UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PETRÓLEOS DE VENEZUELA, S.A., PDVSA PETRÓLEO, S.A., and PDV HOLDING, INC., Plaintiffs, - against - MUFG UNION BANK, N.A. and GLAS AMERICAS LLC, Defendants.	Case No: 19-cv-10023-KPF

REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs respectfully submit this reply memorandum of law in support of their summary judgment motion.

I. THE ACT OF STATE DOCTRINE PRECLUDES ENFORCEMENT OF THE TRANSACTION DOCUMENTS

In its September 2016 Resolution, the National Assembly explicitly invoked its Article 187.9 oversight powers to "categorically reject" the offered pledge of CITGO Shares[1]—the key feature of the Exchange Offer—and launch an investigation into PDVSA and the entire transaction. The National Assembly then withheld authorization of the Transaction Documents as it attempted to conduct its investigation. These sovereign acts undertaken by Venezuela's only legislature applying Venezuelan law all *predated the issuance of the 2020 Notes*. Had the Maduro regime not usurped the National Assembly's constitutional powers, the Transaction Documents never would have been executed. A ruling in Defendants' favor would override and disrespect the National Assembly's legitimate actions under the Venezuelan Constitution in deference to the illegitimate Maduro regime's looting of Venezuelan public assets for personal gain (*e.g.*, the corrupt use of PDVSA for political purposes to the detriment of PDVSA's financial condition). The act of state doctrine forbids this result.

A. The National Assembly Invoked its Constitutional Powers in 2016 to Reject and Withhold Authorization of the 2020 Notes Transaction

As early as March 2015, the U.S. Government recognized that the Maduro regime was violating the Venezuelan people's human rights and undermining Venezuelan democracy.[2] From the moment that opposition parties won an overwhelming majority of seats in the National Assembly later that year, the U.S. Executive Branch has recognized the "democratically-elected

[1] Capitalized terms have the same meanings as in Plaintiffs' opening memorandum of law in support of their summary judgment motion.
[2] *See* Executive Order No. 13692 (Mar. 8, 2015), Bliss Opp. Decl. Ex. 12.

National Assembly [a]s [Venezuela's] ***only legitimate legislative body***."[3] At no time since has the U.S. Government recognized any other legislative body in Venezuela. Indeed, ever since that time (beginning prior to the National Assembly's September 2016 Resolution), the Executive Branch has supported and recognized the opposition-led National Assembly while condemning and sanctioning the Maduro regime for "***illegitimately . . . usurp[ing] the constitutional role of the democratically elected National Assembly***, rewrite[ing] the constitution, and impos[ing] an authoritarian regime on the people of Venezuela:"[4]

- In January 2016, just as the opposition assumed control of the National Assembly, the U.S. Government specifically "recogni[zed] the installation of the National Assembly" and "call[ed] on all parties to respect the independence, authority, and ***constitutional prerogatives*** of the National Assembly."[5]

- In February 2016, the U.S. Government expressed that it was "deeply concerned by decisions of the Venezuelan Supreme Court ***limiting the authority*** of the recently elected National Assembly, which have undermined Venezuelan democracy," and called on the Maduro regime to respect "the will of the people, the rule of law, ***the separation of powers within the government***, and the democratic process."[6]

- In June 2016, the U.S. Government expressed its concern "that the National Assembly has not been allowed to carry out its rightful role and that almost every measure the National Assembly has passed has been blocked by the Supreme Court." The U.S. "join[ed] with others in the international community in calling on the [Maduro regime] to," among other things, "***honor its own constitutional mechanisms***" by demonstrating "respect for the rule of law and representative democracy, including ***the essential elements of the separation of powers*** *and independence of the branches of government*."[7]

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[3] State Dep't, *Assumption of Legislative Powers in Venezuela* (Aug. 18, 2017), Bliss Opp. Decl. Ex. 2.
[4] Treasury Dep't, *Treasury Sanctions the President of Venezuela* (July 31, 2017), Bliss Opp. Decl. Ex. 13; U.S. White House, *Statement by the Press Secretary on New Financial Sanctions on Venezuel*a (Aug. 25, 2017), Bliss Opp. Decl. Ex. 14.
[5] State Dep't, *Seating of the Venezuelan National Assembly* (Jan. 5, 2016), Bliss Reply Decl. Ex. 1 (emphasis added). All references to "Bliss Reply Decl. Ex. _" refer to exhibits attached to the *Reply Declaration of James R. Bliss in Support of Motion for Summary Judgment*, dated July 15, 2020.
[6] State Dep't, *Venezuela: Inclusion of All Parties a Key to Solving Challenges* (Feb. 17, 2016), Bliss Reply Decl. Ex. 2.
[7] State Dep't, *Remarks at the Special Meeting of the OAS Permanent Council on Venezuela*, Statements of Michael J. Fitzpatrick (June 21, 2016), Bliss Reply Decl. Ex. 3; *see also* State Dep't, *Mesa de la Unidad Democrática (MUD) Statement on Dialogue in Venezuela* (July 8, 2016) ("The United States continues to join with countries in the region and around the world to call on the Venezuelan government to release all political prisoners, respect the constitutional role of the National Assembly, and allow the Venezuelan people to have their voices heard through constitutional mechanisms."), Bliss Opp. Decl. Ex. 1 .

The U.S. Government's unwavering support for and recognition of the opposition-led National Assembly culminated in the U.S. President's formal recognition, in 2019, of Interim President Guaidó and the National Assembly as the "only legitimate government" of Venezuela.[8] At that time, the Secretary of State proclaimed that the U.S. "consider[s] ***all*** of [the Maduro regime's] ***declarations and actions illegitimate and invalid***."[9]

Despite this, Defendants now ask this Court to give legal effect to the Maduro regime's illegal usurpation of the National Assembly's constitutional powers—the very conduct the Executive Branch has repeatedly condemned, sanctioned, and declared illegitimate. They also ask this Court to ignore the Executive Branch's recognition of Interim President Guaidó and the National Assembly as the "only legitimate" government of Venezuela, which, under longstanding precedent, is "*retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence*." *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 146 (quoting *Oetjen v. Central Leather Co.,* 246 U.S. 297, 302–03 (1918)). To the extent there was any ambiguity regarding the status of the National Assembly prior to 2019, that ambiguity vanished when the Executive Branch recognized the National Assembly as the only legitimate arm of government in Venezuela, thereby retroactively validating all actions taken by the opposition-led National Assembly from the time the opposition members were seated in early 2016. *See Underhill v. Hernandez*, 168 U.S. 250 (1897) (retroactively recognizing actions taken by the Palacio government in Venezuela before it seized power from the previously recognized government).[10]

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[8] Statement from President Donald J. Trump Recognizing Venezuelan National Assembly President Juan Guaido as the Interim President of Venezuela, WHITEHOUSE.GOV (Jan. 23, 2019), Bliss Opp. Decl. Ex. 4.

