

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL
CORPORATION,

Plaintiff,

v.

BOLIVARIAN REPUBLIC OF
VENEZUELA,

Defendant.

C.A. No. 17-151-LPS

**OPENING BRIEF IN SUPPORT OF CRYSTALLEX INTERNATIONAL
CORPORATION'S MOTION FOR AN ORDER APPROVING THE PROCESS OF SALE
OF SHARES OF PDV HOLDING, INC.**

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Plaintiff and Judgment Creditor Crystallex International Corporation (“Crystallex”), consistent with this Court’s August 9, 2018 and August 23, 2018 orders, D.I. 78, 95, authorizing and directing the issuance of a writ of attachment on the shares of PDV Holding, Inc. (“PDVH”), nominally held by Petróleos de Venezuela, S.A. (“PDVSA”), the alter ego of Defendant and Judgment Debtor Bolivarian Republic of Venezuela (“Venezuela”), and this Court’s May 22, 2020 order, D.I. 174, directing the parties to file their proposals for the sale of shares of PDVH, hereby moves this Court for an order setting the procedures for the sale of shares of PDVH by the U.S. Marshals Service (the “Marshals”) at public auction.

NATURE AND STAGE OF THE PROCEEDINGS

This motion represents the beginning of the end of a saga that began with Venezuela’s unlawful expropriation of Crystallex’s assets in 2008. Venezuela’s misconduct led a respected arbitral tribunal seated in Washington, D.C. and working under the auspices of the World Bank’s International Centre for Settlement of Investment Disputes to issue an arbitral award of \$1.4 billion, including pre-award interest, to Crystallex in April 2016. The United States District Court for the District of Columbia (the “D.C. District Court”) confirmed that award and entered judgment in Crystallex’s favor in April 2017. The D.C. Circuit affirmed. That judgment was then registered in this District and, in August 2018, this Court entered orders finding PDVSA to be an alter ego of Venezuela and directing the Marshals to attach the shares of PDVH, nominally owned by PDVSA, to satisfy Crystallex’s judgment. The United States Court of Appeals for the Third Circuit affirmed this Court’s orders in July 2019. Last month, the United States Supreme Court denied Venezuela and PDVSA’s petition for certiorari.

Now that both this Court’s order and the underlying judgment are final and unappealable, the time has finally come for Venezuela to make good on its obligations. As the Third Circuit explained, “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 Int’l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 149 (3d Cir. 2019). Because Venezuela refuses to honor its debts voluntarily, assets subject to execution must be sold. This motion seeks to set the process by which Crystallex will finally receive satisfaction.

SUMMARY OF ARGUMENT

1. Pursuant to Rule 69 of the Federal Rules of Civil Procedure, Delaware state law provides the law of execution for a judgment registered in this Court. And Delaware law includes a specific provision, Section 324 of the Delaware Corporate Code, that sets the rules of execution of shares of a Delaware corporation. The statute is straightforward. The sheriff—or, pursuant to 28 U.S.C. § 564, the Marshals Service—is to twice publish in a local newspaper a notice of sale describing the property to be sold, with the last publication at least 10 days before the sale. The Marshals then conduct a public auction on the date specified in the notice. This law applies to all sales of corporate shares, no matter how large the company, and without regard to whether the company is publicly traded or privately held.

2. As explained by the Delaware Supreme Court in *Deibler v. Atlantic Properties Group, Inc.*, compliance with the notice provisions of Delaware law, even in the case of sales of shares of privately-held companies such as PDVH, is sufficient. 652 A.2d 553, 555, 558 (Del. 1995). The Court has also noted that interested parties are welcome to provide more notice and information concerning the assets to be sold if they believe it beneficial to do so. Accordingly, Crystallex respectfully requests that this Court issue a sale order providing for additional publication of the notice of sale. Specifically, Crystallex proposes the publication of the notice of sale in *The Wall Street Journal*, *Oil & Gas Investor*, and any other publication deemed advisable by the Marshals. Crystallex further respectfully requests that the Court issue an order authorizing the creation of a virtual data room to host corporate financials and other information

concerning PDVH and its subsidiaries that might be of interest to potential bidders, such as the offering documents prepared in connection with CITGO Petroleum Corporation's June 2, 2020 \$1.125 billion debt offering, as well as any additional information that Venezuela, PDVH or any other interested party believes should be made available to potential bidders.

3. Delaware law provides that the Marshals shall auction shares of PDVH "sufficient to satisfy the debt." 8 *Del. C.* § 324(a). Because the shares of a privately held company are a unique asset, the number of shares to be sold cannot be determined in advance. Accordingly, the Court should authorize the Marshals to sell up to 100% of the shares of PDVH, as a sale of all of the shares may be required to satisfy Crystallex's judgment—particularly as few potential bidders are likely to be interested in becoming business partners with Venezuela. To comply with Delaware law, Crystallex proposes that the Marshals start the auction by offering 10% of the shares of PDVH. If any party is willing to bid an amount equal to (or greater than) Crystallex's outstanding judgment for 10% of the shares of PDVH, the auction will be over.¹ If no one is willing to bid the amount of the judgment for 10% of the shares, the Marshals would then offer 15% of the shares. The process can then repeat until (i) a bid equal to the amount of Crystallex's judgment for a percentage certain is reached, or (ii) the Marshals offer 100% of the shares without receiving a bid in excess of the outstanding judgment, at which point the Marshals would attempt to get the highest possible bid for all of the shares of PDVH.

