> *"modify," or "terminate" any such relief pursuant to section 1522(b) or (c) of the Bankruptcy Code."* [40]

In *Jaffé,* the Court concluded the following in responding to a similar argument raised by the F.R.:

> We believe that Jaffé's view of the relationship between § 1521(a) and § 1522(a) is too myopic. While it is true that Jaffé "never affirmatively requested rejection authority under § 365," he did request several forms of discretionary relief under § 1521, among which was the privilege, pursuant to § 1521(a)(5), to have the bankruptcy court entrust him with "[t]he administration or realization of all or part of the assets of [Qimonda] within the territorial jurisdiction of the United States," specifically identifying the company's U.S. patents as among the U.S. assets he sought to control. ***And, as a prerequisite to awarding any § 1521 relief, the court was required to ensure sufficient protection of the creditors and the debtor.*** Section 1522(a) states this explicitly, providing in relevant part, "The court may grant relief under section ... 1521 ... 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). Additionally, the court was authorized to "subject" any § 1521 relief "to conditions it considers appropriate." Id. § 1522(b); see also H.R.Rep. No. 109–31, pt. 1, at 116 (describing § 1522 as "giving] the bankruptcy court broad latitude to mold relief to meet specific circumstances, including appropriate responses if it is shown that the foreign proceeding is seriously and unjustifiably injuring United States creditors").

12. Finally, the plain language of Section 1522 requires no reading-between the lines. Thus, the court decisions in *Jaffé, Better Place, AJW Offshore, Cozumel Caribe and Vitro* did not need any statutory interpretation or construction. In *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000), the Supreme Court established that statutory interpretation "begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" (Citing *Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992)*). When a statute's language is unambiguous, "the sole function of the courts is to enforce it according to its terms." *U.S. v. Ron Pair Enterprises,* 489 U.S. 235 (1989). There is no ambiguity in § 1522:

> **§1522. Protection of creditors and other interested persons**
> (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.***

(c) The court may, ***at the request of the F.R. or an entity affected by relief granted under section 1519 or 1521, or at its own motion, modify or terminate such relief.*** [Emphasis added].

Thus, if there was ever any ambiguity in the statute, the Courts elucidated it in the *Jaffé, Better Place, AJW Offshore, Cozumel Caribe and Vitro* decisions.

II. The Relief Requested Is Not Appropriate

13. The F.R.s' contention that the requested relief is inappropriate has no basis in law and fact and begs answers to long-standing questions regarding the adequate protection of the interests of the Estate and the Shareholders as its residual owners. First, the Shareholders have not had their day in court and are not pursuing claims based on "the same unfounded and disputed allegations by the Committee." This can be easily ascertained by reviewing and comparing the claims pursued by the Ad Hoc Shareholders Committee (the "Committee") in the Canadian courts and those in the Motion. Nor have they had sufficient notice and opportunity to participate in the Canadian Proceedings.

14. According to the F.R.,

> "**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].

Important missing background is necessary here:

a. Several shareholders decided to organize the Committee once they realized that the representations made by the self-interested DIP/BOD and the trust they had put in the Directors' professed commitment to protect their rights was ill-founded. As indicated in previous case filings (*see* for example D.I. 328, at 41), the Self-interested DIP/BOD granted the DIP Lender 88% of the NAP despite their representations in the DIP Financing auction term sheet, which was endorsed by the CCAA Court, that it would not allow the Shareholders' interest in the Company to be diluted beyond 50%. Subsequently, two shareholder-appointed Directors and the DIP Lender entered the NAP Sharing Agreement that compensated the Self-interested Directors for the diminished

compensation from the MIP, which was put in place to align the BOD's interests with those of the Shareholders, which resulted from their approval of the incremental NAP share to the DIP Lender at the expense of the Shareholders.

b. As a result, the Committee sought the CCAA Court's approval for a shareholders' committee that was rejected based on two main grounds: 1) the opposition by the DIP/BOD and the DIP Lender and 2) and the Court's conclusion that the approval of the Shareholders' Committee would legitimize the Committee as the Shareholders' representative and the Court needed to remain neutral with regards to future litigation. The latter reason was justified on the Committees' intention to pursue legal action to vary court orders that diluted the shareholders' interest beyond what the DIP/BOD had represented and what the Committee believed was reasonable for a US$ 76 million DIP loan in relation to the US$ 1.4 billion Arbitration Award. These justifications were inadmissible based on two self-evident grounds. First, the CCAA Court had approved the NAP Sharing Agreement between the Self-interested Directors and the DIP Lender in Dec. 2014; two years before the Court denied the appointment of the shareholders committee. Thus, it was self-evident by then that the Self-interested DIP/BOD was no longer acting at arms-length with the DIP Lender and could not represent the Shareholders' interests adequately. Second, the opposition by the Self-interested DIP/BOD and the DIP Lender was evidently unwarranted, given their self-interest in the outcome of the insolvency proceeding.

c. The proposed Committee represented shareholders that held approximately 30% of the outstanding shares, including the shares owned by the nine members of the Committee and the those owned by the shareholders that joined the Committee as opt-ins. The shareholders that owned the remaining 70% of the 365 million shares outstanding, the Movant included, did not join the Committee's legal action and have not had their day in court neither.

15. The Committee's intention to pursue the varying of CCAA Court orders was their legal right in seeking to redress the harm they believed had been inflicted on them by a Self-interested

DIP/BOD and the Controlling DIP Lender. The F.R. equates the Committees' lack of success in their attempts to redress the harm to their interests with a prohibition to seek the redressing of harm resulting from court-approved orders. Should this be the case, the non-main proceeding courts would be hamstrung in exercising their authority to apply the local law as required by their bankruptcy laws and the Model Law. In this regard, the Debtor has already admitted to impermissible actions reflected in the MOD which, without doubt, this Court would not have endorsed had it been aware of it. Thus, the Debtor has acknowledged that:

a. It intends to use the MOD to distribute the Estate's property, which is in fact a structured settlement disallowed by U.S. law and contrary to the Model Law guidelines,

b. It entered an agreement with the unsecured lenders pay post-petition interest at 20% p.a., which is disallowed by the Canadian and U.S. bankruptcy laws without a collective agreement in a restructuring proceeding or in a pre-packaged liquidation proceeding as the instant case is,

c. It has agreed to gift Estate property and use its limited resources from its share of the MOD distribution to pay for costs incurred for the sole benefit of the DIP Lender at the Estate's expense in violation of § 506(c).

16. According to the Debtor, the Monitor published announcements in two Canadian Newspaper and the Wall Street Journal to inform its stakeholders of its insolvency filing. It is unlikely that U.S. investors read Canadian newspapers searching for potential negative information on their Canadian investments. Some investors may read the Wall Street Journal to keep abreast of financial and economic information that may impact their investments and/or inform themselves about market and economic trends. The Movant and other Shareholders contacted about this point, never saw any such announcement. In fact, when the Movant purposefully looked for the purportedly issued announcement, they could not be found anywhere; including the Monitor's case records internet site. In contrast, the Debtor used to inform its shareholders via regular mail or

notices delivered through the shareholders' investment account managers regarding its quarterly and annual reporting requirements, and the shareholders' meetings to appoint BOD members.

17. In *Cozumel Caribe* (*In re Cozumel Caribe*, S.A. de C.V. 508 B.R. 330 (Bankr. S.D.N.Y. 2014), the Court made an important observation: "*The Code, however, does not describe what a U.S. court should do when, after granting recognition to a foreign proceeding, the conduct of the Foreign Representative, or other parties in interest, flout the purposes of chapter 15*". In this regard, the Court reached the following decision:

> For the reasons explained below, the Court DENIES the Motion without prejudice. The F.R. should take little comfort from the Court's ruling. The Motion raises very serious questions about the conduct of the F.R. in this Court and in the Concurso Proceeding, as well as very serious questions about the conduct of the principals of the Foreign Debtor. This Court does not sit in review of the rulings and conduct in the Concurso Proceeding, or in other Mexican court proceedings relating to this matter. The F.R., without disclosing to this Court that he was doing so, has taken directly conflicting positions on material issues in this Court and in the Concurso Proceeding. If and when an order or judgment is entered in the Concurso Proceeding for which the F.R. seeks recognition and enforcement, this Court can decide then whether to grant comity to the order or judgment. See In re Vitro S.A.B. de C.V., 701 F.3d 1031, 1054 (5th Cir.2012). At the present time, though, the current status quo (with approximately $8 million held in a CTIM-controlled bank account in New York) sufficiently protects CTIM's interests. [Emphasis added].

It stands to reason that, however many orders a court has approved on the premise that the debtor was acting in good faith and honestly, the court cannot stand idle when that premise may no longer be taken at face value. In deciding to postpone its final decision on whether to approve the enforcement in the U.S. of a future order endorsed by the foreign main proceeding court or withdraw recognition at that time and determining that the Debtor's property under the Court's supervision provided the required adequate protection, the Court in fact acknowledged that it had the authority to do so under § 1522.

18. The Court also relied on *In re Vitro*, 701 F.3d 1031, 1058 (5th Cir. 2012) by agreeing with the Fifth Circuit's decision regarding its authority to withhold relief requested by the F.R. when it runs contrary to the Code's requirements:

> In the event the F.R. seeks enforcement from this Court of an order or judgment issued by the Concurso Court, the Court will consider whether the relief is available under chapter 15. See, e.g., Vitro, 701 F.3d at 1054 (stating that "Chapter 15 does impose certain requirements and considerations that act as a brake or limitation on comity and preclude granting the relief requested by a Foreign Representative"). Emphasis added.

19. According to the F.R., other reasons that make the relief requested in the Motion inappropriate are:

20. ***It would frustrate the policies and purposes underlying Chapter 15 of the Bankruptcy Code*** [44].

This contention contradicts the stated purpose and objectives of Chapter 15 and negates the authority of the Court to redress the harm to the Estate and the Shareholders particularized in the Motion. Namely,

> **§1501. Purpose and scope of application**
>
> (a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—
>
> (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor,
>
> (4) protection and maximization of the value of the debtor's assets; and
>
> (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

To the contrary, the denial of the relief requested in the Motion would result in irreparable harm to the Estate and its residual owners from failure to provide both the protection to their interests, the protection and maximization of the Estate's assets and the opportunity for it to emerge from insolvency, which Congress set forth as important policy objectives in incorporating the Model Law's framework in the Bankruptcy Code.

21. ***The Movant is forum-shopping. He had opportunity to participate in the CCAA proceeding but has not pursued it*** [3, 38].

At a minimum, forum-shopping requires unrestricted access to at least two forums. The Movant and similarly situated Shareholders never had a real chance to participate in the CCAA

proceeding. The Self-interested DIP/BOD, at the direction of the Controlling DIP Lender and the endorsement of the CCAA Court, made sure of this by implementing requirements such as the NDA. These effectively foreclosed any opportunity to participate in the Canadian proceeding, given that anyone seeking access to it had to hire a lawyer. And even if one could hire an attorney to represent you during the nine years the CCAA proceeding has thus far lasted, the required NDA did not guarantee free access to the company's information, and one could not use it in a court of law to protect one's interests. Proof of this can be found in the legal action undertaken by the Noteholders in Canada (see D.I. No. 337), who lack no resources to pay for legal representation to protect their rights (the cost of which is being paid by Estate), and yet are denied access to the Debtor's data they deem necessary to protect their rights. The following paragraph from the NDA makes this perfectly clear.

> (iii) Access to any Confidential Information shall only be granted to Designated Counsel once the Recipient Party has delivered an executed copy of this agreement to Crystallex. By receiving access to the Confidential information, the Recipient Party is not warranting that he will in fact access such Confidential Information, and nothing in this Confidentiality Agreement requires the Recipient Party to access the Confidential Information.

Thus, even if one could afford or manage to get contingent legal representation to seek to redress the harmed suffered, the cards were stacked against you. The Ad Hoc Shareholders Committee's attempt to do so for themselves and other shareholders that joined the action as opt-ins underscores this fact. Notably, the legal action undertaken by the nine shareholders that sought to establish the Committee with Gowling WLG representing them on a contingency basis was short-lived. Gowling WLG told the Committee members in January 2019 that they were leaving the case after they realized that the Committee had no chance to seek redress for the harm caused by the Self-interested DIP/BOD. The reason for this had become clear by then: the Debtor's insolvency was a pre-packaged agreement reached in 2011 between the Self-interested DIP/BOD and the DIP Lender with its terms agreed upon even before the CCAA filing was made in December 2011. And by the time the Committee managed to find contingent representation and

Gowling WLG was ready to pursue the Committee's action, reversing the harm in the Canadian Courts was a bridge too far for Gowling WLG.

Two important points need to be made here: First, Gowling WLG bent over backwards to make clear from the outset that they only represented the nine Committee members and not the shareholders that had opted in, who together with the nine Committee members represented 30% of total shares outstanding. This was the case although the opt-in shareholders were required to contribute to Gowling WLG's contingent compensation. Second, Gowling WLG have not participated in the CCAA proceeding ever since they quit their engagement in January 2019. However, they still appear on the CCAA proceeding's service list. The reason for this seems to be judicial expediency, given that to withdraw from the case legal counsel needs the approval of the Court, which is unlikely to be granted. This is because it would result in the Committee "becoming" unrepresented and unable to replace legal counsel, which exposes the CCAA proceeding to unwanted disruption. I wrote to the CCAA Court, the Monitor and the DIP/MOD about this situation and the inadequate representation afforded to the shareholders, but no action was taken in this regard. See D.I 340, exhibits A & B.

22. The Model Law framers and Congress adopted § 1507 for a reason:

> **§1507. Additional assistance**
> (a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a F.R. under this title or under other laws of the United States.
>
> (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—
> 1) just treatment of all holders of claims against or interests in the debtor's property;
>
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
>
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

23. One such reason was to protect stakeholders in a non-main proceeding from unwarranted inconvenience and inadequate treatment of their claims and rights in contravention of the applicable local statute's rules and regulations and important public policy. This is precisely the reason for the Motion and the relief requested therein. And in UNCITRAL's Guide to Enactment and Interpretation, the Model Law framers made it clear that compliance with *local priorities and statutory exceptions* are necessary elements of a plan of arrangement or liquidation to comply with the purpose and objectives of the Model Law.

> 70. In evaluating whether a given proceeding is collective for the purpose of the Model Law, ***a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions***, and to local exclusions relating to the rights of secured creditors.

The actions and omissions by the Self-interested DIP/BOD particularized in the Motion in violation of the Code's local priorities and statutory exceptions and other breaches of law negate the adequate protection to the Estate and the Shareholders mandated by § 1522.

> 24. ***The Movant seeks to overturn court orders on which the parties have relied for years*** [5, 52].

There is no request to overturn court orders in the Motion. In it, the Movant alleges harm inflicted on the Estate and the Shareholders, its residual owners (enumerated at 2. above) that need to be redressed to comply with the law. If, as the F.R. indicates, the allegations are unfounded and the Examiner corroborates their no harm, no foul assertion, there shall be no need to change any order. Otherwise, it is incumbent upon the F.R. to address the issues the Movant has pointed out over the last few years to comply with the law to maintain the recognition the Court granted it.

> 25. ***The Movant and other shareholders have had every opportunity to advance their interests but have largely neglected to do so. 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*** [29, 53].

The F.R. is encouraged to provide proof of notices to the Shareholders regarding the CCAA filing and the 2013 and 2014 hearings. It is well documented that the only shareholder allowed to participate in the above-mentioned events was Mr. Tony Reyes, a practicing Canadian bankruptcy lawyer that went along with the CCAA proceedings until he was required to disclose that he was an investor in the DIP Lender's investment fund. Per the case records, Mr. Reyes has not taken part in the proceedings ever since.

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

As discussed at 17 b. above, the only determination made by the CCAA Court was that it wanted to remain neutral with respect to future litigation and, by doing so, sided with the Debtor and the DIP Lender. The CCAA Court overlooked the self-evident conflict of interests of the DIP/BOD and the DIP Lender. Therefore, it failed to consider the adequacy of the Shareholders' representation by the Self-interested DIP/BOD who became beholden to the DIP Lender once the CCAA Court approved the NAP sharing agreement.

27. ***Appointing an examiner to perform similar functions to those the Monitor already performs as an officer of the Canadian Court would introduce unnecessary inefficiency. The Office of the Superintendent of Bankruptcies (OSB) conducted an investigation about the Movants alleged ethics violations and found no such violations had occurred*** [32,44].

In the letter to the OSB (Exhibit 1), the Movant pointed out with particularity violations of several articles of its Code of Ethics by the Monitor, which included:

> 39 Trustees shall be honest and impartial and shall provide to interested parties full and accurate information as required by the Act with respect to the professional engagements of the trustees.
> SOR/81-646, s. 2; SOR/98-240, s. 1.
>
> 40 Trustees shall not disclose confidential information to the public concerning any professional engagement, unless the disclosure is
> (a) required by law; or
> (b) authorized by the person to whom the confidential information relates.
> SOR/81-646, s. 3; SOR/98-240, s. 1.
>
> 45 Trustees shall not sign any document, including a letter, report, statement, representation or financial statement that they know, or reasonably ought to know,

> is false or misleading, and shall not associate themselves with such a document in any way, including by adding a disclaimer of responsibility after their signature. SOR/98-240, s. 1; SOR/2005-284, s. 4.

28. One specific issue disclosed in the letter was the actions, or lack thereof, by the Monitor with respect to the Debtor's release of the Restraining Notice on the Nomura Notes, worth over US$ 710 million, on false premises, which caused irreparable harm to the Estate. (As particularized in Exhibit 1). If the Monitor was not aware of this situation before its disclosure in the Movant's letter, he was fully aware thereafter. Still, the Monitor repeated the DIP/BOD's false statements in his report to the CCAA Court and thereby set aside his duties under the Code of Ethics. In the response to the complaint (see D.I. 354-8), the OSB not only neglected to address the essence of the Movant's complaint, but also conceded that the Monitor, in breaching the Code of Ethics, was following the Debtor's instructions per the CCAA Court's initial order. Thus, the OSB found no issue with the Monitor's breaches of its own code to abide by CCAA Court's initial order, which, according to it, took precedence over the Monitor's duty to be honest and impartial. Notably, this assessment was made by the government entity the law entrusted with the faithful implementation of the statute that the Parliament enacted to advance important public policy. In this regard, the OSB's Code of Ethics for Trustees in Bankruptcy states the following:

> 53 Any complaint that relates to a contravention of any of sections 36 to 52 must be sent to the Division Office in writing. The Office of the Superintendent of Bankruptcy helps ensure that insolvency estates in Canada are administered in a fair and orderly manner. As part of our work we supervise various insolvency procedures, record proposal and bankruptcy proceedings, and make the information available to the public.

Further, the CCAA requires the Monitor to abide by the OSB's Code of Ethics:

> **Obligation to act honestly and in good faith**
> 25 In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.5 of the Bankruptcy and Insolvency Act.

III. The Relief Requested Should Be Denied Because The Balancing Test Set Forth In Better Place and Jaffé Clearly Favors The Debtor.

29. This contention is unfounded based on case law and the facts discussed herein above. As underscore by *Jaffé*, *Better Place*, *AJW Offshore, Cozumel Caribe and Vitro,* the balancing test involved turns on the facts of each case and is mandated by the Bankruptcy Code to ascertain whether "*the interests of the creditors and other interested entities, including the debtor, are sufficiently protected,*" before confirming or granting relief to the F.R. The allegations in the Motion, some of which have already been confirmed by the Self-interested DIP/BOD, point to a series of acts and omissions in contravention of the Bankruptcy Code and the Model Law that left unaddressed will result in irreparable harm to the Estate and the Shareholders, its residual owners. Further, the many arguments raised by the F.R. to try to tilt the balance in favor of the Self-interested DIP/BOD and the Controlling DIP Lender are paths that led nowhere once the underlying true facts are disclosed.

30. According to the F.R., the balancing test required by § 1522 favors it also because of the following:

31. **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],**

The F.R. has indeed requested relief under § 1521, starting with the application for recognition by this Court. And will no doubt need to request additional relief under this section until the bankruptcy proceeding can be closed. One such further request for further relief under Section 1521 must certainly be to entrust it with the realization of all or part of the Debtor's assets within the territorial jurisdiction of the United States after the Arbitration Award is collected.

32. **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].**

The F.R. was remiss to elaborate on and support these contentions. The F.R. also neglected to discuss how the purported prejudice to the Debtor, the DIP/BOD and the DIP Lender would outweigh the breaches of law underlying the harm to the Estate and the Shareholders the Motion seeks to redress.

33. **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].**

The Debtor's CCAA proceeding is a pre-packaged liquidation, not a restructuring effort. According to the Oxford Dictionary, "restructuring" is "a reorganization of a company with a view to achieving greater efficiency and profit, or to adapt to a changing market." The MOD leads inexorably to a liquidation. The F.R. is encouraged to disclose the Debtor's plans as a going concern post-CCAA.

34. **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 F.R. has yet to deny any of the allegations in the Motion in particularized manner and to substantiate why these are "misguided." The reason for this is simple: they cannot, which is the reason for the on-going secrecy and the constant "confidential" data sealing requests. In fact, the Debtor has already acknowledged some of the "misguided" allegations (see D.I. 340 at 19). Also, it bears recalling that in the Objections the F.R. argued that the Monitor was indeed also an Examiner. Per the headline above, the Examiner is now a neutral party. In fact, the Monitor is neither a neutral party nor an Examiner. Why the Monitor is not a neutral party in the CCAA proceedings is discussed at length and documented at 28. herein above. And he cannot act as an Examiner motu propio, given that the CCAA Court must appoint him to act in that capacity, which it has not done.

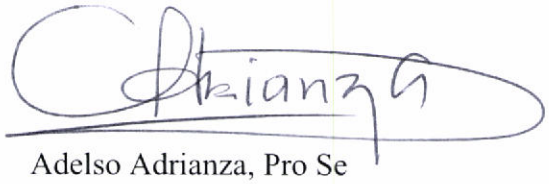
35. One particularly important question in this case remains unanswered: how it is possible for the DIP lender to turn a $75 million DIP loan into close to $US 200 million principal plus interest and over $US 800 million in a special compensation, while gifting hundreds of millions of Estate property and making the Estate pay for expenses for the sole benefit of the DIP Lender. The argument that but for the DIP Lender's DIP loan the Debtor would not have been able to pursue

the arbitration award and its collection is disingenuous. First, there would not have been an arbitration award and collection to pursue if the Shareholders had not invested over US$ 500 million to fund the Las Cristinas mine development. Second, the DIP/BOD had other means to fund the arbitration and the award collection but chose to do so with the Controlling DIP Lender for reasons that are now plainly clear.

