Nos. 16-4012 & 17-1439

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CRYSTALLEX INTERNATIONAL CORP.,

Plaintiff-Appellee,

v.

PETRÓLEOS DE VENEZUELA, S.A.,
PDV HOLDING, INC., AND CITGO HOLDING, INC.,
F/K/A/ PDV AMERICA, INC.,

Defendant-Appellant (PDV Holding, Inc.).

Appeal From The United States District Court
For The District of Delaware
No. 1:15-cv-01082, Chief Judge Leonard P. Stark

APPELLEE'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Robert L. Weigel
Jason W. Myatt
Rahim Moloo
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

Raymond J. DiCamillo
Jeffrey L. Moyer
Travis S. Hunter
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801
(302) 651-7700

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INTRODUCTION

In a precedential opinion, a sharply divided panel of this Court held that the Delaware Uniform Fraudulent Transfer Act ("DUFTA") does *not* prohibit a Delaware corporation from transferring a $2 billion "dividend" to its overseas parent—an arm of the Bolivarian Republic of Venezuela ("Venezuela")—in order to avoid paying an international arbitration award against Venezuela. As a consequence of that holding, foreign sovereigns will be free to fraudulently transfer assets—and enlist their Delaware subsidiaries to do their bidding—so long as the party making the transfer is itself "a non-debtor." Dissenting Opinion ("Dissent") 4.[1] Left uncorrected, the majority's holding will provide a blueprint for the very type of fraudulent asset transfers that DUFTA was enacted to prevent. Rehearing en banc is warranted.

This case arose after the close of evidence in an arbitration that resulted in a $1.4 billion award against Venezuela for its unlawful expropriation of rights to the Las Cristinas gold mine previously held by Appellee Crystallex International Corp. ("Crystallex"). Vowing not to pay any arbitration award, Venezuela hatched a scheme to drain assets from its United States business ventures and transfer those funds overseas. Through its alter ego, the state-owned oil company Petróleos de

[1] Pursuant to Local Appellate Rules 35.2(a) and 40.1(a), the panel opinion is attached hereto.

Venezuela, S.A. ("PDVSA"), Venezuela caused its indirect wholly owned Delaware subsidiary, CITGO Holding, Inc. ("CITGO Holding"), to borrow $2.8 billion and pay those borrowed funds to CITGO Holding's Delaware parent, Appellant PDV Holding, Inc. ("PDVH"). PDVSA then directed PDVH to declare a "dividend" of more than $2 billion and transfer that money to PDVSA, outside of the United States. In this manner, Venezuela caused the fraudulent transfer of assets from the United States to Venezuela in a flagrant effort to evade Venezuela's judgment creditors, including Crystallex.

Crystallex sued PDVH in the United States District Court for the District of Delaware, asserting that the dividend to PDVSA was a fraudulent transfer under DUFTA. DUFTA broadly provides that any "transfer made or obligation incurred by a debtor is fraudulent as to a creditor … if the debtor made the transfer or incurred the obligation … [w]ith actual intent to hinder, delay or defraud any creditor of the debtor."[2] The district court agreed that the dividend that Venezuela directed PDVH to make to PDVSA was a fraudulent transfer, and held that "all that DUFTA requires is a transfer of the debtor's property with sufficient involvement of the debtor." A-013. Thus, because PDVH's transfer of the dividend to PDVSA involved "property of a debtor" and was "orchestrated by and carried-out under orders from Venezuela and/or [PDVSA]," DUFTA's requirements were met. A-012 & n.1.

[2] 6 Del. C. § 1304(a).

This Court granted PDVH's request for interlocutory review. Following oral argument, the panel reversed the district court in a divided opinion. The majority held that "a transfer by a non-debtor cannot be a 'fraudulent transfer' under DUFTA," Majority Opinion ("Op.") 3—even where, as here, the intent behind the transfer was "[c]ertainly" to "hinder creditors," *id.* at 20. In the majority's view, because PDVH's transfer of more than $2 billion out of the United States at Venezuela's behest was not directly made "by the debtor," it was not prohibited by DUFTA.

In a strong dissent, Judge Fuentes noted that the majority's narrow reading of DUFTA "does not comport with—but rather is wholly contrary to—the Act's broad remedial purpose." Dissent 4. In Judge Fuentes's view, "a transfer is made 'by a debtor' under the Act when it is executed on the debtor's 'behalf,'" *id.* at 8, as it was here. "[I]t cannot be that [DUFTA], which is firmly grounded in principles of equity, leaves Crystallex—the victim of a purposeful and complicated fraud—without any remedy for [PDVH's] role in transferring $2.8 billion out of the United States to avoid Venezuela's creditors." *Id.* at 4.

