IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

MEMORANDUM OF LAW IN SUPPORT OF
BOLIVARIAN REPUBLIC OF VENEZUELA'S MOTION FOR RELIEF
UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)

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The Bolivarian Republic of Venezuela respectfully submits this memorandum of law in support of its motion for relief under Federal Rule of Civil Procedure 60(b) from the Court's orders dated August 9 and August 23, 2018.

NATURE AND STAGE OF THE PROCEEEDINGS

In August 2018, this Court directed the Clerk to issue and the Marshal to serve a writ of attachment *fieri facias* to attach all shares of PDV Holding, Inc. (PDVH) owned by the Venezuelan national oil company, Petróleos de Venezuela, S.A. (PDVSA). Based on factual findings regarding the state of affairs that existed in 2018, the Court concluded that Crystallex International Corp. (Crystallex), a judgment creditor of Venezuela, had rebutted the strong presumption of separateness between PDVSA and Venezuela afforded for jurisdictional and immunity purposes under the Foreign Sovereign Immunities Act (FSIA). On that basis, the Court ruled that PDVSA's shares in PDVH were not immune under the FSIA from being attached in anticipation of execution by judicial auction to satisfy the unpaid portion of Crystallex's $1.4 billion judgment against Venezuela.

The Court's FSIA immunity ruling rested on two key conclusions. First, the Court found that Venezuela—then under Nicolás Maduro's regime—exercised extensive control over PDVSA's day-to-day operations. Second, the Court determined that then-applicable U.S. sanctions law did not forbid the attachment.

SUMMARY OF ARGUMENT

1. Neither predicate for this Court's judgment holds true any longer. In January 2019, the United States recognized Interim President Juan Guaidó and the National Assembly as the only legitimate representatives of Venezuela. The Guaidó Government enacted new institutional safeguards to ensure the independence of PDVSA, its subsidiaries, and their assets outside of

Venezuela. And the newly appointed *ad hoc* administrative board of PDVSA (*ad hoc* board) has observed corporate formalities and maintained strict independence from Venezuela.

2. Additionally, in response to the Guaidó Government's assertion of legitimate governing authority, the United States has imposed new, more stringent "blocking" sanctions on property of PDVSA and Venezuela. Those increased prohibitions protect critical assets for the Venezuelan people, who are facing an unprecedented humanitarian crisis. Under the new sanctions, a party must obtain a specific license from the Office of Foreign Assets Control (OFAC)—which Crystallex does not have—*before* any judicial process can encumber PDVSA property.

3. The Guaidó Government recognizes that the judgment obtained by Crystallex confirming its arbitration award creates a valid obligation on the part of Venezuela to Crystallex—just as other valid judgments create obligations on the part of Venezuela to other judgment creditors. Furthermore, the Guaidó Government is committed to a process for global restructuring of Venezuela's debt obligations. The Executive Branch blocking order has created the conditions that would allow for such a global restructuring. At the same time, however, the writ of attachment in this case is no longer sustainable in view of the new facts extinguishing any basis for continuing to treat PDVSA as the Republic's alter ego under the FSIA and thereby subjecting PDVSA and its property to the jurisdiction of the Court; the clarity of the new OFAC sanctions regime; and the foreign-policy interests of the United States, as expressed by the Executive Officers charged with carrying out our Nation's foreign affairs. The writ of attachment should therefore be dissolved.

STATEMENT OF FACTS

I. UNDER MADURO'S REGIME, VENEZUELA DID NOT APPEAR IN THE ATTACHMENT PROCEEDING

In April 2017, Crystallex obtained a judgment against Venezuela from the U.S. District Court for the District of Columbia, which confirmed an arbitral award against Venezuela based on a 2011 expropriation of property carried out by the government of then-President Hugo Chávez. Crystallex registered the judgment in this Court and moved for a writ of attachment *fieri facias* to attach and execute shares of PDVH, *see* 10 Del. C. § 5031; Fed. R. Civ. P. 69, on the theory that shareholder PDVSA is Venezuela's alter ego. PDVSA intervened and defended on the ground that PDVSA and its property were entitled to their own immunity under the FSIA. Venezuela—then under the regime of Chávez's successor, Maduro—did not appear.

On August 9, 2018, this Court found that Crystallex had rebutted the "strong presumption of separateness" between PDVSA and Venezuela for purposes of FSIA immunity by presenting evidence that, under the Maduro regime and the Chávez regime that preceded it, Venezuela exercised "extensive control" over PDVSA. 333 F. Supp. 3d at 396, 401. Accordingly, the Court ruled that it had jurisdiction over PDVSA and that PDVSA's shares in PDVH were not immune from attachment under the FSIA. *Id.* at 425-26.

