IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLD RESERVE INC., Petitioner, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Respondent.	Civil Action No. 1:14-cv-02014-JEB

RESPONDENT'S REPLY IN SUPPORT OF MOTION TO STAY EXECUTION OF JUDGMENT PENDING APPEAL

Nothing in Gold Reserve's Opposition provides any reason why, contrary to its established jurisprudence, this Court should require Venezuela, a foreign sovereign with significant financial means, to post a supersedeas bond in order to exercise its right to stay the Court's money judgment while Venezuela's appeal is pending.

A. The *Federal Prescription* Factors Govern The Motion For A Stay.

To begin with, Gold Reserve does not dispute that this Court has discretion under Fed. R. Civ. P. 62(d) to allow an unsecured stay of a money judgment pending appeal; nor does it contest that the applicable test is set out in *Federal Prescription Services v. American Pharmaceutical Ass'n*, 636 F.2d 755, 760-61 (D.C. Cir. 1980). Instead, Gold Reserve tries to convince the Court to apply a second test as well, even though that test pertains only to motions for stays of equitable orders, and not to money judgments like the one that this Court has entered. Opp. at 2 (citing *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("*Holiday Tours*") (applying four-factor balancing test to motion to stay issuance of preliminary injunction pending appeal).

Gold Reserve is mistaken. Rule 62 of the Federal Rule of Civil Procedure contains separate provisions for obtaining stays pending appeal for money judgments and for judgments that are equitable in nature. Specifically, Rule 62(d) addresses stays of money judgments. It provides that such a stay may be obtained as a matter of right, provided a supersedeas bond is posted. A district court, however, has discretion to waive the bond requirement. *See Federal Prescription*, 636 F.2d at 759 (district court has "discretionary power to stay execution of a money judgment without requiring bond").

Rule 62(c), on the other hand, concerns stays of injunctions.[1] Unlike stays of money judgments, an injunction cannot be stayed as a matter of right. Rather, such a stay is discretionary. *FTC v. TRW, Inc.*, 628 F.2d 207, 210 n.3 (D.C. Cir. 1980) ("stays of district court enforcement orders should be governed by the discretionary standards of Rule 62(c), and should not obtain as a matter of right pursuant to Rule 62(d)"). Whether the Court's discretion should be exercised is determined by a four-factor balancing test that mirrors the test for deciding a motion for a preliminary injunction. *See Holiday Tours*, 559 F.2d at 843; *see also, e.g.*, *Nken v. Holder*, 556 U.S. 418, (2009) (applying same four-factor test to request for stay of alien removal order).[2]

Gold Reserve is wrong to suggest that Venezuela must satisfy both tests. The D.C. Circuit in *Federal Prescription* recognized the distinction between the Rule 62(d) and Rule 62(c) tests when it held that a district court has discretion to order an unsecured stay of a money

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[1] Rule 62(c) provides: "While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore or grant an injunction on terms for bond or other terms that secure the opposing party's rights."

[2] The four *Holiday Tours* factors are: (1) whether the petitioner made a showing that it is likely to prevail on appeal; (2) whether absent the stay, the movant would be irreparably harmed; (3) whether the issuance of the stay would substantially harm other parties in the proceeding; and (4) the public interest. *Holiday Tours*, 559 F.2d at 843.

judgment pending appeal pursuant to Rule 62(d). The Court did *not* mention *Holiday Tours*, which had been decided three years earlier, or apply the four-factor inquiry described therein for considering stays of injunctive orders. Instead, *Federal Prescription* took into account different factors, including the net worth of the defendant in comparison to the judgment and the defendant's residency. This Court has followed the same approach. *See, e.g., OmniOffices, Inc. v. Kaidanow*, 201 F. Supp. 2d 41, 43-44 (D.D.C. 2002) (distinguishing between stays of monetary and non-monetary judgments and applying *Holiday Tours* test to request for stay of declaratory judgment pending appeal) *rev'd on other grounds*, 321 F.3d 165 (D.C. Cir. 2003); *Grand Union Co. v. Food Employers Labor Relations Asso.*, 637 F. Supp. 356, 357-58 (D.D.C. 1986) (applying *Federal Prescription* factors to motion to stay monetary judgment and making no mention of the *Holiday Tours* factors).