[9] State Dep't, *Remarks at the Organization of American States*, Statement of Secretary of State Michael R. Pompeo (Jan. 24, 2019), Bliss Reply Decl. Ex. 4.

[10] Defendants' arguments are directly at odds with *United States v. Belmont*, in which the Supreme Court held that a Soviet decree issued ***15 years prior to the U.S. Government's recognition of the Soviet government and at a time when the U.S. explicitly recognized the provisional Russian government as the legitimate government of Russia***

Defendants do not (and cannot) dispute that, in 2016, the National Assembly was duly elected and empowered by Article 187.9 of the Constitution to exercise authority over national public interest contracts relating to PDVSA's oil industry activities in Venezuela. Even if the Maduro regime were considered the "recognized" government in 2016 (which Defendants have not established and which would be contrary to the absence of any exchange of ambassadors with the Maduro regime for a half decade prior to 2016), the National Assembly was the only Legislative Branch of Venezuelan government, and no precedent supports excising a branch of government from act of state treatment simply because the President is authoritarian. The National Assembly's September 2016 Resolution expressly invoking its constitutional oversight powers, as well as its refusal to authorize the Transaction Documents, are therefore acts of state entitled to deference by U.S. courts.[11] Defendants' counsel argued the very same point in the *PDVSA Litigation Trust* case, explaining that an April 2018 National Assembly resolution (also prior to the May 2018 election that resulted in Interim President Guaidó taking office) invalidating a national public interest contract entered into by PDVSA was entitled to retroactive recognition by U.S. courts.[12] Tellingly, Defendants do not attempt to distinguish that case or the position espoused there by their counsel. Defs. Opp. Mem. at 40.

Contrary to Defendants' suggestion in this case, the National Assembly's September 2016 Resolution was unquestionably an "official act" for purposes of the act of state doctrine. *See Kashef v. BNP Paribas S.A.*, 925 F.3d 53, 60 (2d Cir. 2019) ("To qualify as 'official,' an act

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was subject to act of state treatment. 301 U.S. 324 (1937); *see also United States v. Pink,* 315 U.S. 203 (1942) (same). Likewise, Defendants' argument that the Executive Branch can only retroactively recognize governments that came to power through violent means finds no support in the case law. *See, e.g., O'Bryan v. Holy See*, 490 F. Supp. 2d 826 (W.D. Ky. 2005) (retroactively recognizing the acts of the government of the Holy See, which came to power by virtue of the Lateran Treaty of 1929).

[11] Defendants' mantra that the September 2016 Resolution did not literally declare the transaction "illegal" (*e.g.*, Defs. Opp. Mem. at 5) misses the point, which is that the National Assembly asserted its constitutional authority over the transaction and refused to authorized it. The transaction was not "illegal" until it was executed without National Assembly authorization in violation of the Venezuelan Constitution.

[12] Defs. Motion to Dismiss, *PDVSA U.S. Litig. Tr.*, at 19-23, 26 (S.D. Fl. July 23, 2018), Pls. Ex. 3.

must be imbued with some level of formality, such as authorization by the foreign sovereign through an official 'statute, decree, order, or resolution.'") (quoting *Alfred Dunhill of London, Inc. v. Rep. of Cuba*, 425 U.S. 682, 695 (1976)).[13] Courts have recognized far less formal actions as "official." *See, e.g., American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (recognizing the seizure of property by Costa Rican soldiers); *The Adriatic*, 258 F. 902 (3d Cir. 1919) (recognizing a telegram sent by the British Government). The National Assembly's refusal of authorization is also an "official act" for purposes of the act of state doctrine, as courts do not distinguish between a state's affirmative acts and its failure or refusal to act.[14]

Also contrary to Defendants' suggestion, the National Assembly's resolutions are not mere "non-binding political statements." Rather, they are "legislative act[s] of the same legal rank as a statute" (Brewer Report ¶ 73) that "carry the full force of the law in accordance with the Venezuelan Constitution" (Republic's Letter ¶ 24[15]) and addressed the state-owned oil company's activities in Venezuela (notwithstanding that the purported collateral for the 2020 Notes is a foreign asset). To hold otherwise would contradict not only the considered views of the Republic, but also Defendants' counsel, who argued in the *PDVSA Litigation Trust* case that "[u]nder Venezuelan law, the National Assembly's resolution [that a PDVSA contract required National Assembly authorization] is ***conclusive***."[16]

The National Assembly's October 2019 Resolution and the Republic's Letter both

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[13] *See also Deutsche Bank AG London Branch v. Receivers Appointed by the Court* [2020] EWCH 1721 (Comm) (deferring under the act of state doctrine to a National Assembly resolution "confirming that . . . [the Central Bank of Venezuela's] assets abroad may only be administered by the [BCV] *Ad Hoc* board"), Bliss Reply Decl. Ex. 5.

[14] *See Underhill*, 168 U.S. 250, 252 (holding that the act of state doctrine "must necessarily extend" to the government's *refusal* to grant the plaintiff a passport); *United States v. Merit*, 962 F.2d 917, 921 (9th Cir.1992) (deferring to South Africa's failure to issue a warrant of extradition as an "official act"); *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 828 (9th Cir. 1987) (holding that the act of state doctrine barred review of Mexican officials' "omissions").

[15] Citations to the "Republic's Letter" refer to the June 9, 2020 letter to the Honorable Katherine Polk Failla from Ambassador Carlos Vecchio [Dkt. 80].

