

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

**RESPONDING FACTUM OF
CRYSTALLEX INTERNATIONAL CORPORATION
(Re: Cross-Motion for Unsealing and Disclosure – Returnable October 14, 2021)**

September 28, 2021

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PART I - OVERVIEW

1. This Cross-Motion, served by the Ad Hoc Committee¹ by surprise at 9:14 p.m. on Friday May 28, 2021, upended a litigation schedule that had long since been agreed to by all parties in respect of the motion by Crystallex International Corporation ("**Crystallex**" or the "**Company**") for protective relief concerning its Financial Information under s. 10(3) of the *Companies' Creditors Arrangement Act* (the "**CCA**") (the "**Protective Relief Motion**"). In the Cross-Motion, the Ad Hoc Committee raises a litany of disclosure complaints that it says have arisen in respect of Crystallex over the course of more than five years, none of which are the subject of the Company's Protective Relief Motion.

2. As explained in detail in the context of its Protective Relief Motion, Crystallex has no desire to keep information away from its stakeholders; its only focus is on preventing Venezuela from learning details about the Company's assets that could be used to harm Crystallex's ongoing U.S.-based efforts to enforce an approximately U.S.\$1.4 billion arbitral award against Venezuela, which remains the best prospect for the Company's stakeholders to recover on their investments.

3. The Company was, and is, willing to engage with the Ad Hoc Committee regarding disclosure issues – for that reason, virtually all of the information sought in the Cross-Motion motion has now been disclosed by the Company, including in response to developments in the U.S. litigation that required Crystallex to make public certain information that had previously been maintained in confidence.

¹ Capitalized terms used but not otherwise defined in this factum shall have the meanings given to them in the Affidavit of Robert Fung sworn May 21, 2021 (the "**May Fung Affidavit**"), Motion Record of Crystallex International Corporation dated May 21, 2021 ("**May CMR**"), Tab 2, pp. 8-56.

4. Nevertheless, the Ad Hoc Committee continues to claim injustice and mistreatment at the hands of the Company, going so far as to complain in their Cross-Motion factum about:

- (a) the board of Crystallex having made decisions unanimously;²
- (b) the board of Crystallex having supported (unanimously) the retainer of an advisor to the independent director;³
- (c) the Company's unwillingness to publish the full terms of engagement letters that have never been sealed and form no part of the public record (and which the Company is providing publicly, with their financial terms redacted);⁴ and
- (d) Mr. Fung's stated desire to maximize the value of the estate for the benefit of all stakeholders.⁵

5. That the Ad Hoc Committee has taken 25 pages to continue to air grievances about the Company's disclosure practices in circumstances where its Cross-Motion has been largely *resolved on consent* speaks volumes regarding its true intentions in bringing the Cross-Motion: not to obtain disclosure of the information that is purportedly the basis for the Cross-Motion, but instead to use informational requests as a platform to: (i) launch collateral attacks on prior Orders of this Court; (ii) make unfounded allegations of bad faith against the Company; and (iii) attempt to cast a pall on Crystallex's good-faith efforts,

² Factum of Computershare Trust Company of Canada in its Capacity as Trustee for the Holders of Crystallex 9.375% Senior Notes Due December 23, 2011 and the Ad Hoc Committee of Beneficial Holders of the Senior Notes dated September 3, 2021 ("**Ad Hoc Committee's Factum**") at paras. 12, 42, 47.

³ Ad Hoc Committee's Factum at para. 12.

⁴ Ad Hoc Committee's Factum at paras. 49-52.

⁵ Ad Hoc Committee's Factum at para. 44.

through its own motion, to safeguard information from Venezuela in an effort to protect the Company's most important asset. The Ad Hoc Committee's efforts to use the Court's processes for such purposes should be dismissed.

PART II - FACTS

A. Background and U.S. Enforcement Proceedings

6. Crystallex has been embroiled for more than a decade in arbitration and litigation to recover damages from the government of Venezuela following the expropriation of Crystallex's rights to the world-class Las Cristinas gold mine. Crystallex's only assets are the Award of USD \$1.202 billion, plus interest rendered by the World Bank's International Centre for the Settlement of Investment Disputes against the government of Venezuela and the related proceeds of recovery on the Award received to date.⁶

7. The only way for Crystallex to pay its stakeholders is to successfully enforce on the Award. The Company's enforcement efforts against Venezuela to date have involved: (i) recognition of the Award in proceedings before the United States courts, resulting in the Judgment being issued by the United States Federal Court for the District of Columbia on April 7, 2017; (ii) Crystallex recovering approximately USD \$500 million in cash and securities through settlements with Venezuela; and (iii) Crystallex obtaining the Writ against the PDVH Shares. PDVH indirectly owns CITGO Petroleum Corp., an American oil company valued at billions of dollars.⁷

8. Robert Fung and Marc Oppenheimer are the only remaining individuals at the

⁶ Affidavit of Robert Fung sworn July 9, 2021 ("**July Fung Affidavit**") at para. 8, Responding Motion Record of Crystallex International Corporation dated July 9, 2021 ("**July CMR**"), Tab 1, pp. 4-5.

⁷ July Fung Affidavit at para. 9, July CMR, Tab 1, p. 5.

Company with the personal relationships and institutional knowledge of the decade-long proceedings against Venezuela who are capable of advancing the enforcement of the Award.⁸ Mr. Fung and Mr. Oppenheimer have also engaged in face-to-face negotiations with Venezuela, resulting in settlement agreements that have netted the Company in excess of USD\$500M in payments.⁹

9. On April 16, 2012, this Court approved a management incentive plan (the "**MIP**"), which established a discretionary pool of funds in favour of MIP beneficiaries (including Mr. Fung and Mr. Oppenheimer), to be paid after professional fees, taxes, the principal and interest owing to the DIP Lender and the claims of all unsecured creditors, including the Noteholders. The beneficiaries of the MIP were deemed essential to advancing the arbitration against Venezuela, and the approval of the MIP was a condition of the Company's debtor-in-possession credit agreement ("**DIP Agreement**").¹⁰

10. In 2014, the Company was required to borrow further funds under its DIP Agreement, and entered into a standstill arrangement with the Ad Hoc Committee, which increased the amount of claims that ranked above the MIP and diluted significantly the value of the MIP. At that time, the arbitration against Venezuela was ongoing and the Award had not been issued.¹¹

11. In an effort to retain the key personnel necessary to assist with the pursuit of the arbitration against Venezuela and enforcement of any resulting award, Crystallex and the

⁸ Affidavit of Harry Near sworn December 15, 2014 ("**Near Affidavit**") at para. 45.

⁹ 30th Report of the Monitor dated April 8, 2019 at para. 9, Exhibit "C" to the Affidavit of Robert Fung sworn July 9, 2021 (the "**Reply Fung Affidavit**"), Reply Motion Record of Crystallex International Corporation dated July 9, 2021 ("**Reply CMR**"), Tab 1, p. 52;

¹⁰ Management Incentive Plan Approval Order of the Honourable Justice Newbould dated April 16, 2012; Third Report of the Monitor dated April 3, 2012 at paras. 72-76.

¹¹ Near Affidavit at paras. 53-55.

DIP Lender entered into an agreement with Mr. Fung and Mr. Oppenheimer that would entitle each of Mr. Fung and Mr. Oppenheimer to a [REDACTED] portion of the contingent value rights (the "CVRs")¹² that would otherwise be payable to the DIP Lender after professional fees, taxes, the principal and interest owing to the DIP Lender and the claims of all unsecured creditors (including the Noteholders).¹³ The agreement giving rise to the CVRs – and the sealing of the amounts of the CVRs payable to Mr. Fung and Mr. Oppenheimer (the "CVR Amounts") – was approved by Justice Newbould by confidential Endorsement dated December 2014:

[REDACTED]

[REDACTED]

12. In the accompanying Order, the transfer of the CVR Amounts to Mr. Fung and Mr. Oppenheimer was stated to be "fair, reasonable and appropriate".¹⁵

B. Moelis and Pirinate Engagement

(i) Moelis & Company LLC ("Moelis")

13. In 2018, Crystallex retained Moelis to act as the Company's financial advisor in

¹² The CVRs are prescribed by the Company's DIP Agreement and Court-approved. The CVRs entitle the holders to a percentage share in the proceeds of the Award payable after the proven claims of the Company's unsecured creditors, including the Ad Hoc Committee.

¹³ Near Affidavit at para. 47.

¹⁴ Confidential Endorsement of Justice Newbould dated December 17, 2014, confidential Appendix "A" to the Monitor's 37th Report.

¹⁵ Net Arbitration Proceeds Transfer Order of Justice Newbould dated December 18, 2014, Crystallex International Corporation Document Brief dated September 28, 2021 ("CDB"), Tab 1.

connection with the Company's efforts to execute on the PDVH Shares. On the basis of the Initial Order made December 23, 2011, the Company did not seek Court approval of the engagement letter nor did it make the letter public.¹⁶

(ii) Pirinate Consulting Group, LLC (“Pirinate”)

14. The DIP Agreement provides that an independent director shall act as the special managing director with a mandate to make decisions relating to, among other things, the conduct of the CCAA proceedings. In connection with that mandate, Harry Near (the former Independent Director of Crystallex) engaged Pirinate to provide professional and advisory services to assist him in carrying out his role. When Harry Near resigned, the new Independent Director, Sergio Marchi, continued the engagement of Pirinate. On the basis of the Initial Order made December 23, 2011, the Company did not seek Court approval of Pirinate’s engagement letter, nor did it make this letter public.¹⁷

(iii) Disclosure of Engagement Letters

15. Crystallex is disclosing publicly both the Moelis and the Pirinate engagement letters, on the condition that the financial terms of those retainers are not made public. Those engagement letters (with financial terms redacted) are appended hereto as **Appendix “1”**. In circumstances where the terms at issue: (i) were not required to be approved by the Ad Hoc Committee or the Court, (ii) form no proper part of the public record, and (iii) have never been sealed by the Company, it is unclear to Crystallex why

¹⁶ July Fung Affidavit at para. 33(d), July CMR, Tab 1, p. 19; Initial Order of the Honourable Mr. Justice Newbould dated December 23, 2011, Exhibit “I” to the July Fung Affidavit, paras. 4, 8, July CMR, Tab 11, pp. 213-215.

¹⁷ July Fung Affidavit at para. 33(d), July CMR, Tab 1, p. 19; Initial Order of the Honourable Mr. Justice Newbould dated December 23, 2011, Exhibit “I” to the July Fung Affidavit, paras. 4, 8, July CMR, Tab 1, pp. 213-215; Transcript from the Cross-Examination of Robert Fung held August 5, 2021 (“**Fung Transcript**”) at qq. 291-303, pp. 82-85, Transcript Brief dated September 3, 2021 (“Transcript Brief”), Tab 1, pp. 89-92.

this disclosure is not acceptable to the Ad Hoc Committee.