Even the cases cited by Gold Reserve demonstrate that only the *Federal Prescription* test applies in cases involving monetary judgments. For example, in *Godfrey v. Iverson*, 2007 U.S. Dist. LEXIS 76267 (D.D.C. Oct. 16, 2007), after the Court entered a money judgment, the defendants moved to stay the judgment without having to post security. In considering the motion, the Court did not apply the *Holiday Tours* factors. Instead, it applied the factors set out in *Federal Prescription*:

> In reviewing a district court's exercise of discretion to grant a stay without requiring a supersedeas bond or other security, the D.C. Circuit has focused on three elements: (1) the amount of the money award; (2) the documented net worth of the judgment debtors; (3) whether the judgment debtors are D.C. residents, and if so, whether there is any indication that they may leave the jurisdiction before the completion of the appeals process.

Id. at *4; *see also* *Schreiber v. Kellogg*, 839 F. Supp. 1157, 1161 (E.D. Pa. 1993) ("Defendant contends that his motion for stay should be analyzed according to the four part test [that is similar to *Holiday Tours*] . . . .That test, however, is not applicable to a motion for stay under

Rule 62(d). [That test applies to] stay an injunction under Rule 62(c) rather than a money judgment under Rule 62(d).").[3]

Gold Reserve is not helped by citing per curiam D.C. Circuit orders. *See* Opp. at 2 n.1.[4] The motions to stay in those cases were brought under Fed. R. App. P. 8, not Fed. R. Civ. P. 62(d). Both Circuit Rule 8(a)(1) and the D.C. Circuit Handbook of Practice and Internal Procedures 32 (2015) require that motions to stay pursuant to Fed. R. App. P. 8 address the *Holiday Tours* factors. Neither Fed. R. Civ. P. 62(d) nor this Court's Local Rules contains this requirement.[5]

In short, the law is clear: in deciding whether to allow an unsecured stay of a money judgment, like the one here, only the test set out in *Federal Prescription* should be applied.

B. This Court Has Declined To Order Foreign Sovereigns To Post a Bond.

The law is equally clear that an unsecured stay is appropriate in this case. In that regard, Gold Reserve does not dispute that this Court has allowed stays without security in cases involving foreign sovereigns, including as recently as November 2015. *Getma Int'l v. Republic*

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[3] Since when considering an unsecured stay under Rule 62(d), the purpose of the inquiry is to "protect [the plaintiffs'] financial interest from the risk that an unsuccessful appealing party will not be able to pay the original judgment," the Rule 62(d) inquiry does *not* apply to motions to stay equitable orders under Rule 62(c). *OmniOffices*, 201 F. Supp. 2d at 43 (posting bond pending appeal of equitable judgment would be "meaningless"); *see also Summers v. Howard Univ.*, C.A. No. 98-2692, 2002 U.S. Dist. LEXIS 27478, at *9-10 (D.D.C. June 24, 2002) (finding "[t]he four prong standard which a district court must consider in determining whether a stay of a district court order or non-monetary judgment should be granted pending appeal is as follows" and listing the *Holiday Tours* factors); *Gov't Guar. Fund of Fin. v. Hyatt Corp.*, 167 F.R.D. 399, 400-01 (D.V.I. 1996) (noting that "courts . . . have limited the applicability of Rule 62(d) to appeals from money judgments or their equivalent" and finding Rule 62(c) and the four-part balancing inquiry properly applied to a stay of injunctive relief).

[4] *See Draim v. Virtual Geosatellite Holdings, Inc.*, No. 07-7065, 2007 U.S. App. LEXIS 27251 (D.C. Cir. Nov. 21, 2007); *TMR Energy, Ltd. v. State Prop. Fund of Ukr.*, No. 03-7191, 2004 U.S. App. LEXIS 8195 (D.C. Cir. Apr. 23, 2004); *Manion v. Am. Airlines, Inc.*, No. 03-7154, 2004 U.S. App. LEXIS 4657 (D.C. Cir. Mar. 10, 2004).

