IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CONOCOPHILLIPS PETROZUATA B.V., *et al.* *Plaintiffs*, v. PETRÓLEOS DE VENEZUELA, S.A., *et al.* *Defendants*.	:	Case No. 1:16-cv-00904-LPS Hon. Leonard P. Stark

REPLY OF DEFENDANTS PDV HOLDING, INC., CITGO HOLDING, INC. AND CITGO PETROLEUM CORPORATION IN SUPPORT OF THEIR MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) and 12(b)(6)

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In their Brief in Opposition to the CITGO Defendants'[1] motion to dismiss, Plaintiffs repeatedly insist that Venezuela and its alleged alter ego PDVSA[2] "undert[ook]" or "orchestrated" a series of transactions to spirit PDVSA assets out of the United States before Plaintiffs could collect on judgments they anticipate receiving against Venezuela and PDVSA in pending arbitration proceedings. *See* Opp'n. at 5, 6, 8, 14. If that is the case, then Plaintiffs' fraudulent transfer claims in this case are preempted by the Foreign Sovereign Immunities Act ("FSIA"), which protects foreign sovereigns from pre-judgment interference with their property. If, on the other hand, these alleged transactions were *not* undertaken by PDVSA or Venezuela or did not involve PDVSA property, then Plaintiffs have failed to state a claim under the Delaware Uniform Fraudulent Transfer Act ("DUFTA"), which requires that a transfer be made by a "debtor" and involve "property of the debtor." *See* 6 Del. C. §§ 1301(2), 1304. Plaintiffs cannot escape from this dilemma, and thus their claims must be dismissed for failure to state a claim.

Moreover, because Plaintiffs waived any right they had to seek relief from this Court prior to their obtaining a judgment in pending arbitrations against Venezuela and PDVSA, this suit is not ripe, and it should be dismissed for lack of subject-matter jurisdiction.

I. Plaintiffs Have Not Stated A Claim Under DUFTA

1. The 2015 Dividend Transfer was not made by a DUFTA "debtor."

As claimed in the Complaint, PDVH's alleged transfer of a declared dividend to PDVSA in February 2015 involved property of Plaintiffs' alleged debtor PDVSA.[3] This transfer was not,

[1] PDVH Holding, Inc. ("PDVH"), CITGO Holding, Inc. ("CITGO Holding") and CITGO Petroleum Corporation ("CITGO Petroleum").

[2] Petróleos de Venezuela, S.A.

[3] The contemporaneous transactions involving CITGO Petroleum and CITGO Holding did not involve debtor property and thus are not actionable as fraudulent transfers. *See Crystallex I*, 2016 WL 5724777, at *5

however, made by a "debtor" under DUFTA, because PDVH is not an actual or potential debtor to Plaintiffs. In *Crystallex International Corp. v. Petróleos de Venezuela, S.A.,* Case No. 15-cv-1082-LPS (D. Del.) ("*Crystallex I"*), a fraudulent transfer case involving the same transaction, the Court acknowledged that PDVH transferred the dividend, not PDVSA. *See Crystallex I*, No. 15-1082-LPS, 2016 WL 5724777, at *5 (D. Del. Sept. 30, 2016). Nevertheless, the Court held that PDVH could be liable as a "non-debtor transferor" because the transfer was made "on behalf" of PDVSA. *Id.* Plaintiffs urge the Court to adopt the same reasoning here. *See* Opp'n. at 13. This invitation should be rejected as the Court's holding in *Crystallex I* represents an unprecedented departure from DUFTA's plain language, radically extending the statute's reach. *See* Def. PDV Holding Inc.'s Mem. in Supp. of its Mot. for Certification of Interlocutory Appeal, *Crystallex I*, ECF No. 42 at 10-11 (Oct. 28, 2016). In its decision to grant PDVH's motion to certify the *Crystallex I* ruling for interlocutory review by the Third Circuit, the Court has acknowledged the novelty of its ruling in *Crystallex I*. *See Crystallex I*, 2016 WL 7440471, at *2 (D. Del. Dec. 27, 2016). Given the uncertainty surrounding the *Crystallex I* decision, the Court should decline to extend its holding in *Crystallex I* until the Third Circuit has either affirmed, or overturned, that holding.

