No. 21-

IN THE

Supreme Court of the United States

PDVSA US LITIGATION TRUST,

Petitioner,

v.

LUKOIL PAN AMERICAS, LLC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GEORGE F. CARPINELLO
JOSEPH D. STARSIA
BOIES SCHILLER FLEXNER LLP
30 South Pearl Street, 11th Floor
Albany, New York 12207
(518) 434-0600

DAVID BOIES
Counsel of Record
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, New York 10504
(914) 749-8200
dboies@bsfllp.com

DAVID A. BARRETT
MARILYN C. KUNSTLER
BOIES SCHILLER FLEXNER LLP
55 Hudson Yards, 20th Floor
New York, New York 10001
(212) 446-2300

Counsel for Petitioner

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COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a court of appeals may deem an argument to have been abandoned when it was properly raised and fully briefed in the district court, and raised in the appellate briefing to such an extent that the court addressed the argument in its decision and found it to be meritorious.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was plaintiff in the district court, and appellant in the court of appeals, is PDVSA U.S. Litigation Trust.

Respondents, who were defendants in the district court, and appellees in the court of appeals, are Lukoil Pan Americas LLC; Lukoil Petroleum Ltd.; Colonial Oil Industries, Inc.; Colonial Group, Inc.; Glencore Ltd.; Glencore International A.G.; Glencore Energy UK Ltd.; Masefield A.G.; Trafigura A.G.; Trafigura Trading LLC; Trafigura Beheer B.V.; Vitol Energy (Bermuda) Ltd.; Vitol S.A.; Vitol, Inc.; Francisco Morillo; Leonardo Baquero; Daniel Lutz; Luis Liendo; John Ryan; Maria Fernanda Rodriguez; Helsinge Holdings, LLC; Helsinge, Inc.; Helsinge Ltd., Saint-Helier; Waltrop Consultants, C.A.; Godelheim, Inc.; Hornberg Inc.; Societe Doberan, S.A.; Societe Hedisson, S.A.; Societe Hellin, S.A.; Glencore de Venezuela, C.A.; Jehu Holding Inc.; Andrew Summers; Maximiliano Poveda; Jose Larocca; Luis Alvarez; Gustavo Gabaldon; Sergio De La Vega; Antonio Maarraoui; Campo Elias Paez; Paul Rosado; BAC Florida Bank; EFG International A.G.; and Blue Bank International N.Y.

CORPORATE DISCLOSURE STATEMENT

PDVSA U.S. Litigation Trust does not have a parent corporation and is not a publicly held corporation.

RELATED PROCEEDINGS

PDVSA US Litigation Trust v. Lukoil Pan Americas, et al., Nos. 19-11124, 20-11133, U.S. Court of Appeals for the Eleventh Circuit. Remanded for limited purpose October 1, 2021.

PDVSA US Litigation Trust v. Lukoil Pan Americas, LLC, et al., No. 19-10950, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered March 18, 2021. Petition for rehearing and rehearing *en banc* denied May 7, 2021.

PDVSA US Litigation Trust v. Lukoil Pan Americans, LLC, et al., No. 18-cv-20818-DPG, U.S. District Court for the Southern District of Florida. Judgment entered March 8, 2019.

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JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 2021. A timely petition for rehearing and rehearing *en banc* was filed on April 1, 2021. The order denying the petition for rehearing and rehearing *en banc* was entered on May 7, 2021. Because the petition was denied on May 7, 2021, this petition is subject to the Court's July 19, 2021 order extending the time to file a petition for writ of certiorari to 150 days from the date of an order denying a timely petition for rehearing issued on or before July 19, 2021. The jurisdiction of this Court to review the Court of Appeal's judgment is conferred by 28 U.S.C. § 1254(a)(1).

STATUTORY PROVISIONS INVOLVED

Rule 28 of the Federal Rules of Appellate Procedure provides in relevant part:

> The appellant's brief must contain
>
> . . .

> **(A)** appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and
>
> **(B)** for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues).

INTRODUCTION

This Petition raises important issues to the fair administration of justice in the courts of appeals. The circuits apply different and conflicting—and in some cases, overly formalistic—standards in deciding whether an appellant has abandoned a meritorious argument. The case involves a large-scale litigation involving hundreds of millions of dollars, numerous parties, and thousands of pages of briefing. The Eleventh Circuit affirmed dismissal against Petitioner PDVSA U.S. Litigation Trust (the "Trust"), despite the fact that the court found in its opinion that there was a "strong argument" that the Trust was right on the law on the purportedly abandoned issue.

The Eleventh Circuit strongly implied that the district court's decision dismissing the Trust's claims should have been reversed, but it declined to do so because, it held, the Trust had abandoned the winning argument. Yet the Trust had fully and repeatedly briefed that very argument to the district court below, and thereafter included it in its brief to the Eleventh Circuit, with supporting authority subsequently cited by the court. Yet, the court of appeals held, without explanation, that the Trust had "abandoned" the issue, and so affirmed.

Abandonment is a doctrine rooted in fundamental fairness: that an appellate court should not decide an issue in favor of an appellant, if the appellant's briefing has not given the appellee a fair opportunity to respond to the argument. For that reason, appellate courts will generally not consider an issue that an appellant has failed to brief.

While some courts still hew closely to the concept of fairness, in other courts, the concept of abandonment has metastasized into an overly formalistic doctrine that will find an argument abandoned for arbitrary reasons, including that the argument was not addressed in a separate section in the brief, that the argument was raised in a footnote, or that the argument was "mere background." The result is a doctrine that risks "sacrifice[ing] substantive justice on the altar of administrative convenience." *In re Ogden*, 314 F.3d 1190, 1197 (10th Cir. 2002) (alteration original).

The Court should grant the Petition for three reasons.

First, to resolve a split in the circuit courts regarding the extent to which an argument must be raised in order to preserve it for appellate review. The Court should reject overly formalistic requirements, such as that an argument cannot be preserved if it is raised in a footnote, and instead rule that appellate briefs should be read liberally so that cases can be decided on the merits wherever reasonably possible.

Second, to resolve a split in the circuit courts regarding the obligation of the courts of appeals to consider arguments not raised, or inadequately raised, in order to avoid manifest injustice.

Third, to address a decision by the court of appeals that so far departed from the usual and accepted course of proceedings as to call for exercise of this Court's supervisory power. The Eleventh Circuit's decision, which effectively ruled that the Trust should have won, but instead affirmed dismissal of the complaint on the basis of a technicality, is the sort of arbitrary outcome that diminishes the legitimacy of the courts themselves.

STATEMENT OF THE CASE

A. Formation of the Litigation Trust

Petitioner's complaint alleges that the Defendants executed a multi-billion-dollar fraud on Petróleos de Venezuela, S.A. ("PDVSA"), the national oil company of Venezuela, and by far the nation's most valuable asset, and, by extension, the people of Venezuela. The complaint alleges that the defendants, a cabal of international energy companies, their banks, and corrupt Venezuelan agents and officials, conspired to misappropriate PDVSA's proprietary data and intellectual property, and to use that information in a far-reaching conspiracy to fix prices, rig bids, eliminate competition, and otherwise systematically loot PDVSA.

As described in the complaint, the orchestrators of theis scheme were two Venezuelan nationals, Francisco Morillo and Leonardo Baquero.[1] Operating from their

1. Simultaneous with the filing of this complaint, Swiss prosecutors launched an investigation of Morillo and Baquero for the same conduct and based on information provided by the Trust. Jan-Henrik Forster & Hugo Miller, *Banker's Arrest Puts Boom Years Under Scrutiny at Swiss Bank*, Bloomberg (Sept. 28, 2018

business headquarters in Miami, Florida, Morillo and Baquero bribed certain employees of PDVSA for advance and confidential information concerning bids for sale of PDVSA's hydrocarbon products. They then sold that information to the energy companies who were purportedly bidding for the same products. The conspirators used international corporations and banks to launder payments to Venezuelan officials that enabled them to receive real-time access to PDVSA's computer system via a cloned server. Through these tactics, the energy companies were able to manipulate the bidding process and drive down the price of Venezuela's most valuable natural resource.

The Litigation Trust was formed by PDVSA so that this litigation could proceed without interference from the political and economic instability in Venezuelan government and society, and to safeguard any recovery from the same forces that had conspired to loot PDVSA. The Trust was created under New York law, and it expressly provided that any recovery from the litigation, after expenses, was to be held in trust, subject solely to the authority of the district court, for the sole benefit of PDVSA and the Venezuelan people.

The Trust Agreement was executed in August 2017 by the Venezuelan Oil Minister Nelson Martinez, and the Procurador General, Reinaldo Muñoz Pedroza, and by a trustee designated by PDVSA. The next day, the agreement was executed by two U.S. trustees.

9:30 AM IST), https://www.bloombergquint.com/markets/swiss-bank-cleans-house-after-scandals.

On March 3, 2018, the Trust filed the complaint and simultaneously moved for a preliminary injunction to prevent Defendants from destroying evidence and dissipating assets. Dkt. 5. In opposition, Defendants argued, among other things, that the Trust lacked standing. Dkt. 161. Several months of discovery ensued on the questions of whether the Trust had been properly formed and whether PDVSA's assignment of its claims against Defendants to the Trust was valid. Defendants thereafter moved to dismiss the case under Rule 12(b)(1) for lack of Article III standing.

B. The District Court Dismissal Decision on Champerty Grounds

One of Defendants' arguments as to the Trust's alleged lack of standing was that PDVSA's assignment of claims to the Trust violated New York's prohibition of the ancient doctrine of champerty. *See* N.Y. Judiciary Law § 489(1); Dkt. 638 at 21. By its terms, though it is rarely applied, the champerty statute prohibits "a corporation or association" from taking an assignment of "any claim or demand. . . with the intent and for the purpose of bringing an action or proceeding thereon." *Id.*

In opposition to the motion to dismiss before the magistrate judge, the Trust filed a memorandum of law on standing, and a subsequent reply brief on standing, in which it argued, *inter alia*, that champerty was a fact-intensive issue not appropriate for dismissal at the motion to dismiss stage. Dkt. 533 at 10, n.3.

The magistrate judge recommended dismissal. Her report discussed five major issues—authenticity and

admissibility of the Trust Agreement, validity of the Trust Agreement under New York law, validity of the Trust Agreement under Venezuelan law, the political question doctrine, and whether the act of state doctrine applied to PDVSA's assignment of the claims—and numerous sub-issues within those issues. In the thirty-seven page report, the only discussion of the Trust's argument that champerty cannot be decided on a motion to dismiss was a three-line footnote. App. C at 65a, n 16.

Despite this brief mention, the Trust again raised the issue in its reply brief to the district court in support of its objections to the magistrate judge's report and recommendation. The Trust addressed the argument in an entire subsection of the brief, arguing that the magistrate judge had erred by addressing champerty, which is an affirmative defense under New York law, in connection with a Rule 12(b)(1) motion to dismiss. Dkt. 655 at 12. The district court's decision adopting the magistrate judge's recommendation and dismissing the Trust's claims did not address the Trust's argument in this regard.

C. The Trust's Appellate Brief and the Eleventh Circuit's Decision

The Trust's appellate brief in the Eleventh Circuit fully addressed each issue upon which the courts below had based their decisions: the authenticity and admissibility of the Trust Agreement, the act of state doctrine, the Trust's validity under Venezuelan law, and the champerty issue. Within its argument on champerty, the bulk of which was devoted to the district court's finding of fact that the primary purpose of the Trust was to bring the lawsuit, the Trust again raised the issue that

champerty is an issue not appropriate for decision on a motion to dismiss. The Trust argued that "New York law strongly discourages findings of champerty at preliminary stages of litigation" (Appellant's Brief ("Br.") at 34); and that "[c]hamperty is an affirmative defense" (Br. at 33, n. 13); that "raises a factual issue." Br. at 35. Indeed, the Trust's brief cited a decision by the New York Court of Appeals, *Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 731 N.E.2d 581, 582 (N.Y. 2000), that definitively supported the argument, all of which was set out in a separate paragraph in the brief.

The Trust further emphasized the point in its reply brief, emphasizing that the Defendants had the burden of proving that the Trust's exclusive purpose was to bring litigation, and that Defendants had failed to counter "Plaintiff's argument that dismissal on the grounds of primary purpose is inappropriate at this stage." Appellant's Reply Brief ("Reply Br.") at 17. The Trust supported this argument with Second Circuit authority applying New York law. *Id.* at 17-18 (quoting *Semi-Tech Litig., LLC v. Bankers Tr. Co.*, 272 F.Supp.2d 319, 331 (S.D.N.Y. 2003) ("Where, as here, any basis is advanced that might justify a trier in finding that the sole or primary purpose was not the commencement of a lawsuit, summary judgment must be denied."). The Trust concluded, "This factual issue is only appropriate for resolution at trial." Reply Br. at 18.

In its decision, the Eleventh Circuit agreed with the Trust that the district court had erred by placing on the Trust the burden of proving the authenticity of the Trust Agreement. App. A at 3a. On that basis, the court "assume[d]. . . that the district court erred by ruling that the Trust Agreement was inadmissible." *Id.* at 5a.

Still, the court affirmed the district court's dismissal of the case, on the sole basis of the champerty issue. The court, addressing the champerty issue, held that whether an agreement is champertous "is a mixed question of law and fact," *Id.* at 10a. The court recognized that there were disputed issue of fact (*id.* at 10-11); and that there were "two permissible views of the evidence." *Id.* at 11a. The court's opinion also recognized (*Id.* at 5a): "Our cases hold that claims 'should not be dismissed on motion for lack of subject-matter jurisdiction when that determination is intermeshed with the merits of the claims and there is a dispute as to a material fact.' *Lawrence v. Dunbar*, 919 F.2d 1525, 1531 (11th Cir. 1990)." The court further held that New York law applied and recognized that "a number of New York cases have reversed summary judgment rulings on champerty because there were underlying disputes of material fact." *Id.* at 10a.

The court therefore recognized that "the district court may have erred procedurally in definitively resolving the question of champerty at the Rule 12(b)(1) stage because that question likely implicated the merits of the Litigation Trust's claims." *Id.* at 6a. Indeed, the court said there was "a strong argument that the district court should have used the Rule 56 standard" and should not have resolved disputed issues of fact. *Id.* at 7a.

Nevertheless, the court of appeals affirmed dismissal of the case because it decided that, although the Trust had argued in the district court "that champerty is a fact-intensive issue that must be decided by a jury", on appeal the Trust had failed to raise the argument that where there are factual issues (which both parties and the Court agreed existed) the champerty issue should not be resolved at the motion to dismiss stage (*Id.* at 7a-

8a), and that "the Litigation Trust has abandoned any procedural objections to the champerty ruling." *Id*. at 7a. Because the court found that the Trust had waived this procedural argument, it decided the champerty issue as a question of fact, and applied a clearly erroneous standard to the question of whether the assignment of claims was champertous.

REASONS FOR GRANTING THE WRIT

I. Review Should Be Granted to Resolve a Circuit Split Concerning the Manner in which an Appellant Must Raise an Argument on Appeal to Avoid the Court of Appeals Deeming Argument to Be Abandoned.

Rule 28(a)(4) of the Federal Rules of Appellate Procedure provides that an appellant's brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies," along with "a concise statement of the applicable standard of review."

When an appellant completely fails to raise an issue in its briefing, circuit courts generally deem the issue abandoned. *See, e.g.*, *Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) ("Issues not raised in the opening brief are deemed abandoned or waived."); *Southall v. USF Holland, Inc*, 794 F. App'x 479, 483–84 (6th Cir. 2019) ("Failing to 'advance[ ] any sort of argument for the reversal of the district court[ ],' *Geboy v. Brigano*, 489 F.3d 752, 767 (6th Cir. 2007), or 'cogent argument' that the district court got it wrong 'constitutes abandonment.'"); *Mills v. U.S. Bank, NA*, 753 F.3d 47, 54 (1st Cir. 2014) ("[A]ppellant generally may not preserve a claim merely by referring to it in a

reply brief or at oral argument."); *Advanced Magnetic Closures, Inc. v. Rome Fastener Corp.*, 607 F.3d 817, 833 (Fed. Cir. 2010) ("[W]e have 'consistently held that a party waives an argument not raised in its opening brief.'");[2] *United States v. Young*, 303 F. App'x 574 (9th Cir. 2008) ("If an appellant fails to provide supporting argument and authority, the claim is abandoned."); *State St. Bank & Tr. Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 172 (2d Cir. 2004) ("When a party fails adequately to present arguments in an appellant's brief, we consider those arguments abandoned."); *11126 Baltimore Blvd., Inc. v. Prince George's Cty., Md.*, 58 F.3d 988, 993 (4th Cir. 1995) ("[A] party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue."); *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) ("An appellant abandons all issues not raised and argued in its *initial* brief on appeal."); *Hatley v. Lockhart*, 990 F.2d 1070, 1073 (8th Cir. 1993) ("We have generally held that 'a party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue.'"); *Beard v. Whitley Cty. REMC*, 840 F.2d 405, 408–09 (7th Cir. 1988) ("Rule 28(a)(4) of the Federal Rules of Appellate Procedure mandates that an appellant must present in its brief the issues to the appellate court that the appellant desires to litigate.").