The Court contemplated that, after service of the writ of attachment, "the record may be supplemented," which "could potentially lead to different findings." *Id.* The Court also said that Venezuela could "appear and seek to supplement the factual record" to "argue that additional evidence materially alters the Court's findings, and thereby seek to quash the writ." *Id.*

On August 23, 2018, the Court directed the issuance and service of the writ of attachment. D.I. 95. The Court provided, however, that "[e]xecution on the attached property" would not be

issued "until after the Court has the opportunity to consider any additional motions or other input any party, or any third party, wishes to provide." *Id.* at 2.

II. VENEZUELA PARTICIPATED ON APPEAL AFTER THE U.S. RECOGNIZED GUAIDÓ'S PRESIDENCY

In 2019, Venezuela's political landscape changed dramatically. After widespread condemnation of then-President Maduro's re-election as fraudulent, and amid a growing economic and humanitarian crisis, Venezuela's National Assembly declared Maduro's presidency illegitimate on January 15, 2019. *Jiménez v. Palacios*, 2019 WL 3526479, at *3 (Del. Ch. Aug. 2, 2019). Under the Venezuelan Constitution, the National Assembly's president, Juan Guaidó, was named Interim President. *Id.*

On January 23, 2019, the United States officially recognized Interim President Guaidó. President Trump explained that, "[i]n its role as the only legitimate branch of government duly elected by the Venezuelan people, the National Assembly invoked the country's constitution to declare Nicolás Maduro illegitimate." Ex. 1. Maduro has refused to vacate his office, but the United States continues to recognize Interim President Guaidó as Venezuela's official leader—as have at least fifty-three other nations. *See* Ex. 2.

In March 2019, Venezuela—under the leadership of Interim President Guaidó, and acting at the direction of his newly appointed Special Attorney General—intervened in PDVSA's appeal of this Court's August 2018 orders. Venezuela argued that the Third Circuit should take into account the "new circumstances" of Guaidó's role and the United States' demonstrated commitment to prevent Maduro's usurpation of power. Venezuela C.A. Br. 1, 24-25.

The Third Circuit's July 2019 opinion declined to consider those new facts. But the court made clear that, "[o]n remand, Venezuela may direct to the District Court credible arguments to expand the record with later events." 932 F.3d 126, 144 (3d Cir. 2019).[1]

III. CIRCUMSTANCES HAVE MATERIALLY CHANGED SINCE THIS COURT'S AUGUST 2018 ORDERS

The facts are profoundly different than they were when the Court issued its August 2018 rulings—and those new facts have not been addressed by this Court or the Third Circuit. Two changed circumstances are crucial: (1) under the leadership of Interim President Guaidó, Venezuela has resurrected and reinforced PDVSA's independence from the Republic; and (2) the United States has instituted new blocking sanctions against PDVSA property, rendering void any attachment issued without a specific license from OFAC. To be sure, Venezuela itself remains under an obligation to satisfy the debt to Crystallex. And the Interim Government has made clear its willingness to deal responsibly and equitably with the Government's debt obligations by committing to a consensual negotiated debt restructuring process. But Venezuela's obligation cannot be satisfied by seeking execution against PDVSA's assets in the United States, and the existing attachment of the PDVH shares cannot continue.

A. In 2019, Venezuela's Recognized Representatives Immediately Acted to Reaffirm PDVSA's Corporate Separateness

Since January 2019, Interim President Guaidó has worked with the National Assembly to end any and all government control over PDVSA and its U.S.-based assets.

On February 5, 2019, the National Assembly enacted legislation empowering the Interim President to "[a]ppoint *ad hoc* Administrative Boards" of state-owned corporations and other entities "for the purpose of . . . adopting the measures necessary to control and protect State

[1] Subsequently, the Third Circuit denied a petition for rehearing en banc, and the Supreme Court denied a petition for writ of certiorari, 2020 WL 2515508, at *1 (U.S. May 18, 2020).

company assets." Pacheco Decl., Ex. A (Democracy Transition Statute), art. 15(a). On February 8, 2019, Interim President Guaidó exercised his statutory authority to appoint the members of PDVSA's *ad hoc* board. Pacheco Decl. ¶ 4; *see Jiménez*, 2019 WL 3526479, at *6. Five days later, the National Assembly passed a special resolution ratifying those appointments. *See* Pacheco Decl. ¶ 5; *see Jiménez*, 2019 WL 3526479, at *6.

