IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BANCO CENTRAL DE VENEZUELA, a Venezuelan government organization, Plaintiff, v. DOLARTODAY, LLC, a Delaware limited liability company; GUSTAVO DIAZ VIVAS, an Alabama resident; IVAN DARIO LOZADA-SALAS, a Washington resident; and JOSE ENRIQUE ALTUVE LOZADA, a Florida resident, Defendants.	Civil Action No. 1:15-cv-00965-GMS

OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT WITH PREJUDICE

GREENBERG TRAURIG LLP

/s/ Gregory E. Stuhlman
Gregory E. Stuhlman (No. 4765)
1007 North Orange Street
Suite 1200
Wilmington, Delaware 19801
Tel.: (302) 661-7000

Attorneys for Defendants

ADMITTED *PRO HAC VICE*:

Ricardo A. Gonzalez
Jared E. Dwyer
GREENBERG TRAURIG, P.A.
333 S. E. 2nd Avenue, Suite 4400
Miami, Florida 33131
Tel.: (305)579-0500

Attorneys for Defendants

Dated: December 17, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. PRELIMINARY STATEMENT

The Complaint filed by the self-proclaimed Revolutionary Government of Venezuela, through its central bank, the Banco Central de Venezuela, is just more proof that the Revolutionary Government will stop at nothing to silence anyone who publishes information about the precarious state of the Venezuelan economy, in particular, the precipitous fall of the Venezuelan *bolivar* against the U.S. dollar. Defendant DolarToday, L.L.C. ("DT") is a U.S.-based media outlet that aggregates and reports news and information about the social, political, and economic affairs of Venezuela. DT reports this information on its Internet website, (the "DT Site") and various social media. Among the information reported by DT is an unofficial value of the Venezuelan *bolivar* measured in U.S. dollars (the "DT Rate"). As prominently disclosed on the DT Site and more fully explained below, the DT Rate is calculated on the basis of daily exchange rates offered by currency exchange operators in Cucúta, Colombia. DT is not a foreign currency exchange operator, nor does it buy or sell dollars. DT's purpose is merely to report information to the public and provide a platform for the free flow and free exchange of ideas.

DT's publication of information is highly unpopular with the Revolutionary Government. As described in the Complaint and the materials incorporated by reference therein, over the past several years, the Revolutionary Government has undertaken numerous acts—including blocking and hacking the DT Site and DT's social media pages and vowing publicly to hunt down and jail its owners—to prevent DT from reporting and disseminating information the Revolutionary Government perceives to threaten its grip on power. Notwithstanding its concerted efforts, the Revolutionary Government has failed to silence DT, in large part, because DT operates in the United States where it may exercise its rights to freedom of speech and freedom of the press without reprisal. Put in the proper context, the Complaint is the latest salvo in the Revolutionary Government's "war" of censorship and harassment of the press and media in Venezuela.

Apparently, the Revolutionary Government believes that it will succeed in silencing DT by bringing the "war" to its doorstep. But, just like its previous efforts, the Revolutionary Government's attempt to silence DT by filing this action in the United States must fail.

Almost ironically, the Revolutionary Government has availed itself of the open and "equal access" to courts afforded to litigants in the United States and filed a Complaint that contains legally deficient claims. The Complaint purports to assert claims against DT and three U.S. citizens alleged to be owners and operators of DT (the "Individual Defendants") under U.S. statutory laws, Delaware common law, and even the Venezuelan Civil Code. According to the Complaint, DT's publication of the DT Rate has caused virtually every problem that has plagued the Venezuelan economy under the Revolutionary Government's tenure, to wit, skyrocketing inflation; diminishing real returns on the Venezuelan government's loans to third parties; a decline in trade with global partners; and plummeting confidence among the Venezuelan people in the Revolutionary Government's ability to manage the nation's economy. The Complaint seeks to enjoin the Defendants from publishing the DT Rate and an unspecified amount of damages to redress the harm allegedly caused by the Defendants' actions.

While the U.S. legal system is founded on the principle of "equal access," which generally opens the courthouse door to any litigant—regardless of its political or socioeconomic views or motivations—it also is rooted in the "rule of law" and the principle of "due process." Legal actions must be adjudicated according to prescribed rules, laws, and established legal norms. When the Complaint is tested against the applicable rules, laws, and legal norms, it is abundantly clear that its legal claims and purported injury are so illusory, speculative, and lacking in "facial plausibility," that the Complaint should not have crossed the proverbial threshold of the courthouse door. Accordingly, the Court should dismiss the Complaint *with prejudice* under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. PROCEDURAL HISTORY

On October 23, 2015, Plaintiff filed its Complaint which asserts four claims for relief "against all Defendants": (1) violation of the Racketeer Influenced and Corrupt Organizations Act (the "RICO" Act); (2) violation of the Lanham Act; (3) violation of Article 1185 of the Venezuelan Civil Code (the "Venezuelan Code"); and (4) unjust enrichment. All Defendants have been served or accepted service of the Complaint by and through their legal counsel.

III. SUMMARY OF ARGUMENT

1. Defendants move to dismiss the Complaint with prejudice for lack of subject matter jurisdiction under Rule 12(b)(1), because Plaintiff does not, and cannot, plead Article III standing for any claim asserted in the Complaint.

2. Defendants move to dismiss the claims under the Venezuelan Code, RICO Act, and Lanham Act, and for unjust enrichment under Delaware law, pursuant to Rule 12(b)(6) for failure to state a claim for which relief can be granted. Defendants request dismissal of each claim with prejudice because any curative amendment would be futile and inequitable to them.[1]

IV. STATEMENT OF FACTS[2]

Generally, the question, "How many *bolivars* does it take to buy a U.S. dollar?" would easily be answered in an over-the-counter transaction. In Venezuela, however, the answer to that question is shrouded in mystery by design. The Central Bank concedes, as it must, that under Venezuela's tiered currency exchange system the price of *bolivars*-to-dollars depends on, among other things, who, where, from whom, and for what purpose he or she is seeking to purchase

[1] Where "a motion under Rule 12 is based on more than one ground, the court should consider the 12(b)(1) challenge first because if it dismisses the complaint for lack of subject matter jurisdiction, all other defenses and objections become moot." *In re Corestates Trust Fee Litig.,* 837 F. Supp. 104, 105 (E.D. Pa. 1993), *aff'd*, 39 F.3d 61 (3d Cir. 1994).

[2] All exhibits referenced below are attached to the Declaration of Ricardo A. Gonzalez, Esq. in Support of Motion to Dismiss Complaint with Prejudice, filed contemporaneously herewith.