Beyond this general agreement, however, there is virtually no consistency among the courts of appeals as to the manner and extent to which an argument must be expounded in order to avoid having that argument deemed abandoned. In some instances, courts have taken a generous view of whether an argument is abandoned.

2. Adding to the confusion, courts often use the terms waiver and abandonment interchangeably.

See, e.g., *Wisbey v. City of Lincoln, Neb.*, 612 F.3d 667, 672 (8th Cir. 2010), abrogated on other grounds by *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) (finding no abandonment although appellant did not specifically assign error to the district court's finding on the issue, and her briefing on the issue was "convoluted" and "somewhat disorganized"); *In re Ogden*, 314 F.3d 1190, 1197 (10th Cir. 2002) (no abandonment despite appellant citing virtually no legal authorities on an issue).

Other courts impose hyper-technical and formalistic requirements. The Eleventh Circuit recently held that an appellant abandons an argument not only if she is omits it from an opening brief, but also when "(1) she makes only passing reference to it; (2) she raises it in a 'perfunctory manner without supporting arguments and authority'; (3) she refers to it only in the 'statement of the case' or 'summary of the argument'; or (4) the references to the issue are mere background to her main arguments." *Reid v. Lawson*, 837 F. App'x 767, 767 (11th Cir. 2021). The Seventh Circuit held that a constitutional argument had been abandoned because appellant "devoted no more than three sentences" to it. *Ball v. City of Indianapolis*, 760 F.3d 636, 645 (7th Cir. 2014).

The various circuits differ greatly in the rules they apply to the length of argument that must be presented on an issue in order to avoid abandonment. For example, the Tenth Circuit found an issue not abandoned notwithstanding that the appellant's opening brief contained only a "single sentence on this issue and fails to explain why Billhymer's testimony violated the Confrontation Clause. Nor does Marquez provide the applicable standard of review." *United States v. Marquez*,

898 F.3d 1036, 1047 and n.2 (10th Cir. 2018). Similarly, the Fifth Circuit held that "despite the brevity of [appellant's] briefing," which referred to an issue in "one paragraph. . . comprising two sentences," the issue was "not so insufficiently raised as to be waived." *Barnes ex rel. Est. of Barnes v. Koppers. Inc.*, 534 F.3d 357, 362 (5th Cir. 2008).

Courts are also inconsistent on the question of whether an argument can be preserved for appellate review if it is raised only in a footnote. Compare *Williams v. Woodford*, 384 F.3d 567, 587 (9th Cir. 2004) (claim was preserved despite the only discussion being limited to a footnote, because, whether raised in a footnote or elsewhere, the court considered not the placement of the argument but "whether the opening brief contains the appellant's contentions as well as citations to the record") with *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993) ("We do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review.").

These shifting and inconsistent standards cause confusion for litigants, particularly when appellate briefs are subject to strict page limitations. In a highly complex case, such as the one at bar, litigants have a vast number of issues to litigate, and an overly formalistic standard creates a catch-22 for litigants. Appellants, by necessity, must devote their limited space to the issues addressed by the court below, or risk abandoning those issues. Yet, courts, like the Eleventh Circuit here, punish an appellant by finding abandonment where they conclude, after the fact, that an entire section of the opening brief should have been devoted to an issue that was argued, briefed, and preserved, but not even addressed by the district court in its opinion below.

Where, as here, the issue was actually addressed in the appellate brief, and is dispositive, the Court should reject formalistic requirements, such as that an argument must be given its own heading. Instead, the Court should establish a presumption against abandonment when an issue is expressly raised in appellant's brief, and that abandonment can be found only if the issue is not raised at all, or raised so perfunctorily as to render it meaningless.

II. Review Should Be Granted to Resolve a Circuit Split Concerning Whether a Court of Appeals Must Consider Whether There Are Extraordinary Circumstances That Preclude Deeming an Argument to Be Abandoned.

Most courts of appeals recognize that an issue that is not properly or fully raised in an appellant's briefing should nonetheless sometimes be considered because justice requires it. Although the courts articulate the precise standard differently, the principle that the circumstances of a case must be considered before declaring a meritorious issue abandoned is widely understood and followed. The reason for this principle is simple: To "avoid any appearance that we are sacrifice[ing] substantive justice on the altar of administrative convenience." *In re Ogden*, 314 F.3d at 1197 (alteration original) (quoting *LINC Finance Corp. v. Onwuteaka*, 129 F.3d 917, 922 (7th Cir. 1997)).

Thus, the Second and Ninth Circuits will consider an issue, even if deemed not properly raised on appeal, where failing to do so would result in "manifest injustice." *See United States v. Draper*, 553 F.3d 174, 179 n.2 (2d Cir. 2009) ("Ordinarily, arguments not raised on appeal are deemed abandoned. However, Fed. R. App. P. 2 gives a Court of Appeals the discretion to overlook such failure

if a manifest injustice otherwise would result. Because we have held that a finding of plain error implicates a 'manifest injustice,' it is appropriate for us to proceed with such review." (internal citations and quotation marks omitted)); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992) ("We will only review an issue not properly presented if our failure to do so would result in manifest injustice.").

Similarly, the Fifth and Sixth Circuits will consider an argument, even though deemed not properly raised, if not addressing it would result in a "miscarriage of justice." *United States v. Priester*, 506 F. App'x 416, 420 (6th Cir. 2012) ("Generally, arguments not raised in an appellant's opening brief are considered abandoned. Nonetheless, this rule is prudential and not jurisdictional. Deviations are permitted in 'exceptional cases or particular circumstances,' or when the rule would produce a 'plain miscarriage of justice.'" (internal citations and quotation marks omitted)); *United States v. Whitfield*, 590 F.3d 325, 346 (5th Cir. 2009) ("However, the Government protests that appellants failed to raise this issue on appeal. As a general rule, a party waives any argument that it fails to brief on appeal. However, this court has recognized an exception to this rule whereby we will consider a point of error not raised on appeal when it is necessary 'to prevent a miscarriage of justice.'" (internal citation omitted)).

The Fourth Circuit has considered an issue that was not briefed, and was raised for the first time at oral argument, because the issue was potentially "dispositive." *Robinson v. Wix Filtration Corp. LLC*, 599 F.3d 403, 411 (4th Cir. 2010).[3]

3. In *Villareal-Jaramillo v. Gonzales*, 232 F. App'x 76, 76–77 (2d Cir. 2007), the Second Circuit suggested by negative

The Third Circuit follows a three-part test to decide whether to find that an argument was waived. *United States v. Albertson*, 645 F.3d 191, 195 (3d Cir. 2011). The Third Circuit's test for waiver[4] requires the court to consider (1) appellant's reason for failing to raise the issue, (2) prejudice to the opposing party, and (3) whether failing to consider the issue would result in a miscarriage of justice. *Id.*

The Eleventh Circuit, by contrast, does not even acknowledge the need to consider extraordinary circumstances, or anything equivalent, in deciding whether it should consider an argument it deems inadequately briefed. *See, e.g.*, *Hall v. Georgia*, 649 F. App'x 698, 699 (11th Cir. 2016) (unpublished opinion) ("[T]he law is by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed.") (quoting *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004)).

In keeping with that harsh, absolute rule, the court of appeals affirmed dismissal of this case, despite acknowledging that the Trust had a winning issue, without considering whether terminating the litigation would result in manifest injustice.

Abandonment is a severe penalty where the finding results in dismissal of the case, particularly in a highly

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implication that it too would consider a meritorious, though unraised, argument: "Further, because Petitioner's arguments appear to lack merit, there is no reason for us to exercise our discretion to consider equitable tolling despite its abandonment."

4. In *Albertson*, as in many cases, waiver and abandonment mean effectively the same thing.

complex case like this one, where the appellant must decide whether to brief a myriad of issues that were raised in the courts below, some of which were addressed in the decisions below, and some not. It is, of course, virtually impossible to predict which issue the court of appeals may ultimately find dispositive.

The Court should resolve the disagreement among the circuits on this issue by allowing a finding of abandonment only when it is clearly and substantially justified by the circumstances of the case, including consideration of whether abandonment would result in manifest injustice.

III. Review Should Be Granted Because the Eleventh Circuit's Decision So Far Departed from the Accepted and Usual Course of Proceedings as to Call for Exercise of the Court's Supervisory Power.

This Court "has a significant interest in supervising the administration of the judicial system," and therefore may use its supervisory power to prescribe rules for the lower federal courts. *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010). "The Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes." *Id.* This case weighs on the integrity and legitimacy of the judicial process, and the Court should exercise its supervisory power to direct the Eleventh Circuit to reconsider its rejection of a self-described meritorious argument that disposed of the case, and to apply the proper standard for abandonment as established by this Court.

The Eleventh Circuit held that the Trust had abandoned its argument that the district court should not decide the champerty issue on a motion to dismiss, because

"the Litigation Trust does not raise any procedural objections to the district court's handling of the champerty question." App. A at 7a. But that simply was not true. The Trust did raise the issue. It addressed the issue in a full paragraph of the opening brief which cited leading authority from New York's highest court:

> Moreover, New York law strongly discourages findings of champerty at preliminary stages of litigation. *See Blue Bird Partners*, 731 N.E.2d at 586 ("while this Court has been willing to find that an action is not champertous as a matter of law, it has been hesitant to find that an action *is champterous as a matter of law*") (citations omitted) (emphasis added)."

Br. at 34. Not only did the Trust raise the issue, it cited the very case that the Eleventh Circuit cited for a closely-related legal principle. App. A at 6a ("New York law treats champerty as an affirmative defense. . . *Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 731 N.E.2d 581, 582 (N.Y. 2000)"). The Trust also raised the issue elsewhere in the opening brief and again in its reply brief.

The Eleventh Circuit has previously stated that an argument not briefed is considered abandoned "and its merits will not be addressed." *Access Now, Inc.*, 385 F.3d at 1330. That is the typical situation in which abandonment is found: a court recognizes that certain arguments, issues, or claims were not raised in the appellant's brief and does not consider their merits at all.

But that is not what happened here. Here, the opinion did consider the merits of the Trust's argument, and found them to be convincing. The court stated that (i) "the

district court may have erred procedurally in definitively resolving the question of champerty at the Rule 12(b)(1) stage because that question likely implicated the merits of the Litigation Trust's claims" (App. A. at 6a); (ii) "there is a strong argument that the district court should have used the Rule 56 standard in addressing whether the trust agreement was champertous under New York law" (*Id.* at 7a); and (iii) that "this appeal might have come out differently if it had been argued differently". *Id.* at 18a.

Yet the court still affirmed the judgment, and finally dismissed the case in its entirety. The result is that a potentially meritorious claim of massive fraud and corruption perpetrated against Venezuela's major national asset may never see its merits adjudicated, and the perpetrators of the fraud will walk away with their ill-gotten gains. Such a victory, based on a technicality, may raise serious questions about the legitimacy of the judicial process.

If a court of appeals addresses an issue that it deemed not adequately briefed, it need not write a great deal, or it may not analyze the issue at all. Nor, as the Court has previously explained, does a court need to attempt to create a winning issue on appeal when that issue was not argued or preserved in the district court. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).[5] But a court should not reject an admittedly meritorious argument simply because the argument, although included in an

5. In its decision, the Eleventh Circuit cited *Sineng-Smith* for the point that this case offered "no reason to depart from the general principle of party presentation." App. A at 8. However, *Sineng-Smith* dealt with a situation in which the Ninth Circuit had invited supplemental briefing on three issues that had not been raised by either party *at any stage of the litigation,* and hence has no application here.

appellant's appeal briefs, was deemed not sufficiently raised under a vaguely articulated standard, inconsistent with the standards applied in other circuits, particularly where, as here, the argument is dispositive of the appeal.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. Alternatively, because the Eleventh Circuit's decision found a sufficient basis to vacate the district court's decision, Petitioner respectfully suggests that this case is an appropriate candidate for summary disposition under Supreme Court Rule 16.1.

Respectfully submitted,

George F. Carpinello
Joseph D. Starsia
Boies Schiller Flexner LLP
30 South Pearl Street, 11th Floor
Albany, New York 12207
(518) 434-0600

David Boies
Counsel of Record
Boies Schiller Flexner LLP
333 Main Street
Armonk, New York 10504
(914) 749-8200
dboies@bsfllp.com

David A. Barrett
Marilyn C. Kunstler
Boies Schiller Flexner LLP
55 Hudson Yards, 20th Floor
New York, New York 10001
(212) 446-2300

Counsel for Petitioner

Dated: October ___, 2021

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MARCH 18, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10950

PDVSA US LITIGATION TRUST,

Plaintiff - Appellant,

versus

LUKOIL PAN AMERICAS, LLC, LUKOIL PETROLEUM, LTD., COLONIAL OIL INDUSTRIES, INC., COLONIAL GROUP, INC., GLENCORE, LTD., *et al.*,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:18-cv-20818-DPG

March 18, 2021, Decided

Before JORDAN, TJOFLAT, and ANDERSON, Circuit Judges.

JORDAN, Circuit Judge:

Appendix A

This lawsuit involves an alleged multi-billion-dollar conspiracy to defraud Petróleos de Venezuela, S.A., the Venezuelan state-owned oil company known as PDVSA. The scheme purportedly involved computer hacking and payment of bribes by numerous corporations and individuals to obtain PDVSA's proprietary oil trading information, and the use of that information to manipulate the pricing of crude oil and hydrocarbon products.

But PDVSA, the purported victim of the fraudulent scheme, did not sue the alleged perpetrators. Instead, an entity called the PDVSA U.S. Litigation Trust filed suit, alleging that it had authority to do so as an assignee of PDVSA pursuant to a trust agreement which, through a choice-of-law clause, is governed by New York law.

Following some discovery, the district court adopted in part the report and recommendation of the magistrate judge and dismissed the action without prejudice under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of Article III standing. *See PDVSA U.S. Litigation Trust v. Lukoil Pan Americas LLC*, 372 F. Supp. 3d 1353, 1359-61 (S.D. Fla. 2019). The court ruled that the Litigation Trust did not properly authenticate the trust agreement—it failed to authenticate three of the five signatures in the agreement—and without an admissible agreement it lacked standing. The court also concluded that, even if the trust agreement were authenticated and admissible, it was void as champertous under New York law, specifically N.Y. Judiciary Law § 489. As a result, the Litigation Trust did not have standing. *See generally MSPA Claims 1, LLC v. Tenet Florida, Inc.*, 918 F.3d 1312,

1318 (11th Cir. 2019) (an assignee has standing "if (1) its . . .assignor . . . suffered an injury-in-fact, and (2) [its] claim arising from that injury was validly assigned"); *Kenrich Corp. v. Miller*, 377 F.2d 312, 314 (3d Cir. 1967) (if an assignment is champertous under state law, and therefore "legally ineffective," the assignee lacks standing to sue).

The Litigation Trust appealed. With the benefit of oral argument, we now affirm.

I

Rule 901 of the Federal Rules of Evidence entails a two-step process for determining authenticity. A "district court must first make a preliminary assessment of authenticity . . . , which requires a proponent to make out a prima facie case that the proffered evidence is what it purports to be." *United States v. Maritime Life Caribbean Ltd.*, 913 F.3d 1027, 1033 (11th Cir. 2019) (involving the authenticity of an assignment) (citation and internal quotation marks omitted). "If the proponent satisfies this 'prima facie burden,' the inquiry proceeds to a second step, in which the evidence may be admitted, and the ultimate question of authenticity is then decided by the [factfinder]." *Id.* (citation and internal quotation marks omitted). At the first step of the process, it is inappropriate for the district court to place on the proponent of the evidence the burden of showing authenticity by a preponderance of the evidence. *See id.* ("By requiring Maritime to prove authenticity by 'the greater weight of the evidence,' the district court compressed the two steps of the inquiry under Rule 901 into one and conflated the issue of authenticity with [the merits].").

The magistrate judge stated that the Litigation Trust had the "burden of proving" the authenticity of the trust agreement and concluded that it had not carried that burden because it failed to authenticate the signatures on the agreement. *See* D.E. 636 at 11, 18. The district court noted the burden of proof used by the magistrate judge and agreed that the trust agreement was inadmissible: "The [c]ourt finds that [the Litigation Trust] has failed to establish the admissibility of the [t]rust [a]greement." *PDVSA*, 372 F. Supp. 3d at 1360.

We have not addressed whether or how the two-step authenticity process described in cases like *Maritime Life* should be applied in a Rule 12(b)(1) context where the defendant's attack on subject-matter jurisdiction is factual, and where the district court is permitted to act as the ultimate decision-maker on jurisdictional facts. Some district courts have ruled that on a motion to dismiss for lack of subject-matter jurisdiction they "may only consider evidence which would be of testimonial value at trial." *Dr. Beck & Co. G.M.B.H v. General Electric Co.*, 210 F. Supp. 86, 92 (S.D.N.Y. 1962), *aff'd*, 317 F. 2d 338 (2d Cir. 1963). Others have said that, at the Rule 12(b)(1) stage, a court cannot consider evidence which has "not been authenticated in some proper manner." *Research Inst. for Medicine and Chemistry, Inc. v. Wis. Alumni Research Found., Inc.*, 647 F. Supp. 761, 773 n.8 (W.D. Wis. 1986). It is difficult to know from the short discussions in these cases whether the district courts were speaking of authentication in a prima facie sense or in a final admissibility sense. And the few treatises that speak to the matter are not very helpful because they focus on the

evidence's ultimate admissibility at trial. *See, e.g.*, 61A Am. Jur. 2d, Pleading § 495 (Feb. 2021 update) ("[I]n some [cases], it has been decided that the court may consider only evidence which would be admissible at trial.").

