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April 12, 2017

BY E-FILE AND HAND DELIVERY

The Honorable Leonard P. Stark
United States District Court
District of Delaware
844 N. King Street
Wilmington, DE 19801

Re: *Crystallex International Corp. v. PDV Holding, Inc.*
C.A. No. 16-1007-LPS: No. 15-1082-LPS

Dear Chief Judge Stark:

I write in response to your April 11, 2017 Order (D.I. 71) regarding the request by Crystallex International Corp. ("Crystallex") for a condensed briefing schedule (D.I. 70) on its motion for a preliminary injunction (D.I. 64-65) (the "Motion"). Crystallex's request should be denied and, if the Motion is not summarily denied for the reasons set forth below, PDV Holding, Inc. ("PDVH") respectfully requests that any briefing schedule be established after the Court issues a decision on Petróleos de Venezuela, S.A.'s ("PDVSA") pending motion to dismiss for lack of subject matter and personal jurisdiction (D.I. 28).

The expedited briefing schedule proposed by Crystallex is unreasonable and would prejudice PDVH. After waiting nearly one and a half years since the 2015 dividend transfers that form the basis of this action, nearly six months since PDVH pledged its shares in CITGO Holding, and without identifying any planned or future transfer of assets (or any other relevant change in circumstance), Crystallex chose to file its 20-page Motion, two supporting declarations – including a declaration that purports to give expert legal opinions about the nature of PDVSA's relationship with Venezuela – and thousands of pages of exhibits on the eve of Passover and to request that the Court order the parties to respond only one week later, the day after Easter. Crystallex's delay in seeking injunctive relief belies the assertion that it will suffer irreparable harm absent an injunction and makes clear that an expedited briefing schedule on the complex issues raised by the Motion cannot be justified.

More fundamentally, the Court lacks jurisdiction to hear the Motion, as it directly turns on Crystallex's likelihood of success on the merits of the Delaware Uniform Fraudulent Transfer Act, 6 Del. C. § 1301, *et seq.* ("DUFTA"), and Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* ("FSIA"), issues currently on appeal before the Third Circuit. The filing of a notice of appeal is a jurisdictional event that "divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *see Int'l Bus. Machs. Corp. v. Johnson*, No. 09 CIV. 4826 (SCR), 2009 WL 2356430, at *3 (S.D.N.Y. July 30, 2009) (refusing to entertain a motion for a preliminary injunction that "would require [the district court] to reconsider certain aspects of its original ruling, which is currently before the [Court of Appeals]" on interlocutory review (footnote omitted)); D.I. 40, 59 (notices of appeal).

Even if the Court did have jurisdiction over some limited aspects of this case, litigation of the preliminary injunction cannot go forward in the absence of PDVSA. As this Court is aware, PDVSA was named as a defendant but has moved to dismiss for lack of subject matter and personal jurisdiction under the FSIA. D.I. 28. Until there is a definitive decision on PDVSA's motion to dismiss, PDVSA is presumptively immune from the Court's jurisdiction, and therefore is not a party to the action. Yet both the underlying merits of the preliminary injunction, which focus on PDVSA as the supposed alter ego of Venezuela, and the relief sought, *i.e.,* restrictions on transfers by PDVSA's subsidiary PDVH, involve legally protectable interests of PDVSA. As such, PDVSA is a required party under Federal Rule of Civil Procedure 19, and the Motion should be denied—or at the very least, briefing must be stayed until PDVSA's motion to dismiss is decided—because PDVSA cannot feasibly defend its interests on account of its jurisdictional immunity under the FSIA.

Indeed, pursuant to the U.S. Supreme Court's decision in *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867 (2008), "[a] case may not proceed when a required-entity sovereign is not amenable to suit" and "where there is a potential for injury to the interests of the absent sovereign." *See also Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1281 (3d Cir. 1993) ("[W]e adopt the prevalent view that 'sovereign immunity is an immunity from trial and the attendant burdens of litigation' on the merits, 'and not just a defense to liability on the merits.'" (quoting *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir. 1989)); *In re Papandreou*, 139 F.3d 247, 254-55 (D.C. Cir. 1998) (observing that "resolving a merits issue while jurisdiction is in doubt 'carries the courts beyond the bounds of authorized judicial action'" (quoting Steel *Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998))). There is no question that litigating and deciding, in PDVSA's (and Venezuela's) absence, the issue of whether PDVSA is the alter ego of Venezuela, and thus is responsible for Venezuela's obligations, and the issue of whether PDVSA and/or Venezuela had the requisite fraudulent intent to satisfy DUFTA, would injure the interests of PDVSA.

