PUBLIC

Court File No. CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

CRYSTALLEX INTERNATIONAL CORPORATION

Applicant

MOTION RECORD
OF CRYSTALLEX INTERNATIONAL CORPORATION

June 21, 2021

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PUBLIC

Court File No. CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

CRYSTALLEX INTERNATIONAL CORPORATION

Applicant

I N D E X

PUBLIC

Court File No. CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CRYSTALLEX INTERNATIONAL CORPORATION

CRYSTALLEX INTERNATIONAL CORPORATION

Applicant

NOTICE OF MOTION

TAKE NOTICE THAT the Applicant, Crystallex International Corporation ("**Crystallex**" or the "**Company**"), will make a motion to a Judge on a date to be scheduled by the Commercial List, by way of videoconference due to the COVID-19 crisis via Zoom at Toronto.

PROPOSED METHOD OF HEARING:

The motion is to be heard orally.

THE MOTION IS FOR AN ORDER:

(a) sealing or otherwise prohibiting the release to the public of the unredacted version of the Monitor's Thirty-Fifth Report and the Monitor's Thirty-Sixth Report, including certain cash balances and cash-flow information and

forecasts of the Company as more fully described in the Affidavit of Robert Fung dated May 21, 2021 (the "**Financial Information**"):

(b) sealing the Affidavits of Robert Fung sworn October 28, 2020 and May 21, 2021, along with the transcript of any cross-examination thereon;

(c) sealing the Thirty-Seventh Report, or any other reports of the Monitor filed in connection with this motion;

(d) sealing such further evidence or documents filed (including the transcripts of any cross-examinations on such evidence) and the written submissions on this motion;

(e) to the extent necessary, abridging the time for, and validating the service of the motion such that it is properly returnable;

(f) such further and other relief as counsel may request and this Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

A. Background

2. Crystallex engaged in the business of exploring and developing the Las Cristinas gold project in Venezuela until 2011, when the Venezuelan government expropriated the mine and purported to terminate the mining operation contract that gave rise to the Company's mining rights;

3. On December 23, 2011, an order was made granting Crystallex protection from its creditors under the *Companies' Creditors Arrangement Act* ("**CCAA**"), and

appointing Ernst & Young Inc. as the monitor. Crystallex's only significant asset was its rights against the government of Venezuela in respect of the expropriation;

4. With financial support from the DIP Lender, Crystallex arbitrated the issue of the expropriation before an arbitral tribunal under the Additional Facility of International Centre for the Settlement of Investment Disputes of the World Bank ("**ICSID**") against Venezuela. On April 4, 2016, after five years of arbitration, the tribunal released its decision and final award, ruling that Venezuela was obliged to pay damages to Crystallex in the amount of US$1.202 billion, plus interest (the "**Award**"). The Award was the single largest ICSID award ever issued at the time;

5. The Award has been recognized and enforced as a final judgment against Venezuela in the United States. At present, the Company is in litigation in Delaware to approve a sales process that would permit Crystallex to enforce its judgment by way of a writ of attachment against assets of Venezuela in the United States (the "**Writ**"), specifically shares which control CITGO Petroleum Corp., a major U.S. oil refiner and distributor. Successful execution of the Writ would see Crystallex recover on its Award, and currently represents the best (and perhaps the only realistic) prospect for recovery to the Company's stakeholders;

B. Harm to Crystallex and Its Stakeholders by Disclosure of the Financial Information

6. While Crystallex's enforcement efforts have been highly successful to date, Venezuela will continue to take every step possible to obstruct Crystallex's efforts, particularly as it relates to enforcement of the Writ. Crystallex's enforcement efforts are further complicated by recent U.S. government sanctions that require Crystallex obtain a

license from the Office of Foreign Assets Control of the U.S. Treasury Department to enforce its judgment;

7. A key component of Crystallex's U.S. enforcement strategy has been preventing Venezuela and other competing creditors from understanding Crystallex's financial position and using that information in litigation or otherwise to obstruct Crystallex's enforcement efforts;

8. Disclosure of the Financial Information represents a significant risk to the Company's enforcement efforts and would unduly prejudice the Company;

9. The making of an order preventing disclosure of the Financial Information would not unduly prejudice the Company's creditors, who

(a) have access to certain historical financial information regarding Crystallex;

(b) are able to obtain further information at any time through execution of a non-disclosure agreement; and

(c) in any event have participated fully in the Canadian CCAA proceedings;

10. The order sought is necessary in order to prevent a serious risk to the commercial interests of Crystallex and its stakeholders, and reasonably alternative measures will not prevent the risk;

11. The salutary effects of the confidentiality order outweigh its deleterious effects, including the public interest in open and accessible court proceedings;

C. Other Grounds

12. Section 10(3) of the CCAA;

13. The *Rules of Civil Procedure*, including rules 1.04(1), 37.01 and 37.02(1); and

14. Such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(a) the Affidavit of Robert Fung sworn May 21, 2021; and

(b) Such further and other materials as counsel may advise and this Court may permit.

May 21, 2021

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TO: ATTACHED SERVICE LIST

IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

Crystallex International Corporation **Applicant**

Commercial List File No: CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

NOTICE OF MOTION

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Court File No. CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C- 36 as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

CRYSTALLEX INTERNATIONAL CORPORATION

Applicant

AFFIDAVIT OF ROBERT FUNG
Sworn May 21, 2021

I, Robert Fung, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am the Chairman and CEO of Crystallex International Corporation ("**Crystallex**" or the "**Company**"). I have also been a director of Crystallex since 1996, Chairman of the Board of Directors of Crystallex since 1998 and CEO since June 2008. As such, I have knowledge of the matters to which I hereinafter depose, which knowledge is either personal to me, obtained from a review of the documents to which I refer, or, where indicated, based on information and belief, in which case I verily believe such information to be true.

EXECUTIVE SUMMARY[1]

2. This Affidavit is sworn in support of a motion by Crystallex for an Order that certain un-redacted materials in connection with two of its recent stay extension motions[2] be filed under a sealing order and not form any part of the public record in this proceeding at this time, subject to further order of the Court. In particular, the Company is requesting to seal certain of its Financial Information (as defined and described below).

3. Crystallex's only assets are an award of USD $1.202 billion, plus interest, rendered by the World Bank's International Centre for the Settlement of Investment Disputes ("**ICSID**") against the government of Venezuela (the "**Award**") and the related proceeds of recovery on the Award received to date.

4. The Company's success in enforcing the Award is the single most important issue in this CCAA Proceeding; Crystallex's success on this front will dictate its ability to provide any meaningful recovery to its stakeholders.

5. In the more than five years since the Award was granted, Crystallex's legal enforcement strategy has proved highly successful. Crystallex has recovered from Venezuela over USD $500 million in cash and securities (as explained herein, given current U.S. sanctions, the securities cannot currently be monetized and their market value is unknown). Crystallex's enforcement efforts continue today with the Company in the pole position to recover against what is arguably Venezuela's most important asset:

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1 Capitalized terms used in this executive summary and not otherwise defined have the meanings ascribed to them below in this Affidavit.

2 The stay extension motions held on November 3, 2020 and May 4, 2021.

CITGO, an American oil company valued at billions of dollars. Crystallex has been succeeding in the face of opposition from large, well-funded adversaries (competing creditors of Venezuela), two competing government regimes in Venezuela (being the Nicolas Maduro-led government and the opposition government led by Juan Guaido), as well as obstacles to enforcement created by the U.S. government.

6. A critical component of Crystallex's enforcement strategy and a significant element in its success has been and remains [redacted] This strategy of maintaining confidentiality has never been directed at Crystallex's stakeholders. This is precisely why Crystallex has offered to provide all of its information to any of its stakeholders and their advisors, on a confidential basis.

7. This Court has previously ordered on a number of occasions the sealing of Crystallex's strategic and financial information. On the only occasion where Crystallex's request for a sealing order was not approved in its entirety, the Court determined that Crystallex did not provide a sufficient level of evidence to justify sealing at that particular time. Specifically, in this Court's Endorsement on this issue (a copy of which is attached as **Exhibit "A"** to my Affidavit), the Court found:

> The onus is on Crystallex to satisfy me that it has met the requirements of the *Sierra Club* test. ***The only evidence before me with respect to the Sierra Club requirements is para. 65 of***

> ***Robert Fung's affidavit sworn April 26, 2020***, which states as follows: [...]
>
> I accept Mr. Byers' submission, on behalf of the Monitor, that Mr. Fung's evidence at para. 65 of his affidavit ***does not provide detailed or compelling reasons about how this information, if disclosed, could be used to the detriment of Crystallex or any details whatsoever as to the feared consequences of its disclosure to the public***. [***emphasis added***]

8. The success of Crystallex's litigation strategy against Venezuela is too important to risk the harms that will befall Crystallex and its stakeholders if Crystallex is once again found not to have provided sufficient evidence to justify sealing. This Affidavit sets out those harms and risks in significant detail for the benefit of the Court.

9. I believe that that there is a real and substantial risk that if the Financial Information were unsealed, [redacted] Crystallex would likely have no ability to provide a recovery to its stakeholders in this CCAA Proceeding.

10. Venezuela has repeatedly [redacted]

11. [redacted]

[redacted]

13. Against this background, Crystallex has three possible avenues of recovery for its stakeholders: (i) settlement with Venezuela, (ii) monetization of the Initial Payment Securities, and (iii) enforcement of the Writ. For reasons that are explained more fully below, the Writ currently represents the best (and perhaps the only realistic) prospect for recovery to stakeholders. The PDVH Shares underpinning the Writ represent an indirect ownership interest in CITGO.

14. In order for Crystallex to realize on the PDVH Shares through the Writ, there are two prerequisites: [redacted] f Crystallex fails on <u>either</u> of these fronts, I believe that there will be no recoveries for its stakeholders.

15. I am concerned that if the Financial Information is unsealed, Venezuela will use this information [redacted]

[redacted]

16. [redacted]

17. By contrast, I do not understand why the Ad Hoc Committee needs the Financial Information to be public at this time in order to participate fully in these CCAA proceedings. Nor do I understand any suggestion that Crystallex is withholding this

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3 Pursuant to the Amended Settlement Agreement, Venezuela (under the Maduro Government) made a USD$425 million Initial Payment to Crystallex that was comprised of cash and Initial Payment Securities. The breakdown of the Initial Payment between cash and securities was never made public. As a result, Venezuela (under the Guaido Government) is seeking information about what was paid to Crystallex under the Settlements. [redacted]

information to create leverage over the Ad Hoc Committee. The Company's only objective in sealing the Financial Information is to protect its enforcement efforts and to succeed against Venezuela for the benefit of all of its stakeholders – including the members of the Ad Hoc Committee. [redacted]

18. The Company's main activities at this time are all centred in the U.S. and with the exception of regular stay extension motions, there is no substantive activity in the CCAA Proceeding. There are no proceeds to distribute to creditors at this time. In circumstances where the Ad Hoc Committee now has [redacted] and Crystallex has offered (and remains prepared) to share all of its current Financial Information with any stakeholder (including the Ad Hoc Committee) in a manner that will not risk it falling into the hands of Venezuela or other competing parties that could use it to harm Crystallex, I do not know what prejudice the Ad Hoc Committee could possibly suffer at this time that would warrant jeopardizing the recovery of all of Crystallex's stakeholders through the unsealing of the Financial Information.

19. The paragraphs that follow this Executive Summary are divided into two parts: (i) an update concerning the current status of the Company's enforcement efforts, and (ii) an explanation of the basis on which Crystallex is seeking an order that the Financial Information not be made public at this time.

PART II - UPDATE

A. Update on Settlement and Enforcement Efforts with Respect to the Award

20. As described in previous Affidavits filed in this CCAA Proceeding and in the reports of the Monitor, Crystallex, in consultation with the Monitor, developed and implemented a dual-track strategy for a negotiated resolution with Venezuela and enforcement of the Award. Maintaining the confidentiality of Crystallex's strategic and financial information has been, and continues to be, a key component of the Company's successful litigation and enforcement strategy. Crystallex's efforts to realize on the Award continue for the benefit of the Company's stakeholders and are set out in detail below.

(i) Settlement with Venezuela

21. As described in my previous Affidavits filed in this CCAA Proceeding, in November 2017, Crystallex concluded a settlement agreement with Venezuela, the terms of which were unfulfilled. The parties later reached an Amended and Restated Settlement Agreement dated September 10, 2018 (the "**Amended Settlement Agreement**" and together with the original settlement agreement, the **"Settlements"**).

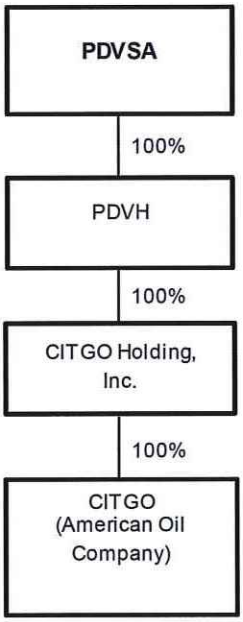
22. Pursuant to the Amended Settlement Agreement, Venezuela agreed to make an initial payment in securities and/or cash with a combined market value, at the time, equal to USD $425,000,000 (the "**Initial Payment**"). The Initial Payment was received in both securities (the "**Initial Payment Securities**") and cash. As will be discussed below, [redacted] and do not provide a good prospect of recovery for the Company's stakeholders at this time. Also, the current economic and political situation in Venezuela,

which is described in greater detail below, makes it difficult for Crystallex to pursue a negotiated settlement with Venezuela. Accordingly, the Company's primary focus is maximizing stakeholder recovery through its enforcement efforts.

(ii) Enforcement of the Award

23. On March 25, 2017, the United States Federal Court for the District of Columbia confirmed the Award and entered judgment in Crystallex's favour in the amount of approximately USD $1.4 billion (the "**Judgment**"), which became final and binding in the United States in 2019.

24. As part of its enforcement efforts, Crystallex registered the Judgment in the United States District Court for the District of Delaware (the "**Delaware Court**") and thereafter obtained orders (collectively, the "**Writ Order**") declaring that Petroleos de Venezuela, S.A. ("**PDVSA**"), Venezuela's national oil company, was the alter ego of Venezuela. The Writ Order authorized the attachment (the "**Writ**") of PDVSA's shares in its U.S. subsidiary PDV Holding, Inc. ("**PDVH**" and the "**PDVH Shares**"). As shown in the organizational chart below, if the Company successfully realizes on the PDVH Shares, the acquirer of the shares will effectively gain control of CITGO Petroleum Corp. ("**CITGO**"). CITGO is an American oil company and Venezuela's largest overseas asset, valued at billions of dollars.



25. In July 2019, the United States Court of Appeals for the Third Circuit (the "**Third Circuit**") affirmed the Writ Order finding that PDVSA was an alter ego of Venezuela and authorizing the Writ. Venezuela's efforts to further appeal that decision were ultimately denied in May 2020. This represented significant progress in the Company's enforcement efforts; both the Judgment and the Writ Order are now final, leaving Venezuela with few options to attack the Writ. Notwithstanding, Venezuela continues to employ a strategy of delay and to bring spurious motions to seek to overturn the Writ Order. [redacted]

26. On May 22, 2020, Judge Stark of the Delaware Court, among other things, ordered simultaneous briefing on the sale process for the PDVH Shares and any motion to quash the Writ that Venezuela, PDVSA or any other party wished to raise in response.

As part of his Order, Judge Stark specifically invited the U.S. government to provide its views on the matters before the Delaware Court (the "**CITGO Litigation**").

27. In response, Venezuela, PDVSA, PDVH and CITGO[4] (collectively, the "**Venezuela Parties**") requested that Judge Stark quash the Writ (the "**Motion to Quash**") and asked the Delaware Court to revisit the alter-ego determination on the basis that the circumstances underlying the Writ Order have changed (the "**Rule 60 Motion**" and together with the Motion to Quash, the "**Opposition Motions**").

28. On the evening of July 16, 2020, the day prior to the hearing of the Opposition Motions, the Department of Justice, on behalf of the U.S. government, filed a statement of interest (the "**Statement of Interest**"), which is attached as **Exhibit "B"** to my Affidavit, in which it informed the Court that the CITGO Litigation and possible enforcement of the Writ implicated issues relevant to U.S. policy towards Venezuela. The position adopted by the U.S. government is discussed more fully below under the heading "*U.S. Policy Towards Venezuela*".

29. On January 14, 2021, Judge Stark issued an order denying the Opposition Motions and granting, in part, the Company's motion for an Order approving the process for the sale of the PDVH Shares (the "**Sales Process Order**"). The Sales Process Order and opinion of Judge Stark also dated January 14, 2021 (the "**Sales Process Decision**"), are attached as **Exhibit "C"** to my Affidavit.

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[4] All references to the Venezuela Parties, Venezuela, PDVSA, PDVH or CITGO throughout this Affidavit in the context of the CITGO Litigation after January 23, 2019 refer to the Venezuela Parties represented through the Guaido Government (defined below).

30. The Venezuela Parties filed notices of appeal of the Sales Process Order and moved before the Delaware Court for a stay pending resolution of their appeal before the Third Circuit (the "**Sales Process Appeal**"), which Crystallex has moved to dismiss. Venezuela's opening brief to the Third Circuit in connection with the Sales Process Appeal is currently due on or before June 22, 2021.

31. On March 19, 2021, the Delaware Court refused to grant Venezuela's stay pending the Sales Process Appeal, with the result that the sale process for the PDVH Shares (the "**Sales Process**") could proceed as ordered by the Sales Process Order while Venezuela's appeal is waiting to be heard by the Third Circuit. On May 19, 2021, Venezuela filed a new stay motion, this time directed to the Third Circuit, asking for a stay of further proceedings in the Delaware Court until a decision on the Sales Process Appeal is rendered.

32. The Sales Process Order set the general parameters for the Sales Process, which are more particularly set out therein and in the Thirty-Sixth Report of the Monitor. The parties[5] were also required to identify a special master to oversee the Sales Process, which ultimately resulted in the appointment of Robert B. Pincus[6] (the "**Special Master**") by the Delaware Court on April 14, 2021. The parties have been working to agree to the terms of an order setting out the Special Master's duties, his terms of compensation and the timeline for when the Special Master is required to submit an order establishing the

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5 On the issue of the Sales Process, the Delaware Court also received and continues to receive, input from Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V,. who each are non-parties but are competing creditors of Venezuela and have similar enforcement proceedings before the Delaware Court.

6 Mr. Pincus is an attorney who practiced at Skadden, Arps, Slate, Meagher & Flom LLP and specialized in mergers and acquisitions until his retirement in 2018.

finer details of the Sales Process. Certain disputes remain, however, and are currently being submitted to the Delaware Court for resolution.

B. Recent Events Relevant to the Company and the Award

33. Although the Judgment and Writ Order are now final and there has been significant progress in the Delaware Court regarding the sale of the PDVH Shares, there continue to be a number of factors that create significant uncertainty concerning the ability of Crystallex to monetize the Award. These include:

(i) Competing government regimes in Venezuela;

(ii) U.S. policy with respect to Venezuela;

(iii) CITGO's uncertain future; and

(iv) Venezuela's financial and humanitarian crisis.

These are discussed in detail in the following paragraphs.

(i) The Competing Government Regimes in Venezuela

34. There continues to be a question concerning who constitutes the legitimate government of Venezuela and who may act on behalf of that country with respect to any discussions with Crystallex: President Nicolas Maduro or Juan Guaido, the former President of the National Assembly (the "**Guaido Government**").

35. Venezuelan National Assembly elections were held on December 6, 2020 and while Juan Guaido and other opposition parties denounced the election as illegitimate, Maduro was the ultimate victor with 90% of seats now controlled by Maduro

allies. Now, the parliamentary majority that was the basis for Guaido's claim to power as President of the National Assembly has expired. The shift in legislative power away from the Guaido-led opposition marks a consolidation of power for Maduro domestically and leaves open the questions of: (i) what, if any, authority Juan Guaido has to make decisions on behalf of Venezuela; and (ii) which regime ultimately has the power to engage with Crystallex. International support for Juan Guaido has declined – though the United States and Canada still consider Venezuela's legitimate head of state to be Juan Guaido.

36. [redacted]. One of the cornerstones of the strategy of the Guaido Government is to preserve CITGO by preventing Crystallex's realization of value from the PDVH Shares. [redacted]

(ii) U.S. Policy Towards Venezuela

37. The Trump administration was very active in opposing the Maduro regime and supporting the Guaido Government. U.S. strategy under President Trump emphasized diplomatic efforts to bolster Guaido and isolate Maduro through broad Sanctions (as defined below) on the economy and government designed to cut off Maduro's sources of revenue and protect CITGO. Attached as **Exhibit "D"** to my Affidavit is an excerpt from the U.S. Department of State's webpage entitled "U.S. Government Support for the Democratic Aspirations of the Venezuelan People" which outlines this strategy.

38. As described in greater detail below, in furtherance of its foreign policy objectives and national security interests, the United States under the Trump administration aided in the protection of CITGO in a number of ways, including: (i) its participation in the ongoing CITGO Litigation; and (ii) its imposition of the Sanctions. President Biden has expressed his support for the Guaido Government and while his policies towards Venezuela have not been formally articulated, it is difficult to envision a scenario where President Biden can support the Guaido Government without also aiding in the protection of CITGO.

Participation in the CITGO Litigation

39. In its Statement of Interest filed in the Delaware Court, the Trump administration took the position that its foreign policy objectives are implicated by the CITGO Litigation. The U.S. government further requested that the Delaware Court not authorize the sale of the PDVH Shares because:

> [...] such a sale is dependent on a license from Treasury's Office of Foreign Assets Control ("OFAC"), and moving forward in the manner Crystallex suggested could imperil U.S. foreign policy and national security interests [...] assets such as PDVH shares, which provide indirect ownership of CITGO are at the ***heart of the United States' current foreign policy efforts with respect to Venezuela***. [***emphasis added***]

40. Attached as **Exhibit "E"** to my Affidavit is a letter from Elliott Abrams, former U.S. Special Representative for Iran and Venezuela, dated July 16, 2020, which was attached as Exhibit 1 to the Statement of Interest. In that letter, Mr. Abrams emphasized the foreign policy and national security risks of allowing the sale of the PDVH Shares:

> [...] the Maduro regime has built a close relationship with foreign adversaries of the United States and which but for the regime's existence would have little foothold in South America, Russia, China and most recently Iran. That these relationships include military and intelligence aspects makes them even more worrying for U.S. national security. [...] Critical to U.S. foreign policy, the United States assesses that the domestic legitimacy of the interim government under Guaido would be severely eroded were a forced sale of CITGO to take place while the illegitimate Maduro regime still attempts to cling to de facto power in Caracas.

41. It is difficult to predict whether the U.S. government under the Biden administration will participate in the CITGO Litigation like its predecessor under the Trump administration; [redacted] only matter currently pending before the Delaware Court is the establishment of the Sales Process as required by the Sales Process Order.

Sanctions

42. As previously disclosed to this Court, the United States Department of Treasury and Office of Foreign Assets Control ("**OFAC**") have imposed sanctions[7] against Venezuela (the "**Sanctions**"), which have made it impossible at this time for the Company either to providently monetize the Initial Payment Securities or to execute on the PDVH Shares subject to the Writ, without first obtaining a license from OFAC.

43. Crystallex submitted its application for a specific license authorizing the sale of the PDVH Shares on April 9, 2020 and is still awaiting OFAC's decision. The granting of an OFAC license to Crystallex is a critical hurdle on the Company's path to realizing value from the PDVH Shares.

44. OFAC provides scant public information about the approval process for licenses but OFAC has indicated that the licensing process is a policy-driven, rather than legal, process. Attached to my Affidavit as **Exhibit "F"** is a copy of the OFAC frequently asked questions and answers FAQ 78 wherein OFAC broadly states that many of its licensing determinations are "guided by U.S. foreign policy and national security concerns".

45. Attached as **Exhibit "G"** to my Affidavit is a July 16, 2020 letter to the U.S. Department of Justice from Andrea M. Gacki, the Director of OFAC, which was appended as Exhibit 2 to the Statement of Interest. In the letter, Ms. Gacki states:

> Crystallex's [OFAC license] submission implicates a series of complicated legal and policy questions, such as (1) the rapidly

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[7] Including by way of an executive order made on August 5, 2019 entitled "Blocking Property of the Government of Venezuela".

> evolving and delicate political and economical situation in Venezuela, including the United States' recognition of Juan Guaido as the Interim President of Venezuela; (2) developments in OFAC sanctions to address the changed circumstances in Venezuela; and (3) the claims of numerous other creditors against Venezuela arising from the malign actions of the regimes of former President Hugo Chavez and Nicolas Maduro. Moreover, other creditors have submitted license applications that implicate PDVH shares. Based on complex considerations such as these, OFAC's internal review of Crystallex's license application, as well as the U.S. government's corresponding interagency review, remain ongoing.

46. [redacted]

47. As outlined above, the U.S. government under the Trump administration was unequivocal that the sale of the PDVH Shares could undermine its foreign policy concerns, its national security interests and the Guaido Government. The notion that Maduro's government is a threat to U.S. national security is not unique to the Trump administration or the Republican party. In fact, in March 2015, President Obama signed an executive order declaring a "national emergency with respect to the unusual and extraordinary threat to the national security and foreign policy of the United States posed by the situation in Venezuela". The White House Office of the Press Secretary Fact Sheet issued in connection with this executive order is attached as **Exhibit "H"** to my Affidavit.

48. Since taking office, the Biden administration has also expressed its support for the Guaido Government and denounced Maduro as a dictator. As discussed above, Juan Guaido's primary objective has been the preservation of CITGO for the benefit of Venezuela and he has implored the U.S. government to aid in the protection of this asset since he took power as Interim President. Attached as **Exhibit "I"** to my Affidavit is an

article from Reuters dated May 2019 in which Guaido noted that a U.S. executive order protecting CITGO from seizure "[...] would be ideal for Venezuela. It should be decided in a sovereign manner by the United States." In light of the Guaido Government's overriding objective to protect CITGO, President Biden's support for the Guaido Government implicitly supports Guaido's strategy to protect CITGO for the benefit of Venezuela.

49. In the Sales Process Decision previously attached as **Exhibit "C"** to my Affidavit, Judge Stark expressed his views that the appropriate mechanism for the U.S. government to protect its foreign policy and national security interests is through the OFAC licensing regime rather than the CITGO Litigation:

> The OFAC licensing process is important for another reason: ***it provides a mechanism by which the interests the government has expressed to the Court can be taken into account by the Executive Branch itself***. [...] The Court understands that the process by which OFAC reviews an application for such a license includes consideration of ***the foreign policy and national security interests*** the government has asked the Court to consider in this litigation. ***[emphasis added]***

50. [redacted]

(iii) CITGO's Uncertain Future

51. As previously disclosed to this Court, PDVSA pledged a 50.1% interest in its shares of CITGO Holding, Inc. (which, as noted above, owns 100% of the shares of CITGO) to secure its bonds due in 2020 (the "**2020 Bonds**"). The 2020 Bonds are in

default, which places the holders of such bonds (the "**2020 Bondholders**") in direct competition with the Company for the control of the sale of CITGO. OFAC initially granted a license that authorized the 2020 Bondholders to sell the CITGO Holding, Inc. shares, but the Sanctions currently prohibit the 2020 Bondholders from enforcing on their debt.

52. Crystallex is currently in a race against the 2020 Bondholders to enforce against Venezuela. If the Sanctions were lifted and the 2020 Bondholders were permitted to realize on the shares of CITGO Holding, Inc., it would significantly impact the value of the PDVH Shares and the ability of Crystallex to enforce the Award.

(iv) Venezuela's Financial and Humanitarian Crisis

53. Venezuela is facing a major financial and humanitarian crisis. As discussed in the Wall Street Journal article attached as **Exhibit "J"** to my Affidavit, a third of Venezuelans cannot access three meals a day, inflation in Venezuela is near 2,000% and some estimates say that the economy contracted by 23% in 2020 after shrinking 40% a year earlier. The humanitarian, health and economic challenges are further complicated because of the significant ongoing leadership conflict between Maduro and Guaido. This emergency has become much more intense because COVID-19 has reduced global economic activity and resulted in collapsing oil prices, which has grave consequences for Venezuela as a country that relies heavily on oil.

54. The humanitarian and economic crises in Venezuela complicate the Company's recovery efforts for a number of reasons. [redacted]

[redacted]

C. [redacted]

55. In connection with its stay extension hearing on May 4, 2020, and to support its U.S. litigation strategy against Venezuela, Crystallex sought an order of this Court sealing (among other things) the following information in the Monitor's Thirty-Third Report: (i) the Company's cash balance as at March 31, 2020, (ii) a summary of the Company's actual receipts and disbursements for the period of October 1, 2019 to March 31, 2020, and (iii) Cash Flow Forecasts for the period of April 1, 2020 through November 30, 2020 (collectively, the "**Historical Financial Information**"). Pursuant to the decisions of the Honourable Justice Hainey made June 8, 2020 and August 31, 2020, respectively, the Company's sealing request was granted in part, and denied in part (collectively, the "**Disclosure Decisions**").

56. On August 14, 2020, Crystallex sought leave to appeal the Disclosure Decisions to the Ontario Court of Appeal (the "**Sealing Appeal**"). [redacted] pending determination of the leave application. On February 9, 2021, the Ontario Court of Appeal denied the Sealing Appeal and the Monitor thereafter [redacted]

[redacted]

PART III – BASIS FOR RELIEF SOUGHT

I. REQUEST FOR A SEALING ORDER

57. As part of this Motion, Crystallex is requesting that the following materials be filed under a sealing order:

(a) this Affidavit;

(b) my Affidavit sworn October 28, 2020;

(c) related documents that would reveal the contents of this Affidavit and my October 28, 2020 Affidavit, including the transcripts of any cross-examinations on such evidence and the written submissions on this motion;

(d) the unredacted version of the Monitor's Thirty-Fifth Report;

(e) the unredacted version of the Monitor's Thirty-Sixth Report; and

(f) the Monitor's Thirty-Seventh Report, or any other reports of the Monitor filed in connection with this motion.

(collectively, the "**Confidential Materials**").

58. The specific information that the Company seeks to redact in the Confidential Materials generally falls into two categories: (i) descriptions of the Company's monetization and enforcement strategy, including views and predictions by Crystallex about positions taken by Venezuela, competing creditors and the U.S. government (the "**Strategic Information**"), and (ii) the following financial information (collectively, the "**Financial Information**"):

(a) The Company's cash balances as at September 30, 2020 and March 31, 2021;

(b) The summary of the Company's actual receipts and disbursements for:

(i) the period from April 1, 2020 to September 30, 2020 compared to the cash flow forecast included in the Thirty-Third Report (Appendix "B" to the Thirty-Fifth Report);

(ii) the period from October 1, 2020 to March 31, 2021 compared to the cash flow forecast included in the Thirty-Fifth Report (Appendix "B" to the Thirty-Sixth Report);

(c) The Company's cash flow forecasts (the "**Cash Flow Forecasts**") for:

(i) the period from October 1, 2020 to May 31, 202` (Appendix "C" to the Thirty-Fifth Report); and

(ii) the period from April 1, 2021 to November 30, 2021 (Appendix "C" to the Thirty-Sixth Report).

59. I am advised by the Company's counsel, Davies Ward Phillips & Vineberg LLP, that the ad hoc committee of holders of the Company's 9.375% senior unsecured notes (the "**Ad Hoc Committee**"): (a) does not oppose the redactions in the Confidential Materials with respect to the Strategic Information, but does not support or consent to its sealing and reserves the right to challenge the sealing of similar information in the future, and (b) opposes the sealing of the current Financial Information. The DIP Lender has advised Crystallex that, based on the recommendations of Gibson, the DIP Lender supports the Company's request to seal both the Financial Information and the Strategic Information [redacted] and prevent risk to enforcement and recovery. Accordingly, the balance of this Affidavit will focus on the Company's reasons for sealing the Financial Information and why such sealing is necessary to prevent the risk that the Financial Information will be used to undermine the Company's enforcement efforts.