C. Disclosure in Canadian Proceedings

16. The Company's main objective in this CCAA proceeding has been to pursue its dual-track strategy of enforcing the Award and seeking a settlement with Venezuela, a strategy developed in coordination with the Monitor.¹⁸ The Company's enforcement efforts in the United States are, understandably, Crystallex's primary focus. Crystallex does not anticipate seeking any relief in the CCAA proceeding in the near term except for: (i) extensions of the stay of proceedings, (ii) extensions of the DIP Agreement maturity; and (iii) the sealing of confidential information.¹⁹

17. Sealing and maintaining the confidentiality of certain of the Company's information has been a key element of the Company's highly successful litigation and enforcement strategy against Venezuela in the United States; to date, Crystallex is the only creditor of Venezuela to successfully obtain an alter ego ruling and obtain a writ authorizing the seizure of the PDVH Shares.²⁰ This strategy was developed with the advice and expertise of the Company's U.S. litigation and enforcement advisors, Gibson, Dunn & Crutcher. As part of this strategy, Crystallex has obtained orders of this Court on 13 prior occasions sealing its strategic and financial information, including an order sealing the CVR Amounts.²¹

18. The Company has endeavoured to maintain a consistent approach between the United States and Canadian proceedings with respect to the sealing of its information.

¹⁸ May Fung Affidavit at para. 117, May CMR, Tab 2, p. 52.

¹⁹ May Fung Affidavit at paras. 117-118, May CMR, Tab 2, p. 52.

²⁰ May Fung Affidavit at para. 104, May CMR, Tab 2, p. 47.

²¹ July Fung Affidavit at para. 11, July CMR, Tab 1, p. 6.

Accordingly, when information is publicly disclosed in the U.S. enforcement proceedings, Crystallex also makes it public in the CCAA proceeding.²² This occurred as recently as September 25, 2021, when Court-ordered disclosures in the U.S. proceeding caused Crystallex to disclose voluntarily certain of the information originally sought to be sealed in the Company's Protective Relief Motion, as well as certain of the information at issue in the Cross-Motion.²³

D. The Cross-Motion

19. The Ad Hoc Committee served its Cross-Motion on May 28, 2021 in the context of the Company's Protective Relief Motion for continued protection of its cash flow information. The parties had agreed in November 2020 that the Protective Relief Motion would be litigated at a motion to be scheduled,²⁴ and the parties also agreed on a timetable for the delivery of materials in connection with the Protective Relief Motion, which contemplated that the Ad Hoc Committee would deliver its *responding record* on May 28, 2021.

20. Notwithstanding the agreement of the parties, the Ad Hoc Committee served the Cross-Motion without notice, on the night its responding record in respect of the Protective

²² May Fung Affidavit at para. 90, May CMR, Tab 2, p. 42; Email from Robin Schwill to Christopher Armstrong, Peter Ruby, Robert Chadwick, David Byers, Maria Konyukhova and Fiona Han dated September 15, 2021, CDB, Tab 3; Email from Robin Schwill to Christopher Armstrong, Peter Ruby, Robert Chadwick, David Byers, Maria Konyukhova, Brian Denega and Fiona Han dated September 15, 2021, CDB, Tab 4; Email from Robin Schwill to Christopher Armstrong, Peter Ruby, Robert Chadwick, David Byers, Maria Konyukhova and Fiona Han dated September 21, 2021, CDB, Tab 5; Letter from Robin Schwill to David Byers dated September 22, 2021, CDB, Tab 6.

²³ The information in question became public in the U.S. proceeding on September 15, 2021, at which time counsel for the Ad Hoc Committee was promptly advised and steps were taken by Crystallex to cause the disclosure in Canada of the information at issue.

²⁴ The Protective Relief Motion was to be scheduled pending determination by the Ontario Court of Appeal on the Company's application for leave to hear an appeal of reasons of Justice Hainey made August 31, 2020 and June 8, 2020. The Ontario Court of Appeal released its Endorsement refusing leave on February 9, 2021; Thirty-Sixth Report of the Monitor dated May 3, 2021 at paras. 46-47; Order of Mr. Justice Hainey made November 3, 2020 at para. 12.

Relief Motion was due. The Cross-Motion represents a scattershot airing of disclosure-related grievances that have arisen over the course of more than five years, and that were not the subject of the Company's Protective Relief Motion.

21. On July 9, 2021, the Company responded to the Ad Hoc Committee by providing the majority of the information requested in the Cross Motion (the "**Requested Information**"). In the limited instances where the Company believed that public disclosure or unsealing of the Requested Information would harm the Company's enforcement efforts or disclose commercially sensitive information of third parties, Crystallex offered to disclose that information to the Ad Hoc Committee on a confidential basis.²⁵

22. As a result, there were *only two* pieces of Requested Information that the Company did not make public: (i) the CVR Amounts; and (ii) the issuer(s), type(s) and market value at the time of receipt of the securities (the "**Initial Payment Securities**") received by Crystallex from Venezuela a part of an initial payment under an amended and restated settlement agreement between the parties.²⁶ (The Ad Hoc Committee later advised that the relief sought in the Cross-Motion was not merely the *terms of engagement* of Moelis and Pirinate, but the *engagement letters* themselves, which Crystallex had not understood to form any part of the Cross-Motion.)

23. The dispute regarding the disclosure of the details of the Initial Payment Securities was resolved following further developments in the U.S. enforcement proceedings, which

²⁵ July Fung Affidavit at para. 15, July CMR, Tab 1, pp. 7-8; Letter from Natalie Renner to Mr. Ruby dated July 9, 2021, Exhibit "A" to July Fung Affidavit, July CMR, Tab 1A, pp. 26-60.

²⁶ July Fung Affidavit at para. 15, July CMR, Tab 1, pp. 7-8; Letter from Natalie Renner to Mr. Ruby dated July 9, 2021, Exhibit "A" to July Fung Affidavit, July CMR, Tab 1A, pp. 26-60.

resulted in Crystallex being required to make disclosure to Venezuela of certain of the information that the Ad Hoc Committee wanted disclosed.²⁷ These disclosures were and are consistent with the Company's approach to confidentiality: to maintain the same disclosure approach as between the U.S. and Canada.

24. As a result of the foregoing developments, the only live issues with respect to the Cross-Motion are: (i) disclosure of the CVR Amounts; and (ii) disclosure of the engagement letters of Moelis and Pirinate.

E. Other Miscellaneous Allegations and Distortions

25. Troublingly, the summary of facts offered by the Ad Hoc Committee in its factum in respect of the Cross-Motion provides a selective and deeply misleading account of the Company's disclosure practices. These statements are designed to portray the Company in a misleading light and must be corrected.

26. First, the Noteholders assert that Mr. Fung has now raised "the risk of Tenor seeking to enforce the DIP rather than allowing Crystallex to continue using its cash on hand to fund enforcement against Venezuela", and claim that in light of that "risk, it is imperative that stakeholders have access to the information at issue so they can be ready to advance options and alternatives".²⁸ These statements represent a significant distortion of Mr. Fung's evidence, which was clarified by the Company (prior to the date for filing of the Ad Hoc Committee's factum) as follows:

"Importantly, Mr. Fung's evidence (at para. 6(b) of his Reply Affidavit) was not that Tenor was taking or had threatened to take enforcement steps. Rather, Mr. Fung stated that

²⁷ Letter from Robin Schwill to David Byers dated September 22, 2021, CDB, Tab 6; Redacted Special Master's Report and Recommendation Regarding Proposed Sale Procedures Order dated August 9, 2021 at paras. 49-50, CDB, Tab 4A.

²⁸ Ad Hoc Committee's Factum at para. 19.

Crystallex "has received no indication that [Tenor] will fund any additional amounts to Crystallex, let alone allow Crystallex to exhaust all of its cash before taking its own enforcement steps to obtain some recovery on its investment".

[...]

With respect to Tenor's enforcement remedies, those have been publically disclosed since the disclosure of the original DIP Credit Agreement in 2012. The Ad Hoc Committee and Goodmans are both well aware of the DIP Lender's rights and remedies, and of the DIP Lender's ability to seek to exercise those rights and remedies each time the DIP Credit Agreement matures if an amendment and extension is not entered into".²⁹

27. Second, the factum of the Ad Hoc Committee asserts that:

"The day before this factum was due, in response to a question taken under advisement during the cross-examination of Mr. Fung, Crystallex advised that it released publicly the DIP balance current to July 31, 2021 in response to questions raised by the Ad Hoc Committee... In fact, the DIP balance was publicly disclosed in a brief filed by Crystallex in the U.S. Proceedings on August 13, 2021".³⁰ [emphasis added]

While the Ad Hoc Committee tries to portray Crystallex as having been delayed and misleading in its disclosure of the DIP balance, it fails to mention that Crystallex's disclosure intentions were fully disclosed to Goodmans, in advance, at every step along the way:

- (a) On the morning of August 13, counsel for Crystallex advised counsel for the Ad Hoc Committee that it planned to make public the current DIP balance

²⁹ Reply Fung Affidavit at para. 6(b), Reply CMR, Tab 1, pp. 4-5; Fung Transcript at q. 759, p. 203, Transcript Brief, Tab 1, p. 210; Answers to Undertakings, Advisements from the Examination of Robert Fung held August 5, 2021 at q. 759, p. 203, Transcript Brief, Tab 4, p. 210.

³⁰ Ad Hoc Committee's Factum at para. 21(d).

as at July 31, 2021 through a filing in the U.S. proceedings;

- (b) Counsel for Crystallex provided a copy of the document disclosing the DIP balance on August 13, 2021, promptly after filing;
- (c) Counsel for Crystallex advised Goodmans on August 18, 2021 that an error had been noted in the DIP balance in the as-filed document, which would be publicly corrected at the outset of the hearing on August 20, 2021; and
- (d) Counsel for Crystallex confirmed during the morning of August 20, 2021 as soon as the correction had been publicly made in the U.S. proceeding.³¹

28. Third, contrary to the statements made at para. 21 of the Ad Hoc Committee's factum, Crystallex did not assert that every question asked and every answer given by Mr. Fung was confidential. Rather, the basis for the approach taken was explained by counsel for Crystallex on the record at the outset of Mr. Fung's cross-examination:

"As you know, Mr. Ruby, one of the heads of relief that we have asked for in the company's motion is that Mr. Fung's transcript be sealed. We, of course, don't know what questions you are going to put to him today. You are under confidentiality obligations and have access to Mr. Fung's confidential versions of each of the affidavits that he's sworn.

We also don't necessarily have control over whether a question that you ask, that is not in and of itself confidential, causes a response of Mr. Fung to tread into confidential territory.

The company does not want to be put in a situation where there is a "gotcha" moment that results from my not intervening quickly enough to move to a confidential transcript. On that basis I suggest that we mark the entirety of the transcript today as confidential, and that the company

³¹ Emails between Maureen Littlejohn and Christopher Armstrong, Peter Ruby and Carlie Fox dated between August 13 to 20, 2021, CDB, Tab 2.

agrees to review it as expeditiously as we reasonably can, in light of tomorrow's cross-examination, to advise whether there are portions that we don't view as confidential, which portions could be unredacted".³² [emphasis added]

29. Fourth, notwithstanding its complaints that Crystallex has not "paid down the DIP, made any distributions to creditors on account of proven claims, or advanced a plan",³³ the Ad Hoc Committee is fully aware that, in light of the U.S. Sanctions, the Company does not have sufficient liquid resources even to repay the DIP Lender, let alone to repay or its other creditors.³⁴

30. The Ad Hoc Committee's failure to represent fairly or accurately the facts underlying these Motions is a continuing source of concern to Crystallex.

