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Case Number 399,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RODOLFO ENRIQUE JIMÉNEZ, ASDRÚBAL CHAVEZ, IRIS MEDINA, MARCOS ROJAS, JOSÉ ALEJANDRO ROJAS, and FERNANDO DE QUINTAL	§	No. 399,2019
Plaintiffs/Counterclaim-Defendants Below/Appellant,	§	Court Below-Court of Chancery of the State of Delaware
	§	C.A. No. 2019-0490-KSJM
v.	§	
LUISA PALACIOS, EDGAR RINCÓN, FERNANDO VERA, ELIO TORTOLERO, ANDRÉS PADILLA, ANGEL OLMETA, JAVIER TROCONIS, LUIS URDANETA, and RICK ESSER	§	
Defendants/Counterclaim Plaintiffs Below/Appellees.	§	

APPELLANTS' OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This action appeals the decision of the Court of Chancery to grant summary judgment to certain directors of three Delaware corporations, PDV Holding, Inc. ("PDV Holding"), CITGO Holding, Inc. ("CITGO Holding") and CITGO Petroleum, Inc. ("CITGO Petroleum" collectively, the "Nominal Defendants") that they had been properly elected as directors of those corporations pursuant to 8 *Del. C.* §225. However, this is not a standard Section 225 proceeding interpreting corporate bylaws and evaluating shareholder consents. Instead this proceeding required the Court of Chancery to analyze and interpret the intersection of foreign relations law, including the recognition of foreign leaders by the Executive Branch of the U.S. Government ("Executive Branch") and the application of the act of state doctrine by U.S. courts, with Delaware corporate principles. The case also involves interpretation of the political question doctrine and the scope of the judiciary's powers in the face of that doctrine.

On January 23, 2019, President Trump recognized Mr. Juan Guaidó as the "interim president" of the Bolivarian Republic of Venezuela ("Venezuela"). The recognition came by way of a press release from the Office of the President (the "Executive Statement"). There is no recognition of any interim government, effective government or any judiciary in exile. There is no use of the term "de-recognition" to describe the current government in control of Venezuela, which is

led by Mr. Nicolás Maduro as President of Venezuela.

Taking this limited recognition, the National Assembly of Venezuela issued a resolution ("Resolution"), directing Mr. Guaidó to name an *ad hoc* board of the national hydrocarbons company, Petróleos de Venezuela, S.A. ("PDVSA"). The Resolution limits the powers vested in the *ad hoc* board to the reconstitution of the board of directors of PDV Holding. The Resolution also lists the names of the individuals who "will comprise" the members of the boards of directors of CITGO Holding and CITGO Petroleum. Venezuela is the sole stockholder of PDVSA. PDV Holding is a wholly-owned subsidiary of PDVSA. CITGO Holding is a wholly-owned subsidiary of PDV Holding, and CITGO Petroleum is a wholly-owned subsidiary of CITGO Holding.

On February 8, 2019, Mr. Guaidó carried out the instructions in the Resolution. On February 18, 2019, the *ad hoc* board of PDVSA elected by written consent five of the six members of the board of directors of PDV Holding. In turn, that PDV Holding board elected by written consent five of the six members of the board of directors of CITGO Holding. And that CITGO Holding board elected by written consent all six members of the board of directors of CITGO Petroleum. Appellees and Defendants/Counterclaim-Plaintiffs below, Luisa Palacios, Edgar Rincón, Fernando Vera, Elio Tortolero, Andrés Padilla, Ángel Olmeta, Javier Troconis, Luis Urdaneta, and Rick Esser (collectively, the "Defendants"), were

elected to the boards of the Nominal Defendants. On February 18, 2019, Appellants and Plaintiffs/Counterclaim-Defendants below, Rodolfo Enrique Jiménez, Asdrúbal Chavez, Iris Medina, Marcos Rojas, José Alejandro Rojas, and Fernando de Quintal (collectively, the "Plaintiffs"), were the members of the board of directors of the Nominal Defendants. Their removal forms the basis of the present dispute.

On June 25, 2019, Plaintiffs filed their complaint, seeking a declaration of their status as members of the boards of directors of the Nominal Defendants. On July 9, 2019, Defendants filed their answer and counterclaim. On July 11, 2019, Plaintiffs and Defendants filed cross-motions for judgment on the pleadings and briefed the motions on an expedited basis. After the completion of briefing on July 16, 2019, Venezuela requested and was granted leave to file a brief as a "non-party" *amicus curiae*. The Court of Chancery held oral argument, on July 18, 2019, and requested supplemental briefing be submitted on July 23, 2019. On August 2, 2019, the Court of Chancery issued its opinion, converting Defendants' motion for judgment on the pleadings into a motion for summary judgment and granting the motion as a matter of law (the "Opinion")[1]. The Opinion denied Plaintiffs' motion for judgment on the pleadings. The Opinion gave Plaintiffs ten

[1] All citations to the Opinion in this opening brief are citations to the revised version of the Opinion issued on August 12, 2019, and attached hereto as Exhibit A.

days to file an affidavit contesting the validity of the consents filed by Defendants. Based on the legal findings in the Opinion, Plaintiffs did not file an affidavit. The Court of Chancery then issued a Final Order and Judgment Pursuant to Court of Chancery Rules 54(a) and 56 on August 21, 2019, attached hereto as Exhibit B.

SUMMARY OF ARGUMENTS

1. The Court of Chancery improperly applied the political question doctrine to the Executive Statement, expanding the effect of the Executive Statement beyond its plain language. Mr. Guaidó was recognized as the Interim President of Venezuela, and the Court of Chancery provides no basis why that limited recognition is a declaration of his authority to appoint the *ad hoc* board of PDVSA. Aside from declaring the Guaidó government to have authority not contained within the Executive Statement, the Court of Chancery's decision further treats that government as the effective government of Venezuela, when foreign relations principles require that the government in actual control of the territory be treated as the current government. Recognition and treatment are two different principles of foreign relations law that have been conflated improperly in the Opinion. Finally, even if the Executive Statement did de-recognize the Maduro administration that act in and of itself does not invalidate the actions of that administration. The political question doctrine does not provide a basis as a matter of law for the Defendants to be confirmed as members of the boards of directors of the Nominal Defendants.

2. The Court of Chancery improperly applied the act of state doctrine. The act of state doctrine only applies to public acts of recognized governments that control territory and people. In addition, courts should only apply the act of state

doctrine to acts whose primary focus is domestic, not extraterritorial. The act of state doctrine does not provide a basis as a matter of law for the Defendants to be confirmed as members of the boards of directors of the Nominal Defendants.

STATEMENT OF FACTS

A. The Executive Statement recognizes Juan Guaidó as the "interim president" and goes no further.

On January 23, 2019, the Executive Branch issued the Executive Statement, where it recognized Mr. Guaidó as the "Interim President of Venezuela" and encouraged other governments in the "Western Hemisphere" to recognize Mr. Guaidó as Interim President. *See* A363; A596 (Executive Statement).

The Executive Statement has not de-recognized the Venezuelan judiciary. *See id.* The Constitutional Court of the Supreme Court of Justice ("Constitutional Court") remains the supreme interpreter of the Venezuelan Constitution. *See* A1488-A1492 (CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA, art. 335).

