UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

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

OPENING BRIEF IN SUPPORT OF BONDHOLDERS' MOTION TO INTERVENE AND MOTION TO STAY EXECUTION OF THE JUDGMENT PENDING APPEAL

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OPENING BRIEF IN SUPPORT OF BONDHOLDERS' MOTION TO INTERVENE AND MOTION TO STAY EXECUTION OF THE JUDGMENT PENDING APPEAL

Certain holders of bonds issued by Petróleos de Venezuela, S.A. ("PDVSA") (the "Bondholders") respectfully move to intervene in the above-captioned action pursuant to Rule 24 of the Federal Rules of Civil Procedure and this Court's August 23, 2018 order (D.I. 95). The Bondholders also seek a stay of execution of the judgment without bond, pursuant to Rule 62(d) of the Federal Rules of Civil Procedure, to the extent of staying any sale of the attached shares, pending appeal. The Bondholders have a unique interest that may be irreversibly harmed upon sale of the subject shares. In contrast, the present writ of attachment fully secures plaintiff's existing rights, and the Bondholders do not oppose any writ that would place the shares in the hands of the U.S. Marshals as long as no sale proceeds.

NATURE AND STAGE OF THE PROCEEDINGS

On June 19, 2017, Crystallex International Corp. ("Crystallex") registered with this Court a $1.2 billion judgment against the Bolivarian Republic of Venezuela ("Venezuela"). (D.I. 1.) Crystallex then moved for an order authorizing a writ of attachment *fieri facias* against the shares of PDV Holding Inc. ("PDVH"), a wholly owned subsidiary of PDVSA, Venezuela's state-owned oil company, based on an alter ego theory. (D.I. 2.) After Venezuela failed to appear, PDVSA intervened (D.I. 14, 17), and on November 3, 2017, moved to dismiss Crystallex's motion for writ of attachment under the Foreign Sovereign Immunities Act ("FSIA"). (D.I. 25, 26.) On August 9, 2018, the Court denied PDVSA's motion, finding, among other things, that PDVSA is an alter ego of Venezuela, thus making PDVSA's shares in PDVH available to satisfy Venezuela's debt. (D.I. 78, 79, 83.) PDVSA appealed the decision on August 15, 2018. (D.I. 80.)

The next day, in a joint status letter from the parties, PDVSA asked the Court to stay execution on the judgment pending a decision from the Third Circuit. (D.I. 86.) PDVSA argued that its appeal of the Court's FSIA ruling divests the Court of enforcement authority. (D.I. 86.) The Court disagreed and thus, on August 23, 2018, authorized issuance and service of a writ of attachment for the PDVH shares, but stayed execution to allow third parties to intervene and present argument. (D.I. 95.) In this motion, the Bondholders seek to intervene and move for a stay pending appeal.

SUMMARY OF ARGUMENT

1. The Court should grant the Bondholders' motion to intervene as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. The application satisfies all the requirements of Rule 24(a)(2) intervention because it is timely, and because the Bondholders' interest in PDVH shares may be affected by the Court's ruling and that interest is not adequately represented by any party to the litigation. *Dev. Fin. Corp.* v. *Alpha Hous. & Health Care, Inc.*, 54 F.3d 156, 161–62 (3d Cir. 1995). In the alternative, the Bondholders are entitled to permissive intervention under Rule 24(b)(1) of the Federal Rules of Civil Procedure because their claims overlap with those presented in this action and intervention would cause no undue delay or prejudice. *Bell Atl.-Del., Inc.* v. *Glob. NAPS S., Inc.*, 77 F. Supp. 2d 492, 502 (D. Del. 1999).

2. The Court should also exercise its discretion to stay execution on its August 23, 2018 judgment without bond until the Third Circuit decides PDVSA's appeal. Because the shares of PDVH have already been attached, they can be promptly utilized to satisfy the judgment if Crystallex prevails on appeal. In contrast, execution at this time will irreversibly harm the Bondholders and other PDVSA creditors. In these circumstances, a stay without bond is the appropriate course. *In re Revel AC, Inc.*, 802 F.3d 558, 565 (3d Cir. 2015); *Dillon* v. *City*

of Chicago, 866 F.2d 902, 904 (7th Cir. 1988). That approach is especially warranted here given PDVSA's likelihood of success on appeal.