4. In light of U.S. sanctions on Venezuela, which impose certain limitations on transfers of property of the government of Venezuela, including property held in PDVSA's name, the Court should provide that bids for the shares of PDVH may be made subject to

¹ As of June 30, 2020, the amount of the outstanding judgment will be \$962,396,426. Interest continues to accrue at the rate set forth in 28 U.S.C. § 1961. Crystallex will provide the Court and the Marshals with an updated amount once the sale date has been determined.

regulatory approval, including, if necessary, receipt of a license from the Office of Foreign Asset Control (“OFAC”), as well as any other approvals that might be required as a result of the identity of the purchaser—such as antitrust approval pursuant to the Hart-Scott-Rodino Act—subject to PDVH maintaining its regular operations in the ordinary course. The sale order should further provide that, if approval is not received within six months, the winning bidder may seek additional time from this Court, or the Marshals shall offer the shares to the second highest bidder. If that bidder is unwilling to proceed, then the Marshals shall re-auction the shares.

STATEMENT OF FACTS

I. History of This Action

In 2008, after Crystallex had invested hundreds of millions of dollars to develop the Las Cristinas gold mine and support the surrounding community, Venezuela illegally expropriated Crystallex’s investment. In 2011, Crystallex initiated arbitration proceedings pursuant to a bilateral investment treaty between Canada and Venezuela. D.I. 3-1 at 5. Crystallex obtained an award of \$1.4 billion, including pre-award interest, in April 2016 and immediately moved to confirm the award in the D.C. District Court. *Id.* The D.C. District Court issued a judgment confirming the award on April 7, 2017. *See* D.I. 1.² Two months later, on June 9, 2017, the D.C. District Court issued an order pursuant to 28 U.S.C. § 1610(c) and 28 U.S.C. § 1963 allowing Crystallex to enforce its judgment against Venezuela and to register that judgment in other district courts, including the District of Delaware. *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, 2017 WL 6349729 (D.D.C. June 9, 2017).

Crystallex registered its judgment with this Court on June 19, 2017, D.I. 1, and on August 14, 2017 moved this Court to issue a writ of attachment *feri facias* attaching PDVSA’s shares in

² The United States Court of Appeals for the District of Columbia Circuit affirmed on February 14, 2019. 760 F. App’x 1, 2 (D.C. Cir. 2019)

PDVH on the grounds that PDVSA was an alter ego of Venezuela in possession of shares of PDVH, a Delaware corporation, and that the shares of PDVH were used in connection with commercial activity and not immune from attachment under the Foreign Sovereign Immunities Act. *See* D.I. 3-1. PDVSA intervened on August 28, 2017, D.I. 17, and, following multiple rounds of briefing and argument, this Court granted Crystallex’s motion on August 9, 2018. D.I. 78, 83. PDVSA appealed the decision the next day, August 10, 2018. D.I. 80. Over PDVSA’s objection, the Court directed the Clerk of Court to issue a praecipe and writ of attachment, D.I. 95, ¶¶ 1–3, which the Marshals served on PDVH on August 24, 2018, D.I. 96.

Pursuant to the writ of attachment, PDVH was directed to serve on Crystallex within 20 days—*i.e.*, no later than September 13, 2018—“a verified answer, . . . specify[ing] what shares of stock and other assets or rights incident to that stock ownership belonging to or owing to PDVSA, as alter ego of Defendant and Judgment Debtor Venezuela” are in PDVH’s possession. D.I. 95. Following motion practice, this Court stayed the deadline to respond pending PDVSA’s and Venezuela’s various appeals. PDVH finally responded to the writ on June 5, 2020. D.I. 177. According to PDVH’s answer, ownership of PDVH is represented by 1,000 shares of stock, all of which are recorded on a single certificate—of which PDVH claims to possess photocopies, but not the original. *Id.* ¶ 7. According to PDVH’s books and records, PDVSA has been at all relevant times, and remains, the owner of 100% of the shares of stock. *Id.*

On July 29, 2019, the Third Circuit unanimously confirmed this Court’s August 9, 2018 order granting the writ, holding that (i) “if the relationship between Venezuela and PDVSA cannot satisfy the Supreme Court’s extensive-control requirement, we know nothing that can,” (ii) “[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,” and (iii) “the

PDVH shares are not immune from attachment.” *Crystallex Int’l Corp.*, 932 F.3d at 152.