[16] *See* Defs. Motion to Dismiss, *PDVSA U.S. Litig. Tr.*, at 19-23, 26 (S.D. Fl. July 23, 2018), Pls. Ex. 3.

confirm that the National Assembly's September 2016 Resolution and refusal to authorize the Transaction Documents represented the legitimate exercise of the National Assembly's constitutional powers. As the Republic explains, these are "official acts of the only legitimate branch of Venezuela's government at the time . . . that vitiate the consent necessary for the Indenture and the Pledge to have come into valid legal existence in the first instance and therefore render these contracts and the 2020 Notes invalid, illegal, and null and void *ab initio*." Republic's Letter ¶ 24. The October 2019 Resolution and the Republic's Letter are entitled to deference under longstanding precedent,[17] including *Pink*, where the Supreme Court held that the Russian Government's declaration to the court that its nationalization decree applied to certain Russian assets in the U.S. was "conclusive so far as the intended extraterritorial effect of the [decree] is concerned." 315 U.S. at 220. Finally, Defendants' claims that the National Assembly's official acts were somehow ineffective under Venezuelan law are irrelevant because the act of state doctrine prohibits this Court from crediting any such claims.[18]

B. *Allied Bank* Did Not Address Acts of State Antecedent to a Debt Issuance

Allied Bank and its progeny are inapplicable here because these cases *all* addressed actions by a sovereign purporting to repudiate debt that existed outside of the sovereign's territory prior to the acts in question—*i.e.*, where "the situs of the [debt obligation] *at the time of*

[17] *Alfred Dunhill*, 425 U.S. at 737 (statements of sovereign's counsel were "authoritative representations of the [sovereign's] position" and "serve[d] to confirm that the continued retention of [the seized money] ha[d] been undertaken as an exercise of sovereign power"); *Banco de Espana v. Fed. Reserve Bank of New York*, 114 F.2d 438, 445-46 (2d Cir. 1940) (accepting statements in the Spanish ambassador's affidavit as proof that certain acts had been taken).

[18] *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415 n.17 ("The courts below properly declined to determine if [Cuba's] issuance of the expropriation decree complied with the formal requisites of Cuban law"); *Fed. Treasury Enters. Sojuzplodoimport OAO v. Spirits Int'l B.V.*, 809 F.3d 737, 742-43 (2d Cir. 2016) (any "declaration of a United States court that the executive branch of the Russian government violated its own law by transferring its own rights to its own quasi-governmental entity . . . would be an affront to the government of a foreign sovereign . . . So long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws."); *Jimenez v. Palacios*, 2019 WL 3526479, at *15 (Del. Ch. Aug. 2, 2019), *as revised* (Aug. 12, 2019) ("Evaluating the Guaidó government's acts under Venezuelan or other law is neither necessary nor appropriate.") (citing *Republic of Panama v. Air Panama Internacional, S.A.*, 745 F. Supp. 669, 672 (S.D. Fla. 1988) ("The act of state doctrine . . . obviates the need for the Court to inquire into private Panamanian law.").

the purported taking" was outside the sovereign's dominion. *Allied Bank v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 (2d Cir. 1985) (emphasis added). There is no dispute that the 2020 Notes ***did not exist*** when the National Assembly acted in 2016 to reject the offered pledge and withhold authorization of the Transaction Documents. The National Assembly's actions took place entirely within Venezuela applying Venezuelan law. The entire purpose of the National Assembly's sovereign acts was to prevent the Maduro regime from circumventing the Venezuelan Constitution by mortgaging the Republic's foreign "crown jewel" as collateral without justifying the deal to the elected representatives charged with approving it. Were it not for the Maduro regime's systematic efforts to usurp the opposition-led National Assembly's powers, which the U.S. Executive Branch has roundly condemned, the 2020 Notes would never have been issued.

As *Allied Bank* recognized, "obviously, where the taking is wholly accomplished within the foreign sovereign's territory, it would be an affront to such foreign government for courts of the United States to hold that such act was a nullity." *Id*. (quotation marks omitted). Here, there is no "taking," as no valid property interest was created in the first place. To the extent the National Assembly did effectuate a "taking," that act occurred before the U.S. became the "situs" of the purported debt, which did not yet exist. *Id.* (holding that courts must analyze the situs of the debt "at the time of the purported taking"). All of the facts Defendants identify to show that, as of today, the "situs of the debt ***is*** the United States" (Defs. Opp. at 7-8) are simply irrelevant.

Moreover, the court's concern in *Allied Bank* was that recognizing a country's unilateral, retroactive renunciation of debt would encourage others to follow suit and disrupt a cooperative international system for the restructuring of otherwise valid debt that plagued many countries. *See* 757 F.2d at 519, 522. There is no such systemic concern here, and it would be

impossible to incentivize a government to *repudiate* a debt before it is even issued.

State of the Netherlands v. Federal Reserve Bank, 201 F.2d 455 (2d Cir. 1953), is instructive. There, the Second Circuit applied the act of state doctrine to a decree issued by the U.S. recognized government-in-exile of the Netherlands, which sought to vest the Netherlands government with protective title to all securities belonging to persons domiciled there in order to prevent the German army from taking possession of securities owned by Jewish citizens. *Id*. at 456. The Second Circuit found that the lower court erred in not giving effect to the decree, which was issued before the bonds were transferred for the purpose of preventing such transfers. *Id.* at 463.[19]

Every case on which Defendants rely can be distinguished on the same grounds as *Allied Bank* because they all involved actions by successor governments to retroactively repudiate preexisting debt.[20] Equally misplaced is Defendants' reliance on *Lloyds Bank Plc* v. *Rep. of Ecuador*, 1998 WL 118170, at *11–12 (S.D.N.Y. Mar. 16, 1998). There, the state act in question was a retroactive refinancing plan seeking to avoid payment of interest arrears on *preexisting debt*, which the Ecuadorian bank attempted to portray as devised based on existing law. Unlike

[19] *See also Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 224 (2d Cir. 1985) (applying the act of state doctrine because the Mexican government's action could be said to have come to "complete fruition" within Mexico *at the time of the purported taking*); *Credit Suisse v. U.S. Dist. Court for Cent. Dist. of California*, 130 F.3d 1342, 1347-48 (9th Cir. 1997) (holding that not giving effect to a Swiss executive order seeking to prevent Swiss banks from transferring certain funds to a foreign individual or entity would "violate the act of state doctrine").

