UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

PDVSA U.S. LITIGATION TRUST,

Plaintiff,

v.

LUKOIL PAN AMERICAS LLC; LUKOIL PETROLEUM LTD.; COLONIAL OIL INDUSTRIES, INC.; COLONIAL GROUP, INC.; GLENCORE LTD.; GLENCORE INTERNATIONAL A.G.; GLENCORE ENERGY UK LTD.; MASEFIELD A.G.; TRAFIGURA A.G.; TRAFIGURA TRADING LLC; TRAFIGURA BEHEER B.V.; VITOL ENERGY (BERMUDA) LTD.; VITOL S.A.; VITOL, INC.; FRANCISCO MORILLO; LEONARDO BAQUERO; DANIEL LUTZ; LUIS LIENDO; JOHN RYAN; MARIA FERNANDA RODRIGUEZ; HELSINGE HOLDINGS, LLC; HELSINGE, INC.; HELSINGE LTD., SAINT-HÉLIER; WALTROP CONSULTANTS, C.A.; GODELHEIM, INC.; HORNBERG INC.; SOCIETE DOBERAN, S.A.; SOCIETE HEDISSON, S.A.; SOCIETE HELLIN, S.A.; GLENCORE DE VENEZUELA, C.A.; JEHU HOLDING INC.; ANDREW SUMMERS; MAXIMILIANO POVEDA; JOSE LAROCCA; LUIS ALVAREZ; GUSTAVO GABALDON; SERGIO DE LA VEGA; ANTONIO MAARRAOUI; CAMPO ELIAS PAEZ; PAUL ROSADO; BAC FLORIDA BANK; EFG INTERNATIONAL A.G.; BLUE BANK INTERNATIONAL N.V.,

Defendants.

Case No. 1:18-CV-20818 (DPG)

PLAINTIFF'S OBJECTIONS TO THE REPORT AND RECOMMENDATION CONCERNING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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STANDARD OF REVIEW

Because Defendants' motion is a dispositive one, the Court must conduct a *de novo* review of both the findings of fact and conclusions of law contained in the Magistrate Judge's report and recommendation made pursuant to 28 U.S.C. § 636. *Jeffrey S. by Ernest S. v. State Bd. of Educ. of State of Ga.*, 896 F.2d 507, 512-13 (11th Cir. 1990). This includes a hearing to "receive further evidence." 28 U.S.C. § 636(b)(1).[1] As the Eleventh Circuit has recognized, § 636 "states expressly … that the district judge in making the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objection has been made by a party" (*Jeffrey S. by Ernest S.*, 896 F.2d at 512-13); "independent consideration of factual issues based on the record" is required. *Id*. "The *de novo* review requirement is essential to the constitutionality of Section 636." *Id*.

Indeed, even if no objections to the findings or recommendations have been filed, the district court may undertake "further review …, *sua sponte*." *Thomas v. Arn*, 474 U.S. 140, 154 (1985).

ARGUMENT

I. PLAINTIFF HAS ARTICLE III STANDING.

A. The Trust Agreement is Authentic and Admissible.

There is no evidence – none – that the signatures on the Trust Agreement are forgeries, or that the Trust Agreement is anything other than what it purports to be. None of the Defendants offered a single fact witness or a single expert witness challenging the authenticity of the Agreement or the signatures thereon. The Defendants had the burden of coming forward with evidence that the signatures they challenged were forgeries. *Six v. Generations Fed. Credit Union*,

[1] In addition, this Court may consider any arguments whether or not raised before the Magistrate Judge. *Stephens v. Tolbert*, 471 F.3d 1173, 1176-77 (11th Cir. 2006).

891, F.3d 508, 519 (4th Cir. 2018); *Columbia First Bank, FSB v. U.S.*, 58 Fed. Cl. 333, 337 (2003) (opponents of evidence must provide a "legally sufficient reason" for why the document should not be considered authenticated under FRE 901 or 902 and admitted). However, regardless of who had what burden, the record makes clear that the Trust Agreement[2] is admissible and Plaintiff has standing for six independently sufficient reasons. The Magistrate Judge's recommendation to the contrary is erroneous.

Under Federal Rule of Evidence 901 the burden to authenticate is "light" and a variety of circumstances, including circumstantial evidence, is sufficient to authenticate a document. *In re Int'l Management Assoc., LLC*, 781 F.3d 1262, 1267 (11th Cir. 2015); *U.S. v. Singleton*, 455 F. App'x 914, 916 (11th Cir. 2012); *U.S. v. Elkins*, 885 F.2nd 775,785 (11th Cir. 1989).

1. The Authenticity of the Trust Agreement was Supported by the Testimony of Plaintiff's Counsel.

The Magistrate Judge held that George Carpinello was not "entitled to testify in this proceeding because of his role as lead counsel in this litigation." (Dkt.562, at 78:21-24). That finding was in error, and Mr. Carpinello's testimony would have confirmed the authenticity of the Trust Agreement. [3]

Mr. Carpinello is not lead counsel, and did not participate in examining witnesses at the standing hearing before the Magistrate Judge. More importantly, the Eleventh Circuit has long held that the advocate witness rule raised by Defendants (Dkt. 562, at 71:8) does not apply in a bench trial – such as the one at issue here – "a judge was the trier of fact, thus, there is no danger that the trier of fact could not distinguish between testimony and advocacy." *Duncan v. Poythress*,

[2] The Trust Agreement was marked PX 1 at the standing hearing and filed as Dkt. 583-1. For ease of reference, plaintiff exhibits will be referenced as "PX".

[3] When Mr. Carpinello was not allowed to testify, a proffer of his testimony was made at the standing hearing. Dkt. 562, at 73:20-78:24.

777 F.2d 1508, 1515 n.21 (11th Cir. 1985); *St. Claire Townhome Ass'n, Inc. v. D. R. Horton, Inc.*, 2008 WL 11336808, at *4 (N.D. Ga. Apr. 23, 2008). Moreover, the advocate witness rule "generally does not apply to pretrial proceedings." *Bauman by and Through Sumner v. Publix Super Markets, Inc.*, 2015 WL 13658206, at *2 (N.D. Ga. Sept. 3, 2015).

Indeed, federal courts routinely allow a party's attorney to provide testimony concerning the provenance of a document in order to establish authenticity. *Potts NH RE, LLC v. Northgate Classics, LLC*, 2012 WL 1964554, at *1 n.1 (D.N.H. May 10, 2012), *report and recommendation adopted*, 2012 WL 1969051 (D.N.H. May 30, 2012); *Star Creations Inv., Co. Ltd. v. Alan Amron Development, Inc.*, 1995 WL 495126, at *2 (E.D. Pa. Aug. 18, 1995) ("This Court credits the testimony of counsel for plaintiff that these documents were provided as authentic business records."); *Shepherd v. Am. Broad. Companies, Inc.*, 62 F.3d 1469, 1473 (D.C. Cir. 1995) (Defendant's attorneys testified as to authenticity of memorandum).

By contrast, the Magistrate Judge permitted Defendants to take the deposition of Mr. Boies (who is lead counsel) as a fact witness. Mr. Boies's testimony was admitted in evidence by the Magistrate Judge as PX 50, and he testified to the authenticity of the Trust Agreement. (*See, e.g.* Dkt. 533-40, 11:20-25, 17:5-13, 37:12-38:7). Even though Mr. Carpinello had greater personal knowledge concerning the negotiation and execution of the Trust Agreement, Mr. Carpinello's testimony concerning those issues was precluded.

2. The Trust Agreement Was Acknowledged By Its Signatories.

Under FRE 902(8) acknowledged documents are "self-authenticating; they require no extrinsic evidence of authenticity to be admitted." Fed. R. Evid. 902. The Trust Agreement was indisputably acknowledged by Trustees Andrews and Swyer. (Dkt. 638, at 12, n.7). This alone was sufficient for the Trust to be admitted since there is no Federal Rule of Evidence requirement that all signatures be acknowledged for a document to be admitted.

Moreover, acknowledgments were offered from Oil Minister Martinez and Attorney General Muñoz.[4] PX 64 (Dkt. 583-49), PX 1B (Dkt. 583-3). The Magistrate Judge declined to consider Minister Martinez's acknowledgement (PX 64, Dkt. 583-49) because the Magistrate Judge considered it to be "too late". However, the acknowledgement was timely listed on Defendants' exhibit list which was exchanged, as directed by the Magistrate Judge, on July 31, 2018. The parties agreed that any exhibit that was listed but was not in the other party's possession would be produced by the next evening. Minister Martinez's acknowledgement, however, was not received by Plaintiff's counsel in the U.S. until 5:33p.m. EDT on August 2, at which time, it was immediately furnished to Defendants.

There was no dispute that the acknowledgement was furnished to Defendants as soon as it was received. There was also no prejudice whatsoever to Defendants as a result of the one-day delay between the exchange of other exhibits and providing a copy of the Minister's acknowledgment (which had been timely listed). It was error for the Magistrate Judge to exclude Minister Martinez's acknowledgement. Moreover, since this Court must consider the evidence *de novo*, there would be no basis for this Court now to ignore an acknowledgement Defendants have had for four months.

The Magistrate Judge also refused to consider Attorney General Muñoz's acknowledgement which was indisputably timely; it was produced to Defendants more than two weeks before exhibits were supposed to be identified. The Magistrate Judge refused to consider the acknowledgment because she said Mr. Muñoz's cancellation of a requested deposition made it "unfair to admit this last minute, untested acknowledgment." (Dkt. 638, at 12). However, Mr.

[4] Plaintiff incorporates by reference its objections to the exclusion of PX 63 and the Rojas testimony (Dkt. 600) and PX 64 (Dkt. 601) filed on August 22, 2018 and the reply (Dkt. 630) filed on Sept. 19, 2018.

Muñoz's acknowledgment was not "last minute"; it was furnished more than two weeks before the time set by the Magistrate Judge. Similarly, there was no prejudice, particularly with respect to the acknowledgement, from the absence of a deposition of Attorney General Muñoz:

(a) The Attorney General was available for, and Plaintiff proposed, depositions pursuant to the Hague Convention or pursuant to FRCP 31 on written questions. Defendants were even offered, and declined, a video deposition of the Attorney General from Venezuela.

(b) Moreover, the point of FRE 902(8)[5] is that acknowledgments are "self-authenticating"[6].

(c) Defendants have demonstrated no prejudice, and there was no prejudice from their lack of a deposition of the Attorney General outside Venezuela.

3. PDVSA Ratified the Trust Agreement.

Throughout this proceeding, highly public in Venezuela, there has been no suggestion from PDVSA, any of the signatories to the Agreement, or any official of the recognized government of Venezuela that the Trust Agreement is not authentic or that any of the signatures on it are forgeries[7].

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[5] In addition to being admissible under FRE 902(8), Mr. Muñoz's acknowledgement was also accompanied by an apostille, which made the acknowledgment self-authenticating and admissible under Fed.R.Civ.P. 44(a)(2) and Fed.R.Evid. 902(3).

[6] FRE 902 expressly obviates any need for the parties to take testimony to demonstrate authenticity absent some evidence that the acknowledgements are other than what they purport to be. *U.S. v. Carriger*, 592 F.2d 312, 316-17 (6th Cir. 1979); *U.S. v. Travelers Cas. & Sur. Co*. of Am., 2014 WL 12633603, at * 8 (M.D. Fla. Nov. 3, 2014); *Coward v. JP Morgan Chase Bank*, 2013 WL 618163, at *4 (E.D. Cal. Feb. 19, 2013), *report and recommendation adopted as modified sub nom., Coward v. J.P. Morgan Chase*, 2013 WL 5274364 (E.D. Cal. Sept. 17, 2013); *Bank of the Ozarks v. Kingsland Hospitality, LLC*, 2012 WL 5928642 (S.D. Ga. Oct. 5, 2012).

[7] Under New York law, even invalid signatures only make an agreement voidable, not void, and the agreement can be ratified by the parties. *Beutel v. Beutel*, 434 N.E.2d 249 (N.Y. 1982) (claims

Moreover, when Plaintiff served its witness list on July 31, 2018, Plaintiff included as a witness a PDVSA representative and at 9:17am the next day Plaintiff identified that witness as PDVSA Vice-President Marcos Rojas. (Mr. Rojas was not identified by name and the title the previous evening because Plaintiff had not been able to confirm exactly who the PDVSA representative would be at that time.) Defendants obviously suffered no prejudice whatsoever by learning Mr. Rojas' name first thing on the morning of August 1 rather than the prior evening. Nevertheless, the Magistrate Judge declined to hear his testimony (Dkt. 562, 7:23-9:11) because he was "disclosed at the last minute" (Dkt. 561 at 7-8).

