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**VIA ELECTRONIC FILING**

The Honorable Leonard P. Stark
U.S. District Court for the
District of Delaware
844 North King Street
Wilmington, Delaware 19801

**Re: *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, C.A. No. 17-151-LPS**

Dear Chief Judge Stark:

I write on behalf of both parties in response to the Court's Order requesting a status report. D.I. 78. The parties' respective positions on the issues raised by the Court are set forth below.

**Crystallex's Position**

**1. How quickly should the Court direct the writ to be issued, how quickly should Crystallex be directed to serve it, and how quickly must Crystallex execute on it?**

Crystallex believes that the Court should direct the Clerk to issue the writ immediately. Pursuant to Local Rule 69.1 and Delaware state law, which governs execution of federal judgments pursuant to Rule 69, Crystallex already submitted the proposed form of the writ and the *praecipe* with its motion, D.I. 4-1 (Myatt Decl. Exs. 1, 2). Once the Clerk signs, seals, and issues the writ, the Clerk "shall deliver [the writ] for service" to the U.S. Marshals. Del. Super. Ct. Civ. R. 4(a); *see also LNC Invs., Inc. v. Democratic Republic of Congo*, 69 F. Supp. 2d 607, 611–12 (D. Del. 1999) (noting that state law rules "govern the process for attaching property by writ of attachment *fi. fa.*" and, in federal court, the Clerk and U.S. Marshals substitute for the Prothonotary and sheriff, respectively). Once Crystallex tenders the requisite fee, the Marshals can, and should, commence service of the writ on PDVH forthwith.[1]

Rapid issuance and service of the writ are essential to effectuating this Court's August 9 Order because "any assignment, or transfer" of the PDVH shares "after attachment, shall be void." 8 *Del. C.* § 324(a). Such a lien is normally created in the ordinary course, and, in light of the Court's findings, should be implemented here as soon as possible so as to provide Crystallex the same protection afforded any other judgment creditor with such a writ. A lien is vital given Venezuela's and PDVSA's propensity for engaging in transactions that, as the Third Circuit put it, are "intent[ionally]" designed to "hinder creditors." *Crystallex Int'l Corp. v. Petróleos de Venezuela, S.A.*, 879 F.3d 79, 89 (3d Cir. 2018). And, given the number of creditors competing

[1] Once the writ is served, PDVH will have 20 days to respond by indicating the number of shares that are attached by the writ and whether such shares are certificated or uncertificated. *See* 8 Del. C. § 324(b).

to collect on Venezuela's (and PDVSA's) assets, prompt issuance and service of the writ also is critical to establishing Crystallex's priority interest in the shares. *See, e.g.*, *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 345 (Del. 2012) ("first in time, first in line [rule] applie[s] . . . to determine the priority of creditors").

PDVSA's filing of a notice of appeal does not change the analysis. The August 9 Order is a final appealable order that the Court "retains the authority to enforce." 20 Moore's Federal Practice, § 303.32[2][b][vi] (2018). "In the absence of a stay obtained in accordance with Rule 62(d), the pendency of an appeal does not prevent the judgment creditor from acting to enforce the judgment."[2] 11 Fed. Prac. & Proc. Civ. § 2905 (3d ed.); 20 Moore's Federal Practice, § 303.32[2][b][vi] ("Until the district court's judgment is superseded or stayed, . . . the district court retains the authority to enforce the judgment."). Indeed, "[i]f an appeal from an order or judgment divested the district court of jurisdiction to enforce that order or judgment, there would be no point to [FRCP] 62(d) . . . which provides for a stay . . . with the posting of a *supersedeas* bond" and "no reason for litigants to petition for a stay" without a bond. *In re Gushlak*, 2012 WL 2564523, at *4 (E.D.N.Y July 2, 2012). In other words, "[i]f the effect of judgments and orders were automatically stayed pending appeal, a great deal of well-established practice and procedure would be superfluous." *Id*.

