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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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

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

FACTUM OF THE DIP LENDER ON PROTECTIVE MOTION
(Returnable October 14, 2021)

September 3, 2021

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FACTUM OF THE DIP LENDER ON PROTECTIVE MOTION
(Returnable October 14, 2021)

PART I - INTRODUCTION AND OVERVIEW

1. The DIP Lender, Tenor Special Situation I, LP, supports the motion by Crystallex (the "**Protective Motion**") to maintain the redaction from the public record of certain sensitive financial information of the Company (the "**Redacted Information**"),[1] until further order of the Court.[2]

2. Based on the clear and uncontroverted evidence provided by Crystallex on this motion, the DIP Lender believes that public disclosure of the Redacted Information at this time poses serious risks to Crystallex's efforts to complete successful enforcement and recovery on its US$1.4 billion judgment against the Republic of Venezuela.

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[1] The Redacted Information consists of Crystallex's cash balances and certain information in Crystallex's cash flow forecasts, as more particularly described in the Protective Motion. By consent orders dated November 3, 2020 and May 4, 2021, this Court approved the redaction from the public record of the Redacted Information, subject to a future hearing on the issue.

[2] Capitalized terms not otherwise defined in this factum shall have the meaning as set out in the Affidavit of Robert Fung sworn May 21, 2021 (the "**Fung May Affidavit**"), Crystallex Motion Record dated May 21, 2021 ("**May CMR**"), Tab 2.

3. The Company's evidence is based on its experience and success over 10 years in dealing with Venezuela in arbitration and litigation, and the expert advice of Crystallex's litigation and enforcement advisors. In contrast, the Ad Hoc Committee, the only party opposing the Protective Motion, put forward the personal and unqualified opinions of a single member of that committee, who admitted that he did not even read or consider all of the evidence filed by Crystallex.

4. On 13 prior occasions in this case since 2014, frequently in the face of opposition by the Ad Hoc Committee, this Court has granted the necessary protective relief to prevent public disclosure of specific financial information of Crystallex, including its cash balance and actual and projected cash flows. In doing so, this Court accepted the serious risks and harms that public disclosure of that information would have on Crystallex's litigation, enforcement and collection efforts against Venezuela. Such protective relief from this Court has been for the benefit of the Company and its stakeholders in this unique *Companies Creditors Arrangement Act*[3] ("**CCAA**") proceeding.

5. On a single occasion in this proceeding (the 14th protective motion filed by Crystallex in May 2020), the Court found that at that time, the Company had provided insufficient evidence of the risks and harms of public disclosure of its financial information. As a result, certain limited information was ultimately made public. That decision was based largely on the Court accepting the Monitor's submission that a *single* paragraph of evidence put forward by Crystallex's Chief Executive Officer, did not satisfy the *Sierra Club*[4] test for protective relief.

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[3] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, as amended.
[4] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*].

6. In contrast, on this current motion, the Company has now gone to great lengths through extensive evidence and submissions to detail the significant risks and harms that public disclosure of the Redacted Information at this time would present to Crystallex's ability to successfully complete its enforcement against Venezuela, and to achieve a recovery for its stakeholders.

7. The sole purpose of the Protective Motion is to prevent Venezuela (and other creditors of Venezuela competing with the Company) from gaining access to the Redacted Information and using it to undermine the enforcement and realization efforts of Crystallex. The motion is not directed at any stakeholder of Crystallex. This is evident by the fact that the Redacted Information has been and continues to be available to any stakeholder or advisor that agrees to receive it on a confidential basis.

8. The Ad Hoc Committee has declined to agree to receive the Redacted Information (or even review all of the Company's evidence in support of redaction) for reasons that relate solely to their narrow and private pecuniary interests - fear of receiving confidential material non-public information that would affect their ability to trade their Notes - and not for any reasons relevant to the open court principle or the public interests at stake. Accordingly, the Company's actual evidence of the risks and harms arising from public disclosure of the Redacted Information is uncontradicted.

9. The DIP Lender submits that Crystallex has satisfied both the test for an order under section 10(3) of the CCAA prohibiting the release of the Redacted Information to the public, and the common law sealing test in *Sierra Club*, as varied and amplified by the recent decision in *Sherman Estate*.[5]

[5] *Sherman Estate v. Donovan*, 2021 SCC 25 [*Sherman Estate*].

10. The DIP Lender is not alone in its support of the Protective Motion, or its assessment of Crystallex's evidence. The Monitor, in discharging its duties to protect all stakeholders' interests, has independently evaluated all of the evidence and positions on this motion, and its analysis and conclusions are supportive of the protective relief requested by Crystallex.[6]

PART II - FACTS

11. The DIP Lender adopts and relies upon the background facts as set out in the Affidavits of Mr. Fung and the Factum of Crystallex, together with the following additional facts respecting the relative interests of stakeholders and the prejudice alleged by the Ad Hoc Committee.