PART III - ISSUES

31. In light of the various categories of Requested Information in the Cross-Motion that have now been resolved by the Company on consent, the only issues remaining to be resolved by this Honourable Court are:

- (a) the Ad Hoc Committee's request for disclosure of the CVR Amounts; and
- (b) the Ad Hoc Committee's request that the engagement letters with Pirinate and with Moelis – including their financial terms – be made public by Crystallex.

32. For the reasons set out below, the Ad Hoc Committee's Cross-Motion to require

³² Fung Transcript at q. 21, pp. 12-14, Transcript Brief, Tab 1, pp. 18-21.

³³ Ad Hoc Committee's Factum at para. 13.

³⁴ May Fung Affidavit at para. 120, May CMR, Tab 2, p. 53; Reply Fung Affidavit at paras. 8-11, Reply CMR, Tab 2, pp. 8-10; Transcript of the Cross-Examination of Scott Reid held August 6, 2021 ("**Reid Transcript**") at qq. 385-416, pp. 105-114, Supplementary Motion Record of Crystallex International Corporation dated September 3, 2021 ("**Supp. CMR**"), Tab 1, pp. 115-124).

the Company to disclose publicly these two categories of Requested Information should be rejected.

PART IV - LAW AND ARGUMENT

A. The Request for Disclosure of the CVR Amounts Should Be Rejected

33. In considering the request of the Ad Hoc Committee for disclosure of the CVR Amounts, it is important to recall that the CVR Amounts were sealed by Order of this Honourable Court dated December 18, 2014 (the “**2014 CCAA Order**”).³⁵ The Cross-Motion request to un-seal this information therefore cannot be treated as though it were a request by Crystallex to seal at first instance. Instead, it is a request by the Ad Hoc Committee to vary the 2014 CCAA Order.

34. The Ad Hoc Committee’s Cross-Motion to vary the 2014 CCAA Order should be rejected. Among other things:

- (a) The Ad Hoc Committee has failed to satisfy its onus to show a material change in circumstances that would warrant this Honourable Court revisiting its decision to seal the CVR Amounts at first instance; and
- (b) In any event, the CVR Amounts readily satisfy the test established by the Supreme Court of Canada in *Sierra Club* and *Sherman Estate* for the sealing of information, particularly in a CCAA proceeding such as this.

35. Each of these is discussed in greater detail below.

³⁵ Net Arbitration Proceeds Transfer Order of Justice Newbould dated December 18, 2014, CDB, Tab 1.

(i) The Ad Hoc Committee has Failed to Discharge its Burden to Show a Material Change Justifying a Variance to the Order Sealing the CVR Amounts

36. The Ad Hoc Committee blithely asserts, in its factum, that “Crystallex has the burden of meeting the *Sherman Estate* test for sealing court records”.³⁶ In doing so, it ignores the fact that Crystallex already met this burden when the information was sealed at first instance. In this motion to vary the 2014 CCAA Order and unseal the CVR Amounts, it is the Ad Hoc Committee, rather than Crystallex, that bears the burden of justifying the relief that it seeks.

37. Only last week, on September 24, 2021, the Supreme Court of Canada released its decision in *Canadian Broadcasting Corp. v. Manitoba*, in which it reiterated that sealing orders may only be varied on two narrow grounds: (i) where an affected party, who was not given notice of the making of the sealing order, brings a timely motion to vary or set aside the order;³⁷ or (ii) where there has been a material change in circumstances since the sealing order was granted.³⁸ The burden of establishing that a material change in circumstances has occurred falls on the party seeking a variation of the order.³⁹

38. Here, the Ad Hoc Committee has failed to establish that there has been a material change in circumstances since the making of the 2014 CCAA Order such that it ought to

³⁶ Ad Hoc Committee’s Factum at para. 26.

³⁷ This ground is clearly not available to the Ad Hoc Committee, which was provided notice of Crystallex’s intention to seek an order sealing the CVR Amounts and participated fully in the resulting hearing, including by making submissions with respect to why a sealing order would not be appropriate in the circumstances. Despite the Ad Hoc Committee’s submissions, the Honourable Justice Newbould concluded that it was appropriate to grant the 2014 CCAA Order in the circumstances.

³⁸ *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at para. 42, Book of Authorities of Crystallex International Corporation (“CBOA”), Tab 1.

³⁹ *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at para. 55, CBOA, Tab 1.

be varied.⁴⁰ The bar to obtain relief on the basis of this narrow ground is high: the Ad Hoc Committee must not only demonstrate that there has been a material change, but must establish that the alleged change relates to a matter that justified the making of the order in the first place⁴¹ and that if known at the time of the initial order, would likely have resulted in an order *on different terms*.⁴² Importantly, where a party seeks to have the Court reconsider or vary a sealing order on the basis of a material change in circumstances, the correctness of the initial order *is presumed* and is not relevant to the existence of a material change in circumstances.⁴³

39. In this case, instead of attempting to discharge its burden on the Cross-Motion, the Ad Hoc Committee has proceeded as though this were a hearing *de novo* on whether sealing of the CVR Amounts would be appropriate *at this time*, going so far as to advance the *same arguments* that it advanced – and that Justice Newbould rejected – in 2014:

[REDACTED]

⁴⁰ *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at paras. 53, 55, CBOA, Tab 1; *R v. Adams*, 1995 CarswellAlta 733 (S.C.C.) at para. 31, CBOA, Tab 2; *L.M.P. v. L.S.*, 2011 SCC 64 at paras. 29-31, CBOA, Tab 3; *W.A.C. v. C.A.F.*, 2021 ONSC 5140 at para. 101, CBOA, Tab 4; *R v. Morin*, 1997 CarswellOnt 400 (Ont. C.A.) at paras. 13-17, CBOA, Tab 5.

⁴¹ *R v. Adams*, 1995 CarswellAlta 733 (S.C.C.) at para. 31, CBOA, Tab 2.

⁴² *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at para. 55, CBOA, Tab 1; *L.M.P. v. L.S.*, 2011 SCC 64 at para. 32, CBOA, Tab 3.

⁴³ *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at paras. 55, 72, CBOA, Tab 1; *L.M.P. v. L.S.*, 2011 SCC 64 at para. 33, CBOA, Tab 3.

⁴⁴ Confidential Endorsement of Justice Newbould dated December 17, 2014 at pp.5-6, confidential Appendix "A" to the Monitor's 37th Report.

40. Having failed even to advert to the onus it bears in seeking to vary the 2014 CCAA Order, the Ad Hoc Committee has made no effort to prove a material change in circumstance justifying a variance to that Order. Instead, the Ad Hoc Committee relies on “concerns” raised by Scott Reid, a member of the Ad Hoc Committee, with respect to alleged conflicts of interest created by the CVRs in this case.

41. This basis asserted by the Ad Hoc Committee to justify a variance to the 2014 CCAA Order does not withstand scrutiny. Among other things:

- (a) Mr. Reid’s evidence was undermined significantly during his cross-examination, and should be discounted on that basis; and
- (b) The Ad Hoc Committee’s justification for this relief appears to be only its desire to re-litigate or attack collaterally this Honourable Court’s decision to approve the CVR Amounts.

(a) Mr. Reid’s Evidence Should be Treated with Scepticism

42. Although the Ad Hoc Committee contends that “None of Mr. Reid’s evidence [concerning the importance of the various types of information at issue on the Cross-Motion] is contested”,⁴⁵ Mr. Reid’s version of events was undermined significantly during his cross-examination. Notwithstanding his affidavit evidence that: (i) he has been unable to “monitor and fully assess the status of [his] funds’ investment in the Notes”,⁴⁶ (ii) it was “very difficult [for him] to fully and accurately assess Crystallex’s situation” since the Company’s financial information was sealed; (iii) he believes that the four CVR-holding

⁴⁵ Ad Hoc Committee’s Factum at para. 18.

⁴⁶ Affidavit of Scott Reid sworn May 28, 2021 (“**Reid Affidavit**”) at para. 64(a), Responding and Cross-Motion Record of Computershare Trust Company and Ad Hoc Committee dated May 28, 2021 (“**AHMR**”), Tab 2, p. 32.

directors of Crystallex “have a significant conflict of interest in addressing the rights and entitlements of the Noteholders and other creditors”,⁴⁷ and (iv) he lacks “a complete understanding of Crystallex’s capital structure” by virtue of the CVRs,⁴⁸ Mr. Reid admitted that:⁴⁹

- (a) In its capacity as investment manager of Ravensource, Mr. Reid’s company Stornoway Portfolio Management continued to make purchases of the Notes between December 2014 and February 2021 (while Crystallex’s financial information remained sealed, and after the CVR transfer was approved), increasing the amount of Ravensource’s face value holdings by approximately 18%,⁵⁰ and from 9.43% of Ravensource’s net assets to 26.75% of net assets.⁵¹
- (b) Notwithstanding that the investment in Crystallex is a significant part of Ravensource’s portfolio (26.75% of net assets as of September 2020),⁵² at no point has Mr. Reid disclosed to Ravensource’s unitholders that he is unable to assess the status of the Fund’s investment in Crystallex,⁵³ and at no point has Mr. Reid disclosed to Ravensource’s unitholders that he is unable to accurately assess Crystallex’s situation.⁵⁴ Rather, Mr. Reid has advised Ravensource’s unitholders repeatedly that Stornoway’s strategy as investment manager is to “concentrate capital in positions we know the best

⁴⁷ Reid Affidavit at para. 54, AHMR, Tab 2, p. 30.

⁴⁸ Reid Affidavit, para. 56, AHMR, Tab 2, p. 30.

⁴⁹ Reid Affidavit, para. 64(b), AHMR, Tab 2, p. 32.

⁵⁰ Reid Transcript at qq. 490-526, pp. 132-141, Supp. CMR, Tab 1, pp. 142-151

⁵¹ Reid Transcript at qq. 117-119, 127-148, pp. 32, 44-49, Supp. CMR, Tab 1, p. 42, 54-59.

⁵² Reid Transcript at qq. 140-143, pp. 37-38, Supp. CMR, Tab 1, pp. 47-48.

⁵³ Reid Transcript at qq. 554-557, pp. 147-149, Supp. CMR, Tab 1, pp. 157-159.

