8. International debt markets

Crystallex claims that denying its license request "is likely to have an adverse impact on both the international debt markets and the United States standing in those markets." The U.S. government finds this argument unconvincing and, in fact, has already heard from stakeholders and potential future investors who are interested in participating in rebuilding efforts. In any event, the U.S. foreign policy and national security interests associated with the license denial, without prejudice to the right to refile, outweighs any potential adverse impact to international debt markets.

* * *

Accordingly, your request for a specific license to effect the sale of the PDVH shares is denied at this time. In light of this denial, we are not addressing the other aspects of your request at this time, which OFAC will continue to consider under application number VENEZUELA-EO13850-2020-366869-2.

OFAC emphasizes that this determination is made without prejudice to reconsideration of a specific license request to sell the PDVH shares at a later time if the foreign policy considerations change. Negotiations between the unified democratic opposition led by Interim President Guaidó and the Maduro regime regarding the future of Venezuela are currently ongoing, and the National Assembly's mandate ends in January 2022. The United States will reassess whether the sale of the PDVH shares is consistent with United States foreign policy, as the situation in Venezuela evolves. The United States anticipates doing so during the first half of 2022 as warranted by changed circumstances.

If you have any questions about the sanctions programs administered by OFAC, you may refer to the OFAC website at *www.treasury.gov/ofac* or call our office at (202) 622-2480.

Sincerely,

September 10, 2021

Andrea Gacki — Date
Director
Office of Foreign Assets Control

THIS IS EXHIBIT "N" REFERRED TO IN THE AFFIDAVIT OF ROBERT FUNG, SWORN BEFORE ME THIS 25TH DAY OF OCTOBER, 2021.

A Commissioner for Taking Affidavits
NATALIE RENNER

U.S. DEPARTMENT OF THE TREASURY

FINANCIAL SANCTIONS

- Specially Designated Nationals And Blocked Persons List (SDN)
- SDN List - Data Formats & Data Schemas
- Consolidated List Sanctions
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- Search OFAC's Sanctions List
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Frequently Asked Questions

Search all FAQs

76. Can I appeal a denial of my license application?

A denial by OFAC of a license application constitutes final agency action. The regulations do not provide for a formal process of appeal. However, OFAC will reconsider its determinations for good cause, for example, where the applicant can demonstrate changed circumstances or submit additional relevant information not previously made available to OFAC.

September 10, 2002

THIS IS EXHIBIT "O" REFERRED TO IN THE AFFIDAVIT OF ROBERT FUNG, SWORN BEFORE ME THIS 25TH DAY OF OCTOBER, 2021.

A Commissioner for Taking Affidavits
NATALIE RENNER

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 15
CRYSTALLEX INTERNATIONAL CORP.	:	**Case No. 11-14074 (LSS)**
Debtor in a Foreign Proceeding.	:	

MOTION FOR AN ORDER DIRECTING THE APPOINTMENT OF AN EXAMINER AND INDEPENDENT COUNSEL FOR THE SHAREHOLDERS

Adelso Adrianza ("Movant"), a shareholder of the debtor ("Debtor"), Pro Se and on behalf of similarly situated U.S. shareholders ("Shareholders") moves the Court, pursuant to the provisions of the Bankruptcy Code, supplemented by provisions of the Canadian Companies' Creditors Arrangement Act ("CCAA"), rules of the Ontario Rules of Civil Procedures ("R.C.P."), and the Courts of Justice Act ("CJA"), hereinbelow to enter an order directing the appointing of an examiner ("Examiner") and independent legal counsel to represent the U.S. Shareholders ("Legal Counsel") and states:

JURISDICTION

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated February 29, 2012. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this Court and in this District pursuant to 28 U.S.C. § 1410. The statutory predicates for the relief requested herein are the Bankruptcy Code Sections 105(a), 1104(a), 1104(c), 1129, 1501(a)(4),(a)(5), 1503, 1506, 1507(b), 1522(a) and 1527(1) and Bankruptcy Rule 2007.1, supplemented by CCAA Sections 18(6)(1),(2), 36(1)(1), 42, 44(c)-(e), 50, 52(3) and 61(1)-(2), R.C.P. Rule 10.01, and CJA Section 101.

BACKGROUND

2. A summary of the relevant history of the instant case ("DEBCC") is provided in D.I. 2 and 315, at para. 2-12, and D.I. 134 in the District Court Case (1:17-mc-00151-LPS, "DEDCC").

INTRODUCTION

3. The decision to seek the redress the harm to the Debtor and its estate (the "Estate"), and the reflective and direct injury to the Shareholders was not taken lightly. The attempts to persuade the Debtor, the Monitor and the CCAA Court to investigate and resolve the issues involved have been fruitless. And seeking to redress the harm in the CCAA Court was a financial and logistical impossibility from the outset. This is the case because the restrictions imposed and the cost to overcome these are well beyond the means for individual shareholders like me to afford; specially in a proceeding almost ten years old and still open.

RELIEF REQUESTED

4. By this Motion, the Movant respectfully requests the appointment of the Examiner and Legal Counsel to investigate the Debtor's affairs as they related to the harm to the Debtor, the Estate and the Shareholders by the acts and omissions alleged in the Motion, and to provide adequate legal representation to the Shareholders and a voice to defend their rights and interests in this proceeding, respectively.

BASIS FOR THE RELIEF REQUESTED

5. The present action is the only remaining option to prevent the concretion of the harm to the Debtor, the Estate, and the Shareholders through the execution of the distribution of the Estate's property via the Mechanics of Distribution (MOD) built into the DIP loan Credit Agreement, which is contrary to settled U.S. law. This is because the MOD, as approved by the CCAA Court, fails to meet settled U.S. law, statutory rules and principles and the Model Law

Requirements (see UNCITRAL. Model Law on Cross-Border Insolvency with Guide to Enactment, at para. 69.-70.) that negate the recognition and protections granted under 11 U.S.C. §§ 1517 and 1519; and precludes any further assistance to the foreign representative under 11 U.S.C. §§ 1507.

6. The investigation and the report by the Examiner are a fundamental fact-finding requirement to aid this Court to obtain an independent assessment of the harms against the Estate and the Shareholders to assure that the Debtor's plan of arrangement or liquidation meets the "fair and equitable" requirement of the Bankruptcy Code (the "Code").

7. The appointment of Legal Counsel is necessary to provide adequate representation to an absentee interested party in this proceeding to protect their rights and interests and pursue a fair and equitable outcome for them.

8. The harms against the Estate and the Shareholders represent statutory breaches that left unresolved will result in irreparable harm to both. Namely,

U.S. §	CAN §	Breaches of Law / Unmet Requirements	Hereinbelow See Section
1501(a)(4)	44(d)	Protection and maximization of the Debtor's assets.	[1] A.-E.
1501(a)(5)	44(e)	Facilitation of the rescue of a financially trouble business.	[1] A.-E.
1503	61(2)	International Obligations of the U.S.: U.S. – Canada Tax Treaty.	[1] A.
1506	61(2)	Public Policy Exception.	[1] A., E.
1507(b)(1)	44(c) 18(6)(1)	Just treatment of all holders of claims against or interest in the Debtor's property.	[1] A.-E., [2]
1507(b)(3)	36(1)(1) 18(6)(2)	Preferential or fraudulent disposition of property of the Debtor.	[1] A.-E.
1507(b)(4)	-	Distribution of proceeds of the Debtor's property substantially in accordance with the order described by the statute.	[1] A.-E.
1507(b)(5)	44(e)	The provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.	[1] A.-E.
1522(a)	18(6)(2)	The court may grant relief under section 1519 or 1521 or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.	[1] A.-E., [2]

PRELIMINARY STATEMENT

9. The Debtor's fixed, unsecured, liquidated debts to U.S. creditors exceeds $5,000,000. Under the Code, upon request of an interested party such as the Movant, appointment of examiner is mandatory under 11 U.S.C. § 1104. Furthermore, the preponderance of the evidence warrants appointment of an examiner under §§ 1129, 1501 and 1522, as well as authority and precedent under Canadian law (see para. 14.A. and 60. infra).

10. There is a controlling DIP lender ("DIP Lender") and a self-interested BOD ("BOD"), who have arranged first to control it, and then arranged the approval of the DIP Lender's entitlement to the net proceeds from an arbitration award ("Award") worth approximately $1.6 billion. Other misconduct includes improper transfer of tax benefits from the Estate to the DIP Lender, transfer of valuable mining data for no consideration, improper waiver of the right to receive substantial interest in the hundreds of millions of dollars, an improper agreement with noteholders to pay excessive interest on their claims to waive their right to require the timely filing of a plan of arrangement or liquidation, mismanagement of the Estate's property and improper oversight over its interests.

11. There is a fundamentally flawed premise in the instant case that has been conveniently used to sideline the Shareholders from the outset: they have little, if any, interest in it despite a US$ 3.4 billion arbitration claim and just over US$ 100 million in unsecured debt. And this premise has been purposefully sustained by actions and omissions by the BOD such as the delisting the stock, thereby precluding a market valuation, and raiding the Estate's property and sharing the spoils amongst them.

12. The appointment of the Examiner is warranted to protect the Estate's property, the Shareholders' right to its residual value and the integrity of the insolvency proceedings. There cannot be a "fair and equitable" plan of arrangement or liquidation if the Estate's property is

misappropriated, misused, and mismanaged. To prevent this from happening, the legislature found it necessary to require that fiduciaries with specific roles and responsibilities be entrusted with the protection of the estate's interests and the safeguarding of its assets; and empowered the Bankruptcy Courts and the Justice Department to see to it through the appointment of a DIP, an insolvency Trustee, an examiner, and a Standing U.S. Trustee towards this end. Nonetheless, the checks and balance in the instant case have thus far failed to prevent the harm to the Estate and the Shareholders that the Code was enacted to protect.

13. The appointment Legal Counsel is necessary to protect the interests of over 300 U.S. equity security holders that represent approximately 35% of the outstanding shares. The Debtor, the DIP Lender, and the unsecured creditors have all their fees and costs reimbursed by the Estate, while the Shareholders cannot afford adequate legal representation. This is the case although by law they are the legal residual owners of an Estate with assets worth US$ 1.6 billion ironclad judgement, US$ 100 million of pre-filing debt and a US$ 76 million DIP loan. This, by itself, demonstrates the Shareholders' significant and unwarranted disadvantage because of the lack of adequate representation, given the complexity of the instant case, whose outcome turns on expert knowledge and experience in resolving complicated questions of law and facts.

THE COURT'S AUTHORITY

14. This Court has the authority to appoint the:

A. Examiner under 11 U.S.C. §§ 105(a), 1104(a), 1104(c), 1129, 1501(a)(4), 1505, 1522(c), 1526 and 1527, and Bankruptcy Rule 2007.1; supplemented by CCAA Sections 42, 44(d), 52(1), 52(3)(a) and 61(1)-(2), and CJA Section 101.

B. Legal Counsel under 11 U.S.C. § 105(a), supplemented CCAA § 42 and R.C.P. Rule 10.01.

BACKGROUND

The Parties

15. The Debtor is a Canadian mining company whose sole asset was a Mine Operating Contract ("MOC") entered in 2002 with a Venezuelan Government enterprise, the Corporacion Venezolana de Guayana ("CVG"). The purpose of the MOC was to exploit the Las Cristinas gold mine located in the Bolivar State. The MOC was cancelled by Venezuela in 2011.

16. Tenor Capital Management Company, L.P. (along with its subsidiary lenders, "DIP Lender Fund") is a private, New York based American investment and financing company and the Debtor's DIP lender in the Canadian Companies' Creditors Arrangement Act ("CCAA") proceedings through its wholly owned foreign subsidiaries.

17. The Debtor issued 365 million common shares on the Canadian and U.S. stock exchanges. According to company reports, as of June 21, 2012, U.S. individual Canadian and U.S. investors held 219 million shares, of which 35% and 25% were owned by U.S. and Canadian shareholders, respectively. Institutional investors held the remaining 40% of the Debtor's equity.

In Rem Property

18. The Debtor filed an arbitration request in 2012 with the International Centre for Settlement of Investment Disputes ("ICSID") to pursue an award for $3.4 billion for the illegal cancellation of the MOC. The ICSID rendered its decision in 2016 and awarded the Debtor a $1.4 billion dollar award ($1.2 billion award plus $200 million pre-award interest through the award date). The award accrues interest at 6-month LIBOR + 1% interest - currently approximately 1.15%, until paid in full.

The Insolvency and The Administrative Claims

19. The Debtor filed a petition for arrangement (reorganization) in Canada on or about December 23, 2011.

20. The Debtor holds unsecured debt significantly more than $5 million.

21. The amount of fixed, unsecured, liquidated debts owed by the Debtor to U.S. creditors also significantly exceeds $5,000,000.

22. While the Debtor, the unsecured creditors, and the DIP Lender have all obtained authorization to have the bankruptcy estate incur or reimburse them for costs and expenses worth over US$ 100 million on their behalf, the Shareholders have not been afforded the same protection. As a result, the Shareholders are at a substantial and unwarranted disadvantage versus other interested persons in this insolvency proceeding.

The Unconscionable Credit Agreement and The Directors

23. The DIP Lender entered into a credit agreement (the "Credit Agreement") with the Debtor to provide $36 million to fund the ICSID arbitration claim.

24. The terms and conditions of the Credit Agreement gave the DIP Lender absolute control over the Debtor from the outset, given that:

A. It prevented the Debtor from obtaining future financing from a source other than The DIP Lender without defaulting on the outstanding DIP loan,

B. It required the appointment by the DIP Lender of two nominee directors to the Debtor's BOD following its recomposition from nine to five directors.

C. It prevented the Debtor from paying off the outstanding DIP loan amount without the DIP Lender's consent, and

D. It issued the DIP Lender a contingent value right ("CVR") initially worth 35% of the Net Arbitration Proceeds ("NAP"), which is equal to the difference between the gross proceeds from the Award less administrative expenses, taxes due, the outstanding principal, and interest due on the DIP loan, and the unsecured debt plus pre- and post-petition interest. The CVR can be converted into the Debtor's equity at an equivalent percentage (initially 35%).

25. Subsequently, the DIP loan amount increased from $36 million to $76 million,

which increased the DIP Lender's entitlement to the NAP from 35% to 88% and reduced the Debtor's estate share from 65% to 12%.[1]

26. Thereafter, the DIP Lender and two of the directors (R. Fung and M. Oppenheimer) entered a NAP sharing agreement worth up to $100 million for the benefit of the two directors. In so doing, four of the five directors on the board became self-interested directors ("Directors").

27. The terms of the Credit Agreement gave the DIP Lender control over the Debtor. The increase of The DIP Lender's entitlement to the NAP from 35% to 88%, the conversion right to 88% of the Debtor's voting common shares, and the NAP share agreement with directors R. Fung and M. Oppenheimer, made the two shareholder-elected directors become beholden to The DIP Lender, giving The DIP Lender absolute *de facto* control over the Debtor.

28. Examples of such control include (i) the terms of the DIP loan agreement that require the DIP Lender's approval before the Debtor can pay it and its share of the NAP share off; and (ii) the abandonment of the restraining notice (the "Restraining Notice") on the Nomura notes.[2]

29. It is well established that as of December 2020, the Debtor held an ironclad money judgment worth $1.2 billion plus pre- and post-award interest worth $400 million. Nevertheless, The DIP Lender and the Directors state that the Award is only worth $1 billion. The reason for this is questionable and currently subject to discovery in the award collection proceedings at the Delaware District Court (Case 1:17-mc-00151 (LPS) ("DEDCC").[3]

THE HARM THAT NEEDS TO BE REDRESSED

1. Improper Transfer and Use of Estate Property and Waiver of Interest

[1] Unconscionably, the initial $36 million DIP loan granted the DIP Lender 35% of a $ 3.4 billion arbitration claim as special contingent compensation, in addition to 10% interest p.a.

