should vacate the District Court's judgment and remand Plaintiff's common law claims to be considered by the District Court. (*See* VR Br. at 28-29.) 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 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 factual allegations which demonstrate 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. 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.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT PLAINTIFF'S CLAIMS ARE TIMELY AND ARE PREDICATED ON A "DOMESTIC TRANSACTION."

A. Plaintiff's Claims Are Timely.

Defendants argue that Plaintiff's claims are untimely since it purchased the Notes at the latest on January 31, 2018, and filed its Complaint more than five years later—on June 29, 2023. (*See* AAB_45.)

It is well settled that "[t]he 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 claim involving "fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws. . . may be brought not later than the earlier of (1) 2 years after the discovery of facts constituting the violation; or (2) 5 years after such violation. *See* 28 U.S.C. § 1658(b). The former is often referred to as a "statute of limitations" and the latter is considered a "statute of repose." *See SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Companies L.L.C.*, 829 F.3d 173, 176 (2d Cir. 2016). "A statute of repose . . . puts an outer limit on the right to bring a civil action. That limit is 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. v. Waldburger*, 573 U.S. 1, 8 (2014).

The parties agree that securities fraud claims are subject to a two-year statute of limitations and five-year statute of repose. (*See* AAB_44.) *See also* 28 U.S.C. § 1658(b). They disagree, however, as to what constitutes a "triggering event" under the statute of repose and whether Defendants may raise a statute of limitations defense for the first time on appeal.

1. Plaintiff's Claims Are Timely Under The Applicable Statute of Repose.

While this Court has not yet ruled on the issue, "the rule, adopted by the majority of [district] courts in this Circuit, [is] 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) (quoting *Plymouth County Ret. Ass'n v. Schroeder*, 576 F. Supp.2d 360, 378 (E.D.N.Y. 2008); *see also, e.g., In re Dynex Capital Secs. Litig.*, 05-CV-1897, 2006 WL 314524, at *5 (S.D.N.Y. Feb. 10, 2006) ("In a case like this one, in which a series of fraudulent misrepresentations is alleged, th[e] 'period of repose begins when the last alleged misrepresentation was made'" (quoting *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, No. 05-CV-1898, 2005 WL 2148919, at *5 (S.D.N.Y. Sept. 6, 2005)). This position is consistent with longstanding rule that statutes of repose, which place an "absolute . . . bar on a defendant's temporal liability" and are generally not subject to equitable tolling, 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 (internal quotation marks and citation omitted); *see also, e.g.*, *Dekalb County Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 411 (2d Cir. 2016) (analyzing a statute of repose under Section 14(a) and holding that it "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"); C. Wright & A. Miller, Fed. Prac. & Proc. § 1056 (4th ed. 2023) ("[T]he point of commencement for the applicable statute of repose is commonly the date of the last act or omission that caused the plaintiff's injury.").

Consistent with these precedents, the District Court found that the statute of repose "begins to run from the defendant's violation." (*See* A-2154 (quoting *City of Pontiac Gen. Emp. Ret. Sys. V. MBIA, Inc.*, 637 F.3d 169, 176 (2d Cir. 2011)).) The District Court concluded that the "operative event for the statute of repose … is the defendants' default on the 2020 Notes in October 2019" and that because Plaintiff filed its Complaint within five years of that date, its claims are timely. This Court should uphold the reasoning of the District Court and the overwhelming weight of authority within this Circuit and affirm the timeliness of Plaintiff's claims under the statute of repose. *See* 28 U.S.C. § 1658(b)(2).

As they unsuccessfully argued below, on appeal Defendants again contend that the statute of repose should be measured from the date Plaintiff purchased the 2020 Notes. (*See* AAB_45 ("[T]he latest hypothetical date VR Global committed

itself to complete the purchase of its 2020 Notes was January 31, 2018 … [t]herefore, the latest date VR Global could have brought its Section 10(b) claims was January 31, 2023.") (internal quotation marks and citations omitted).) But while the date a party purchases a security is relevant to determining its timeliness for purposes of the *statute of limitations*, the purchase date is irrelevant to *the statute of repose*. Binding precedent makes clear that the relevant date for calculation of the *repose period* in a securities claim is not the date the security was purchased, but the date of *the last culpable act or omission* of a defendant. *See, e.g.*, *CTS Corp*, 573 U.S. at 8 (observing that a statute of repose is measured "from the date of the last culpable act or omission of the defendant"); *Dekalb Cty. Pension Fund*, 817 F.3d at 411 (same). Finally, this Court's non-binding summary order in *Arnold v. KPMG LLP*, 334 F. App'x 349, 351 (2d Cir. 2009) does not help Defendants. *Arnold* makes no reference whatsoever to scheme liability pursuant to sections 10b-5(a) and (c)—the sections at issue here—and in any case the statute of repose in *Arnold* had run nearly five years before the plaintiff commenced his action.[3] *See id.* at 351.