2. CITGO Petroleum's alleged payments to BP were not made by a "debtor" and did not involve "property of a debtor."

Plaintiffs allege CITGO Petroleum paid $43.7 million to BP for oil that was delivered to PDVSA. Compl. ¶ 56. As the CITGO Defendants explained in their opening brief, CITGO Petroleum is not Plaintiffs' debtor, and attributing its actions to PDVSA would disregard the separate corporate existence of PDVH, CITGO Holding, *and* CITGO Petroleum based on vague and unsupported allegations of "domination." Such a ruling would turn Delaware's strong

presumption in favor of corporate separateness on its head, and it is not appropriate here. *See Wallace ex rel. Cencom Cable Income Partners II, L.P. v. Wood*, 752 A.2d 1175, 1183-4 (Del. Ch. 1999) ("Persuading a Delaware court to disregard the corporate entity is a difficult task.").

As an alternative theory, Plaintiffs suggest that PDVSA *would have* directly effected the transfers to BP *if* it "transferred money to somebody else to pay bills" or "transferred the obligations" or "gave a credit or gift to another for making a payment." Opp'n. at 14-15. This is speculation, pure and simple, and the Court should disregard this unsupported allegation.

Even if the Court chooses to extend liability to CITGO Petroleum as a non-debtor transferor, the alleged transaction did not involve debtor property as required by the statute. The Complaint alleges CITGO Petroleum remitted payments to BP. Compl. ¶ 56. Clearly, the transferred funds were the property of CITGO Petroleum, not PDVSA. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003) ("A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary."); s*ee also Klauder v. Echo/RT Holdings, LLC*, No. 133, 2016, 2016 WL 7189917, at *2 (Del. Dec. 12, 2016) (affirming dismissal of fraudulent transfer claim challenging transfer by the subsidiary of the debtor based on the general rule absent allegations of alter ego or piercing the corporate veil that a parent has no property interest in the assets of a subsidiary).

Plaintiffs make two arguments for why this transaction involved debtor property, neither of which finds any support in the Complaint. First, they argue that the relevant transaction was not CITGO Petroleum's remittance of money to BP, but rather PDVSA's transfer of its "obligations" to CITGO Petroleum. Opp'n. at 15. This argument fails. DUFTA imposes liability for transfers of "assets." *See* 6 Del. C. § 1301(12) (defining "transfer" as "every mode

… of disposing of or parting with an asset or an interest in an asset."). An obligation is a *liability*, not an asset. *See Obligation*, Black's Law Dictionary (10th ed. 2014) ("A formal, binding agreement or acknowledgment of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons"). Although DUFTA imposes liability on a debtor for *incurring* an obligation, *see* § 1304, it does not impose liability on a debtor for *transferring* an obligation, nor does it impose liability on a non-debtor for incurring an obligation.

Plaintiffs also argue that the relevant fraudulent transaction was CITGO Petroleum's declaration of a "non-cash dividend." Opp'n. at 15-16. This attempt at re-characterizing the transaction does not change the analysis. First, there is no allegation in the Complaint that CITGO Petroleum, or anyone else, issued any such dividend in connection with the payments to BP that form the basis for this claim. The lone allegation concerning non-cash dividends in the Complaint is made on information and belief and states generally that unspecified "Defendants" have "begun to style this procurement activity [on numerous unspecified purchases] as 'non-cash dividends.'" *See* Compl. ¶ 57. Moreover, even if a series of supposed non-cash dividends amongst the Defendants had actually been alleged, Plaintiffs still have not alleged that debtor property was involved in any transaction. Consistent with the Court's holding in *Crystallex I*, the only dividend transfer that could have involved PDVSA's property would have been PDVH's transfer of a declared non-cash dividend to PDVSA. *See Crystallex I*, 2016 WL 5724777, at *4. Thus, at a minimum, this claim would have to be dismissed against CITGO Holding and CITGO Petroleum. But, had it been alleged, even the transfer from PDVH would not have involved debtor property. The February 2015 transfer of the dividend by PDVH involved PDVSA's property because PDVH's declaration of the dividend created a right to payment owned by PDVSA. *See Crystallex I*, 2016 WL 5724777, at *4 n.8. The declaration of

a non-cash dividend, by contrast, would not create such a right to payment, and thus would not create a property right in PDVSA.

3. The 2016 Bond Swap transaction was not made by a debtor and did not involve the property of a debtor.

Plaintiffs allege PDVH engaged in a fraudulent transfer when it granted a lien on 50.1% of its capital stock in CITGO Holding to PDVSA's bondholders as part of a bond swap transaction. *See* Compl. ¶ ¶ 58-62. The creation and grant of the lien was undertaken by PDVH, not Plaintiffs' alleged debtors PDVSA or Venezuela, and, for the reasons stated above, the Court should follow the plain language of the DUFTA statute instead of imposing liability on PDVH as a non-debtor transferor.