[2] The Debtor obtained in 2017 a court order from the SDNY Court authorizing it to seize the notes as payment towards its judgement against Venezuela and released it in 2018 under false justification.

[3] Venezuela transferred bonds to the Debtor originally worth $350 million as an initial payment on the amended settlement agreement. The current value of said bonds is a fraction of the original amount and cannot be traded due to OFAC regulations. The Debtor improperly applies the bond payment at full value against the Award, even though Venezuela renegued on the Amended Settlement Agreement.

A. Fraudulent Transfer of Tax Benefits

30. The Debtor has spent over $800 million to date on the development of Las Cristinas gold mine, the arbitration proceedings, and the collection of the Award.

31. Canadian and U.S. tax laws allow the deduction of these costs and expenses only by the party that incurred them. (*See* DEBC D.I. No. 312, p. 5).

32. Despite this, the Credit Agreement provides for the distribution of approximately 88% of the estimated $220 million in tax loss carryforward benefit to The DIP Lender which belongs to the Estate and is otherwise non-transferable under applicable U.S. and Canadian law and in violation of the U.S – Canada Tax Treaty ("Treaty").

33. The improper use of the tax benefit also represents a tax evasion action, given that with the last assignment of the DIP loan to a tax-exempted Cayman Island subsidiary of the DIP Lender, the U.S. Treasury is deprived of the tax revenue it is owed under the Treaty.

B. Misappropriation of Estate Property: The Las Cristinas Mining Data

34. The terms of the Debtor's Credit Agreement with the DIP Lender make the Las Cristinas mining data (the "Mining Data") property of the Estate that cannot be distributed to the lender. It was originally purchased from the CVG and expanded at great expense to the Debtor to increase and enable the extraction of the mine's 20 million ounces of gold of proven and probable reserves.

35. The government of Venezuela agreed to compensate two gold mining companies it also expropriated, Gold Reserve and Rusoro mining, with over US$ 200 million each for their mining data. However, the Directors bundled the value the of Mining Data and the Award in the Amended Settlement Agreement and thus effectively transferred 88% of its value to the DIP Lender, given its 88% participation in the NAP. (*See* DEBC D.I. No. 312, p. 4).

C. Illegal Post-Petition Interest Payment on Unsecured Debt

36. The Debtor has failed to file a plan of arrangement (akin to reorganization) nine years after filing for CCAA protection. As a result, it has been taken to court in Canada by its unsecured lenders to press for the yet-to-be filed plan. To appease the noteholders, the Debtor (under the control of The DIP Lender) agreed to compensate said noteholders with post filing interest at close to 20% per annum at the Estate's expense, worth almost $100 million.

37. However, post-petition interest is not allowed under Canadian bankruptcy statutes unless a plan or arrangement and compromise is approved by the court and then, only at the statutory rate of 5% per annum. (*See* DEBCC D.I. No. 312, p. 5).

38. The law allows a secured lender to transfer part of its entitlements to unsecure creditors and equity holders when such transfer is necessary to obtain approval on a plan of arrangement or liquidation. Further, per 11 U.S.C § 1506(c) "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, …". The post-filing interest on unsecured debt and a long list of other charges worth over US$ 100 million have been and continue to be incurred for the sole purpose of preserving the collateral securing the DIP loan at the expense of the Estate and its opportunity to emerge from insolvency as a going-concern.

E. <u>Breach of The Loyalty and Care Duties</u>

39. The $1.2 billion award issued to the Debtor by the ICSID in April 2016 required additional payment for pre- and post-award interest: each worth approximately $200 million through December 2020.

40. In the two failed settlement agreements with Venezuela, the Debtor agreed to

forego both the pre- and post-award interest. This even though similar agreements between Gold Reserve and Rusoro mining included full compensation per the ICSID award, including pre- and post-award interest. The Gold Reserve settlement agreement was entered in July 2016 and the Rusoro Mining settlement agreement in October 2018. The Debtor's Amended Settlement Agreement was entered in November 2018, over two years after the Gold Reserves and one month after Rusoro settlements, respectively. (*See* DEDCC D.I. No. 134, pp. 10-12)

E. Fraudulent Misrepresentations

The Credit Agreement

41. The Shareholders relied on the representations made and the good faith professed by the BOD to protect their rights as their fiduciaries once entrusted with the pursuit of the arbitration claim. The application for protection under the CCAA was predicated on it being "the most fair and equitable way to obtain maximum value for all Crystallex's shareholders." (*See* DEBCC D.I. No. 2., Exh. B). In addition, the BOD represented in the DIP loan auction term sheet that:

> "In no circumstance shall the Lender Back-End Entitlement involve, or contemplate directly or indirectly, either (i) an acquisition of control of Crystallex, (ii) an acquisition of any interest in the Arbitration Proceeding, or (iii) a receipt of value exceeding a minority of the Arbitration Proceeds" were made after the BOD and the DIP Lender had negotiated and agreed on the terms under which the DIP loan would be made."

42. As the issuer of shares to public investors and the consequential special relationship between the Debtor and the Shareholders, the BOD occupied a special position of confidence and trust such that the Shareholders reliance on its public statements was justified. However, the term sheet for the DIP loan was negotiated and agreed between the Debtor and the DIP Lender before the DIP loan auction. The CCAA records show that the DIP loan auction was required by the DIP Lender as a condition to extend the DIP loan. Therefore, the BOD knew that the representations

made were false and that material facts contrary to the representations made had been omitted at the time for the purpose of inducing the Shareholders to hold onto the Debtor's shares.

Abandonment of The Nomura Restraining Notice

43. The Debtor abandoned the right to execute the ex-parte Restraining Notice it obtained from a New York Court in June 2017 on US$ 710 million worth of Nomura Bank notes owned by Venezuela and held for sale by Nomura Securities in New York. The execution of the Restraining Notice would have enabled the Debtor to a) pay off all the outstanding debt at the time, b) emerge from Insolvency as a going concern and d) continue the Award collection efforts. However, the execution of the attachment was not in the best interest of the controlling DIP Lender and the Directors, given that it would have triggered breaches of Canadian law by an earlier-than-planned execution of the distribution scheme in the Credit Agreement. The second settlement agreement (the Amended Settlement Agreement) with the Republic was reached in September 2018 and was promoted by the Restraining Notice issued in June 2017. The BOD and the controlling DIP Lender set aside the attachment of the Nomura Notes to pursue the Amended Settlement Agreement, despite the well-known reluctance and failure of the Venezuela to acknowledge its debt and honor its commitments and the attending harm to the Estate. The amended agreement, like the original one, fell through when the Republic failed to provide security to guarantee the scheduled future payments. (*See* DEDC D.I. No. 134, pp. 7-9).

44. The Monitor's report to the CCAA Court number 26 dated August 27, 2018, included a misrepresentation as justification for the abandonment of the Retraining Notice, by stating that…

"The Applicant agreed to withdraw the restraining notice in conjunction with the Ingalls Settlement Agreement (defined below). The Monitor has also been advised

by the Applicant that Nomura did not raise any cash from restructuring fixed-income securities and therefore the Applicant would not have been able to seize any Venezuela assets by pursuing this restraining notice."

45. This justification was false on two counts: First, the Ingalls settlement agreement was entered into by the shipbuilder and the Debtor to share Venezuelan funds in a bank account at the New York Mellon Bank on which Ingalls had a restraining order issued by a Mississippi Federal Court for a frigate repair contract cost dispute with the Venezuelan Defense Ministry. Venezuela opposed the attachment of the funds and never agreed to release the funds voluntarily as payment towards the first settlement agreement with the Debtor. Second, the Nomura Notes were issued by Nomura Finance, an international financial organization with a AAA credit rating that are highly liquid securities traded in most financial markets. These could be sold on the secondary market or held to maturity, when Nomura was required to redeem them, in October. 2018 (US$ 390 million) and December 2023 (US$ 320 million).

46. Per § 5222 of the NY CPLR (2012) - Enforcement of Money Judgments – Restraining Notice…

> A judgment debtor served with a Restraining Notice is forbidden to make any sale, assignment, transfer or interference with any property in which he or she has an interest, subject to narrow statutory exclusions, except upon direction of the sheriff or pursuant to Court order. Unlike Restraining Notices served on third parties, which expire after one-year, Restraining Notices served on judgment debtors remain in effect until the Judgment is satisfied.

The judgement in question, the US$ 1.2 billion award plus pre- and post-award interest, was not satisfied then and remains to be satisfied to date. Therefore, with the decision to withdraw the Restraining Notice the BOD gave up the collection of funds that would have ensured the Estate's emergence from insolvency and necessary to pursue the full collection of the Award.

<u>The Unpaid DIP Loan Principal</u>

47. A recent limited release of the Debtor's sealed financial information because of the ONCA's confirmation of the CCAA Court's order requiring it, the ONCA's

confirmation of the CCAA Court's order requiring it, the Debtor disclosed that it received US$ 150 million in cash payments towards the Award from the end of 2017 through the end of 2018. This amount corresponds to cash transfers by Venezuela as initial payments on the two failed settlement agreement and US$ 19 million from the seizure of Venezuela's Bank of New York Mellon bank account. The unsealed financial data shows that the Debtor's cash availability at the end of November 2020 was US$ 107 million, which indicates the DIP loan was not paid, despite the Debtor's large cash availability.

48. Faithful fiduciaries entrusted with the management of an insolvent company would not hesitate to discharge the duties of care and loyalty they owe the Debtor by using US$ 76 million of the US$ 150 million cash it received to pay off the DIP loan to advance its best interest. The sole fact that not paying off the DIP loan cost the Estate US$ 30 million in 2019 - 2020 and will cots it US$ 17 million in 2021 in P.I.K. interest to the DIP Lender would have moved a faithful fiduciary to do so immediately.

2. The Shareholders' Inadequate Representation

49. No plan of arrangement or liquidation can be deemed "fair and equitable" when an interested party is not adequately represented, and their rights and interests are disregarded by the BOD. As made evident by the Motion, the BOD has disregarded their fiduciary duties to protect the Shareholders' interests to advance their own and those of the Controlling DIP Lender.

50. In Canada, representation orders are commonly issued by the court in insolvency proceedings to facilitate the representation of a large group of individual stakeholders who are impacted by the insolvency. Representation orders allow the group to be represented by a single voice in the insolvency proceeding and ensure its members' rights are protected and advanced by independent legal counsel. Representation orders and the jurisdiction to appoint representative counsel are contained in Rule 10.01 of the Rules of Civil Procedure.

51. In *Karasik v. Yahoo! Inc.*, 2020 ONSC 1440, Justice Perell decided that:

> [11] The court has authority under Rule 10.01 of the Rules of Civil Procedure, to make a representation order, including the jurisdiction to appoint representative counsel. This is possible when persons who have an interest in or may be affected by a matter or a proceeding cannot be readily ascertained, found or served or where it appears necessary or desirable to make the order.
>
> [17] Representation orders are a common phenomenon in proceedings under the Companies' Creditors Arrangement Act.
>
> [18] *In Re CanWest Publishing Inc.*, Justice Pepall stated that factors that have been considered by courts in granting these orders include: (a) the vulnerability and resources of the group sought to be represented; (b) any benefit to the companies under CCAA protection; (c) any social benefit to be derived from representation of the group; (d) the facilitation of the administration of the proceedings and efficiency; (e) the avoidance of a multiplicity of legal retainers; (f) the balance of convenience and whether it is fair and just, including to the creditors

52. There are over 300 hundred Shareholders of the Debtor who are United States residents.

53. Approximately 35% of the issued and outstanding shares of the Debtor are beneficially owned by U.S. residents.

LAW AND ARGUMENT

1. CHOICE OF LAW

54. A Chapter 15 petition by a foreign representative involves an implicit request for the U.S. Court for foreign law to be enforced and even take priority over the Code. This is premised on the purpose of Chapter 15 and the Model Law, the framework it is based on, their invocation of comity (§§ 1507 and 1509), and the requirement that U.S. Courts "*consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.*" (§ 1508). [Emphasis added]

55. The modified universalism adopted by Congress in enacting Chapter 15 circumscribed the relief afforded to a foreign representative by the need to protect fundamental rights bestowed on the U.S. citizens (§ 1506), important U.S. interests and commitments (§ 1503)

and the integrity of the Code and its purpose by ensuring the debtor's property and its distribution are managed in accordance with the law, statutory rules, and principles (§§ 1507 and 1522).

56. The enforcement of the law, statutory rules and principles to date points to the conclusion that, generally, substance prevails over form when determining the similarities of the statutes involved, or the lack thereof, based on the appropriateness of the solutions they yield. In this context, some relevant court decisions illustrate this:

- *In re Vitro, S.A.B. de C.V.*, 473 B.R. 117 (Bankr. N.D. Tex. 2012), confirmation of plan of arrangement denied because:

> *"Generally, reorganization pursuant to the LCM is found to be a fair process, worthy of respect. In other and subsequent cases this Court would expect that Concurso decisions would be enforced in this country. However, if approved for enforcement, the present order would create precedent without any seeming bounds. The Concurso plan presently before the Court discharges the unsecured debt of non-debtor subsidiaries. What is to prevent this type of plan from eventually giving non-consensual releases to discharge the liabilities of officers, directors, and any other person?"*

- *In re Cozumel Caribe, S.A. de C.V.* 508 B.R. 330 (Bankr. S.D.N.Y. 2014), confirmation of plan of arrangement denied because:

> "*The Motion raises very serious questions about the conduct of the Foreign Representative in this Court and in the Concurso Proceeding, as well as very serious questions about the conduct of the principals of the Foreign Debtor."*

2. BROAD POWERS OF THE BANKRUPTCY COURT

57. Section 105(a) of the Code provides a bankruptcy court with broad powers in its administration of a case under it: "*The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code*]." The exercise of power under § 105(a) is proper provided that the bankruptcy court does not employ its equitable powers to achieve a result not contemplated by the Code. *See In re Pincus*, 280 B.R. 303, 312 (Bankr. S.D.N.Y. 2002; *In re Fesco Plastics Corp.*, 996 F.2d 152, 154 (7th Cir. 1993).

3. APPOINTMENT OF AN EXAMINER UNDER THE CODE AND CANADIAN LAW

58. In 11 U.S.C. § 1522, the Code provides that when an examiner is appointed in a Chapter 15 proceeding, the provisions of § 1104(d) shall apply. Section 1104(d) addresses how the U.S. trustee appoints a disinterested person as an examiner upon order of the court, with consultation with interested parties. Section 1104(c)(2) provides that:

> (c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the Debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the Debtor of or by current or former management of the Debtor, if—
>
> (2) the Debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

59. In the case at bar, the Debtor's debts far exceed $5,000,000. This is a request for appointment of an examiner by a shareholder. Therefore, under the Code, appointment of the Examiner is borne out by the preponderance of the evidence provided in the Motion. *See In re Anderson News, LLC, Case No. 09-10695 (CSS) (Bankr. D. Del. Aug. 22, 2012); In re Tribune Co.*, Case No. 08-13141 (KJC) (Bankr. D. Del. Sep. 6, 2013).

