EFiled: Dec 23 2019 03:37PM EST
Filing ID 64553854
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' REPLY BRIEF

Of Counsel
GST LLP
Quinn Smith
Katherine A. Sanoja
1111 Brickell Avenue, Suite 2715
Miami, FL 33131
Telephone: (305) 856-7723

-and-

Gary J. Shaw
Bethel Kassa
2600 Virginia Ave., NW #205
Washington, D.C. 20037
Phone: (202) 681-0529

LANDIS RATH & COBB LLP
Daniel B. Rath (No. 3022)
Rebecca L. Butcher (No. 3816)
Jennifer L. Cree (No. 5919)
919 Market Street, Suite 1800
Wilmington, DE 19801
Telephone: (302) 467-4400
Facsimile: (302) 467-4450

Counsel for Appellants

Dated: December 23, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

Contrary to the precision demanded by this field of law, Appellees' Corrected Answering Brief (the "Answering Brief") conflates terms and doctrines, mixes and matches specific words in imprecise ways and relies largely on straw man arguments, not the text of the Executive Statement[1] and relevant case law. In the Reply Brief, Plaintiffs seek to correct these errors.

Plaintiffs begin by clarifying the Statement of Facts. The Answering Brief has mischaracterized supposed agreements and played loosely with terms of art that require clearness. Plaintiffs then turn to the political question doctrine, with a focus on applying the text of the Executive Statement as written and consistent with the historical practice of the United States. The only conclusion is that the Executive Statement recognized Mr. Guaidó, not an "effective government;" a conclusion that leaves Defendants no basis for application of the act of state doctrine.

Then Plaintiffs address the act of state doctrine while illustrating the many other problems in the Answering Brief, including the over-reliance on cases that do not apply the act of state doctrine or interpret other principles of international law, on which the Opinion (attached as Exhibit A to the Opening Brief) did not rely.

[1] Terms not defined herein have the meanings given in Appellants' Opening Brief ("Opening Brief").

STATEMENT OF FACTS

There are some facts where Plaintiffs and Defendants agree, but there are many where Plaintiffs must respond to prevent any confusion. The parties do not agree that the "President of Venezuela has the sole power to appoint the members of PDVSA's Managing Board by decree." Answering Br. 6. The Answering Brief cites nothing for this "agreement," nor could it. Plaintiffs dispute that Mr. Guaidó appointed a valid Managing Board and that his appointees have any powers. Further, Defendants' assertion conflicts with the Statute they cite, which claims to empower the interim president (not the "President of Venezuela") to appoint an *ad hoc* board of directors of PDVSA. *Id.* at 12-13. Plaintiffs also do not subscribe to the Opinion's description of the facts leading up to the May 2018 presidential election. The parties did not submit these facts below, and they are not dispositive of the issues before this Court.

When the Answering Brief arrives at its description of the recognition of Mr. Guaidó, there are significant discrepancies that stem largely from a misuse of the first line of the Executive Statement. The Answering Brief asserts that the United States recognized the "Guaidó Government." *See generally id.* The Executive Statement does not use those words. A596. Rather, President Trump said that "[t]oday, I am officially recognizing the President of the Venezuelan National Assembly, Juan Guaidó, as the Interim President of Venezuela." *Id.* The next

sentence describes the National Assembly, but it does not extend any recognition to it or any "Guaidó Government," interim or otherwise. *Id.* The Executive Statement stayed consistent in its focus on the individual, referring numerous times to support for Mr. Guaidó, both by name and through the pronoun "his." *Id.*

The Answering Brief takes other liberties with the language used. It states that Mr. Guaidó "reconstituted PDVSA's board," even though Mr. Guaidó has never claimed to name a Board of Directors of PDVSA, invoking instead an "*ad hoc*" or "Managing Board." Answering Br. 14. It also uses the terms "president" and "interim president" interchangeably. *See generally id.* This is inconsistent with the Executive Statement.

