PUBLIC

Court File No. CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

CRYSTALLEX INTERNATIONAL CORPORATION

Applicant

MOTION RECORD
OF CRYSTALLEX INTERNATIONAL CORPORATION
(May 4, 2021)

April 28, 2021

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PUBLIC

Court File No. CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

CRYSTALLEX INTERNATIONAL CORPORATION

Applicant

I N D E X

Court File No. CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CRYSTALLEX INTERNATIONAL CORPORATION

CRYSTALLEX INTERNATIONAL CORPORATION

Applicant

NOTICE OF MOTION

TAKE NOTICE THAT the Applicant, Crystallex International Corporation ("**Crystallex**" or the "**Company**") will make a motion before Mr. Justice Hainey on Tuesday, May 4, 2021 at 10:00 a.m., or as soon thereafter as the motion can be heard, by way of videoconference due to the COVID-19 crisis via Zoom at Toronto.

PROPOSED METHOD OF HEARING:

The motion is to be heard orally.

THE MOTION IS FOR AN ORDER:

(a) to the extent necessary, abridging the time for, and validating the service of the motion such that it is properly returnable on May 4, 2021;

(b) extending the Stay Period as defined in the Initial Order until November 5, 2021;

(c) approving Crystallex entering into the Fifteenth Credit Agreement Amendment (as defined below) and approving the terms of such agreement including the extension of the maturity of Crystallex's obligations under the DIP Credit Agreement (as defined below);

(d) that the DIP Charge (as defined below) and the Lender Additional Compensation Charge (as defined below) shall secure all obligations under the DIP Credit Agreement as amended by the Fifteenth Credit Agreement Amendment;

(e) that certain un-redacted materials in connection with this motion be filed under a sealing order and not form any part of the public record in this proceeding; and

(f) such further and other Orders as counsel may request and this Court may permit.

THE GROUNDS FOR THE MOTION ARE:

A. Background

1. On December 23, 2011, an order (the "**Initial Order**") was made granting Crystallex protection from its creditors under the Companies' Creditors Arrangement Act (the "**CCAA Proceeding**"). Pursuant to the Initial Order, Ernst & Young Inc. was appointed as the monitor (the "**Monitor**"). Crystallex subsequently obtained an order of the United States Bankruptcy Court (the "**US Bankruptcy Court**") for the District of Delaware on December 28, 2011, recognizing this CCAA Proceeding as a foreign main proceeding;

2. The Initial Order granted the Stay Period against Crystallex, which was most recently extended by Order of the Court on November 6, 2020 to May 7, 2021;

3. Crystallex previously engaged in the business of exploring and developing the Las Cristinas gold project in Venezuela until 2011 when the Venezuelan government expropriated the mine and purported to terminate the mining operation contract that gave rise to the Company's mining rights;

4. The Company arbitrated the matter before an arbitral tribunal under the Additional Facility of International Centre for the Settlement of Investment Disputes of the World Bank (the "**ICSID**") against Venezuela. On April 4, 2016, after five years of arbitration, the tribunal released its decision and final award, ruling that Venezuela was obliged to pay damages to Crystallex in the amount of US$1.202 billion, plus interest (the "**Award**"). The Award was the single largest ICSID award ever issued at the time;

B. Update Regarding Crystallex's Efforts with Respect to the Award

5. Crystallex developed and implemented a dual-track strategy for enforcement of the Award, while concurrently pursuing a negotiated resolution with Venezuela. Three primary initiatives in this regard include: (i) the pursuit of recognition and enforcement of the Award against Venezuela in the United States; (ii) the extension of enforcement efforts against Venezuela to its national oil company, Petroleos de Venezuela, S.A. (“**PDVSA**”) on the basis that it is the *alter ego* of Venezuela, and (iii) the pursuit of a negotiated settlement with Venezuela;

(i) Enforcement of the Award

6. On March 25, 2017, the United States Federal Court for the District of Columbia confirmed the Award and a formal judgment was entered in Crystallex's favour in the amount of approximately U.S.$1.4 billion (the "**Judgment**");

7. Crystallex registered the Judgment in the United States District Court for the District of Delaware (the "**Delaware Court**") and sought to execute the Judgment against PDVSA's shares in its subsidiary PDV Holding, Inc. ("**PDVH**"), which indirectly owns the shares in the American oil company, CITGO Petroleum Corp. On August 9 and 23, 2018, the Delaware Court issued an order authorizing the attachment of the shares of PDVH (the "**Writ of Attachment**"), which order was affirmed by the United States Court of Appeals for the Third Circuit (the "**Third Circuit**", and the "**Third Circuit Decision**");

8. This represents significant progress in the Company's enforcement efforts; both the Judgment and the Writ Order are now final;

(iii) Settlement with Venezuela

9. In November 2017, Crystallex and Venezuela settled all of the outstanding issues between the parties, which was subsequently amended pursuant to an Amended and Restated Settlement Agreement dated September 10, 2018 (the "**Amended Settlement Agreement**") and approved by this Court on September 17, 2018;

10. Pursuant to the Amended Settlement Agreement, Venezuela agreed to make an initial payment in cash or securities with a market value equal to $425,000,000, which was received by November 2018;

11. No further payments required under the Amended Settlement Agreement have been received and Venezuela and PDVSA remains in breach of that, and other terms of the Amended Settlement Agreement;

12. As a result, Crystallex has continued to pursue its enforcement strategy against Venezuela, including seeking to execute upon the Writ of Attachment and other efforts to enforce the Judgment;

13. As described in the Fung Affidavit (as defined herein), Crystallex has and intends to continue making significant progress on the enforcement of the Award, including execution on the Writ of Attachment, during the requested Stay Period. The Company's continued success in such efforts is necessary to permit Crystallex to ultimately make distributions to its stakeholders in accordance with the Court-approved waterfall;

C. Extension of the Stay Period

14. The current Stay Period expires on May 7, 2021. Crystallex seeks an extension of the Stay Period until November 5, 2021 to permit Crystallex sufficient time to continue to pursue its strategies to retain and maximize stakeholder value;

15. Crystallex has been operating in good faith and with due diligence, including its efforts to monetize the Award and to resolve various stakeholder issues and will continue to operate in good faith and with due diligence during the proposed Stay Period extension, if such extension is granted by the Court;

16. Crystallex requests that the Stay Period be extended to November 5, 2021 and does not believe that any stakeholder would be materially prejudiced if the Stay Period was so extended;

D. DIP Credit Agreement Maturity Extension and Amendment

17. Crystallex is party to a financing agreement dated as of April 23, 2012 (as amended, the "**DIP Credit Agreement**") with Tenor Special Situation I, LP (the "**DIP Lender**");

18. On April 16, 2012, the Honourable Mr. Justice Newbould made an Order (the "**DIP Order**") granting: (i) a charge on the property of Crystallex to secure obligations under the DIP Credit Agreement and related documents (the "**DIP Charge**"); and (ii) a charge on the property of Crystallex to secure other obligations payable to the DIP Lender under the DIP Credit Agreement (the "**Lender Additional Compensation Charge**");

19. The Maturity Date under the DIP Credit Agreement is currently May 7, 2021, or the expiry of the Stay Period, if earlier;

20. In light of the impending Maturity Date under the DIP Credit Agreement, the parties intend to enter into an agreement, subject to Court approval, on the terms of a further extension and amendment to the DIP Credit Agreement (called the "**Fifteenth Credit Agreement Amendment**"), which will provide Crystallex with an extension of the Maturity Date until November 5, 2021 or the expiry of the Stay Period, if earlier;

21. Crystallex believes the terms of the Fifteenth Credit Agreement Amendment are fair, reasonable, and appropriate. The Fifteenth Credit Agreement Amendment and the extension of the Maturity Date and continued availability of the DIP facility will allow

Crystallex, with the continued support of the DIP Lender, to continue to pursue its dual-track strategy and monetize the Award and advance the threshold matters relating to distributions to its creditors;

22. Further, the DIP Lender has once again agreed to extend the impending Maturity Date without requiring the payment of any extension or amendment fee;

E. Crystallex's Cash Flow Forecasts

23. The Company's cash flow forecasts in connection with this motion have been filed separately and will be subject to the protective sealing order, if granted. The Company's obligations during the proposed Stay Period relate almost entirely to professional fees, including strategic initiatives related to the enforcement and monetization of the Award and threshold matters that affect distributions;

F. Request for Sealing Order

24. Crystallex is requesting that the unredacted version of the Fung Affidavit and the Monitor's Thirty-Sixth Report be filed under a protective sealing order (collectively, the "**Confidential Materials**") and not form any part of the public record in this proceeding. The Confidential Materials disclose details of the Company's enforcement and monetization strategy (the "**Strategic Information**") and certain key financial information (the "**Financial Information**"), the disclosure of which at this time would affect the success of its enforcement and recovery strategies in relation to the Award. Crystallex and its stakeholders will suffer significant harm if the Confidential Information is made public at this time;

25. Subject to approval of this Court, the parties have agreed to (a) a sealing of the Strategic Information, and (b) a temporary sealing of the Financial Information until the issue of sealing the Financial Information is determined on a motion at a date to be scheduled by the Court;

G. Other

26. Sections 11.02 and 23 of the CCAA.

27. The *Rules of Civil Procedure*, including rules 1.04(1), 37.01 and 37.02(1).

28. Such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(a) the Affidavit of Robert Fung sworn April 27, 2021 (the "**Fung Affidavit**");

(b) the Thirty-Sixth Report of the Monitor; and

(c) such further and other materials as counsel may advise and this Court may permit.

April 27, 2021

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TO: ATTACHED SERVICE LIST

IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

Crystallex International Corporation **Applicant**

Commercial List File No: CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

NOTICE OF MOTION

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AND IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

CRYSTALLEX INTERNATIONAL CORPORATION

Applicant

AFFIDAVIT OF ROBERT FUNG
Sworn April 27, 2021

I, Robert Fung, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am the Chairman and CEO of Crystallex International Corporation ("**Crystallex**" or the "**Company**"). I have also been a director of Crystallex since 1996, Chairman of the Board of Directors of Crystallex since 1998 and CEO since June 2008. As such, I have knowledge of the matters to which I hereinafter depose, which knowledge is either personal to me, obtained from a review of the documents to which I refer, or, where indicated, based on information and belief, in which case I verily believe such information to be true.

OVERVIEW

2. This Affidavit is sworn in support of a motion by Crystallex for an Order, among other things:

(a) extending the Stay Period (as defined in the Initial Order (defined below)) until November 5, 2021;

(b) approving Crystallex entering into the Fifteenth Credit Agreement Amendment (as defined below) and approving the terms of such agreement including the extension of the maturity of Crystallex's obligations under the DIP Credit Agreement (as defined below);

(c) that the DIP Charge (as defined below) and the Lender Additional Compensation Charge (as defined below) shall secure all obligations under the DIP Credit Agreement as amended by the Fifteenth Credit Agreement Amendment; and

(d) that certain un-redacted materials in connection with this motion be filed under a sealing order and not form any part of the public record in this proceeding.

3. On December 23, 2011, an order (the "**Initial Order**") was made granting Crystallex protection from its creditors under the *Companies' Creditors Arrangement Act* (the "**CCAA Proceeding**"). Pursuant to the Initial Order, Ernst & Young Inc. was appointed as the monitor (the "**Monitor**"). Crystallex subsequently obtained an order of

the United States Bankruptcy Court for the District of Delaware on December 28, 2011, recognizing this CCAA Proceeding as a foreign main proceeding.

4. Crystallex's only asset is an award of USD $1.202 billion, plus interest, rendered by the World Bank's International Centre for the Settlement of Investment Disputes ("**ICSID**") against the government of Venezuela (the "**Award**"), and the proceeds recovered on account of the Award. The Award was rendered on April 4, 2016 in respect of Venezuela's expropriation from Crystallex of its rights to the Las Cristinas gold mine.

5. In the more than five years since the Award was granted, Crystallex has been engaged in complex legal proceedings aimed at enforcing or otherwise realizing the value of the Award, in the face of opposition from large, well-funded adversaries, two competing government regimes in Venezuela (being the Nicolas Maduro-led government and the opposition government led by Juan Guaido), and against the backdrop of an ever changing geopolitical landscape that includes obstacles to enforcement created by the United States government. Successful enforcement on the Award has required and will continue to require careful and thoughtful legal planning and execution.

6. The Company's success in enforcing the Award is the single most important issue in this CCAA Proceeding, Crystallex's success on this front will dictate its ability to repay the DIP obligations and provide any meaningful recovery to its stakeholders. As described in detail herein, since the last extension of the Stay Period, Crystallex has continued to make significant progress in its enforcement efforts. [redacted]

[redacted]

Crystallex believes that sealing of certain financial and strategic information remains necessary to prevent these harms and ensure that the Company can successfully complete its enforcement on the Award for the benefit of all of its stakeholders.

7. Crystallex has been operating in good faith and with all due diligence in this CCAA Proceeding, including to monetize the Award and to resolve various stakeholder issues. With all of the progress Crystallex has achieved to date, and its ongoing efforts that are described herein, the Company has sought a further extension of the Stay Period, and accompanying relief.

8. This Affidavit is divided into two parts. The first part will update this Court on the Company's ongoing enforcement efforts with respect to the Award and this CCAA Proceeding. The second part of this Affidavit will address the relief sought and the basis for such relief.

PART I - UPDATE

A. UPDATE ON SETTLEMENT AND ENFORCEMENT EFFORTS WITH RESPECT TO THE AWARD

9. As described in previous Affidavits filed in this CCAA Proceeding and in the reports of the Monitor, Crystallex, in consultation with the Monitor, developed and

implemented a dual-track strategy for a negotiated resolution with Venezuela and enforcement of the Award. These efforts continue in a meaningful way for the benefit of the Company's stakeholders and are set out in detail below.

(i) Settlement with Venezuela

10. As described in my previous Affidavits filed in this CCAA Proceeding, in November 2017, Crystallex concluded a settlement agreement with Venezuela (the "**Settlement Agreement**"), the terms of which were unfulfilled. The parties later reached an Amended and Restated Settlement Agreement dated September 10, 2018 (the "**Amended Settlement Agreement**"), which was approved by this Court on September 17, 2018.

[redacted]Pursuant to the Amended Settlement Agreement, Venezuela agreed to make an initial payment in securities or cash with a combined market value equal to U.S.$425,000,000 (the "**Initial Payment**"). The Initial Payment was received in securities (the "**Initial Payment Securities**") and cash. As will be discussed below, the Initial Payment Securities do not represent a good prospect of recovery for the Company's stakeholders at this time because they cannot be liquidated[redacted]

(ii) Enforcement of the Award

12. On March 25, 2017, the United States Federal Court for the District of Columbia confirmed the Award and entered judgment in Crystallex's favour in the amount of approximately U.S.$1.4 billion (the "**Judgment**"), which became final and binding in the United States in 2019.

13. As part of its enforcement efforts, Crystallex registered the Judgment in the United States District Court for the District of Delaware (the "**Delaware Court**") and thereafter obtained orders (collectively, the "**Writ Order**") declaring that Petroleos de Venezuela, S.A. ("**PDVSA**"), Venezuela's national oil company, was the alter ego of Venezuela. The Writ Order authorized the attachment (the "**Writ of Attachment**") of PDVSA's shares in its U.S. subsidiary PDV Holding, Inc. ("**PDVH**" and the "**PDVH Shares**"), which controls CITGO Petroleum Corp. ("**CITGO**"). CITGO is an American oil company and Venezuela's largest overseas asset, valued at billions of dollars.

14. In July 2019, the United States Court of Appeals for the Third Circuit (the "**Third Circuit**") affirmed the Writ Order finding that PDVSA was an alter ego of Venezuela and authorizing the Writ of Attachment and Venezuela's appeal of that decision was ultimately denied on May 18, 2020. This represented significant progress in the Company's enforcement efforts; both the Judgment and the Writ Order are now final.

15. On May 22, 2020, Judge Stark of the Delaware Court, among other things, (a) directed PDVH to answer the Writ of Attachment, and (b) ordered simultaneous briefing on the sale process for the PDVH Shares and any motion to quash the Writ of

Attachment, which Venezuela, PDVSA or any other party[1] wished to raise in response. As part of his Order, Judge Stark specifically invited the U.S. government to provide its views on the matters before the Delaware Court (the "**CITGO Litigation**").

16. In response, Venezuela, PDVSA, PDVH and CITGO[2] (collectively, the "**Venezuela Parties**") requested Judge Stark to quash the Writ of Attachment (the "**Motion to Quash**") and asked the Delaware Court to revisit the alter-ego determination on the basis that the circumstances underlying the Writ Order have changed (the "**Rule 60 Motion**" and together with the Motion to Quash, the "**Opposition Motions**"), which the Company vigorously opposed.

17. On January 14, 2021, Judge Stark issued an order (the "**January Order**") denying the Opposition Motions and granting, in part, the Company's motion for an Order approving the process for the sale of the PDVH Shares. The January Order and opinion of Judge Stark (the "**January Opinion**") also dated January 14, 2021, are attached as **Exhibit "A"** to my Affidavit.

18. The Venezuela Parties filed notices of appeal of the January Order and moved the Delaware Court for a stay pending resolution of their appeal before the Third Circuit. On March 19, 2021, the Delaware Court denied the requested stay with the result that the sale process for the PDVH Shares could proceed as ordered by the January

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1 The current intervenors are BlackRock Financial Management Inc. and Contrarian Capital Management L.L.C. (holders of PDVSA 2020 Bonds); Rosneft Trading S.A. (holder of a 49.9% interest in CITGO as collateral for a loan to Venezuela); PDVH and CITGO.

2 All references to Venezuela, PDVSA, PDVH and CITGO throughout this Affidavit in the context of the CITGO Litigation after January 23, 2019 refer to Venezuela, PDVSA, PDVH and CITGO represented through the Guaido Government (defined below).

Order while Venezuela's appeal is waiting to be heard by the Third Circuit. On April 6, 2021, the Company moved to dismiss the Venezuela Parties' appeals for lack of appellate jurisdiction. That motion is currently pending. A schedule for hearing the appeals and/or the motion to dismiss has not yet been set by the Third Circuit. [redacted]

19. The January Opinion and the January Order represent a significant achievement for the Company's enforcement efforts for two reasons. First, by denying the Opposing Motions, Judge Stark has eliminated yet another attempt by the Venezula Parties to frustrate the Company's efforts to realize on the PDVH Shares. Second, Judge Stark established some of the parameters of the sales procedures (the "**Sales Procedures**") that the Delaware Court will follow in conducting a sale of the PDVH Shares and expressed the intent to advance a sale of the PDVH Shares to the maximum extent that can be accomplished absent a license from Office of Foreign Assets Control ("**OFAC**") (which license requirement is described below in paragraph 29 of my Affidavit). Among other things, the January Opinion established the following in connection with such Sales Procedures:

(a) the day-to-day implementation of the Sales Procedures will be overseen by a special master appointed by the Delaware Court;

(b) the Delaware Court will set minimum requirements for the Sales Procedures;

(c) Crystallex will be permitted to credit bid the debt owing under the Judgment and its priority status will not be affected by the Sale Procedures;

(d) the process will result in the sale of as many, but only as many, PDVH Shares as are necessary to satisfy the Judgment; and

(e) the Venezuela Parties will have an opportunity to be involved in the process but they will not be running the Sales Procedures.

20. While the January Opinion set out the general parameters for the Sales Procedures, Judge Stark, recognizing that more detailed procedures would be needed before a sale of the PDVH Shares could occur, ordered the parties[3] to submit proposals for how the Delaware Court should proceed to establish the finer details of the Sales Procedures and identifying a special master.

21. In response to the January Order, the parties presented the Court with three candidates for the special master position and on April 14, 2021, Judge Stark made an order appointing Robert B. Pincus as special master (the "**Special Master**") to oversee the Sales Procedures. Mr. Pincus is an attorney who practiced at Skadden, Arps, Slate, Meagher & Flom LLP and specialized in mergers and acquisitions until his retirement in 2018. As part of his order, Judge Stark required the Special Master to work with the

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[3] On the issue of the Sales Procedures, the Delaware Court also received and continues to receive, input from Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V., who each are non-parties but have similar enforcement proceedings before the Delaware Court.

parties to submit a proposed order, no later than April 30, 2021, setting out arrangements for how the Special Master will be paid for his time and expenses, and a deadline for when Mr. Pincus must submit a proposed Sales Procedures order.