On April 10, 2019, Interim President Guaidó issued Presidential Decree No. 3, granting "new responsibilities and duties" to PDVSA's *ad hoc* board for the purpose of "protect[ing] the State of Venezuela's foreign assets, directly or indirectly controlled by PDVSA." Pacheco Decl. Ex. B. The Decree mandates strict political independence, ordering the board to "exercise the functions conferred . . . in an autonomous and independent manner, solely following technical criteria aimed at efficiently managing the direct and indirect foreign subsidiaries of PDVSA." *Id.* art. 7. The Decree directs that the *ad hoc* board "shall refrain from following political or partisan guidelines" and "shall not adopt any decisions that affect the management and operation of any direct and indirect subsidiaries of PDVSA," including PDVH. *Id.*

In accordance with those legal enactments, PDVSA's *ad hoc* board has maintained strict independence from Venezuela and its agencies and instrumentalities. Pacheco Decl. ¶ 8. Although it submits periodic reports to the National Assembly, the board does not take orders or directives from any government official, but instead facilitates PDVSA's role of shareholder to PDVSA's U.S. subsidiaries. *Id.* ¶¶ 8-10; Vecchio Decl. ¶¶ 6-8.

B. In 2019, the United States Instituted New Sanctions "Blocking" PDVSA and All Elements of the Venezuelan Government Controlled by Maduro

Shortly after recognizing Interim President Guaidó, the Executive Branch substantially tightened the economic sanctions regime governing Venezuelan assets in the United States. The International Emergency Economic Powers Act (IEEPA) confers on the President broad authority

to "nullify, void, prevent or prohibit, any" transaction involving "any property in which any foreign country or a national thereof has any interest." 50 U.S.C. § 1702(a)(1)(B). In recent years, the President has exercised that authority to control the disposition of Venezuelan assets in a manner that furthers the evolving U.S. policy towards the government of Venezuela.

During the Maduro regime, U.S. sanctions were designed primarily to "deny[] the Venezuelan regime the ability to earn money by selling off public assets at 'fire sale' prices."[2] That sanctions regime, which was in place when the writ of attachment issued in August 2018, barred certain sales or transfers of Venezuelan assets, including PDVSA assets. *See* Ex. 4 (prohibiting sale or transfer of any equity interest in any entity in which Venezuela had at least 50 percent ownership). But those sanctions did not freeze PDVSA's assets entirely, and they did not facially require an OFAC license before those assets could be attached or executed against. Thus, this Court observed that the sanctions then in place "seem[ed] intended to deprive Venezuela of certain assets and opportunities," *Crystallex*, 333 F. Supp. 3d at 420, rather than to prevent attachment or execution.

Upon recognizing the Guaidó Government, the Executive Branch imposed extensive new sanctions directed to an entirely different objective. The Executive now seeks to "preserve [Venezuela's] assets for the people of Venezuela"[3] in support of the Interim Government's efforts to establish itself and achieve stability and necessary structural reform in Venezuela, as well as to foster economic and social prosperity under the rule of law. To that end, the Executive has forbidden *any* disposition of the assets of Venezuelan instrumentalities in the United States—no matter who makes a claim to those assets. In particular, the Executive blocked all property of the Government of Venezuela in the United States, expressly including the property and interests of

[2] Ex. 3.
[3] Ex. 5.

"Petróleos de Venezuela, S.A. (PdVSA)." Ex. 6.[4] The "blocking" of assets "immediately imposes an across-the-board prohibition against transfers or dealings of any kind with regard to [blocked] property" and requires OFAC authorization before exercising "powers and privileges normally associated with ownership."[5] As a result, the property of PDVSA now "may not be transferred . . . or otherwise dealt in" without an OFAC license. Exec. Order 13,884, § 1(a); *accord* Ex. 9, Exec. Order No. 13,850, § 1(a), 83 Fed. Reg. 55,243 (Nov. 1, 2018) (order applicable to the Treasury's January 28, 2019 designation).

The Executive Orders' express designation of PDVSA's property subjects PDVSA's assets to OFAC regulations governing blocked Venezuelan assets. 31 C.F.R. pt. 591. Those regulations require a license before PDVSA's property may be attached or executed upon to enforce a judgment. Specifically, sections 591.506(c) and 591.407 prohibit "the enforcement of any judgment" through "execution, garnishment, or other judicial process purporting to transfer or otherwise alter or affect property or interests in property"—including PDVSA's assets—without a specific license. 31 C.F.R. § 591.506(c); *id.* § 591.407 (interpreting § 591.506(c) to require a specific license); Ex. 10. The regulations also expressly provide that an "attachment" or "other judicial process" issued *without* a valid license "is null and void." 31 C.F.R. § 591.202(e).