60. In Canada, the appointment of an investigative receiver (the equivalent of an examiner in the U.S.) in civil proceedings emerged as "proper exercise of the court's "just and convenient" authority under § 101 of the Courts of Justice Act. (*See Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 368, (citing caselaw of several civil decisions, including shareholder oppression (*Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Gen. Div.), and Bankruptcy and Insolvency Act, (BIA) (*General Electric Canada Real Estate Financing Holding Co. v. Liberty*

Assisted Living Inc., 2011 ONSC 4136)). The appointment of an investigative receiver in CCAA has likewise been approved where necessary for the court to resolve controversies amongst the parties and fulfill its fact-finding requirements.

61. In the instant case, the appointment of an investigative receiver is authorized by the "proper exercise of the court's "just and convenient" and § 42 of the CCAA:

> **Act to be applied conjointly with other Acts**
>
> 42 The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

62. Per Justice Blair in *Akagi v. Synergy Group*:

> [66] Indeed, whether it is labelled an "investigative" receivership or not, there is much to be said in favour of such a tool, in my view – when it is utilized in appropriate circumstances and with appropriate restraints. Clearly, there are situations where the appointment of a receiver to investigate the affairs of a Debtor or to review certain transactions – including even, in proper circumstances, the affairs of and transactions concerning related non-parties – will be a proper exercise of the court's "just and convenient" authority under s. 101 of the Courts of Justice Act.
>
> [90] Some consistent themes emerge from these authorities:
> - The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery: Loblaw Brands, at paras. 10, 14 and 16.
> - The primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a Debtor, or of a Debtor and a related network of individuals or corporations: *General Electric (Div. Ct.)*, at para. 15. One authority characterized the investigative receiver as a tool to equalize the "informational imbalance" between Debtors and creditors with respect to the Debtor's financial dealings: *East Guardian SPC v. Mazur*, 2014 ONSC 6403, at para. 75.

II. ADDITIONAL AUTHORITIES THAT SUPPORT THE APPOINTMENT OF AN EXAMINER

63. This motion alleges fraudulent misrepresentation, depletion of the Debtor's assets, self-dealing by the BOD and conflicts of interest among appointed directors. The drafters of the

Code wanted to provide extra protection to stockholders of public companies through mechanism of an examiner as an independent functionary (*see In re Gilman Services, Inc.*, 46 B.R. 322 (Bankr. D. Mass.1985). An examiner is an official appointed by the bankruptcy court to investigate issues or problems identified with the Debtor. As a court-appointed fiduciary, an examiner is in a unique position to investigate alleged improprieties from a neutral standpoint, without biases or client influence. The court may order the examiner to investigate any aspect of the case, the business, or events leading up to the bankruptcy case, and report its findings to the court and the parties (*see Weathering the Storm: The Appointment of an Examiner* (2009) citing Collier on Bankruptcy-15th Edition Rev. P 1106.01).

64. Where a decision of a foreign court runs contrary to fundamental US law principles and public policy, US courts generally refuse to recognize and enforce it. *See Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009) at para. 51-52, (*"As such, the Court declines to recognize this judgment because the "cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state."*); *Lehman Bros. Special Fin. Inc. v. BNY Corporate Tr. Servs. Ltd.*, 422 B.R. 407 at 418–20, (Bankr. S.D.N.Y. 2010), ("*courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States*"); *In re Sivec SRL*, 476 B.R. at 313, *("Comity is only to be extended so long as the interests of U.S. creditors are sufficiently protected, and so long as any actions taken are not manifestly contrary to the public policy of the United States."*).

DEMAND FUTILITY

65. The several unanswered communications to the Debtor, the Monitor and the CCAA Court since December 2017 (see Exhibit 1) raising the issued and requesting to review and redress the issues harming the Estate and the Shareholders attest to the futility of additional efforts to promote the resolution of the issues involved outside the courts and the need for the

instant Motion.

PRAYER FOR RELIEF

66. WHEREFORE the Movant prays that this Court:

A. To order the appointment of an Examiner to investigate and report on the Debtor's assets, its past and projected financial transactions, and their impact on the Estate's property to establish its rights and interest in a surplus, if any, once it meets its obligations according to the Code.

B. To order the appointment of Legal Counsel to protect the Shareholders' rights and interests as residual owners of the Estate,

C. Such further and other relief as this Court deems just and proper.

RESERVATION OF RIGHTS

67. Movant respectfully

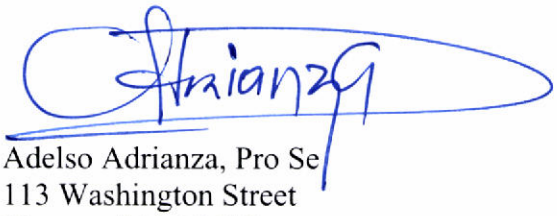
A. Reserves the right to amend or to supplement this motion,

B. Does not consent to the entry of final orders or judgments by the Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

CONCLUSION

For all the reasons set forth herein, the Movant respectfully requests that the Court grant the relief sought in the Motion.

Respectfully submitted,



Dated: July 24, 2021,
Newton, Massachusetts

Adelso Adrianza, Pro Se
113 Washington Street
Newton, MA 02458
aaadrianza@gmail.com
(859) 803-2279

EXHIBIT A

COMMUNICATIONS TO THE CCAA COURT AND THE MONITOR

The following communications can be accessed via the following link:

https://drive.google.com/drive/folders/1Jj47p93-WFbf7yU3NqRDwtqkEzsV_jw7?usp=sharing

Communication / Subject Matter (SM)

1.0 AAdrianza Comm J Haynes re KRY (122617)

SM: Lack of transparency, self-interested BOD, good faith requirement; the mining data property of the estate, not distributable.

2.0 AAdrianza Comm R Fung KRY (020318)

SM: Shareholders' interests, compliance with the law.

3.0 AAdrianza Comm R Fung KRY (030618)

SM: Self-serving BOD.

4.0 AAdrianza Comm R Fung KRY (052618)
4.1 ENCLOSURE

SM: Illegal distribution of tax loss carryforward benefits.

5.0 AAdrianza Comm to J Swartz DWPV (053118)

SM: Ownership of tax loss carryforward benefits.

6.0 AAdrianza Comm KRY Monitor (120418)

SM: Nomura Notes restraining notice abandonment and misrepresentations made, safeguarding the company's and its stakeholders' interests.

7.0 AAdrianza Comm DE District Court (021919) - (DE DC D.I. No. 134).

SM: The Shareholders' issues with the company and lack of redress.

8.0 AAdrianza Comm R Fung KRY (101519)
8.1 ENCLOSURE

SM: Venezuela bond payment not effective payment, gifting of the mining data.

9.0 AAdrianza Comm KRY (032420)

SM: The CCAA's new requirements: good faith and taking the Shareholders' interest in consideration.

10.0 AAdrianza Comm EY BD (032920)

SM: Debt payoff delay and Canada's Interest Stops Rule.

Communication / Subject Matter (SM)

11.0 AAdrianza Comm JF KRYSC (040320) (Chapter 15 D.I. No. 311).

SM: Shareholders' interests not adequately protected.

12.0 AAdrianza Comm J Hainey (042020) – (Chapter 15 D.I. No. 312).

SM: Legally unenforceable Credit Agreement.

13.0 AAdrianza Comm DE Bcky Court (052820) – (Chapter 15 D.I. No. 313).

SM: The Shareholders' issues with the company and lack of redress.

14.0 AAdrianza Comm DE Bcky Court (071420) – (Chapter 15 D.I. No. 314).

SM: Preservation and maximization of the Estate's property.

15.0 AAdrianza Comm J Hainey KRY (103020)

SM: Self-interested directors, their fiduciary duties and the harm to the Estate and the Shareholders.

16.0 AAdrianza Comm J. R Strathy ONCA KRY (110620) - (DE DC D.I. No. 233)

SM: The Shareholders' issues with the company and lack of redress.

17.0 AAdrianza Comm DE Bcky Court (121420) – (Chapter 15 D.I. No. 325).

SM: Oposition to motion to seal Debtor's financial information.

18.0 AAdrianza Comm DE District Court (060121) – (Chapter 15 D.I. No. 326).

SM: Harm to the Estate and the Shareholders, structured dismissal and other contraventions of the Bankruptcy Code.

EXHIBIT B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 15
CRYSTALLEX INTERNATIONAL CORP.	:	**Case No. 11-14074 (LSS)**
Debtor in a Foreign Proceeding.	:	**Related D.I. ____**

ORDER GRANTING MOTION FOR AN ORDER DIRECTING THE APPOINTMENT OF AN EXAMINER AND INDEPENDENT COUNSEL FOR THE SHAREHOLDERS

Upon consideration of the Motion *for an Order Directing the Appointment of An Examiner and Independent Counsel for The Shareholders* pursuant to Sections 105(a), 1104(a), 1104(c), 1129, 1501(a)(4), 1505, 1522(c), 1526 and 1527 of the Bankruptcy Code and Bankruptcy Rule 2007.1, supplemented by CCAA Sections 42, 44(d), 52(1), 52(3)(a) and 61(1)-(2), and CJA Section 101, regarding the appointment of the Examiner; and 11 U.S.C. § 105(a), supplemented by R.C.P. Rule 10.01. regarding the appointment of Legal Counsel, (the "Motion") [D.I. ____];[1,2] and the Court having found that: (i) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated February 29, 2012, (ii) venue is proper in this district pursuant to 28 U.S.C. § 1410, (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (iv) notice of the Motion was sufficient under the circumstances; and the Court having reviewed the Motion and having considered the statements of the Movant and the Debtor's counsel and any objections filed to

[1] The Debtor in this chapter 15 case is Crystallex International Corporation and the last four digits of its federal tax ID number is 2628. The Debtors' service address is: 8 King Street East, Suite 1201, Toronto, Ontario, M5C 1B5, Canada.

[2] Capitalized terms used, but not defined herein, shall have the meaning ascribed to in the Motion.

the Motion and the evidence adduced with respect to the Motion at a hearing before the Court (the "Hearing"); and the Court having determined to:

I. Appoint an examiner under sections 105(a), 1104(a), 1104(c), 1129, 1501(a)(4), 1505, 1522(c), 1526 and 1527 of the Bankruptcy Code, supplemented by CCAA sections 42, 44(d), 52(1), 52(3)(a) and 61(1)-(2), and CJA section 101, to investigate the affairs of the Debtor; and the Court having further concluded that the nature, extent, and duration of the investigation to be conducted by the examiner as set forth herein is appropriate;

IT IS HEREBY ORDERED THAT:

1. The United States Trustee is directed to appoint one examiner ("Examiner") pursuant to Bankruptcy Code section 1104(c). to Bankruptcy Code section 1104(c).

2. The Examiner is directed to investigate and provide a report to the Court and parties in interest, and otherwise perform the duties of an examiner set forth in Bankruptcy Code sections 1106(a)(3) and 1106(a)(4), regarding the following subjects, as described in greater detail in the Motion, and any causes of action that may exist because of the alleged actions or inactions of the Debtors' BOD (collectively, the "Investigation"):

a. Whether the actual circumstances surrounding the negotiation of, and the bidding process involved in the DIP loan leading to the Credit Agreement and the alleged harm to the Estate and the Shareholders correspond to the representations made by the BOD,

b. Whether any of the Debtor's assets were improperly included, used, gifted, abandoned, or otherwise disposed of and to what extent these actions or omissions affect the Estate's property distribution in the MOD with respect to the requirements of the Bankruptcy Code,

c. Whether Estate property has been or is projected to be used for improper, disallowed purposes according to the Bankruptcy Code,

d. Whether the actual and projected charges to the Administrative Expense carve-outs confer a benefit on the Estate or are otherwise appropriate under the Bankruptcy Code,

e. Whether the acts or omissions by the BOD, alleged in the Motion represent breaches of its fiduciary duties of care or loyalty against the Estate or the Shareholders,

f. Whether the MOD, as approved or adjusted for the alleged actions and omissions determined to be factual, represent a viable reorganization or liquidation plan,

g. Whether alternate strategies to those presented by the Debtor would adequately protect creditors to the maximum extent allowed by the Bankruptcy Code and preserve value for its equity holders.

3. The Examiner shall (a) have unfettered access to review all documents and information, including materials that may be confidential or subject to a privilege or protection held by the Debtor, officers, directors, affiliates, and subsidiaries, provided that all privileges and protections applicable to any materials provided to the Examiner shall remain in full force and effect and not be deemed to have been waived by providing such materials to the Examiner, and (b) include all such information (including confidential or privileged materials) in the Examiner's report submitted to this Court, to the extent such inclusion is determined by the Examiner appropriate under the circumstances, provided, that the Examiner shall have the authority, within his or her business judgment, either to (x) waive any privileges or protections with respect to such materials included in the Examiner's report or (y) to the extent any party in interest claimed privilege or confidentiality as to any materials contained in the report, submit an unredacted report to the Court under seal and file and transmit to parties in interest a redacted copy on the public docket, in which case all privileges and protections included in the unredacted report shall remain in full force and effect and not be deemed to have been waived by such inclusion.

4. The Examiner, parties in interest, the Debtors, any official committee appointed pursuant to Bankruptcy Code section 1102 ("Committee") or the United States Trustee shall have the right to petition the Court to further expand the scope of the Investigation, if during such

Investigation other relevant matters are revealed which the Examiner, parties in interest, the Debtors, any Committee, or the United States Trustee believe should be brought to the attention of the Court.

5. The Debtors and the Debtors' direct and indirect officers, directors, affiliates and subsidiaries, and their respective professionals, are directed to fully coordinate and cooperate with the Examiner and its professionals and other parties in interest in conjunction with the performance of any of the Examiner's duties and the Investigation, including producing to the Examiner, as promptly as practicable, all documents and information relevant to the Investigation that the Examiner requests, and exercising their respective best efforts to avoid any unnecessary interference with, or duplication of, the Investigation.

6. The Examiner shall file his or her report on the Investigation as soon as practicable.

7. The Examiner may retain counsel and other professionals, if he or she determines that such retention is necessary to discharge his or her duties, with such retention to be subject to Court approval under standards equivalent to those set forth in 11 U.S.C. § 327.

8. The Examiner and any professionals retained by the Examiner pursuant to any order of this Court shall be compensated and reimbursed for the expenses pursuant to any procedures for interim compensation and reimbursement of expenses of professionals that are established in these Cases. Compensation and reimbursement of the Examiner shall be determined pursuant to Bankruptcy Code Section 330, and compensation and reimbursement of the Examiner's professionals shall be determined pursuant to standards equivalent to those set forth in Bankruptcy Code Section 330.

9. The Examiner shall have the standing of a "party-in-interest" with respect to the matters that are within the scope of the Investigation and shall be entitled to appear and be heard at any and all hearings in this case. Nothing in this Order shall impede the right of the United States Trustee or any other party to request any other lawful relief, including but not limited to the appointment

of a trustee.

II. Appoint legal counsel to represent the Debtor's U.S. equity holders (the "Shareholders") under § 105(a) of the Bankruptcy Code, supplemented by CCAA § 42 and R.C.P 10.01, to provide the Shareholders adequate legal protection for their interest in the Estate; and the Court having further concluded that, to the extent that the Shareholders may be entitled to a recovery, which shall be determined by the Examiner's investigation, and if so determined, the charge of the Legal Counsel's cost and expense against the Estate's residual property is appropriate,

IT IS HEREBY ORDERED THAT:

1. The selection and the appointment of the Legal Counsel shall be undertaken by the Shareholders' lead representative(s) and after review and approval by this Court.