The Magistrate Judge also declined to consider PX 63 (Dkt. 583-48) (the documents from PDVSA, acknowledged by the President of PDVSA, who is also the current Oil Minister, appointing Mr. Rojas as a successor Trustee of the Trust and further demonstrating PDVSA's ratification of the Trust). Without further explanation, the Magistrate Judge said PX 63 "came very late" (even though it was indisputably timely under the Magistrate Judge's Order)[8] and that the exhibit "goes to the testimony. I am excluding both him – his testimony and his appointment" (Dkt. 562, at 100:24-101:09), even though the appointment was acknowledged and hence "self-authenticating" under FRE 902.

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of duress in signing agreement not a defense because party ratified the agreement by her actions); *BAC Home Loans Servicing, LP v. Uvino*, 64 N.Y.S.3d 377, 381 (N.Y. App. Div. 2017); *Banque National de Paris v. 1567 Broadway Ownership Assoc*., 625 N.Y.S.2d 152, 154 (N.Y. App. Div. 1995); *Stern v. President & Directors of Manhattan Co*., 235 N.Y.S. 634, 635-36 (App. Term 1929) (forgery can be ratified by silence); *Springer v. U.S. Bank Nat'l Assoc*., 2015 WL 9462083, at *6 (S.D.N.Y., Dec. 23, 2015) (any alleged non-compliance with New York trust law as it relates to an assignment is voidable, not void and may be ratified by the parties); *Nirvana Int'l, Inc. v. ADT Sec. Servs., Inc*., 881 F.Supp.2d 556, 562 (S.D.N.Y. 2012), *aff'd,* 525 F. App'x 12 (2d Cir. 2013). PDVSA did so by appointing Mr. Rojas as successor trustee to Mr. Arellano.

[8] PX 63 (Dkt. 583-48) was timely listed on July 31, 2018 on Plaintiff's exhibit list, and the next day, August 1, when the parties exchanged exhibits, Plaintiff furnished Defendants with a copy of PX 63. (*id*.)

Again, in any event since the Court has the obligation to make a *de novo* determination, including the consideration of additional evidence, there is now no plausible basis for failing to consider PX 63 (Dkt. 583-48), of which Defendants have been aware for more than three months, and the testimony of Mr. Rojas.

4. The Authenticity of the Trust Agreement's Signatures Was Confirmed by a Handwriting Expert.

Though it was Defendant's burden, as discussed above, to come forward with evidence that the Trust Agreement's signatures were forgeries, Defendants offered no evidence of this at all. Despite the enormous efforts by several law firms and dozens of lawyers, Defendants were not able to find a single expert witness willing to testify subject to cross-examination that any of the Trust Agreement's signatures were not authentic. By contrast, in order to further confirm the authenticity of the Trust Agreement's signatures, Plaintiff offered the testimony of Ms. Ruth Brayer.

There is no doubt that Ms. Brayer is a qualified expert. There is no professional license for handwriting experts and they can be certified by "any of the twenty recognized document examination trade organizations in the United States." *Dracz v. Am. Gen. Life Ins. Co.*, 426 F. Supp. 2d 1373, 1378 (M.D. Ga. 2006) *aff'd*, 201 F. App'x 681 (11th Cir. 2006). Ms. Brayer is certified by the National Association of Document Examiners and the National Bureau of Document Examiners of New York; is professionally affiliated with the International Association of Document Examiners; has trained for hundreds of hours over a 30-year career as a document examiner; has published a document examination book and articles; and has been accepted as a qualified expert over 40 times in state, federal, and international courts and arbitration forums. *See, e.g., U.S. v. Dale*, 618 F. App'x 494, 497 (11th Cir. 2015); *U.S. v. Paul*, 175 F.3d 906, 909–10 & n. 2 (11th Cir.1999).

After accepting Ms. Brayer's qualifications as an expert at the evidentiary hearing (Dkt. 561, at 149:21-22), the Magistrate Judge refused to consider Ms. Brayer's testimony because of the "unreliability of her methodology" (Dkt. 638 at 17). Ms. Brayer's methodology followed the standards of her industry contained in the Scientific Working Group for Forensic Document Examination. As Ms. Brayer explained in her testimony and report, she analyzed the shape, spacing, movement and the overall pictorial characteristics of the signatures, she charted side by side comparisons of the signatures and testified about aspects of the signatures, such as the distinct letter P of Pedroza and the narrow overlapping of letters in Arellano. She evaluated and compared the "pattern and the repetitions" and the "shapes and movements" of the signatures as well as the spacing, positioning, natural variation and relationship of the aspects of the signatures. Dkt. 561, at 154-157, 160-162, 169 and PX 1 (Dkt. 583-1), PX 1B (Dkt. 583-3), PX 37A (Dkt. 583-9), PX 37G (Dkt. 583-11), PX 37H (Dkt. 583-12) and 3 PX 8A (Dkt. 583-18) (As to Muñoz signatures); Dkt. 561, at 164-166 and PX 1 (Dkt. 583-1), PX 37A (Dkt. 583-9), PX 37I (Dkt. 583-13) and PX 37J (Dkt. 583-14) (As to Martinez signatures); Dkt. 561, at 166-170 and PX 1 Dkt. 583-1), PX 37A (Dkt. 583-9), PX 37K-M (Dkt. 583-15-17), PX 38B-J (Dkt. 583-19-27) (As to Arellano signatures). PX 1, 1B, 37G-M and 38A-J were improperly excluded and should have been admitted. Her methodology is accepted in the industry and is the same methodology widely accepted by the courts, including the Eleventh Circuit. *U.S. v. Dale*, 618 F. App'x at 497; *U.S. v. Paul*, 175 F.3d at 909-10 & n.2.

With respect to the signatures of Minister Martinez and Attorney General Muñoz, the only thing the Magistrate Judge found deficient in Ms. Brayer's methodology was Ms. Brayer's reliance on handwriting samples of Ministers Martinez and Attorney General Muñoz from an official Venezuelan government publications. The Magistrate Judge criticized Ms. Brayer for doing so

because Ms. Brayer "had no knowledge" of the publication. (Dkt. 638, at 17 and n.12). With respect, such criticism misses the point.[9]

First, there is no dispute that the exemplars used by Ms. Brayer actually came from the *Gaceta Oficial de la República Bolivariana de Venezuela* (the *Official Gazette of the Bolivarian Republic of Venezuela*) (hereinafter, the "Gaceta"). As a handwriting expert, Ms. Brayer was only asked to opine on whether the signatures on the Trust Agreement were made by the same persons who signed the exemplar documents, including those from the Gaceta. Ms. Brayer did not need to have knowledge about the purpose or role of the Gaceta. (Nor does it matter from whom Ms. Brayer obtained the Gaceta exemplars.).

Second, the admissibility of the Gaceta itself is beyond doubt. The Magistrate Judge herself took judicial notice of it at the hearing, (Dkt. 562, at 44:8-9) and allowed Defendants to admit 24 exhibits from the Gaceta and rely on each for the truth of what was stated therein. Defs' Exhs. 7-10, 12-13, 15, 17, 21, 23, 29, 30, 35, 40, 42-43, 47A, 48-51, 67, 71 and 78. *See, e.g.*, *Reining v. U.S.*, 167 F.2d 362, 364 (5th Cir. 1948) (documents that are admitted for other purposes are authentic for exemplars contained in them). Moreover, it is undisputed that the Gaceta is an official publication of the Government of Venezuela, which is used to publicly promulgate laws, regulations, agreements, circulars, orders, and other acts taken by the Government, so that they are observed and properly applied within the national territory. Antonio Ramírez & Luis Bergolla, *An Introduction to Venezuelan Governmental Institutions and Primary Legal Sources*, GlobaLex (Oct. 2015), http://www.nyulawglobal.org/globalex/ Venezuela1.html ("The quintessential source of Venezuelan legislation (in the broadest sense of the word) is the Official Gazette published

[9] It is also factually incorrect as Ms. Brayer testified that she knew the Gaceta was an official publication of the Government of Venezuela. Dkt. 561, at 153.

since 1872.") (emphasis original).

Under FRE 902(5), the exemplars from the Gaceta are self-authenticating because they are drawn from a "publication purporting to be issued by a public authority." *See also* FRE 902(5) cmt. ("Rule 44(a) of the Rules of civil Procedure has been to the same effect."); FRE P. 44(a)(2) (noting the admissibility of an official publication of a foreign record); 31 Fed. Prac. & Proc. Evid. § 7139(5) (1st ed.) ("Rule 902(5) applies to both domestic or foreign official publications since it is not expressly limited to one or the other, unlike subdivisions (1), (2) and (3)"). *See also U.S. v. Bowles*, 751 F.3d 35, 40-41 (1st Cir. 2014) (exemplars contained in authenticated public records are considered genuine); *Traction Wholesale Center, Co., Inc. v. NLRB*, 216 F.3d 92, 105 (D.C. Cir. 2000) (exemplar signatures are authenticated by being in authenticated documents); *U.S. v. Carriger*, 592 F.2d 312, 316-17 (6th Cir. 1979) (exemplar signatures on self-authenticating documents are considered genuine); *U.S. v. Mangan*, 575 F.2d 32, 41-42 (2d Cir. 1978) (same); *U.S. v. Liguori*, 373 F.2d 304, 305-06 (2d Cir. 1967) (argument that exemplars in authenticated documents could not be admitted as genuine is "baseless speculation"). The Gaceta is publicly available on the Venezuelan Government's website.[10] "A document posted on a [foreign] government website is presumptively authentic if government sponsorship can be verified by visiting the website itself; and in this case it can be." *Qiu Yun Chen v. Holder*, 715 F.3d 207, 212 (7th Cir. 2013). *See also Cave Buttes, L.L.C. v. Comm'r of Internal Revenue*, 147 T.C. 338, 361 (2016); *Hispanic Broadcasting Corp. v. Educational Media Foundation*, 2003 WL 22867633, at *5 (C.D. Cal. 2003). There is no "precise method" for authenticating exemplars, which can be

[10] http://spgoin.imprentanacional.gob.ve/cgi-win/be_alex.cgi?Titulo=%25%25%25&TipoDoc=GCTOF&Nombrebd=spgoin&Sesion=499366825&c08=FechaIso&t08=201809&TitCn=Septiembre%20de%202018&TSalida=T:GeneralGCTOF (last visited on Nov. 19, 2018).

done directly or circumstantially. *U.S. v. White*, 444 F.2d 1274, 1280-81 (5th Cir. 1971). Accordingly, Plaintiff's exhibits PX 37G-J should have been admitted.[11]

The Magistrate Judge also criticized Ms. Brayer's use of exemplars of Trustee Arellano's signature which came from sources other than the Gaceta. *See* PX 37L-M (Dkt. 583-16, 17), PX 38C-D (Dkt. 583-54, 55), PX 38F (Dkt. 583-23). Mr. Arellano served as Gerente General (General Manager) of PDVSA Ecuador from approximately 2010 to 2013. In that capacity, his signature was published on a government website in filings by PDVSA Ecuador with regulatory agencies of Ecuador, including the Superintendencia de Compañías (the equivalent of the Securities and Exchange Commission). These exemplars are also self-authenticating under FRE 902(8) because they are contained in official publications purporting to be issued by a public authority, because they are "accompanied by an acknowledgement that is lawfully executed by a notary public", because they are publicly available on a government website, and because they bear reliable indicators of authenticity.

The Magistrate Judge also criticized Ms. Brayer's analysis of Trustee Arellano's exemplars because she said Ms. Brayer did not adequately analyze markings near the signature that the Defendants suggested might be initials. But it was the signatures themselves that Ms. Brayer was asked to examine, and that is what she did. *See* U.S. v. *Dale*, 618 F. App'x at 497 (rejecting argument that the comparison was "hindered by [defendant's] deliberate distortion of his handwriting on the exemplars" because "expert opinion regarding the similarities in handwriting is generally admissible even if the handwriting expert is not absolutely certain that the handwriting is that of the defendants"); *Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 506-08 (7th Cir. 2003)

[11] Separately, Plaintiff's exhibits PX 38A and PX 38B, which contained Attorney General Munoz's acknowledged signature and apostille, should have been admitted and the Magistrate Judge made no findings as to why the handwriting expert could not use them as exemplars.

(reversible error to exclude handwriting expert based on variations in initials in signature because it does not affect the comparison methodology under *Daubert*). Accordingly, Plaintiff's exhibits PX 37K-M and PX 38C-J should have been admitted.