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: October 4, 2021,
Newton, Massachusetts

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EXIBIT 1

Letter to the Office of Superintendent of Bankruptcy

ADELSO A. ADRIANZA
113 Washington Street – Newton, MA 02458 – U.S.A.
M: (859) 803-2279 | aaadrianza@gmail.com

VIA REGISTERED MAIL

November 5, 2018

Ms. Elisabeth Lang
Superintendent of Bankruptcy
Office of the Superintendent of Bankruptcy Canada
151 Yonge Street, 4th Floor
Toronto, Ontario M5C 2W7
Canada

Dear Superintendent,

I am witting this letter to bring to your attention a matter that falls under your jurisdiction as the Superintendent of Bankruptcy and responsibility to protect the integrity of Canada's insolvency system.

Background

I am a U.S. citizen that bought shares issued by the Canadian company Crystallex International Corporation (KRY) on the American Stock Exchange (AMEX) and have been a Crystallex shareholder since the early 2000, when I invested my retirement savings and my children's education funds in the company. Since then, I have followed religiously the company's operations and dealings throughout the years.

Crystallex International Corporation (KRY) is a Canadian miner whose sole asset was a Mine Operating Contract (MOC) entered in 2002 with a Venezuelan Government enterprise, the Corporacion Venezolana de Guayana (CVG), to exploit the Las Cristinas gold mine located in the Bolivar State. The MOC was cancelled by Venezuela in 2011. Crystallex filed an arbitration case in 2012 with The International Centre for Settlement of Investment Disputes (ICSID) for USD 3.5 billion based on the Canada – Venezuela Bilateral Investment Treaty (BIT). The ICSID rendered its decision in 2016 and awarded KRY USD 1.4 billion ($1.2 billion award plus $0.2 billion interest through the award date) and 6-month LIBOR + 1% interest – currently 2.5% p.a. - until the award is paid in full.

The Canadian CCAA Filing, The Tenor DIP Loan and The Credit Agreement

The KRY bondholders (owed $110 million at the time) tried to take over the company after the MOC cancellation. As a result, KRY filed for and obtained the Canadian CCAA protection in 2012. Tenor Capital Management Company, L.P. (Tenor) is a privately-owned, New York based American financing company and KRY'S Debtor in Possession (DIP) lender in the Canadian CCAA proceedings through wholly-owned foreign subsidiaries. Originally, Tenor agreed to provide USD 36 million in DIP financing for 35% of the share of the Net Arbitration Proceeds (NAP) – the funds remaining from the ICSID award after paying the KRY bondholders (USD 110 million in principal, plus interest), Tenor's DIP loans, unsecured creditors, operating expenses due, and taxes – plus 10% annual interest on the DIP loan. Tenor's DIP loan increased from USD 35 million to USD 76 million through four additional loans taken by the Company to cover its ICSID arbitration and other legal and operating costs, which increased Tenor's share of the NAP from 35% to 88%. The remaining 12% is to be shared by the Company's shareholders and Senior Management participating in the Company's Management Incentive Plan.

As a condition for providing the DIP financing, Tenor designated two BOD members: Mr. Robin Sha, Tenor's founding partner, and Mr. David Kay, Executive Director. The current KRY Board of Directors (BOD) is composed as follows:

- Robert A. Fung - Executive Chairman & CEO (Canadian Citizen) – Crystallex International Corp.
- Marc J. Oppenheimer – Director (U.S. Citizen) – Crystallex International Corp.
- Harry J. Near - Designated Director (Canadian Citizen) – Independent Director
- Robin Shah – Director (U.S. Citizen) – Tenor Capital Management Founding Partner
- David Kay – Director (U.S. Citizen) – Tenor Capital Management Executive Director

The Original Credit Agreement

The Credit Agreement that provided the original DIP loan financing for $36 million committed KRY and Tenor to set aside 35% of the NAP to be shared by the shareholders and the company employees participating in the Management Incentive Plan (MIP). The 35% share of the NAP was to be shared based on a 75% allocation to the shareholders and 25% to the MIP beneficiaries, which included Robert Fung and Marc Oppenheimer. The 35% NAP share was required to get the CCAA Court approved the DIP financing order, given that a) the Company had filed a claim for $3.5 billion expropriation claim with the ICSID against Venezuela, b) the total debt owed to the creditors (both secured and unsecured) was then less than $200 million, c) the company estimated that the $36 million DIP loan was sufficient to finance the arbitration proceedings from start to finish and d) the company asserted that even in the highly unlikely event that the ISCID was reduced to $500 million, this amount would be sufficient to pay all its debts, including the DIP loan, and the interest owed on the debt, compensate the DIP lender adequately and return money to the shareholders.

The Credit Agreement was drawn and approved with the objective to end-run Section 347 – Criminal Interest Rate - and mock this provision of the Canadian Criminal Code by subverting the legislators' objective in enacting this Section. To accomplish this, the agreement provides that:

1. The DIP loan principle cannot be repaid,
2. The DIP loan and Tenor's share of the NAP will be deposited in an escrow account owned by KRY but for the DIP lender's benefit,
3. Tenor will receive annual payments from the escrow account not to exceed an effective interest rate above 59.9% to avoid breaching Section 347 and full discretion in deciding when the payments are to be made.

The Amendments to the Credit Agreement

The company spent the original $36 million DIP loan in less than a year and was required to go back to Tenor for additional funds to finance the ICSDI arbitration. Since the Original Credit Agreement did not allow the pre-payment of the DIP loan and financing by anyone else without defaulting on the agreement, Tenor was the only available source of additional financing. This resulted in four amendments to the Original Credit Agreement to reflect the increase in the DIP loan and Tenor's share of the NAP as additional compensation. The table below shows details on the DIP loan amendments, including date, amount, the resulting NAP share increase and the directors that approved them.

CRYSTALLEX INTERNATIONAL CORPORATION
NET ARBITARTION AWARD ALLOCATION

		$ AMOUNT '000s		NAP %			
LOAN	DATE	LOAN	CUM	LOAN	CUM	NAP % X $ Million	NOTES
• ORIGINAL DIP FINANCING AGREEMENT	4/23/2012	$ 36,000	$ 36,000	35.0%	35.0%	0.97%	Approved by R. Fung, M. Oppenheimer and H. Near
• FIRST DIP FINANCING AMENDMENT	5/15/2012				35.8%		Amendment to reflect new BOD composition: R. Fung (KRY), M. Oppenheimer (KRY), H. Near (Independednt), R. Sha (Tenor) D. Kay (Tenor)
• SECOND DIP FINANCING AMENDMENT	6/5/2013	$ 11,100	$ 47,100	16.2%	51.2%	1.09%	Approved by R. Fung, M. Oppenheimer and H. Near
• THIRD DIP FINANCING AMENDMENT	6/27/2014	$ 12,100	$ 59,200	16.2%	67.4%	1.14%	Approved by R. Fung, M. Oppenheimer and H. Near
• FOURTH DIP FINANCING AMENDMENT	3/13/2015	$ 16,533	$ 75,733	20.6%	88.0%	1.16%	Approved by entire BOD. The Tenor / R. Fung and M. Openheimer NAP Share Agreement was approved before this amendment.

The Compensation Agreement Between Tenor and R. Fung & M. Oppenheimer

Two KRY senior managers and BOD members, Robert Fung and Mark Oppenheimer, entered into a NAP Share Transfer Agreement after the two BOD members lost most of their share of the Management Incentive Plan through Tenor's increased share of the NAP from 35% to over 88%, which they both approved and reduced significantly the dollar amount of the NAP amount to be share by management and the shareholders. The NAP Share Transfer Agreement involves the transfer of an undisclosed percentage of Tenor's 88% share of the NAP to R. Fung and M. Oppenheimer. Although this agreement was sealed by the CCAA Court and remains secret to this date, it is believed to involve a payment equivalent to the amount Mr. Fung and Mr. Oppenheimer were entitled to under the MIP, which was 10% of the NAP up to $700 million plus an additional percentage for the NAP amount over $700 million. Similarly, as its customary in the financial / funds management industry, the Tenor BOD representatives will be compensated based on the earnings from the KRY Credit Agreement transaction.

The KRY / Venezuela Settlement Agreement

KRY sued Venezuela in U.S. courts to pursue its arbitration award collection efforts and managed to get a Delaware court to issue an attachment on and a sale order of the CITGO shares owned by PDVSA, which was deemed to be an alter ego of the Republic. To delay / prevent the attachment, Venezuela agreed to a second settlement agreement which is being implemented as I write this letter. The Company and Venezuela entered their first settlement agreement in November 2017, but Venezuela did not honor the payment plan involved and stopped making the required payments after making a single USD 25 million payment. The new (second) agreement was entered a few weeks ago and provides for a new payment plan and terms, as follows:

- Total payment: USD 1.2 billion
- The republic will:
    a. Issue a first payment within 120 days of the signature of the agreement (in early September 2018), which will consist of about USD 400 million in Venezuelan bearer bonds,
    b. Provide USD 150 million in security backed by Venezuelan bearer bonds that KRY will be entitled to withdraw should Venezuela fail to make the remaining payments,
    c. Issue periodic payments from January 2019 through December 2021 for the balance of the settlement amount.

In return, KRY will a) request and obtain approval of an order by the Delaware Court to withdraw the attachment and sale of the CITGO shares orders upon its receipt of bearer bonds worth $400 million and the $150 million security bond fund is in place, and b) give up upwards of $300 million in interest due on the ICSID award from expropriation through the final payment in Dec. 2023, assuming Venezuela honors

the second settlement agreement. KRY acknowledged in mid-October the receipt of approximately 30% of the $400 million payment due within 120 days from the signing of the second agreement.

The company is expected to put forward a plan of arrangement within the first half of 2019. Toward this end, the Company filed a motion at the CCAA Court to approve a six-month extension of the CCAA stay, per the CCAA Monitor's 28th report.

The Actions and Omissions That Undermined the Integrity of the Bankruptcy Proceedings

The integrity of the Crystallex CCAA proceedings and the Monitor's responsibilities were compromised from the beginning by the CCAA Court orders that required the Monitor to be constrained and impaired by the unrestrained power of Crystallex (the Applicant) to decide what the Monitor could or could not do. The CCAA Court orders where drafted by the Applicant's lawyers with a self-evident intent to keep the company's stakeholders and the public interest in the dark to allow the Interested Directors and the DIP Lender to pursue their own interests. The two examples below will make this clear.

First, in a letter dated June 26, 2018 to R. Fung, the Applicant's CEO and Chairman, in which I copied the Monitor, I pointed out an action by the Company which was contrary to the best interest of the Company and its stakeholders (Attach. 1). The issue here was the withdrawal by the Company of an ex parte restraining order on USD 710 million worth of Nomura Credit-linked Notes (the Notes) owned by Venezuela and in possession of the Nomura Bank in New York that the Applicant obtained from the Southern District of New York Court. The Crystallex Shareholders' Committee's Legal Counsel (also copied in my letter) followed up on my letter and requested the Monitor to explain the Applicant's action. Two months later, the Monitor issued a verbal explanation provided by the Company and restated it in the Monitor's 26th Report dated August 27, 2018.

The answer provided by the Applicant through the Monitor was a complete fabrication, since the Nomura Notes could be sold on the open market anytime or could be held to maturity for redemption by Nomura Financing. The Notes had two maturity dates: USD 390 million matured in October 2018, and USD 320 million will mature in Dec. 2023. Given this, The Crystallex Shareholders' Committee's lawyers asked the Monitor to provide supporting documentation for the information he made public, which to this date has not been done because the Applicant has not allowed it.

In the 26th. Monitor's Report he included the following statement:

> *38. The various stakeholders groups have in the past made requests of the Applicant both directly and through the Monitor to obtain:*
> *a) further financial information related to the Distribution Statements and payments by the Applicant; and*
> *b) information concerning the tax analysis required under the DIP Credit Agreement.*

The repeated request by Company's stakeholders regarding the Nomura Notes was obviated from the statement above.

Second, throughout the CCAA proceedings, the Monitor has aided and abetted the Applicant's interest in either delaying the disclosure of or maintaining actions and omissions secret as the means to prevent the Company's stakeholders from becoming aware of dealings detrimental to their interests and allowing them to protect their rights. A casual perusal of the Ernst & Young Restructuring Document Center will make this fact self-evident by the Applicant's CCAA proceedings motions, orders and the Monitor's

reports, which were often made public long after a these were issued and usually after being redacted to a point that made them meaningless. Thus, the many shareholders that did not have the means to hire a lawyer to protect his/her interest in a six-year long CCAA proceedings, were deprived of their rights long before they knew what had happened. The 28th Monitor's Report dated October 29th, 2018, provides a good example here.

The 28th report is misleading in several ways. First, it represents that the Monitor is providing the interested parties full and accurate information as required by the Bankruptcy and Insolvency Act with respect to the professional engagements of the trustees. This is not the case in two respects:

1. It fails to acknowledge that the Monitor is fully knowledgeable about the Applicant's receipt of payments from Venezuela regarding the Second Settlement Agreement, which are much more than the USD 74 million indicated in the report. Significantly, the report purposefully uses October 5, 2018 as the date by which the $74 million amount was received and obviates the amount of money received from that date until the 28th report was issued.
2. It purports that one of the reasons for the need to extend the CCAA stay is to allow the Applicant to ascertain the tax impact from the settlement payments on the Net Arbitration Proceeds, which is the basis for the execution of the CCAA distribution scheme. In fact, the Applicant hired a reputable tax consulting firm a few months ago to determine 1) the tax implications of the receipt of the Arbitration Award Settlement payments from Venezuela and the use of the accumulated tax loss carry-forward (estimated at over $USD 400 million) to shield the earnings from the settlement payments, and 2) the Net Arbitration Proceeds amount subject to the Distribution Mechanics scheme disclosed in the fourth amendment of the Credit Agreement.

Second, the Monitor is aware of actions and omissions by the Applicant that are breaches of laws and regulations in both the United States (the Company filed for Chapter 15 in Delaware and issued share on the American Stock Exchange) and Canada. Despite this being the case, the Monitor chose to remain silent either because of the CCAA Court orders requirement not to disclose anything without the Permission of the Applicant or the Court, or for fear of missing out on a very lucrative engagement.

Either way, the Monitor's actions and omissions have contravened several of the sections of the Code of Ethics, as shown below:

> *38 Trustees shall not assist, advise or encourage any person to engage in any conduct that the trustees know, or ought to know, is illegal or dishonest, in respect of the bankruptcy and insolvency process.*
> *SOR/98-240, s. 1.*
>
> *39 Trustees shall be honest and impartial and shall provide to interested parties full and accurate information as required by the Act with respect to the professional engagements of the trustees.*
> *SOR/81-646, s. 2; SOR/98-240, s. 1.*
>
> *40 Trustees shall not disclose confidential information to the public concerning any professional engagement, unless the disclosure is*
> *(a) required by law; or*
> *(b) authorized by the person to whom the confidential information relates.*
> *SOR/81-646, s. 3; SOR/98-240, s. 1.*

44 Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment.
SOR/98-240, s. 1.

45 Trustees shall not sign any document, including a letter, report, statement, representation or financial statement that they know, or reasonably ought to know, is false or misleading, and shall not associate themselves with such a document in any way, including by adding a disclaimer of responsibility after their signature.
SOR/98-240, s. 1; SOR/2005-284, s. 4.

47 Trustees shall not engage in any business or occupation that would compromise their ability to perform any professional engagement or that would jeopardize their integrity, independence or competence.
SOR/98-240, s. 1.

50 Trustees shall not obtain, solicit or conduct any engagement that would discredit their profession or jeopardize the integrity of the bankruptcy and insolvency process.
SOR/98-240, s. 1.

Sincerely,

Adelso Adrianza

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

A Commissioner for Taking Affidavits
NATALIE RENNER

Cassels

October 18, 2021

By Email

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

Attention: Sergio Marchi, Independent Director

TIMOTHY PINOS
Certified as a Specialist in Civil Litigation
tpinos@casselsbrock.com
tel: 416.869.5784

Dear Sirs:

Re: DIP Credit Agreement

Reference is made to the Court-approved Senior Secured Credit Agreement dated as of April 23, 2012 (as amended from time to time, the "**DIP Credit Agreement**") pursuant to which Tenor Special Situation I, LP ("**DIP Lender**") advanced monies to Crystallex International Corporation to facilitate Crystallex's prosecution and enforcement of its international arbitration claim, award and judgment against the Republic of Venezuela. The DIP Lender is currently owed in excess of US$164 million in principal and interest.

On September 10, 2021, the United States Office of Foreign Assets Control ("**OFAC**") denied Crystallex's request for a license to effect the sale of the PDVH shares over which Crystallex has a writ of attachment. As of result of that decision, an Event of Default has occurred pursuant to section 8.1(y) of the DIP Credit Agreement.

The DIP Lender remains very concerned about the resources required by Crystallex to address continuous litigation in the CCAA process. The CCAA has become a battleground over issues that have absolutely no bearing on Crystallex's ability to secure and provide a recovery to its stakeholders. Every hearing scheduled in the CCAA proceeding seems to be viewed by parties as an opportunity for further tactical litigation for their own interests, that will only further deplete Crystallex's precious resources, and distract its attention from execution on its enforcement strategy. Maintaining every litigation advantage over Venezuela remains critical to Crystallex's success.

The DIP Lender remains supportive of Crystallex and its efforts to maximize value. The DIP Lender will consider the Independent Director's request as it relates to the terms of a further DIP amendment extension in connection with the upcoming stay extension motion and advise of its position.

Yours very truly,

Cassels Brock & Blackwell LLP
Per:

Tim Pinos
TP/gmc

cc: Robin Schwill, Davies Ward Phillips and Vineberg LLP
Gene Davis, Pirinate Consulting LLC

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

A Commissioner for Taking Affidavits
NATALIE RENNER

CONFIDENTIAL

EXHIBIT "S"

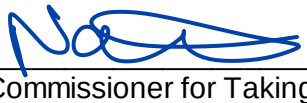
THIS IS EXHIBIT "T" REFERRED TO IN THE AFFIDAVIT OF ROBERT FUNG, SWORN BEFORE ME THIS 25TH DAY OF OCTOBER, 2021.

A Commissioner for Taking Affidavits
NATALIE RENNER

CONFIDENTIAL

EXHIBIT "T"

THIS IS EXHIBIT "U" 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 DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORP., Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Defendant.	Case No. 1:17-mc-00151-LPS

ANSWERING BRIEF OF THE BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., AND PDV HOLDING, INC. REGARDING POTENTIAL FUTURE PROCEDURES

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Defendant Bolivarian Republic of Venezuela (the "Republic" or "Venezuela"), Intervenor Petróleos de Venezuela, S.A. ("PDVSA"), and Garnishee PDV Holding, Inc. ("PDVH") submit this response to the motion of Plaintiff Crystallex International Corp. ("Crystallex") for an Order Approving the Process of Sale of Shares of PDV Holding, Inc. and the Opening Brief of Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. (together, "ConocoPhillips") Regarding Conduct of PDV Holding, Inc. Share Sale.

NATURE AND STAGE OF PROCEEDINGS

Crystallex acknowledges that no sale of PDVSA's shares in PDVH can occur unless and until it obtains a license from the Office of Foreign Assets Control ("OFAC"), which it has not to date secured. Nor has Crystallex provided any clarity on the scope of the license applied for (such as which, if any, steps in furtherance of an auction or sale the application proposes), the timing of OFAC's consideration or decision, or the likelihood that any authorization will issue. Nevertheless, Crystallex seeks to forge ahead not only with establishing sale procedures, but with actually having the U.S. Marshals Service conduct an auction of unprecedented size and complexity.

SUMMARY OF ARGUMENT

1. Venezuela, PDVSA, and PDVH (together, "Respondents") respectfully maintain that no sale of the PDVH shares should be permitted and that the Court should defer establishing a sale process at this time. Given that Crystallex does not have the required OFAC license for "an auction or other sale, including a contingent auction or sale," or to take "concrete steps in furtherance" of one, FAQ 809, designing or implementing a sale process would be premature and destructive to PDVH's fair market value. Moreover, pending motions to quash and for relief under Rule 60(b) would, if granted, vacate the attachment upon which the sale would be predicated.

2. If the Court decides to establish procedures now or to allow a sale to proceed notwithstanding these impediments, the best and fairest course is to adopt the procedure proposed

in the Respondents' opening brief. That procedure is designed to attract sophisticated bidders in order to maximize the value of the PDVH shares. It would result in a sale of only enough shares to satisfy Crystallex's unpaid judgment, consistent with Delaware law and due process, thereby preserving the remaining shares for the ultimate benefit of the Venezuelan people. It proposes that PDVSA manage the sale process in light of its superior knowledge and incentives and the need for PDVSA to negotiate the terms of the post-sale relationship between it and the purchaser.

3. Crystallex's proposed process is completely detached from established market practice for selling large, complex, privately held businesses. Indeed, other than the addition of an incomplete list of potential bidders and the creation of a data room, it hardly differs from the paltry "process" it proposed in 2018. Crystallex's proposal is transparently designed to depress the bidding for the PDVH shares and to maximize its own chances of owning PDVH—a company worth billions of dollars—for a fraction of its real value, at the expense of PDVSA, the people of Venezuela, and U.S. foreign policy objectives. The Court should not—and, under applicable Delaware law, cannot—allow such a procedure.