The Answering Brief does not engage with the General Licenses granted to certain U.S. persons to engage in transactions with PDVSA, as governed by its Board of Directors. There is a passing mention of General License 31, but there is no mention of the numerous General Licenses that accept the continuing validity of PDVSA without the "Managing Board." *Id.* at 14, 27. Despite the doubts sowed by counsel at the hearing, OFAC continues to extend General Licenses that allow substantial business with PDVSA. Opening Br. 9-10.

ARGUMENT

I. THE COURT OF CHANCERY INCORRECTLY APPLIED THE POLITICAL QUESTION DOCTRINE BY EXCEEDING THE TERMS OF THE EXECUTIVE STATEMENT

This dispute is not about the "authority to act on behalf of the Government of Venezuela." Answering Br. 4. This case is about any extension of the Executive Statement beyond its precise words. Plaintiffs argued the plain language of the Executive Statement: the term "interim" reflects an Executive policy not to declare Mr. Guaidó the President of Venezuela given the Maduro administration's complete territorial control. Opening Br. 19, 22-23. This comports with the Executive Statement's declaration that the office of the presidency is "vacant." A596. There is thus no need to analyze *Oetjen v. Central Leather Company*, 246 U.S. 297 (1918) or its progeny. Those cases all discuss the wrong issue, focusing on the Executive Branch's power to recognize a foreign leader or government. The proper analysis comes from the text of the Executive Statement, which Defendants have failed to faithfully construe.

A. The Executive Statement did not recognize Mr. Guaidó as the "effective" or lawful government of Venezuela

1. *The Executive Statement only politically recognized Mr. Guaidó individually as the "Interim President of Venezuela."*

When they address the recognition of Mr. Guaidó, Defendants focus on defending the notion that the recognition of Mr. Guaidó amounted to the

recognition of an "effective government." Answering Br. 21-29. If Mr. Guaidó's recognition does not create an effective government, then Defendants have no justification for the application of the act of state doctrine. Instead, as Plaintiffs maintain, the Executive Statement was not a recognition of an "effective government."

Recognition of foreign leaders and governments is a decision that defines who represents a foreign State within the United States. *See Guar. Tr. Co. of New York v. U.S.*, 304 U.S. 126, 140 (1938). "Recognition statements are usually drafted with great care and the wording employed (or not employed) is of great legal and political significance." A1283 (Talmon, 12 CHIN. J. INT'L L. at 226).

When the U.S. wants to recognize a foreign leader or government of a State, it does so using precise terms. For example, in the 1980s when the Executive sought to differentiate between President Delvalle's ruling government in Panama and the military insurgency led by Noriega, it used the terms "Government of Panama" and "Noriega/Solis regime," respectively. AR56-AR57 (Exec. Order No. 12635, 53 Fed. Reg. 12134 (Apr. 8, 1988)); *see also Republic of Panama v. Air Panama Internacional, S.A.*, 745 F. Supp. 669, 673 (S.D. Fla. 1988). In the 1970s, when the United States shifted its relations away from Taiwan to China, it recognized the Peoples' Republic of China as the "sole legal Government of China." AR58 (Joint Communique on the Establishment of Diplomatic Relations

between the U.S. and China Jan. 1, 1979 (Dec. 15, 1978)); *see also* AR82 (OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, DIGEST OF U.S. PRACTICE IN INT'L LAW 251 (2013) (recognizing the "Government of Somalia")).

The same is true in the reverse. When the U.S. intends to recognize something less than a lawful government, it does so on unambiguous terms. In Syria, for example, the Executive recognized the Syrian Opposition Coalition ("SOC") as the "legitimate representative of the Syrian people," but refused to recognize it as the "government of Syria." A1566 (OFFICE OF THE LEGAL ADVISOR, at 281); *see also* AR94-AR98 (Daily Press Briefing, Under Secretary for Public Diplomacy and Public Affairs (Dec. 12, 2012), https://2009-2017.state.gov/r/pa/prs/dpb/2012/12/201930.htm ("December Briefing"). The reason for this limited recognition was the SOC's lack of "physical control" over territory. *Id.* (December Briefing).