STATEMENT OF FACTS

The Bondholders, BlackRock Financial Management, Inc. and its affiliates, on behalf of certain client funds and accounts under management, and Contrarian Capital Management, L.L.C. (a New York-based investment advising firm), also on behalf of client funds and accounts that it manages, are members of a working group that includes U.S. and UK based investment managers.[1] Together, the funds and accounts under management by these working-group-member institutions or their affiliates hold approximately 60% of the bonds issued by PDVSA that are due to mature in 2020 (the "PDVSA 2020 bonds").[2] These bonds have a face value in excess of $1.5 billion out of a total outstanding issuance size of $2,535,650,500. Investors in these funds and accounts include large pension funds (including both public and private pension funds domiciled in the United States), sovereign wealth funds based in Europe, the Middle East, Asia, and Australasia, and international banks (including banks domiciled in the United States).

The PDVSA 2020 bonds are broadly distributed and actively traded. The bonds were issued in October 2016 in an exchange for PDVSA bonds that were due to mature in April and November 2017. (Ex. A, 1, Section 2.03.) In the bond exchange offering, PDVSA offered to pledge a 50.1% collateral interest in the shares of Citgo Holding, Inc. in order to secure the 2020 bonds. (Ex. A, Section 5.01(e); Ex. B, Section 2.01(a)(i).) The pledge of Citgo Holding constituted the central element of a transparent, arm's-length capital markets transaction. The

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[1] The working group may expand and, if permitted, others may seek to join these motions.

[2] Attached hereto as Exhibit A is the indenture for the PDVSA 8.50% Senior Secured Notes Due 2020.

PDVA 2020 bonds, like the rest of the $25 billion of bonds issued by PDVSA to U.S. and non-U.S. capital markets investors, are not guaranteed by Venezuela, and, by their terms, are recourse only to PDVSA and its subsidiaries, and not to any assets of Venezuela.

As the Court is aware, Citgo Holding is a Delaware corporation and a wholly owned subsidiary of PDVH, another Delaware corporation, which, in turn, is a wholly owned subsidiary of PDVSA. The Bondholders believe PDVH has no material assets in the United States other than shares of Citgo Holdings.

ARGUMENT

I. THE COURT SHOULD GRANT THE BONDHOLDERS' MOTION TO INTERVENE.

A. The Bondholders Are Entitled to Intervene as a Matter of Right.

Rule 24(a)(2) of the Federal Rules of Civil Procedure grants a right to intervene to anyone who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Courts in this district "construe Rule 24 liberally in favor of intervention." *Merck Sharp & Dohme Corp.* v. *Teva Pharm. USA, Inc.*, 2015 WL 5163035, at *2 (D. Del. Sept. 3, 2015). Under Rule 24(a)(2), a court "must" allow intervention when four requirements are met: "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter, by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation." *Dev. Fin. Corp.*, 54 F.3d at 161–62 (internal quotation marks and citation omitted). The Bondholders satisfy all four requirements.

1. The Bondholders Have Moved To Intervene Promptly and Within the Court's Deadline.

The motion is timely under this Court's August 23, 2018 order setting a deadline of seven days from the service of the writ for motions to intervene. (D.I. 95.) *See, e.g.*, *Edwards* v. *City of Houston*, 37 F.3d 1097, 1107 (5th Cir. 1994), *on reh'g en banc*, 78 F.3d 983 (5th Cir. 1996) (holding that the motion to intervene was timely because it was filed before the court's deadline). The motion is also timely under the more general "totality of the circumstances" standards that apply to Rule 24 motions, which consider "(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay," all in light of the Third Circuit's "general reluctance to dispose of a motion to intervene as of right on untimeliness grounds." *Wallach* v. *Eaton Corp.*, 837 F.3d 356, 371 (3d Cir. 2016) (internal quotation marks and citations omitted).