4. Nor should the Court appoint a receiver or adopt bankruptcy procedures, as ConocoPhillips suggests. This is not a bankruptcy, PDVH is not insolvent, and PDVSA would have greater knowledge, ability, and incentives in managing the sale than any receiver, whose appointment is—in any event—not authorized by federal or Delaware law. There is no basis for ConocoPhillips' assertion that PDVSA will not cooperate with the process ordered by this Court. Quite the contrary: PDVSA has the strongest interest of anyone in ensuring a sale on the best

possible terms. Moreover, because under any fair process PDVSA will remain PDVH's majority owner after the sale, it should be permitted to choose its co-owner and the terms of the sale.[1]

STATEMENT OF FACTS

Crystallex's assertion that "Venezuela refuses to honor its debts voluntarily," D.I. 182 at 2, must be emphatically and unequivocally rejected. The Republic has publicly committed to "an orderly and consensual renegotiation of legacy private claims," expressly including claims like Crystallex's. D.I. 191-2. The Republic proposes to do so based on the "equal treatment" of similarly situated creditors, and with the assistance of the International Monetary Fund and other multilateral institutions, "as soon as practicable" after the usurpation of the Maduro regime is ended and the related U.S. sanctions are lifted. *Id.*; *see also* D.I. 184 at 2 ("The Guaidó Government recognizes that the judgment obtained by Crystallex confirming its arbitration award creates a valid obligation on the part of Venezuela to Crystallex . . . [and] is committed to a process for global restructuring of Venezuela's debt obligations.").

ARGUMENT

I. UNLESS AND UNTIL CRYSTALLEX RECEIVES A LICENSE FROM OFAC AND CRYSTALLEX'S WRIT OF ATTACHMENT SURVIVES THE PENDING MOTIONS, NO SALE PROCESS SHOULD BE ESTABLISHED.

Crystallex acknowledges that no sale can occur unless (and until) OFAC grants its license application, and if OFAC denies Crystallex's application, then no sale can proceed.[2] It would be

[1] Nonparty Adélso Adrianza has submitted a letter proposing that the Court order Crystallex's judgment be satisfied out of other assets of PDVSA or its affiliates. D.I. 193. If the Court considers Adrianza's letter (which it should not), it should reject Adrianza's proposal, which impermissibly proposes the disposition of assets that have not been attached and are not available for attachment.

[2] As Crystallex has tacitly conceded by applying for an OFAC license for "the commencement of the sale process," D.I. 182 at 7, under the current sanctions regime, Crystallex may not even "prepare for and hold an auction" or "tak[e] other concrete steps in furtherance of an auction or sale" without a license. FAQ 809. Crystallex hints that it might challenge the enforceability of

more economical for the Court and for all parties to defer establishing sale procedures until it becomes clear that there will even be a sale. Even if OFAC grants a specific license, the particular contours of that license would likely include provisions that directly affect the design of a sale process—for example, language defining precisely what acts the license permits (and what, if any, conditions are imposed on those acts) or specifying what further steps in the sale process would require additional specific licenses. As ConocoPhillips notes, any sale would "need to be conditioned, carefully, on authorization from OFAC or the lifting of sanctions regulations." D.I. 180 at 2. It makes little sense for the Court to rule on a hypothetical sale procedure that may have to be changed—or even redesigned completely—once OFAC has acted (if it acts at all).

In addition to being more economical, deferring establishment of a sale process is the most equitable course at this time. Deferring the establishment of sale procedures until after OFAC decides whether to issue a license—by which time pandemic-related demand shifts may have abated and the sale process could be conducted under more normal conditions—would maximize value without adversely affecting Crystallex. *See* D.I. 188 at 11.

Respondents' opening brief described the unnecessary harm that could befall the Venezuelan people, their Interim Government, and the foreign policy of the United States if the Court were to publicly design a process for the forced sale of the Republic's most strategic foreign asset when such a sale has not been licensed by OFAC. These harms include the propaganda opportunity that an order defining a sale process would present to the illegitimate Maduro regime to defame the Interim Government. D.I. 188 at 4–9. Crystallex's brief, which proposes auctioning off (to itself) PDVSA assets worth billions of dollars for as little as $300 million, shows that this danger is all

OFAC's requirements if it does not get the license it wants. D.I. 182 at 7, 15. But it has made no such challenge, and it has cited no authority that would support one.

too real. Crystallex asserts that PDVH would be more valuable if it were "unburdened with baggage of the sort that surrounds PDVH as a result of its Venezuelan ownership." D.I. 182 at 18. That is, perhaps, an acknowledgment that Crystallex sees a chance for significant upside, in excess of its unpaid judgment, if it can take control of PDVH through these proceedings. In any event, speculation of this sort is helpful only to the Maduro regime. And it is entirely unnecessary when OFAC has not determined that a sale can or should happen.

That is particularly so given that Crystallex's writ of attachment is defective for the reasons explained in CITGO, PDVSA, and PDVH's motion to quash, *see* D.I. 179, and the Republic's motion for relief under Rule 60(b), *see* D.I. 184. If the Court grants either motion, then the writ of attachment must be quashed or dissolved, no execution sale can proceed, and there would be no need to engage with a sale process or issues related to the sanctions regime.

In its opening brief, Crystallex appears to recognize that the writ of attachment has failed because the PDVH shares are certificated and the physical certificate representing PDVSA's shares is not in PDVH's possession. *See* D.I. 182 at 9–10 n.4. As CITGO, PDVSA, and PDVH explained in their motion to quash, without seizure of the physical share certificate, as required by 6 Delaware Code section 8-112(a), "the attachment is not laid and no order of sale shall issue." 8 *Del. C.* § 324(a). Instead of acknowledging that it has no valid attachment and that it makes little sense to establish a sale procedure for assets it has not attached,[3] Crystallex suggests that its failure to satisfy the seizure requirement can be remedied by an order from this Court "direct[ing] the

[3] As explained in the motion to quash, *see* D.I. 179 at 2–3, even if Crystallex had seized the share certificate, Delaware law would not permit Crystallex to attach shares owned by PDVSA to satisfy a judgment against Venezuela on an alter ego theory without a showing of fraud. This Court has already determined that Crystallex cannot show fraud. This fundamental failure makes it all the more appropriate to refrain from establishing a sale procedure.

immediate turnover of the shares to the Marshals or compel[ling] PDVH to reissue the share certificates so that they can be transferred to the successful bidder at the appropriate time." D.I. 182 at 9–10 n.4. For support, Crystallex cites a jumble of statutes, but none allows a creditor to evade the requirement that the garnishee possess share certificates to effect an attachment.

As an initial matter, Crystallex cannot solve the problem by asking the Court to "direct the immediate turnover of the shares to the Marshals." D.I. 182, at 9 n.4. Section 8-112(a) requires seizure of the physical certificate to effect an attachment, and PDVH does not have the certificate. Crystallex apparently contemplates that 8 Delaware Code section 169, which states that the "situs of the ownership of the capital stock" of Delaware corporations is in Delaware, trumps section 8-112(a), but section 169 speaks of *stock*, not *certificates*.[4] And even if the "situs" of the certificate were Delaware, that would not help Crystallex. The 1998 amendment to section 324(a), described in detail in the motion to quash, was specifically enacted to give effect to section 8-112(a)'s requirement of physical seizure notwithstanding section 169. D.I. 179 at 14–16.[5]

Crystallex also cites to 6 Delaware Code section 8-112(e), which permits a creditor to seek "aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security . . . by means allowed at law or in equity in regard to property that cannot readily be

[4] Delaware case law makes clear that shares of capital stock are distinct from the certificates representing them. *See, e.g.*, *United Indus. Corp. v. Nuclear Corp. of Am.*, 237 F. Supp. 971, 977 (D. Del. 1964); *Bush v. Hillman Land Co.*, 2 A.2d 133, 136 (Del. Ch. 1938).

[5] Crystallex would also require an OFAC license before seeking such a turnover order. *See* FAQ 808, https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq_other.aspx#venezuela (explaining that "a specific license from OFAC is required for . . . the enforcement of any lien, judgment, or other order through execution, garnishment, or other judicial process purporting to transfer or otherwise alter or affect property or interests in [blocked] property" and that "a specific license from OFAC would be required for measures such as: Taking Possession (Actual or Constructive) . . . Seizing . . . [and] Assuming or Maintaining Custody" of blocked property); *see also* 31 C.F.R. § 591.309 (defining "property and property interest" to include " stocks [and] . . . any other evidences of title, ownership or indebtedness").

reached by other legal process." Crystallex erroneously suggests that this Court may direct PDVH to reissue the stock certificate so that it can then be attached. Jurisprudence analyzing the analogous UCC provisions is clear: Section 8-112(e) does *not* permit a court itself to reissue certificated shares of stock or to order the issuer of a certificated security to reissue a certificate where the physical certificate has not been seized pursuant to section 8-112(a). *See, e.g.*, *Huntington Nat'l Bank v. Bywood, Inc.*, 2017 WL 2241537, at *4–6 (Ohio Ct. App. May 16, 2017) (court cannot use equivalent of section 8-112(e) to order issuance of new certificates).

Indeed, allowing such a workaround would swallow up the physical-seizure requirement of section 8-112(a) altogether. *See Wolverine Flagship Fund Trading Ltd. v. Am. Oriental Bioengineering, Inc.*, 134 A.3d 992, 995 (N.J. Super. Ct. App. Div., 2016) (holding section 8-112(e) remedies "should stop short of any remedy that circumvents the actual seizure requirement of subsection (a)"); *Ho v. Hsieh*, 181 Cal. App. 4th 337, 347 (2010) (noting "[a] court cannot compel a corporation to issue new stock certificates to a judgment creditor").

Nor do Crystallex's other suggested workarounds defeat section 8-112(a)'s physical seizure requirement. Crystallex identifies provisions in the Delaware code allowing for the *owner* of stock to seek a court order compelling the issuer to reissue certificated shares of stock where the court is satisfied, after a hearing, that the certificates "have been lost, stolen or destroyed" and the issuer has refused to reissue them upon request. 8 *Del. C.* §§ 167, 168. By its terms, Delaware law does not give the Court authority to undertake such proceedings *sua sponte* or on the request of a *creditor* of the owner of the relevant certificated shares. Even if it did, "lost, stolen or destroyed" is not synonymous with "needed for purposes of a writ of attachment."

Finally, Crystallex contends that section 324(c) permits the Court to order reissuance of share certificates, but section 324(c) applies only to the issuance of a certificate "to the purchaser"

after the Court has "confirmed the sale." It is clearly designed to finalize paperwork after a proper sale has concluded. Here, no sale has occurred, there is no successful bidder, and there cannot be one until section 324(a) is satisfied.

If Crystallex wishes to attach the certificate, then it can initiate appropriate process against PDVSA, the shares' owner, to the extent doing so is consistent with the Foreign Sovereign Immunities Act, Delaware law, and applicable OFAC sanctions. (Under the current sanctions regime, Crystallex would require a license before obtaining a court order attaching or seizing the certificate, *see supra* note 4.) But that does not salvage the fact that Crystallex's current writ of attachment has failed and, under Delaware law, has not attached anything. Given that Crystallex has nothing to sell, and may never have anything to sell, devising sale procedures is premature.

II. SHOULD A SALE OF THE PDVH SHARES BE ORDERED, THE PROCESS MUST BE DESIGNED TO PRESERVE THE VALUE OF THE SHARES AND ENSURE THAT NO MORE SHARES ARE SOLD THAN NECESSARY TO SATISFY THE UNPAID AMOUNT OF THE JUDGMENT.

A. The Proposed Execution Sale Is Unprecedented.

PDVH indirectly owns CITGO, one of the largest refiners, transporters, and marketers of motor fuels and other petroleum products in the country, with approximately 3400 employees, three complex deep-conversion refineries, a network of forty-eight petroleum product terminals and ten pipelines, and franchise supply contracts with more than 4700 branded retail outlets. *See* https://www.citgo.com/press/news-room/news-room/2020/citgo-reports-first-quarter-2020-results. PDVH is, under any valuation, worth multiple billions of dollars. ConocoPhillips, for example, points to valuations of CITGO's enterprise value at $9 billion. D.I. 180 at 3.

Neither Crystallex nor ConocoPhillips has presented any examples of an execution sale of comparable scope or complexity—in Delaware or any other jurisdiction. *Cf.* D.I. 102-1 at 12 (listing readily ascertainable judgments for which attachments under section 324 issued or was sought,

all of which were below $600,000). The only reported Delaware case addressing procedures for the execution sale of corporate stock involved two small holding companies whose principal asset was a restaurant in Rehoboth Beach known as the "Olde Dinner Bell Inn." *See Deibler v. Atl. Props. Grp., Inc.*, 652 A.2d 553, 554, 559 (Del. 1995).

This Court therefore is faced with an essentially blank slate. In crafting procedures on this blank slate, the Court is guided by the twin commands of Delaware law (1) that only "[s]o many of the shares" of attached stock "as shall be sufficient to satisfy the debt" may be sold, *see* 8 *Del. C.* § 324(a), and (2) to respect the due process rights of the owner of the shares throughout the proceedings, *see Deibler*, 652 A.2d at 557. These commands require a process that maximizes value to avoid depriving the owner of property in excess of the judgment. The Court should also consider that its decision will have significant effects on PDVSA, the American subsidiaries, their employees, partners, and customers, and the long-suffering people of Venezuela, as well as for U.S. foreign policy objectives. *See Burge v. Fid. Bond & Mortg. Co.*, 648 A.2d 414, 417, 419–20 (Del. 1994) (a court has "inherent equitable power to control the execution process and functions to protect the affected parties from injury or injustice," including to prevent a "grossly inadequate" price or where "the rights of parties to, or interested in the sale are, or may have been, prejudiced").

B. Crystallex's Alternative Proposal Is Legally And Practically Impermissible.

If a sale of the PDVH shares were to be ordered, Respondents' opening brief outlines a reasonable sale procedure for shares of a large, complex company that would vindicate the requirements and purposes described above while also heeding the fact that, as the Delaware Supreme Court has recognized, the owner of the shares has "the superior access to information" and "superior incentives" to maximize the shares' value at a public sale. *See Deibler*, 652 A.2d at 558. The alternative process proposed by Crystallex—a one-day Marshals' auction—would violate Delaware law and is manifestly inferior to the process outlined by Respondents.

1. The Marshals Cannot Conduct the Sale.

Crystallex assumes the Marshals will manage the sale process, but that is not required. Crystallex asserts that "Section 324 . . . provides that shares of a Delaware corporation shall be sold by the sheriff at public auction," requiring by analogy that the Marshals conduct an auction here. D.I. 182 at 9. In fact, section 324 does not contain the word "sheriff" or any variant thereof. Instead, it requires that the shares "be sold at public sale to the highest bidder," and that its notice requirements be followed. This leaves the Court with discretion to design a process (including who manages the sale) that comports with Delaware law's twin commands.

Additionally, as a practical matter, the contemplated sale is far too complex to be conducted by the Marshals. The sale manager must work closely with management to, among other things:

- Assess market conditions;
- Market the asset to a well-chosen group of likely bidders;
- Identify and assemble voluminous due diligence materials and respond to due diligence questions;
- Negotiate data access, confidentiality, and privacy protection provisions (including by managing difficult competitive concerns);
- Negotiate protections for minority stockholders;
- Identify and seek any required consents from third parties and governments;
- Negotiate complex sale documentation; and
- Coordinate the sale effort alongside all the activities necessary to keeping a major energy company running.

See D.I. 188 at 14–18. Respectfully, the Marshals' office does not have the experience or resources required for a process of this nature. Even where a corporation's only assets were a few properties in Rehoboth Beach, the Delaware Supreme Court asked: "What did the sheriff know in this case concerning the value of this stock and how is any public official *reliably* to know such information in the next case involving a closely held business?" *Deibler*, 652 A.2d at 558 n.2.[6]

[6] Contrary to Crystallex's suggestion, *Deibler* did not endorse the process employed in the forced sale there as a model for all future sales of corporate stock. To the contrary, the court commented

Perhaps recognizing that the sale process it proposed in 2018 was woefully inadequate, Crystallex now proposes to contact a list of potential bidders, advertise the auction, and create a data room. Those steps are necessary, but not even remotely sufficient, to produce a sale at an adequate valuation. Sophisticated investors will be reluctant to participate in any process conducted in violation of OFAC guidance. Even after that, they will expect to conduct meaningful due diligence (well beyond reviewing documents in a data room) and a robust negotiation of terms. A one-day auction by the Marshals provides for no such familiar and necessary procedures.

Tellingly, the only precedent Crystallex can provide for an operating business whose competitive sale was managed by Marshals or sheriffs is the interlocutory sale in a criminal case of "Jreck Subs," the franchisor of an upstate New York chain of sandwich shops that the Marshals Service had been *operating* for two years following the sentencing of its owner.[7] *See also* D.I. 102-1 at 12 n.5 (explaining that "[a] representative from the U.S. Marshals Office for the District of Delaware has stated that she could not recall if her office had ever conducted a stock auction" and that a "representative from the New Castle County Sheriff's office in Wilmington has stated that her office had conducted a limited number of stock auctions, but only for a handful of shares at a time"). Crystallex's suggestion that the Court ignore the size and complexity of the business being sold in fact would likely result in a process that violates Delaware law by undervaluing the shares and ignoring the due process rights of the shares' owner.

2. <u>Crystallex's Proposed Auction Rules and Procedures Are Flawed.</u>

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that the notice of sale was "rather far from an ideal towards which we might strive," and that "the amounts realized here are such as to raise a concern that the process misfired." 652 A.2d at 555.

[7] *See* Jreck Subs home page, https://www.jrecksubs.com/index.html; "New Jreck Owner Says He Is Committed to Enhancing Brand" (Nov. 19, 2019), https://www.nny360.com/news/stlawrencecounty/new-jreck-owner-says-he-is-committed-to-enhancing-brand/article_39ce4759-cb6c-50af-8364-e7d052089889.html.

Crystallex's proposed ground rules for an auction are similarly ill-suited to a reasonable sale process. Crystallex proposes that a minimum of 10% of PDVH's shares be sold, and that the sale consist of 5% increments thereafter. This incremental approach threatens to sell more shares than necessary as compared to the reasonable procedure proposed by the Respondents, which, while maximizing the value of the shares, will aim to sell enough shares to satisfy the verified unpaid judgment in the most efficient manner, according to market conditions.

Crystallex also proposes that would-be buyers submit their bids without OFAC licenses and that the winning bidder pay a non-refundable deposit of up to $50 million *before* OFAC grants a license authorizing it to bid. In addition to placing the participants in violation of the sanctions regime as described in FAQ 809, this proposal would limit the field of bidders to those who are willing to risk significant capital, and to assume the risk of a sanctions violation. In Crystallex's proposed process, the eventual "winner" will pay $50 million for nothing more than the possibility of obtaining a stake in PDVH at some indeterminate point in the future, *if* OFAC ever issues the required licenses and *if* OFAC considers the winner acceptable. It is difficult to imagine that many bidders would be interested in participating under these conditions.[8]

Finally, Crystallex's alternative proposal does not include any procedures or safeguards to maximize value, ensure that only as many shares as necessary are sold, or respect PDVSA's right to due process. It does not provide for any meaningful pre-sale marketing or due diligence, any negotiation of issues between buyer and seller including, most significantly, governance provisions that any holder of a minority stake would require, any development of price competition through multiple bidding rounds, or any credible process for obtaining required regulatory approvals.

[8] The $50 million "nonrefundable" deposit Crystallex proposes would give it still another advantage over other bidders. As the ultimate recipient of its own $50 million deposit, only Crystallex would keep the $50 million if necessary approvals are not obtained.

Crystallex contends that any price produced by a sale, no matter how low, is by definition an adequate price. D.I. 182 at 19–20. That ignores the fact that, under Delaware law, "any party" with "an interest in the outcome of the sale" may move to set aside the sale on the ground that the price was "grossly inadequate" or that the auction deprived them of due process, *Burge*, 648 A.2d at 418–19, and that "gross inadequacy of price" is a basis for setting aside an execution sale even if there was "no impropriety, irregularity, or failure to meet statutory requirements." *Girard Trust Bank v. Castle Apartments, Inc.*, 379 A.2d 1144, 1146 (Del. Super. 1977). [9]

3. Crystallex's Proposal Would Suppress Bids and Minimize the Value of the PDVH Shares.

Crystallex's own brief demonstrates that it knows how value-destructive its proposals would be. Crystallex proposes to open an auction with a "credit bid" of its own: $300 million for 100% of PDVH. D.I. 182 at 19. Credit bidding enables a creditor to bid far more than it has in cash, giving it an advantage over other bidders, and thus "can be employed to chill bidding prior to or during an auction, or to keep prospective bidders from participating in the sales process." *In re The Free Lance-Star Publ'g Co.*, 512 B.R. 798, 806–08 (E.D. Va. 2014). Prospective cash bidders will know that Crystallex in effect has a $962 million head start (assuming that the amount owed is what Crystallex says it has estimated). That, in combination with Crystallex's defective sale "process," would discourage cash bidders, reduce price competition, and increase Crystallex's chances of taking full ownership of PDVH in exchange for much less than its true value. Crystallex

[9] Crystallex erroneously cites to *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), for the proposition that any price received at a forced sale is fair. In *BFP*, the U.S. Supreme Court acknowledged that each state has its own standard for establishing a process for a forced sale. 511 U.S. at 540. In the case of a sale of stock to satisfy a judgment, Delaware law commands that only shares sufficient to satisfy the judgment may be sold, and it grants the Court discretion to adopt fair, value-maximizing procedures and to disapprove a sale with a grossly inadequate price.

has made no secret of its intention to take control of PDVH through these proceedings, at one point stating, "The prize here is Citgo and we are getting closer to it."[10]

The Eastern District of Virginia limited credit bidding in a case where the creditor "made no secret of the fact that it acquired the [debtor-in-possession] Loan in order to purchase the Company" and was "tr[ying] to depress the sales price of the Debtors' assets" to receive a hefty return on its investment. *Free Lance-Star*, 512 B.R. at 806. The investment fund that is the primary beneficiary of any recovery by Crystallex, Tenor Special Situation I, L.P. ("Tenor Special"),[11] appears to be employing such a "loan to own" investment strategy. Based on the public Canadian bankruptcy records, Tenor Special appears to have advanced Crystallex $62.5 million, at a 10% interest rate, in exchange for a first priority lien on at least 70% of any recovery against the Republic. *See* Ex. 3 at 7, 8, 77; Ex. 4 at 2–13, 16–17, 26–27. Crystallex's insistence on a rushed bidding process further suggests that it intends to use credit bidding as a tool to depress the price of the PDVH shares. *See Free Lance- Star*, 512 B.R. at 803–06 (stating that credit bidding was being employed to depress the asset price where the creditor pushed for an "expedited . . . sales process"); *In re Fisker Auto. Hldgs., Inc.*, 510 B.R. 55, 60–61 (D. Del. 2014) (stating that the creditor's push for a rapid sale process supported capping the creditor's ability to credit bid).