(i) The DIP Lender Has Made a Substantial Investment in Crystallex to Support a Speculative Claim, With No Assurances of Any Recovery

12. The DIP Lender is the only party to have provided Crystallex with financial support in this CCAA proceeding to enable the Company to monetize its only material asset – a speculative arbitration claim against Venezuela. A loan of this nature was highly risky, given the uncertainty associated with the Company's arbitration claim, and the difficulties of collection on any award against a foreign sovereign. These risks dictated the terms and conditions upon which the DIP Lender was willing to invest in Crystallex.

13. The DIP Lender loaned Crystallex over USD $75 million, starting in 2012, and is currently owed in excess of USD $162 million in principal and interest. The DIP loan obligations also include secured contingent value rights ("**CVR**") earned by the DIP

[6] Confidential Thirty-Seventh Report of the Monitor dated September 3, 2021 (the "**Thirty-Seventh Report**") at paras 73-87.

Lender, representing a percentage interest in the net arbitration proceeds recovered by Crystallex. The current CVR earned by the DIP Lender is 88.242%, less amounts that have been transferred to certain members of management, as approved by Court order.[7]

14. Currently, Crystallex does not have sufficient cash and liquid proceeds available to it to repay the DIP principal and interest balance.[8] Crystallex also needs to preserve cash to continue enforcement efforts against Venezuela to provide a recovery to its other stakeholders, and to pay any tax liabilities owed to Canada Revenue Agency ("**CRA**") in priority to the DIP obligations.[9]

(ii) DIP Lender Agrees to Extend DIP Loan Maturity Without Any Compensation

15. Notwithstanding the maturity of the DIP loan in 2016, the DIP Lender has extended the maturity date on a number of occasions, most recently on May 4, 2021, in each case without requiring any additional compensation. The DIP Lender has done so to allow the Company to continue its enforcement efforts for the benefit of all stakeholders, including the Ad Hoc Committee members.[10] Those other stakeholders of Crystallex are benefitting from the continued ability of Crystallex to enforce and collect on its Award without having taken any post-filing financial risk.

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[7] Reply Affidavit of Robert Fung sworn July 9, 2021 (the "**Fung Reply Affidavit**"), at para. 8(b).
[8] Fung Reply Affidavit at para 6(b) and Transcript at pp. 122, qq. 459-460.
[9] Under the Court-approved Waterfall, taxes owing to CRA rank second, ahead of the principal and interest owing to the DIP Lender; Fung Reply Affidavit at para 8(i-j); Crystallex's tax liability, if any, has not yet been resolved with the CRA.
[10] Transcript of the Cross-Examination of Scott Reid dated August 6, 2021 (the "**Transcript**"), at pp. 247-249, qq. 920-928.

(iii) DIP Lender Agrees to Confidentiality Terms With Crystallex

16. The DIP Lender agreed to confidentiality terms with Crystallex at the commencement of this proceeding. As a result of this, the DIP Lender is able to receive Crystallex's sensitive and material non-public information, but it may also become restricted in terms of its ability to trade in securities of Crystallex. The DIP Lender determined that receiving confidential information was important, despite the accompanying restrictions.

(iv) Crystallex's Concerted Efforts to Protect Its Sensitive Information

17. One of the only things that the Company and the Ad Hoc Committee have been able to agree on in this proceeding is that Crystallex has been remarkably successful to date with its litigation and enforcement strategy against Venezuela.[11] A significant component of that litigation and enforcement strategy has been to avoid disclosing to Venezuela (and other creditors of Venezuela) sensitive financial and strategic information of the Company.[12]

18. On 13 separate occasions in this proceeding, the Court has permitted Crystallex to redact from the public record the Company's cash balance and certain information in its cash flow forecasts. The basis for each of those protective orders was the serious risks and harms that public disclosure of that information could have on Crystallex's litigation, enforcement and collection efforts against Venezuela.

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[11] Ravensource management letter to unitholders dated December 31, 2020 (the "**December 2020 Letter**"), Exhibit 11 to Reid Cross Examination, at pp. 5-6, Tab 12 of Crystallex Supplementary Motion Record dated September 3 (the "**SMR**"), at pp. 412-413; Ravensource management letter to unitholders dated June 30, 2019 (the "**June 2019 Letter**"), Exhibit 12 to Reid Cross Examination, at p. 4, SMR at Tab 13, p. 412 ; Transcript at pp. 97-104, qq. 349-378.

[12] Fung May Affidavit at paras. 6, 88-90, May CMR at p. 10 and 41-42.