⁵⁴ Reid Transcript at qq. 554-557, pp. 147-149, Supp. CMR, Tab 1, pp. 157-159.

and where we hold the strongest convictions”.⁵⁵

43. Further, notwithstanding the statements in Mr. Reid’s Affidavit that “Crystallex’s failure to make routine public disclosure to its stakeholders has impaired Stornoway’s ability to fully participate in the CCAA proceedings in order to protect and advance its rights and interests”,⁵⁶ at no point has Mr. Reid disclosed to Ravensource’s unitholders that Crystallex’s disclosure practices have impeded in any way his ability to participate in the CCAA proceeding. To the contrary, Mr. Reid described his active involvement in the CCAA proceeding to Ravensource’s unitholders in letters dated December 31, 2018, December 31, 2019, and December 31, 2020. Crystallex’s financial information was redacted throughout this period.⁵⁷

(b) The Ad Hoc Committee’s Desire to Launch a Collateral Attack on the CVR Amounts Cannot Justify the Requested Relief

44. Even taken at its highest, however, the evidence of Mr. Reid does not satisfy the Ad Hoc Committee’s burden to prove a “material change in circumstances” that would justify a variance to the 2014 CCAA Order sealing the CVR Amounts. Indeed, the Ad Hoc Committee’s stated basis for requesting public disclosure of the CVR Amounts lays bare that the true basis for the Ad Hoc Committee’s request is its desire to re-litigate or to attack collaterally the 2014 CCAA Order’s approval of the transfer of CVR Amounts to Mr. Fung and Mr. Oppenheimer nearly seven years ago. In this regard, the Ad Hoc Committee’s factum asserts, repeatedly, that such CVRs improperly give rise to a conflict

⁵⁵ Reid Transcript at qq. 534-553, pp. 143-147, Supp. CMR, Tab 1, pp. 153-157.

⁵⁶ Reid Affidavit at para. 43, AHMR, Tab 2, p. 28.

⁵⁷ Reid Transcript at qq. 605-620, pp. 161-165, Supp. CMR, Tab 1, pp. 171-175.

of interest.⁵⁸

45. Notably, however, the 2014 CCAA Order approving the agreement that gave rise to the transfer to Mr. Fung and Mr. Oppenheimer of the CVR Amounts (which Order was granted at a time when the current capital structure was *already in place*) provided as follows:

“THIS COURT ORDERS that **the Net Arbitration Proceeds Transfer Agreement** among Crystallex International Corporation, Tenor KRY Cooperatief U.A. (the “Lender”), Robert Fung, and Marc Oppenheimer (the “NAP Transfer Agreement”) **and all transactions contemplated thereby are fair, reasonable and appropriate and are hereby approved and authorized in their entirety**”.⁵⁹ [emphasis added]

46. In the circumstances, the allegations of conflict raised by the Ad Hoc Committee to justify its Cross-Motion leave no doubt that it is seeking to attack Justice Newbould’s 2014 CCAA Order that first provided for the transfer of CVR Amounts. Such an attack would constitute a clear abuse of process.

47. It is widely accepted by Canadian courts that parties to litigation cannot re-litigate issues that have been finally determined. As the Supreme Court of Canada stated nearly two decades ago in *C.U.P.E.*: “a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue”.⁶⁰ In *C.U.P.E.*, the Supreme Court explained that “relitigation carries serious detrimental

⁵⁸ Ad Hoc Committee’s Factum at paras. 11, 18, 43, and at p. 2 of the chart appended as Schedule “A”.

⁵⁹ Net Arbitration Proceeds Transfer Order of Justice Newbould dated December 18, 2014 at para. 4, CDB, Tab1.

⁶⁰ *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 50, CBOA, Tab 6.

effects”⁶¹ and that there are at least three reasons why re-litigation must be prevented:

"First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality".⁶²

48. The doctrine of abuse of process is frequently invoked to prevent collateral attacks on rulings of the court. A collateral attack involves an attempt to challenge the validity of a binding order in a manner other than using the direct attack procedures properly available (*i.e.*, appeal or judicial review). In *Hoque v. Montreal Trust Co. of Canada*, Justice Cromwell, as he then was, cited the integrity of the judicial process and the administration of justice more generally as the rationale for the rule against collateral attack.⁶³ Similarly, the Supreme Court of Canada has emphasized that the fundamental policy behind the rule against collateral attack is "to 'maintain the rule of law and to preserve the repute of the administration of justice'".⁶⁴ The 2014 CCAA Order is now final and binding, and it is an abuse of process for a litigant to attempt to use the Court's

⁶¹ *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 52, CBOA, Tab 6; *The Catalyst Capital Group Inc. v. VimpeCom Ltd.*, 2019 ONCA 354 at para. 61, CBOA, Tab 7A, *leave to appeal refused*, 2019 CarswellOnt 18743 (S.C.C.), CBOA, Tab 7B.

⁶² *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 38, 51, CBOA, Tab 6; *The Catalyst Capital Group Inc. v. VimpeCom Ltd.*, 2019 ONCA 354 at para. 63, CBOA, Tab 7A, *leave to appeal refused*, 2019 CarswellOnt 18743 (S.C.C.), CBOA, Tab 7B.

⁶³ *Hoque v. Montreal Trust Co. of Canada*, 1997 NSCA 153 at para. 78, CBOA, Tab 8A, *leave to appeal refused*, 1998 CarswellNS 653 (S.C.C.), CBOA, Tab 8B.

⁶⁴ *Garland v. Consumers' Gas Co.*, 2004 SCC 25, at paras. 71-72, CBOA, Tab 9, citing *R. v. Litchfield*, 1993 CarswellAlta 160 (S.C.C.) at para. 22, CBOA, Tab 10; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 34, 36, CBOA, Tab 6; *Hoque v. Montreal Trust Co. of Canada*, 1997 NSCA 153 at paras. 68, 78, CBOA, Tab 8A, *leave to appeal refused*, 1998 CarswellNS 653 (S.C.C.), CBOA, Tab 8B.

process to do indirectly what he is prohibited from doing directly.⁶⁵

49. Thus, it is clear that the Ad Hoc Committee's desire to attack the transfer of CVRs through the 2014 CCAA Order cannot justify its request to vary the 2014 CCAA Order and require disclosure of the CVR Amounts.

(ii) In Any Event, the CVR Amounts Readily Satisfy the *Sierra Club/Sherman Estate* Test

50. In any event, however, the CVR Amounts continue to satisfy the test for sealing established by the Supreme Court of Canada in *Sherman Estate*, as set out in Crystallex's factum in respect of the Protective Relief Motion.⁶⁶ Canadian courts have recognized repeatedly the important public interests that are served by CCAA proceedings, and that the CCAA functions as "a supporting framework for the resolution of corporate insolvencies in the public interest".⁶⁷

51. Justice Newbould approved the transfer of the CVR Amounts to Mr. Fung and Mr. Oppenheimer on the express basis that these men were "critical" to the pursuit of the Award. In this regard, the CVR Amounts played the role of a Key Employee Retention Plan (a "**KERP**"). Notably, details of KERPs have frequently been the subject of sealing orders in CCAA proceedings:

(a) In *Re Danier Leather*, Justice Penny applied the principles in *Sierra Club* in

⁶⁵ *Tan-Jen Ltd. v. Di Pede*, 2017 ONSC 6800 at para. 44, CBOA, Tab 11.

⁶⁶ *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38, CBOA, Tab 21; See also *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53, CBOA, Tab 12.

⁶⁷ *Re Nortel Networks*, [2009] O.J. No. 3169 at para. 29, CBOA, Tab 13; 9354-9186 *Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 42, CBOA, Tab 14; *Urbancorp Cumberland 1 GP Inc. (Re)*, 2020 ONSC 7920 at para. 24, CBOA, Tab 15; *Re Danier Leather Inc.*, 2016 ONSC 1044 at paras. 82-84, CBOA, Tab 16; *Toronto-Dominion Bank v. Hockey Academy Inc.*, 2016 ONSC 4898 at para. 35, CBOA, Tab 17; *Re Lydian International Limited*, 2020 ONSC 3850 at para. 27, CBOA, Tab 18; *Ontario Securities Commission v. Bridging Finance*, 2021 ONSC 4347 at paras. 23-27, CBOA, Tab 19.

granting a sealing order in respect of – among other things – details of a KERP. There, as here in respect of the CVR Amounts, the KERP evidence involved “matters of a private, personal nature”.⁶⁸

- (b) In *Re Canwest Global Communications Corp.*, Justice Pepall found that, applying the guidance in *Sierra Club*, it was appropriate to seal the details of KERPs that would have revealed “individually identifiable information and compensation information” on the basis that “Protection of sensitive personal and compensation information the disclosure of which would cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected”.⁶⁹
- (c) Most recently, in *Ontario Securities Commission v. Bridging Finance Inc.*, the Honourable Chief Justice Morawetz considered the recent decision of the Supreme Court of Canada in *Sherman Estate*, and readily agreed that the three prerequisites had been satisfied, in agreeing to seal “confidential and personal information” with respect to a KERP.⁷⁰

52. Importantly, in none of those cases did the disclosure of KERP information involve the further risk to an employee’s safety. Here, Mr. Fung’s uncontroverted evidence is that the disclosure of the CVR Amounts would increase the risk of him being “targeted for kidnapping-for-ransom in Venezuela”, and that, given the risk to his personal safety that

⁶⁸ *Re Danier Leather Inc.*, 2016 ONSC 1044 at para. 83, CBOA, Tab 16. Justice Penny also noted that “There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case” (*Ibid.* at para. 84).

⁶⁹ *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 at paras. 49-52 (S.C.J.), CBOA, Tab 20.

⁷⁰ *Ontario Securities Commission v. Bridging Finance*, 2021 ONSC 4347 at paras. 23-27, CBOA, Tab 19.

disclosure of the CVR Amounts poses, he “would be unwilling to attend any in-person negotiations with Venezuela if this information is made public”.⁷¹ In the Monitor’s 37th Report, the Monitor noted and agreed that “it may be beneficial to Crystallex’s collection strategy for Mr. Fung and Mr. Oppenheimer to be able to travel to Venezuela at some point in the future to negotiate a settlement or continued payment under existing settlements in person”.⁷²

53. Notably, the Ad Hoc Committee *acknowledges* that “protecting Messrs. Fung’s and Oppenheimer’s safety is a serious matter”, and that “Venezuela is a dangerous country for **any** foreign national to visit (the U.S. Department of State flatly recommends that no one should travel to Venezuela)”.⁷³ Apparently the best response it can muster is that Mr. Fung is already exposed to grave physical harm in light of his position with Crystallex, and that this Court should find that the disclosure of the CVR Amounts would not **increase** that tremendous risk to Mr. Fung’s safety.⁷⁴ These circumstances put disclosure of the CVR Amounts in a different category than the information at issue in *Sherman Estate*; here, the requested disclosure clearly engages the “important public interest” of “a risk to physical safety” recognized by the Supreme Court of Canada in that case.⁷⁵

F. Public Disclosure of the Engagement Letters is Unwarranted and Inappropriate

54. Finally, with respect to Moelis and Pirinate, the Company is disclosing the engagement letters themselves, on the condition that their financial terms are maintained

⁷¹ July Fung Affidavit at para. 16(b), July CMR, Tab 1, pp. 8-9.

⁷² 37th Report of the Monitor dated September 3, 2021 at para. 79.

⁷³ Ad Hoc Committee’s Factum at para. 39.

⁷⁴ Ad Hoc Committee’s Factum at para. 39.

⁷⁵ *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 86, CBOA, Tab 21.

in confidence.

55. Unlike the CVR Amounts, up until now, these engagement letters have never been publicly filed by Crystallex or the Monitor. They were not (nor are they required to be) subject to Court approval nor any request for sealing, and they do not engage the open court principle that was at issue in *Sierra Club* or *Sherman Estate*. The Ad Hoc Committee has proffered no legal basis on which Crystallex is said to be obligated to make them public; rather, its best and only argument appears to be that it views the terms of those engagements as important and wish to see them. The Company is aware of no law that requires the public disclosure of any or all of its agreements, without regard to their materiality, at the whim of the Ad Hoc Committee.