II. THE SEALING OF THE FINANCIAL INFORMATION IS NECESSARY AT THIS TIME TO PREVENT A REAL AND SUBSTANTIAL RISK TO THE COMPANY'S ENFORCEMENT EFFORTS

A. [redacted]

60. As described above, there are two *competing* government regimes in Venezuela. The Guaido Government does not participate in or have knowledge of actions taken by the Maduro government and the Guaido Government does not know the details of what Crystallex has received under the Settlements.

61. For this reason, representatives of Guaido have continually sought information [redacted]

[redacted] – about the payments and transfers from Venezuela under the Maduro regime, including under the Settlements.

62. [redacted]

63. Venezuela has also urged the Delaware Court to order Crystallex to divulge this information through the ongoing CITGO Litigation. Attached to my Affidavit as **Exhibit "L"** is a brief dated June 17, 2020, filed by Venezuela and PDVSA in connection with the Sale Process Motion (the "**Sale Brief**"). In the Sale Brief, Venezuela writes that the first step in the Sale Process should be to:

> Determine how much the judgment creditor [Crystallex] has already collected in satisfaction of its judgment. In November 2018, Crystallex represented to the Court that Crystallex had received an "upfront payment" of $425 million pursuant to a settlement agreement with the Republic (which was then under the control of the Maduro regime, and had not appeared in this action), and had previously received "approximately $75 million in funds" from a source the representation did not identify [...] Crystallex must provide complete disclosure to the Court, the Republic and PDVSA of all funds it has received, at what times, and under what circumstances.[8]

[8] See Section B of the Sale Brief (**Exhibit "L"**) on p. 17.

64. [redacted]

65. [redacted]

66. [redacted]

67. All of these requests make clear that, [redacted] Venezuela still does not have, but is actively seeking, a complete picture of Crystallex's financial situation, including information relating to payments made to the Company on account of the Judgment. I explain below in Section D why, despite Venezuela's ongoing monitoring of this CCAA proceeding, [redacted]

B. [redacted]

68. [redacted]

69. At the time the Initial Payment Securities were paid to the Company, [redacted] Crystallex has publicly disclosed that the Initial Payment is comprised of cash and the Initial Payment Securities with a *combined* market value equal to USD $425,000,000 (the "**Initial Payment**"). [redacted]

70. [redacted]

73. If the Financial Information is made public, I believe that the serious risk of harm that I describe herein will ultimately crystallize – and the risk of harm is even greater

[redacted]

C. [redacted]

74. [redacted]

75. [redacted]

[redacted]

76. [redacted]

[redacted]

78. [redacted]

79. [redacted]

D. [redacted]

80. [redacted]

81. [redacted]

82. [redacted]

83. [redacted]

[redacted]

84. [redacted]

85. [redacted]

86. Further, [redacted] this Court held another stay extension hearing on November 3, 2020. The Thirty-Fourth Report of the Monitor that was prepared in connection with that hearing was posted on the Monitor's website and, among other things, redacted the applicable Financial Information (the sealing of which is, in part, the subject matter of this motion).

87. [redacted]

[redacted]

E. [redacted]

88. [redacted]

[redacted]

90. [redacted]

F. The Disclosure of the Financial Information will Cause Irreparable Harm to the Company's Enforcement Efforts

91. The Company, acting on the advice of Gibson, believes that the disclosure of the Financial Information would cause significant and irreparable harm to the Company in two significant ways:

[redacted]

92. [redacted]

93. [redacted]

[redacted]e

[redacted]

In fact, Venezuela has filed *at least five appeals in the CITGO Litigation in the last three years*.

96. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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9 The amount outstanding under the DIP Credit Agreement has been fully disclosed and the Company has historically reported when they were in receipt of proceeds from their enforcement efforts. [redacted]

99. [redacted] in its answering brief on the Sales Process Motion (the "**Sales Process Answering Brief**") dated July 7, 2020, Venezuela took the following position concerning the Settlements: "[...] under which Crystallex was paid $500 million, apparently without releasing its claim. The Court has almost no information about the circumstances of this extraordinarily generous settlement, or about whether Maduro insiders who made the deal are getting a cut."[10] The Sales Process Answering Brief is attached to my Affidavit as **Exhibit "N"**.

100. [redacted] in the Sales Process Answering Brief Venezuela states: "[...] perhaps, an acknowledgement that Crystallex sees a chance for significant upside, in excess of its unpaid judgment, if it can take control of PDVH through these proceedings."[11]

101. [redacted] one of the issues that is the subject of the Sales Process Appeal is Judge Stark's denial of the Rule 60 Motion in which Venezuela asked the Delaware Court to revisit the alter-ego determination underpinning the Writ Order. Attached as **Exhibit "O"** to my Affidavit is a copy of Rule 60 of the Rules of Civil Procedure for the Superior Court of the State of Delaware. Rule 60 provides for a motion for relief from a final judgment on a number of enumerated

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10 See Sales Process Answering Brief (**Exhibit "N"**) at p. 15

11 See Sales Process Answering Brief (**Exhibit "N"**) at p. 5.

grounds, [redacted]

102. [redacted]

103. [redacted]

104. To date, Crystallex is the only creditor of Venezuela to successfully obtain an alter-ego ruling and to obtain a writ authorizing the seizure of the PDVH Shares (although there are other creditors seeking similar relief). Due to the Writ and the impending threat of a sale of the PDVH Shares, Crystallex is uniquely positioned to exert pressure on Venezuela. [redacted]

105. [redacted]

106. As described above, the Company is currently awaiting a determination on its OFAC license application in order to enforce on the PDVH Shares, which, as stated by the director of OFAC: "implicates a series of complicated legal and policy questions, such as, [...] the rapidly evolving and delicate political ***and economical*** situation in Venezuela".[12] [***emphasis added***]

107. [redacted]

[12] See **Exhibit "G".**

[redacted]

108. [redacted]

109. [redacted]

[redacted] the Award, which serves as

the basis for all of the Company's enforcement efforts, is based on a valid Canada-Venezuela Investment Treaty and was granted by ICSID – an organization which counts both Canada and the United States among its member states.

[redacted]

111. [redacted] Despite Guaido's commitment to restructuring his country's debt, Venezuela has thus far refused to honour its debts voluntarily. [redacted]

112. OFAC license determinations are considered final agency actions, meaning that OFAC has no formal agency process for appealing the denial of a license. Attached as **Exhibit "P"** to my Affidavit is FAQ 76 wherein OFAC states that it will reconsider its licensing decisions only "for good cause", defined as situations "where the applicant can demonstrate changed circumstances or submit additional relevant information not previously made available to OFAC".

113. [redacted]

114. [redacted]

III. NO HARM TO THE AD HOC COMMITTEE OR OTHER STAKEHOLDERS IF THE CURRENT FINANCIAL INFORMATION IS NOT PUBLICLY DISCLOSED AT THIS TIME

115. The only stakeholder group that opposes the sealing of the Financial Information at this time is the Ad Hoc Committee. While their current reasons for opposing this important relief are not entirely known, in the past they have argued that public disclosure is necessary to enable the Ad Hoc Committee to participate in the CCAA Proceedings or assess the conduct and decisions of Crystallex.

116. I do not understand how the sealing of the current Financial Information at this particular point in time impairs in any way the ability of the Ad Hoc Committee to participate in the CCAA Proceeding or to assess the conduct and decisions of Crystallex.

117. The Company's main and oft-stated objective throughout the CCAA Proceeding has been to pursue its dual-track strategy of enforcement and settlement of the Award, a strategy developed in coordination with the Monitor. The CCAA Proceeding has helped to support this strategy. As described herein, Crystallex has been very successful in this strategy and is closer than any other creditor of Venezuela in realizing on the PDVH Shares. All of Crystallex's main activities at this time are centered in the United States, including the Writ and Sale Process, the ongoing CITGO Litigation, navigating the Sanctions regime and the OFAC application process. The Ad Hoc Committee has been, and continues to be, free to follow these activities and provide Crystallex and the Monitor with their input and views. Notably, members of the Ad Hoc Committee have regularly complimented the members of Crystallex's Board in private on their sage decision-making and strategic initiatives in Crystallex's enforcement efforts against Venezuela and the success achieved to date.

118. The only relief routinely being sought by Crystallex in the CCAA Proceeding are: (i) extensions of the stay of proceedings; (ii) extensions of the DIP Credit Agreement maturity; and (iii) requests to seal confidential information that could imperil its U.S. enforcement strategy. As described herein, given existing Sanctions, the Company cannot providently monetize the Initial Payment Securities at this time. Further, until taxes are resolved and comfort is obtained from the Canada Revenue Agency ("**CRA**"), there cannot be distributions to Crystallex's creditors using the Company's existing cash on hand. Rather, all Crystallex can do at this time is pay its post-filing expenses.

119. Crystallex is also required, pursuant to the endorsement of this Court dated May 9, 2018 (a copy of which is attached as **Exhibit "Q"** to my Affidavit), to provide the

Ad Hoc Committee with a copy of the statement provided to the DIP Lender of any arbitration proceeds received by the Company. Crystallex has done so. Given that Crystallex has not received any further proceeds of realization since the payments received under the Settlements, no additional statements have been delivered.

120. [redacted] the Ad Hoc Committee now has data points concerning Crystallex's cash balance and Cash Flow Forecasts. Given the Sanctions, the fact that tax matters are not resolved with the CRA (of which the Ad Hoc Committee is aware) and the fact that no additional Award proceeds have been received by Crystallex, the Ad Hoc Committee knows with certainty that Crystallex [redacted]

121. The Company is only spending its available cash in two places – enforcement and the CCAA Proceeding. The essential activity being undertaken by Crystallex is its enforcement activities in the United States and this is where the majority of its funds are being expended.

122. To the extent that any funds are expended outside of the Company's enforcement strategy, they are used for expenses related to the CCAA Proceeding, which are for (i) fees associated with seeking extensions of the stay, (ii) the Court-ordered mediation, (iii) tax professionals to address tax matters with the CRA (which the Ad Hoc Committee is kept apprised of), and (iv) responding to litigation brought by the Ad Hoc Committee.

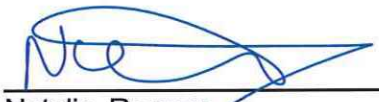
123. There has been a suggestion by the Ad Hoc Committee in the past that Crystallex seeks to seal its financial information in order to create leverage in its negotiations with the Ad Hoc Committee. Nothing could be further from the truth. [redacted] In fact, Crystallex has offered to provide the Ad Hoc Committee with all of its financial information, but on a confidential basis so that Venezuela cannot use it to harm Crystallex and its stakeholders.

124. I do not believe the Company's stakeholders will be prejudiced by the Financial Information being sealed because the information has been, and continues to be, fully available to any stakeholder of Crystallex who executes a non-disclosure agreement or otherwise agrees to maintain the information in confidence. In fact, the Company is currently party to a number of such confidentiality arrangements with its stakeholders and/or their counsel. Crystallex remains willing to enter into such arrangements with any of its stakeholders, which would protect Crystallex's ability to enforce and collect on its only asset without unduly prejudicing the Company's stakeholders.

125. I cannot over-emphasize the risk that disclosure of the Financial Information at this time poses to Crystallex and its stakeholders: the very real possibility of irreparable harm to its enforcement efforts, [redacted] Conversely, the risk to the Ad Hoc Committee [redacted] is that they simply do not know the Company's most *current* cash balance and updated Cash Flow Forecast at this time. Given that the Company's efforts and finances are devoted almost exclusively to its

enforcement efforts (a fact which the Ad Hoc Committee is well aware of) and there is no possibility of distributions at this time, I do not believe that the relief requested by Crystallex in this motion could cause any prejudice to the Ad Hoc Committee.

SWORN remotely by Robert Fung at the City of Toronto, in the Province of Ontario, before me on the 21st day of May, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely..



Natalie Renner
Commissioner for taking Affidavits

ROBERT FUNG

IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

Crystallex International Corporation Applicant Commercial List File No: CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

AFFIDAVIT OF ROBERT FUNG
(Sworn May 21, 2021)

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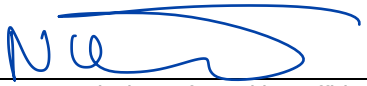
Lawyers for the Applicant

This is Exhibit “A” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

CITATION: Crystallex International Corporation (Re), 2020 ONSC 3434
COURT FILE NO.: CV-11-9532-00CL
DATE: 20200608

SUPERIOR COURT OF JUSTICE – ONTARIO
– COMMERCIAL LIST

RE: **IN THE MATTER OF** the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

BEFORE: Hainey J.

COUNSEL: *Robin B. Schwill* and *Natalie Renner*, for the Applicant, Crystallex International Corporation

David Byers and Maria Konyukhova for the Monitor

Alan Mark, Peter Ruby and Chris Armstrong for Computershare Trust Company of Canada

Shayne Kukulowicz, Ryan C. Jacobs and Timothy Pinos for Tenor Special Situation I

Rahim Moloo and Jason Myatt US Lawyers for Crystallex International Corporation

HEARD: May 7, 2020

ENDORSEMENT

[1] This motion was heard by videoconference (ZOOM) in accordance with the changes to the operation of the Commercial List in light of the COVID-19 crisis and the Chief Justice's Notices to the Profession.

[2] On May 4, 2020, I granted Crystallex International Corporation's ("Crystallex") motion for an order, *inter alia*, extending the stay of proceedings in these *CCAA* proceedings to November

6, 2020 and sealing certain material in the Monitor's 33rd Report which Crystallex relied upon in support of its motion.

[3] At para. 13 of my order I indicated that a further hearing would be held on May 7, 2020 to determine whether the material in the Monitor's report should remain subject to a sealing order.

[4] At the hearing on May 7, 2020 I reserved my decision with respect to the request for a sealing order. I indicated that I would provide my decision in due course. This is my decision.

[5] Crystallex requests a sealing order with respect to the following three areas of the Monitor's 33rd Report filed in support of the motion:

a) Crystallex's current cash balance and projected litigation and enforcement expenses;

b) Information pertaining to the impact of sanctions on Crystallex's asset recovery initiatives and related sanctions and strategic litigation initiatives; and

c) Detailed descriptions of disputes and arguments between Crystallex and the Ad Hoc Committee of holders of senior notes of Crystallex ("Ad Hoc Committee") which are the subject of an ongoing confidential mediation.

[6] The Ad Hoc Committee and the Trustee for the holders of the senior notes ("Trustee") oppose the sealing order sought by Crystallex as it relates to the sealing of Crystallex's (i) cash balance; (ii) cash-flow statement; and (iii) cash-flow forecast.

[7] According to the Ad Hoc Committee and the Trustee, their opposition to the sealing of this information is based upon the importance of the disclosure of this type of information in *CCAA* proceedings to allow creditors and other stakeholders to assess decisions being made by the debtor during the stay extension period in order to protect those stakeholders' own rights and interests.

[8] The Ad Hoc Committee and the Trustee make the following submissions at para. 3 of their factum:

> 3. Crystallex's request to redact and seal the portions of the Monitor's Thirty-Third Report dealing with Crystallex's financial position is unfounded for three reasons:
>
> a) One of the burdens of a company being granted the benefit of a stay of creditor claims under the *CCAA* is the sharing of information with stakeholders. At the very least, creditors must be kept informed of the *CCAA* debtor's financial circumstances.
>
> b) Precluding creditors and the public from having access to information based on which Crystallex, the Monitor and the Court make decisions is a serious matter. Crystallex must meet the sealing order test established by the courts, and this *CCAA* Court should strictly apply that test – not treat sealing as a routine matter.

c) The evidence in support of sealing must be compelling. The evidence adduced by Crystallex on this motion is not. It consists of bald statements, which do not come even close to meeting the applicable test for a sealing order.

[9] Crystallex's *CCAA* proceedings have been ongoing for more than eight and a half years. Throughout this entire period, Crystallex's sole business activity has been pursuing, and now enforcing, its claim against Venezuela for having unilaterally rescinded its gold mining operation contract. Crystallex's arbitration award and related judgement enforcing the arbitration award are now final.

[10] It is significant to me that the Monitor does not fully support Crystallex's request for a sealing order.

[11] The Monitor submits that the *Sierra Club* test and s. 10(3) of the *CCAA* governs the issue of whether there should be a sealing order. Under the *Sierra Club* test I must be satisfied of the following in order to grant a sealing order:

a) That the sealing order is necessary to prevent a real and substantial serious risk to an important commercial interest. The risk must be well-grounded in the evidence and pose a serous threat to the commercial interest in question;

b) There must be no other reasonable alternative to the sealing order and the order, if granted, must be restricted as much as reasonably possible; and

c) The salutary effects of the sealing order must outweigh its deleterious effects including its effect on the open-court principle.

[12] The onus is on Crystallex to satisfy me that it has met the requirements of the *Sierra Club* test. The only evidence before me with respect to the *Sierra Club* requirements is para. 65 of Robert Fung's affidavit sworn April 26, 2020 which states as follows:

> 65. The Report discloses certain key information regarding the Company's enforcement and monetization strategy and financial position. It is critical that information be kept confidential to retain Crystallex's competitive advantage. Crystallex continues to remain concerned that if Venezuela or such other third parties have access to the confidential information contained in the Report, they might use it for strategic purposes to the detriment of Crystallex and its stakeholders.

[13] I accept Mr. Byers' submission, on behalf of the Monitor, that Mr. Fung's evidence at para. 65 of his affidavit does not provide detailed or compelling reasons about how this information, if disclosed, could be used to the detriment of Crystallex or any details whatsoever as to the feared consequences of its disclosure to the public.

[14] I have concluded that under the *Sierra Club* test the level of risk from disclosure must be higher to justify a sealing order than what Mr. Fung has described at para. 65 of his affidavit. Mr. Fung's evidence is highly speculative and does not specify any incremental risk that Crystallex may suffer from the disclosure of this information over and above the risk it is already exposed to.

[15] I am unable to conclude on the strength of Mr. Fung's evidence that the public disclosure of this information would create a real and substantial risk to Crystallex's commercial interests or that there is a serious risk grounded in evidence that would justify the sealing order requested by Crystallex.

[16] Crystallex's Motion for a sealing order is therefore dismissed for these reasons.

[17] Following the hearing, the Monitor identified certain redactions that should be made to its report if I decide not to grant the full sealing order requested by Crystallex. These redactions are set out in the attached email from Maria Konyukhova dated May 12, 2020 attached as Appendix A. As Ms. Konyukhova points out in her email, these redactions "represent only the Monitor's proposal and views", and other parties may wish to make further submissions on the Monitor's proposed redactions.

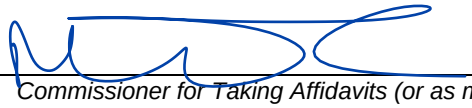
[18] The Monitor's proposed redactions make sense to me, however, if any party wishes to make further submissions only with respect to the Monitor's proposed redactions, they may file written submissions of no more than three pages within five days of the date of this endorsement. After reviewing any submissions, I will decide if a further hearing by video conference on this issue is necessary.

[19] I thank counsel for their helpful submissions.

Hainey J.

Released: June 8, 2020

This is Exhibit “B” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORPORATION, *Plaintiff,* v. BOLIVARIAN REPUBLIC OF VENEZUELA, *Defendant*.	C.A. No. 17-mc-00151-LPS

STATEMENT OF INTEREST OF THE UNITED STATES

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Dated: July 16, 2020

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INTRODUCTION

The United States files this Statement of Interest[1] in response to the invitation of this Court,[2] *see* D.I. 154 at 23. The United States respectfully submits the following views: (1) the current situation in Venezuela implicates important U.S. foreign policy and national security interests, and has changed materially since this Court originally issued the writ of attachment in 2018; (2) these changed circumstances could justify granting the Bolivarian Republic of Venezuela's ("Venezuela") Rule 60(b) motion; and (3) even if this Court denies or defers the Rule 60(b) motion, and the motion to quash the writ of attachment, it should not authorize Crystallex International Corp. ("Crystallex") to proceed toward the contemplated sale of shares of PDV Holding, Inc. ("PDVH") owned by the Venezuelan national oil company, Petróleos de Venezuela, S.A. ("PDVSA") at this time. Such a sale is dependent on a license from Treasury's Office of Foreign Assets Control ("OFAC"), and moving forward in the manner Crystallex suggests could imperil U.S. foreign policy and national security interests.

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[1] Congress has authorized the Attorney General to send "any officer of the Department . . . to any . . . district in the United States to attend to the interests of the United States in a suit pending in a court of the United States." 28 U.S.C. § 517. "A statement of interest, which is authorized by 28 U.S.C. § 517, is designed to explain to a court the interests of the United States in litigation between private parties." *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272, 291 (4th Cir. 2010) (Michael, J., dissenting).

[2] The United States recognizes that this Statement of Interest is being filed the day before this Court's hearing on the pending motions. *See* D.I. 174. The United States sincerely apologizes to the Court and the parties for any inconvenience caused by filing so close to the hearing date.

DISCUSSION

I. The Current Situation in Venezuela Implicates Important U.S. Foreign Policy and National Security Interests.

As detailed in the attached letter from Elliott Abrams, Special Representative for Venezuela at the U.S. Department of State, Venezuela is currently in the midst of an unprecedented humanitarian, political, and economic crisis. *See* Letter from Elliott Abrams to Ethan Davis, dated July 16, 2020, attached hereto as Ex. 1, at 1. The country is currently grappling with an illegitimate regime led by Nicolás Maduro and an inner circle of corrupt officials. *Id.* Over the past two decades, Maduro and his predecessor, Hugo Chávez, have destroyed democratic institutions, repressed free speech, committed serious human rights abuses, and ruined the prosperity Venezuela once enjoyed. *Id.* at 1-2. The Maduro regime has become a source of great instability in the entire region. *Id.* at 1. The regime's abuses have resulted in the greatest refugee crisis in Latin American history, with more than five million Venezuelans leaving their country seeking freedom, sustenance, or both. *Id.* As Secretary of the Treasury Mnuchin has stated, "[t]he policies of the regime of President Maduro have consequences that extend beyond Venezuela's borders, threatening regional stability and national security." Statement by Sec. Steven T. Mnuchin Following Meeting on Venezuela (Apr. 19, 2018), https://home.treasury.gov/news/press-releases/sm0353. Indeed, the Maduro regime has built a close relationship with foreign adversaries of the United States which, but for the regime's existence, would have little foothold in South America: Russia, China, and most recently Iran. Ex. 1, at 1. That these relationships include military and intelligence aspects makes them even more worrying for U.S. national security. *Id.*

Since January 23, 2019, the United States has recognized Juan Guaidó, the democratically elected President of the Venezuelan National Assembly, as the Interim President of Venezuela. *Id*

at 2. U.S. policy toward Venezuela is to support the full restoration of democracy, beginning with free, fair, and transparent presidential elections in which the Venezuelan people choose their leaders. *Id.* To achieve this, Secretary of State Pompeo recently proposed a "Democratic Transition Framework" to resolve Venezuela's crisis that is rooted in a peaceful, democratic transition that calls for Maduro to step aside and the establishment of a broadly acceptable, transitional government to administer free and fair presidential elections. *Id.* This framework also sets forth a viable pathway for lifting Venezuela-related U.S. sanctions. *Id.*; *see also* U.S. Department of State, Office of the Spokesperson, "Democratic Transition Framework for Venezuela – Fact Sheet" (Mar. 31, 2020), https://www.state.gov/democratic-transition-framework-for-venezuela. In fact, U.S. government agencies are planning for exactly this, as Secretary of Commerce Ross outlined: "The U.S. will ease sanctions, promote domestic and international trade credit, deploy technical advisors, and engage international financial institutions to build confidence in Venezuela's new economic policies. [It will also work to] [o]verhaul Venezuela's central bank, tax system, fiscal institutions, debt, and banking sector in the context of a long-term [International Monetary Fund] deal and the need for economic stability and free elections." Remarks by U.S. Commerce Sec. Wilbur L. Ross at the Venezuelan Infrastructure Breakfast in Brasilia, Brazil (Aug. 1, 2019), https://www.commerce.gov/news/speeches/2019/08/remarks-us-commerce-secretary-wilbur-l-ross-venezuela-infrastructure.

The United States has strong foreign policy and national security interests in supporting the interim government's efforts to reconstruct the Venezuelan economy following the departure of Maduro. *See* Ex. 1. In the words of Special Representative Abrams:

> Since recognizing the Guaidó government on January 23, 2019, the U.S. government has taken steps, including through additional

> economic sanctions, to ensure Maduro is not able to liquidate in fire sales the financial assets of Venezuela that are located in United States jurisdictions (and especially CITGO, the crown jewel of PdVSA.) . . . . CITGO, as part of the U.S.-based assets of PDVH and its parent company PdVSA, is one such example of a national resource that has been placed in legal and economic jeopardy as a result of the actions of former Venezuelan governments. Critical to U.S. foreign policy, the United States assesses that the domestic legitimacy of the interim government under Guaidó would be severely eroded were a forced sale of CITGO to take place while the illegitimate Maduro regime still attempts to cling to de facto power in Caracas. The efforts by creditors to enforce judgments against Venezuela by taking immediate steps toward a conditional sale of PdVSA's U.S.-based assets, including PDVH and CITGO, are detrimental to U.S. policy and the interim government's priorities. Should these assets be advertised for public auction at this time, the Venezuelan people would seriously question the interim government's ability to protect the nation's assets, thereby weakening it and U.S. policy in Venezuela today.

Ex. 1, at 2-3.

Thus, assets such as PDVH's shares, which provide indirect ownership of CITGO, are at the heart of the United States' current foreign policy efforts with respect to Venezuela. "It is clear that its loss through a forced sale in a U.S. court would be a great political victory for the Maduro regime, which has already claimed that the United States and Guaidó are conspiring to 'steal' CITGO. The impact on Guaidó, the interim government, and U.S. foreign policy goals in Venezuela, would be greatly damaging and perhaps beyond recuperation." *Id.* at 3.

II. Changed Circumstances Could Justify Granting Venezuela's Motion.

In August 2018, this Court concluded that PDVSA was an alter ego of Venezuela pursuant to the Supreme Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983). In *Bancec*, the Supreme Court recognized that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status.

See id. at 626-27. The Court noted that freely ignoring the separate status of government instrumentalities would frustrate "the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration." *Id.* at 626. As a result, *Bancec* affords a strong presumption that an independent instrumentality of a foreign state should be treated as such by U.S. courts, unless (a) that instrumentality is "so extensively controlled by its owner that a relationship of principal and agent is created" or (b) doing so "would work fraud or injustice." *Id.* at 629.

Following *Bancec*'s guidance, this Court concluded that Crystallex had "rebutt[ed] the presumption of separateness between Venezuela and PDVSA," and had sufficiently established that the "sovereign state exercises significant and repeated control over the instrumentality's day-to-day operations." *Crystallex Int'l Corp. v Bolivarian Rep. of Venezuela*, 333 F. Supp. 3d 380, 401, 403 (D. Del. 2018) (also concluding that Crystallex had not established that giving effect to the separateness of Venezuela and PDVSA would "work a fraud or injustice" as that term is used in *Bancec*). This Court also noted that Venezuela and PDVSA could seek to supplement the factual record and attempt to demonstrate that the additional evidence "materially alters the Court's findings." *Id.* at 425. The Third Circuit, in reviewing this Court's decision, also noted that on remand, "Venezuela may direct to the District Court credible arguments to expand the record with later events." *Crystallex Int'l Corp. v Bolivarian Rep. of Venezuela*, 932 F.3d 126, 144 (3d Cir. 2019). The United States respectfully submits that the circumstances underlying that determination have changed in such a manner that the Court should review its earlier finding

concerning PDVSA's independence from Venezuela.[3]

This Court originally concluded that PDVSA was the alter ego of the Venezuelan government because "Venezuela extensively control[led] PDVSA," *Crystallex*, 333 F. Supp. 3d at 406, based on Venezuela's practices of (1) "us[ing] PDVSA's property as its own," (2) "[i]gnoring PDVSA's separate status," (3) "[d]epriving PDVSA of independence from close political control," (4) "[r]equiring PDVSA to obtain approvals for ordinary business decisions," and (5) "[i]ssuing policies causing PDVSA to act directly on behalf of Venezuela." *Id.* at 406-09.

Since issuing that ruling, circumstances in Venezuela have materially changed. As detailed in the attached letter from Special Representative Abrams, there have been significant developments within Venezuela since 2018 that have precipitated a fundamental shift in U.S. foreign policy. In January 2019, in the wake of the fraudulent Venezuelan presidential elections, Maduro attempted to install himself as president for a second term. Ex. 1, at 2. Shortly afterwards,

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[3] The specific posture of this case makes it appropriate for this Court to take into account changed circumstances in considering the *current* relationship between PDVSA and Venezuela. While courts have routinely examined the historical relationship between a foreign state and its instrumentalities in determining whether to pierce the corporate veil for purposes of imposing liability, this Court was clear that it did not seek to impose Venezuela's primary liability on PDVSA. *Crystallex*, 333 F. Supp. 3d. at 391-94. Instead, the question before the Court was whether the specific property at issue was really the property of Venezuela and only nominally held by PDVSA. *Id.* at 392. This Court determined "it is appropriate – if it finds PDVSA is Venezuela's alter ego – to view the instant case as *not* involving a demand that PDVSA use *its* 'legitimately held assets' to satisfy Venezuela's judgment. Rather, the issue here is whether PDVSA's assets are, in effect, *Venezuela's* assets . . . ." *Id.* at 393. Given that inquiry, it is appropriate for the Court to consider whether the changed circumstances would result in attachment of PDVSA's legitimately held assets now. *See, e.g.*, *Rep. of Austria v. Altmann*, 541 U.S. 677, 696 (2004) ("[Foreign sovereign] immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* protection from the inconvenience of suit as a gesture of comity." (alteration in original, quotation marks omitted)).

the National Assembly, in its role as the only legitimate branch of government duly elected by the Venezuelan people, responded by invoking the Venezuelan Constitution to declare the office of the presidency vacant, upon which Juan Guaidó, President of the National Assembly, was sworn in as Interim President. *Id.* President Trump immediately issued a public statement officially recognizing Guaidó as the Interim President of Venezuela, and Secretary of State Pompeo similarly issued a statement concerning the United States' recognition of the "new Venezuelan government." *Id.* On January 5, 2020, following Guaidó's re-election as president of the National Assembly despite an "unlawful, violent, and despicable campaign of arrests, intimidation, and bribery" led by Maduro regime officials, the State Department issued a congratulatory statement, noting that "[t]he United States and 57 other countries continue to regard [Guaidó] as the legitimate . . . interim president of Venezuela." The United States Congratulates Interim President Juan Guaido on His Re-Election as President of the National Assembly (Jan. 5, 2020), https://ve.usembassy.gov/the-united-states-congratulates-interim-president-juan-guaido-on-his-re-election-as-president-of-the-national-assembly; Ex. 1, at 2.