B. The National Assembly reconstitutes the Nominal Defendants' boards of directors.

After the National Assembly for Venezuela purported to declare Mr. Guaidó the Interim President of Venezuela, the National Assembly began to pass and promulgate a series of laws. A46-A47 (Compl. ¶ 41); A330-A331; A379-A380 (Answer ¶ 41). Among them, the "Statute Governing the Transition to Democracy to Restore the Effectiveness of the Constitution of the Bolivarian Republic of Venezuela" ("Statute") and the Resolution that purports to authorize the appointment of a six-member "*ad hoc* administrative board" for PDVSA that

replaces the board of directors and shareholder's meeting as authorized by PDVSA's bylaws. *See* A257-A271 (Statute); A243-A255, A516-A531 (Resolution).

The *ad hoc* administrative board does not have the same powers as the board of directors of PDVSA. Article 2 of the Resolution states that "[t]he Ad-hoc Administrative Board, directly or through the person they designate, will represent Petróleos de Venezuela S.A. as a shareholder of PDV Holding, Inc., for the only purpose of subscribing the written consent of the sole shareholder required to appoint the board of directors of PDV Holding, Inc." A260; A268 (Resolution, art. 2) (emphasis added)). The Resolution went on to purportedly grant other powers: secure the protection of assets of the CITGO companies, including the removal of CITGO from the sanctions imposed by the Office of Foreign Asset Control ("OFAC"); seek other measures to procure alternative sources of heavy oil for PDVSA; conduct certain audits, and respond to other instructions from the "President in Charge of the Republic." A261; A269 (Resolution, art. 4). It is unclear how or if Mr. Guaidó is giving other instructions to the *ad hoc* board of managers, which in any event, is a role unknown in PDVSA's bylaws.

On February 14, 2019, the Constitutional Court in Venezuela struck down the Statute and the Resolution as unconstitutional (the "Decision"), rendering both void. *See* A47-A48 (Compl. ¶ 44); A273-A294 (Decision). The Constitutional

Court, referring to the acts taken by Mr. Guaidó, noted that "any decision of a body or an officer in contempt or in usurpation of functions who intends internal legal and/or international effects is absolutely void and will be considered inexistent." A274; A285 (Decision at 2).

C. The interim president continues to have no control over any territory or population.

Since the recognition of Mr. Guaidó as interim president, the National Assembly and he have never exercised territorial sovereignty over Venezuela or regulated its internal affairs. At the same time, Mr. Guaidó has tried to pass laws that have a direct effect on Delaware corporations and the obligations they have assumed.

The Maduro government continues to exercise sovereignty over Venezuelan territory and otherwise exists as a government. The same is true of PDVSA, which has the same headquarters in Caracas with many of the same people and positions. Although PDVSA has suffered under the sanctions imposed by OFAC, it continues to try to operate as a corporate entity. The Executive Branch has recognized this fact. For instance, pursuant to General Licenses Nos. 8A-D, the Executive Branch allowed multinational oil companies, such as Chevron Corporation, Halliburton, Schlumberger Limited, Baker Hughes, and Weatherford International Public Limited Company to transact with PDVSA and its subsidiaries, the same PDVSA governed by the board of directors chosen by Mr. Maduro. *See* A835 (General

License No. 8A); A1486 (General License No. 8B); A1493 (General License No. 8C); A1494 (General License No. 8D). It also permitted U.S. persons to enter into transactions with Nynas AB, an oil company in Sweden partially owned by PDVSA. *See* A1495-A1496 (General License No. 13D). And the Executive Branch allowed all U.S. persons (including commercial airlines) in Venezuela to purchase gasoline or other refined petroleum from PDVSA or its subsidiaries for "personal, commercial, or humanitarian uses." A1109 (General License No. 10); *see also* A732 (OFAC FAQ No. 656).

D. The Court of Chancery rules on the cross-motions for judgment on the pleadings.

On August 2, 2019, the Court of Chancery issued its Opinion, which was revised on August 12, 2019, holding, *inter alia*, that the *ad hoc* board of PDVSA had authority to execute a consent reconstituting the board of PDV Holding. Ex. A, at 45. The Opinion also converted the cross-motions for judgment on the pleadings into cross-motions for summary judgment. *See id.* at 45-46.

The resolution of the motions was stayed to allow Plaintiffs to submit an affidavit pursuant to Court of Chancery Rule 56(e) with respect to the remaining issue of the validity of the written consents reconstituting the boards of each of PDV Holding, CITGO Holding, and CITGO Petroleum Corporation. *See id.* at 46. Based on the court's assertion that the Opinion "resolves as a matter of law" the PDVSA board's authority to execute a consent appointing the board of directors of

PDV Holding (*id.* at 46 n.136), Plaintiffs did not submit a Rule 56(e) affidavit regarding Defendants' consents. *See* Ex. B, at 2.

Plaintiffs now urge this Court to reverse the Order and vacate the Opinion granting Defendants' motion for judgment on the pleadings, as converted to a motion for summary judgment.

ARGUMENT

I. THE COURT OF CHANCERY INCORRECTLY APPLIED THE POLITICAL QUESTION DOCTRINE

A. Question Presented

Does the political question doctrine require the Court of Chancery to interpret "interim president" the same as "President of Venezuela" for the purpose of naming an *ad hoc* board of PDVSA? Plaintiffs preserved this question in the Plaintiffs/Counterclaim Defendants' Opening Brief in Support of Their Motion for Judgment on the Pleadings ("Plaintiffs' Opening Brief") (*see* A489-A492, A495-A497 (Pls.' Opening Br. 24-27, 30-32)), the Plaintiffs/Counterclaim Defendants' Answering Brief in Opposition to Defendants' Motion for Judgment on the Pleadings ("Plantiffs' Answering Brief") (*see* A864-A865, A892-A897, A902-A905 (Pls.' Answ. Br. 3-4, 31-36, 41-44)), the Plaintiffs/Counterclaim Defendants' Reply Brief in Support of Their Motion for Judgment on the Pleadings ("Plaintiffs' Reply Brief") (*see* A1453-A1454, A1464-A1477 (Pls.' Reply Br. 4-5, 15-28)), and at oral argument. *See* A968-A981, A1046-A1048, A1051-A1053 (July 18, 2019 Hr'g Tr. 9:4-17:3, 18:20-23:17, 87:6-89:13, 92:14-94:10).

B. Standard and Scope of Review

The Court of Chancery granted Defendants' motion for summary judgment below. The trial court's decision to grant summary judgment is reviewed *de novo*. *See In re Krafft-Murphy Co., Inc.*, 82 A.3d 696, 702 (Del. 2013). Summary

judgment may only be granted where the moving party is entitled to judgment as a matter of law based on the material undisputed facts. *See id*.

There were no disputed material facts before the Court of Chancery in this matter. The Court of Chancery's decision was based on its interpretation of two legal principles, the political question doctrine and the act of state doctrine. The interpretation and applicability of the political question doctrine is a question of law. Questions of law are reviewed *de novo*. *See, e.g.*, *Baker v. Long*, 981 A.2d 1152, 1156 (Del. 2009); *Pike Creek Chiropractic Ctr., P.A. v. Robinson*, 637 A.2d 418, 420 (Del. 1994) (applying *de novo* standard to cross-motions for summary judgment); *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992) (exercising plenary review to examine *de novo* questions of law decided by trial court's granting of summary judgment).