We need not address the interplay between Rule 901 and Rule 12(b)(1) today, for we assume without deciding that the Litigation Trust made out a prima facie case of authenticity for the trust agreement at the Rule 12(b)(1) proceedings, and that this prima facie showing was sufficient. *Cf. Itel Capital Corp. v. Cups Coal Co. Inc.*, 707 F.2d 1253, 1259 (11th Cir. 1983) ("[U]nder Rule 901, proving the signature of a document is not the only way to authenticate it."). We therefore also assume, again without deciding, that the district court erred by ruling that the trust agreement was inadmissible. That leaves the district court's alternative champerty ruling, to which we now turn.

II

Our cases hold that claims "should not be dismissed on motion for lack of subject-matter jurisdiction when that determination is intermeshed with the merits of the claims and there is a dispute as to a material fact." *Lawrence v. Dunbar*, 919 F.2d 1525, 1531 (11th Cir. 1990). "When the jurisdictional basis of a claim is intertwined with the merits, the district court should apply a Rule 56 summary judgment standard when ruling on a motion to dismiss which asserts a factual attack on subject-matter jurisdiction." *Id.* at 1530. *Cf. Culverhouse v. Paulson & Co., Inc.* 813 F.3d 991, 994 (11th Cir. 2016) ("[I]n reviewing the

standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiff would be successful in their claims.") (citation and internal quotation marks omitted).[1]

Based on our review of the record, the district court may have erred procedurally in definitively resolving the question of champerty at the Rule 12(b)(1) stage because that question likely implicated the merits of the Litigation Trust's claims. As it turns out, however, the Litigation Trust does not make this procedural argument on appeal.

A

Rule 8(c) of the Federal Rules of Civil Procedure provides that "illegality" is an affirmative defense. And New York law treats champerty as an affirmative defense. *See, e.g., Justinian Capital SPC v. WestLB AG*, 28 N.Y.3d 160, 43 N.Y.S.3d 218, 65 N.E.3d 1253, 1255 (N.Y. 2016); *Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 94 N.Y.2d 726, 731 N.E.2d 581, 582, 709 N.Y.S.2d 865 (N.Y. 2000); *Krusch v. Affordable Housing, LLC*, 266 A.D.2d 122, 698 N.Y.S. 2d 674, 674 (App. Civ. 1st Dept. 1999); *Phoenix Light SF Ltd. v. U.S. Bank Nat'l Ass'n*, F. Supp. 3d , 2020 U.S. Dist. LEXIS 46950, 2020 WL 1285783, at *11 (S.D.N.Y. 2020). Indeed, if an assignment or agreement is champertous under New York law it is null and void

1. The magistrate judge put the parties on notice of our precedent at one of the hearings in the case. *See* D.E. 423 at 22 (explaining that "very frequently issues related to standing are intertwined with issues related to the merits").

and cannot be enforced or sued upon. *See, e.g., Bluebird Partners*, 731 N.E. 2d at 587; *Elliott Assocs., L.P. v. Republic of Peru*, 948 F. Supp. 1203, 1208 (S.D.N.Y. 1996).

Because champerty likely implicated the merits of the claims brought by the Litigation Trust, there is a strong argument that the district court should have used the Rule 56 standard in addressing whether the trust agreement was champertous under New York law. *See, e.g., Morrison v. Amway Corp.*, 323 F. 3d 920, 927-30 (11th Cir. 2003). But we do not reverse on this ground because the Litigation Trust does not raise any procedural objections to the district court's handling of the champerty question.

The Litigation Trust argued to the magistrate judge that champerty is a fact-intensive issue which must be decided by a jury. *See* D.E. 636 at 23 n.16. Yet on appeal the Litigation Trust does not contend that the district court committed procedural error by failing to employ the Rule 56 standard in addressing the affirmative defense of champerty. Instead, although it acknowledges that champerty is an affirmative defense, it takes the champerty ruling head on and asks us to hold that the assignment was not champertous under New York law. *See* Appellant's Br. at 32-33 & n. 13 (arguing that the district court committed clear error in finding that the clear purpose of the trust agreement was to bring this lawsuit).

We normally decide cases and issues as framed by the parties, and the Litigation Trust has abandoned any procedural objections to the champerty ruling by not raising them in its brief. *See Sapuppo v. Allstate*

Floridian Ins. Co., 739 F.3d 678, 680 (11th Cir. 2014) (collecting several Eleventh Circuit cases holding that a party abandons an issue by not briefing it). In a case like this one—involving sophisticated litigants represented by able counsel—there is no reason to depart from the general principle of party presentation, and we decline to take up *sua sponte* the district court's failure to apply the Rule 56 standard. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579, 206 L. Ed. 2d 866 (2020) ("In our adversarial system, we follow the principle of party presentation . . . . [W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.") (citation and internal quotation marks omitted). Like the district court, then, we address champerty on the merits.

B

The Litigation Trust was created in 2017 by PDVSA, as both the grantor and beneficiary under New York law, so that the litigation efforts to hold the defendants "accountable could proceed without interference from the political and economic instability and rampant corruption in Venezuelan government and society." Appellant's Br. at 2-3. The Litigation Trust has two New York trustees (appointed by the Trust's counsel) and one Venezuelan trustee. All costs and expenses of the litigation against the defendants are borne by the Trust's counsel. Any recoveries or proceeds will be divided between PDVSA (which receives 34%) and the Trust's counsel, investigator, and financier (who collectively receive the remaining 66%).

The trust agreement, dated July of 2017, was purportedly executed in August of 2017. Under the terms of the trust agreement, PDVSA assigned its claims against the defendants to the Litigation Trust so that they could be pursued by the Trust in the United States.

PDVSA's president and board of directors did not approve the trust agreement. The signatories of the agreement were two Venezuelan government officials, Nelson Martinez (a former Venezuelan oil minister) and Reynaldo Muñoz Pedrosa (an attorney general for civil matters); Alexis Arellano, a PDVSA-designated trustee; and Edward Swyer and Vincent Andrews, two American trustees. The Venezuelan government officials who signed the trust agreement were members of the administration of President Nicolas Maduro, which the United States had formally recognized as Venezuela's government at the time.[2]

As relevant here, N.Y. Judiciary Law § 489(1) provides that "no corporation or association . . . shall solicit, buy, or take an assignment of . . . a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon[.]" The New York Court of Appeals recently explained that the "statue prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the purpose of bringing a lawsuit." *Justinian Capital*, 65 N.E.3d at 1254.

2. President Trump later recognized Juan Guaidó, the President of the Venezuelan National Assembly, as the Interim President of Venezuela.

Whether an agreement is champertous "is a mixed question of law and fact," 14 C.J.S., Champerty and Maintenance § 26 (Feb. 2021 update), and a number of New York cases have reversed summary judgment rulings on champerty because there were underlying disputes of material fact (usually regarding the transaction's "primary purpose"). Take, for example, the decision of the New York Court of Appeals in *Bluebird Partners*, 731 N.E.2d at 587: "We are satisfied that the record here does not support a finding of champerty as a matter of law for summary disposition. It cannot be determined on this record and in this procedural posture that champerty was the primary motivation, no less the sole basis, for all this strategic jockeying and financial positioning."

But, as noted, the Litigation Trust does not make any Rule 56-type arguments on appeal. So we treat the champerty ruling as one made by the district court as the ultimate decision-maker, and review any underlying factual findings for clear error (as the Litigation Trust asks us to do). *See generally Cooper v. Harris*, 137 S. Ct. 1455, 1465, 197 L. Ed. 2d 837 (2017) (explaining that, under the clear error standard, "[a] finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern"). On this basis, we affirm the district court's conclusion that the trust agreement was champertous under New York law.

The district court found, on the evidence before it, that the primary purpose of the trust agreement was to "facilitate the prosecution and resolution" of the assigned claims and to liquidate the Litigation Trust's "assets

with no objective to continue or engage in the conduct of a trade or business." *PDVSA*, 372 F. Supp. 3d at 1360. This factual finding was not clearly erroneous. First, the trust agreement's own language states in the same words that this was the primary purpose. *See* D.E. 517-4 at § 2.5(a). Second, one of the Litigation Trust's lead attorneys testified at his deposition that the trust agreement was executed by the parties for "purposes of pursuing claims that are the subject matter of this litigation, among others." D.E. 573-1 at 11. Third, the Litigation Trust was not a pre-existing entity with a separate commercial existence. Fourth, only 34% of any recovery goes to PDVSA, with the remaining amount divided between the Litigation Trust's attorneys, investigator, and financier.

Contrary to the Litigation Trust's argument, the fact that some of the ultimate beneficiaries of the litigation (at least to the tune of 34% of the recovery) may be the Venezuelan people does not detract from the fact that the trust agreement was created to allow a third party—the Trust—to sue on claims that belonged to PDVSA. And even if one accepts that the trust agreement also served the facilitation of cooperation with law enforcement and the engagement of investigators to look further into other improper conduct (as one of the Litigation Trust's lead attorneys testified) that does not make the district court's finding clearly erroneous. The same goes for the Litigation Trust's contention that the 34%-66% fee structure is reasonable. *See Cooper*, 137 S. Ct. at 1465. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

The district court also correctly applied New York law. We come to that conclusion based on *Justinian Capital*, 65 N.E.3d at 1258-59. In that case, the New York Court of Appeals confronted a similar arrangement and concluded on summary judgment that it was champertous under N.Y. Judiciary Law § 489(1).

In *Justinian Capital*, a company called DPAG purchased from two special purposes companies (whom we'll collectively call Blue Heron) notes worth approximately € 180 million. DPAG's portfolio was managed by WestLB, a bank partly owned by the German government. When the notes lost most of their value, DPAG—which was receiving financial support from the German government—did not want to sue WestLB because of a concern that the German government might end its support for DPAG. So DPAG turned to Justinian Capital, a Cayman Islands company with few or no assets. *See Justinian Capital*, 65 N.E.3d at 1254.

Justinian Capital proposed a business plan in which it would purchase the notes from DPAG, commence litigation (by partnering with law firms) to recover the losses on the investment, and remit the recovery from the litigation to DPAG "minus a [20%] cut[.]" *See id.* at 1254-55. DPAG subsequently entered into a sale and purchase agreement by which it assigned the notes to Justinian Capital, which in turn agreed to pay DPAG a base purchase price of $1 million. The assignment of the notes, however, was not contingent on Justinian Capital's payment of the purchase price, and failure to pay did not constitute a breach or default of the agreement. The only

consequences of Justinian Capital's failure to pay the $1 million by the due date were that interest would accrue on the purchase price and that Justinian Capital's share of the proceeds of litigation would decrease from 20% to 15%. At the time Justinian Capital instituted suit against WestLB, it had not paid any portion of the $1 million and DPAG had not demanded payment. *See id.* at 1255.

The New York Court of Appeals held that the assignment from DPAG to Justinian Capital was champertous because the impetus was DPAG's desire to sue WestLB for the decline in the value of the shares and not be named as a plaintiff in the action. And Justinian Capital's business plan was to acquire investments that suffered major losses in order to sue on them. There was no evidence, the Court of Appeals concluded, that Justinian Capital's acquisition of the notes from DPAG "was for any purpose other than the lawsuit it initiated almost immediately after acquiring the notes[.]" *Id.* at 1257. Significantly, the Court of Appeals dismissed as speculative the testimony of Justinian Capital's principal that there might be other possible sources of recovery on the notes: "Here, the lawsuit was not merely an incidental or secondary purpose of the assignment, but its very essence. [Justinian Capital's] sole purpose in acquiring the notes was to bring this action and hence, its acquisition was champertous." *Id.*

The same is true here. As the district court found, the Litigation Trust's primary purpose in acquiring PDVSA's claims was to bring this action.

C

Trying to avoid the force of *Justinian Capital*, the Litigation Trust makes a number of arguments. We find them unpersuasive.

The Litigation Trust says that it is closely related to PDVSA, and therefore not a stranger or "officious intermeddler." *See FragranceNet.com, Inc. v. FragranceX.com*, 679 F. Supp. 2d 312, 319 n.9 (E.D.N.Y. 2010) (explaining, in the context of a parent and subsidiary, that champerty bars the "acquisition of a cause of action by a stranger to the underlying dispute"). It describes itself as a fiduciary of PDVSA which does not stand to profit from the litigation.

On this record, the argument fails. The Litigation Trust was a new entity created for the purpose of obtaining and litigating PDVSA's claims, and as a result was a stranger to the underlying disputes with the defendants. *See BSC Assocs. v. Leidos, Inc.*, 91 F. Supp. 3d 319, 328 (N.D.N.Y. 2015) ("Here, Plaintiff—which did not exist prior to February 2014 and was formed solely to 'retain' this cause of action from BSC Partners—clearly did not have a proprietary interest in the Subcontract underlying this action that predates the transfer of claims to Plaintiff."). And there is no claim that PDVSA—the purported assignor of claims—owns or controls the Litigation Trust or that the Trust is a subsidiary or related entity of PDVSA. Finally, given that the Litigation Trust is a pass-through for 64% of the proceeds to go to its counsel, investigator, and financier, it matters little that

the Trust itself is not going to reap an economic benefit from the litigation.

The Litigation Trust also asserts that § 489(1) does not apply because it is not a collection agency or a corporation, and does not qualify as an "association." We reject this argument, as the New York Court of Appeals has explained that "association" is a "broad term which may be used to include a wide assortment of differing organizational structures including trusts, depending on the context." *Mohonk Trust v. Board of Assessors*, 47 N.Y.2d 476, 392 N.E.2d 876, 879, 418 N.Y.S.2d 763 (N.Y. 1979). Given that § 489(1) lists "trustees" as one of the persons or entities who can violate the statute's general prohibition on champerty, the context here permits the application of the champerty bar to the trust agreement.

Finally, the Litigation Trust argues that it comes within § 489(2), the champerty statute's "safe harbor" provision. This provision states that the champerty bar in § 489(1) is inapplicable if the "aggregate purchase price" of a claim is at least $500,000. The Litigation Trust says that it was prevented from presenting evidence that its counsel had spent over $500,000 in fees and costs, for the benefit of PDVSA, even before the assignment of claims.

The magistrate judge and the district court rejected the Litigation Trust's "safe harbor" argument because there was no evidence of any payment from the Litigation Trust to PDVSA. *See PDVSA*, 372 F. Supp. 3d at 1361; D.E. 636 at 22-23. We come to the same conclusion.

In *Justinian Capital*, the New York Court of Appeals held that the "phrase 'purchase price' in [§] 489(2) is better understood as requiring a binding and bona fide obligation to pay $500,000 or more of notes or securities, which is satisfied by actual payment of at least $500,000 or the transfer of financial value worth at least $500,000 in exchange for the notes or other securities." 65 N.E.3d at 1258. The expenditure by the Litigation Trust or its counsel of fees and costs for the litigation, even if they exceeded $500,000, did not constitute a contractual "purchase price." There were no underlying instruments or claims valued at or transferred for more than $500,000, and there was no obligation on the Litigation Trust or its counsel to spend $500,000 or more for the costs of litigation.

Moreover, none of the Litigation Trust's expenditures for litigation costs flowed to PDVSA. As an entity, PDVSA was no better off financially due to the footing of litigation costs by the Litigation Trust or its counsel, and it still had to wait until the Trust succeeded on the assigned claims to reap any contingent monetary benefit. *Cf. id.* at 1259 ("[B]ecause Justinian [Capital] did not pay the purchase price or have a binding and bona fide obligation to pay the purchase price of the notes independent of the successful outcome of the lawsuit, [it] is not entitled to the protections of the safe harbor.").

We also think the defendants may be correct in asserting that the Litigation Trust's interpretation of § 489(2) could threaten to swallow much of § 489(1). An otherwise-champertous transaction, no matter the value

of the assigned instruments or the lack of a binding obligation to pay a purchase price of $500,000 or more, would be immunized under New York law if the assignee simply spent over $500,000 in litigation expenses.

III

This appeal might have come out differently had it been argued differently. But on the issues presented to us, we affirm the district court's dismissal of the Litigation Trust's complaint without prejudice for lack of standing.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, FILED MARCH 8, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 18-20818-CIV-GAYLES/OTAZO-REYES

PDVSA U.S. LITIGATION TRUST,

Plaintiff,

v.

LUKOIL PAN AMERICAS LLC, *et al.*,

Defendants.

