

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORP.,

Plaintiff,

v.

PETRÓLEOS DE VENEZUELA, S.A.;
PDV HOLDING, INC.,

Defendants.

C.A. No. 15-1082-LPS

**PLAINTIFF'S OPENING BRIEF IN SUPPORT OF ITS
MOTION FOR PRELIMINARY INJUNCTION**

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Crystallex International Corp. (“Crystallex”) respectfully submits this opening brief in support of its motion, pursuant to Federal Rule of Civil Procedure 65, for an order preliminarily enjoining PDV Holding, Inc. (“PDVH”), its officers and directors, and any persons acting in concert therewith, from making any transfers, or otherwise alienating, transferring, encumbering or diminishing its assets, directly or indirectly, other than transactions for fair consideration in the ordinary course of business, pending a final determination in this action.

NATURE AND STAGE OF PROCEEDINGS

It is essentially undisputed that PDVH transferred \$2.8 billion out of the country without consideration to its parent, Petróleos de Venezuela, S.A. (“PDVSA”), during Crystallex’s arbitration against Venezuela. This Court has already found that Crystallex stated a viable claim against PDVH for that fraudulent transfer (the “**First Fraudulent Transfer**”). D.I. 34.¹

Shortly after that decision, PDVH, for no consideration to PDVH, pledged 50.1% of its shares in CITGO Holding, Inc. (“CITGO Holding”) as collateral for new bonds issued by PDVSA for no consideration (the “**Second Fraudulent Transfer**”). Within weeks, PDVH pledged the remaining 49.9% of its shares in CITGO Holding as collateral for an agreement between PDVH’s sister company, PDVSA Petróleos, S.A. (“PPSA”), and an affiliate of Russian oil giant Rosneft, again for no consideration to PDVH (the “**Third Fraudulent Transfer**”). PDVH did not disclose this transfer when the Court specifically asked PDVH about asset transfers at the December 20, 2016 hearing.

PDVH has not only continued to dissipate its assets for no consideration, but it has also made no secret of its belief that it can continue to do so with impunity. At the December 20,

¹ D.I. references are to the docket in C.A. No. 15-1082-LPS unless otherwise noted.

2016 hearing, counsel for PDVH boldly declared to this Court that the Court was powerless to stop it from continuing to dissipate its assets until judgment is entered on Crystallex's DUFTA claim. *See* D.I. 57, Tr. 80:20-81:13. PDVH reiterated that position in a letter to this Court mere days ago in response to Crystallex notifying the Court of the confirmation of its US \$1.4 billion judgment. *See* D.I. 62 at 2.

On March 25, 2017, the United States District Court for the District of Columbia ("D.C. Court") confirmed Crystallex's \$1.4 billion arbitral award, rejected Venezuela's attempts to set aside the tribunal's findings, and directed entry of judgment for the full amount of the award. On April 7, 2017, judgment was entered (the "Judgment"). Ex. 39.² Now that the award has been confirmed and Judgment has been entered, PDVH has more incentive than ever to dissipate its assets (and indeed has told the Court it is a distinct possibility it will do so). Given its past actions and recent proclamations, it is clear that without this Court's intervention, PDVH will continue its campaign to render moot any judgment this Court enters in this action.

In light of the foregoing, and for the additional reasons stated below and in the accompanying Declaration of Robert L. Weigel, and the Declaration of Jose Ignacio Hernandez, Crystallex respectfully requests that this Court preliminarily enjoin PDVH from further encumbering its assets pending a decision on Crystallex's request for a permanent injunction.

SUMMARY OF ARGUMENT

1. Injunctive relief is necessary and appropriate to prevent PDVH from continuing to dissipate its assets in an effort to frustrate Crystallex's relief in this action.

² References to "Ex. []" are to the exhibits attached to the Declaration of Robert L. Weigel, dated April 10, 2017.

2. Crystallex satisfies the standard for a preliminary injunction: (a) Crystallex is likely to succeed on its claims. The facts are not in serious dispute and amply support a finding that PDVSA is Venezuela's alter ego and thus is a "debtor." This Court has already held that Crystallex properly "allege[d] a fraudulent transfer to which PDVH was a direct party, making it an appropriate defendant in this case." D.I. 34 at 11. The transfer of \$2.8 billion out of the country wears numerous badges of fraud, including that the transfer was made during the pendency of a lawsuit for no consideration to an "insider," and the Second and Third Transfers followed shortly thereafter; (b) Crystallex will suffer irreparable harm if the preliminary injunction is not ordered because PDVH will continue to dissipate its assets so as to render Crystallex's requested permanent injunction moot;³ (c) There will be no real harm to PDVH as PDVH will be able to continue its ordinary business operations; and (d) The public interest favors an injunction to prevent further fraudulent transfers.