"Recognition is a 'formal acknowledgement' that a particular 'entity possesses the qualifications for statehood' or 'that a particular regime is the effective government of a state.'" *1702tofsky v. Kerry*, 576 U.S. 1, 11 (2015) (quoting Restatement (Third) of Foreign Relations Law of the United States § 203, cmt. a, p. 84 (1986)). The Supreme Court has made clear that "[t]he text and structure of the Constitution grant the President the power to recognize foreign nations and governments" and that the power is "exclusive," *i.e.*, is vested solely in the President, rather than in the Courts or the Congress. *Id.* at 14. This exclusivity has wide-reaching legal ramifications. Because "[p]olitical recognition is exclusively a function of the Executive," *Banco*

Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964), courts are bound by that judgment when determining what regime constitutes the government of a state. *See*, *e.g.*, *United States v. Pink*, 315 U.S. 203, 223 (1942) ("[R]ecognition of a foreign sovereign conclusively binds the courts."); *see also Crystallex*, 932 F.3d at 135 n.2 (recognizing the Guaidó interim government "as authorized to speak and act on behalf of Venezuela in these appeals"); *Jimenez v. Palacios*, C.A. No. 2019-0490-KSJM, 2019 WL 3526479, at *9-11 (Del. Ch. Aug. 2, 2019) (holding that under the political question doctrine, the U.S. President's recognition of the Guaidó government binds the Delaware Court of Chancery).

Accordingly, the U.S. government's recognition of the Guaidó government constitutes a substantial and material change in circumstances that is itself sufficient to merit reconsideration of this Court's earlier alter ego determination, which rested on the corrupt actions of the Maduro regime in connection with PDVSA, *e.g.*, *Crystallex*, 333 F. Supp. 3d at 407-08. In addition, Venezuela has stated that the Guaidó government has taken "concrete steps to confirm PDVSA's independence from Venezuela." D.I. 184 at 13. The State Department has indicated that it has no reason to doubt the veracity of these representations concerning the independence of the PDVSA, PDVH, and CITGO boards. Ex. 1, at 2. As a result, fundamental premises underlying the alter ego ruling no longer hold.

III. If the Court Denies the Pending Motions to Dissolve or Quash the Writ of Attachment, It Should Not Authorize Crystallex to Proceed Toward a Sale at This Time.

This Court has recognized that it has discretion over whether, when, and in what manner it moves forward with the contemplated sale of shares of PDVH, to the extent otherwise consistent with U.S. sanctions law. *See* D.I. 154 at 9 n.13; *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254-

55 (1936) (recognizing the "power inherent in every court to control the disposition of the causes on its docket"). Regardless of the disposition of the pending motions to eliminate the attachment, the United States respectfully submits that the Court should exercise any such discretion not to proceed toward a sale at this time. The prefatory steps that Crystallex proposes implicate significant U.S. foreign policy and national security interests that are rightly before the Executive Branch in the Crystallex license application, and taking action which advances toward a public auction and contingent sale would serve no purpose if OFAC ultimately denies Crystallex's license application.

A. OFAC is currently reviewing Crystallex's license application and is not yet in a position to issue a decision.

As this Court is aware, U.S. sanctions involving Venezuela require a license for any sale of PDVH shares. *See* 31 C.F.R. §§ 591.506(c), 591.407; 84 Fed. Reg. 3282 (Feb. 11, 2019); E.O. Nos. 13,884 (Aug. 5, 2019), 13,850 (Nov. 1, 2018), 13,835 (May 21, 2018), 13,808 (Aug. 24, 2017); *see also* OFAC FAQs 808 & 809. Crystallex has accordingly "submitted an application to OFAC for a specific license authorizing the sale of shares of PDVH," and "seeks formal approval of the commencement of the sale process, through and including the auction of the shares of PDVH." D.I. 182 at 7; *see also* Letter from Andrea Gacki to Ethan Davis, dated July 16, 2020, attached hereto as Ex. 2, at 1 (quoting Crystallex license application, which seeks authorization from OFAC "to provide Crystallex a Specific License to allow the federal court in the District of Delaware (which has jurisdiction over the shares in question and in whose constructive possession the shares are currently held) to pursue all activities necessary and ordinarily incident to organizing and conducting a judicial sale of the shares as provided for by U.S. federal and Delaware law, regulations, and precedents."). OFAC notes that this request is necessary under applicable law,

not least because "a license is required before a public auction or contingent sale could occur." *See* Ex. 2, at 2 (citing E.O. Nos. 13,808, 13,835, 13,850, 13,884; 31 C.F.R. §§ 591.201, 591.506(c), 591.407; OFAC FAQs 808 & 809). OFAC is currently reviewing this application. *See id.* at 2.

OFAC is not yet in a position to issue a license decision to Crystallex, in part because of the complexity of Crystallex's application.[4] *Id.* at 2. "Unlike a routine OFAC license application, which may present a straightforward request to license a single transaction or limited set of transactions involving the applicant and a sanctioned person or a sanctioned jurisdiction, Crystallex's submission implicates a series of complicated legal and policy questions." *Id.* Relevant issues include the rapidly evolving situation in Venezuela, developments in the OFAC sanctions regime to address this situation, and the claims of other creditors against Venezuela—some of whom have also submitted license applications that implicate the PDVH shares. *Id.* Given the complex nature of these questions, the license request continues to undergo interagency review. *Id.*

Crystallex suggests that proceeding toward a sale of shares of PDVH "could aid OFAC in its review of Crystallex's application for a specific license," D.I. 198 at 3, by providing additional information about "[t]he mechanics of the sale process," *id.* at 9-11; *see also* D.I. 154 at 9 (noting "Crystallex's speculation . . . that OFAC will not issue a license until [a public auction takes place and] a winning bidder has been identified"). Contrary to this suggestion, proceeding toward a

[4] OFAC recognizes that if this Court grants either Venezuela's pending Rule 60(b) motion or PDVSA, PDVH, and CITGO's pending motion to quash the writ of attachment, and thus dissolves or quashes the writ of attachment, that would obviate the need for OFAC to rule on the license application. That might also forestall the need for the parties and the Court to address certain purported issues of constitutional and foreign relations law. *See, e.g.*, D.I. 198 at 9; D.I. 154 at 23.

public auction and contingent sale "would not in any way facilitate OFAC's license adjudication process with respect to Crystallex's instant license application." Ex. 2, at 2. As Director Gacki further explains in her attached letter:

> It is well within OFAC's licensing discretion to evaluate and determine whether to issue Crystallex's requested license without needing to know the identity of the "winning bidder" in advance. OFAC uses its substantial discretion to evaluate a range of options when considering any specific licensing request, from a decision to deny the license in its entirety, to grant the license in its entirety, to grant the license subject to certain conditions, or even to bifurcate the license request and sequence the authorization of actions in the future. When evaluating a specific licensing request, OFAC could also separately determine that additional information or supplemental specific license requests are needed.

Id.

B. Proceeding toward a sale at this time would imperil the United States' foreign policy and national security interests, and would serve no purpose if OFAC ultimately denies Crystallex's license application.

Proceeding in the manner Crystallex proposes would imperil the United States' important foreign policy interest in supporting the Guaidó government. As Special Representative Abrams has explained:

> The efforts by creditors to enforce judgments against Venezuela by taking immediate steps toward a conditional sale of PdVSA's U.S.-based assets, including PDVH and CITGO, are detrimental to U.S. policy and the interim government's priorities. Should these assets be advertised for public auction at this time, the Venezuelan people would seriously question the interim government's ability to protect the nation's assets, thereby weakening it and U.S. policy in Venezuela today.
>
> Whatever the eventual settlement of Venezuela's debts or the fate of other accounts or assets, CITGO today is a special case. Every Venezuelan knows of this company and it is viewed, as are Venezuela's oil reserves, as a central piece of the national patrimony. It is clear that its loss through a forced sale in a U.S.

> court would be a great political victory for the Maduro regime, which has already claimed that the United States and Guaidó are conspiring to 'steal' CITGO. The impact on Guaidó, the interim government, and U.S. foreign policy goals in Venezuela, would be greatly damaging and perhaps beyond recuperation.

Ex. 1, at 3. The situation in Venezuela is fluid, but absent a change in the above foreign policy considerations, these factors will weigh heavily in OFAC's consideration of Crystallex's license application and could prove to be dispositive of OFAC's decision. *See* Ex. 2, at 2.

The United States respectfully submits that this Court should not authorize Crystallex to take further steps toward a forced sale of PDVH in light of the risk that such steps would harm U.S. foreign policy and national security interests in Venezuela. *See, e.g.*, *Zarmach Oil Servs., Inc. v. U.S. Dep't of the Treasury*, 750 F. Supp. 2d 150, 155 (D.D.C. 2010) ("[C]ourts owe a substantial measure of 'deference to the political branches in matters of foreign policy.'" (quoting *Regan v. Wald*, 468 U.S. 222, 242 (1984))); *see also Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) (noting Supreme Court's "customary policy of deference to the President in matters of foreign affairs"); 50 U.S.C. § 1702(a)(1)(B) (conferring on the President broad authority to "nullify, void, prevent or prohibit, any" transaction involving "any property in which any foreign country or a national thereof has any interest"). Here, the value of PDVH both numerically and strategically is clear; there is no comparable asset for Venezuela and its new government. *See* Ex. 1, at 3; *see also, e.g.*, D.I. 182 at 14 (estimating that "PDVH's subsidiaries . . . have assets in excess of $9.2 billion.").

Additionally, at a more practical level, the parties' submissions make clear that nothing comparable to the sale of the PDVH shares has ever been undertaken by a court in this manner. The sole example cited by Crystallex involved shares worth approximately $500,000, a far cry

from the PDVH valuations suggested by the parties. *See* D.I. 188 at 12 n.17 (citing "unrebutted research show[ing] that the largest stock sale ever managed by the Delaware authorities under 8 Del. C. § 324 was for $567,000"); D.I. 182 at 1-4 (seeking to sell enough shares of PDVH under 8 Del. C. § 324 to satisfy "an arbitral award of $1.4 billion"). While the concerns of the U.S. government are with the foreign policy implications of the contemplated auction and contingent sale, the lack of any comparable examples and experience are additional reasons for the Court to forego further action until after OFAC has issued a decision on Crystallex's pending license application.

CONCLUSION

The United States recognizes that "Venezuela owes Crystallex from a judgment that has been affirmed in our courts," D.I. 174 at 3 (quoting *Crystallex*, 932 F.3d at 149), and is not suggesting that Venezuela should be permitted to avoid payment of its lawful obligations. But given the changed circumstances since the Court concluded that PDVSA was an alter ego of Venezuela in 2018, the United States respectfully submits that relief under Rule 60(b) may be appropriate. And given the delicate and evolving political situation in Venezuela, the U.S. foreign policy and national security interests that are implicated, and the related economic sanctions, the United States respectfully asks the Court to refrain from authorizing an auction and sale of Venezuela's largest and most important foreign asset while Crystallex's licensing application is pending before OFAC. Such an action would needlessly imperil U.S. interests, and matters of equity militate against providing such relief, particularly where the parties still dispute the validity of Crystallex's writ.

Dated: July 16, 2020

Respectfully submitted,

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Acting Assistant Attorney General

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Deputy Assistant Attorney General

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Assistant Branch Director
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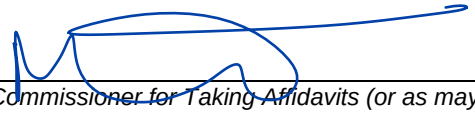
Attorneys for the United States

This is Exhibit “C” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORPORATION, Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Defendant.	:	C.A. No. 17-mc-151-LPS

ORDER

At Wilmington this **14th** day of **January, 2021**, **IT IS HEREBY ORDERED** that:

1. Petróleos de Venezuela, S.A., PDV Holding, Inc., and CITGO Petroleum Corporation's Motion to Quash the Writ of Attachment (D.I. 178) is **DENIED**.

2. Bolivarian Republic of Venezuela's Motion for Relief Under Federal Rule of Civil Procedure 60(b) (D.I. 183) is **DENIED**.

3. Crystallex International Corporation's Motion for an Order Approving the Process of Sale of Shares of PDV Holding, Inc. (D.I. 181) is **GRANTED IN PART** and **DENIED IN PART**.

4. With respect to the writ issued to Crystallex by operation of this Court's August 23, 2018 order (D.I. 95), the priority period of three years, established in 10 Del. C. § 5081, has been tolled at all times to date, and it will remain tolled until a further order of this Court permits Crystallex to begin to execute on the attached property.

5. The parties non-parties shall meet and confer and, no later than **January 22, 2021**, submit a joint status report, which shall include their proposal(s) for how the Court should

proceed with respect to determining the specific details of the sales procedures and identifying a special master to oversee the day-to-day and detailed implementation of the sales procedures.

UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORPORATION, Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Defendant.	:	C.A. No. 17-mc-151-LPS

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OPINION

January 14, 2021
Wilmington, Delaware

STARK, U.S. District Judge:

Crystallex International Corp. ("Crystallex") holds a $1.4 billion judgment against the Bolivarian Republic of Venezuela ("Venezuela" or "Republic"). Crystallex is seeking to collect on its judgment against Venezuela by executing on property nominally owned by the Republic's state-owned oil company, Petróleos de Venezuela, S.A. ("PDVSA"). The specific property Crystallex asks this Court to attach and eventually sell is PDVSA's shares of common stock of its wholly-owned subsidiary, PDV Holding, Inc. ("PDVH").

The extensive litigation that has occurred in this action to date has established (among other things) that PDVSA is the alter ego of Venezuela and that PDVSA's shares of PDVH stock are not immune from attachment or execution. The Court has also issued Crystallex's requested writ of attachment and ordered the United States Marshals Service to serve it on PDVSA. On an interlocutory appeal, the Court of Appeals for the Third Circuit affirmed this Court's findings, conclusions, and actions on these points. The Supreme Court then denied Venezuela's and PDVSA's petition for a writ of certiorari. Hence, the case is now proceeding here on remand from the Third Circuit.

Several motions are pending before the Court. The first is a motion filed by judgment debtor Venezuela pursuant to Federal Rule of Civil Procedure 60(b). (D.I. 183) Venezuela's Rule 60(b) motion seeks relief from the Court's orders of August 9 and 23, 2018, which authorized and directed the Marshal to serve a writ of attachment on PDVSA's shares of PDVH. By a separate motion, PDVSA, PDVH, and PDVH's indirect subsidiary, CITGO Petroleum Corp. ("CITGO" and, together with Venezuela, PDVSA, and PDVH, hereinafter "the Venezuela Parties"), seek to quash that writ of attachment. (D.I. 178)

Crystallex opposes the Venezuela Parties' motions. It has also filed a motion for an order of sale of the attached PDVH shares. (D.I. 181) The Venezuela Parties have submitted their

own proposed procedures for such a sale, in the event their motions to alter the judgment and/or quash the writ are denied. (D.I. 188) Nonparties Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. ("ConocoPhillips") – who are also judgment creditors of the Republic and are plaintiffs in their own actions pending in this Court[1] – have also submitted proposed procedures for how the Court should conduct the sale of PDVH shares. (D.I. 180) Additionally, the United States government filed a Statement of Interest ("Statement") providing its position on aspects of the various motions. (D.I. 212)

The Court received extensive briefing in connection with each of the motions. (*See, e.g.*, D.I. 179, 182, 196, 198-99, 201-02, 204, 206, 219-21, 223, 228-32) The Court also heard telephonic oral argument on two occasions: July 17 and September 17, 2020 (*see* July 17, 2020 Hrg. Tr. (D.I. 214) ("July Tr."); Sept. 17, 2020 Hrg. Tr. (D.I. 226) ("Sept. Tr.")).

For the reasons stated below, the Court will: (1) deny the Republic's Rule 60(b) motion; (2) deny the motion to quash the writ of attachment; and (3) grant in part Crystallex's motion for an order of sale. The Court sets out the contours of the process it will follow to conduct the sale of PDVH shares. While the parties will have an opportunity to provide additional input with respect to details of the sales procedures, the time has come for those procedures to be established and implemented to the greatest extent feasible under current circumstances.

BACKGROUND

Crystallex's decade-long collection efforts have been detailed in numerous prior opinions of this Court and the Third Circuit. *See, e.g.*, *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 333 F. Supp. 3d 380 (D. Del. 2018) ("*Crystallex Writ Op.*"), *aff'd*, 932 F.3d 126 (3d Cir. 2019) ("*Crystallex App. Op.*"). A brief summary will suffice for present purposes.

[1] *See Phillips Petroleum Co. Venezuela Ltd. v. Petróleos de Venezuela, S.A.*, No. 19-mc-342-LPS (D. Del.).

As Judge Ambro wrote for the Third Circuit in July 2019:

> Crystallex International Corp., a Canadian gold mining company, invested hundreds of millions of dollars to develop gold deposits in the Bolivarian Republic of Venezuela. In 2011, Venezuela expropriated those deposits and transferred them to its state-owned oil company, Petróleos de Venezuela, S.A. ("PDVSA"). To seek redress, Crystallex invoked a bilateral investment treaty between Canada and Venezuela to file for arbitration before the International Centre for Settlement of Investment Disputes. The arbitration took place in Washington, D.C., and Crystallex won; the arbitration panel awarded it $1.2 billion plus interest for Venezuela's expropriation of its investment. The United States District Court for the District of Columbia confirmed that award and issued a $1.4 billion federal judgment. Now Crystallex is trying to collect.
>
> Unable to identify Venezuelan-held commercial assets in the United States that it can lawfully seize, Crystallex went after U.S.-based assets of PDVSA. Specifically, it sought to attach PDVSA's shares in Petróleos de Venezuela Holding, Inc. ("PDVH"), its wholly owned U.S. subsidiary. PDVH is the holding company for CITGO Holding, Inc., which in turn owns CITGO Petroleum Corp. ("CITGO"), a Delaware Corporation headquartered in Texas (though best known for the CITGO sign outside Fenway Park in Boston).
>
> This attachment suit is governed by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (the "Sovereign Immunities Act"). Under federal common law first recognized by the Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983), a judgment creditor of a foreign sovereign may look to the sovereign's instrumentality for satisfaction when it is "so extensively controlled by its owner that a relationship of principal and agent is created." *Id.* at 629, 103 S.Ct. 2591.
>
> Interpreting *Bancec*, the District Court, per Chief Judge Stark, concluded that Venezuela's control over PDVSA was sufficient to allow Crystallex to attach PDVSA's shares of PDVH in satisfaction of its judgment against the country. PDVSA and Venezuela, along with PDVSA's third-party bondholders as *amici* (the "Bondholders"), challenge this ruling.
>
> Venezuela and the Bondholders do not substantially contest

> the District Court's finding that it extensively controlled PDVSA. Rather, they raise various jurisdictional and equitable objections to the attachment. Likewise, PDVSA primarily contends that its tangential role in the dispute precludes execution against its assets under *Bancec* irrespective of the control Venezuela exerts over it.
>
> We affirm the District Court's order granting the writ of attachment and remand for further proceedings consistent with this opinion.

Crystallex App. Op. at 132.

On October 1, 2019, the Third Circuit lifted its stay of this Court's proceedings. (D.I. 136) Thereafter, in November 2019, the Court held a status conference, with all parties to the instant action as well as the parties in other pending actions brought by judgment creditors of the Venezuela Parties. (*See* D.I. 141; *see also* D.I. 139 (joint status report)) On December 12, 2019, the Court issued a memorandum order that, among other things, stayed Crystallex's enforcement efforts until the conclusion of the Venezuela Parties' attempt to obtain Supreme Court review of the Third Circuit's decision. (*See* D.I. 154; *see also* D.I. 166 (modifying stay order)) On May 18, 2020, the Supreme Court denied the petition for a writ of certiorari that the Republic and PDVSA had filed. (*See, e.g.*, D.I. 167) The parties' subsequent disputes about how the Court should proceed culminated in the pending motions.

DISCUSSION

I. The Venezuela Parties' Attempts To Eliminate The Writ of Attachment

The Republic's Rule 60(b) motion asks the Court to vacate the writ of attachment that has been served on PDVSA, which holds shares of PDVH to be sold to satisfy Crystallex's judgment against Venezuela. At the same time, PDVSA, PDVH, and CITGO (the "PDVSA Parties") move for the Court to quash the writ of attachment. Together, the Venezuela Parties' attempts to eliminate the writ of attachment are predicated on new facts and circumstances, which

purportedly render the writ inequitable to maintain, and on new legal arguments that were not presented to the Court before it issued the writ. As the Court explains below, both motions lack merit and will be denied.

A. Venezuela's Rule 60(b) Motion

1. Legal Standards

Federal Rule of Civil Procedure 60(b) provides that a party may file a motion for relief from a final judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

A Rule 60(b) motion must be filed within a reasonable time, which for subsections (1), (2), and (3) is one year after the judgment being challenged. *See* Fed. R. Civ. P. 60(c)(1). A motion filed pursuant to Rule 60(b) is committed to the sound discretion of the district court guided by accepted legal principles as applied in light of all relevant circumstances. *See Pierce Assocs., Inc. v. Nemours Found.*, 865 F.2d 530, 548 (3d Cir. 1988). The burden to obtain relief under Rule 60(b) rests on the moving party, and it is a difficult standard to meet. *See generally Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991). This reality stems from the judicial system's "overriding interest in the finality and repose of judgments," which only "extraordinary" and "exceptional" circumstances can "overcome." *Mayberry v. Maroney*, 558 F.2d 1159, 1163-1164 (3d Cir. 1977).

2. The Parties' Contentions

The Republic moves for relief from the Court's August 9 and 23, 2018 orders – which authorized the writ of attachment and then ordered it to be issued and served – pursuant to Rule 60(b)(5) and 60(b)(6). In moving for relief, the Republic principally contends that changed circumstances relating to the relationship between Venezuela and PDVSA vitiate the Court's alter ego determination. According to the Republic, since August 2018, it has "resurrected and reinforced PDVSA's independence" as a company. (D.I. 184 at 5) Further, the Republic argues that one of the crucial predicates underpinning the Court's August 2018 orders – namely, that the government of President Nicolás Maduro exerts control over PDVSA – no longer remains true, for reasons including that the United States now recognizes Juan Guaidó as Interim President. According to Venezuela, Guaidó and the National Assembly have taken concrete steps to confirm PDVSA's independence from the Republic. (*Id.* at 9, 13) Relatedly, the Republic points to the U.S. government's 2019 amendment of sanctions it has imposed on Venezuela as rendering the prospective application of the writ issued by this Court no longer equitable. (*Id.* at 15-16) Finally, the Republic contends that continuing the attachment of its U.S.-based assets undermines U.S. efforts to help Venezuela mitigate its humanitarian crisis, restore democracy, and pay all of its many creditors in a fair and just manner. (*Id.* at 19-20)

Crystallex has multiple responses. With respect to Rule 60(b)(5), Crystallex contends that relief is not available to the Republic because the writ is a final legal remedy and not a prospective equitable remedy. (D.I. 199 at 1-2) In any event, according to Crystallex, maintaining the writ of attachment continues to be equitable under the circumstances. (*Id.* at 2) With respect to Rule 60(b)(6), Crystallex argues that the Republic has failed to identify any "exceptional circumstances" to justify relief. (*Id.* at 2-3) In Crystallex's view, a debtor

reforming practices after a court has imposed consequences for past bad behavior cannot be "exceptional" in this context. (*See id.*)

3. Rule 60(b)(5)

The Court agrees with Crystallex that the Republic has failed to show it is entitled to relief under Rule 60(b)(5). Venezuela has not demonstrated that prospective application of the writ is no longer equitable.

Rule 60(b)(5) authorizes relief from a "final judgment, order, or proceeding" where "applying it prospectively is no longer equitable." The rule "provides a means by which a party can ask a court to modify or vacate a judgment or order if a significant change either in factual conditions or in law renders continued enforcement detrimental to the public interest." *Horne v. Flores*, 557 U.S. 433, 447 (2009) (internal quotation marks omitted). Rule 60(b)(5) permits modification of a judgment on equitable grounds, however, "only if it is 'prospective,' or executory." *Marshall v. Bd. of Educ.*, 575 F.2d 417, 425 (3d Cir. 1978). "[T]he class of judgments having prospective application" is "restricted to forward-looking judgments, such as injunctions and consent decrees." *Comfort v. Lynn Sch. Comm.*, 560 F.3d 22, 28 (1st Cir. 2009). Even then, relief is "limited . . . to injunctions and consent decrees that involve 'long-term supervision of changing conduct or conditions.'" *Id.* (quoting *Paul Revere Variable Annuity Ins. Co. v. Zang*, 248 F.3d 1, 7 (1st Cir. 2001)); *see also Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 272-273 (3d Cir. 2002) (distinguishing cases "involv[ing] injunctions or consent decrees regulating ongoing behavior" from cases in which party failed to make promised payments and "attempt[ed] to use its failure . . . to its own advantage").

The Republic's motion for relief under Rule 60(b)(5) fails, first, because the writ of attachment that the Court issued and had served on PDVSA is not the type of prospective or

executory order to which this Rule applies. Under Delaware law, the issuance of a writ of attachment is a "purely legal remedy" that represents a legal property interest. *Spoturno v. Woods*, 192 A. 689, 692 (Del. 1937). The attachment is not "prospective" in the sense in which that term is used in Rule 60(b)(5), even though it is a necessary precursor to a sale of shares that has not yet occurred and, plainly, will have some future effect. *See Marshall*, 575 F.2d at 425 n.27 ("A 'prospective' injunction envisions a restraint of future conduct, not an order to remedy past wrongs when the compensation payment is withheld from the beneficiaries until some subsequent date."); *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1139 (D.C. Cir. 1988) ("[T]he standard we apply in determining whether an order or judgment has prospective application within the meaning of Rule 60(b)(5) is whether it is 'executory' or involves 'the supervision of changing conduct or conditions.'"). While the Court will need to be involved in the sale of PDVSA's shares of PDVH, the Court's continuing role is merely to remedy the past wrong committed by the Republic by ensuring compensation for Crystallex; it is not the type of ongoing judicial oversight of future conduct to which Rule 60(b)(5) applies. *See, e.g.*, *Twelve John Does*, 841 F.2d at 1138 ("Virtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect; even a money judgment has continuing consequences, most obviously until it is satisfied . . . ."); *see also Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 125 (D.D.C. 2015) (finding *cy pres* provision of agreement analogous to unpaid damages but not "prospective" merely because it "le[ft] some administrative responsibilities to be executed").

The Court is denying Venezuela relief under Rule 60(b)(5) for the further reason that Venezuela has failed to show that continued application of the writ of attachment is no longer equitable. Instead, it would be inequitable to permit the Republic – an adjudicated judgment

debtor, which has acknowledged that it must pay Crystallex what it owes[2] and evidently has the means to do so (at least through sale of PDVSA's shares of PDVH) – to evade its obligation and, thereby, undermine the authority of the U.S. judicial system. As Crystallex observes, and as other courts have recognized, a party that is inequitably refusing to pay a final judgment of the U.S. courts will rarely (if ever) be able to obtain equitable relief for itself from those same courts. (*See, e.g.*, Sept. Tr. at 54 ("They simply do not want to pay, and they want our courts to aid them in evading our judgments."); *see also Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 128 (2d Cir. 2009) (faulting foreign defendants for refusing to comply with court orders and then having "the chutzpah to seek post-judgment, equitable relief from complying with those orders"))

In reaching these conclusions about the equities, the Court is not holding that real-world facts or legal consequences are (to borrow the Republic's terminology) "frozen in amber." (*See, e.g.*, July Tr. at 14; Sept. Tr. at 28-29) Instead, the Court is giving the necessary and proper weight to a final judgment whose validity has been repeatedly recognized in our courts, including the Courts of Appeals for the D.C. Circuit and Third Circuit as well as the District Courts for D.C. and Delaware.

Relatedly, with respect to the equitable analysis, the Court does not see any relevance to the fact that PDVSA has not been held liable for the debts of Venezuela. As Crystallex asked, the Court held only that specified PDVSA property (the shares of PDVH) could be used to satisfy Venezuela's debt to Crystallex. That Crystallex did not seek or receive even more substantial judicial relief does nothing to undermine the equitable importance of enforcing the relief that Crystallex did obtain and ensuring that the final judgment against Venezuela is fully

[2] *See, e.g.*, July Tr. at 18 ("We've tried to be very clear that the Guaidó government recognizes that Venezuela does have to pay this claim . . . ."); *id.* at 52 ("We have said over and over again we acknowledge our responsibility for these debts."); Sept. Tr. at 58-59.

effectuated.

Finally, the Court is also unpersuaded by the Republic's refrain that "it would be inequitable" for Crystallex to collect on its judgment when "all of those other judgment creditors" who have been injured by the Republic are not (yet) about to be paid. (July Tr. at 22-23) Crystallex has done nothing inequitable in litigating against the Republic for more than a decade and prevailing in every forum that has considered the parties' disputes.[3] While the Court joins Crystallex – and, evidently, the United States and the Republic – in hoping that, someday soon, Venezuela will find a way to pay all its debts and also alleviate the terrible suffering in Venezuela, the possibility that this outcome may not be achieved before Crystallex receives what it is owed does not absolve this Court of its duty to comply with the Third Circuit's orders on remand. As the Third Circuit plainly stated, "Venezuela owes Crystallex from a judgment that has been affirmed in our courts. Any outcome where Crystallex is not paid means that Venezuela has avoided its obligations." *Crystallex App. Op.* at 149.

4. Rule 60(b)(6)

Rule 60(b)(6) is a "catch-all" provision, permitting a party to seek reconsideration for "any other reason that justifies relief," i.e., reasons not expressly identified in subsections (b)(1) through (b)(5). The Third Circuit has consistently held that Rule 60(b)(6) provides "extraordinary relief" that is available only in "exceptional circumstances" to address an extreme or unexpected hardship. *Coltec Indus.*, 280 F.3d at 273; *see also Budget Blinds, Inc. v. White*, 536 F.3d 244, 255 (3d Cir. 2008). Here, the Court agrees with Crystallex that the Republic has

[3] *See generally* July Tr. at 27 (Crystallex's counsel: "[Crystallex] has had to spend money chasing assets of the Republic because Venezuela refuses to comply voluntarily with a full and final judgment of the D.C. [District Court] that was affirmed with the D.C. Circuit, and it's final and uncontestable. We're having to search for assets of Venezuela everywhere and to seek attachment because Venezuela does not want to comply with a final judgment of the D.C. Circuit.").

failed to demonstrate the existence of exceptional circumstances that would justify the extraordinary relief that it seeks.

The Republic argues that exceptional circumstances are present because Venezuela has a new government and the new government no longer exercises extensive control over PDVSA. (*See generally* July Tr. at 12, 14-15) Thus, to the Republic, PDVSA is no longer Venezuela's alter ego, so there is no "continuing validity of Crystallex's right to encumber PDVSA's property" based on a debt owed solely by Venezuela. (D.I. 184 at 11) A finding of exceptional circumstances is further supported, according to the Republic, by the fact that the U.S. government recognizes the new Venezuelan government and has imposed stringent sanctions on the Maduro regime in aid of the new Guaidó-led government.

The Court disagrees. Venezuela's motion under Rule 60(b)(6) fails because it is predicated on the Court giving weight (indeed, controlling weight) to events that post-date the situation as it existed at the pertinent time, i.e., the period between the filing of the motion seeking a writ of attachment and the subsequent issuance and service of that writ. Venezuela's arguments are entirely inconsistent with the very purpose of a writ of attachment, which is to hold property of a judgment debtor in the custody of the Court so it can be used for the benefit of the judgment creditor ***no matter what happens in the future***. Hence, crediting Venezuela's position could render this entire litigation a nullity – which would be a highly unusual outcome, particularly given that Crystallex has prevailed in every court that has considered any aspect of this case.

The Court agrees with Crystallex that the important dates are the dates on which it filed its motion for a writ of attachment, on which the writ of attachment was issued, and on which the

writ was served. (*See, e.g.*, July Tr. at 32; Sept. Tr. at 19-20)[4] Before the Court granted Crystallex's motion for a writ, PDVSA was free to alienate its shares of PDVH. After that date, however, the shares were attached; that is, they were (and remain) restricted from alienation by operation of the Court's order. To conclude that the pertinent date of analysis is any date after service of the writ would undermine the entire logic of issuing the writ in the first place.