March 8, 2019, Decided
March 8, 2019, Entered on Docket

ORDER

THIS CAUSE comes before the Court on Defendants' Motion to Dismiss for Lack of Standing (the "Motion") [ECF Nos. 517, 522 (under seal)].[1] The action was referred

1. The moving Defendants are Lukoil Pan Americas LLC; Colonial Oil Industries, Inc.; Colonial Group, Inc.; Paul Rosado; Glencore Ltd..; Glencore Energy UK Ltd.; Gustavo Gabaldon; Sergio de la Vega; Vitol Energy (Bermuda) Ltd.; Vitol, Inc.; Trafigura Tradng, LLC, Francisco Morillo; Leonardo Baquero; Daniel Lutz;

to Magistrate Judge Alicia Otazo-Reyes, pursuant to 28 U.S.C. § 636(b)(1)(B), for a ruling on all pretrial, non-dispositive matters, and for a Report and Recommendation on any dispositive matters. [ECF No. 220]. Following limited discovery, briefing, and an evidentiary hearing on August 2 and 3, 2018, Judge Otazo-Reyes issued her report finding that Plaintiff has no standing and recommending that the Court dismiss this action for lack of subject matter jurisdiction (the "Report") [ECF No. 636]. Plaintiff has timely objected to the Report [ECF No. 646].[2]

BACKGROUND[3]

Petróleos de Venezuela, S.A. ("PDVSA") is a Venezuelan state-owned energy company. [ECF No. 12 at ¶ 1]. According to the Amended Complaint, Defendants[4]

Luis Liendo; John Ryan; Helsinge Holdings, LLC; Helsinge, Inc.; Helsinge Ltd; Maximiliano Poveda; Luis Alvarez; Antonio Maarraoui; and BAC Florida Bank.

2. Defendants filed a response to the objections [ECF No. 652] and Plaintiff filed a reply [ECF No. 655]. On January 29, 2019, the Court directed the parties to address whether the United States Department of the Treasury's designation of Petroleos de Venezuela, S.A. ("PDVSA"), pursuant to Executive Order 13850, has any bearing on the Motion. In their supplemental responses, the parties agreed that Executive Order 13850 does not invalidate the assignment. [ECF Nos. 668, 669].

3. The Court incorporates the Report's recitation of the factual and procedural background.

4. The named Defendants are: Lukoil Pan Americas LLC; Lukoil Petroleum Ltd.; Colonial Oil Industries, Inc.; Colonial Group, Inc.; Glencore Ltd.; Glencore International A.G.; Glencore Energy

conspired to deprive PDVSA of competitive prices for the sale and purchase of oil products and additives causing billions of dollars in damages. [ECF No. 12]. Based on these allegations, PDVSA has standing to bring the claims against Defendants. However, for reasons too speculative to address in this Order, PDVSA assigned its interest in the claims to Plaintiff PDVSA US Litigation Trust ("Plaintiff") via a Litigation Trust Agreement (the "Trust Agreement"). [ECF No. 517-4]. Without this assignment, Plaintiff has no standing.

Assignees, in general, may obtain Article III standing by virtue of a valid assignment. *See Sprint Commc'n Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008). The assignment in this action, however, is of questionable authenticity and legality. Indeed, the very individuals who could testify as to the authenticity of their signatures on the Trust Agreement are unavailable, in part, due to political unrest in Venezuela.[5] And, even if Plaintiff could authenticate

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UK Ltd.; Masefield A.G.; Trafigura A.G.; Trafigura Trading LLC; Trafigura Beheer B.V.; Vitol Energy (Bermuda) Ltd.; Vitol S.A.; Vitol, Inc.; Francisco Morillo; Leonardo Baquero; Daniel Lutz; Luis Liendo; John Ryan; Helsinge Holdings, LLC; Helsinge, Inc.; Helsinge Ltd., Saint-Hélier; Waltrop Consultants, C.A.; Godelheim, Inc.; Hornberg Inc.; Societe Doberan, S.A.; Societe Hedisson, S.A.; Societe Hellin, S.A.; Glencore de Venezuela, C.A.; Jehu Holding lnc.; Andrew Summers; Maximiliano Poveda; Jose Larocca; Luis Alvarez; Gustavo Gabaldon; Sergio De La Vega; Antonio Maarraoui; Campo Elias Paez; Paul Rosado; BAC Florida Bank; EFG International A.G.; and Blue Bank International N.V.

5. The record is replete with allegations that key witnesses could not travel or be deposed due to political upheaval and bans

the Trust Agreement, it violates New York's ban on champerty. Finally, the Venezuelan National Assembly has declared that the Trust Agreement is invalid and unconstitutional. This unequivocal declaration by the only governing body in Venezuela recognized by the United States, the questionable authority of the Venezuelan officials who signed the Trust Agreement, and the political unrest in Venezuela exemplify the problems with Plaintiff's purported standing. While the Court is mindful of the suffering of the people of Venezuela[6] and severity of the allegations against Defendants, it cannot create standing where there is none. Plaintiff has no standing and is not the proper party to bring these claims.

DISCUSSION

A district court may accept, reject, or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1). Those portions of the report and recommendation to which objection is made are accorded *de novo* review, if those objections "pinpoint the specific findings that the party disagrees with." *United States*

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on travel in Venezuela. In addition, since this litigation was filed, the United States withdrew its recognition of Nicolas Maduro as the president of Venezuela and officially recognized the President of the National Assembly, Juan Guaidó, as the Interim President of Venezuela and affirmed its support of the National Assembly as "the only legitimate branch of government duly elected by the Venezuelan people." [ECF No. 665-1].

6. As discussed below, even if Plaintiff had standing and prevailed on its claims, PSDVA would only receive 34% of the recovery. *See infra* § IV.

v. Schultz, 565 F.3d 1353, 1360 (11th Cir. 2009); *see also* Fed. R. Civ. P. 72(b)(3). Any portions of the report and recommendation to which *no* specific objection is made are reviewed only for clear error. *Liberty Am. Ins. Grp., Inc. v. WestPoint Underwriters, L.L.C.*, 199 F. Supp. 2d 1271, 1276 (M.D. Fla. 2001); *accord Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006).

In her Report, Judge Otazo-Reyes made the following findings: (1) the issue of Plaintiff's standing is jurisdictional as opposed to prudential; (2) Plaintiff failed to carry its burden of proving the admissibility of the Trust Agreement; (3) Defendants have standing to challenge the validity of PDVSA's purported assignment of its claims to Plaintiff; (4) the Trust Agreement is void under New York law; and (5) the Trust Agreement is invalid under Venezuelan law. Judge Otazo-Reyes declined to address the Act of State or political question doctrines and their applicability to the issue of Plaintiff's standing. The Court has conducted a *de novo* review of the record and the law and agrees, in part, with the Report's recommendations as set forth below.

I. Standing

"[T]he doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). To establish Article III constitutional standing, "the plaintiff must show an 'injury in fact' that is 'fairly traceable' to the defendant's conduct and 'that is likely to be redressed

by a favorable judicial decision.'" *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1302, 197 L. Ed. 2d 678 (2017) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)). The "irreducible constitutional minimum of standing" requires an "injury in fact" that is both "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations and internal quotation marks omitted).

In addition to Article III standing, a plaintiff must have prudential standing. Prudential standing does not relate to the Court's constitutional power to adjudicate the case. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014). Rather, it encompasses "three broad principles: the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Id.* at 126 (internal quotations and citations omitted).

As Judge Otazo-Reyes correctly concluded in her Report, the Court must first determine if Plaintiff has Article III standing before it evaluates prudential standing.[7] *See Sprint*, 554 U.S. at 289 (first addressing

7. Because the Court finds Plaintiff does not have Article III standing, which a Court may address *sua sponte* , it does not address Plaintiff's arguments that Defendants have no standing to challenge

whether the assignees had Article III standing before addressing prudential concerns). Plaintiff's sole basis for standing is the assignment set forth in the Trust Agreement. "[T]he assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000). However, if the Trust Agreement is inadmissible or void, Plaintiff cannot establish that it suffered an injury in fact sufficient to establish constitutional standing. *See US Fax Law Center, Inc. v. iHire, Inc.*, 476 F.3d 1112, 1120 (10th Cir. 2007) (finding no Article III standing where the assignment was invalid under Colorado law because "an invalid assignment defeats standing if the assignee has suffered no injury in fact himself."); *MSP Recovery, LLC v. Allstate Ins. Co.*, 276 F. Supp. 3d 1311, 1317 (S.D. Fla. 2017) (dismissing action for lack of Article III standing where assignment was invalid); *MAO-MSO Recovery II, LLC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 281 F. Supp. 3d 1278, 1282 (S.D. Fla. 2017).

II. Admissibility of the Trust

The Court agrees with the Report's finding that the Trust Agreement is inadmissible. The Trust Agreement

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the assignment. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines.") (internal quotations and citations omitted); *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005) ("[The Court is] obliged to consider questions of standing regardless of whether the parties have raised them.").

contains five signatures: (1) Alexis Arellano, the PDVSA Appointed Litigation Trustee; (2) Edward P. Swyer, a US Law Firm Appointed Litigation Trustee; (3) Vincent Andrews, a US Law Firm Appointed Litigation Trustee; (4) Nelson Martínez, the former Venezuelan Petroleum Minister; and (5) Reinaldo Muñoz Pedroza, the Venezuelan Procurador General. Only Mr. Andrews and Mr. Swyer, the US Law Firm appointees, acknowledged their signatures on the Trust Agreement.[8] Plaintiff was unable to authenticate the other three signatures, including anyone with authority to take action on behalf of PDVSA.[9] Mr. Arellano never acknowledged his signature and never appeared for deposition.[10] Just before the hearing, Plaintiff submitted an acknowledgement of signature and apostille for Mr. Pedroza. However, Defendants were not able to

8. Mr. Andrews and Mr. Swyer also signed Amendment Number One to the Trust Agreement which eliminated from the Trust Agreement the second US Law Firm Appointer and replaced the Trust Agreement's definition of "PDVSA Appointer" from "The Minister of the People's Petroleum Power" to "The President of PDVSA." *See* Trust Agreement, Pl.'s Ex. 1 at 1, 8; Amendment One Pl. Ex. 2 at 1, 2.

9. Defendants' Venezuelan law experts contend that neither Mr. Martinez nor Mr. Pedroza had the authority to execute the Trust Agreement on behalf of PDVSA.

10. Less than two days before the hearing, Plaintiff attempted to introduce a "Notice of Appointment of Successor Trustee," appointing Marcos Rojas as a successor trustee to Mr. Arellano. Plaintiff also sought to introduce Mr. Rojas as a witness. Judge Otazo-Reyes excluded the evidence as untimely. [ECF No. 564]. The Court affirms Judge Otazo-Reyes's decision to exclude the evidence and, therefore, overrules Plaintiff's Objections set forth at ECF No. 600.

depose Mr. Pedroza because, according to Plaintiff, then President Maduro had restricted the travel of government officials. Because Defendants were not provided the opportunity to depose Mr. Pedroza as to his eleventh-hour acknowledgment, Judge Otazo-Reyes excluded it from consideration. Finally, at the hearing, Plaintiff attempted to introduce Mr. Martinez's alleged acknowledgement of his signature, signed on August 1, 2018, one day before the hearing. On Defendants' motion, Judge Otazo-Reyes excluded the acknowledgement as untimely.[11]

Plaintiff then tried to authenticate the signatures on the Trust Agreement via the testimony of George Carpinello, Plaintiff's counsel. Judge Otazo-Reyes properly precluded Mr. Carpinello from testifying. *See Putman v. Head*, 268 F.3d 1223, 1246 (11th Cir. 2001) ("rules of professional conduct generally disapprove of lawyers testifying at proceedings in which they are also advocates."). Finally, Plaintiff endeavored to authenticate the signatures via a handwriting expert, Ruth Brayer. The Court agrees with the Report's finding that Ms. Brayer's proffered opinions do not meet *Daubert* standards. Accordingly, the Court finds that Plaintiff has failed to establish the admissibility of the Trust Agreement. Without an admissible Trust Agreement, Plaintiff cannot establish its Article III standing and this action must be dismissed for lack of subject matter jurisdiction.

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11. Plaintiff has objected to Judge Otazo-Reyes's Order Striking Mr. Martinez's Acknowledgment [ECF No. 565]. The Court agrees with Judge Otazo-Reyes's decision to exclude the evidence and, therefore, overrules Plaintiff's Objections set forth at ECF No. 601.

III. Sanctions

Judge Otazo-Reyes also excluded the Trust as a sanction for Plaintiff's failure to comply with standing discovery. While the Court acknowledges Plaintiff's repeated discovery violations, often followed by dubious excuses, it does not find that the violations warrant the extreme sanction of excluding the Trust Agreement. This issue, however, is moot, as the Court finds the Trust Agreement inadmissible.[12]

IV. The Trust is Void under New York Law on Champerty

The Court agrees with the Report's finding that, even if it were admissible, the assignment in the Trust Agreement is void under New York law.[13] New York's champerty statute expressly prohibits the assignment of claims "with the intent and for the primary purpose of bringing a lawsuit." *See Justinian Capital SPC v. WestLB AG*, 28 N.Y.3d 160, 43 N.Y.S.3d 218, 65 N.E. 3d 1253, 1254 (N.Y. 2016). *See also Aretakis v. Caesars Entertainment*, No. 16-cv-8751, 2018 U.S. Dist. LEXIS 29552, 2018 WL 1069450, at *10 (S.D. Fla. 2018) (holding assignment was

12. Judge Otazo-Reyes has recommended that the Court grant Defendants' Motion for Order to Show Cause, for Sanctions and Other Relief. [ECF No. 430]. The Court reserves ruling on the sanctions motion and any award of fees until after Defendants have had an opportunity to respond to Plaintiff's objections to the Report and Recommendation [ECF No. 670].

13. The Trust Agreement's choice of law provision provides that the Trust Agreement is governed by New York law.

void where "portions of the purported assignment make plain that the purpose of the assignment was to allow Plaintiff to prepare and file a lawsuit seeking to obtain the funds to which Plaintiff claims [assignor] is entitled."). Here, the "primary purpose" of the Trust Agreement "is to facilitate the prosecution and resolution of the Assigned Actions and to liquidate the Liquidation Trust Assets with no objective to continue or engage in the conduct of a trade or business." [ECF No. 517-4]. Indeed, only 34% of any recovery goes to PDVSA. The remaining 66% is split between Plaintiff's lawyers, investigator, and financier.[14] The clear purpose of the Trust Agreement was to bring this lawsuit — with attorneys and investors as the primary beneficiaries. As a result, the Trust Agreement is void under New York law and cannot provide a basis for Plaintiff's standing to bring this action.

Despite the choice of law provision in the Trust Agreement, Plaintiff argues that New York law does not apply where the transferred claims are federal claims. This objection is without merit. Federal courts have applied New York's champerty ban to federal claims filed in federal court. *See Koro Company, Inc. v. Bristol-Myers Company*, 568 F. Supp. 280, 288 (D.D.C. 1983) (applying New York's champerty law to the assignment of an antitrust claim). Plaintiff also contends that the champerty statute is inapplicable because Plaintiff is not technically a "corporation" or an "association." The Court disagrees. *See Mohonk Trust v. Board of Assessors*, 47

14. The identities of Plaintiff's investigator and financier and the specifics of the financial arrangements were submitted to the Court under seal.

N.Y.2d 476, 392 N.E.2d 876, 879, 418 N.Y.S.2d 763 (N.Y. 1979) ("Although the word 'corporation' is strictly defined in the law, the word 'association' is a broad term which may be used to include a wide assortment of differing organizational structures including trusts . . ."). Finally, the Court agrees with the Report's findings that the safe harbor provisions in the champerty statute do not apply.[15]

V. Venezuelan Law and the Act of State Doctrine

Judge Otazo-Reyes, relying on the testimony of Professor Jose Ignacio Hernandez, found that the Trust Agreement was void under Venezuelan law because it was a "public order obligation" that could not be transferred to third parties. [ECF No. 570-2, ¶ 85]. Plaintiff has now offered an untimely expert report to rebut Professor's Hernandez's opinions. In light of the Court's dispositive rulings as to the admissibility of the Trust Agreement and New York's champerty law, it declines to make a formal ruling on Venezuelan law. However, the Court notes that the National Assembly's declaration that the Trust Agreement is unconstitutional certainly lends credence to Judge Otazo-Reyes's recommendation. Indeed, if the Court were to hold otherwise, it would be ruling in direct contravention to a resolution by a foreign sovereign — likely in violation of the Act of State doctrine.

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15. Because the Court finds that the Trust Agreement is void under New York's champerty law, it declines to address whether the lack of certificates of acknowledgement violate New York Trust law or whether the Trust Agreement fails to sufficiently define its corpus.

