IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORP., *Plaintiff*, v. BOLIVARIAN REPUBLIC OF VENEZUELA, *Defendant*.	Case No. 1:17-mc-151-LPS Hon. Leonard P. Stark

VENEZUELA PARTIES' JOINT RESPONSE
REGARDING THE COURT'S JANUARY 1, 2025 ORDER

I. The Special Master and All Parties Agree on Issues (1) and (2).[1]

All parties that submitted opening briefs on these issues agree that (1) a party that views confidential bid information during the Stalking Horse Bid round should not be barred from bidding in subsequent rounds, and that (2) each Venezuela Party is and should be treated as a separate party for purposes of the Sale Process. *See* D.I. 1521 at 1–2 (Crystallex); D.I. 1522 at 2–3 (Special Master); D.I. 1523 at 3 (Four Creditors); D.I. 1524 at 1–3 (Venezuela Parties); D.I. 1525 at 1 (ConocoPhillips). Thus, the Court should enter an order affirming these points.

II. Although Issue (3) Is Not Yet Ripe, Delaware Law Does Not Permit the Court to Approve a Sale for an Unconscionable Price.

A. The Court need not and should not decide this question now.

The opening briefs of parties that addressed this issue all make clear that, as the Venezuela Parties explained, D.I. 1524 at 3–4, it is not yet ripe for this Court to assess the scope or application of the Delaware-law standard governing a permissible price for the sale of shares under 8 *Del. C.* § 324. The Four Creditors and ConocoPhillips both stated this point expressly. *See* D.I. 1523 at 3–4 (Four Creditors arguing that considering "the Delaware law standard for the permissible value for the sale of the PDVH Shares . . . is premature at this stage, and more properly taken up in conjunction with the Court's review and approval of the specifics of the recommended Stalking Horse bid and then the Final Recommended bid, and objection periods for the same"); D.I. 1525 at 1 (ConocoPhillips stating that it is not prepared to "evaluat[e]" this issue "at this stage in the process," and "reserv[ing] its rights as to the fairness of the price to be obtained in the auction"). And the Special Master and Crystallex, while wrong about the law in several important respects, are correct that whether the Court can approve any ultimate recommended bid depends in part on

[1] Nothing in this filing should be construed to imply the Venezuela Parties' consent to a forced sale under any circumstances. The Venezuela Parties preserve all rights and positions, including on appeal.

considerations that will not be determinable until the sale process is complete. *See, e.g.*, D.I. 1521 at 3 (Crystallex acknowledging 50% rule but arguing that a court may depart from that rule "if warranted under the particular conditions" of the case, including based on the level of "buying interest" attracted at the sale); D.I. 1522 at 4 (Special Master conceding that a "*grossly* inadequate" price justifies setting aside a judicial sale and that "Delaware courts apply special judicial scrutiny if property is sold for less than 50% of its fair market value" (emphasis in original) (internal quotation marks omitted)). Notably, *no party* argues that any sale-process design question that this Court must decide now requires a current determination about the scope or application of the standard that will govern when the Court must decide whether to accept any recommendation for a winning bid. Moreover, however this Court rules, deciding this issue before a concrete dispute arises could influence the amount that bidders choose to bid. Nevertheless, Delaware law is clear that the Court must set aside any sale that is for an unconscionable price, including for less than 50 percent of fair market value, or that works an injustice or unfairness.

B. A sale price below 50 percent of fair market value is grossly inadequate and shocks the conscience of the Court as a matter of law.

The Special Master and Crystallex misstate the standard for assessing adequacy of price in a judicial sale. The standard as stated by the Delaware Supreme Court is clear: While a sale cannot be set aside on the sole ground that the bid price is merely "inadequate," the sale should be set aside where the price "is so *grossly* inadequate that it shocks the conscience of the court." *Burge v. Fid. Bond & Mortg. Co.*, 648 A.2d 414, 419 (Del. 1994) (emphasis in original). And under the "50% test," "[i]f the fair market value of the property is over twice the sales price, the price is considered to be grossly inadequate, shocking the conscience of the court." *Id.* (cleaned up).

The Special Master's and Crystallex's suggestion that the 50% test applies only where there has been some defect in the sale process, D.I. 1522 at 4–5; D.I. 1521 at 3, is incorrect.