The panel majority's construction of DUFTA conflicts with the bedrock principle of fraudulent-conveyance law—dating back to the 1571 Statute of Elizabeth—that "every conveyance made to ... delay, hinder, or defraud creditors ...

shall be void."[3] Under the majority's reading, transfers of a debtor's property that are designed to hinder creditors are beyond DUFTA's reach so long as the debtor instructs a *non-debtor* to make the transfer. This holding not only is contradicted by the express language of DUFTA, which defines "transfer" broadly to include *indirect* transfers of the debtor's property, but also is contrary to decisions of this Court[4] and the Seventh Circuit[5] invalidating transfers that were not made directly by the debtor. Nor does it matter that Venezuela was "the recipient of the assets," Op. 19; under Delaware law, transfers designed to hinder or delay creditors are fraudulent, even when the debtor retains possession of the asset.[6]

Because the panel's split decision narrowly construes a uniform act that must be read broadly and conflicts with decisions of this Court and the Seventh Circuit, rehearing is warranted. At a minimum, this Court should certify a question to the Delaware Supreme Court regarding the proper construction of DUFTA.

ARGUMENT

Crystallex respectfully submits that the full Court should rehear Crystallex's arguments because this case presents a question of exceptional importance.

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[3] *United States v. Bess*, 243 F.2d 675, 678 (3d Cir. 1957), *aff'd*, 357 U.S. 51 (1958).

[4] *In re Wettach*, 811 F.3d 99, 114–15 (3d Cir. 2016).

[5] *Cont'l Cas. Co. v. Symons Int'l Grp., Inc.*, 817 F.3d 979, 992–93 (7th Cir. 2016).

[6] *See, e.g.*, *Dryden v. Estate of Gallucio*, 2007 WL 185467, at *4 (Del. Ch. 2007).

Alternatively, the panel should rehear Crystallex's arguments because the majority overlooked or misapprehended several points of law and fact.

I. REHEARING IS NECESSARY TO RESOLVE AN ISSUE OF EXCEPTIONAL IMPORTANCE

A. The Majority's Opinion Immunizes A Transfer Of Debtor Property Made With Actual Intent To Hinder Creditors

The panel majority acknowledged that Crystallex's complaint set forth "detailed allegations of intent" that "[c]ertainly" established that the "intent behind [the] series of transactions was to hinder creditors." Op. 20. And yet, the majority suggests that the intentionally fraudulent transfer of debtor property from PDVH to PDVSA, the debtor's alter ego, is somehow not actionable. Neither PDVH nor the majority cited any case in which a court found that a transfer of debtor property that was made with actual intent to hinder creditors was not voidable as a fraudulent transfer. The Court's opinion thus breaks with more than four-hundred years of law providing that transactions that are done with actual intent to defraud, hinder, or delay creditors are void. *See, e.g.*, *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 540–41 (1994) ("The modern law of fraudulent transfers had its origin in the Statute of 13 Elizabeth, which invalidated 'covinous and fraudulent' transfers designed 'to delay, hinder or defraud creditors and others.'"); *Bess*, 243 F.2d at 678 ("The statute of 13 Elizabeth was designed to prevent conveyances which defeated or delayed creditors" and "declare[d], in substance, that every conveyance made to ... delay,

hinder, or defraud creditors ... shall be void."); *Chandler v. Hollingsworth*, 3 Del. Ch. 99, 122 (1867) ("Where a conveyance is tainted with fraud *in fact*, ... [it] is wholly void[.]" (emphasis in original)); *see also Blumenthal v. Blumenthal*, 28 Del. Ch. 1, 8 (1944) ("The English statute of 13 Elizabeth, enacted in 1570, was merely declaratory of ancient equitable principles."). As Crystallex argued at length, *see* Opp. 31–45,[7] DUFTA has a broad remedial purpose and exists to maintain and, where necessary, reestablish the status quo.[8]

This Court's decision immunizes transactions made with actual intent to hinder creditors so long as the debtor did not transfer property away. Yet it has long been settled that a debtor need not part with its asset for a transfer to be actionable. *See, e.g.*, *Dryden*, 2007 WL 185467, at *4 (moving "assets to a jointly-held account" was "a transfer" even though defendant "never relinquished control of the asset" because debtor "placed the property beyond the reach of his own creditors"); *see also Boston Trading Grp., Inc. v. Burnazos*, 835 F.2d 1504, 1508 (1st Cir. 1987) ("paradigm example[]" of fraudulent conveyance is where "debtor exchanges assets

[7] "Opp." refers to Plaintiff-Appellee Crystallex International Corp.'s Opposition Brief, filed June 1, 2017.