[10] Julie Wernau, *As Venezuela's Default Risk Rises, Battle Heats Up for Control of Refiner Citgo*, The Wall Street Journal, May 14, 2017.

[11] Tenor Special is the latest assignee (there have been at least three) of the debtor-in-possession loan advanced to Crystallex to finance this litigation. *See* Ex. 1 at 42. (Exhibits cited herein are to the Declaration of Stephen C. Childs, filed herewith.) It appears that Tenor Special is controlled by the individuals that control Tenor Capital Management Company, L.P., a hedge fund that specializes in investing in litigation against sovereign nations undergoing political turmoil. *See* Ex. 2 at 2, 3, 10; Tom Hals, *INSIGHT-Want to Sue Venezuela for millions? These firms can help, for a price*, Reuters (Dec. 21, 2018, 12:01am), https://af.reuters.com/article/commoditiesNews/idAFL1N1Y823L.

Moreover, as discussed in Respondents' opening brief, D. 188 at 17-18, Crystallex entered into a settlement agreement with the Maduro regime, under which Crystallex was paid $500 million, apparently without releasing its claim. The Court has almost no information about the circumstances of this extraordinarily generous settlement, or about whether Maduro insiders who made the deal are getting a cut. In these circumstances, the Court should be wary of authorizing Crystallex's proposed sale process. *See*, *e.g.*, *Free Lance-Star*, 512 B.R. at 804 (creditor's failure to provide evidence about how it came to be assigned the claim was inequitable); *In re Aloha Airlines, Inc.*, 2009 WL 1371950, at *10 (Bankr. D. Haw. May 14, 2009) (rejecting credit bidding where creditor entered agreement with competitor intended to force debtor out of business).

C. ConocoPhillips' Proposal For A Receiver Should Be Rejected.

ConocoPhillips' suggestion that the Court appoint a receiver to manage the sale process is an unauthorized and unnecessary step given that PDVSA is well-positioned to manage the sale itself. ConocoPhillips mistakenly contends that federal law governs the procedure for the contemplated sale, based on an argument that section 324 provides for a judicial rather than an execution sale. ConocoPhillips is incorrect that this would be a judicial sale,[12] but little turns on that question, because neither Delaware law nor federal law authorize appointment of a receiver.

[12] "A 'judicial sale,' as distinguished from a sale on execution, refers to a sale of property by court order in connection with proceedings such as judicial foreclosure, bankruptcy, and partition." Restatement (Third) of Restitution and Unjust Enrichment § 18 (2011). An execution sale is conducted upon a writ of execution, such as Crystallex's writ of attachment *fieri facias* under 10 Delaware Code section 5031. Section 324 merely imposes procedural safeguards when the property executed upon is corporate stock. The mere fact that a state statute requires a court to approve and confirm property sold on execution does not convert an execution into a judicial sale. *See O'Brien v. Kelly*, 597 F. Supp. 17, 19 (D. Alaska 1984); *See In re Sale of Certain Unmined Coal*, 76 A.2d 194, 196 (Pa. 1950) (distinguishing between a "*judicial sale[]*" and "*judicial assent* to a sale" because of a statutory requirement); *Fowler v. Fitzgerald*, 570 A.2d 866, 870 (Md. Ct. App. 1990) (explaining that "confirmation of the sale is the practice" in some execution sales).

The Delaware Court of Chancery is "extremely cautious about using its inherent equitable powers to appoint a receiver" over a solvent company. *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 785 (Del. Ch. 2004); *see also Ross Hldg. & Mgmt. Co. v. Advance Realty Grp., LLC*, 2010 WL 3448227, at *6 (Del. Ch. Sept. 2, 2010) (explaining that the caution is even greater "where the entity continues to function actively"). It will do so only for "fraud, gross mismanagement or extreme circumstances causing imminent danger of great loss which cannot otherwise be prevented." *Del. State Hous. Auth. v. Hillside Ass'n, L.P.*, 1992 WL 127503, at *1 (Del. Ch. June 9, 1992). ConocoPhillips does not contend that any of these conditions is satisfied here. And aside from its unsupported and incorrect assumption that PDVSA will not cooperate in any sale process, ConocoPhillips merely suggests that a receiver would be helpful. That falls far short of the Delaware standard.

Federal authority is no more helpful to ConocoPhillips. "The appointment of a receiver is an equitable remedy of rather drastic nature." *Mintzer v. Arthur L. Wright & Co.*, 263 F.2d 823, 824 (3d Cir. 1959). "Because a receiver unquestionably interferes with an individual's right to otherwise control his or her property," such appointment should occur only "in cases of necessity" where "the plaintiff clearly and satisfactorily shows that an emergency exists and the receiver is needed to protect the property interests of the plaintiff." *Mfrs. & Traders Trust Co. v. Minuteman Spill Response, Inc.*, 999 F. Supp. 2d 805, 816 (W. D. Pa. 2013) (internal quotation marks and brackets omitted). Thus, "a district court can appoint a receiver only on a showing of fraud or the imminent danger of property being lost, injured, diminished in value or squandered, and where legal remedies are inadequate." *Leone Indus. v. Associated Packaging, Inc.*, 795 F. Supp. 117, 120 (D.N.J. 1992). A receivership is not appropriate "if milder measures will give the plaintiff, whether creditor or shareholder, adequate protection for his rights." *Maxwell v. Enter. Wall Paper Mfg.*

Co., 131 F.2d 400, 403 (3d Cir. 1942). The authorities ConocoPhillips cites, *see* D.I. 180 at 7, are not to the contrary. For example, as ConocoPhillips itself notes, the court in *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234 (5th Cir. 1997), appointed a receiver to collect and sell the judgment debtor's property only because it had already been shown that "usual remedies at law [had] proven inadequate." D.I. 180 at 7.[13]

ConocoPhillips claims only that appointing a receiver would be helpful, not that it is necessary or that an emergency exists. It does not allege fraud, any imminent danger of property being hidden or squandered, or that it lacks an adequate remedy at law. And this Court has ample supervisory power to ensure adherence to Respondents' outlined plan, should a sale be required.

In fact, rather than being "helpful," appointing a receiver in these circumstances would be impractical and costly given that PDVSA can conduct the sale itself. Unlike PDVSA, a receiver would lack the familiarity with PDVH's assets, liabilities, structure and operations necessary to manage the process, and getting it up to speed would merely incur needless expense. Unlike PDVSA, a receiver would not be able to directly negotiate the terms of the post-sale stockholder relationship. No receiver could manage the delicate task of preserving relationships with customers, employees, and other stakeholders during a sale process. And no receiver could match PDVSA's powerful incentive, as the owner, to maximize value.

[13] ConocoPhillips' other cases involve fraud or misconduct, *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 889 (5th Cir. 2019); *Liberte Capital Grp., LLC v. Capwill*, 462 F.3d 543, 547 (6th Cir. 2006); *SEC v. Am. Capital Invs., Inc.*, 98 F.3d 1133, 1136 (9th Cir. 1996); *SEC v. Hardy*, 803 F.2d 1034, 1035 (9th Cir. 1986); *Lawsky v. Condor Capital Corp.*, 154 F. Supp. 3d 9, 11 (S.D.N.Y. 2015); *SEC v. Helms*, 2015 WL 11255450, at *1 (W.D. Tex. July 2, 2015), insolvency, *SEC v. W. L. Moody & Co.*, 374 F. Supp. 465, 467–68 (S.D. Tex. 1974), or appointment of a receiver pursuant to contract, *View Crest Garden Apartments, Inc. v. United States*, 281 F.2d 844, 845 (9th Cir. 1960); *Fleet Nat'l Bank v. H&D Entm't, Inc.*, 926 F. Supp. 226, 231 (D. Mass. 1996).

Moreover, OFAC sanctions require a specific license before control of blocked property can be vested in a receiver. OFAC regulations prohibit any "judicial process purporting to transfer or otherwise alter or affect property or interests in [blocked] property" without a "specific license" authorizing it, 31 C.F.R. § 591.407, and define "transfer" to include "the appointment of any agent, trustee, or fiduciary." *Id.* § 591.310. Materially identical regulations have been held to require a license before appointing a receiver over blocked property. *Fed. Rep. of Yugoslavia v. Park-71st Corp.*, 913 F. Supp. 191, 192, 194 (S.D.N.Y. 1995); *see also Quilling v. Trade P'rs, Inc.*, 2011 WL 4973870, at *2 (W.D. Mich. Sep. 30, 2011) ("The receiver serves as the court's agent."); *Eller Indus., Inc. v. Indian Motorcycle Mfg., Inc.*, 929 F. Supp. 369, 372 (D. Colo. 1995) (a receiver "is a fiduciary"). ConocoPhillips does not represent that it has obtained or even applied for a license.[14]

ConocoPhillips also mistakenly urges the Court to adopt "certain principles and mechanics of bankruptcy proceedings." D.I. 180 at 9. The Bankruptcy Code, however, is a set of protections and burdens created for a specific set of circumstances: to provide a debtor with a fresh start while balancing and protecting the interests of creditors in an equitable distribution of assets. *See, e.g.*, *Janvey v. Romero*, 883 F.3d 406, 410–11 (4th Cir. 2018); *Westmoreland Human Opportunities, Inc. v. Walsh*, 246 F.3d 233, 251 (3d Cir. 2001). It does not apply here, and given that PDVH is not insolvent, its provisions are not even theoretically suited to these circumstances.[15]

[14] ConocoPhillips suggests that the Court could appoint a "special master or special commissioner." *See* D.I. 180 at 2. Because ConocoPhillips does not develop this argument, point to any authority to support it, or even explain how such a party would differ in anything but name from a receiver, the argument is forfeited. Even if the argument were not forfeited, appointment of such an agent would also be subject to the OFAC license requirement.

[15] Invoking section 363(m) of the Bankruptcy Code, 11 U.S.C § 363(m), ConocoPhillips erroneously contends that the validity of the sale of shares of PDVH should be immune from challenge on appeal. This is not a case to which the Bankruptcy Code applies, but ConocoPhillips' erroneous contention highlights that, to reconcile the parties' rights to appeal with any interest of bidders in finality, the appropriate time for any appeal would be before the sale occurs or before the sale becomes final.

III. SHOULD A SALE OF THE PDVH SHARES BE ORDERED, THE PROCEDURES DESCRIBED IN RESPONDENTS' OPENING BRIEF WOULD BEST ADDRESS THE UNIQUE CHALLENGES PRESENTED BY THE SIZE AND COMPLEXITY OF THE CONTEMPLATED SALE.

Respondents' opening brief described some basic processes—common to commercial sales of other major operating businesses—that would be necessary should a sale be ordered. D.I. 188, at 16–20. It also explained why care must be exercised to ensure that no sale process gets ahead of the OFAC sanctions regime, a misstep that itself would likely destroy value. *Id*. at 9–11.

While ConocoPhillips' proposed receiver solution is misguided, the interests it seeks to protect can be vindicated by allowing PDVSA to manage the sale process. Unlike Crystallex, ConocoPhillips agrees that maximizing value is the proper objective of any reasonable sale process. *See* D.I. 180 at 4–5, 13 n.5. It acknowledges the need for experts (including an investment bank) and for the sale to be managed by a knowledgeable party capable of making complex and sophisticated business judgments, which would enable bidding rules to be designed and applied based on experience and business knowledge, rather than guesswork. Contrary to ConocoPhillips' unsupported assumption, if the Court orders a sale, PDVSA would be fully willing and able to cooperate with the process of managing the sale, assuming OFAC licenses it. The process need sell only enough shares to satisfy the unpaid portion of Crystallex's judgment. At the end of any process that fairly values PDVH, PDVSA would remain the majority stockholder in PDVH, and thus the partner of whoever purchases the shares here. It is only fair to allow PDVSA to manage the process of selecting that partner and negotiating the details of post-sale governance.

Even in the bankruptcy context, to which ConocoPhillips looks for guidance, D.I. 180 at 2, there is a "strong presumption" in favor of vesting control of any sale in the owner or possessor of the property. *See In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 471 (3d Cir. 1998) (explaining that "current management is generally best suited to orchestrate the process of rehabilitation for

the benefit of creditors and other interests of the estate"); *accord Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 577 (3d Cir. 2003). And here, where not only Crystallex's interests are at stake but also the interests of PDVSA, the Republic, and the Venezuelan people in maximizing the governance and equity value remaining after a sale, only the owner has the incentive to achieve the statutory objectives.

CONCLUSION

Crystallex's motion (D.I. 181) should be denied. The Court should defer establishing a sale process until the Court rules on the motions to quash the writ of attachment and for reconsideration, and until the time (if ever) when OFAC issues a license. If the Court does determine the mechanics of a sale process, the Court should establish a process that does not destroy value and that complies with Delaware law. Crystallex's and ConocoPhillips' proposals would not satisfy these requirements, while the Respondent's proposed procedures would.

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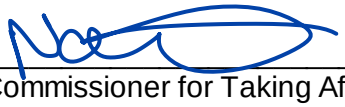
Attorneys for Garnishee PDV Holding, Inc.

THIS IS EXHIBIT "V" 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 DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORPORATION,	:	
Plaintiff,	:	
v.	:	**Misc. No. 17-151-LPS**
BOLIVARIAN REPUBLIC OF VENEZUELA,	:	**FILED UNDER SEAL**
Defendant.	:	**UNDER SEAL PURSUANT TO ORDER REGARDING SPECIAL MASTER (D.I. 277)**

PROPOSED ORDER (A) ESTABLISHING SALE AND BIDDING PROCEDURES, (B) APPROVING SPECIAL MASTER'S REPORT AND RECOMMENDATION REGARDING PROPOSED SALE PROCEDURES ORDER, (C) AFFIRMING RETENTION OF EVERCORE AS INVESTMENT BANKER BY SPECIAL MASTER AND (D) REGARDING RELATED MATTERS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORPORATION,	:	
Plaintiff,	:	
v.	:	**Misc. No. 17-151-LPS**
BOLIVARIAN REPUBLIC OF VENEZUELA,	:	
Defendant.	:	

PROPOSED ORDER (A) ESTABLISHING SALE AND BIDDING PROCEDURES, (B) APPROVING SPECIAL MASTER'S REPORT AND RECOMMENDATION REGARDING PROPOSED SALE PROCEDURES ORDER, (C) AFFIRMING RETENTION OF EVERCORE AS INVESTMENT BANKER BY SPECIAL MASTER AND (D) REGARDING RELATED MATTERS

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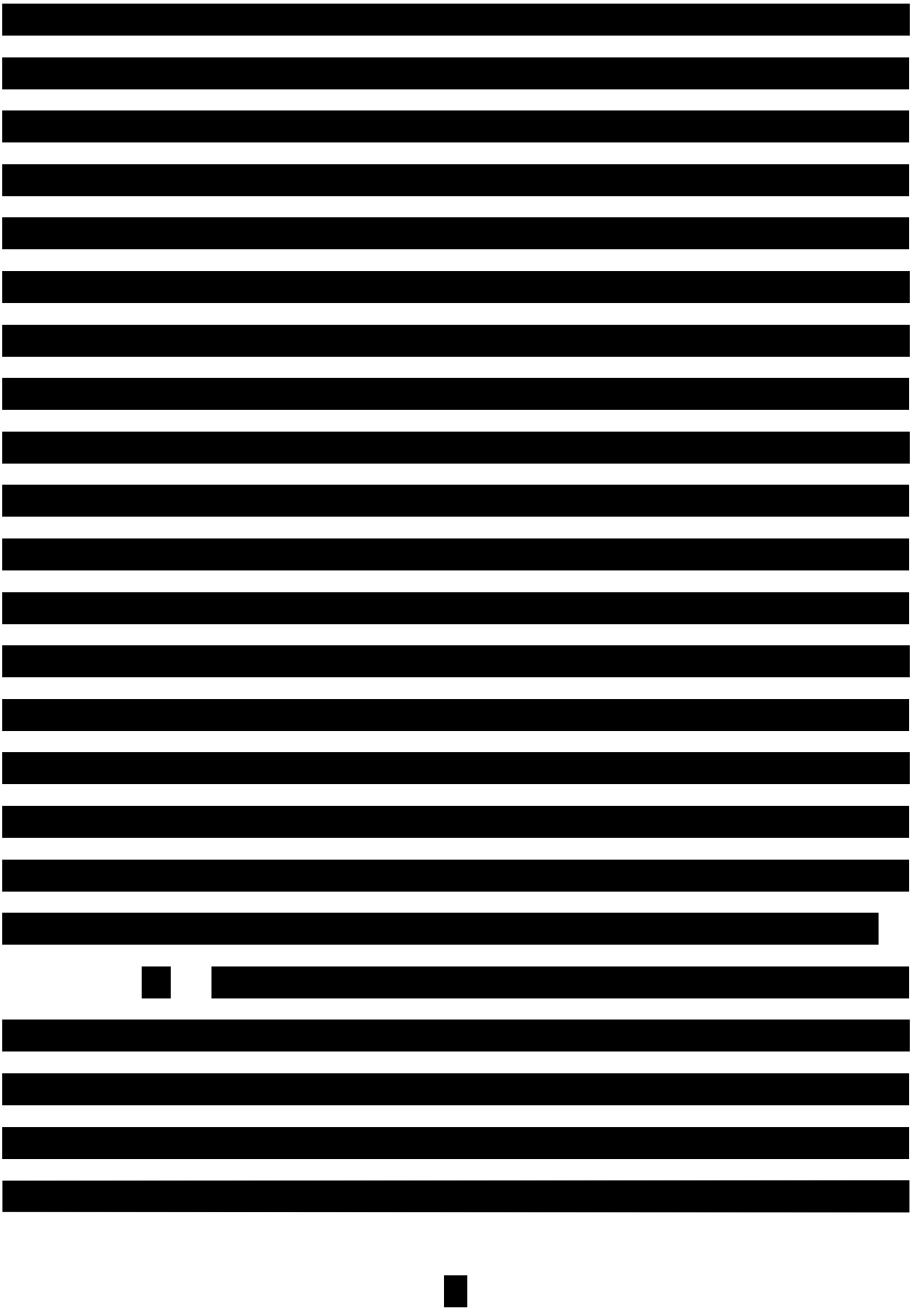

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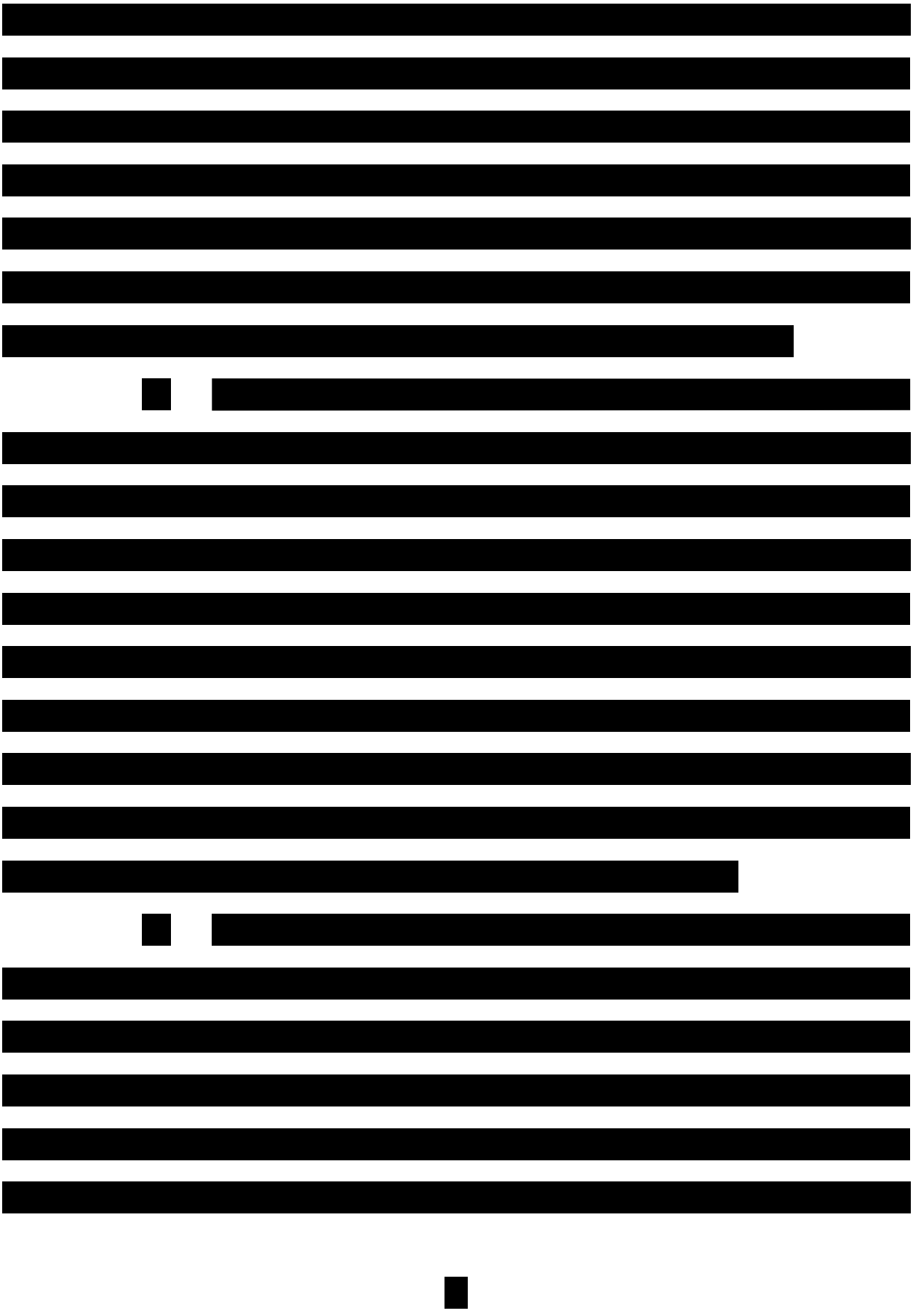