B. RECENT EVENTS RELEVANT TO THE COMPANY AND THE AWARD

22. Although the Judgment and Writ Order are now final and there has been significant progress in the Delaware Court regarding the sale of the PDVH Shares, there continue to be a number of factors that create significant uncertainty and may impact the ability of Crystallex to monetize the Award. These include:

(i) Competing government regimes in Venezuela;

(ii) U.S. policy with respect to Venezuela;

(iii) CITGO's uncertain future; and

(iv) Venezuela's financial and humanitarian crisis.

These are discussed in detail in the following paragraphs.

(i) The Competing Government Regimes in Venezuela

23. There continues to be a question of who constitutes the legitimate government of Venezuela and who may act on behalf of that country with respect to any discussions with Crystallex; President Nicolas Maduro or Juan Guaido, the former President of the National Assembly (the "**Guaido Government**").

24. Venezuelan National Assembly elections were held on December 6, 2020 and while Juan Guaido and other opposition parties denounced the election as

illegitimate, Maduro was the ultimate victor with 90% of seats now controlled by Maduro allies. Now, the parliamentary majority that was the basis for Guaido's claim to power as President of the National Assembly has expired. The shift in legislative power away from the Guaido-led opposition marks a consolidation of power for Maduro domestically and leaves open the question of what, if any, authority Juan Guaido has to make decisions on behalf of Venezuela.

25. The United Nations, Russia, China, among others, continue to recognize the Maduro regime as the legitimate government of Venezuela. Relatively few of the nearly 60 governments that previously recognized Guaido as Interim President still do – though the United States and Canada still consider Venezuela's legitimate head of state to be Juan Guaido. The European Union's 27 states had previously supported the Guaido Government. However, on January 6, 20201, after Guaido lost the National Assembly elections these states said they could no longer legally recognize Guaido as the Interim President, and instead has characterized him as a "privileged interlocutor" (notwithstanding that the European Union did not recognize the elections as legitimate). Attached to my Affidavit as **Exhibit "B"** are articles from the Wall Street journal, CNN and Reuters describing Guaido's political situation.

[redacted]

[redacted]

(ii) U.S. Policy Towards Venezuela

28. As discussed in my Affidavit dated October 28, 2020 (the "**October Affidavit**"), the Trump Administration manifested its support for the Guaido Government through participation in the ongoing CITGO Litigation and the imposition of broad sanctions (the "**Sanctions**") on Venezuela's economy and government, most notably on its crucial oil sector, to try and force Maduro to cede power.

29. [redacted] As previously disclosed to this Court, Crystallex has submitted its application for a specific license authorizing the sale of the PDVH Shares and is awaiting OFAC's decision.

30. Since taking office, the Biden Administration has also expressed its support for Guaido and denounced Maduro as a dictator. While the Biden Administration has

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4 Including by way of an executive order made on August 5, 2019 entitled "Blocking Property of the Government of Venezuela".

been a vocal supporter of the Guaido Government [redacted]

31. In a March 8, 2021 press briefing, a transcript of which is attached as **Exhibit "C"** to my Affidavit, an official from the Biden Administration indicated their willingness to review the Sanctions when they stated:

> [...] we're going to review the sanctions to make sure that they are effective because the focus of sanctions should be to increase pressure on the regime, eliminate any sort of access to corrupt capital to sustain themselves, and — but also not one to — that penalizes and punishes unnecessarily the Venezuelan people in the country.

[redacted]

(iii) CITGO's Uncertain Future

33. As previously disclosed to this Court, PDVSA pledged a 50.1% interest in its CITGO Holding shares to secure their bonds due in 2020 (the "**2020 Bonds**"). The 2020 Bonds are in default owing to the failure by PDVSA to make a US$913 million payment due on October 28, 2019, placing the holders of the 2020 Bonds (the "**2020 Bondholders**") in competition with the Company for the control of the sale of the ownership of CITGO. The 2020 Bondholders however, like Crystallex, are currently prohibited by the Sanctions from enforcing on their debt. OFAC initially granted a license ("**General License 5**") that authorized the 2020 Bondholders to sell the CITGO shares but General License 5 was superseded most recently on December 23, 2020 by General

License 5F, which prevents the holders of the 2020 Bonds from engaging in any transactions relating to the sale or transfer of the CITGO shares until July 21, 2021.

[redacted]

(iv) Venezuela's Financial and Humanitarian Crisis

35. As discussed in my previous affidavits, Venezuela has been in the midst of a severe humanitarian and economic crisis for several years, which has been worsened significantly by ongoing political turmoil. As discussed in the articles found at Exhibit "A", a third of Venezuelans cannot access three meals a day, inflation in Venezuela is near 2,000% and some estimates say that the economy contracted by 23% in 2020 after shrinking 40% a year earlier. The humanitarian, health and economic challenges are further complicated because of the significant ongoing leadership conflict between Maduro and Guaido, more particularly described above. This emergency has become much more intense because COVID-19 has reduced global economic activity and resulted in collapsing oil prices, which has grave consequences for Venezuela as a country that relies heavily on oil.

36. The humanitarian and economic crises in Venezuela complicate the Company's recovery efforts for a number of reasons. [redacted]

C. NEXT STEPS

(i) Enforcement Efforts

[redacted]

[redacted]

(ii) Taxes

38. The DIP Credit Agreement contains several key provisions that relate to procedures for Crystallex's tax determination, reporting and filing obligations as well as the priority and timing of any payments to Canada Revenue Agency ("**CRA**"). As described in my prior affidavits sworn in this CCAA Proceeding, under the second step of the Waterfall contained in the DIP Credit Agreement, Crystallex is required "to pay any taxes, payable or required to be withheld by the Borrower or by any government in respect of the settlement, judgment or collection in relation to the Arbitration Proceeding...". As required pursuant to the DIP Credit Agreement, Crystallex engaged leading Canadian accounting and legal tax professionals (the "**Tax Advisors**") to advise Crystallex with respect to (a) the amount of taxes that must be paid or withheld in respect of the Award, prior to the Company making any distributions under the subsequent steps of the Waterfall, and (b) the characterization of the Award by Crystallex in any tax return filed.

39. Based on the detailed advice of its Tax Advisors, and in compliance with the terms of the DIP Credit Agreement, the Company (in consultation with the Monitor, the DIP Lender and the ad hoc committee of the holders of the Company's 9.375% Notes (the "**Ad Hoc Committee**")) filed its tax returns on August 7, 2020 (the "**Tax Filing**").

40. Following the Tax Filing, Crystallex, through its counsel and with the involvement of the Monitor, has been engaging with CRA to address their inquiries and ultimately seek comfort with respect to the tax return filed by Crystallex. The Company continues to update counsel for the DIP Lender and the Ad Hoc Committee on its discussions and progress with CRA.

(iii) Mediation

41. On January 27, 2020, the Company, the DIP Lender and the Ad Hoc Committee were directed by Justice Hainey to mediate their disputes. The mediation remains ongoing.

42. The Company remains optimistic that the mediation will allow the parties to resolve their disputes and avoid the need for lengthy and costly litigation before this Court. The Company intends to continue to mediate in good faith.

PART II – RELIEF SOUGHT

D. REQUEST FOR A SEALING ORDER

43. As part of this Motion, Crystallex is requesting that the following materials be filed under a sealing order:

(a) the unredacted motion record of the Company, including the unredacted version of this Affidavit; and

(b) the unredacted version of the Monitor's Thirty-Sixth Report,

(collectively, the "**Confidential Materials**").

44. The information (the "**Confidential Information**") that the Company seeks to redact in the Confidential Materials generally falls into two categories: (a) certain limited financial information of the Company, including the Company's current cash balance (the "**Financial Information**"), and (b) descriptions of the Company's monetization and enforcement strategy, including views and predictions by Crystallex about positions taken by Venezuela, competing creditors and the U.S. government (the "**Strategic Information**").

45. I understand from my counsel Natalie Renner at Davies that, similar to the approach taken in November 2020, the Company, DIP Lender and Ad Hoc Committee have agreed, subject to the approval of the Court, to a sealing of the Strategic Information and a temporary sealing of the Financial Information, with the sealing issue on the Financial Information to be determined on a motion at a date to be scheduled by the Court (the "**Sealing Motion**"). The parties have agreed on a litigation timetable to address the Sealing Motion, if necessary. As such, the Company is seeking an order to seal the Confidential Materials, and in the case of the Financial Information until the determination of the Sealing Motion.

46. Crystallex and its stakeholders will suffer significant and irreparable harm if the Confidential Information is made public. The detailed and specific harms that would be caused by the disclosure of the Confidential Information is described herein and as set forth in Confidential Appendix I to my October Affidavit as applicable, which I incorporate and adopt in this affidavit. I will provide further and updated evidence in support of sealing the Financial Information in connection with any future Sealing Motion, if necessary.

E. EXTENSION OF THE STAY

47. The Initial Order granted a stay of proceedings against Crystallex and its directors and officers during the Stay Period, which was most recently extended by Order of the Court on November 3, 2020 until May 7, 2021.

48. Crystallex seeks an extension of the Stay Period until November 5, 2021 to allow the Company to remain focused on continuing its enforcement steps and efforts (including the sales procedures), while also dealing with an uncertain and volatile situation in Venezuela and with PDVSA.

49. The Company has made significant progress since the last extension of the Stay Period in advancing the monetization of the Award [redacted]

50. Crystallex believes that a six-month Stay Period is reasonable in the circumstances as it will provide the Company with time to continue to pursue the enforcement and monetization of the Award. After discussions with the Monitor, the Company has decided to seek an extension of the Stay Period entirely consistent with the last extension of the Stay Period of six months. The Company understands that the DIP Lender has also consented to a six month extension of the Stay Period.

51. Finally, the Company will continue to work with the Monitor, the DIP Lender and its other principal stakeholder groups during the Stay Period to continue to respond to information requests or provide updates, as may be appropriate, and to continue to mediate the various issues between the parties in good faith.

52. I believe that Crystallex has acted, and continues to act, in good faith and with due diligence and will continue to do so during the proposed Stay Period extension, if such extension is granted by the Court.

53. In the circumstances, Crystallex requests that the Stay Period be extended to November 5, 2021 and does not believe that any stakeholder would be materially prejudiced if the Stay Period was so extended.

F. DIP CREDIT AGREEMENT MATURITY EXTENSION AND AMENDMENT

54. On April 16, 2012, Mr. Justice Newbould made an Order (the "**DIP Order**") approving a debtor-in-possession loan to the Company (the "**DIP Loan**") and : (i) a charge on the property of Crystallex to secure obligations under the DIP Credit Agreement and related documents; and (ii) a charge on the property of Crystallex to secure certain other obligations payable to the DIP Lender under the DIP Credit Agreement.

55. The last extension of the Maturity Date under the DIP Credit Agreement expires on May 7, 2021.

56. The Company and the DIP Lender have agreed, subject to Court approval, on the terms of a further extension and amendment to the DIP Credit Agreement (called the "**Fifteenth Credit Agreement Amendment**"), in substantially the form of agreement attached as **Exhibit "D"** to my Affidavit. The Fifteenth Credit Agreement Amendment would provide for an extension of the Maturity Date until November 5, 2021 or the expiry of the Stay Period, if earlier, and otherwise provides the same terms as recent previous extension and amendment agreements between the Company and DIP Lender and approved by the Court ("**Prior DIP Amendments**").

57. The effectiveness of the Fifteenth Credit Agreement Amendment is subject to the same conditions set forth in Prior DIP Amendments, including, among other things: (i) the entry of an order: (a) extending the Stay Period to November 5, 2021, without any conditions to such approval; and (b) approving the Fifteenth Credit Agreement Amendment and authorizing Crystallex to enter into the Fifteenth Credit Agreement Amendment and perform all of its obligations thereunder; and (ii) no motion, action, application or any other form of court process seeking an order has been filed, threatened in writing or pending that could be reasonably expected to, among other things: (a) adversely impair the DIP Lender's rights under the DIP Credit Agreement, orders made in connection therewith, or any other order or endorsement of this Court or the US Bankruptcy Court; or (b) interfere with Crystallex's efforts to monetize the Award or collect under the Amended Settlement Agreement.

58. The DIP Lender has agreed not to seek an extension fee or an amendment fee in connection with the form of Fifteenth Credit Agreement Amendment. Crystallex believes this is a material concession that will benefit its stakeholders and appreciates the DIP Lender's continued support of the Company. Crystallex believes the terms of the Fifteenth Credit Agreement Amendment are fair, reasonable, and appropriate.

59. The DIP Loan has been fully drawn and Crystallex is not relying on further advances thereunder during the requested Stay Period.

A. CRYSTALLEX'S CASH FLOW FORECASTS

60. The Company's cash flow forecasts in connection with this motion have been filed separately and will be subject to a protective sealing order, if granted. The cash flow forecasts show that the Company will have sufficient funds to meet its projected liquidity requirements throughout the requested extension of the Stay Period. The Company's disbursements during the proposed Stay Period relate almost entirely to professional fees, including for the Company's strategic initiatives related to asset preservation and enforcement and collection strategies in connection with the Award and its monetization and enforcement.

SWORN remotely by Robert Fung at the City of Toronto, in the Province of Ontario, before me on the 27th day of April, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.)

ROBERT FUNG

Natalie Renner
Commissioner for taking Affidavits

IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

Crystallex International Corporation Applicant

Commercial List File No: CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

AFFIDAVIT OF ROBERT FUNG
(Sworn April 27, 2021)

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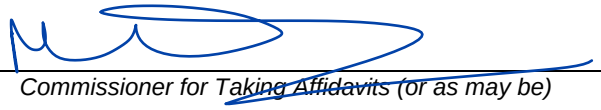
This is Exhibit “A” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on April 27, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORPORATION, Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Defendant.	:	C.A. No. 17-mc-151-LPS

ORDER

At Wilmington this **14th** day of **January, 2021**, **IT IS HEREBY ORDERED** that:

1. Petróleos de Venezuela, S.A., PDV Holding, Inc., and CITGO Petroleum Corporation's Motion to Quash the Writ of Attachment (D.I. 178) is **DENIED**.

2. Bolivarian Republic of Venezuela's Motion for Relief Under Federal Rule of Civil Procedure 60(b) (D.I. 183) is **DENIED**.

3. Crystallex International Corporation's Motion for an Order Approving the Process of Sale of Shares of PDV Holding, Inc. (D.I. 181) is **GRANTED IN PART** and **DENIED IN PART**.

4. With respect to the writ issued to Crystallex by operation of this Court's August 23, 2018 order (D.I. 95), the priority period of three years, established in 10 Del. C. § 5081, has been tolled at all times to date, and it will remain tolled until a further order of this Court permits Crystallex to begin to execute on the attached property.

5. The parties non-parties shall meet and confer and, no later than **January 22, 2021**, submit a joint status report, which shall include their proposal(s) for how the Court should

proceed with respect to determining the specific details of the sales procedures and identifying a special master to oversee the day-to-day and detailed implementation of the sales procedures.

UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORPORATION, Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Defendant.	:	C.A. No. 17-mc-151-LPS

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OPINION

January 14, 2021
Wilmington, Delaware

STARK, U.S. District Judge:

Crystallex International Corp. ("Crystallex") holds a $1.4 billion judgment against the Bolivarian Republic of Venezuela ("Venezuela" or "Republic"). Crystallex is seeking to collect on its judgment against Venezuela by executing on property nominally owned by the Republic's state-owned oil company, Petróleos de Venezuela, S.A. ("PDVSA"). The specific property Crystallex asks this Court to attach and eventually sell is PDVSA's shares of common stock of its wholly-owned subsidiary, PDV Holding, Inc. ("PDVH").

The extensive litigation that has occurred in this action to date has established (among other things) that PDVSA is the alter ego of Venezuela and that PDVSA's shares of PDVH stock are not immune from attachment or execution. The Court has also issued Crystallex's requested writ of attachment and ordered the United States Marshals Service to serve it on PDVSA. On an interlocutory appeal, the Court of Appeals for the Third Circuit affirmed this Court's findings, conclusions, and actions on these points. The Supreme Court then denied Venezuela's and PDVSA's petition for a writ of certiorari. Hence, the case is now proceeding here on remand from the Third Circuit.

Several motions are pending before the Court. The first is a motion filed by judgment debtor Venezuela pursuant to Federal Rule of Civil Procedure 60(b). (D.I. 183) Venezuela's Rule 60(b) motion seeks relief from the Court's orders of August 9 and 23, 2018, which authorized and directed the Marshal to serve a writ of attachment on PDVSA's shares of PDVH. By a separate motion, PDVSA, PDVH, and PDVH's indirect subsidiary, CITGO Petroleum Corp. ("CITGO" and, together with Venezuela, PDVSA, and PDVH, hereinafter "the Venezuela Parties"), seek to quash that writ of attachment. (D.I. 178)

Crystallex opposes the Venezuela Parties' motions. It has also filed a motion for an order of sale of the attached PDVH shares. (D.I. 181) The Venezuela Parties have submitted their

own proposed procedures for such a sale, in the event their motions to alter the judgment and/or quash the writ are denied. (D.I. 188) Nonparties Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. ("ConocoPhillips") – who are also judgment creditors of the Republic and are plaintiffs in their own actions pending in this Court[1] – have also submitted proposed procedures for how the Court should conduct the sale of PDVH shares. (D.I. 180) Additionally, the United States government filed a Statement of Interest ("Statement") providing its position on aspects of the various motions. (D.I. 212)

The Court received extensive briefing in connection with each of the motions. (*See, e.g.*, D.I. 179, 182, 196, 198-99, 201-02, 204, 206, 219-21, 223, 228-32) The Court also heard telephonic oral argument on two occasions: July 17 and September 17, 2020 (*see* July 17, 2020 Hrg. Tr. (D.I. 214) ("July Tr."); Sept. 17, 2020 Hrg. Tr. (D.I. 226) ("Sept. Tr.")).

For the reasons stated below, the Court will: (1) deny the Republic's Rule 60(b) motion; (2) deny the motion to quash the writ of attachment; and (3) grant in part Crystallex's motion for an order of sale. The Court sets out the contours of the process it will follow to conduct the sale of PDVH shares. While the parties will have an opportunity to provide additional input with respect to details of the sales procedures, the time has come for those procedures to be established and implemented to the greatest extent feasible under current circumstances.

BACKGROUND

Crystallex's decade-long collection efforts have been detailed in numerous prior opinions of this Court and the Third Circuit. *See, e.g.*, *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 333 F. Supp. 3d 380 (D. Del. 2018) ("*Crystallex Writ Op.*"), *aff'd*, 932 F.3d 126 (3d Cir. 2019) ("*Crystallex App. Op.*"). A brief summary will suffice for present purposes.

[1] *See Phillips Petroleum Co. Venezuela Ltd. v. Petróleos de Venezuela, S.A.*, No. 19-mc-342-LPS (D. Del.).

As Judge Ambro wrote for the Third Circuit in July 2019:

> Crystallex International Corp., a Canadian gold mining company, invested hundreds of millions of dollars to develop gold deposits in the Bolivarian Republic of Venezuela. In 2011, Venezuela expropriated those deposits and transferred them to its state-owned oil company, Petróleos de Venezuela, S.A. ("PDVSA"). To seek redress, Crystallex invoked a bilateral investment treaty between Canada and Venezuela to file for arbitration before the International Centre for Settlement of Investment Disputes. The arbitration took place in Washington, D.C., and Crystallex won; the arbitration panel awarded it $1.2 billion plus interest for Venezuela's expropriation of its investment. The United States District Court for the District of Columbia confirmed that award and issued a $1.4 billion federal judgment. Now Crystallex is trying to collect.
>
> Unable to identify Venezuelan-held commercial assets in the United States that it can lawfully seize, Crystallex went after U.S.-based assets of PDVSA. Specifically, it sought to attach PDVSA's shares in Petróleos de Venezuela Holding, Inc. ("PDVH"), its wholly owned U.S. subsidiary. PDVH is the holding company for CITGO Holding, Inc., which in turn owns CITGO Petroleum Corp. ("CITGO"), a Delaware Corporation headquartered in Texas (though best known for the CITGO sign outside Fenway Park in Boston).
>
> This attachment suit is governed by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (the "Sovereign Immunities Act"). Under federal common law first recognized by the Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983), a judgment creditor of a foreign sovereign may look to the sovereign's instrumentality for satisfaction when it is "so extensively controlled by its owner that a relationship of principal and agent is created." *Id.* at 629, 103 S.Ct. 2591.
>
> Interpreting *Bancec*, the District Court, per Chief Judge Stark, concluded that Venezuela's control over PDVSA was sufficient to allow Crystallex to attach PDVSA's shares of PDVH in satisfaction of its judgment against the country. PDVSA and Venezuela, along with PDVSA's third-party bondholders as *amici* (the "Bondholders"), challenge this ruling.
>
> Venezuela and the Bondholders do not substantially contest

> the District Court's finding that it extensively controlled PDVSA. Rather, they raise various jurisdictional and equitable objections to the attachment. Likewise, PDVSA primarily contends that its tangential role in the dispute precludes execution against its assets under *Bancec* irrespective of the control Venezuela exerts over it.
>
> We affirm the District Court's order granting the writ of attachment and remand for further proceedings consistent with this opinion.

