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

RESPONDING FACTUM OF THE DIP LENDER TO CROSS-MOTION OF AD HOC COMMITTEE OF UNSECURED NOTEHOLDERS
(Returnable October 14, 2021)

September 28, 2021

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PART I - OVERVIEW

[redacted]

- Justice Newbould.[1]

[1] Confidential Endorsement of Justice Newbould dated December 18, 2014 (the "**Newbould Endorsement**").

1. There are only two issues for this Court to decide on the Ad Hoc Committee's Cross-Motion[2]:

(a) Whether this Court's December 18, 2014 order sealing the quantum of the incentive and retention payments to two key management employees of Crystallex (the "**Retention Amounts**") should be varied, such that the information be made public *at this time.*

The answer is no. The Ad Hoc Committee has failed to provide any compelling reasons, demonstrate any material change in circumstances and introduce evidence that a change, if known at the time of making this Court's 2014 protective order, would likely have resulted in an order on different terms. Their reasons for unsealing are a recycling of their arguments on 'transparency', which were made and rejected by the Court at the time the sealing order was approved. On the other hand, Crystallex (who bears no burden on this motion) has provided additional evidence that further justifies this Court's existing sealing order. Notably, the Ad Hoc Committee's counsel has this information on an unredacted basis, and all other

[2] All of the remaining information sought by the Ad Hoc Committee on its Cross-Motion has been disclosed and the relief is resolved. 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.

terms of the retention agreement for the key employees have been publicly disclosed;[3] and

(b) Whether Crystallex should be compelled to publicly disclose the financial terms of engagement of Crystallex's U.S. sale advisor, Moelis & Co. ("**Moelis**"), and the independent director's independent advisor Pirinate Consulting LLC ("**Pirinate"**).

The answer is also no. Crystallex and its independent director are entitled, by existing orders, to engage professionals without further order of the Court. They have each done so, retaining leading advisors. [redacted] Public disclosure of the advisors' sensitive financial terms could seriously harm the competitive and commercial interests of those parties, who rely on this confidentiality. It may also discourage other advisors from accepting similar retainers. The DIP Lender reasonably believes that the involvement of these advisors is important to Crystallex's continued success. Importantly, the fees at issue are relatively small

[3] The key employee retention terms are set forth in the Net Arbitration Proceeds Transfer Agreement as among Crystallex, the DIP Lender, and Crystallex executives Mr. Robert Fung ("**Fung**") and Mr. Marc Oppenheimer ("**Oppenheimer**"). Pursuant to that agreement, which was approved by an order granted by Justice Newbould on December 18, 2014 (the "**Net Arbitration Proceeds Transfer Agreement Orde**r"), the DIP Lender agreed to transfer a portion of the CVR that it earned in connection with the Fourth DIP loan advance, to Fung and Oppenheimer as compensation to retain and incentivize their continued involvement in the prosecution of the Arbitration claim and the enforcement and collection of any Award.

and immaterial in the context of this case and no success fees are involved. Both engagement letters have been made public, with only the financial terms redacted. Those terms have been provided to the Ad Hoc Committee's counsel confidentially, and are available to any stakeholder on a similar basis.

2. Protective relief has been sought and ordered in this proceeding to assist Crystallex with its litigation and enforcement efforts against Venezuela. Although Crystallex is a CCAA applicant, its remaining business is its enforcement efforts currently playing out before courts and government agencies in the United States. Crystallex is therefore also subject to the jurisdiction of those courts and agencies, whose orders and procedures could at any time impact protective orders entered by this Court. On September 8, 2021, Judge Stark of the Delaware Court, made such an order (the "**Proceeds Disclosure Order**").[4]

3. The Proceeds Disclosure Order provided for public disclosure of certain information by parties before the Delaware Court. That court determined the information would be necessary for the Special Master to complete the Sales Process for the PDVH Shares over which Crystallex has a Writ. In the case of Crystallex, the disclosure included the amount and date of payments received from the Maduro regime on account of the Award, and the fact that the Initial Payment Securities were bonds issued by Venezuela and PDVSA (information that was sealed years earlier by orders of this Court). This