U.S. currency. There is no single exchange rate; instead, the Central Bank publishes three different "official" rates: CECOEX, SICAD I, and SIMADI. Although Venezuela's currency controls require the Central Bank to serve "as the sole exchange house" for foreign currency transactions, the Central Bank concedes that "Venezuelans also trade dollars through private exchange houses or with individuals with dollars to sell" in the "'parallel' or 'black' market."[3] While the Central Bank itself does not, by definition, buy or sell dollars in the "black" market, it nevertheless publishes the SIMADI rate, which it claims is based on an "average" of "black" market prices for dollars in Venezuela.

Since 2010, DT has been reporting the DT Rate. DT always has been transparent about the unofficial nature of the DT Rate and how it is calculated. As the Central Bank concedes, DT publishes the "official" SIMADI rate alongside the DT Rate every day.[4] In a news article quoted extensively in the Complaint, a DT representative disclosed that "'the exchange rates he publishes are based on daily calls to several currency traders in Cúcuta, a Colombian border city where bolivares [*sic*] are openly traded for Colombian pesos.'" As he described, the Cúcuta exchange houses provide a daily *bolivar* to peso exchange rate, which he then converts to a *bolivar*-to-dollar reference using basic mathematics.[5] His explanation is consistent with the detailed disclosures on the DT Site.[6] In addition, the DT Site proclaims, "Our job is to

[3] The term "black" (or "parallel") market refers to the sale or exchange of currencies among private, *i.e.* non-governmental, individuals and entities. The fact that a governmental entity is not involved does not make the "black" market illegal in Venezuela. As admitted in the Complaint, the Central Bank actually publishes an "official" "black" market rate (SIMADI).

[4] *See* Complaint, ¶¶ 36, 37 (displaying "SIMADI" rate on DT Site).

[5] **Exhibit A**, p. 7 (Rueda, M., "Meet the Venezuelan Rebel Whose Crime is Publishing the Exchange Rates" (the "Rueda Article")). Because the Complaint quotes and incorporates the Rueda Article by reference (*see* ¶ 28; p. 11, fn.15), the Court may properly consider it in deciding this Motion. *See Arizmendi v. Lawson,* 914 F. Supp. 1157, 1160-61 (E.D. Pa. 1996) (on motion to dismiss the court may look to matters of public record and documents referenced or incorporated in complaint or which are essential to the plaintiff's claim).

[6] *See* **Exhibit B**, pp. 3-4; 25-28 (content from the DT Site (with certified English translations)

DISSEMINATE the price of the Dollar, **NOT TO DETERMINE IT**, much less speculate [about it]."[7] Even the Complaint and its incorporated materials state the DT Rate is "unofficial."[8]

According to the Complaint, well-respected financial news outlets have "embraced" the DT Rate "as the authoritative 'parallel' or 'black market' exchange rate in Venezuela."[9] It also claims that since 2013 the DT Rate has been "the most widely read and followed" "black" market *bolivar*-to-dollar exchange reference in Venezuela.[10] But, Defendants never have represented the DT Rate is the "official," "authoritative" or "true" *bolivar*-to-dollar exchange rate. As disclosed on the DT Site, Defendants do not have a financial motive for publishing the DT Rate: DT "**DOES NOT SELL DOLLARS**, [DT] just report[s] their value."[11] Further, DT's stated purpose for reporting the DT Rate is to "facilitate access to information," "educate people," and serve as "**a GAUGE that reports what happens in the border market.**"[12]

Since 2013, DT and its suspected owners and operators have been targeted for censorship and harassment by the Revolutionary Government in Venezuela, including, but not limited to, by the following acts admitted in the Complaint and its incorporated materials: (1) intermittently and permanently "blocking" the DT Site on the Internet; (2) hacking the DT Site and/or "mirror" websites; (3) in December 2014, broadcasting a nationally-televised speech in which Venezuelan President, Nicolás Maduro, denounced the owners of DT as "bandits" who are waging an "economic war against Venezuela from Miami" and vowed to put them "behind bars;" and (4) in

---

(emphasis in original)). These materials also are incorporated by reference in the Complaint.

[7] **Exhibit B**, pp. 4; 29 (emphasis in original).

[8] *See* Complaint, ¶ 27; p. 11, at fn. 19.

[9] Complaint, ¶ 30.

[10] *See* Complaint, ¶ 31. Plaintiff bases its claim on allegations that approximately 1 million people visit the DT Site (or "mirror" websites) daily; the DT Twitter Feed has over 1.5 million followers; and mobile "apps" (the "DT Apps"), which allow mobile users to access the DT Rate at no cost on their mobile devices, are among the most downloaded mobile apps in Venezuela.

[11] **Exhibit B,** pp. 4; 29 (emphasis in original).

[12] **Exhibit B**, pp. 29; 30 (emphasis in original).

April 2015, broadcasting another nationally-televised speech in which Maduro stated he would ask the President of the United States to hunt down the operators of the DT Site and extradite them to Venezuela to be tried as criminals.[13] Most recently, on October 23, 2015, the Central Bank filed the instant Complaint in which it levels harassing and inflammatory accusations that the Defendants are "cyber-terrorists" and are intentionally fermenting discontent amongst and inflicting harm upon the Venezuelan people. The Complaint even goes so far as to list the street addresses for each of the Individual Defendants' homes and include a color photograph of one of the Individual Defendants while accusing him of being a "committed and visibly vocal opponent" of the Revolutionary Government.[14]

V. LEGAL ARGUMENT

A. Plaintiff Cannot Establish Article III Standing As a Matter of Law.

Plaintiff's Article III standing is a threshold prerequisite to invoke the Court's jurisdiction, and Plaintiff has the burden of establishing it. *See In re Schering Plough Corp*, 678 F.3d 235, 245-46 (3d Cir. 2012) (citations omitted). Defendants' Motion presents both a "facial" and a "factual" challenge to Plaintiff's Article III standing. Pursuant to their "facial" challenge, Defendants contend that the Complaint fails to plead sufficient plausible facts to establish Article III standing. In reviewing Defendants' "facial" challenge, the Court must apply the standard for a Rule 12(b)(6) motion to dismiss. *See id.* at 243. Under that standard, the Court must only consider and accept as true the well-pleaded allegations in the Complaint and any documents

[13] The Revolutionary Government's feigned respect for Defendants' "freedom of the speech" (*see* Complaint, p. 16, fn. 25) is belied by its actual conduct. *See* **Exhibit C (t**rue and correct copies of reports by Freedom House; Reporters without Borders; Human Rights Watch; the Committee to Protect Journalists; Electronic Frontier Foundation; and the Knight Center for Journalism in the Americas, as well as news articles by Business Insider, the Associated Press, Bloomberg, and USA Today, regarding censorship of the press/media and Internet in Venezuela.