19. On one occasion in this proceeding (the 14th protective motion), a request by Crystallex to redact that same information was denied *in part*, the Court holding that the evidence put forward by Crystallex was insufficient to satisfy the test for sealing (the "**June 2020 Decision**"). While Crystallex had submitted similar evidence on the 13 prior occasions, the Court stated that the "only evidence" before it "with respect to the *Sierra Club* requirements" on the 14th motion was a single paragraph and accepted the Monitor's submission that such limited evidence was insufficient.[13]

20. As a result of the June 2020 Decision, certain redacted financial information of Crystallex was unredacted in February 2021. The ultimate ramifications from this recent public disclosure are currently unknown and may not be known for some time.[14]

21. Despite the June 2020 Decision, Crystallex and the DIP Lender are unequivocally of the view that the continued risks and potential harms of public disclosure of the Redacted Information are real and serious. These risks and harms are detailed in three separate affidavits providing 88 pages of *uncontroverted* evidence from Crystallex's Chief Executive Officer, Mr. Robert Fung.[15]

22. Mr. Fung's evidence is largely based on the advice and expertise of the Company's US enforcement experts and its management team, who have served for the last decade on the front lines of the Company's intense legal battle against Venezuela. Those experts are carrying out the Company's enforcement efforts and are best situated to assess the actual risks and harms of public disclosure of the Redacted Information.[16]

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[13] Exhibit "A" to Fung May Affidavit, May CMR at p. 57.
[14] Fung May Affidavit at para 10-12, 56, 80-87, May CMR at p. 11-12, 28-29, and 39-41; Fung Reply Affidavit at para 6(d); Transcript at pp. 179-181, qq. 671-679.
[15] Fung May Affidavit; Fung Reply Affidavit; Responding Affidavit of Robert Fung sworn July 9, 2021 (the "**Fung Responding Affidavit**"). When combined with the Affidavit of Robert Fung sworn October 28, 2020 there is over 100 pages of uncontroverted evidence.
[16] Fung Reply Affidavit at para 4; Fung Responding Affidavit at para 11.

23. Consistent with the strategy of preventing disclosure of sensitive financial information to Venezuela (and its other creditors), Crystallex has also recently obtained orders from the Delaware District Court in the U.S. proceedings, to permit it to designate certain of its financial information as "Highly Confidential". Such designation will prevent public disclosure of the information until further order of that Court.[17]

(v) The Ad Hoc Committee's "Evidence" on This Motion

24. The Ad Hoc Committee's affiant on this motion is Mr. Scott Reid ("**Reid**"), the president of Stornoway Asset Management ("**Stornoway**"), which manages the Ravensource Fund that holds a beneficial interest in the Notes.

25. Stornoway is one of three current members of the Ad Hoc Committee, the other two being QVT Financial and Greywolf Capital. Membership in the Ad Hoc Committee has not remained unchanged over the years. A long standing and often vocal member of the committee, Outrider Asset Management, sold its entire position in Crystallex's Notes in 2016 and left the Ad Hoc Committee.[18] There is no guarantee that the Ad Hoc Committee members opposing Crystallex's motion (and threatening other actions), will remain invested in the Notes next year, or even next month.

26. Considering Reid's evidence, it must be emphasized that:

(a) no member of the Ad Hoc Committee has read or considered all of the Company's evidence supporting the risks and harms of public disclosure of the Redacted Information;[19]

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[17] Memorandum Order of Justice Stark from July 6, 2021, Fung Responding Affidavit at para 31-32, Exhibit F.
[18] Transcript at pp. 195-196, qq. 721-723**.**
[19] Transcript at pp. 170, qq. 638.

(b) his evidence as to the lack of risk or harm from public disclosure is based solely on his own personal views;[20]

(c) he is not a lawyer or otherwise a legal expert, arbitral award expert, has no experience negotiating with or enforcing awards against Venezuela and has never collected a judgment against a foreign sovereign;[21]

(d) he has no way of knowing whether or in what manner Venezuela may already be using the financial information of Crystallex that has been made public to ultimately seek to delay or influence the US enforcement litigation or OFAC's decision on Crystallex's license application;[22]

(e) the Ad Hoc Committee is not currently working with its own legal or other experts in the US to advise it on the risks and harms of public disclosure identified by Crystallex;[23]

(f) the Ad Hoc Committee fully understands that Crystallex does not currently have sufficient cash or liquid proceeds to provide a recovery to the Noteholders and that the securities that Crystallex received pursuant to a settlement agreement with Venezuela, are subject to current US sanctions and cannot be monetized at this time;[24] and,

(g) the members of the Ad Hoc Committee do not want to receive the Redacted Information on a confidential basis as that may prevent their ability to trade their Notes and exit their Crystallex positions, if necessary.[25]