Crystallex App. Op. at 132.

On October 1, 2019, the Third Circuit lifted its stay of this Court's proceedings. (D.I. 136) Thereafter, in November 2019, the Court held a status conference, with all parties to the instant action as well as the parties in other pending actions brought by judgment creditors of the Venezuela Parties. (*See* D.I. 141; *see also* D.I. 139 (joint status report)) On December 12, 2019, the Court issued a memorandum order that, among other things, stayed Crystallex's enforcement efforts until the conclusion of the Venezuela Parties' attempt to obtain Supreme Court review of the Third Circuit's decision. (*See* D.I. 154; *see also* D.I. 166 (modifying stay order)) On May 18, 2020, the Supreme Court denied the petition for a writ of certiorari that the Republic and PDVSA had filed. (*See, e.g.*, D.I. 167) The parties' subsequent disputes about how the Court should proceed culminated in the pending motions.

DISCUSSION

I. The Venezuela Parties' Attempts To Eliminate The Writ of Attachment

The Republic's Rule 60(b) motion asks the Court to vacate the writ of attachment that has been served on PDVSA, which holds shares of PDVH to be sold to satisfy Crystallex's judgment against Venezuela. At the same time, PDVSA, PDVH, and CITGO (the "PDVSA Parties") move for the Court to quash the writ of attachment. Together, the Venezuela Parties' attempts to eliminate the writ of attachment are predicated on new facts and circumstances, which

purportedly render the writ inequitable to maintain, and on new legal arguments that were not presented to the Court before it issued the writ. As the Court explains below, both motions lack merit and will be denied.

A. Venezuela's Rule 60(b) Motion

1. Legal Standards

Federal Rule of Civil Procedure 60(b) provides that a party may file a motion for relief from a final judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

A Rule 60(b) motion must be filed within a reasonable time, which for subsections (1), (2), and (3) is one year after the judgment being challenged. *See* Fed. R. Civ. P. 60(c)(1). A motion filed pursuant to Rule 60(b) is committed to the sound discretion of the district court guided by accepted legal principles as applied in light of all relevant circumstances. *See Pierce Assocs., Inc. v. Nemours Found.*, 865 F.2d 530, 548 (3d Cir. 1988). The burden to obtain relief under Rule 60(b) rests on the moving party, and it is a difficult standard to meet. *See generally Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991). This reality stems from the judicial system's "overriding interest in the finality and repose of judgments," which only "extraordinary" and "exceptional" circumstances can "overcome." *Mayberry v. Maroney*, 558 F.2d 1159, 1163-1164 (3d Cir. 1977).

2. The Parties' Contentions

The Republic moves for relief from the Court's August 9 and 23, 2018 orders – which authorized the writ of attachment and then ordered it to be issued and served – pursuant to Rule 60(b)(5) and 60(b)(6). In moving for relief, the Republic principally contends that changed circumstances relating to the relationship between Venezuela and PDVSA vitiate the Court's alter ego determination. According to the Republic, since August 2018, it has "resurrected and reinforced PDVSA's independence" as a company. (D.I. 184 at 5) Further, the Republic argues that one of the crucial predicates underpinning the Court's August 2018 orders – namely, that the government of President Nicolás Maduro exerts control over PDVSA – no longer remains true, for reasons including that the United States now recognizes Juan Guaidó as Interim President. According to Venezuela, Guaidó and the National Assembly have taken concrete steps to confirm PDVSA's independence from the Republic. (*Id.* at 9, 13) Relatedly, the Republic points to the U.S. government's 2019 amendment of sanctions it has imposed on Venezuela as rendering the prospective application of the writ issued by this Court no longer equitable. (*Id.* at 15-16) Finally, the Republic contends that continuing the attachment of its U.S.-based assets undermines U.S. efforts to help Venezuela mitigate its humanitarian crisis, restore democracy, and pay all of its many creditors in a fair and just manner. (*Id.* at 19-20)

Crystallex has multiple responses. With respect to Rule 60(b)(5), Crystallex contends that relief is not available to the Republic because the writ is a final legal remedy and not a prospective equitable remedy. (D.I. 199 at 1-2) In any event, according to Crystallex, maintaining the writ of attachment continues to be equitable under the circumstances. (*Id.* at 2) With respect to Rule 60(b)(6), Crystallex argues that the Republic has failed to identify any "exceptional circumstances" to justify relief. (*Id.* at 2-3) In Crystallex's view, a debtor

reforming practices after a court has imposed consequences for past bad behavior cannot be "exceptional" in this context. (*See id.*)

3. Rule 60(b)(5)

The Court agrees with Crystallex that the Republic has failed to show it is entitled to relief under Rule 60(b)(5). Venezuela has not demonstrated that prospective application of the writ is no longer equitable.

Rule 60(b)(5) authorizes relief from a "final judgment, order, or proceeding" where "applying it prospectively is no longer equitable." The rule "provides a means by 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) (internal quotation marks omitted). Rule 60(b)(5) permits modification of a judgment on equitable grounds, however, "only if it is 'prospective,' or executory." *Marshall v. Bd. of Educ.*, 575 F.2d 417, 425 (3d Cir. 1978). "[T]he class of judgments having prospective application" is "restricted to forward-looking judgments, such as injunctions and consent decrees." *Comfort v. Lynn Sch. Comm.*, 560 F.3d 22, 28 (1st Cir. 2009). Even then, relief is "limited . . . to injunctions and consent decrees that involve 'long-term supervision of changing conduct or conditions.'" *Id.* (quoting *Paul Revere Variable Annuity Ins. Co. v. Zang*, 248 F.3d 1, 7 (1st Cir. 2001)); *see also Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 272-273 (3d Cir. 2002) (distinguishing cases "involv[ing] injunctions or consent decrees regulating ongoing behavior" from cases in which party failed to make promised payments and "attempt[ed] to use its failure . . . to its own advantage").

The Republic's motion for relief under Rule 60(b)(5) fails, first, because the writ of attachment that the Court issued and had served on PDVSA is not the type of prospective or

executory order to which this Rule applies. Under Delaware law, the issuance of a writ of attachment is a "purely legal remedy" that represents a legal property interest. *Spoturno v. Woods*, 192 A. 689, 692 (Del. 1937). The attachment is not "prospective" in the sense in which that term is used in Rule 60(b)(5), even though it is a necessary precursor to a sale of shares that has not yet occurred and, plainly, will have some future effect. *See Marshall*, 575 F.2d at 425 n.27 ("A 'prospective' injunction envisions a restraint of future conduct, not an order to remedy past wrongs when the compensation payment is withheld from the beneficiaries until some subsequent date."); *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1139 (D.C. Cir. 1988) ("[T]he standard we apply in determining whether an order or judgment has prospective application within the meaning of Rule 60(b)(5) is whether it is 'executory' or involves 'the supervision of changing conduct or conditions.'"). While the Court will need to be involved in the sale of PDVSA's shares of PDVH, the Court's continuing role is merely to remedy the past wrong committed by the Republic by ensuring compensation for Crystallex; it is not the type of ongoing judicial oversight of future conduct to which Rule 60(b)(5) applies. *See, e.g.*, *Twelve John Does*, 841 F.2d at 1138 ("Virtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect; even a money judgment has continuing consequences, most obviously until it is satisfied . . . ."); *see also Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 125 (D.D.C. 2015) (finding *cy pres* provision of agreement analogous to unpaid damages but not "prospective" merely because it "le[ft] some administrative responsibilities to be executed").

The Court is denying Venezuela relief under Rule 60(b)(5) for the further reason that Venezuela has failed to show that continued application of the writ of attachment is no longer equitable. Instead, it would be inequitable to permit the Republic – an adjudicated judgment

debtor, which has acknowledged that it must pay Crystallex what it owes[2] and evidently has the means to do so (at least through sale of PDVSA's shares of PDVH) – to evade its obligation and, thereby, undermine the authority of the U.S. judicial system. As Crystallex observes, and as other courts have recognized, a party that is inequitably refusing to pay a final judgment of the U.S. courts will rarely (if ever) be able to obtain equitable relief for itself from those same courts. (*See, e.g.*, Sept. Tr. at 54 ("They simply do not want to pay, and they want our courts to aid them in evading our judgments."); *see also Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 128 (2d Cir. 2009) (faulting foreign defendants for refusing to comply with court orders and then having "the chutzpah to seek post-judgment, equitable relief from complying with those orders"))

In reaching these conclusions about the equities, the Court is not holding that real-world facts or legal consequences are (to borrow the Republic's terminology) "frozen in amber." (*See, e.g.*, July Tr. at 14; Sept. Tr. at 28-29) Instead, the Court is giving the necessary and proper weight to a final judgment whose validity has been repeatedly recognized in our courts, including the Courts of Appeals for the D.C. Circuit and Third Circuit as well as the District Courts for D.C. and Delaware.

Relatedly, with respect to the equitable analysis, the Court does not see any relevance to the fact that PDVSA has not been held liable for the debts of Venezuela. As Crystallex asked, the Court held only that specified PDVSA property (the shares of PDVH) could be used to satisfy Venezuela's debt to Crystallex. That Crystallex did not seek or receive even more substantial judicial relief does nothing to undermine the equitable importance of enforcing the relief that Crystallex did obtain and ensuring that the final judgment against Venezuela is fully

[2] *See, e.g.*, July Tr. at 18 ("We've tried to be very clear that the Guaidó government recognizes that Venezuela does have to pay this claim . . . ."); *id.* at 52 ("We have said over and over again we acknowledge our responsibility for these debts."); Sept. Tr. at 58-59.

effectuated.

Finally, the Court is also unpersuaded by the Republic's refrain that "it would be inequitable" for Crystallex to collect on its judgment when "all of those other judgment creditors" who have been injured by the Republic are not (yet) about to be paid. (July Tr. at 22-23) Crystallex has done nothing inequitable in litigating against the Republic for more than a decade and prevailing in every forum that has considered the parties' disputes.[3] While the Court joins Crystallex – and, evidently, the United States and the Republic – in hoping that, someday soon, Venezuela will find a way to pay all its debts and also alleviate the terrible suffering in Venezuela, the possibility that this outcome may not be achieved before Crystallex receives what it is owed does not absolve this Court of its duty to comply with the Third Circuit's orders on remand. As the Third Circuit plainly stated, "Venezuela owes Crystallex from a judgment that has been affirmed in our courts. Any outcome where Crystallex is not paid means that Venezuela has avoided its obligations." *Crystallex App. Op.* at 149.

4. Rule 60(b)(6)

Rule 60(b)(6) is a "catch-all" provision, permitting a party to seek reconsideration for "any other reason that justifies relief," i.e., reasons not expressly identified in subsections (b)(1) through (b)(5). The Third Circuit has consistently held that Rule 60(b)(6) provides "extraordinary relief" that is available only in "exceptional circumstances" to address an extreme or unexpected hardship. *Coltec Indus.*, 280 F.3d at 273; *see also Budget Blinds, Inc. v. White*, 536 F.3d 244, 255 (3d Cir. 2008). Here, the Court agrees with Crystallex that the Republic has

[3] *See generally* July Tr. at 27 (Crystallex's counsel: "[Crystallex] has had to spend money chasing assets of the Republic because Venezuela refuses to comply voluntarily with a full and final judgment of the D.C. [District Court] that was affirmed with the D.C. Circuit, and it's final and uncontestable. We're having to search for assets of Venezuela everywhere and to seek attachment because Venezuela does not want to comply with a final judgment of the D.C. Circuit.").

failed to demonstrate the existence of exceptional circumstances that would justify the extraordinary relief that it seeks.

The Republic argues that exceptional circumstances are present because Venezuela has a new government and the new government no longer exercises extensive control over PDVSA. (*See generally* July Tr. at 12, 14-15) Thus, to the Republic, PDVSA is no longer Venezuela's alter ego, so there is no "continuing validity of Crystallex's right to encumber PDVSA's property" based on a debt owed solely by Venezuela. (D.I. 184 at 11) A finding of exceptional circumstances is further supported, according to the Republic, by the fact that the U.S. government recognizes the new Venezuelan government and has imposed stringent sanctions on the Maduro regime in aid of the new Guaidó-led government.

The Court disagrees. Venezuela's motion under Rule 60(b)(6) fails because it is predicated on the Court giving weight (indeed, controlling weight) to events that post-date the situation as it existed at the pertinent time, i.e., the period between the filing of the motion seeking a writ of attachment and the subsequent issuance and service of that writ. Venezuela's arguments are entirely inconsistent with the very purpose of a writ of attachment, which is to hold property of a judgment debtor in the custody of the Court so it can be used for the benefit of the judgment creditor ***no matter what happens in the future***. Hence, crediting Venezuela's position could render this entire litigation a nullity – which would be a highly unusual outcome, particularly given that Crystallex has prevailed in every court that has considered any aspect of this case.

The Court agrees with Crystallex that the important dates are the dates on which it filed its motion for a writ of attachment, on which the writ of attachment was issued, and on which the

writ was served. (*See, e.g.*, July Tr. at 32; Sept. Tr. at 19-20)[4] Before the Court granted Crystallex's motion for a writ, PDVSA was free to alienate its shares of PDVH. After that date, however, the shares were attached; that is, they were (and remain) restricted from alienation by operation of the Court's order. To conclude that the pertinent date of analysis is any date after service of the writ would undermine the entire logic of issuing the writ in the first place.

No party has presented the Court with legal authority, and the Court is aware of none, that requires the Court to reconsider its alter ego determination, a determination that was made based on the record that the parties chose to make, and which was upheld on appeal. As Crystallex persuasively explains:

> PDVSA was Venezuela's alter ego when it received Crystallex's expropriated assets for no consideration, when it paid Venezuela's fees in the underlying arbitration with Crystallex, when Venezuela used it to access U.S. credit markets, when Crystallex filed its attachment motion, and when this Court ruled on that motion. No federal or state authority provides any precedent for Venezuela and PDVSA avoiding accountability for that past conduct by changing course ***after*** this Court has made its dispositive alter-ego finding.

(D.I. 199 at 15) Thus, any change in the status of the relationship between PDVSA and the Republic after the Court's August 2018 rulings does not constitute an exceptional circumstance justifying relief under Rule 60(b)(6). Because all the events on which Venezuela relies – including the Guaidó administration's changes with respect to the PDVSA board, the National Assembly's adoption of new laws, the U.S. government's January 2019 recognition of the Guaidó government, and amendment of U.S. sanctions on Venezuela – post-date August 2018, they do not provide a valid basis for relief. (*See, e.g.*, D.I. 219 at 7; D.I. 224 at 4)

[4] In so holding, the Court is not suggesting that historical events preceding the filing of the motion for a writ are irrelevant. Historical facts could have an impact, even a substantial or perhaps dispositive impact, on assessing (for example) whether an alter ego relationship exists in the pertinent period.

Venezuela's contrary view is based on little more than suggestions from the Third Circuit and this Court that the record might be expanded with evidence arising after August 2018 (*see* D.I. 184 at 12 (citing *Crystallex App. Op.* at 144; *Crystallex Writ Op.* at 425)), and a citation to *Bancec*'s statement that the pertinent inquiry must take account of current circumstances, in light of its design to safeguard international comity. These are, at best, weak support for requiring the Court to reevaluate in 2020 or 2021 an alter ego finding that it made on a record created in 2018, which was the basis for findings that were affirmed in 2019. Adopting Venezuela's position would invite abuse; it would permit a judgment debtor whose alter ego's property has been attached to "fix" whatever facts supported the adverse alter ego determination and then delay, appeal, and ultimately escape having to pay its judgments.

Moreover, courts have held that a change in government is not the type of extraordinary event sufficient to be the basis for relief under Rule 60(b)(6). *See Socialist Republic of Romania v. Widenstein & Co.*, 147 F.R.D. 62, 66 (S.D.N.Y. 1993). To the contrary, such changes occur "regularly, and to allow such . . . event[s] to support a Rule 60(b)(6) motion would wholly negate the finality of judgments." *Id.* at 65-66.

The Court finds further confirmation for its conclusion (that events post-dating the August 2018 issuance and service of the writ of attachment do not constitute exceptional circumstances warranting extraordinary relief under Rule 60(b)(6)) in the reality that Venezuela and PDVSA brought these same "new" facts to the attention of the Third Circuit, which nonetheless affirmed this Court's alter ego finding. Additionally, Venezuela finds itself in its present situation because of its own "deliberate choices" as a litigant, i.e., its refusal to pay judgments that it recognizes that it will eventually have to pay. (July Tr. at 38-39; *see also* Sept. Tr. at 11) Troubling incentives would be created if a party's own inequitable conduct were later

found to create the type of exceptional circumstances justifying relief for that party from a final judgment.

Thus, again, Venezuela's motion for relief under Rule 60(b)(6) will be denied.

5. Interests of the United States

In deciding to deny the Republic's motion, the Court has carefully considered the statement of interest and arguments made by the United States (as the Court has also done in connection with the sales procedures, as discussed below). The U.S. government, like Venezuela, takes the position that "fundamental premises underlying the alter ego ruling no longer hold," which the U.S. says could justify granting the Republic's motion, although it "express[es] no firm legal position on whether [the changed] circumstances require Rule 60(b) relief." (D.I. 212 at 8; *see also* D.I. 220 at 1) For the reasons already explained above, the Court has determined that the changed circumstances post-dating the August 2018 alter ego finding do not justify the relief sought by Venezuela.[5]

Understandably, the government (like the parties) has devoted much attention to the sanctions regime, which is implemented by the United States Department of Treasury's Office of Foreign Assets Control ("OFAC"). In the Court's view, the 2019 changes to the OFAC sanctions do not amount to exceptional circumstances warranting Rule 60(b) relief.[6] The sanctions are established by Executive Orders and through regulations imposing licensing

[5] The Court is grateful to the United States Department of Justice for filing a Statement of Interest and a supplemental brief (*see* D.I. 212, 220) and for participating in the oral arguments in July and September 2020. Although the Court has not been persuaded to act in accordance with the government's request, it has been helped by the government's input – which the Court has long sought (*see, e.g.*, D.I. 154 at 9 n.14, 23 n.25) and hopes to continue to receive as this case proceeds.

[6] Nor does the government contend that they do. (*See* D.I. 220 at 1) (declining to take "firm legal position" on whether Rule 60(b) relief is warranted)

requirements for certain transactions with the Republic. *See, e.g.*, 31 C.F.R. §§ 591.201, 591.202(c), 591.310; *see also* Exec. Order Nos. 13,692 (Mar. 8, 2015), 13,835 (May 21, 2018), 13,850 (Nov. 1, 2018), 13,884 (Aug. 5, 2019). The Court previously held that Executive Order 13,835, which governed the sanctions regime in August 2018, "does not pose a bar to granting relief." *Crystallex Writ Op.* at 421. Likewise now, the modified sanctions regime does not require a retroactive change in the order granting the writ. While the current sanctions regime does appear to block issuance of new writs of attachment on Venezuelan assets in the United States without an OFAC license – as Crystallex and the Republic agree (*see, e.g.*, July Tr. at 41; D.I. 203 at 9) – neither the Executive Orders nor the regulations require invalidating preexisting judicial orders. *See* Exec. Order No. 13,884 §§ 1(a), 1(c), 6(d); Exec. Order No. 13,850; 31 C.F.R. §§ 591.201, 591.202(e), 591.407, 591.506(c).

The OFAC licensing process is important for another reason: it provides a mechanism by which the interests the government has expressed to the Court can be taken into account by the Executive Branch itself. All involved in this litigation, including Crystallex, recognize that (under current law and policy) a specific license will be required from OFAC before a sale of PDVSA's shares of PDVH can close. The Court understands that the process by which OFAC reviews an application for such a license includes consideration of the foreign policy and national security interests the government has asked the Court to consider in this litigation. *See Crystallex App. Op.* at 151 ("[I]t is . . . conceivable that short- or long-term U.S. foreign policy interests may be affected by attachment and execution of PDVSA's assets. The Treasury sanctions provide an explicit mechanism to account for these.").

Thus, again, the Court will deny Venezuela's Rule 60(b) motion.