56. The demand for public disclosure appears to be premised not on any legal principle or prior order of this Court, but rather on the desire of the Ad Hoc Committee members to ensure that they receive no material non-public information that might impede their ability to protect their private pecuniary interests by trading in the Notes. However, the personal financial circumstances of the members of the Ad Hoc Committee are not Crystallex's concern. In circumstances where the Ad Hoc Committee is represented by sophisticated commercial counsel, it is unclear why it cannot obtain from Goodmans any necessary assurances that the financial terms in the engagement letters of Moelis and Pirinate do not constitute material non-public information.

PART V - CONCLUSION

57. For all of the foregoing reasons, Crystallex respectfully submits that the Cross-Motion should be dismissed with costs.

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



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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *9354-9186 Québec Inc. v. Callidus Capital Corp.*, [2020 SCC 10](#)
2. *Canadian Broadcasting Corp. v. Manitoba*, [2021 SCC 33](#)
3. *Re Canwest Global Communications Corp.*, [2009 CarswellOnt 6184](#) (Ont. S.C.)
4. *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, [2019 ONCA 354](#), leave to appeal refused, [2019 CarswellOnt 18743](#) (S.C.C.)
5. *Re Danier Leather Inc.*, [2016 ONSC 1044](#)
6. *Garland v. Consumers' Gas Co.*, [2004 SCC 25](#)
7. *Hoque v. Montreal Trust Co. of Canada*, [1997 NSCA 153](#), leave to appeal refused, 1998 CarswellNS 653 (S.C.C.)
8. *L.M.P. v. L.S.*, [2011 SCC 64](#)
9. *Re Lydian International Limited*, [2020 ONSC 3850](#)
10. *Re Nortel Networks*, [\[2009\] O.J. No. 3169](#)
11. *Ontario Securities Commission v. Bridging Finance*, [2021 ONSC 4347](#)
12. *R. v. Litchfield*, [1993 CarswellAlta 160](#) (S.C.C.)
13. *R v. Morin*, [1997 CarswellOnt 400](#) (Ont. C.A.)
14. *Sherman Estate v. Donovan*, [2021 SCC 25](#)
15. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#)
16. *Tan-Jen Ltd. v. Di Pede*, [2017 ONSC 6800](#)
17. *Toronto (City) v. C.U.P.E., Local 79*, [2003 SCC 63](#)
18. *Toronto-Dominion Bank v. Hockey Academy Inc.*, [2016 ONSC 4898](#)
19. *Urbancorp Cumberland 1 GP Inc. (Re)*, [2020 ONSC 7920](#)
20. *W.A.C. v. C.A.F.*, [2021 ONSC 5140](#)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies’ Creditors Arrangement Act, R.S.C., 1985, c. C-36

Publication Ban

s. 10(3) 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.

APPENDIX “1”

December 1, 2018

CONFIDENTIAL

Crystallex International Corporation
8 King Street East Suite 1201
Toronto, ON M5C 1B5, Canada

Attention: Mr. Robert Fung

Dear Mr. Fung:

This agreement confirms that, as of December 1, 2018, Crystallex International Corporation (the “Company”) has engaged Moelis & Company LLC (“Moelis”) to act as the Company’s financial advisor in connection with the Company’s efforts to execute upon Petróleos de Venezuela, S.A.’s (“PDVSA”) shares in PDV Holding, Inc. (“PDVH”) to satisfy its Judgment against the Bolivarian Republic of Venezuela (“Venezuela”), in relation to its award obtained on April 4, 2016 from an arbitral tribunal established under the auspices of the International Centre for Settlement of Investment Disputes (*ICSID Case No. ARB(AF)/11/2*).

1. As part of our engagement, Moelis will provide financial advisory services, including the following as appropriate and requested (collectively, the “Services”):
 - (a) assist the Company in reviewing potential alternatives for resolving or otherwise pursuing its Judgment against Venezuela;
 - (b) conduct customary financial analysis of PDVH and its subsidiaries;
 - (c) conduct financial analysis in relation to the Company’s Judgment, including scenario analysis and sensitivity analysis of various potential outcomes;
 - (d) represent the Company as financial advisor in preliminary discussions with relevant parties;
 - (e) at your request, meet with your Board of Directors to discuss matters relating to this engagement; and
 - (f) provide such other financial advisory and investment banking services in connection with this engagement as Moelis and the Company may mutually agree.

Please note that Moelis does not provide legal, tax, accounting or actuarial advice.

2. (a) As compensation for our Services hereunder, the Company agrees to pay Moelis the following nonrefundable cash fees:

Monthly Fee

- (i) During the term of this agreement, a fee of [REDACTED] per month (the “Monthly Fee”), payable at the beginning of this agreement and on each monthly anniversary thereafter.

The Company will pay the first Monthly Fee immediately upon the execution of this agreement. Moelis shall earn and be paid the Monthly Fee every month during the term of this agreement.

The total amount payable under this agreement will be no less than [REDACTED] total irrespective of the duration of its term.

(b) The Company will reimburse Moelis for all of its reasonable and documented expenses as they are incurred in entering into and performing Services pursuant to this agreement. Notwithstanding the foregoing, the Company will not be obligated to reimburse Moelis for amounts under this paragraph that exceed [REDACTED] in the aggregate without the prior consent of the Company (such consent not to be unreasonably withheld). Moelis requires the Company's approval prior to engaging any outside legal counsel in connection with this engagement, which approval request will include the identity of proposed counsel, proposed scope of services and a budget of anticipated legal costs. This paragraph will not apply to *Annex A*.

(c) The Company's obligation to pay any fees or expenses set forth herein is not subject to any reduction by way of setoff, recoupment or counterclaim. All fees, expenses and any other amounts payable hereunder are payable in U.S. dollars, free and clear of any withholding taxes or deductions, to the bank account set forth on *Schedule 1*. The Company will pay such additional amounts to Moelis in U.S. dollars to such bank account as may be necessary so that the net amount received by Moelis in respect of each payment by the Company of any fee, expense or other amount payable hereunder, after deduction or withholding for or on account of any present or future tax, levy, assessment or other governmental charge (including, without limitation, value added tax, goods and services tax or harmonized sales tax) imposed on, or as a result of, such payment by Canada or any political subdivision or taxing authority thereof or any other jurisdiction from which such payment or reimbursement may be made, will not be less than the amount provided herein to be paid or reimbursed by the Company.

3. The Company will furnish Moelis with all information concerning the Company and, to the extent available to the Company, PDVH, CITGO Holding, or their subsidiaries, as Moelis reasonably deems appropriate (collectively, the "Information") to execute this engagement and will provide Moelis with access to the Company's officers, directors, employees, accountants, counsel and other representatives of the Company and, as practicable, those of PDVH. To the best of the Company's knowledge, the Information will be true and correct in all material respects and will not contain any material misstatement of fact or omit to state any material fact necessary to make the statements contained therein not misleading. The Company will advise Moelis promptly of any material event or change in the business, affairs, condition (financial or otherwise) or prospects of the Company or, to the Company's knowledge, PDVH that occurs during the term of this agreement. In performing our Services hereunder, Moelis will be entitled to use and rely upon the Information as well as publicly available information without independent verification. Moelis is not required to conduct a physical inspection of any of the properties or assets, or to prepare or obtain any independent evaluation or appraisal of any of the assets or liabilities of the Company. Moelis will be entitled to assume that financial forecasts and projections the Company or any Acquirer makes available to Moelis have been reasonably prepared on bases reflecting the best currently available estimates and judgments of the management of the Company or such Acquirer, as the case may be, as to the matters covered thereby.

Moelis will not disclose to any third party nonpublic Information concerning the Company parties provided to Moelis in connection with this agreement as long as it remains nonpublic, except as otherwise required by subpoena or court order and for private disclosure to our financial regulatory authorities. This paragraph shall terminate two years following the date of this agreement (provided, however, to the extent any agreement between the Company and the Bolivarian Republic of Venezuela requires any information to be kept confidential for a period longer than two years or for an undefined period of time, the Company will inform Moelis of such confidentiality period or in the case of an undefined period of

time the subsequent termination of such period, and Moelis agrees to keep any such information confidential for the applicable confidentiality period).

4. The Company will not disclose, summarize or refer to any of Moelis' advice or the terms of this agreement publicly or to any third party without the prior written consent of Moelis. Moelis hereby provides such consent to disclose the terms of this agreement to the Monitor and its counsel and on a professional eyes only basis to those professionals that are subject to a confidentiality agreement with the Company. In the event disclosure is required by subpoena or court order, the Company will provide Moelis with reasonable advance notice and permit Moelis to comment on the form and content of the disclosure. Moelis may, at our option and expense after the end of this engagement, disclose publicly Moelis' role in connection with the Services hereunder for marketing purposes, including, without limitation, on Moelis' website, stating that Moelis has acted as financial advisor to the Company in connection with its claim against Venezuela.

5. Moelis is an independent contractor with the contractual obligations described herein owing solely to the Company. The parties agree that Moelis is not acting as an agent or fiduciary of the Company or any other party, and the Company agrees to not make any claims against Moelis based on an agency or fiduciary relationship. The Company and Moelis agree to the indemnity and other provisions set forth in *Annex A*. Other than the Indemnified Persons, there are no third party beneficiaries of this agreement.

6. Either the Company or Moelis may terminate this agreement upon written notice thereof to the other party. In the event of any termination, (i) Moelis will continue to be entitled to the fees and expenses that became payable hereunder prior to termination or expiration and (ii) *Annex A*, the last paragraph of Section 2(a) and Sections 3 through 8 shall remain in full force and effect after the completion, termination or expiration of this agreement.

7. Moelis is an independent investment bank which is engaged in a range of investment banking activities. Certain affiliates of Moelis are engaged in asset management and other activities for their own account and otherwise. Moelis and its affiliates may have interests that differ from the interests of the Company. Moelis and its affiliates have no duty to disclose to any party, or use for the benefit of any party, any information acquired in the course of providing services to any other party, engaging in any transaction or carrying on any other businesses. Moelis' employees, officers, partners and affiliates may at any time own the Company's securities or those of any other entity involved in any transaction contemplated by this agreement. Moelis recognizes its obligations under applicable securities laws in connection with the purchase and sale of such securities.

Moelis is required to obtain, verify, and record information that identifies each party with whom it does business in a manner that satisfies the requirements of and in accordance with the USA Patriot Act. Upon request, each of the parties hereto will provide Moelis with information necessary to verify such party's identity for purposes of the USA Patriot Act.