In any event, any issue the Magistrate Judge might have had with Ms. Brayer's analysis of Trustee Arellano's signature is irrelevant. As the Magistrate Judge elsewhere recognized, there is no dispute that the signatures of Trustees Andrews and Swyer are genuine, and New York law at most, requires the signature of only one trustee. Dkt. 638, at 24 and n.17. (*citing* N.Y. Est. Powers & Trusts Law § 7-1.17(a)).

5. The Factfinder's Own Comparison of the Trust Agreement Signatures with Exemplars Confirms Their Authority.

A factfinder's own comparison of a signor's signature with known exemplars of that individual's signatures is itself sufficient to establish authenticity. *U.S. v. Rementol*, 410 F. App'x 236,240 (11th Cir. 2010); *U.S. v. Alvarez-Farfan*, 338 F.3d 1043, 1045 (9th Cir. 2003). Thus, this Court can compare the signatures for itself and draw the obvious conclusion: *i.e.*, that the signatures are all genuine.

6. Overwhelming Circumstantial Evidence Also Confirms the Authenticity of the Trust Agreement.

The numerous admitted drafts of the Trust Agreement, including attached to emails back and forth between Trust counsel and the Attorney General and his counsel, all support the obvious conclusion that the Trust Agreement is not some forgery or rogue document. PX 21-28. The Magistrate Judge erroneously excluded numerous other emails and their attachments that Mr. Carpinello would have testified about, (PX 29, 29A, 33, 33A, 34, 34A) all of which further confirm the authenticity of the Trust Agreement.

In addition, the evidence of PDVSA's ratification of the Trust Agreement (*see* Section I.A.3.) also constituted evidence that the Trust Agreement was authenticate, and not some forgery.

Under FRE 901, circumstantial evidence alone is sufficient to support the admissibility of a document. At a minimum, it constitutes a prima facie showing of the document's authenticity that requires admission in the absence of evidence of fabrication. *U.S. v. Caldwell*, 776 F.2d 989, 1001-3 (11th Cir. 1985).

B. Even If (Contrary to Fact) There Were Evidence That Certain Signatures Were Not Authenticated, That Would at Most Raise a Real Party in Interest Issue of Prudential Standing, Not Article III Standing.

While the two inquiries frequently overlap, Article III standing concerns the constitutional limitations on a federal court's jurisdiction, "whereas the real party in interest rule, as defined by Fed.R.Civ.P. 17(a), addresses the prudential limitations on the exercise of this jurisdiction." *Sas v. Serden Techs., Inc*., 2013 WL 12086638, at *2–3 (S.D. Fla. Dec. 3, 2013), *citing Ensley v. Cody Resources, Inc*., 171 F.3d 315, 319-20 (5th Cir. 1999).

Prudential standing can be conferred through an assignment by an assignor which itself has Article III standing, like PDVSA, to an assignee like the Trust. *See Sprint Commc'ns Co., L.P. v. APCC Servs., Inc*., 554 U.S. 269, 286 (2008). When an assignee's *Article III standing* is questioned, courts look for the assignment language proving the assignor "assigned their claims to the [assignee] lock, stock, and barrel." *Id.* As the Report noted, in *Sprint*, the Article III standing of assignees was established after determining that the assignment "transfers and sets over" to the assignee "all rights, title and interest." Dkt. 638 at 8, citing 554 U.S. at 286. The assignment here clearly meets the *Sprint* standard because it recites that "PDVSA hereby *irrevocably transfers, assigns, and delivers* to the Litigation Trust, without recourse, *all of its respective rights, title, and interests* in and to the Contributed Claims and the Assigned Actions." Dkt. 583-1, at 2.2 (emphasis added).

While the Magistrate Judge is correct that a challenge to Article III standing should generally be considered before considering prudential standing (Dkt. 638 at 10), that is not the

pertinent issue here. The issue here is whether Defendants' standing arguments do or do not raise an Article III standing issue.

Where an assignment has purportedly been made and the validity of the assignment is challenged, that is a challenge to the real-party-in-interest, or the prudential, standing of the assignee. *Sas v. Serden Techs., Inc*., 2013 WL 12086638, at *2–3 (S.D. Fla. Dec. 3, 2013); *Luis Medina & Evatech, Inc. v. Wright*, 2014 WL 12618175, at *2 (M.D. Fla. Dec. 4, 2014) *Alps S., LLC v. Ohio Willow Wood Co*., 2014 WL 2003128, at *3 (M.D. Fla. May 15, 2014); *First-Citizens Bank & Tr. Co. v. Tricor Grp. LLC*, 2017 WL 1178354, at *3 (N.D. Ill. Mar. 30, 2017) ("Defendants contest the validity of the assignment of the Note to First-Citizens, contending that First-Citizens is not the proper party to enforce the Note and therefore lacks prudential standing to sue"); *RCB Equities #3, LLC v. Skyline Woods Realty, LLC*, 2014 WL 12595246, at *12 (N.D.N.Y. Nov. 10, 2014), *aff'd sub nom., RCB Equities #£3, LLC v. Martin*, 632 F. App'x 663 (2d Cir. 2015); *HSBC Bank USA, N.A. v. Hardman*, 2013 WL 515432, at *3 (N.D. Ill. Feb. 12, 2013) ("Thus, the question of whether HSBC has prudential standing turns on whether the Assignment is valid"); *American Optical Co. v. Curtiss*, 56 F.R.D. 26 (S.D.N.Y. 1971) (whether assignment violates New York champerty law is an issue of real party in interest under Rule 17).

In making her determination that Plaintiff lacked Article III standing, the Magistrate Judge relied upon Defendants' arguments that certain PDVSA representatives did not have the authority to transfer PDVSA's interest in the claims and that the Trust was improperly formed. Dkt. 638, at 18-19. As discussed below, these arguments are without merit. But in any event, these are classic challenges to prudential standing. *Sas*, 2013 WL 12086638, at *2–3. While such arguments "may form the basis of an affirmative defense or a challenge to Plaintiff as the real party in interest," these challenges do not implicate Plaintiff's standing under Article III. *Id*. The Magistrate Judge's

Report fails to deal with the foregoing dispositive case law.

The cases cited by the Magistrate Judge for the proposition that challenges to the validity of an assignment are always considered in the context of Article III, do not stand for that proposition. Rather, they hold that Article III bars a plaintiff's standing only when alleged defects in standing cannot be cured, as where an assignment is *void ab initio* or illegal. For example, in *US Fax Law Ctr., Inc. v. iHire, Inc.*, 476 F.3d 1112, 1119 (10th Cir. 2007), the assignment of personal injury claims was declared *void ab initio* because Colorado law expressly forbade the assignment of such claims. And in *MAO-MSO Recovery II, LLC v. Boehringer Ingelheim Pharm., Inc.*, 281 F. Supp. 3d 1309, 1314 (S.D. Fla. 2017), *appeal dismissed, cause remanded*, 2018 WL 4183397 (11th Cir. July 9, 2018), *vacated sub nom*, 2018 WL 5811020 (S.D. Fla. July 11, 2018), it was undisputed that no alleged assignment at all existed at the time plaintiff filed suit.

II. THE MAGISTRATE JUDGE'S RECOMMENDATION THAT THE TRUST AGREEMENT DID NOT COMPLY WITH NEW YORK LAW WAS ERROR.

The conclusion of the Magistrate Judge that the Trust Agreement should be excluded for failure to comply with New York trust formalities is also erroneous for four independently sufficient reasons:

First, under well-established New York law, signatures of the party assigning claims do not need to be acknowledged to render an assignment valid. *See e.g., Sterling Nat. Bank v. Polyseal Packaging Corp.*, 961 N.Y.S.2d 109, 110 (N.Y. App. Div. 2013) ("since an assignment need not be in writing it need not be notarized") citing *M.S. Textiles, Ltd. v. Rafaella of Sportswear, Inc.*, 739 N.Y.S.2d 386, 386 (N.Y. App. Div. 2002).

Second, the Trust is a liquidating trust[12] and, as such, no acknowledgment of signatures is required to make the Trust Agreement valid. The Magistrate Judge's citation to N.Y. EPTL § 7-1.17 for the proposition that the trust is "invalid" because it (allegedly) did not contain required acknowledgements (Dkt. 638, at 25), is simply incorrect. By its terms, EPTL § 7-1.17 applies only to lifetime trusts: "Every **lifetime trust** shall be in writing and shall be executed and acknowledged by the person establishing such trust . . ." *Id.* And New York law specifically **excludes liquidating trusts** from the definition of a lifetime trust under EPTL § 1-2.20 (defining "lifetime trust" which "**shall not include**" [listing different types of trusts including] a "**liquidation" trust**) (emphasis added).

Third, as discussed above, the acknowledgements of Oil Minister Martinez and Attorney General Muñoz have now been received.

Fourth, under New York law, any defect in an assignment or lack of authority to make an assignment, would merely render the assignment voidable not void and therefore curable by the parties' acquiescence or ratification. *Springer*, 2015 WL 9462083, at *6 (alleged violation of EPTL renders assignment voidable, not void, and may be ratified); *U.S. Bank, N.A. v. Squadron VCD, LLC*, 2011 WL 4582484, at *5 (S.D.N.Y. Oct. 3, 2011), *aff'd*, 504 F. App'x 30 (2d Cir. 2012); *Quantum Corp. Funding, Ltd. v. Westwood Design/Build Inc.*, 2008 WL 4344529, at *4 (S.D.N.Y. Sept. 16, 2008) (a party to an assignment that is "voidable for fraud (or other cause) may affirm" or ratify the transaction); *Lee v. Ocwen Loan Servicing, LLC*, 2015 WL 12591007, at *1 (N.D. Ga. Feb. 17, 2015) (under New York law, an allegedly late assignment into a trust was

[12] The Trust document expressly states that it is a Liquidating Trust and that its purpose is to liquidate the assets in several places. Dkt. 583-1, at p. 1 introductory paragraph; p.3, § 2.5(a); p. 7 § 3.9(e),(f); *See also* p. 5, § 3.7(a) and p. 6, § 3.8 (referencing Treasury Regulations relating to liquidating trusts).

voidable, not void); *Reinagel v. Deutsche Bank Nat. Trust Co*., 735 F.3d 220, 225 (5th Cir.2013) (challenges to the authority of the person who executed the trust and assignment and to the authenticity of the signature on the assignment and allegations that the assignment was contrary to the terms of the trust, were grounds that made the assignment voidable, not void); *Bradley v. Wells Fargo Bank, N.A*., 2014 WL 815333, at *3 (D.N.H. Mar. 3, 2014), *on reconsideration in part*, 2014 WL 2106495 (D.N.H. May 20, 2014) (assignments with alleged defects in signatures, notarizations were voidable, not void).

Even if the Trust required acknowledgements, the Trust Agreement would only need to be acknowledged by one trustee (EPTL § 7-1.17(a)), so a lack of Arellano's acknowledgment is irrelevant. Moreover, the absence of Muñoz's or Martinez's acknowledgment would not render the Trust Agreement "void", and the Magistrate Judge's Report does not cite any authority for such a conclusion. Also, New York law allows a missing acknowledgment to be cured. *E.g. In re Palmeri's Estate*, 348 N.Y.S.2d 711, 716 (N.Y. Sur. Ct. 1973), *aff'd*, 334 N.E.2d 595 (N.Y 1975) (lack of an acknowledgement may be cured at any time and allowing acknowledgment to be provided more than a year after signing the document).

III. DEFENDANTS DO NOT HAVE STANDING TO CHALLENGE THE FORMALITIES OR THE VALIDITY OF THE ASSIGNMENT AND TRUST.

Only parties to an agreement have standing to raise an issue that makes an assignment or trust voidable as opposed to void. *See Rothko v. Reis (In re Estate of Rothko)*, 43 N.Y.2d 305, 72 N.E.2d 291, 299 (N.Y. 1977). It was error for the Magistrate Judge to conclude otherwise. The Supreme Court has held that a defendant must have prudential standing to raise such a defense, which is akin to the requirement of prudential standing to state a claim. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975). The prudential standing rule therefore prevents a non-party to the agreement from challenging a voidable assignment because such a challenge would "interfere with the

beneficiaries' right of ratification." *Rajamin v. Deutsche Bank Nat. Tr. Co.*, 757 F.3d 79, 89 (2d Cir. 2014). Challenges by outsiders to an agreement are limited to issues that would render an agreement void, not simply voidable. *See, e.g., In re Canellas*, 2012 WL 868772, at *2 (M.D. Fla. Mar. 14, 2012) ("Even if the Aurora employees did not have actual authority at the time they signed the assignment and the Allonge, however, it is clear that Aurora has adopted and ratified the employees' actions.").