These factors weigh in favor of finding timely intervention. In particular, the Bondholders have moved to intervene at this time because the primary issue they are concerned with is stopping a potential sale of PDVH shares, which, under Delaware law, can occur only upon a court order after final judgment has been rendered in the case. 8 Del. C. § 324. The Bondholders understand that such an order of sale may result from this Court's recent order authorizing a writ of attachment on the shares of PDVH. (D.I. 95.) Intervention will not cause any undue delay given that the Court solicited motions at this time and all briefing regarding the Court's temporary stay, as well as "any other motion or input," will be complete within a month of August 23, 2018. (D.I. 95 at 2.) Moreover, because the U.S. Marshals have already served the writ of attachment on PDVH (D.I. 96), Crystallex's interest in the PDVH shares is secure.

2. The Outcome of This Action Will Directly Affect the Bondholders' Rights.

To satisfy the second requirement of Rule 24(a)(2), "the applicant must have an interest 'relating to the property or transaction which is the subject of the action' that is 'significantly protectable.'" *Kleissler* v. *U.S. Forest Serv.*, 157 F.3d 964, 969 (3d Cir. 1998) (quoting *Donaldson* v. *U.S.*, 400 U.S. 517, 531 (1971)). The proposed intervenors must also, under the third prong of Rule 24(a)(2), "demonstrate that their interest *might* become affected or impaired, as a practical matter, by the disposition of the action." *Mountain Top Condo. Ass'n* v. *Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 367 (3d Cir. 1995) (emphasis in original). Applying these standards, "an intervenor's interest in a specific fund is sufficient to entitle intervention in a case affecting that fund," *id.* at 366, even if intervention is not "the only possible avenue of potential relief." *Brody ex rel. Sugzdinis* v. *Spang*, 957 F.2d 1108, 1123 (3d Cir. 1992) ("An applicant need not . . . prove that he or she would be barred from bringing a later action."). That is because "judicial economy . . . favors intervention over subsequent collateral attacks." *Id.*

Both requirements are satisfied here. The Bondholders own PDVSA bonds that are secured by shares of Citgo Holding. (Ex. A, Section 5.01(e); Ex. B, Section 2.01(a)(i).) As explained more fully below in support of the Bondholders' request for a stay, *see* pp. 11-18, *infra*, the Bondholders have an interest that will be directly affected by the disposition in this matter: (i) allowing Venezuela's creditors to reach PDVSA's assets prejudices the Bondholders as creditors of PDVSA who relied on its status as an entity separate from Venezuela when exchanging for the 2020 bonds; and (ii) a sale of PDVH shares could impair the value of Citgo Holding—the security for which the Bondholders bargained—by forcing Citgo Holding to repurchase $1.5 billion of bonds and could cause other adverse consequences, such as the loss of

significant tax assets, the termination of material contracts, and the triggering of employee change of control protections.

3. The Bondholders' Interests Are Not Adequately Represented.

The final requirement of Rule 24(a)(2) "is satisfied if the applicant shows that representation of [its] interest may be inadequate; and the burden of making that showing should be treated as minimal." *Mountain Top*, 72 F.3d at 368 (quoting *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)) (internal quotation marks omitted). For example, an intervenor's interests are not adequately represented even when a party to the litigation is obligated to serve the intervenor's interest, so long as that party also has to act for the benefit of others. *Trbovich*, 404 U.S. at 538. Similarly, a debtor in possession who "represents all the creditors of the bankrupt" does not adequately represent every individual creditor. *See In re Larkham*, 27 B.R. 859, 861-62 (Bankr. D. Vt. 1983).

The Bondholders' interests are not satisfactorily represented by either Crystallex or PDVSA (or for that matter Venezuela, which has not appeared). Crystallex and the Bondholders are clearly adverse; Crystallex seeks to sell PDVH shares, and the Bondholders object. And even though PDVSA may share an interest with the Bondholders in seeking to prevent attachment and execution of the PDVH shares, that does not preclude intervention, because PDVSA inherently has other interests as well. Venezuela, which owns 100% of PDVSA, has an interest in seeing that Venezuela's creditors, such as Crystallex, get paid, and Venezuela may thus conclude that expanding the universe of assets available to its creditors is in its interest at this time. Thus, whether or not PDVSA is Venezuela's alter ego, PDVSA cannot be relied upon to defend the interests of creditors who have competing interests in PDVSA's assets. As a result, the Bondholders are not adequately represented in this matter.