PDVSA’s and Venezuela’s petitions for rehearing or rehearing en banc were denied on November 21, 2019. *Crystallex Int’l Corp.*, Sur Petition for Rehearing, Nos. 18-2797 & 18-3124, Sur Petition for Rehearing, Doc. 003113412157 (3d Cir. Nov. 11, 2019). PDVSA and Venezuela subsequently filed a joint petition for a writ of certiorari before the United States Supreme Court, which was denied without dissent on May 18, 2020. *Venezuela v. Crystallex Int’l Corp.*, ___ S. Ct. ___, 2020 WL 2515508 (S. Ct. May 18, 2020). On May 22, 2020, this Court issued an order directing the parties to file briefs on “the mechanics by which the sale of PDVH is to occur ... [and] any other issue that any party reasonably foresees may interfere with the Court expeditiously proceeding to enforce its prior orders.” D.I. 174 at 1.

II. The Shares of PDVH and PDVH’s Ultimate Assets

The shares of PDVH are formally owned entirely by PDVSA, permitting PDVSA to control PDVH, a Delaware company with its principal place of business in Delaware. *See* D.I. 5-1, Exs. 81 at 80, 91, 92. PDVH’s value is derived from its subsidiaries. PDVH “owns 100% of the shares of CITGO Holding, Inc., which in turn owns 100% of the shares of CITGO Petroleum Corp. . . . , a multi-billion dollar Delaware corporation headquartered in Texas and founded in 1910.” D.I. 26 at 9. As CITGO Petroleum explained in offering materials circulated last month:

We own and operate three large-scale, highly complex petroleum refineries with a total rated crude oil refining capacity of approximately 769 MBPD, located in Lake Charles, Louisiana, Corpus Christi, Texas and Lemont, Illinois. Our refining operations are supported by an extensive distribution network, which provides reliable access to our refined product end-markets. We own 32 active refined product terminals with a total storage capacity of 8.3 million barrels and have equity ownership of an additional 3.8 million barrels of refined product storage capacity through our joint ownership of an additional nine terminals, spread across 21 states.

CITGO Petroleum June 2, 2020 Offering Memo., at 1.³ In 2019, CITGO Petroleum generated revenues of \$25.6 billion, net income of \$246 million and Adjusted EBITDA of \$1.2 billion. *Id.*

III. Crystallex’s Pending Application for a Specific License.

Current OFAC guidance provides that, “prior to conducting an auction or other sale, including a contingent auction or other sale, or taking other concrete steps in furtherance of an auction or sale,” a party holding an attachment of shares of an entity whose property and interest are blocked pursuant to the Venezuela Sanctions Regulations is to seek a specific license from OFAC. OFAC, Frequently Asked Questions No. 809 (“FAQ 809”), https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq_other.aspx. While the application and enforceability of that guidance to Crystallex’s attachment of the shares of PDVH is far from clear—particularly to the extent that it purports to limit this Court’s power to enforce its prior orders—on April 9, 2020, Crystallex submitted an application to OFAC for a specific license authorizing the sale of the shares of PDVH. The license seeks formal approval of the commencement of the sale process, through and including the auction of the shares of PDVH.

SUMMARY OF CRYSTALLEX’S PROPOSED SALE PROCESS

Crystallex respectfully requests that this Court enter an order authorizing the sale of the shares of PDVH upon confirmation that (i) OFAC has issued a license authorizing the sale of the shares, or (ii) OFAC or a court of competent jurisdiction has otherwise determined that no license to conduct the sale is required under applicable sanctions, on the following terms:

1. The Marshals shall provide notice of the public sale in *The Delaware News Journal*, as well as *The Wall Street Journal*, and *Oil & Gas Investor*. The notice may also be

³ The Offering Memorandum is not available for download, but is publicly available. *See Venezuela’s Citgo Issues \$1.125 Billion of New 5 Year Bonds*, *Latin American Herald Tribune* (June 3, 2020), <http://www.laht.com/article.asp?CategoryId=10717&ArticleId=2492571>.

published in such additional periodicals as the Marshals see fit. At the same time, any interested party may cause the notice to be publicized in additional periodicals and otherwise provide copies of the sale notice to potential strategic and financial purchasers.

2. A virtual data room containing available information concerning PDVH and its subsidiaries may be created and made available to potential bidders. The data room will host recent offering documents produced by CITGO Holding and CITGO Petroleum, as well as any additional information that Venezuela, PDVH or any other interested party is willing to provide.

3. Sixty days after the initiation of the notice phase, the Marshals shall conduct a public auction. Potential bidders will be required to provide a \$10 million letter of credit, or a refundable deposit, to the Marshals before the auction commences. The auction shall be conducted as a sale of a percentage of the shares of PDVH, by which the Marshals shall offer increasing percentages of the shares in exchange for the payment of an amount equal to Crystallex's outstanding judgment. Whichever bidder is willing to satisfy the judgment for the fewest number of shares shall be declared the winning bidder. If no sale can be completed for less than all of the shares, then 100% of the shares of PDVH shall be sold to the highest bidder.