B. PDVSA Parties' Motion To Quash

PDVSA, PDVH, and CITGO (collectively, the "PDVSA Parties") move to quash the writ of attachment that has been served on PDVSA relating to its shares of PDVH. The PDVSA Parties' motion to quash rests on two contentions: (i) under Delaware law, Crystallex cannot attach PDVSA's shares of PDVH to satisfy a judgment against Venezuela without showing fraud, which Crystallex has failed to do; and (ii) even if Crystallex could attach PDVSA's shares of PDVH to satisfy its judgment against Venezuela, the writ is "inoperable" because PDVH does not possess the physical certificates representing the shares owned by PDVSA. (D.I. 179 at 2-4) The Court concludes that PDVSA is collaterally estopped from arguing that the writ of attachment is invalid under Delaware law, as the validity of the writ was already litigated and determined by this Court in 2018 and upheld by the Third Circuit in 2019. The Court also concludes that PDVSA is judicially estopped from pressing its new contention based on lack of physical possession of shares certificating PDVSA's holdings because it contradicts numerous representations PDVSA made to this Court and the Court of Appeals to obtain relief (such as stays and not having to post a bond). PDVSA's wholly-owned subsidiary, PDVH, and PDVH's indirect subsidiary, CITGO, are bound to the same extent as PDVSA. Finally, the Court concludes that the PDVSA Parties' Delaware law challenges are also untimely.

1. Collateral Estoppel Precludes PDVSA from Challenging the Validity of the Writ Under Delaware Law

The PDVSA Parties argue that Federal Rule of Civil Procedure 69(a), which authorizes execution on property in accordance with "the procedure of the state where the court is located," applies to attachment actions involving foreign states, notwithstanding the statutory immunity provisions of the Foreign Sovereign Immunities Act ("FSIA") of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in 28 U.S.C.). (D.I. 179 at 7-8) Thus, according to the PDVSA

Parties, Crystallex's ability to satisfy its judgment against the Republic by executing on PDVSA's shares of PDVH depends on application of Delaware law. (*Id.* at 9) Under Delaware law, the PDVSA Parties continue, (i) Crystallex may not pierce the corporate veil under an alter ego theory and thereby attach PDVSA's shares of PDVH without a showing of fraud; and (ii) Crystallex failed to allege or prove fraud with particularity during any relevant period. (*Id.* at 9-13) Moreover, according to the PDVSA Parties, to this point in the litigation this Court has "only decided that PDVSA was Venezuela's alter ego for purposes of resolving sovereign immunity under the FSIA. It never decided the question of whether Venezuela has an attachable interest in the shares of" PDVH under Delaware law. (July Tr. at 55)

The Court agrees with Crystallex that collateral estoppel precludes the PDVSA Parties from now challenging the validity of the writ under Delaware law. (*See generally* D.I. 199 at 20-24) While the litigation to date has focused on the FSIA, *Bancec*, and federal law, this Court's findings were not limited to issues of federal law. In addition to denying PDVSA's motion to dismiss – which was predicated principally on federal-law issues of jurisdiction and immunities with respect to Venezuela, PDVSA, and the shares of PDVH – the Court also granted Crystallex's motion to issue the writ. The Court rejected whatever challenges PDVSA made to the validity of that writ and ordered the writ to be served. The Court's orders resulting in service of the writ were affirmed on appeal. At this point, then, the PDVSA Parties are collaterally estopped from challenging the validity of the writ under Delaware law.

Collateral estoppel (also known as issue preclusion) applies where "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action." *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201,

209 (3d Cir. 2001) (internal quotation marks omitted). Each of these requirements is satisfied here. (*See generally* D.I. 229 at 1) (Crystallex: "PDVSA and its affiliates are estopped from relitigating these issues because PDVSA actually litigated the merits of the writ of attachment of its own accord and this Court and the Third Circuit actually decided them adversely to PDVSA's arguments.") The identical issue that the PDVSA Parties now wish to have adjudicated – the validity of the writ of attachment served on PDVSA to attach its shares of PDVH – was previously adjudicated, was actually litigated, and was necessarily decided in the course of this Court deciding to grant Crystallex's motion for a writ of attachment, issue that writ, and have it served. Further, it is undisputed that PDVSA has been fully represented at all stages of this litigation ever since it chose to intervene.

That PDVSA now raises ***new*** arguments in support of its ***old*** position does not defeat application of collateral estoppel. As the Third Circuit has stated, "Once an ***issue*** is raised and determined, it is the entire ***issue*** that is precluded, not just the particular arguments raised in support of it in the first case." *Alevras v. Tacopina*, 226 F. App'x 222, 231 (3d Cir. 2007) (internal alteration omitted). The issue that PDVSA wants to litigate in its motion to quash – the validity of the writ – is the very issue that this Court already decided. That the earlier part of the litigation focused on federal-law arguments against the validity of the writ and PDVSA now wants to make arguments based on Delaware law does not change the reality that the validity of the writ has already been litigated.[7]

[7] Although collateral estoppel would apply even if this Court had decided the validity of the writ without any express reference to Delaware law, in fact both parties and the Court did allude to Delaware law in the earlier part of this litigation. For instance, PDVSA argued in opposition to Crystallex's motion for a writ of attachment that *Bancec* should be applied in accordance with Delaware corporate law, that "Delaware law is crystal-clear that alter ego liability applies only in the rare circumstance where the corporate form is abused to perpetrate a fraud against the plaintiff," and that a clear-and-convincing-evidence standard applies. (D.I. 26 at 16-17 (citing cases applying Delaware law that require showing of fraud or similar injustice); *see also* D.I. 179

In resolving PDVSA's appeal, the Third Circuit explicitly stated that it was reviewing both "the District Court's denial of PDVSA's motion to dismiss as an immune sovereign ***and*** the grant of Crystallex's motion for a writ of attachment under Federal Rule of Civil Procedure 69." *Crystallex App. Op.* at 136 (emphasis added). It further observed that its jurisdiction to review the denial of the motion to dismiss arose "under the collateral order doctrine" and that it had appellate jurisdiction over the grant of the writ because that order "amounted to a ***final judgment*** under 28 U.S.C. § 1291 by leaving the District Court ***nothing left to do but execute***." *Crystallex App. Op.* at 136 (emphasis added; internal quotation marks omitted). The Third Circuit could not have characterized this Court's decision to grant the motion for a writ of attachment as a final order, and as one leaving this Court with "nothing . . . to do but execute," had the Third Circuit required or intended for this Court to permit additional challenges to the validity of the very writ it was describing as "final."[8]

Other statements in the Third Circuit's opinion further confirm that the validity of the writ has been actually, necessarily, and finally resolved. The Court of Appeals held that "so long as PDVSA is Venezuela's alter ego under *Bancec*, the District Court had the power to issue a writ of attachment on that entity's non-immune assets to satisfy the judgment against the country." *Crystallex App. Op.* at 139. This means that if the *Bancec* standard is met – as it has been here – then PDVSA's shares of PDVH are validly attached and can be executed on; no

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at 2-3) In rejecting these arguments, the Court considered "cases applying state-law alter ego standards" but found them "unpersuasive" and "unhelpful." *Crystallex Writ Op.* at 396 n.13, 405; *see also id.* at 387-388 (legal standards section quoting 10 Del. C. § 5031; 8 Del. C. § 324(a)); *id.* at 425 n.48 (noting parties' agreement that Delaware law requires execution of writ to take place through public sale of attached shares).

[8] Crystallex also observes that implicit in Venezuela's filing of a motion pursuant to Rule 60(b) – which, after all, authorizes relief "from a ***final judgment***" (emphasis added) – is Venezuela's recognition that everything about the validity of the writ has already been litigated. (*See, e.g.*, July Tr. at 81)

more challenge to the writ is contemplated. Similarly, the Third Circuit said that "[t]he District Court acted within its jurisdiction ***when it issued a writ of attachment*** on PDVSA's shares of PDVH to satisfy Crystallex's judgment against Venezuela." *Id.* at 152 (emphasis added). This means, again, that the writ is valid – under federal law and, to the extent anyone had a basis to challenge its validity under state law, under state law as well.

Following the September oral argument, PDVSA submitted supplemental authority relating to an issue about which the Court had inquired: whether PDVSA was required to raise merits defenses to Crystallex's motion for a writ of attachment at the same time PDVSA was briefing its purported entitlement to immunity under the FSIA. (*See* D.I. 227; *see also* D.I. 229-32; Sept. Tr. at 40) The case on which PDVSA relies, *Process & Industrial Development Ltd. v. Federal Republic of Nigeria*, 962 F.3d 576, 580 (D.C. Cir. 2020), addresses a situation in which the foreign sovereign, Nigeria, was forced, over its objection, to present all its jurisdictional and merits arguments in a single response to a petition for confirmation of an arbitration award. The Court of Appeals for the D.C. Circuit held that the district court had erred in requiring Nigeria to "brief the merits before resolving a colorable assertion of immunity." *Id.* at 579. *Process* does not help PDVSA evade the application of collateral estoppel here because the situation is fundamentally different from the one addressed by the D.C. Circuit.

As an initial matter, the analogy between the *Process* scenario and the situation here is imperfect, as it is not entirely clear that what *Process* meant by "merits" is truly analogous to the Delaware law issues PDVSA now seeks to press as a basis for quashing the writ. In any event, even accepting that PDVSA is now raising "merits" defenses, PDVSA is collaterally estopped because PDVSA (unlike Nigeria in *Process*) voluntarily intervened in the earlier stages of this litigation and voluntarily interjected those "merits" defenses into this case at that time. As

already explained, PDVSA opposed Crystallex's motion for a writ of attachment on both jurisdictional and "merits" grounds, under both federal and Delaware law. (*See, e.g.*, D.I. 26 at 2, 20-23, 25, 27) (examples of PDVSA arguing merits of Crystallex's motion for attachment) As *Process* confirms, PDVSA was "free to oppose" the motion in that manner. *See* 962 F.3d at 585. PDVSA was not forced, over its objection, to argue its merits positions simultaneously with its jurisdictional positions; it chose to do so. But that choice has consequently led to the application of collateral estoppel.

Because PDVSA's Delaware law challenges to the validity of the writ are barred by the doctrine of collateral estoppel, the Court will not substantively address them.

2. Judicial Estoppel Bars PDVSA from Prevailing on its Lack of Physical Certificates Argument

As an additional basis to quash the writ of attachment, the PDVSA Parties argue that Delaware law requires physical seizure of stock certificates for an effective attachment of shares of a Delaware corporation, but PDVH does not possess physical certificates representing any property belonging to PDVSA, so this Court's attachment is "not laid." (D.I. 179 at 14-16; *see also* 8 Del. C. § 324(a) (stating that, "[e]xcept as to an uncertificated security . . . attachment is not laid and no order of sale shall issue" unless 6 Del. C. § 8-112 has been satisfied); 6 Del. C. § 8-112(a) ("[T]he interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy.")) The Court agrees with Crystallex that PDVSA is judicially estopped from prevailing on this argument. (D.I. 199 at 27-37)

"The doctrine of judicial estoppel prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Carlyle Inv. Mgmt. LLC v. Moonmouth Co. SA*, 779 F.3d 214, 221-22 (3d Cir. 2015); *see also*

New Hampshire v. Maine, 532 U.S. 742, 750-751 (2001) (identifying factors commonly considered in assessing whether to apply judicial estoppel, including (1) whether party's current position is "clearly inconsistent" with its earlier position, (2) whether acceptance of later inconsistent position would create "perception" that court had been "misled," and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped"). Thus, "'absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.'" *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996) (quoting 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477 (1981)).

Judicial estoppel applies here. In August 2018, PDVSA persuaded the Court not to impose a bond requirement when it stayed proceedings pending PDVSA's interlocutory appeal. (*See* D.I. 98) PDVSA obtained this relief by assuring the Court that "a bond . . . is unnecessary because the Writ itself is sufficient security in lieu of a bond," adding that "[g]ranting an unconditional stay does not make Crystallex any worse off than it is today" because "a writ of attachment . . . provides the same functional security as a supersedeas bond." (D.I. 98 at 6, 17) PDVSA further assured the Court that it would be "a waste of money" to require a bond because the writ is "more than enough security in lieu of a bond." (*Id.* at 19; *see also* D.I. 118 at 10 (stating on reply that "the current restraint on the PDVH shares by virtue of the Writ . . . could constitute sufficient security in lieu of a bond"))[9]

In making these representations to the Court, PDVSA was stating that the writ was valid

[9] Likewise, in December 2019, the Court again denied Crystallex's request for a bond, when it stayed these proceedings while the petition for a writ of certiorari was proceeding in the Supreme Court. (D.I. 154) The Court did so based on the Republic's representation that Crystallex was "fully secured for whatever the value is of those assets." (*Id.* at 4 n.4)

and that, unless PDVSA were to prevail on appeal, Crystallex would execute on the writ and collect its judgment. (*See, e.g.*, Sept. Tr. at 55) (Crystallex explaining that PDVSA "affirmatively, factually represented, in order to dispense with the bond, that the writ was effectual to give [Crystallex] security, and that [Crystallex] would have recourse to the shares to sell") PDVSA's new contention that the writ is not valid under Delaware law because PDVH does not possess the physical certificate – and, thus, the writ has no value to Crystallex – is inconsistent with PDVSA's prior assurances that the writ secured Crystallex. There is no good explanation for PDVSA's change of positions. Instead, allowing PDVSA to prevail based on its new argument would show that the Court was previously misled by PDVSA into believing that the validity of the writ would not be subject to any further post-appeal challenge. It would be inequitable for PDVSA to prevail based on its present position, which is incompatible with its prior position.

Similarly, in opposing Crystallex's motion to expedite the appellate proceedings, PDVSA told the Third Circuit that "there is nothing that PDVSA can do to 'prejudice' or 'disturb' the writ of attachment," and that "Crystallex's writ of attachment also preclude[s] any transactions in the PDVH shares." (*Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, No. 18-2797, Doc. No. 3113121203 (3d Cir. Dec. 28, 2018), Opp. to Mot. to Expedite at 16, 18) At various points, PDVSA likewise made representations to this Court that Crystallex would not be harmed by these proceedings moving slowly because the writ protected Crystallex's interests. (*See* D.I. 199 at 34-35 (listing representations PDVSA made in November 2019, December 2019, and February 2020, all seeking to slow down proceedings); *see also* Sept. Tr. at 69-73)) It would be inequitable to permit the PDVSA Parties to quash the writ based on PDVH's lack of physical possession of the share certificates when PDVSA repeatedly relied on the protection of the writ

to persuade this Court not to expedite this litigation.

Relatedly, in August 2018, PDVSA told the Court that "[t]he PDVH shares are located in Delaware, and they are not going anywhere." (D.I. 98 at 6, 15) PDVSA now asserts that it was merely making a representation about a legal fiction, not a statement of fact. According to PDVSA, all it was saying was that under 8 Del. C. § 169, "for ownership purposes, the location of the shares [is] in Delaware." (July Tr. at 100) The Court, however, understood PDVSA to be making a factual statement: that the shares were in Delaware, so the Court need not be concerned about prejudice to Crystallex, as Crystallex's rights were protected by the attached shares that would remain available in Delaware to sell and satisfy Crystallex's judgment. PDVSA's current explanation is not credible and, even if it were, it does not render application of judicial estoppel inequitable. PDVSA persuaded the Court not to require a bond by telling the Court that the shares were in Delaware, then later admitted that the shares are not in Delaware (and cannot even be located). To permit PDVSA to avoid attachment and execution based on this lack of candor with the Court would be grossly unfair to Crystallex and would undermine the integrity of these proceedings.

Accordingly, the Court will not quash the writ based on PDVH's lack of physical possession of a share certificate.

3. PDVH and CITGO Are Estopped To The Same Extent As PDVSA

The PDVSA Parties seeking to quash the writ of attachment include PDVH and CITGO. Even though much of what the Court has said in connection with the motion to quash focuses on PDVSA, the Court's collateral estoppel and judicial estoppel conclusions also estop PDVH and CITGO from prevailing on this motion.

Estoppel doctrines, including collateral and judicial estoppel, can apply "not only against

actual parties to prior litigation, but also against [those] in privity to a party." *Milton H. Green Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 986 (9th Cir. 2012); *see also Board of Trs. of Trucking Emps. of N. Jersey Welfare Fund, Inc. v. Centra*, 983 F.2d 495, 505 (3d Cir. 1992) (noting that one requirement for collateral estoppel is that "the party against whom the bar is asserted was a party ***or in privity*** with a party to the prior adjudication") (emphasis added); *Maitland v. University of Minnesota*, 43 F.3d 357, 364 (8th Cir. 1994); *In re Johnson*, 518 F.2d 246, 252 (10th Cir. 1975). This is because "a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy." *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008).

PDVH and CITGO are in privity with PDVSA, at least for purposes of this litigation. PDVH and CITGO are wholly-owned subsidiaries of PDVSA. *See Crystallex Writ Op.* at 418 n.36. All three entities share a "commonality of . . . interest in [this] matter" in that all three prefer that Crystallex collect on its judgment against Venezuela without involving PDVSA, PDVH, or CITGO. *See generally Doe v. Urohealth Sys., Inc.*, 216 F.3d 157, 162 (1st Cir. 2000). As Crystallex correctly observes, "both subsidiaries are only in this case because of their corporate relationship with PDVSA – *i.e.*, because PDVSA nominally owns the PDVH shares, and CITGO issued debt with change-of-control provisions." (D.I. 199 at 40) Further, "[g]iven that PDVSA brought this motion to quash jointly with its subsidiaries and co-signed the brief, D.I. 179 at 1, 19, it would 'strain credulity to find that the interests of [the subsidiary] and [the parent] were so distinct that they are not aligned' for purposes of preclusion." (*Id.*) (quoting *Anchor Glass Container Corp. v. Buschmeier*, 426 F.3d 872, 880 (7th Cir. 2005)) Additionally, PDVH is here as the custodian of PDVSA's nominal property (the PDVH shares), and preclusion applies where a "bailee seeks to relitigate" the "bailor's right of recovery." *Union Ins. Soc'y of Canton, Ltd. v. William Gluckin & Co.*, 353 F.2d 946, 953 (2d Cir. 1965); *see also McLaughlin*

v. Board of Trs. of Nat'l Elevator Indus. Health Benefit Plan, 686 F. App'x 118, 122-123 (3d Cir. 2017) (citing *Taylor*, 553 U.S. at 894) (noting that bailor-bailee relationship falls within "substantive legal relationship" exception to same-party-or-privity requirement for res judicata).[10]

Moreover, it would be inequitable for PDVH or CITGO to succeed in quashing the writ on a basis on which PDVSA is estopped. This case has been heavily litigated for years, in multiple courts, and Crystallex has prevailed at every step. It has done so by defeating every material argument raised in opposition to the relief that it has obtained. When the Court permitted PDVH and CITGO to intervene as parties, it did not do so in contemplation of these parties potentially undoing all the work that Crystallex, PDVSA, the Republic, this Court, and other courts have done in this case.

Finally, as Crystallex also contends, "[w]hoever brings this motion, this Court is bound by the Third Circuit's published, precedential decision," which held that the writ is valid. (D.I. 199 at 40) Hence, even if PDVH and CITGO were not in privity with PDVSA (which they are) and were not estopped to the same extent as PDVSA (which they are), the Court's obligation to comply with the appellate mandate would still require the Court to deny the motion to quash.

4. The PDVSA Parties' Delaware Law Challenges Are Untimely

A related reason for denying the motion to quash, in addition to those already given above, is that all the PDVSA Parties' Delaware law challenges to the validity of the writ are untimely. Given how this case has proceeded, the proper time to have made these arguments was when the Court was evaluating Crystallex's motion to issue and serve the writ of attachment.

[10] Because PDVH and CITGO are in privity with PDVSA, and are therefore estopped to the same extent as PDVSA, the Court need not decide whether PDVH and CITGO have standing. Even assuming PDVH and CITGO have standing, they cannot prevail on the motion.

Failing that, at minimum PDVSA needed to have put the Court on notice that, after the Court granted Crystallex's motion, PDVSA would still seek an opportunity to attack the validity of the writ on state law grounds. PDVSA did not do so, notwithstanding this Court's express inquiry.