Appendix B

The Act of State doctrine prevents courts from adjudicating an action where "the relief sought or the defense interposed . . . require[s] a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l.*, 493 U.S. 400, 405, 110 S. Ct. 701, 107 L. Ed. 2d 816 (1990). The doctrine "'is not some vague doctrine of abstention but a principle of decision binding on federal and state courts alike'; 'the act within its own boundaries of one sovereign State . . . becomes . . . a rule of decision for the courts of this country.'" *Federal Treasury Enterprise Sojuzplodoimport v. Spirits Intern. B.V.*, 809 F.3d 737, 743 (2d Cir. 2016) (quoting *W.S. Kirkpatrick & Co.*, 493 U.S. at 406); *see also Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1253 (11th Cir. 2006) ("The act of state doctrine is a judicially-created rule of decision . . ."). The doctrine applies when an action cannot be decided without the "court having to inquire into the legal validity" of a foreign sovereign's activity and conduct. *Hourani v. Mirtchev*, 796 F.3d 1, 15, 418 U.S. App. D.C. 1 (D.C. Cir. 2015). Indeed, "[w]hen it is made to appear that the foreign government has acted in a given way . . . the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Konowaloff v. Metropolitan Museum of Art*, 702 F.3d 140, 146 (2d Cir. 2012) (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 309, 38 S. Ct. 312, 62 L. Ed. 733 (1990)). The foreign government need not be a party to the litigation for the doctrine to apply. Rather, its application "turns on what must be adjudicated." *Hourani*, 796 F.3d at 15.

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Earlier in this case, Plaintiff argued there is no "doubt that PDVSA is an instrumentality of the Venezuelan government" and that the Act of State and the international comity doctrines foreclose the Court from adjudicating the legality of action taken by the Venezuelan government. [ECF No. 646, p. 30-31]. Subsequently, on January 23, 2019, the United States recognized Juan Guaidó as the Interim President of Venezuela and reaffirmed its recognition of the National Assembly as Venezuela's only legitimate branch of government. The United States' recognition of the National Assembly, as opposed to the Maduro regime, "is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence." *United States v. Pink*, 315 U.S. 203, 223, 62 S. Ct. 552, 86 L. Ed. 796 (1942) (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S. Ct. 309, 62 L. Ed. 726 (1918)). Therefore, if the National Assembly's declaration that the Trust Agreement is unconstitutional is considered an official act of the government of Venezuela, the Act of State doctrine would preclude this Court from ruling otherwise. *See Konowaloff*, 702 F.3d at 143 ("After the Executive Branch's recognition of a foreign state, the act of state doctrine applies retroactively to acts that were undertaken by the foreign state prior to official United States recognition."). The Venezuelan government, now recognized by the United States government, has declared the Trust Agreement at issue to be invalid. But given the current turmoil in Venezuela and the uncertainty concerning Venezuelan leadership, and because the Court has already determined that Plaintiff does not have standing, the Court declines to apply the Act of

State doctrine here. The principles behind the doctrine, however, clearly support the Court's reticence to enforce the Trust Agreement.

CONCLUSION

Accordingly, after careful consideration, it is **ORDERED AND ADJUDGED** as follows:

(1) Judge Otazo-Reyes's Report and Recommendation [ECF No. 10] is **ADOPTED in PART**;

(2) Defendants' Motion to Dismiss for Lack of Standing (the "Motion") [ECF Nos. 517, 522 (under seal)] is **GRANTED**. This action shall be **DISMISSED** without prejudice for lack of subject matter jurisdiction.

(3) Campo Elias Paez's Motion to Quash Service of Process [ECF No. 272] and Campo Elias Paez's Motion to Quash Renewed Service of Process [ECF No. 604] are **DENIED as MOOT**.

(4) Plaintiff's Objections to the Order Striking a Witness and the Order Excluding Admission of Plaintiff Exhibit 63 [ECF No. 600] are **OVERRULED**.

(5) Plaintiff's Objections to the Order Striking Plaintiff's Exhibit 64 [ECF No. 601] are **OVERRULED**.

(6) This action shall be **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of March, 2019.

/s/ Darrin P. Gayles
DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED NOVEMBER 5, 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:18-CIV-20818-GAYLES/OTAZO-REYES

PDVSA US LITIGATION TRUST,

Plaintiff,

v.

LUKOIL PAN AMERICAS LLC, *et al*.,

Defendants.

November 5, 2018, Decided
November 5, 2018, Entered on Docket

ALICIA M. OTAZO-REYES, UNITED STATES MAGISTRATE JUDGE.

REPORT AND RECOMMENDATION

THIS CAUSE was referred to the undersigned by the Honorable Darrin P. Gayles, United States District Judge, pursuant to Title 28, United States Code, Section 636, for a report and recommendation on dispositive matters [D.E. 220]. The following matters fall within the scope of the referral order:

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(1) Defendants Lukoil Pan Americas LLC, Colonial Oil Industries, Inc., Colonial Group, Inc., Paul Rosado, Glencore Ltd., Glencore Energy UK Ltd., Gustavo Gabaldon, Sergio de la Vega, Vitol Inc., Vitol Energy (Bermuda) Ltd., Antonio Maarraoui, Trafigura Trading, LLC, BAC Florida Bank, Francisco Morillo, Leonardo Baquero, Helsinge Holdings, LLC, Helsinge, Inc., Helsinge Ltd., Daniel Lutz, Luis Liendo, John Ryan, Luis Alvarez, and Maximiliano Poveda's (collectively, "Defendants") Motion to Dismiss for Lack of Standing (hereafter, "Motion to Dismiss") [D.E. 517, 522 (under seal)];[1]

(2) Plaintiff PDVSA U.S. Litigation Trust's ("Plaintiff" or "Trust") Memorandum of Law on Standing T.D.E. 518, 519 (under seal));[2]

(3) Defendants' Response in Support of their Motion to Dismiss for Lack of Standing [D.E. 532];

(4) Plaintiff's Reply Brief on Standing [D.E. 533, 535 (under seal)]; and

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1. In accordance with the undersigned's Scheduling Order, as modified, Defendants have until December 13, 2018 "to answer, move, or otherwise respond to Plaintiffs Amended Complaint. This would be the Defendants' first responsive pleadings, and thus all defenses and motions under Federal Rules of Civil Procedure are preserved." *See* Scheduling Order [D.E. 253 at 3]; Paperless Order [D.E. 635]. For the avoidance of confusion, the undersigned notes that the collective "Defendants" as defined above does not encompass all named defendants in the case.

2. PDVSA is the Venezuelan state-owned energy company Petroleos de Venezuela, S.A. See Am. Compl. [D.E. 12 at 2].

(5) Defendants' Notice of Supplemental Authority in Support of their Motion to Dismiss for Lack of Standing [D.E. 626].

The undersigned held an evidentiary hearing on the issue of Plaintiffs standing on August 2 and 3, 2018 (hereafter, "Standing Hearing") [D.E. 555, 558]. At the Standing Hearing, the parties presented respective experts on Venezuelan law and Plaintiff presented a handwriting expert. *See* Exhibit and Witness List [D.E. 569 at 10, 15-16].

Upon a thorough review of the evidence, the arguments presented by the parties and the applicable law, the undersigned concludes that the Trust lacks standing to pursue this action as the purported assignee of claims belonging to PDVSA. Therefore, the undersigned respectfully recommends that Defendants' Motion to Dismiss be GRANTED and that this action be DISMISSED for lack of subject matter jurisdiction.

PROCEDURAL BACKGROUND

The Trust commenced this action on March 3, 2018 [D.E. 1]. The Trust filed an Amended Complaint on March 5, 2018 [D.E. 12]. In its amended pleading, the Trust alleges that Defendants engaged in a conspiracy to: "fix prices, rig bids, and eliminate competition in the purchase and sale of crude oil and hydrocarbon products by PDVSA; misappropriate PDVSA proprietary data and intellectual property; and systematically loot PDVSA by causing corrupt PDVSA officials not to collect monies due PDVSA, to pay inflated prices for products and services

acquired by PDVSA, to accept artificially low prices for products sold by PDVSA, to overlook the failure to deliver products and services paid for by PDVSA, and to fraudulently conceal what was owed to PDVSA." *See* Am. Compl. [D.E. 12 at 2-3].

In the section of the Amended Complaint entitled "Parties," the Trust alleges: "Plaintiff PDVSA US Litigation Trust is a trust established pursuant to the laws of New York to investigate and pursue claims against Defendants and others." *Id.* ¶ 8. No additional facts regarding the establishment of the Trust were alleged in the Amended Complaint; and no documentation, such as the Trust Agreement establishing the Trust, was attached to the pleading.

The Amended Complaint consists of nineteen counts:

Count I	PDVSA Sales of Hydrocarbon Products - Violations of Section I of the Sherman Act.
Count II	PDVSA Purchases of Light Crude Products - Violations of Section I of the Sherman Act.
Count III	PDVSA Sales of Hydrocarbon Products - Violations of Section 2(c) of the Robinson-Patman Act.
Count IV	PDVSA Purchases of Light Crude Products - Violations of Section 2(c) of the Robinson-Patman Act.

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Count V	Violations of the Florida Deceptive and Unfair Trade Practices Act.
Count VI	Violations of the U.S. Racketeer Influenced and Corrupt Organizations Act Under 18 U.S.C. § 1962(c).
Count VII	Violations of the U.S. Racketeer Influenced and Corrupt Practices Act Under 18 U.S.C. § 1962(d).
Count VIII	Violations of the Civil Remedies for Criminal Practices Act.
Count IX	Fraud.
Count X	Civil Conspiracy.
Count XI	Aiding and Abetting Breach of Fiduciary Duty.
Count XII	Aiding and Abetting Fraud.
Count XIII	PDVS A Purchases of Light Crude Products - Breach of Contract.
Count XIV	PDVS A Sales of Hydrocarbon Products - Breach of Contract.
Count XV	Unjust Enrichment.
Count XVI	Violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

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Count XVII	Violation of the Stored Communications Act, 18 U.S.C. § 2701.
Count XVIII	Violation of the Wire and Electronic Communications Interception and Interception of Oral Communications Act (Federal Wiretap Act), 18 U.S.C. § 2510.
Count XIX	Violation of the Florida Uniform Trade Secrets Act, CH. 688.

Id. at 27-58. In its Prayer for Relief, the Trust seeks various forms of damages, interest, costs, fees, and injunctive relief. *Id.* at 58-59.

At the time it commenced the action, the Trust also filed Plaintiff's *Ex Parte* Motion for a Temporary Restraining Order ("TRO") and Preliminary Injunction and Delayed Service (hereafter, "Injunction Motion") [D.E. 5]. On March 5, 2018, the Court entered a TRO requiring the preservation of records and documents and directing Defendants to file responses to the Injunction Motion by a set deadline [D.E. 9]. On March 26, 2018, certain Defendants filed a response to the Injunction Motion, in which they argued that, "[a]s a threshold matter, Plaintiff lacks standing to. assert the pleaded claims both as a matter of Venezuelan and New York law." *See* Defendants' Joint Response in Opposition to Plaintiff's Motion for a Preliminary Injunction (hereafter, "Injunction Response") [D.E. 161 at 1]. According to Defendants, "the Court lacks jurisdiction and, before

permitting or considering further action or argument in this case, should first determine whether the Plaintiff can meet its burden to establish standing at the Preliminary Injunction phase." *Id.* at 2.[3] While arguing that the standing issue raised by Defendants is prudential rather than jurisdictional, Plaintiff agreed to the issue being addressed preliminarily. *See* Transcript of Status Conference Held Before The Honorable Darrin P. Gayles on April 4, 2018 [D.E. 234 at 8, 10-11].

On April 16, 2018, the undersigned entered a Scheduling Order prescribing a procedure and schedule for the parties to conduct discovery on the issue of Plaintiff's standing. *See* Scheduling Order [D.E. 253]. Thereafter, the undersigned issued a series of Discovery Orders [D.E. 278, 355, 370, 390, 396, 404, 442, 475, 507] and modified the Scheduling Order twice [D.E. 356, 498].

On June 14, 2018, Defendants filed a Motion, by Order to Show Cause, for Sanctions and Other Relief against Plaintiff (hereafter, "Sanctions Motion") [D.E. 430]. Therein, Defendants contend that Plaintiff failed to fully comply with the discovery contemplated by the Scheduling Orders. *Id.* Defendants seek as sanctions: 1) the dismissal of Plaintiff's claims; 2) in the alternative, an order precluding Plaintiff from claiming that PDVSA properly created the Trust or properly assigned claims to the Trust, and/or from offering or relying on any evidence from PDVSA in attempting to prove its standing; and 3)

3. Defendants attached to their Injunction Response a copy of the Trust Agreement that they claimed to have obtained on their own [D.E. 161 at 5-6; D.E. 161-1].

an award of attorneys' fees and costs. *Id.* After a hearing, the undersigned directed Plaintiff to "supplement the record explaining how it proposes to authenticate the Trust Agreement, upon which Plaintiff's standing is predicated, at the anticipated hearing on standing." *See* Order [D.E. 482 at 1]. On July 13, 2018, Plaintiff filed its Memorandum Responding to the Court's Inquiry as to What Evidence Plaintiff Will Offer to Authenticate the PDVSA U.S. Litigation Trust Agreement (hereafter, "Plaintiff's Evidentiary Proffer") [D.E. 494]. On July 18, 2018 Defendants filed their Response to Plaintiff's Evidentiary Proffer [D.E. 502]. After receiving the parties' submissions, the undersigned decided to defer ruling on the Sanctions Motion pending the Standing Hearing. *See* Order [D.E. 508 at 3].

THE PARTIES' ARGUMENTS RE: PLAINTIFF'S STANDING

1. Defendants' Arguments

First. The Trust Agreement upon which Plaintiff relies to establish its Article III standing to pursue the foregoing claims against Defendants is inadmissible because none of the signatories to the instrument appeared during discovery to: authenticate their signatures; establish their authority to sign it; or demonstrate that they understood it.

Second. Even if the Trust Agreement were admissible, the instrument is void under New York law, which expressly governs it, because: it violates New York's

ban on champerty; it lacks a notarized certificate of acknowledgment by the individual who signed on behalf of PDVSA; and it purports to assign, an indefinite trust corpus, namely, PDVSA's claims against Defendants.

Third. Even if the Trust Agreement were valid under New York law, the case should be dismissed on non-justiciable political question grounds. Two resolutions from Venezuela's National Assembly state that: (1) the Trust is "unconstitutional;" and (2) one of the Trust's signatories "usurped" his office. According to Defendants, a finding that Plaintiff has standing pursuant to the Trust Agreement would contravene the U.S. State Department's support for the Venezuelan National Assembly and undermine U.S. foreign policy.

Fourth. Even if the Court finds the standing issue to be justiciable, the Trust Agreement is void under Venezuelan law because: the signatories lacked legal authority; and the Trust Agreement is a "national interest contract" that lacks the required approval by the Venezuelan National Assembly.

Fifth. Contrary to Plaintiff's contention, the act of state doctrine does not apply to PDVSA's act of assigning its claims against Defendants because: the act was not performed solely within Venezuela's borders; and PDVSA authorized the bringing of suit in the United States.

2. Plaintiff's Arguments

First. The standing issue raised by Defendants is prudential, not jurisdictional; and it can be cured at any time during the course of litigation on the merits.

Second. Defendants lack standing to challenge the validity of the Trust Agreement because they are not parties to it.

Third. Even if Defendants had standing to challenge the validity of the Trust Agreement under Venezuelan law, the creation of the Trust falls within the act of state doctrine and, in any event, the Trust Agreement is valid under Venezuelan law.

Fourth. The signatures on the Trust Agreement have been properly authenticated in multiple ways.

Fifth. The Trust Agreement is not void as champertous or maintenance and Defendants have no standing to raise such claims.

Sixth. The Trust Agreement does not violate United States foreign policy.

Seventh. The Trust Agreement complies with the requirements of New York law.

The undersigned addresses the parties' respective arguments below.

Appendix C

DISCUSSION

1. Whether the issue of Plaintiff's standing is jurisdictional.

Article III of the United States Constitution "restricts the jurisdiction of the federal courts to litigants who have standing to sue." *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1001 (11th Cir. 2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). "The irreducible constitutional minimum of standing comprises three elements: injury in fact, causation, and redressability." *Id.* "A plaintiff has injury in fact if he suffered an invasion of a legally protected interest that is concrete, particularized, and actual or imminent." *Id.* at 1002. In this case, the Trust has not sustained any injury itself, but relies on the assignment of PDVSA's claims to it by operation of the Trust Agreement. According to the United States Supreme Court: "Lawsuits by assignees, including assignees for collection only, are 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Sprint Comm'n Co, L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 285, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008) (quoting *Vermont Agency Nat. Res. v. United States ex rel Stevens*, 529 U.S. 765, 777-78, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000)). In *Vermont Agency*, the Supreme Court stated that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Vermont Agency*, 529 U.S. at 773.

In *Sprint*, the Supreme Court described the contours of the assignments at issue as follows:

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> The present litigation involves a group of aggregators who have taken claim assignments from approximately 1,400 payphone operators. Each payphone operator signed an Assignment and Power of Attorney Agreement (Agreement) in which the payphone operator "assigns, transfers and sets over to [the aggregator] for purposes of collection all rights, title and interest of the [payphone operator] in the [payphone operator's] claims, demands or causes of action for 'Dial-Around Compensation' . . . due the [payphone operator] for periods since October 1, 1997." App. to Pet. for Cert. 114. The Agreement also "appoints" the aggregator as the payphone operator's "true and lawful attorney-in-fact." *Ibid.* The Agreement provides that the aggregator will litigate "in the [payphone operator's] interest." *Id.*, at 115. And the Agreement further stipulates that the assignment of the claims "may not be revoked without the written consent of the [aggregator]." *Ibid.* The aggregator and payphone operator then separately agreed that the aggregator would remit all proceeds to the payphone operator and that the payphone operator would pay the aggregator for its services (typically via a quarterly charge).