2. The Legal Counsel shall be compensated and reimbursed for the expenses pursuant to any procedures for interim compensation and reimbursement of expenses of professionals that are established in this case. Compensation and reimbursement of the Legal Counsel shall be determined pursuant to Bankruptcy Code Section 330,

III. Jurisdiction

1. This Court shall retain jurisdiction with respect to any matters related to or arising from the implementation of this Order.

Dated: _____, 2021

THE HONORABLE LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 15
CRYSTALLEX INTERNATIONAL CORP.	:	**Case No. 11-14074 (LSS)**
	:	Hearing date: Aug. 20, 2021
Debtor in a Foreign Proceeding.	:	
	:	Objections due by: 4:00 PM EDT on Aug.13, 2021

NOTICE OF MOTION FOR AN ORDER DIRECTING THE APPOINTMENT OF AN EXAMINER AND INDEPENDENT COUNSEL FOR THE SHAREHOLDERS

PLEASE TAKE NOTICE that Adelso Adrianza, a shareholder of the above captioned debtor (the "Debtor"), Pro Se and on behalf of similarly situated U.S. shareholders (the "Shareholders"), has filed the attached Motion for An Order Directing the Appointment of An Examiner and Independent Counsel for The Shareholders (the "Motion") with the United States Bankruptcy Court for the District of Delaware (the "Court").

PLEASE TAKE FURTHER NOTICE that objections and responses, if any, to the relief requested in the Motion shall be filed by on or before **4:00 p.m. (ET) on Aug. ____, 2021** (the "Objection Deadline") with the Court at 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801. At the same time, you must serve a copy of any objection or response upon: (a) the undersigned party, Adelso Adrianza, 113 Washington Street, Newton, MA 02458, to be received on or before the Objection Deadline.

PLEASE TAKE FURTHER NOTICE that a hearing to consider the Motion to Seal will be held on August 20, 2021, at 10:00 a.m. (EDT) before the Honorable Laurie Selber Silverstein in the Court, 824 North Market Street, 6th. Floor, Courtroom No. 2, Wilmington, Delaware 19801.

PLEASE TAKE FURTHER NOTICE THAT, IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THEN THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION TO SEAL WITHOUT FURTHER NOTICE OR A HEARING.

Dated: July 24, 2021,
Newton, Massachusetts

Adelso Adrianza, Pro Se
113 Washington Street
Newton, MA 02458
(859) 803-2279

CERTIFICATE OF SERVICE

I, Adelso Adrianza, hereby certify that on this 22nd day of July 2021 I caused copies of the *Motion for An Order Directing The Appointment Of An Examiner And Independent Counsel For The Shareholders* Pursuant to Sections 11 U.S.C. §§ 105(a), 1104(a), 1129, 1501(a)(4), 1505, 1522(c), 1526 and 1527, supplemented by CCAA §§ 42, 44(d), 52(1), 52(3)(a) and 61(1)-(2), and 11 U.S.C. §§ 105(a), supplemented by R.C.P. Rule 10.01, respectively, to be served on the parties listed below by courier or otherwise indicated:

United States Trustee
844 King Street, Room 2207
Lockbox # 35
Wilmington, DE 19899-0035

Matthew Barry Lunn, Esq.
Young, Conaway, Stargatt &
Taylor1000 West Street, Fl. 17
PO Box 391
Wilmington, DE 19899

Alex W. Cannon, Esq.
Willkie Farr & Gallagher, LLP
787 Seventh Avenue # 2
New York, NY 10019

Mr. Christopher P. Simon, Esq.
Cross & Simon, LLC
1105 North Market Street, Ste. 901
Wilmington, DE 19801

Adelso A. Adrianza

THIS IS EXHIBIT "P" REFERRED TO IN THE AFFIDAVIT OF ROBERT FUNG, SWORN BEFORE ME THIS 25TH DAY OF OCTOBER, 2021.

A Commissioner for Taking Affidavits
NATALIE RENNER

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 15
Crystallex International Corporation[1]	:	Case No. 11-14074 (LSS)
Debtor in a Foreign Proceeding.	:	**Ref. Docket No. 328**
	:	**Hearing Date: August 20, 2021 at 10:00 a.m. (ET)**

FOREIGN REPRESENTATIVE'S OBJECTION TO MOTION FOR AN ORDER DIRECTING THE APPOINTMENT OF AN EXAMINER AND INDEPENDENT COUNSEL FOR THE SHAREHOLDERS

Crystallex International Corporation, in its capacity as the court-appointed foreign representative (the "Foreign Representative") for the above-captioned debtor (the "Debtor") in a proceeding (the "Canadian Proceeding") under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), pending before the Ontario Superior Court of Justice (Commercial List) (the "Canadian Court"), respectfully submits this objection (this "Objection") to the *Motion for an Order Directing the Appointment of an Examiner and Independent Counsel for the Shareholders* [Docket No. 328] (the "Motion"), filed on July 26, 2021, by Adelso Adrianza (the "Movant"). In support of this Objection, the Foreign Representative respectfully represents as follows:

[1] The last four digits of the Debtor's United States taxpayer identification number are 2628. The Debtor's executive headquarters are located at 8 King Street East, Suite 1201, Toronto, Ontario, M5C 1B5, Canada.

PRELIMINARY STATEMENT[2]

1. The Motion should be denied because it seeks unnecessary relief that is outside the statutory authority and scope of Chapter 15 of the Bankruptcy Code and antithetical to its underlying and fundamental principles.

2. First, there is no statutory authority in Chapter 15 for the appointment of an examiner, except at the request of a foreign representative.[3] Similarly, there is no statutory basis for Movant's request for the appointment of counsel to represent the Debtor's shareholders in connection with the Chapter 15 case. Accordingly, the Motion should be denied based on a plain textual interpretation of the Bankruptcy Code.

3. Second, assuming authority exists under the Bankruptcy Code to grant the Motion, it should nonetheless be denied because it conflicts with fundamental principles of Chapter 15, namely "international comity and respect for the laws and judgments of other nations."[4] The Motion is, at bottom, an effort to re-litigate issues already decided by the Canadian Court (and recognized by this Court), most prominently, the CCAA Financing Order and various amendments to the DIP Credit Agreement. In fact, Movant admittedly seeks relief in this Court because he has been unable to convince the Debtor, ***the Monitor, or the Canadian Court*** (among others) to accept his view regarding multiple issues that have been the subject of an extensive letter-writing campaign over the years.[5] Stated differently, Movant is requesting the Court override (or at least

[2] Capitalized terms used but not defined in this Preliminary Statement shall have the meanings given to such terms below.

[3] *See* 11 U.S.C. §§ 1519 & 1521 (providing that the Court may grant certain specified relief "at the request of the foreign representative…".)

[4] In re Vitro S.A.B. de CV, 701 F.3d 1031, 1053 (5th Cir. 2012).

[5] Motion, ¶ 65 ("The several unanswered communications to the Debtor, the Monitor and the CCAA Court since December 2017 (see Exhibit 1) raising the [sic] issued and requesting to review and redress the issues harming the

second-guess) the judgment of the Canadian Court and the Monitor regarding issues that, as Movant admits, have already been raised and in some cases litigated before the Canadian Court, as well as re-visit its own orders recognizing nearly all of those rulings. The requested relief would be extraordinary in light of the policies that underlie Chapter 15 of the Bankruptcy Code, and the circumstances do not warrant it here.

4. Relatedly, the requested relief is unnecessary. The Canadian Proceeding is moving forward under the oversight of the Canadian Court and with the active participation of the Monitor – a statutory appointee and an officer of the Canadian Court charged with many of the same duties any examiner appointed by this Court would presumably undertake (among others). In addition, there is, in fact, already an ad hoc committee of equity security holders that has been active in the Canadian Proceeding with the assistance of counsel. There is no basis or need to duplicate these efforts or to incur the attendant costs.

5. For these reasons, set forth more fully below, the Court should deny the Motion.

BACKGROUND

6. On December 23, 2011 (the "Petition Date"), the Debtor commenced the Canadian Proceeding and the Canadian Court entered the Initial Order, pursuant to the CCAA, providing various forms of relief thereunder. Also on the Petition Date, the Foreign Representative commenced this proceeding by filing a verified petition on behalf of the Debtor, pursuant to sections 1504 and 1515 of the Bankruptcy Code, seeking recognition by this Court of the Canadian Proceeding as a "foreign main proceeding" under chapter 15.

Estate and the Shareholders attest to the futility of additional efforts to promote the resolution of the issues involved outside the courts and the need for the instant Motion."

7. Pursuant to the Initial Order, the Canadian Court appointed Ernst & Young Inc. as monitor (the "Monitor") pursuant to the CCAA. Generally, the Monitor is an officer of the Canadian Court charged with overseeing the Canadian Proceeding in a neutral fashion and reporting to the Canadian Court and stakeholders with respect to various aspects of the Debtor's restructuring efforts. To-date, the Monitor has filed 36 reports in the Canadian Proceeding, the most recent of which was filed on May 3, 2021 and is attached hereto as Exhibit A.

8. On January 20, 2012, the Court entered the *Order Granting Final Relief in Aid of Canadian Proceeding Pursuant to Section 105(a), 1517, 1520, and 1521 of the Bankruptcy Code* [Docket No. 44] (the "Recognition Order"). Pursuant to the Recognition Order, the Court (a) granted recognition of the Canadian Proceeding as a "foreign main proceeding" under section 1517 and (b) enforced in full the Initial Order on a permanent basis in the United States, including, without limitation, any extensions of the Stay Period granted by the Canadian Court.

9. On April 26, 2012, the Court entered the *Order Enforcing Financing Order of the Canadian Court* [Docket No. 111] (the "U.S. Financing Order"), which, among other things, (a) recognized and enforced the *CCAA Financing Order* of the Canadian Court, issued on April 16, 2012 (the "CCAA Financing Order"), including any amendments thereto, approving the DIP Credit Agreement (as defined in the CCAA Financing Order) and (b) granted to, and for the benefit of, the DIP Lender (as defined in the CCAA Financing Order) certain protections afforded by the Bankruptcy Code.

10. Some of the key features of the Debtor's court-approved DIP financing were: (i) an initial US $36 million principal amount loan (which was subsequently increased following several additional advances to US $75,733,333.33 of principal amount, such that the DIP loan principal and interest balance as of July 31, 2021 according to the DIP Lender is approximately US $164

million); (ii) at the time the DIP Financing Agreement was approved, the DIP Lender had also earned 35% of the Net Arbitration Proceeds (as defined in the DIP Financing Agreement and also called "NAP"), (which earned NAP amount was increased to 88.274% following additional DIP loan advances); (ii) the Debtor's board would be comprised of two Debtor directors, two nominees of the DIP Lender, and an independent director selected by mutual agreement of the Debtor and the DIP Lender; and (iii) Exhibit F to the DIP Financing Agreement set forth the court-approved waterfall setting out the priority and order of distributions of claims against the Debtor.

11. An ad hoc committee of the Debtor's senior unsecured noteholders (the "Noteholder Committee") vigorously opposed the Debtor's DIP financing on a number of grounds, including on the basis that the DIP Lender had been given control over the Debtor and its restructuring process. The Canadian Court carefully considered and then dismissed the Noteholder Committee's opposition, and the Noteholder Committee appealed that decision. On June 13, 2012, the Ontario Court of Appeal dismissed the Noteholder Committee's appeal and upheld approval of the DIP Financing.

12. Below is a brief summary of the various financing-related recognition orders entered by the Court since the entry of the CCAA Financing Order and U.S. Financing Order:

a. On June 19, 2013, this Court entered the *Order Recognizing the Additional Financing Order of the Canadian Court* [Docket No. 125] (the "First Additional U.S. Financing Order"), which, among other things, recognized and enforced the *Additional CCAA Financing Order* of the Canadian Court, issued on June 5, 2013 (the "First Additional CCAA Financing Order"), including any amendments thereto, approving the Second DIP Amendment (as defined in the First Additional U.S. Financing Order).

b. On April 28, 2014, this Court entered the *Order Recognizing the Second Additional CCAA Financing Order* [Docket No. 138] (the "Second Additional U.S. Financing Order"), which, among other things, recognized and enforced the *Second Additional CCAA Financing Order* of the Canadian Court, issued on April 14, 2014 (the "Second Additional CCAA Financing Order"), including any amendments

thereto, approving the Third DIP Amendment (as defined in the Second Additional U.S. Financing Order).

c. On February 3, 2015, this Court entered the *Order Recognizing Approval Order* [Docket No. 162] (the "Third Additional U.S. Financing Order"), which, among other things, recognized and enforced the *Approval Order* of the Canadian Court, issued on December 18, 2014 (the "Third Additional CCAA Financing Order"), including any amendments thereto, approving the Fourth DIP Amendment (as defined in the Third Additional U.S. Financing Order).

d. On December 27, 2016, this Court entered the *Order Recognizing and Enforcing the CCAA Extension and Amendment Order* [Docket No. 184] (the "U.S. Extension and Amendment Order"), which, among other things, recognized and enforced the *Order* of the Canadian Court, issued on December 14, 2016 (the "CCAA Extension and Amendment Order") approving the Extension and Amendment (as defined in the U.S. Extension and Amendment Order).

e. On June 23, 2017, this Court entered the *Order Recognizing and Enforcing the CCAA Second Extension and Amendment Order* [Docket No. 189] (the "U.S. Second Extension and Amendment Order"), which, among other things, recognized and enforced the *Order* of the Canadian Court, issued on May 25, 2017 (the "CCAA Second Extension and Amendment Order") approving the Second Extension and Amendment (as defined in the U.S. Second Extension and Amendment Order).

f. On February 15, 2018, this Court entered the *Order Recognizing and Enforcing the CCAA Bridge DIP Loan Order* [Docket No. 251] (the "U.S. Bridge Loan Order"), which, among other things, recognized and enforced the *Order* of the Canadian Court, dated December 20, 2017, approving the Bridge Loan Agreement and the Seventh Amendment Agreement (as such terms are defined in the U.S. Bridge Loan Order).

g. On June 20, 2018, this Court entered the *Order Recognizing and Enforcing the CCAA Fifth Extension and Ninth Amendment Order* [Docket No. 260] (the "U.S. Fifth Extension and Ninth Amendment Order"), which, among other things, recognized and enforced the *Order* of the Canadian Court, dated May 9, 2018 (the "CCAA Fifth Extension and Ninth Amendment Order") approving the Ninth Amendment Agreement (as defined in the U.S. Fifth Extension and Ninth Amendment Order).

h. On November 13, 2018, this Court entered the *Order Recognizing and Enforcing the CCAA Sixth Extension and Tenth Amendment Order* [Docket No. 275] (the "U.S. Sixth Extension and Tenth Amendment Order"), which, among other things, recognized and enforced the *Order* of the Canadian Court, dated October 29, 2018 (the "CCAA Sixth Extension and Tenth Amendment Order") approving the Tenth Amendment Agreement (as defined in the U.S. Sixth Extension and Tenth Amendment Order).

i. On May 28, 2019, this Court entered the *Order Recognizing and Enforcing the CCAA Seventh Extension and Eleventh Amendment Order* [Docket No. 294] (the "U.S. Seventh Extension and Eleventh Amendment Order"), which, among other things, recognized and enforced the *Order* of the Canadian Court, dated May 3, 2019 (the "CCAA Seventh Extension and Eleventh Amendment Order") approving the Eleventh Amendment Agreement (as defined in the U.S. Seventh Extension and Eleventh Amendment Order).

j. On December 5, 2019, this Court entered the *Order Recognizing and Enforcing the CCAA Eighth Extension and Twelfth Amendment Order* [Docket No. 306] (the "U.S. Eighth Extension and Twelfth Amendment Order"), which, among other things, recognized and enforced the *Order* of the Canadian Court, dated November 4, 2019 (the "CCAA Eighth Extension and Twelfth Amendment Order") approving the Twelfth Credit Agreement Amendment (as defined in the U.S. Eighth Extension and Twelfth Amendment Order).

k. On January 5, 2021, this Court entered the *Order Recognizing and Enforcing the CCAA Tenth Extension and Fourteenth Amendment Order* [Docket No. 320] (the "U.S. Tenth Extension and Fourteenth Amendment Order"), which, among other things, recognized and enforced the *Order* of the Canadian Court, dated November 3, 2020 (the "CCAA Tenth Extension and Fourteenth Amendment Order") approving the Fourteenth Credit Agreement Amendment (as defined in the U.S. Tenth Extension and Fourteenth Amendment Order).[6]

13. On November 24, 2017, the Canadian Court approved a settlement agreement between the Debtor and Venezuela pursuant to which the Debtor would receive certain payments from Venezuela; however, Venezuela failed to fulfill the terms of the agreement.