4. Closing on the winning bid may be conditioned on the bidder receiving any necessary regulatory approvals, including a specific license from OFAC if required, provided that the successful bidder tender a non-refundable deposit of 10% of the winning bid or \$50 million, whichever is less, within 30 days of being selected as the winning bidder. If the winning bidder is unable to obtain any necessary approvals within a six-month period, the bidder may seek an extension from the Court for good cause shown. Alternatively, the Marshals shall offer the shares to the second highest bidder. If the second highest bidder declines to proceed, the auction shall be re-noticed on the same terms.

ARGUMENT

Delaware law, which provides the law of execution for the judgment in this action pursuant to Federal Rule of Civil Procedure 69(a)(1), sets forth a straightforward process for the sale of the shares of PDVH that were attached as a result of this Court's August 2018 order authorizing the issuance of the writ of attachment. Specifically, Section 324 of the Delaware Corporate Code provides that shares of a Delaware corporation shall be sold by the sheriff at public auction, after twice providing notice of the sale by publication. No more is required.

The value of the shares, or the assets underlying those shares, has no legal bearing on the operation of the statutorily mandated Section 324 process. Nor does it matter whether the corporation is privately held or publicly traded. Nonetheless, as discussed in more detail below, Crystallex believes that the Court should permit the Marshals and any interested parties to take efforts to (i) increase notice of the sale and (ii) ease access to, and increase the availability of, potentially relevant information concerning PDVH and its subsidiaries. In addition, Crystallex believes that this Court should set certain bidding requirements to ensure that any participant in the Court-ordered auction is serious and financially able to complete the purchase of the shares.

I. Delaware Law Requires Personal Property, Including Corporate Shares, to Be Sold at Public Sale to the Highest Bidder.

Here, the Marshals served the writ of attachment on August 24, 2018.⁴ Pursuant to

⁴ On June 5, 2020, PDVH stated for the first time that the shares are certificated in a single stock certificate that is not in its possession. Instead, according to its Answer to the Writ of Attachment, D.I. 177, PDVH only possesses copies of the stock certificate representing the shares of PDVH. Notably, PDVH does not state where the certificate is now, but the answer is ultimately irrelevant. Pursuant to Section 169 of the Delaware Corporate Code, “[f]or all purposes of title, action, attachment, garnishment and jurisdiction . . . the situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . shall be regarded as in this State.” 8 *Del. C.* § 169. To avoid delay, this Court can, and respectfully should, direct the immediate turnover of the shares to the Marshals or compel PDVH to reissue the share certificates so that they can be transferred to the successful bidder

Section 324, after the shares are attached, “[s]o many of the shares . . . may be sold at public sale to the highest bidder, as shall be sufficient to satisfy the debt . . . upon an order issued therefor by the court from which the attachment process issued, and after such notice as is required for sales upon execution process.” 8 *Del. C.* § 324(a). Once a “final judgment” has been rendered, as is the case here, the court may “order” the sale of the shares. *Id.*

Once ordered by the Court, the sale of shares pursuant to Section 324 is to be conducted by the Marshals on a date certain. *See, e.g., Livingston v. Ramunno*, 1999 WL 1611322, at *1 (Del. Super. Ct. Mar. 30, 1999) (describing sale of garnished stock); *see also* 10 *Del. C.* § 4972 (detailing notice provisions for sales of personal property). The statute charges the Marshals with advertising the sale order “at least twice for 2 successive weeks, the last publication to be at least 10 days before the sale, in a newspaper published in the county where the attachment process issued.” 8 *Del. C.* § 324; *see also* 10 *Del. C.* § 4972. A public auction is then conducted, after which any motion to set aside the sale is addressed to this Court. 2 *Woolley on Delaware Practice* § 1066. Once any such motion is resolved, the sale is then confirmed. *Id.*

II. This Court Can Supplement the Statutory Procedure to Increase Knowledge of, and Participation in, the Auction of the Shares of PDVH.

A. Relevant Financial and Operational Information Can Be Made Available to Potential Bidders.

Delaware courts have recognized that “[t]he sale of stock, especially closely held stock, is

at the appropriate time. *See* 8 *Del. C.* § 324(c) (“The court which issued the levy and confirmed the sale shall have the power to make an order compelling the corporation, the shares of which were sold, to issue new certificates or uncertificated shares to the purchaser at the sale[.]”). The Delaware Corporate Code expressly authorizes the issuance of new stock or shares where the originals “have been lost, stolen or destroyed,” 8 *Del. C.* § 167, and authorizes judicial proceedings to compel issuance of new certificates if necessary, 8 *Del. C.* § 168. Similarly, Delaware’s version of the Uniform Commercial Code provides that a creditor “is entitled to 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 reached by other legal process.” 6 *Del. C.* § 8-112(e).