[20] *See Drexel Burnham Lambert Grp. Inc. v. Galadari*, 777 F.2d 877, 881 (2d Cir. 1985) (Dubai decree retroactively repudiating preexisting debt); *MMA Consultants 1, Inc. v. Rep. of Peru*, 245 F. Supp. 3d 486, 497 (S.D.N.Y. 2017) (Peruvian statute passed after debt had been validly issued); *DRFP, LLC* v. *Republica Bolivariana de Venezuela*, 945 F. Supp. 2d 890, 914–15 (S.D. Ohio 2013) (Venezuelan Attorney General opinion and Constitutional Chamber decision issued after bonds had been validly issued); *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Corp.*, 2011 WL 6187077, at *14 n.10 (S.D.N.Y. Nov. 28, 2011) (Irish government's nationalization of a bank after notes had been issued); *Lightwater Corp.* v. *Rep. of Arg.*, 2003 WL 1878420, at *5 (S.D.N.Y. Apr. 14, 2003) (Argentina's halting of payments on validly existing bonds); *Daly* v. *Llanes*, 2001 WL 1631419, at *2 (S.D.N.Y. Dec. 19, 2001) (Venezuelan statute attempting to stay recovery on assets after a certificate of deposit had already come due); *Pravin Banker Assocs., Ltd.* v. *Banco Popular del Peru*, 895 F. Supp. 660, 664 n.4 (S.D.N.Y. 1995) (Peru's unilateral suspension of preexisting commercial bank debt); *Optopics Labs. Corp.* v. *Savannah Bank of Nigeria, Ltd.*, 816 F. Supp. 898, 907 (S.D.N.Y. 1993) (Peruvian decree dissolving its national bank after preexisting notes were in default).

in *Lloyds Bank Plc*, Plaintiffs are not arguing that later acts should be given effect simply because they are consistent with preexisting law. The state acts here predate the 2020 Notes Transaction and prevented the Transaction Documents from coming into valid legal existence.

C. Respecting the National Assembly's Rejection and Invalidation of the 2020 Notes Transaction is Consistent With U.S. Law and Policy

It has been U.S. policy to support the National Assembly since at least the 2015 parliamentary elections. This has included specific backing of efforts to stop the Maduro regime from looting national assets and violating Venezuela's constitutional separation of powers by disregarding the National Assembly. The U.S. has long supported, and argued for deference to, efforts by a recognized foreign government to prevent such conduct by authoritarian regimes. *See, e.g.*, *Netherlands*, 201 F.2d at 456, 463 (giving effect to the Netherlands government-in-exile's decree because it was consistent with U.S. policy to prevent looting by the Nazis). As the court recognized in *Impact Fluid*, it would be inconsistent with U.S. law and policy to "tolerate those who seek to . . . loot Venezuelan resources to enrich themselves at the expense of the people;"[21] namely, the Maduro regime, which continues to "unjustly appropriate[] the inheritance of the Venezuelan people and pillage[] its assets for personal benefit."[22] In that case, the U.S. Government stated that it "remains steadfast in its support of Guaidó as the interim president and in its support of his government."[23] And as Defendants' counsel rightly noted in the *PDVSA Litigation Trust* case, "directly contravening the National Assembly's express declaration that [a national public interest contract] is illegal" would "no doubt undermine U.S. foreign policy by strengthening Maduro's hand in his power struggle with the National

[21] White House, Fact Sheet, President Donald J. Trump Supports the Venezuelan People's Efforts to Restore Democracy in Their Country (Jan. 29, 2019), Bliss Opp. Decl. Ex. 15.
[22] Order, *Impact Fluid Solutions v. Bariven S.A.*, Civ No. 4:19-cv-00652, Dkt. No. 55, at 17 (S.D. Tex. May 20, 2020), Bliss Reply Decl. Ex. 6.
[23] *Impact Fluid Solutions v. Bariven S.A.*, Civ No. 4:19-cv-00652, Dkt. No. 43-1, at 1 (S.D. Tex. Jan. 31, 2020), Bliss Opp. Decl. Ex. 24.

Assembly."[24]

Separately, deferring to the National Assembly's official acts would further, rather than compromise, "New York's status as one of the foremost commercial centers in the world." *Allied*, 757 F.2d at 521-522. As soon as the Exchange Offer was announced, the National Assembly put the world on notice that the proposed transaction was invalid and would be deemed as such by an eventual opposition-led government.[25] [redacted] Whatever policy interests may have been at stake in *Allied Bank* and its progeny, there can be no U.S. interest in immunizing sophisticated hedge funds from the foreseeable consequences of entering into a transaction with an authoritarian regime over the protest of that nation's only democratically elected body, which had asserted its constitutional oversight powers. Disregarding the National Assembly's acts here would encourage authoritarian regimes to finance the suppression of democracy by circumventing constitutional or legislative controls knowing that U.S. courts will retroactively bless a transaction, no matter how patently illegal, so long as the law of some U.S. state is chosen in the contracts. Indeed, Defendants' request—that this Court disregard the sovereign acts of the Venezuelan National Assembly, applying the Venezuelan Constitution *in* Venezuela prior to the issuance of the purported debt—"could harm U.S. interests in promoting issuers' use of New York law and

[24] Pls. Ex 3 (arguing further that not giving effect to the National Assembly's resolution would risk 'embarrassment from multifarious pronouncements by various departments on one question,' [*Carmichael v. Kellogg, Brown & Root Svc., Inc.*, 572 F.3d 1271, 1280 (11th Cir. 2009)], with the Executive Branch recognizing the National Assembly's authority but the Judiciary countermanding the National Assembly's conclusions about its own authority as against the Maduro regime. (citing *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Rep. of Yugoslavia*, 218 F.3d 152, 160–61 (2d Cir. 2000) (holding that recognition of which newly-formed state succeeded to assets of the former Yugoslavia was "precisely the type of determination that is reserved to the Executive in the first instance"))).

[25] Hinman Report at § III.B.