Recognition followed a similar path with Libya. The Executive's ability to recognize came in "incremental steps," first offering political recognition of the National Transitional Council ("NTC") followed by legal recognition once the Qadhafi government "lost control." AR100 (December Briefing). In Libya, the United States recognized the NTC as the "legitimate interlocutor for the Libyan people during this interim period." AR108-AR110 (David Kenner, *Clinton edges toward recognition of Libyan rebels*, THE CABLE (June 9, 2011),

https://foreignpolicy.com/2011/06/09/clinton-edges-toward-recognition-of-libyan-rebels/). These statements are acts of political support rather than recognition. AR25-AR26 (INTERNATIONAL LAW ASS'N, RECOGNITION/NON-RECOGNITION IN INT'L LAW 20 (Fourth (Final) Report 2018)). As former State Department Legal Advisor Harold Koh explained:

> [The United States is] reluctant to recognize entities that do not control entire countries because then they are responsible for parts of the country that they don't control, and [it is] reluctant to derecognize leaders who still control parts of the country because then you're absolving them of responsibility in the areas that they do control.

AR40-AR41 (*Libya and War Powers*, 112th Cong. 39 (2011) (statement of Hon. Harold Koh, Legal Adviser, U.S. Dep't of State)).

Following this tradition, the Executive Statement limited its recognition to the individual: Mr. Guaidó. A596. The Executive unambiguously recognized Mr. Guaidó as the "Interim President of Venezuela." *Id*. There is no declaration that he is the "lawful government" of Venezuela. *Id.*; *cf. Air Panama*, 745 at 673. Other words in the Executive Statement support this conclusion.

The Executive Statement recognized the limits on Mr. Guaidó's powers. The Executive Statement considers the office of the presidency of Venezuela vacant, not filled by Mr. Guaidó. A596. The Executive Statement referenced the existence of a legislative branch in the form of the National Assembly, but there is

no mention of an executive branch or judicial branch. *Id.* These contours make sense. Mr. Guaidó's stated motive was to be interim president such that he could call new elections, not to act indefinitely as the President of Venezuela.

Against this backdrop, Defendants see a more ambiguous picture driven by generalities. Defendants assert that recognition is an all-or-nothing exercise, and that any act of recognition identifies the "effective government of a state." Answering Br. 21. The Opinion reached the same erroneous conclusion. Opinion 25 ("Regardless of what title Guaidó holds, Guaidó and his regime are the effective government of Venezuela."). This oversimplification of a nuanced doctrine contravenes the text of the Executive Statement and historical state practice.

Defendants' presumed result of Mr. Guaidó's recognition conflicts with the current governance in Venezuela. Mr. Guaidó controls no territory in Venezuela and has not established authority over its people. He has not been elected to the Office of the President; nor does he wield any of those powers within Venezuela. He has no "access to the Republic's operations, facilities, or personnel . . . [or] to the bank accounts or assets of the government in Venezuela." *Dresser-Rand Co. v. Petroleos de Venez., S.A.*, 2019 U.S. Dist. LEXIS 114704, at *3 (S.D.N.Y. July 3, 2019). He is merely an opposition leader challenging the "de facto" authority of President Maduro—authority that the Executive Branch still accepts. A1544-A1547 (de Córdoba, *U.S. and Venezuela Hold Secret Talks*, WALL ST. J. (Aug. 21,

2019)). The fact that the Executive Branch has taken the incremental step to afford Mr. Guaidó political recognition—like in Syria and Libya—is not the same as declaring him the effective government or the President.

2. *Subsequent statements from the Executive Branch do not expand the limited Executive Statement.*

Defendants contend that certain statements from Vice President Pence and a tweet from Secretary Pompeo expand the Executive Statement. Answering Br. 9, 26. That contention is problematic. Vice President Pence and Secretary Pompeo do not have authority to contradict President Trump or change the terms of the Executive Statement. The Executive Statement recognizes the "interim president." That recognition is not continually altered by the description used by the person discussing the Executive Statement.