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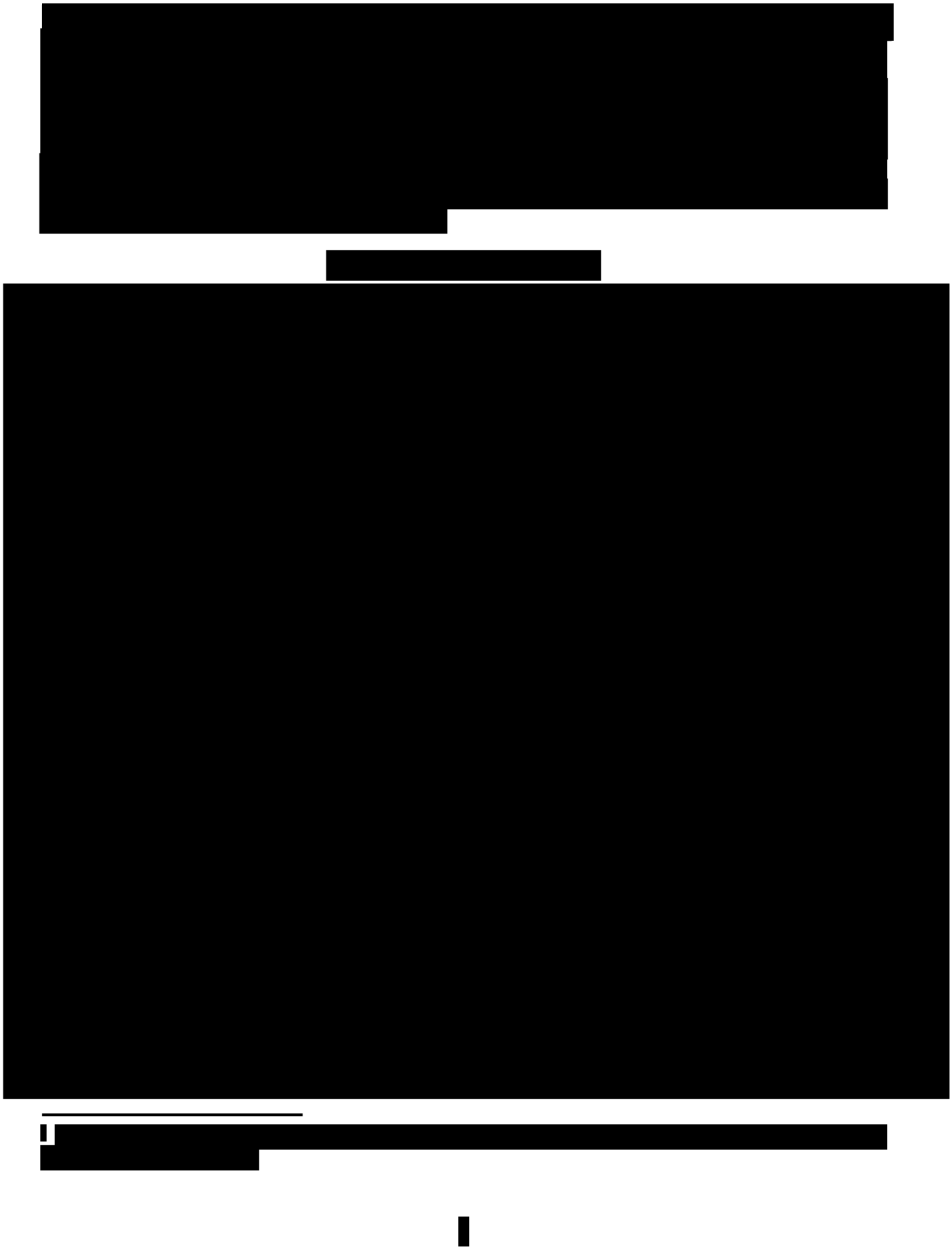

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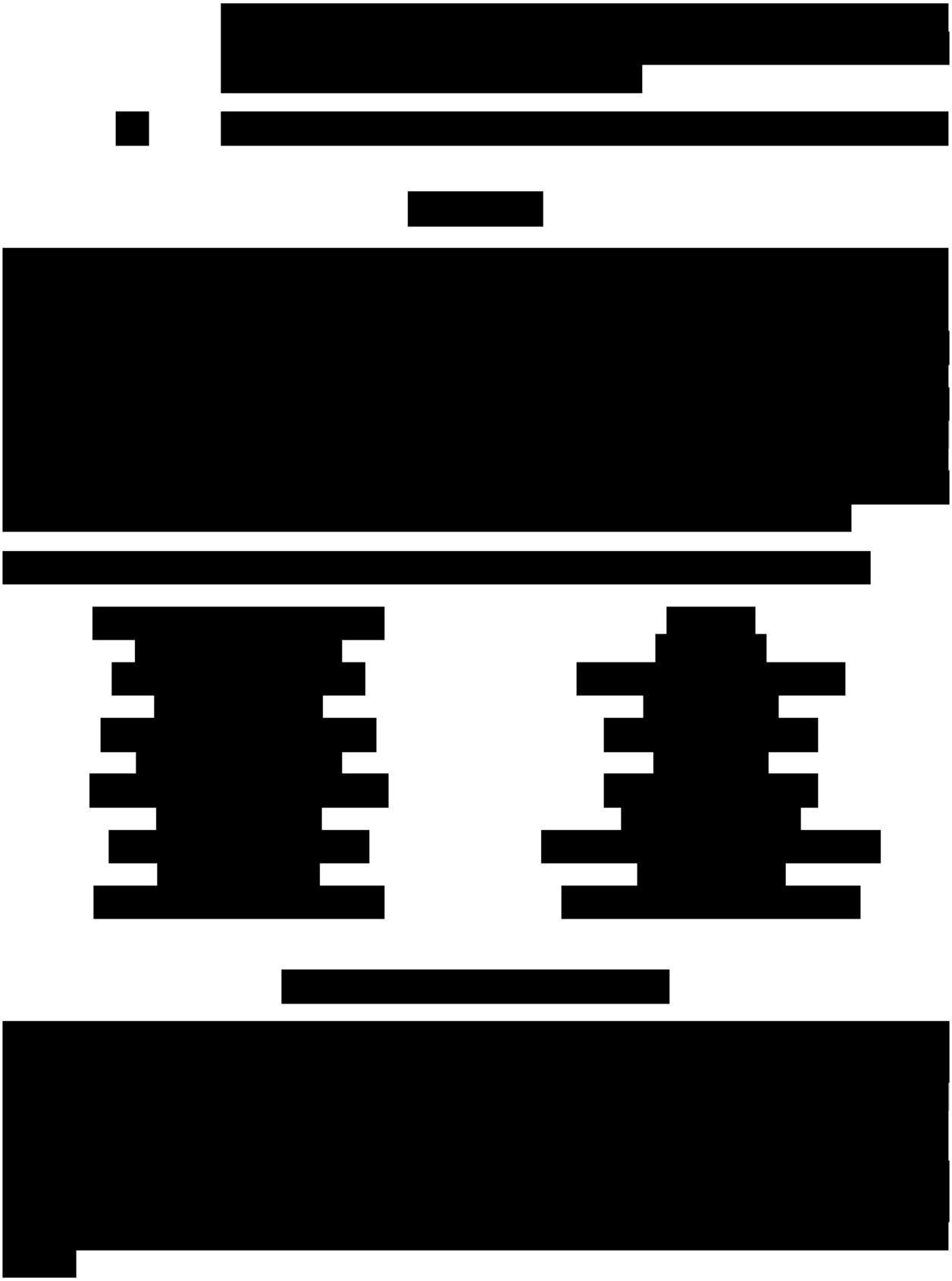

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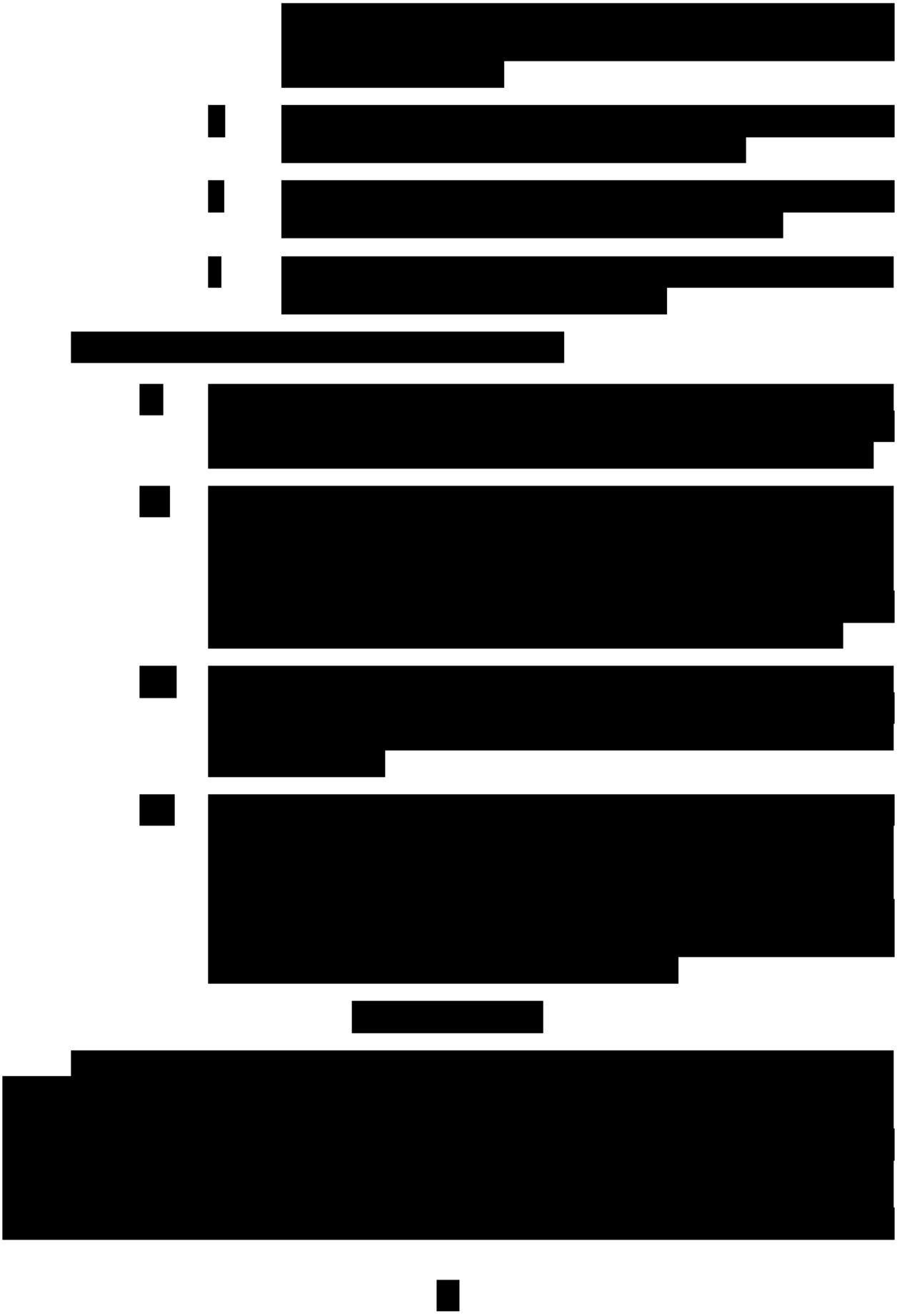