[14] The Individual Defendants reside in and are citizens of the U.S., where two of them were granted political asylum from the very government that seeks to harass them further in this case.

referenced therein or attached thereto in the light most favorable to Plaintiff, and determine therefrom whether Plaintiff has established standing. *See id*. The Court, however, is not obligated to accept as true "unsupported conclusions and unwarranted inferences" or "legal conclusion[s] couched as factual allegation[s]." *Baraka v. McGreevey,* 481 F.3d 187, 195 (3d Cir. 2007).[15] Accordingly, Plaintiff must plead sufficient factual content to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S.Ct. 1937 (2009). A complaint "has facial plausibility when it pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*. at 678. To determine facial plausibility, the Court must draw on "its judicial experience and common sense" and decide whether the well-pleaded facts "nudge" the claim "from conceivable to plausible." *Id.* at 679–80.

Defendants' "factual" challenge attacks "the existence of subject matter jurisdiction in fact, quite apart from any pleadings." *Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3d Cir. 1977).[16] In reviewing Defendants' "factual" challenge under Rule 12(b)(1), the Court is permitted to make factual findings, beyond the pleadings, that are decisive to determining its jurisdiction. *See CNA v. U.S.*, 535 F.3d 132, 139-40 (3d Cir. 2008).[17] "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims" under Defendants' Rule 12(b)(1) "factual" challenge. *Mortensen*, 549 F.2d at 891.

Plaintiff must establish three elements for Article III standing: (1) an "injury in fact," (2) "fairly traceable" to Defendants' alleged misconduct; (3) that is "likely" to be "redressed by "a favorable decision" in this case. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct.

[15] *See Morse v. Lower Merion Sch. Dist.,* 132 F.3d 902, 906 (3d Cir. 1997); *Travelers Indem. Co. v. Cephalon, Inc.*, 32 F. Supp.2d 538, 545 (E.D. Pa. 2014) ("Naked assertions devoid of factual enhancements will not suffice.").
[16] *See Moretti v. Hertz Corp.*, No. 14-469-LPS, 2015 WL 1383097, *3 (D. Del. Mar. 23, 2015).
[17] *See U.S. ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007).

2130 (1992).[18] Because Plaintiff fails to establish any of the requisite elements, Plaintiff lacks Article III standing, and the Court lacks subject matter jurisdiction in this case as a matter of law.

1. Plaintiff Does Not and Cannot Plead an Article III "Injury-in-Fact."

To establish an "injury-in-fact," Plaintiff must affirmatively plead sufficient plausible facts to allege "an invasion of a legally protected interest" that is (1) "particularized," (2) "concrete," and (3) "'actual or imminent, not conjectural or hypothetical.'"[19] The alleged "injury" underlying all of Plaintiff's claims is the purported "acceleration" or "exacerbation" of price inflation in Venezuela. However, "price inflation" in a nation's economy is not an injury sufficiently "particularized" to the Central Bank, but rather, a generalized harm allegedly visited upon an entire nation's economy and its people. This is manifest on the face of the Complaint which uses the terms "Central Bank" and "Venezuelan people" either conjunctively or interchangeably to describe the alleged "victims" of the "price inflation" allegedly caused by Defendants.[20] Where, as in this case, a plaintiff asserts a "'generalized'" harm that is "shared in substantially equal measure by all or a large class of citizens," it will not have standing.[21]

Thus, in *Arias v. Dyncorp*, 738 F. Supp.2d 46 (D. D.C. 2010), the district court held that certain provinces of the Republic of Ecuador that sued companies which sprayed pesticides over cocaine and heroin farms of Colombia and allegedly "damaged…their economies, provincial lands, waters, and budgets" in nearby Ecuador, did not satisfy the injury-in-fact requirement. *Id.* at 50. The claimed injuries, "increased housing costs, education costs, [and] costs associated with the housing and feeding of refugees., were insufficient because "damages associated with relocating, housing, educating, feeding, and providing medical care" to its people "are exactly

[18] *See Schering Plough*, 678 F.3d at 244.
[19] *Schering Plough*, 678 F.3d at 244 (quoting *Lujan*, 504 U.S. at 560-61).
[20] Complaint, ¶¶ 1; 3; 7; 37; 40; 42; 66; 72; 87; 105.
[21] *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197 (1975).

the type of third-party, derivative claims that the Article III standing inquiry was designed to avoid." *Id.* at 50-53. Plaintiff's Complaint, which asserts generalized injury to the Venezuelan people, and not to Plaintiff specifically, suffers the same problem and also should be dismissed.[22]

But, even assuming, hypothetically, that any of the alleged derivative injuries stemming from the purported "inflationary pressures" caused by the Defendants were "particularized" to the Central Bank, they still would fail to plead an "injury-in-fact" because they are not sufficiently "concrete." An alleged injury must be "concrete" both qualitatively, *i.e.* "specific," "identifiable," "distinct," and "palpable," and temporally, *i.e.* "actual or imminent, not conjectural or hypothetical."[23] Plaintiff's allegations regarding the derivative injuries amount to nothing more than "unsupported conclusions," "unwarranted inferences," and "'bald assertions'" which the Court does not have to—and should not—accept as true.[24] Thus, while Plaintiff claims that Defendants' conduct is "diminishing" or "diminishes" the value of its *seignoriage* (Complaint, ¶¶ 7, 72), nowhere in the Complaint does it affirmatively plead any facts to support that conclusion, including whether its *seignoriage* has, in fact, been diminished, and, if it has, the value of any such diminution. Similarly, Plaintiff fails to plead any facts to support its assertions that Defendants' conduct "robs" the Central Bank of lending or trade income, or the loss of "capital that it would otherwise retain . . . [to] other world economies." *Id.* In short, Plaintiff's alleged injuries are neither "concrete" nor "actual or imminent." Plaintiff asserts broad, ambiguous, and wholly unsupported *theories* about the "economic and reputational" harm Defendants have allegedly caused, but nowhere in the Complaint does it affirmatively plead any facts to "nudge" those theories, in the parlance of *Iqbal*, "from conceivable to plausible," or, in

[22] Plaintiff, like any foreign nation, also is precluded from asserting *parens patriae* standing. *See Arias*, 738 F. Supp.2d at 54 (citation omitted).
[23] *See Whitmore v. Arkansas,* 495 U.S. 149, 155; 158, 110 S.Ct. 1717 (1990).
[24] *See Baraka,* 481 F.3d at 195; *Morse,* 132 F.3d at 906.

Article III parlance, from "conjectural or hypothetical" to "actual or imminent.[25] Accordingly, because Plaintiff fails to plead an "injury-in-fact," it does not have Article III standing.