8. This agreement and any disputes or claims that may arise out of this agreement shall be governed by and construed in accordance with the internal laws of the State of New York, and this agreement embodies the entire agreement and supersedes any prior written or oral agreement relating to the subject matter hereof, and may only be amended or waived in writing signed by both the Company and Moelis. If any part of this agreement is judicially determined to be unenforceable, it shall be interpreted to the fullest extent enforceable so as to give the closest meaning to its intent, and the remainder of this agreement shall remain in full force and effect. Any proceeding arising out of this

agreement shall be heard exclusively in a New York state or federal court sitting in the city and county of New York, to whose jurisdiction and forum Moelis and the Company irrevocably submit. The Company also irrevocably consents to the service of process in any such proceeding by mail to the Company's address set forth above. This agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same agreement. This agreement shall be binding upon the Company and Moelis and its and our respective successors and permitted assigns. MOELIS AND THE COMPANY (ON ITS OWN BEHALF AND, TO THE EXTENT PERMITTED BY APPLICABLE LAW, ON BEHALF OF ITS CREDITORS AND SECURITY HOLDERS) WAIVE ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY PROCEEDING ARISING OUT OF THIS AGREEMENT.

(Signature page follows)

MOELIS & COMPANY

Moelis is delighted to accept this engagement and looks forward to working with the Company. Please sign and return the enclosed duplicate of this agreement. The individuals signing this agreement each represent that he or she is authorized to execute and deliver it on behalf of the entity whose name appears above his or her signature.

Very truly yours,

MOELIS & COMPANY LLC

By: 
Name: MICHAEL DITERNA
Title: Managing Director

Agreed to as of the date first written above:

CRYSTALLEX INTERNATIONAL CORPORATION

By: 
Name: Robert A. Fung
Title: Chairman & CEO

ANNEX A

In the event that Moelis or its affiliates or any of Moelis' or Moelis' affiliates' respective current or former directors, officers, partners, managers, members, agents, representatives or employees (including any person controlling Moelis or any of its affiliates) (collectively, the "Indemnified Persons") becomes involved in any capacity in any actual or threatened action, claim, suit, investigation or proceeding (an "Action") arising out of, related to or in connection with this agreement or any matter referred to herein (including, without limitation, related matters prior to the date of this agreement), the Company will reimburse such Indemnified Person for the reasonable out-of-pocket costs and expenses (including reasonable and documented counsel fees) of investigating, preparing for and responding to such Action or enforcing this agreement, as they are incurred. The Company will also indemnify and hold harmless any Indemnified Person from and against, and the Company each agrees that no Indemnified Person shall have any liability to the Company or its affiliates, or their respective owners, directors, officers, employees, security holders or creditors for, any losses, claims, damages, expenses or liabilities (collectively, "Losses") (A)(i) related to the Company's actions or omissions (or the actions or omissions of the Company's officers, directors, employees and agents other than Moelis) in connection with the agreement or the matters referred to herein, or (ii) related to or arising out of oral or written statements or omissions made or information provided by the Company or its agents in connection with the agreement or the matters referred to herein (including, without limitation, the Information Memo and any other information provided by or on behalf of the Company to any purchaser or seller of a security in any transaction contemplated by the agreement), or (B) otherwise arising out of, related to or in connection with this agreement or Moelis' performance hereunder or any other services or advice the Company requests any Indemnified Person to provide (in each case, including prior to the date of this agreement), except that this clause (B) shall not apply to Losses to the extent such Losses are finally judicially determined to have resulted primarily from willful misconduct, bad faith or gross negligence of such Indemnified Person.

If such indemnification or limitation on liability for any reason is not available or is insufficient to hold an Indemnified Person harmless, the Company agrees to contribute to the Losses in such proportion as is appropriate to reflect the relative benefits received (or anticipated to be received) by the Company, on the one hand, and by Moelis, on the other hand, with respect to this agreement or, if such allocation is judicially determined to be unavailable, in such proportion as is appropriate to reflect the relative benefits and relative fault of the Company, on the one hand, and of Moelis, on the other hand, and any other equitable considerations; *provided, however*, that, to the extent permitted by applicable law, in no event shall the Indemnified Persons be responsible for amounts that exceed the fees actually received by Moelis from the Company in connection with this agreement. Relative benefits to the Company, on the one hand, and Moelis, on the other hand, with respect to this agreement shall be deemed to be in the same proportion as (i) the total value paid or proposed to be paid or received or proposed to be received by the Company or its security holders, as the case may be, pursuant to the transaction(s), whether or not consummated, contemplated by this agreement bears to (ii) the fees actually received by Moelis in connection with this agreement.

The Company will not without the prior written consent of Moelis (not to be unreasonably withheld), settle, compromise, consent to the entry of any judgment in or otherwise seek to terminate (a "Settlement") any Action or participate in or facilitate a Settlement of any Action in respect of which indemnification is or may be sought hereunder (whether or not an Indemnified Person is a party thereto) unless such Settlement includes a release of each Indemnified Person from any Losses arising out of such Action. The Company will not permit any such Settlement to include a statement as to, or an admission of, fault or culpability by or on behalf of an Indemnified Person without such Indemnified Person's prior

written consent. No Indemnified Person seeking indemnification, reimbursement or contribution under this agreement will, without the Company's prior written consent (not to be unreasonably withheld), agree to the Settlement of any Action. The Company's obligations set forth herein shall be in addition to any rights that any Indemnified Person may have at law or otherwise.

Prior to effecting any proposed sale, exchange, dividend or other distribution or liquidation of all or substantially all of its assets or any significant recapitalization or reclassification of its outstanding securities that does not explicitly or by operation of law provide for the assumption of the obligations of the Company set forth herein, the Company will notify Moelis in writing of its arrangements for the Company's obligations set forth herein to be assumed by another creditworthy party (for example through insurance, surety bonds or the creation of an escrow) upon terms and conditions reasonably satisfactory to the Company and Moelis.

SCHEDULE 1

[REDACTED]

[REDACTED]

PIRINATE Consulting Group, LLC

As of July 6, 2020

Mr. Harry Near
Independent Director, Crystallex International Corporation
36 Noel St
Ottawa, ON
K1M2A5

Crystallex International Corporation
8 King Street East, Suite 1410
Toronto, Ontario M5C 1B5

Dear Sirs:

This letter agreement (the “**Agreement**”), entered into as of July 6, 2020 (the “**Effective Date**”), confirms the terms of the agreement among PIRINATE Consulting Group, LLC (“**Pirinate**”) and Mr. Harry Near solely in his capacity as the “New Independent Director” and “Special Managing Director” (as those terms are defined in the DIP Credit Agreement) of the Board of Crystallex International Corporation (including any successor director, the “**Independent Director**”), accepted and agreed to by Crystallex International Corporation (“**Crystallex**”) pursuant to which the Independent Director has engaged Pirinate to provide professional advisory services to the Independent Director.

1. Scope of Engagement: On the terms and subject to the conditions of this Agreement, Pirinate will provide to the Independent Director professional advisory services through its founder and Chairman, Eugene Davis, as requested by the Independent Director and agreed to by Pirinate, in order to assist the Independent Director in carrying out its duties and responsibilities as a Director of Crystallex, the applicable duties and responsibilities of the Independent Director as set forth in section 6.15(a) of the Senior Secured Credit Agreement dated as of April 23, 2012 between Crystallex International Corporation and Luxembourg Investment Company 31 S.a.r.l. (as amended from time to time, the “**DIP Credit Agreement**”), and such other tasks as may be agreed between the Independent Director and Pirinate (the “**Services**”)

As part of the Services, Pirinate may be requested to assist the Independent Director in discussing issues with the CCAA Court-appointed Monitor, Ernst and Young Inc. or its counsel, and in negotiating with Crystallex’s DIP Lender, unsecured creditors and equity holders and with other interested parties. In the event that Pirinate or any of its principals, founders, partners, employees or representatives, including Eugene Davis (each, a “**Representative**”) participate in such discussions or negotiations, the representations made and the positions advanced will be those of the Independent Director, not Pirinate or any of its Representatives.

It is our intention to work closely with the Independent Director throughout the course of our engagement. Regular discussions with the Independent Director regarding our progress should provide the Independent Director with an opportunity to confirm or request that Pirinate modify the scope of engagement to best serve the Independent Director’s needs. The Services and compensation arrangements set forth herein do not encompass other financial advisory services not set forth in this Section 1. If the Independent Director and Pirinate later determine to expand the scope of Services to include other services not otherwise set forth herein, such future agreement will be the subject of a further and separate written agreement of the parties.

None of Pirinate or any Representative shall be an employee, officer or director of Crystallex pursuant to this Agreement.

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2. Crystallex's Information:

In order to fulfill the Services under this Agreement, it will be necessary for Pirinate and its Representatives to have access to Crystallex's facilities and certain books, records and reports of Crystallex. In addition, Pirinate will need to have discussions with Crystallex's management, other directors, certain other personnel and professional advisors to Crystallex, and stakeholders of Crystallex. We understand that, pursuant to the confidentiality and common interest terms of this Agreement, Crystallex has agreed it will furnish Pirinate with such information as Pirinate believes reasonably appropriate to its assignment (all such information so furnished being the "**Information**"). Crystallex recognizes and confirms that Pirinate (i) will use and rely on the accuracy and completeness of the Information and on Information available from generally recognized public sources without independently verifying the same, and (ii) does not assume responsibility for the accuracy, completeness or reasonableness of the Information and such other Information. Crystallex shall advise Pirinate promptly upon obtaining any actual knowledge of the occurrence of any event or any other change in fact or circumstance upon which Pirinate formed part or all of its opinions, advice, or conclusions, or which could reasonably be expected to result in some or all of the Information being incorrect, inaccurate, or misleading. To the best of Crystallex's knowledge, the Information to be furnished by or on behalf of Crystallex, when delivered, will be true and correct in all material respects and will not contain any material misstatement of fact or omit to state any material fact necessary to make the statements contained therein not misleading.

3. Fees and Expenses: As consideration for the Services, Pirinate shall be paid a monthly fee of [REDACTED] (the "**Monthly Fee**") for an initial term of no less than twelve (12) months (the "**Initial Term**"), the first Monthly Fee payable upon signing and thereafter payable in advance on the same day of each successive month. Any wire charges and/or currency conversion charges shall be the responsibility of Crystallex. The Monthly Fees for the Initial Term shall be earned in full upon execution of this Agreement and not subject to clawback. Pirinate shall also be entitled to reimbursement of its reasonable expenses incurred in connection with the provision of Services ("**Expenses**"), provided that Pirinate shall obtain the written consent of Crystallex prior to incurring any single Expense above [REDACTED]. Prior to the conclusion of the Initial Term, the Independent Director and Pirinate agree to meet and negotiate in good faith any desired extension of the Initial Term and applicable terms and conditions, having regard to the current requirements and remaining duties of the Independent Director.

4. Payment Obligations, Billing and Independence:

- (a) Payment Obligations: The Monthly Fee and Expenses set forth herein as well as the indemnification, reimbursement and contribution obligations described in Schedule I, shall be obligations of Crystallex and under no circumstances shall the Independent Director have any obligations or liability to make such payments to Pirinate. Crystallex agrees to pay all amounts, whether for Monthly Fees or Expenses or otherwise, to Pirinate by wire transfer of immediately available funds. Crystallex also confirms that the Independent Director's retention of Pirinate, and Crystallex's agreement to pay the Monthly Fees and Expenses will not cause a default under the DIP Credit Agreement.
- (b) Independence: Notwithstanding that Crystallex has agreed to pay the fees and expenses of Pirinate hereunder, Pirinate shall act only as an advisor to the Independent Director and not Crystallex.