B. Alternatively, the Court Should Grant Permissive Intervention.

Rule 24(b) of the Federal Rules of Civil Procedure separately permits timely intervention by anyone with "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Permissive intervention is discretionary and depends to a large extent on whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. *See* Fed. R. Civ. P. 24(b)(1), (3); *Brody*, 957 F.2d at 1115–16; *Bell Atl.-Del.*, 77 F. Supp. 2d at 502 ("The central consideration for the exercise of discretion is whether allowing intervention will cause delay or prejudice.").

The Bondholders have "a claim or defense that shares with the main action a common question of law or fact." They, like PDVSA, seek to prevent Crystallex from forcing a sale of PDVH shares before an appellate court can decide the novel legal issues raised by seizing PDVSA property, ahead of a creditor of PDVSA itself, to satisfy a judgment creditor of Venezuela. As shown above, there is no risk of undue delay or prejudice on the brisk schedule set by the Court. *See* p. 5, *supra*. As a result, if the Court denies the Bondholders' request to intervene as of right, it should grant permissive intervention.

II. THE COURT SHOULD STAY EXECUTION ON THE PDVH SHARES UNTIL THE THIRD CIRCUIT DECIDES THE APPEAL.

Rule 62(d) of the Federal Rules of Civil Procedure permits an appellant to obtain an automatic stay of execution of judgment pending appeal by posting a bond. In the alternative, district courts may employ their discretion to waive the bond requirement. *Dillon*, 866 F.2d at 904–06 (affirming grant of stay of execution without bond); *Fed. Prescription Serv., Inc.* v. *Am. Pharm. Ass'n*, 636 F.2d 755, 757–59 (D.C. Cir. 1980) (district court can exercise "a sound discretion to authorize unsecured stays"); *In re Nassau Cty. Strip Search Cases*, 783 F.3d 414, 417 (2d Cir. 2015) (district court "may, in its discretion, waive the bond requirement").

"In considering whether to grant a stay pending appeal, courts consider the following four factors: (1) whether the appellant has made a strong showing of the likelihood of success on the merits; (2) will the appellant suffer irreparable injury absent a stay; (3) would a stay substantially harm other parties with an interest in the litigation; and (4) whether a stay is in the public interest." *In re Revel AC, Inc.*, 802 F.3d 558, 565 (3d Cir. 2015). Ultimately, a district court's goal is "to ensure recovery for a party who ultimately prevails on appeal, and to protect the judgment debtor from the risk of losing the money if the decision is reversed." *In re Nassau Cty. Strip Search Cases*, 783 F.3d at 418. In service of these aims, courts decide whether to grant a stay without bond based on factors that assess how quickly recovery could proceed after appeal, the extent to which delay poses a risk to the judgment creditor, and whether posting a bond could injure other creditors of the debtor. *See, e.g.*, *Dillon*, 866 F.2d at 904–05 (considering "(1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money, and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position") (internal quotation marks and citations omitted); *In re Nassau Cty.*, 783 F.3d at 417–18 (same); *Acevedo-García* v. *Vera-Monroig*, 296 F.3d 13, 17 (1st Cir. 2002) ("Courts have held that no bond is required if: (1) the defendant's ability to pay is so plain that the posting of a bond would be a waste of money; or (2) the bond would put the defendant's other creditors in undue jeopardy.").

Courts often waive the bond requirement where the appellant has sufficient assets to satisfy the judgment or where the applicant otherwise shows a good reason for not requiring

such security. *See, e.g.*, *Poplar Grove Planting and Ref. Co., Inc.* v. *Bache Hasley Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979) (full supersedeas bond is not required if the appellant can show an adequate substitute assurance); *C. Albert Sauter Co.* v. *Richard S. Sauter Co.*, 368 F. Supp. 501, 520 (E.D. Pa. 1973) (same); *In re Nassau Cty.*, 783 F.3d at 418 (stay pending appeal without bond is appropriate where funds are available to pay the judgment without substantial delay); *Bollore, S.A.* v. *Imp. Warehouse, Inc.*, 2004 WL 1873069, at *1 (N.D. Tex. Aug. 19, 2004) (listing "among the factors" courts consider when deciding whether to waive the bond requirement "whether the debtor's financial condition is so precarious that the requirement to post a bond would place other creditors in an insecure position").