Further, if the statements by Vice President Pence and Secretary Pompeo are needed to expand the scope of the Executive Statement, then the Executive Statement itself must be ambiguous. Defendants do not address this point. Either the Executive Statement means what it says, or it is ambiguous and needs further interpretation. Defendants' interpretation using outside statements to expand the meaning of the Executive Statement does not withstand rigorous analysis.

Regardless, the statements cited by Defendants do not support their argument. Vice President Pence used the word "president" and "interim president" in the same sentence. AR111-AR112 (Michael Pence, Vice President, U.S.,

Remarks During Visit with Venezuelan Migrant Families (Feb. 26, 2019), https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-visit-venezuelan-migrant-families-bogota-colombia/ ("With that, it's my great honor to stand here with the Interim President of Venezuela, President Juan Guaidó.")). This incongruous labeling has many possible explanations, including a simple error, that created, at best, an ambiguity. And Secretary Pompeo's tweet was uninformative. The tweet referenced Article 233, but Article 233 does not contemplate an interim president. AR45-AR55 (José Ignacio Hernández G., *¿Y qué dice el artículo 233 de la Constitución?*, PRODAVINCI (Jan. 11, 2019), https://prodavinci.com/y-que-dice-el-articulo-233-de-la-constitucion/); *see also* A1473-A1475. In fact, Article 233 does not even apply to the current situation in Venezuela, as Special Attorney General, José Ignacio Hernandez has affirmed publicly and forcefully. *See id*. In any event, the meaning of "interim president" within the Venezuelan legal system is a question of Venezuelan law that Vice President Pence's and Secretary Pompeo's statements do not address.

Defendants also contend that the sanctions levelled against the Maduro administration effectively elevated Mr. Guaidó to the Presidency. Answering Br. 26-28. Quite the opposite is true. The sanctions acknowledge the Maduro administration's undeniable control over PDVSA and Venezuela. *See* Opening Br. 26. Moreover, the sanctions expressly referred to the Maduro administration as the

"Government of Venezuela." AR113-AR115 (Exec. Order No. 13884, 84 Fed. Reg. 152 (Aug. 5, 2019) (*see* § 6(d))); A599-A600 (Exec. Order No. 13857, 84 Fed. Reg. 20 (Jan. 25, 2019) (*see* § 1(d))).

In sum, the statements and actions cited by Defendants do not establish an overall policy of recognizing Mr. Guaidó as the President or the effective government of Venezuela. They simply demonstrate the Executive Branch's willingness to lend political recognition to an opposition leader. The disparate statements from Vice President Pence and Secretary Pompeo demonstrate that the language of the Executive Statement provides its meaning, not the extraneous commentary.

B. International law and persuasive precedent support Plaintiffs' position

Despite decades of established authority reflected in the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ("Restatement (Second)") and the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ("Restatement (Third)"), Defendants do not address the requirements under international law for the recognition of a foreign government. The oversight should not go unnoticed. Section 101 of the Restatement (Second) states: "[b]efore recognizing a revolutionary regime as the government of a state, the recognizing state is required to make a determination, reasonably based upon fact, that the regime . . . is in control of the territory and population of the state."

A1497 (Restatement (Second) § 101 (emphasis added)). This is the "minimum standard[] required by international law" to ensure that the authority of a foreign government is "not unreasonably or arbitrarily affected by the acts of other states." *Id.* at cmt. a. Section 203 of the Restatement (Third) builds on this foundation: "[a] state . . . is required to treat as the government of another state a regime that is in effective control of that state." A1500 (Restatement (Third) § 203 (emphasis added)). "Recognizing or treating a rebellious regime as the successor government while the previously recognized government is still in control constitutes unlawful interference in the internal affairs of that state." A1501 (*Id.* at cmt. g); *see also* A1898-A1900 (*Valores*, Procedural Order No. 2 (applying international law to find that Mr. Guaidó lacks control over territory and is not the lawful government of Venezuela).