ARGUMENT

Federal Rule of Civil Procedure 60(b) authorizes this Court to provide relief from its prior orders concerning the writ of attachment *fieri facias*.

First, Rule 60(b)(5) authorizes relief from a "final judgment, order, or proceeding" on the ground that "applying it prospectively is no longer equitable."[6] The rule "provides a means by

[4] *See also* Ex. 7.
[5] Ex. 8.
[6] To the extent that this Court's prior orders are deemed nonfinal, Rule 54(b) similarly permits reconsideration based on a material change in fact or law. *See Carlson v. Boston Scientific Corp.*,

which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009) (citation omitted). Once a party "establish[es] that changed circumstances warrant relief," a court that declines to grant relief "abuses its discretion." *Id.* Rule 60(b)(5) applies so long as the decision at issue is "prospective" or "executory." *Marshall v. Bd. of Educ.*, 575 F.2d 417, 425 (3d Cir. 1978).

Second, Rule 60(b)(6) independently authorizes relief for "any other reason that justifies [it]." An "intervening change in the law" can be an "extraordinary circumstance justifying [Rule 60(b)(6)] relief." *Ortiz v. Pierce*, 2014 WL 3909138, at *2 (D. Del. Aug. 11, 2014) (Stark, J.).[7]

Circumstances have changed radically since this Court's August 2018 sovereign immunity alter-ego determination under the FSIA. First, this Court's determination that the PDVH shares were not immune from attachment to facilitate satisfaction of Crystallex's judgment against Venezuela was based on the determination that Maduro's government dominated and controlled PDVSA. But the predicates underlying that ruling no longer exist. Now, the United States recognizes Juan Guaidó as Interim President and considers Maduro's activities to be illegitimate. The recognized representatives of Venezuela have removed PDVSA from governmental control by directing PDVSA's newly confirmed *ad hoc* board to exercise its judgment to manage assets and oversee subsidiaries. And the board has taken steps to ensure PDVSA's separateness from the government.

856 F.3d 320, 325 (4th Cir. 2017); *Ampro Computers, Inc. v. LXE, LLC*, 2016 WL 3703129, at *2 (D. Del. July 8, 2016) (Stark, J.).

[7] It would also be open to the Court to grant the relief requested in this motion as a matter of Delaware law, which comparably authorizes quashing a writ of attachment where "the writ if . . . executed will produce an unlawful result or otherwise offend the interests of justice." *Holmes v. Wooley*, 792 A.2d 1018, 1020 (Del. Super. Ct. 2001).

Second, since the Court issued the August 2018 orders, the United States has imposed new sanctions that, for the first time, "block" all property and interests in property of PDVSA and Venezuela within the jurisdiction of the United States. The applicable Executive Orders now provide that the PDVH shares "may not be transferred." Binding regulations implementing those blocking orders, which have the full force of law, forbid enforcement of Crystallex's judgment in the absence of a specific license from OFAC.

For those reasons, maintaining the existing writ of attachment would be inequitable. The re-establishment of PDVSA's separate corporate existence has vitiated the factual predicate for this Court's ruling that the PDVH shares are not immune from attachment under the FSIA. Maintaining the attachment would also be in significant tension with federal regulations, which now prohibit issuance of unlicensed writs of attachment. It would undermine the United States' foreign-policy interests in supporting the Guaidó Government's efforts to restore democracy in Venezuela and to preserve Venezuela's assets for its people. And it would undermine the Interim Government's commitment to a process for the orderly and consensual restructuring of Venezuela's debts. The writ of attachment should be dissolved.

I. THE NEWLY RECOGNIZED VENEZUELAN GOVERNMENT HAS MADE MATERIAL CHANGES TO PDVSA'S GOVERNANCE THAT VITIATE THE AUGUST 2018 ALTER-EGO DETERMINATION

The facts underlying this Court's FSIA ruling no longer hold true. In August 2018, the immunity analysis was necessarily limited to the Maduro regime's dominion and control over PDVSA's day-to-day operations. Since Juan Guaidó became President of the Interim Government in 2019, there has been a material change in the relationship between the government and PDVSA that conclusively establishes their separateness and vitiates any basis for treating PDVSA as Venezuela's alter ego. Those changed circumstances compel a finding that PDVSA's U.S. assets are immune from attachment or execution under the FSIA.

1. Rules 60(b)(5) and 60(b)(6) permit this Court to revisit outdated findings that underlie prospective orders like those at issue here. *See, e.g.*, *Twelve John Does v. Dist. of Columbia*, 841 F.2d 1133, 1139 (D.C. Cir. 1988).

