

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

**GOVERNMENT OF THE UNITED
STATES VIRGIN ISLANDS,**

Plaintiff,

v.

HESS CORPORATION,

Defendant.

Removed from:
SUPERIOR COURT OF THE VIRGIN
ISLANDS
SX-15-CV-358

CIVIL NO. 2015-66

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that Defendant Hess Corporation (“Hess” or “Defendant”) hereby removes the above-captioned action from the Superior Court of the Virgin Islands to the District Court of the Virgin Islands. This action is removable pursuant to 28 U.S.C. §§ 1452(a) and 1334(b) because it is “related to” the bankruptcy proceedings of HOVENSA L.L.C. (“HOVENSA”), Case No. 1:15-bk-10003-MFW, and should be referred to the Bankruptcy Division pursuant to 28 U.S.C. § 157(a). This action is further removable pursuant to 28 U.S.C. § 1441, and 48 U.S.C. § 1612(b) as a civil action over which there is original federal jurisdiction.

INTRODUCTION

1. On Sunday, September 13, 2015—less than 48 hours before HOVENSA filed for bankruptcy protection in this Court—the Government of the United States Virgin Islands (the “GVI”) filed this lawsuit against Hess in the Virgin Islands Superior Court. While the GVI’s lawsuit names only Hess as a defendant, the party with the most at stake in this lawsuit, and the party whose conduct this lawsuit squarely attacks, is HOVENSA. The central allegation in the complaint, attached hereto as Exhibit A (the “Complaint”), is that HOVENSA breached its 1998 agreement with the GVI (the “Third Extension Agreement”) by closing its St. Croix refinery and

subsequently marketing it as an oil storage terminal. (Compl. ¶¶ 194, 227, 236.) Based on the allegedly improper closing of the refinery, the GVI claims that Hess is liable for billions of dollars in damages—damages for which Hess has an automatic and immediate right of indemnification from HOVENSA.

2. In view of Hess’s indemnification right against HOVENSA, Hess respectfully submits that this Court has jurisdiction over this proceeding under 28 U.S.C. § 1334(b) as “related to” the HOVENSA bankruptcy case, and removal is proper under 28 U.S.C. § 1452(a). Moreover, pursuant to 28 U.S.C. § 157(a), Hess respectfully submits that this proceeding should be referred to the Bankruptcy Division.

3. Even if this Court does not refer this proceeding to the Bankruptcy Division, this Court has subject-matter jurisdiction over this proceeding for two independent reasons: (1) the Complaint attacks the validity of HOVENSA’s consent decree (the “Consent Decree”) with the Environmental Protection Agency (the “EPA”), which remains under this Court’s jurisdiction; and (2) the Virgin Islands passed legislation giving this Court jurisdiction over the dispute raised in the Complaint.

FACTUAL AND PROCEDURAL BACKGROUND

4. The HOVENSA St. Croix refinery was originally constructed around 1965 by Hess Oil Virgin Islands Corp. (“HOVIC”). Since 1998, HOVENSA has owned, operated, and maintained the refinery. HOVENSA, in turn, is jointly owned and managed by HOVIC and PDVSA V.I., Inc., who are presently providing Debtor-in-Possession financing to HOVENSA during its restructuring.

5. The GVI concedes that the HOVENSA St. Croix refinery operated successfully for decades, becoming “the largest refinery in the Western Hemisphere” and “result[ing] in the significant expansion and stabilization of the Territory’s economy.” (Compl. ¶¶ 43, 46.)

HOVENSA is an oil-fueled refinery, however, while most of its competitors are natural gas-fueled refineries. When U.S. natural gas prices began to decrease and oil prices remained relatively high, HOVENSA was unable to compete in the marketplace.¹ For the three-year period from 2009-2011, HOVENSA incurred operating losses of roughly \$1.3 billion.