The Magistrate Judge distinguished the Second Circuit's holding in *Rajamin* because there it was the plaintiff's standing that was challenged, not the defendant's. (Dkt. 638, at 19). As discussed above, that the distinction is foreclosed by Supreme Court authority. Moreover, it is a distinction that *Rajamin* did not make: the key holding in *Rajamin* is that non-parties to an agreement (like Defendants, who are non-parties to the Trust) have no standing to raise issues that would make an assignment or trust voidable versus void. *Rajamin*, 757 F.3d at 89. *Rajamin* clearly stated that its holding applied to defendants as well as plaintiffs: "[t]he weight of caselaw throughout the country holds that a non-party to a PSA lacks standing to assert noncompliance with the PSA as a claim **or defense** unless the non-party is an intended (not merely incidental) third party beneficiary of the PSA." *Id.* at 84 (*quoting Rajamin v. Deutsche Bank National Trust Co.*, 2013 WL 1285160, at *3–4 (S.D.N.Y. Mar. 28, 2013) (emphasis added).

The principle announced in *Rajamin* is well-established in New York. *W. Loan Acquisition Holdings, LP v. MWF Realty, Inc.*, 984 N.Y.S.2d 635, 2013 WL 6908364, at *6 (N.Y. Sup. Ct. 2013) ("Also lacking merit are the **defendants'** challenges to the validity of the assignment of the note and the loan documents to the plaintiff as the answering defendants are not signatories to those documents and thus lack standing to challenge them.") (emphasis added); *Capital One Equip. Fin. Corp. v. Harari*, 2017 N.Y. Slip Op. 32460(U), 11 2017 WL 5668413, at *6 (N.Y.

Sup. Ct. 2017) ("the Assignment and Transfer is sufficient to grant plaintiff standing and demonstrate **defendants** lack standing to challenge the validity of those documents.") (citations omitted) (emphasis added); *Springer*, 2015 WL 9462083, at *6 (person who is not a beneficiary under the trust lacks standing to challenge validity of assignment); *Obal v. Deutsche Bank*, 2015 WL 631404, at *4 (S.D.N.Y. Feb. 13, 2015) (same); *In re Richmond*, 534 B.R. 479, 490-91 (Bankr. Ct., E.D.N.Y. 2015).

IV. THE CLAIMS ARE SUFFICIENTLY IDENTIFIED AS TRUST PROPERTY.

The Report erred in concluding that the trust property, *i.e.* the corpus or *res*, was not sufficiently identified.

First, the Report relied on the wrong "WHEREAS" clause, citing only the third "WHEREAS" clause. For example, the second "WHEREAS" clause specifically identifies the claims transferred as follows:

> WHEREAS, PDVSA is the owner of claims against multiple individuals and entities (the "Conspirators") arising out of (1) the Conspirators' depression of prices for PDVSA's futures contracts; (2) the Conspirators' systematic failure to pay the ten percent (10%) balance for the futures contracts; (3) the Conspirators' inflation of the prices PDVSA pays for Naphtha; and (4) the Conspirators' systematic failure to deliver the full amount of Naphtha purchased by PDVSA (the "Contributed Claims");

(Dkt. 583-1 (emphasis omitted)).

New York courts and courts in the Eleventh Circuit have found comparable assignments to be sufficiently defined to determine the scope of the assigned litigation claims. *RGH Liquidating Tr. v. Deloitte & Touche LLP*, 891 N.Y.S.2d 324, 328 (N.Y. App. Div. 2009), *rev'd on other grounds*, 955 N.E.2d 329 (N.Y. 2011) (claims were defined to include claims from classes of creditors "that arose from or in connection with [the creditor's] claims against RFS or RGG."); *In re Residential Capital*, 2013 WL 12161584, at *48 (Bankr. S.D.N.Y. Dec. 11, 2013); *In re*

Futter Lumber Corp., 2011 WL 5417094, at *2 (Bankr. E.D.N.Y. Nov. 8, 2011); *Sirius Computer Sols., Inc. v. AASI Creditor Liquidating Tr*., 2011 WL 3843943, at *1 (S.D. Fla. Aug. 29, 2011) (a description of litigation claims is adequate without specifying every cause of action or every potential defendant).

The Magistrate Judge's finding that the assignment needed to have named the alleged conspirators is also wrong. An assignment of claims does not need to specify the identities of the potential defendants. *E.g. Sirius Computer,* 2011 WL 3843943, at *1 (liquidating trust's description of litigation claims was adequate even though it "did not list Sirius as a potential defendant," included "any other parties that may be identified upon further investigation"). Whether or not all the alleged conspirators were or could have been known at the time the Trust Agreement was executed, or even now, the claims being transferred are adequately described. Nor does the Report cite any case law that requires any more detailed identification. Neither *In re Damon,* nor any of the other cases relied upon in the Report, hold otherwise.

Even where there may be questions about the identity of a trust corpus, the Trust cannot be invalidated if the corpus can be identified through facts extraneous to the document. *In re Nortz's Estate,* 71 N.Y.S.2d 858, 864 (N.Y. App. Div. 1947) (corpus was completely unidentified, but the nature of the corpus was "the subject of proof"); *Gillies v. Gillies*, 268 N.Y.S. 199 (N.Y. App. Div. 1933) (despite informality of the trust, intent of settlor and identity of corpus can be determined from evidence presented); *In re Kline Revocable Trust*, 763 N.Y.S.2d 721 (Surr. Ct. 2003) (in absence of any identification of trust corpus, identity could be determined by extrinsic evidence). *See also, Seton Health at Schuyler Ridge v. Dziuba*, 6 N.Y.S.3d 750, 752 (3d Dep't 2015) (indefiniteness of the price term did not invalidate contract where price could be determined by extrinsic evidence).

Moreover, a challenge by Defendants as to the specificity of the Trust corpus cannot invalidate the transfer when both the assignor and the assignee have ratified the transfer and there is no dispute between them as to the scope of the transfer. *See Mooney v. Madden*, 597 N.Y.S.2d 775, 776 (N.Y. App. Div. 1993) (finding that lower court "improperly grounded its decision on the invalidity of the agreement alone without considering whether the agreement had been consented to and/or ratified by the two trustees/beneficiaries and the remainder persons who also are beneficiaries.").

Neither PDVSA nor any of the signatories have challenged the Trust Agreement. By opting not to challenge deficiencies (were they to exist), PDVSA has ratified the Trust Agreement in its current form. *See Banque Arabe Et Internationale D'Investissement v. Maryland Nat. Bank*, 850 F. Supp. 1199, 1212 (S.D.N.Y. 1994), *aff'd*, 57 F.3d 146 (2d Cir. 1995) ("Ratification results where a party to a voidable contract accepts benefits flowing from the contract, or remains silent, or acquiesces in a contract for any considerable length of time after he has an opportunity to annul or void the contract.") (quotation omitted). Here, PDVSA has not only acquiesced in the Trust's continued pursuit of this litigation, but has also affirmatively ratified the Trust, including by appointing a new trustee.

V. PDVSA'S ASSIGNMENT OF CLAIMS TO THE TRUST DOES NOT VIOLATE NEW YORK CHAMPERTY LAWS.

The better reasoned view is that state champerty laws do not apply where the claims transferred are federal claims which most of the claims here are. *See Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1052-1053 (4th Cir. 1980) (concurrence) (federal law determines to assignability of federal claims); *Refac Int'l Ltd. v. Matsushita Elec. Corp.*, 1990 WL 269885, at *7 n.5 (D. N.J. Nov. 14, 1990) (state champerty law does not apply to the assignment of federal claims). Moreover, since the assignment was made in Venezuela by Venezuelan officials and

constituted the assignment of the claims of a Venezuelan agency, state champerty laws are inapplicable.

Even if state champerty laws were to apply, there was no violation of them. Relying almost exclusively on the decision in *Justinian Capital SPC v. West LB AG*, 65 N.E.3d 1253 (N.Y. 2016), in which a corporation acquired a claim for the sole purpose of litigating the claim for its own profit, the Magistrate Judge concluded that "PDVSA's assignment of its claims to the Trust violates N.Y. Jud. Law § 489(1)" Dkt. 638, at 23. That statute, by its terms, does not apply. Nor is the relationship here the kind the statute is designed to deal with because the grantor, PDVSA, and the Trust are related entities and the Trust, as PDVSA's fiduciary, has no economic interest separate from PDVSA. Even if § 489(1) applied, the Trust Agreement would not constitute champerty.

A. Section 489 Does Not Apply to the Trust.

1. The Trust Is Not a Corporation or Association.

Section 489 deals only with the purchasing of claims by a collection agency, a "corporation" or an "association." N.Y. Jud. Law § 489 ("Section 489"). The Trust is none of those. The Magistrate Judge rejected Plaintiff's position with no more explanation than "Plaintiff does not provide any authority for such a literal reading of the statute." (Dkt. 638, at 22).

With respect, that reasoning, even if true, would be contrary to clear United States Supreme Court and Eleventh Circuit holdings that courts are required to accept the literal, plain reading of statutes wherever possible. *In re Paschen*, 296 F.3d 1203, 1207 (11th Cir. 2002) ("When the language of a statute is unambiguous, we need go no further, because we must presume that Congress said what it meant and meant what it said. 'The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters'" (quoting *U.S. v. Ron Pair Enters.*,

Inc., 489 U.S. 235, 242 (1989)). Moreover, the New York Court of Appeals has instructed that Section 489 must be construed narrowly. *See Tr. for the Certificate Holders of Merrill Lynch Mortg. Inv'rs, Inc. v. Love Funding Corp*., 918 N.E.2d 889, 895 (N.Y. 2009) ("*Love Funding*").

Section 489, which is entitled "Purchase of claims by corporations or collection agencies" by its terms explicitly applies only to a "person or co-partnership, engaged directly or indirectly in the business of collection and adjustment of claims" or to a "corporation or association" (neither of which the Trust is) that acquires a claim. Here, the Trust has not been formed as a corporation, or an association, and the agreement so states.[13] An "association" is defined in the New York General Association Law as a "joint stock association or a business trust." N.Y. Gen. Ass'ns Law § 2(4). "Business trust," in turn, is defined as "any association operating as a business under a written instrument or declaration of trust, the beneficial interest under which is divided into shares represented by certificates." Gen. Ass'ns. Law § 2(2).

The PDVSA Trust is not a business trust. *First*, it is not "operating as a business."

Second, it is not set up to earn a profit, "Under New York law, the distinction between a business trust and a nonbusiness trust 'is that between an entity used to make profit (directly or indirectly) and one used to effect a gift or transfer of property'" (emphasis added). *In re Gurney's Inn Corp. Liquidating Tr*., 215 B.R. 659, 661 (Bankr. E.D.N.Y. 1997), *quoting Denmark Cheese Ass'n v. Hazard Advertising Co*., 298 N.Y.S.2d 98, 100 (Sup. Ct. 1969), *modified on other grounds*, 305 N.Y.S.2d 1019 (Sup. Ct. 1969).

[13] Trust Agreement at 3 (Dkt. 583-1) ("The Litigation Trust is not intended to be, and shall not be deemed to be, or be treated as, a general partnership, limited partnership, joint venture, corporation, joint stock company or association…. The relationship of PDVSA to the Litigation Trustees shall be solely that of beneficiary of a trust....").

Third, the entire beneficial interest is possessed by PDVSA; it is not "divided into shares represented by certificates."

Since the Trust is not a business trust, it is also not an association.

The only case Defendants cited in support of their position, *Mohonk Tr. v. Bd. of Assessors of Town of Gardiner*, 392 N.E.2d 876, 47 N.Y.2d 476 (N.Y. 1979), is clearly distinguishable. That case spoke only to the meaning of the term "corporation or association" in the context of a property tax exemption, *Mohonk*, 47 N.Y.2d at 482, with the court concluding that such exemptions were not limited to only incorporated entities. Not surprisingly, the court found that a trust formed to hold land for charitable purposes was intended to be covered by the statute. Other cases have found that trusts are considered associations only when they are engaged "in the carrying on of any business."[14] *See e.g., A.A. Lewis & Co. v. Comm'r of Internal Revenue,* 301 U.S. 385, 389 (1937) (a trust is not an association under a tax statute "because there are no associates and no feature making (the trust) analogous to a corporate organization").

2. PDVSA's Assignment of Claims to the Trust Is Not the Type of Arrangement the Statute Was Intended to Protect Against.

The conclusion that PDVSA has violated Section 489 is also wrong because PDVSA is not a stranger to the Trust, the Trust is not trading in litigation, and does not stand to profit from the assignment.