2. Plaintiff Does Not and Cannot Plead the Requisite Article III Causation.

Plaintiff must allege sufficient facts to plausibly support "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. Plaintiff's theory of causation is set forth in paragraphs 41-43 of the Complaint and may be summarized as follows: Because Venezuelans who are "inclined" to exchange *bolivars* for goods and dollars on the "black" market and "importers of priority goods" who buy dollars from the Venezuelan Government at "the preferential price of 6.3 bolivares [*sic*]" and then "turn around and sell [them] for a huge markup" on the "black" market, often "*consult*" the DT Rate "to calculate the replacement costs of their goods and set their selling prices," the *bolivar* is devalued and "price inflation" is "further exacerbat[ed]." As the "inflationary pressures drive down the value of bolivares [*sic*], the Central Bank loses th[e] profit" from its *seignoriage*, "as well as revenue needed to … serve the Venezuelan people."[26]

Put simply, Plaintiff fails to plead the requisite "causal link" between its alleged "injury" and the publication of the DT Rate by Defendants. First, Plaintiff's theory of causation is remarkable for the extraordinarily passive conduct of the Defendants who allegedly do nothing more than publish the DT Rate which, in turn, is "*consulted*" by unknown and unidentifiable third parties—on their own accord—"to calculate the replacement costs of their goods and set the … prices" and sell their dollars to other unknown and unidentifiable third parties on the "black"

[25] *See Cottrell v. Alcon Labs., Inc.*, No. 14-5859-FLW, 2015 WL 3889367, at *6 (D. N.J. Jun. 25, 2014) (no injury-in-fact alleged because plaintiffs pled only "bald assertion" that they wouldn't have been injured but for defendants' conduct); *Travelers Indem.,* 32 F. Supp.3d at 547 (no injury-in-fact alleged because plaintiffs didn't plead "specific facts" to support alleged injuries).
[26] Complaint, ¶¶ 41-43 (emphasis supplied).

market. Moreover, Plaintiff's theory is based on a host of unfounded assumptions including that: (1) Defendants misrepresented the DT Rate; (2) all or a significant majority of the approximately 1 million daily visitors to the DT Site and the 1.5 million-plus followers of the DT Twitter Feed "consulted" the DT Rate; (3) all or a significant majority of the third parties who allegedly "consulted" the DT Rate also traded *bolivars* for dollars based on the DT Rate in the "black" market; (4) if Defendants had not reported the DT Rate, countless unnamed and unidentifiable third parties would not have exchanged *bolivars* for dollars or exchanged them on some basis other than the DT Rate; and (5) if those third parties would not have exchanged *bolivars* for dollars or exchanged them on some other basis, then (a) "price inflation" would not exist or would substantially decrease; (b) "the purchasing power of the Venezuelan people and the Central Bank" would not be diminished; (c) "the value of the Central Bank's seignoriage" would not be diminished; (d) the Central Bank would not be "deprived of higher real returns;" (e) "trade" would not be "withheld from the Central Bank," and Venezuela would "retain" and "attract" investment "capital;" and (f) the Venezuelan people would not consequently believe the Revolutionary Government is incapable of managing Venezuela's economy.

Confronted with a comparable theory of causation in *Arias*, the court held that the Ecuadorian provinces failed to plead causation. In that case, the provinces relied on budget deficits to show they had been forced to spend funds on housing, feeding, and providing medical care to residents as a result of the harm caused by the defendants' pesticides. *Arias*, 738 F. Supp.2d at 51. The court found the budget deficits did not plausibly establish a causal link between the provinces' alleged damages and the harm caused by the pesticides sprayed by the defendants, given that "several unknown factors"—"oil workers' strikes," "a volcanic eruption," "floods," and "difficulty enforcing tax collections"—could have caused the budget deficits. *Id.*

In this case, there are even more salient independent intervening factors. As described in

various publications cited in the Complaint, there are multiple independent intervening causes for the purported "inflationary pressures" and derivative "injuries" alleged in the Complaint, including the dramatic plunge in oil prices and oil exports (oil accounts for 95% of Venezuela's exports) and the Revolutionary Government's own actions to devalue the currency and increase government spending.[27] Plaintiff's causation theory also is contingent on the intervening actions of millions of unknown and unidentifiable third parties who sold dollars on the "black" market. Their multiple layers of independent decision-making—did they "consult," "set their prices," or sell dollars based on the DT Rate—could never be fully known or examined in this case.[28]

Implicitly recognizing the implausibility of its core theory that Defendants' publication of the DT Rate has caused the alleged "inflationary pressures" and derivative injuries to the Central Bank and Venezuelan people, Plaintiff tries to fabricate conduct by the Defendants beyond the mere publication of the DT Rate. Plaintiff asserts that, ***on information and belief***, "in or about May 2013... at least some of the Defendants began trading in black markets for currency futures for their personal financial gain," and that, ***on information and belief***, Defendants are "manipulating" the DT Rate to "manufactur[e] a market… for the exchange of bolivares [*sic*] into dollars and vice-versa." Even if Plaintiff's allegations were true—and they are not—they would be insufficient to plead causation given the myriad independent intervening causes described above. Moreover, Plaintiff's claims are pled on "information and belief," and Plaintiff improperly fails to state any specific facts to describe the basis for its purported "belief."[29] To the extent the basis for its "belief" is the image in paragraph 37 of the Complaint, then Plaintiff's

[27] *See* **Exhibit D,** pp. 1-3; 5-7; 10-11; 15-18 (true and correct copies of articles published by CNN, CNBC, Reuters and Barclay's Market Research which are cited in the Complaint).
[28] *See County Bd. of Chosen Freehold. v. Beretta, USA Corp.*, 123 F.Supp.2d 245, 257-58 (D. N.J. 2000) (no standing where causation severed by any number of intervening actors or events).
[29] *See Brinkmeier v. BIC Corp.*, 733 F. Supp.2d 552, 559 (D. Del. 2010) (plaintiffs have an *obligation*" to accompany "information and belief" allegations "'with factual allegations that make their theoretically viable claim plausible'"); *Schering Plough*, 678 F.3d at 252-53.

"belief" is unreasonable. While Plaintiff characterizes the image as a solicitation to Facebook "users to sell dollars to the Defendants," in fact, the image is a "snapshot" taken from a larger comment posted in the public feed of the DT Facebook Page. Notwithstanding that the comment was posted on May 6, 2013, and the image in paragraph 37 somehow is dated October 22, 2015, that comment does not, on its face, support Plaintiff's purported "belief" that Defendants sold "currency futures" or "manufactured" a market for dollars. If anything, the comment negates Plaintiff's "belief," given that it contains a hyperlink that opens to a page on the DT Site which discloses: "**WARNING:** We **DO NOT SELL OR BUY** dollars; we limit ourselves to reporting the price at the border."[30] Accordingly, Plaintiff's unsupported "information and belief" allegations cannot plausibly supply the requisite causal link for Article III standing.