Both Restatements make the same point. As part of the practice in the United States and in compliance with international law, the Executive Branch only recognizes a government that controls the territory of the state. Otherwise, the United States has unlawfully interfered in that state's internal affairs by influencing the authority of its government. A1561 (LAUTERPACHT, AT 95 ("[R]ecognition of a revolutionary party as a *de jure* government constitutes a drastic interference with the independence of the State concerned.")).

While they do not address the Restatements, Defendants cite cases—decided before the publication of both Restatements—where a court purportedly deferred to a recognized government with no territory. Answering Br. 31-32. None of these cases are persuasive. In *Netherlands v. Federal Reserve Bank*, the United States recognized the government-in-exile because Germany was a belligerent occupier, 201 F.2d 455 (2d Cir. 1953), which is a separate field of law known as the "law of occupation" and a feature of physical invasions such as World War II. This is obviously not the case here.

A similar situation confronted a court in *Lehigh Valley R.R. Co. v. State of Russia*, where the property at issue belonged to the state before the Soviets came to power. 21 F.2d 396, 399 (2nd Cir. 1927). The actions of a particular government (controlling or not controlling) were not an issue. *Id.* After the Soviets took control, the claim survived, and the court found that the representatives of the recognized government had to continue with the case in the absence of a new recognition. *Id.* at 400. This does not touch on the recognition of a government with no territorial control.

Next, Defendants argue that this Court is not obliged to give effect to the Maduro administration's territorial control. Answering Br. 32-33. That argument ignores the position adopted in the Restatements and leading, persuasive cases, such as *M. Salimoff & Company v. Standard Oil Company*. 186 N.E. 679, 682

(N.Y. 1933); *see also* Opening Br. 23-24. Indeed, Defendants attempt to distinguish *Salimoff* falls flat. Defendants argue that the case is inapplicable because the acts in question were done within the territory. Answering Br. 31-32. That is the exact same situation as in this case, where the appointment of the directors of the Delaware corporations stem from the appointment in Venezuela of the Board of Directors of PDVSA (in the case of Mr. Maduro) or the *ad hoc* board of directors of PDVSA (in the case of Mr. Guaidó).[2]

Accepting Defendants' argument also places the Court in the awkward position of finding that the United States has breached international law, even though there is no indication the Executive Branch intended to do so. Although not directly applicable, courts have long sought to interpret legislation to keep from violating international law. *See United States v. Ali*, 718 F.3d 929, 935 (D.C. Cir. 2013); *Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law."). The same should apply to the analysis of an executive order or statement of recognition.

C. The recognition of Mr. Guaidó did not nullify the acts of the non-recognized Maduro administration

Courts have recognized the limits of the Executive Branch's recognition power. *See Baker v. Carr*, 369 U.S. 186, 211 (1962) ("[I]t is error to suppose that

[2] This argument also fails to give effect to the Executive Statement, which continues to hold the Maduro administration responsible for acts within Venezuela.

every case or controversy which touches foreign relations lies beyond judicial cognizance."); *Salimoff*, 186 N.E. 679, 682 (N.Y. 1933); *Upright v. Mercury Bus. Machines Co.*, 13 A.D.2d 36, 38-42 (N.Y. App. Div. 1961). And have further declared that non-recognition does not nullify the internal acts of the non-recognized government. Opening Br. 26-28. This principle has been affirmed by the Restatement (Second), which Defendants do not challenge. A1572-A1574 (Restatement (Second) § 113).

Turning to other decisions, courts routinely give effect to the acts of non-recognized governments. In *Salimoff*, the Court gave effect to the non-recognized Soviet government's expropriation decree. 186 N.E. at 682. And it did so not because it complied "with U.S. foreign policy," as Defendants allege (Answering Br. 31), but because "[i]f it is a government in fact, its decrees have force within its borders and over its nationals." *Salimoff*, 186 N.E. at 682.

