IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CONOCOPHILLIPS PETROZUATA B.V., PHILLIPS PETROLEUM COMPANY VENEZUELA LIMITED, CONOCOPHILLIPS GULF OF PARIA B.V. AND CONOCOPHILLIPS HAMACA B.V.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 16-904-LPS
PETRÓLEOS DE VENEZUELA, S.A., PDV HOLDING, INC., CITGO HOLDING, INC. AND CITGO PETROLEUM CORPORATION,	)	
Defendants.	)	

PLAINTIFFS' ANSWERING BRIEF IN OPPOSITION TO PETRÓLEOS DE VENEZUELA, S.A.'S MOTION TO DISMISS

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Dated: April 10, 2017

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STATUTES

ConocoPhillips Petrozuata B.V., Phillips Petroleum Company Venezuela Limited, ConocoPhillips Gulf of Paria B.V. and ConocoPhillips Hamaca B.V. ("Plaintiffs") respectfully submit this answering brief in opposition to the motion to dismiss filed by defendant Petróleos de Venezuela, S.A. ("PDVSA"). D.I. 24 and 24-2 (the "Motion").

Nature and Stage of Proceedings

On October 6, 2016, Plaintiffs filed the complaint in this case against PDVSA and its direct and indirect Delaware subsidiaries, PDV Holding, Inc. ("PDVH"), CITGO Holding, Inc. ("CITGO Holding") and CITGO Petroleum Corporation ("CITGO Petroleum"). *See* D.I. 1 ("Compl."). Plaintiffs have multi-billion dollar arbitration claims against the Bolivarian Republic of Venezuela ("Venezuela") and against PDVSA, and allege by this action that PDVSA made several fraudulent transfers by removing assets from the United States to Venezuela and by encumbering assets located in the United States, in violation of the Delaware Uniform Fraudulent Transfer Act, 6 *Del. C.* §§ 1301-1311 ("DUFTA"). *See* Compl. ¶¶ 1-15.

On November 23, 2016, the three Delaware defendants moved to dismiss this case. They argued they are not proper defendants because Plaintiffs are creditors of Venezuela and PDVSA, not creditors of the Delaware defendants, and that this DUFTA cause of action is preempted by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (the "FSIA"). *See* D.I. 10. That motion has been briefed.

Before Plaintiffs brought this action, the Court had already ruled in another case challenging some of these same transfers under DUFTA, in *Crystallex Int'l Corp. v. Petróleos de Venezuela, S.A.*, No. 15 Civ. 1082 (D. Del. 2015) ("*Crystallex I*"), that PDVH was a proper defendant as a "non-debtor transferor" of PDVSA's property and that the DUFTA claims were not preempted by federal law. *See Crystallex I*, D.I. 34, 2016 WL 5724777 (D. Del. Sept. 30,

2016) (the "*Crystallex* Opinion"). PDVH appealed to the Third Circuit from the *Crystallex* Opinion and, on December 5, 2016, the Delaware defendants in this case asked the Court to stay this action pending resolution of PDVH's interlocutory appeals in *Crystallex I*. *See* D.I. 11. Plaintiffs opposed that motion as a delay tactic and that motion to stay has been briefed. *See* D.I. 14 and 16.

Now, by this Motion, PDVSA moves to dismiss this case. PDVSA repeats the FSIA preemption argument the Court already rejected in the *Crystallex* Opinion and which is on appeal to the Third Circuit in *Crystallex I*. *See* Mot. at 17-20.

PDVSA otherwise argues that the Complaint should be dismissed for lack of subject matter jurisdiction and personal jurisdiction under the FSIA. *See* Mot. at 8-17. Notwithstanding that Plaintiffs' claims concern the removal of assets *from the United States* and the encumbering of assets *located in the United States*, PDVSA contends that the Complaint somehow fails to allege either any activity in the United States or any activity outside of the United States causing a direct effect in the United States. *See id.* As explained below, PDVSA is wrong.