6. In January 2012, HOVENSA announced plans to idle its refinery operations. HOVENSA ceased refining operations in February 2012, and thereafter, until the facility was completely idled in February 2015, HOVENSA operated the facility only as an oil storage terminal.²

7. In response to the closure of HOVENSA's refining operations, the GVI repeatedly threatened to sue HOVENSA (and others), arguing that HOVENSA had an obligation to continue its refinery operations until at least 2022. For example, on April 24, 2015, the GVI stated in tax cases pending before this Court that it intended to pursue claims against HOVENSA "arising out of the abrupt, premeditated, and wrongful shutdown of the St. Croix refinery in early 2012." *Hess Oil Virgin Islands Corp. v. The United States Virgin Islands*, Case No. 3:14-cv-0116-CVG-RM, *Gov't Mt'n to Consolidate Tax Litig.*, at 5 (D.V.I. April 24, 2015 [ECF No. 16]).

8. Weeks later, at a May 12, 2015 hearing in those same tax cases, the GVI stated that it had publicly "announced that it [was] contemplating filing a large lawsuit against Hess and PDVSA and HOVIC and **HOVENSA** and others over the closure of the refinery[,] and is going to be seeking significant damages from them" *Id.*, May 12, 2015 Hr'g Tr. at 56:10-22 (emphasis added). And on June 18, 2015, the GVI asserted that it claims, as purported grounds

¹ *In re HOVENSA L.L.C.*, Case No. 1:15-bk-10003, *Certification of Thomas E. Hill in Support of Chapter 11 Petition and First Day Motions*, ¶ 36 (Bankr. D.V.I. Sept. 15, 2015 [ECF No. 3]).

² *Id.* ¶¶ 15, 51.

for set-off in the tax proceedings, “a variety of breaches by *HOVENSA* of its obligations under long-term contracts with the Government, including in particular damages arising from the improper closure of the HOVENSA refinery in 2012, ten years before the contract was set to expire.” *Id.*, *Gov’t Discovery Mem.*, at 3 (June 18, 2015 [ECF No. 50]) (emphasis added).

9. By September 8, 2015, the GVI knew that HOVENSA was about to file for bankruptcy. Recognizing that HOVENSA’s bankruptcy filing was imminent, the GVI hastily filed its Complaint on September 13, 2015, the Sunday immediately before HOVENSA’s Tuesday bankruptcy filing. And in a transparent attempt to circumvent this Court’s jurisdiction, the GVI did not name HOVENSA as a defendant; instead, the GVI named only Hess.

10. Despite the GVI’s pleading tactic, even a cursory review of the Complaint makes clear that its lawsuit is predicated almost entirely on HOVENSA’s conduct and will directly affect HOVENSA’s restructuring. For example, the Complaint alleges that:

- HOVENSA breached the Third Extension Agreement by ceasing refinery operations at the St. Croix facility (Compl. ¶¶ 205-06);
- HOVENSA engaged in a criminal conspiracy to defraud its creditors (*id.* ¶¶ 255, 259(a));
- HOVENSA engaged in non-arm’s-length transactions with corporate affiliates (*id.* ¶ 259(h) and (i));
- HOVENSA released chemical pollutants into neighborhoods surrounding the refinery (*id.* ¶ 173);
- HOVENSA reduced its inventory, rendering it unable to fulfill its contractual obligations to the GVI (*id.* ¶ 259(b));
- HOVENSA deferred necessary maintenance at the refinery (*id.* ¶ 172);
- HOVENSA entered into the Consent Decree with the EPA, requiring it to spend \$700 million in order to continue its refinery operations (*id.* ¶259(c));
- HOVENSA used nearly all of its available cash to buy back \$356 million in bonds, rendering itself insolvent (*id.* ¶ 198);

- HOVENSA threatened to file for bankruptcy protection if the GVI would not grant it contractual concessions (*id.* ¶ 259(g));
- HOVENSA stopped providing discounted fuel to the GVI (*id.* ¶ 197);
- HOVENSA stopped providing training and educational support in the Virgin Islands (*id.* ¶ 262(c));
- HOVENSA is no longer providing real estate or other tax revenue to the GVI (*id.* ¶ 262(a) and (d)); and
- HOVENSA is occupying land owned by the GVI, thereby depriving the GVI of the use of those lands (*id.* ¶ 262(h)).