Sokoloff v. National City Bank of New York clarifies this point. 145 N.E. 917 (N.Y. 1924). The relevant decision is from the court of appeals, not the lower court's decision cited by Defendants and relied on in the Opinion. Answering Br. 32-33; Opinion 38 n.113. And the *Sokoloff* court recognized that "effect may at times be due to the ordinances of foreign governments which, though formally unrecognized, have notoriously an existence as governments *de facto*." *Sokoloff*, 145 N.E. at 919. This again supports Plaintiffs, similar to *Carl Zeiss Stiftung v.*

V.E.B Carl Zeiss, Jena, 293 F. Supp. 892, 915-16 (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) (recognizing "decisions handed down by the courts of East Germany"). In *Upright v. Mercury Business Machines Company*, the court, relying on the standard set in *Salimoff*, also concluded that "the internal acts of the [unrecognized] East German Government, insofar as they concern the parties here, should be given effect generally." 13 A.D.2d at 40. Again, acts taken within Venezuela continue to have effect, regardless of the recognition of Mr. Guaidó.

II. THE COURT OF CHANCERY INCORRECTLY APPLIED THE ACT OF STATE DOCTRINE

Because the Executive Statement did not recognize an "effective government," there is no basis to reach the act of state doctrine for acts taken by Mr. Guaidó or the National Assembly. But Defendants face additional hurdles due to the absence of any of the features that merit act of state treatment.

A. The Act of State Doctrine only applies to a sovereign's act, and Mr. Guaidó is not a sovereign

Exceeding President Trump's limited recognition, Defendants bestow upon Mr. Guaidó the title of a "sovereign." Answering Br. 39. Defendants cite nothing in support of this assertion. Nor could they: nothing could be further from the truth. Mr. Guaidó does not meet the requirements to be considered a sovereign, and the Executive Branch has not said otherwise. Opening Br. 31-32; *Carl Zeiss*, 293 F. Supp. at 909-910. Accordingly, his acts are not subject to the act of state doctrine. Opening Br. 31-34.

Defendants struggle to justify the Court of Chancery's decision. They insist that the Opinion "relied upon an unbroken line of cases recognizing acts of a *de jure* government that lacked *de facto* control over its territory." Answering Br. 40. But, like the Opinion, Defendants have failed to cite a single case, let alone an "unbroken line of cases," to support this conclusion. Instead, Defendants cite cases that do not discuss or apply the act of state doctrine. *See id.* at 40-42. They refer

to *Lehigh Valley Railroad Company v. State of Russia*, but the cited paragraph discusses the continuity of the life of a state, not the application of the act of state doctrine. 21 F.2d at 400. As previously explained, and unchallenged by Defendants, the issue in *Lehigh Valley* was not whether the court should give effect to the act of the provisional government, recognized by the United States, despite its lack of territorial control. Opening Br. 35-36. Instead, the question was whether the carrier, Lehigh Valley, was liable for the explosion under common law, federal law, or both. *Lehigh Valley*, 21 F.2d at 402. The case offers no guidance because it does not address a particular act by the recognized government.

Defendants' reliance on *Sokoloff* is misplaced. In *Sokoloff*, no party presented the act of state doctrine, and the court did not consider it *sua sponte*. *See generally Sokoloff*, 145 N.E. 917. There was no basis to argue the act of state doctrine because the provisional government did not have territorial control. *See id.* Similarly, the factual and legal issues involved in *State of Russia v. National City Bank of New York* involved the act of a government that was both *de facto* and *de jure*, making the case inapplicable here. 69 F.2d 44, 47-48 (2d Cir. 1934).

Defendants are adamant about the application of *Netherlands v. Federal Reserve Bank*, but they do not dispute that *Netherlands* did not discuss or apply the act of state doctrine; the only doctrine that Defendants rely on to give effect to Mr.

Guaidó's non-sovereign act. Answering Br. 39-41. Instead, they dismiss this critical distinction, focusing on the exiled government's lack of territorial control. *Id.* at 41.