Summary of Argument

1. PDVSA argues that "[t]his case arises out of a purely foreign dispute that has *no connection to the United States*." Mot. at 1 (emphasis added). But that is not a serious contention. While the underlying debt for Venezuela's and PDVSA's expropriation arose outside of the United States, *this DUFTA action* arises out of transfers made *in the United States* and from obligations given against property located *in the United States*. The Court has subject matter jurisdiction and personal jurisdiction because the Complaint alleges claims based on acts performed in the United States, alleges that PDVSA engaged in activity in the United States, and alleges that PDVSA engaged in activity causing "direct effects" in the United States.

2. As the Court already held in the *Crystallex* Opinion, and as Plaintiffs point out in opposition to the Delaware defendants' motion to dismiss, this action is consistent with the FSIA. *See* D.I. 15 at 9-11. Regardless of whether the FSIA may protect sovereign property from pre-judgment "attachment[,] arrest and execution" or limit the remedies ultimately available if Plaintiffs prevail on the merits, the mere prospect of liability for a fraudulent transfer is not an attachment or execution on any property. Without repeating them below, all of the arguments Plaintiffs made against dismissal of the claims against the Delaware defendants (D.I. 15) are incorporated by reference into this answering brief.

Statement of Facts

In 2007, Venezuela completed the nationalization of its oil industry and the confiscation of Plaintiffs' investments worth billions of dollars. Plaintiffs brought an arbitration claim before the World Bank's International Centre for Settlement of Investment Disputes ("ICSID") against Venezuela and, in September 2013, the tribunal ruled that Venezuela had expropriated Plaintiffs' investments. Compl. ¶¶ 1-4. On January 17, 2017, the ICSID tribunal issued another Interim Decision reaffirming Venezuela's liability for unlawfully confiscating Plaintiffs' investments. *See* D.I. 22. Decision on the quantum of damages is pending. Compl. ¶ 28.

In October 2014, Plaintiffs brought two arbitration claims in the International Chamber of Commerce ("ICC") against PDVSA and others. A final hearing on liability and quantum was held in those ICC arbitrations from November 28 to December 10, 2016. *Id.* ¶¶ 29-30.

Venezuela publicly vowed it will not pay arbitration awards on such expropriation claims. After the ICSID decision on liability in 2013, PDVSA decided to remove assets from the United States to prevent eventual collection on arbitration awards. PDVSA attempted, but failed, to sell CITGO Petroleum, PDVSA's largest asset in the United States. PDVSA owns CITGO

Petroleum through PDVH and CITGO Holding. PDVH, CITGO Holding and CITGO Petroleum are Delaware corporations. *Id.* ¶¶ 20-23, 33-45. Through the Delaware defendants, PDVSA holds, among other things, interests in petroleum refineries, blending plants and numerous terminals and pipelines located within the United States. *Id.* ¶ 7.

I. The 2015 Dividend Recapitalization

After PDVSA was unable to sell CITGO Petroleum, PDVSA liquidated and expatriated ~US $2.8 billion worth of CITGO Petroleum assets and equity. By the transaction completed in February 2015, CITGO Petroleum's parent, CITGO Holding, raised US $2.8 billion through US $1.5 billion worth of high-yield bonds and a US $1.3 billion three-and-a-half year term loan. *Id.* ¶¶ 10, 46-53.

PDVSA caused CITGO Holding to pledge its equity in CITGO Petroleum and caused CITGO Petroleum to incur obligations against its assets as security for the new debt. Then PDVSA caused CITGO Holding to transfer the proceeds from the new debt in the form of a dividend to PDVH. PDVSA then caused PDVH to transfer the proceeds in the form of another dividend to PDVSA. *Id.* ¶¶ 10, 46-53.