The last section of the Court's August 9, 2018 opinion (which denied PDVSA's motion to dismiss and granted Crystallex's motion for the writ) identified four aspects of the parties' dispute that, as of that date, "remain[ed] unsettled." *Crystallex Writ Op.* at 425. None of the questions that the Court posed expressly referenced Delaware law or the validity of the writ, reflecting the Court's belief that these issues had been settled (an impression that PDVSA never tried to correct). The last of the Court's questions did reference the possibility of a motion to quash, but only with respect to whether the alter ego finding might be subject to further evidentiary proceedings. The Court asked: "will Venezuela, PDVSA, and/or any other entity appear and seek to supplement the factual record already developed in this litigation and, if so, will such an entity attempt to (and, if so, be permitted to) argue that additional evidence materially alters the Court's findings, and thereby seek to quash the writ?" *Id.*

After asking that question, the Court cited a Delaware case and then referenced three occasions on which Crystallex had stated or suggested that the validity of the writ might be subject to challenge ***after*** it was issued.[11] These statements appear to have been made by

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[11] The full citation sentence is as follows:

> *See generally Hibou, Inc. v. Ramsing*, 324 A.2d 777, 783 (Del. Super. Ct. 1974) ("[O]n a motion to quash the order the Court as required by 10 Del. C. § 3506 must look at the Prima facie case presented to ascertain whether the plaintiff has 'a good cause of action' against all the defendants whose property has been attached."); D.I. 3-1 at 2 (Crystallex noting, "if any party has a claim to the shares at issue, that party can raise the issue with the Court after the writ is served"); Tr. at 21, 23 (Crystallex recognizing PDVSA, as well as perhaps PDVH and Venezuela, ***may*** have right to "come back in and challenge the writ"); D.I. 70

Crystallex in contemplation of ordinary proceedings under Delaware law, where the imperative is to get the writ in place, thereby attaching the property (and protecting the creditor) while deferring litigation over the validity of the attachment as much as possible until after the writ is served. Over time, as this case advanced – including as PDVSA intervened, moved to dismiss, and vigorously litigated all issues, including by opposing Crystallex's motion for a writ – Crystallex appeared to come to the view that, in the circumstances here, all litigation about the validity of the writ had occurred. (*See, e.g.*, D.I. 49 at 23 (Crystallex arguing: "The standard procedure in Delaware as I understand it is that when we are dealing with a foreign sovereign, we would go to the Clerk's Office, we would get a writ issued, we would serve it, and anyone who had an objection would come in and move to quash the writ. And that is essentially . . . what we're doing here."); D.I. 70 at 3 n.5 (Crystallex stating that PDVSA should have moved to quash writ after issuance, "as is the ordinary course," rather than "preemptively" moving to dismiss, as PDVSA chose to do))

Thus, in August 2018, it seemed that, as this case had evolved, the litigation over the validity of the writ had already occurred in connection with the Court's decisions on the motion for a writ and the motion to dismiss. For this reason (among others), the Court ordered the parties to submit a joint status report before deciding whether and when to order service of the writ. *See Crystallex Writ Op.* at 425. In the status report that the Court subsequently received, PDVSA did not address the Court's questions. (*See* D.I. 86 at 6-8) PDVSA provided no

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> at 2 n.4 (Crystallex noting, "PDVSA may, of course, seek to challenge the writ on non-jurisdictional grounds by a motion to quash brought after the writ has issued and before the Court allows the execution process to commence").

Crystallex Writ Op. at 425 (emphasis added).

indication that it, or any other entity, would seek to quash the writ based on Delaware law or on any other basis. Nor did PDVSA challenge Crystallex's statement in its portion of the status report (in response to the Court's question about supplementing the record) that "Venezuela has no new legal or factual basis on which to attempt to quash the writ at this stage of the litigation." (*Id.* at 5 n.7) The Court then proceeded to issue the writ and to have it served on PDVSA.[12]

The Court cannot find any indication, either in the record of this Court or that of the Third Circuit, that the PDVSA Parties were purporting to reserve their rights to press Delaware-law objections to the validity of the writ.[13] For example, neither PDVSA's mandamus petition (in No. 18-2889) nor opening brief for the consolidated appeals (in Nos. 18-2797 & 18-3124) stated or suggested that there were potentially unresolved issues of state law that this Court would have to consider on remand. PDVSA's reply in support of its mandamus petition suggested that this Court might ultimately need to order additional briefing and hear additional argument concerning how the sale of the attached shares should proceed, ***but not*** as to whether the writ of attachment was even valid in the first place. (*See In re Petróleos de Venezuela, S.A.*, No. 18-2889, Doc. No. 3113093035 (3d Cir. Nov. 23, 2018) PDVSA Mandamus Reply Br. at 5-6)[14]

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[12] Even the way in which the PDVSA Parties now characterize their position in the August 2018 status report supports the Court's conclusion that these parties acted as if the writ was valid, subject only to their appellate rights. In an October 2020 letter to the Court, the PDVSA Parties state that "PDVSA took the position that 'until the Third Circuit finally resolves PDVSA's appeal from this Court's denial of its sovereign immunity, this Court can take no further action with respect to issuance or enforcement of the Writ.'" (D.I. 230 at 4) (quoting D.I. 86 at 8)

[13] As previously noted, both the parties and the Court did allude to Delaware law issues during the portion of the litigation leading to the grant of Crystallex's motion for issuance of the writ and denial of PDVSA's motion to dismiss. *See supra* p. 18 n.7.

[14] Crystallex, in its mandamus brief, reiterated to the Third Circuit the view that it had taken in

The PDVSA Parties now insist that "PDVSA made clear" that "the question of the propriety of the attachment was something that should be litigated later, and that the only issue the Court should decide was the FSIA question" (Sept. Tr. at 38), but they fail to cite to where they purportedly made this clear. Likewise, they assert that "from the beginning, everyone . . . knew there was going to be an attack on the attachment" after the writ was granted (July Tr. at 67), yet they identify no basis from which the Court (or Crystallex) should have "known" to expect a post-grant attack. When the Court directly asked counsel whether they could have raised their Delaware law challenges to the writ in the earlier phase of the litigation, counsel simply stated that "it wasn't raised, and PDVSA had every right not to raise it . . . nor was it required to be part of the litigation before this Court." (Sept. Tr. at 40)

In the Court's view, the PDVSA Parties' challenges to the validity of the writ are untimely. The Court agrees instead with Crystallex, which stated that the PDVSA Parties "were supposed to raise all of these arguments when they were fighting . . . the issuance of the writ." (Sept. Tr. at 54) As Crystallex accurately put it, if "PDVSA thought that there were questions of Delaware law that were additional questions that should have been adjudicated," then "the time

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this Court, explaining that challenges to the writ typically come after the writ has been served, but PDVSA intervened and "preemptively oppose[d] attachment." (*See In re Petróleos de Venezuela, S.A.*, No. 18-2889, Doc. No. 3113055847 (3d Cir. Oct. 9, 2018) Crystallex Mandamus Br. at 8) Crystallex added that this Court had never limited the briefing on either Crystallex's or PDVSA's motions to jurisdiction issues and that PDVSA never asked for the briefing be so limited. (*Id.* at 9) Likewise, in its brief on the consolidated appeals, Crystallex explained that PDVSA had intervened to oppose the writ both on jurisdictional grounds and on the merits. (*Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, No. 18-2797, Doc. No. 3113141891 (3d Cir. Jan. 23, 2019) Crystallex Appeal Br. at 18) In its reply briefs in support of its mandamus petition and appeal, PDVSA did not challenge these contentions or indicate that there were any state law or validity issues remaining to be litigated in this Court. (*See generally* PDVSA Mandamus Reply Br.; *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, No. 18-2797, Doc. No. 3113154696 (3d Cir. Feb. 6, 2019) PDVSA Appeal Reply Br.)

to raise them" was when the Court was adjudicating Crystallex's motion for a writ and PDVSA's motion to dismiss. (July Tr. at 80) It is now too late to raise these issues.

Thus, again, the PDVSA Parties' motion to quash will be denied.

II. Crystallex's Time To Execute The Writ Has Been And Remains Tolled

An issue that arose in the September 2020 argument was whether the writ of attachment issued by the Court in August 2018 would expire after three years, pursuant to Delaware law, 10 Del. C. § 5081. (*See, e.g.*, Sept. Tr. at 71-72) Having reviewed the parties' subsequently-filed letter briefs on this topic, the Court agrees with Crystallex that the stay orders issued by this Court and the Third Circuit have tolled the three-year priority period of Section 5081. (*See* D.I. 228 at 1) The Court further agrees with Crystallex that the Court has discretion to issue additional orders tolling the expiration of the three-year priority period should that become necessary – depending on future events and their pace – where any delay is not of Crystallex's making. (*See id.* at 1-2) Such tolling is consistent with the principles of equitable tolling. *See CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014) (explaining that statutes of limitations exist to encourage plaintiff to pursue his rights diligently, and when extraordinary circumstance prevents him from bringing timely action, restriction imposed by statute of limitations does not further its purpose). The Venezuela Parties – the Republic, PDVSA, PDVH, and CITGO – do "not object to a ruling by the Court that the running of the 3-year period specified in 10 *Del. C.* § 5081 is tolled during the pendency of any stay order." (D.I. 228 at 3) ConocoPhillips and the United States take no position on the proper interpretation of the Delaware statute. (*See id.*)

The Court deems it the most appropriate exercise of its discretion to expressly order that the three-year priority period has not yet begun, as Crystallex has not been permitted to execute on its writ, and no writ of execution has been issued. Given the pace of these proceedings to

date, and the large amount of litigation that likely lays ahead, it is not in the interests of any parties, any other creditors, or the Court to leave doubt as to whether the priority period is running.

III. Crafting The Contours Of The Sales Process

The Court stated in December 2019: "If the Supreme Court proceedings do not alter the Third Circuit's instructions to this Court, the Court intends to proceed to selling" PDVSA's shares of PDVH that are attached. (D.I. 154 at 4 n.4) Consistent with this pronouncement, Crystallex has been pushing the Court – ever since the Supreme Court denied the Republic's petition for certiorari in May 2020 – to move expeditiously toward a sale.[15] By contrast, the Venezuela Parties (in addition to pressing their Rule 60(b) motion and motion to quash) have asked the Court to refrain from taking any steps toward a sale unless and until OFAC provides a specific license. Additionally, on July 16 – the eve of the Court's hearing on the pending motions – the United States appeared, urging the Court to follow the Republic's preferred path and not to proceed toward a sale absent an OFAC license.

The Court directed that the disputes relating to sales procedures be briefed in parallel with the briefing on the motions for relief from the writ of attachment. (D.I. 213, 218) In addition to hearing from the parties and the government, the Court also received briefing from non-party ConocoPhillips, which requests that its judgment against Venezuela be handled according to the same process that the Court implements for Crystallex. (D.I. 180, 202)

The Court has decided that the most reasonable and appropriate course of action, in light of the totality of the circumstances, is to set up the sales procedures and then to follow them to

[15] At the September 17 oral argument, Crystallex asked the Court to set a target sale date during the week of January 11, 2021. (*See* Sept. Tr. at 73) As is evident from the timing of today's Opinion, the Court has not granted this request.

the maximum extent that can be accomplished without a specific license from OFAC. All parties agree that, under current law and policy, a sale of PDVH shares cannot be completed without a specific OFAC license. (*See, e.g.*, Sept. Tr. at 86) But all the preparatory steps that can be taken without such a license can, and should, be taken. The alternative would be to make Crystallex wait for an indefinite additional period, which cannot be justified given the decade and resources that Crystallex has already spent trying to collect on its judgment and given its uninterrupted string of litigation victories. At this point, the Court agrees with Crystallex that "[t]here is no just reason not to advance this litigation to the furthest point that OFAC's sanctions regime permits." (D.I. 223 at 2)

Two principal arguments have been made against moving forward at this time, but neither of them has persuaded the Court. First, the Venezuela Parties point out that OFAC may never issue a specific license allowing the sale and, in that event, all the Court's efforts toward conducting the sale (and all the litigation accompanying those efforts) will have been wasteful. The Court recognizes this risk. It does not deter the Court from progressing toward the sale because the Court has been provided no indication as to the timing of an OFAC decision and it seems possible that OFAC is waiting to make a decision until after this Court makes further progress.

Second, the government expresses substantial concern that even "prefatory steps" toward a sale will be "potentially damaging" to the Guaidó regime and, thereby, undermine U.S. foreign policy and potentially raise national security issues. (Sept. Tr. at 47; *see also id.* at 31 (counsel for Republic echoing U.S. concerns: "When the United States tell[s] you that the step like establishing a sales process could have national security implications, that really needs to be taken seriously.")) As the Court has already noted, it does not, of course, take these serious

concerns lightly. As the Court has also already stated, however, the OFAC licensing process provides the better mechanism through which the Executive Branch can bring to bear the foreign policy and national security interests on which Crystallex's collection efforts might have an impact. (*See generally* Sept. Tr. at 47 (government counsel acknowledging that "the OFAC process is certainly the backstop for protecting U.S. interest[s]"); *id.* at 88; *see also* D.I. 212-2 at 2 ("[A]ny auction or sale of PDVH's shares at this time would undermine current U.S. foreign policy on Venezuela. Absent a change in the above considerations, these factors will weigh heavily in OFAC's license determination and could prove to be dispositive in adjudicating this license application.")) The government has not taken the position that the Court is "blocked from moving forward" (Sept. Tr. at 105) and, in the Court's view, the time has arrived for the sales process to proceed. *See also generally Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, No. 19-cv-10023, 2020 WL 6135761, at *19 (S.D.N.Y. Oct. 16, 2020) (rejecting government's request for delay despite government's position that "[a]ny . . . loss of PdVSA's U.S.-based assets . . . would be detrimental to U.S. policy and the interim government's priorities").

Having decided that the Court should proceed with the sale to whatever extent is possible in the absence of a specific OFAC license, the Court will now set out some of the contours of the sales procedures that it will follow. The parties will be required to meet and confer and then submit more specific proposals in the very near future.

- *Consistent with all parties' recognition of the Court's broad discretion, the Court will appoint a special master to oversee the day-to-day and detailed implementation of the sales procedures, which will comply with the "twin*

commands" of (i) selling the shares at a public sale to the highest bidder and (ii) meeting the notice requirements. Delaware statutory provisions and Supreme Court decisions set out the Court's broad discretion. *See* 8 Del. C. § 324; *Deibler v. Atlantic Properties Group, Inc.*, 652 A.2d 553, 558 (Del. 1995). The parties agree that the Court can appoint a special master, who will have the time and expertise to fulfill the Court's and the U.S. Marshal's duties to prepare for and conduct the sale. (*See, e.g.*, D.I. 180 at 1-2, 4-6 (ConocoPhillips); D.I. 196 at 10 (Venezuela Parties); D.I. 198 at 18 (Crystallex); *see also* Sept. Tr. at 80, 97-98, 108, 112)

- *With the assistance of the special master, the Court will set minimum requirements – for example, for advertising and other notices to reach potential bidders, for the materials that will be deposited in a data room to be accessed by potential bidders – which any interested entity may supplement or exceed.* (*See generally* Sept. Tr. at 75, 79-80, 95; *see also Deibler*, 652 A.2d at 557-58 ("[J]udgment debtors are free to supplement such notice as the sheriff may disseminate. As the owner of the property, they not only have the economic interest rationally to expend the appropriate level of resources on notices, but also have the fullest (and cheapest) access to relevant information."))

- *Crystallex will be permitted to credit bid.*

- *Crystallex's priority status shall not be affected by the sales procedures that are ultimately implemented.*

- *To ensure that only serious bidders participate, and that only a bidder seriously interested in completing the transaction wins at the auction, bidders will be required to make a substantial good faith deposit, which will be refundable to all but the winning bidder. The winning bidder may be required to make an additional non-refundable deposit to provide adequate incentive to close the deal.*

- *The winning bidder will be given a reasonable amount of time to pursue any necessary and desirable regulatory approvals, with the potential for a Court-ordered extension upon a showing of good cause.*

- *The process will result in the sale of as many, but only as many, shares of PDVH as are necessary to satisfy the judgment of Crystallex (and of any other judgment creditor whose judgment may be added to the sale).* The parties (including, if they wish, ConcocoPhillips and the United States) shall work with the special master to consider implementing procedures to permit any other judgment creditor of Venezuela to request to participate in the Court's process.

- *The Venezuela Parties will have a fair and reasonable opportunity to be involved in the prefatory procedures, the sale, and any negotiations, but the Court will retain control over the sale.*[16] *The Venezuela Parties will have a seat at the table, but they will not be running the process.*

[16] The Court expects that the Venezuela Parties are likely right that an aspect of finalizing a sale will be the necessity for "rather complex negotiations of minority rights in any stock that is sold." (Sept. Tr. at 96)

A bit more needs to be said about this last point. The Court rejects the Venezuela Parties' contention that only PDVSA should be permitted to conduct the sales process, purportedly because only PDVSA has the incentive and knowledge to conduct a fair process. (*See* D.I. 188 at 3, 17) While Crystallex's incentives, as creditor, may extend only so far as to ensure that the result of the sales process is sufficient to recover what it is owed, and not necessarily to maximize the value of the PDVH shares to be sold, the whole point of the public, noticed, full and fair competitive sales process required under Delaware law is to maximize the sales price obtained, regardless of the creditor's incentive. The Court is confident that the procedures it follows will result in the appropriate incentives. As for knowledge, the Court's procedures will include a data room, into which PDVSA may (and will be expected to and, if need be, ordered to) deposit information that will be material to potential bidders' understanding of the full and fair value of the shares being sold. In other words, any unique knowledge held by PDVSA can – and will – be obtained and utilized irrespective of whether PDVSA is permitted to conduct the sale itself.

Importantly, it would be inequitable to permit PDVSA to conduct the sale at this point. Venezuela, through PDVSA and otherwise, has had every opportunity to pay its legitimate, Court-recognized debt to Crystallex, including before, during, and after the arbitration, and throughout the extensive litigation in this Court, the Court of Appeals, and the Supreme Court. Even today, the Republic could pay Crystallex what it owes and avoid the sales process altogether. But, having made Crystallex undertake a decade's worth of extensive and expensive efforts to collect on its judgment, the Court is not going to permit a highly-recalcitrant judgment debtor to conduct its own sales process over the objection of its repeatedly-victorious judgment creditor.

Each day that Crystallex does not recover on its judgment is arguably something of an affront to the United States judicial system. Those days must soon come to an end.

CONCLUSION

For the reasons discussed above, Venezuela's motion for relief under Federal Rule of Civil Procedure 60(b) will be denied, as will the motion to quash the writ of attachment filed by PDVSA, PDVH, and CITGO. Crystallex's motion to set the sales procedures will be granted in part and denied in part. The parties will be ordered to meet and confer and then provide further input on the specific manner in which the Court should proceed toward conducting the sale of PDVSA's shares of PDVH in an amount sufficient to satisfy the judgment that Venezuela owes Crystallex. An appropriate Order follows.

This is Exhibit “B” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on April 27, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

Venezuela Opposition Debilitated as Biden Set to Take Office; President Maduro's regime tightens grip on National Assembly, undermining U.S.-backed movement despite oil sanctions - Correction Appended

The Wall Street Journal Online

January 5, 2021

Correction Appended

THE WALL STREET JOURNAL.

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Body

When Venezuela's regime takes over the National Assembly on Tuesday, it will put the U.S.-backed opposition leader Juan Guaidó in his most precarious position since becoming head of the movement to oust the authoritarian President Nicolás Maduro two years ago.

For the current government, Mr. Guaidó will no longer be head of congress in Venezuela now that Mr. Maduro's lieutenants are about to be sworn in *to lead the 277-member National Assembly*. Mr. Guaidó's position as president of the assembly had given the U.S. and more than 50 countries justification to recognize him over Mr. Maduro as Venezuela's legitimate leader.

Mr. Maduro has publicly said his government is willing to engage with the U.S., though past efforts at brokering a dialogue failed.

An official on President-elect Joe Biden's transition team said that it has no plans to negotiate with Mr. Maduro, adding that it has had no communications with the Venezuelan regime.

"President-elect Biden has been clear throughout the campaign and during the transition that he believes Maduro is a dictator and that the Biden administration will stand with the Venezuelan people and their call for a restoration of democracy through free and fair elections," the official said.

The U.S., the official added, will seek to rebuild multilateral pressure on Mr. Maduro, call for the release of political prisoners, implement sanctions against Venezuelan officials guilty of corruption and human-rights abuses, and grant Temporary Protected Status for Venezuelans living in the U.S.

As Mr. Maduro tightens his grip on congress, the country's opposition will soon be dealt another blow. Some remaining opposition lawmakers close to Mr. Guaidó plan to flee the country, fearing jail if they remain in Venezuela, opposition activists said. With no powers or control over territory, what Mr. Guaidó and his team call an interim government is now little more than a virtual entity, making pro-democracy statements through social media and Zoom. The Trump administration has said it still considers Mr. Guaidó as Venezuela's only democratically elected leader.

With many in the opposition leadership now outside Venezuela, Mr. Guaidó is increasingly isolated, living in a small apartment in Caracas with his wife and small daughter and wondering whether the secret police will arrest him.