3. Plaintiff Does Not and Cannot Satisfy the "Redressability" Requirement.

Finally, Plaintiff fails to plead that a "favorable" decision in this case is "likely" to redress its alleged injury. The assumption that, if the DT Rate were not reported, inflation in Venezuela would cease or substantially decrease is undermined by Plaintiff's concession that there is a thriving "black" market for dollars inside and outside of Venezuela which it does not control. Also, enjoining Defendants from reporting the DT Rate would not stop other websites that currently publish their own unofficial "black" market *bolivar*-to-dollar rates from continuing to publish them.[31] In sum, Plaintiff does not, and cannot, plead standing under Article III.

B. Plaintiff Fails to State a Claim under the Venezuelan Code.

When exercising diversity jurisdiction, a federal court applies the substantive law of the forum state, in this case, Delaware. *See Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 112, 65 S.Ct. 1464 (1945) ("The source of substantive rights enforced by a federal court under diversity

[30] **Exhibit E**, at pp. 1-3 (emphasis in original).
[31] **Exhibit F** (true and correct copies of six different Internet sites which currently publish "black" market *bolivar*-to-dollar exchange references similar to the DT Rate).

jurisdiction, it cannot be said too often, is the law of the States."). It is improper for a district court in a diversity case to recognize a cause of action never previously recognized by the supreme court of the forum state. *See Devnew v. Brown & Brown, Inc.*, 396 F. Supp. 2d 665, 671-72 (E.D. Va. 2005); *see also Fleming v. Asbill*, 42 F.3d 886, 890 (4th Cir. 1994) (it is the duty of a federal court in a diversity case to apply state law as the court finds it, even if the law may be contrary to trends in other jurisdictions). Here, Plaintiff purports to assert a cause of action under Section 1185 of the Venezuelan Code. However, Plaintiff has not pled, and Defendants are not aware of, any authority for the proposition that the Delaware Supreme Court has recognized a cause of action for violation of Section 1185 of the Venezuelan Code.[32] Accordingly, Plaintiff's cause of action under the Venezuelan Code must be dismissed with prejudice because it does not, and cannot, state a claim for which relief can be granted.[33]

C. Plaintiff Fails to State a Claim under the RICO Act.

1. Plaintiff's "Wire Fraud" Allegations Fail to Plead a RICO Predicate Act.

RICO claims predicated on wire fraud must be pled with the particularity required by Federal Rule of Civil Procedure 9(b). *Lum v. Bank of America*, 361 F.3d 217, 223 (3d Cir. 2004), *abrog. in part on other grounds*, by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 127 S.Ct. 1955 (2007). If a plaintiff fails to do so, the complaint must be dismissed. *Lum*, 361 F.3d at 223. At a minimum, Rule 9(b) requires that "plaintiffs must plead with particularity the circumstances of the alleged fraud in order to place the defendants on notice of the precise misconduct with

[32] Plaintiff also fails to plead any plausible basis for applying the Venezuelan Code to a U.S. corporation and three U.S. citizens who reside in the U.S. and whose acts of misconduct are alleged to have been committed entirely in the U.S., *i.e.* outside of the territory of Venezuela.

[33] It would be a different matter altogether if Plaintiff had pled a legally cognizable cause of action under Delaware law and pled a plausible basis to allege that, pursuant to Delaware's choice-of-law rules, that cause of action is governed by the substantive laws of Venezuela. *See Integral Resources (PVT) Ltd. v. Istil Grp., Inc.*, No. 03–904 (GMS), 2004 WL 2758672, at **5-6 (D. Del. Dec. 2, 2004) (finding that claims for tortious interference—recognized under Delaware law—were governed by Ukrainian law), *aff'd*, 155 Fed. Appx. 69 (3d Cir. 2005).

which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Lum*, 361 F.3d at 223-24. "Plaintiffs may satisfy this requirement by pleading the 'date, place or time' of the fraud, or through 'alternative means of injecting precision into the allegations of fraud.'" *Id.* Moreover, plaintiffs "also must allege who made a misrepresentation to whom and the general content of the misrepresentation." *Lum*, 361 F.3d at 224. Further, a plaintiff must indicate which plaintiff received the allegedly fraudulent information. *Saporito v. Combustion Engineering*, 843 F.2d 666, 675 (3d Cir.1988), *vacated on other grounds*, 489 U.S. 1049, 109 S.Ct. 1306 (1989).

Applying these principles, the Complaint must be dismissed. The Complaint's allegations are just blanket allegations lacking in specificity as to time, date, content, and nature.[34] There is no reference to any statement where any Defendant misrepresented the bolivar-dollar exchange rate; there is no reference to any statement where any Defendant misrepresented the DT Rate as the true rate; and there is no reference to any statement where any Defendant misrepresented the basis for calculating the unofficial exchange rate. These failings, of course, have real consequences. Plaintiff's claims are founded on the allegation that the DT Rate is false and not the "true" value of the parallel market. But Plaintiff has not given a single example of a DT Rate for a given day that is allegedly false or materially misleading. In other words, there is no specific false statement. These broad, blanket types of charges are precisely the types of claims that Rule 9(b) guards against. *Rolo v. City Investing, Co.*, 155 F.3d 644, 658 (3d Cir. 1998).

Further, even if these broad allegations were arguably sufficient as to time and date, which they are not, they nevertheless do not meet the standard of Rule 9(b) because the

[34] *See* Complaint, ¶ 63 (The "fraud" alleged by the Plaintiff is that: (1) "Defendants" deliberately misrepresented the "bolivar-dollar exchange rate through their daily posting of the DT Rate;" (2) made daily postings to the DT Site, "on which the Defendants repeatedly – yet falsely promote the DT rate as the 'true bolivar-dollar exchange rate;" and (3) misrepresented the "basis for calculating the unofficial exchange rate."

Complaint does not allege *who* made the alleged misrepresentation but instead relies on the blanket allegation that "Defendants" made the statements. *Rolo*, 155 F.3d at 658-59 (blanket allegations that Defendants made the statement are insufficient). More fundamentally, Plaintiff has failed to specifically "link [its] own injuries to the alleged RICO enterprise [or] allege what happened to [it]." *Rolo*, 155 F.3d at 659. Plaintiff has not explained how it was directly injured by the actions of the Defendant except to point to broad, institutional or macro-economic harms that are, at best, indirectly linked to the alleged fraud. In sum, Plaintiff's allegations are the very types of "spurious charges of immoral and fraudulent behavior" that Rule 9(b) is intended to "safeguard defendants against."[35] *Lum,* 361 F.3d at 223-24.