[4] Memorandum Order granted by Judge Stark of the Delaware Court dated September 8, 2021, at paras 7-8, Compendium of the DIP Lender (the "**Compendium**") at Tab A.

disclosure is significantly narrower than the information sought by the Ad Hoc Committee on its Cross-Motion. Notwithstanding, Crystallex considered the order and reasonably determined that, in light of the information disclosed, continued protection of the remaining details of the Initial Payment Securities sought by the Ad Hoc Committee is no longer necessary. On September 22, 2021, Crystallex authorized the Monitor to re-file its 31st Report to unredact the market value of the Initial Payment Securities.

4. As a result of the Proceeds Disclosure Order, Crystallex has also reasonably determined that the continued protection of certain financial information subject to the Protective Motion is no longer necessary. As such, on September 22, 2021, Crystallex also authorized the Monitor to publicly re-file its 35th and 36th Reports with the Company's financial information unredacted in a manner consistent with the June 2020 Decision[5] and its re-filed 33rd Report.[6] Unless the Ad Hoc Committee now insists on public disclosure beyond what was approved in the June 2020 Decision (i.e., seeking disclosure of the Line-Item Detail which is currently redacted), the disputed portions of the Protective Motion are resolved.[7]

5. From the DIP Lender's perspective, the Company has gone to great lengths to address information requests in a manner that fairly balances the interests of all of its stakeholders, having due regard for the impact of decisions by all of the courts before which it appears. The fact that the Protective Motion and the Cross-Motion have been

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[5] Endorsement of Justice Hainey dated June 8, 2020 (the "**June 2020 Decision**").
[6] The June 2020 Decision authorized the redaction of line-item details and explanatory notes in the subject cash flow reconciliations and cash flow forecasts (the "**Line-Item Detail**").
[7] The Protective Motion also seeks to redact certain of Crystallex's strategic information, which relief the DIP Lender does not believe is in dispute.

almost entirely resolved including through voluntary disclosure by Crystallex, reflects these efforts. The Ad Hoc Committee will predictably try to suggest that their actions have forced disclosure by Crystallex. This is, of course, untrue.

6. The fact that the Ad Hoc Committee insists on litigating the two remaining matters on the Cross-Motion is disappointing. These are matters that are frankly, entirely immaterial to their interests, but very material (and harmful) to Crystallex and the other individuals concerned if the sensitive information is made public at this time. Critically, Crystallex has tried to resolve these matters fairly by offering the information on a confidential basis - a manner entirely consistent with the Court's prior directions in this case regarding stakeholder access to confidential information. Yet the Ad Hoc Committee refuses to accept anything short of complete public disclosure.

7. Several judges overseeing this proceeding have taken the extremely rare step of openly criticizing and questioning the motives and tactics of the Ad Hoc Committee, on more than one occasion. The Ad Hoc Committee's insistence on litigating the remaining collateral issues in this Cross-Motion is more of the same type of conduct and an abuse of process. The Cross-Motion should be dismissed with costs.

PART II - THERE IS NO COMPELLING EVIDENCE OR JUSTIFICATION TO GRANT THE CROSS-MOTION RELIEF

8. The DIP Lender adopts and relies upon the submissions of Crystallex in its responding factum, together with the following additional submissions on the remaining two issues in the Cross-Motion.

(A) RETENTION AMOUNTS SHOULD REMAIN SEALED AT THIS TIME

(i) The Retention Amounts Were Awarded to Retain two Key Personnel

9. The Retention Amounts were approved and sealed by order of this Court almost seven years ago. The Ad Hoc Committee appeared at that hearing and opposed the sealing relief. Its objection was overruled.