[5] Because the *Holiday Tours* factors are inapplicable to Venezuela's motion in this Court, Venezuela does not address them here. As explained, the D.C. Circuit's local rules require that the four-factor test in *Holiday Tours* be addressed in a motion to stay filed in that court. Should the need arise for Venezuela to file a motion to stay in the D.C. Circuit, it reserves all rights to address those factors pursuant to the D.C. Circuit's local rules.

of Guinea, 2015 U.S. Dist. LEXIS 148482 (D.D.C. Nov. 3, 2015); *see also DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66 (D.D.C. 2011). Gold Reserve instead contends that "this Court has already fully considered and denied" the relief now sought by Venezuela. Opp. at 4. That is incorrect. This Court has never ruled on whether a stay should be secured by a bond. Since the Court denied Venezuela's request to stay enforcement pursuant to Article VI of the New York Convention, it never reached the issue of whether Venezuela should be required to secure such a stay by posting security. Dkt. No. 42 at 39.

Venezuela is entitled to stay the present monetary judgment. *See Federal Prescription*, 636 F.2d at 759 (it is "[b]eyond question" that "Rule 62(d) entitles the appellant who files a satisfactory supersedeas bond to a stay of money judgment as a matter of right"); *Cayuga Indian Nation of N.Y. v. Pataki*, 188 F. Supp. 2d 223, 251-52 (N.D.N.Y. 2002) ("there is a significant body of case law 'interpreting Rule [62(d)] as entitling an appellant to a stay as a matter of right upon posting of a supersedeas bond or upon the court's waiver of the bond requirement where the appeal is taken from a monetary judgment or its equivalent'") (quoting *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 926 F. Supp. 888, 890 (D.S.D. 1996)). The only question before this Court is therefore whether the Court should exercise its discretion not to require that Venezuela post a supersedeas bond.

The decisions of this Court that squarely address whether a foreign sovereign should be compelled to provide security hold that absent extenuating circumstances, foreign sovereigns should *not* be required to do so. In *Getma*, the Court declined to require Guinea to post a bond, explaining that the cases that the plaintiff cited where bonds were required "do not involve respondents that were solvent sovereigns." *Getma*, 2015 U.S. Dist. LEXIS 148482, at *21-22 n.10. In *DRC*, this Court reached the same conclusion in regard to a motion that Honduras be

required to provide security. As in *Getma*, the court declined to require the foreign sovereign to do so. *DRC, Inc.*, 774 F. Supp. 2d at 76.

Gold Reserve makes no attempt to distinguish these cases other than to note "they involved requests for a stay of confirmation proceedings, not requests for a stay of execution of judgment pending appeal." Opp. at 4. Gold Reserve's assertion does not address the fundamental premise underlying the rulings in both cases, however, namely that "a sovereign state…[is] presumably…solvent and will comply with legitimate orders issued by courts in this country or…[abroad]." *Id*. (quoting *DRC, Inc.*, 774 F. Supp. 2d at 76).

The cases on which Gold Reserve relies also do not help it. In fact, *TMR Energy, Ltd. v. State Property Fund of Ukraine*, C.A. No. 03-0034 (TPJ) at Dkt. No. 36, confirms that a stay without security is proper. There, the court *issued a stay pending appeal without requiring a supersedeas bond*, and ruled that the unsecured stay should continue to apply until a contemplated motion to stay before the D.C. Circuit was ruled upon.[6]

The remaining cases cited by Gold Reserve are likewise inapposite. *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90 (D.D.C. 2011) concerned a judgment holding Syria liable for acts of state-sponsored terrorism. Syria failed to appear for eight years, until a default judgment was entered. *Id*. at 94-95. When Syria eventually did appear, it appealed the entry of default and moved for a stay pending appeal. *Id*. at 95. Unsurprisingly, the court denied the motion, holding that "the Syrian defendants, and the counsel representing them, have chosen default as their litigation strategy." *Id*. In that connection, the court observed that "[t]his [wa]s not the first time Syria has done this," and that "Syria ha[d] defaulted in several

[6] The D.C. Circuit's subsequent two-paragraph per curiam order provides no explanation as to why the D.C. Circuit denied a stay.

recent and currently pending cases before this court." *Id*. Venezuela, in contrast, has fully participated in these proceedings, as well as in the underlying arbitration. It therefore cannot be said that it presents the "problem of a totally unresponsive party," as was the case with Syria.[7] *Id*. (internal quotations omitted). Nor is the arbitral award in the investment dispute between Venezuela and Gold Reserve remotely comparable to the judgment against Syria for state-sponsored terrorism.