PDVSA undertook this transaction, using its wholly-controlled subsidiaries as its agents to carry it out, in order to monetize as much of the value of its indirect ownership of CITGO Petroleum that it could, and to remove the proceeds from the United States. By this transaction, PDVSA removed ~US $2.8 billion worth of value from assets in the United States. *See id.*

II. The Non-Cash Dividends

PDVSA dominates and controls CITGO Petroleum and uses CITGO Petroleum as its procurement and payment agent. For example, in 2016 PDVSA awarded British Petroleum Plc. ("BP") a large tender for the supply of light crude deliveries to PDVSA. Under the contract,

PDVSA was to pre-pay for shipments of 7.4 million barrels during the second quarter of 2016. PDVSA instead caused CITGO Petroleum to begin paying on the BP invoices. CITGO Petroleum paid BP on at least two PDVSA invoices totaling US $43.7 million. *Id.* ¶ 56.

PDVSA caused CITGO Petroleum to assume these obligations and has used CITGO Petroleum to pay for PDVSA's obligations as its procurement and paying agent on numerous purchases, including for airplanes, power generators and mechanical parts for vessels, for nothing in return. For many years, PDVSA did not even try to compensate CITGO Petroleum or account for these transactions in any way because PDVSA used CITGO Petroleum's assets as its own. *Id.* ¶ 57.

For some of these transactions, PDVSA styled or accounted for them as "[N]on-cash [D]ividends." *Id.* ¶¶ 11-12, 54-57. After PDVSA transferred its payables obligations to CITGO Petroleum and CITGO Petroleum satisfied them, when PDVSA caused CITGO Petroleum to characterize (or re-characterize) payments made to PDVSA's creditors as "dividends," any "dividend" was necessarily payable to CITGO Holding, the parent of CITGO Petroleum. And then in order to clear the credit back to PDVSA (since it was originally PDVSA's obligation), PDVSA necessarily caused CITGO Holding to pay a "dividend" to PDVH, the parent of CITGO Holding, and caused PDVH to pay a "dividend" to PDVSA, not unlike the special dividend in the 2015 Dividend Recapitalization.

III. The 2016 Bond Swap

In 2016, PDVSA first proposed to swap US $7 billion worth of its short term debt for new bonds with longer maturities. It later reduced the proposal to US $5.325 billion and then ultimately ~US $3.367 billion worth was exchanged. These new bonds are secured by a pledge of a first priority lien on 50.1% of PDVH's capital stock in CITGO Holding. *Id.* ¶¶ 13, 58-62.

PDVSA issued the bonds and received the proceeds, and, if PDVSA defaults, bondholders will have recourse to over half of PDVH's equity in CITGO Holding, yet PDVH received nothing in return. *Id.*

PDVSA orchestrated all of these transactions to transfer value out of the United States. These transactions were made with the intent to hinder, delay or defraud PDVSA's and Venezuela's creditors, including Plaintiffs. *Id.* ¶¶ 73-79. Additionally or in the alternative, when PDVSA transferred proceeds from these transactions to Venezuela, for no consideration, PDVSA made the transfers at a time when it intended to incur, or believed or reasonably should have believed that it would incur debts beyond its ability to pay them as they became due. *See id.* ¶¶ 83-85.

Argument

I. The Claims are Based on Acts in the United States and PDVSA's Activity in the United States

PDVSA argues that "Plaintiffs fail to allege that PDVSA did *anything* in the United States." Mot. at 11 (emphasis in original). PDVSA is wrong. Instead, with one possible exception, *every* allegation of PDVSA's conduct involves activity in the United States.

The only allegation of commercial activity potentially occurring outside of the United States is that, after PDVSA received proceeds from a fraudulent transfer that it carried out in the United States, PDVSA then transferred the proceeds to the government of Venezuela. *See, e.g.*, Compl. ¶ 48 ("Upon information and belief, PDVSA then handed the proceeds over to Venezuela").

All of the other activity complained of occurred in the United States. Plaintiffs complain about the 2015 Dividend Recapitalization because PDVSA removed ~US $2.8 billion worth of assets and equity out of the United States. Plaintiffs complain about the Non-cash Dividends for

same reason, because PDVSA removed assets from the United States when it made CITGO Petroleum assume the obligations to its trade creditors, for nothing in return. Similarly, Plaintiffs complain about the 2016 Bond Swap because PDVSA gave away a pledge against over half of the equity in the U.S.-based CITGO ownership chain, for nothing in return.