11. The significance of this case to HOVENSA does not end there. In addition to money damages, the Complaint seeks to have “Defendants [*sic*] divested of their interest in the lease of the Government-owned submerged lands on which certain refinery operations are or have been conducted” (*Id.* at 68.) The GVI repeatedly acknowledges that “The Government leased [the] submerged land to **HOVENSA**” and that “Government-owned submerged lands are currently occupied by **HOVENSA**.” (*Id.* ¶¶ 136, 262(h), 271(e) (emphasis added).) The GVI’s direct challenge to a lease held by HOVENSA clearly implicates property of HOVENSA’s bankruptcy estate.

12. The Complaint purports to allege numerous torts and crimes committed directly by **HOVENSA**. Specifically, the GVI alleges that HOVENSA participated in a business enterprise that conducted “a pattern of criminal activity” for “the purpose of defrauding the Government.” (*See id.* ¶¶ 255-56.) The Complaint further alleges that HOVENSA stopped “providing fuel oil bids to WAPA” (the Virgin Islands Water and Power Authority) that were supposedly “required” under its contract with the GVI. (*Id.* ¶ 197.) And the Complaint repeatedly alleges that HOVENSA made fraudulent transfers to Hess, (*id.* ¶ 259(a)-(i)), that its entry into the Consent Decree violated territorial and federal law, (*id.* ¶ 259(c)), and that it breached its obligations under the Third Extension Agreement with the GVI (*id.* ¶¶ 276, 278,

292-93). These and other allegations, if proven, would cause HOVENSA to be liable directly to the GVI.

13. The GVI, however, assiduously avoids seeking damages from HOVENSA; instead, the GVI seeks damages only from Hess, which is two corporate levels removed from HOVENSA. Hess is the ultimate parent of HOVIC, which, in turn, is one of two joint 50% owners of HOVENSA (along with PDVSA V.I., Inc.).

14. The fact is that irrespective of what entity is named in the caption of the case, HOVENSA is the party with the greatest exposure in the GVI's lawsuit. That is because Hess has an automatic, immediate, and non-contingent contractual right to indemnification from HOVENSA for all liabilities relating to the HOVENSA St. Croix refinery, including any liability resulting from the GVI's lawsuit. That indemnity right is contained in HOVENSA's own operating agreement (the "LLC Agreement"), which states:

The Company³ shall, to the fullest extent permitted by Legal Requirements, indemnify, hold harmless and defend the Members *and their Affiliates*,⁴ and their respective directors, officers, employees, consultants, shareholders, members, agents and representatives, and all successors and assigns of the foregoing, against and *from any Damages*⁵ (*including any Damages resulting from a claim asserted by a third party*) *arising out of the Company Business*,⁶ except to the extent (i) such Damages are incurred by such indemnified party in its capacity as a party to any agreement with the Company other than this Agreement or (ii) that it is finally judicially determined that such Damages arose out of or were related to actions or omissions of the indemnified Member, its Affiliates or any of their respective officers, directors or employees (acting in their capacities as such),

³ The LLC Agreement defines the "Company" as HOVENSA L.L.C. (Ex. E, LLC Agreement at 1.)

⁴ The LLC Agreement defines "Affiliates" to include Hess Corporation under the name it used prior to its 1996 name change: the Amerada Hess Corporation. (Ex. F, LLC Agreement Glossary at B-1 (defining Affiliate to include "Hess"), B-11 (defining Hess as "Amerada Hess Corporation").)

⁵ The LLC Agreement defines "Damages" to include "all obligations, liabilities, damages, injuries, fines, liens, penalties, deficiencies, losses, Judgments, settlements, costs and expenses." (*Id.* at B-7.)

⁶ The LLC Agreement defines "Company Business" to include "own[ing] and operat[ing] the Assets and the Refinery Business" (among other activities). (Ex. E at 2-3.)

constituting (a) bad faith, fraud, intentional violation of law or intentional misconduct or (b) a Material Breach. The Company shall reimburse any Person entitled to indemnity under this Section for its legal and other expenses incurred in connection with defending any claim (other than a claim by the Company or a Member) with respect to such Damages if such Person shall agree to reimburse promptly the Company for such amounts if it is finally judicially determined that such Person was not entitled to indemnity hereunder.