The Court's issuance of the writ of attachment *fieri facias* regulates ongoing party conduct and requires further judicial action for enforcement. *See id.* at 1139 (defining when order has prospective application). Indeed, that issuance is just one step in "an integrated procedure" that culminates in a judicial sale. *Blaustein v. Standard Oil Co.*, 49 A.2d 726, 731 (Del. 1946). The writ directs PDVH to retain PDVSA's shares "until another order of this Court releases [PDVH] from this obligation," D.I. 95 at 7, operating as a continuing encumbrance of that property, *see* 2 Victor B. Woolley, *Practice in Civil Actions and Proceedings in the Law Courts in the State of Delaware* § 1165 (1906) (attachment "bind[s] the property of the defendant so attached"). In Crystallex's own words, the "purpose of that relief is to preserve the status quo pending execution." Crystallex C.A. Supp. Br. 22 (citing 10 Del. C. § 5031; 8 Del. C. § 324).

Moreover, the *present* status of the relationship between PDVSA and the government of Venezuela is what determines the continuing validity of Crystallex's right to encumber PDVSA's property. Crystallex has repeatedly insisted that it does not seek to hold PDVSA liable on the original judgment, instead asserting that "the specific property at issue [here]—the shares of PDVH—though nominally held in the name of PDVSA, are, *at this time*, really the property of Venezuela." D.I. 70 at 8 (emphasis added). Indeed, Crystallex pointed to, and this Court relied on, events occurring all the way up until the December 2017 hearing on Crystallex's motion for attachment. *See, e.g.*, 333 F. Supp. 3d at 408 (discussing Maduro's November 2017 actions). This Court agreed that Crystallex sought only a "limited finding" under the FSIA that PDVSA's shares could be treated as Venezuela's property at the time of attachment. *Id.* at 394 (citation omitted).

Because that was the theory that enabled this Court to treat the alter ego's property as the property of the judgment debtor for immunity purposes, the object of examination is necessarily the *current* relationship among the entities alleged to be alter egos. Put another way, where the purpose of an attachment is to sell a debtor's property to pay its debts, the relevant question is whether the property is the debtor's at the time of seizure and sale—that is, at the time of execution. This Court and the Third Circuit appear to have recognized as much in this case, leaving open the possibility of "different findings" on an augmented record "in the next stage of the proceedings." *Id.* at 425; *see* 932 F.3d at 144 ("On remand, Venezuela may [raise] credible arguments to expand the record with later events.").

In short, the enduring character of the proceedings and the nature of the remedy require a fresh examination of the facts as they exist now. It would make no sense to press ahead with the additional judicial process needed to prepare for execution on PDVSA's property based on a factual determination that PDVSA is Venezuela's alter ego for jurisdictional and immunity purposes—even though that determination no longer has a valid basis. Disregarding pertinent factual developments would also violate the very "principles of equity" on which the *Bancec* alter-ego doctrine is founded. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 613 (1983); *see Janvey v. Libyan Inv. Auth.*, 840 F.3d 248, 260 (5th Cir. 2016) (alter egos under the FSIA "are created equitably").

That is particularly so in the unique circumstances of this case. Crystallex's theory depends on facts that have changed as a result of bona fide actions by a newly recognized foreign government—and those changes mean that maintaining the attachment could well interfere with U.S. foreign policy. *See Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, 864 F.3d 172, 176 (2d Cir. 2017) (courts evaluating changed circumstances must "assign

significant weight to considerations of international comity"). Those are indeed rare circumstances, as to which there can be no suggestion of manipulation of the Court's processes. While equity might not demand recognition of a change in facts in other cases, it does so here.

2. The significant political events in Venezuela have overtaken the factual circumstances that existed in August 2018. While the appeal of this Court's August 2018 orders was pending, the United States in January 2019 officially recognized the legitimacy of Juan Guaidó's interim presidency, paving the way for Venezuela to intervene and participate on appeal. Moreover, Interim President Guaidó and the National Assembly immediately took concrete steps to confirm PDVSA's independence from Venezuela. In February 2019, Interim President Guaidó appointed a new *ad hoc* board for PDVSA, and the National Assembly ratified his appointments. PDVSA's subsidiaries' boards were similarly reconstituted.[8] And under the Democracy Transition Statute and Presidential Decree No. 3, PDVSA's *ad hoc* board and PDVSA's U.S. subsidiaries must make business decisions independent from any political considerations, and the board is expressly forbidden to use the assets of PDVSA's subsidiaries for the political benefit of Venezuela. *See* Democracy Transition Statute, Arts. 15(a), 34; Presidential Decree No. 3, Art. 7.