[26] [redacted]

preserving New York as a global financial jurisdiction."[27]

II. VALIDITY IS GOVERNED BY VENEZUELAN LAW

As Defendants would have it, Venezuela's constitutional separation of powers and National Assembly oversight of public interest contracts can be nullified through the simple expedient of a contractual choice-of-law provision. This makes no sense. Moreover, New York law itself requires the application of Venezuelan law to the threshold validity question, and the guaranty and the Pledge are invalid under New York law in any event because the 2020 Notes they purport to secure were illegally issued and are void *ad initio*.

Defendants do not dispute (because they cannot) that NYGOL 5-1401 requires the application of UCC Article 8's choice-of-law rules to issues within their scope.[28] Nor do Defendants dispute (because they cannot) that UCC 8-110 requires the application of the "local law of the issuer's jurisdiction" to the "validity of a security" (Defs. Opp. at 19). Defendants' primary argument—that the issuance of securities in violation of constitutional provisions does not bear on their "validity" within the meaning of UCC 8-110—is contradicted by the very commentators they cite as their main support. In the paragraph immediately preceding the passage Defendants quote (Defs. Opp. at 20), the Hawkland & Rogers treatise explains that "validity" corresponds to the issues addressed in UCC 8-202, including the issuance of securities "in violation of a constitutional provision":

> [T]he way to avoid giving subsection 8-110 absurd effects is to read the choice of law provisions in light of the substantive provisions of Article 8 to which they correspond. The Official Comment specifically states that the "validity" issue covered by subsection 8-110(a)(1) was excluded from the selection of law provision in subsection (d) because "[t]he question whether an issuer can assert

[27] *See* Brief for the United States of America as Amicus Curiae in Support of the Republic of Argentina's Petition for Panel Rehearing and Rehearing En Banc, *NML Capital, LTD. v. The Republic of Argentina*, No. 12-105-cv(L), Dkt. No. 653 (2d Cir. Dec. 28, 2012), Bliss Reply Decl. Ex. 7.

[28] As discussed in Plaintiffs' opposition to Defendants' summary judgment motion (Pls. Opp. Mem. at 11-14), Defendants have cited no authorities supporting the proposition that a contractual choice-of-law provision can override a contrary choice-of-law rule incorporated in NYGOL 5-1401 such as UCC 8-110.

> the defense of invalidity may implicate significant policies of the issuer's jurisdiction of incorporation, *see, e.g.*, section 8-202 and the comments thereto." Thus, section 8-202 is the principal Article 8 substantive rule to look to for guidance in applying the choice of law rule in subsection 8-110(a). Section 8-202 deals with the defenses that an issuer can raise, particularly against subsequent purchasers. The provision dealing with "validity" is found in subsection 8-202(2). The scenario contemplated by this provision is that municipal bonds were issued and sold to the public, the issuer defaulted, and ***the issuer then discovered that the requirements of some constitutional or statutory provision concerning authorization for issuance of municipal bonds had not been satisfied***, whereupon the issuer sought to avoid its payment obligation by contending that the bonds were not "valid."

William D. Hawkland & James S. Rogers, 7A UCC Series § 8-110:2 (2019) (emphasis added). In short, "'valid' . . . refers to the issue that lawyers today would probably describe as whether issuance of the securities had been 'duly authorized.'"[29] *Id*.; *see Oliner v. Canadian Pac. Ry. Co*., 34 A.D.2d 310, 313 (1st Dep't 1970) (applying old UCC 8-106, which corresponds to current UCC 8-110, and noting that "Canadian Pacific, the issuer of the securities, is a Canadian corporation and we must, therefore, consider the duties and obligations of Canadian Pacific, under the laws of Canada, in order to determine what rights the plaintiff has against the issuer, vis-a-vis the Canadian law which binds the actions of such issuer.").

Defendants' other argument regarding the 2020 Notes—that Venezuelan law permits the selection of foreign law to govern the Transaction Documents' validity—is simply wrong. This point is addressed at length in Professor Brewer's opening report (pp. 53-59) and his reply

[29] Defendants' suggestion that this conclusion is contrary to accepted New York opinion letter practice is belied by the very Hogan Lovells opinion letter they cite (Opp. at 22, citing Clark Ex. 33), which expressly assumed that the Transaction Documents did not violate Venezuelan law—a subject that was addressed separately (and erroneously) by Venezuelan counsel. Clark Ex. 33 at 2-3. This is consistent with the TriBar opinion letter guidance Defendants cite, which recognizes in the sentence immediately following the commentary quoted by Defendants that "[d]ue authorization and due execution are sometimes dealt with by an express assumption or reliance on an opinion of local counsel-for example, when the opinion does not cover the corporation law of the state in which the Company was incorporated." *Special Report of the TriBar Opinion Committee: The Remedies Opinion – Deciding When to Include Exceptions and Assumptions*, 59 BUS. LAW. 1483, 1487 n.22 (1971). "Opinions on Delaware corporations often are limited to the Delaware General Corporation Law, which is understood to include only the Delaware corporation statute, applicable provisions of the Delaware constitution, and reported judicial decisions interpreting that statute and those constitutional provisions." *Id*. at n.25.

declaration filed herewith. Defendants also argue that PDVSA Petróleo's guaranty is not subject to UCC 8-110 because it is not a "security" (Defs. Opp. Mem. at 24-25). However, UCC 8-201(b) provides that "[w]ith respect to an obligation on or defense to a security, a guarantor is an issuer to the extent of its guaranty, whether or not its obligation is noted on a security certificate." Thus, PDSVA Petróleo is deemed an "issuer" of the 2020 Notes with respect to its invalidity defense to enforcement of the guaranty.[30] This treatment is consistent with "[t]he prevailing view . . . that the UCC applies to those guaranties that are ancillary to [an underlying] UCC transaction." *Royal Palm Senior Invs, LLC v. Carbon Capital II, Inc*., 2009 U.S. Dist. LEXIS 57452, at *31 (S.D.N.Y. July 7, 2009).