Applying these standards, the Court should grant a stay without bond.

A. A Stay of Execution Poses Little Risk to Crystallex, which Can Quickly Execute on the PDVH Shares if It Prevails on Appeal.

The relief Crystallex obtained in this case was the right to take and potentially sell PDVH shares in satisfaction of Venezuela's $1.2 billion debt. Under this Court's August 23, 2018 order, those shares have now been attached. (D.I. 95, 96.) As a result, PDVH, a Delaware corporation, has been ordered to "retain" and "hold" the shares, including "all shares of stock and any other assets or rights incident to that stock ownership." (D.I. 95 (Writ of Attachment *Fieri Facias*).) The PDVH shares, in other words, are safely in storage waiting for Crystallex should it prevail on appeal. There is no reason to require a bond to protect Crystallex against risk of loss while the shares are protected in this way. *See, e.g.*, *Arban* v. *W. Pub. Corp.*, 345 F.3d 390, 409 (6th Cir. 2003) ("[T]he district court's decision to grant a stay without a bond was not an abuse of discretion" because the appellant's annual revenue suggested that it had the means to satisfy the judgment). And because the shares have already been attached, there would be no delay in executing on the shares and putting them up for auction should Crystallex prevail.

See 8 Del. C. § 324 (specifying sale timelines, including requiring a sale to be advertised "twice for 2 successive weeks, the last publication to be at least 10 days before the sale" where the debtor is a nonresident of Delaware).

B. In Contrast, Executing on the August 23, 2018 Order May Irreversibly Harm the Bondholders and Other PDVSA Creditors.

1. Exposing PDVSA's Assets to Creditors of Venezuela Harms Those Who Dealt with PDVSA in Reliance on Its Separate Status.

In transacting with PDVSA, the Bondholders relied on PDVSA's status as a separate corporate entity from Venezuela. In particular, although the Bondholders bargained for a security interest in Citgo Holding, they also understood that they would have recourse to other assets of PDVSA if the Citgo Holding interest proved inadequate. The Bondholders' prospects of full recovery may be significantly reduced if they have to share the PDVSA assets with creditors of Venezuela, a situation that the Bondholders did not reasonably expect when agreeing to the bond exchange.

2. A Sale of PDVH's Shares Will Trigger a Change of Control, Potentially Necessitating Waste of Citgo Holding's Corporate Assets.

Unless PDVSA were to buy back a majority of the shares, a sale of PDVH's shares will lead to a change of control of PDVH. A change of control may reduce or eliminate tax assets, trigger termination rights in corporate contracts, and lead to the trigger of special compensation arrangements for key employees. *See, e.g.* 26 U.S.C. §§ 172(g), 382 (Internal Revenue Code provisions governing ability to deduct net operating losses after a change of control). In addition, Citgo relies heavily on its normal trade terms for the delivery of products. Disorder in or around Citgo could cause trade creditors to tighten delivery terms and/or require bonds, thereby damaging the franchise. The Bondholders do not know the

magnitude of any of these costs, but a sale by the Marshal would not allow time to attempt to minimize these costs as would be part of any orderly sale process by private actors.

For example, in July 2014, Citgo Petroleum Corp., a U.S. corporation and wholly owned subsidiary of Citgo Holding, issued $650 million of senior secured notes that carry an interest rate of 6.25% and are due to mature in 2022 ("Citgo Petroleum 2022 bonds").[3] The offering memorandum for the bonds outlines a change of control provision that requires Citgo Petroleum to offer to repurchase the bonds in cash within 30 days of any "Change of Control." (Ex. C, 119.)

A sale of the shares of PDVH may constitute a Change of Control for Citgo Petroleum under these provisions. The offering memorandum defines a "Change of Control" as, among other things:

> (2) the Issuer becomes aware of . . . the acquisition by any Person or group acting for the purpose of acquiring, holding or disposing of securities . . . but excluding any Permitted Holder, in a single transaction or in a related series of transactions, by way of merger, consolidation or other business combination or purchase, of "beneficial ownership" . . . of Voting Stock of the Issuer or any of its direct or indirect parent companies enabling such Person or group to elect a majority of the board of directors of the Issuer or any of its direct or indirect parent companies . . . .