The purpose of champerty laws is to discourage trading in litigation by preventing strangers to a claim or "officious intermeddlers" from fomenting litigation.[15] *See SB Schwartz & Co. v.*

[14] *See* Trust Agreement at 2.5(a) (Dkt. 583-1) (The Trust has "no objective to continue or engage in the conduct of a trade or business").

[15] Black's Law Dictionary (10th ed. 2014) defines "CHAMPERTY" as "[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds; specifically, an

Levine, 82 A.D.3d 742, 743 (N.Y. App. Div. 2011) (champerty doctrine "developed to prevent or curtail the commercialization of or trading in litigation" (*quoting Bluebird Partners v. First Fid. Bank,* 94 N.Y.2d 726, 729 (2000)). Because there has been no transfer of any commercial interest or trading in litigation, New York's champerty statute does not apply to the Trust.

Section 489 does not apply when the assignee bringing the claims is related to the assignor. *Anisom Corp. v. Banque Exel, S. A.*, 338 N.Y.S.2d 848 (N.Y. App. Div. 1972) (no champerty where the assignor was a foreign corporation and the assignee was its U.S. subsidiary). Since the very purpose of a liquidating trust (such as the Trust here) is to liquidate and distribute assets for the benefit of the beneficiaries, the liquidating trustee, who acts solely as a fiduciary for the beneficiaries, and will not itself profit from the litigations, there can be no champerty. *See* Trust Agreement, at ¶ 2.4 (Dkt. 583-1) ("The transfer… is being made by PDVSA for the sole benefit, and on behalf of, PDVSA."). In contrast, in *Justinian*, the claims were acquired by a corporation with no relationship to the assignor and whose business plan was to acquire claims to sue on them for its own profit. *Justinian Capital SPC v. WestLB AG*, 65 N.E.3d 1253, 1257 (N.Y. 2016) ("Justinian's business plan … was acquiring investments that suffered major losses in order to sue on them, and it did so here within days after it was assigned the notes.")

B. Even If N.Y. Jud. Law § 489(1) Applies, the Assignment of Claims to the Trust Does Not Constitute Champerty.

1. The Trust Was Not Created for the Sole Purpose of Commencing This Litigation.

The Magistrate Judge concluded that "the terms of the Trust Agreement and the results of standing discovery reveal that the Trust's purpose is 'to facilitate the prosecution of claims PDVSA

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agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim."

has against various entities and individuals and the distribution of the Proceeds thereof.'" But the relevant test is not just whether the assignment or purchase was made in order to facilitate the prosecution of claims. If it were, then virtually every assignment of a claim that was ultimately litigated would be champertous and a century of New York cases teaches that it is not. Rather, "the purchase must be made for the very purpose of bringing such suit, and this implies an exclusion of any other purpose." *Richbell Info. Servs. v. Jupiter Partners*, 280 A.D.2d 208, 215, 723 N.Y.S.2d 134 (N.Y. 2001) (*citing Moses v. McDivitt*, 88 N.Y. 62, 65 (1882)); *Elliott Assocs., L.P. v. Republic of Peru*, 961 F. Supp. 83, 85 (S.D.N.Y. 1997) ("In order to prove champerty, the defendant must demonstrate that the plaintiff acquired the claim for the 'sole' or 'primary' purpose of bringing suit.").

The sole purpose test is not satisfied where the assignment was made "for the purpose of pursuing the full value of its settlement of contractual claims, [and] not for the purpose of bringing a claim against [Defendant] either as an investment or to harass or injure it." *Love Funding*, 918 N.E.2d at 895 (discussing *Promenade v. Schindler El. Corp.*, 834 N.Y.S.2d 97 (N.Y. App. Div. 2007) (internal quotation marks omitted)). *See Universal Inv. Advisory SA v. Bakrie Telecom PTE, Ltd.*, 154 A.D.3d 171, 180 (N.Y. App. Div. 2017) ("there is a difference 'between one who acquires a right in order to make money from litigating it and one who acquires a right in order to enforce it'") (*quoting Love Funding*, 13 N.Y.3d 190, 200, 918 N.E.2d 889, 984). Here, that is precisely the case.

The Trust did not acquire the claims as an investor; rather, it brings suit on behalf of, and entirely for the benefit of, PDVSA. Indeed, "if a party acquires a debt instrument for the purpose of enforcing it that is not champerty simply because the party intends to do so by litigation." *Love Funding*, 13 N.Y.3d 190, 200, 918 N.E.2d 889. *Justinian* did not abrogate the Court of Appeals's

holding in *Love Funding* or the long line of cases under New York law which stand for the same proposition. Indeed, the *Justinian* court (65 N.E.3d at 1256) discusses *Love Funding* and the primary purpose test which has existed under New York law for more than a century; *see* also Love *Funding*, 13 N.Y.3d 190, 201, 918 N.E.2d 889.

As noted above, the claims were transferred to the Trust, not for the purpose of allowing some intermeddler to make money, but to protect any recovery from undue interference by politicians who might attempt to prematurely terminate the assigned claims, or appropriate the funds.[16] In addition, litigation is not the sole goal of the Trust. As David Boies testified, the pursuit of PDVSA's claims against Defendants itself was only one "among others" of the purposes of the Trust (Boies Dep., PX 50, at 11:21-25 (Dkt. 533-4)). Other purposes included "cooperating with law enforcement agencies" (*id.*), the engagement of support personnel (Trust Agreement, PX 1, at 1 (583-1)), to "hold the Litigation Trust Assets for the benefit of PDVSA" (*id.*, at §3.1), and to "use commercially reasonable efforts to dispose of the Litigation Trust Assets." *Id.*

2. The Champerty Statute's Safe-Harbor Provision Applies to the Assignment.

The Magistrate Judge further erred in concluding that the safe-harbor provision outlined in Section 489(2) does not apply to the assignment of claims to the Trust. That safe harbor makes the champerty statute inapplicable if the "aggregate purchase price" is at least $500,000. As *Justinian* holds, the legislature did not intend "that actual payment necessarily had to have been

[16] *See* Trust Agreement at 1 (Dkt. 583-1) ("in order to obtain compensation for PDVSA and the people of Venezuela"). Duker Dep. Tr., 78:15-79:3 (PX 39, Dkt. 533-2) ("The purpose of the trust was to make sure that this litigation was conducted without any interference from the Government or politicians in Venezuela once the litigation began, so that we didn't get way down the road, spend a whole lot of money, then find that some subsequent Government decided against the trust or, more importantly, and the most important thing on my mind and the minds of others, including the General Attorney, was that no senior official, or anyone else who had access to a senior official, would influence the litigation because of some personal interest.").

made" to obtain this safe-harbor protection. It can be satisfied by "the transfer of financial value worth at least $500,000" as to which "payment obligations may be structured in various forms, whether by exchange of funds, forgiveness of a debt, a promissory note, or transfer of other collateral." *Justinian*, 65 N.E.3d at 1258. Here, it is undisputed that Algamex, the Trust's funder, paid in excess of $500,000 to an investigative firm for the benefit of PDVSA to investigate PDVSA's claims, and that the document management company retained by Plaintiff for this litigation has expended more than $100,000 per month, not to mention the time expended to analyze and prepare the claims and draft the Complaint. Dkt. at 55:14-58:20, 64:25-65:7.)

The investment of such significant resources is consistent with the legislative history of Section 489(2), which states "that a purchase price of at least $500,000 was selected because the legislature took comfort that buyers of claims would not invest large sums of money to pursue litigation unless the buyers believed in the value of their investments." *Justinian,* 65 N.E. 3d, at 1258 (internal quotation marks and citation omitted)).

VI. THE ACT OF STATE AND INTERNATIONAL COMITY DOCTRINES BAR JUDICIAL INQUIRY INTO WHETHER PDVSA'S ASSIGNMENT OF CLAIMS TO THE TRUST CONFORMS TO VENEZUELAN LAW.

The act of state and international comity doctrines preclude any inquiry into whether PDVSA's assignment of claims to the Trust violated Venezuelan law. The Magistrate Judge erroneously found that she "was bound to evaluate" the Trust Agreement's compliance with Venezuelan law. (Dkt. 638, at 27). Far from being "bound to evaluate" these purely Venezuelan issues, however, the Magistrate Judge was foreclosed by black letter law from adjudicating the legality of the actions taken by the Venezuelan government officials in creating the Trust. [17]

[17] Defendants mistakenly attempted to invoke the political question doctrine to block this lawsuit entirely. The political question doctrine, however, applies only to separation of powers issues within the United States Government, not to issues involving a foreign government's internal

As the Eleventh Circuit has held, the act of state doctrine "is a judicially-created rule of decision that '*precludes* the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.'" *Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545, 552 (11th Cir. 2015) (emphasis added) (*quoting Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1253 (11th Cir. 2006); *see also Fogade v. ENB Revocable Tr.*, 263 F.3d 1274, 1293 (11th Cir. 2001) (*quoting W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 409 (1990)) (The act of state doctrine "requires that the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.").

The Magistrate Judge did not address any of the case authority on which Plaintiff relied, most notably *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l B.V.*, 809 F.3d 737, 742–43 (2d Cir. 2016) ("*Spirits Int'l*"), which applied both the international comity and act of state doctrines in factual circumstances that are strikingly similar to this case. *See Spirits Int'l*, 809 F.3d

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organization and powers. *See Baker v. Carr*, 369 U.S. 186, 210-17 (1962). Indeed, the authority cited by Defendants actually ***requires*** the Court to follow the position of the U.S. Executive Branch *on the issue of who is recognized as the government of a foreign state*. As stated by Justice Stone, in a case on which Defendants rely: "We accept as conclusive here the determination of our own State Department that the Russian State was represented by the Provisional Government through its duly recognized representatives from March 16, 1917, to November 16, 1933, when the Soviet Government was recognized." *Guaranty Trust Co. of N.Y. v. United States*, 304 U.S. 126, 138 (1938); *see also Republic of Panama v. Citizens & So. Int'l Bank*, 682 F. Supp. 1544, 1545 (S.D. Fla. 1988). Thus, who the United States recognizes as the head of a foreign government and acts for a foreign state is an objective fact. Here, it is the Venezuelan government of President Nicolas Maduro. *See, e.g.*, State Department Factsheet on US-VZ Bilateral Relations, https://www.state.gov/r/pa/ei/bgn/35766.htm (recognizing as President of Venezuela "Nicolas Maduro (2013-present)"); U.S. Relations with Venezuela, U.S. State Dep't (Apr. 2, 2018), https://www.state.gov/r/pa/ei/bgn/35766.htm; and http://www.un.org/en/sc/members/elected.asp, ("the United States and Venezuela maintain diplomatic relations, with embassies each headed by a chargé d'affaires"). Similar to its recognition of Chairman Kim Jong-un of North Korea and President Rouhani of Iran, the recognition of President Maduro does not mean that the United States endorses the acts of those governments.

at 741-45. "Under the principles of international comity, United States courts ordinarily refuse to review acts of foreign governments . . . allowing those acts . . . to have extraterritorial effect in the United States." *Id*. at 742-43 (*quoting Pravin Banker Assoc., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997)). In *Spirits Int'l*, the Second Circuit concluded that the district court's entire analysis of Russian law – which, just as in this case, included a two day hearing on foreign law – should never have been undertaken because "the doctrines of comity and act of state preclude a United States court from invalidating an action of a foreign sovereign . . . on the ground that the transfer is invalid under the law of that foreign sovereign." *Id*. at 740.

Thus, *Spirits Int'l* specifically rejects any inquiry by a federal court into the legality of a foreign sovereign's acts under its own law, such as the assignment at issue here:

> The Decree and Assignment were indisputably acts of a foreign government. The 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 (FTE) would be an affront to the government of a foreign sovereign. Even an inquiry into whether Russian law permitted the Assignment is a breach of comity. "So long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws."

Spirits Int'l, 809 F.3d, at 743 (*quoting Banco de Espana v. Fed. Reserve Bank of N.Y.*, 114 F.2d 438, 444 (2d Cir.1940)).