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5. Term of Agreement: The Initial Term of Pirinate's engagement shall extend from the Effective Date and shall continue thereafter for twelve (12) months after the Effective Date, provided, however, that Pirinate may terminate this Agreement immediately at any time during the Initial Term if Crystallex fails to perform any of obligations or continuing to perform Services under this Agreement violates law or regulation. Any termination of this Agreement shall not affect any provisions that survive the termination hereof, including, (i) the indemnification, reimbursement, contribution and other obligations set forth in this Agreement, including Schedule I, and (ii) Pirinate's right to receive payment of the Monthly Fees and Expenses incurred by Pirinate through the date of termination, or where termination is caused by Crystallex's failure to pay any Monthly Fees or Expenses, Pirinate's entitlement to Monthly Fees for the full Initial Term, and Crystallex shall promptly pay or cause to be paid all such Monthly Fees and Expenses due and owing. Notwithstanding anything to the contrary herein, in the event that the Independent Director terminates this Agreement after written notice and an opportunity to cure, to the extent curable, for reasons that are determined by a judgment of a court of competent jurisdiction, which judgment is no longer subject to appeal or further review finds Pirinate's actual fraud, willful misconduct, or gross negligence was the result of such termination, Pirinate shall not be entitled to any Monthly Fee hereunder except to the extent determined by a court of competent jurisdiction that Pirinate is entitled to a Monthly Fee because the loss or damages to Crystallex as a result of Pirinate's actual fraud, willful misconduct, or gross negligence was less than the Monthly Fees owed to Pirinate hereunder. The parties agree that Pirinate shall be entitled to reimbursement by Crystallex of its costs of collection (including its costs of counsel) in the event of any breach by Crystallex of its obligations hereunder.
6. Nature of Services; Use of Advice:
 - (a) Pirinate shall act as an independent contractor under this Agreement, and not in any other capacity (for certainty, no Representative of Pirinate shall be considered a director or employee of Crystallex), and any obligations arising out of its engagement shall be owed solely to the Independent Director. Any advice rendered pursuant to this Agreement is intended solely for the use of the Independent Director in considering the matters to which this Agreement relates, and such advice may not be relied upon by any other person or used for any other purpose. Nothing in this Agreement, expressed or implied, is intended to confer or does confer on any person or entity, other than the parties hereto, the Indemnified Persons (as such term is defined in Schedule I) and each of their respective successors, heirs and assigns, any rights or remedies under or by reason of this Agreement or as a result of the services to be rendered by Pirinate hereunder.
 - (b) Any advice rendered by or other materials prepared by, or any communication from, Pirinate (in each case, the "*Pirinate Advice*") may not be disclosed, or used, in whole or in part, to or by, any third party, or summarized, quoted from, or otherwise referred to in any manner, without the prior written consent of Pirinate, such consent not to be unreasonably withheld, conditioned or delayed. Pirinate Advice may only be used by the Independent Director for the purposes set forth in this Agreement. The terms of this Agreement shall not be referred to without Pirinate's prior written consent, such consent not to be unreasonably withheld, conditioned or delayed.
7. Confidentiality and Internal Use: In connection with this engagement, Pirinate may come into the possession, whether orally or in writing, of Confidential Information of Crystallex. Pirinate hereby agrees that it will not disclose, publish or distribute such Confidential Information to any third party without Crystallex's express written consent. For purposes of this Agreement,

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“Confidential Information” means any and all nonpublic, confidential or proprietary knowledge, data, or information of or concerning Crystallex. For the avoidance of doubt, Confidential Information includes without limitation, research, analyses, names, financial information, accounting information, litigation plans, agreements, valuations, opinions, databases and management systems. Confidential Information shall not include information that: (i) was publicly known and made generally available in the public domain prior to the time of disclosure; (ii) is already in the lawful possession of Pirintae at the time of disclosure; (iii) is lawfully obtained from a third party lawfully in possession of such information and without a breach of such third party’s obligations of confidentiality; (iv) is independently developed without use of or reference to any Confidential Information; (v) is required to be disclosed or is requested by governmental agencies having regulatory authority or other authority over Pirinate or (vi) is required by a court order or legal process to be disclosed, provided that Pirinate shall use its best efforts, to the extent permitted by law to do so, to promptly give Crystallex prior written notice to any disclosure under this clause (vi) or (v) so that Crystallex can seek a protective order at Crystallex’s expense. Nothing in this Section 7 or this Agreement shall prohibit Pirinate from using Crystallex’s name and logo as part of a general client listing.

8. Common Interest Privilege: Commencing on the Effective Date, Crystallex, the Independent Director and Pirinate have a common, joint and mutual interest in the subject matter of the Agreement and the Services to be provided thereunder. Crystallex and the Independent Director may disclose to Pirinate information and communications which are or would be privileged and protected from disclosure or productions to third parties on the basis of lawyer-client (attorney-client) privilege, litigation privilege, work product privilege, without prejudice privilege, settlement privilege or any other applicable rule of privilege (“*Privileged Information*”). The disclosure of any Privileged Information by either Crystallex or the Independent Director to Pirinate is not intended to, and will not, constitute a waiver in whole or in part of any applicable privilege or other rule of protection from disclosure, and will not be asserted by any party to be a waiver of such privilege or rule of protection. Pirinate will not further disclose Privileged Information to any third party without the prior written consent of Crystallex and the Independent Director. If a court or other authority of competent jurisdiction orders the disclosure of Privilege Information by Pirinate, it shall take all steps to preserve all privileges and protections against disclosure, shall provide immediate written notice to Crystallex and the Independent Director, and shall not disclose Privilege Information in compliance with any order without providing Crystallex and the Independent Director a reasonable opportunity to protect the Privileged Information before the court or other authority; provided, however, that Crystallex agrees to advance up front and pay to Pirinate the costs (including costs of counsel) of Pirinate’s compliance with any such order or direction, if such compliance is required. The termination of the Agreement shall not affect the status of the Privileged Information, and its protection by this Agreement and this clause shall survive any termination.
9. Indemnification: Crystallex shall provide indemnification, contribution and reimbursement as set forth in Schedule I hereto. The terms and provisions of Schedule I are an integral part hereof, are hereby incorporated by reference, are subject in all respects to the provisions hereof and shall survive any termination or expiration of this Agreement. Further, if an Indemnified Person (as defined in Schedule I) is requested or required to appear as a witness in any Action (as defined in Schedule I) that is brought by or on behalf of or against the Independent Director or Crystallex or that otherwise relates to this Agreement or the Services rendered by Pirinate hereunder, Crystallex shall advance up front and pay to Pirinate and the Indemnified Person the costs for all documented, actual out of pocket expenses to be incurred by them in connection with such

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Indemnified Person appearing or preparing to appear as such a witness, including without limitation, the fees and disbursements of legal counsel selected by Pirinate.

10. Entire Agreement; Amendments: This Agreement (including Schedule I) represents the entire agreement between the parties, supersedes all previous agreements relating to the subject matter hereof (should they exist) and may not be modified or amended except in writing signed by all of the parties hereto.
11. Counterparts: This Agreement may be executed in counterparts (and by facsimile or other electronic means), each of which shall constitute an original and all of which together will be deemed to be one and the same document.
12. Severability: The invalidity or unenforceability of any provision of this Agreement (including Schedule I) shall not affect the validity or enforceability of any other provision.
13. Announcements: Pirinate shall be entitled to identify Crystallex and use Crystallex's name and logo in connection with marketing and pitch materials upon conclusion of the Services.
14. This Agreement shall be governed by and interpreted in accordance with the laws of Canada and the Province of Ontario, without giving effect to the choice of law provisions thereof. The Courts of Ontario sitting in Toronto shall have exclusive jurisdiction in relation to any claim, dispute or difference concerning the Agreement and any matter arising from it. The parties submit to the jurisdiction of such Courts and irrevocably waive any right they may have to object to any action being brought in these Courts, to claim that the action has been brought in an inconvenient forum or to claim that those Courts do not have jurisdiction.
15. Notices: Notice given pursuant to any of the provisions of this Agreement shall be in writing and shall be mailed or delivered (including via email so long as the recipient acknowledges receipt) at the address set forth in the signature blocks of each such person below.
16. Miscellaneous:
 - (a) Conflicts:
 - (i) Pirinate is involved in a wide range of other activities from which conflicting interests, or duties, may arise. We have undertaken an inquiry of our records in accordance with our standard business practices based on the parties identified to us and have determined that we may proceed. We confirm that we do not act for or represent the interests of The Bolivarian Republic of Venezuela ("*Venezuela*"), Petroleos de Venezuela, S.A. or its affiliates ("*PDVSA*"), or other entities who may have a competing claim against Venezuela. Should an actual conflict come to the attention of Pirinate during the course of this engagement, we will notify you immediately and take appropriate actions, as necessary. The Independent Director and Crystallex represent and warrant that they have informed Pirinate of the parties-in-interest to this matter and agree that they will inform Pirinate of additions to, or name changes for, those parties-in-interest. Pirinate is not restricted from working on other engagements unrelated to Crystallex involving the parties in this matter.

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- (ii) Crystallex acknowledges that Pirinate and its Representatives may have provided professional services to, may currently provide professional services to, or may in the future provide such services to other parties-in-interest on other engagements unrelated to Crystallex involving the parties in this matter. Crystallex agrees that Pirinate, its Representatives, affiliates, subsidiaries, subcontractors and their respective personnel will have no responsibility to Crystallex in relation to such professional services, nor any responsibility to use or disclose information Pirinate possesses by reason of such services.
- (b) Authority; Due Authorization; Enforceability: Each party hereto represents and warrants that it has all requisite power and authority to enter into this Agreement and to perform its obligations hereunder. Each party hereto further represents and warrants that this Agreement has been duly and validly authorized by all necessary corporate action and has been duly executed and delivered by each such party and constitutes the legal, valid and binding agreement of each such party, enforceable in accordance with its terms.
- (c) Independent Contractors: In connection with the Services, Pirinate may utilize agents or independent contractors or its own affiliates or its own agents or independent contractors provided that they are bound by the same confidentiality and conflict of interest terms as contained herein. References in this Agreement to Pirinate personnel shall apply equally to employees, agents or independent contractors of Pirinate and its affiliates. The parties intend that an independent contractor relationship will be created by this Agreement. As an independent contractor, Pirinate will have complete and exclusive charge of the management and operations of its business, including hiring and paying the wages and other compensation of all its employees and agents, and paying all bills, expenses and other charges incurred or payable with respect to the operations of its business. Nothing in this Agreement is intended to create, nor shall be deemed or construed to create a fiduciary or agency relationship between Pirinate and the Independent Director or Crystallex.
- (d) Limitations of Engagement: Pirinate is being retained solely to assist the Independent Director as described in this Agreement. This engagement shall not constitute an audit or review, or any other type of financial statement reporting engagement. Our engagement is to represent and advise the Independent Director and not any other directors, officers, employees, creditors or shareholders of Crystallex.
- (e) Counsel Representation: The terms of this Agreement have been negotiated by the parties hereto, who have each been represented by counsel, there shall be no presumption that any of the provisions of this Agreement shall be construed adverse to any party as “drafter” in the event of a contention of ambiguity in this Agreement, and the parties waive any statute or rule of law to such effect.
- (f) Assignment: This Agreement may not be assigned by any party hereto without the prior written consent of the other parties. Any attempted assignment of this Agreement made without such consent shall be void and of no effect, at the option of the non-assigning parties. This Agreement shall be binding on the parties hereto and their successors and permitted assigns.
- (g) Headings: Headings used herein are for convenience of reference only and shall not affect the interpretation or construction of this Agreement.