[3] Defendants also argue that if the Court declines to accept its "accrual"/"commitment" argument, it should rule that the statute of repose in a 10b-5(a) and (c) securities fraud case runs "from the date when the scheme became publicly known." (AAB_46.) But Defendants provide no authority whatsoever to support the proposition that the statute of repose runs from the date a scheme is "publicly known." Yet more problematic, as discussed elsewhere in this brief, Defendants provide no factual support—either in the Amended Complaint or elsewhere—for their claim that the National Assembly Resolutions or the larger

Plaintiff filed its Complaint on June 29, 2023. Accordingly, the statute of repose extends to June 29, 2018. Plaintiff has alleged in its Amended Complaint multiple acts within the repose period, including, inter alia, that: (1) PDVSA defaulted on the 2020 Notes on October 28, 2019 (*see* ¶¶ 7, 93); (2) PDVSA made its last payment on the 2020 Notes on April 27, 2019 (¶ 79); (3) as late as May 15, 2019, representatives of PDVSA made public statements indicating their support continued payments of the Notes (¶ 87); (4) PDVSA's legal strategist worked in "direct" collaboration with the former U.S. Undersecretary of the Treasury to buy time for PDVSA to initiate litigation, (¶¶ 84, 89); (5) PDVSA initiated litigation to invalidate the Notes on October 29, 2019, (¶¶ 97-103); and (6) PDVSA issued a public statement on March 30, 2023, stating that it was willing to comply with the obligations derived from the bonds, (¶ 106). 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.

scheme to defraud Noteholders *was* public knowledge prior to October 2019. The Court should dismiss Defendants' request that it draw a significant, unsubstantiated, and impermissible inference in Defendants' favor.

2. Defendants May Not Raise a Statute of Limitations Defense For The First Time On Appeal.

Defendants also argue that Plaintiff's claims are barred by the two-year statute of limitations. (AAB_47.) Defendants did not raise this affirmative defense in their brief below seeking dismissal of Plaintiff's claims, and the District Court therefore correctly declined to consider it. (*See* A-2154 n.1 ("The Defendants have not moved to dismiss the Exchange Act claim pursuant to its two-year statute of limitations.").) It is well settled that a plaintiff may not raise a statute of limitations defense for the first time on appeal. *See, e.g., Slayton v. American Exp. Co.*, 460 F.3d 215, 229-230 (2d. Cir. 2006) ("The failure to raise the specific statute of limitations defense as to [certain defendants] in the district court waives this defense, and it cannot be raised for the first time on appeal."); *Fisher v. Vassar College*, 70 F.3d 1420, 1452 (2d Cir. 1995) ("The [statute of limitations] defense cannot be raised for the first time on appeal."), *reversed in part on other grounds* 114 F.3d 1332 (2d Cir. 1997) (en banc); *cf. Musacchio v. U.S.*, 577 U.S. 237, 248 (2016) (observing that a defendant cannot successfully raise a statute of limitations defense for the first time on appeal). Defendants have provided no grounds for the Court to depart from these precedents.

B. Plaintiff Alleges a "Domestic Transaction" Which is Not "Predominantly Foreign."

There is little doubt that Plaintiff plausibly alleged a domestic transaction which is not predominantly foreign. Defendants concede the domestic locus of "the Exchange Offer, the 2020 Notes, and the PDVSA Parties' fraudulent conduct" that they acknowledge the District Court looked to in rejecting Defendants' primary argument in support of their 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. (AAB_49-50; 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." (A-2149-50; A-2105-06 (quoting *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 and found by the District Court, 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.)

Defendants' attempt to ignore these uncontested domestic facts by focusing on the locus of where Plaintiff obtained the 2020 Notes is a red herring. 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* AAB_50-51.) This Court, however, looks holistically at all of the factors for determining whether irrevocable liability was incurred in the United States, rather than at any single factor in isolation. As this Court explained in *Giunta*, the "[r]elevant facts concerning the formation of the contracts, the placement of purchase orders, . . . or the exchange of money should be considered. At the pleading stage, it is sufficient for the plaintiff to allege facts leading to the plausible inference of a domestic transaction." *Giunta*, 893 F.3d at 79 (internal citations and quotation marks omitted).