Finally, the requested injunction raises new FSIA attachment immunity issues. When opposing PDVH's motion to dismiss, Crystallex emphatically argued, and the Court agreed, that the FSIA's bar on prejudgment relief did not require the dismissal of Crystallex's

case because Crystallex "has limited its request to post-judgment remedies under [DUFTA]" and "*[t]o be clear, Crystallex does not seek a preliminary injunction or attachment in this action.*" *See* D.I. 14 at 17 (emphasis added); *see also id.* at 16 ("But regardless of whether the FSIA would preclude Crystallex from seeking a prejudgment attachment, the issue is irrelevant here, as *Crystallex has not moved for a prejudgment attachment (or any other provisional relief for that matter*)." (emphasis added)); D.I. 34 at 16. Having successfully deployed that argument to defeat PDVH's motion to dismiss, Crystallex now reverses course and is seeking a preliminary injunction to restrain the assets of PDVH on the purported basis that those assets should be preserved to satisfy some future judgment against PDVSA as an alleged alter ego of Venezuela. The Court should not countenance such tactics, and on that basis alone, the Motion should be summarily denied.

And, to the extent the injunction would prevent PDVH from transferring the property of PDVSA, for example by declaring and/or transferring a dividend to PDVSA, the injunction is barred by the FSIA. *See* 28 U.S.C. §§ 1609-1610; *Janvey v. Libyan Inv. Auth.*, 478 F. App'x 233, 236 (5th Cir. 2012) (holding a preliminary injunction blocking transfers of property belonging to the instrumentality of a foreign sovereign barred by § 1609 attachment immunity). Although Crystallex has confirmed its arbitration award against *Venezuela*, in order to enjoin, attach, or execute upon *PDVSA's* property, Crystallex will first need to obtain a court order pursuant to 28 U.S.C. § 1610(c) finding that PDVSA is an alter ego of Venezuela, that the PDVSA property at issue is not otherwise immune pursuant to 28 U.S.C. § 1610(b), and that a reasonable period of time has elapsed following the entry of judgment and the giving of notice. *See* 28 U.S.C. § 1610(c); *Conn. Bank of Commerce v. Congo*, 309 F.3d 240, 247 (5th Cir. 2002) ("[Section 1610(c)] requires a court to enter the writ of execution, so that the court can determine whether the property in question falls within one of the statutory exceptions for foreign sovereign immunity."). Crystallex represents that it is pursuing such an order, but unless and until a court finds that PDVSA and Venezuela are alter egos, the FSIA's prohibition against prejudgment attachment bars any court from enjoining the transfer of PDVSA's property. If the injunction is directed only at transfers of assets belonging to PDVH, which is not a debtor, DUFTA does not provide for the restraint of assets of a non-debtor.[1]

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[1] The Court's September 30, 2016 decision to deny PDVH's motion to dismiss was premised on its conclusion that PDVH could be liable under DUFTA as a "non-debtor transferor of debtor property," *i.e.*, the dividend declared by PDVH to PDVSA. *See* D.I. 34 at 12. In dismissing CITGO Holding from the case, the Court recognized that DUFTA does not impose liability on, or allow the Court to restrain transfers by, non-debtors that transfer their own (non-debtor) property.

For the reasons stated above, the Motion is (at best) premature, and to the extent the Court does not summarily deny the Motion, PDVH respectfully submits that the question of a briefing schedule is best reserved until after the Court rules on PDVSA's motion to dismiss.

Sincerely,

/s/ Kenneth J. Nachbar

Kenneth J. Nachbar (#2067)

cc: All Counsel of Record