27. Throughout this CCAA proceeding, the Ad Hoc Committee has been extremely adversarial with the Company. Litigation has been a longstanding tool used by the Ad Hoc Committee to try to exert leverage over Crystallex. In fact, the Ad Hoc Committee has opposed or objected to most motions brought by Crystallex in this proceeding and regularly threatens to bring its own motions with the goal of frustrating Crystallex so that

[20] Transcript at pp. 179-181, qq. 671 to 679.
[21] Transcript at pp. 12, 42, qq. 23, 163-164.
[22] Transcript at pp. 179-181, qq. 671 to 679.
[23] Transcript at pp. 167-170, qq. 625-637.
[24] Transcript at pp. 107-112, qq. 392-409.
[25] Transcript at pp. 50-51, qq. 189.

its demands are met. Those demands include Stornoway's position that Crystallex's unsecured noteholders are entitled to a recovery of more than 100 cents on the dollar, at the expense of all other stakeholders of Crystallex.[26]

28. In Stornoway's December 31, 2018 letter to its unitholders, Reid advises as it relates to their investment in Crystallex:

> However, we believe we are **entitled to more than simply our 9.375 percent coupon** as creditors have been exposed to far greater risks and over a much longer time than originally bargained for when the notes were issued. **Any amounts paid to us represent a zero-sum game. What we gain the other stakeholders stand to lose** and as much will almost certainly challenge the amount we are due.[27] [emphasis added]

(vi) Court Orders Use of Confidentiality Agreement

29. The Ad Hoc Committee continues to complain about disclosure despite the fact that this Court has ordered in this proceeding that any stakeholder or advisor who wants access to Crystallex's confidential financial information must sign a confidentiality agreement to receive such information. Specifically, this Court's Approval Order dated December 18, 2014 (the "**December 2014 Approval Order**") provided as follows:

> THIS COURT ORDERS that, **subject to the execution of an appropriate confidentiality agreement,** the form of which is to be settled between the Monitor and counsel to the Trustee and Ad Hoc Committee, each acting reasonably, or by court order, and subject to any order made on any application of the Applicant or Monitor to prevent the release of any particular information or documentation, **the Applicant or Monitor shall provide to counsel to the Trustee and the Ad Hoc Committee and to any other stakeholder that executes a confidentiality agreement, access to the Applicant's information and documents**….[28] [emphasis added]

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[26] Transcript at pp. 182-183, qq. 682-687.
[27] Ravensource management letter to unitholders dated December 31, 2018 (the "**December 2018 Letter**"), Exhibit 21 to Reid Cross Examination, p. 3, SMR Tab 22, p. 694.
[28] Approval Order granted by Justice Newbould December 18, 2014, at para 9.

30. Despite the reticence of the Ad Hoc Committee, its counsel finally signed a confidentiality agreement in 2016 and has since been granted access to Crystallex's confidential data site and documents, unredacted copies of motion materials and unredacted Monitor's reports.[29]

31. The members of the Ad Hoc Committee refused to sign a confidentiality agreement unless it contained a clause with a (near term) fixed calendar date by which the information that they receive is publicly disclosed (a "**Blow-out Date**"). Such a Blow-out Date has been demanded to ensure that the Ad Hoc Committee members will not be restricted under securities laws and can freely trade their Notes.[30] Agreeing to a fixed Blow-out Date in the future irrespective of the circumstances and any serious harms and consequences to Crystallex at that time, is simply an unacceptable risk. This Court agreed with Crystallex on that issue in its Endorsement dated January 14, 2019 (the "**January 2019 Endorsement**"), stating:

> I declined to grant the relief requested by the Noteholder Committee and the Trustee and the Shareholder Committee in view of the terms of the Amended Settlement Agreement, the urgency of this motion and the approval required. I also found that the Applicant had satisfied the Sierra Club test for sealing of the materials. Counsel to the Noteholder Committee and the Trustee as well as counsel to the Shareholder Committee have each signed a confidentiality agreement and have reviewed all of the unredacted materials pertaining to this motion. **In the circumstances before me, it is reasonable that if stakeholders are not prepared to sign a confidentiality agreement (unless it is subject to a condition that all confidential information received will be made public by a date certain or the happening of specified events), they cannot receive confidential information about the Amended Settlement Agreement.** [emphasis added][31]

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[29] Transcript at pp. 71-72, qq. 256-257.
[30] Transcript at pp. 46-51, qq. 179-189.
[31] Endorsement of Justice Hainey dated January 14, 2019 (the January 2019 Endorsement), Fung Reply Affidavit Exhibit I.