Whether the political question doctrine applies in this case as a legal basis for granting summary judgment dictates a *de novo* standard of appellate review.

C. Merits

1. *The political question doctrine does not enable the Court of Chancery to add language or meaning to the Executive Statement.*

The Court of Chancery's recognition of Mr. Guaidó goes well beyond the limits of the Executive Statement. Although the Executive recognized Mr. Guaidó as the "Interim President of Venezuela," the trial court held itself bound by the political question doctrine to declare him the "effective government of Venezuela,"

effectively elevating Mr. Guaidó to the title of "President of Venezuela," with the power to appoint the Board of PDVSA and thereby the boards of the Nominal Defendants. *See* Ex. A, at 25. This was not a proper application of the political question doctrine. The Executive Branch has never declared Mr. Guaidó to be the "effective government of Venezuela," much less the "President of Venezuela." The word "interim" conveys a limitation on his recognition that overlays a host of policy decisions best reserved for the Executive. The trial court was bound by the political question doctrine to respect that limitation.

If this Court agrees, and the Executive's recognition is limited to its text, then this Court need not proceed to Plaintiffs' second question for appeal, which concerns the act of state doctrine. The Court of Chancery, after recognizing Mr. Guaidó as the foreign sovereign and effective government of Venezuela automatically afforded him act of state deference. *See id.* at 25-26 ("Recognition of Guaidó's government has significant consequences in this litigation because foreign sovereigns are entitled to the benefits of the act of state doctrine."). Assuming that such deference flows automatically from recognition, then the opposite must also be true: If Mr. Guaidó is not recognized as the President of Venezuela, then his acts are not entitled to act of state deference *per se*, without reaching the other limitations of the act of state doctrine, also applicable here.

2. *The facts surrounding the recognition given determine the scope of the political question doctrine.*

The political question doctrine excludes from judicial review all determinations constitutionally committed to the Executive. *See, e.g.*, *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *Al-Tamimi v. Adelson*, 916 F.3d 1, 8 (D.C. Cir. 2019). The rationale behind the doctrine is longstanding. The judiciary is fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature. *Japan Whaling*, 478 U.S. at 230.

Political recognition of a foreign state is one area where the doctrine commonly applies. That function is exclusively reserved for the Executive Branch. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964); *but see* A1497-A1499 (RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ("Restatement (Second)") § 101 (Am. Law Inst. 1965)) and A1500 (RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ("Restatement (Third)") § 203(1) (Am. Law. Inst. 1987) (discussing limitations on the Executive's recognition power in light of the realities of the situation)); *M. Salimoff & Co. v. Standard Oil Co.*, 186 N.E. 679, 681-83 (N.Y. 1933) (discussing similar limitations upon the courts). Any decision to recognize (or not to recognize) a foreign government is a non-justiciable political question that federal and state courts must accept. *Guaranty Tr. Co. of New York v. U.S.*, 304 U.S. 126,

137-38 (1938); *see also Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2088 (2015) ("[W]hen the executive branch of the government assumes a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department.") (quoting *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839) (internal quotations omitted)).

While the formulation appears simplistic, its application is often anything but. In some cases, the question before the court turns on which government has been recognized by the United States. In *Guaranty Trust*, for instance, the question was which Russian government—the Provisional government or the Soviet government—was to be regarded as the "representative of a foreign sovereign state." *Guaranty Trust*, 304 U.S. at 137-38. Other times, however, the issue is not so binary; it turns rather on the precise nature of the recognition itself. *See* A1518 (ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.8.4 at 148 (5th ed. 2015) ("[I]ssues concerning who represents a foreign state, and in what capacity, are not justiciable.") (emphasis added)). As Winston Churchill once put it: "One can recognize a man as an Emperor or as a Grocer. Recognition is meaningless without a defining formula." A1530 (*Telegraph, The British Prime Minister (Churchill) to President Roosevelt*, July 21, 1943, in FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1943, EUROPE, VOL. II at 173, U.S. Gov't Printing Off. (1964),

https://history.state.gov/historicaldocuments/frus1943v02/pg_173 (last visited Nov. 5, 2019)). The question then becomes *what* was recognized; not who.

The Supreme Court has grappled with the latter scenario numerous times, and in each case, it has enforced the precise terms of the recognition. In 1831, two shipping vessels were seized by authorities from the Falkland Islands for violations of laws promulgated by the government of Buenos Aires (the "GOBA"). *Williams*, 38 U.S. at 416. At the time, the United States did not recognize the GOBA's sovereignty over the Falkland Islands[2], although it did recognize the GOBA's sovereignty over the mainland. *Id*. at 418-20. The issue before the Court was whether GOBA had jurisdiction over the Falkland Islands. *Id.* at 420.

In its Opinion, the Court did not assume based on proximity or any other misguided indicator that Argentina was the "effective government" of the Falkland Islands.[3] It rather looked to the express terms of the Executive Branch's recognition of GOBA to hold that the Falkland Islands were carved out of that recognition. *See id*. ("[W]e think in the present case, as the executive, in his

[2] The United Kingdom has a longstanding claim of sovereignty over the Falkland Islands, to which the United States takes no position. Instead, the United States recognizes the United Kingdom's *de facto* control over the Islands. *See* A1535 (*U.S. Position of the Falkland (Malvinas) Islands*, U.S. DEP'T OF STATE (Jan. 20, 2012), https://2009-2017.state.gov/r/pa/prs/ps/2012/01/182294.htm (last visited Nov. 5, 2019)).

[3] Although not discussed in the Court's opinion, the United Kingdom exercised control over the Falkland Islands at this time.

message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland islands; the fact must be taken and acted on by this Court as thus asserted and maintained.").

The practice continues to this day. In 2015, an act of Congress challenged the Executive Branch's recognition policy towards Israel. *Zivotofsky*, 135 S. Ct. at 2082. The act allowed persons born in Jerusalem to identify their birthplace as Israel despite the Executive's refusal to recognize Jerusalem as part of Israel. *Id.* The Supreme Court held that the act was unconstitutional because it conflicted with the "terms on which recognition [of Israel was] given." *Id*. at 2082, 2096. Quoting longstanding precedent, the Court stressed that lower courts must view a government "as it is viewed" by the Executive Branch. *Id*. at 2091 (quoting *United States v. Palmer*, 16 U.S. 610, 643 (1818)); *see also United States v. Pink*, 315 U.S. 203, 229 (1942) ("[The Executive's] authority . . . includes the power to determine the policy which is to govern the question of recognition."). The Executive Branch's policy towards Israel did not include Jerusalem, and the Court was bound to respect that policy.

The question in each case was not who, but what was recognized. To answer that question, each respective court reviewed the Executive Branch's written comments and adhered to the express terms or limitations of each

recognition. The Court of Chancery did not. It simply likened recognition to effective governance (*see* Ex. A, at 25 (‘“Recognition’ is a term of art used by the Executive Branch to identify a regime that ‘is the effective government of a state.’”)). And it assumed that Mr. Guaidó was the effective government because he was recognized in some capacity. *See id.* Then, without any further reasoning, the trial court essentially elevated him to the “President of Venezuela.” *See id.* at 25-26. These conclusions are problematic for several reasons.

