

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

CRYSTALLEX INTERNATIONAL CORP.,

Plaintiff,

v.

PDV HOLDING, INC.,

Defendant.

C.A. No. 16-1007-LPS

**PLAINTIFF CRYSTALLEX INTERNATIONAL CORP.'S
ANSWERING BRIEF IN RESPONSE TO
DEFENDANT PDV HOLDING, INC.'S
MOTION TO CONSOLIDATE AND TO STAY**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
NATURE AND STAGE OF PROCEEDINGS	1
FACTUAL AND PROCEDURAL HISTORY	3
ARGUMENT	5
I. Crystalex Does Not Object To PDVH's Request To Consolidate Crystalex I and Crystalex II	5
II. Consolidation Should Not Stay Discovery in the Actions.....	6
CONCLUSION.....	9

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Aerocrine AB v. Apieron Inc.</i> , 2010 WL 1225087 (D. Del. Mar. 30, 2010)	8
<i>Easton & Co. v. Mutual Benefit Life Insurance Co.</i> , 1992 WL 448794 (D.N.J. Nov. 4, 1992)	6
<i>Krentz v. Township of Bloomfield</i> , 2010 WL 5479617 (D.N.J. 2010)	7
<i>Landis v. North America Co.</i> , 299 U.S. 248 (1936).....	9
<i>Waste Distillation Tech., Inc. v. Pan American Resources, Inc.</i> , 775 F.Supp. 759 (D. Del. 1991).....	6

NATURE AND STAGE OF PROCEEDINGS

Plaintiff Crystalex International Corp. (“Crystalex”) holds a \$1.4 billion arbitral award against the Bolivarian Republic of Venezuela (“Venezuela”). Consistent with public pronouncements of Venezuela’s former President, the late Hugo Chavez, Venezuela has long refused to make whole those entities, such as Crystalex, that had their assets expropriated for no consideration by the Venezuelan government. Unable to defeat Crystalex’s expropriation claim, and facing the prospect of a judgment of over a billion-dollars in Crystalex’s favor (and billions more owed to other creditors), Venezuela and its alter ego, Petróleos de Venezuela, S.A. (“PDVSA”), undertook efforts to remove assets from this country. Once an attempt to sell Venezuela’s and PDVSA’s largest U.S. asset, their indirect subsidiary CITGO Petroleum Corp. (“CITGO”) failed, PDVSA and Venezuela began to explore other alternatives in an attempt to deprive their creditors of any meaningful recovery for Venezuela’s wrongful acts.

One such effort, by which PDVSA directed its subsidiaries PDV Holding, Inc. (“PDVH”) and CITGO Holding, Inc. (“CITGO Holding”) to take on \$2.8 billion in debt in order to pay a \$2.8 billion dividend, for no consideration to hinder and delay creditors, is the subject of the action styled, *Crystalex International Corp. v. Petróleos de Venezuela, S.A., et al.*, No. 15-cv-1082-LPS (Crystalex I). This Court has already found that Crystalex stated a viable claim against PDVH for its role in PDVSA’s fraudulent transfer, and that if Crystalex were successful on its claims, this Court could enjoin PDVH from engaging in any further asset transfers.

In October 2016, shortly after the Court issued its decision in Crystalex I, PDVH, in connection with PDVSA, undertook further efforts to hinder and delay creditors, this time pledging 50.1% of its stock in CITGO Holding as collateral for new bonds issued not by PDVH, but by PDVSA. This transfer, to which PDVH has offered no defense other than that this Court

got it wrong in finding that PDVH could be liable for its role in the \$2.8 billion dividend transfer, is currently the subject of this action, *Crystallex International Corp. v. PDV Holding, Inc.*, Civil Action Number 16-1007-LPS (Crystallex II).

More recently, Crystallex has learned that PDVH, which told this Court that the Court was powerless to stop it from transferring assets until a judgment was entered, pledged the remaining 49.9% of its stock in CITGO Holding as collateral for an agreement between PDVH's sister company, PDVSA Petróleos, S.A. ("PPSA"), and an affiliate of Russian oil giant Rosneft. This transaction is the subject of the First Amended Complaint in Crystallex II, which is being filed concurrently with this response.

In an attempt to avoid having to answer for its conduct, PDVH has asked this Court to consolidate Crystallex I and Crystallex II and stay further proceedings until the Third Circuit has issued its decision on PDVH's interlocutory appeals of this Court's denial of the motion to dismiss. While Crystallex disagrees with PDVH's characterization of the facts and legal issues upon which the claims in the Crystallex cases are based, Crystallex agrees that there are overlapping issues, such that consolidation of the actions would lead to increased efficiencies in discovery and other pre-trial proceedings.