No party has presented the Court with legal authority, and the Court is aware of none, that requires the Court to reconsider its alter ego determination, a determination that was made based on the record that the parties chose to make, and which was upheld on appeal. As Crystallex persuasively explains:

> PDVSA was Venezuela's alter ego when it received Crystallex's expropriated assets for no consideration, when it paid Venezuela's fees in the underlying arbitration with Crystallex, when Venezuela used it to access U.S. credit markets, when Crystallex filed its attachment motion, and when this Court ruled on that motion. No federal or state authority provides any precedent for Venezuela and PDVSA avoiding accountability for that past conduct by changing course ***after*** this Court has made its dispositive alter-ego finding.

(D.I. 199 at 15) Thus, any change in the status of the relationship between PDVSA and the Republic after the Court's August 2018 rulings does not constitute an exceptional circumstance justifying relief under Rule 60(b)(6). Because all the events on which Venezuela relies – including the Guaidó administration's changes with respect to the PDVSA board, the National Assembly's adoption of new laws, the U.S. government's January 2019 recognition of the Guaidó government, and amendment of U.S. sanctions on Venezuela – post-date August 2018, they do not provide a valid basis for relief. (*See, e.g.*, D.I. 219 at 7; D.I. 224 at 4)

[4] In so holding, the Court is not suggesting that historical events preceding the filing of the motion for a writ are irrelevant. Historical facts could have an impact, even a substantial or perhaps dispositive impact, on assessing (for example) whether an alter ego relationship exists in the pertinent period.

Venezuela's contrary view is based on little more than suggestions from the Third Circuit and this Court that the record might be expanded with evidence arising after August 2018 (*see* D.I. 184 at 12 (citing *Crystallex App. Op.* at 144; *Crystallex Writ Op.* at 425)), and a citation to *Bancec*'s statement that the pertinent inquiry must take account of current circumstances, in light of its design to safeguard international comity. These are, at best, weak support for requiring the Court to reevaluate in 2020 or 2021 an alter ego finding that it made on a record created in 2018, which was the basis for findings that were affirmed in 2019. Adopting Venezuela's position would invite abuse; it would permit a judgment debtor whose alter ego's property has been attached to "fix" whatever facts supported the adverse alter ego determination and then delay, appeal, and ultimately escape having to pay its judgments.

Moreover, courts have held that a change in government is not the type of extraordinary event sufficient to be the basis for relief under Rule 60(b)(6). *See Socialist Republic of Romania v. Widenstein & Co.*, 147 F.R.D. 62, 66 (S.D.N.Y. 1993). To the contrary, such changes occur "regularly, and to allow such . . . event[s] to support a Rule 60(b)(6) motion would wholly negate the finality of judgments." *Id.* at 65-66.

The Court finds further confirmation for its conclusion (that events post-dating the August 2018 issuance and service of the writ of attachment do not constitute exceptional circumstances warranting extraordinary relief under Rule 60(b)(6)) in the reality that Venezuela and PDVSA brought these same "new" facts to the attention of the Third Circuit, which nonetheless affirmed this Court's alter ego finding. Additionally, Venezuela finds itself in its present situation because of its own "deliberate choices" as a litigant, i.e., its refusal to pay judgments that it recognizes that it will eventually have to pay. (July Tr. at 38-39; *see also* Sept. Tr. at 11) Troubling incentives would be created if a party's own inequitable conduct were later

found to create the type of exceptional circumstances justifying relief for that party from a final judgment.

Thus, again, Venezuela's motion for relief under Rule 60(b)(6) will be denied.

5. Interests of the United States

In deciding to deny the Republic's motion, the Court has carefully considered the statement of interest and arguments made by the United States (as the Court has also done in connection with the sales procedures, as discussed below). The U.S. government, like Venezuela, takes the position that "fundamental premises underlying the alter ego ruling no longer hold," which the U.S. says could justify granting the Republic's motion, although it "express[es] no firm legal position on whether [the changed] circumstances require Rule 60(b) relief." (D.I. 212 at 8; *see also* D.I. 220 at 1) For the reasons already explained above, the Court has determined that the changed circumstances post-dating the August 2018 alter ego finding do not justify the relief sought by Venezuela.[5]

Understandably, the government (like the parties) has devoted much attention to the sanctions regime, which is implemented by the United States Department of Treasury's Office of Foreign Assets Control ("OFAC"). In the Court's view, the 2019 changes to the OFAC sanctions do not amount to exceptional circumstances warranting Rule 60(b) relief.[6] The sanctions are established by Executive Orders and through regulations imposing licensing

[5] The Court is grateful to the United States Department of Justice for filing a Statement of Interest and a supplemental brief (*see* D.I. 212, 220) and for participating in the oral arguments in July and September 2020. Although the Court has not been persuaded to act in accordance with the government's request, it has been helped by the government's input – which the Court has long sought (*see, e.g.*, D.I. 154 at 9 n.14, 23 n.25) and hopes to continue to receive as this case proceeds.

[6] Nor does the government contend that they do. (*See* D.I. 220 at 1) (declining to take "firm legal position" on whether Rule 60(b) relief is warranted)

requirements for certain transactions with the Republic. *See, e.g.*, 31 C.F.R. §§ 591.201, 591.202(c), 591.310; *see also* Exec. Order Nos. 13,692 (Mar. 8, 2015), 13,835 (May 21, 2018), 13,850 (Nov. 1, 2018), 13,884 (Aug. 5, 2019). The Court previously held that Executive Order 13,835, which governed the sanctions regime in August 2018, "does not pose a bar to granting relief." *Crystallex Writ Op.* at 421. Likewise now, the modified sanctions regime does not require a retroactive change in the order granting the writ. While the current sanctions regime does appear to block issuance of new writs of attachment on Venezuelan assets in the United States without an OFAC license – as Crystallex and the Republic agree (*see, e.g.*, July Tr. at 41; D.I. 203 at 9) – neither the Executive Orders nor the regulations require invalidating preexisting judicial orders. *See* Exec. Order No. 13,884 §§ 1(a), 1(c), 6(d); Exec. Order No. 13,850; 31 C.F.R. §§ 591.201, 591.202(e), 591.407, 591.506(c).

The OFAC licensing process is important for another reason: it provides a mechanism by which the interests the government has expressed to the Court can be taken into account by the Executive Branch itself. All involved in this litigation, including Crystallex, recognize that (under current law and policy) a specific license will be required from OFAC before a sale of PDVSA's shares of PDVH can close. The Court understands that the process by which OFAC reviews an application for such a license includes consideration of the foreign policy and national security interests the government has asked the Court to consider in this litigation. *See Crystallex App. Op.* at 151 ("[I]t is . . . conceivable that short- or long-term U.S. foreign policy interests may be affected by attachment and execution of PDVSA's assets. The Treasury sanctions provide an explicit mechanism to account for these.").

Thus, again, the Court will deny Venezuela's Rule 60(b) motion.

B. PDVSA Parties' Motion To Quash

PDVSA, PDVH, and CITGO (collectively, the "PDVSA Parties") move to quash the writ of attachment that has been served on PDVSA relating to its shares of PDVH. The PDVSA Parties' motion to quash rests on two contentions: (i) under Delaware law, Crystallex cannot attach PDVSA's shares of PDVH to satisfy a judgment against Venezuela without showing fraud, which Crystallex has failed to do; and (ii) even if Crystallex could attach PDVSA's shares of PDVH to satisfy its judgment against Venezuela, the writ is "inoperable" because PDVH does not possess the physical certificates representing the shares owned by PDVSA. (D.I. 179 at 2-4) The Court concludes that PDVSA is collaterally estopped from arguing that the writ of attachment is invalid under Delaware law, as the validity of the writ was already litigated and determined by this Court in 2018 and upheld by the Third Circuit in 2019. The Court also concludes that PDVSA is judicially estopped from pressing its new contention based on lack of physical possession of shares certificating PDVSA's holdings because it contradicts numerous representations PDVSA made to this Court and the Court of Appeals to obtain relief (such as stays and not having to post a bond). PDVSA's wholly-owned subsidiary, PDVH, and PDVH's indirect subsidiary, CITGO, are bound to the same extent as PDVSA. Finally, the Court concludes that the PDVSA Parties' Delaware law challenges are also untimely.

1. Collateral Estoppel Precludes PDVSA from Challenging the Validity of the Writ Under Delaware Law

The PDVSA Parties argue that Federal Rule of Civil Procedure 69(a), which authorizes execution on property in accordance with "the procedure of the state where the court is located," applies to attachment actions involving foreign states, notwithstanding the statutory immunity provisions of the Foreign Sovereign Immunities Act ("FSIA") of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in 28 U.S.C.). (D.I. 179 at 7-8) Thus, according to the PDVSA

Parties, Crystallex's ability to satisfy its judgment against the Republic by executing on PDVSA's shares of PDVH depends on application of Delaware law. (*Id.* at 9) Under Delaware law, the PDVSA Parties continue, (i) Crystallex may not pierce the corporate veil under an alter ego theory and thereby attach PDVSA's shares of PDVH without a showing of fraud; and (ii) Crystallex failed to allege or prove fraud with particularity during any relevant period. (*Id.* at 9-13) Moreover, according to the PDVSA Parties, to this point in the litigation this Court has "only decided that PDVSA was Venezuela's alter ego for purposes of resolving sovereign immunity under the FSIA. It never decided the question of whether Venezuela has an attachable interest in the shares of" PDVH under Delaware law. (July Tr. at 55)

The Court agrees with Crystallex that collateral estoppel precludes the PDVSA Parties from now challenging the validity of the writ under Delaware law. (*See generally* D.I. 199 at 20-24) While the litigation to date has focused on the FSIA, *Bancec*, and federal law, this Court's findings were not limited to issues of federal law. In addition to denying PDVSA's motion to dismiss – which was predicated principally on federal-law issues of jurisdiction and immunities with respect to Venezuela, PDVSA, and the shares of PDVH – the Court also granted Crystallex's motion to issue the writ. The Court rejected whatever challenges PDVSA made to the validity of that writ and ordered the writ to be served. The Court's orders resulting in service of the writ were affirmed on appeal. At this point, then, the PDVSA Parties are collaterally estopped from challenging the validity of the writ under Delaware law.

Collateral estoppel (also known as issue preclusion) applies where "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action." *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201,

209 (3d Cir. 2001) (internal quotation marks omitted). Each of these requirements is satisfied here. (*See generally* D.I. 229 at 1) (Crystallex: "PDVSA and its affiliates are estopped from relitigating these issues because PDVSA actually litigated the merits of the writ of attachment of its own accord and this Court and the Third Circuit actually decided them adversely to PDVSA's arguments.") The identical issue that the PDVSA Parties now wish to have adjudicated – the validity of the writ of attachment served on PDVSA to attach its shares of PDVH – was previously adjudicated, was actually litigated, and was necessarily decided in the course of this Court deciding to grant Crystallex's motion for a writ of attachment, issue that writ, and have it served. Further, it is undisputed that PDVSA has been fully represented at all stages of this litigation ever since it chose to intervene.

That PDVSA now raises ***new*** arguments in support of its ***old*** position does not defeat application of collateral estoppel. As the Third Circuit has stated, "Once an ***issue*** is raised and determined, it is the entire ***issue*** that is precluded, not just the particular arguments raised in support of it in the first case." *Alevras v. Tacopina*, 226 F. App'x 222, 231 (3d Cir. 2007) (internal alteration omitted). The issue that PDVSA wants to litigate in its motion to quash – the validity of the writ – is the very issue that this Court already decided. That the earlier part of the litigation focused on federal-law arguments against the validity of the writ and PDVSA now wants to make arguments based on Delaware law does not change the reality that the validity of the writ has already been litigated.[7]

[7] Although collateral estoppel would apply even if this Court had decided the validity of the writ without any express reference to Delaware law, in fact both parties and the Court did allude to Delaware law in the earlier part of this litigation. For instance, PDVSA argued in opposition to Crystallex's motion for a writ of attachment that *Bancec* should be applied in accordance with Delaware corporate law, that "Delaware law is crystal-clear that alter ego liability applies only in the rare circumstance where the corporate form is abused to perpetrate a fraud against the plaintiff," and that a clear-and-convincing-evidence standard applies. (D.I. 26 at 16-17 (citing cases applying Delaware law that require showing of fraud or similar injustice); *see also* D.I. 179

In resolving PDVSA's appeal, the Third Circuit explicitly stated that it was reviewing both "the District Court's denial of PDVSA's motion to dismiss as an immune sovereign ***and*** the grant of Crystallex's motion for a writ of attachment under Federal Rule of Civil Procedure 69." *Crystallex App. Op.* at 136 (emphasis added). It further observed that its jurisdiction to review the denial of the motion to dismiss arose "under the collateral order doctrine" and that it had appellate jurisdiction over the grant of the writ because that order "amounted to a ***final judgment*** under 28 U.S.C. § 1291 by leaving the District Court ***nothing left to do but execute***." *Crystallex App. Op.* at 136 (emphasis added; internal quotation marks omitted). The Third Circuit could not have characterized this Court's decision to grant the motion for a writ of attachment as a final order, and as one leaving this Court with "nothing . . . to do but execute," had the Third Circuit required or intended for this Court to permit additional challenges to the validity of the very writ it was describing as "final."[8]

Other statements in the Third Circuit's opinion further confirm that the validity of the writ has been actually, necessarily, and finally resolved. The Court of Appeals held that "so long as PDVSA is Venezuela's alter ego under *Bancec*, the District Court had the power to issue a writ of attachment on that entity's non-immune assets to satisfy the judgment against the country." *Crystallex App. Op.* at 139. This means that if the *Bancec* standard is met – as it has been here – then PDVSA's shares of PDVH are validly attached and can be executed on; no

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at 2-3) In rejecting these arguments, the Court considered "cases applying state-law alter ego standards" but found them "unpersuasive" and "unhelpful." *Crystallex Writ Op.* at 396 n.13, 405; *see also id.* at 387-388 (legal standards section quoting 10 Del. C. § 5031; 8 Del. C. § 324(a)); *id.* at 425 n.48 (noting parties' agreement that Delaware law requires execution of writ to take place through public sale of attached shares).

[8] Crystallex also observes that implicit in Venezuela's filing of a motion pursuant to Rule 60(b) – which, after all, authorizes relief "from a ***final judgment***" (emphasis added) – is Venezuela's recognition that everything about the validity of the writ has already been litigated. (*See, e.g.*, July Tr. at 81)

more challenge to the writ is contemplated. Similarly, the Third Circuit said that "[t]he District Court acted within its jurisdiction ***when it issued a writ of attachment*** on PDVSA's shares of PDVH to satisfy Crystallex's judgment against Venezuela." *Id.* at 152 (emphasis added). This means, again, that the writ is valid – under federal law and, to the extent anyone had a basis to challenge its validity under state law, under state law as well.

Following the September oral argument, PDVSA submitted supplemental authority relating to an issue about which the Court had inquired: whether PDVSA was required to raise merits defenses to Crystallex's motion for a writ of attachment at the same time PDVSA was briefing its purported entitlement to immunity under the FSIA. (*See* D.I. 227; *see also* D.I. 229-32; Sept. Tr. at 40) The case on which PDVSA relies, *Process & Industrial Development Ltd. v. Federal Republic of Nigeria*, 962 F.3d 576, 580 (D.C. Cir. 2020), addresses a situation in which the foreign sovereign, Nigeria, was forced, over its objection, to present all its jurisdictional and merits arguments in a single response to a petition for confirmation of an arbitration award. The Court of Appeals for the D.C. Circuit held that the district court had erred in requiring Nigeria to "brief the merits before resolving a colorable assertion of immunity." *Id.* at 579. *Process* does not help PDVSA evade the application of collateral estoppel here because the situation is fundamentally different from the one addressed by the D.C. Circuit.

As an initial matter, the analogy between the *Process* scenario and the situation here is imperfect, as it is not entirely clear that what *Process* meant by "merits" is truly analogous to the Delaware law issues PDVSA now seeks to press as a basis for quashing the writ. In any event, even accepting that PDVSA is now raising "merits" defenses, PDVSA is collaterally estopped because PDVSA (unlike Nigeria in *Process*) voluntarily intervened in the earlier stages of this litigation and voluntarily interjected those "merits" defenses into this case at that time. As

already explained, PDVSA opposed Crystallex's motion for a writ of attachment on both jurisdictional and "merits" grounds, under both federal and Delaware law. (*See, e.g.*, D.I. 26 at 2, 20-23, 25, 27) (examples of PDVSA arguing merits of Crystallex's motion for attachment) As *Process* confirms, PDVSA was "free to oppose" the motion in that manner. *See* 962 F.3d at 585. PDVSA was not forced, over its objection, to argue its merits positions simultaneously with its jurisdictional positions; it chose to do so. But that choice has consequently led to the application of collateral estoppel.

Because PDVSA's Delaware law challenges to the validity of the writ are barred by the doctrine of collateral estoppel, the Court will not substantively address them.

2. Judicial Estoppel Bars PDVSA from Prevailing on its Lack of Physical Certificates Argument

As an additional basis to quash the writ of attachment, the PDVSA Parties argue that Delaware law requires physical seizure of stock certificates for an effective attachment of shares of a Delaware corporation, but PDVH does not possess physical certificates representing any property belonging to PDVSA, so this Court's attachment is "not laid." (D.I. 179 at 14-16; *see also* 8 Del. C. § 324(a) (stating that, "[e]xcept as to an uncertificated security . . . attachment is not laid and no order of sale shall issue" unless 6 Del. C. § 8-112 has been satisfied); 6 Del. C. § 8-112(a) ("[T]he interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy.")) The Court agrees with Crystallex that PDVSA is judicially estopped from prevailing on this argument. (D.I. 199 at 27-37)

"The doctrine of judicial estoppel prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Carlyle Inv. Mgmt. LLC v. Moonmouth Co. SA*, 779 F.3d 214, 221-22 (3d Cir. 2015); *see also*

New Hampshire v. Maine, 532 U.S. 742, 750-751 (2001) (identifying factors commonly considered in assessing whether to apply judicial estoppel, including (1) whether party's current position is "clearly inconsistent" with its earlier position, (2) whether acceptance of later inconsistent position would create "perception" that court had been "misled," and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped"). Thus, "'absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.'" *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996) (quoting 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477 (1981)).

Judicial estoppel applies here. In August 2018, PDVSA persuaded the Court not to impose a bond requirement when it stayed proceedings pending PDVSA's interlocutory appeal. (*See* D.I. 98) PDVSA obtained this relief by assuring the Court that "a bond . . . is unnecessary because the Writ itself is sufficient security in lieu of a bond," adding that "[g]ranting an unconditional stay does not make Crystallex any worse off than it is today" because "a writ of attachment . . . provides the same functional security as a supersedeas bond." (D.I. 98 at 6, 17) PDVSA further assured the Court that it would be "a waste of money" to require a bond because the writ is "more than enough security in lieu of a bond." (*Id.* at 19; *see also* D.I. 118 at 10 (stating on reply that "the current restraint on the PDVH shares by virtue of the Writ . . . could constitute sufficient security in lieu of a bond"))[9]

In making these representations to the Court, PDVSA was stating that the writ was valid

[9] Likewise, in December 2019, the Court again denied Crystallex's request for a bond, when it stayed these proceedings while the petition for a writ of certiorari was proceeding in the Supreme Court. (D.I. 154) The Court did so based on the Republic's representation that Crystallex was "fully secured for whatever the value is of those assets." (*Id.* at 4 n.4)

and that, unless PDVSA were to prevail on appeal, Crystallex would execute on the writ and collect its judgment. (*See, e.g.*, Sept. Tr. at 55) (Crystallex explaining that PDVSA "affirmatively, factually represented, in order to dispense with the bond, that the writ was effectual to give [Crystallex] security, and that [Crystallex] would have recourse to the shares to sell") PDVSA's new contention that the writ is not valid under Delaware law because PDVH does not possess the physical certificate – and, thus, the writ has no value to Crystallex – is inconsistent with PDVSA's prior assurances that the writ secured Crystallex. There is no good explanation for PDVSA's change of positions. Instead, allowing PDVSA to prevail based on its new argument would show that the Court was previously misled by PDVSA into believing that the validity of the writ would not be subject to any further post-appeal challenge. It would be inequitable for PDVSA to prevail based on its present position, which is incompatible with its prior position.

Similarly, in opposing Crystallex's motion to expedite the appellate proceedings, PDVSA told the Third Circuit that "there is nothing that PDVSA can do to 'prejudice' or 'disturb' the writ of attachment," and that "Crystallex's writ of attachment also preclude[s] any transactions in the PDVH shares." (*Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, No. 18-2797, Doc. No. 3113121203 (3d Cir. Dec. 28, 2018), Opp. to Mot. to Expedite at 16, 18) At various points, PDVSA likewise made representations to this Court that Crystallex would not be harmed by these proceedings moving slowly because the writ protected Crystallex's interests. (*See* D.I. 199 at 34-35 (listing representations PDVSA made in November 2019, December 2019, and February 2020, all seeking to slow down proceedings); *see also* Sept. Tr. at 69-73)) It would be inequitable to permit the PDVSA Parties to quash the writ based on PDVH's lack of physical possession of the share certificates when PDVSA repeatedly relied on the protection of the writ

to persuade this Court not to expedite this litigation.

Relatedly, in August 2018, PDVSA told the Court that "[t]he PDVH shares are located in Delaware, and they are not going anywhere." (D.I. 98 at 6, 15) PDVSA now asserts that it was merely making a representation about a legal fiction, not a statement of fact. According to PDVSA, all it was saying was that under 8 Del. C. § 169, "for ownership purposes, the location of the shares [is] in Delaware." (July Tr. at 100) The Court, however, understood PDVSA to be making a factual statement: that the shares were in Delaware, so the Court need not be concerned about prejudice to Crystallex, as Crystallex's rights were protected by the attached shares that would remain available in Delaware to sell and satisfy Crystallex's judgment. PDVSA's current explanation is not credible and, even if it were, it does not render application of judicial estoppel inequitable. PDVSA persuaded the Court not to require a bond by telling the Court that the shares were in Delaware, then later admitted that the shares are not in Delaware (and cannot even be located). To permit PDVSA to avoid attachment and execution based on this lack of candor with the Court would be grossly unfair to Crystallex and would undermine the integrity of these proceedings.

Accordingly, the Court will not quash the writ based on PDVH's lack of physical possession of a share certificate.

3. PDVH and CITGO Are Estopped To The Same Extent As PDVSA

The PDVSA Parties seeking to quash the writ of attachment include PDVH and CITGO. Even though much of what the Court has said in connection with the motion to quash focuses on PDVSA, the Court's collateral estoppel and judicial estoppel conclusions also estop PDVH and CITGO from prevailing on this motion.

Estoppel doctrines, including collateral and judicial estoppel, can apply "not only against

actual parties to prior litigation, but also against [those] in privity to a party." *Milton H. Green Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 986 (9th Cir. 2012); *see also Board of Trs. of Trucking Emps. of N. Jersey Welfare Fund, Inc. v. Centra*, 983 F.2d 495, 505 (3d Cir. 1992) (noting that one requirement for collateral estoppel is that "the party against whom the bar is asserted was a party ***or in privity*** with a party to the prior adjudication") (emphasis added); *Maitland v. University of Minnesota*, 43 F.3d 357, 364 (8th Cir. 1994); *In re Johnson*, 518 F.2d 246, 252 (10th Cir. 1975). This is because "a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy." *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008).

PDVH and CITGO are in privity with PDVSA, at least for purposes of this litigation. PDVH and CITGO are wholly-owned subsidiaries of PDVSA. *See Crystallex Writ Op.* at 418 n.36. All three entities share a "commonality of . . . interest in [this] matter" in that all three prefer that Crystallex collect on its judgment against Venezuela without involving PDVSA, PDVH, or CITGO. *See generally Doe v. Urohealth Sys., Inc.*, 216 F.3d 157, 162 (1st Cir. 2000). As Crystallex correctly observes, "both subsidiaries are only in this case because of their corporate relationship with PDVSA – *i.e.*, because PDVSA nominally owns the PDVH shares, and CITGO issued debt with change-of-control provisions." (D.I. 199 at 40) Further, "[g]iven that PDVSA brought this motion to quash jointly with its subsidiaries and co-signed the brief, D.I. 179 at 1, 19, it would 'strain credulity to find that the interests of [the subsidiary] and [the parent] were so distinct that they are not aligned' for purposes of preclusion." (*Id.*) (quoting *Anchor Glass Container Corp. v. Buschmeier*, 426 F.3d 872, 880 (7th Cir. 2005)) Additionally, PDVH is here as the custodian of PDVSA's nominal property (the PDVH shares), and preclusion applies where a "bailee seeks to relitigate" the "bailor's right of recovery." *Union Ins. Soc'y of Canton, Ltd. v. William Gluckin & Co.*, 353 F.2d 946, 953 (2d Cir. 1965); *see also McLaughlin*

v. Board of Trs. of Nat'l Elevator Indus. Health Benefit Plan, 686 F. App'x 118, 122-123 (3d Cir. 2017) (citing *Taylor*, 553 U.S. at 894) (noting that bailor-bailee relationship falls within "substantive legal relationship" exception to same-party-or-privity requirement for res judicata).[10]

Moreover, it would be inequitable for PDVH or CITGO to succeed in quashing the writ on a basis on which PDVSA is estopped. This case has been heavily litigated for years, in multiple courts, and Crystallex has prevailed at every step. It has done so by defeating every material argument raised in opposition to the relief that it has obtained. When the Court permitted PDVH and CITGO to intervene as parties, it did not do so in contemplation of these parties potentially undoing all the work that Crystallex, PDVSA, the Republic, this Court, and other courts have done in this case.

Finally, as Crystallex also contends, "[w]hoever brings this motion, this Court is bound by the Third Circuit's published, precedential decision," which held that the writ is valid. (D.I. 199 at 40) Hence, even if PDVH and CITGO were not in privity with PDVSA (which they are) and were not estopped to the same extent as PDVSA (which they are), the Court's obligation to comply with the appellate mandate would still require the Court to deny the motion to quash.

4. The PDVSA Parties' Delaware Law Challenges Are Untimely

A related reason for denying the motion to quash, in addition to those already given above, is that all the PDVSA Parties' Delaware law challenges to the validity of the writ are untimely. Given how this case has proceeded, the proper time to have made these arguments was when the Court was evaluating Crystallex's motion to issue and serve the writ of attachment.

[10] Because PDVH and CITGO are in privity with PDVSA, and are therefore estopped to the same extent as PDVSA, the Court need not decide whether PDVH and CITGO have standing. Even assuming PDVH and CITGO have standing, they cannot prevail on the motion.

Failing that, at minimum PDVSA needed to have put the Court on notice that, after the Court granted Crystallex's motion, PDVSA would still seek an opportunity to attack the validity of the writ on state law grounds. PDVSA did not do so, notwithstanding this Court's express inquiry.

The last section of the Court's August 9, 2018 opinion (which denied PDVSA's motion to dismiss and granted Crystallex's motion for the writ) identified four aspects of the parties' dispute that, as of that date, "remain[ed] unsettled." *Crystallex Writ Op.* at 425. None of the questions that the Court posed expressly referenced Delaware law or the validity of the writ, reflecting the Court's belief that these issues had been settled (an impression that PDVSA never tried to correct). The last of the Court's questions did reference the possibility of a motion to quash, but only with respect to whether the alter ego finding might be subject to further evidentiary proceedings. The Court asked: "will Venezuela, PDVSA, and/or any other entity appear and seek to supplement the factual record already developed in this litigation and, if so, will such an entity attempt to (and, if so, be permitted to) argue that additional evidence materially alters the Court's findings, and thereby seek to quash the writ?" *Id.*

After asking that question, the Court cited a Delaware case and then referenced three occasions on which Crystallex had stated or suggested that the validity of the writ might be subject to challenge ***after*** it was issued.[11] These statements appear to have been made by

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[11] The full citation sentence is as follows:

> *See generally Hibou, Inc. v. Ramsing*, 324 A.2d 777, 783 (Del. Super. Ct. 1974) ("[O]n a motion to quash the order the Court as required by 10 Del. C. § 3506 must look at the Prima facie case presented to ascertain whether the plaintiff has 'a good cause of action' against all the defendants whose property has been attached."); D.I. 3-1 at 2 (Crystallex noting, "if any party has a claim to the shares at issue, that party can raise the issue with the Court after the writ is served"); Tr. at 21, 23 (Crystallex recognizing PDVSA, as well as perhaps PDVH and Venezuela, ***may*** have right to "come back in and challenge the writ"); D.I. 70

Crystallex in contemplation of ordinary proceedings under Delaware law, where the imperative is to get the writ in place, thereby attaching the property (and protecting the creditor) while deferring litigation over the validity of the attachment as much as possible until after the writ is served. Over time, as this case advanced – including as PDVSA intervened, moved to dismiss, and vigorously litigated all issues, including by opposing Crystallex's motion for a writ – Crystallex appeared to come to the view that, in the circumstances here, all litigation about the validity of the writ had occurred. (*See, e.g.*, D.I. 49 at 23 (Crystallex arguing: "The standard procedure in Delaware as I understand it is that when we are dealing with a foreign sovereign, we would go to the Clerk's Office, we would get a writ issued, we would serve it, and anyone who had an objection would come in and move to quash the writ. And that is essentially . . . what we're doing here."); D.I. 70 at 3 n.5 (Crystallex stating that PDVSA should have moved to quash writ after issuance, "as is the ordinary course," rather than "preemptively" moving to dismiss, as PDVSA chose to do))

Thus, in August 2018, it seemed that, as this case had evolved, the litigation over the validity of the writ had already occurred in connection with the Court's decisions on the motion for a writ and the motion to dismiss. For this reason (among others), the Court ordered the parties to submit a joint status report before deciding whether and when to order service of the writ. *See Crystallex Writ Op.* at 425. In the status report that the Court subsequently received, PDVSA did not address the Court's questions. (*See* D.I. 86 at 6-8) PDVSA provided no

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> at 2 n.4 (Crystallex noting, "PDVSA may, of course, seek to challenge the writ on non-jurisdictional grounds by a motion to quash brought after the writ has issued and before the Court allows the execution process to commence").

Crystallex Writ Op. at 425 (emphasis added).

indication that it, or any other entity, would seek to quash the writ based on Delaware law or on any other basis. Nor did PDVSA challenge Crystallex's statement in its portion of the status report (in response to the Court's question about supplementing the record) that "Venezuela has no new legal or factual basis on which to attempt to quash the writ at this stage of the litigation." (*Id.* at 5 n.7) The Court then proceeded to issue the writ and to have it served on PDVSA.[12]

The Court cannot find any indication, either in the record of this Court or that of the Third Circuit, that the PDVSA Parties were purporting to reserve their rights to press Delaware-law objections to the validity of the writ.[13] For example, neither PDVSA's mandamus petition (in No. 18-2889) nor opening brief for the consolidated appeals (in Nos. 18-2797 & 18-3124) stated or suggested that there were potentially unresolved issues of state law that this Court would have to consider on remand. PDVSA's reply in support of its mandamus petition suggested that this Court might ultimately need to order additional briefing and hear additional argument concerning how the sale of the attached shares should proceed, ***but not*** as to whether the writ of attachment was even valid in the first place. (*See In re Petróleos de Venezuela, S.A.*, No. 18-2889, Doc. No. 3113093035 (3d Cir. Nov. 23, 2018) PDVSA Mandamus Reply Br. at 5-6)[14]

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[12] Even the way in which the PDVSA Parties now characterize their position in the August 2018 status report supports the Court's conclusion that these parties acted as if the writ was valid, subject only to their appellate rights. In an October 2020 letter to the Court, the PDVSA Parties state that "PDVSA took the position that 'until the Third Circuit finally resolves PDVSA's appeal from this Court's denial of its sovereign immunity, this Court can take no further action with respect to issuance or enforcement of the Writ.'" (D.I. 230 at 4) (quoting D.I. 86 at 8)

[13] As previously noted, both the parties and the Court did allude to Delaware law issues during the portion of the litigation leading to the grant of Crystallex's motion for issuance of the writ and denial of PDVSA's motion to dismiss. *See supra* p. 18 n.7.