14. On September 10, 2018, the Debtor entered into an amended settlement agreement with Venezuela (the "Amended Settlement Agreement"), pursuant to which Venezuela agreed to pay approximately $1.265 billion to the Debtor, including an initial payment of $425 million. On September 17, 2018, the Canadian Court approved the Amended Settlement Agreement.

[6] Recognition by this Court of the Order entered by the Canadian Court granting a ninth extension of the stay to November 6, 2020 and approving the Thirteenth Amendment to the DIP Credit Agreement was not sought by the Foreign Representative. In addition, recognition by this Court of the Order entered by the Canadian Court granting an eleventh extension of the stay to November 5, 2021 and approving the Fifteenth Amendment to the DIP Credit Agreement has not been sought by the Foreign Representative.

OBJECTION

A. The Motion Seeks Relief Outside of the Scope of Chapter 15 of the Bankruptcy Code and Should Therefore be Denied

15. As noted by the Supreme Court in Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., in approaching questions of statutory interpretation courts "begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" 530 U.S. 1, 6, 120 S. Ct. 1942, 1947, 147 L. Ed. 2d 1 (2000) (quoting Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). Accordingly, where a statute's language is plain, "the sole function of the courts is to enforce it according to its terms." United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S. Ct. 1026, 1030, 103 L. Ed. 2d 290 (1989). Based on a review of the plain language of applicable provisions of the Bankruptcy Code, there is no statutory basis for granting Movant the relief requested in the Motion, which should therefore be denied.

i. There is no statutory basis for the appointment of an examiner in a Chapter 15 case, except at the request of a foreign representative.

16. Movant asserts that the Court may, or is required to, appoint an examiner under sections 105(a), 1104, 1129, 1501(a)(4), 1505, 1522(c), 1526, and 1527 of the Bankruptcy Code. Objection, ¶ 14. However, certain of these sections are inapplicable in a Chapter 15 case, and none authorizes the Court to appoint an examiner upon the Movant's request.

17. First, sections 1104 and 1129 of the Bankruptcy Code only apply in a Chapter 11 case. 11 U.S.C. § 103(g) ("Except as provided in section 901 of this title, subchapters I, II, and III of chapter 11 of this title apply only in a case under such chapter"). The Court cannot appoint an examiner under either of those sections because they are inapplicable to this proceeding.

18. Next, section 1501(a)(4) of the Bankruptcy Code merely states that one of the purposes of Chapter 15 of the Bankruptcy Code is the "protection and maximization of the value of the debtor's assets;" it does not authorize the Court to grant any relief.

19. Section 1505 of the Bankruptcy Code provides that "[a] trustee or another entity (including an examiner) may be authorized by the court to act in a foreign country on behalf of an estate created under section 541." While this section allows the Court to authorize a duly appointed examiner to take certain actions, it does not authorize the Court to ***appoint*** an examiner.

20. Likewise, section 1522 of the Bankruptcy Code does not authorize the appointment of an examiner. Subsection (a) of section 1522 of the Bankruptcy Code provides:

> (a) The court may grant relief ***under section 1519 or 1521***, or may modify or terminate relief under subsection (c), ***only if*** the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.

11 U.S.C. § 1522(a) (emphasis added). As highlighted here, this subsection limits the Court's discretion to grant relief under sections 1519 or 1521 of the Bankruptcy Code, or modify any such relief under section 1522(c) of the Bankruptcy Code, but it does not independently authorize the Court to grant any relief. And, importantly, sections 1519 and 1522 of the Bankruptcy Code only permit the Court to grant the relief specified therein "at the request of the foreign representative." *See* 11 U.S.C. §§ 1519(a); 1521(a), (b), & (c). Subsections (b) and (c) of section 1522 of the Bankruptcy Code similarly refer to relief previously granted – at the request of a foreign representative - under sections 1519 or 1521:

> (b) The court may subject relief ***granted under section 1519 or 1521***, or the operation of the debtor's business under section 1520(a)(3), to conditions it considers appropriate, including the giving of security or the filing of a bond.
>
> (c) The court may, at the request of the foreign representative or an entity ***affected by relief granted under section 1519 or 1521***, or at its own motion, modify or terminate ***such relief***.

11 U.S.C. § 1522(b) & (c) (emphasis added). Lastly, subsection (d) of section 1522 provides:

> (d) Section 1104(d) shall apply to the appointment of an examiner under this chapter. Any examiner shall comply with the qualification requirements imposed on a trustee by section 322.

This subsection (by reference to sections 1104(d) and 322 of the Bankruptcy Code) addresses the qualifications of a duly appointed trustee or examiner and circumstances in which one is unable to fulfill its mandate; it does not authorize the Court to appoint an examiner.

21. Continuing on, sections 1526 and 1527 of the Bankruptcy Code address the means of cooperation and communication amongst the Court, the foreign court or foreign representative, and any entity authorized by the Court to act in a Chapter 15 case, including a trustee or examiner. *See* 11 U.S.C. 1526 & 1527. Again, these sections would govern the conduct of a duly appointed examiner, but they do not authorize the Court to appoint one.

22. The only sections of Chapter 15 of the Bankruptcy Code that authorize the Court to appoint an examiner are 1519 and 1521, but, as noted above, in each case the Court may do so only "at the request of the foreign representative." 11 U.S.C. §§ 1519(a); 1521(a), (b), & (c). Interpreting section 1519 or 1522 to allow ***Movant*** to request the appointment of an examiner is contrary to the plain language of those provisions and would render the words "at the request of the foreign representative" superfluous. See Rea v. Federated Invs., 627 F.3d 937, 941 (3d Cir. 2010) ("We will not contravene congressional intent by implying statutory language that Congress omitted . . . Nor will we interpret statutory language in a way that would render any part thereof superfluous.") (internal citations omitted).

23. Lastly, in light of the foregoing, Movant cannot rely on section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code provides, in relevant part, that the Court may "issue any order, process, or judgment that is necessary or appropriate to carry out the

provisions of this title." 11 U.S.C. § 105(a). Section 105(a) of the Bankruptcy Code "does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code."[7] As the Supreme Court noted in Law v. Siegel, section 105(a) "confers authority to 'carry out' the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits. That is simply an application of the axiom that a statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere."[8]

24. Through sections 1519 and 1522 of the Bankruptcy Code, Congress provided the bankruptcy courts with authority to grant specified relief in Chapter 15 cases and expressly provided that such relief could be granted only upon the request of a foreign representative. The Foreign Representative respectfully submits that this limitation is clear and was deliberate, as it accords with the principles of comity and respect for foreign judgments that underlie Chapter 15. The Motion, if granted, would contravene these principles (in addition to the plain language of the Bankruptcy Code) by allowing the Movant to seek relief in this Court that could significantly impact the Canadian Proceeding because he is dissatisfied with court-approved developments therein. This is not the role that Congress envisioned for bankruptcy courts in a Chapter 15 case where the court has recognized the foreign proceeding as a foreign main proceeding, and thus the requested relief is neither necessary nor appropriate to carry out the provisions of the Bankruptcy Code.

[7] Law v. Siegel, 571 U.S. 415, 421, 134 S. Ct. 1188, 1194, 188 L. Ed. 2d 146 (2014) (quoting 2 Collier on Bankruptcy ¶ 105.01[2], p. 105–6 (16th ed. 2013)).

[8] Id. (citations omitted).

ii. There is no basis in Chapter 15 of the Bankruptcy Code for the appointment of counsel to represent the Crystallex shareholders.

25. Movant asks the Court to appoint legal counsel to represent the Debtor's shareholders under section 105(a) of the Bankruptcy Code.

26. Again, section 105(a) does not permit the Bankruptcy Court to override the specific mandates of other Bankruptcy Code sections, and it must only be used as necessary and appropriate to carry out other provisions of the Bankruptcy Code. As noted above, Congress specifically enumerated the forms of relief the bankruptcy court is permitted to grant in a Chapter 15 case and upon whose request such relief may be granted. Movant has not, and cannot, point to any provision in Chapter 15 that contemplates a bankruptcy court's appointment of, effectively, an official committee of equity security holders at the request of an individual shareholder.

27. Moreover, there is already a committee of equity security holders (the "Ad Hoc Committee of Shareholders") with independent legal counsel that has been active in the Canadian Proceeding, including by raising therein many of the same claims Movant asserts in the Motion. See, e.g., *Factum of Ad Hoc Committee of Shareholders of Crystallex International Corporation (Motion of the DIP Lender),* attached hereto as Exhibit B, at ¶ 9 ("The point of the Shareholders Variance Motion is to permit the Shareholders Committee to commence proceedings by way of an action against Crystallex and Tenor . . . to reduce or eliminate certain additional compensation . . . granted to Tenor in relation to its DIP loans through assignments of the Net Arbitration Proceeds …"); and ¶ 10 ("Ultimately the Shareholders Variance Motion and the Shareholders Claim are intended to redress a situation in which members of the Shareholders Committee have

seen their interest in Crystallex and the approximately $1.4 billion award . . . diluted. The balance of the Net Proceeds has been taken by Tenor through its DIP lending arrangements.").[9]

28. The Ad Hoc Committee of Shareholders also moved in the Canadian Proceeding for official committee status, and the Canadian Court denied that motion as well.[10]

29. For the foregoing reasons, Movant's request for appointment of independent counsel to represent the Debtor's shareholders should also be denied.

B. The Motion Should Also be Denied Because the Relief Requested Contravenes the Principles of Comity and Respect for Foreign Judgments Underlying Chapter 15 of the Bankruptcy Code and is Unnecessary

30. Assuming there is a statutory basis to grant it, the Motion should be denied because the relief requested contravenes the policies and principles underlying Chapter 15 of the Bankruptcy Code and is, in any event, unnecessary.

31. Congress enacted Chapter 15 of the Bankruptcy Code to "incorporate the Model Law on Cross–Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency," and with the express objectives of "cooperation between United States courts, trustees, examiners, debtors and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor's assets; and the facilitation of the rescue of financially troubled businesses." In re SPhinX, Ltd., 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006), aff'd, 371 B.R. 10 (S.D.N.Y. 2007); 11 U.S.C. § 1501(a)(1)-(5).

[9] The Shareholders Variance Motion was dismissed by the Canadian Court and the Ontario Court of Appeal dismissed the shareholders' motion for leave to appeal.

[10] A copy of the Ad Hoc Committee of Shareholders' motion for committee status is attached hereto as Exhibit C.

Thus, "a central tenet of Chapter 15 is the importance of comity in cross-border insolvency proceedings." In re Cozumel Caribe, S.A. de C.V., 482 B.R. 96 (Bankr.S.D.N.Y.2012). [11]

32. In contravention of these policies and principles, Movant requests the Court's assistance in his efforts to re-litigate, or collaterally attack, the CCAA Financing Order, certain amendments to the DIP Credit Agreement, the Amended Settlement Agreement, and other orders, all of which were approved by the Canadian Court and (with limited exceptions) recognized by this Court. *See, e.g.*, Objection at ¶ 5 (asserting challenge to the Mechanics of Distribution approved via the DIP Order and DIP amendments); ¶¶ 23-29 (expressing dissatisfaction with the terms of the Debtor's court-approved DIP financing); ¶¶ 30-33 (asserting that certain terms of the Debtor's court-approved DIP financing constitute fraudulent transfers and tax evasion); ¶¶ 34-35 (asserting that court-approved settlement agreement was a misappropriation of estate assets); ¶¶ 36-38 (taking issue with negotiated compromise approved by Canadian Court in connection with standstill agreement); ¶¶ 39-40 (asserting that court-approved settlement agreement constituted breach of duties of care and loyalty by Debtor's board of directors); ¶¶ 41-42 (asserting fraudulent misrepresentations in connection with court-approved DIP financing); ¶¶ 43-46 (expressing dissatisfaction with certain terms of court-approved settlement agreement). And, in fact, Movant admits that he is now seeking relief in this Court because he has been unable to obtain the "review and redress" he desires in the Canadian Proceeding. Objection, ¶ 65.

33. Of course, bankruptcy courts in Chapter 15 cases need not merely accept any judgment or order entered in a foreign main proceeding and, as Movant notes, may refuse to recognize and enforce orders under certain circumstances. See Objection, ¶ 64. But, those

[11] Webster's dictionary defines "comity of nations" as "the courtesy and friendship of nations marked especially by mutual recognition of executive, legislative, and judicial acts."

circumstances are not present here. First, this Court has already recognized nearly all of the orders Movant takes issue with in the Motion. Moreover, the cases cited by Movant concern orders or judgments described as "repugnant to public policy," "prejudicial to the interests of the United States," and "manifestly contrary to the public policy of the United States," none of which are remotely close to describing the relief that has been granted in the Canadian Proceeding. And even assuming any orders of the Canadian Court granted relief unavailable in the United States (and Movant has not demonstrated as such), as noted by the court in Vitro, "[g]iven Chapter 15's heavy emphasis on comity, it is not necessary, nor to be expected, that the relief requested by a foreign representative be identical to, or available under, United States law."

34. In light of the foregoing, the Motion conflicts with the principles of comity and cooperation by asking this Court to second-guess the judgment of the Canadian Court and the Monitor appointed to oversee the Canadian Proceeding (as well as re-visit its own rulings recognizing orders of the Canadian Court) where there is no credible basis for concluding that any relief granted by the Canadian Court would be prejudicial to the United States or manifestly contrary to its public policy. In further contravention of the aforementioned principles, the relief requested would cause inefficiency and uncertainty by introducing another court-appointed entity, in addition to the Monitor, to oversee and report upon these cross-border proceedings, leading to duplication of effort and potentially conflicting positions with respect to matters before the Canadian Court and this Court.

35. Lastly, aside from having no basis in law or fact, the relief requested in the Motion is simply unnecessary. As noted above, there is a represented committee of equity security holders that has been active in the Canadian Proceeding, and it has already asserted before the Canadian Court many of the same claims made by Movant in the Motion. Further, there is a court-appointed,

neutral party charged with monitoring the proceeding and reporting to the Canadian Court and interested parties on its progress - which is, in fact, doing so, as demonstrated by the 36 detail reports the Monitor has filed in the Canadian Proceeding to-date. If the Debtor were not acting appropriately, as Movant alleges, the Monitor, which has a duty to the Canadian Court as its officer, would have reported as such. To the contrary, however, the Monitor's reports have contained statements that the Debtor is making progress in the Canadian Proceeding and has acted in good faith. See, e.g., Exhibit A, ¶ 65 ("The Monitor is of the view that the Applicant has made progress and is continuing to act in good faith and with due diligence.").