In any event, the transaction did not involve the property of a debtor, as PDVH's shares of CITGO Holding stock, even once encumbered, are the property of PDVH, not PDVSA. *See Lien; Lienee; Lienholder*, Black's Law Dictionary (9th ed. 2009); *Patrickson*, 538 U.S. at 475.[4]

In an attempt to salvage their claim, Plaintiffs acknowledge that the grant of the lien was made by PDVH and involved PDVH's property, but argue that PDVH is actually Plaintiffs' debtor with respect to the Bond Swap. Under DUFTA, a debtor-creditor relationship exists between two parties if the creditor has a "claim" against the debtor, which is defined as "a right to payment, whether or not the right is reduced to judgment … ." 6 Del. C. § 1301(3) (emphasis added). Plaintiffs advance two bases for a debtor-creditor relationship between them and PDVH, neither of which is valid. Plaintiffs first claim PDVH became Plaintiffs' debtor after the

[4] Plaintiffs cite cases establishing that, pursuant to the Uniform Commercial Code, a debtor may pledge collateral that he does not own. *See In re Atchison*, 832 F.2d 1236, 1239 (11th Cir. 1987); *In re WL Homes, LLC*, 452 B.R. 138, 145 (D. Del. 2011). While this, perhaps, establishes that the PDVSA bondholders have a valid lien, it does not establish that the lien was ever the property of PDVSA as required for liability under DUFTA.

Crystallex I lawsuit was filed. *See* Opp'n. at 17 ("Prior to the 2016 Bond Swap … Crystallex sued PDVH in relation to the 2015 Dividend Recapitalization."). Plaintiffs do not try to explain, because they cannot, how a lawsuit filed against PDVH by a third party created a right to payment in Plaintiffs.

Next, Plaintiffs argue that a debtor-creditor relationship was created by a pre-suit petition for permission to take a deposition filed in Texas in 2014. *Id.* This too cannot establish debtor-creditor relationship between Plaintiffs and PDVH. First, in the Complaint, there are no allegations regarding this petition, and thus no basis for a debtor-creditor relationship based upon it. Second, the existence of a claim under DUFTA turns on a "right to payment." While a lawsuit seeking damages can provide the basis for a debtor-creditor relationship, the pre-suit petition is not the same. It is merely a petition to take a deposition. *See* Opp'n. Ex. A (ECF 15-1). Without a "right to payment," Plaintiffs cannot establish a debtor-creditor relationship between PDVH and Plaintiffs.

Since none of the three transactions Plaintiffs have challenged as fraudulent involve both a transfer by a debtor and debtor property, Plaintiffs claims against the CITGO Defendants must be dismissed.

II. The FSIA Bars Plaintiffs' Claims

In their opening brief, the CITGO Defendants contended that to the extent Plaintiffs claim that the transferred assets belonged to PDVSA, Plaintiffs' claims are preempted by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611. Plaintiffs argue that the FSIA's attachment immunity provisions are not implicated by their claims in this suit because attachment immunity only applies to protect foreign sovereign property from *in rem* remedies. *See* Opp'n. at 9-10. Since Plaintiffs are not seeking *in rem* remedies in this suit, the argument

goes, the FSIA does not apply to their claims. *See id*. This demonstrates a fundamental misunderstanding of the CITGO Defendants' position. The argument does not turn on whether there will be a judgment under DUFTA in this suit and what post-judgment relief Plaintiffs might seek. It turns on whether Plaintiffs may use DUFTA to skirt the FSIA by encumbering Venezuela's alleged property based on conduct undertaken before an award in the underlying arbitrations proceedings between Venezuela, PDVSA and Plaintiffs have been confirmed by a court in compliance with the exclusive procedure for attaching sovereign property set out under the FSIA. 28 U.S.C. § 1610(a)(6), (c).

Restraining a foreign sovereign's property in any way, whether *in rem* or *in personam* such as an injunction to void a transfer or prevent future transfers prior to entry of a judgment, is prohibited by the FSIA. 28 U.S.C. §§ 1609-10; *see Republic of Arg. v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2257 (2014); *Exp.-Imp. Bank*, 768 F.3d 75, 87 & n.12 (2d Cir. 2014); *Pine Top Receivables of Ill., LLC v. Banco de Seguros del Estado*, 771 F.3d 980, 984 (7th Cir. 2014); *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 799 (7th Cir. 2011), *as corrected* (Apr. 1, 2011); *Raji v. Bank Sepah-Iran*, 495 N.Y.S.2d 576, 580-81 (N.Y. Sup. Ct. 1985). Accordingly, the FSIA preempts state law that purports to restrain a sovereign's freedom to transfer or dispose of its assets. *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1232 (2d Cir. 1995) ("The FSIA's language . . . supports the interpretation that it means to preempt state law."); *see also Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1179 (11th Cir. 2011) (preempting federal common law rules affecting a sovereign's property).