There is a stark difference between the *Netherlands* case and the present case. In *Netherlands*, the court addressed whether to give effect to the decree issued by the "wartime government-in-exile," which had fled to Great Britain. *Netherlands*, 201 F.2d at 456, 460. The court decided to give effect to the decree because it did not "offend the public policy" of the United States, a factor that would not have been considered had the court decided to apply the act of state doctrine. *See id.* at 460, 463; *see also* Opening Br. 36. Two specific conditions were also present that allowed the court to give effect to the act of the exiled government of Netherlands. *See Netherlands* at 462-63. The first condition is the belligerent occupation of the Netherlands by Germany. *See id.* at 462. The second condition is that there was a *lex specialis* that dictated result in the form of the Hague Regulations. *See id.* at 462-63. These considerations are absent here. There is no belligerent occupier nor does the *lex specialis* applied in that case pertain to acts taken by Mr. Guaidó.

Turning to *Air Panama*, in the course of justifying their reliance, Defendants actually identify further reasons why this Court should not rely on this decision. Answering Br. 23-24, 42. The act of state doctrine and the political question

doctrine are two distinct doctrines. Opening Br. 30-31. But as explained by Defendants, *Air Panama* did not treat these doctrines separately. Answering Br. 41-42. Instead, conflating these principles, Defendants assert the Court of Chancery held that "it must give 'complete judicial deference' to and was 'conclusively b[ou]nd' by the decision of the Executive Branch to recognize the Delvalle government." *Id.* at 42 (quoting Opinion 37). Without separating the doctrines, it is difficult to tell the normative basis for the decision in *Air Panama*, making the opinion even less persuasive as discussed in the Opening Brief. Opening Br. 34-35.

Lastly, Defendants cite to *Carl Zeiss* to claim that "*de jure* recognition by the U.S. is sufficient to invoke the act of state doctrine." Answering Br. 42. But that case concludes otherwise. *See Carl Zeiss*, 293 F. Supp. at 909–10. Relying on the existence of territorial control, the court accepted the plaintiffs' submission, having found that Wuerttemberg and West Germany "possessed sufficient attributes of an independent sovereign." *Id.* at 910. The court explained 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 909-10. And the court stressed that the act of state doctrine will apply "only to the extent that West Germany had territorial jurisdiction to act." *Id.* at 911 (emphasis

added). Defendants do not challenge this holding. Instead, defeating their own argument on the extraterritorial application of the doctrine, Defendants cite to a section of the court's ruling which elaborated on the territorial limitation of act of state doctrine. *See* Answering Br. 42-43; *see also Carl Zeiss*, 293 F. Supp. at 911.

Despite referencing a line of cases in their favor, Defendants do not cite to any case that supports the Opinion. This is not a coincidence—acts by an entity without territorial control are not subject to the act of state doctrine.

B. The Act of State Doctrine does not reach acts that have an almost exclusive extraterritorial effect

As they must, Defendants admit that the act of state doctrine cannot apply to acts that would have extraterritorial effect. Answering Br. 42-43. This aligns with the RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ("Restatement (Fourth)") and several decisions that the Defendants do not challenge. A1576 (Restatement (Fourth) § 441 cmt. e); *see also 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); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 713 (5th Cir. 1968); *Mann v. Compania Petrolera Trans-Cuba, S.A.*, 223 N.Y.S.2d 900, 902 (Sup. Ct. 1962).

To avoid the conclusion mandated by the limitation of the act of state doctrine, Defendants seek out a new exception, stressing that the limitations on the

act of state doctrine pertain to properties outside the state at issue. *See* Answering Br. 45-46 n.17. But the cases cited by Defendants do not provide such a caveat. On the contrary, the cases, similar to the Restatement (Fourth), affirm that the doctrine will not apply to acts that target any interest outside the acting state. *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)); *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985).