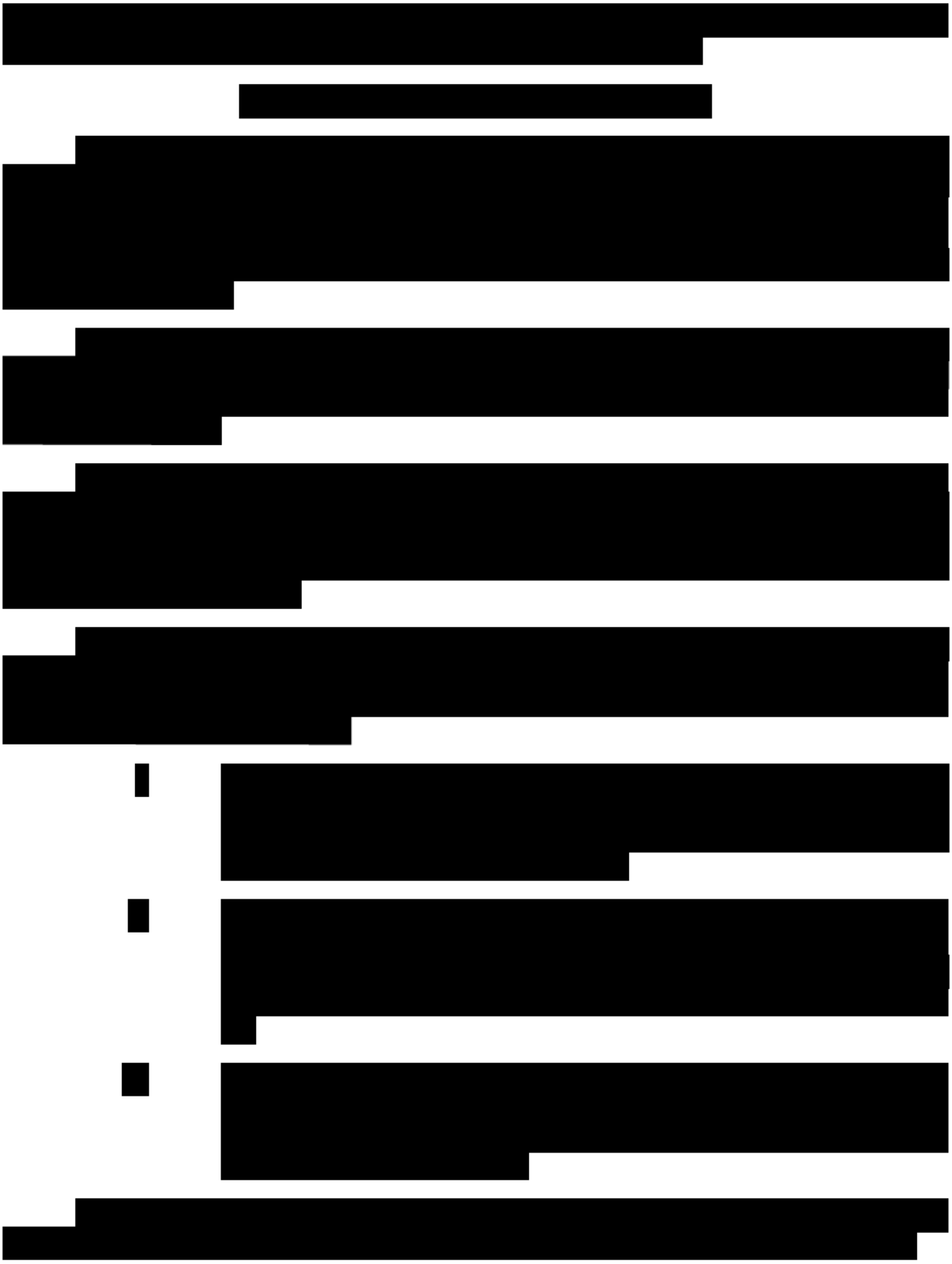

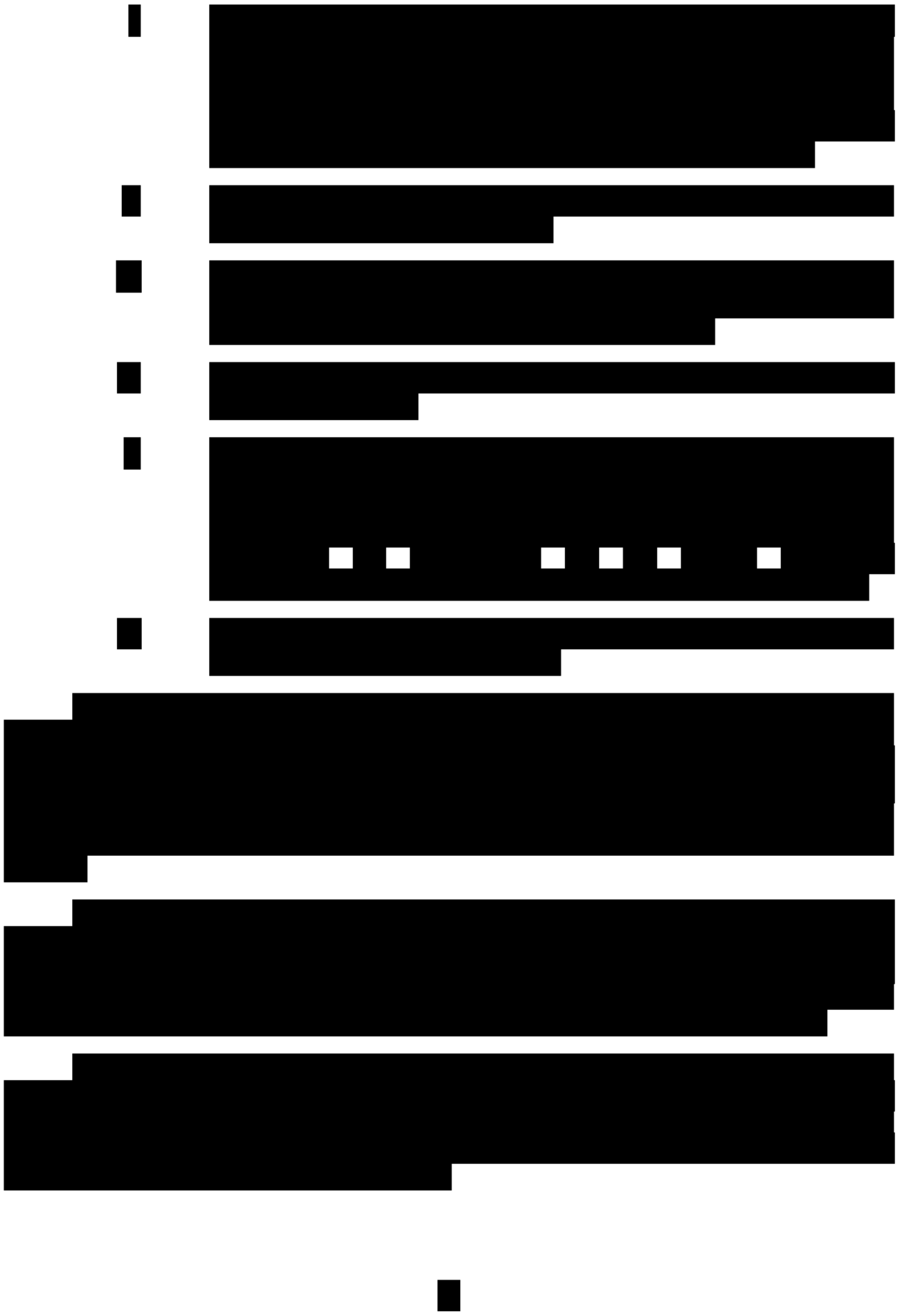

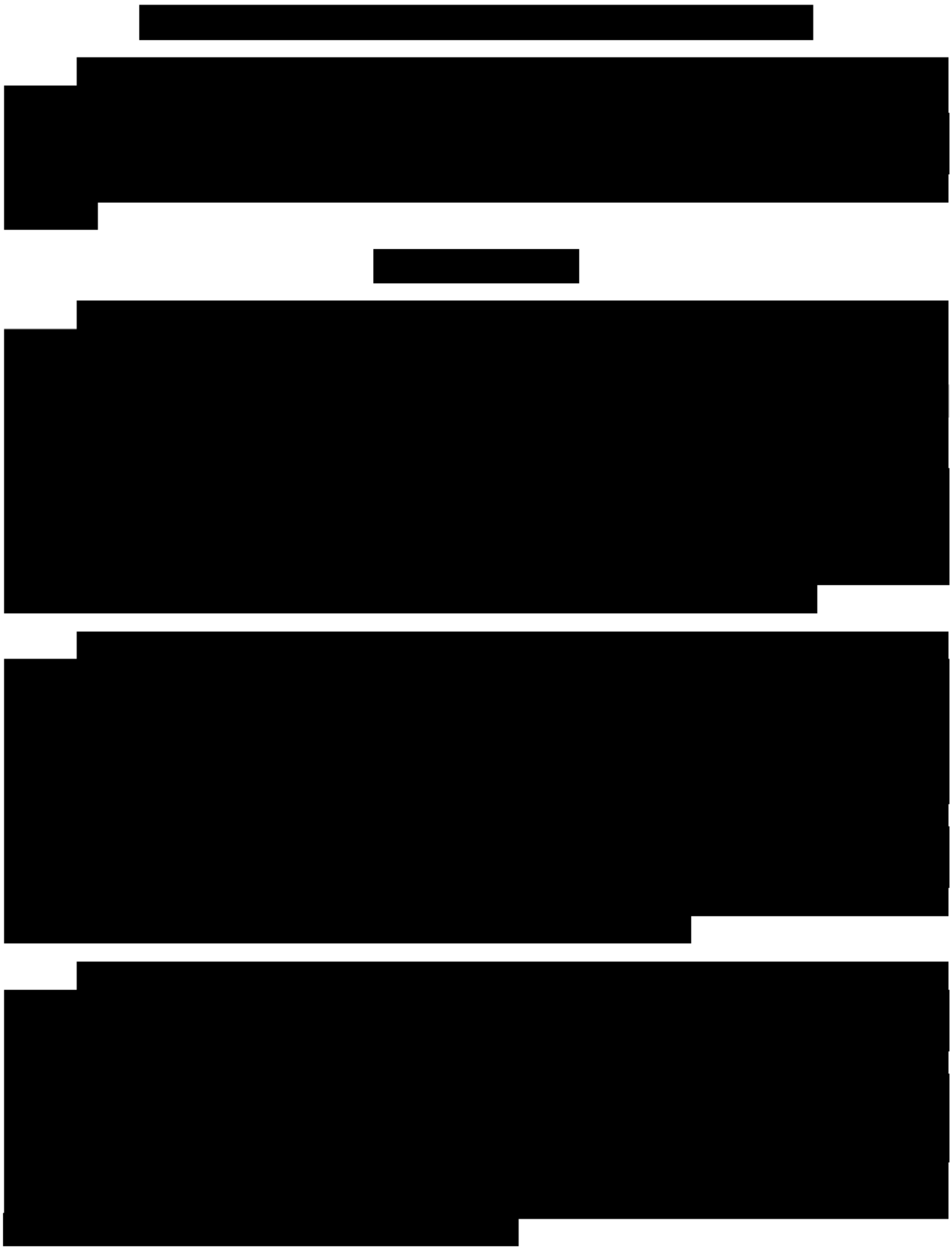

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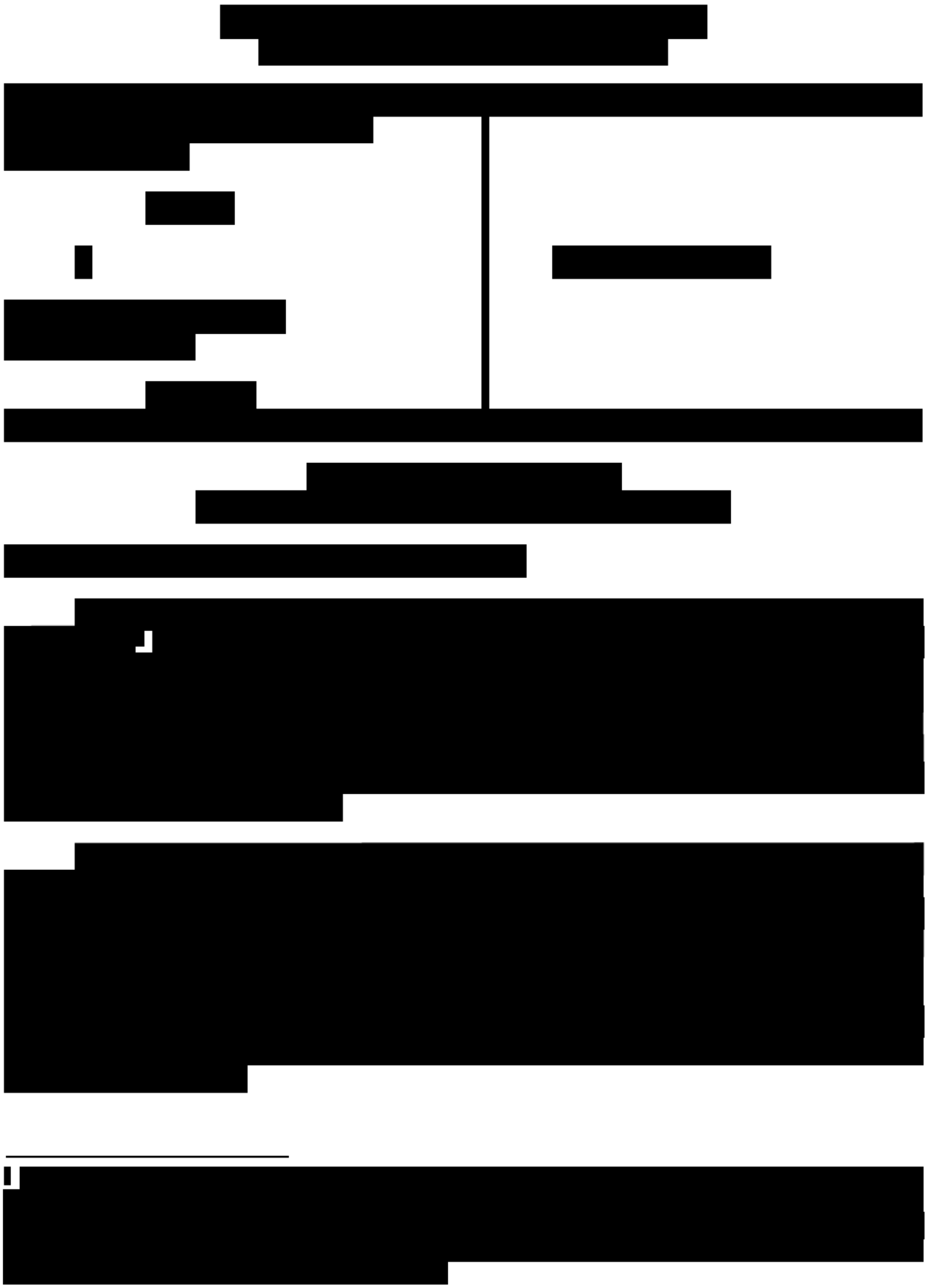

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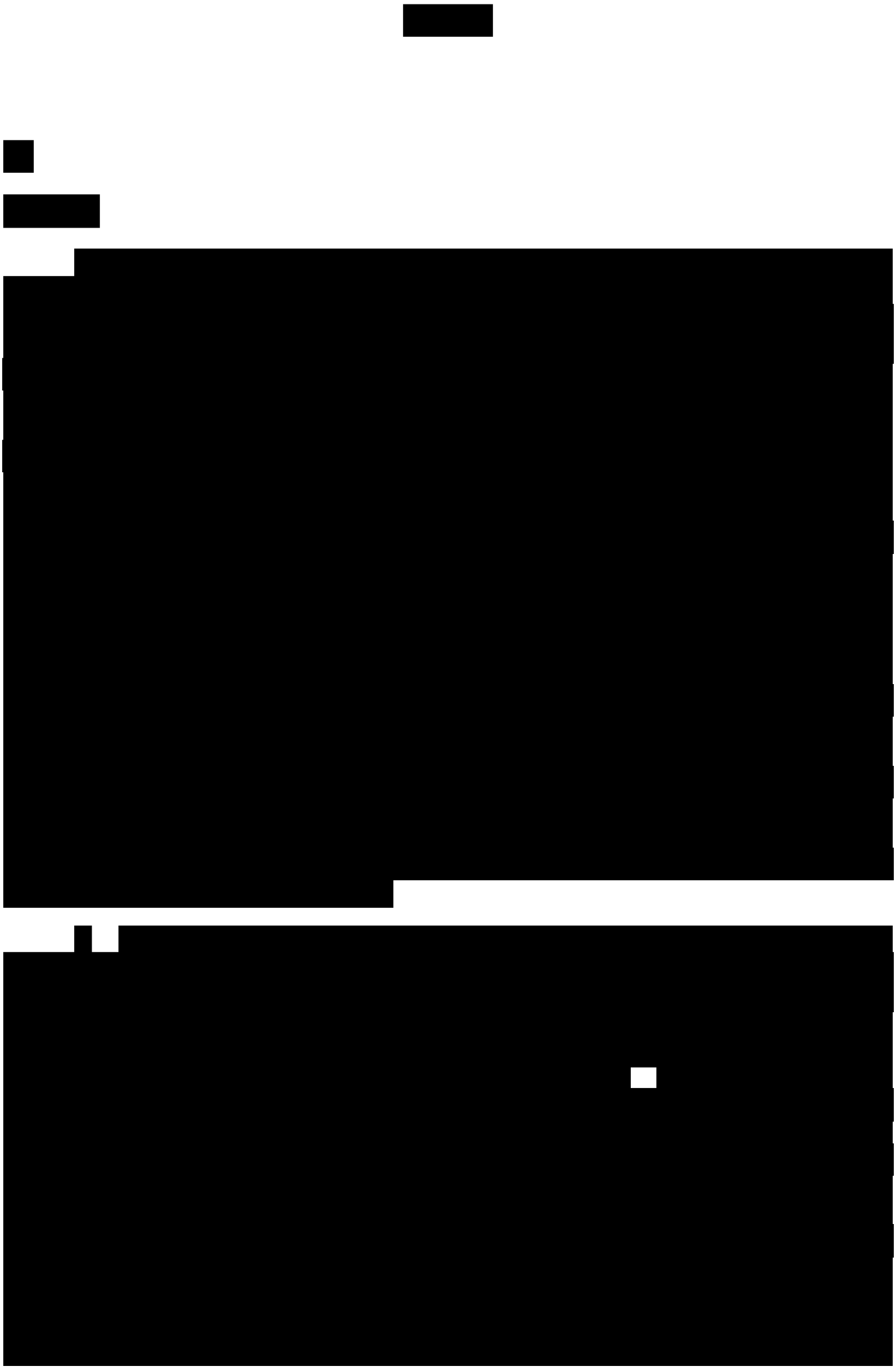

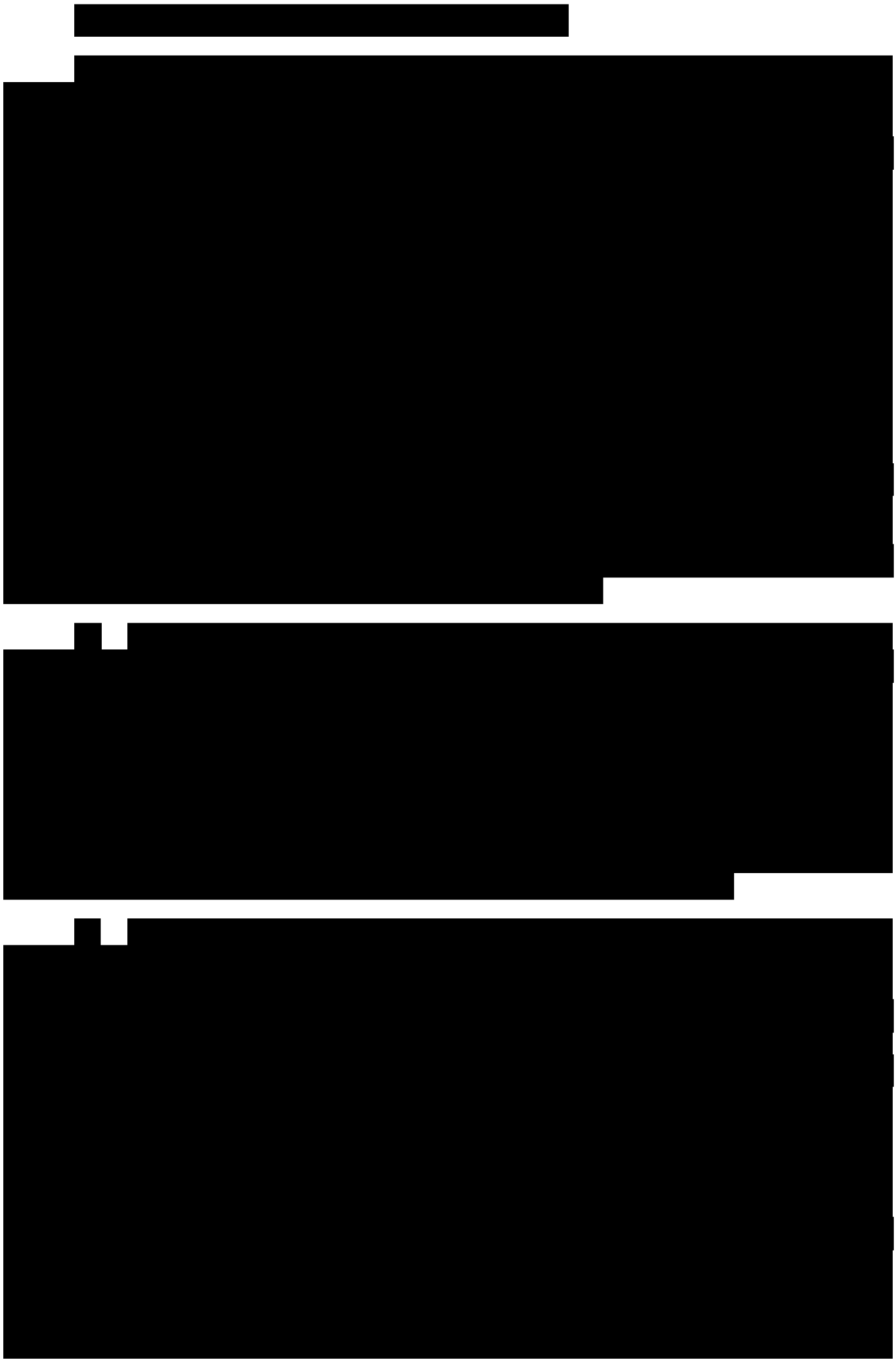

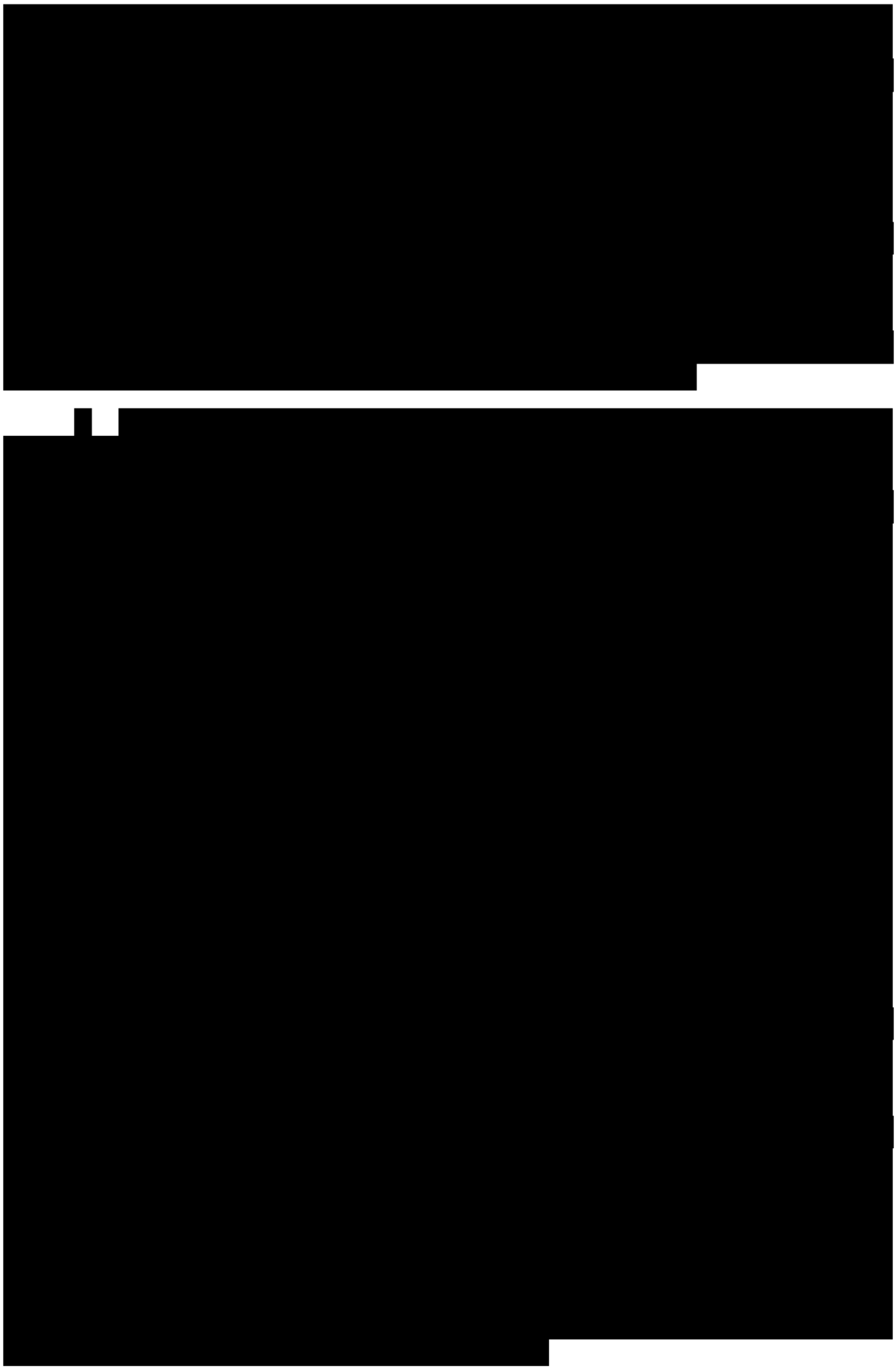

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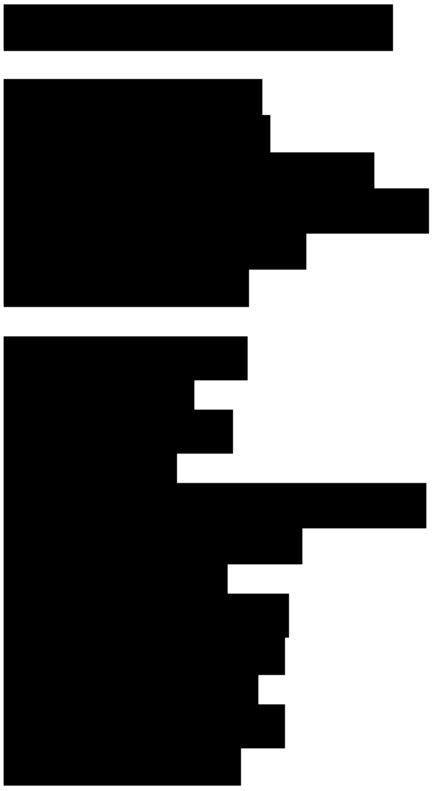

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORPORATION, Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Defendant.	:	Misc. No. 17-151-LPS FILED UNDER SEAL HIGHLY CONFIDENTIAL PURSUANT TO SPECIAL MASTER CONFIDENTIALITY ORDER (D.I. 291)

SPECIAL MASTER'S REPORT AND RECOMMENDATION
REGARDING PROPOSED SALE PROCEDURES ORDER

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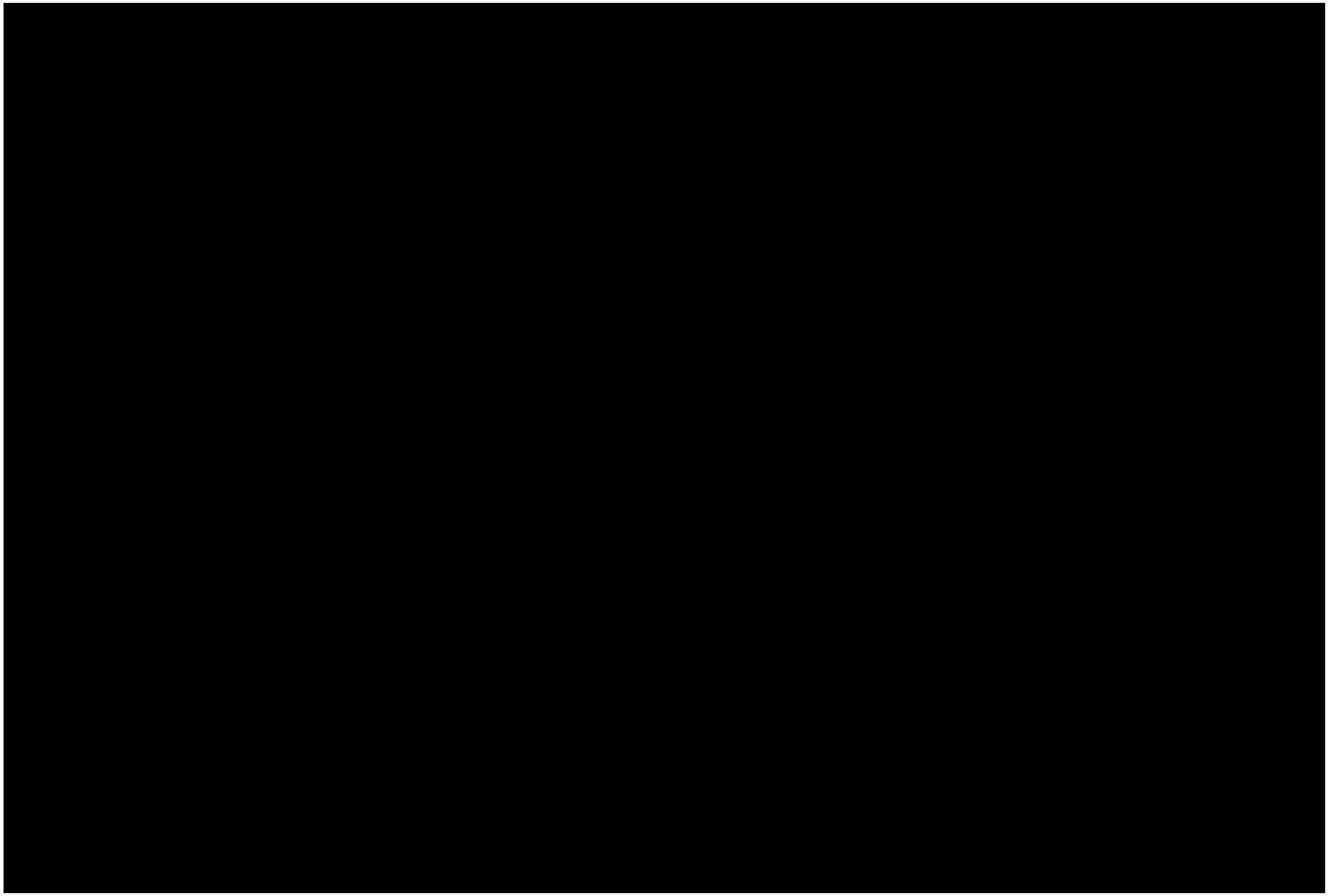

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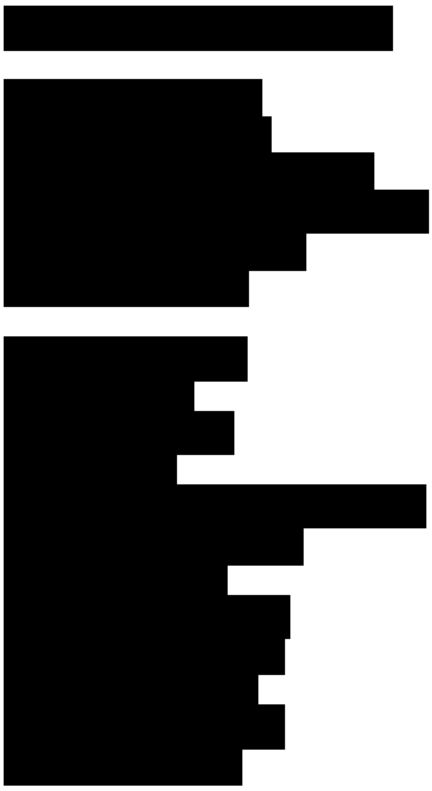