Those institutional safeguards must be, and have been, consistently followed, *see* Pacheco Decl. ¶ 8; Vecchio Decl. ¶ 6—and they extinguish any justification for continuing the August 2018 attachment order. For example, it is no longer true that "Venezuela and PDVSA regularly ignore their separate legal status" or that there is "a great deal of overlap" between Venezuela's and PDVSA's leadership. *Crystallex*, 333 F. Supp. 3d at 407-08. In fact, since the appointment of

[8] The former members of those corporations' boards, appointed by the Maduro government, unsuccessfully challenged the validity of Interim President Guaidó's appointment of PDVSA's *ad hoc* board in Delaware Chancery Court. *See Jiménez*, 2019 WL 3526479, at *1.

PDVSA's *ad hoc* board, key facts are now the opposite of those that underpinned the Court's August 2018 findings (contra *id.* at 406-11):

- The board has ensured that the property under its control is used for business purposes. Pacheco Decl. ¶ 12.a.
- No Guaidó official has influenced or interfered with the board's management of PDVSA's U.S. subsidiaries or with those subsidiaries' commercial affairs. Pacheco Decl. ¶ 12.b-c; Vecchio Decl. ¶¶ 7-8.
- No Guaidó official has imposed material commitments on the board or PDVSA's U.S. subsidiaries. Pacheco Decl. ¶ 12.d.
- No Guaidó official holds any seat on the board or any board seat or senior management position at PDVSA's U.S. subsidiaries. Pacheco Decl. ¶ 12.e-f.

As this evidence establishes, the government no longer plays an active role in, let alone exerts extensive day-to-day control over, PDVSA's *ad hoc* board. Instead, the National Assembly passively receives reports from the board, but no official of the Guaidó Government issues any orders or directives to the board. Pacheco Decl. ¶ 8; Vecchio Decl. ¶ 7. The *ad hoc* board in turn has served its role in managing PDVSA's U.S. subsidiaries by enhancing their corporate governance and formal reporting requirements. Pacheco Decl. ¶¶ 10, 13.

Whether Maduro and his associates continue to exercise illegal domination and control over PDVSA's assets within Venezuela is irrelevant to the analysis of whether the lawful government of Venezuela—as recognized by the United States—is PDVSA's alter ego for purposes of FSIA immunity. *See* Brewer-Carías Decl. ¶¶ 37-40; *Zivotofsky v. Kerry*, 576 U.S. 1, 18 (2015) ("'[W]hen the executive branch of the government' assumes 'a fact in regard to the sovereignty of any island or country, it is conclusive upon the judicial department.'" (citation omitted)). Following the instructions of Venezuela's lawfully recognized government, the *ad hoc* board has provided PDVSA and its U.S. subsidiaries with independence from Venezuela's control

over its governance and day-to-day operations as carried out by PDVSA's lawful board and management. *See* Brewer-Carías Decl. ¶¶ 16-19; *Jiménez*, 2019 WL 3526479, at *11-13.

There is thus no longer any ground to treat PDVSA as Venezuela's alter ego under the FSIA. In the absence of such an alter ego relationship, the FSIA provides that PDVSA and its separate assets in the United States are immune from attachment or execution.

II. CURRENT OFAC SANCTIONS ESTABLISH THAT MAINTAINING THE WRIT PROSPECTIVELY IS NO LONGER IN THE PUBLIC INTEREST

In 2019, after this Court issued the writ of attachment, the United States recognized the Guaidó Government, and the Executive Branch employed OFAC's sanctions regime to support the newly recognized government and preserve Venezuelan assets for the people of Venezuela. The Executive designated PDVSA as a "blocked" person, thereby prohibiting all transfers of its assets, including the issuance of unlicensed judicial attachments. That intervening change in law makes clear that even if the writ was consistent with then-governing sanctions when issued, it is now inconsistent with the United States' *current* foreign-policy judgment that PDVSA's assets should be protected from attachment. The "continued enforcement" of the writ therefore would be "'detrimental to the public interest.'" *Horne*, 557 U.S. at 447; *see* Fed. R. Civ. P. 60(b)(5).