First, they disregard the Executive Branch’s express designation of Mr. Guaidó as the interim president. As explained in the next section, the term “interim” reflects an Executive Branch policy against declaring him the “effective government” or the President of Venezuela. The trial court refused to engage with that decision. *See id.* at 25 (“Regardless of what title Guaidó holds, Guaidó and his regime are the effective government of Venezuela.”). Instead it focused on the “who” question: deciding whether one “particular regime” had been recognized over the other. *See id.* at 20. Plaintiffs never raised the “who” question, however. There was no dispute that Mr. Guaidó was recognized by the United States. *See* A968 (July 18, 2019 Hr’g Tr. 9:11-14 (“The issue of whether or not the President can recognize the interim Guaidó government is off the table. We are not arguing that.”); *see also* A864-A865 (Pls.’ Answering Br. 3-4). Plaintiffs raised the “what” question, arguing that certain powers were carved out of his recognition. *See*

A491-A492 (Pls.' Opening Br. 26-27); *see also* Ex. A, at 24 ("To the plaintiffs, the word 'interim' precludes Guaidó from 'invok[ing] the powers that come with the title' of President.") (citing Pls.' Opening Br. 26-27). The trial court failed to evaluate that distinction.

Second, there was no attempt to define the meaning of the phrase "effective government," or describe how that status gives Mr. Guaidó the power to appoint PDVSA's board of directors. The parties agreed that only the "President of Venezuela" had the power to appoint PDVSA's board of directors. *See* A470 (Pls.' Opening Br. 5); A544 (Defs.' Opening Br. 4). The trial court's political question analysis only reached to "effective government." *See* Ex. A, at 25 ("'Recognition' is a term of art used by the Executive Branch to identify a regime that 'is the effective government of a state.' Regardless of what title Guaidó holds, Guaidó and his regime are the effective government of Venezuela."). The parties never briefed the trial court on the powers of an "effective government;" nor did the court ask for such briefing. Assuming Mr. Guaidó was properly declared the "effective government," the court had to go further and explain how "effective government" and the title of "President of Venezuela" were one in the same. No such explanation was given.

Third, by all other standards, the Maduro administration remains the "effective government" of Venezuela. The United Nations has consistently

maintained that the Maduro administration is the effective government. *See* A1536-A1538 (*UN Chief Rules Out Meeting Venezuela's Guaido in New York*, VOA NEWS (Sept. 18, 2019), https://www.voanews.com/usa/un-chief-rules-out-meeting-venezuelas-guaido-new-york (last visited Nov. 5, 2019) ("Nicolas Maduro's government holds Venezuela's U.N. seat")); A1539-A1543 (*At UN, Venezuela's Rival Delegations Circle Each Other*, VOA NEWS (Sept. 26, 2019), https://www.voanews.com/usa/un-venezuelas-rival-delegations-circle-each-other (last visited Nov. 5, 2019) ("Guaido's delegation could not enter U.N. headquarters as Venezuelan delegates.")). As recent as August 2019, the United States signed a treaty alongside the representatives of the Maduro government (Venezuela and the United States both became signatories to the U.N. Convention on International Settlement Agreements Resulting from Mediation). International law treats the Maduro administration as the effective government. *See, e.g.*, A1288 (Stefan Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12 CHIN. J. INT'L L. 219, 231 (2013). As Talmon explains,

> A State, the government of which is not politically recognized by another State, nevertheless remains a subject of international law in relation to the latter State and all rights and duties stipulated by treaty or customary international law remain in force in the mutual relations between both States. It is the government which fulfils the international obligations and activates the international rights of the State.

Id. In addition, through the Statute, the Venezuelan National Assembly, treats the Maduro administration as the "*de facto*" government, which the Executive Branch accepts. *See* A245, A523 (Statute, art. 7(1)); A733 (OFAC FAQ No. 660). Finally, the Maduro administration exercises operational control over state-owned entities such as PDVSA, which the Executive Branch also accepts. *See* A733 (OFAC FAQ No. 660) ("The path to sanctions relief for PDVSA and its subsidiaries is through the expeditious transfer of control of the company to Interim President Juan Guaidó or a subsequent, democratically elected government.") (emphasis added). The trial court simply refused to engage with these arguments. The political question doctrine requires more.

3. *The Executive Branch cannot recognize Mr. Guaidó's jurisdiction over PDVSA or the Nominal Defendants.*

"Interim" reflects a policy of restraint towards Mr. Guaidó's recognition that the courts are "fundamentally underequipped" to second guess. *Japan Whaling*, 478 U.S. at 230; *see also* A1283 (Talmon, 12 CHIN. J. INT'L L. at 226 ("Recognition statements are usually drafted with great care and the wording employed (or not employed) is of great legal and political significance.")). Never once has the Executive Branch recognized Mr. Guaidó as the "President of Venezuela." It refers to him as the "interim president" and believes that the Venezuelan National Assembly is the only "legitimate branch of government duly elected by the Venezuelan people." A596 (Executive Statement). In turn, the

National Assembly treats Mr. Maduro as the "*de facto*" government. A245, A523 (Statute, art. 7(1), 8). And in recent months, the Executive Branch has even re-entered into negotiations with the Maduro administration, making it clear that the Executive Branch *treats* the Maduro administration as the government of Venezuela. A1544-A1547 (José de Córdoba, *et al*., *U.S. and Venezuela Hold Secret Talks*, WALL ST. J. (Aug. 21, 2019), https://www.wsj.com/articles/u-s-and-venezuela-hold-secret-talks-11566434509?mod=searchresults&page=1&pos=3 (last visited Nov. 5, 2019)).

The Executive Branch's policy has a legal underpinning. According to the Restatement (Second), the Executive cannot recognize Mr. Guaidó legally until he controls a substantial amount of territory. A1497 (Restatement (Second) § 101). Until that occurs, the Executive is required to treat the Maduro administration as the *de facto* government for as long as it maintains effective control. *See* A1500-A1501 (Restatement (Third) § 203(1) ("A state . . . is required to treat as the government of another state a regime that is in effective control of that state."); cmt. b ("[T]here is a duty to treat as the government a regime that is the government in fact."); cmt. f ("[A]ny regime in effective control must be treated as the government")). U.S. courts adhere to the same policy. *See Salimoff*, 186 N.E. at 682 (followed by *Agricultural Coop. Ass'n of Lithuania Lietukis v. The Denny*,

127 F.2d 404, 410 (3rd Cir. 1942)). As the *Salimoff* court elaborated with respect to Soviet Russia

> The courts may not recognize the Soviet government as the de jure government until the State Department gives the word. They may, however, say that it is a government, maintaining internal peace and order, providing for national defense and the general welfare, carrying on relations with our own government and others. To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country is to give to fictions an air of reality which they do not deserve.

Id.

Treatment is different from recognition, as the texts of the Restatements (Second) and (Third) demonstrate. It is akin to the difference between political recognition *i.e.* Mr. Guaidó's recognition, and legal recognition, which Mr. Maduro still retains. The former signifies a willingness to enter into political relations with a government. It can lend prestige to an opposition group, but the rights and obligations of the state remain with the incumbent government. *See* A1288 (Talmon, 12 CHIN. J. INT'L L. at 231).