unique.” *Atl. Props. Grp., Inc. v. Deibler*, 1994 WL 45433, at *8 (Del. Super. Ct. Jan. 6, 1994) (citing 8 *Del. C.* § 324). Those same courts have nevertheless held that the sale of corporate stock “is to be conducted in the same manner as other personalty.” *Id.* The decision in *Atlantic Properties* is particularly instructive here. At issue in that case was the propriety of a public auction of attached shares of a privately held Delaware corporation where the notice of sale did nothing more than the list the names of the companies and number of shares to be sold. The sale was confirmed by the court over the debtors’ objections. As the court explained, “a reasonable bidder may have to do more work due to the uniqueness of the property being sold, but that should not translate to the Court becoming involved in requiring additional information in the Bill of Sale.” *Id.* at *8. The decision was affirmed by the Delaware Supreme Court. *See Deibler*, 652 A.2d 553.

While no more information is required to be publicized in connection with a sale of the shares of a private company than with any other form of personal property, courts have welcomed judgment debtors to provide additional information to the public. As the Delaware Supreme Court explained in *Deibler*, a party to an execution sale is “free to supplement such notice as the sheriff may disseminate.” *Id.* at 557. Indeed, property owners “have the fullest (and cheapest) access to relevant information.” *Id.* at 558. Here, Venezuela has every incentive to maximize the price of the shares of PDVH as any excess value belongs to Venezuela. It is up to Venezuela to decide whether to facilitate the sales process by making additional information available. But, should it choose not to do so, Venezuela cannot be heard to complain about the lack of public awareness of information that it failed to provide. *See id.*

With the statute and guidance from *Deibler* in mind, Crystallex believes that the statutory auction process can be supplemented to ensure that potential bidders have access to as much

information about PDVH and its underlying assets as is possible. To facilitate the sale process, a “virtual data room” can be created to host information that could be of interest to bidders in deciding whether, and how much, to bid at auction. Fortunately, a great deal of useful information is already available. PDVH’s subsidiaries CITGO Holding and CITGO Petroleum have both been active in the debt markets since this Court issued the writ of attachment. To Crystallex’s knowledge, the two companies have combined to issue more than \$3 billion in new debt since the Court issued its writ of attachment. The most recent of these debt offerings—a \$1.125 billion offering by CITGO Petroleum that closed on June 3, 2020—was supported by a 323-page offering memorandum providing detailed financial and operational information on CITGO Petroleum.⁵ CITGO Holding provided similarly detailed information in connection with its August 2019 offering of \$1.37 billion of secured notes.⁶ These offering memoranda, and any other information that Venezuela, PDVH or any other interested party wishes to provide, can be made available in the data room for the benefit of potential bidders.⁷

B. The Required Publication Requirements Can Be Supplemented to Ensure Broad Awareness of the Auction.

“The purpose of the notice of [a Marshals’] sale and the advertising is to apprise the public and potential bidders of the sale and promote bidding.” *Shipley v. New Castle Cty.*, 975

⁵ See CITGO Petroleum June 2, 2020 Preliminary Offering Memorandum, available at *Venezuela’s Citgo Issues \$1.125 Billion of New 5 Year Bonds*, Latin American Herald Tribune, (June 3, 2020), <http://www.laht.com/article.asp?CategoryId=10717&ArticleId=2492571>.

⁶ See CITGO Petroleum, *CITGO Holding, Inc. Refinances Debt* (Aug. 1, 2019), <https://www.citgo.com/press/news-room/news-room/2019/citgo-holding-inc-refinances-debt> (confirming \$1.37 billion offering completed on August 1, 2019).

⁷ To that end, Crystallex is in the process of serving discovery seeking financial and other information on Venezuela, PDVSA, PDVH, CITGO Holding, and CITGO Petroleum and is prepared to make the responses available for posting in the proposed data room.

A.2d 764, 768 (Del. 2009). There is little doubt that the sale of shares of PDVH will be well known. For years, this action has been the subject of regular reporting by nationally-circulated newspapers, major news services, and many specialty news outlets.⁸ Coverage of the Court's sale order undoubtedly will be widespread.

Nevertheless, to ensure that knowledge of the sale is disseminated widely, Crystallex requests that the Marshals be directed to provide supplemental notice to potential bidders. Again the Delaware Supreme Court's decision in *Deibler* is instructive. As that Court noted, "judgment debtors are free to supplement such notice as the sheriff may disseminate." 652 A.2d at 557. It is unclear whether Venezuela is willing to take on that burden, but the Marshals can supplement the statutory notice by causing the notice of sale to be posted in *The Wall Street Journal* and *Oil & Gas Investor*, in addition to the *Delaware News Journal*. This supplemental advertising can serve to increase awareness of the sale and potentially increase the number of bidders.