STATEMENT OF FACTS

A. Crystallex's Confirmed Arbitral Award Against Venezuela

Crystallex, a Canadian gold producer that specialized in developing and operating gold mines in Venezuela and other parts of South America, owned comprehensive and exclusive rights to the Las Cristinas gold mine in Venezuela. Ex. 1, ¶ 878. Venezuela terminated Crystallex's rights in Las Cristinas without a legitimate basis and expropriated Crystallex's investment. Ex. 1, ¶ 718. Venezuela subsequently transferred Crystallex's rights to Las

³ Crystallex is preparing to file a motion seeking an order pursuant to 28 U.S.C. § 1610(c) so that Crystallex may seek to attach assets to aid in the execution of its judgment. Once that happens, Crystallex intends to seek an order directing that the shares of PDVH held by Venezuela's alter ego, PDVSA, be sold to satisfy Crystallex's judgment.

Cristinas to PDVSA for no consideration, and PDVSA in turn sold 40% of these expropriated rights for more than \$6 billion. Ex. 2, p. 361.

These actions violated Venezuela's obligations under its bilateral investment treaty with Canada, and as a result, Crystallex filed an arbitration in Washington, D.C. Ex. 1. In April 2016, the tribunal awarded Crystallex approximately \$1.2 billion, plus pre- and post-award interest, which total another approximately \$200 million. Ex. 1, ¶ 961. Crystallex's petition to confirm the award in the United States was granted by the D.C. Court on March 25, 2017. Ex. 3. No other court has the power to set aside the award.

B. PDVSA: Venezuela's Alter Ego

PDVSA is Venezuela's alter ego. PDVSA's very creation was mandated by Presidential decree and its ongoing relationship with the government has been enshrined in the Venezuelan Constitution.⁴ The Venezuelan government has full control over PDVSA, which Venezuela uses freely as its piggy bank and as a tool to implement state policy initiatives that have little (if anything) to do with its activities as a petroleum company. For example:

Government officials run PDVSA on a day-to-day basis. There is little distinction, much less a meaningful one, between the Venezuelan government and PDVSA.

- Venezuela appoints PDVSA's entire Board of Directors by presidential decree.⁵ Ex. 9, p. 16.
- Government personnel are cross-appointed by presidential decree to the most senior posts within PDVSA, and government officials and other personnel run the company on a day-to-day basis, from within the company itself. For example, Venezuela's Minister of Petroleum

⁴ Article 303 of Venezuela's Constitution states that "[f]or reasons of economic and political sovereignty and national strategy, the State shall retain all shares of [PDVSA]." Ex. 4, p. 108.

⁵ In January 2017, President Nicolás Maduro appointed PDVSA's Board of Directors. Ex. 10.

and Mining, Nelson Martinez, is the President and Chief Executive Officer of PDVSA's subsidiary, CITGO, and recently served as a member of PDVH's board.⁶ Ex. 8, p. 2.

- The government, including the Venezuelan President himself, hires and fires PDVSA personnel. For example, the late President Hugo Chavez personally and publicly fired seven PDVSA executives and forcibly retired 12 other employees on live TV. Ex. 11.⁷
- Venezuela designates the price at which PDVSA must sell its products to certain buyers, including sales to Venezuelan citizens at a substantial loss. In many circumstances, Venezuela even forces PDVSA to "sell" oil to third parties for effectively no, or de-minimus, consideration. As PDVSA explained in a 2011 debt offering, "[t]he Venezuelan government, rather than the international market, determines the price of products . . . sold by us through our affiliates in the domestic market." Ex. 9, p. 14.
- One of PDVSA's own stated objectives is to "guarantee state control over PDVSA." Ex. 13.

For example, in 2014, Rafael Ramirez, then-Minister of Petroleum and Mining and President of PDVSA, explained how Venezuela's control of PDVSA had increased over the years and, in particular, after the Bolivarian revolution:

In the first instance, the Ministry of Petroleum and Mining as a representative of the Venezuelan state . . . is now the one who establishes the sales prices of our oil destroying policies of discounts of the old PDVSA; it exercises control of our production and export of oil and oil products; it sets production coordination policies with the defense strategy of prices and grants the rights and mining areas as established in our Hydrocarbons Law.

Ex. 14. Just recently, it was reported that "PDVSA is now less oil oriented, more military and more under the influence of Tareck El Aissami," Venezuela's Vice President. Ex. 40. PDVSA thus warned investors there were no assurances that Venezuela would not "impose further

⁶ Mr. Martinez's immediate predecessor as minister, Eulogio Del Pino, was cross-appointed as president of PDVSA and CITGO Holding. Ex. 5, p. 2; Ex. 6, p. 123. Rafael Ramirez, another predecessor as Minister of Petroleum and Mining, also long served as president of PDVSA. Ex. 7, pp. 1-2. The Minister of Foreign Affairs, Delcy Rodriguez, was appointed by the President as PDVSA's Vice-President of International Affairs, and has been given charge of PDVSA America, S.A., PDVSA Caribe, S.A. and PDVSA Europa, S.A. Ex. 5, p. 2.