Also meritless is Defendants' argument that the guaranty and the Pledge remain valid even if the 2020 Notes are not. As discussed in Plaintiffs' opposition to Defendants' summary judgment motion (pp. 17-19), guarantees and pledges purporting to secure illegal obligations are invalid and unenforceable under New York law. None of the cases cited by Defendants is to the contrary.[31] Defendants summarily dismiss the court's survey of New York law in *In re Republic Airways Holding Inc.* with the comment that "it is far from clear that the court's view of public policy was correct."[32] However, the court's conclusion—that a guarantor's defense based on

[30] Defendants cite only to the trial court's decision in *IRB-Brasil Resseguros* case in their discussion of the status of the PDVSA Petróleo guaranty under the UCC (Defs. Opp. Mem. at 24-25), but the *IRB-Brasil* opinion contains no discussion of the interaction between NYGOL 5-1401 and UCC 8-110. Nor does it discuss the status of the underlying obligations as "securities" (or whether they satisfied the UCC's formal definition of a "security"), the legality of the underling "securities," or the significance (if any) of any distinction between the securities and guaranty at issue in that litigation. These issues were simply not raised, and neither the Appellate Division nor the Court of Appeals revisited the trial court's assumption that no statutory exceptions to NYGOL 5-1401 applied.

[31] In *Ursa Minor Ltd. v. Aon Fin. Prods., Inc*., 2000 WL 1010278, at *6 (S.D.N.Y. July 21, 2000), *aff'd*, 7 F. Appx. 129 (2d Cir. 2001), the one new case cited on this issue in Defendants' opposition memorandum (p. 25), the guarantor objected to an allegedly unauthorized transfer of the obligation underlying its guarantee, but "neither party contend[ed] that the [underlying] Loan Agreement was invalid or unenforceable." The cases cited by Defendants in their prior briefing are similarly inapposite (Defs. Mem. at 36-37), as none involved allegations that the underlying obligation was invalid due to illegality or violation of public policy.

[32] Defendants cite *In re 136 Field Point Circle Holding Co.,* LLC, 644 F. Appx. 10 (2d Cir. 2016), as support for this comment, but that summary ruling is unpublished and non-precedential, and neither that case nor any of the decisions on which it relies involved underlying obligations that were invalid due to illegality or violation of public

invalidity of the underlying obligation due to illegality or violation of public policy can never be waived—was entirely consistent with the "general rule" that "New York courts will not enforce illegal contracts." *Schlessinger v. Valspar Corp*., 686 F.3d 81, 85 (2d Cir. 2012).

Finally, there is no merit to Defendants' argument (pp. 22-23) that New York law should govern apparent authority, ratification, and the effect of an alleged *ultra vires* act even if Venezuelan law governs validity as required by UCC 8-110. Given that New York law requires the application of Venezuelan law to the issue of validity on the stated basis that "[t]he question whether an issuer can assert the defense of invalidity may implicate significant policies of the issuer's jurisdiction of incorporation" (UCC 8-110, Official Comment 2), this rule and its underlying rationale would be completely undermined if a security that is invalid under the law of the issuer's jurisdiction could be enforced on an apparent authority, ratification, estoppel, or other New York law theory.[33] And even if PDVSA was incorporated in New York, section 203(a) of the N.Y. Business Corporation Law would be inapplicable because it only bars the application of an *ultra vires* defense to "otherwise lawful" acts and because another statutory provision, UCC 8-202, provides specific rules for when an invalid security can be enforced. Moreover, the New York rule that "[i]llegal contracts are not generally enforceable" is "a rule that applies as well to ratification," *New York State Med. Transporters Ass'n, Inc. v. Perales*, 77 N.Y.2d 126, 131-32 (1990), and Defendants have cited no case in which apparent authority rendered enforceable a contract for which New York law (UCC 8-110 or otherwise) required the

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policy. *See In re Republic Airways Holdings, Inc.*, 598 B.R. 118 (Bankr. S.D.N.Y. 2019) at 147-48 (surveying cases).

[33] Indeed, with respect to questions of validity, UCC 8-110 displaces any New York common law theory that would produce a contrary result. *See McNally Wellman Co. v. N.Y. State Elec. & Gas Corp*., 63 F.3d 1188, 1196 (2d Cir. 1995) ("New York courts have held specifically that the UCC displaces the common law when the particular section at issue produces a result that would be contrary to that obtained under ordinary contract law."). Defendants' citation to *Highland Capital Mgmt., L.P. v. Schneider*, 533 F. Supp. 2d 345, 356 (S.D.N.Y. 2008) (Defs. Opp. Mem. at 23) is inapposite, as that case merely holds that Article 3 of the UCC does "not substantively address principles of agency," which is an entirely different issue.

application of foreign law to the question of validity, let alone a contract that was illegal and void *ab initio* under the applicable foreign law.[34] In any event, Plaintiffs are entitled to summary judgment on these defenses for the reasons set forth in prior briefing.[35]

III. THE TRANSACTION DOCUMENTS ARE INVALID AND UNENFORCEABLE UNDER APPLICABLE VENEZUELAN LAW

A. Defendants' Position is Contrary to the Overwhelming Weight of Venezuelan Legal Authority and Misrepresents the *Andrés Velásquez* Decision

Consistent with the Republic's views, which are entitled to substantial deference,[36] three prominent Venezuelan public law scholars in addition to Professor Brewer—Professor Carmona (at the time of the Exchange Offer), Professor Duque, and Professor Badell (on whom [redacted] purported to rely)—have specifically addressed the 2020 Notes Transaction and expressed the view that the Transaction Documents are national public interest contracts for which the Venezuelan Constitution required prior National Assembly authorization.[37] Numerous Venezuelan scholars, including Professor Brewer in his prior academic writings and Professor Badell prior to his recent article in the *Journal of Public Law*, have expressed the view that

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[34] *See Lehman Bros. v. Tutelar CIA Financiera*, 1997 WL 403463 (S.D.N.Y. July 17, 1997) (margin account guarantee) (Defs. Opp. Mem. at 22); *Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank*, 98 N.Y.2d 238 (2002) (forward currency exchange transactions) (Defs. Mem. at 26). Although the parties have cited cases in which the court considered actual authority under foreign law and apparent authority under New York law (*see, e.g. Themis Capital, LLC v. Democratic Rep. of Congo*, 881 F.Supp.2d 508, 520-22 (S.D.N.Y. 2012)), none involved contracts or securities for which the broader issue of "validity" was governed by foreign law. *Cf. Pegasus Aviation, Inc. v. Aerolineas Austral Chile, S.A.*, 2012 WL 967301 at *5-9 (S.D.N.Y. Mar. 20, 2012) (holding that Argentine law should govern validity despite a New York choice-of-law provision and then applying Argentine law to both actual and apparent authority). The old doctrine of "estoppel by recitals" is also unavailing because the 2020 Notes do not contain (nor does the Indenture contain) recitals of compliance with the Venezuelan Constitution (or any other legal requirements) and, under New York law, the doctrine does not apply where, as here, the violation of law resulted in a lack of authority to issue the securities. *Craig v. Town of Andes*, 93 N.Y. 405, 405 (1883); *Cagwin v. Town of Hancock*, 94 N.Y. 532, 542 (1881).