32. Seeking to avoid the requirements of the December 2014 Approval Order and January 2019 Endorsement, the Ad Hoc Committee is now trying to force the public disclosure of the Company's most sensitive financial information. It is noteworthy that Crystallex has even offered in good faith to disclose the Redacted Information to the Ad Hoc Committee on a confidential basis without the formalities of a confidentiality agreement.[32] Notwithstanding this, the Ad Hoc Committee members have flatly refused to receive any Redacted Information on a confidential basis because receiving the information may affect their personal pecuniary interests (i.e., restrict them from trading in the Notes).[33]

(vii) Ad Hoc Committee is Actively Participating in This Proceeding

33. The allegation by Reid that the Ad Hoc Committee cannot effectively participate in this CCAA proceeding unless the Redacted Information is publicly disclosed, is directly contradicted by Reid's own statements to Stornoway's investors:

> We are very active members of the Ad Hoc Senior Noteholder Committee with two other financially savvy institutional investors with significant skin in the game and deep with relevant expertise and experience. We are well advised by the restructuring team at Goodmans LLP, who we believe is Canada's number one law firm on such matters. We have resolve, conviction that the law is on our side, and are very well prepared.[34]

34. Since the commencement of this proceeding, the Ad Hoc Committee has:

(a) tried to advance a competing CCAA application;

(b) opposed the DIP financing (and appealed that decision);

(c) opposed Crystallex's settlement agreements with Venezuela;

(d) opposed several of Crystallex's sealing requests;

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[32] Transcript at pp. 64-70, qq. 227-250.
[33] Transcript at pp. 50-51 and 73, qq. 189 and 262.
[34] December 2018 Letter, Exhibit 21 to Reid Cross Examination, at p. 3, SMR Tab 22, p. 694.

(e) filed and tried to advance three separate plans of arrangement, and recently delivered a fourth plan;

(f) negotiated a complex settlement with Crystallex and the DIP Lender related to Crystallex's 2020 corporate tax filing and process for resolution of its potential liability with CRA;

(g) participated in three separate mediations; and,

(h) negotiated an agreement that provided the holders of the Notes with a 20% rate of post-filing interest in return for a standstill respecting litigation. Notably, this "standstill" period was the only time during this proceeding that the Ad Hoc Committee was not actively litigating with (or threatening litigation against) the Company.[35]

(viii) The Ad Hoc Committee Admits That It Can Properly Protect Its Rights and Interests

35. The allegation by Mr. Reid that the members of the Ad Hoc Committee cannot properly protect their rights and interests in Crystallex without public disclosure of the Redacted Information, is again undercut by Reid's own statements to his investors, which were confirmed on cross-examination.[36]

36. Ravensource, in its letters to unitholders, has **never** warned that it lacks sufficient financial or other information from Crystallex to properly protect its rights and interests. In fact, Ravensource has repeatedly advised its investors that it has an "investment strategy" that captures value from financially distressed opportunities through "*extensive due diligence and active involvement*". Specifically, Ravensource stated in is management letter dated December 31, 2019:

[35] Fung Reply Affidavit at paras 13-14.
[36] Transcript at pp. 164-165, qq. 619-620.

> As one of the three members of the Ad Hoc Committee of Senior Noteholders [of Crystallex], we have been actively involved in protecting our investment and achieving a successful outcome.[37]

37. At no point has Reid or Ravensource ever warned their investors that they are unable to assess the status of their investment in Crystallex.[38] In fact, Ravensource in a June 30, 2019 letter to unitholders, stated (and Reid confirmed on examination) that:

> We expect that the fund will continue to concentrate our capital in position that we **know the best** and where we hold the strongest convictions. [emphasis added][39]

38. Reid admitted on examination that the redaction of financial and other information by Crystallex in this proceeding has not impaired Stornoway's ability to manage its clients' investments or protect their positions in Crystallex.[40] On the contrary, Reid admitted he has sufficient public information about Crystallex and its assets and liabilities to make informed decisions to increase his position in the Notes year after year, and to advise his investors that their investment is not at risk and that they can expect a very significant return on their investment.[41]

39. Tellingly, Ravensource advised its unitholders on December 31, 2020:

> Crystallex is the proverbial little engine that could. In its efforts to collect a USD $1.5 billion damages award against Venezuela, Crystallex has won ground-breaking legal judgements….

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[37] Ravensource management letter to unitholders dated December 31, 2019, Exhibit 13 to Reid Cross Examination, at p. 5, SMR Tab 14, p. 449.
[38] Transcript at pp. 24 and 148, qq. 90-91 and 556.
[39] June 2019 Letter, Exhibit 12 to Reid Cross Examination, at p. 12, SMR Tab 13, p. 438; Transcript at pp. 145, qq. 544.
[40] Transcript at pp. 162 and 164-165, qq. 612 and 619.
[41] Transcript at pp. 39, 110, 126-127, 140, 145, 148 and 182, qq. 149, 402, 473, 523, 544, 556 and 682. In fact, Ravensource's relative investment in Crystallex grew from 4.99 percent of the fund's net asset value from the date Crystallex commenced its CCAA proceeding, to 26.75 percent in September of 2020: Transcript at pp. 31-39, qq. 114-149.