⁷ Similarly, in 2003, the government directly fired approximately 18,000 PDVSA employees, nearly 40% of the company's workforce at the time. Ex. 12.

material commitments upon us or intervene in our commercial affairs in a manner that will adversely affect our operations, cash flow and financial results.” Ex. 9, p. 16.

Venezuela’s economy is entirely dependent on PDVSA. PDVSA, directly or indirectly, provides nearly all state funding. In 2016, PDVSA’s President declared that PDVSA is the “economic pillar of the Nation.” Ex. 15. The Constitutional Chamber of the Supreme Tribunal of Justice has likewise referred to the “relevance of PDVSA in the economic, constitutional and social order.” Ex. 16. PDVSA is even forced to take out debt on behalf of the government. For example, in October 2010, President Chavez announced that revenues from a \$3 billion bond offering of PDVSA would be used to finance a housing program. Ex. 17.

PDVSA also contributes billions of additional dollars to off-budget “development funds,” without receiving any consideration in return. It has been reported that “PDVSA spent twice as much on off-budget government programmes as it did on taxes, royalties and dividends.” Ex. 18. For example, PDVSA contributes to Fondo Nacional para el Desarrollo Nacional (“FONDEN”), and other off-budget operations through the Venezuelan Central Bank’s foreign exchange system, (again without consideration). Ex. 19.⁸ When PDVSA converts currency into Bolivars, it does so at an artificially low U.S. Dollar to Bolivar exchange rate (approximately 1/500th of the market rate), thereby funneling additional contributions to the State. Exs. 20, 42.

PDVSA itself has admitted to this financial entanglement with Venezuela. In 2011, PDVSA warned that “[a]ny actual or anticipated changes or downgrades in Venezuela’s credit ratings could affect the market value of” notes that PDVSA was offering. Ex. 9, p. 14.

Venezuela uses PDVSA to achieve the government’s social and political objectives.

⁸ Simón Alejandro Zerpa Delgado, the president of FONDEN, is also vice president of finance of PDVSA. Ex. 42.

As a former PDVSA President and Venezuelan Minister of Petroleum and Mining stated PDVSA is “subject to the Venezuelan state and [an] instrument of liberation of our beloved Venezuelan people.” Ex. 14. Accordingly, PDVSA is charged with contributing to social and political objectives of the State that have nothing to do with its business, for no remuneration. As just one example, PDVSA Agricola implements Venezuela’s Strategic Plan for Agricultural Development. Ex. 21. As a result of these activities, PDVSA warned debt investors in 2011 that it could make no assurances “that the government of Venezuela will not require us to increase our financial contributions to social programs” Ex. 9, p. 17.

Venezuela also uses PDVSA to advance its social objectives. In January 2017, President Maduro highlighted PDVSA’s crucial role in building Venezuela’s socialist model. Ex. 22. To accomplish that goal, President Maduro approved the “PDVSA Strategic Socialist Plan 2016-2025,” pursuant to which PDVSA has been further structured in accordance with the guidelines of the Bolivarian Socialist Revolution. Ex. 23. It is therefore not surprising that Venezuela has been accused of using PDVSA “as a piggy bank for [its] ‘socialist revolution.’” Ex. 18.

PDVSA is Venezuela’s key political and foreign policy tool. PDVSA’s own website confirms that PDVSA exists to “[s]upport the geopolitical positioning of Venezuela internationally.” Ex. 24. Indeed, one of PDVSA’s stated “objectives” is “[t]o turn Venezuela into a social, economic and political power.” Ex. 13. PDVSA’s role in Venezuela’s foreign policy is demonstrated by how it has been utilized to run a program known as Petrocaribe. Through Petrocaribe, Venezuela commits PDVSA to selling oil to select Caribbean and Latin American nations at substantial discounts (often not requiring any payment for 10 to 20 years) and/or on preferential payment terms—without seeking or receiving PDVSA’s consent or even having PDVSA execute the agreements. *See* Exs. 25, 41. Essentially, this program is a form of

state aid to neighboring countries that Venezuela seeks to influence. Even when these Petrocaribe “sales” are repaid, the money is given to Venezuela, not to PDVSA. Ex. 41.

Venezuela treats PDVSA’s oil as its own and uses it to achieve political goals—without regard to PDVSA’s commercial operations. For example, Venezuela has entered into numerous agreements with China, pursuant to which, in exchange for substantial investments in Venezuela, Venezuela directed PDVSA to sell millions of barrels of oil to China at below-market prices or subject to terms that increased PDVSA’s costs of sale. Ex. 26. To date, China has advanced over \$50 billion to Venezuela in exchange for oil and fuel from PDVSA, but PDVSA has received no remuneration. Ex. 26. Venezuela also has used PDVSA to fund the purchase of large companies in other Venezuelan industries—and, as with its other uses of PDVSA, these purchases provided no consideration or remuneration of any kind to PDVSA. Ex. 9, p. B-35; Ex. 12. In 2011, PDVSA could not “assure” its debt investors “that the government of Venezuela will not require us to . . . purchase other businesses” in the future. Ex. 9, page 17.