As Mr. Biden prepares to be inaugurated as U.S. president Jan. 20, Venezuelan opposition leaders said they are shifting away from strategies to spur a revolt to force Mr. Maduro from power. Instead, they said they would lean more toward *finding a way to alleviate food and medicine shortages* in a country facing economic calamity. A third of Venezuelans can't access three meals a day, according to the U.N. World Food Program. As many as half endure daily power outages while they struggle to get by with annual inflation near 2,000%, according to the Caracas business-consulting firm Ecoanalítica.

Since the U.S. first recognized Mr. Guaidó as Venezuela's interim president in January 2019, Washington has imposed oil and financial sanctions and drummed up international support for a movement to overthrow Mr. Maduro. That effort has failed.

Now many opposition activists, as well as former advisers to President Trump, are saying changes are needed.

"The whole Guaidó interim-government scheme probably outlived its life," said Juan Cruz, who previously advised the White House on Venezuela policy. He said the U.S. needs to reconsider its broad sanctions, which targeted state companies and figures accused of corruption and human-rights abuses.

"January represents a new day for a lot of players: the opposition, the U.S. administration and even the regime," said Mr. Cruz.

Mr. Guaidó, in a recent video address on Twitter, sought to instill confidence in his movement by assuring that it is unified and would lead the country toward free elections. "The dictatorship is not going to leave willingly, and that's why we need to make them leave," he said.

He called on supporters to protest in the streets on Tuesday as Mr. Maduro's allies take their seats in the National Assembly. He also urged Venezuelan envoys operating in other countries to lobby host nations to increase pressure on Mr. Maduro.

But he proposed little else. And in Venezuela, the economic meltdown and jailings have most Venezuelans preoccupied with getting access to scarce running water and fuel rather than thinking about protests.

"You've lost the capacity to mobilize people," said Luis Vicente León, a political analyst who directs the Caracas polling firm Datanálisis. "Today there's no one pressuring Maduro inside Venezuela-no political negotiations, no election participation or protests. The result is the complete pulverization of the opposition."

In a recent poll, Datanálisis found only 25% of respondents said they had hopes for a democratic transition in the country. Ecoanalítica estimates that the economy contracted by 23% in 2020 after shrinking 40% a year earlier.

Hopelessness in the country is expected to increase the outflow of desperate Venezuelans, which now totals five million. The Organization of American States estimates that the number of Venezuelan migrants could swell to seven million by the end of 2021, more than the number of Syrians who have fled that country's brutal war.

The political standoff is making the search for solutions to the humanitarian crisis difficult. Opposition lawmakers allied with Mr. Guaidó recently approved a resolution on a Zoom videoconference calling for them to continue in office after Tuesday, when their five-year congressional terms ended. They argued that the legislative elections Mr. Maduro held in December were illegitimate, as did the U.S. and many other countries.

Mr. Maduro said in a recent address that he would crack down on any lawmakers trying to extend their mandate. "I won't be afraid to act fiercely to apply the law," the leftist leader shouted in the televised speech, flanked by the military high command.

At times Mr. Maduro has challenged Mr. Guaidó by *taking over opposition political parties*. But Mr. Guaidó also faces fissures within his own movement. Democratic Action, one of the main political parties in the opposition coalition, abstained from a vote on keeping Mr. Guaidó as assembly chief. Some lawmakers said they have lost faith in his team.

Oscar Ronderos, a lawmaker who has broken from Mr. Guaidó, described the current opposition movement as "an interim government that does not exist, in a National Assembly that doesn't serve anyone."

The movement's internal discord, according to opposition lawmakers, could further damage its credibility, especially among countries in the European Union that advocate negotiations with the regime to permit humanitarian aid and later an agreement on free elections.

In recent weeks, the Maduro regime displayed its repression by arbitrarily detaining the directors of organizations that provide food to poor Venezuelans and sentencing six former executives of Citgo to long prison terms. The U.S. government has said the executives-five of whom are U.S. citizens-are being held unjustly.

"Rather than being confidence building, it's confidence eroding," for negotiation hopes, Mr. Cruz said.

Julio Borges, who from exile in Colombia serves as the top diplomat for Mr. Guaidó's movement, said he expects the U.S. and its allies won't go easy on Mr. Maduro.

"The most important thing for the democratic struggle in Venezuela is that Maduro is still unable to stabilize the country or increase his popularity," he said.

Ginette Gonzalez in Caracas, Venezuela, contributed to this article.

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Notes

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Correction

Corrections & Amplifications

As many as half of Venezuelans endure daily power outages while they struggle to get by with annual inflation near 2,000%, according to the Caracas business-consulting firm Ecoanalítica. An earlier version of this article incorrectly said 12,000%. (Corrected on Jan. 4.)

Load-Date: January 5, 2021

Venezuela's revolution has stalled. Is Juan Guaidó still the answer?

Analysis by Vasco Cotovio and Isa Soares, CNN
Updated 3:01 PM ET, Thu January 14, 2021

What should President Biden do about Venezuela? 00:59

(CNN) Flanked by flags in the makeshift assembly hall of a non-descript office building, the leader of Venezuela's opposition told lawmakers that 2021 would be the year that would change Venezuela's fate.

"It's the end of a cycle, because in 2021 Venezuela will be reborn and will see freedom," Juan Guaidó said at the January 5 meeting, as he asked the opposition to unite around him.

There was some applause from dozens of opposition members present or calling into the wood-paneled room in East Caracas -- but it was a stark contrast from nearly two years ago, when the young leader took the stage with a similar promise of freedom.

In January 2019, surrounded by friends and allies, Guaidó -- recently minted the head of opposition-controlled National Assembly -- had stood before a roaring crowd. In his left hand, he held a small pocket Constitution engraved with the face of South American revolutionary and local hero Simon Bolivar, then raised his right hand and began reciting an oath: "I swear," he said, pausing as the crowd began cheering. "To formally assume the power of the National Executive as the President of Venezuela."

Guaidó at a protest in February 2019.

The crowd went wild, waving flags, holding their fists in the air in celebration, some even brought to tears by his declaration. For many, this seemed to be a turning point toward justice, after a widely disputed election in which Nicolas Maduro claimed a second term as Venezuela's President.

The opposition's argument was that Guaidó should instead serve as Venezuela's interim president per his constitutional duty as President of the National Assembly -- at least until free and fair elections could be held.

The United States under President Donald Trump soon recognized Guaidó as the country's lawful leader. More than 60 countries soon did the same. Venezuela suddenly seemed poised for change after years of corruption and mismanagement under the governments of Hugo Chavez and Maduro, widely considered responsible for driving the country into extreme poverty.

Weeks of demonstrations in support of Guaidó's claim to the presidency ensued, especially in the capital Caracas, some attracting hundreds of thousands of people. The popular movement culminated in a botched coup attempt in April 2019, when Guaidó announced a revolutionary uprising at dawn from Generalissimo Francisco de Miranda Air Base, also known as "La Carlota" in Caracas, alongside supporters, allies and a group of soldiers.

He called it "the final phase of Operation Freedom" and said it would put an end to Maduro's control of the Venezuelan government -- but the uprising ultimately failed.

An anti-Maduro protest in 2019.

Protests have since waned and animosity against the regime tuned down. Many Venezuelans, already on their knees after years of economic decline, seem to have lost the urgency of their desire for political change, as the country grapples with a deadly pandemic.

Last month, most opposition figures from the National Assembly, including Guaidó withdrew ahead of another round of elections, saying they didn't have a fair shot. They said they saw the vote as fraudulent after Venezuela's Supreme Court - which is full of Maduro loyalists - wrested control of the main opposition parties and handed it over to politicians loyal to the regime. And though they maintain they are the only democratically elected and rightful representatives of the Venezuelan people, the unseated opposition legislators have been forced into hiding and meet in secret locations.

Venezuela is quietly quitting socialism

Some in the international community, including the United States, have promised continued support for Guaidó and his movement. "The international community cannot allow Maduro, who is in power illegitimately because he stole the 2018 election, to gain from stealing another election," a spokesperson for the US State Department Bureau of Western Hemisphere Affairs told CNN on January 8.

"Neither Maduro nor his new, fraudulently elected illegitimate National Assembly will represent the voice of the Venezuelan people, which should be expressed through free and fair elections."

But many in the country and abroad now doubt that Guaidó can deliver on his promise to restore democracy. Even the European Union, while rejecting the results of the National Assembly elections, did not refer to Guaidó as "Interim President" in a recent statement, saying "the EU will maintain its engagement with all political and civil society actors striving to bring back democracy to Venezuela, including in particular Juan Guaidó and other representatives of the outgoing National Assembly elected in 2015."

Meanwhile, cracks are appearing in Guaidó's armor at home, with some in the opposition questioning his strategy.

On August 23, fellow opposition politician and former presidential candidate Henrique Capriles called for Venezuelans to participate in the December election, breaking ranks with the rest of the opposition which had called for a boycott. "It's not about returning to argue what we already know: that the Maduro regime doesn't want the discontent to use their vote, that they are capable of everything even while having 80% of the country against them," he wrote on Twitter. "It's about... debating a route that isn't solely that of abstention and resignation."

Another former presidential candidate from opposition ranks, Maria Corina Machado, wants more extreme action than Guaidó took. "Today we call for the strategy of force," she said in a video to her supporters on December 30 "Yes, I am calling for it, because it is the only that allows us to remove these criminals from power."

Some in the opposition have started questioning Guaidó's strategy.

Machado believes Guaidó's team missed its chance to effect real change, she told CNN last month. "I think there's been a lack of accountability from the interim government (of Juan Guaidó)," she said. "We had the greatest opportunity ever to get rid of this horrible regime and I think the opposition has committed important mistakes."

Despite her criticism and the fact that some lawmakers have recently given in to regime pressure and switched sides to support Maduro, Machado claims Venezuela's opposition is still united -- though its strategy needs to change.

"Society has been more united and supportive when the opposition has been able to manage a strategy that the population feels can be effective in producing regime change," she explains, adding that "Juan Guaidó had huge support" while people believed his strategy of relying mostly on international pressure, especially US sanctions, could deliver. As it became clear it would not, "people started doubting as well," she adds.

Many on the streets of Caracas seem to agree with Machado. Nearly two years after Guaidó's declaration, they feel momentum has shifted, that Maduro has tightened his grip on power and that another shift is needed.

Joe Biden faces a key decision on Venezuela

"The form of struggle needs to change," with a pro-opposition union leader said, out elaborating how. Speaking on condition of anonymity for fear of repercussion , they added that that Venezuelans are "disappointed" and "no longer expect anything" from Juan Guaidó. "People feel he does not represent a solution. And what people need is a solution."

Back in the wood-panelled room in East Caracas, Guaidó told lawmakers he welcomed "constructive criticism" from all sides, acknowledging that some had proposed different strategies, including Capriles and Machado, whom he said had done "so much" for Venezuela.

However, he also asked them to debate each other's differences from a position of "unity, needed to face this dictatorship."

"This is the moment, the last call from your country," he said, asking for perseverance. "[This is] a call to each and every one of you for the need to rebuild this moment and find a definitive way to achieve a democratic transition."

There's certainly a feeling in Venezuela that a new cycle is about to begin as Joe Biden takes over as President of the United States, offering a potential reset in relations. But it's still unclear whether that means more US engagement with the government of embattled President Nicolas Maduro, or an even tougher stance towards his regime.

And it's becoming increasingly apparent that there might not be room for Guaidó in that cycle.

EMERGING MARKETS JANUARY 25, 2021 / 7:17 AM / UPDATED 3 MONTHS AGO

EU states no longer recognise Guaido as Venezuela's interim president

By Reuters Staff

2 MIN READ

FILE PHOTO: Venezuelan opposition leader Juan Guaido speaks during a news conference in Caracas, Venezuela December 5, 2020. REUTERS/Manaure Quintero

BRUSSELS (Reuters) - Venezuela's Juan Guaido is a "privileged interlocutor" but no longer considered interim president, European Union states said in a statement on Monday, sticking by their decision to downgrade his status.

The EU's 27 states had said on Jan. 6 they could no longer legally recognise Guaido as after he lost his position as head of parliament following legislative elections in Venezuela in December, despite the EU not recognising that vote.

Following the disputed re-election of President Nicolas Maduro in 2018, Guaido, as head of parliament, became interim president. Guaido is still seen by the United States and Britain as Venezuela's rightful leader.

The status of interim president gives Guaido access to funds confiscated from Maduro by Western governments, as well as affording him access to top officials and supporting his pro-democracy movement domestically and internationally.

The 27 EU members said in a joint statement that he was part of the democratic opposition - despite a resolution by the European Parliament last week for EU governments to maintain Guaido's position as head of state.

“The EU repeats its calls for ... the freedom and safety of all political opponents, in particular representatives of the opposition parties elected to the National Assembly of 2015, and especially Juan Guaido,” the statement said following a meeting of EU foreign ministers in Brussels.

“The EU considers them to be important actors and privileged interlocutors,” it said, calling for the opposition to unite against the disputed rule of Maduro.

The assembly elected in 2015 was held by the opposition, whereas the new assembly is in the hands of Maduro’s allies, after the opposition called on Venezuelans to boycott the vote.

Guaido last week thanked the European Parliament for recognising him as president of the National Assembly, a committee of lawmakers who assert they are the country’s legitimate legislature, arguing the 2020 parliamentary elections were fraudulent.

Reporting by Robin Emmott; Editing by Alison Williams

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This is Exhibit “C” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on April 27, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

BRIEFING ROOM

Background Press Call by Senior Administration Officials on Venezuela

MARCH 08, 2021 • PRESS BRIEFINGS

Via Teleconference

SENIOR ADMINISTRATION OFFICIAL: Thank you. Greetings to everyone from the National Security Council. My name is [senior administration official], and on behalf of the NSC press team, I would like to welcome our participants to an on-background conference call to discuss Venezuela.

Today, we are joined by [senior administration official], as well as [senior administration official]. We will begin with remarks from [senior administration official], and then from [senior administration official]. Then we will open it up for a question-and-answer session. As a reminder, today's briefing will be on background, attributable to a "senior administration official," and embargoed until 4:15 p.m. this evening. I know that we mentioned in the invitation that the call contents are embargoed until 4:30, but we'll amend that until 4:15 this afternoon.

And with that, I will turn it over to our first senior administration official.

SENIOR ADMINISTRATION OFFICIAL: Hey, everybody. Thanks for jumping on the phone call. So, the purpose of the call today is really to talk about the decision of the Department of Homeland Security to grant Temporary Protected Status to Venezuelans already in the United States. But I want to put this into the context of the President's policies toward Venezuela.

You know, first of all, as a candidate, the President was the first democratic candidate to actually recognize Juan Guaidó as the legitimate leader of Venezuela and has been very clear that Nicolás Maduro is a dictator and that the May 2018 elections were fraudulent and illegitimate.

His approach to Venezuela has been — has been fairly clear. Number one, he is going to underscore the importance of supporting the Venezuelan people inside and outside of the

country by — with robust humanitarian assistance, particularly to the countries in the region that have been impacted by the over 5 million Venezuelans that have fled their country.

Number two, he is committed to a robust multilateralism, meaning that we're going to, as an administration, be working to increase the international consensus in favor of free and fair elections in Venezuela, and that we're working with the international community to increase pressure in a coordinated fashion, and making clear that the only outcome of this crisis is a negotiation that leads to a democratic solution.

He has also made clear that — and directed the administration to focus really on matters of human rights; to combat rampant corruption in the country; to go after every penny that has been stolen from the Venezuelan people by elements of the regime and its supporters; and to ensure that once Venezuela returns to democracy, that the United States is the first country in line to help rebuild. So, as part of that approach, we moved very quickly to grant Temporary Protected Status.

And with that, I want to turn it over to my colleague, "senior official number two."

SENIOR ADMINISTRATION OFFICIAL: Thank you, "senior official number one." Hi, everybody. Echoing my colleague's thanks for hopping on the call today. I'm also really delighted to be able to share with you that Secretary Mayorkas has designated Temporary Protected Status for Venezuelans.

As "senior official one" just said, it is for an 18-month period in order to qualify. And this is very important: Individuals have to demonstrate continuous residence as of March 8th, 2021. So, by today. If you are arriving tomorrow or any day after, you do not qualify for this TPS designation. So, for those who do qualify and can show that they have been here as of today, they can apply for TPS.

The designation is due to the extraordinary and temporary conditions in Venezuela, which is one of the statutory basis for it. Because of conditions there, it is not safe for Venezuelans to return. TPS is — also will require people to go through security and background checks. They will have to fill out, of course, the application, which does include a fee. All of this will be in a federal register notice that is going to be made available for public inspection this afternoon. And then we'll go live, if you will, as of tomorrow.

There are an expected — just to, you know, be upfront about the number — over 300,000 individuals are estimated to be eligible to file applications for TPS. But again, they have to be people who are already here. We really want to underscore that we very much expect that

smugglers and other unscrupulous individuals will be now claiming that the border is open, and that is not the case. So, due to the pandemic and travel and admission restrictions at the border, those all remain in place — those restrictions.

So, I think, with that, I will turn it back over to our moderator.

MODERATOR: Why don't we go to a line with Carla Angola with EVTV? Please go ahead.

Q Thank you so much for this opportunity. This question is for a (inaudible) officer number one. It's related to Venezuela, not to the TPS, but it has to be — I think that Venezuelans need an answer about that. The question is: If you are willing to start a negotiation with the Venezuelan regime through allies', as you say, "international pressure," what are you willing give in, taking into account that, in a negotiation, you always have to give in something? And what would you ask the regime in return? This is my question. Thank you so much.

SENIOR ADMINISTRATION OFFICIAL: Gracias, Carla. Really great to hear from you. So look, just to be clear here that the negotiation is one that is not between the United States and the regime; it is between the illegitimate regime and the interim government of Venezuela. And the outcome is one that needs to lead to free and fair elections.

To be clear though: We've seen negotiations like these fail in the past. We've seen Maduro use them to — as a delay tactic to centralize power; to polarize the opposition; to — and to jail opponents; and to use — crack down on peaceful protesters. So we are very clear-eyed about, really, what the expectations — what the regime's intentions and incentives are.

The message is clear, and it's been clear since President Biden took office, which is that the United States is going to continue to increase the pressure. It's going to expand that pressure multilaterally to ensure that those that are, you know, guilty of human rights abuses; that are robbing the Venezuelan people; that are engaged in rampant criminal activity really find no quarter anywhere until they sit down to the table in earnest and make decisions that lead toward free and fair elections in the country.

Once that happens, we will, you know, consult with the multi- — the international community and make decisions about whether sanctions would be lifted. Again, that is something that, you know, we would be in close touch with the interim government.

And, so again, just to repeat: The dialogue is not between us and the regime. It's one where the regime has to sit at the table in good faith, demonstrate confidence in the process, and make decisions that lead to an electoral outcome.

Thank you.

Q So, hello, I don't know if you can hear me. Hello?

SENIOR ADMINISTRATION OFFICIAL: Yes, we can.

Q Okay. Sorry for that. Yeah. This is Rafael Salido from Voice of America. I was wondering, going back to the sanctions: What would you respond to those criticizing the fact that the sanctions are still in place? Because they may even — well, sorry, that — the fact that, if you suppress, if you suspend the sanctions, that may make it possible for countries, such as Venezuela and Iran, to go back to business, especially with things regarding with fuel, which is helping the regime getting loads of money. And some of it is going to corrupt ways, let's say. What would be your — your response to that? Thank you.

SENIOR ADMINISTRATION OFFICIAL: So I think what you're asking me is — for those people that are against lifting sanctions, what —

Q Exactly.

SENIOR ADMINISTRATION OFFICIAL: — what our response would be? Okay.

So, look, I think the first thing I would say is we — the United States is in no rush to lift sanctions. But let's — we need to recognize here that the unilateral sanctions, over the last four years, have not succeeded in achieving an electoral outcome in the country. Nowhere in the world have unilateral sanctions actually lead to a democratic transition in the absence of a multilateral and coordinated approach with — among the international community, which is what the previous administration failed to accomplish.

And so, really, what we're focused on is making sure that we're working very closely and coordinating very closely with the European Union, with our friends and allies in Latin America and the Caribbean to make sure that we're driving a consensus view of how we can be most effective at exerting pressure on the regime. Because, look — again, unilateral sanctions, the — what we have clearly seen is that the regime has adapted to sanctions. Oil markets, long ago, have adapted to oil sanctions. And that — they are able to sustain themselves through illicit flows.

So really the — we could keep on with unilateral sanctions and stay in this situation for who knows how long. Or, actually, we could start sitting down with the international community to

see how we can actually exert coordinated pressure and set clear expectations about the way forward.