There is no reason that the amended complaint in Crystallex II cannot be answered immediately. If PDVH intends to move to dismiss the complaint, the briefing can be completed during the pendency of the Third Circuit appeal. Similarly, documents can be located and exchanged while the appeal is pending. That way, if, as expected, the Third Circuit upholds this Court's prior decision, the actions can move forward expeditiously. However, PDVH's attempt to use consolidation as a basis for further delay so that it (and its affiliates) can continue to dissipate assets is an obvious tactic and need not be tolerated. The mere possibility that this

Court’s decision could be modified or reversed does not warrant an indefinite stay of these proceedings, particularly in light of PDVH’s (and PDVSA’s) demonstrated willingness to hinder and delay creditors and continuing efforts to move assets out of the United States or otherwise drain those assets of their worth.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Crystalex filed suit against PDVSA, PDVH, and CITGO Holding on November 23, 2015, alleging civil conspiracy and violations of the Delaware Uniform Fraudulent Transfer Act (“DUFTA”). (Crystalex I D.I. 1) (Complaint). Crystalex, a creditor of Venezuela with a then-pending ICSID arbitration seated in Washington, D.C.,¹ alleged that Venezuela, knowing it would be held liable to Crystalex in the pending arbitration, took affirmative steps to hinder and delay any enforcement action in the United States by paying a dividend of \$2.8 billion from PDVH to PDVSA, and transferring that money out of the country. (*See generally id.*). Specifically, Crystalex alleged that PDVSA—an alter ego of Venezuela—directed CITGO Holding to borrow \$2.8 billion to issue a “dividend” to PDVH, which in turn issued a dividend of the \$2.8 billion out of the country to PDVSA (the “First Fraudulent Transfer”). (*See id.* at ¶¶ 53-61).

PDVH and CITGO Holding (together, the “Subsidiary Defendants”) moved to dismiss the complaint in Crystalex I on February 3, 2016, for failure to state a claim. (Crystalex I D.I. 8). On September 30, 2016, this Court issued a Memorandum Opinion, denying in relevant

¹ On April 4, 2016 the ICSID tribunal rendered its award, finding that Venezuela owed Crystalex approximately \$1.4 billion, plus post-award interest. A Canadian judgment issued in July 2016 and Crystalex’s petition to confirm that award is currently pending in the District Court for the District of Columbia. A decision in that action is expected shortly.

part PDVH’s motion to dismiss the DUFTA claim Crystalex asserted against it. (Crystalex I D.I. 34, 35).²

Within weeks of that decision, in which this Court observed that “[Subsidiary] Defendants offer no convincing explanation as to why, for example, PDVH could not at least be enjoined from further transfer of its assets out of the country” (Crystalex I D.I. 34 at 18), PDVH (again at PDVSA’s direction) engaged in a second fraudulent transfer to dodge Crystalex and other creditors, this time giving away a lien on 50.1% of its shares of CITGO Holding for no consideration to secure approximately \$3.367 billion of new debt of PDVH’s parent, PDVSA (the “Second Fraudulent Transfer”). (Crystalex II D.I. 1) (Complaint). Crystalex filed the complaint against PDVH in Crystalex II on October 28, 2016 alleging a second violation of DUFTA by PDVH to hinder the future enforcement of Crystalex I pending before this Court. (*Id.*)

At the same time that it was effecting the Second Fraudulent Transfer, PDVH filed a notice of appeal to the Third Circuit, (Crystalex I D.I. 40), based on the collateral order doctrine, and brought a motion for certification of an interlocutory appeal of this Court’s decision in Crystalex I under 28 U.S.C. § 1292(b). (Crystalex I D.I. 41). At the conclusion of oral argument on PDVH’s 28 U.S.C. § 1292(b) motion before the Court on December 20, 2016, this Court asked PDVH’s counsel whether PDVH would maintain the status quo pending its requested appeal. Dec. 22, 2016 Hr’g Tr. at 80:12-23. Counsel for PDVH could not commit to refrain from further asset transfers. *Id.* at 80:24-81:13. Indeed, PDVH’s counsel suggested that this Court was powerless to stop further asset transfer until a judgment was entered.