A. The Executive Branch Has Imposed Significant New Restrictions on PDVSA's Assets that Reflect Its Current Foreign-Relations Judgment that PDVSA's Assets Should Be Protected from Attachment

1. a. When the Court issued the writ of attachment, PDVSA's assets were not "blocked," i.e., frozen for all purposes. Instead, the sanctions regime was designed to prevent the Maduro regime from exploiting Venezuelan assets, and it prohibited certain transactions in equity interests owned by PDVSA or the Republic absent a license. *See* Exec. Order No. 13,835 (May 21, 2018). This Court concluded that the then-governing sanctions regime did not explicitly "*prohibit* the

[unlicensed] attachment" of PDVSA's property. *Crystallex*, 333 F. Supp. 3d at 421; *see* OFAC FAQ 596.[9]

b. In 2019, The Executive Branch reoriented U.S. sanctions policy to focus on preserving assets under the Guaidó Government's control for the benefit of the Venezuelan people. The Executive tightened the sanctions regime to advance that objective. The Executive blocked PDVSA's property, thereby subjecting that property to OFAC's Venezuela sanctions regulations. *See* Exec. Order No. 13,850, § 1(a) (Nov. 1, 2018); *see also* Determination Pursuant to Section 1(a)(i) of Executive Order 13850, *supra*, note 4. Those regulations prohibit "enforcement of any . . . judgment" by means of any "judicial process" that purports to "transfer or otherwise alter or affect . . . interest[] in" PDVSA's property, unless that judicial process is authorized by a specific license from OFAC. 31 C.F.R. §§ 591.407, 591.506(c). The regulations also provide that "any" unlicensed "attachment, judgment, decree, . . . or other judicial process is null and void." *Id.* § 591.202(e). These OFAC regulations now govern this case. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317, 1328 (2016) (Executive Branch may alter the law governing a pending action against a foreign sovereign by enacting new rules that "govern[] the[] [assets'] availability for attachment"); *Dames & Moore v. Regan*, 453 U.S. 654, 675 (1981).

The sanctions regime reflects the Executive's judgment that the United States' interests are best served by prohibiting creditors from attaching and executing against Venezuela's U.S. assets. As the Supreme Court observed in *Dames & Moore*, Congress and the Executive may decide that permitting "individual claimants" to pursue "attachments, garnishments, or similar encumbrances on property" undermines U.S. foreign-relations interests, and that another remedy (such as sovereign debt restructuring) would better serve U.S. interests. 453 U.S. at 673-74.

[9] For frequently asked questions, see *Venezuela Sanctions*, OFAC FAQs, *available at* https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq_other.aspx#venezuela.

B. In Light of the Intervening Executive Blocking Orders and the Newly Applicable Regulations, the Court Should Grant Relief from the Attachment

1. The OFAC regulations that now govern this proceeding constitute a change in the law that compels the conclusion that "applying" the writ "prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). This Court should therefore vacate the writ.

The Executive Branch sanctions that now govern attachments of PDVSA's property seek to "preserve [Venezuela's] assets for the people of Venezuela"[10] to further the United States' interest in helping the Guaidó Government establish itself and achieve stability in Venezuela. To that end, the regulations now prohibit any creditor from obtaining an unlicensed writ of attachment or any other "judicial process" in order to enforce an existing judgment against Venezuela. 31 C.F.R. § 591.506(c); *id*. § 591.407. The United States has thus concluded that its interests are best served by protecting blocked Venezuelan assets from attachment by creditors.

If Crystallex sought its writ of attachment today, section 591.506(c), as interpreted in section 591.407, would prohibit the Court from issuing the writ without an OFAC license. To be sure, when the Court issued the writ, PDVSA's assets were not yet blocked and therefore were not governed by section 591.506(c)'s prohibition on unlicensed writs of attachment. Nevertheless, the writ is an *ongoing* encumbrance on PDVSA's property—one whose purpose is to facilitate the very satisfaction of creditor claims that the United States has now concluded should be prohibited without a license, which Crystallex does not have. Maintaining the writ going forward is thus inconsistent with the Executive Branch's current foreign-policy judgments. Stated in terms of Rule 60(b)(5), a "significant change either in factual conditions or in law"—here, the Executive Branch's recognition of the Guaidó Government and its consequent modification of the governing

[10] Ex. 7.

legal sanctions regime—"renders continued enforcement" of the writ "'detrimental to the public interest.'" *Horne*, 557 U.S. at 447.

In addition, maintaining the writ of attachment is inequitable. As this Court has recognized, other creditors possess judgments against Venezuela, and the existence of Crystallex's writ of attachment creates the danger of a run on the court by other creditors who feel the need to protect their interests. But although Crystallex was able to obtain the writ in its favor before PDVSA's assets were blocked, sections 561.506(c) and 591.407 now prohibit Venezuela's other creditors from obtaining unlicensed writs of attachment. Allowing Crystallex to maintain its attachment affords Crystallex an inequitable advantage over those creditors.