(Ex. C, 155.) Under the offering memorandum, the only "Permitted Holders" are "PDVSA and its Wholly Owned Subsidiaries." (Ex. C, 168.) Thus, a sale of PDVH shares to anyone other than PDVSA or its wholly owned subsidiaries may constitute a Change of Control under the

[3] Attached hereto as Exhibit C is the Offering Memorandum for the Citgo Petroleum Corp. 6.25% Senior Secured Notes Due 2022.

indenture for the Citgo Petroleum 2022 bonds. Similar change of control provisions apply to an even larger Citgo Holding issuance of $1.875 billion of senior secured notes due 2020.[4]

Therefore, if the Court allows a sale of PDVH's shares to proceed, the sale would trigger the change of control provision, requiring Citgo Petroleum and Citgo Holding to offer and potentially finance the repurchase in cash of all of the notes at a premium. Upon information and belief, in today's interest environment, financing that purchase would be significantly more expensive than the existing debt burden, both in terms of the interest rate that the market would likely demand and transaction costs of raising new money.[5] The need to quickly finance the repurchase of as much as $2.5 billion of notes would likely reduce the value of Citgo Petroleum as an asset, harming the Bondholders, whose 50.1 % collateral interest in Citgo Holding would correspondingly decline in value.

In short, if the Court's opinion finding that PDVSA is an alter ego of Venezuela is overturned after the sale of the PDVH shares, there could have already been a wasteful and unnecessary reduction in the value of Citgo Holding.

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[4] *See* Rating Action: Moody's Assigns Caa1 Rating to Citgo Holding, Inc. and Its Proposed Transactions, Moody's (Jan. 22, 2015), https://www.moodys.com/research/Moodys-assigns-Caa1-rating-to-Citgo-Holding-Inc-and-its--PR_316905; CITGO Refinancing Raises Credit Ratings and Positions Company for Further Growth, PR Newswire (Mar. 15, 2018), https://www.prnewswire.com/news-releases/citgo-refinancing-raises-credit-ratings-and-positions-company-for-further-growth-300615087.html; Citgo Holding, Inc. Preliminary Offering Memorandum dated Jan. 28, 2015, at 155-56.

[5] *See Historical Prime Rate: 1983-Present*, JPMorgan Chase & Co., https://www.jpmorganchase.com/corporate/About-JPMC/historical-prime-rate.htm (showing increase in prime interest rate from 3.50% in December 2015 to 5.00% in June 2018); *see also* Jim Tankersley and Neil Irwin, *Fed Raises Interest Rates and Signals 2 More Increases Are Coming*, N.Y. Times (June 13, 2018), https://www.nytimes.com/2018/06/13/us/politics/federal-reserve-raises-interest-rates.html (noting that the Federal Reserve had increased the federal funds rate, which impacts the prime interest rate, "and signaled that two additional increases were on the way this year").

C. PDVSA is Likely to Succeed on Appeal.

A stay that preserves the status quo is appropriate where, as in this instance, there is a likelihood of success on appeal. *Acevedo-Garcia*, 296 F.3d at 17 ("[W]e do not believe the defendants have shown a clear likelihood of success of the merits."); *Bank of Nova Scotia* v. *Pemberton*, 964 F. Supp. 189, 192 (D.V.I. 1997) ("At this stage, [the moving party] has provided no new evidence or theory showing why he is likely to succeed on appeal"). That standard is met given the uncertainty of federal case law in this area and the potential impact of the Court's ruling on PDVSA's many third-party creditors. In particular, the Bondholders submit that the Court erred by applying a mechanical "only control" test to hold that PDVSA was the alter ego of Venezuela without considering adequately, if at all, the interests of PDVSA's own creditors, such as the Bondholders.