Here, the execution of the Trust Agreement was an act undertaken by Venezuelan government officials in Venezuela to assign the claims of a Venezuelan agency. As a result, the question of whether that act complied with Venezuelan law is simply not a subject for adjudication in a court of the United States. As Defendants acknowledge "the issue is, *inter alia*, who ***within Venezuela*** signed, under what circumstances, and under what authority, because those questions go to the heart of whether PDVSA actually assigned any claims it may have had." (Dkt. 502, at 16) (emphasis in original). The fact that this is a challenge to the validity of the acts of Venezuelan Government officials and instrumentalities – "***within Venezuela***" – could not be clearer. Nor is

there any doubt that PDVSA is an instrumentality of the Venezuelan government. *See In re Refined Petroleum Prod. Antitrust Litig*., 649 F. Supp. 2d 572, 588 (S.D. Tex. 2009) (act of state doctrine barred inquiry into alleged acts of PDVSA and other state-controlled oil production entities); *Lyondell-Citgo Ref., LP v. Petróleos de Venezuela, S.A.*, 2003 WL 21878798, at *7 (S.D.N.Y. Aug. 8, 2003) (PDVSA's decision to follow an OPEC directive was unreviewable under the act of state doctrine because "[t]he government of Venezuela controls [PDVSA], not the other way around").

The cases that Defendants cited below are inapplicable here. They all involved repudiation of contracts or expropriation of debts located in the United States, and are readily distinguishable because: (1) the relevant act of state in this case is the assignment of the claim ***in*** Venezuela (as Defendants concede); where that claim is litigated is irrelevant to the act of state of assigning it, as the *Spirits Int'l* court held; (2) the act at issue does ***not*** involve the expropriation of debts or accounts payable in the United States as in Defendants' cases; and (3) a sovereign foreign plaintiff ***can*** invoke the act of state doctrine even though it has brought the litigation in the United States. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 437-39 (1964) (plaintiff that sued in the United States successfully invoked the act of state doctrine); *Spirits Int'l*, 809 F.3d at 743-45 (same); *Fogade v. ENB Revocable Trust*, 263 F.3d 1274 (11th Cir. 2001) (same); *Empresa Cubana Exportadora De Azucar y Sus Derivados v. Lamborn & Co*., 652 F.2d 231, 239 (2d Cir. 1981) (same) ("policy considerations require that the act of state doctrine not be abandoned merely because the sovereign appears as plaintiff").

VII. IN ANY EVENT, THE TRUST IS VALID UNDER VENEZUELAN LAW.

Even if the act of state and international comity doctrines did not bar a US court from considering the validity of official actions taken under Venezuelan law, it is clear that the Trust is valid under Venezuelan law. Defendants fail to meet their burden of showing it is not.

In challenging the assignment under Venezuelan law, Defendants have the "burden of proving foreign law," *Canon Latin Am., Inc. v. Lantech, S.A.*, No. 08-21518-CIV, 2011 WL 13101029, at *9 (S.D. Fla. July 26, 2011), and cannot meet that with unsupported, conclusory declarations. *Creazioni Artistiche Musicali, S.r.l. v. Carlin Am., Inc*., 2016 WL 7507757, at *5 (S.D.N.Y. Dec. 30, 2016). *See* Fed. R. Civ. P. 44.1 advisory committee's note to 1966 amendment; Wright & Miller § 2444 & n. 14. *See DEF v. ABC*, 366 F. App'x 250, 252 (2d Cir. 2010) (refusing to consider defendant's expert affidavit on Paraguayan law as "conclusory," and declining to apply foreign law to invalidate an assignment that defendants claimed deprived plaintiff of standing).

The Magistrate Judge identified five major questions of Venezuelan law, but did not actually determine what the law is with respect to any of them. (Dkt. 638, at 34-35.) With respect to four of the questions, she merely summarized the views of the experts on both sides, and did not attempt to resolve the experts' disagreements. *Id*. at 35. Even on the fifth issue – which the Magistrate Judge described as by whom and how the claims alleged in the Complaint should be investigated – she made no analysis or determination as to the substance of Venezuelan law. Rather, she found that issue was dispositive because one defense expert's opinion on that issue was supposedly "unrebutted." On that basis – without ever determining what the law actually is – she found that the entire Trust Agreement violated Venezuelan law. *Id*.

This was error. To begin with, the issue was "unrebutted" only because it was raised for the first time by defense expert José Ignacio Hernández G. in his report submitted on the last day for serving expert reports. Plaintiff's supplemental expert report was due that same day, which left Plaintiff's expert no opportunity to respond to Dr. Hernández because the Magistrate Judge ruled that experts were confined in their testimony to what was disclosed in their reports. (Dkt. 562, at 42:5-11). The Magistrate Judge also refused post-hearing briefs. Dkt. 562, at 108:21-22).

Contrary to Dr. Hernández' opinion, criminal and administrative investigations are not the exclusive remedy available to PDVSA to uncover wrongdoing causing it harm. As Prof. Pérez explains, nothing in Venezuelan law makes these procedures exclusive, and Dr. Hernández' assertions are conclusory and not supported by the statutes he cites. Second Supplemental Pérez Opinion,[18] ¶¶ 1.2, 1.4, 2.1-2.5. Nothing provides that a government-owned corporation somehow loses the right that all other businesses have under Venezuelan law to investigate injuries that it has suffered due to breach of contract, negligence, malfeasance, anti-trust or fraud and to take legal action to recover damages. *Id.* ¶¶ 2.1-2.5. Nor would such a restriction makes sense: it would effectively cripple PDVSA's business by preventing it from pursuing claims of injury to its business, as any other business is entitled to do under Venezuelan law. *Id.* ¶¶ 2.1-2.5. In fact, PDVSA regularly litigates claims that could be covered by Dr. Hernández' procedures. *Id.* ¶ 2.4.

Moreover, the issue of when, how, and by whom certain issues should be "investigated" in Venezuela does not affect the validity of the assignment to the Trust of claims for settlement and prosecution. As the Magistrate Judge elsewhere recognized, even Defendants' experts conceded

[18] Accompanying this brief is a second supplemental expert report from Prof. Pérez demonstrating why Dr. Hernández is wrong. As noted, it was impossible for Prof. Pérez to address the new issue raised for the first time in the last-minute Hernández report. Nor, as noted above, was it possible for Plaintiff's expert to testify at the hearing on this subject. The Magistrate Judge also declined to receive any post-hearing briefs. In their pre-hearing briefs, Defendants did not present any argument on this issue, so Plaintiff did not address it on reply. At the hearing, Dr. Hernández testified only briefly on the subject. Dkt. 561, at 28:24-29:7, 57:13-58:23.

Foreign law expert reports can come in at any time. Under Rule 44.1, a reviewing court may, even at the appellate level, consider arguments and materials on foreign law, whether or not provided to the lower court. *See* 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2444 (3d ed. 2008) ("Wright & Miller") (reviewing court "is free to consider not only the fruits of the trial court's independent research and the materials introduced by the parties in the lower courts, but also any information that it has unearthed itself. By the same token, the attorneys should be permitted to present new foreign-law materials on appeal.").

that "retaining counsel to engage in litigation" falls within PDVSA's ordinary course of business. Report at 31.

The Magistrate Judge's failure to decide the four unresolved issues of Venezuelan law may be in part due to her limiting of Prof. Pérez's testimony. With no prior notice or motion in limine, Defendants objected to Prof. Pérez's expertise concerning the Organic Law of Hydrocarbons (and numerous other laws). The Court precluded him from testifying on that subject, including any explanation of how the powers of the Oil Minister under the Hydrocarbons Law are affected by the Constitution of Venezuela, the interaction with other laws, and the structure of the Venezuelan legal system except at a very high level of generality. *See* Dkt. 562, at 34:21-25 (limiting testimony on Venezuelan legal system); 37:7-9 (same); 36:13-14 (precluding testimony on Hydrocarbons Law); 45:18-20 (precluding testimony on administrative law); 56:22-23 (striking testimony about PDVSA by-laws). But these are all subjects, along with the principles governing interpretation of statutes under Venezuelan law, that Prof. Pérez has spent a lifetime studying. Explaining the powers of a minister granted by the Organic Law governing his industry falls squarely within Prof. Pérez's expertise, as Plaintiff pointed out at the hearing. Dkt. 562, at 16:12-21 (Prof. Pérez describing his experience); 35:9-13 (summary of Prof. Pérez's experience by plaintiff's counsel); 38-2-16 (Prof. Pérez describing principles of interpretation of law of Venezuela). Nothing required Prof. Pérez to have expertise in the functioning of the oil industry or specific detailed application of the Hydrocarbons Law beyond its place in the structure of government.

Moreover, Plaintiff was entitled to a ruling well before Prof. Pérez took the stand, as Plaintiff argued (Dkt. 562, at 36:19-37:10), so that his testimony could have been prepared in compliance with the Magistrate Judge's (erroneous) ruling. This would have obviated the almost

continuous objections that interrupted Prof. Pérez's testimony and may have affected the Magistrate Judge's understanding of his testimony.

CONCLUSION

For all the foregoing reasons, Plaintiff objects to the Magistrate Judge's Report and Recommendation and asks the Court to undertake a *de novo* consideration of Defendants' motion, including the holding of an evidentiary hearing, and find that the Court has subject matter jurisdiction and that the Plaintiff has standing.

Dated: November 19, 2018

BOIES SCHILLER FLEXNER LLP

By: */s/ Steven W. Davis*

Steven W. Davis (Bar No. 347442)
Stephen N. Zack (Bar No. 145215)
Bank of America Tower
100 Southeast 2nd St., Suite 2800
Miami, FL 33131
Tel: (305) 539-8400
Fax: (305) 539-1307

David Boies
Helen M. Maher
333 Main Street
Armonk, New York 10504
Tel: (914) 749-8200
Fax: (914) 749-8300

Nicholas A. Gravante, Jr.
David A. Barrett
Marilyn Kunstler
Ellen Brockman
Alexander Boies
575 Lexington Avenue
New York, New York 10022
Tel: (212) 446-2300
Fax: (212) 446-2350

George F. Carpinello
Teresa A. Monroe
30 S. Pearl Street, 11th Floor
Albany, New York 12207
Tel: (518) 434-0600
Fax: (518) 434-0665

Stacey Grigsby
1401 New York Ave NW
Washington, DC 20005
Tel: (202) 237-2727
Fax: (202) 237-6131

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

PDVSA U.S. LITIGATION TRUST,

Plaintiff,

v.

LUKOIL PAN AMERICAS LLC; LUKOIL PETROLEUM LTD.; COLONIAL OIL INDUSTRIES, INC.; COLONIAL GROUP, INC.; GLENCORE LTD.; GLENCORE INTERNATIONAL A.G.; GLENCORE ENERGY UK LTD.; MASEFIELD A.G.; TRAFIGURA A.G.; TRAFIGURA TRADING LLC; TRAFIGURA BEHEER B.V.; VITOL ENERGY (BERMUDA) LTD.; VITOL S.A.; VITOL, INC.; FRANCISCO MORILLO; LEONARDO BAQUERO; DANIEL LUTZ; LUIS LIENDO; JOHN RYAN; MARIA FERNANDA RODRIGUEZ; HELSINGE HOLDINGS, LLC; HELSINGE, INC.; HELSINGE LTD., SAINT-HÉLIER; WALTROP CONSULTANTS, C.A.; GODELHEIM, INC.; HORNBERG INC.; SOCIETE DOBERAN, S.A.; SOCIETE HEDISSON, S.A.; SOCIETE HELLIN, S.A.; GLENCORE DE VENEZUELA, C.A.; JEHU HOLDING INC.; ANDREW SUMMERS; MAXIMILIANO POVEDA; JOSE LAROCCA; LUIS ALVAREZ; GUSTAVO GABALDON; SERGIO DE LA VEGA; ANTONIO MAARRAOUI; CAMPO ELIAS PAEZ; PAUL ROSADO; BAC FLORIDA BANK; EFG INTERNATIONAL A.G.; BLUE BANK INTERNATIONAL N.V.,

Defendants.

Case No. 1:18-CV-20818 (DPG)

SECOND SUPPLEMENTAL OPINION OF EXPERT WITNESS
ROGELIO PÉREZ PERDOMO

For the reasons, among others, explained in my opinions dated April 9, 2018, July 10, 2018, and this second supplemental opinion; and based on my review of

documents produced by the parties, the reports of Defendants' experts and their depositions, the testimony before the Court at the hearing concerning standing on August 2-3, 2018 (the "Hearing"), and the Report and Recommendation of the Court dated November 5, 2018 (the "Report and Recommendation"); it is my opinion that the PDSVA U.S. Litigation Trust Agreement (the "Trust Agreement") is valid and binding under Venezuelan law.

1. Response to Section VII.C of the Expert Report of José Ignacio Hernández G., dated July 10, 2018 (the "Hernández Report")

1.1.