The latter is not so discretionary. Its criterion is set by international law. A government must control the State's territory, something Mr. Guaidó does not (*see infra*) before it can be legally recognized. A1289 (Talmon, 12 CHIN. J. INT'L L. at 232). Otherwise, a state has no authority to recognize a government. *See* A1561 (HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 95 (1947) ("Premature recognition is a tortious act against a lawful government; it is a breach

of international law.")); A1289 (Talmon, 12 CHIN. J. INT'L L. at 232 ("If it were otherwise, there would be nothing to prevent States so minded from recognizing at will whatever political group they thought fit as a government of another State.")). Premature legal recognition is a violation of a state's sovereignty (A1552 (LAUTERPACHT, at 8)), which is why the U.S. government refrains from recognizing groups that do not have effective control. *See* A1467 (Pls.' Reply Br. 18) ("The United States recognized 'the Syrian Opposition Coalition ("SOC") as the legitimate representative of the Syrian people,' but '[t]he United States does not recognize the SOC as the government of Syria.'") (quoting A1566 (OFFICE OF THE LEGAL ADVISOR, U.S. DEP'T OF STATE, DIGEST OF THE UNITED STATES PRACTICE IN INTERNATIONAL LAW (2012), at 281)). And yet, the trial court has sanctioned such a violation: the holding set forth in the Opinion results in the U.S. Executive Branch being able to use the recognition power to determine the outcome of a civil foreign dispute and even exercise indirect control over government entities. This cannot be correct. *See* A1289 (Talmon, 12 CHIN. J. INT'L L. at 232 ("Government status would be at the political discretion of other governments, which it is not.")).

In light of these principles, the Executive Branch takes an even more hands-off approach when it comes to the control over PDVSA and the Nominal Defendants. The Treasury Department believes that "[t]he path to sanctions relief

for PDVSA is through the expeditious transfer of control to the Interim President or subsequent democratically elected government." A1569-A1571 (*Treasury Sanctions Venezuela's State-Owned Oil Company*, U.S. DEP'T OF TREASURY (Jan. 28, 2019), https://home.treasury.gov/news/press-releases/sm594 (last visited Nov. 5, 2019) (emphasis added)). These statements offer the Maduro administration a choice between a voluntary transfer of control of PDVSA or sanctions. That choice (and those sanctions) shows that the Executive Branch still extends legal recognition to the Maduro administration. The trial court's Opinion essentially removes that choice, forcing a transfer of control of PDVSA, and thus conflicts with the continued legal recognition of the Maduro administration.

4. *De-recognition does not require this Court to invalidate the acts of the Maduro administration.*

Even if Mr. Maduro was de-recognized, which he was not, de-recognition would not nullify his internal acts. In the often cited *Salimoff* case, the court noted that "[t]he courts of one independent government will not sit in judgment upon the validity of the acts of another done within its own territory." 186 N.E. at 680. The *Salimoff* court held that "[i]f it is a government in fact, its decrees have force within its borders and over its nationals." *Id.* at 682. Accordingly, the court held that the confiscation act issued by the unrecognized Soviet government was valid under Russian law. *Id*.

This principle has been upheld by several courts. *See e.g.*, *Upright v. Mercury Bus. Machines Co.*, 13 A.D.2d 36, 38-40 (N.Y. App. Div. 1961); *Sokoloff v. Nat'l City Bank of New York*, 145 N.E. 917, 919 (N.Y. 1924). And it was eventually enshrined in section 113 of the Restatement (Second), which unequivocally notes that the "law of unrecognized entity or regime" related to "matters of an essentially private, nature within the effective control of the unrecognized entity, or regime" will be given "effect which it would have under the rules of conflict of laws if the entity or regime were recognized." A1572.

This was also affirmed in *Carl Zeiss Stiftung v. V.E.B Carl Zeiss, Jena*, where the court applied the law of the unrecognized East Germany to the extent that such law "pertain to its purely local, private, and domestic affairs." 293 F. Supp. 892, 900-01 (S.D.N.Y. 1968), *aff'd as modified sub nom. Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686 (2d Cir. 1970).

The Court of Chancery did not address this issue. It instead confused the above principle with the act of state doctrine and mischaracterized Plaintiffs' argument. *See* Ex. A, at 40 ("[t]he plaintiffs alternatively contend that the actions of Maduro's regime, which they characterize as 'non-recognized' or 'unrecognized' are equally entitled to presumptions of validity under the act of state doctrine."). The principle is "distinguish[able]" from the act of state doctrine because it "does not preclude examination by a court in the United States of the

validity of an act of an unrecognized regime in control of a foreign state." A1573 (Restatement (Second) § 113 cmt. b).

There is no dispute that the Maduro administration is the *de facto* government of Venezuela. And, in such case, the law requires the Court to give effect to acts pertaining to local and private matters in Venezuela.

II. THE ACT OF STATE DOCTRINE DOES NOT APPLY TO THE RESOLUTION

A. Question Presented

Does the act of state doctrine apply even though the Interim President and the National Assembly control no territory or people, and the Resolution has an almost entirely extraterritorial effect? Plaintiffs preserved this question in Plaintiffs' Opening Brief (A492-A495, A497-A501 (Pls.' Opening Br. 27-30, 32-36)), Plaintiffs' Answering Brief (A885-A892, A900-A902, A905-A912 (Pls.' Answ. Br. 24-31, 39-41, 44-51)), Plaintiffs' Reply Brief (A1451, A1455-A1464, A1477-A1480 (Pls.' Reply Br. 2, 6-15, 28-31)), and at oral argument. *See* A976-A977, A985-A994, A996-A999, A1045-A1046, A1048-A1051 (July 18, 2019 Hr'g Tr. 17:4-18:19; 26:15-35:15; 37:8-40:8, 86:17-87:5, 89:14-92:13).

B. Standard and Scope of Review

The trial court's decision to grant summary judgment is reviewed *de novo*. *See In re Krafft-Murphy*, 82 A.3d at 702. Summary judgment may only be granted where the moving party is entitled to judgment as a matter of law based on the material undisputed facts. *See id*.

The Supreme Court of Delaware reviews *de novo* questions of law. *Baker*, 981 A.2d at 1156. The application of the act of state doctrine involves a question of law, requiring a *de novo* review. *See D'Angelo v. Petroleos Mexicanos*, 331 A.2d 388, 391-92 (Del. 1974). A similar standard is followed by federal courts

that have reviewed issues involving the act of state doctrine. *See, e.g.*, *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 376 (3d. Cir. 2006) (exercising plenary review to determine the applicability of the act of state doctrine).

The Court of Chancery relied on the act of state doctrine as a matter of law to grant Defendants summary judgment. That reliance should be reviewed *de novo*.

C. Merits

The political question doctrine and the act of state doctrine are distinct in their nature and effect. *See* A1575 (RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ("Restatement (Fourth)") § 441 (Am. Law Inst. 2018)). While the former "renders a case nonjusticiable," the latter allows a court to decide on the merits. A1578 (Restatement (Fourth) § 441 reporters' n.3).