Sprint, 554 U.S. at 272.

The Supreme Court only considered the issue of prudential standing after finding that these claims' assignees had Article III standing. *See Sprint*, 554 U.S.

at 289. As defined by the Supreme Court, "prudential standing doctrine embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Id.* (quoting *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004)). The Supreme Court found that the prudential standing issue was not applicable to the assignees, because they were "suing based on injuries originally suffered by third parties" but had been assigned "all rights, title and interest in claims based on those injuries." *Id.* at 290. Thus, the assignees were "asserting first-party, not third-party legal rights." *Id.*

Circuit courts that have analyzed the issue of an assignee's standing have done so in the jurisdictional context of Article III. *See e.g., US Fax Law Center, Inc. v. iHire, Inc.*, 476 F.3d 1112, 1120 (10th Cir. 2007) (given that the assignment of Telephone Consumer Protection Act ("TCPA") claims was invalid because such claims "are in the nature of personal-injury, privacy claims," assignee lacked constitutional standing); *Dougherty v. Carlisle Transp. Prods., Inc.*, 610 F. App'x 91, 93-94 (3d Cir. 2015) (given that the assignment of a claim was champertous under Pennsylvania law, assignee was not permitted to litigate it, notwithstanding the *Sprint* decision finding that an assignee of a legal claim for money owned had Article III standing).

In the Southern District of Florida, the issue of an assignee's standing has been similarly treated as a threshold jurisdictional inquiry. *See MAO-MSO Recovery II, LLC v. Boehringer Ingelheim Pharms., Inc.*, 281 F. Supp. 3d 1309, 1314-15 (S.D. Fla. 2017) (dismissing complaint after finding that factual allegations did not

support purported assignees' claim that they had Article III standing);[4]

In arguing that Article III standing analysis should be bypassed in favor of prudential standing analysis only, Plaintiff improperly invites the Court to follow a different path than that followed by the Supreme Court, the Tenth and Third Circuits, and the Southern District of Florida. Moreover, given that prudential standing analysis involves a further limitation on the exercise of federal jurisdiction, *Sprint*, 554 U.S. at 289, prudential standing considerations necessarily follows a finding of constitutional standing.

Plaintiff argues that, because it has pled a valid assignment, Defendants' challenge to the validity of the assignment does not raise an issue of subject matter jurisdiction but one of prudential standing that does not affect jurisdiction. Plaintiff misapprehends Defendants' subject matter jurisdiction challenge as a facial one, but it is actually a factual one, which challenges the Court's "very power to hear the case." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). In such challenges, "no presumptive truthfulness attaches to plaintiffs allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.*

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4. On appeal, the parties settled the case and jointly moved for vacatur of the district court's order, which was granted after remand. *See MAO-MSO Recovery II, LLC v. Boehringer Ingelheim Pharms., Inc.*, No. 18-10739-FF, 2018 U.S. App. LEXIS 18650, 2018 WL 4183397 (11th Cir. July 9, 2018); Order, Case No. 17-cv-21996-UU [D.E. 113].

Based on the foregoing analysis, the undersigned concludes that Plaintiff's standing as an assignee of PDVSA's claims is a threshold issue that must be addressed as a Fed. R. Civ. P. 12(b)(1) factual challenge to subject matter jurisdiction. *Lawrence*, 919 F.2d at 1529. Thus, the undersigned rejects Plaintiff's argument that the challenge be addressed solely as one to its prudential standing that should abide a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). The undersigned next considers the grounds advanced by Defendants in support of their contention that Plaintiff lacks constitutional standing.

2. Whether Plaintiff has failed to carry its burden of proving the admissibility of the Trust Agreement upon which it relies to establish its Article III standing as assignee of PDVSA and to support its claim that the purported assignment is valid.

A. The Trust Agreement.

The Trust Agreement, which is dated July 27, 2017, recites:

(1) That PDVSA is the owner of "Contributed Claims" against so-called "Conspirators," whose purported "misconduct has caused and continues to cause vast damages to PDVSA and the people of Venezuela." *See* Trust Agreement, Pl.'s Ex 1, at 1.[5]

5. At the Standing Hearing, the undersigned reserved ruling on the admissibility of the Trust Agreement. *See* Transcript of Continued Standing Hearing held on August 3, 2018 (hereafter, "8/3/18 Transcript") [D.E. 562 at 79-80].

(2) That PDVSA has authorized "the engagement of United States law firms and investigators to further investigate, commence one or more civil actions (the 'Assigned Actions'), and prosecute the Assigned Actions to conclusion." *Id.*

(3) That PDVSA and Boies Schiller Flexner LLP (the "US Law Firm Appointer") "are appointing the Litigation Trustees to hold and pursue the Assigned Actions." *Id. See also* Amendment Number One to Trust Agreement, dated April 10, 2018 (hereafter, "Amendment One"), Pl.'s Ex 2.[6]

The following three Litigation Trustees were appointed: Alexis Arellano ("Mr. Arellano") (the "PDVSA Appointee"); and Vincent Andrews ("Mr. Andrews") and Edward P. Swyer ("Mr. Swyer") (together, the "US Law Firm Appointees). *See* Trust Agreement, Pl.'s Ex. 1 at 8.

Mr. Arellano purportedly signed the Trust Agreement. *Id.* at 15-16. Mr. Andrews and Mr. Swyer signed the Trust Agreement and acknowledged their respective signatures before notaries. *Id. See also* Pl.'s Ex. 1A. Mr. Andrews and Mr. Swyer also signed Amendment One and acknowledged their respective signatures before notaries. *See* Amendment One, Pl.'s Ex. 2.[7]

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6. Amendment One eliminated from the Trust Agreement the second US Law Firm Appointer, Meister Seelin & Fein LLP; and replaced the Trust Agreement's definition of "PDVSA Appointer" from "The Minister of the People's Petroleum Power" to "The President of PDVSA." *See* Trust Agreement, Pl.'s Ex. 1 at 1, 8; Amendment One Pl.'s Ex. 2 at 1, 2.

7. Defendants do not challenge Mr. Andrews' and Mr. Swyer's acknowledgments of their respective signatures, as shown on Pl.'s Exs. 1A and 2A. *See* 8/3/18 Transcript [D.E. 562 at 80].

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Two Venezuelan officials also purportedly signed the Trust Agreement. *See* Trust Agreement, Pl.'s Ex. 1 at 15-16. One such signatory is the original PDVSA Appointer, Nelson Martinez, as Minister of the Peoples Petroleum Power, Bolivarian Republic of Venezuela ("Mr. Martinez"). *Id.* As noted above, however, Amendment One changed the definition of PDVSA Appointer from "The Minister of the People's Petroleum Power," namely, Mr. Martinez, to "The President of PDVSA." The gentleman holding that title is Manuel Quevedo ("Mr. Quevedo"). *See* Motion to Dismiss [D.E. 517 at 14].

The Second Venezuelan official who purportedly signed the Trust Agreement is Reinaldo Mufioz Pedroza, as "Procurador General de 1a Republica," Bolivarian Republic of Venezuela ("Mr. Pedroza"), who, as "General Attorney" purportedly "duly authorized" the Trust Agreement under Venezuelan law. *See* Trust Agreement, Pl.'s Ex. 1 at 8, 13, 15-16. Shortly before the Standing Hearing, Plaintiff submitted an acknowledgment of signature and apostille dated July 12, 2018, for Mr. Pedroza's signature on the Trust Agreement. *See* Pl.'s Ex. 1B. At the Standing Hearing, the undersigned reserved ruling on the admissibility of Mr. Pedroza's acknowledgment. *See* 8/3/18 Transcript [D.E. 562 at 81]. The undersigned finds that, given Mr. Pedroza's failure to submit for deposition, as discussed below, it would be unfair to admit this last minute, untested acknowledgement of his signature on the Trust Agreement. Accordingly, Plaintiff's Exhibit 1B is excluded.

B. Standing discovery.

During the course of standing discovery, conducted pursuant to the undersigned's Scheduling Orders [D.E. 253, 356, 498] and Discovery Orders [D.E. 278, 355, 370, 390, 396, 404, 442, 475, 507], Defendants attempted but did not succeed in deposing the Venezuelan officials who purportedly signed and/or authorized the Trust Agreement, namely: Mr. Arellano (the PDVSA appointed trustee); Mr. Martinez (the original PDVSA appointer of the PDVSA trustee); and Mr. Pedroza, the "General Attorney" who purportedly authorized the Trust Agreement. During standing discovery, Defendants also sought the deposition of Mr. Quevedo, the replacement PDVSA appointer of the PDVSA trustee pursuant to Amendment One.

On April 25, 2018, the undersigned prescribed a deadline of April 27, 2018 for the parties to meet and confer regarding the availability of Mr. Pedroza, Mr. Martinez, Mr. Arellano and Mr. Quevedo for deposition by Defendants. *See* First Discovery Order [D.E. 278 at 3]. The undersigned prescribed the same deadline regarding the availability of PDVSA's corporate representative for deposition by Defendants. *Id.*

As of May 1, 2018, Plaintiff had agreed to produce for deposition Mr. Pedroza and a Rule 30(b)(6) representative of PDVSA. *See* Second Discovery Order [D.E. 355 at 2].

On May 9, 2018, the undersigned ruled that Defendants could depose Dr. Hilda Cabeza ("Dr. Cabeza") as PDVSA's

Rule 30(b)(6) representative and Mr. Pedroza. *See* Third Discovery Order [D.E. 370 at 3]. Noting that Defendants had indicated their desire to depose Mr. Arellano, the undersigned prescribed a deadline of May 22, 2018 for Plaintiff to inform Defendants whether it could produce Mr. Arellano, or his replacement, if any, as the PDVSA appointed litigation trustee. *Id.*[8]

Plaintiff never produced Mr. Arellano or his replacement for deposition.[9] With regard to Mr. Martinez,

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8. The Trust had claimed that Mr. Arellano could not be located. *See* Motion to Dismiss [D.E. 517 at 14]; *see also* Transcript of May 8, 2018 Telephonic Hearing [D.E. 373 at 29]:

> THE COURT: All right. So, you are telling me that you cannot locate Mr. Arellano, that you have made due diligence efforts. You are representing as an officer of the court that you have exhausted your abilities to locate Mr. Arellano and are not able to determine his whereabouts at this time. Is that correct?
>
> MR. D. BOIES: That is correct, Your Honor. Moreover I have told counsel that if we were able to locate him we would immediately tell them that we have located him, but I represent to the Court that we have used every [ ] means that I know of that we could use to try to locate him. And we have been unable to do so and they are going to take the Procurador General's deposition and they can ask him, and I believe he will conf[irm], that he tried as well to find this person in Venezuela.

9. At the Standing Hearing, Plaintiff included in its witness list an unnamed "PDVSA Representative" who would testify "[i]f available." *See* Plaintiff's Witness List [D.E. 543-1 at 2].

who Defendants also expressed they wanted to depose, the undersigned prescribed a deadline of May 9, 2018 for Defendants to notify Plaintiff if they wished to substitute another deponent in his place. *Id.*[10] Should Defendants still seek Mr. Martinez's deposition, Plaintiff had until May 22, 2018 to inform Defendants whether he could be produced. *Id.* Plaintiff never produced Mr. Martinez for deposition.[11]

On May 23, 2018, the undersigned noted that Mr. Pedroza's deposition had been scheduled for May 30, 2018 in New York. *See* Fourth Discovery Order [D.E. 390 at 3].

Defendants filed a Motion to Strike the Unnamed "PDVSA Representative" [D.E. 545]. The undersigned granted Defendants' Motion to Strike [D.E. 564]. Plaintiff also proffered a "Notice of Appointment of Successor Trustee" as Exhibit 63, which it might offer. *See* Plaintiff's Exhibit List [D.E. 544-1 at 9]. Plaintiff's Exhibit 63 consists of various documents dated July 27-30, 2018, whereby Mr. Quevedo appoints an individual named Marcos Alejandro Rojas ("Mr. Rojas") as the PDVSA appointed litigation trustee in place of Mr. Arellano [D.E. 583-48]. The undersigned excluded Plaintiff's Exhibit 63. *See* 8/3/18 Transcript [D.E. 562 at 101]. Defendant has objected to the undersigned's rulings regarding Mr. Rojas and Pl.'s Ex 63 [D.E. 600].

10. Mr. Martinez had reportedly been arrested and imprisoned in Venezuela on charges of corruption and executing contracts without proper authorization. *See* Motion to Dismiss [D.E. 517 at 14] (citing November 30, 2017 news reports).

11. Plaintiff attempted to introduce at the Standing Hearing Mr. Martinez's purported acknowledgment of his signature on the Trust Agreement, which Defendants opposed. *See* Defendants' Motion to Exclude Plaintiff's Exhibit 64 [D.E. 551]. The undersigned granted Defendants' Motion [D.E. 565]. Plaintiff has objected to the undersigned's ruling [D.E. 601].

The undersigned also prescribed a deadline of May 25, 2018, for the parties to file a joint notice disclosing the deponent's identity, date and location for the deposition of PDVSA's Rule 30(b)(6) representative. *Id.* On June 7, 2018, the Honorable Andrea M. Simonton, United States Magistrate Judge, presided over an emergency telephonic hearing due to the undersigned's absence from the Southern District of Florida. *See* Order [D.E. 422 at 1]. At the telephonic hearing, Plaintiff advised that the deposition of Dr. Cabeza as PDVSA's corporate representative, which had been scheduled for Friday, June 8, 2018 in Madrid, Spain "was cancelled because the President of Venezuela precluded Dr. Cabeza from leaving Venezuela for the deposition." *Id.* Similarly, Mr. Pedroza's deposition, which had been scheduled to take place in New York on May 30, 2018, was cancelled because "the President of Venezuela had restricted travel of government officials outside the country." *See* Emails from Plaintiff's counsel, George Carpinello, dated May 27, 2018 [D.E. 430-1 at 7-8].

On July 19, 2018, the undersigned denied Plaintiff's request "to conduct Rule 31 depositions by written questions of its own witnesses who ha[d] not appeared for Rule 30 depositions by oral examination." *See* Eighth Discovery Order [D.E. 507 at 1-2].

Defendants were able to take the deposition of Plaintiff's counsel, David Boies ("Mr. Boies"). *See* Excerpt of Transcript of Confidential Videotape Deposition of David Boies (hereafter, "Boies Depo.") [D.E. 436-1 (sealed)]. Mr. Boies testified that Mr. Pedroza, who

knows Mr. Arellano, was the individual who secured Mr. Arellano's signature on the Trust Agreement. *Id.* at 17. Mr. Boies also testified that, to verify Mr. Martinez's signature on the Trust Agreement and the seal that appears next to the signature, he would begin his inquiry with Mr. Pedroza. *Id.* at 33. As noted above, however, Mr. Pedroza's scheduled deposition during the standing discovery period was cancelled as a result of an order issued by the President of Venezuela.

C. Plaintiff's proffered handwriting expert.

Plaintiff attempted to remedy the failure to authenticate the signatures of Mr. Arellano, Mr. Martinez and Mr. Pedroza during the standing discovery period by proffering the testimony of a handwriting expert, Ruth Brayer ("Ms. Brayer"), who testified at the Standing Hearing. *See* Transcript of Standing Hearing held on August 2, 2018 (hereafter, "8/2/18 Transcript") [D.E. 561 at 126-200].

Initially, Defendants challenged Ms. Brayer's qualifications as a handwriting expert based on her being a graphologist and her lack of membership in the American Board of Forensic Document Examiners ("ABFDE"). After hearing the argument of counsel, the undersigned decided "to allow Ms. Brayer to testify as a handwriting expert." *Id.* at 149. However, the undersigned reserved "on what weight I will give to that testimony and the potential that I may eventually find either that she is not qualified or that her methodology is not -- does not meet the *Daubert* requirements." *Id.* at 150.

Ms. Brayer testified that she had been "hired to compare question signatures to known signatures by the same people and to come up with some—with an expert opinion whether they are written by the same person or not." *Id.* at 151. Ms. Brayer relied on signatures appearing on a Venezuelan government online publication known as "the Gaceta Oficial" provided to her by Plaintiff's counsel as the purported originals of Mr. Pedroza's and Mr. Martinez's signatures. Ms. Brayer admitted that she had no knowledge regarding what is the Gaceta Oficial. Nevertheless, she concluded that Mr. Pedroza's and Mr. Martinez's respective signatures appearing on the Trust Agreement were executed by the same individuals whose signatures appear in the Gaceta Oficial online exemplars she utilized as purported originals.[12] With regard to Mr. Arellano, Ms. Brayer considered as exemplars business documents from Ecuador purportedly signed by him. However, in one of the documents, handwritten initials appear next to Mr. Arellano's purported signature. Rather than inquiring into this fact, Ms. Brayer assumed that Mr. Arellano had two signature styles, one with and one without the handwritten initials.