> Over 2020, our conviction grew as Crystallex notched key legal wins, moving it much closer to selling CITGO and Ravensource closer to capturing significant gains on our investment.[42]

PART III - ISSUES

40. The DIP Lender adopts the issues as set out by the Company.

PART IV - SUBMISSIONS

41. The DIP Lender supports the continued protection of the Redacted Information and submits that the Company has provided ample detailed and uncontroverted evidence to support the request for a publication ban under the provisions of the CCAA, as well as the more stringent test for sealing under the common law.

42. While the law is addressed below, the DIP Lender adopts and relies upon the legal submissions of the Company. In order to minimize any duplication, the DIP Lender focuses its submissions primarily on the components of (i) the "undue prejudice" or "negative effects" to stakeholders from granting a publication ban pursuant to section 10(3) of the CCAA and (ii) the common law test respecting sealing.

(i) Crystallex's Evidence Supports a Publication Ban Under the CCAA

43. The concept, in section 10(3) of the CCAA, of "undu[e] prejudice" to the Company and its creditors is discussed in detail below. It is clear that the failure to protect the Redacted Information could have a disastrous effect on Crystallex and its stakeholders, whereas the Ad Hoc Committee (and other stakeholders) will suffer no undue prejudice if the protective relief is granted.

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[42] December 2020 Letter, Exhibit 11 to Reid Cross Examination, at pp. 5, 6, SMR Tab 12, pp. 412-413.

44. The evidence is that the Ad Hoc Committee seeks public disclosure of the Redacted Information in order to avoid signing a confidentiality agreement, receiving non-public information and becoming restricted from trading in the Notes. With respect, protective relief that impacts the personal pecuniary interests of one stakeholder cannot constitute undue prejudice or negative effects that are more important than protecting the Company's ability to provide and maximize recoveries for the benefit of all stakeholders.

45. When overruling a similar objection by the Ad Hoc Committee to protective relief sought by Crystallex earlier in this CCAA proceeding, Justice Newbould observed that the Ad Hoc Committee's position

Redacted

[43] This Court's observation applies equally here.

46. The Ad Hoc Committee has provided no serious evidence of undue prejudice or negative effects of continuing to protect the Redacted Information. The only "evidence" offered by the Ad Hoc Committee is the personal unqualified opinions of one member of the Committee, the manifest shortcomings of which are considered in detail above.[44]

47. In respect of the Ad Hoc Committee's position that they will suffer serious prejudice if the information at issue remains redacted, it needs to be emphasized again that:

(a) the information the Company seeks to keep redacted is already in the possession of the Ad Hoc Committee's counsel, who has signed a confidentiality agreement with Crystallex;

(b) as noted by the Monitor in its report to the Court on this motion, the Ad Hoc Committee has access to Crystallex's historical financial information (including information unredacted pursuant to the June 2020 Decision)

[43] Confidential Endorsement of Justice Newbould dated December 18, 2020.
[44] See paragraph 26 of this factum.

which provides the Ad Hoc Committee with more than sufficient information to continue to participate in this proceeding (and they have been effectively participating in this proceeding even before that disclosure);[45] and

(c) the Redacted Information will be immediately disclosed to any stakeholder, including the members of the Ad Hoc Committee, on a confidential basis.

48. The spurious allegations of prejudice are belied by the fact that the Ad Hoc Committee has been a most active participant in this CCAA proceeding, and is the only stakeholder group that has been able to "protect their interests" by improving upon their claim entitlements through the standstill order. The suggestion that the Ad Hoc Committee cannot effectively participate in this proceeding unless the Redacted Information is made public is simply not credible.

49. The inescapable conclusion is that the Ad Hoc Committee has provided no evidence of any prejudice, let alone undue prejudice or negative effects, other than to their personal pecuniary interest to trade in the Notes, if the Redacted Information remains protected at this time.

50. The further proviso in section 10(3) that the Court may order disclosure "on any terms or conditions that the court considers appropriate," is exactly what the Court has previously ordered in this proceeding. As noted above, in the December 2014 Approval Order, this Court ordered that signing a confidentiality agreement was an appropriate measure for stakeholders or their advisors to access Crystallex's confidential financial information. This protective measure was reaffirmed in the January 2019 Endorsement.[46] It should be of no concern or moment to the Court that because of private interests, the Ad Hoc Committee members have not availed themselves of this option.

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[45] Thirty-Seventh Report at para 81.
[46] January 2019 Endorsement, Fung Reply Affidavit Exhibit I, at para 6.