(Ex. E (LLC Agreement) § 10.1(b) (emphasis added).)⁷

PROCEDURAL REQUIREMENTS FOR REMOVAL

15. This lawsuit was filed on September 13, 2015, and Hess was served on September 18, 2015. Since it was commenced only weeks ago, nothing of substance has transpired in this action. No proceedings in this case have taken place, and discovery has not commenced.

16. A copy of the Summons and Complaint served upon Hess is annexed hereto as Exhibit A. Attached as Exhibit B is the Notice of Appearance of Joel Holt. Attached hereto as Exhibit C is Plaintiff's Notice of Service of the Complaint. Attached hereto as Exhibit D is Defendant's Notice of Negotiated Enlargement of Time. Defendant has not received service of any other process, pleadings, motions, or orders in the Superior Court.

17. For the avoidance of doubt, this removal notice is filed within 30 days of service and is timely under 28 U.S.C. §§ 1446(b)(1) & 1452(a) and Fed. R. Bankr. P. 9027.

18. The Superior Court of the United States Virgin Islands is within the geographical boundaries of the District Court of the Virgin Islands, and thus the Complaint is properly removed to this Court.

⁷ Due to the confidentiality requirements of the LLC Agreement, the LLC Agreement and the Glossary have been filed in redacted and excerpted form to avoid the need for a motion to file under seal. If the Court or any party so requests, Hess will provide the entire LLC Agreement and Glossary under seal.

19. This is not a “core” proceeding under 28 U.S.C. § 157(b) or Federal Rule of Bankruptcy Procedure 9027. Hess consents to entry of a final order or judgment by the Bankruptcy Court.⁸

THIS COURT HAS “RELATED TO” BANKRUPTCY JURISDICTION OVER THE COMPLAINT

20. Federal courts have jurisdiction over all civil proceedings arising under Title 11, or arising in or “related to” cases under Title 11. *See* 11 U.S.C. § 1334(b). Under the test articulated by the Third Circuit in *Pacor v. Higgins (In re Pacor, Inc.)*, a civil proceeding is “related to” the bankruptcy if the outcome of the proceeding “could conceivably have any effect on the estate being administered in bankruptcy.” 743 F.2d 984, 994 (3d Cir. 1994). The civil proceeding need not be against the debtor or the debtor’s property; instead, it is sufficient if the “outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.” *Id.*

21. The Third Circuit repeatedly has held that “contractual indemnity claims can have an effect on a bankruptcy estate and thus provide a basis for the exercise of ‘related to’ jurisdiction.” *Belcufine v. Aloe*, 112 F.3d 633, 636 (3d Cir. 1997) (Alito, J.); *see also In re Exide Techs*, 544 F.3d 196, 217 (3d Cir. 2008) (“The proofs of claim for indemnification against the debtor merely demonstrate that the claims against the non-debtor Exide entities are ‘related to’ Exide’s bankruptcy case as they ‘could conceivably’ have an effect on the bankruptcy estate.”); *In re Allegheny Health Educ. & Research Found.*, 383 F.3d 169, 180 n.7 (3d Cir. 2004)

⁸ While Hess consents to the Bankruptcy Court’s subject-matter jurisdiction, Hess preserves any and all defenses in removing this action, including but not limited to the defense of lack of personal jurisdiction. *See, e.g., Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 157 n.4 (2d Cir. 1996) (“Removal does not waive any Rule 12(b) defenses.”); *Dunn, By & Through Tatum v. Skate 22, Inc.*, No. CIV. A. 97-2373, 1997 WL 786439, at *2 (E.D. Pa. Nov. 24, 1997) (“Removal, in itself, does not constitute a waiver of the right to object to lack of jurisdiction that could have been exercised in the state court.”).