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- (h) Survival: Upon any termination of this Agreement, the sections intended to survive such termination shall survive and remain in effect.
- (i) Force Majeure: Neither party shall be liable for any delays or nonperformance directly or indirectly resulting from circumstances or causes beyond its reasonable control, including but not limited to, fire, epidemic, pandemic or other casualty, act of God, strike or labor dispute, war or other violence, or any law, order or requirement of any governmental agency or authority.

[Signature pages follow.]

If the foregoing correctly sets forth our understanding, please indicate your acceptance thereof in the space provided below, whereupon this Agreement and your acceptance shall constitute a binding agreement between us.

PIRINATE Consulting Group, LLC

By:



Name: Eugene Davis

Title: Chairman & CEO

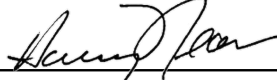
Address: 5 Canoe Brook Drive
Livingston, New Jersey 07039

[Additional signature pages follow.]

PIRINATE Consulting Group, LLC

Accepted and agreed to as of the Effective Date:

Harry Near,
solely in his capacity as the Independent Director
of Crystallex International Corporation

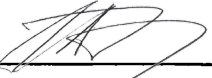
By: _____

Name: Harry Near

Title: Independent Director

Address:

Crystallex International Corporation

By: _____

Name: Robert A. Fung

Title: Chairman & CEO

[Signature page to Engagement Agreement]

PIRINATE Consulting Group, LLC

Schedule I

This Schedule I is a part of and incorporated into the letter agreement (the “*Agreement*”), between Pirinate and the Independent Director, pursuant to which Pirinate has been engaged to act as the professional advisor to the Independent Director to provide advisory services as set forth in the Agreement. Capitalized terms not defined herein shall have the same meaning assigned in the Agreement.

As a material part of the consideration for the agreement of Pirinate to furnish its Services under the Agreement, Crystallex agrees that it shall defend, indemnify and hold harmless Pirinate and its affiliates and their respective partners, members, directors, officers, employees, attorneys and other agents appointed by any of the foregoing and each other person, if any, controlling Pirinate or any of its affiliates (Pirinate and each such person and entity being referred to as an “*Indemnified Person*”), from and against any losses, claims, damages, judgments, assessments, costs and other liabilities (collectively, “*Liabilities*”), and will advance up front and pay each Indemnified Person for all documented fees and expenses (including the fees and expenses of counsel as outlined in the Agreement) (collectively, “*Expenses*”) as and when they are incurred in investigating, preparing, pursuing or defending any claim, action, proceeding or investigation, whether or not in connection with pending or threatened litigation and whether or not any Indemnified Person is a party (collectively, “*Actions*”), in each case, in any way related to or arising out of or in connection with the Services rendered or to be rendered by an Indemnified Person pursuant to the Agreement or any Indemnified Persons’ actions or inactions in connection with any such Services; provided that Crystallex will not be responsible for any Liabilities or Expenses of any Indemnified Person that are determined by a judgment of a court of competent jurisdiction, which judgment is no longer subject to appeal, to have resulted directly as a result of such Indemnified Person’s (x) actual fraud, gross negligence or willful misconduct in connection with any of the Services, or (y) Liabilities directly resulting from a material breach of Pirinate’s obligations under this Agreement. Crystallex shall also reimburse such Indemnified Person for all Expenses as they are incurred in connection with enforcing such Indemnified Persons’ rights under the Agreement (including its rights under this Schedule I). Such Indemnified Person shall reasonably cooperate with the defense of any Actions.

Crystallex shall have the right to assume the defense of any such Action including the employment of counsel reasonably satisfactory to Crystallex. Crystallex will not, without prior written consent of Pirinate, settle, compromise or consent to the entry of any judgment in or otherwise seek to terminate any pending or threatened Action in respect of which indemnification or contribution may be sought hereunder (whether or not any Indemnified Person is a party thereto) unless such settlement, compromise, consent or termination (i) includes an unconditional release of such Indemnified Person from all Liabilities arising out of such Action and (ii) does not include any admission or assumption of fault or culpability on the part of any Indemnified Person.

No Indemnified Person shall have any liability (whether direct or indirect, in contract or tort or otherwise) to Crystallex or its respective owners, parents, affiliates, security holders, creditors or equity holders for, or in connection with advice or Services rendered or to be rendered by any Indemnified Person pursuant to the Agreement, the transactions contemplated thereby or any Indemnified Person’s actions or inactions in connection with the Services except for Liabilities (and related Expenses) of Crystallex that are determined by a judgment of a court of competent jurisdiction, which judgment is no longer subject to appeal, to have directly resulted from such Indemnified Person’s actual fraud, gross negligence or willful misconduct in connection with any such Services. In no event shall Pirinate be liable to Crystallex for any loss of use, data, goodwill, revenues or profits (whether or not deemed to constitute a direct claim), or any consequential, special, indirect, direct, incidental, punitive or exemplary loss, damage or expense relating to this engagement, the Services or this Agreement.

PIRINATE Consulting Group, LLC

These indemnification, contribution and other provisions of this Schedule I shall (i) remain operative and in full force and effect regardless of any termination of the Agreement or completion of the engagement by Pirinate; (ii) inure to the benefit of any successors, assigns, heirs or personal representative of any Indemnified Person; (iii) be in addition to any other rights that any Indemnified Person may have.

The claims of Pirinate, including without limitation under Schedule I hereto, are not claims which may be compromised within or otherwise effected by the current CCAA proceeding of Crystallex, or under a plan of compromise or arrangement, if any.

CONSULTING AGREEMENT AMENDMENT AND EXTENSION #1

THIS CONSULTING AGREEMENT AMENDMENT AND EXTENSION #1 (this “Amending Agreement”) is dated and effective as of June 30 2021.

WHEREAS PIRINATE Consulting Group, LLC (“Pirinate”), Harry Near (“Near”), solely in his capacity at the time as the “New Independent Director” and Special Managing Director of the Board of Crystallex (including any successor director, the “Independent Director”), entered into the letter agreement dated as of July 6, 2020, accepted and agreed to by Crystallex International Corporation (“Crystallex” and together with Pirinate and Marchi, the “Parties” and each individually a “Party”) pursuant to which the Independent Director engaged Pirinate to provide professional advisory services to the Independent Director (the “Consulting Agreement”);

AND WHEREAS Sergio Marchi (“Marchi”) replaced Harry Near as the Independent Director, and as a result of such replacement, and on consent of the Parties, Marchi assumed Near’s rights and obligations under the Consulting Agreement;

AND WHEREAS the Parties have agreed to extend the Initial Term of the Consulting Agreement and amend certain other terms of the Consulting Agreement in accordance with the terms of this Amending Agreement;

AND WHEREAS capitalized words and terms used and not otherwise defined herein have the meanings ascribed to such words and terms in the Consulting Agreement;

NOW THEREFORE, for good and valuable consideration including without limitation the terms of this Amending Agreement (the receipt and sufficiency of which consideration are hereby acknowledged by each of the Parties), the Parties hereby covenant and agree as follows:

1. The parties hereto represent and warrant and confirm and agree that the above recitals are true and correct and form part of this Amending Agreement.
2. The Initial Term of the Consulting Agreement is and shall be extended for an additional twelve (12) months starting on July 6, 2021 through and including July 6, 2022 (the “Extended Term”) and thereafter shall be extended on a month to month basis commencing on July 7, 2022 unless otherwise agreed to in writing by the parties (the “Renewal Term”). Each 30-day period starting on July 6, 2021 is hereafter referred to as a “Calendar Month”. The Independent Director may only elect to terminate the Consulting Agreement after the Extended Term or at any time during the Renewal Term on three (3) months’ written notice delivered to Pirinate and copied to Crystallex. For certainty, the earliest a termination notice may be delivered to Pirinate is the first day following the Extended Term, with an effective termination of three (3) months from that date.
3. The Monthly Fee to be paid to Pirinate during the Extended Term and Renewal Term is and shall be U.S. [REDACTED] for each Calendar Month, with the first of such Monthly Fee payable on signing of this Amending Agreement and thereafter payable in advance on the same day of each successive Calendar Month. The Monthly Fees payable for the Extended Term shall be earned


in full upon execution of this Amending Agreement and are not subject to clawback. In the event that Eugene Davis of Pirinate ("**Davis**") provides more than twenty (20) hours of Services under the Consulting Agreement in any Calendar Month during the Extended Term or Renewal Term, then in such case and without any other action or agreement required whatsoever, the Monthly Fee to be paid to Pirinate for such Calendar Month shall automatically be increased to U.S. [REDACTED] regardless of the maximum number of hours of Services provided by Davis during the applicable Calendar Month. For certainty and without limitation, (i) in the event that Pirinate is requested to provide services by any of its Representatives beyond Davis, those services are not covered by the Monthly Fee and the parties agree to negotiate in good faith the fees for such services, and (ii) all other terms and conditions regarding the payment of Monthly Fees and Expenses as set forth in the Consulting Agreement shall continue in force and effect.

4. Except as amended by this Amending Agreement, all provisions of the Consulting Agreement are reaffirmed and continue in force and effect.
5. This Amending Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior negotiations (written or oral) relating to the amendments contained herein.
6. This Amending 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.
7. This Amending Agreement may be executed in one or more counterparts and each of such counterparts when taken together shall constitute one and the same agreement. Any executed counterpart of this Amending Agreement may be circulated by any form of direct electronic transmission (including pdf email or "DocuSign") and any such counterpart circulated in such manner shall be deemed to be an original of this Amending Agreement.

[Signature Pages Follow]

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

PIRINATE CONSULTING GROUP, LLC

By: 
Name: _____
Title: EUGENE DAVIS
COO / CEO

SERGIO MARCHI,
Solely in his capacity as the Independent Director of
Crystallex International Corporation

By: _____
Name: _____
Title: _____

CRYSTALLEX INTERNATIONAL CORPORATION

By: 
Name: Robert Fung
Title: Chairman and CEO

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

PIRINATE CONSULTING GROUP, LLC

By: _____

Name:

Title:

SERGIO MARCHI,
Solely in his capacity as the Independent Director of
Crystallex International Corporation

By: _____

Name:

Title:

CRYSTALLEX INTERNATIONAL CORPORATION

By: _____

Name:

Title: Chairman and CEO

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
Applicant

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at [Toronto](#)

RESPONDING FACTUM OF
CRYSTALLEX INTERNATIONAL CORPORATION
(RE: CROSS-MOTION FOR UNSEALING AND
DISCLOSURE – RETURNABLE OCTOBER 14, 2021)

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Lawyers for Crystallex International Corporation