One of the Defendants' experts, Dr. José Ignacio Hernández G., submitted an opinion for the first time on July 10, 2018, the same date as I submitted my prior supplemental report. Most of the subjects in the Hernández Report overlap with the opinions of Defendants' other expert, Dr. Rafael Badell Madrid. I responded to the opinions of Dr. Badell in my prior reports. To the extent the opinions of Dr. Hernández may differ from the opinions of Dr. Badell on those subjects, I have not been asked to, and do not, address them here.

However, in Section VII.C of his report, Dr. Hernández raised a new issue that did not overlap with the opinions of Dr. Badell. (Hernández Report ¶¶ 79-85, pages 33-36). I have been asked to respond to the opinions expressed by Dr. Hernández in Section VII.C of his Report and during his related testimony at the Hearing, which I have not had an opportunity to do previously.

1.2.

The issue submitted for my consideration concerns the interpretation of the law of the Bolivarian Republic of Venezuela (the "Republic"). The assertion of Dr. Hernández to which I am responding is that only the *Fiscal General de la República* ("General Public Prosecutor" or "Public Prosecutor") and the *Contralor General de la República* ("Comptroller General") can investigate and take legal action concerning

damages suffered by Petróleos de Venezuela, S.A. ("PDVSA"), a *sociedad anónima* (business corporation) entirely owned by the Republic. According to Dr. Hernández, the internal audit department of PDVSA can also conduct investigations, but PDVSA cannot take legal action except against limited types of wrongdoers and only following a formal administrative report.

Dr. Hernández incorrectly bases his assertion on the assumption that these damages could only be the result of crimes or administrative irregularities, and the Public Prosecutor and the Comptroller General, and in limited circumstances internal audit, have the exclusive power to investigate and take legal action concerning such crimes and administrative irregularities. This error undermines his entire opinion on this subject.

1.3.

Dr. Hernández argues in his Report: "Because PDVSA and affiliates are state-owned enterprises, all equity and assets are 'public property' ('*patrimonio público*'), and both PDVSA's public property and the alleged public employee misconduct that caused injury to PDVSA are regulated by the General Comptroller Organic Law and the Anti-Corruption Law. Therefore, the alleged misconduct should have been investigated through administrative procedures pursuant to these laws before the 'Litigation Trust Agreement' was subscribed and lawsuit filed." (Hernández Report ¶ 79).

Dr. Hernández then states that "damage to public property can result in civil, administrative and criminal liabilities." (Hernández Report ¶ 80). From this he concludes, without citing any authority, that there is a "principle" under which "civil liability must be based on a preliminary administrative or criminal investigation." (Hernández Report ¶ 80).

At the Hearing, Dr. Hernández expanded on the type of investigation he says is required. He testified that "any investigation related with damage on public

property" should have been conducted by "first the general controller office; second, PDVSA internal audit office; third, the public prosecutor and also the National Assembly." (8/2/18 Tr. 28:24–29:4; 57:18-20). He also testified that the Ministry of Oil must "present, denounce or inform facts related with presumptive corruption activities" to these three bodies, "and then these three bodies must conduct administrative and eventually criminal investigations in order to determine any violation of the law." (8/2/18 Tr. 58:3-8).

Dr. Hernández further testified that only the public prosecutor can bring claims for criminal conduct causing harm to PDVSA, and a "civil claim based on criminal offense" can only be brought after a "prior investigation conducted by the private[1] prosecutor office." (8/2/18 Tr. 58:13-16). Even as to civil claims for damage to PDVSA, there must be an "administrative investigation conducted by the general controller office or by the internal audit office." Without citing any authority, at the Hearing he described this as an "exclusive" power, even as to civil claims. (8/2/18 Tr. 58:13-20). Dr. Hernández further testified it is "not possible" to delegate that function to a third party. (8/2/18 Tr. 29:5-7).

1.4.

Much of the argument put forward by Dr. Hernández is addressed to showing that the Public Prosecutor has the power to prosecute crimes committed against PDVSA and claims for damages produced by these crimes. Dr. Hernández also analyzes the power of the Comptroller General, who has authority to examine the economic performance and the accounts of PDVSA and determine the administrative responsibilities if any damage or irregularity has occurred. I agree with Dr. Hernández that these functionaries have these powers, but I disagree with his interpretation that only these functionaries have these powers and that PDVSA, as a victim of these acts, cannot investigate damages it has suffered and bring corresponding claims.

[1] Dr. Hernández may have intended to say "public prosecutor."

Dr. Hernández says: "the Public Prosecutor's Office has the sole competence and exclusive authority to bring civil actions seeking compensation for criminal conduct." (Hernández Report ¶ 82). He cites article 91 of the Anti-Corruption Law (*Ley Contra la Corrupción*), but neither this article nor any other provision states that the prosecutor has the exclusive authority to bring civil actions.[2] This is an incorrect interpretation of the law that is not based in the letter, much less the spirit, of this legislation.

Dr. Hernández also says that "alleged administrative irregularities at PDVSA must be investigated either by the General Comptroller Office or by PDVSA's internal audit office." (Hernández Report ¶ 80). He refers to article 93 of the General Comptroller Organic Law, but does not quote any language from that law. Nothing in article 93 renders the authority of the Comptroller General exclusive, and article 93 does not mention internal audit at all.[3] Thus Dr. Hernández' ultimate conclusion, that these

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[2] Article 91 *Decreto con Rango, Valor y Fuerza de Ley Contra la Corrupción ("Ley Contra la Corrupción")*, as translated by Dr. Hernández: "The Public Prosecutor, in a separate chapter of the criminal accusation, will propose the civil action necessary for the compensation of damages, the restitution, indemnification, or payment of interest owed for damage to public property caused by the criminal acts attributed to the defendant." Hernández Report p. 34, fn. 78.

Dr. Hernández also states that the Public Prosecutor has "exclusive authority" to bring "certain civil claims" related to criminal conduct, and references footnote 80; however, footnote 80 is missing from his Report and, notwithstanding his promise to furnish it, to date I am not aware that he has done so.

[3] "Artículo 93. Las potestades sancionatorias de los órganos de control serán ejercidas de conformidad con lo previsto en la Constitución de la República y las leyes, siguiendo el procedimiento establecido en esta Ley para la determinación de responsabilidades. Dicha potestad comprende las facultades para: 1. Declarar la responsabilidad administrativa de los funcionarios, funcionarias, empleados, empleadas, obreros y obreras que presten servicio en los entes señalados en los numerales 1 al 11 del artículo 9 de esta Ley, así como de los particulares que hayan incurrido en los actos, hechos u omisiones generadores dedicha responsabilidad. 2.

investigatory powers are exclusive, is without support in his Report or his testimony.

2. On the authority of PDVSA to investigate and pursue its own civil claims for damages.

2.1.

It is a general principle of Venezuelan law that those who cause damage should repair it. This obligation is broad in Venezuelan law, as established in article 1185 of the Civil Code[4].

> "He who has caused damage to another with intention, or by negligence or by imprudence, is obliged to repair it. Equally, he who causes damage in exercise of his right, but exceeding the limits established by good faith or the purpose for which such right was conferred upon him, should also repair such damage."

It is clear that claiming damages does not require proving that a crime, or an administrative irregularity, was committed.

Imponer multas en los supuestos contemplados en el artículo 94 de la presente Ley. 3. Imponer las sanciones a que se refiere el artículo 105 de esta Ley."
("Article 93. The sanctioning powers of the control bodies shall be exercised in accordance with the provisions of the Constitution of the Republic and the law, following the procedure established in this Law for the determination of responsibility. These powers include the ability to: 1. Proclaim the administrative responsibility of the officials, employees and laborers who provide services to the entities indicated in numerals 1 through 11 of article 9 of this Law, as well as the administrative responsibility of those who were involved in the acts, facts or omissions which caused said responsibility. 2. Impose fines in the situations contemplated in article 94 of this Law. 3. Impose the sanctions referenced in article 105 of this Law.")

[4] Article 1185 *Código Civil*: "El que con intención, o por negligencia, o por imprudencia, ha causado un daño a otro está obligado a repararlo. Debe igualmente reparaciones quien haya causado un daño a otro, excediendo, en el ejercicio de su derecho, los límites fijados por la buena fe o por el objeto en vista del cual le ha sido conferido ese derecho".

2.2.

Dr. Hernández says: "It may be possible, in some cases, for PDVSA to file civil claims related to public employee misconduct, but only if the conduct is not potentially criminal and only *after* and administrative investigation finding an administrative irregularity." (Hernández Report ¶ 83). Therefore, according to Dr. Hernández, before any "purely civil action" for damages can be brought by PDVSA, there must be a "finding," by the Comptroller General or internal audit, of "an illicit act or administrative irregularities." (Hernández Report ¶ 83 & fn. 81).

Dr. Hernández further asserts that PDVSA can bring no civil claim at all unless the wrongdoing is "attributable to civil servants or a private contractor." (Hernández Report ¶ 81 & fn. 77). According to Dr. Hernández, under Art. 85 of the General Comptroller Organic Law and Art. 41.3 of the Anti-Corruption Law, only if the claims are "attributable to civil servants or a private contractor" can PDVSA pursue the claims; but if civil claims arise from criminal conduct, or if the claims are attributable to any other wrongdoer, only the Public Prosecutor can bring the claims. (Hernández Report ¶ 81 and fn. 77). However, nothing in the statutes cited by Dr. Hernández prohibits PDVSA from bringing other types of civil claims, or makes the power to bring civil claims exclusive to the Public Prosecutor or General Comptroller. Dr. Hernández' interpretation defies logic and common sense.

2.3.

In other words, according to this reasoning, a state-owned corporation that has suffered damages is in a much worse situation that any other person or business because it has to wait for the prosecutor or the Comptroller General to investigate and cannot take any action independent of these functionaries. Under this interpretation of the law, those who profit from wrongdoing in connection with a state-owned corporation or otherwise cause damage to it are guaranteed immunity if the prosecutor does not take action or the Comptroller has not declared an administrative irregularity. Needless to say, these public officials, particularly in the present chaotic situation in Venezuela, have limited resources and vast numbers of

matters calling for attention. They cannot possibly investigate, let alone litigate, all potential claims. And like any government bureaucracy, they invariably move slowly and may be subject to all sorts of political and other pressures. This would inevitably take years.

2.4.

This is an erroneous interpretation of Venezuelan law. PDVSA is a business corporation owned by the Republic. It is an essential function of any business enterprise to pursue litigation in its own name to recover damages that the business has suffered and is entitled to recover. The functioning of PDVSA's litigation activity is treated the same as any private litigant. Dr. Hernández does not distinguish between a claim for breach of contract, patent, antitrust, tort, fraud, or any other basis for liability. The logical extension of his argument would mean that PDVSA could not conduct normal business activity or operate effectively as a business. The claims alleged in this case include claims for breach of contract, antitrust violations and fraud that might not be criminal in nature. For example, in Dr. Hernández' view, if the seller of a business to PDVSA, such as a refinery, made misrepresentations in connection with the sale, PDVSA could not sue for breach of contract or negligent misrepresentation without going through the elaborate investigation procedure.

Moreover, in the ordinary course of business PDVSA regularly participates in civil lawsuits and arbitration proceedings involving millions and even billions of dollars, none of which required prior investigations by "the general controller office, PDVSA's internal audit office, the public prosecutor, and the National Assembly." The claims brought by the Trust in this litigation assert that PDVSA has suffered substantial damages, and, if so, these are damages that PDVSA can claim through a civil action, like any other business.

2.5.

The power given to the Comptroller General, the Public Prosecutor, and the Procurador General to act on behalf of PDVSA is meant to enhance the defense of the

Republic's patrimony. To convert the actions available to these high functionaries into a requirement PDVSA must meet before it is able to recover damages it has suffered runs against the purposes of the laws and common sense. It also runs against the letter of Venezuelan legislation. Article 51of the Organic Code of Criminal Procedure sets forth: "In the case of offenses that have affected the patrimony of the Republic, of the States or of the Municipalities, the civil action will be brought by the Procurator General of the Republic, the Procurators General of the States, or the Municipal Trustees, respectively." Article 51 also provides that the: "Procurator General of the Republic or the Public Prosecutor of the Republic, as the case may be, may determine that the [civil] action be filed and prosecuted by other organs of State or by civil entities."[5] Article 52 of the same Code establishes that a civil action may be brought by the victim independently of the criminal prosecution -– as it reads, "without prejudice to the right of the victim" to bring a civil action.[6] The purpose and letter of the legislation is not to create difficulties for the recovery of damages to the public patrimony, but to facilitate it.