Gold Reserve's reliance on *Micula v. Gov't of Romania*, 2015 U.S. Dist. LEXIS 102907 (S.D.N.Y. Aug. 5, 2015), is equally misplaced. There, Romania requested a stay pending the resolution of an appeal *in a case in which Romania was not itself a party*. The court unsurprisingly denied the requested stay, noting that Romania had "not cite[d] precedent for addressing a stay of judgment pending appeal in a different case." *Id*. at *13. *Micula* thus provides no support for Gold Reserve.

C. The *Federal Prescription* Factors Favor A Stay Without Requiring Security.

Independent of Venezuela's status as a foreign sovereign, application of the *Federal Prescription* factors here demonstrates that an unsecured stay is appropriate, and Gold Reserve's Opposition provides no indication otherwise. Specifically, Gold Reserve does not deny that Venezuela's budget for 2016 is approximately $245 billion, which is approximately 200 times larger than the judgment. Instead, Gold Reserve only quibbles with the source that Venezuela cites for those statistics, which it derisively refers to as an "internet posting." Opp. at 5. Gold Reserve fails to note, however, that the cited source is an official statement published by

[7] While Gold Reserve cannot, and does not, claim that Venezuela has refused to participate in these proceedings, it erroneously asserts that Venezuela has "attempted to delay and forestall these confirmation and enforcement proceedings." Opp. at 7 n. 7. That is not true. In fact, at all times Venezuela has acted in accordance with its legal rights under the Foreign Sovereign Immunities Act and the New York Convention in opposing Gold Reserve's efforts to confirm and enforce a flawed award.

Venezuela's Ministry of Communication and Information reporting on the December 1, 2015 allocation of funds for the 2016 fiscal year by Venezuela's National Assembly. The Court is entitled to take judicial notice of official statements by foreign sovereigns, like the one cited by Venezuela. *See Edumoz v. Republic of Mozam.*, 968 F. Supp. 2d 1041, 1048 (C.D. Cal. 2013) ("Public facts concerning the governments of sovereign nations that are capable of immediate and accurate determination are appropriate subjects of judicial notice.") (internal quotations omitted).[8]

While Venezuela's national budget establishes its ability to pay the judgment, requiring the posting of a bond large enough to cover such a large amount – in excess of $700 million – would force Venezuela to divert resources that are needed to provide essential public services. That incontrovertible fact is not, as Gold Reserve claims, trying to "have it both ways." Opp. at 7.[9] Gold Reserve has no answer to the fact that "posting a supersedeas bond" involves a "high cost," and there is no reason for the appellant "to incur such an expense when it appears from the facts at hand that waiver of the bond requirement will not unduly endanger [the petitioner's] interest in ultimate recovery." *Kanuth v. Prescott, Ball, & Turben*, 1990 U.S. Dist. LEXIS 17156, at *5-6 (D.D.C. Dec. 14, 1990). There is thus no inconsistency in the fact that a sovereign can have sufficient means to pay a judgment while also recognizing that it would impose an unnecessary hardship for those same funds to be re-allocated from public services to

[8] Venezuela's publicly announced budget for 2016 is in line with recent estimates of Venezuela's national budget found in the *CIA World Factbook*, which estimated Venezuela's 2014 world expenditures at $206.9 billion. The Court is entitled to take judicial notice of that publication as well. *Id*. (collecting cases judicially noticing facts found in the *CIA World Factbook* and taking judicial notice of four facts found therein).

[9] Gold Reserve cites two cases for its argument that posting a bond would not be "impracticable or a hardship for Venezuela." Opp. at 5-6. However, neither involved a foreign sovereign and both are otherwise distinguishable. *Godfrey*, 2007 U.S. Dist. LEXIS 76267 at *4-5 (one defendant did not establish he had assets to satisfy the judgment, neither defendant resided in the District of Columbia, and the defendants offered "no justification as to why posting a bond would not be 'practicable.'"); *Grand Union*, 637 F. Supp. at 358 (movant did not reside in the District of Columbia and no justification as to why the movant should not have had to post a bond).

payment of an appeal bond. This is especially the case since, as Gold Reserve accepts, the cost of securing a bond could not be recovered by Venezuela even upon a successful appeal.