² Following its decision, and in light of PDVSA’s July 25, 2016 motion to dismiss, on October 25, 2016, this Court stayed discovery in Crystalex I pending resolution of PDVSA’s motion to dismiss that action for lack of subject matter and personal jurisdiction, and for failure to state a claim under DUFTA. (Crystalex I D.I. 39).

What PDVH failed to mention at that time (and what Crystalex only recently learned) was that PDVH had already pledged the remaining 49.9% of its shares in CITGO Holding at the time of the Hearing. PDVH pledged its remaining unencumbered shares in CITGO Holding to guarantee the obligations of a third party, PPSA, to repay Rosneft Trading S.A. (“Rosneft”), which is ultimately controlled by the Russian state (the “Third Fraudulent Transfer”), the \$1.5 billion that Rosneft reportedly loaned to PDVSA. (*See* Crystalex I D.I. 54, Ex. A (Rosneft UCC-1 financing statement dated November 30, 2016)). PDVH did not receive any consideration for its pledge of roughly half of its assets. Indeed, PDVSA has stated that this lien, like the Second Fraudulent Transfer, was merely a “leverage[ing]” of **PDVSA’s** assets.³

Based on its discovery of the Third Fraudulent Transfer, contemporaneous with its response, Crystalex is filing an amended complaint in this action, which adds additional fraudulent transfer claims based on PDVH’s lien in favor of Rosneft and adds additional parties to the action in order to allow the Court to grant full relief, including the lien holders and PDVSA, which admitted to leveraging “itself in October” in connection with the bond swap and again in connection with the Rosneft financing. *Id.*

ARGUMENT

I. Crystalex Does Not Object to PDVH’s Request to Consolidate Crystalex I and Crystalex II

In its opening brief, PDVH presents a litany of purported overlapping issues between Crystalex’s claims in Crystalex I and its claims in Crystalex II. While Crystalex does not agree with PDVH’s characterization of the legal and factual issues presented in either action, it does agree that, as currently alleged, certain issues are present in both Crystalex I and Crystalex

³ See PDVSA Press Release, “PDVSA maintains full ownership of Citgo,” available at http://www.pdvsa.com/index.php?tpl=interface.en/design/salaprensa/readnew.tpl.html&news_id_obj_id=14432&newsid_temas=1.

II—the first and foremost of which is whether Crystalex is a creditor of PDVSA. In light of these overlapping issues, Crystalex agrees that there are efficiencies that could be gained from coordinating the litigation of Crystalex I and Crystalex II.⁴

Accordingly, Crystalex does not oppose the prong of PDVH’s motion that seeks to consolidate (for pretrial purposes) Crystalex I and Crystalex II pursuant to Federal Rule of Civil Procedure 42(a), which permits a district court to consolidate two or more actions that “involve a common question of law or fact” when “consolidation would facilitate the administration of justice.” *Waste Distillation Tech., Inc. v. Pan American Resources, Inc.*, 775 F.Supp. 759, 761 (D. Del. 1991). Though district courts have “broad discretion” when determining whether consolidation is appropriate, a court should weigh “the interests of judicial economy against the potential for new delays, expense, confusion, or prejudice.” *Easton & Co. v. Mutual Benefit Life Insurance Co.*, 1992 WL 448794, at *4 (D.N.J. Nov. 4, 1992) (citing *Ellerman Lines, Ltd. V. Atlantic & Gulf Stevedores, Inc.*, 339 F.2d 673 (3d Cir. 1964)).

II. Consolidation Should Not Stay Discovery in the Actions

The true reason for PDVH’s request to consolidate is not efficiency but delay. As its motion papers make clear, PDVH seeks consolidation to bring the fraudulent transfer claims alleged in Crystalex II, which PDVH has thus far bent over backwards to avoid answering, within the discovery stay currently in place in Crystalex I, and then leverage that stay into a

⁴ To be clear, Crystalex does not concede that it must be entitled to any particular relief from PDVSA for PDVH to be liable for its role in the fraudulent transfer of PDVSA’s assets, whether in the form of the dividend at issue in Crystalex I or “PDVSA[’s] leverag[ing of] itself in October using as collateral 50.1% of Citgo for the bond swap operation” at issue in Crystalex II. See PDVSA Press Release, “PDVSA maintains full ownership of Citgo,” available at http://www.pdvsa.com/index.php?tpl=interface.en/design/salaprensa/readnew.tpl.html&news_id_obj_id=14432&newsid_temas=1

complete stay of any proceedings on the Second (or Third) Fraudulent Transfers.⁵ Using consolidation to create delay is wholly improper. *See, e.g., Krentz v. Township of Bloomfield*, 2010 WL 5479617 (D.N.J. 2010) (denying consolidation when it “would only act as a delay of the [] proceedings”). PDVH should not be allowed any more time to transfer away its assets.