Should Venezuela or PDVSA seek to stay this enforcement action, there is a clear and simple path to follow: post a bond for the amount of the judgment. Unless and until a bond is posted, the Court remains free to issue further orders as needed to enforce the August 9 Order.[3] *Printing & Paper Trades Auxiliary Workers v. Cuneo E. Press, Inc. of Pa.*, 72 F.R.D. 588, 590 (E.D. Pa. 1976) (district court retained jurisdiction to compel levy of execution and a marshal's sale despite a pending appeal); *see also N.L.R.B. v. Cincinnati Bronze, Inc*., 829 F.2d 585, 588 (6th Cir. 1987) (district court "retain[s] jurisdiction to enforce" judgment pending appeal); *Brown v. Braddick*, 595 F.2d 961, 965 (5th Cir. 1979) ("district court retained power to enforce its order" where defendant "failed to ask . . . for a stay pending appeal and to post supersedeas bond as required by F.R.C.P. 62(d)"); *Lauber v. Belford High Sch*., 2012 WL 12994877, at *2 n.4 (E.D. Mich. Aug. 31, 2012) (enforcement proper given the "well established rule that district courts retain jurisdiction, even after a notice of appeal is filed, to enforce an order already issued prior to the filing of the notice of appeal."). Nor is there any reason to think that a motion for a stay of execution without a bond could succeed. PDVSA's alter ego Venezuela sought such a stay of

[2] Under the Federal Rules of Civil Procedure, the term "judgment" includes "any order from which an appeal lies." Fed. R. Civ. P. 54(a). Not only is this an action to enforce a judgment against Venezuela issued by the United States District Court for the District of Columbia, but, at least for the limited purposes of PDVSA's pending appeal, the Court's August 9 Order is an appealable "judgment."

[3] Delaware State law is even more restrictive. Article IV, § 24 of the Delaware Constitution "establishes that on appeal no stay of proceedings will occur unless the appellant shall give 'sufficient security to be approved by the court below,'" and Delaware Supreme Court Rule 32(c) provides that "a stay or injunction pending an appeal shall be granted upon filing and approval of sufficient security." *Gates v. Texaco, Inc.*, 2008 WL 1952162, at *1 (Del. Super. Ct. May 2, 2008).

enforcement, and it lost. *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 1:16-cv-00661-RC (D.D.C. Aug. 8, 2017) (order denying motion to stay). In denying a stay without bond, the D.C. Court found a "likelihood that Venezuela will be either unwilling or unable to satisfy the full judgment at the end of this case," and that "Venezuela's conduct thus far" had not "demonstrated unmistakably its intent and ability to pay." *Id*. at 3–4. Because the D.C. Court was "unable to conclude that Crystallex's interests would not be injured" by a stay without a bond, it "decline[d] to stay the case." *Id*. at 6. There is even less justification for a stay now.

Put simply, nothing divests this Court of the ability to enforce its prior order by authorizing service of the writ that it already has approved.

**2. What is the 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, and how involved (if at all) does the Court need to be in that sale process?**

Pursuant to 8 *Del. C.* § 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, and once the shares have been attached by service of the writ of execution by the Marshals' Office, the court may "order . . . the sale" of the shares. *Id.*; *see also, e.g., Livingston v. Ramunno*, 1999 WL 1611322, at *1, *3–4 (Del. Super. Ct. Mar. 30, 1999).

Once ordered by the Court, the sale of shares pursuant to 8 *Del. C.* § 324 is to be conducted by the sheriff, or here the U.S. Marshals, on a date certain. *See, e.g., Livingston*, 1999 WL 1611322, at *1 (describing "sheriff's sale" of garnished stock). Because the Marshals are responsible for selling the shares, the Court need not oversee the sale process.[4] The statute charges the sheriff with advertising the sale by "publish[ing] [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(a). Because Crystallex is interested in maximizing the value of the shares and ensuring that the sale is commercially reasonable, it intends to supplement the Marshals' efforts to advertise the sale by (1) identifying and notifying potential buyers of the sale, and (2) publishing additional sale notices in national (and potentially international) publications. *See Deibler v. Atl. Props. Grp., Inc.*, 652 A.2d 553, 554, 557 (Del. 1995) (finding that a party was "free to engage in wider or different advertisement of [a] forthcoming [execution] sale," beyond "such notice as the sheriff may disseminate," "if they thought it beneficial" because it is in their "economic interest . . . to encourage wide knowledge of and participation in any execution sale").

[4] The Court does, however, retain jurisdiction to ensure that the sale is completed in accordance with the statutory requirements. *See, e.g., Bartlett v. Gen. Motors Corp.*, 36 Del. Ch. 131, 133 (1956).