CONCLUSION

WHEREFORE, the Foreign Representative respectfully requests that the Court deny the Motion and grant such other and further relief as it deems just and proper.

Dated: August 13, 2021
Wilmington, Delaware

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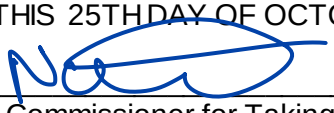
Counsel to the Foreign Representative

THIS IS EXHIBIT "Q" REFERRED TO IN THE AFFIDAVIT OF ROBERT FUNG, SWORN BEFORE ME THIS 25TH DAY OF OCTOBER, 2021.



A Commissioner for Taking Affidavits
NATALIE RENNER

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 15
Crystallex International Corporation[1]	:	Case No. 11-14074 (LSS)
Debtor in a Foreign Proceeding.	:	**Ref. Docket No. 328, 339 & 340**
	:	**Hearing Date: TBD[2]**

FOREIGN REPRESENTATIVE'S SUPPLEMENTAL OBJECTION TO MOTION FOR AN ORDER DIRECTING THE APPOINTMENT OF AN EXAMINER AND INDEPENDENT COUNSEL FOR THE SHAREHOLDERS

Crystallex International Corporation, in its capacity as the Foreign Representative for the Debtor in the Canadian Proceeding, respectfully submits this supplemental objection (this "Supplemental Objection") to the *Motion for an Order Directing the Appointment of an Examiner and Independent Counsel for the Shareholders* [Docket No. 328] (the "Motion"), filed by Adelso Adrianza (the "Movant"), and in support of the Foreign Representative's objection thereto [Docket No. 339] (the "Objection").[3] In support of this Supplemental Objection, the Foreign Representative respectfully represents as follows:

PRELIMINARY STATEMENT

1. At the August 20th Hearing, the Court directed the Foreign Representative to submit supplemental briefing regarding the Court's authority to grant the relief requested in the Motion in light of its ruling in Better Place, and certain decisions cited therein, and to provide

[1] The last four digits of the Debtor's United States taxpayer identification number are 2628. The Debtor's executive headquarters are located at 8 King Street East, Suite 1201, Toronto, Ontario, M5C 1B5, Canada.

[2] By agreement, the Foreign Representative's deadline to submit a supplemental objection is September 20, 2021 and Mr. Adrianza's deadline to submit a response is October 11, 2021.

[3] Capitalized terms used but not otherwise defined herein shall have the meanings given to such terms in the Objection.

additional information concerning, among other things, the Debtor's DIP financing and the participation of the Debtor's shareholders in the CCAA Proceeding.

2. The Foreign Representative respectfully submits that the Fourth Circuit's ruling in Jaffe (cited in Better Place) is distinguishable and maintains there is no statutory basis for the Court to appoint an equity committee or examiner upon the Movant's request.

3. If, however, the Court determines that it does have authority to grant the Motion, it should nonetheless be denied under the balancing test described in Jaffe and Better Place. The Debtor's shareholders have had (and continue to have) sufficient notice and opportunity to participate in the Canadian Proceeding. However, for whatever reason, they failed or otherwise declined to participate when the orders they complain of were noticed, considered, and approved by the Canadian Court. Indeed, the Foreign Representative is unaware of any effort by the Movant to participate in the Canadian Proceeding aside from his letter-writing campaign, which the Movant is or should be aware is not the proper procedural avenue for addressing issues before the Canadian Court (or this Court). There is no justification to upend any relief granted by the Canadian Court or this Court, the majority of which was approved many years ago, particularly given the shareholders' failure to take appropriate action, at the appropriate time.

4. Further, in 2017 and 2018, well after the Debtor's DIP financing and other complained-of orders had been approved, an ad hoc group of the Debtor's shareholders requested, by separate motions, that the Canadian Court (a) grant them official committee status and (b) reconsider certain of its prior orders and permit the shareholders to pursue claims and legal theories based on the same unfounded and disputed allegations levied in the Motion. The Canadian Court denied both motions. There has been no material change in circumstances since, and there is otherwise no reason to revisit the Canadian Court's decisions.

5. To the extent the Movant ultimately seeks to overturn all or any portion of the DIP financing orders – which were entered based on the facts and circumstances that existed at that time, and upon which the parties have relied for years - it would "have a serious impact on the credit arrangements and would throw the CCAA proceedings into chaos".[4] And in any event, if the Motion were granted, it would have a substantial negative effect on the Debtor's creditors and other stakeholders by creating unnecessary costs and inefficiencies that would impair the Debtor's restructuring efforts.

6. For these and other reasons discussed more fully below and in the Objection, the Court should deny the Motion.

BACKGROUND

A. General Background

7. On December 23, 2011 (the "Petition Date"), the Debtor commenced the Canadian Proceeding and the Canadian Court entered the Initial Order, pursuant to the CCAA, providing various forms of relief thereunder. Also on the Petition Date, the Foreign Representative commenced this proceeding by filing a verified petition on behalf of the Debtor, pursuant to sections 1504 and 1515 of the Bankruptcy Code, seeking recognition by this Court of the Canadian Proceeding as a "foreign main proceeding" under chapter 15.

8. Pursuant to the Initial Order, the Canadian Court appointed the Monitor pursuant to the CCAA. Generally, the Monitor is an officer of the Canadian Court charged with overseeing the Canadian Proceeding in a neutral fashion and reporting to the Canadian Court and stakeholders with respect to various aspects of the Debtor's restructuring efforts. To-date, the Monitor has filed

[4] See Exhibit G at ¶ 23. In addition, the relief requested in the Motion, if granted, could in and of itself result in a default under the Debtor's DIP facility, which would have a substantial negative impact on the Debtor's stakeholders. And notably, no other constituency supports the Motion.

36 reports in the Canadian Proceeding, the most recent of which was filed on May 3, 2021 and was attached to the Objection as Exhibit A. As noted in the Objection, in its reports, the Monitor has consistently found that the Debtor is making progress in its restructuring efforts and proceeding in good faith.

9. On January 20, 2012, the Court entered the Recognition Order [Docket No. 44]. Pursuant to the Recognition Order, the Court (a) granted recognition of the Canadian Proceeding as a "foreign main proceeding" under section 1517 and (b) enforced in full the Initial Order on a permanent basis in the United States, including, without limitation, any extensions of the Stay Period granted by the Canadian Court.

B. The Financing Orders

10. On April 26, 2012, the Court entered the U.S. Financing Order [Docket No. 111], which, among other things, (a) recognized and enforced the CCAA Financing Order, including any amendments thereto, approving the DIP Credit Agreement (as defined in the CCAA Financing Order) and (b) granted to, and for the benefit of, the DIP Lender (as defined in the CCAA Financing Order) certain protections afforded by the Bankruptcy Code.

11. Some of the key features of the Debtor's DIP financing were: (a) an initial US $36 million principal amount loan, which was subsequently increased following several additional advances to US $75,733,333.33 of principal amount, such that the DIP loan principal and interest balance as of July 31, 2021 was approximately US $162 million; (b) at the time the DIP Financing Agreement was approved, the DIP Lender had also earned 35% of the Net Arbitration Proceeds (as defined in the DIP Financing Agreement, and also referred to as the "NAP"), which was later increased to 88.274% following additional DIP loan advances; (c) the Debtor's board would be comprised of two Debtor directors, two nominees of the DIP Lender, and an independent director

selected by mutual agreement of the Debtor and the DIP Lender; and (d) Exhibit F to the DIP Financing Agreement set forth the court-approved waterfall to govern distributions of claims against the Debtor (the "Mechanics of Distribution").[5] Accordingly, the Mechanics of Distribution formed part of what the Canadian Court approved when it approved the DIP financing by issuing the CCAA Financing Order as recognized by the U.S. Financing Order.

12. As noted in the Objection, an ad hoc committee of the Debtor's senior unsecured noteholders (the "Noteholder Committee") vigorously opposed the Debtor's DIP financing on a number of grounds, including on the basis that the DIP Lender had been given control over the Debtor and its restructuring. The Canadian Court carefully considered and then dismissed the Noteholder Committee's opposition, and the Noteholder Committee appealed that decision. On June 13, 2012, the Ontario Court of Appeal dismissed the Noteholder Committee's appeal and upheld approval of the DIP Financing.

13. Without the DIP financing, the Debtor would not have been able to pursue the arbitral award and, upon successfully achieving it after five years of arbitral proceedings, advance the enforcement of it. The award and all recoveries achieved on it to date, are the Debtor's only asset.

14. As requested by the Court, attached hereto as Exhibit A is a chart detailing the various amendments to the CCAA Financing Order and DIP Financing Agreement, including: (a) any incremental advances made by the DIP Lender; (b) the consideration provided to the DIP Lender in exchange therefor; and (c) whether the applicable CCAA order has been recognized by

[5] At the August 20th Hearing, the Court asked whether the Debtor would be required to obtain Canadian Court approval prior to making any distributions under the Mechanics of Distribution. The Foreign Representative understands that the Debtor must make the appropriate application as Canadian Court approval of any material distributions will be required by both the Debtor's board of directors and the Monitor.

this Court.[6] Also as requested, the Debtor's cash balance, as of August 31, 2021, is approximately [redacted]

C. The MIP and the NAP Transfer Agreement Order

15. On April 16, 2012, the Canadian Court entered an order approving a Management Incentive Plan (the "MIP"), which provided incentive-based compensation for certain of the Debtor's executives. The MIP provides for a pool of money consisting of a percentage of the NAP after payment of certain prior claims. The executives' recoveries under the MIP are capped by a percentage recovery of the Debtor's shareholders (the "Residual Pool").

16. As a result of the Second, Third and Fourth Amendments to the CCAA Financing Order, pursuant to which the DIP Lender advanced approximately $40 million in additional financing to the Debtor, as set forth on Exhibit A hereto, the DIP Lender's percentage participation in the NAP increased with a corresponding reduction in the Residual Pool. Accordingly, the compensation payable to the debtor's executives under the MIP also decreased.

17. In light of the foregoing and considering the critical role of the Debtor's executives in the pursuit of recovery against Venezuela and the Debtor's restructuring efforts, the Debtor, the DIP Lender, and the executives entered into an agreement (the "NAP Transfer Agreement"), in conjunction with the Fourth Amendment to the CCAA Financing Order, pursuant to which the DIP Lender transferred a portion of its additional compensation to be received pursuant to the Fourth Amendment to the executives.

[6] Every motion in the Canadian Proceeding is served on the service list maintained for the proceeding, and any interested party can request in writing at any time that they be placed on the service list. Gowling WLG (Canada) LLP and Blaney McMurtry, attorneys for the members of the Shareholder Committee (defined below), remain on the service list to this day. The service list can be found on the Monitor's website.

18. The NAP Transfer Agreement was approved by the Canadian Court by order dated December 18, 2014 (the "NAP Transfer Agreement Order").[7]

19. On February 3, 2015, the Court entered an order recognizing the NAP Transfer Agreement Order [Docket No. 161].

D. The Amended Settlement Agreement

20. As of the Petition Date, the Debtor's primary asset consisted of an arbitral claim for US $3.8 billion dollars against the Bolivarian Republic of Venezuela for breach of an exclusive mining contract. The primary purpose of the Debtor's DIP financing was to enable the continuation of this arbitral proceeding, including seeking recovery of any award or judgment, and to otherwise fund the Debtor's restructuring efforts.

21. On November 24, 2017, the Canadian Court approved a settlement agreement between the Debtor and Venezuela pursuant to which the Debtor would receive certain payments from Venezuela; however, Venezuela failed to fulfill the terms of the agreement.

22. On September 10, 2018, the Debtor entered into an amended settlement agreement with Venezuela (the "Amended Settlement Agreement"), pursuant to which Venezuela agreed to pay approximately $1.265 billion to the Debtor, including an initial payment of $425 million. On September 17, 2018, the Canadian Court approved the Amended Settlement Agreement.

23. The Debtor's collection efforts under the Amended Settlement Agreement are ongoing.

[7] A copy of the NAP Transfer Agreement Order is attached hereto as Exhibit B.

E. Shareholder Participation in the Canadian Proceedings

24. On October 29, 2015, an ad hoc group of the Debtor's shareholders (the "Shareholder Committee"),[8] through counsel, provided notice of a motion with the Canadian Court seeking official committee status (the "Committee Appointment Motion"). On April 4, 2016, the Shareholder Committee filed its factum in support of the Committee Appointment Motion. On April 6, 2016, the Debtor and the DIP Lender each filed objections to the Committee Appointment Motion and, on April 8, 2016, the Shareholder Committee filed a reply.[9]

25. On April 18, 2016, following a hearing held on April 11, 2016, the Canadian Court issued a written opinion denying the Committee Appointment Motion.[10]

26. In December of 2017, the Shareholder Committee, through counsel, provided notice of a motion (the "Committee Variance Motion") seeking, among other things, relief from stay to commence and continue to pursue remedies for certain alleged breaches of the Canadian criminal code relating to allegedly usurious interest rates in respect of the DIP financing, as well as for the "variance" of certain orders that were approved years prior by the Canadian Court, including various DIP financing orders and the NAP Transfer Agreement Order.

27. On February 22, 2018, the Debtor's Board of Directors and the DIP Lender each filed a response to the Committee Variance Motion, including a request that the Canadian Court dismiss the motion and order the Shareholder Committee to pay costs in connection therewith. On

[8] The Shareholder Committee represented the interest of over 200 of the Debtor's shareholders who together held as much as 30% of the Debtor's common shares.

[9] Copies of the foregoing pleadings are attached hereto as Exhibit C. Given the volume of the attachments, certain related documents, including notices and supporting affidavits, as applicable are not attached hereto. All related documents may be accessed at the Monitor's website, which is linked below.

[10] A copy of the Canadian Court's written opinion is attached hereto as Exhibit D.

March 8, 2018, the Shareholder Committee filed a reply in support of the Committee Variance Motion. On March 27, 2018, the DIP Lender filed a reply.[11]

28. A hearing to consider the Committee Variance Motion was held on March 28, 2018. On May 22, 2018, the Canadian Court issued a written opinion indicating it would dismiss the Committee Variance Motion. On June 11, 2018, it entered an order dismissing the Committee Variance Motion in its entirety and directing certain Shareholder Committee members, jointly and severally, to reimburse the DIP Lender, the Debtor and the Debtor's Board of Directors for their respective costs incurred in connection therewith (in the amount of $50,000 in the aggregate).[12]

29. The Shareholder Committee appealed to the Court of Appeal for Ontario, but the appeal was dismissed.[13] Among other things, the appeals court found that: (a) the Canadian Court had properly determined that there was no "slip or error in the expression of the [challenged orders]" and that the Shareholder Committee had not "alleged any fraud or newly discovered facts" in connection therewith; (b) that the Shareholder Committee members were provided notice of the complained-of orders, but "took no steps to participate and failed to attend the hearings in 2013 and 2014 when the orders were issued and granted," and had failed to take any steps to be placed on the service list for the Canadian Proceeding despite being aware of it since at least 2012; and (c) that there was no basis to interfere with the Canadian Court's conclusion that varying the

[11] Copies of the foregoing pleadings are attached hereto as Exhibit E. Given the volume of the attachments, certain related documents, including notices and supporting affidavits, as applicable are not attached hereto. All related documents may be accessed at the Monitor's website, which is linked below.