10. The circumstances surrounding the award of the Retention Amounts was set out in detail in the December 15, 2014 affidavit of Harry Near, Crystallex's independent director at the time. In his affidavit, Mr. Near states that:

> [45.] Crystallex believes that certain key personnel and consultants, namely Robert Fung and Marc Oppenheimer, are **vital to the success of the pursuit of the Arbitration Claim**. This is especially true given that, in order to save money, Crystallex has decreased staff to the point where Fung and Oppenheimer are the only remaining individuals at the Company to have firsthand knowledge of the facts at issue in the Arbitration Proceedings, as well as the only individuals with the historical knowledge to aid the Arbitration Professionals in answering the myriad of questions required for each filing and identifying relevant documents. In short, due to diligent efforts to decrease expenses, **without the assistance of Fung and Oppenheimer, the Company would be unable to** effectively plead its case, respond to Tribunal questions, interpret a potential award, or **enforce a potential award.** This view is supported by the DIP Lender.
>
> [redacted]

> [57.] For all the reasons described above, [redacted].[8] [emphasis added]

11. [redacted][9]

12. [redacted]

> [redacted][10]

[8] Affidavit of Harry Near sworn December 15, 2014 at paras 45, 56 and 57, Motion Record of Crystallex dated December 15, 2014 at Tab 2.
[9] *Re Danier Leather Inc.*, 2016 ONSC 1044 at paras 82-85; *Ontario Securities Commission v. Bridging Finance*, 2021 ONSC 4347 at paras 23-27.
[10] Newbould Endorsement dated December 18, 2014.

(ii) The Ad Hoc Committee has Failed to Show any Material Change in Circumstances to Justify Unsealing the Retention Amounts at this Time

13. The Ad Hoc Committee bears the legal burden to establish a material change of circumstances that would justify a modification to this Court's sealing order. The relevant provisions in the order approving the Net Arbitration Proceeds Transfer Agreement specifically provide:

> THIS COURT ORDERS that any party may apply to the Court on proper notice to all parties in interest to modify the provisions in paragraphs 7 and 8 of this Order and **nothing in this Order shall be deemed to prejudice their right to seek such modification or to assert that the Sealed Materials are not confidential.**[11] [Emphasis added]

14. The case law on modification of a sealing order has recently been reviewed by the Supreme Court of Canada in *Canadian Broadcast Corp. v. Manitoba*.[12] The SCC held that "a court may vary or set aside a publication ban or sealing order where the circumstances relating to the making of the order have materially changed".[13] The party seeking the variation has the burden of establishing both that a material change of circumstances has occurred and that the change, if known at the time of the original order, would likely have resulted in an order on different terms.[14] Finally, the correctness of the initial sealing order is presumed and is not relevant to the existence of a material change of circumstances.

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[11] Net Arbitration Proceeds Transfer Agreement Order at para 9.
[12] *Canadian Broadcast Corp. v. Manitoba,* 2021 SCC 33;*Ivandaeva Total image Salon Inc. v. Hlembizky*, [2003] OJ No 949 (QL); *Robichaud v Locilento*, 2016 ONSC 2352 at para 14.
[13] *Canadian Broadcast Corp. v. Manitoba,* 2021 SCC 33 at para 53.
[14] *Canadian Broadcast Corp. v. Manitoba,* 2021 SCC 33 at paras 55.

15. The Ad Hoc Committee has failed to meet its burden. The circumstances justifying sealing have not materially changed (with sealing arguably more necessary now) and there is no new evidence that would otherwise have resulted in the Court not making the initial sealing order. The Ad Hoc Committee has simply recycled the same arguments they made seven years ago regarding the *Sierra Club* test, general principles of transparency and openness, and ability to participate, all of which were rejected by this Court when the sealing relief was originally granted.[15]

16. Their principal argument for modification is that they are suddenly unable to participate in the CCAA proceeding without the disclosure of this information. This argument continues to defy logic and credibility. The truth is that the Ad Hoc Committee has been (and remains) the most active (and litigious) participant both before and after the sealing order in question. This Court has recognized that, and the Ad Hoc Committee's own affiant on this motion has openly boasted to his investors about just how effective their participation has been.[16] Sealing of the Retention Amounts over the past number of years has had zero effect on their participation.