Besides failing to satisfy the specificity requirements under Rule 9(b), Plaintiff's "wire fraud" allegations also fail because Plaintiff does not allege it was deprived of any recognized property right. At bottom, the alleged wire fraud scheme pled by Plaintiff is a purported scheme to defraud Venezuela of its right to set the exchange rate and manage the economy. While novel, this claim is not recognized in U.S. law. A scheme to defraud must be aimed at depriving someone of recognized property rights. *McNally v. United States*, 483 U.S. 350 (1987). Consistent with this principle, the Eleventh Circuit held that a wire fraud charge alleging that the defendant sought to "defraud the United States of the right to implement its foreign policy free from stealth, false statement, and fraud," could not be sustained. *United States v. Elkins*, 885 F.2d 775, 781 (11th Cir. 1989). Further, the protected property rights must be real and not potential future property. *See United States v. Berlin*, 707 F. Supp. 832, 835 (E.D. Va. 1989).

Similar to *Elkins*, Plaintiff's RICO predicate "wire fraud" allegations fail to state a claim for relief. The alleged RICO act violations purport to "undermine[] the entire purpose of the

[35] Plaintiff cannot save its claim by stepping into the shoes of viewers of the DT Site or readers of "Benjamin's" statements in the Rueda Article (at **Exhibit A**). *See Rolo*, 155 F.3d at 659.

Central Bank's currency exchange system."[36] Indeed, Plaintiff claims that its alleged injuries, inflation and the purported derivative losses of revenue due to inflation, would cease if Plaintiff were free to set the exchange rate without the alleged interference of DT. Thus, the real harm or defrauding is the lost ability to exclusively set the exchange rate. The ability to set the exchange rate, however, is not a property right. *See U.S. v. F.J. Vollmer & Co., Inc.*, 1 F.3d 1511, 1521 (7th Cir. 1993) (holding that "[i]t is well established that the government's regulatory interests are not protected by the mail fraud statute."); *cf. Elkins*, 885 F.2d at 781.

Moreover, the Complaint's inadequacies cannot be corrected by Plaintiff's claim that it was allegedly defrauded by inflationary pressures or purportedly deprived of some future lending deal or trade because of inflation. An economy free of inflationary pressures is not a property right that the law has traditionally recognized in any case Defendants have located. The other items of value of which Plaintiff alleges it was defrauded, potential "seignoriage, "potential lending or trade, are also not recognized property interests. They are speculative, unguaranteed future contingencies that are dependent on other parties and may reasonably have gone to another provider for other reasons. *See Berlin*, 707 F. Supp. at 835. Because Plaintiff cannot cure or plead around these glaring deficiencies, its RICO claim is subject to dismissal with prejudice.

2. Plaintiff Does Not and Cannot Plead RICO "Proximate Causation."

"[T]o state a claim under civil RICO, the plaintiff is required to show that a RICO predicate offense 'not only was a 'but for' cause of his injury, but was the proximate cause as well.'" *Hemi Group LLC v. City of New York, N.Y.,* 559 U.S. 1, 9 (2010)(quoting *Holmes v. Securities Investor Protection Corp*., 503 U.S. 258, 268 (1992). Whereas causation for purposes of Article III standing requires that the plaintiff's alleged injuries be "fairly traceable" to the defendant's alleged misconduct, proximate causation under the RICO Act requires the more

[36] *See* Complaint, ¶ 43.

demanding standard of "*direct* relation between the injury asserted and the injurious conduct alleged. A link that is too remote, purely contingent, or indirec[t] is insufficient." *Hemi*, 559 U.S. at 9. Thus, "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451, 461 (2006). Accordingly, when the plaintiff is not the direct victim of the alleged RICO act, a RICO complaint generally lacks the requisite causation. *Anza, Id.* at 454. Likewise, if the direct harm flowing from the RICO act does not affect the plaintiff, a RICO complaint lacks the requisite causation. *Id*. Further, if there are intervening or independent factors in the chain of causation, there is no RICO causation. *Id.* Implicit in each of these requirements is the concept that there is no RICO causation if another more directly injured party could bring a RICO action. *Holmes*, 503 U.S. at 269-70.

Applying these principles, the Complaint fails to plead the requisite proximate causation. As described above, Plaintiff's alleged "injury" is the "inflationary pressures" and the derivative harms to the Central Bank's *seignoriage,* lost lending, lost capital and trade, and the lost confidence in the Revolutionary Government's ability to manage the economy.[37] None of these "injuries," however, was directly caused by Defendants' alleged RICO acts. Plaintiff was not the direct victim of the alleged fraud and did not suffer any direct injury as a result of the alleged fraud. Instead, Plaintiff broadly alleges that Defendants defrauded the viewers or readers of DT by publishing an alleged false exchange rate related to the parallel market, and thereafter, allegedly traded on "currency futures" related to that rate. Thus, the direct victims of the alleged fraud are the viewers of the DT Rate and those that participate in the parallel market. Indeed, the Complaint identifies the supposed victims when it says "millions of Venezuelans have viewed

[37] *See* pp. 9-11, *supra*; Complaint, ¶¶ 7, 72. RICO only allows claims for harm to business and property and not injuries considered personal like the "reputational" injury alleged by Plaintiff. *See Genty v. Resolution Trust Corp*., 937 F.2d 899, 918–19 (3d Cir.1991).

and relied on the false and misleading exchange rate posted on the DT site."[38] Those unknown and unidentifiable individuals are the only ones who could have suffered an injury as a direct result of Defendants' alleged RICO acts, because they were the only ones who could have been misled by the DT Rate. Plaintiff was not a direct victim of the alleged fraud. *See Anderson v. Ayling*, 396 F.3d 265, 270 (3d Cir. 2005) (no causation where alleged fraud was aimed at others and not plaintiffs). Any alleged harm it suffered would be derivative and not direct. Indeed, Plaintiff could never be a direct victim of the alleged RICO acts, because it claims to have known the DT Rate was allegedly false.[39]

Second, as described previously in connection with the causation requirement for Article III standing, Plaintiff's claim of direct causation is insufficient because it rests on multiple intervening acts of multiple third parties, each making independent choices and taking intervening actions to produce the alleged injuries to Plaintiff. *See Anderson*, 396 F.3d at 270-71 (no proximate causation because "the causal connection between wrongdoing and harm is attenuated, as several independent causes intervened"); *see also Hemi*, 559 U.S. at 9. Third, Plaintiff's alleged injuries present the almost impossible task of attempting to separate the effect, if any, of the alleged RICO acts of Defendants from other independent factors, such as the Plaintiff's poor market management or a plunge in oil prices. *See Holmes*, 503 U.S. at 259 (no proximate cause because third party acts, including plaintiff's bad business practices, and not the defendant's alleged conduct could have directly caused plaintiffs' injury); *Anza,* 547 U.S. at 458 (same); *Anderson*, 396 F.3d at 270 (same). Fourth, others that were more directly harmed by the alleged RICO acts could easily vindicate their claims. "Where a more directly affected party is available to vindicate the public interest in enforcing the law, [courts] have less need to stretch