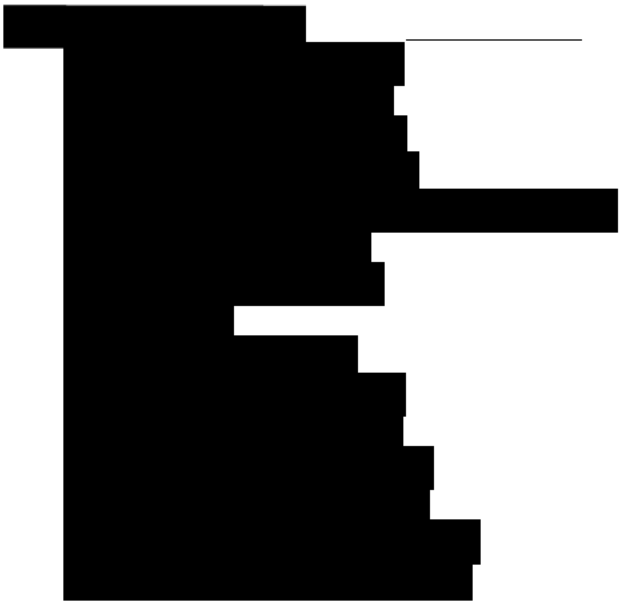

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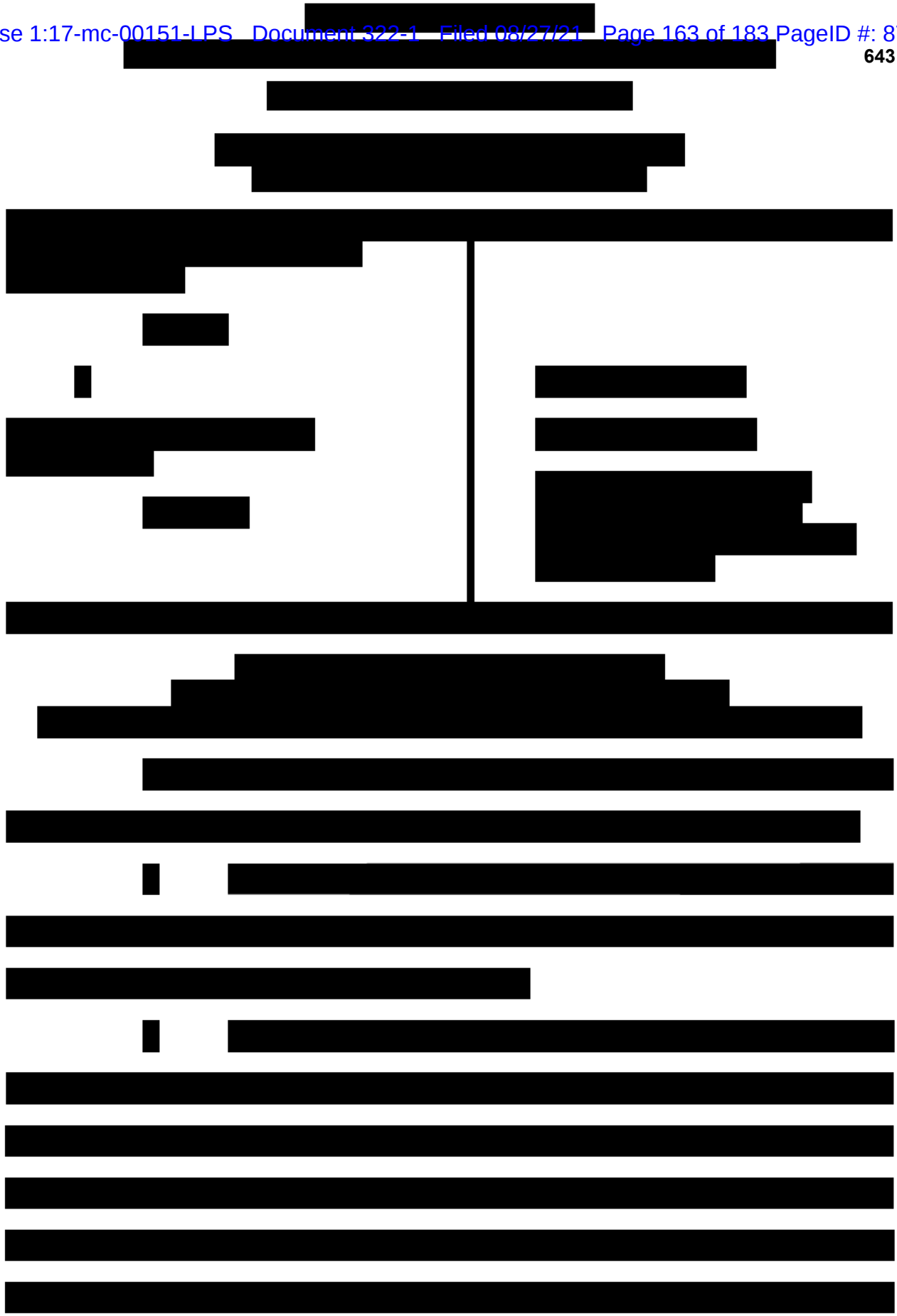

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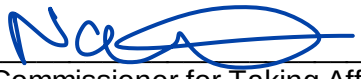
THIS IS EXHIBIT "W" REFERRED TO IN THE AFFIDAVIT OF ROBERT FUNG, SWORN BEFORE ME THIS 25TH DAY OF OCTOBER, 2021.



A Commissioner for Taking Affidavits
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August 20, 2021

FILED UNDER SEAL VIA ELECTRONIC FILING

PUBLIC VERSION
filed August 27, 2021

The Honorable Leonard P. Stark
U.S. District Court for the District of Delaware
844 North King Street
Wilmington, Delaware 19801

Re: *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, et al.*,
C.A. No. 17-mc-151-LPS

Dear Judge Stark:

The Venezuela Parties seek an order maintaining under seal portions of the recently filed Proposed Sales Procedures Order (D.I. 302) and the Special Master's Report and Recommendation Regarding Proposed Sale Procedures Order ("Explanatory Report") (D.I. 303) that contain unverified information, discuss the tentative timing and process of a potential sale, and/or refer to competitive Highly Confidential Information provided to the Special Master pursuant to the July 6, 2021 Confidentiality Order (D.I. 291) (all highlighted in Exhibit 1).[1] Such an order is necessary because two types of serious harm are likely to flow from immediate public disclosure. First, these provisions implicate serious national security concerns and will harm the aligned policy interests of the Republic and the United States if publicly filed. [redacted] As the State Department asserted in July 2020, and as remains the case per the attached declaration of Venezuelan Ambassador Carlos Vecchio, taking steps toward a public sale of PDVH shares would cause "the Venezuelan people [to] seriously question the interim government's ability to protect the nation's assets, thereby weakening it and U.S. policy in Venezuela today." D.I. 212-1 at 4. Second, [redacted]

The strong national security interests of Venezuela and the U.S. as well as the sensitive business interests of the Venezuela Parties outweigh any public interest in the disclosure of the information at issue at this time. The Special Master's unadopted proposal and supporting explanation are merely the first step in the process of establishing procedures to satisfy Crystallex's

[1] The Highly Confidential Information sought to be sealed is at Explanatory Report ¶¶ 53, 59, 64, 65, 69, 75, and 76; and the Hiltz Declaration ¶¶ 14, 19, 27, and 28. The remainder of the information highlighted in Exhibit 1 is sale-process related information, the disclosure of which will harm the Venezuela Parties for the reasons discussed herein.

judgment, which, along with briefing on the parties' objections (which will begin to be submitted on August 25), have yet to be considered by the Court and in any event cannot be implemented until OFAC authorization is obtained. Thus, the portions of the Proposed Sales Procedures Order and Explanatory Report highlighted in Exhibit 1 should be sealed because disclosure would harm protected interests of the Venezuela Parties while providing little, if any, value to the public.

LEGAL STANDARD

Federal Rule of Civil Procedure 5.2(d) provides that the "[t]he court may order that a filing be made under seal" and can later require that "a redacted version" be filed "for the public record." *See Genentech, Inc. v. Amgen, Inc.*, Civ. No. 17-1407-CFC & 18-924-CFC, 2020 WL 9432700, at *2 (D. Del. Sept. 2, 2020) (applying the same standard to determine whether sealing or redacting a judicial record is justified), adopted in 2020 WL 9432702 (D. Del. Oct. 1, 2020). While there is a "right of access" to public court filings, that right "is not absolute." *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 165 (3d Cir. 1993). This Court may direct the filing of a pleading or other document under seal if, after balancing "countervailing interests," the movant's "interest in secrecy outweighs the presumption" of public access. *Id.* This includes documents authored by special masters. *See* Fed. R. Civ. P. 53 Advisory Comm. Notes (stating that there are "circumstances that justify sealing a report or review record against public access").

ARGUMENT

A. Publicly Filing the Proposed Sales Procedures Order and Explanatory Report Without the Proposed Redactions Threatens the Venezuela Parties with Serious Harm.

i. Disclosure threatens the national security and the mutual policy interests of Venezuela and the United States.

Courts routinely seal case records that implicate national security interests. *U.S. v. Hubbard*, 650 F.2d 293, 315–16 (D.C. Cir. 1980) ("The public has in the past been excluded, temporarily or permanently, from court proceedings or the records of court proceedings to … guard against risks to national security interests."); *see, e.g.*, *United States v Washington Post Co.*, 403 U.S. 943 (1971) (sealing parts of the record that the government claimed implicated national security); *N.Y. Times v. United States*, 403 U.S. 942 (1971) (same); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1263–64 (W.D. Wash. 2002) (redacting language from a court order implicating the government's "compelling interest" in "safeguarding the national security").

Since January 2019, the democratic government led by Interim President Juan Guaidó has worked to restore the integrity of Venezuelan institutions and protect the Venezuelan people. [redacted] The United States' "strong foreign policy and national security interests," D.I. 212 at 3, have long been aligned with the Republic's domestic policy and security interests. The United States has been unwavering in its support for "the interim government's efforts to reconstruct the Venezuelan economy following the departure of Maduro" and has consistently "support[ed] the full restoration of democracy" in Venezuela in accordance with its "strong foreign policy and national security interests." *Id.*; *see also* Ex. 2 ¶ 1.[2] The State Department has also explained that the fact that the

[2] The U.S. Government's position has not changed since filing its Statement of Interest (D.I. 212) on July 16, 2020. *See* Ex. 2 ¶ 1 (citing United States Dep't of State, "U.S. Relations with Venezuela Bilateral Relations Fact Sheet (July 6, 2021), https://www.state.gov/u-s-relations-with-venezuela/).

Maduro regime has built "military and intelligence" relationships with "foreign adversaries of the United States which, but for the regime's existence, would have little foothold in South America" is of significant concern for U.S. national security. D.I. 212 at 2.

[redacted] Both the Republic and the United States have made it clear that CITGO is not an ordinary asset; "[e]very Venezuelan knows of this company and it is viewed, as are Venezuela's oil reserves, as a central piece of the national patrimony." D.I. 212-1 at 4; *see also* Ex. 2 ¶¶ 3–4. [redacted] Indeed, the Maduro regime "has already claimed that the United States and Guaidó are conspiring to 'steal' CITGO" as part of its ongoing strategy to wrest power from the Guaidó government. D.I. 212 at 4; *see also* Ex. 2 ¶ 6. [redacted]

As asserted by the State Department: "[T]he United States assesses that the domestic legitimacy of the interim government under Guaidó would be severely eroded were a forced sale of CITGO to take place while the illegitimate Maduro regime still attempts to cling to de facto power in Caracas" and even "taking immediate steps toward a conditional sale" would be "detrimental to U.S. policy and the interim government's priorities." D.I. 212-1 at 4. [redacted]

ii. Disclosure threatens CITGO's business.

"[C]ourts have refused to permit their files to serve as sources of business information that might harm a litigant's competitive standing." *Leucadia*, 998 F.2d at 166. If "the dissemination of [ ] information would subject the defendants to a serious risk of competitive injury or … violate some other important privacy interest," these factors may "militate against the disclosure of the[] materials." *Joint Stock Soc'y v. UDV N. Am., Inc.*, 104 F. Supp. 2d 390, 403 (D. Del. 2000). Sensitive business information does not need to "meet the formal definition of 'trade secret'" for a party to "rebut the presumption favoring access." *Genentech*, 2020 WL 9432700, at *4 (special master approving the sealing of sensitive business information). It is appropriate to seal material that "reflects commercial intelligence…[,] competitive assessments, includ[ing] inward-facing judgments on the parties' own capacities as well as outward-facing judgments on the capacities of others[,] … information on the approaches of the parties to interfacing with government regulators," information that could put a party "at a demonstrable disadvantage in navigating and negotiating other litigation contests," and "confidential legal information." *Id.* at *5–6.

The public disclosure of the Special Master's filings without the redactions proposed in Exhibit 1 threatens harm to CITGO's business and "competitive standing," *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978), in two ways. ***First,*** [redacted]

[redacted]

Second, the filings include certain information that was provided to the Special Master by CITGO in confidence, pursuant to this Court's Confidentiality Order, and that should continue to be protected from disclosure. D.I. 291. Under the Confidentiality Order, "[a]ny Party or ConocoPhillips may designate any documents or information as 'Highly Confidential Information' if such party in good faith believes that disclosure of such ***non-public, confidential, proprietary, or commercially sensitive*** information other than as permitted pursuant to this Order is ***substantially likely to cause injury*** to the producing party." D.I. 291 ¶ 2 (emphasis added). [redacted]

B. The Threatened Harm from Publicly Filing the Proposed Sales Procedures Order and Explanatory Report At This Time Outweighs the Public Interest in Disclosure.

In this case, there is no public interest in the disclosure at this time of the provisions of the Special Master's Proposed Sales Procedures Order and Explanatory Report highlighted in Exhibit 1. [redacted] *See Joint Stock Soc'y*, 104 F. Supp. 2d at 407 (affirming the special master's recommendation to seal information "which the defendants had taken reasonable steps to protect and which, if disclosed, would subject the defendants to a competitive harm because other firms in the [ ] industry could use the information to their advantage"). The proposed order and report are not orders of the Court, they do not bind any party, they do not constitute the argument or position of any party, and they are subject to revision—perhaps extensive revisions—before any sale process will be confirmed by Court order, allowed under OFAC licensing, and actually be ready to take place. The U.S. Government itself has stated that "taking action which advances toward a public auction and contingent sale ***would serve no purpose*** if OFAC ultimately denies Crystallex's license application." D.I. 212 at 9 (emphasis added). [redacted]

[redacted] In light of the highly preliminary and contingent nature of the Special Master's filings and their lack of any actual impact on any party or non-party (other than the Venezuela Parties and the United States through their disclosure), the usual public interest in access to court filings is not present here.

In contrast, and as described above and in the attached declarations, public disclosure of the Special Master's filings without the Venezuela Parties' proposed redactions threatens serious harm to the Venezuela Parties. [redacted] As discussed, the public filings would cause "the Venezuelan people to seriously question the interim government's ability to protect the nation's assets," D.I. 212-1, and would further entrench the illegitimate Maduro regime. Such an outcome is in direct contravention to American and Venezuelan foreign policy and national security interests, which recognize that the sale of the PDVH shares, and the appearance of progress toward a sale, "would be greatly damaging and perhaps beyond recuperation." D.I. 212-1 at 4; *see also* Ex. 2 ¶¶ 2, 4, 7. [redacted] CITGO is not a defendant in these proceedings; it intervened solely to prevent undue disruptions to its ongoing business. *See United States v. Criden*, 648 F.2d 814, 829 (3d Cir. 1981) (stating that "courts may appropriately exercise their discretion" to deny access to documents "which may inflict unnecessary and intensified pain on third parties who the court reasonably finds are entitled to such protection"); *accord United States v. Smith*, 776 F.2d 1104, 1110 (3d Cir. 1985) (sealing a bill of particulars that listed individuals the government may consider "unindicted co-conspirators" because the public perception created by the speculative document would cause "irreparable injury" to the reputations of named individuals). [redacted]

REQUEST FOR RELIEF

For the foregoing reasons, the Venezuela Parties respectfully request that the portions of the Proposed Sales Procedures Order and the Special Master's Report and Recommendation Regarding Proposed Sale Procedures Order highlighted in Exhibit 1 be sealed. Should the Court deny any aspect of this motion, the Venezuela Parties request an administrative stay maintaining those documents under seal in their entirety for three business days to give the Venezuela Parties an opportunity to consider whether to seek emergency relief from the Third Circuit.

Respectfully submitted,

/s/ Kenneth J. Nachbar

Kenneth J. Nachbar (#2067)

cc: All Counsel of Record (Via E-Filing)

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

A Commissioner for Taking Affidavits
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September 22, 2021

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5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Attention: David Byers

Dear Dave:

Crystallex International Corporation ("Crystallex" or the "Company")

As discussed on our call with you, the Monitor, counsel to the DIP Lender and counsel to the Noteholders on September 21, 2021, certain disclosure orders have been made recently by Judge Stark of the U.S. District Court for the District of Delaware in connection with the the PDVH Share sale process (the "**Sale Process**") under the supervision of the Special Master (the "**Public Disclosure Orders**"). The Public Disclosure Orders have the effect of making public, among other things, the timing and amounts of all payments received by Crystallex in connection with the Award, and providing the Guaido administration with visibility as to Crystallex's current cash balance. The Public Disclosure Orders also make public the fact that the Initial Payment Securities are comprised of PDVSA and Venezuelan bonds and the approximate aggregate market value of those bonds as of the time Venezuela transferred the bonds to Crystallex. We understand that the Public Disclosure Orders were made to assist the Special Master in facilitating the Sale Process.

In addition, as discussed, it is also now public that OFAC has denied Crystallex's licence application without prejudice to its ability to reapply in 2022.

In light of the foregoing, Crystallex (with the support of the DIP Lender) will be withdrawing its Protective Motion and requests that the Monitor file revised redacted 35th and 36th Reports in the same manner as it did with the 33rd Report in respect of the Financial Information.

With respect to the Noteholders' cross-motion (the "**Cross Motion**), Crystallex also request that the Monitor re-file its 31st Report with the market value of the Initial Payment Securities currently redacted at paragraph 54 being un-redacted.

In light of the current briefing schedule on the Protective Motion and Cross-Motion, we kindly request that such revised filings be made by the Monitor as soon as possible this week.

We believe that the only issues remaining on the Cross-motion are the Noteholders' request to (i) modify the Courts' 2014 sealing order to unseal the percentage of CVRs transferred to Messrs. Fung and Oppenheimer, and (ii) compel public disclosure of the terms of engagement of Crystallex's financial advisor, Moelis & Co., and the independent director's advisor, Pirinate Consulting LLC. The Monitor is aware of the risks to the affected management personnel and to Crystallex's enforcement efforts if the sealed CVR information is made public at this time. As it relates to the advisors, those professionals have confirmed to Crystallex that the terms of their engagement (which have never been part of a public record) are confidential and disclosure of their competitively sensitive information could seriously harm their commercial interests. Notwithstanding the foregoing, Crystallex remains ready to provide both the CVR information and advisor engagement terms to any stakeholder (including the Noteholders) on a confidential basis, but not publicly.

In light of Crystallex's good faith efforts to resolve issues, including withdrawal of the Protective Motion, it would be unfortunate if the Noteholders pressed forward with costly litigation on the remaining issues in the Cross-Motion, particularly considering the immateriality of the issues to the Noteholders. We remain hopeful that the Cross-Motion will now also be withdrawn and await a decision on that from counsel to the Noteholders.

Yours very truly,

Robin B. Schwill

cc. Bob Fung
Marc Oppenheimer
Natalie Renner
Maureen Littlejohn

RBS/sfv

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

A Commissioner for Taking Affidavits
NATALIE RENNER

DAVIES

155 Wellington Street West
Toronto, ON M5V 3J7 Canada

dwpv.com

Natalie Renner
T 416.367.7489
nrenner@dwpv.com

File 246577

July 9, 2021

BY EMAIL

Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Attention: Peter Ruby

Dear Sirs:

Crystallex International Corporation

We write in response to the Notice of Cross Motion delivered by the Ad Hoc Committee of Unsecured Noteholders (the "**Ad Hoc Committee**") seeking public disclosure of certain information, including information that is currently the subject of sealing orders (the "**Cross Motion**").

Crystallex has and remains willing to discuss and address information requests from any of its stakeholders in a responsible manner, having regard to the risks and harms of public disclosure to Crystallex's current litigation, enforcement and monetization efforts against Venezuela. Crystallex is therefore disappointed that your clients chose to seek information disclosure by delivering a motion record, instead of first attempting to take the basic step of engaging the Company in a good faith discussion.