17. Recognizing the fatal flaw in their argument, the Ad Hoc Committee has been forced to pivot to a fall-back argument. They say that public disclosure of this information is necessary to help them assess the level of alleged "conflict" on the part of the director recipients of the Retention Amounts, because they receive their payments after the

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[15] Newbould Endorsement dated December 18, 2014.
[16] Transcript of the Cross-Examination of Scott Reid dated August 6, 2021 (the "**Transcript**") at pp. 161-163 qq. 607-613; Ravensource management letter to unitholders dated December 31, 2019, Exhibit 13 to Reid Cross Examination, at pp. 5-6, Tab 12 of Crystallex Supplementary Motion Record dated September 3, 2021 ("SMR").

Noteholders. This argument fails too, as facilitating discovery rights is not a justification to modify a sealing order. As discussed below, the argument of an alleged conflict also cannot withstand factual scrutiny.

18. The factual matrix underpinning the alleged conflict existed at the time the initial sealing order was granted, so this argument is not new. The Court also concluded at that time that the nature and amount of the Retention Amounts were "appropriate".[17] The suggestion that the director recipients of the Retention Amounts are now somehow "conflicted" because they are incentivized to maximize the value of the estate is simply not credible. Maximizing the value of a corporation for the benefit of all of its stakeholders is a principle not only consistent with, but is mandated by, a director's fiduciary duties. Fulfilling those fiduciary duties would also require protecting stakeholders from creditors seeking to recover more than 100 cents on the dollar – a stated goal of the Ad Hoc Committee.[18] In any event, it is the Court that will ultimately determine the amount of any disputed claim of the Noteholders – not the director recipients of the Retention Amounts. The directors of Crystallex do not have the power to unilaterally adjudicate a claim, and similarly they would not be in a position to award the Noteholders a premium without Court approval.

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[17] Newbould Endorsement dated December 18, 2014.
[18] Transcript at pp. 182-183, qq. 682-687; Ravensource management letter to unitholders dated December 31, 2018, Exhibit 21 to Reid Cross Examination, p. 3, SMR Tab 22, p. 694.

19. As discussed in detail later herein, the allegation of "conflict" is a thinly veiled attempt to set up a re-litigation of the governance features of the DIP financing that were approved by the CCAA Financing Order of this Court in 2012.[19]

20. Despite all of this noise, Crystallex (who bears no burden on this motion) has led additional evidence that highlight the heightened risks to the beneficiaries and to Crystallex's enforcement efforts if the Retention Amounts are unsealed at this time.[20]

21. Notably, Venezuela has recently emphasized in US pleadings the "undisclosed percentage" of CVR (i.e., the Retention Amounts) that has been provided to Fung and Oppenheimer to support its arguments that Crystallex's enforcement is not about a Canadian gold mining company and its shareholders, but about enrichment of CVR holders.[21] It is now clear that if the Retention Amounts are unsealed and publicly disclosed, Venezuela will use that information to try to prevent or obstruct Crystallex's enforcement.

22. The DIP Lender has made significant advances to the Company at tremendous risk, including foregoing a portion of its own contractual entitlements to provide for the Retention Amounts. It did so with the expectation that the director recipients would remain critically involved in enforcement and collection against Venezuela, at all stages, which

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[19] CCAA Financing Order, granted by Justice Newbould on April 16, 2012 (the "**CCAA Financing Order**").
[20] Responding Affidavit of Robert Fung sworn July 9, 2021, at para 16(b).
[21] Venezuela Parties' Response to Objections to The Special Master's Proposed Order (A) Establishing Sale and Bidding Procedures, (B) Approving Special Master's Report and Recommendation Regarding Proposed Sale Procedures Order, (C) Affirming Retention of Evercore As Investment Banker By Special Master And (D) Regarding Related Matters, filed September 10, 2021 (the "**Venuzuela September Pleading**"), at footnote 7, Compendium at Tab B.

they have been. Unsealing the Retention Amounts at this stage, could seriously threaten the overall success of the Company's enforcement and collection efforts, thereby impacting the DIP Lender's interests and rights.