That said, we're going to review the sanctions to make sure that they are effective because the focus of sanctions should be to increase pressure on the regime, eliminate any sort of access to corrupt capital to sustain themselves, and — but also not one to — that penalizes and punishes unnecessarily the Venezuelan people in the country.

And so we reserve the right to undertake a review of the current (inaudible) regime. But, again, as I said before, there is no rush to lift sanctions, and — you know, unless the Maduro regime demonstrates that it is ready to sit down at the table and takes measures that demonstrate to the international community, to the Venezuelan interim government that this time is going to be different.

Q Thank you.

Q Hey, thank you so much for doing the call. Just quickly, for housekeeping, I wanted to know — I know it's "senior administration official" — but who "senior official two" was.

And my questions were: How would you respond to some of the, you know, critics who are — who have always been critical of TPS, who are going to say this is a permanent reprieve, permanent protections?

Also, can you talk a little bit about — more about the reasons for granting TPS? Under what provision of TPS is this going to be granted? And do you anticipate this will have an impact on political support in South Florida? Thank you.

SENIOR ADMINISTRATION OFFICIAL: Hi. So I am the "administration official number two." My name is [senior administration official].

Q Thank you (inaudible).

SENIOR ADMINISTRATION OFFICIAL: And I have to tell you that my — no, no, that's — that's okay. And I have to tell you that my pen literally ran out of ink as you were talking, so I'm so sorry.

But let's start with the — one question I remember is about the fact that it is really not temporary, that it is permanent. It is worth taking a look of at least 10 countries that have had TPS — that have had it revoked or ended and terminated. So it is not the case that TPS goes on

forever. And I am looking for the list of some of the countries, but I know the American Immigration Council, if you go to their website, has a very complete list.

Secondly, in terms of the question regarding the politics of South Florida: I don't know if the implication is that this is a political call. It is not at all — the suffering and the ongoing turmoil that the Venezuelan people have endured is well documented. And that's neither Democrat nor Republican; there — this is based on what the conditions on the ground are.

This designation is due to the extraordinary and temporary conditions in Venezuela that prevent the nationals there, who are here, from returning safely. And this is a complex humanitarian crisis: widespread hunger, malnutrition, growing influence and presence of non-state armed groups, a crumbling infrastructure, and you could go on and on.

So this is an (inaudible), completely nonpartisan, bipartisan decision — the designation. And I may have missed one of your questions, so my apologies.

Q No, no, thank — and thank you. Thank you so much. I think you pretty much got them. I — could you explain, just to follow up: In 18 months, under what criteria would it be extended? What would you be looking for?

SENIOR ADMINISTRATION OFFICIAL: That's a great question. Honestly, I'm new to government, so I haven't participated in those kinds of assessments. So I can certainly get back to you on what, you know — upon what it's based.

But, you know, like I said, there have been nearly a dozen countries that had TPS and it was terminated, and then there are others that have had it renewed. So there is well-applied criteria to make that designation for determination.

Q Thank you.

Q Hello. Thank you for the call. So, first, embargo is 4:30, right?

And (inaudible) question is, there has been — on the last day in office, President Trump left a DED designation for Venezuela. Is this any part of it? Obviously, TPS is very different. So did that play anything into the process?

And I missed the top part of the call, so if you could go into numbers — the number of people you think that will benefit from this. This is a very — a big story, and I think those details have to come up very quickly: what they have to do, when they can start applying, all those things.

SENIOR ADMINISTRATION OFFICIAL: That's right. So the — this is a little unusual in that Venezuelans were given Deferred Enforced Departure based on a January 19th presidential memorandum by then-President Trump. This is a TPS designation for people who are here as of today. TPS is different, in that it is statutory. It is a very firm platform, if you will, for this kind of action, where people will have the opportunity to apply, if they qualify, to get work authorization.

Deferred Enforced Departure is more at the pleasure of a President, generally based on foreign policy matters. And DED has been used by Democrats and Republicans alike over at least the last 40 years, I think.

So it's not to say that it isn't just different in that it is not based on statute, but it's more a presidential decision based on foreign policy considerations.

In terms of the mechanics, the — there is information in the upcoming Federal Register notice that you'll all be able to read it 4:15 about the DED and how it interplays with TPS. And the individuals who apply for and receive TPS and who are also covered by DED, they'll need to apply for employment authorization documents under both programs.

So people can make their selection, if you will. The cost is the same. You know, we encourage people who believe that they're eligible for TPS to apply for it, but the protection is essentially the same. And this is a bit unusual that you have one country that has both.

And, I'm sorry, you asked me another question, and I've forgotten it — the number of people, I think.

MODERATOR: We no longer have that line open, unfortunately.

SENIOR ADMINISTRATION OFFICIAL: Oh, sorry. I think it was a question about the number of people. There — of course, these are our estimates, and we will see at the end of the day how many people do come forward, but the number is around 320,000.

MODERATOR: And next, we can go to the line of Beatriz Pascual at EFE. Please go ahead.

Q Thank you. So I am looking for some practical information or people who are who are thinking about applying. So I wanted to know if you could please specify how much Venezuelans would have to pay, what would be the fee approximately; how long it would take for them to be granted TPS — how long the process would be; and how they can prove that

they have been in the U.S. until today? What type of documents can they give to the authorities? Thank you.

SENIOR ADMINISTRATION OFFICIAL: Sure. I can answer some of those at least. The TPS application is set by statute at $50. There's also a required biometrics fee, that's $85. And then if the work authorization is desired, that's $410. So the total is $545.

In terms of the length of time that processing will take: They have 180 days to apply for TPS. So there's a clock, if you will, to keep in mind as the applicant.

In terms of the turnaround time, I'm afraid I just don't have that information, but can certainly try to get it and give it to you.

And then in terms of the documents that are needed to show physical presence: You know, again, this is well known in the immigrant community, where there had been previous designations of TPS, but certainly anything that's got a date on it — a bill, anything like school records, an employment pay stub. At times, affidavits, I know, have also been submitted. So I think it's a real range.

And I would just encourage people to get some practical advice from community-based organizations that, again, have done this many times in the past and can just be really careful in steering people so that they get it right the first time, in terms of giving the correct documentation.

MODERATOR: Thank you. We have time for one more question. We'll go to Janet Rodriguez with Univision Network. Please go ahead.

Q Thank you. Thank you for having the call. So I want to piggyback on the last question. And you just said they have 180 days to apply for TPS, as of tomorrow?

And then my second question is on the memorandum signed by the last administration: Will that still continue to be in place or do you guys plan on eliminating that — superseding that memorandum with this TPS order?

SENIOR ADMINISTRATION OFFICIAL: Yeah, so to your first question, individuals who want TPS have to file an application with USCIS within 180 days. It's a registration period; this is very common with all TPS designations.

And the DED designation is also in place. This isn't a repeal of that. As I explained earlier, TPS

is — has a statutory basis, and so it is another way of being able to provide people protection. And so, it is the option of the person how it is that they want to apply.

But this (inaudible) an expression of this administration's commitment to trying to offer those who are from Venezuela in the U.S. protection under Temporary Protected Status, which, again, is based in statute.

SENIOR ADMINISTRATION OFFICIAL: Thank you so much, [senior administration official]. And thanks to our speakers.

So, as a reminder, the contents of the call today are embargoed until 4:15. Again, that's 4:15 p.m. And thank you so much to our senior administration officials for giving their time and thanks to our participants for their questions.

If you have any questions, please email the NSC Press Team or you can e-mail me. Our e-mail is — one second. Or I'll give my e-mail. It's [redacted].

Thank you all so much. Have a good day.

END

This is Exhibit “D” referred to in the Affidavit of Robert Fung sworn by Robert Fung at the City of Toronto, in the Province of Ontario, before me on April 27, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

NATALIE RENNER

THIS FIFTEENTH CREDIT AGREEMENT AMENDMENT is dated as of _____, 2021 and effective as of May 7, 2021.

B E T W E E N:

CRYSTALLEX INTERNATIONAL CORPORATION
(the "**Borrower**")

- and –

TENOR SPECIAL SITUATION I, LP
A Cayman Island Exempted Limited Partnership
(the "**Lender**") (sometimes called "**Tenor Cayman**")

WHEREAS the Borrower and Tenor Special Situation I, LLC (known and referred to in the Credit Agreement (as that term is defined below) as Tenor Special Situation Fund I, LLC ("**Tenor Situation I**")) entered into a credit agreement dated as of April 23, 2012, which was assigned by Tenor Special Situation I, LLC to Tenor KRY Cooperatief U.A. ("**KRY Coop**") on such date (as so assigned and as amended by the first credit agreement amending and confirming agreement dated as of May 15, 2012, the second credit agreement amendment agreement dated as of June 5, 2013 (the "**Second Credit Agreement Amendment**"), the third credit agreement amendment agreement dated as of April 16, 2014 (the "**Third Credit Agreement Amendment**"), each of such amending agreements between the Borrower and KRY Coop, and as further amended, amended and restated, supplemented, converted or otherwise modified from time to time prior to the date hereof (the "**KRY Coop Credit Agreement**"));

WHEREAS subject to the provisions of the KRY Coop Credit Agreement, KRY Coop made a term loan to the Borrower, in accordance with Section 2.2 of the KRY Coop Credit Agreement and the other provisions thereof, in an aggregate principal amount not exceeding US$62,533,333.33;

WHEREAS pursuant to an assignment agreement dated as of December 30, 2014 between KRY Coop and Tenor Capital Management Company, L.P. ("**Tenor Management**"), as assignors, and Luxembourg Investment Company 31 S.a.r.l., a private limited liability company registered with the Luxembourg Register of Commerce and Companies (**"Luxco 31"**), as assignee, and the "Borrower Agreement" attached thereto and executed by and delivered by the Borrower on December 30, 2014 (the "**2014 Assignment Agreement**") (a) KRY Coop assigned to the Luxco 31 all of KRY Coop's rights, obligations and interests in and to (i) the KRY Coop Credit Agreement, (ii) all Obligations now or hereafter owing by the Borrower under the KRY Coop Credit Agreement or any of the other Credit Documents, (iii) all of the other Credit Documents and any other documents, agreements, assignments, instruments, registrations or filings delivered to or for the benefit of Tenor Situation I (in its capacity as the original lender under the Credit Agreement (as that term is hereinafter defined)) or to or for the benefit of KRY Coop by the Borrower pursuant to or in connection with the Credit Agreement and (iv) the CCAA Financing Orders and the U.S. Financing Orders including without limitation the Third Additional CCAA Financing Order and the NAP Transfer Order (collectively, the "**KRY Coop Assigned Assets**") and Luxco 31 agreed to assume all obligations of KRY Coop and under and in respect of the KRY Coop Assigned Assets and (b) Tenor Management assigned to Luxco 31 all of Tenor Management's rights, obligations and interests in and to (i) the December 2014 Commitment and (ii) the December 2014 Additional Financing Order and the NAP Transfer Order (collectively, the "**Tenor Management Assigned Assets**") and Luxco 31 agreed to assume all obligations of Tenor Management under and in respect of the Tenor Management Assigned Assets;

WHEREAS as a result of the assignments and assumptions made in the 2014 Assignment Agreement, Luxco 31 became the "the Lender" under the Credit Agreement and all other Credit Documents (the KRY Coop Credit Agreement, as assigned by KRY Coop to Luxco 31 and assumed by Luxco 31 in accordance with the terms of the 2014 Assignment Agreement is hereinafter called the "**Luxco 31 Credit Agreement**");

WHEREAS Luxco 31 and the Borrower entered into the fourth credit agreement amendment agreement dated as of March 12, 2015 (the "**Fourth Credit Agreement Amendment**") whereby Luxco 31 agreed, subject to the terms and conditions of the Luxco 31 Credit Agreement as amended by the Fourth Credit Agreement Amendment, to lend an additional amount to the Borrower, and Luxco 31 did advance and lend such additional amount to the Borrower;

WHEREAS Luxco 31 and the Borrower entered into the extension and amendment agreement dated as of December 31, 2016 (the "**Fifth Credit Agreement Amendment**") whereby Luxco 31 and the Borrower agreed, subject to the terms and conditions of the Luxco 31 Credit Agreement as amended by the Fourth Credit Agreement Amendment and the Fifth Credit Agreement Amendment, to (i) extend the Maturity Date as specifically set out therein and (ii) certain amendments to the Credit Agreement as specifically set out therein;

WHEREAS Luxco 31 and the Borrower entered into the extension and amendment agreement dated as of June 30, 2017 (the "**Sixth Credit Agreement Amendment**") whereby Luxco 31 and the Borrower agreed, subject to the terms and conditions of the Luxco 31 Credit Agreement as amended by the Fourth Credit Agreement Amendment, the Fifth Credit Agreement Amendment and the Sixth Credit Agreement Amendment, to extend the Maturity Date as specifically set out therein;

WHEREAS Luxco 31 and the Borrower entered into the seventh credit agreement amendment dated as of December 27, 2017 (the "**Seventh Credit Agreement Amendment**") whereby Luxco 31 and the Borrower agreed, subject to the terms and conditions of the Luxco 31 Credit Agreement as amended by the Fourth Credit Agreement Amendment, the Fifth Credit Agreement Amendment, the Sixth Credit Agreement Amendment and the Seventh Credit Agreement Amendment, to (i) extend the Maturity Date as specifically set out therein and (ii) certain amendments to the Credit Agreement as specifically set out therein;

WHEREAS Luxco 31 and the Borrower entered into the eighth credit agreement amendment dated as of February 28, 2018 (the "**Eighth Credit Agreement Amendment**") whereby Luxco 31 and the Borrower agreed, subject to the terms and conditions of the Luxco 31 Credit Agreement as amended by the Fourth Credit Agreement Amendment, the Fifth Credit Agreement Amendment, the Sixth Credit Agreement Amendment, the Seventh Credit Agreement Amendment and Eighth Credit Agreement Amendment, to (i) extend the Maturity Date as specifically set out therein and (ii) certain other matters as specifically set out therein;

WHEREAS pursuant to an endorsement of the CCAA Court issued on April 26, 2018 and confirming email correspondence between counsel for each of the Borrower and Luxco 31 on April 27, 2018, the Maturity Date was extended as specifically set out therein (such CCAA Court endorsement and confirming email correspondence are collectively called the **"April 2018 Amendment"**), and whereas Luxco 31 and the Borrower entered into the ninth credit agreement amendment dated as of May 9, 2018 (the "**Ninth Credit Agreement Amendment**") whereby Luxco 31 and the Borrower agreed, subject to the terms and conditions of the Luxco 31 Credit Agreement as amended by the Fourth Credit Agreement Amendment, the Fifth Credit Agreement Amendment, the Sixth Credit Agreement Amendment, the Seventh Credit

Agreement Amendment, the Eighth Credit Agreement Amendment, and the Ninth Credit Agreement Amendment to (i) extend the Maturity Date as specifically set out therein and (ii) certain other matters as specifically set out therein;

WHEREAS Luxco 31 and the Borrower entered into the tenth credit agreement amendment dated as of October 31, 2018 (the "**Tenth Credit Agreement Amendment**") whereby Luxco 31 and the Borrower agreed, subject to the terms and conditions of the Luxco 31 Credit Agreement as amended by the Fourth Credit Agreement Amendment, the Fifth Credit Agreement Amendment, the Sixth Credit Agreement Amendment, the Seventh Credit Agreement Amendment, Eighth Credit Agreement Amendment, the April 2018 Amendment, and the Ninth Credit Agreement Amendment to (i) extend the Maturity Date as specifically set out therein and (ii) certain other matters as specifically set out therein;

WHEREAS Luxco 31 and the Borrower entered into the eleventh credit agreement amendment dated as of May 6, 2019 (the **"Eleventh Credit Agreement Amendment**") whereby Luxco 31 and the Borrower agreed, subject to the terms and conditions of the Luxco 31 Credit Agreement as amended by the Fourth Credit Agreement Amendment, the Fifth Credit Agreement Amendment, the Sixth Credit Agreement Amendment, the Seventh Credit Agreement Amendment, Eighth Credit Agreement Amendment, the April 2018 Amendment, the Ninth Credit Agreement Amendment, and the Tenth Credit Agreement Amendment to (i) extend the Maturity Date as specifically set out therein and (ii) certain other matters as specifically set out therein;

WHEREAS Luxco 31 and the Borrower entered into the twelfth credit agreement amendment dated as of November 6, 2019 (the **"Twelfth Credit Agreement Amendment**") whereby Luxco 31 and the Borrower agreed, subject to the terms and conditions of the Luxco 31 Credit Agreement as amended by the Fourth Credit Agreement Amendment, the Fifth Credit Agreement Amendment, the Sixth Credit Agreement Amendment, the Seventh Credit Agreement Amendment, Eighth Credit Agreement Amendment, the April 2018 Amendment, the Ninth Credit Agreement Amendment, the Tenth Credit Agreement Amendment and the Eleventh Credit Agreement Amendment to (i) extend the Maturity Date as specifically set out therein and (ii) certain other matters as specifically set out therein (the Luxco 31 Credit Agreement as amended by the Fourth Credit Agreement Amendment, the Fifth Credit Agreement Amendment, the Sixth Credit Agreement Amendment, the Seventh Credit Agreement Amendment, the Eighth Credit Agreement Amendment, the April 2018 Amendment, the Ninth Credit Agreement Amendment, the Tenth Credit Agreement Amendment, the Eleventh Credit Agreement Amendment, and the Twelfth Credit Agreement Amendment are collectively called the **"Pre-2020 Assignment Credit Agreement**");

WHEREAS pursuant to an assignment agreement dated and effective as of March 30, 2020 between Luxco 31, as assignor, and the Lender, as assignee, and the "Agreement of Borrower" attached thereto and executed by and delivered by the Borrower on March 30, 2020 (the "**2020 Assignment Agreement**") (a) Luxco 31 assigned to the Lender all of Luxco 31's rights, obligations and interests in and to (i) the Pre-2020 Assignment Credit Agreement, (ii) all Obligations now or hereafter owing by the Borrower under the Pre-2020 Assignment Credit Agreement or any of the other Credit Documents, (iii) all of the other Credit Documents and any other documents, agreements, assignments, instruments, registrations or filings delivered to or for the benefit of Tenor Situation I (in its capacity as the original lender under the Credit Agreement (as that term is hereinafter defined)) or to or for the benefit of KRY Coop by the Borrower pursuant to or in connection with the Pre-2020 Assignment Credit Agreement or to or for the benefit of Luxco 31 by the Borrower pursuant to or in connection with the Pre-2020 Assignment Credit Agreement and (iv) the CCAA Financing Orders and the U.S. Financing Orders including without limitation the Third Additional CCAA Financing Order and the NAP Transfer Order (collectively, the

"**Luxco 31 Assigned Assets**") and the Lender agreed to assume all obligations of Luxco 31 under and in respect of the Luxco 31 Assigned Assets;

WHEREAS as a result of the assignments and assumptions made in the 2020 Assignment Agreement, Tenor Cayman is the "the Lender" under the Pre-2020 Assignment Credit Agreement and all other Credit Documents (the Pre-2020 Assignment Credit Agreement, as assigned by Luxco 31 to Tenor Cayman and assumed by Tenor Cayman in accordance with the terms of the 2020 Assignment Agreement, is hereinafter called the **"Post-2020 Assignment Credit Agreement**");

WHEREAS the Lender and the Borrower entered into the thirteenth credit agreement amendment dated as of October 28, 2020 and effective as of May 6, 2020 (the **"Thirteenth Credit Agreement Amendment**") whereby the Lender and the Borrower agreed, subject to the terms and conditions of the Thirteenth Credit Agreement Amendment, to extend the Maturity Date as specifically set out therein;

WHEREAS the Lender and the Borrower entered into the thirteenth credit agreement amendment dated as of April 14, 2021 and effective as of November 6, 2020 (the **"Fourteenth Credit Agreement Amendment**") whereby the Lender and the Borrower agreed, subject to the terms and conditions of the Fourteenth Credit Agreement Amendment, to extend the Maturity Date as specifically set out therein (the Post-2020 Assignment Credit Agreement as amended by the Thirteenth Credit Agreement Amendment and the Fourteenth Credit Agreement Amendment is collectively called the **"Credit Agreement**");

WHEREAS the Lender (and prior to the 2020 Assignment Agreement, the prior lenders under the Credit Agreement) made a series of credit decisions to (i) enter into the Credit Agreement and thereafter advance substantial credit to the Borrower and (ii) to extend the Maturity Date of the Obligations, in each case on a number of occasions, over extended periods of time and in direct reliance on the Financing Order, the other Orders, the other orders of the CCAA Court in the CCAA Case including without limitation the findings of fact and prior determinations by the CCAA Court that all terms and conditions of the Credit Agreement, the advances made thereunder to the Borrower, and the Obligations owing to the Lender are fair, reasonable and appropriate;

WHEREAS the Maturity Date under the Credit Agreement is currently May 7, 2021 (being the "**Eleventh Extended Maturity Date**");

WHEREAS the Borrower has requested the Lender to agree to further extend the Maturity Date to the "Twelfth Extended Maturity Date" (as that term is defined below) (the "**Maturity Date Extension**");

WHEREAS the Lender is prepared, subject to the provisions of this fifteenth credit agreement amendment (**"this agreement"**) and in reliance on the Financing Order, other Orders, and other orders of the CCAA Court as well as the findings of fact and prior determinations by the CCAA Court that all terms and conditions of the Credit Agreement, the advances made thereunder to the Borrower, and the Obligations owing to the Lender are fair, reasonable and appropriate, to agree to the Maturity Date Extension set out herein; and

WHEREAS capitalized terms used herein and not otherwise defined herein have the meanings ascribed to them in the Credit Agreement.