[5] Article 51 *Decreto con Rango, Valor y Fuerza de Ley del Código Orgánico Procesal Penal* ("*Código Orgánico Procesal Penal*") : "Cuando se trate de delitos que han afectado el patrimonio de la República, de los Estados o de los Municipios la acción civil será ejercida por el Procurador o Procuradora General de la República, o por los Procuradores o Procuradoras de los Estados o por los o las Síndicos Municipales, respectivamente". Article 51 also provides that the: "Procurador o Procuradora General de la República o el o la Fiscal General de la República, según el caso, podrán decidir que la acción sea planteada y proseguida por otros órganos del Estado o por entidades civiles".

[6] Article 52 *Código Orgánico Procesal Penal*: "La acción civil se ejercerá conforme a las reglas establecidas en este Código después que la sentencia penal quede firme; sin perjuicio del derecho de la víctima de demandar ante la jurisdicción civil". ("The civil action shall be prosecuted in accordance with the rules set forth in this Code after the criminal sentence is final; without prejudice to the right of the victim to file a complaint under civil jurisdiction".)

3. On the Anti-Corruption Law

3.1.

Another fallacious argument is derived from article 90 of the *Ley Contra la Corrupción*. This article defines the obligation of repairing damages and seeking compensation for losses as "obligaciones de orden público" (obligations that cannot be negotiated or erased), and gives power to make the claim to the prosecutor.[7] The correct interpretation of this article is that these obligations cannot be forgiven and the prosecutor has the obligation to file for damages in the cases where the public patrimony has suffered these damages. The interpretation of Dr. Hernández is that the public entity that is the victim of the crime cannot act. (Hernández Report ¶ 85). In other words, as these are obligations of "orden público", PDVSA has to suffer the damages without taking any action itself. Only the prosecutor could act. This is an interpretation of legislation that distorts the purposes of the law.

3.2.

Dr. Hernández further states that the potential claims described in the Trust Agreement are "public order obligations" that "cannot be transferred to third parties." (Hernández Report ¶ 85). Dr. Hernández concludes from this that the Trust Agreement violates Art. 90 of the Anti-Corruption Law because the related fee arrangements "renounced 66% of the compensation" related to "public order obligations."

Under this incorrect interpretation of the law, the agreement that 34 percent of the amounts recovered would go to PDVSA and 66 percent would go towards the expenses of recovery is seen as a transfer of public property rights. Under this

[7] Article 90 *Ley Contra la Corrupción*: "Se considera de orden público la obligación de restituir, reparar el daño o indemnizar los perjuicios inferidos al patrimonio público… A estos efectos el Ministerio Público practicará de oficio las diligencias conducentes a la determinación de la responsabilidad civil de quienes aparecieran como participantes en el delito".

interpretation 100 percent would have to go to PDVSA as if there were no expenses entailed in making the recovery. Under this interpretation, PDVSA should do nothing and, in this way, would keep the worthless right to 100 percent compensation for damages it did not pursue. The fierce opposition to attempts at recovery that this very case has generated demonstrates that the people who have allegedly caused severe damages to PDVSA for their personal profit are not willing to compensate for the damages caused and that difficult legal battles have to be fought.

4. Nothing in the Trust Agreement impedes any government investigation and prosecution of wrongdoing against PDVSA.

4.1.

It is clear that the PDVSA US Litigation Trust was not designed nor constituted to deprive the Venezuelan public authorities of their power to investigate and prosecute crimes against PDVSA and to recover the consequent damages. The same can be said of illicit administrative activities, which is the matter of concern of the Comptroller General. Under Venezuelan law, simultaneous criminal and private civil actions are possible. (Article 52 *Código Orgánico Procesal Penal*, cited in fn. 6] above). Nothing in the Trust Agreement impedes any governmental entity from conducting its own investigation of potential criminal or civil wrongdoing.

Indeed, it is a matter of public record that the Venezuelan authorities are prosecuting crimes committed against PDVSA: some indicted individuals are in Venezuela, and the authorities have asked for the extradition of several others that escaped and sought refuge in other countries. There are also ongoing criminal proceedings brought by the authorities in other countries, including the United States, Switzerland, Spain and Andorra.

4.2.

Any action by PDVSA to investigate claims and pursue recoveries, or delegate investigation and litigation to expert investigators and counsel, has no effect on the actions of governmental entities. Documents and press reports show that prosecutors and governmental authorities in several countries are investigating and prosecuting criminal wrongdoing that has been committed against PDVSA, including matters relating to the claims asserted in this litigation. *See, e.g.,* PX-51A (Letter dated April 13, 2018 from General Counsel of PDVSA to Swiss authorities).[8] There is no harm to governmental interests if PDVSA investigates and pursues its own claims. In fact, it could harm the public interest to prevent the investigation and litigation from going forward due to years-long delay that would occur if the process described by Dr. Hernández were followed.

[8] *See also* "Geneva probe opened into alleged oil trade corruption," Mar. 13, 2018, available at https://www.swissinfo.ch/eng/business/venezuelan-ties_geneva-probe-opened-into-alleged-oil-trade-corruption/43968468; Reuters, "Justice Department Demands Details from Glencore on Intermediary Firms – Sources," Oct. 23, 2018, available at https://www.reuters.com/article/us-glencore-usa-subpoena-exclusive/exclusive-justice-department-demands-details-from-glencore-on-intermediary-firms-sources-idUSKCN1MX1JP; U.S. Department of Justice Press Release, "Former Swiss Bank Executive Sentenced to Prison for Role in Billion-Dollar Money Laundering Scheme Involving Funds Embezzled from Venezuelan State-Owned Oil Company," Oct. 29, 2018, available at https://www.justice.gov/usao-sdfl/pr/former-swiss-bank-executive-sentenced-prison-role-billion-dollar-international-money.

5. On the *Procurador General de la República*

5.1.

It is important to remember that the Venezuelan Constitution[9] and the *Ley Orgánica de la Procuraduría General de la República*[10] give the Procurador General the power to defend and represent judicially and extra-judicially the patrimonial interests of the Republic and that the Procurador General signed and approved the Trust Agreement establishing the PDVSA US Litigation Trust. Under the interpretation of Dr. Hernández, none of this is considered at all, except in contrast to the power of the prosecutor. (Hernández Report p. 34 n. 79).

5.2.

As explained in my prior reports, the Procurador General's signature and "VISTO" stamp show his concurrence that the Trust Agreement is lawful. (Supplemental Opinion ¶ 3.2). Therefore, the Procurador General has already approved the assignment of the claims and investigations described in the Trust Agreement and determined that any delegation of the investigation does not violate Venezuelan law.

6. On the National Assembly and the Acuerdo of April 24th, 2018

6.1.

Dr. Hernández states that his assertions regarding the requirements for the investigation of civil claims have been confirmed by the National Assembly of Venezuela. (Hernández Report ¶ 84). I disagree with this conclusion.

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[9] Constitution of the Bolivarian Republic of Venezuela, Article 247: "The Procurador General's office advises, defends and judicially and extra-judicially represents the patrimonial interests of the Republic…"

[10] Article 2 *Ley Orgánica de la Procuraduría General de la República*: "In exercise of the powers conferred by the Constitution…the Procurador General…exercise the defense and judicial and extra-judicially representation of rights, assets and patrimonial interests of the Republic, both nationally and internationally".

6.2.

As explained in my prior report, on April 24, 2018, the National Assembly published an '*acuerdo*' (the "Acuerdo") regarding the Trust Agreement. (Supplemental Opinion ¶ 4.1). The Acuerdo declares that the Trust is unconstitutional due to certain asserted procedural defects. *Id.* In his Report, Dr. Hernández quotes a portion of the Acuerdo stating that PDVSA's claims concern "damages to the public property," and "there is no evidence of" criminal procedures or "the administrative procedures initiated to determine the administrative responsibility." (Hernández Report ¶ 84).

6.3.

As I have explained previously, the National Assembly cannot invalidate a contract by means of legislation. Invalidating a contract is a matter for a court of law. As stated in my prior report, as of the date of such report there had been no court proceedings in Venezuela challenging the constitutionality of the Trust Agreement or a decision of the Constitutional Chamber on the issue. (Supplemental Opinion ¶ 4.1). This continues to be the case, in both respects, as of the date of this report.

6.4.

Since the April 24, 2018 Acuerdo was published, the National Assembly published a second acuerdo, dated September 12, 2018.[11] The September 12 acuerdo ratifies the April 24 Acuerdo, and again states that Dr. Reinaldo Enrique Munoz Pedroza is not the validly-acting Procurador General of Venezuela. For the reasons stated in my prior supplemental opinion, this position is inconsistent with Venezuelan law. (Supplemental Opinion ¶¶ 4.2, 4.3). The September 12 acuerdo also is not binding on the courts of Venezuela. For the past five years, the courts of Venezuela, by their

[11] It is my understanding that the September 12, 2018 acuerdo has been submitted to the Court in this litigation as Docket No. 626.

decrees, have accepted Dr. Munoz as the acting Procurador General in his appearances as counsel for the Republic, without comment or question.

7. My Expert Qualifications

7.1.

The Defendants' lawyers objected to my testimony at the Hearing because I am not an expert on administrative law. It is true that I have not taught administrative law in the law schools where I have worked. Defendants' lawyers also asked if I regard myself as an expert in the hydrocarbons laws. (8/3/18 Tr. 23:4-6). I said "no", because my scholarship has not focused on the technical administration of the hydrocarbons industry.[12]

However, I have taught philosophy of law and general theory of law, among other subjects, and I have well-known writings on legal reasoning and legal thought. I have also written on corruption, criminal procedure and criminal law. This opinion, and my opinions expressed in my prior reports and testimony, address the interpretation of Venezuelan legislation, and the interpretation of law is one of the subjects I have taught and I still teach in Venezuela.

7.2.

As stated in my first opinion, I have been teaching law full time since 1967. My areas of scholarship include not only constitutional law, but jurisprudence and the functioning of the justice system.

Among the primary subjects I have studied is the interpretation of laws. As I explained at the Hearing, during the early part of my career, my specialty was philosophy of law, particularly interpretation of law. (8/3/18 Tr. 16:12-14) This

[12] As indicated in the Report and Recommendation, based on this testimony the Court ruled that I could not testify about the powers of the Minister of Oil over the hydrocarbons industry. Report and Recommendation at 33 n.24.

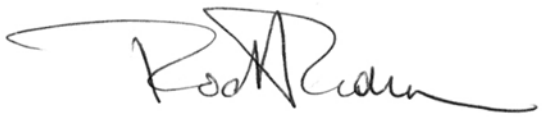
included logic and interpretation of statutes, such as legal arguments and legal reasoning. (8/3/18 Tr. 16:12-14) Encompassed within this is the interpretation of the organic laws of Venezuela and the powers of ministers provided for in the organic laws of Venezuela.

I have studied for many years the principles of interpretation of law applicable to the Constitution and Organic Laws of Venezuela. Therefore I do regard myself as an expert in the interpretation of the laws referenced by Defendants' experts, including the Organic Law of Hydrocarbons, the Procurador General Organic Law, the Public Prosecutor Organic Law, the Anti-Corruption Organic Law, and the General Comptroller of the Republic Organic Law.

8. Conclusion

As explained above, nothing in the law of Venezuela prevents PDVSA from bringing a civil claim for civil damages. It follows that nothing prevents PDVSA from investigating potential wrongdoing against it that could give rise to a claim for civil damages that PDVSA could pursue. Dr. Hernández' reading of Venezuelan law is wrong and defies common sense. The fact that one organ or entity has power to investigate claims does not mean that other entities cannot also investigate claims and seek damages, particularly civil claims, or hire someone to investigate and litigate claims on their behalf. The procedure Dr. Hernández describes is complex and would take years to complete. It would paralyze an entity like PDVSA from investigating wrongdoing in a timely fashion and prevent PDVSA from taking action to protect itself. It would instead serve to protect wrongdoers. It is also inconsistent with the fact that PDVSA regularly brings litigation and arbitration proceedings without following such procedures. Dr. Hernández' reading of the law of Venezuela would lead to absurd results and is contrary to good governance.

Palo Alto, California, November 19, 2018



Rogelio Pérez Perdomo

LIST OF MATERIALS CONSIDERED

1. Expert Report of José Ignacio Hernández G., dated July 10, 2018
2. Transcript of Proceedings, Standing Hearing, dated August 2-3, 2018
3. Report and Recommendation of the Court, dated November 5, 2018
4. Expert Report of Rafael Badell Madrid, dated July 10, 2018
5. Materials considered and referred to in the prior opinions of Rogelio Pérez Perdomo, dated April 9, 2018 and July 10, 2018