(iii) Crystallex has Offered to Disclose the Retention Amounts to any Stakeholder on a Confidential Basis

23. This Court has ordered on a number of occasions in this proceeding that a confidentiality agreement is an appropriate means to disclose sensitive information to stakeholders. In fact, at the same time the Retention Amounts were approved, the Court approved the Fourth DIP Loan and that order provided:

> 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**….[22] [emphasis added]

24. The idea that parties should be required to sign a confidentiality agreement to access sensitive information in this proceeding was also later addressed by Justice Hainey in an endorsement relating to the sealing of the Amended Settlement Agreement. Justice Hainey stated:

> 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,

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[22] Approval Order granted by Justice Newbould December 18, 2014, at para 9.

> 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.** [23] [emphasis added]

25. Unsealing the Retention Amounts is entirely unnecessary as Crystallex has offered to disclose this information to any stakeholder on a confidential basis. The fact that the Ad Hoc Committee has refused to receive information this way for fear of affecting their ability to acquire additional Crystallex securities or to manage their funds by trading out of their positions, is not a new fact or a material change in circumstance justifying a modification to this Court's sealing order. These reasons all existed at the time the protective relief was granted. In the circumstances, the relief sought amounts to a collateral attack on this Court's prior decisions and directions and should be dismissed.

(B) THE FINANCIAL TERMS OF THE MOELIS AND PIRINATE ENGAGEMENT LETTERS ARE COMMERCIALLY SENSITIVE AND SHOULD NOT BE PUBLICLY DISCLOSED

26. The Initial Order permits Crystallex to retain such advisors as are necessary, without requiring any further order of the Court.[24] The CCAA Financing Order approved

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[23] Endorsement of Justice Hainey dated January 14, 2019, Reply Affidavit of Robert Fung sworn July 9, 2021, Exhibit I.
[24] Initial Order granted by Justice Newbould December 23, 2011, at para 4.

the DIP Credit Agreement which permits the independent director to retain advisors on a similar basis.[25] In accordance with such authorizations, Crystallex has retained Moelis as its US advisor in connection with the sale process for the PDVH Shares, and the Hon. Sergio Marchi, Crystallex's independent director, has retained Pirinate as his independent advisor. These are both very highly qualified advisors that are involved in some of the largest and most complicated restructuring cases globally.[26] [redacted] In the circumstances, it is important to these advisors that their commercially sensitive financial terms not be made public. In fact, the engagement letters have not been included in a court record until now.[27]

27. The engagement letters have been publicly disclosed by Crystallex with only the financial terms redacted. Unredacted copies of the engagement letters have been provided to the Ad Hoc Committee's counsel confidentially, and any stakeholder may obtain the financial terms on that same basis. Unfortunately, the Ad Hoc Committee has again refused to receive the financial terms in this manner. They claim that this information may be material and could restrict their ability to trade in Crystallex securities unless it is made public.

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[25] *Crystallex (Re)*, 2012 ONCA 404 at para 24.
[26] Pirinate is lead by its founder and Chairman, Mr. Eugene Davis. Mr. Davis, a former attorney, is widely regarded as one of the most experienced corporate directors, governance experts and restructuring advisors in North America, having sat on hundreds of public and private company boards, and having been directly involved in the restructuring of numerous companies under Chapter 11 and CCAA.
[27] Copies of both engagement letters have been appended to the Responding Factum of Crystallex to the Cross-Motion.

28. The Ad Hoc Committee often seeks to compare Crystallex's disclosure practices to those of other public companies. Applying that standard, one would rarely if ever, see a public company publicly disclose the actual engagement letters with its advisors, let alone the fees they are paying those advisors. Instead, in certain circumstances, a public company may identify the professional advisory firms that it has retained. Crystallex has not only publicly confirmed its engagement of Moelis and the Independent Director's engagement of Pirinate, it has also disclosed the actual engagement letters with only the monthly fee amounts redacted. Notably, the fees being paid under the engagement with these advisors are, in the scheme of things, simply not material to Crystallex and its stakeholders in the landscape of this proceeding, and the Ad Hoc Committee's own counsel (who has a copy of the engagement letters) knows this. They could easily confirm this to their clients. [redacted]. That this could be material is absurd. Critically, Crystallex has not agreed to pay any success fee or to secure any of the fees in issue by a charge against the assets of Crystallex, and would require a Court order (on notice) to approve any such success fee or charge, if they become necessary.