Courts pierce a veil when it is fair to creditors to do so, and do not when it is not. *See Trevino* v. *Merscorp, Inc.*, 583 F. Supp. 2d 521, 528 (D. Del. 2008) (a creditor must show that "an overall element of injustice or unfairness is present" to pierce the corporate veil); *In re Broadstripe, LLC*, 444 B.R. 51, 102 (Bankr. D. Del. 2010) (citing *Harper* v. *Del. Valley Broadcasters, Inc.*, 743 F.Supp. 1076, 1085 (D. Del. 1990), *aff'd* 932 F.2d 959 (3d Cir. 1991) (holding the same). The Supreme Court's decision in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 613 (1983) has been read to suggest a disjunctive test under federal common law: either the use of the corporate form to perpetuate an injustice, or excessive domination and control. However, as this Court noted in footnote 15 of its August 9, 2018 decision, the disjunctive/conjunctive debate has a false precision: even the control prong for veil-piercing has a background that is premised on what is fair under the circumstances. (D.I. 79, 83, at 23 n.15); *see also Minpeco, S.A.* v. *Hunt*, 686 F. Supp. 427, 437 (S.D.N.Y. 1998) (explaining that even though "Minpeco and Peru have a close relationship and

. . . their interests are aligned, these features typify the relationship between *all* government instrumentalities and their parent governments," and "in the absence of abuse, fraud or injustice[] is legally insufficient to overcome the presumption of separateness set forth in *Bancec*") (emphasis in the original); *Blair* v. *Infineon Techs. AG*, 720 F. Supp. 2d 462, 473 (D. Del. 2010) (fraud or injustice "must be found in the defendants' use of the corporate form") (internal quotation marks omitted). This is why current state law generally does not permit veil-piercing unless there is both (1) a confusion of corporate form or excessive control *and* (2) an injustice to creditors. Delaware law, for example, is clear on this. *See, e.g.*, *Trevino*, 583 F. Supp. 2d at 528 (to pierce the corporate veil under an alter ego theory, a party "must show (1) that the corporation and its [principals in question] operated as a single economic entity, and (2) that an overall element of injustice or unfairness is present") (applying Delaware law).

Under federal common law, there is a direct analogy in the policy considerations cited in *Bancec*, which are designed to protect the interests of creditors of a government-owned instrumentality that borrows money from third parties. *See Bancec*, 462 U.S. at 624, 626–27 (noting that the United States' strong interest in helping foreign instrumentalities "obtain the financial resources necessary to make . . . national investments."). As Justice O'Connor explained in *Bancec*, "the instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions with third parties. . . . Limited liability is the rule, not the exception; and on that assumption . . . huge sums of capital [are] attracted." *Id*. at 625–26 (internal quotations omitted).

The interests of third-party creditors of the supposedly dominated instrumentality should be given particular weight in a downward veil-piercing claim such as this one. In a downward piercing case, creditors of the dominating parent seek to gain access to the assets of

the nominally separate subsidiary to satisfy the parent's debts. In the more common upward veil-piercing case, creditors of a subsidiary seek to hold the parent liable for the subsidiary's debts. If a parent has excessively dominated the affairs of that subsidiary, it is "inherently" fair to hold the parent liable for the subsidiary's debts. (D.I. 79, 83 at 23 n.15.) The parent has ignored the veil, creditors of the subsidiary are harmed, and the fair result is to allow the claim directly against the parent.

In a downward piercing case, the facts are opposite. The parent's domination of its subsidiary does not suggest that the subsidiary automatically should be liable for the unrelated debts of the parent. The subsidiary itself may have creditors, who relied on its corporate separateness and deserve the protection of the law. The subsidiary creditors are *helped* by upward veil-piercing (especially where it permits a claim against a sovereign) but *harmed* by downward veil-piercing because they must share their corporate assets with a larger constituency. Thus, permitting downward veil-piercing based on control alone, without consideration of the impact on the subsidiary's creditors, sets up the wrong incentives: the parent (here, Venezuela) is rewarded for abusing the corporate form because the assets of its nominally separate subsidiary will now be available to satisfy the parent's creditors, thereby relieving pressure on the parent. Said differently, Venezuela fairly can be held liable for PDVSA's debts if it controls PDVSA. But, for PDVSA fairly to be held liable for Venezuela's debts under the control prong, PDVSA would have to control Venezuela.