[14] Crystallex, in its mandamus brief, reiterated to the Third Circuit the view that it had taken in

The PDVSA Parties now insist that "PDVSA made clear" that "the question of the propriety of the attachment was something that should be litigated later, and that the only issue the Court should decide was the FSIA question" (Sept. Tr. at 38), but they fail to cite to where they purportedly made this clear. Likewise, they assert that "from the beginning, everyone . . . knew there was going to be an attack on the attachment" after the writ was granted (July Tr. at 67), yet they identify no basis from which the Court (or Crystallex) should have "known" to expect a post-grant attack. When the Court directly asked counsel whether they could have raised their Delaware law challenges to the writ in the earlier phase of the litigation, counsel simply stated that "it wasn't raised, and PDVSA had every right not to raise it . . . nor was it required to be part of the litigation before this Court." (Sept. Tr. at 40)

In the Court's view, the PDVSA Parties' challenges to the validity of the writ are untimely. The Court agrees instead with Crystallex, which stated that the PDVSA Parties "were supposed to raise all of these arguments when they were fighting . . . the issuance of the writ." (Sept. Tr. at 54) As Crystallex accurately put it, if "PDVSA thought that there were questions of Delaware law that were additional questions that should have been adjudicated," then "the time

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this Court, explaining that challenges to the writ typically come after the writ has been served, but PDVSA intervened and "preemptively oppose[d] attachment." (*See In re Petróleos de Venezuela, S.A.*, No. 18-2889, Doc. No. 3113055847 (3d Cir. Oct. 9, 2018) Crystallex Mandamus Br. at 8) Crystallex added that this Court had never limited the briefing on either Crystallex's or PDVSA's motions to jurisdiction issues and that PDVSA never asked for the briefing be so limited. (*Id.* at 9) Likewise, in its brief on the consolidated appeals, Crystallex explained that PDVSA had intervened to oppose the writ both on jurisdictional grounds and on the merits. (*Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, No. 18-2797, Doc. No. 3113141891 (3d Cir. Jan. 23, 2019) Crystallex Appeal Br. at 18) In its reply briefs in support of its mandamus petition and appeal, PDVSA did not challenge these contentions or indicate that there were any state law or validity issues remaining to be litigated in this Court. (*See generally* PDVSA Mandamus Reply Br.; *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, No. 18-2797, Doc. No. 3113154696 (3d Cir. Feb. 6, 2019) PDVSA Appeal Reply Br.)

to raise them" was when the Court was adjudicating Crystallex's motion for a writ and PDVSA's motion to dismiss. (July Tr. at 80) It is now too late to raise these issues.

Thus, again, the PDVSA Parties' motion to quash will be denied.

II. Crystallex's Time To Execute The Writ Has Been And Remains Tolled

An issue that arose in the September 2020 argument was whether the writ of attachment issued by the Court in August 2018 would expire after three years, pursuant to Delaware law, 10 Del. C. § 5081. (*See, e.g.*, Sept. Tr. at 71-72) Having reviewed the parties' subsequently-filed letter briefs on this topic, the Court agrees with Crystallex that the stay orders issued by this Court and the Third Circuit have tolled the three-year priority period of Section 5081. (*See* D.I. 228 at 1) The Court further agrees with Crystallex that the Court has discretion to issue additional orders tolling the expiration of the three-year priority period should that become necessary – depending on future events and their pace – where any delay is not of Crystallex's making. (*See id.* at 1-2) Such tolling is consistent with the principles of equitable tolling. *See CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014) (explaining that statutes of limitations exist to encourage plaintiff to pursue his rights diligently, and when extraordinary circumstance prevents him from bringing timely action, restriction imposed by statute of limitations does not further its purpose). The Venezuela Parties – the Republic, PDVSA, PDVH, and CITGO – do "not object to a ruling by the Court that the running of the 3-year period specified in 10 *Del. C.* § 5081 is tolled during the pendency of any stay order." (D.I. 228 at 3) ConocoPhillips and the United States take no position on the proper interpretation of the Delaware statute. (*See id.*)

The Court deems it the most appropriate exercise of its discretion to expressly order that the three-year priority period has not yet begun, as Crystallex has not been permitted to execute on its writ, and no writ of execution has been issued. Given the pace of these proceedings to

date, and the large amount of litigation that likely lays ahead, it is not in the interests of any parties, any other creditors, or the Court to leave doubt as to whether the priority period is running.

III. Crafting The Contours Of The Sales Process

The Court stated in December 2019: "If the Supreme Court proceedings do not alter the Third Circuit's instructions to this Court, the Court intends to proceed to selling" PDVSA's shares of PDVH that are attached. (D.I. 154 at 4 n.4) Consistent with this pronouncement, Crystallex has been pushing the Court – ever since the Supreme Court denied the Republic's petition for certiorari in May 2020 – to move expeditiously toward a sale.[15] By contrast, the Venezuela Parties (in addition to pressing their Rule 60(b) motion and motion to quash) have asked the Court to refrain from taking any steps toward a sale unless and until OFAC provides a specific license. Additionally, on July 16 – the eve of the Court's hearing on the pending motions – the United States appeared, urging the Court to follow the Republic's preferred path and not to proceed toward a sale absent an OFAC license.

The Court directed that the disputes relating to sales procedures be briefed in parallel with the briefing on the motions for relief from the writ of attachment. (D.I. 213, 218) In addition to hearing from the parties and the government, the Court also received briefing from non-party ConocoPhillips, which requests that its judgment against Venezuela be handled according to the same process that the Court implements for Crystallex. (D.I. 180, 202)

The Court has decided that the most reasonable and appropriate course of action, in light of the totality of the circumstances, is to set up the sales procedures and then to follow them to

[15] At the September 17 oral argument, Crystallex asked the Court to set a target sale date during the week of January 11, 2021. (*See* Sept. Tr. at 73) As is evident from the timing of today's Opinion, the Court has not granted this request.

the maximum extent that can be accomplished without a specific license from OFAC. All parties agree that, under current law and policy, a sale of PDVH shares cannot be completed without a specific OFAC license. (*See, e.g.*, Sept. Tr. at 86) But all the preparatory steps that can be taken without such a license can, and should, be taken. The alternative would be to make Crystallex wait for an indefinite additional period, which cannot be justified given the decade and resources that Crystallex has already spent trying to collect on its judgment and given its uninterrupted string of litigation victories. At this point, the Court agrees with Crystallex that "[t]here is no just reason not to advance this litigation to the furthest point that OFAC's sanctions regime permits." (D.I. 223 at 2)

Two principal arguments have been made against moving forward at this time, but neither of them has persuaded the Court. First, the Venezuela Parties point out that OFAC may never issue a specific license allowing the sale and, in that event, all the Court's efforts toward conducting the sale (and all the litigation accompanying those efforts) will have been wasteful. The Court recognizes this risk. It does not deter the Court from progressing toward the sale because the Court has been provided no indication as to the timing of an OFAC decision and it seems possible that OFAC is waiting to make a decision until after this Court makes further progress.

Second, the government expresses substantial concern that even "prefatory steps" toward a sale will be "potentially damaging" to the Guaidó regime and, thereby, undermine U.S. foreign policy and potentially raise national security issues. (Sept. Tr. at 47; *see also id.* at 31 (counsel for Republic echoing U.S. concerns: "When the United States tell[s] you that the step like establishing a sales process could have national security implications, that really needs to be taken seriously.")) As the Court has already noted, it does not, of course, take these serious

concerns lightly. As the Court has also already stated, however, the OFAC licensing process provides the better mechanism through which the Executive Branch can bring to bear the foreign policy and national security interests on which Crystallex's collection efforts might have an impact. (*See generally* Sept. Tr. at 47 (government counsel acknowledging that "the OFAC process is certainly the backstop for protecting U.S. interest[s]"); *id.* at 88; *see also* D.I. 212-2 at 2 ("[A]ny auction or sale of PDVH's shares at this time would undermine current U.S. foreign policy on Venezuela. Absent a change in the above considerations, these factors will weigh heavily in OFAC's license determination and could prove to be dispositive in adjudicating this license application.")) The government has not taken the position that the Court is "blocked from moving forward" (Sept. Tr. at 105) and, in the Court's view, the time has arrived for the sales process to proceed. *See also generally Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, No. 19-cv-10023, 2020 WL 6135761, at *19 (S.D.N.Y. Oct. 16, 2020) (rejecting government's request for delay despite government's position that "[a]ny . . . loss of PdVSA's U.S.-based assets . . . would be detrimental to U.S. policy and the interim government's priorities").

Having decided that the Court should proceed with the sale to whatever extent is possible in the absence of a specific OFAC license, the Court will now set out some of the contours of the sales procedures that it will follow. The parties will be required to meet and confer and then submit more specific proposals in the very near future.

- *Consistent with all parties' recognition of the Court's broad discretion, the Court will appoint a special master to oversee the day-to-day and detailed implementation of the sales procedures, which will comply with the "twin*

commands" of (i) selling the shares at a public sale to the highest bidder and (ii) meeting the notice requirements. Delaware statutory provisions and Supreme Court decisions set out the Court's broad discretion. *See* 8 Del. C. § 324; *Deibler v. Atlantic Properties Group, Inc.*, 652 A.2d 553, 558 (Del. 1995). The parties agree that the Court can appoint a special master, who will have the time and expertise to fulfill the Court's and the U.S. Marshal's duties to prepare for and conduct the sale. (*See, e.g.*, D.I. 180 at 1-2, 4-6 (ConocoPhillips); D.I. 196 at 10 (Venezuela Parties); D.I. 198 at 18 (Crystallex); *see also* Sept. Tr. at 80, 97-98, 108, 112)

- *With the assistance of the special master, the Court will set minimum requirements – for example, for advertising and other notices to reach potential bidders, for the materials that will be deposited in a data room to be accessed by potential bidders – which any interested entity may supplement or exceed.* (*See generally* Sept. Tr. at 75, 79-80, 95; *see also Deibler*, 652 A.2d at 557-58 ("[J]udgment debtors are free to supplement such notice as the sheriff may disseminate. As the owner of the property, they not only have the economic interest rationally to expend the appropriate level of resources on notices, but also have the fullest (and cheapest) access to relevant information."))

- *Crystallex will be permitted to credit bid.*

- *Crystallex's priority status shall not be affected by the sales procedures that are ultimately implemented.*

- *To ensure that only serious bidders participate, and that only a bidder seriously interested in completing the transaction wins at the auction, bidders will be required to make a substantial good faith deposit, which will be refundable to all but the winning bidder. The winning bidder may be required to make an additional non-refundable deposit to provide adequate incentive to close the deal.*

- *The winning bidder will be given a reasonable amount of time to pursue any necessary and desirable regulatory approvals, with the potential for a Court-ordered extension upon a showing of good cause.*

- *The process will result in the sale of as many, but only as many, shares of PDVH as are necessary to satisfy the judgment of Crystallex (and of any other judgment creditor whose judgment may be added to the sale).* The parties (including, if they wish, ConcocoPhillips and the United States) shall work with the special master to consider implementing procedures to permit any other judgment creditor of Venezuela to request to participate in the Court's process.

- *The Venezuela Parties will have a fair and reasonable opportunity to be involved in the prefatory procedures, the sale, and any negotiations, but the Court will retain control over the sale.*[16] *The Venezuela Parties will have a seat at the table, but they will not be running the process.*

[16] The Court expects that the Venezuela Parties are likely right that an aspect of finalizing a sale will be the necessity for "rather complex negotiations of minority rights in any stock that is sold." (Sept. Tr. at 96)

A bit more needs to be said about this last point. The Court rejects the Venezuela Parties' contention that only PDVSA should be permitted to conduct the sales process, purportedly because only PDVSA has the incentive and knowledge to conduct a fair process. (*See* D.I. 188 at 3, 17) While Crystallex's incentives, as creditor, may extend only so far as to ensure that the result of the sales process is sufficient to recover what it is owed, and not necessarily to maximize the value of the PDVH shares to be sold, the whole point of the public, noticed, full and fair competitive sales process required under Delaware law is to maximize the sales price obtained, regardless of the creditor's incentive. The Court is confident that the procedures it follows will result in the appropriate incentives. As for knowledge, the Court's procedures will include a data room, into which PDVSA may (and will be expected to and, if need be, ordered to) deposit information that will be material to potential bidders' understanding of the full and fair value of the shares being sold. In other words, any unique knowledge held by PDVSA can – and will – be obtained and utilized irrespective of whether PDVSA is permitted to conduct the sale itself.

Importantly, it would be inequitable to permit PDVSA to conduct the sale at this point. Venezuela, through PDVSA and otherwise, has had every opportunity to pay its legitimate, Court-recognized debt to Crystallex, including before, during, and after the arbitration, and throughout the extensive litigation in this Court, the Court of Appeals, and the Supreme Court. Even today, the Republic could pay Crystallex what it owes and avoid the sales process altogether. But, having made Crystallex undertake a decade's worth of extensive and expensive efforts to collect on its judgment, the Court is not going to permit a highly-recalcitrant judgment debtor to conduct its own sales process over the objection of its repeatedly-victorious judgment creditor.

Each day that Crystallex does not recover on its judgment is arguably something of an affront to the United States judicial system. Those days must soon come to an end.

CONCLUSION

For the reasons discussed above, Venezuela's motion for relief under Federal Rule of Civil Procedure 60(b) will be denied, as will the motion to quash the writ of attachment filed by PDVSA, PDVH, and CITGO. Crystallex's motion to set the sales procedures will be granted in part and denied in part. The parties will be ordered to meet and confer and then provide further input on the specific manner in which the Court should proceed toward conducting the sale of PDVSA's shares of PDVH in an amount sufficient to satisfy the judgment that Venezuela owes Crystallex. An appropriate Order follows.

This is Exhibit “D” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

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U.S. Government Support for the Democratic Aspirations of the Venezuelan People

BUREAU OF WESTERN HEMISPHERE AFFAIRS

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ARTICLE INDEX

What is going on in Venezuela?

Slide towards Dictatorship: On January 10, 2019, Nicolás Maduro illegally assumed the presidency of Venezuela, despite the lack of free and fair elections. As he has done for years to retain power, Maduro arbitrarily jails or bans prominent political leaders and uses the distribution of food as a tool for social control. He manipulated the electoral process and timeline to his advantage; electoral irregularities included everything from intimidation and disenfranchisement of voters to improper tabulation of the results. The freely and fairly elected Venezuelan National Assembly, in accordance with the Venezuelan constitution, determined the presidency was vacant because Maduro claimed victory in a fraudulent election.

A country in crisis: Meanwhile the economy and basic social services have continued to spiral downward, leading to a growing humanitarian crisis. For example:

- Nearly 9 out of 10 Venezuelans live in poverty
- More than 3 million Venezuelans have fled the country
- 90% of families report not being able to buy enough food and Venezuelans lost an average of 24 pounds in 2018.
- The country's inflation rate is over 1 million percent and growing

Restoring Democracy: On January 23, National Assembly President Juan Guaidó, supported by the democratically-elected National Assembly and the Venezuelan constitution, assumed the interim Presidency of Venezuela in an effort to restore democracy and constitutional rule. As of May 8, 53 countries, along with the majority of the Venezuelan people, join the United States in recognizing Juan Guaidó as the legitimate interim President of Venezuela.

How is the United States helping? United States policy supports the interim government, the National Assembly, and the Venezuelan people in their struggle for a stable, democratic, and prosperous Venezuela. In service of this goal, the United States has undertaken a series of strong policy actions since 2017 meant to pressure the former Maduro regime and support democratic actors. In addition, the U.S. is providing robust support for the region's humanitarian response to this crisis.

The U.S. effort focuses on three key pillars:

1. Sanctions and Visa Revocations

U.S. actions ensure the former Maduro regime cannot rely on the U.S. financial system for its destructive practices. The U.S. government has made over 150 designations of individuals and entities in Venezuela since 2017 via Executive Orders (E.O.) and the Kingpin Act. Learn more about these actions **here**. More details on the U.S. Department of Treasury Sanctions are located **here**.

In addition, The United States has imposed visa restrictions on individuals responsible for undermining Venezuela's democracy, including numerous Maduro-aligned officials and their families. Since January 10, 2019, the United States has revoked more than 700 visas, including 107 of former diplomatic personnel.

2. Diplomatic engagement

The United States is working alongside regional partners to help Venezuelans return their country to a prosperous democracy and hold Maduro and those who support him accountable for the current political, economic, and humanitarian crises. On January 24, 2019, the United States and 15 other OAS member states recognized Juan Guaidó as the interim President of Venezuela. On April 9, the OAS approved a resolution to accept Guaidó's

nominee Gustavo Tarre as Venezuela's representative to the Permanent Council. The Lima Group, consisting of 14 countries in Latin America, was founded in 2017 to find a peaceful resolution to the Venezuelan crisis. They have been committed to that goal since and issued several declarations in 2019, including a 17-point statement on April 15 calling on the UN and other international organizations for additional support; rejecting military intervention; and urging unity of process among partners supporting Venezuela.

3. Humanitarian and Development Assistance

U.S. assistance supports emergency response efforts throughout the region, and builds long-term capacity to assist those who have fled the crisis in Venezuela. Total regional support is more than $256 million since Fiscal Year 2017, including:

- More than $213 million in humanitarian response.
- $43 million in economic and development assistance.

On January 24, Secretary Pompeo announced the United States is ready to provide an additional $20 million in initial humanitarian assistance to the people inside Venezuela.

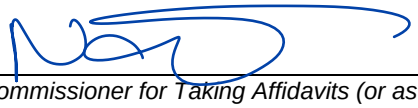
For more information about United States' humanitarian assistance, please visit: **https://www.usaid.gov/EstamosUnidosVE** and **https://www.state.gov/overseas-assistance-by-region/europe-central-asia-and-the-americas/#Venezuelans**.

Find all releases, including remarks by Secretary Pompeo, Special Representative to Venezuela Abrams, and other key actions by the State Department HERE.

TAGS

Bureau of Economic and Business Affairs | Bureau of Western Hemisphere Affairs | Democracy | Division for Counter Threat Finance and Sanctions | Human Rights

This is Exhibit “E” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

EXHIBIT 1

United States Department of State

Bureau of Western Hemisphere Affairs
Washington, D.C. 20520-6258

July 16, 2020

Ethan P. Davis
Assistant Attorney General, Acting
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Cc: Andrea Gacki, Director, Office of Foreign Assets Control

Re: Crystallex Int'l Corp. v. Bolivarian Rep. of Venezuela (D. Del. C.A. No. 17-mc-151-LPS)

Dear Mr. Davis:

I would appreciate your assistance in forwarding this letter to the District Court for the District of Delaware. This letter is in response to the Court's invitation on December 12, 2019 to file a Statement of Interest concerning the United States' views on this matter.

As the Special Representative for Venezuela since January 24, 2019, I, Elliott Abrams, confirm the following:

Facing an illegitimate regime led by Nicolás Maduro and an inner circle of corrupt officials, Venezuela is in the midst of an unprecedented humanitarian, political and economic crisis. This can be directly tied to a two-decade process, which Maduro continues today, in which the government has destroyed democratic institutions, repressed free speech, committed serious human rights abuses, and ruined the prosperity Venezuela once enjoyed.

The regime has become a source of great instability in the entire region because this continuing conduct has resulted in the greatest refugee crisis in Latin American history. More than five million Venezuelans have left their country seeking freedom, sustenance, or both. This wave has created great social and economic problems for the recipient nations: nearly two million individuals in Colombia, roughly 800,000 in Peru, and an estimated 300,000 each in Ecuador and in Chile. Moreover, the Maduro regime has built a close relationship with foreign adversaries of the United States and which but for the regime's existence would have little foothold in South America: Russia, China, and most recently Iran. That these relationships include military and intelligence aspects makes them even more worrying for U.S. national security.

There have been significant developments within Venezuela since 2018 that have precipitated a fundamental shift in U.S. policy. Fraudulent presidential elections in Venezuela in May 2018 failed to produce any winner. On January 23, 2019, the National Assembly, in its role as the only legitimate branch of government duly elected by the Venezuelan people, invoked the Venezuelan constitution to declare the office of the presidency vacant.[1] Consistent with the Venezuelan constitution, the President of the National Assembly, Juan Guaidó, was sworn in as Interim President of the country. On January 23, 2019, President Trump issued a public statement officially recognizing Guaidó as the Interim President of Venezuela.[2] The same day, Secretary of State Pompeo also issued a statement concerning the United States' recognition of the "new Venezuelan government."[3] On January 5, 2020, Secretary Pompeo congratulated Guaidó on his re-election as president of the National Assembly, and confirmed: "The United States and 57 other countries continue to regard him as the legitimate leader of the National Assembly and thus the legitimate interim president of Venezuela."[4]

United States policy toward Venezuela is to support the full restoration of democracy, beginning with free, fair, and transparent presidential elections in which the Venezuelan people choose their leaders. To achieve this, the Secretary of State recently proposed a "Democratic Transition Framework" to resolve Venezuela's crisis that is rooted in a peaceful, democratic transition that calls for Maduro to step aside, and the establishment of a broadly acceptable, transitional government to administer free and fair presidential elections. This framework also sets forth a viable pathway for lifting Venezuela-related U.S. sanctions.[5]

Since recognizing the Guaidó government on January 23, 2019, the U.S. government has taken steps, including through additional economic sanctions, to ensure Maduro is not able to liquidate in fire sales the financial assets of Venezuela that are located in United States jurisdictions (and especially CITGO, the crown jewel of PdVSA). The United States government recognizes the authority of Interim President Guaidó to preserve these assets. To this end, the National Assembly and President Guaidó have taken such steps, including by appointing new ad hoc boards of directors for PdVSA, PDVH, and CITGO. The State Department takes note of the Government of Venezuela's recent statements to this Court regarding the current independence of these boards and has no reason to doubt the veracity of those representations.

Insofar as interim President Guaidó has responsibility over Venezuela's assets, he also has responsibility for its liabilities. Unfortunately, as a result of years of mismanagement through the regimes of former Presidents Chávez and Maduro, Venezuelan financial assets have been imperiled. CITGO, as part of the U.S.-based assets of PDVH and its parent company PdVSA, is one such example of a national resource that has been placed in legal and economic jeopardy as a result of the actions of former Venezuelan governments. Critical to U.S.

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[1] https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-recognizing-venezuelan-national-assembly-president-juan-guaido-interim-president-venezuela/

[2] *Id.*

[3] https://www.state.gov/recognition-of-juan-guaido-as-venezuelas-interim-president/

[4] https://ve.usembassy.gov/the-united-states-congratulates-interim-president-juan-guaido-on-his-re-election-as-president-of-the-national-assembly/

[5] https://www.state.gov/democratic-transition-framework-for-venezuela/

foreign policy, the United States assesses that the domestic legitimacy of the interim government under Guaidó would be severely eroded were a forced sale of CITGO to take place while the illegitimate Maduro regime still attempts to cling to de facto power in Caracas. The efforts by creditors to enforce judgments against Venezuela by taking immediate steps toward a conditional sale of PdVSA's U.S.-based assets, including PDVH and CITGO, are detrimental to U.S. policy and the interim government's priorities. Should these assets be advertised for public auction at this time, the Venezuelan people would seriously question the interim government's ability to protect the nation's assets, thereby weakening it and U.S. policy in Venezuela today.

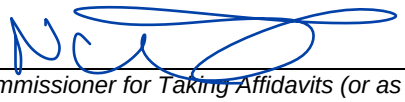
Whatever the eventual settlement of Venezuela's debts or the fate of other accounts or assets, CITGO today is a special case. Every Venezuelan knows of this company and it is viewed, as are Venezuela's oil reserves, as a central piece of the national patrimony. It is clear that its loss through a forced sale in a U.S. court would be a great political victory for the Maduro regime, which has already claimed that the United States and Guaidó are conspiring to 'steal' CITGO. The impact on Guaidó, the interim government, and U.S. foreign policy goals in Venezuela, would be greatly damaging and perhaps beyond recuperation.

Sincerely,

Elliott Abrams

Elliott Abrams
Special Representative for Venezuela
United States Department of State
2201 C Street N.W.,
Washington D.C. 20520

This is Exhibit “F” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

U.S. DEPARTMENT OF THE TREASURY

FINANCIAL SANCTIONS

- Specially Designated Nationals And Blocked Persons List (SDN)
- SDN List - Data Formats & Data Schemas
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- OFAC Reporting System
- Contact OFAC

Frequently Asked Questions

Search all FAQs

OFAC LICENSES

78. What agencies other than Treasury review OFAC license applications and what are the roles of these other agencies?

Many of OFAC's licensing determinations are guided by U.S. foreign policy and national security concerns. Numerous issues often must be coordinated with the U.S. Department of State and other government agencies, such as the U.S. Department of Commerce. Please note that the need to comply with other provisions of 31 C.F.R. chapter V, and with other applicable provisions of law, including any aviation, financial, or trade requirements of agencies other than the Department of Treasury’s Office of Foreign Assets Control. Such requirements include the Export Administration Regulations, 15 C.F.R. Parts 730 et seq., administered by the Department of Commerce, and the International Traffic in Arms Regulations, 22 C.F.R. Parts 120-130, administered by the Department of State.

June 16, 2006

This is Exhibit “G” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

EXHIBIT 2

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

July 16, 2020

Ethan P. Davis
Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (D. Del. 17-mc-151-LPS)

Dear Mr. Davis:

This letter is in response to the U.S. District Court for the District of Delaware's invitations on December 12, 2019, and May 22, 2020, to provide certain input concerning the above-referenced litigation. I would appreciate your assistance in forwarding this letter to the Court.

As the Director of the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"), I, Andrea M. Gacki, confirm the following:

On April 9, 2020, Crystallex submitted a specific license application requesting OFAC "to provide Crystallex a Specific License to allow the federal court in the District of Delaware (which has jurisdiction over the shares in question and in whose constructive possession the shares are currently held) to pursue all activities necessary and ordinarily incident to organizing and conducting a judicial sale of the shares as provided for by U.S. federal and Delaware law, regulations, and precedents." In other words, Crystallex seeks OFAC authorization for an auction and sale of the shares of PDV Holding, Inc. ("PDVH") belonging to Petróleos de Venezuela, S.A. ("PDVSA"). PDVH is the holding company for CITGO Holding, Inc., which in turn wholly owns CITGO Petroleum Corp. ("CITGO"). Crystallex's license application is predicated on its possession of a valid writ of attachment against the PDVH shares issued by the U.S. District Court for the District of Delaware (Case No. C.A. No. 17-mc-00151-LPS).

In its December 12, 2019, Memorandum Order, the District of Delaware expressed interest in hearing directly from the Executive Branch regarding "whether OFAC will refrain from issuing a license until the bidding process is complete." It is my understanding that the "bidding process" referenced in the Court's order is Crystallex's proposed auction of the PDVH shares to execute on its writ of attachment. Subsequently, OFAC has monitored the Court's stay of the litigation and has reviewed the parties' recent motions and briefing in response to the

Court's May 22, 2020, Memorandum Order lifting that stay. In the May 22 Memorandum Order, the Court reiterated its interest in receiving input from the Executive Branch.

In response to the Court's question, it is not the case that OFAC is waiting to adjudicate Crystallex's license application until after a public auction of PDVH's shares has been held. Indeed, a license is required before a public auction or contingent sale could occur. *See* Executive Orders 13808, 13835, 13850, 13884; 31 C.F.R. §§ 591.201, 591.506(c) & 591.407; *see also* OFAC Frequently Asked Questions 808 & 809. In fact, taking the steps Crystallex proposes toward an auction and sale of PDVH's shares would not in any way facilitate OFAC's license adjudication process with respect to Crystallex's instant license application. It is well within OFAC's licensing discretion to evaluate and determine whether to issue Crystallex's requested license without needing to know the identity of the "winning bidder" in advance. OFAC uses its substantial discretion to evaluate a range of options when considering any specific licensing request, from a decision to deny the license in its entirety, to grant the license in its entirety, to grant the license subject to certain conditions, or even to bifurcate the license request and sequence the authorization of actions in the future. When evaluating a specific licensing request, OFAC could also separately determine that additional information or supplemental specific license requests are needed.

Although OFAC is not yet in a position to issue a decision to Crystallex on its license application, OFAC would like to take this opportunity to discuss the license application review process. Unlike a routine OFAC license application, which may present a straightforward request to license a single transaction or limited set of transactions involving the applicant and a sanctioned person or a sanctioned jurisdiction, Crystallex's submission implicates a series of complicated legal and policy questions, such as (1) the rapidly evolving and delicate political and economic situation in Venezuela, including the United States' recognition of Juan Guaidó as the Interim President of Venezuela; (2) developments in OFAC sanctions to address the changed circumstances in Venezuela; and (3) the claims of numerous other creditors against Venezuela arising from the malign actions of the regimes of former Presidents Hugo Chávez and Nicolás Maduro. Moreover, other creditors have submitted license applications that implicate the PDVH shares. Based on complex considerations such as these, OFAC's internal review of Crystallex's license application, as well as the U.S. government's corresponding interagency review, remain ongoing.

As you know, Elliott Abrams, the U.S. Department of State's Special Representative for Venezuela, has submitted to the U.S. Department of Justice (with a copy to OFAC) a letter intended for this Court indicating that any auction or sale of PDVH's shares at this time would undermine current U.S. foreign policy on Venezuela. Absent a change in the above considerations, these factors will weigh heavily in OFAC's license determination and could prove to be dispositive in adjudicating this license application.

OFAC also notes that the pending license application is predicated on Crystallex's possession of a valid writ of attachment. OFAC is aware that the Court is currently considering (1) Venezuela's Motion for Relief Under Federal Rule of Civil Procedure 60(b); and (2) PDVSA, PDVH, and CITGO's Motion to Quash the Writ of Attachment. If the Court grants either of these two motions, then Crystallex's pending license application will become moot.

OFAC intends to continue its review of Crystallex's license application while monitoring the District of Delaware litigation and communicating with the U.S. Department of State regarding Venezuela's evolving political and economic situation.

Sincerely,

Andrea M. Gacki Digitally signed by Andrea M. Gacki
Date: 2020.07.16 13:28:58 -04'00'

Andrea Gacki
Director
Office of Foreign Assets Control

This is Exhibit “H” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

The White House
Office of the Press Secretary

For Immediate Release March 09, 2015

FACT SHEET: Venezuela Executive Order

President Obama today issued a new Executive Order (E.O.) declaring a national emergency with respect to the unusual and extraordinary threat to the national security and foreign policy of the United States posed by the situation in Venezuela. The targeted sanctions in the E.O. implement the Venezuela Defense of Human Rights and Civil Society Act of 2014, which the President signed on December 18, 2014, and also go beyond the requirements of this legislation.

We are committed to advancing respect for human rights, safeguarding democratic institutions, and protecting the U.S. financial system from the illicit financial flows from public corruption in Venezuela.

This new authority is aimed at persons involved in or responsible for the erosion of human rights guarantees, persecution of political opponents, curtailment of press freedoms, use of violence and human rights violations and abuses in response to antigovernment protests, and arbitrary arrest and detention of antigovernment protestors, as well as the significant public corruption by senior government officials in Venezuela. The E.O. does not target the people or the economy of Venezuela.