29. It is important to emphasize that the request by the Ad Hoc Committee for disclosure of the financial terms is not a question of unsealing or contesting the subject matter of any protective order. The engagement letters are currently not part of any filing, confidential or otherwise. There is no obligation on Crystallex to publish all agreements that it has authority to enter into, particularly ones that are not considered by the Company to be material, but are sensitive for the counterparty.

30. The sole issue is whether the Ad Hoc Committee's request to compel the Company to publicly disclose such confidential information is justified. The Court must use its discretion to balance the confidentiality concerns of the advisors, against a stakeholder's desire for such granular information, particularly when such stakeholder has rejected the established path of receiving the information on a confidential basis. The Ad Hoc Committee has the burden to demonstrate why this information cannot be received confidentially and needs to be publicized despite the negative consequences for the subject advisors and possibly the Company.

31. It is simply not credible to assert that the Ad Hoc Committee needs the financial terms to be made public so that it can "effectively participate" in this CCAA proceeding. Again, the evidence demonstrates that the Ad Hoc Committee has been participating extensively, irrespective of this information.

32. The only other argument put forward by the Ad Hoc Committee is that the information is necessary to protect the interests of Noteholders because the fees would be paid before the Noteholder claims. As this Court is aware, the fees at issue, particularly in the absence of any success fees, are *de minimis* in the context of the quantum of the Award and Crystallex's current cash position and its ongoing expenses. Importantly, the Ad Hoc Committee has provided no evidence as to how public disclosure of the financial terms could or would change anything that they are now doing. Crystallex requires a sale advisor in connection with the PDVH Sale process and no one disputes the fact that the Initial Order permits Crystallex to retain advisors or that Moelis is extremely qualified to provide these services. Similarly, the independent director is

entitled to retain his own advisor and Pirinate is exceptionally qualified to provide this advice.

33. The DIP Lender believes that continued participation of Moelis and Pirinate is critical to Crystallex's continued success. In all of the circumstances, maintaining the confidentiality of the financial terms is fair and appropriate and will not prejudice any party.

(C) THE ALLEGATIONS OF BOARD CONFLICT LACK ANY FOUNDATION AND ARE AN UNFORTUNATE DISTRACTION

34. The Ad Hoc Committee dedicates a substantial portion of their factum to describing an alleged "conflict" at the Board. This conflict narrative is wholly without merit but also has absolutely nothing to do with public disclosure of confidential information. It is instead being deployed as a "trailer" to try to lay a foundation for a later motion by the Ad Hoc Committee to re-litigate the corporate governance structure of Crystallex, established under the DIP Credit Agreement.[28] The Ad Hoc Committee has been (unsuccessfully) litigating with Crystallex since 2008.[29] Their obsession with the governance of Crystallex only intensified after they failed to provide DIP financing and the DIP Lender was awarded governance rights, including seats on the Board. The false conflict narrative is yet another attempt to relitigate those issues and obtain some control to further their objectives of a premium recovery on their claim.

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[28] The Ad Hoc Committee is likely also using the "conflict" narrative to distract the Court from its own serious conflicts with respect to Crystallex. One of the largest and most important members of the Ad Hoc Committee, Greywolf, is also the largest shareholder of Gold Reserve Inc. Gold Reserve is competing with Crystallex as a material creditor of Venezuela, Transcript at pp. 18-22 qq. 58-76.

[29] *Computershare Trust Co. of Canada v. Crystallex International Corp. (2009)*, 65 B.L.R. (4th) 281 (S.C.), aff'd 2010 ONCA 364; and *Computershare v. Crystallex*, 2011 ONSC 5748.

35. The false premise upon which the Ad Hoc Committee's conflict argument relies is that this proceeding is a contest between only "two material groups of stakeholders": the unsecured Noteholders *vs*. the holders of CVRs. In this fictional contest, the holders of CVRs allegedly want to keep the Ad Hoc Committee in the dark because that will reduce the Noteholders' claim. This proposition is both unsupported by any fact and is absurd.