[12] Copies of the Canadian Court's opinion and the June 11, 2018 Order are attached hereto as Exhibit F.

[13] A copy of the Court of Appeal for Ontario's order is attached hereto as Exhibit G.

financing orders would "have a serious impact on the credit arrangements and would throw the CCAA proceedings into chaos." See Exhibit G.[14]

30. In addition, the Movant has sent letters to this Court, the Canadian Court, the Delaware District Court, the Monitor, and perhaps others, making the same or substantially similar disputed allegations as those set forth in the Motion and Reply. The Movant has previously been advised, in writing by the Debtor, that the proper way to address issues in the Canadian Proceeding is to bring a motion and that letters to the Canadian Court, the Monitor, and others do not form a part of the court's record.

31. Further still, as noted in the Movant's reply, the Movant has written the Office of the Superintendent of Bankruptcies (the "OSB") in Canada to allege ethics violations by the Monitor. See Reply at ¶16. After conducting an investigation, the OSB responded to the Movant stating that it found no such violations had occurred. More specifically, the OSB found, among other things, that the Monitor: (a) had "observed and participated as appropriate in the CCAA proceedings and provided the court with its independent views, analysis and advice"; (b) "brought substantive matters before the court for approval and kept the court aware of competing views amongst stakeholders and Crystallex"; (c) had "met its responsibilities under the CCAA" and had not been "compromised" by Crystallex as the Movant alleged; (d) had redacted portions of its reports "consistent with the CCAA Initial Order"; (e) had served and published notices to inform stakeholders of the CCAA proceedings and maintained a publically available website where

[14] As noted by the appeals court, the Canadian Court dismissed the Shareholder Committee's claims that the DIP Financing Agreement contained "criminal" interest rate provisions, finding the opposite. Id. at ¶ 15 ("Finally, [the Canadian Court] stated that the claims regarding the criminal interest rate were bound to fail because the DIP financing agreements did not require, and in fact prohibited, the payment of interest at a criminal rate.").

information regarding the proceedings could be accessed;[15] and (f) has "administered the Crystallex proceedings in accordance with the CCAA and the Code of Ethics for trustees."[16] In addition, the OSB advised the Movant that he may wish to consult with counsel and that "[a]s CCAA processes are court driven, all on-going matters and concerns pertaining to the administration of a CCAA filing must be addressed by the court." See Exhibit H.

E. The August 20, 2021 Hearing

32. On August 20, 2021 (the "August 20th Hearing"), the Court held a hearing to consider the Motion and all pleadings related thereto. At the conclusion of the hearing, the Court requested that the parties submit supplemental briefing regarding, among other things, the Court's authority to grant the relief requested in the Motion in light of the Court's ruling in In re Better Place, Inc., Case No. 13-11814 (Bankr. D. Del.) (Feb. 28, 2018) ("Better Place") and the authorities cited therein, including Jaffe v. Samsung Elecs. Co., 737 F.3d 14 (4th Cir. 2013) ("Jaffe").

SUPPLEMENTAL OBJECTION

A. The Motion Seeks Relief Outside of the Scope of Chapter 15 of the Bankruptcy Code and Should Therefore be Denied

33. In determining that it could grant the relief requested in Better Place, though ultimately declining to do so, the Court relied, in part, on the Fourth Circuit's opinion in Jaffe. See Better Place, ¶¶ 23-24.

34. The Jaffe decision is distinguishable and, as result, the Foreign Representative maintains that there is no statutory basis for granting the relief requested in the Motion.

[15] The Monitor's website may be accessed via the following web address: www.ey.com/ca/crystallex

[16] A copy of the OSB's letter to the Movant is attached hereto as Exhibit H.

35. In Jaffe, the Fourth Circuit upheld a bankruptcy court order conditioning certain relief granted to the foreign representative under section 1521 of the Bankruptcy Code – namely, permitting the foreign representative to administer the debtor's US patents - on the application of section 365(n) of the Bankruptcy Code. Jaffe, 737 F.3d at 32. The bankruptcy court in Jaffe found that requiring the application of section 365(n) in that case was necessary to sufficiently protect the interests of U.S. patent licensees, and that the failure to do so would be manifestly contrary to the fundamental U.S. policy of promoting technological innovation. Id., at 18.

36. As the Court noted at the August 20th Hearing and in Better Place, the Fourth Circuit determined that in granting any discretionary relief under section 1521 of the Bankruptcy Code, bankruptcy courts must consider "the question of sufficient protection under § 1522(a)." Id., at 26; Better Place, at ¶ 23, fn. 41. And, while it was true that the foreign representative in Jaffe had not specifically requested the relief at issue (that is, any relief under section 365 of the Bankruptcy Code), it ***had requested*** other relief pursuant to section 1521, which the Fourth Circuit determined triggered the bankruptcy court's section 1522(a) analysis. Jaffe, 737 F.3d at 26.

37. The Jaffe decision is distinguishable for several reasons.

38. ***First***, unlike in Jaffe, no specific relief requested by, or granted to, the Foreign Representative triggered the filing of the Motion or requires the Court to conduct a "sufficient protection" analysis under section 1522(a). Rather, the Movant is seeking affirmative relief, untethered to any specific relief requested by the Foreign Representative, because he is generally dissatisfied with court-approved developments in the Canadian Proceeding and because the Canadian Court has declined to grant substantially similar relief when presented with the same disputed allegations set forth in the Motion. Stated differently, the Movant is forum shopping. And particularly in light of the role of this Court in a chapter 15 proceedings, the Court should not

countenance the Movant's efforts to end-run the foreign main proceeding. Section 1522(a) of the Bankruptcy Code was not intended to allow parties in interest to seek the broad affirmative relief requested by the Movant, nor is it a broad grant of authority along the lines of section 105(a) of the Bankruptcy Code; rather, it was intended to guide the Court's analysis if and when it was asked to grant relief to a foreign representative under sections 1519 and 1521.[17]

39. ***Second***, Jaffe involved creditors whose property interests were directly impacted by specific relief requested by the foreign representative. Namely, the foreign representative requested authority to control and administer the US patents, and the record reflected that the foreign representative had taken steps to invalidate certain US patent licenses under German law. In fact, the issue in Jaffe was originally brought to the bankruptcy court ***on the foreign representative's request*** to amend a prior order granting it relief under section 1521 to remove references to section 365 of the Bankruptcy Code and thereby preclude arguments by the affected patent licensees that they were protected by section 365(n). See Jaffe, 737 F.3d at 20 ("The letters from Samsung and Elpida prompted Jaffé to move to amend the bankruptcy court's July 22, 2009 Supplemental Order to delete entirely its reference to § 365). In Jaffe, the court was considering specific relief that had been granted to a foreign representative under section 1521 and, pursuant to section 1522(a) of the Bankruptcy Code, tailored such relief to protect directly impacted creditors ***in connection with that specific relief***.

[17] The Foreign Representative acknowledges that the Court may, on its own motion, modify or terminate relief it has granted under section 1519 or 1521 of the Bankruptcy Code, pursuant to section 1522(c) of the Bankruptcy Code. However, the Foreign Representative does not understand the Court to have made such a motion and it is not clear what relief would be the target of any such termination or modification. Further, the Jaffe decision did not address the scope of the Court's obligation (if any) to make such a motion or to reconsider prior orders where no further relief has been requested by the foreign representative.

40. Unlike in Jaffe, the Movant has not identified any specific relief requested by, or granted to, the Foreign Representative under section 1521 of the Bankruptcy Code from which he requires protection. Rather, the Movant has raised a slew of complaints with the Debtor's exercise of its business judgment and numerous orders that were approved many years ago by the Canadian Court, and has asked this Court to grant broad, generalized relief with no indication of how it would remedy any of the alleged issues. Thus, the Foreign Representative respectfully submits that section 1522(a), on which the Jaffe ruling centered, is inapplicable here.[18]

41. For the same reasons, the Movant has also not demonstrated that he is an "entity affected by" any specific relief that was granted to the Foreign Representative under section 1519 or 1521 of the Bankruptcy Code, or that the Court should "condition," "modify," or "terminate" any such relief pursuant to section 1522(b) or (c) of the Bankruptcy Code. While the Movant is a shareholder of the Debtor, that does not in and of itself establish that he has been affected by any of the various orders of which he complains, let alone and specific relief that has been granted to the Foreign Representative by this Court under sections 1519 or 1521 of the Bankruptcy Code. Nor has the Movant requested to modify or terminate any such relief.

42. ***Third***, the bankruptcy court in Jaffe had a clear statutory basis to impose the condition that it did. As noted above, the foreign representative in Jaffe sought authority to administer the debtor's US patents and, in connection therewith, was taking steps to invalidate

[18] Similarly, the United States Bankrupty Court for the Southern District of New York, in In re Cozumel Caribe, S.A. de C.V., was considering a specific request by a foreign representative (a motion to stay an adversary proceeding) and, pursuant to section 1522(a), placed conditions on the parties in connection with that specific relief. See 482 B.R. 96, 118 (Bankr. S.D.N.Y. 2012) (granting stay of adversary proceeding, but requiring the debtor and foreign representative to commence appropriate proceeding in foreign jurisdiction to determine parties interest in subject assets, within a certain time period, and to provide notice to the court and other interested parties in connection therewith).

certain US patent licenses under German law. Jaffe, 737 F.3d at 17. The bankruptcy court conditioned the foreign representative's ability to administer the US patents on the applicability of section 365(n) of the Bankruptcy Code, which demonstrates a clear Congressional intent to protect the rights of patent licensees, and limited the applicability of 365(n) to US patent licensees. Id. at 25, fn. 3. Accordingly, the bankruptcy court's order in Jaffe was plainly necessary, appropriate, and consistent with the policies and principles of the Bankruptcy Code, including the considerations of comity underlying Chapter 15.

43. Conversely, as detailed in the Objection, there is no language in the Bankruptcy Code that specifically provides for the appointment of an equity committee or examiner in a Chapter 15 case at the request of an individual shareholder. To the contrary, sections 1519 and 1521 of the Bankruptcy Code detail specific relief bankruptcy courts may grant in a Chapter 15 "at the request of the foreign representative." 11 U.S.C. 1519 & 1521. If, in a Chapter 15 case, such affirmative relief could be granted at the request of any party in interest, the limitation "at the request of the foreign representative" would be rendered superfluous, in contravention of fundamental principles of statutory construction. See Rea v. Federated Invs., 627 F.3d 937, 941 (3d Cir. 2010) ("We will not contravene congressional intent by implying statutory language that Congress omitted . . . Nor will we interpret statutory language in a way that would render any part thereof superfluous.") (internal citations omitted).[19]

[19] At the August 20th Hearing, the Movant argued that the provisions of Chapter 11 are applicable in a Chapter 15 case, citing In re Qimonda AG Bankr. Litig., 433 B.R. 547 (E.D. Va. 2010). But that case involved the applicability of section 365(n) of the Bankruptcy Code, not any provisions of Chapter 11, and is therefore inapposite. As the Court is aware, Chapter 3 of the Bankruptcy Code in generally applicable, while Chapter 11 is not. In Qimonda, the court was resolving an inconsistency between sections 103 and 1520 of the Bankrupty Code, as it pertains to the applicability of sections 362 and 365 of the Bankruptcy Code in Chapter 15 cases, by applying the "basic principle of statutory construction that when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision." Qimonda, 433 B.R. at 561 (citations omitted). There is no such conflict, however, between section 103(g) of the Bankruptcy Code – which specifically addresses the applicability of the provisions of Chapter 11 - and any provisions of Chapter 15. 11 U.S.C. 103(g) ("Except as

44. Also as detailed in the Objection, the relief requested would frustrate the policies and purposes underlying Chapter 15 of the Bankruptcy Code, whereas in Jaffe, the opposite was true. For one, the principle of comity would be frustrated, because the Movant is forum shopping; requesting relief that was already denied by the Canadian Court (and, where applicable, upheld on appeal) from this Court. The goals of efficiency and certainty in cross-border proceedings would be frustrated for the same reason, and because any examiner would serve largely, if not entirely, the same function as the Monitor, leading to unnecessary costs, inefficiency, and uncertainty.

45. For the foregoing reasons, the Foreign Representative respectfully submits that there is no basis under the Bankruptcy Code to grant the Motion, including under section 105(a).

B. The Motion Should be Denied Because the Balancing Test Set Forth in Better Place and Jaffe Clearly Favors the Debtor

46. If the Court determines, however, that it has authority to grant the Motion, it should nonetheless be denied under the balancing test described in Better Place and Jaffe.

47. According to the Fourth Circuit, section 1522(a) of the Bankruptcy Code requires the Court to undertake "a particularized balancing analysis that considers the 'interests of the creditors and other interested entities, including the debtor,' 11 U.S.C. § 1522(a), and . . . a weighing of the interests of the foreign representative [] in receiving the requested relief against the competing interests of those who would be adversely affected by the grant of such relief…." Jaffe, 737 F.3d at 29.

48. As noted above, the Movant has not identified any specific relief granted by this Court to the Foreign Representative under section 1519 or 1521 of the Bankruptcy Code from

provided in section 901 of this title, subchapters I, II, and III of chapter 11 of this title apply only in a case under such chapter").

which he requires protection. Instead, the Movant is seeking broad affirmative relief, presumably on the basis that prior orders of the Canadian Court have caused him prejudice and that he is unable to protect his interests without it. *See, e.g.*, Objection at ¶ 5 (asserting challenge to the Mechanics of Distribution approved via the DIP Order and DIP amendments); ¶¶ 23-29 (expressing dissatisfaction with the terms of the Debtor's court-approved DIP financing); ¶¶ 30-33 (asserting that certain terms of the Debtor's court-approved DIP financing constitute fraudulent transfers and tax evasion); ¶¶ 34-35 (asserting that the court-approved settlement agreement was a misappropriation of estate assets); ¶¶ 36-38 (taking issue with negotiated compromise approved by Canadian Court in connection with standstill agreement); ¶¶ 39-40 (asserting that the court-approved settlement agreement constituted breach of duties of care and loyalty by Debtor's board of directors); ¶¶ 41-42 (asserting fraudulent misrepresentations in connection with court-approved DIP financing); ¶¶ 43-46 (expressing dissatisfaction with certain terms of the court-approved settlement agreement).

49. Because the prejudice to the Debtor if the Motion were to be granted would significantly outweigh any harm to the Movant if it were not, the Motion should be denied.

50. First, the requested relief is not necessary to protect the Movant's interests.

51. An examiner would unnecessarily complicate and duplicate the efforts of the Monitor, a neutral party and officer of the Canadian Court, which is already overseeing the Debtor's operations and restructuring efforts and routinely reporting to the Canadian Court and interested parties on its progress. While the Movant may be dissatisfied that he has not gained traction with the Monitor by alleging the disputed "facts" set forth in the Motion that is not evidence that the Monitor has been derelict in its duties. In fact, there have been no credible

allegations that the Monitor is not fulfilling its duties, as demonstrated by (among other things) the OSB's complete dismissal of Movant's ethics complaint.

52. Moreover, the appointment of an examiner to "investigate" the misguided allegations in the Motion would be a bridge to nowhere. All of the orders of which the Movant complains are final and non-appealable. They were entered years ago based on the facts and circumstances that existed at that time and have been relied on by the parties for years, including by the DIP Lender in extending credit to fund the Debtor's restructuring efforts. As noted above, the same or substantially similar allegations were put before the Canadian Court in the Shareholder Committee's motions, both of which were denied after full briefing and a hearing (and, where applicable, upheld on appeal).