[8] *See, e.g.*, *In re Mobilactive Media, LLC*, 2013 WL 297950, at *32 (Del. Ch. Jan. 25, 2013) ("The overarching goal in applying [DUFTA] remedies is to put a creditor in the position she would have been in had the fraudulent transfer not occurred."); *see also, e.g.*, *Klein v. King & King & Jones*, 571 F. App'x 702, 704 (10th Cir. 2014) (Uniform Fraudulent Transfer Act "is remedial in nature" and "should be liberally construed").

a creditor might readily reach (say, shares of stock) for assets that are difficult for a creditor to seize" because "it hinders" creditors' "efforts to satisfy their debts"); *Empire Lighting Fixture Co. v. Practical Lighting Fixture Co.*, 20 F.2d 295, 297 (2d Cir. 1927) (L. Hand, J.) (debtor's conversion of assets into form that would be more difficult for creditor to collect was fraudulent because "[a]n intent to delay and hinder creditors is as much within the statute as an intent to defraud them"); *Gilchinsky v. Nat'l Westminster Bank N.J.*, 159 N.J. 463, 480 (1999) (transfer of assets from New York pension fund to New Jersey IRA account was fraudulent because it was made with "intent to hinder or delay [creditor's] ability to satisfy its New York judgment"); *cf. Shapiro v. Wilgus*, 287 U.S. 348, 354 (1932) ("A conveyance is illegal if made with an intent to defraud the creditors of the grantor, but equally it is illegal if made with an intent to hinder and delay them.").

As the dissent recognized, the majority opinion creates a roadmap for foreign sovereigns to repatriate their assets so as to hinder creditors. Dissent 4. But the opinion goes even further: Other debtors are similarly free to transfer assets so long as the transfers are made by intermediaries. That outcome is "wholly contrary" to longstanding Delaware law, which holds that fraudulent-transfer laws—which are "firmly grounded in principles of equity"—must be construed broadly so that "the victim of a purposeful and complicated fraud" (like Crystallex) is not left "without any remedy." *Id.*; *see also In re High Strength Steel, Inc.*, 269 B.R. 560, 567–68

(Bankr. D. Del. 2001) (definition of "transfer" in 11 U.S.C. § 101 is "as broad as possible" and "substantially similar" to DUFTA's definition).

B. The Majority's Opinion Is In Direct Conflict With Authoritative Decisions Of This Court And The Seventh Circuit

The majority's decision also creates a direct conflict with the Seventh Circuit's decision in *Continental Casualty Company v. Symons*, 817 F.3d at 992–93, a decision that Crystallex raised in its opposition and at oral argument. *See* Opp. 49–50; Transcript of September 12, 2017 Oral Argument ("Tr.") 32:10–33:6; *see also* Fed. R. App. P. 35(b)(1)(B). In *Continental Casualty*, the plaintiff alleged that its debtor structured an asset sale so that proceeds would be transferred from the buyer to third parties, and argued that the transaction constituted a fraudulent transfer under Indiana's Uniform Fraudulent Transfer Act. *See* 817 F.3d at 987–88. Finding several badges of fraud, the Seventh Circuit concluded that it was a fraudulent transfer, even though the debtor did not itself make the transfer. *Id.* at 988–89, 993 (noting that "a transfer is 'disposing of or parting with an asset …, *whether the mode is direct or indirect*" (emphasis in original)). The Seventh Circuit recognized that, because the debtor had caused the transaction to be structured in a way that hindered its creditors, the transaction was fraudulent—even though, technically, *the transferor* of the property at issue *was the buyer of the debtor's property*, not the debtor itself. To hold otherwise would "fundamentally misunderstand[] a basic precept of fraudulent-transfer doctrine: substance trumps form." *Id.* at 992–93.