[38] Complaint, ¶ 71.
[39] *See* Complaint, ¶¶ 32, 33.

the limits of proximate causation in RICO cases." *Callahan v. A.E.V., Inc.,* 182 F.3d 237, 265 (3d Cir. 1999). If the Complaint is accepted as true, those viewers of the DT Rate who relied on its content are more directly harmed by the alleged RICO acts. Those individuals conceivably could file lawsuits against the Defendants to vindicate their claims. *See Holmes*, 503 U.S. at 274. Similarly, and finally, anyone who lost "purchasing power" because of the weak bolivar could assert a claim to have suffered an indirect injury as a result of the Defendants' alleged RICO acts. That would of course require the court to apportion relief among various parties which is a further indicator that there is no proximate cause. *See Callahan,* 182 F.3d at 264 (where courts are required to apportion relief among multiple injured parties, they are inclined not to find proximate causation for those less directly involved). Thus, the RICO claim should be dismissed.

D. Plaintiff Fails to State a "False Advertising" Claim under the Lanham Act.[40]

1. Plaintiff Does Not and Cannot Establish Standing under Section 43(a).

To fall within the "zone of interests" the Lanham Act is intended to protect, the plaintiff must allege a specific type of injury, that is, "an injury to a commercial interest in reputation and sales," which flows directly from a specific form of deception by the defendant, that is, "deception wrought by the defendant's advertising." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1390-91, 188 L.Ed.2d 392 (2014). Thus, standing under Section 43(a) requires: (1) "an injury to a commercial interest in sales or business reputation," (2) "proximately caused by the defendant's misrepresentations" in commercial advertisement or promotion of a product or service. *Id.* Here, Plaintiff fails to plead that it has suffered an injury to a "commercial interest in sales or reputation" which "flow[s] directly" from Defendants'

[40] Plaintiff fails to establish each of the elements to state a claim under Section 43(a). *See Zenith Electronics Corp. v. Exzec, Inc.,* 182 F.3d 1340, 1348 (Fed. Cir. 1999) (setting forth the elements of a Section 43(a) claim). However, because Plaintiff fails to plead two threshold requirements—standing and "commercial advertising and promotion"—the Court need not reach nor consider the elements of a Section 43(a) claim to dismiss this claim with prejudice.

alleged deception of consumers, such that consumers have "withheld trade from the Plaintiff." *Id.* at 1391; *see U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.,* 898 F.2d 914, 922 (3d. Cir. 1990) (recovery under Section 43(a) requires a plaintiff to show that the misrepresentation "deceives a portion of the buying public").

In paragraphs 86 and 87 of the Complaint, Plaintiff purports to plead its alleged injuries as a result of Defendants' purported misrepresentations of the DT Rate under the Lanham Act. Among the alleged injuries, only Plaintiff's claims that Defendants' alleged misrepresentation of the DT Rate has caused it to lose trade and "robbed" it of revenues it could have charged on foreign exchange transactions can conceivably—although not plausibly—relate to the Central Bank's "commercial interests in sales or reputation" with respect to any product or service it offers to "the buying public."[41] However, those allegations are "bald assertions" and "unsupported conclusions" which this Court should not accept as true.[42] The Complaint is devoid of any facts regarding by whom, where, when, or how any "trade" or revenues have been withheld from the Central Bank by any consumer who purportedly was deceived by the DT Rate. In short, Plaintiff has failed to carry its burden of pleading sufficient "plausible facts" to establish any basis whatsoever for its conclusory injury-related allegations.

Further, Plaintiff does not, and cannot, satisfy the "proximate cause" requirement under Rule 43(a). At a minimum, the plaintiff must establish that actions of the defendant caused the withholding of trade from the plaintiff. *Lexmark*, 134 S.Ct. at 1394. And, while the causal chain in false advertising claims often is not "direct," as it may be interrupted by the intervening deception of the consumer by the defendant, *Lexmark*, 134 S.Ct. at 1394, there nevertheless must be some allegation that shows that the harm is "surely attributable" to the alleged conduct, and

[41] Complaint, ¶¶ 86-87.
[42] *See Iqbal*, 556 U.S. at 678; *Baraka,* 481 F.3d at 195; *Travelers Indem.* 32 F. Supp.2d at 545.

the link between the two must not be "speculative" or subject to "uncertain inquiries." *Id.* As applied to this case, Plaintiff has failed to plead sufficient plausible facts to allege that any consumer was deceived by the DT Rate, and that, as a direct result of the supposed deception of any such consumer, Plaintiff was injured, such that the deceived consumer "withheld trade" from the Plaintiff. *See Lexmark,* 134 S.Ct. at 1391; *see also Accenture Global Srvcs. v. Guidewire Software, Inc.*, 581 F.Supp.2d 654, 667 (D. Del. 2008) (dismissing "false advertising" claim because plaintiff "failed to allege facts sufficient to make plausible the contention that the relevant public was…actually confused or misled, not just that the marketplace could have been confused or misled") (citation omitted)). Accordingly, there is no proximate cause.[43] To the extent that Plaintiff relies on the same "you caused inflation and its attendant results argument," that claim is simply too speculative and subject to the many uncertain inquiries as thoroughly detailed above and in the materials attached hereto at **Exhibit D**. *See Lexmark*, 134 S.Ct. at 1394.

2. The DT Rate Is Not "Commercial Advertising or Promotion."

The courts define "commercial advertising or promotion" as (1) commercial speech, (2) for the purposes of influencing consumers to buy the defendant's goods or services, (3) sufficiently disseminated to the relevant purchasing public.[44]

(a) The DT Rate Is Not "Commercial Speech."

Courts have identified "the proposal of a commercial transaction" as "*the*" test for

[43] Of course, given that the DT Rate is a "black" market reference, and the Central Bank does not sell dollars on the "black" market, the Central Bank cannot plausibly allege that it has been deprived of foreign exchange transactions or fees by consumers who trade in the "black" market in purported reliance on the DT Rate. *See Ortho Pharm. Corp. v. Cosprophar*, Inc., 32 F.3d 690, 695 (2d Cir. 1994) (affirming dismissal because the causal link was speculative). If, as Plaintiff alleges, "importers of priority goods" buy dollars from the Central Bank at the CECOEX Rate only to re-sell them on the "black" market, then the DT Rate would appear to incentivize those importers to do *more* business with the Central Bank, *i.e.* to purchase as many dollars as possible from the Central Bank in order to sell them on the "black" market based on the DT Rate.