The act of state doctrine instructs a court to "assume the validity of an official act of a foreign sovereign performed within its own territory." *Id.* But a party seeking act of state doctrine treatment bears the burden of proving that the elements for applying the doctrine are met. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691 (1976); *see also* A1579 (Restatement (Fourth) § 441 reporters' n.5); A1613-A1616 (Donald T. Kramer, *Modern Status of the Act of State Doctrine*, 12 A.L.R. Fed. 707, § 3b (1972) (one alleging the applicability of the doctrine must "satisfy the evidentiary necessity of proving that

an act of a foreign state . . . actually occurred and what the intended effect of that act was.")).

The Court of Chancery erred in extending this doctrine to acts issued by a non-sovereign entity that affected interests outside Venezuela.

1. *The act of state doctrine only applies to recognized governments that control territory and people*

The Fourth Restatement of the Foreign Relations Law of the United States is clear. The act of the state doctrine only applies to an "act of a foreign sovereign." *See* A1575 (Restatement (Fourth) § 441).

Courts commonly refer to the Restatement to define what qualifies as a "sovereign." *See Ungar v. Palestine Liberation Org*., 402 F.3d 274, 283 (1st Cir. 2005) (the court referred to the Restatement (Third) to define a "foreign state," noting that "[u]sing the Restatement standard as the rule of decision is a colorable position."); *Carl Zeiss*, 293 F. Supp. at 909-10.

The Restatement (Second) defines a sovereign as "an entity that has a defined territory and population under the control of a government and that engages in foreign relations." A1758 (Restatement (Second) § 4); *see also* A1763 (Restatement (Third) § 201). The state "need not have any particular form of government, but there must be some authority exercising governmental functions and able to represent the entity in international relations." *Id*. (Restatement (Third) § 201 cmt. d).

Courts have applied the same definition in the context of the act of state doctrine. For instance, in *Carl Zeiss*, the court analyzing the act of the state doctrine, noted that, "[a] foreign state for such purposes is an entity recognized by our Government, which has a defined territory and population under control of its government." 293 F. Supp. at 909-10 (emphasis added). The court further stressed that "[o]ne of the fundamental conditions of the 'act of state' doctrine is that the foreign state whose act is involved have a clearly recognizable jurisdictional basis for its action, usually one based on territorial control over the subject of its action." *Id*. at 910.

The Court of Chancery gave no weight to this decision. The trial court dismissed this "fundamental condition," describing it rather as the Plaintiffs' attempt to "transmute this general statement into a new rule." *See* Ex. A, at 35. The trial court's characterization is inaccurate; this is not "a new rule" but rather a principle derived from the classical notion of the doctrine. *See Carl Zeiss*, 293 F. Supp. at 910 ("[r]epeatedly our Supreme Court in reaffirming the doctrine has expressly referred to it as relating to the acts of a foreign sovereign 'within its own territory.'"); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (The Supreme Court held that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory," implying that the government must have control over the territory.) (emphasis added); *Sabbatino*,

376 U.S. at 416; *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965).

Acts that emanate from any entity that has no control or authority over a territory cannot be given act of state treatment. As noted in *Sokoloff*, the general rule is that "acts or decrees, to be ranked as governmental, must proceed from some authority recognized as a government *de facto.*" 145 N.E. at 919. This is confirmed by several decisions which have applied the doctrine only to *de jure* governments that meet the definition of sovereign under the Restatement (Second). *See* A1644-1647 (Kramer, *Modern Status of the Act of State Doctrine*, 12 A.L.R. Fed. 707, § 8a (collecting cases)); *See e.g., Underhill*, 168 U.S. at 253 (a *de jure* government in control of territory at the time of the trial); *Oetjen v. Cent. Leather Co*., 246 U.S. 297, 302-03 (1918) (same); *Ricaud v. Am. Metal Co*., 246 U.S. 304, 306 (1918) (same); *First Nat'l City Bank v. Banco Nacional De Cuba.*, 400 U.S. 1019 (1971) (same); *Sabbatino*, 376 U.S. 398 at 404 (same); *Banco Nacional de Cuba v. First Nat'l City Bank of New York*, 431 F.2d 394, 399 (2d Cir. 1970), vacated *sub nom.; Republic of Iraq*, 353 F.2d at 49-50 (same); *Union Shipping & Trading Co. v. U.S.*, 127 F.2d 771, 774 (2d Cir. 1942) (same); *Capitol Records v. Mercury Record Corp*., 109 F. Supp. 330, 343-44 (S.D.N.Y. 1952), *aff'd sub nom. Capitol Records v. Mercury Records Corp*., 221 F.2d 657 (2d Cir. 1955) (the court gave effect to a Czechoslovakian decree issued by the Communist regime that was

"in control of the government of Czechoslovakia."); *E. States Petroleum Co. v. Asiatic Petroleum Corp*., 28 F. Supp. 279, 280-81 (S.D.N.Y. 1939) (Mexican president led a *de facto* government).

Despite the above cases, the Court of Chancery claims that "[t]he act of state doctrine even extends to decrees by recognized governments in exile that control no territory." Ex. A, at 37. But none of the cases cited by the Court support such conclusion. *See id.* at 37 n.110, 38 n.113. Indeed, the opposite is true. Decades of decision and practice show that the act of state doctrine requires control over territory.

The Court of Chancery unduly relied on the *Republic of Panama v. Air Panama* decision. *See id.* at 33-34, 36-37. In that case, the Republic of Panama, as represented by the recognized Delvalle government, requested a preliminary injunction to, *inter alia*, prevent any interference with Delvalle's appointee exercising control of Air Panama. *Republic of Panama v. Air Panama Internacional, S.A.*, 745 F. Supp. 669, 670-71 (S.D. Fla. 1988). Based on the political question doctrine, the court found that the Republic "is likely to succeed on the merits of its claim." *Id.* at 672.

The facts in *Air Panama* are distinct from the present case and, hence, the case provides no guidance. In *Air Panama*, Noriega's appointee requested that the court "void the recognition extended by the President and the Executive Branch of

the United States to the Delvalle government." *Id.* at 673-74. This is not the case here. Plaintiffs do not seek the Court to void the Executive Branch's decision to recognize Mr. Guaidó as the interim president.

Unlike the present case, the Noriega appointee did not argue that the act of state doctrine was inapplicable. Instead he submitted that Panamanian law applies because Air Panama is a private entity. *See id*. at 673. The court on its own motion and with little to no analysis held that the act of state doctrine which is a "companion to the political question doctrine" prevents the court from "inquir[ing] into private Panamanian law." *Id*. Noriega's appointee did not argue, and the court did not examine if all the elements for applying the act of state doctrine were met. And the *Air Panama* court's conclusion, which does not go beyond a paragraph, is anything but "instructive." *See* Ex. A, at 33. There is an absence of analysis and lack of appreciation for the elements of different concepts.