In addition, while it has no statutory obligation to do so, Crystallex intends to provide copies of the notice of sale to 36 potential bidders.⁹ These potential bidders fall into two camps. First, strategic buyers for which the acquisition of some or all of PDVH's assets could enhance their existing business, such as the top domestic and Canadian oil refiners and commodities

⁸ See, e.g., *U.S. Supreme Court declines to hear Venezuela's appeal in Crystallex case*, Reuters (May 18, 2020), <https://www.reuters.com/article/venezuela-pdvs-crystallex/us-supreme-court-declines-to-hear-venezuelas-appeal-in-crystallex-case-idUSL1N2D014V>; Greg Stohr, *Venezuela Spurned by U.S. Supreme Court in Citgo Stake Clash*, Bloomberg (May 18, 2020), <https://finance.yahoo.com/news/venezuela-rejected-u-supreme-court-133257499.html>; Gugarats and Patricia Garip, *US court clears sale of Citgo shares*, Argus Media (May 25, 2020), <https://www.argusmedia.com/en/news/2108248-us-court-clears-sale-of-citgo-shares>; Andrew Scurria, *Venezuela Creditor Cleared to Resume Citgo Seizure Efforts*, Wall St. J. (Sept. 30, 2019), <https://www.wsj.com/articles/venezuela-creditor-cleared-to-resume-citgo-seizure-efforts-11569865813>.

⁹ The list of potential bidders that Crystallex proposes to contact is set forth as Exhibit 1 of the accompanying Myatt Declaration.

traders. The second category consists of financial buyers that would be interested in acquiring PDVH or its assets for investment purposes. This category includes private equity firms and investment funds with experience investing in the energy sector. Of course, other interested parties are welcome to identify potential bidders and give them notice of the sale as well.

III. The Sale Order Should Impose Certain Minimum Bidder Requirements.

According to recent offering documents, PDVH's subsidiaries generate tens of billions of dollars in revenue each year and have assets in excess of \$9.2 billion. While it is difficult to determine how different bidders might value PDVH as an asset, *see* Section V, *infra*, the value is likely to be substantial. Thus, the Court's sale order should include two provisions to help ensure that any bidders are qualified. First, before participating in the auction, any bidder should be required to provide a sworn statement that they are not a Specially Designated National or Blocked Person precluded from acquiring the blocked property even through a licensed sale. Second, any bidder should be required to present to the Marshals a letter of credit, or refundable deposit, in the amount of \$10 million, to provide some assurance that they are serious and have the financial wherewithal to complete a purchase of the shares if they prevail at the auction.

IV. This Court's Sale Order Should Provide for a Conditional Sale.

As the Court is aware, under the current Venezuelan sanctions regime, the shares of PDVH are considered blocked property because they belong to the Venezuelan government. Exec. Order No. 13,884 (Aug. 5, 2019) ("All property and interests in property of the Government of Venezuela . . . are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in."). Absent a license, transactions involving blocked property are subject to various restrictions, and OFAC has indicated that its current position is that a sale

of the shares of PDVH requires a specific license.¹⁰ Questions of enforceability aside, few potential bidders faced with these pronouncements will be prepared to expend significant funds without OFAC approval of their purchase. While the U.S. sanctions regime is subject to change at any time, under current regulations, if approval is found to be required, it is most likely to come in the form of a specific license—which requires a detailed application to, and review by, OFAC. *See* 31 C.F.R. § 591.407.

In addition, given the nature of the ultimate downstream assets being sold—which include oil refineries and pipelines—additional regulatory approvals may well be required for a prospective purchaser to take ownership of the shares of PDVH. Strategic buyers with existing refinery assets may need to seek approval under the Hart-Scott-Rodino Act, which requires that filings be made with the Federal Trade Commission and the Department of Justice before the closing of certain major acquisitions that may trigger antitrust concerns. *See generally* 15 U.S.C. § 18a. Similarly, potential bidders from outside the United States may need approval from the Committee on Foreign Investment in the United States (“CFIUS”) before they can complete the purchase, as CITGO Petroleum’s pipelines and refineries could be considered strategic energy assets, the acquisition of which could implicate national security concerns. *See generally* 50 U.S.C. § 4565; 31 C.F.R. pt. 800.

In order to address these concerns, Crystallex believes that the sale order should allow for bids for the shares of PDVH to be made subject to the bidder receiving necessary government

¹⁰ OFAC, Frequently Asked Questions No. 808, https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq_other.aspx (“[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 property blocked pursuant to the Venezuela Sanctions Regulations.”); FAQ 809 (noting that “OFAC would consider license applications seeking to authorize [enforcement] activities on a case-by-case basis”).

approvals. This will allow potential purchasers to offer full value for the shares without the need to discount their bids to reflect regulatory uncertainty and the possibility that they would be required to pay for an asset that they ultimately were not allowed to own. As part of this proposal, the winning bidder would be provided six months to secure the requisite approvals, with the possibility of an extension from the Court for good cause shown. PDVH would be required to operate only in the ordinary course during this approval period. If no approvals are forthcoming, the Marshals may offer the shares to the second-highest bidder. If that bidder is unwilling or unable to proceed, the Marshals would then re-notice the sale along the same terms as the initial auction.