(ii) The Common Law Test for Sealing Has Been Met

51. The test to determine if a sealing order should be granted, as established by the Supreme Court, in *Sierra Club*, as restated and amplified by the same court in *Sherman Estate*, requires three core findings that:

(a) Court openness poses a serious risk to an important public interest;

(b) The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

(c) As a matter of proportionality, the benefits of the order outweigh its negative effects.[47]

(A) There Are Important Public Interests at Risk

52. The Courts in *Sierra Club* and *Sherman Estate* explicitly recognized that commercial interests such as preserving confidential information or avoiding a breach of a confidentiality agreement are an "important public interest" for the purposes of the aforementioned test.[48]

53. Further, Canadian courts have recognized repeatedly the important public interests that are served by CCAA proceedings. In *Re Nortel Networks*, Justice Morawetz (as he then was) observed that: “The CCAA has been described as ‘skeletal in nature’. It has also been described as a ‘sketch, an outline, **a supporting framework for the resolution of corporate insolvencies in the public interest’**”.[49] In *9354-9186 Québec Inc. v. Callidus Capital Corp.*, a unanimous Supreme Court of Canada agreed that the CCAA had “the simultaneous objectives of maximizing creditor recovery, preservation of

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[47] *Sierra Club* at para 53; *Sherman Estate* at paras 38 and 43.
[48] *Sierra Club* at para 55; *Sherman Estate* at paras 41-43.
[49] *Re Nortel Networks*, [2009] O.J. No. 3169 at para 29.

going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress … and enhancement of the credit system generally".[50] The Honourable Chief Justice Morawetz recently cited this decision in *Urbancorp*, confirming that the "remedial objectives of Canadian insolvency laws" included (among others) the objective "**to preserve and maximize the value of a debtor's assets**".[51]

54. This Court has consistently and repeatedly sealed confidential information in the context of a CCAA proceeding where there was a risk that disclosure of the information at issue would compromise the proceeding. By way of example:

(a) In *Re Danier Leather Inc.*, this Court sealed details about a Key Employee Retention Plan (a "**KERP**") and a stalking horse offer summary, finding that premature disclosure jeopardized "value-maximizing dealings with any future prospective purchasers or liquidators", and that there was "**a public interest in maximizing recovery in an insolvency that goes beyond each individual case**".[52]

(b) In *Toronto-Dominion Bank v. Hockey Academy Inc.*, this Court ordered the sealing of information regarding the appraised value of certain assets of the debtor company pending attempts to sell those assets. The Court agreed that the requested order met the *Sierra Club* test, as "**there is a public interest in enabling secured creditors and other stakeholders to maximize value on the realization of assets in an insolvency situation**".[53]

(c) In *Urbancorp*, this Court applied *Sierra Club* to seal "highly sensitive commercial information including the Offer Summary, which, if made public, **could detrimentally affect the price that could be obtained on a**

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[50] *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para 42.
[51] *Urbancorp Cumberland 1 GP Inc. (Re)*, 2020 ONSC 7920 [*Urbancorp*] at para 24. Even outside of the CCAA process, the important interests served by sealing in a CCAA proceeding have been recognized: see *Fairview Donut Inc. v. TDL Group Corp.*, 2010 ONSC 789 at para 45.
[52] *Re Danier Leather Inc.*, 2016 ONSC 1044 at paras 82-85.
[53] *Toronto-Dominion Bank v. Hockey Academy Inc.*, 2016 ONSC 4898 at para 35.

subsequent sale of the Purchased Assets should the Transaction not close".[54]

(d) In *Re Lydian International Limited*, this Court granted a sealing order over information pertaining to a sale and investment solicitation process and to the financing of an arbitration against the Government of Armenia, whose conduct was alleged to have caused the debtor company's insolvency, stating: "**I have previously granted sealing orders in these CCAA proceedings where the documents in question contains sensitive commercial information, the disclosure of which could be harmful to the stakeholders**", and that "the sealing request currently being sought is consistent with previous orders in these CCAA proceedings".[55]

(e) The Court similarly had no issue sealing KERP details in *Ontario Securities Commission v. Bridging Finance*, applying the newly enunciated *Sherman Estate* test, noting that: "The terms of the proposed transactions are confidential and **the Receiver submits the disclosure of such confidential commercially sensitive information at this time would undermine its efforts to maximize value for stakeholders.**"[56] Additionally in that case, there was "a public interest in ensuring the integrity of the Sales Process and any arbitration."

55. Accordingly, there can be no question that there are a number of significant public interests at risk here, first and foremost the integrity and success of CCAA proceedings, but also with respect to protection of confidential information and support of the pursuit of arbitral remedies and enforcement of awards.

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[54] *Urbancorp*, at para 56.
[55] *Re Lydian International Limited*, 2020 ONSC 3850 at para 27.
[56] *Ontario Securities Commission v. Bridging Finance*, 2021 ONSC 4347 at paras 23-27.