Venezuela expropriated Crystallex’s interest in Las Cristinas and gave it to PDVSA for free. After illegally expropriating Crystallex’s interest in Las Cristina, Venezuela turned around and gave those assets to PDVSA for no consideration. PDVSA later sold 40% of its interests in Las Cristinas—for which it had paid Venezuela nothing—at a valuation of over \$6 billion. Ex. 2. That same year, PDVSA contributed more than \$13 billion to Venezuelan social development programs—also for no consideration. Ex. 28, p. 24. Even the Crystallex arbitration process itself demonstrates the level of Venezuela’s day-to-day control over PDVSA’s assets. Although Crystallex had brought claims against *Venezuela* in the arbitration, *PDVSA*—which was not a party to the arbitration—paid ICSID’s administrative fees *directly* on

Venezuela's behalf, as Venezuela expressly confirmed after ICSID specifically questioned Venezuela about the payment. Ex. 29.

C. Venezuela, through PDVSA and PDVH, Arranged the Transfer of Nearly \$2.8 Billion to Hinder and Delay Creditors

Faced with numerous arbitration awards for billions of dollars, Venezuela took affirmative steps to hinder and delay Crystallex. First, Venezuela tried to sell CITGO Petroleum Corporation ("CITGO"), its largest United States-based asset (owned through PDVSA, PDVH, and CITGO Holding), to avoid enforcement of any award against it. Ex. 30. When it was unable to do so, Venezuela and its alter ego, PDVSA, worked to extract as much value as possible from CITGO. PDVSA did this by orchestrating a series of debt offerings and asset transfers among PDVSA and its subsidiaries, including PDVH, for no purpose other than to convert PDVSA's equity value to cash that could be whisked out of the United States and into PDVSA's coffers abroad before Venezuela's creditors could act. PDVH played an integral role in this scheme.

Venezuela and PDVSA made no secret of their intent to hinder and delay creditors. As early as July 2014, CITGO was advising potential bondholders that its indirect parent, "PDVSA . . . [was] currently seeking to monetize its ownership interest in [CITGO Holding]." Ex. 31, p.

8. The offering documents in January 2015 further advised that:

- "[N]o assurance [could] be given that any of the Transactions would not be challenged as a fraudulent transfer"; Ex. 6, p. 59.
- "[No] assurance [could] be given that . . . Venezuela, as PDVSA's shareholder, will not adopt policies or exercise its control of PDVSA in a manner that might adversely affect [CITGO Holding bondholders'] interests"; Ex. 6, p. 59, and
- "PDVSA could at any time in the future conduct other processes or undertake one or more transactions to monetize its interest in us, and any such process could be undertaken or any such transaction could occur at a time when it would be beneficial to PDVSA but could have a negative impact on [CITGO Holding]." Ex. 6, p. 59.

These warnings were realized when PDVSA directed its wholly-owned subsidiary, PDVH, to direct its wholly-owned subsidiary, CITGO Holding, to issue \$2.8 billion in debt, which, after a series of intercompany transfers between CITGO and CITGO Holding, was paid to PDVH.

The transfer of \$2.8 billion from CITGO Holding to PDVH was made without any consideration. Ex. 6, p. 9. The debt offering had no legitimate business purpose, yet CITGO Holding was forced to pay a 12-percent interest rate to borrow the \$2.8 billion. Ex. 32. The bonds that CITGO Holding issued were rated as non-investment grade “junk” bonds by all three major ratings agencies from the moment they were issued. Upon receiving the \$2.8 billion, PDVH paid its own “dividend,” equal to what it received from CITGO Holding, to its immediate parent, PDVSA. *See* D.I. 29 at Tr. 6:2-7 (confirming that Exhibit A to Crystallex’s Opposition to Motion to Dismiss “is more or less the series of transactions that happened, yes”); *see also* D.I. 14-1 (Exhibit A to Crystallex’s Opposition to Motion to Dismiss). The net result of this was that Venezuela repatriated \$2.8 billion to Venezuela where it was safe from execution by creditors. This was done without PDVH or CITGO Holding receiving any consideration, and the transaction left CITGO Holding insolvent on an accounting basis. Ex. 6, p. 47.

D. This Court Denied PDVH’s Motion to Dismiss Crystallex’s Fraudulent Transfer Claim

On November 23, 2015, Crystallex filed a complaint in this Court alleging that PDVSA, as Venezuela’s alter ego, along with PDVH, and CITGO Holding violated DUFTA by fraudulently transferring \$2.8 billion out of the United States and into Venezuela during the then-pending ICSID arbitration (“Crystallex I”). D.I. 1, pp. 77-121. PDVH (and CITGO Holding) moved to dismiss the complaint on February 3, 2016. On September 30, 2016, this Court issued a Memorandum Opinion, denying in relevant part PDVH’s motion to dismiss the DUFTA claim.