2. Vacating the writ of attachment is particularly appropriate because the now-applicable sanctions regime is best understood to render prospective maintenance of the writ unlawful. Indeed, the regulations would appear to nullify any judicial process issued without a specific license, regardless of whether a license would have been required at the time of issuance. Section 591.202(e) states that "[u]nless licensed pursuant to this part, *any* attachment . . . or other judicial process *is null and void* with respect to any [blocked] property and interests in property." 31 C.F.R. § 591.202(e) (emphasis added). The President's order blocking PDVSA's assets rendered section 591.202(e) applicable and triggered this provision. *Cf. Dames & Moore*, 453 U.S. at 675 (explaining that 31 C.F.R. § 535.218 (1981), which provided that all rights "deriving from" any attachment "are nullified," rendered existing judicial attachments ineffective).[11]

[11] In *Dames & Moore*, the attachment at issue had been entered pursuant to a revocable specific license. Although the attachment of PDVSA's shares here was not predicated on a revocable license, Crystallex has always conceded that, even under the sanctions regime in place when the writ issued, a specific license was required before it could realize any proceeds from selling the shares, and that in any case it was "likely that a potential purchaser may wish to seek a license before completing a purchase of the shares." D.I. 86, at 4-5. Thus, Crystallex has always had notice that any interest it might obtain in PDVSA's property is subject to the Executive Branch's evolving sanctions regime.

Even if the regulations do not retrospectively render the prior attachment null and void ab initio, they nonetheless forbid its continued enforcement. The relevant provisions, 31 C.F.R. §§ 591.506(c) and 591.407, prohibit the ongoing *maintenance* of an existing unlicensed writ of attachment, as well as the issuance of such writs. Specifically, they prohibit the unlicensed "enforcement of any . . . judgment" by means of execution or other any "judicial process" that purports to "transfer *or otherwise alter or affect . . . interests in*" PDVSA's property. 31 C.F.R. § 591.506(c) (emphasis added); *id*. § 591.407. The writ of attachment is indisputably a form of "judicial process" that "enforce[s]" Crystallex's "judgment" by encumbering PDVSA's shares of PDVH on an ongoing basis. Each day that the writ is in effect, it "alter[s] or affect[s]" "interests" in PDVSA's shares by prohibiting PDVSA from transferring or assigning the property. *See* 10 Del. C. § 3511; *see also* FAQ 808, *supra*, note 9. Thus, even if the writ was lawful when issued, it is not lawful now to continue to maintain the writ without a license.

III. CONTINUING THE ATTACHMENT ORDER WOULD BE INEQUITABLE AND CONTRARY TO THE PUBLIC INTEREST BECAUSE IT UNDERMINES U.S. FOREIGN POLICY

Given the important developments that have occurred since this Court's 2018 orders, a change in the equities justifies dissolution of the attachment. In seeking to overcome PDVSA's attachment immunity under an alter-ego theory, Crystallex necessarily sought *equitable* relief. *See Bancec*, 462 U.S. at 613 (applying "principles of equity" to disregard corporate separateness under FSIA); *Janvey*, 840 F.3d at 260. Courts evaluating the continued propriety of equitable relief, and especially relief implicating public interests, must assess any "substantial change in circumstances bearing on the propriety of the requested relief." *Salazar v. Buono*, 559 U.S. 700, 714-15 (2010) (plurality opinion). They must also "assign significant weight to considerations of international comity." *Thai-Lao Lignite (Thailand) Co.*, 864 F.3d at 176; *see FG Hemisphere Assocs., LLC v. Democratic Repub. of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006).

The United States' foreign-policy interests—which have changed since this Court's August 2018 orders—are significant here. The United States has recognized the pressing need to mitigate Venezuela's massive humanitarian crisis—"the biggest economic collapse in human history outside of war or state collapse."[12] And it has declared its official "support [for] Interim President Juan Guaidó, the National Assembly, and the Venezuelan people's efforts to restore their democracy."[13] Continued attachment of Venezuela's U.S.-based assets would significantly undermine that support. "The judicial seizure of the property of a friendly state may be regarded as such an affront to its dignity" that it will adversely "affect our relations with it." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945). Furthermore, a continued attachment and possible judicial auction of PDVH (potentially at fire-sale prices) would signal the inability of Venezuela's legitimate, democratically elected officials to protect key assets. It would also undermine the Interim Government's commitment to an orderly restructuring process to address the claims of Crystallex and others that the Interim Government acknowledges are valid, thereby undercutting decades of U.S. policy supporting the orderly restructuring of sovereign debts.

CONCLUSION

The Court should dissolve the writ of attachment *fieri facias* pursuant to Rule 60(b).

[12] Colleen Walsh, *Understanding Venezuela's Collapse*, Harvard Gazette (Feb. 12, 2019).
[13] Dep't of Treasury, *supra* note 3.

Respectfully submitted,

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