Here, the assets at issue are well known in petroleum and refining industries. Indeed, PDVH and its subsidiaries, including CITGO Petroleum Corporation, were the subject of an extensive marketing and sales process as recently as 2014. While Venezuela ultimately chose not to go forward, public reports indicate that approximately 20 different entities engaged in one or more phases of that process. Crystallex believes that these entities—strategic buyers with substantial assets—continue to have interest in PDVH and its assets and are the most likely to purchase the shares of PDVH. Crystallex further believes that an additional 10-20 entities may be interested in participating in the auction. As noted above, Crystallex is preparing to provide notice of the auction to each of these parties. In addition, Crystallex fully anticipates making a substantial judgment credit bid for the shares when they are subject to auction.

There is also substantial information available to all of these prospective bidders to assist in preparing potential bids. PDVSA publishes annual financial statements that report on results in North America. Audited financial statements were distributed in connection with CITGO Holding Inc.'s 2015 debt offerings. And financial analysts regularly report on PDVH and its subsidiaries and their financials; JP Morgan issued a new report following this Court's August 9 Order. Crystallex is also prepared to make available to potential bidders any information that Venezuela or PDVSA is willing to provide to inform the valuation of the shares and maximize the value received for them at auction, which also is in Venezuela's and PDVSA's interests.[5]

In sum, the Marshals' auction, as supplemented by Crystallex's efforts to increase knowledge and involvement in the auction that go above and beyond that which is statutorily required, will fully satisfy the requirements for a sale of the shares of PDVH.

**3. Does Crystallex, or alternatively, a purchaser of the PDVH shares, wish to (or need to) seek a license from OFAC to permit the sale and, if so, when will it do so?**

Following the issuance of the Court's August 9 Order and Opinion, representatives of Crystallex and its investors have been in contact with OFAC. Those representatives have informed OFAC of the general outline of the execution process discussed above. While OFAC has not taken — and is not expected to take—a formal position on the matter, it has not advised Crystallex or its representatives that it believes that a license is necessary at this time. It is nevertheless likely that a potential purchaser may wish to seek a license before completing a purchase of the shares. It is Crystallex's understanding, however, that OFAC does not typically issue advisory licenses. Accordingly, any application for a license to purchase the shares of PDVH will be best presented to OFAC after the bidding for the shares has completed, but before the sale closes. This could be

[5] Useful information includes, but is not limited to: (1) historical and current financial statements; (2) internal monthly financial reports; (3) corporate forecasts; (4) corporate budgets; (5) recent auditor letters; (6) supply contracts; (7) inventory and working capital information; (8) information detailing related-party transactions; (9) monthly management and operations reports; and (10) board minutes.

facilitated by the Court issuing a conditional sale order, which provides that any sale may be conditioned on the issuance of a license by OFAC (or a statement that no license is necessary).[6]

**4. 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?**

As the Court explained in its August 9 Opinion, "[t]here is no doubt PDVSA has had fair notice of each of [Crystallex's] allegations," and "neither party can credibly contend that it has been denied due process or had an inadequate opportunity to be heard." D.I. 83 at 27–28 n.17.[7] The Court's observations are unsurprising given that PDVSA made a full factual challenge—including substantive declarations and more than 50 exhibits—to Crystallex's motion for a writ. With that evidence in hand, the Court found that Crystallex had proven—by a preponderance of the evidence—that PDVSA was Venezuela's alter ego and that PDVSA's factual submissions failed to controvert the facts set forth in the declarations and exhibits that Crystallex submitted. *See* D.I. 83 at 54. While a party with a claim to—or other protected interest in—the shares that are the subject of the writ ordinarily could move to quash the writ after it has been served and the resulting lien created, that is because writs of this type are most typically granted without notice. Here, PDVSA moved to intervene and then brought a full factual challenge before the writ was issued. Having successfully asked the Court to consider a factual challenge prior to the issuance of the writ, PDVSA is not entitled to re-litigate those same challenges in the context of a motion to quash. *See, e.g., Honeywell Int'l Inc. v. Universal Avionics Sys. Corp.*, 585 F. Supp. 2d 623, 629 (D. Del. 2008) (issue preclusion applies where the party " had a full and fair opportunity to litigate the issue . . .; the issue was actually litigated; the controlling facts and applicable legal rules were the same . . .; resolution of the particular issue was essential . . .; and the identical issue was decided in the first action"). Having argued and lost, on the facts, that it was not an alter ego of Venezuela, PDVSA cannot be heard to argue again, on those same facts, that it is not an alter ego of Venezuela. Given that PDVSA is the party in possession of the facts detailing its relationship with Venezuela and had every incentive to marshal all the evidence that it could in support of its opposition to the motion for a writ of attachment, it is difficult to imagine what new evidence it could hope to introduce to alter this Court's findings.