Federal case law is consistent with the view that, to satisfy its obligation under *Bancec* to consider equitable and policy implications, the Court should have considered whether violating PDVSA's separateness would harm PDVSA creditors or undermine the ability of government-owned corporations to borrow money in the future. In *De Letelier* v. *Rep. of Chile*,

for example, the Second Circuit noted that, where a creditor of a sovereign sought to execute against assets of its instrumentality, the interests of the instrumentality's third party creditors had to be considered:

> An injustice might be inflicted on third parties were [the instrumentality's] separate status so easily ignored. . . .[A]buse of corporate form must be clearly demonstrated to justify holding the "subsidiary" liable for the debts of its sovereign "parent," particularly, where, as here, [the instrumentality] has non-party private bank creditors. Concern for these non-party creditors is stronger in this case as the net result will be an out-of-pocket loss to [the instrumentality]. To adopt a rule facilitating an easy piercing of the corporate veil threatens the interests of such unsuspecting third parties.

748 F.2d 790 n.1 (2d Cir. 1984); *see also Arch Trading Corp.* v. *Rep. of Ecuador*, 839 F.3d 193, 201 (2d Cir. 2016) ("Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty for sovereigns and creditors alike.") (internal quotations omitted); *Hercaire Int'l, Inc.* v. *Argentina*, 821 F.2d 559, 564 (11th Cir. 1987) (concluding that a *Bancec* analysis must "account for the policy considerations underlying the recognition of [instrumentalities'] separate juridical existence"). There are cases where courts have emphasized control with little attention to the interests of a subsidiary's creditors; however, most of these cases are inapposite jurisdictional disputes where an alter ego finding would not have affected the relative rights of the subsidiary's third-party creditors. *See*, *e.g.*, *Doe* v. *Holy See*, 557 F.3d 1066, 1069 (9th Cir. 2009) (seeking to upward veil pierce to create jurisdiction over a sovereign); *Walter Fuller Aircraft Sales, Inc.* v. *Rep. of Philippines*, 965 F.2d 1375, 1384 (5th Cir. 1992) (same); *McKesson Corp.* v. *Islamic Rep. of Iran*, 52 F.3d 346, 349 (D.C. Cir. 1995) (same).[6]

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[6] *EM Ltd.* v. *Banco Cent. de la República Argentina*, 800 F.3d 78 (2d Cir. 2015), relied upon by this Court in its August 9, 2018 ruling, was a special case, because it involved an (ultimately unsuccessful) attempt to pierce the veil of a central bank to satisfy the sovereign parent's debt.

When the interests of PDVSA's third-party creditors are taken into account, Crystallex should not be permitted to execute on the PDVH shares. PDVSA has been an active participant in the capital markets and has massive outstanding obligations: more than $25 billion in outstanding bonds, none of which are guaranteed by Venezuela. It may be that, in the short term, the PDVH shares are the only assets of PDVSA that are in the United States and available for a U.S. court to seize to pay PDVSA's bondholders. Taking those shares now away from PDVSA's bondholders to pay a debt of Venezuela that is structurally junior deprives the PDVSA bondholders of the priority claim to the value of those shares established at the time PDVSA bonds were issued, reflected in the Citgo/PDVH holding company structure and publicly disclosed to the capital markets. The potential harm to the many pensions, retirement funds and other institutional and individual investors who own PDVSA bonds, as well as the consequences for future capital markets offerings by other state-owned corporations, are critical considerations in a complete *Bancec* analysis.[7]

The Third Circuit's ability to meaningfully weigh in on these important questions should be preserved by granting the requested stay.

Central banks do not typically have significant trade creditors or large outstanding long-term debts to private creditors. Moreover, the amount of the attachment at issue in *EM* was a relatively small proportion of the assets of the Argentine central bank ("$105 million deposited in BCRA's FRBNY account," *id.* at 85, rather than the billions that had been transferred to an "attachment-proof account" in the Bank of International Settlements in Switzerland, *id.* at 96), so that the concerns of any third-party creditors of the bank would have been less prominent than they are here.

[7] In *De Letelier*, the Court held that fairness to the creditors of the Chilean national airline required there be no piercing of the corporate veil notwithstanding the district court's finding of egregious abuse of the corporate form. 748 F.2d at 794–95.

CONCLUSION

For the foregoing reasons, the Bondholders respectfully ask that the Court grant their motion to intervene and their motion to stay enforcement of the judgment to the extent of staying any sale of the attached shares, pending appeal.

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