Delaware courts have recognized that statutory and regulatory restrictions need not bar sales; rather, any potential pitfalls can be addressed through careful drafting of the sale order. *See, e.g., Wallace v. Geckosystems Int'l Corp.*, 2013 WL 3340535, at *1, *4 (Del. Super. Ct. June 26, 2013) (affirming order authorizing sale of shares that defendant argued were subject to securities registration requirements and directing the parties to confer on proper language for sales order in light of same). And, while Crystallex is unaware of a conditional sale order issuing in the context of a Section 324 auction, Court-ordered and approved sale orders in other contexts frequently include provisions allowing for conditional bids made subject to government approvals. *See, e.g., In re Indianapolis Downs, LLC*, 486 B.R. 286, 298 (Bankr. D. Del. 2013) (“It is not at all unusual for . . . [an asset sale] to be conditioned upon the expectation of approval by regulatory authorities.”); *MW Capital Funding, Inc. v. Magnum Health & Rehab of Monroe, LLC*, 2019 WL 549173, at *1 (E.D. Mich. Feb. 12, 2019) (“The Sale Order provides that the closing . . . will occur after certain regulatory approvals have been obtained.”), *reconsideration denied*, 2019 WL 1077174 (E.D. Mich. Mar. 7, 2019); *In re Chateaugay Corp.*, 186 B.R. 561,

573 (Bankr. S.D.N.Y. 1995) (sale required party to “obtain Presidential approval under the Exon-Florio amendment pursuant to the CFIUS process”), *order aff’d, appeal dismissed*, 198 B.R. 848 (S.D.N.Y. 1996), *aff’d*, 108 F.3d 1369 (2d Cir. 1997).

Accordingly, Crystallex respectfully requests that this Court’s sale order provide that the closing of any sale shall be expressly conditioned on the winning bidder receiving the requisite government approvals. To ensure that bidders approach any approval processes in good faith, Crystallex requests that any winning cash bidder be required to provide a non-refundable deposit of 10% of the bid price or \$50 million, whichever is less, to the Marshals within 30 days of the acceptance of its bid at auction.¹¹

V. The Marshals Should Be Authorized to Sell as Many Shares of PDVH as Is Necessary to Satisfy Crystallex’s Judgment.

Section 324 authorizes the sale of “[so] many shares . . . as shall be sufficient” to satisfy the judgment underlying the attachment. 8 *Del. C.* § 324(a). This Court can authorize, and the Marshals may sell, all of the shares of PDVH, so long as any excess sale proceeds are preserved for PDVSA. The possibility that anticipated sale proceeds could exceed the amount that “is actually due [on Crystallex’s judgment] . . . could not affect the validity of the sale, and has materiality only to the distribution of proceeds from it.” *Atlas Subsidiaries of Del., Inc. v. Burns*, 57 Del. 499, 503 (1964). In any event, the auction can be easily structured so that only those shares necessary to satisfy Crystallex’s judgment are sold.

While it is theoretically possible to perform a valuation of PDVH as a whole, it is impossible to determine the value of anything less than the entire company because of the risks

¹¹ Such a deposit would be consistent with the 10% deposit required at auctions run by the Newcastle County Sheriff. *See The Newcastle County Sheriff’s Office Bidder Auction Rules*, <https://www.nccde.org/DocumentCenter/View/193/Sheriff-Auction-Rules-and-Bidder-Registration?bidId=>.

associated with being a business partner with PDVSA. As long as PDVH is majority-owned by PDVSA, it is subject to U.S. sanctions and its business activities are limited by the scope of OFAC licenses that are subject to change at any time. *See, e.g.*, Venezuela General License No. 7C (Aug. 5, 2019) (providing 18-month license for transactions involving PDVH, CITGO Holding or CITGO Petroleum, so long as no other Venezuelan government entities are involved). Some potential investors may be willing to consider becoming a majority shareholder in PDVH, with PDVSA remaining as the minority shareholder, but the potential headaches are still likely to suppress the amount that an investor would pay as compared to an otherwise similar company that was unburdened with baggage of the sort that surrounds PDVH as a result of its Venezuelan ownership. This is not idle speculation. As Fitch Ratings explained just weeks ago, “CITGO’s credit profile should improve under nearly any other owner besides PDVSA.”¹²

An auction is the best—and indeed only—way of determining the number of shares that need to be sold to satisfy Crystallex’s judgment.¹³ To preserve the possibility, however unlikely, that a partial sale could generate sufficient funds to satisfy Crystallex’s judgment, the bidding could be structured to determine the minimum number of shares that would need to be sold to raise the approximately \$1 billion still outstanding on Crystallex’s judgment. Under this approach, the Marshals would offer a certain percentage of the company, starting at 10% for

¹² *Fitch Rates CITGO Petroleum’s Senior Secured 2025 Notes ‘BB’/‘RR1’* (June 2, 2020), <https://www.fitchratings.com/research/corporate-finance/fitch-rates-citgo-petroleum-senior-secured-2025-notes-bb-rr1-02-06-2020>; *see also Fitch Assigns ‘B+’/‘RR1’ Expected Rating to CITGO Holdco Issuances; Upgrades Holdco IDR to ‘CCC+’* (July 16, 2019), <https://www.fitchratings.com/research/corporate-finance/fitch-assigns-b-rr1-expected-rating-to-citgo-holdco-issuances-upgrades-holdco-idr-to-ccc-16-07-2019>.