The undersigned finds that, even assuming that she is qualified as a handwriting expert, Ms. Brayer's proffered expert opinions regarding Mr. Pedroza's, Mr. Martinez's and Mr. Arellano's respective signatures do not meet the *Daubert* standards. Her testimony at the Standing Hearing was contrived, equivocal, evasive and, frankly,

12. Given Ms. Brayer's complete lack of knowledge regarding the provenance of these purported exemplars, Plaintiff's Exhibits 37G and 37H are excluded as the purported original signatures of Mr. Pedroza and Mr. Martinez that she utilized.

non-scientific. Moreover, her methodology is highly suspect. She used as purported originals for Mr. Pedroza's and Mr. Martinez's signatures documents provided to her by Plaintiff's counsel from an online Venezuelan government publication regarding which she admitted she had no knowledge. And she disregarded the appearance of initials next to one of Mr. Arellano's purported original signatures on business documents, explaining it away as variations in signature styles. Therefore, the undersigned rejects and excludes Ms. Brayer's handwriting opinions based on the unreliability of her methodology under *Daubert*. *See United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (citing *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). *See also McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th . Cir. 2002) (The gatekeeping function requires the trial court "to conduct an exacting analysis of the proffered expert's methodology" to ensure it meets the standards of admissibility under *Daubert*). Accordingly, the undersigned concludes that Ms. Brayer did not succeed in remedying Plaintiff's failure to authenticate the signatures of Mr. Arellano, Mr. Martinez and Mr. Pedroza during the standing discovery period.

In light of the foregoing analysis, the undersigned concludes that Plaintiff has failed to carry its burden of proving the admissibility of the Trust Agreement upon which it relies to establish its Article III standing as assignee of PDVSA. Therefore, the Trust Agreement, Plaintiff's Exhibit 1, is excluded.[13]

13. As a housekeeping matter, the undersigned has reviewed Plaintiff's Exhibit 40 and finds it irrelevant to the issue of Plaintiff's standing; therefore, it is excluded.

D. Defendants' additional challenges to Plaintiff's standing due to Plaintiff's failure to provide standing discovery.

In addition to challenging the authenticity of Mr. Arellano's, Mr. Martinez's and Mr. Pedroza's respective signatures on the Trust Agreement, Defendants argue that they have been precluded from exploring the following standing-related questions due to Plaintiff's failure to produce these individuals for deposition during standing discovery:

> What were the circumstances of the signatures? What authorizations did the signatories obtain, if any, before signing the Trust Agreement? What were PDVSA's normal procedures for transferring assets of the alleged size here (billions of dollars), and what did its corporate organizational documents require for such transfers? Did the signatories or anyone authorized to act on PDVSA's behalf read the Trust Agreement? Did the signatories have an understanding of what "claims" were ostensibly transferred pursuant to the Trust Agreement, and which were not transferred? Given that PDVSA subsidiaries typically entered the contracts with oil companies, did PDVSA take any steps to transfer claims from those subsidiaries to the parent corporation (so that it could, in turn, transfer them to the Trust)?

See Defendants' Response to Plaintiff's Evidentiary Proffer [D.E. 502 at 6-7]. These questions, which Plaintiff

has failed to answer in the course of standing discovery, go to the validity of PDVSA's assignment of the claims that the Trust asserts in this action against Defendants. Thus, in addition to the undersigned's determination that Plaintiff has failed to carry its burden of proving the admissibility of the Trust Agreement, the undersigned further finds that Plaintiff has failed to support its claim that it holds a valid assignment from PDVSA by not complying with standing discovery.

3. Whether Defendants lack standing to challenge the validity of PDVSA's purported assignment of its claims to the Trust.

Plaintiff contends that Defendants lack standing to challenge the validity of the Trust Agreement because they are not parties to it. This argument does not require much discussion given the consideration of similar challenges as those presented here by Defendants by the United States Supreme Court, the Tenth and Third Circuits, and the Southern District of Florida, as discussed above. *See Sprint*, 554 U.S. at 285; *US Fax Law Center*, 476 F.3d at 1120; *Dougherty*, 610 F. App'x at 93-94; *MAO-MSO Recovery*, 281 F. Supp. 3d at 1314-15. Indeed, a case upon which Plaintiff relies for this argument actually involved challenges to *plaintiffs'* standing to assert their claims, much like Defendants are doing here with regard to Plaintiff. *See Rajamin v. Deutsche Bank Nat. Tr. Co.*, 757 F.3d 79, 83 (2d Cir. 2014) (complaint dismissed on the grounds that "plaintiffs lacked standing to pursue claims based on alleged violations of agreements to which plaintiffs [we]re not parties").

Plaintiff also quotes *Coursen v. JP Morgan Chase & Co.*, No. 8:12-cv-690-T-26EAJ, 2013 U.S. Dist. LEXIS 144295, 2013 WL 5437341 (M.D. Fla. Sept. 27, 2013) for the bare proposition that "a non-party to the assignment lacks standing to contest it." 2013 U.S. Dist. LEXIS 144295, [WL] at *11. However, Plaintiff fails to provide the context for that statement, namely a discussion of standing under Florida law to enforce a note and mortgage, and the conclusion that plaintiff in that case could not assert various consumer fraud claims based on her home's foreclosure. 2013 U.S. Dist. LEXIS 144295, [WL] at *12-17. Thus, *Coursen* is wholly inapposite.

Plaintiff also cites *Paramount Disaster Recovery LLC v. Amica Mut. Ins. Co.*, No. 2:16-CV-14566-ROSENBERG/MAYNARD, 2017 U.S. Dist. LEXIS 216839, 2017 WL 6948728, at *3 (S.D. Fla. Dec. 6, 2017) for the proposition that a non-party to a contingency contract lacked standing to raise arguments based on alleged flaws in the contract. In *Paramount*, the court rejected the defendant's argument that deficiencies in the contingency contract rendered the plaintiff's assignment invalid. 2017 U.S. Dist. LEXIS 216839, [WL] at *4. As stated by the *Paramount* court: "Under Florida law, a nonparty to an agreement has no standing to challenge the rights of the parties in the agreement." 2017 U.S. Dist. LEXIS 216839, [WL] at *3. In this case, however, Defendants are challenging the validity of PDVSA's assignment of its claims to the Trust for purposes of Plaintiff's jurisdictional standing to bring claims against them. Thus, *Paramount* is also inapposite.

Accordingly, the undersigned finds no merit in Plaintiff's argument that Defendants lack standing to make their jurisdictional challenge.[14]

Given the foregoing determinations, the undersigned concludes that Plaintiff lacks standing to proceed with its purportedly assigned claims against Defendants and that this action is subject to dismissal for lack of subject matter jurisdiction. In an abundance of caution, however, the undersigned addresses the parties' additional arguments.

4. Whether Plaintiff lacks standing because the Trust Agreement that purports to assign PDVSA's claims to the Trust is void under New York law, which expressly governs it.

Defendants advance three separate grounds in support of their argument that the Trust Agreement is void under its governing New York law, hence the assignment of PDVSA's claims is similarly void: (1) the Trust Agreement violates New York's ban on champerty; (2) the Trust Agreement lacks certificates of acknowledgement, as required by New York law; and (3) the Trust Agreement fails to sufficiently identify the claims purportedly assigned by PDVSA. The undersigned addresses each of these arguments in turn.

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14. The undersigned finds that Plaintiff's numerous other cited cases in lengthy footnotes in support of its challenge to Defendants' standing are similarly inapposite.

Appendix C

A. Champerty.

Defendants argue that PDVSA's assignment of its claims to the Trust is void because such assignment violates New York's ban on champerty. New York law provides that

> no corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon...

N.Y Jud. Law § 489(1). According to the Court of Appeals of New York, "the statute prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit." *Justinian Capital SPC v. WestLB AG*, 28 N.Y.3d 160, 43 N.Y.S.3d 218, 65 N.E.3d 1253, 1254 (N.Y. 2016). In *Justinian*, a company assigned its claims against a bank to a third party to commence litigation to recover the company's bank investment losses. *Id.* The third party was to "remit the recovery from such litigation to the company, minus a cut" and "partner with specific law firms to conduct litigation." *Id.* at 1255. The Court of Appeals found the assignment to be champertous and affirmed dismissal of the complaint. *Id.* at 1259.

Here, the terms of the Trust Agreement and the results of standing discovery reveal that the Trust's purpose is "to facilitate the prosecution of claims PDVSA has against various entities and individuals and the distribution of the Proceeds thereof." *See* Trust Agreement, Pl.'s Ex 1, at 1; see also Motion to Dismiss [D.E. 522 (under seal) at 20] (citing Boies Depo [D.E. 436-1 (under seal)]). Further, an Engagement Letter prescribes the procedure for the distribution of the Proceeds. *See* Motion to Dismiss [D.E. 522 (under seal) at 15] (citing Engagement Letter [D.E. 522-2 (under seal)]).

Plaintiff argues, however, that Defendants lack standing to assert champerty under Florida law. Plaintiff also argues that PDVSA's assignment of claims to the Trust does not violate N.Y Jud. Law § 489(1) because: the Trust is not a "corporation or association;" the Trust does not have as its sole purpose bringing litigation; the champerty law is not applicable here, where the assignor of the claims, namely PDVSA, is the sole beneficiary of the Trust; and the value of the work expended before the assignment exceeds the $500,000 champerty safe harbor threshold.[15] The undersigned addresses each of these arguments in turn.

Plaintiff's Florida law argument lacks merit because it disregards the Trust Agreement's choice of New York law. With regard to New York law, Plaintiff first argues that the Trust does not fall within the scope of N.Y Jud.

15. N.Y Jud. Law § 489(2) provides a safe harbor for assignments that exceed that amount in value.

Law § 489(1) because it is not technically a "corporation" or an "association," which are the two entities listed in the statute. However, Plaintiff does not provide any authority for such a literal reading of the statute. Plaintiff further argues that, notwithstanding the explicit language of the Trust Agreement, the Trust does not have as its sole purpose bringing litigation. Plaintiff claims that other purposes of the Trust are to pursue pre-suit settlement, to cooperate with law enforcement agencies, to engage investigators, and to hold and dispose of assets. However, these activities are all predicated on the Trust's pursuit of PDVSA's claims through litigation, as it has done here. Plaintiff further argues that N.Y Jud. Law § 489(1) does not apply because PDVSA is both the assignor and the sole beneficiary of the Trust. However, PDVSA's position is no different than that of the assignor in *Justinian*, where the Court of Appeals of New York applied N.Y Jud. Law § 489(1). *See Justinian*, 65 N.E.3d at 1254. Finally, Plaintiff argues that it is eligible for the safe harbor provision in N.Y Jud. Law § 489(2) because the value of the work expended before the assignment exceeds $5\00,000. However, the safe harbor only applies if the assignee pays a purchase price for the assigned claims that exceeds $500,000 or had a bona fide obligation to pay such purchase price independently of the outcome of the lawsuit. *Id.* at 1259. Here, there is no evidence of any payment by the Trust to PDVSA and no commitment to make any payment other than the distribution of the Proceeds from the prosecution of PDVSA's claims. *See* Trust Agreement, Pl.'s Ex 1, at 1. Therefore, the Trust does not qualify for N.Y Jud. Law § 489(2)'s safe harbor provision.

Based on the foregoing analysis, the undersigned concludes that, like the assignment in *Justinian*, PDVSA's assignment of its claims to the Trust violates N.Y Jud. Law § 489(1).[16]

B. Certificates of acknowledgement.

Defendants also argue that the Trust Agreement lacks mandatory certificates of acknowledgement under New York trust law, which makes the Trust invalid and the assignment of PDVSA's claims null and void.

New York trust law provides:

> Every lifetime trust shall be in writing and shall be executed and acknowledged by the person establishing such trust and, unless such person is the sole trustee, by at least one trustee thereof, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument.

N.Y. Est. Powers & Trusts Law § 7-1.17(a).

In this case, PDVSA established the Trust through the actions of Mr. Martinez, who purportedly signed the Trust

16. Plaintiff argues that champerty is a fact-intensive issue that must be decided by a jury. However, *Justinian* was decided prior to trial. And Plaintiff had ample opportunity during the course of standing discovery to provide support for its position that PDVSA's assignment of claims to the Trust is valid.

Agreement as Minister of the People's Petroleum Power, Bolivarian Republic of Venezuela. *See* Trust Agreement, Pl.'s Ex. 1 at 1-2, 15-16. Plaintiff never produced Mr. Martinez for deposition, but attempted to introduce at the Standing Hearing his purported acknowledgment of his signature on the Trust Agreement, which the undersigned excluded. Therefore, Plaintiff has not complied with N.Y. Est. Powers & Trusts Law § 7-1.17(a)'s requirement that the Trust Agreement be "executed and acknowledged" by Mr. Martinez as the person establishing the Trust. Plaintiff argues that an acknowledgement by Mr. Pedroza is adequate to satisfy N.Y. Est. Powers & Trusts Law § 7-1.17(a) because as "General Attorney" he "duly authorized" the Trust Agreement under Venezuelan law. *See* Trust Agreement, Pl.s's Ex. 1 at 8, 13. However, Mr. Martinez is the individual through whom PDVSA purportedly established the Trust, not Mr. Pedroza. *See id.* at 1-2, 8. Moreover, as discussed above, Mr. Pedroza's purported acknowledgement of his signature on the Trust Agreement and apostille dated July 12, 2018 have been excluded, given Mr. Pedroza's failure to appear for deposition. Therefore, Mr. Pedroza's late submission does not satisfy N.Y. Est. Powers & Trusts Law § 7-1.17(a).[17]

Plaintiff first argues that N.Y. Est. Powers & Trusts Law § 7-1.17(a) should be disregarded. According to Plaintiff, the Trust was formed by Venezuelan officials in Venezuela, hence Venezuelan law applies to its formation.

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17. Plaintiff has submitted the acknowledged signatures of Mr. Andrews and Mr. Swyer, who are two of the three trustees, without objection by Defendants. Therefore, Plaintiff has complied with N.Y. Est. Powers & Trusts Law § 7-1.17(a) as it pertains to trustees.

See Plaintiff's Reply Brief on Standing [D.E. 533 at 11 n.4]. However, this argument disregards the fact that two of the trustees, Mr. Andrews and Mr. Swyer, executed and acknowledged the Trust Agreement in New York and that they are "Parties" to the Trust Agreement. *See* Trust Agreement, Pl.'s Ex. 1, at 1, 15-16; Pl.'s Ex. 1A.

Plaintiff next argues that Defendants lack standing to challenge the validity of the Trust or the assignment of PDVSA's claims. The undersigned already discussed and rejected this argument above.

Plaintiff next argues that N.Y. Est. Powers & Trusts Law § 7-1.17(a) is not applicable here because it only applies to a "person" establishing a "life time trust." *See* Plaintiff's Reply Brief on Standing [D.E. 533 at 12]. Plaintiff offers no authority for this proposition.

Based on the foregoing analysis, the undersigned concludes that the Trust Agreement does not comply with N.Y. Est. Powers & Trusts Law § 7-1.17(a).

C. Identification of claims.

Defendants also argue that the Trust is invalid under New York law because its corpus is not sufficiently defined. The Trust Agreement defines the "Contributed Claims" as claims against so-called "Conspirators," whose purported "misconduct has caused and continues to cause vast damages to PDVSA and the people of Venezuela." *See* Trust Agreement, Pl.'s Ex 1, at 1. No further details are provided regarding 'the identity of the alleged

"Conspirators" or the nature of PDVSA's purported claims against them. New York trust law requires "a fund or other property sufficiently designated or identified to enable title of the property to pass to the trustee." *In re Doman*, 68 A.D.3d 862, 863, 890 N.Y.S.2d 632 (N.Y. App. Div. 2009). Plaintiff cites *Sterling Natl. Bank v. Polyseal Packaging Corp.*, 104 A.D.3d 466, 961 N.Y.S.2d 109 (N.Y. App. Div. 2013) as "upholding [an] assignment that did not name potential defendants or specific causes of action." *See* Plaintiff s Reply Brief on Standing [D.E. 533 at 14]. However, in *Sterling* what the court did was reject the defendant's contention that the assignment was invalid because it predated the invoices sent by the assignor, stating: "An assignment may properly relate to a future right which is adequately identified." *Sterling*, 104 A.D.3d at 467. Thus, there was no identification issue in *Sterling*. Plaintiff also cites *Amusement Indus. v. Stern*, No. 07 Civ. 11586 (LAK)(GWG), 2011 U.S. Dist. LEXIS 150050, 2011 WL 6811018 (S.D.N.Y. Dec. 28, 2011) for the proposition that the "assignment of all rights to claims that 'arise' under certain conditions is effective to incorporate claims that were unknown to the parties at the time of the assignment." *See* Plaintiff's Reply Brief on Standing [D.E. 533 at 14]. Nothing in *Amusement Indus*. supports this proposition. Rather, the *Amusement Indus*. court's ruling was that, absent the assignor's allegation that it retained any legal interest in a contract after assigning "all its rights and interests" in the contract, the assignor lacked standing to bring any claim for payments pursuant to the contract. *Amusement Indus.*, 2011 U.S. Dist. LEXIS 150050, 2011 WL 6811018, at *5.