36. Contrary to the Ad Hoc Committee's characterizations, there are a number of "material" stakeholders of Crystallex, including professional advisors, the CRA for any taxes payable on the Award (which could be significant and is currently unresolved), the DIP Lender (for in excess of $162 million principal and interest), other unsecured creditors, CVR holders, the MIP beneficiaries, and shareholders. The Crystallex Board has a duty to maximize the value of the corporation for the benefit of all of these stakeholders, not just the Noteholders.[30]

37. In this case, we are faced with the unusual circumstance of a creditor complaining about a debtor company doing everything it can to maximize recoveries. Normally creditors complain when the debtor wants to sell assets or settle litigation for a recovery that does not pay claims in full. This case is exactly the opposite where the Company is pursing a maximum recovery which would pay out the Noteholder claim (in whatever

[30] Curiously, the Ad Hoc Committee neglects to mention in its alleged "conflict" narrative that the Trustee has a proven claim for in excess of $5 million which sits at the bottom of the waterfall, after all CVR holders are paid. The quantum of this claim is greater than all other general unsecured claims against Crystallex, and can only be paid if Crystallex maximizes the value of the corporation. This claim is either not important to the Ad Hoc Committee or has been conveniently forgotten because it does not neatly fit into the "conflict" argument.

amount determined by the Court and not the Board) in full. Notably, the Retention Amounts actually align with the directors' fiduciary duties to maximize value.

38. The conflict argument is also undercut entirely by the facts of this case. The actions of the Company as authorized by the Board, have been supervised by the Monitor and approved by this Court.[31] Paradoxically, the Ad Hoc Committee has gone to great lengths to commend the remarkable decisions and success of Crystallex (led by its Board). By the Ad Hoc Committee's own admissions, the Board of Crystallex has been acting in manner that has delivered incredible results and increased the value of the Notes.[32]

39. It must be remembered that the governance structure of Crystallex was established as part of the DIP Financing at the start of these proceedings. Among various strategic steps, the Ad Hoc Committee unsuccessfully submitted its own financing DIP financing proposal and then appealed the DIP Financing, including seeking leave unsuccessfully from the Supreme Court of Canada.

40. In 2012, when the Court of Appeal dismissed the appeal of the Ad Hoc Committee in respect of the DIP Financing, its Decision included specific reference to the DIP provisions relating to the composition of the Crystallex Board.[33] The Court of Appeal went

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[31] The Monitor attends all meetings of the Board of Crystallex as observer.
[32] Ravensource management letter to unitholders dated December 31, 2020, Exhibit 11 to Reid Cross Examination, at pp. 5-6, Tab 12 of SMR, at pp. 412-413.
[33] *Crystallex (Re)*, 2012 ONCA 404 at para 24.

on to describe the Ad Hoc Committee's attempts to provide a different, less favourable DIP offer with a different governance structure, as follows:

> [81] **The Noteholders are sophisticated parties. They pursued a strategy. It ultimately proved less successful than hoped.** It appears that the supervising judge would have been prepared to approve the advance of Funds to Crystallex by the Noteholders, on the terms of the Tenor DIP Loan, notwithstanding the *Soundair* principles, had the Noteholders agreed to do so, without condition, on April 5, 2012.
>
> [82] The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, **despite having the effect of constraining the negotiating position of the creditors**.[34] [emphasis added]

41. The complaints of the Ad Hoc Committee regarding conflict are really an attempt to reargue the corporate governance approved as part of the DIP Financing a decade later for leverage purposes. [redacted]

> [redacted][35] [emphasis added]

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[34] *Crystallex (Re)*, 2012 ONCA 404 at paras 81-82.
[35] Newbould Endorsement dated December 18, 2014.

42. There is simply no merit in the allegations of conflict and the Ad Hoc Committee's attempt to constantly relitigate these issues is another example of an abuse of process.