Specifically, the E.O. targets those determined by the Department of the Treasury, in consultation with the Department of State, to be involved in:

- actions or policies that undermine democratic processes or institutions;
- significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014;
- actions that prohibit, limit, or penalize the exercise of freedom of expression or peaceful assembly; or
- public corruption by senior officials within the Government of Venezuela.

The E.O. also authorizes the Department of the Treasury, in consultation with the Department of State, to target any person determined:

- to be a current or former leader of an entity that has, or whose members have, engaged in any activity described in the E.O. or of an entity whose property and interests in property are blocked or frozen pursuant to the E.O.; or
- to be a current or former official of the Government of Venezuela;

Individuals designated or identified for the imposition of sanctions under this E.O., including the seven individuals that have been listed today in the Annex of this E.O., will have their property and interests in property in the United States blocked or frozen, and U.S. persons are prohibited from doing business with them. The E.O. also suspends the entry into the United States of individuals meeting the criteria for economic sanctions.

We will continue to work closely with others in the region to support greater political expression in Venezuela, and to encourage the Venezuelan government to live up to its shared commitment, as articulated in the OAS Charter, the Inter American Democratic Charter, and other relevant instruments related to democracy and human rights.

The President imposed sanctions on the following seven individuals listed in the Annex to the E.O.:

1. Antonio José Benavides Torres: Commander of the Strategic Region for the Integral Defense (REDI) of the Central Region of Venezuela's Bolivarian National Armed Forces (FANB) and former Director of Operations for Venezuela's Bolivarian National Guard (GNB).

- Benavides Torres is a former leader of the GNB, an entity whose members have engaged in significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014. In various cities in Venezuela, members of the GNB used force against peaceful protestors and journalists, including severe physical violence, sexual assault, and firearms.

2. Gustavo Enrique González López: Director General of Venezuela's Bolivarian National Intelligence Service (SEBIN) and President of Venezuela's Strategic Center of Security and Protection of the Homeland (CESPPA).

- González López is responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, or has participated in, directly or indirectly, significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014. As Director General of SEBIN, he was associated with the surveillance of Venezuelan government opposition leaders.
- Under the direction of González López, SEBIN has had a prominent role in the repressive actions against the civil population during the protests in Venezuela. In addition to causing numerous

injuries, the personnel of SEBIN have committed hundreds of forced entries and extrajudicial detentions in Venezuela.

3. Justo José Noguera Pietri: President of the Venezuelan Corporation of Guayana (CVG), a state-owned entity, and former General Commander of Venezuela's Bolivarian National Guard (GNB).

- Noguera Pietri is a former leader of the GNB, an entity whose members have engaged in significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014. In various cities in Venezuela, members of the GNB used excessive force to repress protestors and journalists, including severe physical violence, sexual assault, and firearms.

4. Katherine Nayarith Haringhton Padron: national level prosecutor of the 20th District Office of Venezuela's Public Ministry.

- Haringhton Padron, in her capacity as a prosecutor, has charged several opposition members, including former National Assembly legislator Maria Corina Machado and, as of February 2015, Caracas Mayor Antonio Ledezma Diaz, with the crime of conspiracy related to alleged assassination/coup plots based on implausible - and in some cases fabricated - information. The evidence used in support of the charges against Machado and others was, at least in part, based on fraudulent emails.

5. Manuel Eduardo Pérez Urdaneta: Director of Venezuela's Bolivarian National Police.

- Pérez Urdaneta is a current leader of the Bolivarian National Police, an entity whose members have engaged in significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014. For example, members of the National Police used severe physical force against peaceful protesters and journalists in various cities in Venezuela, including firing live ammunition.

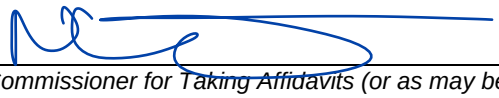
6. Manuel Gregorio Bernal Martínez : Chief of the 31st Armored Brigade of Caracas of Venezuela's Bolivarian Army and former Director General of Venezuela's Bolivarian National Intelligence Service (SEBIN).

- Bernal Martínez was the head of SEBIN on February 12, 2014, when officials fired their weapons on protestors killing two individuals near the Attorney General's Office.

7. Miguel Alcides Vivas Landino: Inspector General of Venezuela's Bolivarian National Armed Forces (FANB) and former Commander of the Strategic Region for the Integral Defense (REDI) of the Andes Region of Venezuela's Bolivarian National Armed Forces.

- Vivas Landino is responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, or has participated in, directly or indirectly, significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014.

This is Exhibit “I” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

COMMODITIES NEWS MAY 22, 2019 / 5:43 PM / UPDATED 2 YEARS AGO

Exclusive: Guaido says Washington should help Venezuela keep U.S. refiner Citgo

By Brian Ellsworth, Mayela Armas, Daniel Flynn

5 MIN READ

CARACAS (Reuters) - The United States should help Venezuela keep control over U.S. refiner Citgo by preventing its seizure by creditors seeking to collect on unpaid Venezuelan debts, opposition leader Juan Guaido said in an interview with Reuters on Wednesday.

Venezuelan opposition leader Juan Guaido, who many nations have recognized as the country's rightful interim ruler, poses for picture after an interview with Reuters in Caracas, Venezuela, May 22, 2019. REUTERS/Manaure Quintero

Venezuela's opposition is pushing to remove President Nicolas Maduro amid a catastrophic economic collapse that has created a humanitarian crisis. It also wants to protect overseas assets that it says will be crucial for a future economic recovery after Maduro leaves office.

Guaido, who invoked the constitution in January to assume the interim presidency after declaring Maduro's 2018 re-election a fraud, said a U.S. executive order protecting Citgo from seizure was the best option to keep the refiner in Venezuelan hands.

"That would be ideal for Venezuela. It should be decided in a sovereign manner by the United States," he said at the headquarters of opposition party Popular Will in Caracas. "We are looking to follow that path, given the institutional fragility of Venezuela, which is living through a dictatorship."

“Our objective is to protect the nation’s assets, (which is necessary) because of irresponsible borrowing,” said Guaido, who heads the opposition-run legislature.

Houston-based Citgo, a subsidiary of Venezuelan state oil firm PDVSA, is the country’s most important overseas asset. It is the eighth-largest U.S. refiner, with a 750,000 barrel-per-day refining network supplying 4% of America’s fuel.

The United States, along with nearly 50 countries around the world, calls Guaido Venezuela’s legitimate leader and has thrown its support behind him in efforts to push Maduro from power.

Washington has levied several rounds of sanctions that have crippled Venezuela's capacity to borrow abroad and hobbled its vital oil industry by restricting crude sales to the United States.

But the White House has not issued an executive order protecting Citgo from creditors. Washington carried out a similar measure for Iraqi assets following the U.S. invasion of that nation in 2003.

Venezuela's opposition this week hired veteran debt lawyer Lee Buchheit to help restructure its more than $150 billion in debts. In October, Buchheit co-authored a paper saying Venezuela needed a protective executive order to force debtholders reluctant to accept losses to the negotiating table.

The White House did not immediately respond to a request for comment.

Venezuela's Information Ministry and Petroleos de Venezuela SA (PDVSA) did not respond to emails seeking comment.

SEEKING MILITARY SUPPORT

An ad-hoc board of PDVSA, made up of Guaido allies, made a $71 million interest payment this month on the company's 2020

Slideshow (5 images)

bond, which is backed by Citgo shares.

The move was criticized by some opposition sympathizers on the grounds that Venezuela is likely to lose Citgo anyway. The same bond has a $913 million payment due in October that most believe the ad-hoc board will not have the resources to pay.

“When October comes, under the conditions of Maduro today, it will be difficult to pay,” Guaido said in the interview. “When October comes, we hope to be able to protect assets.”

Venezuela’s inflation has topped 1 million percent, fueling malnutrition and disease. Millions of Venezuelans have fled what was once a bustling economy.

Maduro, who blames the country’s economic problems on U.S. sanctions, calls Guaido a puppet of the United States and has said he should “face justice.”

Guaido has called on the military to end the crisis by turning on Maduro and helping to create a transition government that can call free and fair elections.

But the military has been slow to respond.

A small group of officers, along with Guaido, led street protests on April 30, urging the armed forces to rise up against Maduro. But the effort collapsed when the bulk of Venezuela's military stood by the ruling Socialist Party.

Guaido said change was being blocked by fear among military officers over taking the first step, as well as by the extensive presence of Cuban intelligence agents who conduct surveillance operations.

“What is preventing a transition? That there is a dictatorship, that there is persecution of military officers that does not allow for direct interaction between them,” he said. “Cuba’s interference is notorious.”

Cuba has sent thousands of doctors to support Venezuela’s health service. Venezuela’s opposition, defecting military officers and Washington officials have also said Cuba provides intelligence services to prop up Maduro’s administration. That is denied by the Venezuelan and Cuban governments.

Reporting by Brian Ellsworth, Mayela Armas and Daniel Flynn in Caracas; additional reporting by Matt Spetalnick in Washington; Editing by Rosalba O’Brien

Our Standards: The Thomson Reuters Trust Principles.

MORE FROM REUTERS

This is Exhibit “J” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

Venezuela Opposition Debilitated as Biden Set to Take Office; President Maduro's regime tightens grip on National Assembly, undermining U.S.-backed movement despite oil sanctions - Correction Appended

The Wall Street Journal Online

January 5, 2021

Correction Appended

THE WALL STREET JOURNAL.

Section: WORLD; Latin America News

Length: 1277 words

Byline: By Kejal Vyas

Body

When Venezuela's regime takes over the National Assembly on Tuesday, it will put the U.S.-backed opposition leader Juan Guaidó in his most precarious position since becoming head of the movement to oust the authoritarian President Nicolás Maduro two years ago.

For the current government, Mr. Guaidó will no longer be head of congress in Venezuela now that Mr. Maduro's lieutenants are about to be sworn in *to lead the 277-member National Assembly*. Mr. Guaidó's position as president of the assembly had given the U.S. and more than 50 countries justification to recognize him over Mr. Maduro as Venezuela's legitimate leader.

Mr. Maduro has publicly said his government is willing to engage with the U.S., though past efforts at brokering a dialogue failed.

An official on President-elect Joe Biden's transition team said that it has no plans to negotiate with Mr. Maduro, adding that it has had no communications with the Venezuelan regime.

"President-elect Biden has been clear throughout the campaign and during the transition that he believes Maduro is a dictator and that the Biden administration will stand with the Venezuelan people and their call for a restoration of democracy through free and fair elections," the official said.

The U.S., the official added, will seek to rebuild multilateral pressure on Mr. Maduro, call for the release of political prisoners, implement sanctions against Venezuelan officials guilty of corruption and human-rights abuses, and grant Temporary Protected Status for Venezuelans living in the U.S.

As Mr. Maduro tightens his grip on congress, the country's opposition will soon be dealt another blow. Some remaining opposition lawmakers close to Mr. Guaidó plan to flee the country, fearing jail if they remain in Venezuela, opposition activists said. With no powers or control over territory, what Mr. Guaidó and his team call an interim government is now little more than a virtual entity, making pro-democracy statements through social media and Zoom. The Trump administration has said it still considers Mr. Guaidó as Venezuela's only democratically elected leader.

With many in the opposition leadership now outside Venezuela, Mr. Guaidó is increasingly isolated, living in a small apartment in Caracas with his wife and small daughter and wondering whether the secret police will arrest him.

As Mr. Biden prepares to be inaugurated as U.S. president Jan. 20, Venezuelan opposition leaders said they are shifting away from strategies to spur a revolt to force Mr. Maduro from power. Instead, they said they would lean more toward *finding a way to alleviate food and medicine shortages* in a country facing economic calamity. A third of Venezuelans can't access three meals a day, according to the U.N. World Food Program. As many as half endure daily power outages while they struggle to get by with annual inflation near 2,000%, according to the Caracas business-consulting firm Ecoanalítica.

Since the U.S. first recognized Mr. Guaidó as Venezuela's interim president in January 2019, Washington has imposed oil and financial sanctions and drummed up international support for a movement to overthrow Mr. Maduro. That effort has failed.

Now many opposition activists, as well as former advisers to President Trump, are saying changes are needed.

"The whole Guaidó interim-government scheme probably outlived its life," said Juan Cruz, who previously advised the White House on Venezuela policy. He said the U.S. needs to reconsider its broad sanctions, which targeted state companies and figures accused of corruption and human-rights abuses.

"January represents a new day for a lot of players: the opposition, the U.S. administration and even the regime," said Mr. Cruz.

Mr. Guaidó, in a recent video address on Twitter, sought to instill confidence in his movement by assuring that it is unified and would lead the country toward free elections. "The dictatorship is not going to leave willingly, and that's why we need to make them leave," he said.

He called on supporters to protest in the streets on Tuesday as Mr. Maduro's allies take their seats in the National Assembly. He also urged Venezuelan envoys operating in other countries to lobby host nations to increase pressure on Mr. Maduro.

But he proposed little else. And in Venezuela, the economic meltdown and jailings have most Venezuelans preoccupied with getting access to scarce running water and fuel rather than thinking about protests.

"You've lost the capacity to mobilize people," said Luis Vicente León, a political analyst who directs the Caracas polling firm Datanálisis. "Today there's no one pressuring Maduro inside Venezuela-no political negotiations, no election participation or protests. The result is the complete pulverization of the opposition."

In a recent poll, Datanálisis found only 25% of respondents said they had hopes for a democratic transition in the country. Ecoanalítica estimates that the economy contracted by 23% in 2020 after shrinking 40% a year earlier.

Hopelessness in the country is expected to increase the outflow of desperate Venezuelans, which now totals five million. The Organization of American States estimates that the number of Venezuelan migrants could swell to seven million by the end of 2021, more than the number of Syrians who have fled that country's brutal war.

The political standoff is making the search for solutions to the humanitarian crisis difficult. Opposition lawmakers allied with Mr. Guaidó recently approved a resolution on a Zoom videoconference calling for them to continue in office after Tuesday, when their five-year congressional terms ended. They argued that the legislative elections Mr. Maduro held in December were illegitimate, as did the U.S. and many other countries.

Mr. Maduro said in a recent address that he would crack down on any lawmakers trying to extend their mandate. "I won't be afraid to act fiercely to apply the law," the leftist leader shouted in the televised speech, flanked by the military high command.

At times Mr. Maduro has challenged Mr. Guaidó by *taking over opposition political parties*. But Mr. Guaidó also faces fissures within his own movement. Democratic Action, one of the main political parties in the opposition coalition, abstained from a vote on keeping Mr. Guaidó as assembly chief. Some lawmakers said they have lost faith in his team.

Oscar Ronderos, a lawmaker who has broken from Mr. Guaidó, described the current opposition movement as "an interim government that does not exist, in a National Assembly that doesn't serve anyone."

The movement's internal discord, according to opposition lawmakers, could further damage its credibility, especially among countries in the European Union that advocate negotiations with the regime to permit humanitarian aid and later an agreement on free elections.

In recent weeks, the Maduro regime displayed its repression by arbitrarily detaining the directors of organizations that provide food to poor Venezuelans and sentencing six former executives of Citgo to long prison terms. The U.S. government has said the executives-five of whom are U.S. citizens-are being held unjustly.

"Rather than being confidence building, it's confidence eroding," for negotiation hopes, Mr. Cruz said.

Julio Borges, who from exile in Colombia serves as the top diplomat for Mr. Guaidó's movement, said he expects the U.S. and its allies won't go easy on Mr. Maduro.

"The most important thing for the democratic struggle in Venezuela is that Maduro is still unable to stabilize the country or increase his popularity," he said.

Ginette Gonzalez in Caracas, Venezuela, contributed to this article.

Write to Kejal Vyas at *kejal.vyas@wsj.com*

Notes

PUBLISHER: Dow Jones & Company, Inc.

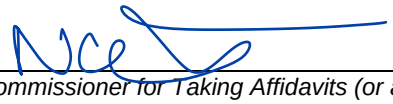
Correction

Corrections & Amplifications

As many as half of Venezuelans endure daily power outages while they struggle to get by with annual inflation near 2,000%, according to the Caracas business-consulting firm Ecoanalítica. An earlier version of this article incorrectly said 12,000%. (Corrected on Jan. 4.)

Load-Date: January 5, 2021

This is Exhibit “K” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



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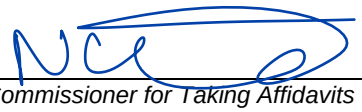
NATALIE RENNER

This is Exhibit “L” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORP., Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Defendant.	Case No. 1:17-mc-00151-LPS

BRIEF OF THE BOLIVARIAN REPUBLIC OF VENEZUELA AND PETRÓLEOS DE VENEZUELA, S.A., AND PDV HOLDING, INC. REGARDING POTENTIAL FUTURE PROCEDURES

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Dated: June 17, 2020

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Defendant Bolivarian Republic of Venezuela (the "Republic" or "Venezuela") and Intervenor Petróleos de Venezuela, S.A. ("PDVSA") respectfully request the Court to defer further consideration of the sale procedures until (1) the Court rules on the motion of CITGO Petroleum Corp. ("CITGO"), PDVSA, and PDV Holding, Inc. ("PDVH") to quash the writ of attachment and the Republic's motion for relief under Federal Rule of Civil Procedure 60(b), and (2) the Office of Foreign Assets Control ("OFAC") issues a specific license authorizing Plaintiff Crystallex International Corp. ("Crystallex") to "tak[e] other concrete steps in furtherance of an auction or sale" of the PDVH shares.[1]

NATURE AND STAGE OF PROCEEDINGS

The Court's Memorandum Order of May 22, 2020 directed the parties to submit "briefs on . . . the mechanics by which the sale of PDVH is to occur" and "any other issues." D.I. 174.

SUMMARY OF ARGUMENT

1. The Guaidó Government is committed to a process for global restructuring of Venezuela's debt obligations. The Executive Branch blocking order, under which steps toward any asset sale cannot occur without an OFAC license, has created the conditions that would allow for such a global restructuring.[2]

2. Even assuming that Crystallex has validly attached the PDVH shares (which it has not),[3] publicly designing a process to sell even a part of Venezuela's most important strategic foreign asset for the benefit of Crystallex would undermine that restructuring effort and present a

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[1] U.S. Dep't of Treasury, OFAC FAQs: General Questions, FAQ No. 809 (2019) ("FAQ 809"), Declaration of Stephen C. Childs, Ex. 1. All references in this brief to "Ex. __ refer to exhibits to the Declaration of Stephen C. Childs.

[2] *See* Memorandum of Law in Support of the Republic's Motion for Relief Under Federal Rule of Civil Procedure 60(b), filed today.

[3] This is addressed in the pending motions to quash the writ of attachment and for relief under Federal Rule of Civil Procedure 60(b).

concrete and very substantial political threat to the Interim Government led by Juan Guaidó (the "Interim Government"), and thereby undermine the asset protection strategy of the Venezuelan National Assembly and U.S. foreign policy. It would also undermine the interests of both the United States and Venezuela in an orderly and equitable resolution of all of Venezuela's legacy private claims. In contrast, a decision not to determine the sale procedure at this juncture would not injure Crystallex, whose judgment is accruing interest, who is barred by OFAC sanctions from taking concrete steps in furtherance of a sale, and who admits a sale cannot close without such a license. Crystallex has represented that it made an application to OFAC for a license to proceed to execute on its judgment. The Court should allow the administrative process to play out before addressing (if a license is issued) the process by which any licensed sale should take place.

3. If the Court decides to proceed to determine a process for how to sell shares of PDVH, the Court should not begin that process until Crystallex obtains an OFAC license to allow it to move forward with the sale and the market recovers from the current anomalously depressed and volatile conditions. Because each phase of a competitive share sale process involves "prepar[ation] for" and "concrete steps in furtherance of an auction or sale," FAQ 809, an OFAC license will be needed from the outset of the process. Even if OFAC issues a specific license authorizing certain preliminary steps in preparation for a sale—e.g., hiring advisors, preparing marketing materials and creating and populating a data room—no bids should be solicited unless and until Crystallex has obtained the OFAC license required to complete a sale. Without reasonable certainty that OFAC will permit a sale, and at what time and under what limitations a sale would be permitted, any auction will not produce a value-maximizing price. Potential buyers either will not expend the considerable effort to determine the true value of CITGO and all its components, or will not participate at all. And with the oil industry in virtual collapse because of

low oil prices and the effects of the worldwide pandemic shutdown, numerous industry participants have delayed asset sales; the Court should do the same.

4. In short, contrary to the Court's expectations at the time it issued the writ of attachment in 2018, under the current circumstances it is not possible to implement an "appropriate commercially reasonable procedure by which to effectuate the sale of the PDVH shares, in order to maximize the likelihood of a fair and reasonable recovery."[4]

5. For all those reasons, now is not the time to determine sale procedures. But if the Court decides to address the procedures for a sale at this time (contingent on OFAC eventually licensing the transaction),[5] any sale procedures would have to comply with certain minimum legal and commercial mandates that are essential to a fair outcome in a highly complex context like this. The first procedure should be to determine the amount of Crystallex's judgment that remains unpaid, which will require Crystallex to provide a full accounting of the amounts, dates and circumstances of the payments it has already received at the Republic's expense from the illegitimate Maduro regime (which total, at least, approximately $500 million). Then, for a multibillion-dollar privately-held company like PDVH (where there have been no transactions in its stock since its certificate was issued in 2000), the owner must conduct a robust and professional sale process to determine the fair value of the shares and to ensure that no more shares than necessary are sold.

6. While the Delaware courts have never had an occasion to address an execution sale of stock of such a corporation, Delaware cases scrutinizing M&A transactions and liquidations in

[4] *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 333 F. Supp. 3d 380, 425 (D. Del. 2018).

[5] Crystallex does not dispute that "any final sale of the shares of PDVH remains subject to OFAC approval under the current sanctions regime." D.I. 167 at 1.

connection with corporate deadlocks are instructive as to the minimum steps required to maximize value in connection with stock sales. Such cases support the proposition that any appropriate commercially reasonable sale procedure would need to include, at a minimum, the primary customary phases of a competitive share sale process involving a large private corporation. Any sale should be managed by the owner, which (unlike a judgment creditor like Crystallex) knows the asset best, would continue to own most of the shares following a sale, and owes responsibilities to other creditors and its stockholder—all of whom have interests in preserving and maximizing value.

ARGUMENT

I. EVEN ASSUMING THAT CRYSTALLEX HAS VALIDLY ATTACHED THE PDVH SHARES (WHICH IT HAS NOT), THE COURT SHOULD DEFER DETERMINING THE PROCEDURES FOR THE SALE OF SUCH SHARES.

Assuming the Court concludes that the PDVH shares have been validly attached and that the writ should not be quashed, the Court should defer determining the procedures for a sale at this time. A public process of determining such procedures presents a serious destabilizing risk to the Interim Government and is inconsistent with U.S. foreign policy as expressed in OFAC guidance. Nor does it delay any sale for the satisfaction of Crystallex's judgment because all parties agree that no sale can occur without a license.

A. The Balance of Competing Interests Weighs in Favor of Deferring the Court's Determination of Any Sale Procedures.

The Court "has the inherent authority to manage the cases on its docket 'with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.'" *Noble* v. *Delaware*, C.A. No. 17-353-LPS, 2017 WL 5163355, at *5-6 (D. Del. Nov. 7, 2017) (quoting *Landis* v. *N. Am. Co.*, 299 U.S. 248, 254-55(1936))(internal quotation marks omitted)

(Stark, J.). Here, the balance of competing interests weighs in favor of deferring the Court's determination of the procedures for the sale of the PDVH shares until OFAC issues a specific license.

A decision determining the procedures to sell the PDVH shares—Venezuela's most valuable and strategic foreign asset—would have serious political and legal consequences for the Interim Government. In particular, it would allow the illegitimate Maduro regime, which illegally controls the major media outlets in Venezuela, to destabilize the Interim Government by suggesting that Interim President Guaidó is about to lose CITGO, when, in fact, the PDVH shares are blocked property and OFAC has taken no action on Crystallex's application for a license permitting a sale. The Republic has publicly committed to a voluntary restructuring on "equal terms" of all its legacy debt, including claims, like Crystallex's, "resulting from the expropriations and nationalizations carried out by the Chavez/Maduro regimes."[6] The CITGO assets are the largest and most strategic foreign asset in the Venezuelan people's patrimony. So important are those assets that the Venezuelan Constitution recognized the authority of the National Assembly to oversee any transfer of interests in them to a foreign entity.[7] Any steps taken at this time toward a forced sale of a stake in those assets, at the insistence of a single creditor, would hand the Maduro regime an opportunity (however misleadingly) to question the sincerity of the United States' support for the Interim Government and the National Assembly. In normal times, considerations of comity should counsel against such steps; with the extraordinary challenges facing the

[6] Ex. 2.

[7] Litigation is currently pending in the Southern District of New York challenging a purported security interest in those assets given in 2016 to noteholders, in defiance of the National Assembly, by PDVSA when it was controlled by the Maduro regime. That litigation invokes Articles 150 and 187 of the Venezuelan Constitution, which require National Assembly approval for "contracts in the national public interest" with "entities . . . not domiciled in Venezuela." *See* Ex. 3.

Republic's legitimate government and the United States' efforts to support it, those considerations of comity are particularly compelling.

The Maduro regime has demonstrated that it is monitoring this litigation closely, and it is attempting to misuse and distort developments in this litigation to undermine the authority of the Interim Government. For example, after this Court lifted the stay of this action on May 22, 2020, Maduro spokesman Jorge Arreaza accused the United States of using "lawmaker Juan Guaidó and his accomplices" to undertake "a fraudulent representation of the republic and PDVSA, which is not only illegal but acts to the detriment of the national interest," in order to illegally seize Venezuelan assets in the United States.[8] More recently, following the entry of this Court's Memorandum Order of May 22, 2020, Carlos Ron—the Maduro regime's purported Vice-Minister for North America—inaccurately asserted on national television that, after the United States "gave control of Citgo to the phantom government that they recognize headed by Guaidó," the Court decided to "give the go-ahead to begin the process of selling Citgo."[9] While the current crisis in Venezuela is the result of the recklessness and corruption of the Chávez and Maduro regimes, the political ramifications of a misperception of the imminent loss of a critical asset such as CITGO will fall directly on the shoulders of the Interim Government.

A decision deferring determination of the sale mechanics until such time as OFAC issues a specific license in favor of Crystallex also comports with U.S. foreign policy, which strongly supports the Interim Government's plans to alleviate the humanitarian emergency in Venezuela, restore the country's democracy, and promote an orderly consensual sovereign debt

[8] *See* Declaration of Allan R. Brewer-Carías, filed concurrently herewith, ¶ 20.
[9] *Id.* Mr. Ron's message is, of course, materially incorrect: the Court's Memorandum Order of May 22, 2020 scheduled briefing on the mechanics of a sale and any Rule 60(b) motion or motion to quash or to reconsider (D.I. 174); it did not "give the go-ahead" to begin a sale process.

restructuring.[10] In support of this foreign policy goal, the U.S. government has put in place a sanctions regime designed to help "preserve [Venezuela's] assets for the people of Venezuela"[11] and expressly reserved to the U.S. Government the power to decide whether and which dispositions of Venezuela's assets in the United States—whether by settlements or enforcement of court judgments—should go forward and under what circumstances.[12] In light of the sensitivity of such asset dispositions, OFAC has published guidance expressly "*urg[ing] caution* in proceeding with *any step* in furtherance of measures which might alter or affect blocked property or interests in blocked property." FAQ 809 (emphasis added). OFAC has further explained that under its regulations creditors claiming under writs of attachment (1) are *not* "authorized to *prepare for* and hold an auction or other *sale of the [PDVH] shares*, contingent upon the winning bidder obtaining a license from OFAC" and (2) "pursuant to the Venezuela Sanctions Regulations (31 C.F.R. Part 591), must obtain a specific license from OFAC *prior to . . . taking . . . concrete steps* in furtherance of an auction or sale." *Id.* (emphasis added).

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[10] *See, e.g.*, Ex. 4 ("The United States fully supports the efforts of Interim President Juan Guaidó to address the endemic corruption, human rights abuses, and violent repression that has become the hallmark of the illegitimate Maduro regime . . . ."); Ex. 5 (noting that the United States has committed itself to "rebuilding Venezuela's infrastructure and economy" and "supporting the effort to restore democracy and stability in Venezuela"); Ex. 6 (reaffirming the U.S. commitment to the people of Venezuela); *see also* Brief of the United States, *Aurelius Capital Master, Ltd., et al. v. Republic of Argentina*, 2016 WL 1267524, at *4 (2d Cir Mar. 23, 2016) (United States has "a significant interest in the orderly and cooperative resolution of sovereign debt defaults").

[11] Ex. 7.

[12] In August 2019, President Trump blocked "all property and interests in property of the Government of Venezuela that are in the United States," meaning that such property may not be "transferred, paid, exported, withdrawn, or otherwise dealt in" without a license from OFAC. Ex. 8. The implementing OFAC Venezuela Sanctions Regulations provide that "entry into a settlement agreement or the enforcement of any lien, judgment, . . . order through execution, garnishment, or other judicial process purporting to transfer or otherwise alter or affect property or interests in [blocked property] is prohibited unless licensed pursuant to this part." 31 C.F.R. § 591.506(c).

Crystallex, on the other hand, will not be injured by a decision of the Court to defer further consideration of the sale procedures, because Crystallex has failed thus far to obtain an OFAC license authorizing it to prepare for, or take concrete steps in furtherance of, a sale of the PDVH shares. Until Crystallex obtains such a license, Crystallex will not be able to move forward with any sale. In the meantime, Crystallex's judgment is accruing interest. *Crystallex Int'l Corp.* v. *Bolivarian Republic of Venezuela*, C.A. No. 1:16-cv-00661-RC (D.D.C. 2016), D.I. 31, ¶ 5. While Crystallex has previously expressed concerns that "[f]urther staying the sale of PDVH's shares would substantially injure Crystallex by giving PDVSA and Venezuela the opportunity to dissipate those assets," (D.I. 112 at 21) those concerns now have no basis in light of the current OFAC sanctions regime blocking Venezuela's U.S. assets.

The Republic therefore respectfully submits that, in view of the potentially destabilizing effect determining the sale procedures would have on the Interim Government, the inconsistency of such a process with the Venezuelan public policies and announced United States foreign policy, and the absence of any real-world harm to Crystallex, the Court should defer determining the procedures for a sale process until OFAC has determined that such a process is in the foreign policy interests of the United States.

B. Unless and Until OFAC Grants Crystallex's License Application, Any Proceeding to Determine Sale Mechanics Would Be Inappropriate.

Appropriate consideration of the respective roles of the Executive and Judiciary branches counsels deferring any effort to predict how a sale process—if licensed by OFAC—might proceed. On May 18, 2020, Crystallex represented that it had "submitted its application for a specific license authorizing the sale of the shares of PDVH and is awaiting OFAC's decision." D.I. 167 at 1. OFAC has not granted the license Crystallex requested. The Republic and PDVSA believe OFAC should deny Crystallex a license for the sale of these blocked assets. Proceeding to design a sale

process on the assumption that OFAC will license it, and with hypothetical assumptions about what a specific license might permit or forbid, would violate the principle that a court "must resolve a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) (internal quotation marks omitted).

By asking the Court to "resolve . . . the mechanics by which the sale of PDVH is to occur" before OFAC has decided what kind of sale, if any, it would license (D.I. 167 at 1-2), Crystallex is improperly inviting the Court to interpose itself into OFAC's deliberations. "OFAC must be allowed to apply its expertise and decide whether [an applicant] should be issued a specific license . . . . [T]he Court cannot take on the agency's job, before they have a chance to do it themselves." *Matos* v. *O'Neill*, 220 F. Supp. 2d 99, 103 (D.P.R. 2002).