53. Similarly, there is no basis for the appointment of an official shareholders committee, as the Canadian Court previously determined. Again, the fact that the Shareholder Committee was unable to gain traction with the Canadian Court is not evidence that the Debtor's shareholders are unable to protect their interests, or that they have been deprived of due process; official shareholders committees are not appointed as a matter of course in Canada or in the United States. Moreover, the record reflects the Movant and other shareholders have had every opportunity to advance their interests, but have largely neglected to do so.[20] In fact, the Ontario Court of Appeals adopted the Canadian Court's finding that the shareholders did not appear and dispute the complained-of financing orders at the time they were considered and approved. See Exhibit G, at ¶ 20 ("None of the shareholders now represented by the Committee took any steps

[20] Like here, Court hearings in Canada have been conducted by Zoom in light of the ongoing pandemic. In addition, the Foreign Representative understands that the Movant has never requested to be added to the service list in the Canadian Proceeding, though some shareholders may have.

to be placed on the service list. They took no steps to participate and failed to attend the hearings in 2013 and 2014 when the orders in issue were granted. According to their own evidence, the shareholders knew of the CCAA proceeding since early 2012.").

54. Indeed, despite being advised of the proper manner in which to address issues with the Canadian Court, the Movant does not appear to have taken any procedurally appropriate action in the Canadian Proceeding outside of any participation in the Shareholder Committee efforts, opting instead to engage in a letter-writing campaign. The Movant's failure or unwillingness to address issues before the Canadian Court is not grounds to appoint an official equity committee in this Chapter 15 case, and it is not evidence that Movant is unable to protect his interests. To the contrary, the fact that the Movant's repeated complaints to the Monitor, the OSB, or any of the other entities or agencies he has contacted, have not spurred any action by those entities serve only to show that the Movant's unsubstantiated allegations of fraud, tax evasion, and other bad acts are unfounded. Appointing an official committee to continue to pursue those theories at the estate's expense would be a fruitless and unnecessary drain on the Debtor's resources.

55. Second, the relief requested, if granted, would significantly harm the Debtor's restructuring efforts. For one, it would require the Debtor's estate to bear the cost of an official shareholders committee and an examiner when, as noted above, neither is warranted under the facts and circumstances. Relatedly, appointing an examiner to perform similar functions to those the Monitor already performs as an officer of the Canadian Court would introduce unnecessary inefficiency.

56. Moreover, to the extent the Movant is asking or intends to ask the Court to revisit its prior financing orders, varying those would substantially and negatively impact the Debtor's restructuring efforts, as the Canadian Court previously determined. Those orders, as well as the

others of which Movant complains, were considered and approved in light of the facts and circumstances that existed at the time, and the DIP Lender has relied on them in continuing to extend credit to the Debtor to fund its restructuring efforts and pursuit of the arbitration award against Venezuela. Accordingly, to the extent the Movant (or any official committee) would seek to do so, having those orders unwound or "varied" could jeopardize the Debtor's DIP financing and, by extension, creditor recoveries.

57. For the foregoing reasons, the balance of harms weighs in favor of the Debtor and the Court should therefore deny the Motion.

CONCLUSION

WHEREFORE, the Foreign Representative respectfully requests that the Court deny the Motion and grant such other and further relief as it deems just and proper.

Dated: September 20, 2021
Wilmington, Delaware

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 15
CRYSTALLEX INTERNATIONAL CORP.	:	**Case No. 11-14074 (LSS)**
Debtor in a Foreign Proceeding.	:	**Hearing Date: TBD**
	:	**Ref. Docket No. 328, 339, 340 & 354**

RESPONSE TO THE FOREIGN REPRESENTATIVE'S SUPPLEMENTAL OBJECTION TO THE MOTION FOR AN ORDER DIRECTING THE APPOINTMENT OF AN EXAMINER AND INDEPENDENT COUNSEL FOR THE SHAREHOLDERS

Adelso Adrianza (the "Movant"), a shareholder of the debtor (the "Debtor"), Pro Se and on behalf of similarly situated U.S. shareholders (the "Shareholders") in the above-captioned Chapter 15 case, respectfully submits this response (the "Response") to the supplemental objections (the "Supplemental Objections") filed by the Foreign Representative (the "F.R.", D.I. No. 354) to the Movant's Motion to appoint an Examiner and Independent Legal Counsel for the Shareholders (D.I. No. 328).

PRELIMINARY STATEMENT

1. The Court adjourned the August 20, 2021, hearing to afford the F.R.'s Counsel the opportunity to further develop and support their position that this Court has no statutory authority to grant the relief requested in the Motion, and to provide information it deemed important to enable it to enable its fact-finding requirements. The information requested was:

   a. The Debtor's cash position,

   b. The DIP Financing steps that led to the DIP Lender being granted 88% of the NAP[1] as special compensation for the US$ 76 million DIP loan,

[1] All capitalized terms used but not defined herein have the meanings given to them in the Motion for An Order directing the Appointment of An Examiner and Independent Counsel for the Shareholders (DEBCC D.I. No. 328).

c. The CCAA Court order denying the appointment of the Ad Hoc Shareholders' Committee, and

d. The actions taken by the Debtor to inform its shareholders about the CCAA proceeding.

2. Before responding to the F.R.'s Supplemental Objections, it bears repeating the reasons for the Motion: it seeks to redress the harm to the Estate and the Shareholders, as its residual owners, through actions and omissions by the Self-interested DIP and Board of Directors (the "DIP/BOD") and the Controlling DIP Lender (the "DIP Lender"). The harm suffered by the Estate was caused by actions and omissions particularized in the Motion and involved:

a. Fraudulent Transfer of Tax Benefits,

b. Misappropriation, Misuse and Waste of Estate Property,

c. Illegal Post-petition Interest Payment on Unsecured Debt,

d. Breach of The Loyalty and Care Duties by a Self-interested BOD,

e. Fraudulent Misrepresentations,

f. Distributing the Estate's property using the MOD, which is in essence a structured dismissal that is not permissible under precedential U.S. case law (See *Czyzewski v. Jevic Holding Corp.*, No. 15-649, S. Ct., 2017 WL 1066259) and the Model Law.

THE FOREIGN REPRESENTATIVE'S SUPPLEMENTAL OBJECTIONS

The F.R.'s Supplemental Objections to the Motion are grounded in three main arguments:

3. I. The Court lacks statutory authority to grant the relief requested in the Motion, including under § 105(a), and persuasive case law is distinguishable. Further, the Motion seeks relief outside of the scope of Chapter 15 of the Bankruptcy Code and should therefore be denied. The Bankruptcy Code details specific relief bankruptcy courts may grant in a Chapter 15 case "at the request of the Foreign Representative". If relief could be granted at the request of any party in interest, the limitation "at the request of the Foreign Representative" would be rendered superfluous, in

contravention of fundamental principles of statutory construction. [45][2].

4. II. The relief requested is not appropriate because:

   a. The Shareholders had their day in the Canadian Courts and were unsuccessful in their attempt to obtain official committee status, vary DIP Financing Court orders and pursue claims based on the same unfounded and disputed allegations levied in the Motion [4, 28, 29],

   b. The Relief requested would frustrate the policies and purposes underlying Chapter 15 of the Bankruptcy Code [44],

   c. The Movant is forum-shopping. He had opportunity to participate in the CCAA proceeding but has not pursued it. The Movant and other shareholders have had every opportunity to advance their interests, but have largely neglected to do so [3, 38, 53],

   d. The Movant seeks to overturn court orders on which the parties have relied for years, which would throw the CCAA proceedings into chaos, and create unnecessary costs and inefficiencies that would impair the Debtor's restructuring efforts. The orders were entered years ago based on the facts and circumstances that existed at that time and have been relied on by the parties for years, including by the DIP Lender in extending credit to fund the Debtor's restructuring efforts [5, 52],

   e. The Shareholders have had and continue to have sufficient notice and opportunity to participate in the Canadian Proceedings. The shareholders took no steps to participate and failed to attend the hearings in 2013 and 2014 when the orders in issue were granted. According to their own evidence, the shareholders knew of the CCAA proceeding since early 2012 [3, 29, 53],

   f. There is no basis for the appointment of an official shareholders committee, as the Canadian Court previously determined [45],

5. III. The relief requested should be denied because the balancing test set forth in *Better Place* and *Jaffé* clearly favors the Debtor. According to the Fourth Circuit, § 1522(a) of the Bankruptcy Code requires the Court to undertake "*a particularized balancing analysis that considers the 'interests of the creditors and other interested entities, including the debtor,' 11 U.S.C. § 1522(a), and a weighing of the interests of the F.R. [] in receiving the requested relief against the competing interests of those who would be adversely affected by the grant of such relief....*" *Jaffé*, 737 F.3d at 29. [47]

   a. The Movant has not identified any specific relief granted by this Court to the F.R. under section 1519 or 1521 of the Bankruptcy Code from which he requires protection [48],

[2] Refers to the paragraph number in the F.R.'s Supplemental Objections (D.I. 354).

b. If the Motion were to be granted, the prejudice to the Debtor would significantly outweigh any harm to the Movant. The requested relief is not necessary to protect the Movant's interests [49, 50],

c. The relief requested, if granted, would significantly harm the Debtor's restructuring efforts. To the extent the Movant is asking or intends to ask the Court to revisit its prior financing orders, varying those would substantially and negatively impact the Debtor's restructuring efforts, as the Canadian Court previously determined [55, 56],

d. The appointment of an examiner to "investigate" the misguided allegations in the Motion would be a bridge to nowhere. All of the orders of which the Movant complains are final and non-appealable. An examiner would unnecessarily complicate and duplicate the efforts of the Monitor, a neutral party and officer of the Canadian Court [51,52].

THE MOVANT'S RESPONSE

6. The F.R.'s Supplemental Objections fail to address the true issues raised in the Motion and the need for the relief requested thereto. This is the case for the following reasons:

I. The Court Lacks Statutory Authority To Grant The Relief Requested

7. The Court does have the statutory authority to grant the requested relief and the argument and case law used to argue the contrary is tergiversated. To begin with, the F.R.'s reading of the *Jaffé* decision (*Jaffé v. Samsung Elecs. Co. 737* F.3d 14 (4th Cir. 2013)) by the Fourth Circuit is subjective. The *Jaffé* decision requires no reading-between-the-lines to establish its legal basis and scope. It plainly states what the Court meant, as follows:

> We conclude that the bankruptcy court properly recognized that Jaffé's request for discretionary relief under § 1521 required it to consider "the interests of the creditors and other interested entities, including the debtor" under § 1522(a) and that it properly construed § 1522 as requiring the application of a balancing test. Moreover, relying on the particular facts of this case and the extensive record developed during the four-day evidentiary hearing, we also conclude that the bankruptcy court reasonably exercised its discretion in balancing the interests of the licensees against the interests of the debtor and finding that application of § 365(n) was necessary to ensure the licensees under Qimonda's U.S. patents were sufficiently protected. Accordingly, we affirm.

8. Chapter 15 expressly prohibits the implementation of certain provisions of other chapters of the US Bankruptcy Code, such as those permitting preferential and fraudulent transfer avoidance actions, in Chapter 15 cases. See 11 U.S.C. § 1521(a)(7). The logic of these restrictions is that potentially conflicting avoidance actions in multiple jurisdictions would become a legal

quagmire and, therefore, avoidance actions, if any, should be brought under the law of the primary insolvency proceeding of the foreign debtor, not under US law through Chapter 15. But other provisions of the US Bankruptcy Code not expressly carved out from Chapter 15 may be applied by the court overseeing a Chapter 15 case, if necessary to achieve the Code's purpose and objectives.

9. This is precisely what the Court pursued and achieved in *Jaffé*. In so doing, it denied the granting of comity to the German Court and bankruptcy law and enforced the application of § 1522(c) as mandated by the Code. The Fourth Circuit endorsed the lower court's decision at para. 29 by stating that:

> We therefore conclude, through interpretation of § 1522(a)'s text and consideration of Chapter 15's international origin, that the district court correctly interpreted § 1522(a)'s sufficient protection requirement as requiring a particularized balancing analysis that considers the "interests of the creditors and other interested entities, including the debtor," 11 U.S.C. § 1522(a), and, in this case in particular, a weighing of the interests of the Foreign Representative (the debtor) in receiving the requested relief against the competing interests of those who would be adversely affected by the grant of such relief (here, the Licensees). And we also agree that § 1506 is an additional, more general protection of U.S. interests that may be evaluated apart from the particularized analysis of § 1522(a).
>
> In reaching this conclusion, we join the Fifth Circuit, which interpreted § 1522(a) similarly, based largely on the language in the Guide to Enactment. See *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1060, 1067 n. 42 (5th Cir.2012); see also *In re Int'l Banking Corp. B.S.C.*, 439 B.R. 614, 626– 27 (Bankr.S.D.N.Y.2010); *In re Tri–Cont'l Exch. Ltd.*, 349 B.R. 627, 637 (Bankr.E.D.Cal.2006).
>
> [Emphasis Added.]
>
> Despite the foregoing, the F.R. asserts that...
>
> "*... the Fourth Circuit's ruling in Jaffé (cited in Better Place) is distinguishable and maintains there is no statutory basis for the Court to appoint an equity committee or examiner upon the Movant's request*" [3].

10. The *Jaffé* decision is not the only one in which a bankruptcy court pursued a balancing test to reach the objectives and meet the requirements of the Code. Thus, *In re AJW Offshore, Ltd.*, 488 B.R. 551 (Bankr. E.D.N.Y. 2013), the court ruled that the Bankruptcy Code does not prohibit a bankruptcy court from authorizing a F.R. in a Chapter 15 case to employ turnover powers available

under sections 542 and 543, two sections not listed in § 103 as applicable in a case under Chapter 15. According to the Court, access to turnover powers under § 1521(a)(7) is conditioned upon the provision of sufficient protections to creditors and other stakeholders under § 1522, which requires a balancing of the respective parties' interests.

11. In the Objections (D.I. No. 338), the F.R. put forward a legal theory that purportedly negated the Court's authority to grant the relief requested in the Motion. In the Supplemental Objections, the F.R. takes a 180 degree turn while mutating the statute and adding convenient nuances to case law, as follows:

a. First, the F.R. agrees with the *Jaffé* decision as to the need to balance the interests of the parties affected, for which the Court relied on § 365(n) to achieve that balance. In the Objections, the F.R. argued that relying on sections of the Code not expressly designated as applicable to cases under Chapter 15 was impermissible. *See* D.I. 339 at 15 – 23. In the Supplemental Objections (D.I. 354 at 43), the F.R. takes a contrary position, while mutating the scope of § 103. This section stipulates that…

> Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15.

The F.R. indicates in a footnote at 43 that "*As the Court is aware, Chapter 3 of the Bankruptcy Code is generally applicable, while Chapter 11 is not.*" (Id.). Section 103 specifically enumerates the sections from Chapters 3 and 5 that apply in a Chapter 15 case, which excludes the application of § 365(n) in *Jaffé* and §§ 542 – 543 in *AJW Offshore*. Hence, the F.R. is counter-arguing its previous position that the applicability of sections not expressly enumerated by the Code as applicable to Chapter 15 cases are impermissible.

b. Second, per the F.R.,

> "*Unlike in Jaffé, the Movant has also not demonstrated that he is an "entity affected by" any specific relief that was granted to the F.R. under section 1519 or 1521 of the Bankruptcy Code, or that the Court should "condition,"*