[44] *See Tobinick, M.D. v. Novella,* No. 9:14-CV-80781, 2015 WL 1191267, at *5 fn.10 (S.D. Fla. Mar. 16, 2015) (all three must be pled or else the claim is subject to dismissal) (slip op.)).

determining whether speech is commercial. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423, 113 S.Ct. 1505 (1993). Other courts have analyzed the following factors: (1) is the speech an advertisement; (2) does it refer to a specific product or service; and (3) does the speech relate solely to the economic interests of the speaker and audience. *See U.S. Healthcare*, 898 F.2d at 933. An affirmative answer to all three questions provides "strong support" for the conclusion that the speech is commercial. *Id.; accord American Future Sys., Inc. v. Penn. State Univ.*, 752 F.2d 854, 862 (3d Cir. 1984), *cert. den.*, 473 U.S. 911, 105 S.Ct. 3527.

Regardless of the test applied, the DT Rate is *not* actionable "commercial speech." The DT Rate does not propose a commercial transaction, it is not an advertisement, and it does not refer to a specific product or service for sale by the Defendants. As disclosed on the DT Site, the DT Rate is reported only to facilitate the access to information and to educate the public, and not for commercial reasons.[45] DT does not sell anything to the "buying public," including U.S. currency. And the DT Rate is available for viewing by the general public at no cost. Far from constituting "commercial speech," the DT Rate is constitutionally-protected expression that seeks to inform and educate the public on an issue of significance to millions of individuals—exactly the type of speech Congress intended to exclude from the Lanham Act's reach.[46]

(b) The DT Rate is Not Reported for the Purpose of Influencing Consumers' Purchasing Decisions.

Plaintiff also fails to establish that Defendants publish the DT Rate for the purpose of influencing consumers to buy DT's "goods or services." In *CHW Group, Inc. v. Better Business Bureau of N.J., Inc.*, No. 11-3261(JAP-TJB), 2012 WL 426292 (D. N.J. Feb. 8, 2012), the plaintiff, a company that sold home warranties, filed an action against the Better Business Bureau (BBB) alleging that the grade it was given by the BBB and posted on the BBB's website

[45] **Exhibit B**, pp. 4; 29-30; **Exhibit E**, p. 3.
[46] *See New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710 (1964).

violated Section 43(a). *Id.* at **1-2. Stating that the relevant inquiry under the "commercial advertising and promotion test" is whether the BBB's letter grade was intended to cause consumers to buy the BBB's services instead of the plaintiff's services—and the court ruled it was not given that the BBB did not sell home warranties and therefore could not possibly divert the plaintiff's customers to itself—the court dismissed the claim with prejudice. *Id.* at **5-6.[47]

Similarly, the DT Rate is not reported for the purpose of influencing consumers to purchase DT's products or services or to divert customers away from the Central Bank. Not only does DT not sell any products or services, but the Central Bank does not buy or sell dollars in the "black" market. Thus, any consumer who allegedly "consulted" the DT Rate to buy or sell dollars in the "black" market could not possibly have been diverted away from the Central Bank. Just as in *CHW Group*, Plaintiff's Section 43(a) claim should be dismissed with prejudice.

E. Plaintiff Fails to State a Claim for Unjust Enrichment.

In *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.,* 171 F.3d 912, 936 (3d Cir. 1999), the Third Circuit dismissed the plaintiff's unjust enrichment claim under Delaware law, because the underlying substantive claim upon which it was based was found to be insufficient as a matter of law. *Id.* at 937; *see also Blystra v. Fiber Tech Group, Inc.,* 407 F. Supp. 2d 636, 645 n.11 (D.N.J. 2005) (treating plaintiffs' unjust enrichment claim "as subsumed by other tort claims, and not as an independent cause of action"). That rationale applies with even greater force in this case, because Plaintiff expressly incorporates its claims under the RICO Act, Lanham Act, and Venezuelan Code in its unjust enrichment claim.[48] This Court

[47] *See Hy Cite Corp. v. Badbusinessbureau.com*, 418 F. Supp.2d 1142, 1151 (D. Ariz. 2005) (a false representation for purpose other than competition is not actionable under Lanham Act).

[48] Even assuming Plaintiff's "information and belief" allegation that "some" of the Individual Defendants traded in "currency futures" were true—and it is not—Plaintiff fails to establish that any money made by the Individual Defendants from trading in the "black" market would

should follow the Third Circuit's lead and dismiss Plaintiff's unjust enrichment claim.

VI. CONCLUSION

Declaring unconstitutional an Oregon statute that allowed the state to arrest individuals who participated in Communist Party meetings based on nothing more than unfounded claims that syndicalism and sabotage were advocated at the meetings, the Supreme Court stated in 1937:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech…[and] free press…in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people…. Therein lies the security of the Republic, the very foundation of constitutional government.[49]

Only in the misguided view of the Revolutionary Government would the wisdom imparted by the Supreme Court nearly 80 years ago ring hollow today. Facing a national economic crisis largely of its own creation, the Revolutionary Government has censored the press and online media from publishing "negative" information about the Venezuelan economy, under the pretext that it is protecting the Venezuelan people from the damaging effects that negativity has on the nation's economy. To be sure, the only thing the Revolutionary Government is protecting is its own slippery grip on power. The Complaint is just another "weapon" in the Revolutionary Government's arsenal of censorship against DT, whose only "crime" has been to facilitate access to information to the general public. But, the Revolutionary Government clearly failed to calibrate its "weapon" before it fired it. Premised on implausible legal theories, the Complaint fails to satisfy even the basic jurisdictional and pleading requirements. For all of the reasons described above, the Court should enter an Order dismissing the Complaint *with prejudice,* and awarding Defendants such other relief as the Court deems just and proper.

---

constitute "ill-gotten" gain, since Plaintiff does not trade in the "black" market and therefore, never would have been entitled to receive that money in the first place.

[49] *De Jonge v. State of Oregon*, 299 U.S. 353, 365, 57 S.Ct. 255 (1937).

GREENBERG TRAURIG, LLP

/s/ Gregory E. Stuhlman

Gregory E. Stuhlman (#4765)
1007 North Orange Street, Suite 1200
Wilmington, Delaware 19801
(302) 661-7000
stuhlmang@gtlaw.com

Attorneys for Defendants

Admitted *pro hac vice*:

Ricardo A. Gonzales
Jared E. Dwyer
GREENBERG TRAURIG, P.A.
333 S.E. 2nd Avenue, Suite 4400
Miami, Florida 33131
(305) 579-0500

Dated: December 17, 2015