D.I. 34 at 10-12, 20.⁹ The Court held that “PDVH’s continued presence in this action is appropriate” because “all that DUFTA requires is a transfer of the debtor’s property with sufficient involvement of the debtor.” *Id.* at 11. The Court reasoned that, here, the transfer of a dividend from PDVH to PDVSA involved “property of a debtor,” and was “orchestrated by and carried-out under orders from Venezuela and/or [PDVSA].” *Id.* at 8-10. Therefore, because Crystallex alleged “a transfer of a debtor’s property at the debtor’s behest,” it “properly allege[d] the existence of a fraudulent transfer under DUFTA.” *Id.* at 10.¹⁰

E. Since Crystallex Filed Crystallex I, PDVH Engaged in at least Two Additional Fraudulent Transfers

After this Court stated in its September 30, 2016 Opinion that it could enjoin further asset transfers at the conclusion of this action, PDVH doubled down on its efforts to dissipate assets. Within a month of the decision denying PDVH’s motion to dismiss Crystallex I, PDVH, without receiving any consideration in return, gave creditors of PDVSA a lien on 50.1% of PDVH’s shares in its most significant asset, CITGO Holding, in support of more than \$3 billion in new debt issued by PDVSA. Ex. 33.¹¹

On November 30, 2016, barely one month later, another lien was recorded against PDVH’s shares of CITGO Holding. Ex. 34. This new lien covered the remaining 49.1% of the

⁹ The decision of this Court is currently on appeal to the Third Circuit. On July 25, 2016, PDVSA also moved to dismiss the complaint for lack of subject matter and personal jurisdiction and failure to state a claim. D.I. 28. That motion has been fully briefed and argument was heard on December 20, 2016. D.I. 37. PDVSA’s motion is still pending.

¹⁰ The Court also found that Crystallex’s fraudulent transfer claim was not barred by the FSIA because “[t]here is nothing in the FSIA’s text that bars eventual liability for a transfer of property which was immune from attachment when the transfer was made.” D.I. 34 at 15-17.

¹¹ In light of this misconduct, Crystallex filed a separate DUFTA suit against PDVH for this Second Fraudulent Transfer (“Crystallex II”). *Crystallex Int’l Corp. v. PDV Holding, Inc.*, C.A. No. 16-1007-LPS (D. Del. Filed Oct. 28, 2016).

outstanding stock. Ex. 34. Again PDVH agreed to pledge its assets for no consideration, this time in support of an agreement between Rosneft, PDVSA, and PDVH's sister, PPSA, in connection with Rosneft's \$1.5 billion loan to Venezuela. Exs. 35, 36, 37.¹²

It is undisputed that these actions were undertaken for the benefit of PDVSA / Venezuela, not PDVH. On December 23, 2016, PDVSA issued a press release confirming that, in October, it had "leveraged itself . . . using as collateral 50.1% of Citgo for the bond swap operation." Ex. 38. In the same press release, PDVSA confirmed that it had now "used the remaining 49.9% [of Citgo] to raise new financing" from Rosneft. Ex. 38. PDVH effectively conveyed assets out of the country by using its assets to secure its parent's debt for no consideration to PDVH. In short, PDVSA and Venezuela have the cash, and PDVH's assets are diminished by the liens.

F. PDVH Has Repeatedly Represented That It Can and Will Continue to Dissipate Its Assets

On December 20, 2016, during oral argument before this Court on PDVH's request for 28 U.S.C. § 1292(b) certification, the Court asked PDVH's counsel whether PDVH would maintain the status quo pending its requested appeal. *See* Tr. 80:20-81:13. Counsel for PDVH could not commit to refrain from further asset transfers. *See id.* ("THE COURT: So . . . should I infer anything from your silence in response to their concern that money is just going to keep leaving the country if I let this be delayed? MR. EIMER: Your Honor, I can't make any representations about that . . . Nor do I think the Court can stop it right now."). Lest there be any doubt as to PDVH's intentions, PDVH sent a letter to the Court on March 28, 2017, following the D.C. Court's confirmation of the \$1.4 billion arbitral award, reiterating that, in its view,

¹² Consequently, Crystallex filed an amended complaint in *Crystallex II* on January 4, 2017 to include this Third Fraudulent Transfer (D.I. 18 in *Crystallex II*).

future transactions “are possible and permissible.” *See* D.I. 62 at 2.¹³ Put simply, PDVH, a Delaware corporation, has told the Court (most recently after the confirmation of the \$1.4 billion award) that it believes it can and will continue to transfer assets fraudulently in violation of DUFTA. A preliminary injunction is necessary and appropriate.

ARGUMENT

Crystallex is entitled to interim injunctive relief to prevent PDVH from making further illegal transfers or otherwise encumbering its assets outside the normal course of business during the pendency of this action. PDVH’s conduct to date makes clear that, absent court intervention, it will continue to transfer away even more assets to avoid judgment creditors, thereby causing Crystallex irreparable harm by rendering moot Crystallex’s request for a post-judgment injunction barring further fraudulent transfers.