The Opinion's other citations do not cure this error. The Opinion cites *Lehigh Valley Railroad Company v. State of Russia*, but the court in that case did not apply the act of state doctrine. *See Lehigh Valley R.R. Co. v. State of Russia*, 21 F.2d 396 (2d Cir. 1927). The court, in passing, noted that the act of the state doctrine is inapplicable to acts outside the territory of the acting state. *See id.* at 401. But its discussion as to the doctrine ends there. And rightly so, because the dispute concerned the loss of goods as the result of an explosion in interstate

commerce. *Id.* at 402. In that case, the question was whether the Carmack Amendment of the Interstate Commerce Act or the common law was applicable and not whether Russian law was applicable. *See id.*

Similarly, in *Netherlands v. Federal Reserve Bank of New York*, the court did not apply the act of state doctrine. In *Netherlands*, the plaintiff brought a claim over bonds held by a U.S. resident in New York, pursuant to Royal Decree A-1 which was issued while the government of the Netherlands was in exile. *See Netherlands v. Fed. Reserve Bank of New York*, 201 F.2d 455, 455-56 (2d Cir. 1953). The court recognized and enforced the decree not pursuant to the act of state doctrine but because the act did not "conflict with any legitimate legislation or regulation of the occupant or with [the United States'] public policy." *Id.* at 460, 463. If the act of state doctrine had applied, the court would not have assessed whether the act conflicts with U.S. law or policy. It simply would have treated the act as valid. *See* A1575 (Restatement (Fourth) § 441 cmt. a) ("The act of state doctrine when applicable bars a court from questioning the validity of the foreign act on the ground that it did not comply with that sovereign's own legal requirements, international law, or U.S. law or policy.").

2. *The act of state doctrine only applies to acts with a predominantly domestic focus.*

The Court of Chancery erred by extending the doctrine to acts affecting interests outside the acting state's territory. Contrary to the trial court's assertion,

Plaintiffs do not contend that the doctrine is inapplicable because the act occurred outside of Venezuela. *See* A1460-A1463 (Pls.' Reply Br. 11-14); Ex. A, at 41. Plaintiffs rather submit that the doctrine is inapplicable to the Resolution because the Resolution is exclusively directed against interests outside Venezuela. *See* A1460-A1463 (Pls.' Reply Br. 11-14).

The act of state doctrine does not extend to acts affecting interests outside the acting state's territory. *See* A1576 (Restatement (Fourth) § 441 cmt. e ("[t]he doctrine applies only to an act of state performed with respect to persons, property, or other legal interests within the foreign sovereign's territory.") (emphasis added)).

Courts have consistently affirmed the territorial limitation of the doctrine. *See* A1829 (Joseph W. Dellapenna, *Deciphering the Act of State Doctrine*, 35 Vill. L. Rev. 1, 62 (1990) ("the territorial limitation remains one of the few aspects of the doctrine that has been accepted by every Supreme Court Justice, at least in dictum, and followed in numerous lower court decisions.")); *see e.g.*, *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l B.V.*, 61 F. Supp. 3d 372, 381 (S.D.N.Y. 2014), *aff'd in part, vacated in part, remanded*, 809 F.3d 737 (2d Cir. 2016) ("[I]t is black-letter law that the doctrine 'does not prevent examination of the validity of an act of a foreign state with respect to a thing located, or an interest localized, outside of its territory.'") (internal citations omitted); *Allied Bank Int'l v.*

Banco Credito Agricola de Cartago, 757 F.2d 516, 522 (2d Cir. 1985); *Tabacalera Severiano Jorge, S. A. v. Standard Cigar Co.*, 392 F.2d 706, 713 (5th Cir. 1968) (The court held that the doctrine would be inapplicable to a Cuban decree which gave an intervenor the right to collect sums owed by a Florida company, noting that the subject-matter was a "credit owed to the Cuban corporation (albeit arising out a Cuban transaction) by an American creditor domiciled in Tampa, Florida."); *Republic of Iraq*, 353 F.2d at 51; *Mann v. Compania Petrolera Trans-Cuba, S.A.*, 223 N.Y.S.2d 900, 902 (Sup. Ct. 1962) ("[T]he '[a]ct of state' doctrine . . . has been applied only to persons who, and *res* which, are within the territorial dominion of the acting state; and to contracts whose 'center of gravity' is within the territorial dominion of the state.").

For instance, in *Republic of Iraq v. First National City Bank*, the Second Circuit held that the doctrine did not apply to Iraq Ordinance No. 23 which purported to confiscate King Faisal's bank account and stock in the custody of a company in New York. *See Republic of Iraq*, 353 F.2d at 51. And the court noted that the ordinance would be "[e]xtra-territorial[ly]" enforced only if it was "consistent with [U.S.] policy and laws." *Id.* While the trial court found the second step of the *Republic of Iraq* analysis unnecessary (*see* Ex. A. at 44 n.130), this analysis is nothing out of the ordinary. It is in line with the general principle that "[a]cts of foreign governments not performed within their own territory are

subject to ordinary conflict-of-laws rules and 'should be recognized by the courts only if they are consistent with the law and policy of the United States.'" *See* A1581-A1583 (Restatement (Fourth) § 441 reporters' n.7 (quoting *Allied Bank*, 757 F.2d at 522)).

Despite this long-held extraterritorial exception, the Court of Chancery summarily dismissed Plaintiffs' argument and held that it does not "need to look to or analyze the effects of the official act at issue." *See* Ex. A, at 44 n.130. Its conclusion was based on a misinterpretation of *Allied Bank v. Banco Credito Agricola de Cartago*, *Interamerican Refining Corp. v. Texaco Maracaibo Inc*., and *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*. *See id.* at 41-44. Each of these decisions recognized the extraterritorial exception to the act of state doctrine. *See Allied Bank*, 757 F.2d at 522; *Interamerican Refining*, 307 F. Supp. 1291, 1298-99 (D. Del. 1970); *Carl Zeiss*, 293 F. Supp. at 912.

The Court of Chancery noted that the *Allied Bank* court held that the "[a]cts of foreign governments purporting to have extraterritorial effect . . . fall[] outside the scope of the act of state doctrine," which supports Plaintiffs' submission that the doctrine does not apply to acts having extraterritorial effects. *See* Ex. A, at 43. But the court concluded that *Allied Bank*'s finding is a dictum that "lacks any theoretical foundation within the decision itself or case law generally." *See id.* at 43-44. This is an incorrect interpretation of the decision, which is cited in many

authorities as supporting the extraterritorial exception to the act of state doctrine. *See e.g.*, A1581-A1583 (Restatement (Fourth) § 441 reporters' n. 7).

Allied Bank's finding is not dictum but a holding. A "holding of a case includes, besides the facts and the outcome, the reasoning essential to that outcome." *Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580, 582 (7th Cir. 2005); *see also Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 66-67 (1996) (defining holding as "the result [and] also those portions of the opinion necessary to that result."). In contrast, a dictum is a judicial statement that "would have no effect on the outcome of the case." *See Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 276-77 (Del. 2010). The full reading of the *Allied Bank* case reveals the trial court's erroneous conclusion.

In *Allied Bank*, the court held that the act of state doctrine does not apply to the Costa Rican executive decree which permitted the Central Bank of Costa Rica to refuse all foreign debt payments, including the promissory note issued to Allied Bank and payable in New York City. *Allied Bank*, 757 F.2d at 520-21.