[35] Pls. Mem. at 39-42; Pls. Opp. Mem. at 40-43. In light of the National Assembly's contemporaneous, public, and widely reported opposition to the Exchange Offer and withholding of authorization, Defendants' rote claim that the transaction was neither "novel" nor "extraordinary" (Defs. Opp. Mem. 41-42) does nothing to alter this conclusion.

[36] *See* Pls. Mem. at 18-21.

[37] Brewer Report at ¶¶ 77-81 (citing JUAN CRISTÓBAL CARMONA BORJAS, 2 ACTIVITY AND PUBLIC FINANCE IN VENEZUELA 425-29, 431–32, 436-37, 440 (2016), Bliss Reply Decl. Ex. 8; Brewer Rebuttal Report at ¶ 63 n. 80 (citing DUQUE CORREDOR, OPINION ON THE UNCONSITTUTIONALITY OF THE 2020 PDVSA NOTES, at 2), Bliss Reply Decl. Ex. 9 ; Brewer Declaration ¶ 14 (citing Rafael Badell Madrid, *Public Interest Contracts*, in 159-160 REVISTA DE DERECHO PÚBLICO, Brewer Opp. Decl. Ex. 1 at 14).

contracts entered into by state-owned entities can qualify as national public interest contracts, while only one scholar has ever expressed the contrary view.[38]

Regarding the *Andrés Velásquez* decision, this Court can readily see that: (i) the case came before the Constitutional Chamber on "an appeal for annulment, under grounds of unconstitutionality, of the last section of article 80 of the ORGANIC LAW GOVERNING THE FINANCIAL ADMINISTRATION OF THE PUBLIC SECTOR . . ."[39] (*not* an appeal requesting an interpretation of the concept of national public interest contracts in the Venezuelan Constitution); (ii) as a "preliminary matter," the Chamber "examined" (among other things) "whether, *as maintained by the plaintiffs, without contradiction by the Official of the Attorney General of the Republic*, when carrying out public credit transactions the National Executive can enter into contracts susceptible of being included in the concept of national public interest contract[s] . . ."[40] (thus, whether public credit transactions could qualify as national public interest contracts *was not even in dispute*); (iii) having examined that undisputed question, the Chamber stated that "contracts concluded by the Republic through the competent organs of the National Executive to do so and whose purpose is determinant or essential to accomplishing the purposes and objectives of the Venezuelan State would be *included* within the species of national public interest contracts . . . ."[41] (*not* that contracts entered into by state-owned entities (which were not even addressed) could *not be included* in that species of contract); (iv) while invoking its power under Article 336 of the Constitution to "declare the total or partial nullity of national laws and other acts with the rank of law of the National Assembly conflict with this Constitution," the Constitutional Chamber did not invoke its exclusive power under Article 335

[38] *See* Pls. Opp. Mem., Appendix 1.
[39] Supreme Tribunal of Justice No. 2241, *Andrés Velásquez and others, the partial anullment of Article 80 of the Organic Law of the Financial Administration of the Public Sector*, Sept. 24, 2002, at 1, [redacted] Ex. 7.
[40] *Id.* at 15 (emphasis added).
[41] *Id.* at 17 (emphasis added).

to establish "interpretations . . . of constitutional rules and principles [that] are binding on the other [Chambers] of the Supreme [Tribunal] of Justice and other courts of the Republic."[42]

This Court can also readily see that (i) although the EDELCA agreement at issue in the subsequent decision was entered into in relation to a separate agreement entered into by the Republic with the Federal Republic of Brazil, *the Republic itself was not a party to the EDELCA agreement*, which was nevertheless characterized as a national public interest contract[43]; (ii) although Defendants assert that the BANDAGRO promissory notes at issue in the subsequent *Attorney General of the Republic II* decision were "allegedly guaranteed by the Republic," *the Republic itself was not a party to the notes*,[44] which were considered to be national public interest contracts simply on the basis that they were "promissory notes" issued by BANDARGO[45]; and (iii) subsequent to the *Andrés Velásquez* decision (and prior to 2016), the National Assembly passed numerous resolutions authorizing joint venture agreements entered into by PDVSA subsidiaries (and not the Republic itself) as national public interest contracts, *expressly referencing Article 150*.[46]

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[42] 1999 VENEZUELAN CONSTITUTION art. 335 Pls. Ex. 4. The Constitutional Chamber's reference to being the "maximum and ultimate interpreter of the Constitution" is not a reference to this exclusive power. As set forth in the prior sentence of Article 335, the "Supreme Tribunal of Justice" as a whole (*i.e.*, all of its Chambers, not just the Constitutional Chamber) is the "maximum and ultimate interpreter of the Constitution."

[43] *See* Brewer Report at ¶¶ 112–113 (citing Supreme Tribunal of Justice No. 953, *EDELCA*, Apr. 29, 2003, 11–12, [redacted] Ex. 16); Brewer Rebuttal Report at ¶ 9 (citing Supreme Tribunal of Justice No. 953, *EDELCA*, Apr. 29, 2003, 14–15, [redacted] Ex. 16).

[44] The promissory notes (the authenticity of which had been questioned) were purportedly signed by BANDAGRO's General Manager, Legal Advisor, and "Intervenor" (which is someone appointed pursuant to the Venezuelan banking law to supervise the finances of a failing bank). The "Guarantee Collateral" section, which was purportedly signed by the Intervenor in his own capacity as Intervenor, a position within the corporation (not on behalf of the Republic), stated: "I confirm that all engagement of BANDAGRO have the backing of the National Government of the Republic of Venezuela according to the letter of Minister of Hacienda number 733 dated November 5, 1981." That purported "guarantee" letter is not part of the record in this case. Brewer Reply Decl. at n. 36; [redacted], Ex. 19. All references to "Brewer Reply Decl." refer to the *Reply Declaration of Allan R. Brewer-Carías in Support of Plaintiffs' Summary Judgment Motion*, dated July 15, 2020.