NOW THEREFORE, for good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged by the parties), the Borrower and the Lender hereby agree as follows:

1. The definition of the defined term "Maturity Date" in Section 1.1 of the Credit Agreement (Defined Terms) is hereby deleted and the following phrase is inserted in its place:

   "the earlier to occur of (i) **[November 5]**, 2021 and (ii) the date of the expiry of the stay of proceedings in the CCAA Case, as such earlier date may be extended by the Lender in its sole discretion and without further action by the Borrower or any other approvals, consents or orders of any court including the CCAA Court (the earlier to occur of such dates, as same may be extended being called the "**Twelfth Extended Maturity Date**")".

2. The Borrower represents and warrants that each of the representations and warranties made in or pursuant to Article IV of the Credit Agreement, to the extent, if any, hereby amended, or which are contained in any other Credit Document, as corrected from time to time pursuant to Section 4.15 of the Credit Agreement (if applicable), are true and correct in all material respects immediately after the execution and delivery of this agreement by the Borrower and the Lender.

3. Except as amended by this agreement, all provisions of the Credit Agreement and the other Credit Documents shall remain unchanged.

4. This agreement and the amendments to the Credit Agreement set out herein, are and shall be conditional on each of the following conditions being satisfied or the Lender receiving, as applicable, each such delivery and court order in form and substance satisfactory to the Lender, in each case in the Lender's sole and absolute discretion (unless any such conditions are waived by the Lender in its sole and absolute discretion in writing):

   (a) a certificate of status with respect to the Borrower;

   (b) a certificate by an officer of the Borrower containing *inter alia:*

      (i) a statement confirming that the copies of the Borrower's articles and the amendments thereto attached as a schedule to the Borrower's officer's certificates to the Lender dated December 31, 2016 are true and complete copies of such articles and have not been further amended;

      (ii) a resolution by the board of directors of the Borrower authorizing the execution and delivery of this agreement and the performance by the Borrower of its obligations under this agreement; and

      (iii) an incumbency certificate in respect of the Borrower with applicable specimen signatures;

   (c) the following court orders:

      (i) an order by the CCAA Court approving the terms of this agreement and the execution and delivery of this agreement by the Borrower and the other documents contemplated hereby and ordering the Borrower to comply with its obligations under the Credit Agreement as amended by this agreement and the other documents contemplated hereby in the form of the order attached hereto as Schedule "A" (the "**DIP Financing Extension and Amendment Order**", which

DIP Financing Extension and Amendment Order shall constitute a CCAA Financing Order);

(ii) an order of the CCAA Court extending the stay of proceedings in the CCAA Case, without any conditions, to and including **[November 5]**, 2021; and

(iii) a U.S. recognition order issued by the U.S. Bankruptcy Court in the Chapter 15 Case with respect to items (i) and (ii) immediately above,

and this agreement shall be further conditional on all applicable periods to seek a stay, leave and/or appeal with respect to such orders referred to in this Section 4 having expired without (x) any further right of any Person to seek any of the foregoing relief or (y) any of the foregoing relief having been sought, and none of such orders having been reversed, stayed, vacated or, unless otherwise agreed by the Lender in writing, amended or modified in any manner;

(d) all accrued and unpaid fees and disbursements of the Lender to the date of this agreement shall have been paid in full;

(e) no motion, action, application, or any other form of court process seeking any order, direction or other relief from the CCAA Court, U.S. Bankruptcy Court or any other court of competent jurisdiction has been filed, threatened in writing or is otherwise pending that, if the requested relief is granted, could reasonably be expected to (i) adversely affect, impact or impair, directly or indirectly, the Lender's rights, remedies and/or entitlements under any Credit Document, any CCAA Financing Order, any other Order, or any other endorsement or direction of the CCAA Court or the U.S. Bankruptcy Court, (ii) cause an Event of Default under the Credit Agreement, (iii) adversely affect, impact or impair, directly or indirectly, the Borrower's rights and/or entitlements to pursue or monetize the Arbitration Entitlement and Arbitration Proceeding Rights, under any Order, endorsement or direction of the CCAA Court or U.S. Bankruptcy Court, or (iv) interfere in any manner, directly or indirectly, with the Borrower's actions, efforts, strategies or process to monetize the Arbitration Entitlement and Arbitration Proceeding Rights, including pursuant to the Venezuela Settlement and all rights to enforcement and payments of all amounts when due thereunder; and

(f) the Borrower shall have acknowledged and agreed to the budget CP extension notice delivered by the Lender to the Borrower in respect of the replacement Budget.

5. Until such time as a replacement Budget has been agreed to between the Borrower and the Lender and such replacement Budget is satisfactory to the Lender in its sole and absolute discretion, the second sentence in Section 11 of the Seventh Credit Agreement Amendment shall not be effective and the Borrower covenants and agrees that it shall not use any monies hereafter received by it or by any other Person on its behalf from any source (including without limitation the Venezuela Settlement Payments, the Ingalls Settlement Payments, or any other Arbitration Proceeds) for any purposes whatsoever without the prior written consent of the Lender and such use of monies being in compliance with the terms of the Credit Agreement as amended by this agreement and without limitation specifically in accordance with Section 3.3 and Exhibit F thereof. For certainty and in furtherance of the covenant by the Borrower contained in the second sentence of section 5 of the Eighth Credit Agreement Amendment

regarding use of monies by the Borrower, the Borrower represents and warrants to the Lender that from and after February 28, 2018 (being the date of the Eighth Credit Agreement Amendment), the Borrower has not used any monies received by it or by any other Person on its behalf from any source (including without limitation the Venezuela Settlement Payments, the Ingalls Settlement Payments, or any other Arbitration Proceeds) for any purposes whatsoever without the prior written consent of the Lender and in compliance with the terms of the Credit Agreement. The Borrower acknowledges and agrees that the Lender has no obligation, and has made no agreement whatsoever to permit any deviation from the terms and conditions of the Credit Agreement, as amended by this agreement, regarding the Borrower's use and application of the Arbitration Proceeds. For certainty, the Borrower confirms and agrees that any such cash flow or cash flow projections attached to or forming part of any motion record filed by the Borrower with the Court or any report issued by the Monitor and/or filed with the Court does not and shall not be deemed to constitute a Budget or a replacement Budget satisfactory to the Lender for the purposes of the Credit Agreement.

6. For certainty, all Security Documents do and shall secure payment of all Obligations including without limitation all interest accruing thereon.

7. None of the Lender Additional Compensation, the Additional Principal Compensation Amount, the Second Additional Principal Compensation Amount, the Third Additional Principal Compensation Amount, the Fourth Additional Principal Compensation Amount, or any shares of the Borrower into which any one or more of them is hereafter converted shall, under any circumstances, be diluted in any manner.

8. The Borrower shall, promptly on request by the Lender at any time and from time to time, and at the expense of the Borrower, make, execute, endorse, acknowledge, file and/or deliver any and all such documents, instruments, agreements and other items, and take such further steps relating to this agreement, the Credit Documents or any of the transactions contemplated hereunder or thereby and without limitation, the Borrower shall deliver such agreements to the Lender, enter into such agreements with the Lender, or seek to obtain court orders or amendments to any court orders from the CCAA Court or the U.S. Bankruptcy Court, in each case relating in any way to this agreement or the transactions contemplated hereby and as the Lender may require.

9. Despite any other provision of this agreement or any other document, this agreement and the amendments to the Credit Agreement contained herein shall not be effective unless and until the Lender delivers to the Borrower a written notice by the Lender that all conditions precedent contained in Section 4 of this agreement have been satisfied (or have been waived by the Lender in writing) (the "**Extension CP Satisfaction Notice**"). The Lender may at any time and for any reason unilaterally waive the requirement for delivery of the foregoing written notice.

10. This agreement supersedes all prior term sheets and commitment agreements and prior negotiations relating to the amendments contained herein.

11. This agreement shall be governed by and shall be construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein.

12. This agreement may be executed in counterparts and both such counterparts shall constitute one and the same agreement. A counterpart may be executed and circulated by fax or other method of direct electronic transmission (including pdf email) and any such counterpart so executed and circulated shall be deemed to be an original of this agreement.

[remainder of page deliberately left blank]

IN WITNESS WHEREOF the parties have executed this agreement as of the date first above written.

CRYSTALLEX INTERNATIONAL CORPORATION

By: _____
Name:
Title:

TENOR SEPCIAL SITUATION I, LP
by its General Partner,
TENOR OPPORTUNITY ASSOCIATES, LLC

By: _____
Name:
Title:

Schedule "A"

DIP Financing Extension and Amendment Order

Court File No. CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	TUESDAY THE 4th DAY
	)	
MR. JUSTICE HAINEY	)	OF MAY, 2021
	)	

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

CRYSTALLEX INTERNATIONAL CORPORATION

Applicant

ORDER

THIS MOTION, made by the Applicant proceeded by way of judicial videoconference due to the COVID-19 crisis via Zoom at Toronto, Ontario.

ON READING the Affidavit of Robert Fung, sworn April 27, 2021 (the "**Fung Affidavit**"), the Thirty-Sixth Report of the Monitor, Ernst & Young Inc. (the "**Monitor**"), and on hearing the submissions of counsel for the Applicant, counsel for the Monitor, counsel for Tenor Special Situation I, LP, in its capacity as the debtor-in-possession lender of the Applicant (the "**DIP Lender**"), and counsel for Computershare Trust Company of Canada in its capacity as Trustee (the "**Trustee**") for the holders of Senior 9.375% Notes due December 23, 2011 issued by the Applicant (the "**Senior Notes**") and the *ad hoc* committee of beneficial owners of the Senior Notes (as specified on Schedule "A" hereto):

SERVICE

1. **THIS COURT ORDERS** that the time for service of the notice of motion and the motion record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS

2. **THIS COURT ORDERS** that unless otherwise defined in this Order, capitalized terms used in this Order shall have the meanings given to them in the CCAA Financing Order this Court granted in these proceedings on April 16, 2012 (the "**CCAA Financing Order**") or in the Credit Agreement, as applicable.

EXTENSION OF STAY PERIOD

3. **THIS COURT ORDERS** that the Stay Period (as defined in the Initial Order of the Honourable Justice Newbould made December 23, 2011) be and is hereby extended to and including November 5, 2021 (the "**Stay Extension**").

EXTENSION AND AMENDMENT OF THE DIP CREDIT AGREEMENT

4. **THIS COURT ORDERS** that the Applicant is hereby authorized and empowered to enter into an amendment to the credit agreement dated as of April 23, 2012 between the Applicant and Tenor Special Situation Fund I, LLC ("**Tenor**"), which was assigned by Tenor to Tenor KRY Cooperatief U.A. ("**Tenor KRY**") on such date, subsequently assigned by Tenor KRY to Luxembourg Investment Company 31 S.a.r.l. ("**Tenor Luxco**") and ultimately assigned to the DIP Lender, as previously amended by the first credit agreement amending and confirming agreement dated May 15, 2012, the second amendment agreement dated June 5, 2013, the third credit agreement

amendment agreement dated as of April 16, 2014, the fourth credit amendment agreement dated March 12, 2015, the fifth extension amendment agreement dated as of December 31, 2016, the sixth extension and amendment agreement dated as of June 30, 2017, the seventh credit agreement amendment dated as of December 27, 2017, the eighth credit agreement amendment dated as of February 28, 2018, the ninth credit agreement amendment dated as of May 9, 2018, the tenth credit agreement amendment dated as of October 31, 2018, the eleventh credit agreement amendment dated as of May 6, 2019, the twelfth credit agreement amendment dated as of November 6, 2019, the thirteenth credit agreement amendment dated October 28, 2020 and effective as of May 6, 2020, the fourteenth credit agreement amendment dated April 14, 2021 and effective as of November 6, 2020 (collectively, the "**Credit Agreement**"), pursuant to and substantially in the form of the fifteenth credit agreement amendment between the DIP Lender and the Applicant (the "**Fifteenth Credit Agreement Amendment**") attached as Exhibit "D" to the Fung Affidavit, and all other documents contemplated or required by the DIP Lender in connection with the Fifteenth Credit Agreement Amendment, provided that any date references therein to May 7, 2021 shall be changed to November 5, 2021.

5. **THIS COURT ORDERS** that the provisions and terms of the Fifteenth Credit Agreement Amendment, the Credit Agreement as amended by the Fifteenth Credit Agreement Amendment, and the other Credit Documents (including the Security Documents) are proper, fair and reasonable, and are hereby approved, and the Applicant is hereby authorized and directed to pay and perform all of its principal indebtedness, interest, expenses, fees, liabilities and other compensation and obligations to the DIP Lender under and pursuant to the Credit Agreement, as amended by the Fifteenth Credit

Agreement Amendment, and the other Credit Documents, as and when the same become due and are to be performed.

6. **THIS COURT ORDERS** that the DIP Lender is entitled, in accordance with the provisions of the DIP Credit Agreement as amended by the Fifteenth Credit Agreement Amendment, to all fees, interest, compensation and other amounts paid or payable under the Credit Agreement, as amended by the Fifteenth Credit Agreement Amendment.

7. **THIS COURT ORDERS** that:

(a) the DIP Charge shall secure all Obligations outstanding from time to time under the Credit Agreement, as amended by the Fifteenth Credit Agreement Amendment, or under any other Credit Document except for any obligation of the Applicant to pay Lender Additional Compensation, the Additional Principal Compensation Amount, the Second Additional Principal Compensation Amount, the Third Additional Principal Compensation Amount or the Fourth Additional Principal Compensation Amount to the DIP Lender;

(b) the Lender Additional Compensation Charge shall secure the obligation of the Applicant to pay to the DIP Lender the Lender Additional Compensation, the Additional Principal Compensation Amount, the Second Additional Principal Compensation Amount, the Third Additional Principal Compensation Amount and the Fourth Additional Principal Compensation

Amount in accordance with the Credit Agreement, as amended by the Fifteenth Credit Agreement Amendment; and

(c) the DIP Charge and the Lender Additional Compensation Charge shall continue to have the priority set out in paragraph 17 of the CCAA Financing Order.

8. **THIS COURT ORDERS** that the Credit Agreement, the Fifteenth Credit Agreement Amendment, the other Credit Documents, the DIP Charge and the Lender Additional Compensation Charge, any advances made in good faith by the DIP Lender under the Credit Agreement, as amended by the Fifteenth Credit Agreement Amendment, and the Applicant's agreement to pay (and the payment of) Lender Additional Compensation, the Additional Principal Compensation Amount, the Second Additional Principal Compensation Amount, the Third Additional Principal Compensation Amount and the Fourth Additional Principal Compensation Amount to the DIP Lender are fair, reasonable and appropriate and shall not be rendered invalid or unenforceable and the rights and remedies of the DIP Lender shall not otherwise be limited or impaired in any way by: (i) the pendency of these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (iii) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (iv) the provisions of any federal or provincial statutes or any common law; or (v) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances contained in any existing agreement (an "**Agreement**") which binds the Applicant and, notwithstanding any provision to the contrary in any Agreement:

(a) none of the execution, delivery or performance of the Credit Agreement, the Fifteenth Credit Agreement Amendment or the other Credit Documents shall create nor be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;

(b) the Applicant shall not have any liability to any Person (as defined by the Initial Order) whatsoever as a result of any breach of any Agreement caused by or resulting from the execution, delivery or performance of the Credit Agreement, the Fifteenth Credit Agreement Amendment or the other Credit Documents; and

(c) the payments made by the Applicant pursuant to this Order, the Credit Agreement, as amended by the Fifteenth Credit Agreement Amendment, or the other Credit Documents, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law including common law.

9. **THIS COURT ORDERS** that each of the CCAA Financing Order and the Additional CCAA Financing Order issued by this Court in these proceedings on June 5, 2013, the Second Additional CCAA Financing Order issued by this Court in these proceedings on April 14, 2014, and the Approval Order issued by this Court in these proceedings on December 18, 2014 (collectively, the "**Additional CCAA Financing Orders**") shall continue in full force and effect and that all protections and other provisions of the CCAA Financing Order and the Additional CCAA Financing Orders, as applicable,

shall apply *mutatis mutandis* to all principal amounts, interest thereon, the Lender Additional Compensation, the Additional Principal Compensation Amount, the Second Additional Principal Compensation Amount, the Third Additional Principal Compensation Amount and the Fourth Additional Principal Compensation Amount and all other amounts owing to the DIP Lender under the Credit Agreement, as amended by the Fifteenth Credit Agreement Amendment, and the other Credit Documents and to all charges and other security therefor.

CONFIDENTIALITY

10. **THIS COURT ORDERS** that subject to paragraph 12 of this Order, the following materials in connection with this motion (the "**Confidential Materials**") shall be sealed and filed under a protective order and not form any part of the public record in this proceeding:

(a) the Confidential Motion Record of the Applicant, which includes the unredacted Fung Affidavit; and

(b) the Confidential Unredacted Thirty-Sixth Report of Ernst & Young Inc. in its Capacity as Monitor.

11. **THIS COURT ORDERS** that the Confidential Materials shall not be copied or disseminated beyond counsel except as authorized by the Applicant or by further order of this Court.

12. **THIS COURT ORDERS** that the Financial Information (as defined in the Fung Affidavit) contained in the Confidential Materials shall remain sealed pending determination, at a motion to be scheduled (the "**Sealing Motion**"), whether all, or any

part of, the Financial Information should remain sealed pursuant to this Order and nothing in this Order shall be deemed to prejudice any party's rights or positions with respect to that issue at such Sealing Motion, the appropriate date for such a Sealing Motion, the ability of any party to file additional materials in connection with the Sealing Motion or to cross-examine in advance of such Sealing Motion on those aspects of the Fung Affidavit or other materials filed related to the sealing of the Financial Information.

TOLLING

13. **THIS COURT ORDERS** that by agreement of the Applicant, the Trustee and the DIP Lender, the tolling of limitation periods provided for in paragraph 26 of the Stay Extension and Standstill Order of this Court dated June 5, 2013 (the "**Standstill Order**") shall continue until the date that is thirty (30) days following the expiration of the Stay Extension, provided that any limitation period applicable to a Claim (as defined in the Standstill Order) released pursuant to paragraph 29 of the Standstill Order shall not be tolled.

GENERAL

14. **THIS COURT HEREBY REQUESTS** the aid and recognition of any Court, Tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, including the United States Bankruptcy Court for the District of Delaware (the "**Bankruptcy Court**"), to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make orders and to provide such assistance to the Applicant and to the Monitor, as an Officer of this Court, as may be necessary or desirable to give effect to this Order, to grant

representative status to the Applicant in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

15. **THIS COURT ORDERS** that each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, including the Bankruptcy Court, for the recognition of this Order and for assistance in carrying out the terms of this Order.

16. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. (Toronto time) on the date of this Order.

SCHEDULE "A"

BENEFICIAL OWNERS OF SENIOR NOTES PART OF AD HOC COMMITTEE

1. QVT Fund LP
2. Quintessence Fund LP
3. Greywolf Loan Participation LLC
4. Ravensource Fund
5. Stornoway Recovery Fund LP

IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

Crystallex International Corporation Applicant

Commercial List File No: CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

ORDER

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IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.1985, c. C-36 AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CRYSTALLEX INTERNATIONAL CORPORATION	Court File No. CV-11-9532-00CL ***ONTARIO*** **SUPERIOR COURT OF JUSTICE** **(COMMERCIAL LIST)** Proceeding commenced at Toronto
	MOTION RECORD **OF CRYSTALLEX INTERNATIONAL CORPORATION** **(RETURNABLE MAY 4, 2021)**
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