Defendants argue that Plaintiff has insufficiently alleged that it incurred "irrevocable liability" for the Notes in the United States or that "title was transferred" through a domestic transaction. (*See* AAB_49 (quoting *Absolute Activist*, 677 F.3d at 62).) In doing so, Defendants mischaracterize the ruling in *Absolute Activist* by suggesting that the only avenue to assess the locus of a transaction is the place that the transaction occurred. (AAB_49-50.) Whereas in this case Plaintiff sets forth numerous factual domestic connections, *Absolute Activist* had alleged only one. *See Absolute Activist*, 677 F.3d at 70 ("The sole allegation that affirmatively states that

the transactions took place in the United States only does so in conclusory fashion: 'The fraudulent transactions that Defendants carried out through [the broker-dealer] took place in the United States.'").

In sum, the Amended Complaint contains multiple allegations that indicate the Plaintiff obtained the Notes through a domestic transaction. Drawing all inferences in Plaintiff's favor, as is proper at the pleading stage, the District Court correctly found that Plaintiff's allegations, taken together, were sufficient. This Court should do the same.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF LEAVE TO AMEND.

Defendants acknowledge that leave to amend should be "give[n] freely . . . when justice so requires." (AAB_57 (quoting Fed. R. Civ. P. 15(a)(2)).) Nor do Defendants anywhere contest that "[t]he 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); that "[c]omplaints dismissed under Rule 9(b) are almost always dismissed with leave to amend." *id.*; or that "[i]n 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).

Defendants instead argue that the District Court acted within its discretion in denying Plaintiff's request for leave to amend because Plaintiff (1) did not identify how further amendment would address deficiencies in the Amended Complaint and (2) did not file a proposed second amended complaint with its opposition to the Motion to Dismiss.

Plaintiff, however, 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. Briefing on Defendants' Motion to Dismiss 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 ultimately found 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.) Moreover, 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. This specific issue of the timing of Defendant's fraudulent scheme was not addressed by either party in the briefing below and, therefore, Plaintiff had no way of knowing that it needed to amend its allegations of scienter pre-dating 2019.

Defendants rely on *Porat v. Lincoln Towers Cmty. Ass'n*, to support the proposition that "[a] counseled plaintiff is not necessarily entitled to a remand for repleading whenever he has indicated a desire to amend his complaint, notwithstanding the failure of plaintiff's counsel to make a showing that the complaint's defects can be cured." 464 F.3d 274, 276 (2d Cir. 2006).[4] But in *Porat*, which did not implicate the PSLRA's heightened pleading standard as this appeal does, the district court had dismissed the plaintiff's complaint *without prejudice* and "never explicitly denied [plaintiff] leave to amend his complaint." *Id.* at 276. Here, by contrast, the District Court *explicitly denied Plaintiff leave to amend*. Moreover, the Second Circuit in *Porat* noted that in similar circumstances, it had "ruled that the district court had abused its discretion in failing to allow repleading where the plaintiff had made no motion to replead but had noted in his opposition brief his

[4] In both *TechnoMarine SA* and *City of Pontiac Policemen's & Firemen's Ret. Sys.*, the Second Circuit analyzed whether the district court properly determined that amendment would be futile. *See TechnoMarine v. Giftports, Inc.*, 758 F.3d 493, 506 (2d Cir. 2014); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 188 n.70 (2d Cir. 2014) (assuming that the reason the district court dismissed plaintiff's claims "was futility"). Here, the District Court did not make a determination of futility.

desire to replead if the motion were granted." *Id.* at 276 (citation omitted). While the Second Circuit declined to make a bright line rule that "abuse of discretion will be found and the case remanded whenever a district court fails to provide for repleading," it noted that "[w]ithout doubt, this circuit strongly favors liberal grant of an opportunity to replead after dismissal of a complaint." *Id.*

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. The Federal Rules, the Southern District's local rules, 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 ultimately found to be deficient, Plaintiff had no way of tailoring its amended pleading to address these unknown 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 Amended Complaint.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's order and 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: September 6, 2024
New York, New York

/s/ Christopher J. Clark

CLARK SMITH VILLAZOR LLP
Christopher J. Clark
Benjamin A. Butzin-Dozier
666 Third Avenue, 21st Floor
New York, New York 10017
TEL: (212) 377-0850
FAX: (212) 377-0868
clark@csvllp.com
benjamin.dozier@csvllp.com

Attorneys for Plaintiff-Appellant VR Global Partners, L.P.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I HEREBY CERTIFY PURSUANT TO Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionally spaced, has a typeface (Times New Roman) of 14 points, and contains 6,761 words (excluding, as permitted by Fed. R. App. P. 32(a)(7)(B), the table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word program used to produce this brief.

Dated: September 6, 2024

/s/ Christopher J. Clark
Christopher J. Clark