"Delaware law provides a bright line. If a property is sold at [a forced sale] for less than half its fair market value (the 50% test), it shocks the conscience of the Court, and justifies setting aside the sale." *JP Morgan Chase Bank, Nat'l Ass'n v. Shea*, CV S18L-07-047 CAK, 2019 WL 4071855, at *2 (Del. Super. Ct. Aug. 28, 2019)); *accord Burge*, 648 A.2d at 419. While procedural defects provide *additional and independent* grounds on which the Court can refuse confirmation, *see Burge*, 648 A.2d at 419, evidence of a procedural defect is unnecessary. Unlike the law in some other jurisdictions, Delaware law "does not accept th[e] view" that a court-ordered sale may be confirmed, "even where gross inadequacy of price has been shown[,] if no impropriety, irregularity, or failure to meet statutory requirements has been shown." *Girard Tr. Bank v. Castle Apartments, Inc.*, 379 A.2d 1144, 1146 (Del. Super. Ct. 1977); *see also Burge*, 648 A.2d at 418 ("[A] party may challenge a sheriff's sale which is procedurally correct if the party can demonstrate that he or she has suffered detriment."). And Delaware law does not apply only to sales of ordinary real estate, as the Special Master and Crystallex suggest. *See* D.I. 1522 at 4–5; D.I. 1521 at 3. The Delaware Supreme Court has in fact applied the 50% test to a sheriff's sale of stock. *See Deibler v. Atl. Properties Grp.*, 652 A.2d 553, 555 (Del. 1995). Nor does Delaware law require a party objecting to a grossly inadequate sale price to prove that a higher bid is "likely to be made at a subsequent sale" or "lack of knowledge … or confusion," as the Special Master contends, D.I. 1522 at 4–5. Since the *Girard Trust* decision in 1977, the Delaware Supreme Court adopted the 50% test without any caveats, *Burge*, 648 A.2d at 419, and a more recent Superior Court has recognized the 50% test as a "bright line" rule, *JP Morgan Chase Bank*, 2019 WL 4071855, at *2.

While the Special Master, the Four Creditors, and Crystallex point to Delaware decisions stating that a court may depart from the 50% test where the "particular circumstances of the case" warrant it, those cases simply inform *how* the 50% threshold is met, not whether it applies at all.

In *Girard Trust*, for example, the Superior Court confirmed a sale for a price below 50%, but only because the judgment creditor agreed to "limit its recovery against [the debtor] to the deficiency judgment which it could obtain if the sale had been for the fair market value." 379 A.2d at 1146–47. The court expressly stated that it would have found "no basis to sustain" the sale "in the absence of" that factor. *Id.* at 1146.[2] As for *Home Beneficial Life Insurance Co. v. Blue Rock Shopping Center, Inc.*, 379 A.2d 1147 (Del. Super. Ct. 1977), the language that the Special Master relies on in support of his suggestion that the 50% test is not absolute, *see* D.I. 1522 at 4, is mere dicta and not applicable here. In *Home Beneficial*, the court found that the sale price of an office building was above 50% of fair market value, then suggested in dictum that the 50% rule might not be appropriate because the property was an office building unattractive to ordinary auction sale buyers and because only the debtor appeared at auction. 379 A.2d at 1149. By contrast, the stock of a successful refiner generating billions of dollars in annual net revenue is a highly desirable asset.

Moreover, even if the nature of the property could affect how *Burge's* 50% test applies, that factor would counsel in favor of *more* scrutiny here, not less, *See Diebler*, 652 A.2d at 557 ("[t]he sale of corporate stock at an execution sale is a relatively unusual event calling perhaps for more judicial attention than the sale of real estate"). Indeed, under Delaware law a sale can be set aside even where the sale price is "mere[ly]" inadequate (not grossly inadequate) but "result[s] in unfairness or work[s] an injustice on any party having an interest in the outcome of the sale." *Burge*, 648 A.2d at 419, 422; *see also JP Morgan*, 2019 WL 4071855, at *2 (setting aside a

[2] The Delaware Supreme Court applied a similar analysis in *Deibler*, affirming a sale of corporate stock where the bidder provided value to the judgment debtor (including the foregoing of a deficiency) worth 46% of the stock's fair market value, but only because the property was subject to additional liens. *See* 652 A.2d at 559. After accounting for those liens, the value provided to the debtor was 56% of the value of the stock. *See id.* (property was worth approximately $1.8 million but was worth approximately $1.5 million after subtracting remaining lien amount, and bidder provided value of around $841 thousand).

sheriff's sale where the sale price exceeded 50 percent but the price was still unfair under the circumstances). *Cf. Smith v. Caldera Props.-Nassau Grove, LLC*, C.A. No. S09C-05-005, 2011 WL 2420842, at *3 (Del. Super. Ct. June 9, 2011) (objecting party presented no evidence of value of undeveloped parcel of land accessible only by crossing adjoining property, but assuming it was worth $2,000, bid of $1,000 did not shock the court's conscience given the small amount of money at stake). A sale of the PDVH shares would surpass the scale of any other Section 324 sale in Delaware history by orders of magnitude. *See* D.I. 102-1 at 12. To that end, even a bid price at or somewhat above 50 percent of fair market value would represent an immense loss in potential value—on the order of *billions* of dollars. This would "work an injustice" or unfairness, *Burge*, 648 A.2d at 419, both on lower-priority Attached Judgment Creditors and on the people of Venezuela, a foreign sovereign nation in the midst of a humanitarian, political, and fiscal crisis, as more of the debts of the Republic and PDVSA will remain unsatisfied.