Thus, recognizing that "[t]he sleight of hand on which the defendants now rely was the very means of the fraud," the court of appeals observed that, "[i]f anything, this is a textbook example of why the law of fraudulent transfer privileges substance over form." *Id*. at 993.[9]

In addition to conflicting with the Seventh Circuit's decision in *Continental Casualty*, the panel's decision also conflicts with this Court's decision in *In re Wettach*, 811 F.3d. There, the Court concluded that a debtor's employer's direct-deposit payment into an account owned by the debtor and his spouse was "precisely the type of indirect transfer" that was covered by Pennsylvania's Uniform Fraudulent Transfer Act. *Id.* at 114–15. That was so, the Court reasoned, because of the "broad scope" of the term "transfer," and because the debtor "exercised control over where his employer deposited his wages." *Id.* at 114. So too here: Venezuela—through its alter ego PDVSA—had control over PDVH's issuance of a dividend and thereby caused the transfer of more than $2 billion out of the country to evade creditors. In light of these conflicts, rehearing is warranted.

[9] Other courts considering DUFTA have reached similar conclusions. For example, in *Fields v. Three Cities Research, Inc.*, the District of Oregon held that the plaintiff's allegation that the debtor had "indirectly transferred the majority of its assets—[Subsidiary A's] stock—by approving the stock transaction between [Subsidiary A] and [Subsidiary B], with the intent to hinder, delay, or defraud plaintiff" was sufficient to state a DUFTA claim. 2004 WL 1173158, at *5 (D. Or. May 25, 2004).

C. Delaware Law Does Not Immunize Transfers Of Debtor Property Made With Actual Intent To Hinder Or Delay Creditors

No Delaware Supreme Court decision upholds a transfer of a debtor's assets made with actual intent to hinder or delay creditors. Nor has the Delaware Supreme Court addressed whether DUFTA recognizes a claim against a non-debtor transferor that transferred debtor assets at the debtor's direction with actual intent to hinder and delay the debtor's creditors. The four federal judges who have considered the question have split 2-2.

The panel majority predicted that the Delaware Supreme Court would hold that non-debtor transferors are not liable under DUFTA, but that prediction depends on a misapprehension of the Chancery Court cases on which the majority relied. For instance, the majority relied heavily on a single statement in *Edgewater Growth Capital Partners, L.P. v. H.I.G. Capital, Inc.*, 2010 WL 720150 (Del. Ch. Mar. 3, 2010): "By its own terms, the [] Fraudulent Transfer Act only provides for a cause of action by a creditor against debtor-transferors or transferees …." *Id.* at *2. In *Edgewater*, however, the Chancery Court also stated that the "proper defendants in a fraudulent transfer action under the [DUFTA] are the *transferor* or transferee of the assets at issue." *Id.* (emphasis added); *see also id.* at *1.

The question of non-debtor transferor liability was not before the Chancery Court in *Edgewater*. *See* Tr. 23:4–22. Rather, the *Edgewater* plaintiff had asserted

an aiding-and-abetting claim against *directors* of the transferor.[10] "[T]he complaint [did] not allege that any of the Director Defendants [were] transferors or transferees—the only classes of defendants against whom plaintiffs are expressly granted a cause of action under [DUFTA]." *Edgewater*, 2010 WL 720150, at *1. The panel majority overlooked that the Chancery Court's determination turned on the fact that the defendants were not *transferors*—not on the fact that the defendants were not *debtors*. *See id.* at *3. And the other decisions to which the majority looked also do not support its prediction that the Delaware Supreme Court would find that non-debtor transferors cannot be liable for debtor-directed fraudulent transfers.[11]

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[10] During oral argument, Crystallex made clear that it was "not alleging an aiding and abetting claim," Tr. 19:12–16, and PDVH "agree[d]" that Crystallex did not "use the words aiding and abetting" in its complaint, *id.* at 9:17–18.

[11] *See In re Wickes Tr.*, 2008 WL 4698477, at *7–8 (Del. Ch. Oct. 16, 2008) (plaintiff failed to establish that she was a creditor of the debtor); *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 203 (Del. Ch. 2006) ("fraudulent conveyance statutes ... have not been interpreted as creating a cause of action for 'aiding and abetting'" because "the only proper defendants ... are the transferor and any transferees"); *Spring Real Estate, LLC v. Echo/RT Holdings, LLC*, 2016 WL 769586, at *2–3 (Del. Ch. Feb. 18, 2016) (transferred assets were not property of the debtor); *In re Plassein Int'l Corp.*, 366 B.R. 318, 321 n.2, 326 (Bankr. D. Del. 2007) (transferred assets were not debtor property and actual intent was not alleged).