Defendants maintain that the act of state doctrine applies to Mr. Guaidó's acts committed within Venezuela regardless of their extraterritorial effects. Answering Br. 43-45. Nothing supports such a dangerous conclusion, essentially rendering this state's courts powerless to determine the effects of a foreign government's attempt to interfere in Delaware affairs. *See id.* at 44 n. 15.

The Supreme Court cases cited by Defendants are inapplicable. *See id.* In *Banco Nacional de Cuba v. Sabbatino*, the Court applied the act of state doctrine to Cuba's expropriation decree, having found that the decree targeted and affected a Cuban company's "property interest in the sugar subject to the territorial jurisdiction of Cuba," and not respondent's "contractual rights, the situs of which was in New York." 376 U.S. 398, 406, 413 (1964).

The Supreme Court's decisions in *United States v. Belmont*, 301 U.S. 324 (1937) and *United States. v. Pink*, 315 U.S. 203 (1942), which refer to the doctrine in passing, are equally unhelpful. In those cases, the United States filed an action to recover assets in New York based on the Litvinov Assignment, "an international compact" between the United States and the *de jure* and *de facto* Soviet government, where the latter assigned certain claims to the United States. *Belmont*, 301 U.S. at 327; *Pink*, 315 U.S. at 211. The Court gave effect to the Litvinov Assignment, noting that "acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted." *Belmont*, 301 U.S. at 330; *Pink*, 315 U.S. at 230. The cases challenging the Litvinov Assignment thus turn on the power of the President to enter into a binding agreement with a foreign government, not the requirement for a court in the United States to give deference to the act of a foreign state. *Id.*

This is also not a case where a foreign state's act had an indirect or a spill-over effect, as Defendants describe. Answering Br. 44-45. The Resolution had one purpose: to reconstitute the boards of directors of the CITGO Entities. A259-A260, A267-A268 (Resolution (recognizing that, due to the control exercised by the Maduro administration, it was "not possible for the Board of Directors of PDVSA and, consequently, for the shareholders meeting to fulfill all the formalities to designate" a new board of directors of the Delaware corporations)).

In fact, the Resolution has no purpose or effect in Venezuela. The members of the *ad hoc* board of PDVSA appointed by the Resolution are all in exile. After Mr. Guaidó was appointed interim president, the offices of PDVSA in Venezuela are still staffed by individuals appointed through the oversight of the board of directors of PDVSA and other officers appointed by that board.

The other cases cited by Defendants do not change the basic structure of the act of state doctrine. In two cases arising from Mexico, the act of state at issue had broad impact with an indirect influence outside that country. Unlike in this case, in *D'Angelo v. Petroleos Mexicanos*, the act of state doctrine applied to a nationalization, one of the quintessential acts of state power within a country's borders. 317 A.2d 38, 41 (Del. Ch. 1973). *Braka v. Bancomer, S.N.C.* also lends no support since the decree applied to the Mexican bank's "obligation to pay the contractually mandated return on plaintiffs' investment" and that the "place of deposit and of payment of interest and principal" was in Mexico. 762 F.2d 222, 224 (2d Cir. 1985). Neither of these cases is a broad statement applicable to every case dealing with the act of state doctrine. Rather, these cases relate to those specific circumstances where a foreign government with territorial control engages in an act within its boundaries that has an incidental impact in the United States. These facts are certainly not present here.

CONCLUSION

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

Dated: December 23, 2019

LANDIS RATH & COBB LLP

/s/ Rebecca L. Butcher
Daniel B. Rath (No. 3022)
Rebecca L. Butcher (No. 3816)
Jennifer L. Cree (No. 5919)
919 Market Street, Suite 1800
Wilmington, DE 19801
Telephone: (302) 467-4400
Facsimile: (302) 467-4450

Counsel for Appellants

Of Counsel

GST LLP
Quinn Smith
Katherine A. Sanoja
1111 Brickell Avenue
Suite 2715
Miami, FL 33131
Telephone: (305) 856-7723

-and-

Gary J. Shaw
Bethel Kassa
2600 Virginia Ave., NW #205
Washington, D.C. 20037
Phone: (202) 681-0529