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[6] This would have the added benefit of potentially increasing the price that bidders would pay as they would not have to risk paying for shares to which they could not take title. Providing for the sale to be conditioned on the successful completion of a Committee on Foreign Investments in the United States review could further increase the price that prospective bidders are willing to pay.

[7] Venezuela was provided notice of the motion and declined to appear. Nonetheless, its interests were represented by its alter ego, PDVSA. And, as noted above, Venezuela has already tried, and failed to prevent Crystallex from executing on the Judgment. Thus, Venezuela has no new legal or factual basis on which to attempt to quash the writ at this stage of the litigation.

Accordingly, there is no reason to allow PDVSA (or Venezuela) to rehash the legal and factual challenges already considered (and rejected) by this Court.

**PDVSA's Position**

PDVSA's timely filed Notice of Appeal [D.I. 80] from this Court's August 9, 2018 order [D.I. 78] (the "August 9 Order") denying PDVSA's cross-motion to dismiss for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") has divested this Court of jurisdiction to take any further action with respect to issuance or enforcement of the writ of attachment against PDVSA's shares in PDVH (the "Writ"). Accordingly, this case cannot proceed until final resolution of PDVSA's appeal by the Third Circuit.[8]

In its Opinion, this Court agreed that "PDVSA is a presumptively separate sovereign instrumentality that is entitled to . . . invoke its own sovereign immunity, and is presumptively immune from the court['s] subject matter jurisdiction, presumptively separate from Venezuela, and its property is presumptively immune from attachment and execution." Opinion at 75, D.I. 83. Nevertheless, this Court denied PDVSA's cross-motion to dismiss for lack of jurisdiction, finding "that Crystallex has rebutted the presumption of separateness [between PDVSA and Venezuela] and has shown that PDVSA may be deemed the alter ego of Venezuela pursuant to the exclusive control prong of *Bancec* and its progeny. Therefore, Crystallex has proven the applicability of an exception to PDVSA's sovereign immunity." *Id.* at 54. This Court did not enter a separate judgment against PDVSA, nor did it authorize the issuance of the Writ.

Because the August 9 Order denies PDVSA's sovereign immunity, it is a collateral order and is immediately appealable. *See Abi Jaoudi & Azar Trading Corp. v. CIGNA Worldwide Ins. Co.*, 391 F. App'x 173, 177 (3d Cir. 2010) ("we have already recognized that a denial of a motion to dismiss based on sovereign immunity under the FSIA satisfies the collateral order doctrine.") (citing *Fed. Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1281-82 (3d Cir. 1993) ("*Federal Ins.*") (district court's denial of a claim of foreign sovereign immunity is immediately appealable under the collateral order doctrine)); *EM Ltd. v. Banco Cent. De La Republica Argentina*, 800 F.3d 78 (2d Cir. 2015) ("*EML*") (permitting immediate appeal of denial of foreign sovereign immunity resulting from district court's alter ego finding); *Blue Ridge Invs. L.L.C. v. Republic of Argentina*, 735 F.3d 72, 80 (2d Cir. 2013) (holding that an appeal to resolve the "threshold determination of FSIA immunity" is properly brought under the collateral order doctrine, and rejecting the argument that the doctrine did not apply "where the denial of immunity subjects the sovereign simply to entry of [a] judgment" and "the sovereign can just as easily and effectively appeal after entry of a final order.") (alterations supplied)); *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 112 F. App'x 756, 758 (D.C. Cir. 2004) (*per curiam*) ("When a defendant moves to dismiss on the ground of sovereign immunity, a district

[8] PDVSA's appeal was docketed by the Third Circuit on August 15, 2018. *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, Case No. 18-2797 (3d Cir.).

court judgment denying the motion is a collateral order and is immediately appealable."); *Princz v. Fed. Republic of Germany*, 998 F.2d 1, 1 (D.C. Cir. 1993) (*per curiam*) (Wald, J., and Ginsburg, R.B., J.) ("a district court's denial of a foreign state's motion to dismiss on grounds of sovereign immunity is immediately appealable").