¹³ In prior briefing, Intervenor CITGO Petroleum suggested that the first part of any sale process should be to appraise the company. D.I. 102-2. An appraisal would simply add unnecessary time and expense to the sale process, as an auction would still need to be conducted and as many shares as are actually necessary to satisfy the judgment would need to be sold regardless of whatever valuation an appraisal might provide.

example, and ask if any bidder would pay the outstanding judgment amount for that number of shares. The Marshals could then increase the number of shares being offered for auction until a willing bidder appears. If and when a bidder is prepared to pay the judgment amount, the Marshals would then see if any other bidder was willing to pay more for the same number of shares, to ensure that the maximum value was received. If the number of shares on offer reached 100%, the auction could proceed to determine the highest bid for the entire company, much like any other public auction.

In all events, Crystallex is prepared to start the bidding with a \$300 million credit bid for 100% of the shares of PDVH.

VI. The Sale Process Should Be Consistent with Delaware State Law.

Based on positions taken in prior briefing before this Court, some combination of Venezuela, PDVSA and/or their U.S.-based subsidiaries will undoubtedly argue that a statutory sale is commercially unreasonable, and that the best way to maximize the sale price is through a brokered sale of PDVH run by company management with the assistance of a financial advisor. *See* D.I. 102-2. Venezuela and PDVSA have had years to sell the shares of PDVH to raise funds sufficient to satisfy Crystallex's judgment. They could have conducted their own sale process at any time in the more than 11 years since Crystallex's Venezuelan assets were first expropriated, the more than nine years since Crystallex commenced arbitration proceedings against Venezuela, the more than four years since the arbitral award issued, the more than three years since judgment was entered, or the 22 months that have passed since this Court authorized the writ of attachment. Even now they could simply pay Crystallex's judgment. Having chosen to do nothing, they cannot now be heard to complain that the price received at a forced sale could be less than that received at a brokered sale between a willing seller and a willing buyer. As the *Deibler* Court noted, a valid sale requires only that "a reasonable process be employed to give

notice to the public of the sale so that a reasonable price, *considering the forced sale nature of the transaction*, might be obtained.” *Deibler*, 652 A.2d at 557 (emphasis added). The United States Supreme Court has similarly explained that “a fair and proper price” for property subject to a forced sale is “the price in fact received at the [judicial] sale, so long as all the requirements of the State’s . . . law have been complied with.” *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994).¹⁴ Any other approach would be subject to challenge unless all interested parties agree on the process.¹⁵ And given the unknown number of Venezuela’s creditors, it would be impossible to obtain the consent of everyone that might have an interest in the sale.

CONCLUSION

For the reasons set forth above, Crystallex respectfully requests that this Court enter an order approving the terms of a public sale by the U.S. Marshals Service of PDVH Shares—to occur as soon as Crystallex’s license for the auction is obtained or found to be unnecessary—in order to satisfy Crystallex’s remaining judgment against Venezuela.

¹⁴ While the Supreme Court in *BFP* considered the question of whether the price received at a mortgage foreclosure sale was “reasonably equivalent value” for the foreclosed asset, the Court’s considerations can apply to any forced sale conducted pursuant to state law. In *BFP*, the Court noted that foreclosure sales typically require “notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, and strict adherence to prescribed bidding rules and auction procedures.” *Id.* at 542. These same principles apply to the sale of stock under Delaware law. “When these procedures have been followed, however, it is ‘black letter’ law that mere inadequacy of the foreclosure sale price is no basis for setting the sale aside.” *Id.* (citations omitted).

¹⁵ Rule 69 allows this Court to enforce a money judgment by a writ of execution “unless the Court directs otherwise.” Fed. R. Civ. P. 69(a)(1). As an alternative to an order under Section 324 of the Delaware Corporate Code, the Court could authorize a judicial sale pursuant to 28 U.S.C. § 2004, which incorporates the sale provisions of 28 U.S.C. § 2001 and provides for the public sale of personal property on notice and subject to court supervision. A judicial sale under those provisions would impose slightly different notice requirements, *see generally* 28 U.S.C. § 2001, but otherwise would function largely the same as the proposed sale, *see, e.g.*, Myatt Decl. Ex. 2 (*United States v. Swartz*, No. 16-cr-00264-DNH, Order, Dkt. 203 (N.D.N.Y. Sept. 9, 2019) (authorizing detailed sale process of forfeited assets under the supervision of the Marshals)).

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