For these same reasons, courts have declined to require supersedeas bonds in circumstances that are analogous to those here. For example, in *Cayuga Indian Nation*, 188 F. Supp. 2d at 255-56, the U.S. District Court for the Northern District of New York refused to require that the State of New York post a bond. It held that, as a "sovereign taxing authority…the court is confident in the State's ability to pay the judgment." *Id*. at 256. Nonetheless, the court recognized that it "would be almost impossible to find a bonding agency willing and able to secure a judgment" of approximately $211 million and that "the potential costs to the State of posting a bond…would be prohibitively expensive." *Id*. (internal quotations omitted). The court therefore ruled that no supersedeas bond would be required to secure a stay pending appeal. *Id*.; *see also Ortiz v. N.Y.C. Hous. Auth.*, 22 F. Supp. 2d 15, 40 (E.D.N.Y. 1998) ("[T]he Housing Authority, as a government subdivision, has ample means to satisfy Ortiz's judgment."; granting stay without supersedeas bond).[10]

D. Venezuela Has Followed Established Legal Procedures In Contesting The Arbitration Award And Judgment.

Finally, Gold Reserve is wrong to suggest that Venezuela has acted improperly because it has "refused to make any payment." Opp. at 6. As Gold Reserve is well aware, an arbitral award is not an enforceable judgment. *See Zeiler v. Deitsch*, 500 F.3d 157, 170 (2d Cir. 2007) ("Once confirmed, [arbitral] awards become enforceable court orders…."). After the issuance of the arbitral award, Venezuela exercised its unquestionable right to seek the award's annulment in

[10] Further, it is undisputed that Venezuela has a presence in the District of Columbia, and there is no reason to conclude that this will not continue. *Federal Prescription*, 636 F.2d at 761 ("the judgment debtor was a long-time resident of the District of Columbia, and there was no indication it had any intent to leave"). Gold Reserve seeks to turn this inquiry into a question of whether Venezuela has assets in the district. Opp. at 7-8 However, as *Federal Prescription* makes clear, that is not a consideration. *Id.*

Paris, the seat of the arbitration, as Venezuela is entitled to do under French law. It is entirely proper for Venezuela to have taken that step and to withhold paying the award while the annulment proceeding in Paris is pending. *See Getma*, 2015 U.S. Dist. LEXIS 148482 at *11-12 (challenge of an award in an annulment proceeding is fully consistent with the parties' bargained-for rights).[11] In choosing arbitration of this dispute rather than domestic litigation in Venezuela, Gold Reserve accepted that any arbitral award could be challenged (by either party).

Moreover, Gold Reserve's own public statements belie its assertion that Venezuela's decision not to pay the award while the annulment proceedings in Paris are ongoing has been improper. On August 7, 2015 Gold Reserve issued a press release titled "Gold Reserve Reports on Recent Meeting with Venezuelan Government Officials." It stated that "the parties agreed to work in good faith" to reach a resolution, and that it is "*understood that …Venezuela will take all legal steps to defend its legal rights*."[12]

That is exactly what Venezuela has done, and will continue to do. The question before this Court is whether Venezuela should be required to expend significant and non-recoverable public resources in order to exercise its right to stay the judgment while the appeal is pending. For the reasons set out above, the law is clear that Venezuela should not be constrained to do so.

Conclusion

WHEREFORE, Venezuela respectfully requests that this Court stay execution of the judgment pending appeal without requiring Venezuela to post a supersedeas bond.

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[11] Gold Reserve incorrectly asserts that "Venezuela argues that it could not have filed the present motion prior to January 20, 2016." Opp at 3 n.2. Venezuela's motion said no such thing. Rather, it correctly pointed out that a motion for a stay pending appeal prior to the Court granting Gold Reserve's 1610(c) motion would have been "premature because Gold Reserve could not yet initiate attachment proceedings." Venezuela's Motion at 1 n.1.

[12] *See* Gold Reserve Press Release (emphasis added), a copy of which is attached hereto as Exhibit A.

Dated: February 12, 2016

Respectfully submitted,

BOLIVARIAN REPUBLIC OF VENEZUELA

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as unregistered participants on February 12, 2016.

/s/ *Lawrence H. Martin*
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