II. NO REASONABLE SALE PROCESS CAN BEGIN UNLESS AND UNTIL CRYSTALLEX OBTAINS AN OFAC LICENSE AND THE MARKET RECOVERS FROM THE CURRENT DEPRESSED AND VOLATILE CONDITIONS.

If, despite the concerns set forth above, the Court decides to outline a sale process at this time, the Court should not have the process begin until OFAC has issued the necessary licenses to provide certainty as to when such a sale would occur, and should not proceed with any sale in the current historically depressed economic conditions. Commencing the process sooner would depress the value of any sale and unreasonably erode other stakeholders' interests in PDVH.

A. Until OFAC Provides a License to "Prepare for and Hold" a Sale of the PDVH Shares, It Will Not Be Possible to Conduct a Value-Maximizing Sale Process.

The Court should defer any sale process until Crystallex obtains a license because a sale process conducted when a buyer cannot know whether or when, or under what limitations, a sale

may actually occur, will not maximize value, as required by Delaware law.[13] At this juncture, there is no clarity (let alone certainty) as to if, when or under which conditions OFAC will be willing to authorize Crystallex to "prepare for" or "conduct[] an auction or other sale, including a contingent auction or other sale." FAQ 809. Such an extraordinarily high level of uncertainty with respect to a material regulatory condition will inevitably have a substantial chilling effect on the appetite of the already limited pool of candidates eligible to acquire some share ownership of PDVH. Buyers who are capable of undertaking a multi-billion transaction have other investment options and may be unwilling to spend a significant amount of time attempting to close a transaction that could be indefinitely blocked by regulatory hurdles. As a result, undergoing a sale process prior to licensure risks a miniscule or nonexistent bidding pool and the significant undervaluation of PDVH shares. Further, bidders may also be discouraged from participating in a sale process due to the risk of civil penalties for actions taken in violation of the OFAC sanctions regime. As noted, OFAC has urged "caution in proceeding with any step in furtherance of measures which might alter or affect blocked property" and stated that participation in "prepar[ation] for . . . an auction or other sale of the shares" would require prior authorization from OFAC. FAQ 809. Credible bidders are likely to be particularly sensitive to this risk in light of, among other things, the strong U.S. Government support of the Interim Government, the potential for political ramifications associated with the beginning of a sale process involving the PDVH shares, and the complex and high-profile nature of such process. *See* 31 C.F.R. § 501, App. A (III) (stating that, when determining whether to issue a civil penalty, OFAC may consider, among other factors, the "actual or potential harm to sanctions program objectives caused by the conduct giving

[13] We address the requirements of Delaware law with respect to a sale process in Part III *infra*.

rise to the apparent violation," "the commercial sophistication and experience of the Subject Person," and the "size of a Subject Person's business operations and overall financial condition").

B. The Court Should Not Attempt to Design a Process to Sell a Major Oil Asset in the Current Depressed and Volatile Market Conditions.

The Court should exercise its discretion to delay the implementation of a share sale process given the current abnormally negative market conditions.[14] Current conditions are "the worst crisis the oil industry has faced" due to fuel demand falling "roughly 30% worldwide."[15] As a result, knowledgeable industry participants have pulled back from asset sales. For example, the *Wall Street Journal* reported on May 4, 2020, that "most of the world's biggest energy companies had planned to sell billions in assets to help pay down debt and maintain dividends" but that, as of that date, most "have had major asset sales restructured or delayed indefinitely as coronavirus lockdown restrictions decimated energy demand and oil prices fell by two-thirds."[16] The Court should not undertake a sale process in conditions in which the relevant industry, the members of which would include many of the most likely potential bidders for the PDVH stock, recognizes that no sale will be value-maximizing.

[14] Courts have recognized that they have authority to delay forced sale processes due to the effects of an economic collapse. *See, e.g., Fifth Ave. Bank of N.Y.* v. *Compson*, 166 A. 86, 87 (N.J. Chan. 1933) (noting that, in the context of a "financial emergency, world-wide in its scope and affecting all nations and peoples," courts may apply "legal and equitable rules and concepts . . . to render their judgments with more fidelity to economic facts, with more general utility and in partial or complete disregard of rules conceived in the past, upon the basis of totally different postulates and world conditions") (citations and internal quotation marks omitted).

[15] *See, e.g.*, Ex. 9.

[16] *See, e.g.*, Ex. 10; *see also* Ex. 11 (noting that "[t]he crash in oil price could further slow BP PLC's ability to wrap up what was initially planned to be a two-year $10 billion asset divestiture").

III. ANY SALE PROCEDURES MUST COMPLY WITH MINIMUM LEGAL AND COMMERCIAL MANDATES THAT ARE ESSENTIAL TO A FAIR OUTCOME.

A. Delaware Law Requires That the Court Establish a Fair and Robust Sale Process That Does Not Deprive the Debtor of Value in Excess of the Judgment Amount.

Delaware law applies here because the "procedure on execution . . . must accord with the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(1). While there is no precedent for the sale of stock in a complex, multibillion-dollar privately-held corporation in an execution sale,[17] Delaware law does provide several guiding principles. The first principle is the statutory command to sell only "[s]o many of the shares" of attached stock "as shall be sufficient to satisfy the debt," 8 Del. C. § 324(a). The second principle is that the Court should devise a process that comports with due process and does not result in a grossly inadequate price. *See Burge* v. *Fidelity Bond & Mortg. Co.*, 648 A.2d 414, 417, 420 (Del. 1994) (court has "inherent equitable power to control the execution process . . . to protect the affected parties from injury or injustice"); *Deibler* v. *Atl. Props. Grp., Inc.*, 652 A.2d 553, 557 (Del. 1995) ("[A] person's right to due process of law continues throughout the execution process and that right impresses certain limitations upon that process."); *Girard Tr. Bank* v. *Castle Apartments, Inc.*, 379 A.2d 1144, 1146 (Del. Super. Ct. 1977) (allowing challenges to execution sales based solely on "gross inadequacy of price" even if there was "no impropriety, irregularity, or failure to meet statutory requirements"). The third principle is that the judgment debtor should lead the sale process given its superior access to information and incentive to preserve value and successful continuing operations. *See Deibler*, 652 A.2d at 557–58 (noting that "the flexible requirements of due

[17] CITGO's unrebutted research shows that the largest stock sale ever managed by the Delaware authorities under 8 Del. C. § 324 was for $567,000 (i.e., 0.047% the size of the $1.2 billion judgment Crystallex seeks to enforce). D.I. 102-1 at 12. Moreover, CITGO's counsel spoke with representatives of the U.S. Marshal and the New Castle County Sheriff, both of which expressed a complete lack of familiarity or experience with large stock auctions. D.I. 102-1 at 12 n.5.

process" allow courts to design sale processes for corporate stock that "can take into account (and rely upon) the superior access to information . . . of judgment debtors").

Application of these principles is particularly important in the context of a sale of shares of an enormous, complex, privately held company. A forced sale of shares is a complex and infrequent exercise[18] that poses unique challenges and requires special attention. As the Delaware Superior Court said in the decision affirmed in *Deibler,* the only case in which it has addressed the process for selling corporate stock in an execution sale, bidding on corporate stock "requires studious inquiry by the buyer into the assets, liabilities, and income potential" of the company. *Atl. Props. Grp., Inc.* v. *Deibler*, 1994 WL 45433, at *5 (Del. Super. Ct. Jan. 6, 1994).[19] That is, in part, because a corporation's value is "intangible and not readily subject to inspection" and because, in contrast to real or personal property, the execution sale of corporate stock does not eliminate any "unknown or contingent liabilities" of the corporation. *Id.* at *2, *5. *Cf. Md. Nat'l Bank* v. *Porter-Way Harvester Mfg. Co.*, 300 A.2d 8, 11 (Del. 1972) ("[U]nder the established case law of this State, the title acquired by the purchaser [of chattel] at the sale is free and clear of all liens theretofore existing"); *E. Sav. Bank, FSB* v. *CACH, LLC*, 55 A.3d 344, 349 (Del. 2012) ("Longstanding statutory and common law precedent requires that land sold at a sheriff's sale be transferred free of all nonmortgage liens.").

[18] *See, e.g., Deibler*, 652 A.2d at 557 (noting that "the sale of corporate stock at an execution sale is a relatively unusual event").

[19] In *Atl. Props. Grp.*, the Superior Court confirmed a sheriff's sale of shares in a private company based on a significantly different set of facts. In contrast to this case: (1) the corporations whose stock was sold were small real estate holding companies that were much easier to value than a company whose underlying asset is a multibillion-dollar refining company with complex operations; (2) the judgment debtors were found to have forfeited their right to challenge the sale by their pre-sale misconduct; and (3) the judgment debtors had not objected to the sheriff's conducting the sale and declined the opportunity to participate in the process, but sought to overturn the result of a sheriff's sale on the basis of the inadequacy of the price.

In *Deibler,* the Supreme Court also observed that a process for sale of corporate stock should generally include significant participation by the judgment debtor. *See Deibler*, 652 A.2d at 557–58. Indeed, in most cases, the debtor has "the fullest (and cheapest) access to relevant information." *Id.* A similar principle applies to the sale of a debtor's assets in Chapter 11 bankruptcies. In that context, the debtor-in-possession is the presumptive manager of the sale of its own assets because "current management is generally best suited to orchestrate the process of rehabilitation for the benefit of creditors and other interests of the estate." *In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 471 (3d Cir. 1998) (quoting *In re V. Savino Oil & Heating Co.*, 99 B.R. 518, 524 (Bankr. E.D.N.Y. 1989)); *accord Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp.* v. *Chinery,* 330 F.3d 548, 577 (3d Cir. 2003).

Delaware law on the fiduciary duties of corporate directors also provides guidance on the proper process for selling shares in a complex business. The goal of a corporate sale is to "secure the highest price realistically achievable given the market for the company," and the directors' duties are measured against that goal. *In re Netsmart Techs., Inc. Shareholders Litig.*, 924 A.2d 171, 192 (Del. Ch. 2007); *see also Revlon, Inc.* v. *MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). The quality of the process that the company and its directors engage in is important. In *Netsmart*, a case involving the sale of a "niche" healthcare software company, the Delaware Chancery Court preliminarily enjoined a going-private transaction where the record showed that the board failed to make "a material effort at salesmanship," for example, by "put[ting] together materials explaining Netsmart's business, why it had attractive growth potential, and how Netsmart's products and services fit within the broader healthcare IT space" in order to take advantage of "the potential utility of a sophisticated and targeted sales effort." 924 A.2d at 196–97. These shortcomings, combined with the board's "cursory and poorly documented" decision

to solicit bids only from financial buyers and not to attempt "a serious sifting of the strategic market to develop a core list," led the Chancery Court to conclude that the board may have breached its fiduciary duties. *Id.* at 196.

Similarly, when a Delaware court appoints a custodian of a corporation to "liquidate its affairs and distribute its assets" due to irreconcilable corporate deadlock or abandonment under 8 Del. C. § 226(b), the custodian must develop a sale plan for court approval. *See In re TransPerfect Global, Inc.*, Nos. 9700–CB, 10449–CB, 2016 WL 3949840, at *1 (Del. Ch. July 18, 2016). Courts typically approve sale plans that are designed to maximize value for shareholders. *See In re TransPerfect Global, Inc.*, Nos. 9700–CB, 10449–CB, 2018 WL 904160, at *1 (Del. Ch. Feb. 15, 2018) ("*TransPerfect II*") (custodian's sale process was designed to effectuate the court's "dual mandate[] 'to sell the Company with a view toward maintaining the business as a going concern and maximizing value for stockholders'"). A proper process may include: (1) hiring experts such as management advisors, accounting firms, and financial advisors to manage the sale and solicit bids; (2) distributing of marketing materials; (3) entering into confidentiality agreements preventing bidders from releasing confidential company information; (4) holding multiple rounds of bidding where bidders are evaluated based on, among other things, "price range, perceived ability to obtain financing sources, investment thesis and proven ability of the participant to consummate difficult transactions"; and (5) conducting extensive due diligence. *TransPerfect II*, 2018 WL 904160, at *1–13. Additional material steps are meetings with management and negotiation of transaction documents, which would have to account for the minority interest of a buyer of stock in a company with a controlling stockholder.

B. To Be Fair and Commercially Reasonable, the Sale Process Should Adequately Account for the Significant Challenges Arising from a Sale of PDVH Shares, Including the OFAC License Requirements.

A sale of PDVH stock would present unprecedented challenges of uniquely complex proportions, requiring a customized and robust process. In particular, any sale process should adequately address two critical issues in order to "maximize the likelihood of a fair and reasonable recovery." *Crystallex*, 333 F. Supp. 3d at 425. *First*, because PDVH is a multibillion-dollar private company whose value is predicated on the value of CITGO's business (which is itself operationally and financially complex), any commercially reasonable sale process should provide buyers with sufficient access to information and time to understand and adequately value PDVH.

Second, any reasonable sale process should also take into account the fact that prospective buyers will be hesitant to commit time and resources to performing due diligence and undertaking other preliminary steps in a transaction that cannot be completed or even begin without a license. Accordingly, even if OFAC issued a specific license (which it has not) authorizing preliminary steps in preparation for a sale (i.e., Phase II of the process discussed below), no bids should be solicited unless and until Crystallex obtains the OFAC license required to complete a sale. Any pre-license process requiring significant investments of time and resources from potential bidders could result in a drastic undervaluation of PDVH shares or a failure to find any interested bidders. In light of these challenges, a commercially reasonable sale procedure would, at a minimum, comply with the following basic mandates, which are customary in any competitive share sale process involving a large private corporation:

1. Objective: The objective of the sale process should be to identify the buyer that will pay the highest price per share (and thus will require the fewest number of shares to satisfy the unpaid portion Crystallex's judgment). That objective needs to be balanced against the desire to offer the least restrictive package of minority protections. Potential buyers need to understand

exactly how much money needs to be raised, and this requires the determination, at the outset, of exactly what the judgment creditor is owed and will be owed, including interest, as of a reasonable assumed closing date (which remains unknown).

2. Leadership: The owner of the shares should be in control of the process, together with its advisors and with input from the managers of the underlying business. Only they can marshal the personnel and information necessary to market the shares to bidders, respond to due diligence requests, conduct negotiations, seek required regulatory and legislative approvals, and complete a transaction. Moreover, where, as here, the business is far more valuable than whatever part of the judgment remains unpaid, the owner is almost certain to remain a shareholder, and likely the controlling shareholder, after a transaction. Therefore, the owner should have discretion to select the buyer from among the parties who offer enough money to satisfy the judgment creditor. The owner would provide periodic status reports to the Court and conduct status conferences as requested by the Court, subject to preserving any necessary confidentiality for the sale process and bidders.

3. Key Phases: At a minimum, the sale process should include the following phases:[20]

Phase I: Determine how much the judgment creditor has already collected in satisfaction of its judgment. In November 2018, Crystallex represented to the Court that Crystallex had received "upfront payment" of $425 million pursuant to a settlement agreement with the Republic (which was then under the control of the Maduro regime, and had not appeared in this action),[21] and had previously

[20] *See generally Netsmart*, 924 A.2d at 195–99; *TransPerfect II*, 2018 WL 904160, at *1–13.

[21] The reasons for these settlement payments remain obscure because the Republic and PDVSA appear to have received little if anything from Crystallex in return under the Settlement Agreement. The National Assembly has ordered an investigation into the circumstances surrounding the payments and the settlement itself. *See* Ex. 12.

received "approximately $75 million in funds" from a source the representation did not identify. D.I. 130 at 2. Crystallex must provide complete disclosure to the Court, the Republic and PDVSA of all funds it has received, at what times, and under what circumstances.

Phase II: Preliminary steps to elicit initial expressions of interest from qualified buyers, including hiring advisors to identify potential buyers, devising a marketing strategy, preparing marketing materials, preparing draft agreements (e.g., confidentiality agreements and form of sale documents), retaining a service provider to host a data room, and creating and populating a virtual data room.

Phase III: Outreach to potential bidders, negotiating confidentiality agreements, and receiving nonbinding expressions of interest based on the marketing materials.

Phase IV: Choosing qualified bidders who will be permitted to go on to the next round, providing them access to the data room, responding to their due diligence requests, updating the data room, holding management presentations, distributing drafts of the transaction agreements and receiving preliminary bids along with documents to confirm the bidders are qualified (e.g. financing commitments in draft form).

Phase V: Selecting preferred and reserve bidders, negotiating transaction documents, receiving final bids, finalizing transaction documents, obtaining necessary approvals and signing.

Phase VI: Seeking final government approvals and third-party consents and then closing.

4. OFAC License Requirements and Timing: The sale procedures should be designed in light of the current OFAC sanctions regime. Because Phases II through VI set forth above

involve "prepar[ation] for" or "concrete steps in furtherance of" a sale, potential parties to the transaction will not be authorized to take further action until OFAC grants a specific license authorizing these steps.

The minimum mandates outlined above are consistent with Delaware law and due process requirements. If these mandates are not observed, the stock will be undervalued, which will result in more shares being sold than necessary, contrary to Delaware law, and deprive the debtor and potentially its other creditors of value in excess of the unpaid portion of the judgment.

CONCLUSION

The Court should not determine any sale procedures unless and until the Court rules on the motions to quash the writ of attachment and for reconsideration, and the time (if ever) when OFAC issues a specific license authorizing Crystallex to take concrete steps in furtherance of a sale. Unless and until Crystallex prevails on those motions and on its application to OFAC, no sale can occur. If and when a time comes to determine the mechanics of a sale process, the Court should establish a process that does not commence at a value-destroying time, and that complies with Delaware law and minimum commercial mandates that are essential to a fair valuation of a privately held company of this size and complexity.

Respectfully submitted,

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Dated: June 17, 2020

This is Exhibit “M” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

This is Exhibit “N” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORP., Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Defendant.	Case No. 1:17-mc-00151-LPS

ANSWERING BRIEF OF THE BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., AND PDV HOLDING, INC. REGARDING POTENTIAL FUTURE PROCEDURES

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Defendant Bolivarian Republic of Venezuela (the "Republic" or "Venezuela"), Intervenor Petróleos de Venezuela, S.A. ("PDVSA"), and Garnishee PDV Holding, Inc. ("PDVH") submit this response to the motion of Plaintiff Crystallex International Corp. ("Crystallex") for an Order Approving the Process of Sale of Shares of PDV Holding, Inc. and the Opening Brief of Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. (together, "ConocoPhillips") Regarding Conduct of PDV Holding, Inc. Share Sale.

NATURE AND STAGE OF PROCEEDINGS

Crystallex acknowledges that no sale of PDVSA's shares in PDVH can occur unless and until it obtains a license from the Office of Foreign Assets Control ("OFAC"), which it has not to date secured. Nor has Crystallex provided any clarity on the scope of the license applied for (such as which, if any, steps in furtherance of an auction or sale the application proposes), the timing of OFAC's consideration or decision, or the likelihood that any authorization will issue. Nevertheless, Crystallex seeks to forge ahead not only with establishing sale procedures, but with actually having the U.S. Marshals Service conduct an auction of unprecedented size and complexity.

SUMMARY OF ARGUMENT

1. Venezuela, PDVSA, and PDVH (together, "Respondents") respectfully maintain that no sale of the PDVH shares should be permitted and that the Court should defer establishing a sale process at this time. Given that Crystallex does not have the required OFAC license for "an auction or other sale, including a contingent auction or sale," or to take "concrete steps in furtherance" of one, FAQ 809, designing or implementing a sale process would be premature and destructive to PDVH's fair market value. Moreover, pending motions to quash and for relief under Rule 60(b) would, if granted, vacate the attachment upon which the sale would be predicated.

2. If the Court decides to establish procedures now or to allow a sale to proceed notwithstanding these impediments, the best and fairest course is to adopt the procedure proposed

in the Respondents' opening brief. That procedure is designed to attract sophisticated bidders in order to maximize the value of the PDVH shares. It would result in a sale of only enough shares to satisfy Crystallex's unpaid judgment, consistent with Delaware law and due process, thereby preserving the remaining shares for the ultimate benefit of the Venezuelan people. It proposes that PDVSA manage the sale process in light of its superior knowledge and incentives and the need for PDVSA to negotiate the terms of the post-sale relationship between it and the purchaser.

3. Crystallex's proposed process is completely detached from established market practice for selling large, complex, privately held businesses. Indeed, other than the addition of an incomplete list of potential bidders and the creation of a data room, it hardly differs from the paltry "process" it proposed in 2018. Crystallex's proposal is transparently designed to depress the bidding for the PDVH shares and to maximize its own chances of owning PDVH—a company worth billions of dollars—for a fraction of its real value, at the expense of PDVSA, the people of Venezuela, and U.S. foreign policy objectives. The Court should not—and, under applicable Delaware law, cannot—allow such a procedure.

4. Nor should the Court appoint a receiver or adopt bankruptcy procedures, as ConocoPhillips suggests. This is not a bankruptcy, PDVH is not insolvent, and PDVSA would have greater knowledge, ability, and incentives in managing the sale than any receiver, whose appointment is—in any event—not authorized by federal or Delaware law. There is no basis for ConocoPhillips' assertion that PDVSA will not cooperate with the process ordered by this Court. Quite the contrary: PDVSA has the strongest interest of anyone in ensuring a sale on the best

possible terms. Moreover, because under any fair process PDVSA will remain PDVH's majority owner after the sale, it should be permitted to choose its co-owner and the terms of the sale.[1]

STATEMENT OF FACTS

Crystallex's assertion that "Venezuela refuses to honor its debts voluntarily," D.I. 182 at 2, must be emphatically and unequivocally rejected. The Republic has publicly committed to "an orderly and consensual renegotiation of legacy private claims," expressly including claims like Crystallex's. D.I. 191-2. The Republic proposes to do so based on the "equal treatment" of similarly situated creditors, and with the assistance of the International Monetary Fund and other multilateral institutions, "as soon as practicable" after the usurpation of the Maduro regime is ended and the related U.S. sanctions are lifted. *Id.*; *see also* D.I. 184 at 2 ("The Guaidó Government recognizes that the judgment obtained by Crystallex confirming its arbitration award creates a valid obligation on the part of Venezuela to Crystallex . . . [and] is committed to a process for global restructuring of Venezuela's debt obligations.").

ARGUMENT

I. UNLESS AND UNTIL CRYSTALLEX RECEIVES A LICENSE FROM OFAC AND CRYSTALLEX'S WRIT OF ATTACHMENT SURVIVES THE PENDING MOTIONS, NO SALE PROCESS SHOULD BE ESTABLISHED.

Crystallex acknowledges that no sale can occur unless (and until) OFAC grants its license application, and if OFAC denies Crystallex's application, then no sale can proceed.[2] It would be

[1] Nonparty Adélso Adrianza has submitted a letter proposing that the Court order Crystallex's judgment be satisfied out of other assets of PDVSA or its affiliates. D.I. 193. If the Court considers Adrianza's letter (which it should not), it should reject Adrianza's proposal, which impermissibly proposes the disposition of assets that have not been attached and are not available for attachment.

[2] As Crystallex has tacitly conceded by applying for an OFAC license for "the commencement of the sale process," D.I. 182 at 7, under the current sanctions regime, Crystallex may not even "prepare for and hold an auction" or "tak[e] other concrete steps in furtherance of an auction or sale" without a license. FAQ 809. Crystallex hints that it might challenge the enforceability of

more economical for the Court and for all parties to defer establishing sale procedures until it becomes clear that there will even be a sale. Even if OFAC grants a specific license, the particular contours of that license would likely include provisions that directly affect the design of a sale process—for example, language defining precisely what acts the license permits (and what, if any, conditions are imposed on those acts) or specifying what further steps in the sale process would require additional specific licenses. As ConocoPhillips notes, any sale would "need to be conditioned, carefully, on authorization from OFAC or the lifting of sanctions regulations." D.I. 180 at 2. It makes little sense for the Court to rule on a hypothetical sale procedure that may have to be changed—or even redesigned completely—once OFAC has acted (if it acts at all).

In addition to being more economical, deferring establishment of a sale process is the most equitable course at this time. Deferring the establishment of sale procedures until after OFAC decides whether to issue a license—by which time pandemic-related demand shifts may have abated and the sale process could be conducted under more normal conditions—would maximize value without adversely affecting Crystallex. *See* D.I. 188 at 11.

Respondents' opening brief described the unnecessary harm that could befall the Venezuelan people, their Interim Government, and the foreign policy of the United States if the Court were to publicly design a process for the forced sale of the Republic's most strategic foreign asset when such a sale has not been licensed by OFAC. These harms include the propaganda opportunity that an order defining a sale process would present to the illegitimate Maduro regime to defame the Interim Government. D.I. 188 at 4–9. Crystallex's brief, which proposes auctioning off (to itself) PDVSA assets worth billions of dollars for as little as $300 million, shows that this danger is all

OFAC's requirements if it does not get the license it wants. D.I. 182 at 7, 15. But it has made no such challenge, and it has cited no authority that would support one.

too real. Crystallex asserts that PDVH would be more valuable if it were "unburdened with baggage of the sort that surrounds PDVH as a result of its Venezuelan ownership." D.I. 182 at 18. That is, perhaps, an acknowledgment that Crystallex sees a chance for significant upside, in excess of its unpaid judgment, if it can take control of PDVH through these proceedings. In any event, speculation of this sort is helpful only to the Maduro regime. And it is entirely unnecessary when OFAC has not determined that a sale can or should happen.

That is particularly so given that Crystallex's writ of attachment is defective for the reasons explained in CITGO, PDVSA, and PDVH's motion to quash, *see* D.I. 179, and the Republic's motion for relief under Rule 60(b), *see* D.I. 184. If the Court grants either motion, then the writ of attachment must be quashed or dissolved, no execution sale can proceed, and there would be no need to engage with a sale process or issues related to the sanctions regime.

In its opening brief, Crystallex appears to recognize that the writ of attachment has failed because the PDVH shares are certificated and the physical certificate representing PDVSA's shares is not in PDVH's possession. *See* D.I. 182 at 9–10 n.4. As CITGO, PDVSA, and PDVH explained in their motion to quash, without seizure of the physical share certificate, as required by 6 Delaware Code section 8-112(a), "the attachment is not laid and no order of sale shall issue." 8 *Del. C.* § 324(a). Instead of acknowledging that it has no valid attachment and that it makes little sense to establish a sale procedure for assets it has not attached,[3] Crystallex suggests that its failure to satisfy the seizure requirement can be remedied by an order from this Court "direct[ing] the

[3] As explained in the motion to quash, *see* D.I. 179 at 2–3, even if Crystallex had seized the share certificate, Delaware law would not permit Crystallex to attach shares owned by PDVSA to satisfy a judgment against Venezuela on an alter ego theory without a showing of fraud. This Court has already determined that Crystallex cannot show fraud. This fundamental failure makes it all the more appropriate to refrain from establishing a sale procedure.

immediate turnover of the shares to the Marshals or compel[ling] PDVH to reissue the share certificates so that they can be transferred to the successful bidder at the appropriate time." D.I. 182 at 9–10 n.4. For support, Crystallex cites a jumble of statutes, but none allows a creditor to evade the requirement that the garnishee possess share certificates to effect an attachment.

As an initial matter, Crystallex cannot solve the problem by asking the Court to "direct the immediate turnover of the shares to the Marshals." D.I. 182, at 9 n.4. Section 8-112(a) requires seizure of the physical certificate to effect an attachment, and PDVH does not have the certificate. Crystallex apparently contemplates that 8 Delaware Code section 169, which states that the "situs of the ownership of the capital stock" of Delaware corporations is in Delaware, trumps section 8-112(a), but section 169 speaks of *stock*, not *certificates*.[4] And even if the "situs" of the certificate were Delaware, that would not help Crystallex. The 1998 amendment to section 324(a), described in detail in the motion to quash, was specifically enacted to give effect to section 8-112(a)'s requirement of physical seizure notwithstanding section 169. D.I. 179 at 14–16.[5]

Crystallex also cites to 6 Delaware Code section 8-112(e), which permits a creditor to seek "aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security . . . by means allowed at law or in equity in regard to property that cannot readily be

[4] Delaware case law makes clear that shares of capital stock are distinct from the certificates representing them. *See, e.g.*, *United Indus. Corp. v. Nuclear Corp. of Am.*, 237 F. Supp. 971, 977 (D. Del. 1964); *Bush v. Hillman Land Co.*, 2 A.2d 133, 136 (Del. Ch. 1938).

[5] Crystallex would also require an OFAC license before seeking such a turnover order. *See* FAQ 808, https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq_other.aspx#venezuela (explaining that "a specific license from OFAC is required for . . . the enforcement of any lien, judgment, or other order through execution, garnishment, or other judicial process purporting to transfer or otherwise alter or affect property or interests in [blocked] property" and that "a specific license from OFAC would be required for measures such as: Taking Possession (Actual or Constructive) . . . Seizing . . . [and] Assuming or Maintaining Custody" of blocked property); *see also* 31 C.F.R. § 591.309 (defining "property and property interest" to include " stocks [and] . . . any other evidences of title, ownership or indebtedness").

reached by other legal process." Crystallex erroneously suggests that this Court may direct PDVH to reissue the stock certificate so that it can then be attached. Jurisprudence analyzing the analogous UCC provisions is clear: Section 8-112(e) does *not* permit a court itself to reissue certificated shares of stock or to order the issuer of a certificated security to reissue a certificate where the physical certificate has not been seized pursuant to section 8-112(a). *See, e.g.*, *Huntington Nat'l Bank v. Bywood, Inc.*, 2017 WL 2241537, at *4–6 (Ohio Ct. App. May 16, 2017) (court cannot use equivalent of section 8-112(e) to order issuance of new certificates).

Indeed, allowing such a workaround would swallow up the physical-seizure requirement of section 8-112(a) altogether. *See Wolverine Flagship Fund Trading Ltd. v. Am. Oriental Bioengineering, Inc.*, 134 A.3d 992, 995 (N.J. Super. Ct. App. Div., 2016) (holding section 8-112(e) remedies "should stop short of any remedy that circumvents the actual seizure requirement of subsection (a)"); *Ho v. Hsieh*, 181 Cal. App. 4th 337, 347 (2010) (noting "[a] court cannot compel a corporation to issue new stock certificates to a judgment creditor").

Nor do Crystallex's other suggested workarounds defeat section 8-112(a)'s physical seizure requirement. Crystallex identifies provisions in the Delaware code allowing for the *owner* of stock to seek a court order compelling the issuer to reissue certificated shares of stock where the court is satisfied, after a hearing, that the certificates "have been lost, stolen or destroyed" and the issuer has refused to reissue them upon request. 8 *Del. C.* §§ 167, 168. By its terms, Delaware law does not give the Court authority to undertake such proceedings *sua sponte* or on the request of a *creditor* of the owner of the relevant certificated shares. Even if it did, "lost, stolen or destroyed" is not synonymous with "needed for purposes of a writ of attachment."

Finally, Crystallex contends that section 324(c) permits the Court to order reissuance of share certificates, but section 324(c) applies only to the issuance of a certificate "to the purchaser"

after the Court has "confirmed the sale." It is clearly designed to finalize paperwork after a proper sale has concluded. Here, no sale has occurred, there is no successful bidder, and there cannot be one until section 324(a) is satisfied.

If Crystallex wishes to attach the certificate, then it can initiate appropriate process against PDVSA, the shares' owner, to the extent doing so is consistent with the Foreign Sovereign Immunities Act, Delaware law, and applicable OFAC sanctions. (Under the current sanctions regime, Crystallex would require a license before obtaining a court order attaching or seizing the certificate, *see supra* note 4.) But that does not salvage the fact that Crystallex's current writ of attachment has failed and, under Delaware law, has not attached anything. Given that Crystallex has nothing to sell, and may never have anything to sell, devising sale procedures is premature.