I. INJUNCTIVE RELIEF IS AVAILABLE TO PREVENT FRAUDULENT TRANSFERS

Under the Federal Rules, district courts have the authority to issue preliminary injunctions maintaining the status quo pursuant to their general equitable power. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282, 290 (1940).¹⁴ As long as the cause of action sounds in equity, district courts may exercise this general equitable power to enter asset-preserving

¹³ In so arguing, PDVH ignores the fact that it is not a sovereign, has not asserted sovereign immunity, and under Supreme Court precedent has no right to assert sovereign immunity as to its own assets simply because it is a wholly-owned subsidiary of an entity entitled to sovereign immunity. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 475-77 (2003).

¹⁴ In addition, this Court is empowered to use any and all prejudgment remedies that are available under Delaware law, Fed. R. Civ. P. 64, and injunctions are the primary means by which Delaware courts preserve the status quo during the pendency of litigation. *See, e.g., Brinati v. TeleSTAR, Inc.*, 1985 WL 44688, at *4-5 (Del. Ch. Sept. 3, 1985) (granting preliminary injunction to preserve status quo and prevent dissipation of defendant’s assets); *Eberhardt v. Christiana Window Glass Co.*, 74 A. 33, 36 (Del. Ch. 1909) (granting preliminary injunction preserving funds pending merits hearing).

preliminary injunctions. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 325 (1999). There is no dispute (nor can there be) that Crystallex’s fraudulent transfer claims are equitable claims. *See, e.g., United States v. Kensington Shipyard & Drydock Corp.*, 187 F.2d 709, 712 (3d Cir. 1951) (“At common law . . . the judgment creditor could either bring an action in equity to set aside the [fraudulent] transfer or bring a creditor’s bill in equity to reach the debtor’s equitable assets.”). As such, this Court is empowered to issue a preliminary injunction preventing PDVH from dissipating the assets over which Crystallex seeks entry of a permanent injunction in this action. *See, e.g., In re SK Foods, L.P.*, 2011 WL 10723414, at *30 (Bankr. E.D. Cal. Oct. 11, 2011) (noting that “[a] plaintiff in a fraudulent transfer action is entitled to preliminary equitable relief” if it otherwise meets the injunction standard).

II. CRYSTALLEX IS ENTITLED TO A PRELIMINARY INJUNCTION

Courts consider four factors when ruling on a motion for a preliminary injunction: “(1) the likelihood that plaintiff will prevail on the merits at final hearing; (2) the extent to which plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest.” *Pappan Enters., Inc. v. Hardee’s Food Sys., Inc.*, 143 F.3d 800, 803 (3d Cir. 1998).

A. Crystallex Is Likely To Succeed On The Merits Of Its DUFTA Claim

This Court already found that Crystallex validly stated a claim against PDVH under DUFTA, D.I. 34 at 11, which provides that “[a] transfer made . . . by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made . . . if the debtor made the transfer or incurred the obligation [w]ith actual intent to hinder . . . any creditor of the debtor.” 6 *Del. C.* § 1304(a)(1). The facts underlying Crystallex’s fraudulent transfer claim—the transfer of \$2.8 billion out of the country for no consideration—are essentially undisputed. This Court considered and rejected PDVH’s legal arguments that (1) there was no

“transfer” made under the statute, and (2) there was no relevant transfer made “by a debtor” in respect of PDVH.¹⁵ See D.I. 34 at 10-12. To prevail against PDVH in this action, Crystallex need only further show that (1) PDVH (along with PDVSA and CITGO) had actual intent to hinder Crystallex, and (2) that PDVSA is an alter ego of Venezuela and therefore liable as a “debtor” under DUFTA. Crystallex is likely to succeed on the merits of these factual questions.

1. PDVH Acted With Actual Intent To Defraud Crystallex

There is no question that PDVH acted with actual intent to defraud Crystallex. In making that determination, courts look to the non-exclusive badges of fraud in the statute, and other considerations. 6 *Del. C.* § 1304(b). Here, the transactions at issue bear several badges of fraud:

- The debt proceeds were transferred from PDVH to PDVSA, which controls PDVH (and CITGO Holding) and is thus an “insider.” 6 *Del. C.* § 1304(b)(1).
- By moving assets from its indirect U.S.-based subsidiary to its own coffers, PDVSA (the debtor) retained control of the transferred debt proceeds and merely moved them offshore. 6 *Del. C.* § 1304(b)(2).
- Before causing the transfer through the purported “dividend” payouts, Venezuela (and PDVSA) had either already been sued or threatened with suits predicted to result in billions of dollars in arbitral awards against it. 6 *Del. C.* § 1304(b)(4).
- PDVSA not only retained control but also “removed” the debt proceeds from the United States by moving \$2.8 billion offshore. 6 *Del. C.* § 1304(b)(7).
- No consideration was exchanged for the nearly \$2.8 billion “dividend” PDVH paid to PDVSA. 6 *Del. C.* § 1304(b)(8).