The same is true of the out-of-circuit cases that the majority cited, none of which involved claims against non-debtors that effectuated debtor-directed transfers. *See Folmar & Assocs. LLP v. Holberg*, 776 So.2d 112, 114, 117–18 (Ala. 2000) (no allegation that debtor directed transfer); *Ferri v. Powell-Ferri*, 2012 WL 3854425, at *4 (Conn. Super. Ct. July 30, 2012) (same); *In re Healthco Int'l, Inc.*, 201 B.R. 19, 21–22 (Bankr. D. Mass. 1996) (same).

Indeed, this Court elsewhere has taken a broad view of fraudulent-conveyance laws and held that non-debtor non-transferees were proper defendants in fraudulent conveyance actions. *See, e.g.*, *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206, 215–19 (3d Cir. 1990) (imposing constructive trust on debtor-transferor's shareholders who were neither debtor-transferors nor transferees).[12] By focusing solely on the debtor as the transferor, the majority's decision severely limits the "'broad latitude'" that courts long have had "to craft a remedy to 'put a creditor in the position she would have been in had the fraudulent transfer not occurred.'" *Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC*, 2014 WL 5192179, at *15 (Del. Ch. Oct. 10, 2014) (quoting *August v. August*, 2009 WL 458778, at *10 (Del. Ch. Feb. 20, 2009)).

In light of the above, Crystallex respectfully requests rehearing by the full Court. Given the potentially broad consequences of the panel's ruling, at a minimum, the Court should certify this question of fundamental importance to the Delaware Supreme Court to secure and maintain uniformity of decisions in this Court.[13]

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[12] The Seventh Circuit drew a similar conclusion in *Continental Casualty*. 817 F.3d at 992–93 (debtor's shareholders were liable for fraudulent transfer even though they were neither debtor-transferors nor transferees).

[13] *Cf. Kerns v. Dukes*, 153 F.3d 96, 100, 106–07 (3d Cir. 1998) (federal question turned on certified question "whose basic ingredients constitute a question of Delaware law").

II. THE MAJORITY OVERLOOKED OR MISAPPREHENDED SEVERAL POINTS OF LAW AND FACT

A. The Majority Overlooked Or Misapprehended Law And Facts Establishing That The Transfer Was Made "By The Debtor"

Despite finding that the transfer was made with actual intent to hinder Venezuela's creditors, the majority nevertheless determined that Crystallex had failed to state a claim against PDVH. In so doing, the majority not only departed from settled fraudulent-transfer law, as set forth above, but also overlooked or misapprehended Crystallex's numerous allegations demonstrating that PDVSA—Venezuela's alter ego—caused the transfer, which rendered the transfer one "by the debtor." *See* Op. 19 ("Nothing in the complaint suggests that Venezuela, the debtor, transferred an asset directly or indirectly."). As Crystallex noted in its opposition brief, Opp. 43 n.20, the complaint is replete with allegations that Crystallex's debtor directed the fraudulent transfer of assets:

- "Venezuela enlisted its alter ego PDVSA ... to extract as much value as possible from CITGO ... by orchestrating a series of debt offerings and asset transfers among PDVSA and its subsidiaries PDVH and CITGO Holding ... [and] then removing those funds from the United States," A-031 ¶ 7;
- "PDVSA directed its wholly-owned subsidiary PDVH to direct its wholly-owned subsidiary CITGO Holding to issue $2.8 billion in debt, almost all of which CITGO Holding then proceeded to transfer, without any consideration, to its immediate parent, PDVH, as a shareholder 'dividend,'" after which "PDVH paid its own 'dividend' equal to what it received from CITGO Holding to its immediate Venezuela-based and -owned parent, PDVSA]," A-031 ¶ 8;
- "Venezuela's alter ego, PDVSA, caused CITGO Holding to raise $2.8 billion in debt and execute a series of transactions that moved those debt

proceeds offshore as 'dividends' from CITGO Holding to PDVSA," A-062 ¶ 162; and

- "The debt proceeds were subsequently transferred from PDVH to PDVSA, which controls PDVH," A-062 ¶ 162(ii).

As the district court concluded, "[t]he only reasonable" interpretation of Crystallex's allegations is that Venezuela—acting through PDVSA—"order[ed]" and "orchestrated" PDVH's transfer of debtor property, which rendered the transfer one "made in every meaningful sense 'by a debtor.'" A-012.