II. SHOULD A SALE OF THE PDVH SHARES BE ORDERED, THE PROCESS MUST BE DESIGNED TO PRESERVE THE VALUE OF THE SHARES AND ENSURE THAT NO MORE SHARES ARE SOLD THAN NECESSARY TO SATISFY THE UNPAID AMOUNT OF THE JUDGMENT.

A. The Proposed Execution Sale Is Unprecedented.

PDVH indirectly owns CITGO, one of the largest refiners, transporters, and marketers of motor fuels and other petroleum products in the country, with approximately 3400 employees, three complex deep-conversion refineries, a network of forty-eight petroleum product terminals and ten pipelines, and franchise supply contracts with more than 4700 branded retail outlets. *See* https://www.citgo.com/press/news-room/news-room/2020/citgo-reports-first-quarter-2020-results. PDVH is, under any valuation, worth multiple billions of dollars. ConocoPhillips, for example, points to valuations of CITGO's enterprise value at $9 billion. D.I. 180 at 3.

Neither Crystallex nor ConocoPhillips has presented any examples of an execution sale of comparable scope or complexity—in Delaware or any other jurisdiction. *Cf.* D.I. 102-1 at 12 (listing readily ascertainable judgments for which attachments under section 324 issued or was sought,

all of which were below $600,000). The only reported Delaware case addressing procedures for the execution sale of corporate stock involved two small holding companies whose principal asset was a restaurant in Rehoboth Beach known as the "Olde Dinner Bell Inn." *See Deibler v. Atl. Props. Grp., Inc.*, 652 A.2d 553, 554, 559 (Del. 1995).

This Court therefore is faced with an essentially blank slate. In crafting procedures on this blank slate, the Court is guided by the twin commands of Delaware law (1) that only "[s]o many of the shares" of attached stock "as shall be sufficient to satisfy the debt" may be sold, *see* 8 *Del. C.* § 324(a), and (2) to respect the due process rights of the owner of the shares throughout the proceedings, *see Deibler*, 652 A.2d at 557. These commands require a process that maximizes value to avoid depriving the owner of property in excess of the judgment. The Court should also consider that its decision will have significant effects on PDVSA, the American subsidiaries, their employees, partners, and customers, and the long-suffering people of Venezuela, as well as for U.S. foreign policy objectives. *See Burge v. Fid. Bond & Mortg. Co.*, 648 A.2d 414, 417, 419–20 (Del. 1994) (a court has "inherent equitable power to control the execution process and functions to protect the affected parties from injury or injustice," including to prevent a "grossly inadequate" price or where "the rights of parties to, or interested in the sale are, or may have been, prejudiced").

B. Crystallex's Alternative Proposal Is Legally And Practically Impermissible.

If a sale of the PDVH shares were to be ordered, Respondents' opening brief outlines a reasonable sale procedure for shares of a large, complex company that would vindicate the requirements and purposes described above while also heeding the fact that, as the Delaware Supreme Court has recognized, the owner of the shares has "the superior access to information" and "superior incentives" to maximize the shares' value at a public sale. *See Deibler*, 652 A.2d at 558. The alternative process proposed by Crystallex—a one-day Marshals' auction—would violate Delaware law and is manifestly inferior to the process outlined by Respondents.

1. The Marshals Cannot Conduct the Sale.

Crystallex assumes the Marshals will manage the sale process, but that is not required. Crystallex asserts that "Section 324 . . . provides that shares of a Delaware corporation shall be sold by the sheriff at public auction," requiring by analogy that the Marshals conduct an auction here. D.I. 182 at 9. In fact, section 324 does not contain the word "sheriff" or any variant thereof. Instead, it requires that the shares "be sold at public sale to the highest bidder," and that its notice requirements be followed. This leaves the Court with discretion to design a process (including who manages the sale) that comports with Delaware law's twin commands.

Additionally, as a practical matter, the contemplated sale is far too complex to be conducted by the Marshals. The sale manager must work closely with management to, among other things:

- Assess market conditions;
- Market the asset to a well-chosen group of likely bidders;
- Identify and assemble voluminous due diligence materials and respond to due diligence questions;
- Negotiate data access, confidentiality, and privacy protection provisions (including by managing difficult competitive concerns);
- Negotiate protections for minority stockholders;
- Identify and seek any required consents from third parties and governments;
- Negotiate complex sale documentation; and
- Coordinate the sale effort alongside all the activities necessary to keeping a major energy company running.

See D.I. 188 at 14–18. Respectfully, the Marshals' office does not have the experience or resources required for a process of this nature. Even where a corporation's only assets were a few properties in Rehoboth Beach, the Delaware Supreme Court asked: "What did the sheriff know in this case concerning the value of this stock and how is any public official *reliably* to know such information in the next case involving a closely held business?" *Deibler*, 652 A.2d at 558 n.2.[6]

[6] Contrary to Crystallex's suggestion, *Deibler* did not endorse the process employed in the forced sale there as a model for all future sales of corporate stock. To the contrary, the court commented

Perhaps recognizing that the sale process it proposed in 2018 was woefully inadequate, Crystallex now proposes to contact a list of potential bidders, advertise the auction, and create a data room. Those steps are necessary, but not even remotely sufficient, to produce a sale at an adequate valuation. Sophisticated investors will be reluctant to participate in any process conducted in violation of OFAC guidance. Even after that, they will expect to conduct meaningful due diligence (well beyond reviewing documents in a data room) and a robust negotiation of terms. A one-day auction by the Marshals provides for no such familiar and necessary procedures.

Tellingly, the only precedent Crystallex can provide for an operating business whose competitive sale was managed by Marshals or sheriffs is the interlocutory sale in a criminal case of "Jreck Subs," the franchisor of an upstate New York chain of sandwich shops that the Marshals Service had been *operating* for two years following the sentencing of its owner.[7] *See also* D.I. 102-1 at 12 n.5 (explaining that "[a] representative from the U.S. Marshals Office for the District of Delaware has stated that she could not recall if her office had ever conducted a stock auction" and that a "representative from the New Castle County Sheriff's office in Wilmington has stated that her office had conducted a limited number of stock auctions, but only for a handful of shares at a time"). Crystallex's suggestion that the Court ignore the size and complexity of the business being sold in fact would likely result in a process that violates Delaware law by undervaluing the shares and ignoring the due process rights of the shares' owner.

2. <u>Crystallex's Proposed Auction Rules and Procedures Are Flawed.</u>

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that the notice of sale was "rather far from an ideal towards which we might strive," and that "the amounts realized here are such as to raise a concern that the process misfired." 652 A.2d at 555.

[7] *See* Jreck Subs home page, https://www.jrecksubs.com/index.html; "New Jreck Owner Says He Is Committed to Enhancing Brand" (Nov. 19, 2019), https://www.nny360.com/news/stlawrencecounty/new-jreck-owner-says-he-is-committed-to-enhancing-brand/article_39ce4759-cb6c-50af-8364-e7d052089889.html.

Crystallex's proposed ground rules for an auction are similarly ill-suited to a reasonable sale process. Crystallex proposes that a minimum of 10% of PDVH's shares be sold, and that the sale consist of 5% increments thereafter. This incremental approach threatens to sell more shares than necessary as compared to the reasonable procedure proposed by the Respondents, which, while maximizing the value of the shares, will aim to sell enough shares to satisfy the verified unpaid judgment in the most efficient manner, according to market conditions.

Crystallex also proposes that would-be buyers submit their bids without OFAC licenses and that the winning bidder pay a non-refundable deposit of up to $50 million *before* OFAC grants a license authorizing it to bid. In addition to placing the participants in violation of the sanctions regime as described in FAQ 809, this proposal would limit the field of bidders to those who are willing to risk significant capital, and to assume the risk of a sanctions violation. In Crystallex's proposed process, the eventual "winner" will pay $50 million for nothing more than the possibility of obtaining a stake in PDVH at some indeterminate point in the future, *if* OFAC ever issues the required licenses and *if* OFAC considers the winner acceptable. It is difficult to imagine that many bidders would be interested in participating under these conditions.[8]

Finally, Crystallex's alternative proposal does not include any procedures or safeguards to maximize value, ensure that only as many shares as necessary are sold, or respect PDVSA's right to due process. It does not provide for any meaningful pre-sale marketing or due diligence, any negotiation of issues between buyer and seller including, most significantly, governance provisions that any holder of a minority stake would require, any development of price competition through multiple bidding rounds, or any credible process for obtaining required regulatory approvals.

[8] The $50 million "nonrefundable" deposit Crystallex proposes would give it still another advantage over other bidders. As the ultimate recipient of its own $50 million deposit, only Crystallex would keep the $50 million if necessary approvals are not obtained.

Crystallex contends that any price produced by a sale, no matter how low, is by definition an adequate price. D.I. 182 at 19–20. That ignores the fact that, under Delaware law, "any party" with "an interest in the outcome of the sale" may move to set aside the sale on the ground that the price was "grossly inadequate" or that the auction deprived them of due process, *Burge*, 648 A.2d at 418–19, and that "gross inadequacy of price" is a basis for setting aside an execution sale even if there was "no impropriety, irregularity, or failure to meet statutory requirements." *Girard Trust Bank v. Castle Apartments, Inc.*, 379 A.2d 1144, 1146 (Del. Super. 1977). [9]

3. Crystallex's Proposal Would Suppress Bids and Minimize the Value of the PDVH Shares.

Crystallex's own brief demonstrates that it knows how value-destructive its proposals would be. Crystallex proposes to open an auction with a "credit bid" of its own: $300 million for 100% of PDVH. D.I. 182 at 19. Credit bidding enables a creditor to bid far more than it has in cash, giving it an advantage over other bidders, and thus "can be employed to chill bidding prior to or during an auction, or to keep prospective bidders from participating in the sales process." *In re The Free Lance-Star Publ'g Co.*, 512 B.R. 798, 806–08 (E.D. Va. 2014). Prospective cash bidders will know that Crystallex in effect has a $962 million head start (assuming that the amount owed is what Crystallex says it has estimated). That, in combination with Crystallex's defective sale "process," would discourage cash bidders, reduce price competition, and increase Crystallex's chances of taking full ownership of PDVH in exchange for much less than its true value. Crystallex

[9] Crystallex erroneously cites to *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), for the proposition that any price received at a forced sale is fair. In *BFP*, the U.S. Supreme Court acknowledged that each state has its own standard for establishing a process for a forced sale. 511 U.S. at 540. In the case of a sale of stock to satisfy a judgment, Delaware law commands that only shares sufficient to satisfy the judgment may be sold, and it grants the Court discretion to adopt fair, value-maximizing procedures and to disapprove a sale with a grossly inadequate price.

has made no secret of its intention to take control of PDVH through these proceedings, at one point stating, "The prize here is Citgo and we are getting closer to it."[10]

The Eastern District of Virginia limited credit bidding in a case where the creditor "made no secret of the fact that it acquired the [debtor-in-possession] Loan in order to purchase the Company" and was "tr[ying] to depress the sales price of the Debtors' assets" to receive a hefty return on its investment. *Free Lance-Star*, 512 B.R. at 806. The investment fund that is the primary beneficiary of any recovery by Crystallex, Tenor Special Situation I, L.P. ("Tenor Special"),[11] appears to be employing such a "loan to own" investment strategy. Based on the public Canadian bankruptcy records, Tenor Special appears to have advanced Crystallex $62.5 million, at a 10% interest rate, in exchange for a first priority lien on at least 70% of any recovery against the Republic. *See* Ex. 3 at 7, 8, 77; Ex. 4 at 2–13, 16–17, 26–27. Crystallex's insistence on a rushed bidding process further suggests that it intends to use credit bidding as a tool to depress the price of the PDVH shares. *See Free Lance- Star*, 512 B.R. at 803–06 (stating that credit bidding was being employed to depress the asset price where the creditor pushed for an "expedited . . . sales process"); *In re Fisker Auto. Hldgs., Inc.*, 510 B.R. 55, 60–61 (D. Del. 2014) (stating that the creditor's push for a rapid sale process supported capping the creditor's ability to credit bid).

[10] Julie Wernau, *As Venezuela's Default Risk Rises, Battle Heats Up for Control of Refiner Citgo*, The Wall Street Journal, May 14, 2017.

[11] Tenor Special is the latest assignee (there have been at least three) of the debtor-in-possession loan advanced to Crystallex to finance this litigation. *See* Ex. 1 at 42. (Exhibits cited herein are to the Declaration of Stephen C. Childs, filed herewith.) It appears that Tenor Special is controlled by the individuals that control Tenor Capital Management Company, L.P., a hedge fund that specializes in investing in litigation against sovereign nations undergoing political turmoil. *See* Ex. 2 at 2, 3, 10; Tom Hals, *INSIGHT-Want to Sue Venezuela for millions? These firms can help, for a price*, Reuters (Dec. 21, 2018, 12:01am), https://af.reuters.com/article/commoditiesNews/idAFL1N1Y823L.

Moreover, as discussed in Respondents' opening brief, D. 188 at 17-18, Crystallex entered into a settlement agreement with the Maduro regime, under which Crystallex was paid $500 million, apparently without releasing its claim. The Court has almost no information about the circumstances of this extraordinarily generous settlement, or about whether Maduro insiders who made the deal are getting a cut. In these circumstances, the Court should be wary of authorizing Crystallex's proposed sale process. *See*, *e.g.*, *Free Lance-Star*, 512 B.R. at 804 (creditor's failure to provide evidence about how it came to be assigned the claim was inequitable); *In re Aloha Airlines, Inc.*, 2009 WL 1371950, at *10 (Bankr. D. Haw. May 14, 2009) (rejecting credit bidding where creditor entered agreement with competitor intended to force debtor out of business).

C. ConocoPhillips' Proposal For A Receiver Should Be Rejected.

ConocoPhillips' suggestion that the Court appoint a receiver to manage the sale process is an unauthorized and unnecessary step given that PDVSA is well-positioned to manage the sale itself. ConocoPhillips mistakenly contends that federal law governs the procedure for the contemplated sale, based on an argument that section 324 provides for a judicial rather than an execution sale. ConocoPhillips is incorrect that this would be a judicial sale,[12] but little turns on that question, because neither Delaware law nor federal law authorize appointment of a receiver.

[12] "A 'judicial sale,' as distinguished from a sale on execution, refers to a sale of property by court order in connection with proceedings such as judicial foreclosure, bankruptcy, and partition." Restatement (Third) of Restitution and Unjust Enrichment § 18 (2011). An execution sale is conducted upon a writ of execution, such as Crystallex's writ of attachment *fieri facias* under 10 Delaware Code section 5031. Section 324 merely imposes procedural safeguards when the property executed upon is corporate stock. The mere fact that a state statute requires a court to approve and confirm property sold on execution does not convert an execution into a judicial sale. *See O'Brien v. Kelly*, 597 F. Supp. 17, 19 (D. Alaska 1984); *See In re Sale of Certain Unmined Coal*, 76 A.2d 194, 196 (Pa. 1950) (distinguishing between a "*judicial sale[]*" and "*judicial assent* to a sale" because of a statutory requirement); *Fowler v. Fitzgerald*, 570 A.2d 866, 870 (Md. Ct. App. 1990) (explaining that "confirmation of the sale is the practice" in some execution sales).

The Delaware Court of Chancery is "extremely cautious about using its inherent equitable powers to appoint a receiver" over a solvent company. *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 785 (Del. Ch. 2004); *see also Ross Hldg. & Mgmt. Co. v. Advance Realty Grp., LLC*, 2010 WL 3448227, at *6 (Del. Ch. Sept. 2, 2010) (explaining that the caution is even greater "where the entity continues to function actively"). It will do so only for "fraud, gross mismanagement or extreme circumstances causing imminent danger of great loss which cannot otherwise be prevented." *Del. State Hous. Auth. v. Hillside Ass'n, L.P.*, 1992 WL 127503, at *1 (Del. Ch. June 9, 1992). ConocoPhillips does not contend that any of these conditions is satisfied here. And aside from its unsupported and incorrect assumption that PDVSA will not cooperate in any sale process, ConocoPhillips merely suggests that a receiver would be helpful. That falls far short of the Delaware standard.

Federal authority is no more helpful to ConocoPhillips. "The appointment of a receiver is an equitable remedy of rather drastic nature." *Mintzer v. Arthur L. Wright & Co.*, 263 F.2d 823, 824 (3d Cir. 1959). "Because a receiver unquestionably interferes with an individual's right to otherwise control his or her property," such appointment should occur only "in cases of necessity" where "the plaintiff clearly and satisfactorily shows that an emergency exists and the receiver is needed to protect the property interests of the plaintiff." *Mfrs. & Traders Trust Co. v. Minuteman Spill Response, Inc.*, 999 F. Supp. 2d 805, 816 (W. D. Pa. 2013) (internal quotation marks and brackets omitted). Thus, "a district court can appoint a receiver only on a showing of fraud or the imminent danger of property being lost, injured, diminished in value or squandered, and where legal remedies are inadequate." *Leone Indus. v. Associated Packaging, Inc.*, 795 F. Supp. 117, 120 (D.N.J. 1992). A receivership is not appropriate "if milder measures will give the plaintiff, whether creditor or shareholder, adequate protection for his rights." *Maxwell v. Enter. Wall Paper Mfg.*

Co., 131 F.2d 400, 403 (3d Cir. 1942). The authorities ConocoPhillips cites, *see* D.I. 180 at 7, are not to the contrary. For example, as ConocoPhillips itself notes, the court in *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234 (5th Cir. 1997), appointed a receiver to collect and sell the judgment debtor's property only because it had already been shown that "usual remedies at law [had] proven inadequate." D.I. 180 at 7.[13]

ConocoPhillips claims only that appointing a receiver would be helpful, not that it is necessary or that an emergency exists. It does not allege fraud, any imminent danger of property being hidden or squandered, or that it lacks an adequate remedy at law. And this Court has ample supervisory power to ensure adherence to Respondents' outlined plan, should a sale be required.

In fact, rather than being "helpful," appointing a receiver in these circumstances would be impractical and costly given that PDVSA can conduct the sale itself. Unlike PDVSA, a receiver would lack the familiarity with PDVH's assets, liabilities, structure and operations necessary to manage the process, and getting it up to speed would merely incur needless expense. Unlike PDVSA, a receiver would not be able to directly negotiate the terms of the post-sale stockholder relationship. No receiver could manage the delicate task of preserving relationships with customers, employees, and other stakeholders during a sale process. And no receiver could match PDVSA's powerful incentive, as the owner, to maximize value.

[13] ConocoPhillips' other cases involve fraud or misconduct, *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 889 (5th Cir. 2019); *Liberte Capital Grp., LLC v. Capwill*, 462 F.3d 543, 547 (6th Cir. 2006); *SEC v. Am. Capital Invs., Inc.*, 98 F.3d 1133, 1136 (9th Cir. 1996); *SEC v. Hardy*, 803 F.2d 1034, 1035 (9th Cir. 1986); *Lawsky v. Condor Capital Corp.*, 154 F. Supp. 3d 9, 11 (S.D.N.Y. 2015); *SEC v. Helms*, 2015 WL 11255450, at *1 (W.D. Tex. July 2, 2015), insolvency, *SEC v. W. L. Moody & Co.*, 374 F. Supp. 465, 467–68 (S.D. Tex. 1974), or appointment of a receiver pursuant to contract, *View Crest Garden Apartments, Inc. v. United States*, 281 F.2d 844, 845 (9th Cir. 1960); *Fleet Nat'l Bank v. H&D Entm't, Inc.*, 926 F. Supp. 226, 231 (D. Mass. 1996).

Moreover, OFAC sanctions require a specific license before control of blocked property can be vested in a receiver. OFAC regulations prohibit any "judicial process purporting to transfer or otherwise alter or affect property or interests in [blocked] property" without a "specific license" authorizing it, 31 C.F.R. § 591.407, and define "transfer" to include "the appointment of any agent, trustee, or fiduciary." *Id.* § 591.310. Materially identical regulations have been held to require a license before appointing a receiver over blocked property. *Fed. Rep. of Yugoslavia v. Park-71st Corp.*, 913 F. Supp. 191, 192, 194 (S.D.N.Y. 1995); *see also Quilling v. Trade P'rs, Inc.*, 2011 WL 4973870, at *2 (W.D. Mich. Sep. 30, 2011) ("The receiver serves as the court's agent."); *Eller Indus., Inc. v. Indian Motorcycle Mfg., Inc.*, 929 F. Supp. 369, 372 (D. Colo. 1995) (a receiver "is a fiduciary"). ConocoPhillips does not represent that it has obtained or even applied for a license.[14]

ConocoPhillips also mistakenly urges the Court to adopt "certain principles and mechanics of bankruptcy proceedings." D.I. 180 at 9. The Bankruptcy Code, however, is a set of protections and burdens created for a specific set of circumstances: to provide a debtor with a fresh start while balancing and protecting the interests of creditors in an equitable distribution of assets. *See, e.g.*, *Janvey v. Romero*, 883 F.3d 406, 410–11 (4th Cir. 2018); *Westmoreland Human Opportunities, Inc. v. Walsh*, 246 F.3d 233, 251 (3d Cir. 2001). It does not apply here, and given that PDVH is not insolvent, its provisions are not even theoretically suited to these circumstances.[15]

[14] ConocoPhillips suggests that the Court could appoint a "special master or special commissioner." *See* D.I. 180 at 2. Because ConocoPhillips does not develop this argument, point to any authority to support it, or even explain how such a party would differ in anything but name from a receiver, the argument is forfeited. Even if the argument were not forfeited, appointment of such an agent would also be subject to the OFAC license requirement.

[15] Invoking section 363(m) of the Bankruptcy Code, 11 U.S.C § 363(m), ConocoPhillips erroneously contends that the validity of the sale of shares of PDVH should be immune from challenge on appeal. This is not a case to which the Bankruptcy Code applies, but ConocoPhillips' erroneous contention highlights that, to reconcile the parties' rights to appeal with any interest of bidders in finality, the appropriate time for any appeal would be before the sale occurs or before the sale becomes final.

III. SHOULD A SALE OF THE PDVH SHARES BE ORDERED, THE PROCEDURES DESCRIBED IN RESPONDENTS' OPENING BRIEF WOULD BEST ADDRESS THE UNIQUE CHALLENGES PRESENTED BY THE SIZE AND COMPLEXITY OF THE CONTEMPLATED SALE.

Respondents' opening brief described some basic processes—common to commercial sales of other major operating businesses—that would be necessary should a sale be ordered. D.I. 188, at 16–20. It also explained why care must be exercised to ensure that no sale process gets ahead of the OFAC sanctions regime, a misstep that itself would likely destroy value. *Id*. at 9–11.

While ConocoPhillips' proposed receiver solution is misguided, the interests it seeks to protect can be vindicated by allowing PDVSA to manage the sale process. Unlike Crystallex, ConocoPhillips agrees that maximizing value is the proper objective of any reasonable sale process. *See* D.I. 180 at 4–5, 13 n.5. It acknowledges the need for experts (including an investment bank) and for the sale to be managed by a knowledgeable party capable of making complex and sophisticated business judgments, which would enable bidding rules to be designed and applied based on experience and business knowledge, rather than guesswork. Contrary to ConocoPhillips' unsupported assumption, if the Court orders a sale, PDVSA would be fully willing and able to cooperate with the process of managing the sale, assuming OFAC licenses it. The process need sell only enough shares to satisfy the unpaid portion of Crystallex's judgment. At the end of any process that fairly values PDVH, PDVSA would remain the majority stockholder in PDVH, and thus the partner of whoever purchases the shares here. It is only fair to allow PDVSA to manage the process of selecting that partner and negotiating the details of post-sale governance.

Even in the bankruptcy context, to which ConocoPhillips looks for guidance, D.I. 180 at 2, there is a "strong presumption" in favor of vesting control of any sale in the owner or possessor of the property. *See In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 471 (3d Cir. 1998) (explaining that "current management is generally best suited to orchestrate the process of rehabilitation for

the benefit of creditors and other interests of the estate"); *accord Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 577 (3d Cir. 2003). And here, where not only Crystallex's interests are at stake but also the interests of PDVSA, the Republic, and the Venezuelan people in maximizing the governance and equity value remaining after a sale, only the owner has the incentive to achieve the statutory objectives.

CONCLUSION

Crystallex's motion (D.I. 181) should be denied. The Court should defer establishing a sale process until the Court rules on the motions to quash the writ of attachment and for reconsideration, and until the time (if ever) when OFAC issues a license. If the Court does determine the mechanics of a sale process, the Court should establish a process that does not destroy value and that complies with Delaware law. Crystallex's and ConocoPhillips' proposals would not satisfy these requirements, while the Respondent's proposed procedures would.

Dated: July 7, 2020

Respectfully submitted,

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This is Exhibit “O” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

RULES OF CIVIL PROCEDURE FOR THE SUPERIOR COURT OF THE STATE OF DELAWARE

I. SCOPE OF RULES – ONE FORM OF ACTION.

Rule 1. Scope and purpose of Rules.

These Rules shall govern the procedure in the Superior Court of the State of Delaware with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy and inexpensive determination of every proceeding.

Rule 2. One form of action.

There shall be one form of action to be known as "civil action."

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS; DEPOSIT AND SECURITY FOR COSTS.

Rule 3. Commencement of action.

(a) Complaint and praecipe. -- Except amicable actions, an action is commenced by filing with the Prothonotary a complaint or, if required by statute, a petition or statement of claim, all hereafter to be referred to as a "complaint" and a praecipe directing the Prothonotary to issue the writ specified therein. Sufficient copies of the complaint shall be filed so that one copy can be served on each defendant as hereafter provided. An amicable action is commenced by filing an agreement specifying the matters agreed upon. Every newly filed complaint shall be accompanied by a Case Information Statement (CIS). The CIS form is used solely for administrative purposes and the information thereon has no legal effect on the action. If any party objects to the Related Cases listed by another party in the CIS, the objecting party shall separately file a written objection with the Prothonotary no later than ten days after the last responsive pleading is filed. Any nonobjecting party may respond in writing within five days to any such objection. The Prothonotary shall forward any objection to the Related Cases, along with any response thereto, to the Civil Administrative Judge. The Civil Administrative Judge may, with prior approval of the President Judge, reassign the case to a different judge.

(b) Actions pursuant to 10 Del. C. { 3901. -- In all actions upon bills, notes, bonds, or other instruments of writing for the payment of money, or for the recovery of book accounts, on foreign judgments and in all actions of scire facias on recognizances, judgments or mortgages, the plaintiff may make a specific notation upon the face of the complaint requiring the defendant or defendants to answer any or all allegations of the complaint by affidavit.

(c) Appeals de novo. -- When an appeal de novo is permitted by law, an action is commenced in the Superior Court by the appellant filing with the Prothonotary a praecipe within the time prescribed by statute for the filing of an appeal. If no time is prescribed by statute, the praecipe shall be filed within 15 days from the entry of the final judgment, order, or disposition from which an appeal is permitted by law. When the appellant is the party having the duty of filing the complaint or other first pleading on appeal, the appellant shall file such pleading with praecipe. When the appellee is the party having the duty of filing the complaint or other first pleading on appeal, the appellee shall serve a copy of such pleading within 20 days after service of the process on appeal, or if appellee has not been served, within 40 days after the date of the process, and thereafter the pleadings shall proceed as in other actions.

(d) Record; stay. -- The appellant shall file a certified copy of the record of the proceedings below, not including the evidence, within 10 days of the filing of the praecipe. Process shall not issue until the appellant has filed the record. There shall be no stay of execution or other proceedings below unless ordered by this court pursuant to Rule 62(c).

(e) Deposit for costs. -- The Prothonotary shall not file any paper or record or docket any proceeding until the required deposit for costs and fees has been made. Before any civil suit, action or other proceeding is instituted in the Superior Court, the Prothonotary shall demand and receive the sum of $125, as a deposit of guaranty for the payment of the fees and costs in the Prothonotary's office, and the Prothonotary shall apply the sum of $125 from time to time in payment of such fees and costs in that office. If the sum of $125 is expended in the payment of the fees and costs in the Prothonotary's office as the fees and costs accrue from time to time, the Prothonotary shall demand and receive a sufficient amount, which shall be necessary, in the Prothonotary's judgment, to defray the fees and costs for additional service or services before any such additional service or services shall be performed by the Prothonotary. This Rule shall not apply to any suit, action or other proceeding which is exempted by law from the requirement of a deposit for costs.

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. -- Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time of its own initiative or on the motion of any party and after such notice, if any, as the Court orders.

(b) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. -- On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant any relief provided by statute, or to set aside a judgment for fraud upon the Court, or to deal with judgments by confession as provided by law. Writs of coram nobis, coram vobis, and audita querela are abolished, and the procedure for obtaining relief from judgments shall be by motion as prescribed in these Rules or by an independent action.

This is Exhibit “P” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

U.S. DEPARTMENT OF THE TREASURY

FINANCIAL SANCTIONS

Frequently Asked Questions

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76. Can I appeal a denial of my license application?

A denial by OFAC of a license application constitutes final agency action. The regulations do not provide for a formal process of appeal. However, OFAC will reconsider its determinations for good cause, for example, where the applicant can demonstrate changed circumstances or submit additional relevant information not previously made available to OFAC.

September 10, 2002

This is Exhibit “Q” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on May 21, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

CITATION: Crystallex International Corporation (Re), 2018 ONSC 2959
COURT FILE NO.: CV-11-9532-00CL
DATE: 20180509

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CRYSTALLEX INTERNATIONAL CORPORATION

BEFORE: HAINEY J.

COUNSEL: *Robin Schwill*, for Crystallex International Corporation

David Byers and *Lesley Mercer*, for the Monitor of Applicant

Tim Pinos and *Ryan Jacobs*, for the DIP Lender

Robert Chadwick and *Chris Armstrong*, for Computershare Trust Company of Canada in its capacity as Trustee of the Senior Notes and the Ad Hoc Committee of Holders of the Senior Notes

Nicholas Kluge, for the Equity Committee

Aubrey G. Kauffman, for Robert Fung and Marc Oppenheimer

HEARD: May 9, 2018

ENDORSEMENT

[1] Stay extension granted to October 31, 2018 on the terms of the Order as signed. Without prejudice as to whether such statements are or are not required pursuant to the Stay Extension and Standstill Order dated June 5, 2013 (the "Standstill Order") and to all rights of the parties under the Standstill Order (all of which are fully reserved), the Applicant has agreed to provide Computershare Trust Company of Canada, in its capacity as Trustee for the holders of 9.375% Senior Unsecured Notes of Crystallex (the "Noteholders"), and the Ad Hoc Committee of the Noteholders the statements referred to in the first paragraph of the Waterfall Provision and paragraph 23 of the Standstill Order, with respect to any arbitration proceeds received to date and from and after this date. Such statements shall be provided by the Applicant to the Trustee and the Ad Hoc Committee at the same time they are provided to the Monitor and the DIP Lender. The motion materials marked confidential are to be sealed in accordance with the terms of the Order and without prejudice to any party's right to seek modification or to assert that the sealed materials are not confidential. The stay extension order is without prejudice to the Noteholders' ability to seek the relief as set out in paragraph 18 of the Noteholders' factum by way of further motion.

HAINEY J.

Date: May 9, 2018

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.1985, c. C-36 AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CRYSTALLEX INTERNATIONAL CORPORATION	Court File No. CV-11-9532-00CL ***ONTARIO*** **SUPERIOR COURT OF JUSTICE** **(COMMERCIAL LIST)** Proceeding commenced at Toronto
	MOTION RECORD **OF CRYSTALLEX INTERNATIONAL CORPORATION**
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