“related-to” jurisdiction existed over adversary proceeding where an “asset purchase agreement require[d] [debtors] to defend [a third party] or else pay for its defense of third-party claims covered by the indemnity agreement”); *Halper v. Halper*, 164 F.3d 830, 838 (3d Cir. 1999) (finding “related to” jurisdiction over a dispute involving guarantee of a corporate debtor’s obligations by a non-debtor insider, where the guarantee was provided pursuant to indemnity agreement).⁹

22. In determining whether an indemnity claim gives rise to “related to” jurisdiction, “two questions must be asked: (1) does the action against the party seeking indemnification automatically result in debtor’s liability for indemnification; and (2) is a subsequent lawsuit against the debtor required prior to a determination of indemnification? If the answer to the first question is ‘yes’ or to the second ‘no,’ then automatic indemnification creates ‘related to’ jurisdiction. When indemnification arises independent of any additional legal actions, the case is ‘related to’ the bankruptcy proceeding.” *In re W.R. Grace & Co.*, 412 B.R. 657, 667-68 (D. Del. 2009) (citations omitted).

23. Here, HOVENSA’s LLC Agreement clearly provides that HOVENSA must indemnify Hess “from any Damages (including any Damages resulting from a claim asserted by a third party) arising out of the Company Business” (Ex. E, LLC Agreement § 10.1(b) (emphasis added).) Hess thus has an immediate right to indemnification from HOVENSA for

⁹ See also *In re SemCrude, L.P.*, 428 B.R. 82, 100 (Bankr. D. Del. 2010) (finding “related to” jurisdiction based on debtors’ contractual obligation to indemnify); *In re W.R. Grace & Co.*, 412 B.R. at 667 (“When indemnification arises independent of any additional legal actions, the case is ‘related to’ the bankruptcy proceeding.”); *In re G-I Holdings Inc.*, 420 B.R. 216, 277 (D.N.J. 2009) (holding that IRS tax claims against non-debtor affiliates were “related to” bankruptcy proceedings because the affiliates had a contractual right to indemnity from the debtor for any amounts paid to the IRS); *In re HQ Global Holdings, Inc.*, 293 B.R. 839, 844 (Bankr. D. Del. 2003) (Walrath, J.) (holding that related-to jurisdiction existed over third-party lawsuit where “determination of the underlying issue” in the third-party suit would determine whether defendant had an indemnification claim against the debtor); *Davis v. Merv Griffin Co.*, 128 B.R. 78, 98-99 (D.N.J. 1991) (finding “related to” jurisdiction where debtor corporation’s employee filed state court suit against second corporation and individual who allegedly controlled the debtor corporation, where defendants in state court suit held a contractual right of indemnification against the debtor corporation).

damages and defense costs resulting from the claims asserted in the GVI's lawsuit. Indeed, HOVENSA's LLC Agreement expressly defines Hess as one of the "Affiliates" that HOVENSA must indemnify, (Ex. F at B-1 (defining "Affiliates" to include "Hess"), B-11 (defining "Hess")), and the GVI's claims plainly seek damages arising out of HOVENSA's "Company Business," which includes, among other things, owning and operating the HOVENSA St. Croix refinery (*id.* at B-6).

24. Significantly, HOVENSA's indemnity obligation to Hess is non-contingent. There is no need for Hess to bring a subsequent action against HOVENSA to obtain a right to indemnification. Instead, under the LLC Agreement, Hess's indemnification right is immediate and automatic.

25. In view of this indemnification provision, the outcome of the lawsuit between the GVI and Hess "could have an immediate effect on the bankruptcy estate" of HOVENSA. *In re Allegheny Health Educ. & Research Found.*, 383 F.3d at 180 n.7. Thus, this Court has jurisdiction over the GVI's lawsuit under 28 U.S.C. § 1334(b) as it is related to the HOVENSA bankruptcy case.

26. Moreover, this Court is authorized to refer this proceeding to the Bankruptcy Division pursuant to 28 U.S.C. § 157(a), which provides that: "Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." Accordingly, Hess respectfully removes this matter and requests referral to the Bankruptcy Division.