Plaintiffs' claims here are a transparent attempt to circumvent the FSIA's prohibition on prejudgment attachment through the guise of an action for fraudulent conveyance. The FSIA would not have allowed Plaintiffs to obtain an order under DUFTA enjoining PDVH, for

example, from paying a dividend to PDVSA while Plaintiffs sought a judgment against PDVSA asserting the dividend payment was a fraudulent transfer, yet Plaintiffs are seeking to impose liability against PDVH for doing exactly what Congress determined is protected conduct under the FSIA. To allow Plaintiffs' claims and create liability for movements of assets that are supposedly free from encumbrance is to in fact restrict the movement of those assets in violation of the FSIA. This stratagem, if permitted, could be employed by any potential judgment creditor of a foreign sovereign, effectively creating a secondary legal regime governing the movement of foreign sovereign property and threatening both sovereigns and third parties such as PDVH with massive liability for transferring such property. This outcome is expressly proscribed by the FSIA. *See Raji*, 495 N.Y.S.2d at 583 n.2 ("foreign sovereign entities may, with impunity, remove assets from the jurisdiction").

III. Plaintiffs' Claims Are Not Ripe

In their opposition brief, Plaintiffs scoff at the idea that they waived their right to obtain relief from this Court prior to a final award in the pending arbitrations. In fact, this is exactly what they did, in clear and unequivocal language. Although Plaintiffs say in their letters to the arbitration tribunals that they "seek injunctive and other relief from the [District of Delaware] court, including an order for the return of any assets found to have been fraudulently transferred," they immediately caveat this by explaining that they are not seeking such relief just yet: "*The plaintiffs are not, however, seeking any pre-award or pre-judgment [sic] relief from the Delaware court.*" (*Id*.) (emphasis added).[5] Because the arbitrations are ongoing, and there

[5] No doubt Crystallex sent the letters to the arbitral panels because, under the rules of the arbitrations, it could not pursue any remedies in this Court. *See, e.g.,* Article 26 of the ICSID Convention (stating that consent to arbitration under the convention is "to the exclusion of any other remedy.").

have not been arbitration awards, plaintiffs are, in their own words, "not seeking relief from the Delaware Court." Thus, this case is not ripe and must be dismissed pursuant to Fed R. Civ. P. 12(b)(1). *See Tree of Life Christian Schs. v. City of Upper Arlington*, 536 F. App'x 580, 583 (6th Cir. 2013); *In re Kmart Corp*., 359 B.R. 189, 199-200 (Bankr. N.D. Ill. 2005) (dismissing case on ripeness grounds where plaintiff "admit[ted] that it is not seeking affirmative relief from this court").

Plaintiffs contend that that their letters do not constitute waiver because they attached a copy of the Complaint, which seeks remedies from this Court. Opp'n. at 12. This misses the point. The CITGO Defendants' waiver argument pertains to the timing of Plaintiffs' remedies, not their existence. Plaintiffs did not waive their right to seek remedies from this Court. They did, however, clearly and explicitly waive their right to seek remedies from the Court *right now*, before judgments are awarded in the arbitrations. As a result this suit is not ripe.[6]

IV. The Rosneft Transaction

In their January 4, 2017 letter to the Court (D.I. 14), Plaintiffs made reference to a report that PDVH had recently pledged 49.9% of its shares in CITGO Holding to secure a certain obligation of a subsidiary of PDVSA, PDVSA Petróleos, S.A. The CITGO Defendants state that the pledge occurred, but reiterate that the FSIA renders the existence of this pledge immaterial to the question presently before the Court.

[6] Plaintiffs contend that a challenge to ripeness can only be a facial challenge based on the Complaint. Not so. A factual challenge under Rule 12(b)(1) authorizes a court to "weigh [external] evidence [to] satisfy itself as to the existence of its power to hear the case" and affords no "presumptive truthfulness" to the allegations in the complaint, *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977); *accord Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997).

CONCLUSION

The CITGO Defendants respectfully request that this Court grant its motion to dismiss.

DATED: January 6, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on January, 6 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF which will send notification of such filing to all registered participants, including:

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