And the Complaint alleges that all of this commercial activity in the United States was undertaken and carried out *by PDVSA*, either directly or through the Delaware defendants as PDVSA's agents and instrumentalities. The Complaint alleges the transfer of the dividend from PDVH to PDVSA as part of the 2015 Dividend Recapitalization was caused "by PDVSA." *See, e.g.*, Compl. ¶ 48. Based upon similar allegations about the 2015 Dividend Recapitalization in *Crystallex I*, the Court found that: "[t]he only reasonable view of the Transactions, as alleged, is of an extraction of funds orchestrated by and carried-out under orders from Venezuela and/or Petróleos." *Crystallex* Opinion at 10. "On this view . . . the Transactions were directly executed by an 'instrumentality of' the debtor or on its 'behalf' and, in that respect, 'by' the debtor." *Id.*

The Complaint alleges that "PDVSA control[led] and dominate[d] CITGO" in relation to the Non-cash Dividend allegations. *Id.* ¶ 54. The Complaint alleges that PDVSA gave away a pledge of PDVH's equity in CITGO Holding as part of *PDVSA's* own 2016 Bond Swap, not debt separately issued by PDVH or any of the Delaware defendants. *Id.* ¶¶ 58-62.

That PDVSA conducted these activities through the Delaware defendants in the United States is the only fair reading of the allegations. For example, if it were otherwise, if PDVH had engaged in the 2015 Dividend Recapitalization, PDVH, and not PDVSA, would have retained the ~US $2.8 billion in proceeds. If CITGO Petroleum had caused itself to engage in the Non-cash Dividends, CITGO Petroleum, and not PDVSA, would have taken delivery from BP on the

light crude tender. Likewise, if PDVH itself conducted the 2016 Bond Swap, PDVH, and not PDVSA, would have realized new cash in exchange for pledging its equity.

As Plaintiffs allege in their second DUFTA action challenging one of the recent transactions with Rosneft Trading S.A., in a December 23, 2016 press release and referring to the 2016 Bond Swap, PDVSA explained: "Just as PDVSA leveraged itself in October [2016] using as collateral 50.1% of Citgo for the bond swap operation, in the midst of attacks against the company and a downturn in the global oil industry, it has used the remaining 49.9% [of equity in CITGO] to raise new financing [from Rosneft]." *ConocoPhillips Petrozuata B.V. v. Petróleos de Venezuela, S.A.,* No. 17 Civ. 28 (D. Del. 2017), D.I. 1 ¶ 38. By that statement, PDVSA confirms the allegations in and the inferences from this Complaint, that it was PDVSA that "leveraged itself" and PDVSA that "used" its downstream equity in the Delaware defendants. Indeed, PDVSA carried out all of the fraudulent transfers alleged in the Complaint.

PDVSA otherwise argues that the Court is deprived of jurisdiction, notwithstanding the alleged acts and commercial activity in the United States, because the "gravamen" of these DUFTA claims is the alleged mental state of PDVSA, which was supposedly formed exclusively somewhere in Venezuela. *See* Mot. at 12. That argument is misplaced.

In this case, one set of the DUFTA claims is based on allegations that PDVSA carried out these commercial transactions in the United States with actual fraudulent intent. *See* Compl. ¶¶ 73-79. Those allegations make out actual intent fraudulent transfers under DUFTA (*see* 6 *Del. C.* § 1304(a)(1)), that are based on acts and activity in the United States. That is sufficient to grant jurisdiction under the FSIA, whether or not the wrongful intent that allegedly animated the conduct was formed in Venezuela or anywhere else.