(D) THE AD HOC COMMITTEE'S STRATEGY OF FORCING PUBLIC DISCLOSURE IS ACTUALLY HARMING CRYSTALLEX

43. The constant contested motions and tactics of the Ad Hoc Committee come at a cost that goes well beyond the legal expenses. The Company and the DIP Lender have expressed concerns throughout this CCAA proceeding as to how Venezuela could use certain information against the Company in its enforcement efforts and to the detriment of stakeholders.

44. Crystallex has attempted to persuade the Ad Hoc Committee to stop its incessant demands for pubic disclosure of sensitive information, but the Ad Hoc Committee has dismissed these requests as the Company just "crying wolf''. The factum of the Ad Hoc Committee challenges whether the release of financial information will have any "marginal" effect on the Company or its stakeholders.

45. It turns out (not surprisingly), the Ad Hoc Committee's position is again, completely wrong. Venezuela has in fact been carefully reviewing the Monitor's website and is now using information that was made public in July 2021 (in response to demands by the Ad Hoc Committee) to argue its case in Delaware against Crystallex's continued enforcement.[36] Political activists and lobbyists, in possession of the details of the Initial Payment Securities and other payments received by Crystallex, are now lobbying with an

[36] Venezuela September Pleading, Compendium at Tab B.

assertion that Crystallex has already been paid in full, and that Crystallex should be prosecuted criminally.[37] Finally, OFAC recently denied Crystallex a license to sell the PDVH Shares, dealing a blow to the timely completion of its enforcement efforts.[38]

46. Crystallex will have to respond to all of these issues and there will be further delays to enforcement, and risks to recovery. To use Justice Newbould's words, the Ad Hoc Committee's tactics have "come home to roost" and continuing down this path will only make it worse for stakeholders.

47. It is for these reasons that Crystallex, with the support of the DIP Lender, is seeking and will continue to seek the protection of certain financial and strategic information that Venezuela and other parties may try to use against the Company. [redacted]

[37] Article entitled "Carta pública a Juan Guaidó, a la Comisión Delegada de la Asamblea Nacional y al Procurador Enrique Sánchez Falcón" published on El Carabobeno on September 23, 2021, Compendium at Tab C.
[38] Letter from Travis S. Hunter to the Honorable Leonard P. Stark, dated September 15, 2021, enclosing the letter from Andrea M. Gacki, Director of the Office of Foreign Asset Control to Adam M. Smith, counsel for Crystallex, dated September 10, 2021, Compendium at Tab D.
[39] Newbould Endorsement dated December 18, 2014.

PART III - CONCLUSION

48. The Ad Hoc Committee has failed to present to the Court compelling reasons and evidence that would justify unsealing the Retention Amounts or the public disclosure of the financial terms for Moelis and Pirinate at this time. There are critical events unfolding in the US enforcement process that impact on the interests of all stakeholders. Publication of the requested information could have a serious impact on Crystallex's ultimate success in enforcement against Venezuela, and access to experienced advisors necessary to assist with those efforts. The relief requested on the Cross-Motion disregards the broader interests of the Company and other stakeholders.

49. The Cross-Motion should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMTTED this 28th day of September 2021.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re Danier Leather Inc.*, 2016 ONSC 1044

2. *Ontario Securities Commission v. Bridging Finance*, 2021 ONSC 4347

3. *Canadian Broadcast Corp. v. Manitoba,* 2021 SCC 33

4. *Ivandaeva Total image Salon Inc. v. Hlembizky*, [2003] OJ No 949 (QL)

5. *Robichaud v Locilento*, 2016 ONSC 2352

6. *Crystallex (Re)*, 2012 ONCA 404

7. *Computershare Trust Co. of Canada v. Crystallex International Corp. (2009)*, 65 B.L.R. (4th) 281 (S.C.), aff'd 2010 ONCA 364

8. *Computershare v. Crystallex*, 2011 ONSC 5748

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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PROCEEDING COMMENCED AT
TORONTO

RESPONDING FACTUM OF THE DIP LENDER TO CROSS-MOTION OF AD HOC COMMITTEE OF UNSECURED NOTEHOLDERS

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