EVEN IF NOT REFERRED TO THE BANKRUPTCY DIVISION, THIS COURT HAS SUBJECT-MATTER JURISDICTION OVER THE GVI'S LAWSUIT

27. Putting aside the “related to” jurisdiction justifying referral of this matter to the Bankruptcy Division, this Court has subject-matter jurisdiction over this action for two additional and independent reasons.

28. *First*, this Court specifically retained jurisdiction to adjudicate any and all disputes relating to the 2011 Consent Decree among the EPA, the Virgin Islands and HOVENSA. *United States v. HOVENSA L.L.C.*, No. 1:11-cv-00006, *Consent Decree*, ¶ 190 (D.V.I. Jan. 26, 2011 [ECF No. 3]) (“Consent Decree”). “It is well settled that a federal court has the inherent power to enforce and to consider challenges to settlements entered into in cases originally filed therein.” *Fox v. Consol. Rail Corp.*, 739 F.2d 929, 932 (3d Cir. 1984) (citation omitted). This Court, having entered the Consent Decree, has inherent jurisdiction to “enforce and consider challenges” to this order. *See id.*; *see also Del. Valley Citizens’ Council for Clean Air v. Pennsylvania*, 755 F.2d 38, 39 (3d Cir. 1985) (“Only the federal courts have the power to determine the authority of federal court litigants, bringing suit under federal law, to enter into consent decrees approved by a federal court.”).

29. Here, the Complaint directly challenges the validity of the Consent Decree, alleging that it was “another orchestrated step by Hess Corp towards turning the refinery into an oil storage facility.” (Compl. ¶ 185.) The GVI further alleges that the Consent Decree was “a violation of territorial and federal law,” (*id.* ¶ 259), and constituted “intentional interference with existing contractual relations” (*id.* ¶ 283). These allegations challenge the fundamental legality of the Consent Decree, which is precisely the type of dispute over which this Court specifically retained jurisdiction when the Consent Decree was entered. Consent Decree at 124-25 (“The Court shall retain jurisdiction over this matter for the purposes of . . . adjudicating all disputes

between the United States, the Virgin Islands and HOVENSA that may arise under the provisions of this Consent Decree until the Decree terminates . . .”).

30. *Second*, this Court has subject-matter jurisdiction over this proceeding because the Virgin Islands legislature specifically vested this Court with jurisdiction to hear disputes arising from the contract that lies at the heart of the Complaint. In 1965, the Virgin Islands entered into an agreement (the “Incentive Agreement”) pertaining to the creation and operation of the HOVENSA St. Croix refinery. The Incentive Agreement was then ratified as Act 1524 by the Virgin Islands legislature. Act No. 1524, September 1, 1965 (V.I.). Act 1524 provides, in pertinent part, that any disputes arising out of or relating to the agreement may be litigated “in the District Court of the Virgin Islands, or any other court of the United States having original or appellate jurisdiction thereof.” *Id.* § 11. Two acts passed in 1998 and 2013 extended certain terms of the Incentive Agreement, including those providing this Court with jurisdiction over related disputes. Act No. 6231, May 18, 1998 (V.I.); Act No. 7566, November 5, 2013 (V.I.).

31. This legislation vested this Court with jurisdiction over the Complaint. The Revised Organic Act grants the District Court plenary original jurisdiction over “all causes in the Virgin Islands the jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands.” 48 U.S.C. § 1612(b). Accordingly, this Court has original jurisdiction over the removed action pursuant to 48 U.S.C. § 1612(b).

32. Thus, even if this matter is not referred to the Bankruptcy Division as “related to” the HOVENSA bankruptcy, this Court has subject-matter jurisdiction over this proceeding and removal is proper.

Respectfully submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

/s/ Chad C. Messier

Dated: October 16, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2015, I electronically filed the foregoing **Notice of Removal** with the Clerk of the Court using the CM/ECF system, and served the same upon the following counsel of record who have not yet noticed their appearances in this case by email and placing the same in the Unites States mail, postage prepaid, addressed to:

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