There is no reason to delay Crystalex II. While PDVH is correct that stays are discretionary, they are not the norm. Based on PDVH’s comments at the December 22, 2016 hearing, it appears that PDVH’s only defense to the fraudulent transfer alleged in Crystalex II is that PDVH is not a debtor. *See Dec. 22, 2016 Hr’g Tr. at 77:19-78:2.* If so, PDVH should answer the complaint and allow the case to proceed to discovery. Similarly, if PDVH has some other, yet unmentioned, legal argument, there is no need to delay in asserting and resolving any such defense. Crystalex does not believe it is likely that the Third Circuit overturn this Court’s well-reasoned decision denying PDVH’s motion to dismiss. In any event, the mere possibility that there may be a change in law in the future does not justify a failure to even respond to the complaint, especially where, as here, the defendant has demonstrated not only a willingness but an active desire to frustrate any recovery by the plaintiff. *Cf Aerocrine AB v. Apieron Inc.*, 2010 WL 1225087, at *1 (D. Del. Mar. 30, 2010) (denying motion to stay where stay would allow movant to “continue infringing” non-movants patents and “delay in resolution of the litigation”).

Since this Court issued its decision denying PDVH’s motion to dismiss the fraudulent transfer claim against it, PDVH has allowed liens to be placed on all of its shares of CITGO Holding for no consideration. The first of those transactions—the encumbrance of 50.1% of PDVH’s shares in CITGO Holding as security for debt offerings of its parent, PDVSA—is the

⁵ Per this Court’s December 27, 2016 order certifying its decision on PDVH’s motion to dismiss for interlocutory appeal, whether the discovery can or should stay in place in Crystalex I is the subject of a joint status report that is being filed in that action today.

subject of the complaint filed in Crystalex II on October 28, 2016. The second transaction, the encumbrance, without consideration, of PDVH's remaining 49.9% of its shares in CITGO Holding as security for financing provided by Rosneft Trading, S.A., a subsidiary of Russian oil giant Rosneft Oil Company, to another company was only recently discovered. This transfer, which by PDVSA's admission was a leveraging of PDVSA's assets, is the subject of claims set forth in the concurrently-filed amended complaint in Crystalex II. Considering the lengths to which PDVH has gone to avoid the Court's suggestion that it could enjoin PDVH from further transferring assets, (Crystalex I D.I. 34 at 8), and PDVH's bold statement at the December 22, 2016 hearing that this Court is powerless to stop it from further transferring its assets, further delay could have catastrophic effects on Crystalex's ability to collect on its \$1.4 billion arbitration award or any judgment in Crystalex I.

For this reason, Crystalex respectfully requests that this Court lift the stay of discovery in Crystalex I as soon as the Court's schedule permits and further that the Court order that discovery be expedited so that a final judgment may be reached before PDVH or PDVSA are able to fully dissipate their assets in an attempt to render meaningless any judgment issued by this Court. Though stays are generally within the discretion of the court, the Supreme Court set down the rule that "the suppliant for a stay must make out a clear case of hardship or inequity in being required to for forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis v. North America Co.*, 299 U.S. 248, 255 (1936).

As set out in the Joint Status Report dated January 4, 2017, Crystalex is not asking for unbounded discovery pending the Third Circuit appeal. Rather, Crystalex seeks document discovery concerning PDVH's fraudulent transfers. (See Crystalex I D.I. 56 (Joint Status Report)). If document discovery is completed before the Third Circuit has issued its ruling, the

parties can seek the Court's guidance as to how best to proceed at that time. But delay is only to PDVH's advantage and Crystalex's detriment. PDVH has not satisfied its burden of proving "a clear case of hardship or inequity" by moving forward with such limited discovery, especially since this Court already denied PDVH's motion to dismiss in respect of the first fraudulent transfer in Crystalex I. Rather, it is Crystalex that will be prejudiced if the discovery does not move forward, given PDVH's unabashed admission to this Court that it will not refrain from further asset transfers.

CONCLUSION

For the foregoing reasons, Crystalex does not oppose PDVH's request to consolidate the pending action, but asks that the Court reject any attempt by PDVH (or any other Defendant) to use consolidation to delay responding to the unanswered claims or to delay discovery on claims that this Court has found should proceed.

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