C. The price obtained in a forced sale does not reflect fair market value.

As the Venezuela Parties explained in their opening brief, D.I. 1524 at 6, longstanding precedent forecloses Crystallex's suggestion—now echoed by the Special Master—that the "sale price" in a forced sale "itself is the best representation of the legitimate fair market value of the property," D.I. 1521 at 3; *see* D.I. 1522 at 3. The fair market value of corporate stock is "the price which would be agreed upon by a *willing seller* and a willing buyer under usual and ordinary circumstances, after consideration of all available uses and purposes, without *any compulsion upon the seller to sell* or upon the buyer to buy." *Poole v. N. V. Deli Maatschappij*, 243 A.2d 67, 70 n.1 (Del. 1968) (emphasis added); *see also id.* at 72 (adopting fair market value as the appropriate valuation metric in a stock sale). Those conditions do not apply to a compulsory sale like this one. *See BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 537–38 (1994) (fair market value "is the very

antithesis of forced-sale value" (emphasis in original)); *see also, e.g.*, *Girard Tr. Bank*, 379 A.2d at 1146 ("A mortgage foreclosure involves conditions of compulsion and accelerated sale which are foreign to the concept of fair market value.").

As the Venezuela Parties also explained, Crystallex's and the Special Master's proposal makes no sense in the context of the 50% test, the entire point of which is that the price obtained in a forced sale is different—and likely substantially less—than fair market value. *See Girard Tr. Bank*, 379 A.2d at 1146 (explaining that "the 50% test is 50% of fair market value" and that the 50% "test has been set substantially below the fair market value to reflect the realities of forced sale even under ordinary sale"). That test requires the Court to first determine the property's fair market value by taking evidence, including valuation "evidence from experts," *Deibler*, 652 A.2d at 558; *see also Burge*, 648 A.2d at 419 (beginning analysis by determining the property's fair market value), then determining whether the bid price is above or below 50% of the fair market valuation, *see Deibler*, 652 A.2d at 559–60; *Burge*, 648 A.2d at 419.

The cases that the Special Master cites do not alter these principles. *Dunmire v. Farmers & Merchants Bancorp of Western Pennsylvania, Inc.* was a merger appraisal case, and the court's statement that it sometimes "has found the merger price to be the best evidence of fair value" concerned the appraisal price "result[ing] from an arm's-length process between two independent parties, and if no structural impediments existed that might materially distort the crucible of objective market reality." CV 10589-CB, 2016 WL 6651411, at *7 (Del. Ch. Nov. 10, 2016). The court was not discussing a compulsory judicial sale, which structurally distorts objective market reality because the owner cannot walk away if it believes the price offered is too low.

Likewise, the unsupported dictum in *New Castle County v. Candler* that in the court's experience "the fair market value of a property is often the value for which someone at a Sheriff's

Sale is willing to pay," C.A. No. N13J-00542-MSV, 2014 Del. Super. LEXIS 2753, at *9 (Jan. 30, 2014), involved a case in which the objecting party produced no evidence of fair market value. But here, the Special Master's own advisor Evercore conducted an independent valuation of the PDVH Shares, though Evercore made certain objective errors that reduced its valuation below the proper amount, and other parties may do the same before the hearing. *Cf.* Oct. 1, 2024 Hr'g Tr. at 52:19 – 53:20 (counsel for PDVH and CITGO explaining that the fair market value of the shares is close to $17 billion). And the *Candler* court's experience about what "often" happens at sheriff's sales both says nothing about the proper legal standard for assessing fair market value—especially of privately held corporate stock like the PDVH shares, which are subject to well-recognized valuation methods–and is contrary to controlling precedent. *See Deibler*, 652 A.2d at 559; *Burge*, 648 A.2d at 419; *see also Kool, Mann, Coffee & Co. v. Coffey*, 300 F.3d 340, 362–63 (3d Cir. 2002) (a discounted cash flow analysis is the "favor[e]d" method for valuing stock of a private company).

III. To Resolve Issue (4), the Special Master Should Place the Written Answers to Both Previously and Newly Submitted Questions in the Data Room.

The Special Master's claim about what happens in a typical M&A transaction, D.I. 1522 at 5, is incorrect, but in any event this is not a typical M&A transaction. As explained previously, bidders have received different levels of access and must bid based on an accelerated due diligence period, and the Special Master and his investment advisor placed few if any limits on the thousands of questions bidders have asked CITGO and may ask in the future. *See* D.I. 1391 at 9–10 (describing CITGO's efforts to respond to nearly 3,000 bidder questions). The Special Master's response makes clear that he and his advisors have little concern either about a level playing field for all bidders or about placing the full burden of fielding duplicative questions onto CITGO. Moreover, the Four Creditors (some of whom also are potential bidders) have echoed the Venezuela Parties' call for transparency and equal access to written Q&As. *See* D.I. 1523 at 5.

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