(B) There Is a Serious Risk and Undue Prejudice to Crystallex and Its Stakeholders if the Redacted Information Is Made Public at This Time

56. In *Sherman Estate*, the Supreme Court of Canada provided helpful guidance concerning the appropriate calculus for risk assessment at the first branch of the test for sealing, emphasizing that both the probability of harm and the magnitude of harm must be taken into consideration:

> Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that **implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur**. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, **this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability**.[57] [emphasis added]

57. Although it is difficult to predict with certainty how Venezuela would use the Redacted Information to attack Crystallex, the Supreme Court's decision in *Sherman Estate* makes clear that certainty is not required:

> …it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. **Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative**.[58] [emphasis added]

58. All of the stakeholders in this proceeding, including the Ad Hoc Committee, as well as the Monitor, have acknowledged that Crystallex has been remarkably successful to date with its arbitration award enforcement and collection strategies against Venezuela. More recently Crystallex's obstacles to enforcement have been compounded by a

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[57] *Sherman Estate*, at para 82.
[58] *Sherman Estate*, at para 98.

stampede of other competing creditors and by US government policy and Sanctions affecting the enforcement process. A failure to collect on the Judgment would be catastrophic for all stakeholders.

59. The protection of sensitive information has been a cornerstone of Crystallex's litigation strategy against Venezuela. Crystallex has carefully followed the advice of its enforcement experts to avoid providing its sensitive financial and strategic information to Venezuela (or other competing creditors of Venezuela), as doing so could seriously harm the Company's chances of success in its enforcement on the Judgment to the detriment of all of its stakeholders.

60. The DIP Lender alone has risked significant capital to support Crystallex's claim and enforcement efforts against Venezuela. The DIP Lender did so with the expectation that all reasonable protective measures (and particularly those recommended by Crystallex's experts and/or approved by the Court), would be applied in this unique CCAA case.

61. Redactions have never been used by Crystallex to prevent stakeholder access to its financial information. Crystallex has always invited any of its stakeholders to receive sensitive financial information on a confidential basis. This protective approach has been approved by the Court in this case as an appropriate measure to balance the various competing interests. In the circumstances, it is the DIP Lender's view that Crystallex's request to maintain redaction, while providing the information to any stakeholders under terms of confidentiality, fairly balances the interests of all parties in a manner that best protects the estate for the benefit of all stakeholders.

(C) There Are No Reasonable Alternatives to the Selective Redaction Sought by Crystallex, That Would Prevent the Risks and Harms of Public Disclosure at This Time

62. Given the risks and harms of disclosure of Crystallex's sensitive financial information at this time, a complete sealing or selective redaction of the public record are the only two ways in which those risks can be avoided. Crystallex seeks the less restrictive relief of redaction, rather than a complete sealing of the court file.

(D) The Ad Hoc Committee Will Suffer No Undue Prejudice if the Redacted Information is Not Made Public at This Time

63. The DIP Lender takes the position that the private pecuniary interest of the members of the Ad Hoc Committee is not a factor to be considered in the application of the *Sierra Club/Sherman Estate* test and is only a consideration under 10(3) of the CCAA. Despite this, for the reasons set out above, it is clear that the relief sought by the Company will cause no undue prejudice or other serious negative effects to the members of the Ad Hoc Committee.

PART V - RELIEF REQUESTED

64. The DIP Lender supports continued protection of the Redacted Information on the clear basis that public disclosure at this time will create a serious risk to Crystallex's enforcement efforts and to stakeholder recoveries. The Company has provided detailed and uncontroverted evidence to support its request for an order banning the publication of this information under the provisions of the CCAA, as well as the more stringent test for sealing under the common law. Accordingly, the DIP Lender requests that this Court grant the necessary protective order in respect of the Redacted Information.

ALL OF WHICH IS RESPECTFULLY SUBMTTED this 3rd day of September 2021.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
2. *Sherman Estate v. Donovan*, 2021 SCC 25
3. *Re Nortel Networks*, [2009] O.J. No. 3169
4. *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10
5. *Urbancorp Cumberland 1 GP Inc. (Re)*, 2020 ONSC 7920
6. *Fairview Donut Inc. v. TDL Group Corp.*, 2010 ONSC 789
7. *Re Danier Leather Inc.*, 2016 ONSC 1044
8. *Toronto-Dominion Bank v. Hockey Academy Inc.*, 2016 ONSC 4898
9. *Re Lydian International Limited*, 2020 ONSC 3850
10. *Ontario Securities Commission v. Bridging Finance*, 2021 ONSC 4347

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY - LAWS

***Companies' Creditors Arrangement Act*, RSC 1985, c. C-36**

10(3) Publication ban

The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, 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

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SUPERIOR COURT OF JUSTICE
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TORONTO

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