Crystallex's allegations establish that its debtor indirectly transferred debtor property out of the United States. *See* Tr. 21:11–14, 22:1–9; Dissent 8. Indeed, it is difficult to imagine what an indirect transfer by a debtor would be if a debtor-directed transfer effectuated by a third-party transferor—as alleged here—does not meet that standard. *See In re Wettach*, 811 F.3d at 114–15 (direct-deposit payment into debtor's joint account was an indirect transfer within the scope of Pennsylvania's Uniform Fraudulent Transfer Act).

B. The Majority Overlooked Law And Facts Establishing That PDVH Also May Be Liable Directly As A Transferee

PDVH also may be liable under DUFTA in its capacity as transferee of the dividend from CITGO Holding, which Crystallex alleges was the first step in the series of transactions between CITGO Holding, PDVH, and PDVSA that ultimately resulted in the dividend to PDVSA. *See* Opp. 45–50. This Court and others have recognized the importance of looking at transactions in their entirety, rather than as

a series of piecemeal transfers. *See, e.g.*, *Voest-Alpine Trading USA Corp*., 919 F.2d at 211–12 (series of transactions undertaken to preclude creditors from reaching assets should be viewed as "a single, integrated transaction that functioned as a subterfuge"); *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1302–03 (3d Cir. 1986) (series of transactions, when viewed in the aggregate, combined to create a single fraudulent transfer); *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35 (2d Cir. 1993) ("In equity, substance will not give way to form ... where a transfer is only a step in a general plan, the plan must be viewed as a whole with all its composite implications." (internal quotations, alterations, and citations omitted)).

Here, viewing each step of the alleged fraudulent transfer in isolation, PDVH argued that it cannot be liable as a transferee because the property that it received from CITGO Holding technically was not property of the debtor. But the economic reality of the transfers makes abundantly clear that the property was at all times debtor property; it simply changed form—from PDVSA's shareholder equity (reflected on PDVH's books) to cash at PDVH to cash in the hands of PDVSA—during the transfer. *Cf. Cont'l Cas. Co.*, 817 F.3d at 992–93 (rejecting "formalistic argument" that money owed to debtor but paid to third parties was not debtor property). The majority overlooked Crystallex's argument that PDVH can be liable as a transferee because PDVH received assets of the debtor and thereby enabled PDVH to shield itself from liability by "the very means of the fraud." *Id.* at 993.

CONCLUSION

For the foregoing reasons, Crystallex respectfully requests that the Court grant rehearing.

Respectfully submitted,

/s/ Robert L. Weigel

Robert L. Weigel
Jason W. Myatt
Rahim Moloo
Gibson, Dunn & Crutcher LLP
200 Park Avenue
New York, New York 10166
Tel: (212) 351-4000
Fax: (212) 351-4035

and

Raymond J. DiCamillo
Jeffrey L. Moyer
Travis S. Hunter
Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Tel: (302) 651-7700
Fax: (302) 651-7701

Attorneys for Appellee

Dated: January 17, 2018

LOCAL RULE 35.1 STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance, *i.e.*, whether a non-debtor transferor that, at the direction of a foreign sovereign debtor, transfers the debtor's property with actual intent to hinder, delay, or defraud the debtor's creditors is liable under the Delaware Uniform Fraudulent Transfer Act where longstanding Delaware law, prior Third Circuit law, and an authoritative decision from the Seventh Circuit indicate that the answer should be yes but the panel majority found that the answer is no.

/s/ Robert L. Weigel
Robert L. Weigel

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This Petition complies with the type-volume limitation of Federal Rules of Appellate Procedure 32, 35, and 40, because it contains no more than 3,900 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

2. This Petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: January 17, 2018

/s/ Robert L. Weigel
Robert L. Weigel

CERTIFICATE OF SERVICE

I, Robert L. Weigel, hereby certify that I caused the foregoing to be filed via the Court's CM/ECF system and served on counsel of record by CM/ECF on January 17, 2018.

Dated: January 17, 2018

/s/ Robert L. Weigel
Robert L. Weigel

CERTIFICATE OF BAR MEMBERSHIP, DIGITAL SUBMISSION AND ANTI-VIRUS SCAN

I hereby certify that at least one of the attorneys whose names appear on the Petition is a member of the bar of this court.

I further certify that no privacy redactions were necessary for this filing. I have scanned for viruses the Portable Document Format version of the attached document using Symantec Endpoint Protection (version 14), and according to that program, the document was free of viruses.

Dated: January 17, 2018

/s/ Robert L. Weigel
Robert L. Weigel