The court noted that "'[t]he act of state doctrine does not . . . bar inquiry by the courts into the validity of extraterritorial takings.'" *Id.* at 520 (quoting (*Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 658 F.2d 903, 908 (2d Cir. 1981); *Republic of Iraq*, 353 F.2d at 51. It explained that "[t]he doctrine does not necessarily 'preclude judicial resolution of all commercial consequences' that

results from acts of foreign sovereigns performed within their own borders." *Allied Bank*, 757 F.2d at 521 (internal citations omitted) (emphasis added).

Having found that the situs of the debt was in New York City and recognizing "[t]he extraterritorial limitation" of the doctrine, the court concluded that the doctrine is inapplicable. *Id*. It further explained that "[a]cts of foreign governments purporting to have extraterritorial effect . . . fall[] outside the scope of the act of state doctrine" and stressed that such acts will only be "recognized if they are consistent with the law and policy of the United States." *Id.* at 522. The court finally noted that "[t]hus we have come full circle to reassess whether we should give effect to the Costa Rican directives. We now conclude that we should not." *Id*.

The statement cited by Plaintiffs and dismissed by the Court of Chancery as dictum was the basis for the Second Circuit's conclusion. It was clear to the court that if it gives extraterritorial effect to the decree, "Allied's right to receive payment in accordance with the agreement is thereby extinguished," and would mean that "a taking has occurred." *Id.* at 521 n.3.

The trial court further criticized *Allied Bank*'s conclusion on the extraterritorial limitation of the doctrine, noting that the "quote lacks any theoretical foundation within the decision itself or case law generally." Ex. A, at 44. That is simply wrong. The Second Circuit arrived at its conclusion based on

case law that recognized the extraterritorial limitation of the doctrine. *See Allied Bank*, 757 F.2d at 522 (citing *United States v. Belmont*, 301 U.S. 324, 332-333 (1937) (the Supreme Court noted that the U.S. courts cannot invalidate or intervene on measures that only affect the rights of the Russian corporation in Russia); *Chemical Bank*, 658 F.2d at 908 (The court held that "[t]he act of state doctrine does not, however, bar inquiry by the courts into the validity of extraterritorial takings."); *Republic of Iraq*, 353 F.2d at 51).

Similarly, the Opinion misinterprets the decision in *Interamerican Refining Corporation v. Texaco Maracaibo*. *See* Ex. A, at 41-42. In that case, the court applied the act of state doctrine to a government order instructing defendants not to sell Venezuelan oil to a plaintiff if they wish to continue doing business in Venezuela. *See generally Interamerican Refining*, 307 F. Supp. 1291 (D. Del. 1970). The court noted that "sovereignty includes the right to regulate commerce within the nation." *Id.* at 1298. And rejected the plaintiff's submission that "the act of compulsion must be valid under Venezuelan laws." *Id.* at 1298-1299.

Unlike the trial court's observation, the *Interamerican Refining* court did not reject the extraterritorial exception of the act of state doctrine (*see id.*; Ex. A, at 41, 42 nn.125-126) because the *Interamerican Refining* court had determined that the act affected "commerce" within Venezuela. *Interamerican Refining*, 307 F. Supp. at 1298-99.

The Opinion never made such a finding, nor could it. The Resolution is directed against interests located outside Venezuela. While in *Interamerican Refining*, the act applied to defendants' rights to sell oil or generally to "commerce within" the acting state. *Id.* at 1298.

The Opinion also misapplies *Carl Zeiss*. *See* Ex. A, at 44 n.130. In *Carl Zeiss*, the court applied the act of state doctrine to the Wuerttemberg decrees and the German Parliament's Act of 1967 as it related to matters within West Germany, but asserted that the acts will not be given extraterritorial effect to the extent that they affect interests in East Germany. *See Carl Zeiss*, 293 F. Supp. at 912. As noted by the trial court, in *Carl Zeiss* the "act of state doctrine is not rendered inapplicable because the act involved has some impact outside of the territory of the acting state. *Id.*; Ex. A, at 44 n.130. This, however, does not support the Court of Chancery's conclusion that the doctrine applies to "any effects outside of Venezuela." Ex. A, at 44 n.130. The opposite is true. Where an act has predominantly extraterritorial effect, then it does not apply outside the boundaries of the foreign state.

Following the above case law and the Restatement (Fourth), the Court must recognize the extraterritorial exception and apply the principle to the instant case.

3. *The act of state doctrine cannot apply to the Statute or the Resolution.*

Based on the wealth of the decisions cited above, the act of state doctrine

cannot apply. Because Mr. Guaidó does not lead a government that meets the definition of a "foreign sovereign," the Statute and the Resolution cannot benefit from the act of state doctrine. The interim Guaidó government does not have any territorial control in Venezuela and does not meet the definition of a "foreign state." Numerous international tribunals have supported this conclusion. In *Valores v. Venezuela* ICSID arbitration case, the *ad hoc* committee declined the interim government's request to represent Venezuela. *See* A1898-A1915 (*Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/13/11) ("Valores Decision"). The committee held that the interim Guaidó government, beyond recognition by some foreign states, does not control Venezuela's territory. *See* A1899 (Valores Decision 42, 48, 49).

Without a doubt, the Maduro government effectively exercises control in Venezuela and continues to represent the country, including before the United Nations. *See* A1916-A1919 (*UN rejects Venezuela's Guaido, will only cooperate with recognized government of Maduro*, PRESSTV (Feb. 2, 2019), https://www.presstv.com/detail/2019/02/01/587387/un-reject-guaido-cooperate-maduro (last visited Nov. 5, 2019)). The Maduro government on behalf of Venezuela recently appeared as a signatory alongside the United States and many other nations. *See* A1923-A1927 (*Venezuela firma Convención de Singapur sobre la Mediación*, Venezuela, Ministry of Foreign Affairs (Sept. 8, 2019),

http://mppre.gob.ve/2019/08/09/venezuela-firma-convencion-de-singapur-sobre-la-mediacion/ (last visited Nov. 5, 2019)); A1928-A1931 (SINGAPORE CONVENTION ON MEDIATION, *List of Signatory Countries*, https://www.singaporeconvention.org/official-signatories.html (last visited Nov. 5, 2019)).

Additionally, the Resolution cannot benefit from the doctrine because it is directed towards interests located outside Venezuela. The main purpose of the Resolution was to restructure the management of PDVSA's subsidiaries situated in the United States. *See* A260, A268 (Resolution, art. 2).

Having recognized that the PDVSA board of directors, as controlled by the Maduro government, will not "designate a new [b]oard of [d]irectors of PDV Holding, Inc., of the [c]ompany CITGO Holding, Inc. and of the [c]ompany CITGO Petroleum Corporation," the National Assembly, through the Resolution, appointed the "Ad-hoc Administrative Board" to designate "new boards of directors of the subsidiaries of PDV Holding, Inc., of CITGO Holding, Inc. and of CITGO Petroleum Corporation." *See* A260-A261, A267-A269 (Resolution).

These are all strictly extraterritorial acts to which the act of state doctrine does not apply.

CONCLUSION

For all of the foregoing reasons, the Court of Chancery's Opinion granting Defendants' motion for summary judgment and affirming them as the current directors on the boards of the Nominal Defendants was in error, and this Court should reverse.

Dated: November 5, 2019

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