The other set of the DUFTA claims in this case is based on allegations that, without receiving reasonably equivalent value in exchange, PDVSA carried out commercial transactions in the United States at a time when PDVSA was engaged or was about to engage in business or a transaction for which the remaining assets of PDVSA were unreasonably small in relation to the business or transaction, or when PDVSA intended to incur, or believed or reasonably should have believed that PDVSA would incur, debts beyond its ability to pay as they became due. *See* Compl. ¶¶ 80-85. Those allegations make out constructive fraudulent transfers under DUFTA (*see* 6 *Del. C.* § 1304(a)(2)), that are based on acts and activity in the United States. That is sufficient to grant jurisdiction under the FSIA, without regard to whether PDVSA ever formed any actual intent whatsoever, in Venezuela or anywhere else.

For both sets of Plaintiffs' claims, there can be no dispute the "gravamen" of the claims is that PDVSA and Venezuela have by these acts and by these activities *in the United States* removed billions of dollars *from the United States*. *See generally* Compl. The FSIA by its terms removes immunity for such claims when they are, as here, based on commercial activity in the United States or based on acts performed in the United States in connection with commercial activity. 28 U.S.C. § 1605(a)(2).

II. The Conduct Caused "Direct Effects" in the United States

Additionally, a foreign state is not immune from suit in any case in which the action is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The Complaint plainly alleges conduct that "cause[d] a direct effect in the United States." 28 U.S.C. § 1605(a)(2). An effect is direct when it is "an immediate

consequence of the defendant's . . . activity"; it need not be "substantial" or "foreseeable." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618-19 (1992).

PDVSA argues that the conduct complained of does not allege "direct effects" in the United States because the effects are somehow speculative, that no direct effect can result from transactions that *might* interfere with Plaintiffs' future efforts to enforce an eventual arbitral award. *See* Mot. at 14-16. PDVSA further argues that financial losses suffered abroad by foreign plaintiffs do not amount to sufficient "direct effects" in the United States. *See id.*

But PDVSA's preoccupation with the effects of its activity *on the Plaintiffs* is beside the point. The exception to immunity requires a direct effect in the United States, but "[n]othing in the FSIA requires that the 'direct effect in the United States' harm the plaintiff." *Cruise Connections Charter Mgmt. v. Canada*, 600 F.3d 661, 666 (D.C. Cir. 2010). For example, transferring (or not transferring) assets to or from the United States has a "direct effect" in the United States. *See, e.g.*, *Weltover*, 504 U.S. at 619 (rescheduling of payment obligations had a "direct effect" in the United States because "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming"); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 997 (10th Cir. 2007) ("[T]he Bank's transfer of $400,000 of Wil–Bao's funds from its account in the Bank's Lingbao sub-branch to the Utah bank had a direct effect in the United States—the Utah bank received $400,000 on Gaowa's behalf.").

The claims in this case are based upon transfers of billions of dollars within and from the United States, and upon pledges of the equity and against assets of U.S. companies, located in the United States. *See generally* Compl. These are direct effects in the United States within the meaning of 28 U.S.C. § 1605(a)(2).

III. The Court Has Personal Jurisdiction over PDVSA

Because the Court has subject matter jurisdiction over this matter and PDVSA does not dispute that it was properly served, the Court also has personal jurisdiction over PDVSA under the FSIA. *See, e.g.*, *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir. 1991) ("Under the FSIA . . . personal jurisdiction equals subject matter jurisdiction plus valid service of process.").

Conclusion

For the foregoing reasons, and for the reasons set forth in Plaintiffs' answering brief in opposition to the Delaware defendants' motion to dismiss (D.I. 15), Plaintiffs respectfully request the Court to deny the Motion.

Respectfully submitted,

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Dated: April 10, 2017

CERTIFICATE OF SERVICE

I, Garrett B. Moritz, hereby certify that on April 10, 2017, I caused the foregoing ***Plaintiffs' Answering Brief in Opposition to Petróleos De Venezuela, S.A.'S Motion to Dismiss*** to be served via electronic mail upon the following counsel of record:

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