¹⁵ This Court found that Crystallex properly alleged a “transfer” because “for at least some time between PDVH’s declaration of a dividend and the transfer of that dividend to [PDVSA], ‘PDVH indisputably had assets of PDVSA in its possession.’” D.I. 34 at 8. The Court also found that Crystallex properly alleged a transfer “by a debtor” because, “through the ordinary meaning of the words” in DUFTA, a transfer executed by an “instrumentality of” the debtor or on its behalf are in that respect, “‘by’ the debtor.” *Id.* at 9-10. The Court concluded, because Crystallex alleged “a transfer of a debtor’s property at the debtor’s behest,” it “properly allege[d] the existence of a fraudulent transfer under DUFTA.” *Id.* at 10.

- The transfer of the debt proceeds to PDVSA rendered CITGO Holding insolvent on an accounting basis. The debt incurred by CITGO Holding through the bond issuance and loan facility created negative shareholder equity and reduced the value of PDVH by \$2.8 billion the moment the dividend was paid. 6 *Del. C.* § 1304(b)(9).
- The transfer of the near-\$2.8 billion occurred shortly after CITGO Holding incurred a substantial debt nearly identical to that amount. 6 *Del. C.* § 1304(b)(10). This debt flowed up to PDVH, whose financials are consolidated with those of its wholly-owned subsidiaries.
- CITGO Holding incurred the \$2.8 billion in debt just months after PDVSA and PDVH ended their unsuccessful attempt to sell their indirectly wholly-owned subsidiary, CITGO Petroleum.
- PDVH subsequently liened 50.1% and then 49.9% of its shares in CITGO Holding pursuant to the Second and Third Fraudulent Transfers.

Under Delaware law, “[a]lthough the presence of a single factor [or ‘badge of fraud’] may cast suspicion on the transferor’s intent, the confluence of several in one transaction generally provides conclusive evidence of an actual intent to defraud.” *In re Vaso Active Pharm., Inc.*, 2012 WL 4793241, at *10 (Bankr. D. Del. Oct. 9, 2012). Here, there are numerous badges of fraud that evidence PDVH’s fraudulent intent.

2. PDVSA Is An Alter Ego Of Venezuela

PDVSA is Venezuela’s alter ego. While instrumentalities of foreign sovereigns are generally accorded a presumption of independent judicial status, that presumption is rebuttable and courts will apply the alter ego doctrine when: (1) the foreign state exercises complete control over the instrumentality; or (2) the foreign state uses its control over the instrumentality to commit a “fraud or injustice.” *See First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629-32 (1983) (declining “to adhere blindly to the corporate form where doing so would cause such an injustice”); *see also Funnekotter v. Agricultural Dev. Bank of Zimbabwe*, 2013 WL 6091616, at *3-4 (S.D.N.Y. Nov. 15, 2013) (denying motion to dismiss

where plaintiffs alleged defendants were “controlled by political appointees” and served “no purpose or function other than as an arm of the . . . government”).

To determine “control,” courts look to “whether the state exercises day-to-day control over” the instrumentality. *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006). In *Bridas S.A.P.I.C. v. Gov’t of Turkmenistan*, the court held that a state-owned oil and gas company was the alter ego of the Government of Turkmenistan. 447 F.3d 411, 420 (5th Cir. 2006). In so holding, the court disregarded the existence of certain “corporate formalities,” focusing instead on “the reality of the corporate relationship.” *Id.* at 419. The court found compelling the facts that the Government caused the company’s incorporation, there was overlap between the Government’s high-ranking officials and the company’s officials, the company was grossly undercapitalized, the company was operated as a closely-held subsidiary of the Government, and the company’s revenues were diverted to a state oil and gas fund. *Id.* at 419-20.¹⁶

There is substantial evidence that Venezuela (i) controls all aspects of PDVSA’s operations and finances and (ii) used that control to effect a fraudulent transfer through PDVH:

- PDVSA’s very creation was mandated by Presidential decree and its ongoing relationship with the government has been enshrined in the Venezuelan Constitution.

¹⁶ See also *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 301-02 (D.C. Cir. 2005) (holding that State Property Fund of Ukraine should not be treated as independent from Ukraine because Ukraine “had plenary control over” Fund, including that Fund’s chairman is “appointed and discharged by the President of Ukraine . . . and the members of its board must be approved by” Parliament) (internal quotation marks omitted); *In re 650 Fifth Ave. & Related Props.*, 881 F. Supp. 2d 533, 551 (S.D.N.Y. 2012) (finding defendant companies were alter egos of Iran because they had “no true separate decision making authority, power or real existence except that allowed and directed by the Iranian government”); *Kensington Int’l Ltd. v. Republic of Congo*, 2007 WL 1032269, at *10 (S.D.N.Y. Mar. 30, 2007) (finding national oil company was alter ego of Republic of Congo based on, among other things, overlap between national and corporate officials and intermingling of corporate and government assets).