Indeed, this Court's decision denying PDVSA's sovereign immunity is "effectively unreviewable" unless an immediate appeal is taken, because the "legal and practical value" of PDVSA's sovereign immunity defense and presumption of separateness would be "destroy[ed]" by the issuance and enforcement of the Writ pending appeal. *Federal Ins.*, 12 F.3d at 1281-82 (quoting *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498-99 (1989)); s*ee also United States v. Moats*, 961 F.2d 1198, 1201 (5th Cir. 1992) (finding that enforcing a judgment before resolution of an FSIA appeal would lead to "extraordinary harm" and "irreparable loss"); *EML*, 800 F.3d at 87, 88 n. 38 & n.45 ("the threshold sovereign-immunity determination is immediately reviewable"; "it would be inconsistent with the underlying purpose of the foreign-sovereign-immunity doctrine to subject BCRA to further burdensome litigation" before determining "conclusively" whether it was immune from the alter ego claim) (citing *Republic of Philippines v. Pimentel*, 553 U.S. 851, 865 (2008)) (FSIA immunity "is designed to give foreign states and their instrumentalities some protection from the inconvenience of suit.") (internal quotations omitted).

For that reason, PDVSA's timely filed Notice of Appeal from this Court's denial of its sovereign immunity "divests the district court of its control over those aspects of the case involved in the appeal" and vests "***exclusive*** jurisdiction to resolve the threshold issue" of PDVSA's right to sovereign immunity in the Third Circuit. *Princz*, 998 F.2d at 1 (emphasis added) (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.")); *Eckert Int'l, Inc. v. Gov't of Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167, 174 (E.D. Va. 1993) (an appeal from a denial of FSIA immunity "divests this Court of jurisdiction over the remaining matters"), *aff'd*, 32 F.3d 77 (4th Cir. 1994). That includes issuing and enforcing the Writ, which is void *ab initio* if the Court of Appeals rules in favor of preserving PDVSA's own immunity. *Cf. Venen v. Sweet*, 758 F.2d 117, 123 (3d Cir. 1985) (reversing district court's decision to exercise jurisdiction pending appeal from a denial of absolute immunity and vacating district court's orders entered after the filing of a notice of appeal); *In re Sacred Heart Hosp. of Norristown*, 204 B.R. 132, 143 (E.D. Pa. 1997) (relying on *Princz* to vacate a judgment entered before appeal of Eleventh Amendment immunity), *aff'd*, 133 F.3d 237 (3d Cir. 1998).[9]

[9] As a technical matter, there is no need to enter a stay pending appeal, because the effect of PDVSA's Notice of Appeal from the denial of its sovereign immunity is sufficient to stop all further proceedings. *Princz*, 998 F.2d at 1 (denying "as unnecessary" motion to stay all proceedings in the district court, because appeal from denial of sovereign immunity divested the district court of jurisdiction such that "the district court may not proceed to trial until the appeal is resolved." (citations omitted)). Nevertheless, out

Accordingly, 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.

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Counsel are available if the Court has any questions.

Respectfully submitted,

*/s/ Travis S. Hunter*

Travis S. Hunter (#5350)

cc: All Counsel of Record (by CM/ECF)

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of an abundance of caution, some courts have entered unconditional stays to avoid embroiling the sovereign entity in further burdensome litigation. *See, e.g.*, *Abur v. Republic of Sudan*, 437 F. Supp. 2d 166, 170 (D.D.C. 2006) (staying enforcement of a default judgment "pending resolution of any appeals of jurisdictional rulings"); *see also Mamani v. Berzain*, No. 07-22459, 2010 U.S. Dist. LEXIS 147349 (S.D. Fla. Mar. 16, 2010) (entering stay pending appeal of FSIA immunity); *Beaty v. Republic of Iraq*, No. 03-cv-0215, 2007 WL 1169333, at *2 (D.D.C. Apr. 19, 2007) (staying entire case pending FSIA appeal) (relying on *Princz*, 998 F.2d at 1). *Cf. In re Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998) (granting extraordinary mandamus relief to protect a foreign state's jurisdictional immunity); *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015) (Ambro, J.) (reversing the district court's decision denying a stay of an order authorizing the sale of property pending appeal).