Based on the foregoing analysis, the undersigned concludes that the Trust Agreement fails to sufficiently identify the "Contributed Claims."

Having considered and found merit in Defendants' three arguments regarding the Trust's and the Trust Agreement's failure to comply with various aspects of New York law, the undersigned concludes that the assignment of PDVSA's claims under the Trust Agreement's governing law is void and that this action is subject to dismissal due to the Trust's lack of standing.

5. Whether the political question doctrine and the act of state doctrine and international comity are applicable in this case.

Defendants argue that the Trust's validity under Venezuelan law presents a non-justiciable political question requiring the Court to dismiss the case pursuant to the political question doctrine. Plaintiff responds that the political question doctrine addresses separation of powers within the United States and that, in any event, the Court is bound to follow the position of the United States executive branch, which recognizes the government of Venezuela's current President.

Plaintiff argues that the act of state doctrine and international comity preclude the Court from invalidating acts of Venezuelan officials performed within Venezuela, under Venezuelan law, transferring Venezuelan assets. Defendants respond that the act of state doctrine does not apply to PDVSA's assignment of its claims to the Trust

because the assignment was not performed solely within the borders of Venezuela and the Trust Agreement is governed by New York law.

Both sides' arguments are aimed at precluding analysis of the Trust Agreement's compliance with Venezuelan law. Yet each side has presented expert testimony on that very issue, which the undersigned is bound to evaluate to make this report complete. Therefore, the undersigned declines the parties' respective invitations to short-circuit the Venezuelan law analysis by invoking prudential doctrines that, in any event, are of doubtful application in this case.

6. Whether the Trust Agreement is void or valid under Venezuelan law.

Defendants argue that the Trust Agreement is void under Venezuelan law. In support of this proposition, Defendants presented the testimony of their Venezuelan law experts, Professor Jose Ignacio Hernandez ("Mr. Hernandez") and Rafael Badell Madrid ("Mr. Badell Madrid"), at the Standing Hearing. *See* 8/2/18 Transcript [D.E. 561 at 22-126]. Plaintiff counters that the Trust Agreement is valid under Venezuelan law and proffered the testimony of its expert, Professor Rogelio Perez Perdomo ("Mr. Perdomo"). *See* 8/3/18 Transcript [D.E. 562 at 12-67].

Appendix C

A. Mr. Hernandez's expert testimony.

Mr. Hernandez was admitted as an expert in Venezuelan law, particularly, constitutional law, administrative law, Venezuelan oil law and regulations, and commercial law. Defendants engaged Mr. Hernandez to determine if the Trust Agreement is a valid and binding contract according to Venezuelan law. Mr. Hernandez's understanding of the purpose of the Trust Agreement was for the oil minister, acting on behalf of PDVSA, to transfer PDVSA's litigation rights to allow the Trust to conduct investigations and file claims in order to recover presumptive damage suffered by PDVSA's property, without any payment to PDVSA for the transfer of those claims. Mr. Hernandez opined that the Trust Agreement is not a valid and binding contract according to Venezuelan law for the following four reasons:

1. The National Assembly of Venezuela, in a final and binding decision enacted by the legislative power in Venezuela, has declared that the Trust Agreement is invalid and unconstitutional and is a "national interest contract" that requires, but lacks, the National Assembly's prior authorization.

2. Mr. Martinez, who allegedly signed the Trust Agreement on behalf of PDVSA in his capacity as the Minister of the People's Petroleum Power, did, not have the legal authority to do so because only PDVSA's board of directors and PDVSA's president have the competence to enter into an agreement on behalf of PDVSA.

3. Mr. Pedroza, who allegedly signed the Trust Agreement as Procurador General of Venezuela, does not exercise the legal representation of PDVSA and has no competence to sign agreements related to PDVSA's activities.

4. The Trust Agreement improperly delegates the investigation of damage to public property to a third party because, according to Venezuelan law, such investigation must be conducted by certain Venezuelan entities and is not delegable.

Mr. Hernandez explained the bases for his opinions as follows:

Opinion # 1

The National Assembly has two powers: (1) to enact laws; and (2) to exercise control over the other branches of government. Pursuant to this oversight function, the National Assembly issued an "Acuerdo," dated April 24, 2018, which declared the Trust Agreement to be a national interest contract and invalid. *See* Def.'s Ex. 6. In addition, the Trust Agreement meets the definition of a national interest contract under Venezuelan law, namely: a contract between the executive branch and a foreign entity, which has special impact on the national sovereignty, and has a deep economic impact.[18]

18. According to Mr. Hernandez, a state-owned enterprise, such as PDVSA, is part of the executive branch of the Venezuelan government.

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Opinion # 2

According to the Venezuelan Commercial Code and PDVSA's bylaws, the board of directors of PDVSA must authorize that entity to enter into a contract, and the contract must be signed by PDVSA's president. Mr. Martinez's execution of the Trust Agreement on behalf of PDVSA did not follow this procedure. Venezuela's organic law on hydrocarbons did not confer on Mr. Martinez the broad discretionary power to enter into the Trust Agreement on behalf of PDVSA; and the Venezuelan state, as the sole shareholder of PDVSA, could not act in lieu of the board of directors. As a result, the Trust Agreement is a nullity.

Opinion # 3

Mr. Pedroza purportedly signed the Trust Agreement invoking the competence of the Procurador General to control this kind of agreement, but he did not have such competence. Additionally, Mr. Pedroza is not the legitimate Procurador General of Venezuela because he was not appointed by presidential decree with prior authorization from the National Assembly.[19]

Opinion # 4

The proper authorities to investigate the damage to Venezuelan property described in the Trust Agreement are: the general controller office; PDVSA's internal audit

19. After the Standing Hearing, Defendants filed a resolution issued by the National Assembly on September 12, 2018, stating that Mr. Pedroza had usurped the office of Procurador General [D.E. 626].

office; the public prosecutor; and the National Assembly. This is based on the constitution, the general controller organic law, the anti-corruption organic law and the internal rule of debate of the National Assembly.

On cross-examination, Mr. Hernandez testified that he had no knowledge of any Venezuelan court decisions relating to the National Assembly's "Acuerdo" or the Trust Agreement. Mr. Hernandez also acknowledged an earlier expert opinion in which he stated that, in practice, PDVSA has no autonomy from the state; and explained that, in his view, the Venezuelan government had destroyed PDVSA's autonomy in violation of Venezuelan law.

B. Mr. Badell Madrid's expert testimony.

Mr. Badell Madrid was admitted as an expert in Venezuelan law, specifically in the areas of constitutional, public, and administrative law. Defendants engaged Mr. Badell Madrid to render opinions regarding whether Mr. Martinez, in his capacity as oil minister, was authorized to sign contracts on behalf of PDVSA; whether Mr. Pedroza, as Procurador General of Venezuela, was competent to sign the Trust Agreement and, if so, under what formalities or requirements; and whether the Trust Agreement is a national interest contract under Venezuelan law. Mr. Badell Madrid fully agreed with Mr. Hernandez's opinions, and rendered the following opinions and rationales:

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1. Mr. Martinez, in his capacity as oil minister, lacked competence to sign the Trust Agreement on behalf of PDVSA. There is no provision in Venezuelan law that allows it and, by contrast, there are multiple provisions providing that resolutions issued by PDVSA must be signed by an officer or an official representing PDVSA.

2. Mr. Pedroza is usurping the office of Procurador General and all of his acts are null and void. In addition, he has no authority to sign any contract, agreement or resolution that relates to PDVSA. In any event, prior to signing the Trust Agreement, Mr. Pedroza should have issued a written opinion because the Trust Agreement is a national interest contract and because it includes an arbitration clause.[20] A procedure has been established for the issuance of such written opinions by the Procurador General and, according to the Venezuelan Supreme Court of Justice, the procedure must be followed in all cases that directly or indirectly affect the interests of the Republic. Additionally, the Procurador General's written opinion must be submitted, along with the contract, to the National Assembly for approval or rejection. The failure to satisfy these requirements renders the Trust Agreement null and void.

3. The Trust Agreement is a national interest contract entered into with a foreign entity that requires, but lacks, authorization from the National Assembly. Hence, it is null and void.[21]

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20. *See* Trust Agreement, Pl.'s Ex. 1 at 12-13.

21. Mr. Badell Madrid further opined that the Trust Agreement compromises the interests of the Republic of Venezuela

On cross-examination, Mr. Badell Madrid testified that he had no knowledge of any Venezuelan court having held the acts of Mr. Pedroza, as Procurador General of Venezuela, or the acts of Mr. Martinez, as oil minister, to be invalid or null and void. Mr. Badell Madrid also had no knowledge of any Venezuelan court having declared the creation of the Trust and the assignment of PDVSA's claims to the Trust to be invalid. Mr. Badell Madrid acknowledged that contracts into which PDVSA or its affiliates enter in the ordinary course of business need not be approved by the National Assembly. Mr. Badell Madrid further acknowledged that retaining counsel to engage in litigation falls within PDVSA's and its affiliates' ordinary course of business.

C. Mr. Perdomo's expert testimony.

Mr. Perdomo was admitted as an expert in Venezuelan constitutional law.[22] Mr. Perdomo testified that he disagrees completely with the opinions expressed by Defendants' Venezuelan law experts, Mr. Hernandez and Mr. Badell Madrid. He opined as follows:

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because it exposes the Republic to suits for damages by the alleged "Conspirators" referenced in the Trust Agreement.

22. Plaintiff also proffered Mr. Perdomo as an expert in the Venezuelan legal system, but the undersigned limited his testimony in this area to general opinions regarding this topic rather than allow Plaintiff to sweep into it specific matters regarding which Mr. Perdomo acknowledged he had no expertise.

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1. The Trust is not a national public interest contract.

2. Mr. Martinez, as oil minister, and Mr. Pedroza, as Procurador General, had the authority to sign the Trust Agreement.

Mr. Perdomo explained the bases for his opinions as follows:

Opinion # 1

The Supreme Court of Venezuela has decided that a national public interest contract: has to be engaged in by the Republic of Venezuela, not one of its decentralized entities; has to be a very important contract; and should imply payments by the Republic during several years, thereby representing an important commitment for the Venezuelan economy.[23] Under this definition, the Trust Agreement is not a national public interest contract because it was entered into by PDVSA, which is a decentralized unit of the public administration of Venezuela. Additionally, the Trust Agreement does not involve anything that is really important to the state, such as communications, telecommunications, railroads or big highways. Finally, the Trust Agreement does not require yearly payments by the Republic of Venezuela but contemplates, instead, that the Republic will receive money indirectly as a result of litigation of PDVSA's claims. The Trust Agreement does not contemplate obligations in the form of payments on the part of the Republic.

23. For this definition, Mr. Perdomo relied on the "Velasquez" decision issued by the Supreme Court of Venezuela. *See* Pl.'s Ex. 47.

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Opinion # 2(a)

The organic law of public administration confers on each minister control of the decentralized entities that are under the minister's power.[24] Thus, Mr. Martinez as the oil minister has the power to intervene in the business of PDVSA and make decisions on its behalf Formalities should not trump the actions of the people. There is no Venezuelan court decision stating that the oil minister's role with regard to PDVSA as the sole shareholder, or his exercise of all the shares of PDVSA, is unconstitutional.

Opinion # 2(b)

Mr. Pedroza was not operating illegally as Procurador General of Venezuela at the time of his execution of the Trust Agreement. He properly holds that title in an "acting" capacity. The process by which Mr. Pedroza became Procurador General of Venezuela has not been contested in any Venezuelan court. It is common for the Procurador General to approve contracts, and there was nothing improper with Mr. Pedroza signing the Trust Agreement, which represented his approval of the contract.

According to Mr. Perdomo, the National Assembly's "Acuerdo" regarding the Trust Agreement is a political

24. Mr. Perdomo also attempted to proffer an opinion that the organic law of hydrocarbons gives the oil minister supreme powers over any matter related to hydrocarbons. Because Mr. Perdomo had previously testified that he did not regard himself as an expert in hydrocarbon laws, the undersigned did not allow him to proffer this opinion.

statement that does not have the effect of making it void. He has no knowledge of any court in Venezuela having declared the Trust to be invalid. In his opinion, the Trust is legal according to Venezuelan law.

D. Evaluation of expert testimony.

Not surprisingly, the parties' respective experts on Venezuelan law have diametrically opposing views regarding the validity of the Trust Agreement and the Trust it purports to establish under that country's laws.

Whether the Trust Agreement is valid:

- Mr. Hernandez expressed the view that the Trust Agreement is not a valid and binding contract, relying in part on the National Assembly's "Acuerdo" declaring the Trust Agreement invalid and unconstitutional.

- Mr. Perdomo opined that the Trust is legal and called the "Acuerdo" a political statement with no legal effect.

Whether the Trust Agreement is a public interest contract:

- Mr. Badell Madrid characterized the Trust Agreement as a public interest contract that requires the approval of the National Assembly.

- Mr. Perdomo opined that the Trust Agreement does not meet the Venezuelan Supreme Court's definition of public interest contract.

Whether Mr. Martinez was a proper signatory on behalf of PDVSA:

- According to Mr. Hernandez and Mr. Badell Madrid, Mr. Martinez lacked the legal authority to execute the Trust Agreement on behalf of PDVSA, and thereby assign PDVSA's claims to the Trust because only PDVSA's board of directors and president had that authority.

- Mr. Perdomo opined that, as oil minister, Mr. Martinez had broad powers to make decisions on PDVSA's behalf and that any formalities could be disregarded.

Whether Mr. Pedroza was a proper signatory as Procurador General:

- Mr. Hernandez deemed Mr. Pedroza to be lacking the competence to sign agreements related to PDVSA's activities. Both Mr. Hernandez and Mr. Badell Madrid opined that Mr. Pedroza does not legally hold the office of Procurador General of Venezuela.

- According to Mr. Perdomo, Mr. Pedroza properly holds the title of Procurador General of Venezuela in an "acting" capacity; and the approval of contracts,

such as the Trust Agreement, is a common function of that office.

Whether the Trust may properly carry out its ostensible purpose:

- Mr. Hernandez opined that the Trust Agreement improperly delegates the investigation of damage to public property to a third party because, according to Venezuelan law, such investigation must be conducted by certain Venezuelan entities, namely, the general controller office, PDVSA's internal audit office, the public prosecutor, and the National Assembly; and that function may not be delegated. Mr. Perdomo did not address this contention.

The foregoing summary shows that the opposing experts' opinions are in equipoise, except for Mr. Hernandez's opinion that the investigation of damage to public property may not be delegated to a third party, such as the Trust. That opinion stands unrebutted. Moreover, the undersigned found Mr. Hernandez to be extremely knowledgeable, articulate and logical in his explanations of Venezuelan law. Therefore, the undersigned accepts Mr. Hernandez's unchallenged opinion on this point; and concludes that the Trust Agreement is invalid under Venezuelan law on the basis that it illegally delegates the investigation of damage to public property allegedly sustained by PDVSA to the Trust.

Appendix C

CONCLUSION

Having considered Defendants' jurisdictional arguments, the undersigned concludes that the Trust lacks standing to assert PDVSA's purportedly assigned claims in this action, on the grounds that Plaintiff has failed to carry its burden of proving the admissibility of the Trust Agreement upon which it relies to establish its Article III standing as assignee of PDVSA; and that Plaintiff has failed to support its claim that it holds a valid assignment from PDVSA by not complying with standing discovery. The undersigned further concludes that Plaintiff lacks standing due to the Trust's and the Trust Agreement's failure to comply with various aspects of its governing New York law, which renders the assignment of PDVSA's claims void. The Trust Agreement is also invalid under Venezuelan law on the basis that it illegally delegates to the Trust the investigation of damage to public property allegedly sustained by PDVSA.

RECOMMENDATION

Based on the foregoing considerations, the undersigned RESPECTFULLY RECOMMENDS that Defendants' Motion to Dismiss be GRANTED and that this action be DISMISSED for lack of subject matter jurisdiction.

Pursuant to Local Magistrate Judge Rule 4(b), the parties have *fourteen* days from the date of this Report and Recommendation to file written objections, if any, with the Honorable Darrin P. Gayles. Failure to timely file objections shall bar the parties from attacking on appeal

the factual findings contained herein. *See Resolution Tr. Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993). Further, "failure to object in accordance with the provisions of [28 U.S.C.] § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." *See* 11th Cir. R. 3-1 (I.O.P. - 3).

RESPECTFULLY SUBMITTED in Miami, Florida this 5th day of November, 2018.

/s/ Alicia M. Otazo-Reyes
ALICIA M. OTAZO-REYES
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MAY 7, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10950-AA

PDVSA US LITIGATION TRUST,

Plaintiff-Appellant,

versus

LUKOIL PAN AMERICAS, LLC, LUKOIL PETROLEUM, LTD., COLONIAL OIL INDUSTRIES, INC., COLONIAL GROUP, INC., GLENCORE, LTD., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, TJOFLAT and ANDERSON, Circuit Judges.

Appendix D

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)