[45] Brewer Rebuttal Report at ¶¶ 11–12, 56 (citing Supreme Tribunal of Justice No. 1460, *Attorney General of the Republic II*, July 12, 2007, [redacted] Ex. 19).

[46] Brewer Reply Decl. at ¶ 11; Brewer Opp. Decl. at ¶ 17. Although, as declared in the National Assembly's October 2019 Resolution, "the 2020 Bond indenture violated Article 150 of the Constitution, since it concerned a national public interest contract, executed with foreign companies, which was not authorized by the National

B. The Transaction Documents are National Public Interest Contracts Under Any Definition

Defendants argue that "[t]he PDVSA Parties' proposed definition of contracts of national interest, which turns on the argument that CITGO is Venezuela's foreign 'crown jewel,' is contradicted by the previous writings of their expert, who opined prior to this litigation that the economic significance of a transaction is an 'inadmissible' and unworkable criterion for defining contract[s] of national interest."[47] It is hard to see how Defendants think it helps their case that, under the non-qualitative definition espoused by Professor Brewer and others, the Transaction Documents are definitively national public interest contracts. Defendants also contend that Plaintiffs' position is at odds with the National Assembly's May 2016 Resolution, which refers to national public interest contracts as contracts entered into by the "National Executive" (as opposed to state-owned entities).[48] However, as Professor Brewer explains, and as the text of the resolution makes clear, that specific wording focused on national public interest contracts entered into by the "National Executive" because the resolution "was adopted in reaction to a specific provision of Decree No. 2323 of May 13, 2016, whereby Maduro declared a state of exception and economic emergency and 'authorized' himself [the National Executive] (unconstitutionally) to 'approve and enter into public interest contracts . . . without being subject to authorizations or approvals from the other branches of government.'"[49]

As explained in Professor Brewer's reports and prior briefing, the Transaction Documents are national public interest contracts under any potentially applicable qualitative

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Assembly," the PDVSA Ad Hoc Board remains open to seeking an orderly and consensual settlement with respect to the 2020 Notes, consistent with the Guaidó Administration's commitment to an amicable and orderly renegotiation of all legacy claims against Venezuela, as discussed in the Republic's Letter.

[47] Defs. Opp. Mem. at 32.

[48] Venezuelan National Assembly, *Resolution on the Respect of the Inherent and Nontransferable Powers of the National Assembly on Contracts of Public Interest Signed by and Between the National Executive and Foreign State or Official Entities or with Companies Not Domiciled in Venezuela* (May 26, 2016), Pls. Ex. 13

[49] *Id.*; Brewer Rebuttal Report at ¶¶ 62-64.

criteria, including the qualitative criteria from the *Andrés Velásquez* decision that Defendants have erroneously claimed are "binding" (but now also characterize as merely "authoritative"). In short, the Transaction Documents relate to PDVSA's oil industry activities in Venezuela, which are matters of national public interest pursuant to Articles 302 and 303 of the Venezuelan Constitution, and are integral components of a single transaction involving the purported pledge of a controlling interest in CITGO—Venezuela's most important asset abroad.

C. There Is No "Multi-Decade Practice" of Securing PDVSA Debt Transactions With Purported Pledges of Assets Such as CITGO

When describing the alleged "multi-decade practice" of "not seeking or obtaining National Assembly authorization" of debt transactions, Defendants speak collectively of "PDVSA and its subsidiaries, including CITGO Holding and CITGO Petroleum," and transactions involving "secured and unsecured debt" so as to create a false impression of comparability. Unlike PDVSA debt transactions, however, the debt transactions of subsidiaries such as CITGO Holding and CITGO Petroleum cannot qualify as national public interest contracts subject to National Assembly authorization for the simple reason that such foreign subsidiaries are not within the National Public Administration of the Republic.[50] And none of PDVSA's prior debt transactions were purportedly secured by a pledge of CITGO Shares[51] or any comparable asset of national interest. The only remotely comparable PDVSA transaction is PDVSA's transaction with Rosneft in which the remaining 49% of CITGO Shares were purportedly pledged without the National Assembly's knowledge, and that transaction has also

[50] *See* Brewer Report at § VI.A (explaining what entities fall within the National Public Administration).
[51] *See* Asamblea Nacional, *Regular Session of Tuesday, September 27, 2016. Discussions on the effects of PDVSA Bond Redemption* (translated), Pls. Ex. 14, at 22.

been declared invalid by the National Assembly.[52]

D. Plaintiffs Have Addressed the Arguments that Supposedly "Undermine Their Approach"

As Professor Brewer has explained,[53] the Organic Law on the Financial Administration of the Public Sector's exemption of PDVSA from the requirement of National Assembly authorization for public debt transactions under Article 312 of the Venezuelan Constitution does not exempt PDVSA debt transactions from the *separate and independent* requirement of authorization under Article 150 for contracts with foreign/non-domiciled counterparties. As Professor Brewer has also explained,[54] Venezuela's "principle of legitimate expectations" and "presumption of legality" cannot be invoked to enforce a contract entered into in violation of legal requirements. Finally, to address another of Defendants' arguments barely worth addressing (Defs. Opp. Mem at 33-34), there is an obvious and fundamental difference between the risk inherent in owning any asset—that unsecured creditors could try to reach it—and pledging an asset as collateral security.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motion for summary judgment be granted in its entirety.

[*Remainder of page intentionally left blank*]

[52] Asamblea Nacional, *Resolution Declaring the Invalidity and Nullity of Contracts by which Petróleos de Venezuela S.A. and its Subsidiary Companies granted 49.9% of the shares of Citgo Holding, Inc. in Favor of Rosneft Trading S.A.* (Mar. 4, 2020), Pls. Ex. 72.
[53] Brewer Report at ¶ 107; Brewer Rebuttal Report at ¶ 91; Brewer Opp. Decl. at ¶ 22.
[54] Brewer Rebuttal Report at ¶ 6, 104-05, 108; Brewer Opp. Decl. at ¶¶ 34-35.

Dated: July 15, 2020

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