- There is substantial overlap between government personnel and personnel that run PDVSA on a day-to-day basis.
- The government uses PDVSA's oil to pay debts and raise financing, and PDVSA receives no consideration in return.
- The Venezuelan government appoints PDVSA's entire Board of Directors by presidential decree, and hires and fires specific PDVSA personnel.
- Venezuela dictates PDVSA's day-to-day business, including the price at which PDVSA must sell its products (often at steep discounts to market prices and/or for no consideration to political allies) and to whom oil must be sold.
- The government requires PDVSA to fund and run social programs on its behalf for no remuneration or consideration of any kind.
- Venezuela's economy is entirely dependent on PDVSA.
- Venezuela regularly uses PDVSA's assets for state purposes that have nothing to do with PDVSA's business, for no consideration.
- Venezuela uses PDVSA to achieve the government's social and political objectives.¹⁷

B. Crystallex Will Suffer Irreparable Harm Without Injunctive Relief

The second factor considered in determining whether to grant a preliminary injunction is the potential for irreparable harm if the injunction is denied. *See Pappan Enters., Inc.*, 143 F. 3d at 803. Without an injunction, PDVH can—and undoubtedly will—continue to illegally dissipate its assets. In its complaint, Crystallex sought a permanent injunction enjoining PDVH from fraudulently transferring its assets. D.I. 1 at 38. In denying PDVH's motion to dismiss, this Court expressly recognized that Crystallex may be entitled to such relief. *See* D.I. 34 at 18 (“Assuming that Plaintiff obtains a final judgment on the merits in its favor, CITGO Defendants offer no convincing explanation as to why, for example, PDVH could not at least be enjoined from further transfer of its assets out of the country.”). Crystallex's request for a preliminary

¹⁷ *See supra* Section B of the Statement of Facts for additional aspects of Venezuela's control over PDVSA.

injunction is thus appropriately tailored toward protecting its potential right to that final remedy. *See USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 98 (6th Cir. 1982) (“A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally.” (quoting *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945)) (internal quotation marks omitted)).

The risk of PDVH making additional fraudulent transfers has only become more severe now that the D.C. Court has confirmed Crystallex’s arbitral award and issued the Judgment. PDVH has a demonstrated record of making fraudulent transfers in the wake of unfavorable court decisions. PDVH also has repeatedly represented to this Court that it can—and will—continue to transfer its assets during the pendency of Crystallex I and Crystallex II. *See* Tr. 80:20-81:13 (declining to represent that PDVH would not continue to move assets out of the United States); D.I. 62 (confirming “PDVH’s position that transactions, both past and future, were and are possible and permissible”). There can be little doubt that, in the absence of a preliminary injunction, PDVH will find additional ways to fraudulently transfer or otherwise dissipate its assets now that Crystallex’s arbitral award has been confirmed and the Judgment has been issued. Crystallex will face irreparable harm if this Court does not enter a preliminary injunction preventing PDVH from doing so. *See USACO Coal Co.*, 689 F.2d at 99 (affirming entry of injunction and noting that “the breadth of the injunction evidence[d] the serious concern of the district court, being thoroughly familiar with the record of defendants’ past questionable transactions, that defendant . . . would be able to dispose of defendants’ holdings in the United States”); *In re SK Foods, L.P.*, 2011 WL 10723414, at *30 (noting that “the possibility of irreparable harm is established where the plaintiff can show prior instances where the defendant has dissipated or concealed assets”).

C. The Balance of the Equities Weighs in Crystallex's Favor

The balancing of “the hardships to the respective parties,” *Pappan Enters., Inc.*, 143 F.3d at 805, also weighs in Crystallex’s favor. Without an injunction now, there will be nothing for Crystallex to enjoin at the conclusion of this case. PDVH, on the other hand, will suffer no harm if this Court enters an injunction because it will retain the ability to take actions that are reasonable and necessary to its continued operations. While PDVH’s temporary inability to transfer or otherwise encumber assets outside the ordinary course may be, at best, inconvenient, it does not constitute irreparable harm. *See USACO Coal Co.*, 689 F.2d at 99 (affirming entry of preliminary injunction “prevent[ing] . . . the dissipation and concealment of defendants’ assets that would render the litigation meaningless” where “the competing interests involved” were balanced by “specifically accommodat[ing] the legitimate business concerns of defendants”).

D. There Is No Public Interest In Permitting Fraudulent Transfers

Finally, the Court must consider the public interest. *See Pappan Enters., Inc.*, 143 F.3d at 803. Any public interest that is implicated could weigh only in favor of protecting Crystallex as a creditor and preventing PDVH from fraudulently transferring its property. *See USACO Coal Co.*, 689 F.2d at 99-100 (concluding that “public interest is no way disserved by the order prohibiting defendants from dissipating and concealing assets until the plaintiffs’ equitable claims are resolved”); *In re SK Foods, L.P.*, 2011 WL 10723414, at *36 (“[I]t is certainly in the public interest to prevent fraudulent transfers of assets for the purpose of avoiding the claims of creditors, especially where the individuals involved have a track record of doing so.”).

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