While the Company has been fully engaged over the last several weeks in its enforcement efforts, in particular the heavily contested CITGO litigation and sales process, the Company has now had a chance to fully consider with its advisors the information requests in your client's Cross Motion and the risks of public disclosure, at this time. The Company has also discussed the applicable information requests with our DIP Lender. Crystallex believes that most of the information requested can now be publicly disclosed. In the limited cases where the Company believes that public disclosure or unsealing is not appropriate at this time, we have proposed other means of disclosure to the Ad Hoc Committee. Specifically, we can advise as follows:

(a) **Total CVR earned by the DIP Lender**: Through the advances made under the CCAA Court-approved DIP financing, the DIP Lender has earned CVR in the amount of approximately 88.242% of the Award proceeds;

(b) **Outstanding DIP Balance:** While the outstanding DIP balance has been publicly disclosed previously, Crystallex and the DIP Lender consent to the continuing public disclosure of this information. Crystallex will disclose the outstanding DIP balance in its materials filed in connection with each of the Company's stay extension motions;

(c) **Net Arbitration Proceeds Transfer Agreement:** Attached as Schedule "A" to this letter is a copy of the Net Arbitration Proceeds Transfer Agreement that was approved by the Court and attached to the confidential Affidavit of Harry Near sworn December 15, 2014. This information is being provided on a non-confidential basis, with the sole exception of the CVR amounts transferred under the agreement which have been redacted. The redacted information may be provided to your clients on a confidential basis;

(d) **Advisors Engaged in connection with the Sales Process:** Attached as Schedule "B" to this letter is a summary of the identity and terms of engagement of each advisor that the Company has engaged in connection with the sale process for the PDVH Shares that is currently pending before the United States District Court for the District of Delaware. This information is being provided on a non-confidential basis, with the sole exception of the monthly fee information for the Company's financial advisor, Moelis & Co., which has been redacted. The redacted monthly fee information may be provided to your clients on a confidential basis;

(e) **The Engagement Terms of the Independent Director:** Mr. Sergio Marchi was appointed as an independent director of Crystallex. Mr. Marchi receives an annual honorarium of CAD $200,000. Mr. Marchi is not entitled to any other compensation and there is no formal engagement letter entered into between Crystallex and Mr. Marchi. This information is provided on a non-confidential basis;

(f) **The Engagement Terms of the Independent Advisor:** Attached as Schedule "C" to this letter is a summary of the terms of engagement of Pirinate Consulting Group, LLC, as independent advisor to the Independent Director. This information is being provided on a non-confidential basis, with the sole exception of the monthly fee information which has been redacted. The redacted fee information may be provided to your clients on a confidential basis; and

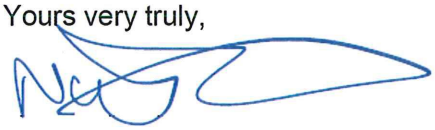
(g) **Details of the Initial Payment Securities:** Crystallex can confirm that the Initial Payment Securities are comprised of debt. The Company is not prepared at this time to consent to unseal any further details of the Initial Payment Securities received from Venezuela (or its detailed views on the risks and harms that public disclosure of this information would present). Crystallex will, however, address this information request and Crystallex's concerns in the context of the confidential Court-ordered mediation.

A copy of this letter will be attached to Crystallex's responding evidence to the Cross Motion.

DAVIES

Crystallex would be pleased to discuss any of the above items with the Ad Hoc Committee and looks forward to a good faith mediation on matters that remain in issue between the parties.

Yours very truly,



Natalie Renner

cc David Byers and Maria Konyukhova, *Stikeman Elliot LLP (counsel to Monitor)*
Brian Denega and Fiona Han, *Ernst & Young (Monitor)*
Robert Chadwick, Chris Armstrong, *Goodmans LLP (counsel to Ad Hoc Committee)*
Timothy Pinos, Shayne Kukulowicz and Ryan Jacobs, *Cassels Brock & Blackwell LLP (counsel to DIP Lender)*

SCHEDULE A

COURT APPROVED NET ARBITRATION PROCEEDS TRANSFER AGREEMENT

NET ARBITRATION PROCEEDS TRANSFER AGREEMENT

THIS AGREEMENT is dated as of [●], 2014.

B E T W E E N:

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

-and-

●
(the "**Lender**")

-and-

ROBERT FUNG,
of the City of Toronto, Canada
("**Fung**")

-and-

MARC OPPENHEIMER,
of the City of Aventura, Florida, U.S.A.
("**Oppenheimer**")

A. **WHEREAS** the Borrower and Tenor Special Situation Fund I, LLC entered into a credit agreement dated as of April 23, 2012, which was assigned by Tenor Special Situation Fund I, LLC to Tenor KRY Cooperatief U.A. on such date (as so assigned and as amended by the first credit agreement amending and confirming agreement dated as of May 15, 2012, the second credit agreement amendment agreement dated as of June 5, 2013, the third credit agreement amendment agreement dated as of April 16, 2014 and the fourth credit agreement amendment agreement dated as of **[●]**, 2014 (the "**Fourth Amendment Agreement**"), and as further amended, amended and restated, supplemented, converted or otherwise modified from time to time (the "**Credit Agreement**"));

B. **WHEREAS** in connection with the Borrower's CCAA Case, the MIP was approved by the CCAA Court on April 16, 2012;

C. **WHEREAS** the Fourth Amendment Agreement permits the parties hereto to enter into this Agreement;

NOW THEREFORE for good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged by each of the parties hereto), each of the parties hereto covenants and agrees to and in favour of each other as follows:

1. The parties hereto represent and warrant that recitals above are true and correct.

2. (a) Each of the Borrower and Fung represent and warrant, confirm and agree that (i) Fung is an employee of the Borrower and acts as a director and the Chief Executive Officer of the Borrower and is a beneficiary under the MIP, and (ii) attached as Schedule "A-1" to this Agreement is a true and complete copy of Fung's employment agreement with the Borrower (including any and all amendments and extensions) and there are no other agreements between the Borrower and Fung, oral or written, in any way relating to (x) the terms of Fung's employment with the Borrower or (y) employment income or any other form of compensation of any kind whatsoever to be paid by the Borrower to Fung on account of his employment or in connection with any other role in respect of which Fung may perform for the Borrower (including without limitation as an officer and/or director of the Borrower).

(b) The Borrower and Fung covenant and agree to deliver to the Selected Accountants (as defined below) all requested Tax (as defined in section 6 of this Agreement) and other information, documentation and financial and Tax reporting information to enable the Selected Accountants to determine the amount of Tax required to be withheld, remitted and paid by the Borrower to any governmental authority from time to time on account of the Transferred CVR (as defined below) transferred to Fung hereunder, including any distributions thereon, including without limiting the foregoing, the information and documents listed on Schedule "A-2". The Selected Accountants shall be directed to calculate such amounts to be withheld and to report in writing thereon to the Borrower and the Lender.

3. (a) Each of the Borrower and Oppenheimer represent and warrant, confirm and agree that (i) Oppenheimer is providing consulting services to the Borrower as an independent contractor and Oppenheimer acts as a director of the Borrower and is a beneficiary under the MIP, (ii) all payments to Oppenheimer are on account of his services as a consultant and not on account of his duties as a director of the Borrower (for certainty, each of the Borrower and Oppenheimer represent and warrant that the Borrower does not pay and Oppenheimer does not receive any compensation or remuneration in any form whatsoever in connection with or in respect of Oppenheimer acting as a director of the Borrower), and (iii) attached as Schedule "B" to this Agreement is a true and complete copy of Oppenheimer's independent contractor agreement with the Borrower (including any and all amendments and extensions) and there are no other agreements between the Borrower and Oppenheimer, oral or written, in any way relating to (x) the terms of Oppenheimer's relationship with the Borrower or (y) income or any other form of compensation of any kind whatsoever to be paid by the Borrower to Oppenheimer on account of his services or in connection any other role in respect of which Oppenheimer may perform for the Borrower including without limitation as a director of the Borrower

(b) The Borrower and Oppenheimer covenant and agree to deliver to the Selected Accountants all requested Tax and other information, documentation and financial and Tax and reporting information to enable the Selected Accountants to determine the

amount, if any, of Tax required to be withheld and remitted by the Borrower to any governmental authority from time to time on account of the Transferred CVR transferred to Oppenheimer hereunder, including any distributions thereon, including, without limiting the foregoing, the information and documents listed on Schedule "A-2". The Selected Accountants shall be directed to calculate such amounts to be withheld and to report in writing thereon to the Borrower and the Lender as described in Section 7 of this Agreement.

4. Each of Fung and Oppenheimer (i) agrees that neither of them will seek to amend the existing MIP previously approved by the CCAA Court, now or in the future, and (ii) irrevocably consents to the CCAA Court entering an order approving this Agreement and the transactions contemplated hereby; provided, however, that the parties acknowledge and agree that the transactions contemplated hereby and provided for hereunder shall not be deemed to be amendments to the MIP and shall in no way impair or otherwise affect their respective rights and entitlements under and pursuant to the MIP. The Borrower agrees that it shall not seek to amend the MIP now or in the future except with the prior consent of the Lender in its discretion.

5. (a) Each of the Lender and the Borrower agrees that concurrently with the later of (x) the advance of the Loan constituting Supplemental Loan Tranche D and the Lender earning, among other things, the Fourth Additional Compensation Amount equivalent to 17.688% of the Net Arbitration Proceeds and (y) the Effective Date, the Lender does and shall be deemed to concurrently transfer an aggregate of [redacted] of the Net Arbitration Proceeds as follows: (i) [redacted] of the Net Arbitration Proceeds to Fung and (ii) [redacted] of the Net Arbitration Proceeds to Oppenheimer (in the case of each of Fung and Oppenheimer individually, and collectively, the "**Transferred CVR**"), without any further action, approval, consent, documentation or court order required whatsoever and without any payment by Fung or Oppenheimer to the Borrower or other consideration for such transfers. For certainty, the Lender does and shall retain the balance of the Fourth Additional Compensation Amount equivalent to [redacted] of the Net Arbitration Proceeds.

(b) Each of Fung and Oppenheimer are and shall at all times hereafter be severally responsible for and shall pay or cause to be paid when due to the appropriate governmental authority any and all present or future Taxes payable by him for, in connection with or in any way related to the transfer of any of the Transferred CVR to or by Fung or Oppenheimer, as the case may be, or any of their respective heirs, legal administrators or estates including any payment which may be received by any one or more of them in connection with the Transferred CVR, or any of the other transactions contemplated by this Agreement. In the event that either Fung or Oppenheimer is assessed any Tax or is otherwise required to pay any Tax in connection with the Transferred CVR or any of the other transactions contemplated in this Agreement, including in respect of any indemnity payments required to be paid by him to the Lender, but fails to pay any of such Tax by the date that is 30 days after date of issuance by Canada Revenue Agency or any other taxing authority of a notice of assessment or similar notice from the applicable taxing authority that such Tax is payable (the "**Payment Date**") regardless of whether Fung or Oppenheimer elects to object to or dispute the assessment of the Tax, then in such case the applicable Transferred CVR shall automatically and without any further action whatsoever be transferred and deemed to

be transferred from Fung or Oppenheimer, as the case may be, to the Lender without any further action, approval, consent, documentation or court order required whatsoever and without any payment by the Lender to Fung or Oppenheimer, as the case may be, or other consideration. Upon either Fung or Oppenheimer, as applicable, not paying any of such Tax on the Payment Date, Fung or Oppenheimer, as applicable, shall promptly deliver written notice to the Borrower and the Lender confirming the non-payment on the Payment Date of any such Tax; for certainty, the transfer of the Transferred CVR to the Lender as contemplated by this Section 5(b) shall occur and be deemed to occur immediately upon any such Tax not being paid by the Payment Date even if Fung or Oppenheimer, as applicable, does not provide such notice. Each of Fung and Oppenheimer covenants and agrees to promptly provide to the Borrower and the Lender all correspondence received by him from any taxing authority relating in any way to the assessment or potential assessment of such Taxes.

(c) Notwithstanding anything to the contrary contained herein, in the Credit Agreement or in any other Credit Document, prior to the payment by the Borrower of any amounts pursuant to the Transferred CVR to either Fung or Oppenheimer or any Replacement Person, each of Fung, Oppenheimer, or any such Replacement Person, shall be required to deliver a declaration to each of the Borrower and the Lender swearing or affirming that such Person paid to all applicable taxing authorities when due any and all Tax payable by such Person in connection with each and every transaction contemplated by this Agreement including in respect of any indemnity payments required to be paid to the Lender.

6. (a) For the purposes of this Agreement, the following terms shall have the following meanings respectively:

(i) "**Cause**" includes any of the following circumstances, past (to the extent not known by either the Borrower as of the date of this Agreement) or future:

A. the failure of an individual to properly carry out (x) any of his duties and responsibilities under his employment or consulting agreement, as the case may be, or (y) for any reason other than Disability, any duties or responsibilities that are new duties or responsibilities assigned by the Borrower to such individual after the date of this Agreement and which such individual is capable of performing when same are initially assigned by the Borrower to him, or (z) any reasonable and lawful instruction or directive of the Board of Directors of the Borrower;

B. the individual acting dishonestly or fraudulently or the wilful misconduct of the individual in the course of his employment or consulting services, as the case may be;

C. the laying of any charge against the individual for any criminal offence including without limitation any offence involving fraud, theft, embezzlement, forgery, wilful misappropriation of funds or property, violation of securities legislation or other fraudulent or dishonest acts, and in respect of which any such charge a conviction may result in possible incarceration for any period of time;

D. the failure by the individual to comply with and perform his duties as a director of the Borrower;

E. any conduct by the individual which is unbecoming to the Borrower;

F. any action or inaction by the individual which is against the interests of the Borrower; or

G. any other act, event or circumstance which would constitute just cause at law for termination of Fung's employment agreement or Oppenheimer's consulting agreement.

(ii) "**Disability**" or "**Disabled**" means the physical or mental inability of Fung or Oppenheimer, as the case may be, to perform any of his duties under his employment agreement or consulting agreement, as the case may be including without limitation any new duties or responsibilities assigned to him by the Borrower after the date of this Agreement, but for certainty "Disability" or "Disabled" shall not include the physical or mental inability of Fung or Oppenheimer to perform any of such new duties or responsibilities assigned by the Borrower to such individual (i) after the date of this Agreement and (ii) as of the date on which any of such new duties or responsibilities are first assigned by the Borrower to such individual; and for certainty, in all circumstances regardless of any definition of "disability" or "disabled" under any applicable law. "Disability Determination" means that the Borrower has made a determination that either Fung or Oppenheimer, as applicable is Disabled.

(iii) "**Good Reason**" means the occurrence of any of the following events without the consent of Fung or Oppenheimer, as the case may be, except for action by the Borrower which is remedied by the Borrower within 60 days after receipt by the Borrower of written notice thereof given by Fung or Oppenheimer:

A. any substantial and material breach of Fung's employment agreement or Oppenheimer's consulting agreement, as the case may be, taken by the Borrower;

B. if the Borrower assigns new duties to Fung or Oppenheimer after the date of this Agreement (i.e. for clarity, which duties were not part of his job description or were not required to be completed by him prior to the date of this Agreement) that Fung or Oppenheimer, as applicable, cannot perform because of lack of skills or experience; or

C. in the case of Oppenheimer only, any requirement that he (i) perform any duties on behalf of the Borrower on the Jewish Sabbath (i.e. Friday sundown to Saturday sundown where Oppenheimer is situate at such time) or a Jewish holiday listed on Schedule "B-3" or (ii) be away from his home on (x) the day on which any such holiday starts in the evening of such day or (y) the evening on which any such holiday ends.

(iv) "**Tax**" and "**Taxes**" means all taxes, assessments, charges, dues, duties, rates, fees, imposts, levies and similar charges of any kind lawfully levied, assessed or imposed by any taxing authority (domestic or foreign), including all income taxes (including any tax on or based upon net income, gross income, income as specially defined, earnings, profits or selected items of income, earnings or profits) and all capital taxes, gross receipts taxes, environmental taxes, sales taxes, use taxes, *ad valorem* taxes, value added taxes, transfer taxes (including, without limitation, taxes relating to the transfer of interests in real property or entities holding interests therein), franchise taxes, licence taxes, withholding taxes, payroll taxes, employment taxes, Canada or Québec Pension Plan premiums, excise, severance, social security, workers' compensation, employment insurance or compensation taxes or premium, stamp taxes, occupation taxes, premium taxes, property taxes, windfall profits taxes, alternative or add-on minimum taxes, goods and services tax, customs duties or other taxes, fees, imports, assessments or charges of any kind whatsoever, together with any interest and any penalties or additional amounts imposed by any taxing authority (domestic or foreign), and any interest, penalties, additional taxes and additions to tax imposed with respect to the foregoing.

(b) In the event that either Fung or Oppenheimer

(i) resigns or terminates his relationship with the Borrower including by way of Oppenheimer terminating his independent contractor agreement with the Borrower except for Good Reason (in each case, referred to herein as a "**voluntary termination**" or "**voluntary terminating his employment**"), or

(ii) is terminated for Cause by the Borrower (for certainty including the Borrower terminating for Cause the independent contractor agreement with Oppenheimer),

then in any such case the applicable Transferred CVR then held by such Person shall automatically be and be deemed to be transferred by such Person to the Lender (in each such case, the **"Returned CVR"**) without any other action, approval, consent, documentation or court order required whatsoever on the date on which such employment ceases or on the date on which the Borrower makes the disability determination. For certainty, (i) no consent from Fung or Oppenheimer, as applicable, the Borrower or the Monitor, or further order of the CCAA Court or any other court or Governmental Authority is or shall be required whatsoever and (ii) no consideration, compensation or other payment of any kind is required to be paid by the Lender or the Borrower or any other Person to such Person who is transferring the Transferred CVR to the Lender. Such transfer to the Lender shall be made without any deduction or set off whatsoever for or on account of any Tax that may be or become owing to any applicable taxing authority in any jurisdiction by any such Person who is transferring the Transferred CVR to the Lender as a result of or in connection with such Person acquiring such Transferred CVR and the subsequent transfer of such Transferred CVR by such Person.

(c) Subject to the following sentence, the transfer of the Returned CVR to the Lender pursuant to paragraph 6(b) shall be effective on the date on which:

(i) Fung or Oppenheimer, as applicable, delivers his notice of voluntary termination to the Borrower (even if such termination will occur after the date of delivery of such notice of termination), or

(ii) the Borrower delivers a notice of termination for Cause to Fung or Oppenheimer, as applicable (even if his last date of employment or the last date of consulting services, as applicable, will occur after the date of delivery of such notice of termination).

Notwithstanding the preceding sentence in this Section 6(c), if Fung or Oppenheimer delivers a Notice of Objection to Termination for Cause or if the Borrower delivers a Notice of Objection to Voluntary Termination for Good Reason, the Transferred CVR for Fung or Oppenheimer, as applicable, shall not automatically be transferred to the Lender and same will only be transferred to the Lender if and when there is an Arbitration Award for the Borrower (as defined and discussed below). In the event that Fung or Oppenheimer, as the case may be, delivers a Notice of Objection to Termination for Cause or the Borrower delivers a Notice of Objection to Voluntary Termination for Good Reason, then in such case, the Borrower shall not make any payments or distributions in respect of the Transferred CVR for such Person until an Arbitration Award is issued, and then only in accordance with the terms hereof as to whether the applicable Transferred CVR continues to remain owned by the applicable Person or such applicable Transferred CVR is transferred, pursuant to the terms hereof, by such Person to the Lender.

(d) The Borrower shall deliver written notice to the Lender of any such notice of voluntary termination received by the Borrower from Fung or Oppenheimer, as applicable, or notice of termination for Cause delivered to Fung or Oppenheimer by the Borrower, as applicable, or a notice of Disability Determination delivered by the Borrower to Fung or Oppenheimer, as applicable, not later than the first Business Day immediately following (i) the date of receipt by the Borrower of the notice of voluntary termination, (ii) the date of delivery by the Borrower to Fung or Oppenheimer, as applicable, of the notice of termination for Cause or (iii) the date on which the notice of Disability Determination is delivered to Fung or Oppenheimer, as the case may be. The failure by the Borrower to deliver such notice to the Lender shall not in any way affect the automatic transfer of the Returned CVR to the Lender and the Lender's rights to the ownership of and benefits to such Returned CVR, or the right of the Lender to transfer any or all of the applicable Transferred CVR to a Replacement Person thereafter in accordance with the terms hereof.

(e) In the event that the Borrower gives notice of termination for Cause to either Fung or Oppenheimer, then within fifteen (15) days after the date of delivery of such notice (the date of delivery of such notice being deemed to be the first day of such fifteen (15) day notice period), Fung or Oppenheimer, as the case may be, may deliver a notice of objection to the Borrower and the Lender (a "**Notice of Objection to Termination for Cause**"). If such Person does not deliver a Notice of Objection to Termination for Cause before the expiry of such fifteen (15) day period, such Person shall be deemed to have accepted and irrevocably agreed to the fact that he was terminated for Cause and such circumstance will be referred to as "No Objection to Termination for Cause".

(f) In the event that the Borrower gives notice of a Disability Determination to either Fung or Oppenheimer, then within fifteen (15) days after date on which the Borrower delivers such notice, Fung or Oppenheimer, as the case may be, may deliver a notice of objection to the Borrower and the Lender (a "**Notice of Objection to Disability Determination**"). If Fung or Oppenheimer, as the case may be, does not deliver a Notice of Objection to Disability Determination before the expiry of such fifteen (15) day period, he shall be deemed to have accepted and irrevocably agreed to the fact that he is Disabled, and such circumstance will be referred to as "**No Objection to Disability Determination**".

(g) In the event that Fung or Oppenheimer, as applicable, delivers a Notice of Objection to Termination for Cause or a Notice of Objection to Disability Determination within the time periods set out in clauses (e) and (f) of this Section 6, then in such case, the Borrower and Fung or Oppenheimer, as applicable, shall be deemed to have agreed to arbitrate the question as to whether Fung or Oppenheimer, as applicable, was terminated for Cause or without Cause or has become Disabled, as applicable in accordance with the provisions hereinafter set forth regarding such arbitration.

(h) In the event that Fung voluntarily terminates his employment or Oppenheimer terminates his consulting contract on the basis that there is Good Reason for doing so, then within fifteen (15) days after the date of delivery by Fung of the notice of termination of employment for Good Reason or delivery by Oppenheimer of notice of termination of consulting contract for Good Reason, the Borrower may deliver to Fung or Oppenheimer, as the case may be, a notice of objection that such termination was made by Fung or Oppenheimer, as the case may be, for Good Reason, and such notice of objection shall be concurrently delivered by the Borrower to the Lender (a "**Notice of Objection to Voluntary Termination for Good Reason**"), provided that the failure by the Borrower to concurrently deliver the Notice of Objection to Voluntary Termination for Good Reason will shall not in any way affect the validity and effectiveness of such Notice of Objection to Voluntary Termination for Good Reason. If the Borrower fails to deliver the Notice of Objection to Voluntary Termination for Good Reason within such fifteen (15) day period, the Borrower shall be deemed to have accepted and irrevocably agreed that the voluntary termination of employment or consulting contract, as applicable, was made for Good Reason and such circumstances will be referred to as "No Objection to Voluntary Termination for Good Reason".

(i) In the event that the Borrower delivers a Notice of Objection to Voluntary Termination for Good Reason within the fifteen (15) business day period described in clause (h) of this Section 6 immediately above, then in such case, the Borrower and Fung or Oppenheimer, as applicable, shall be deemed to have agreed to arbitrate the issue of whether the voluntary resignation was or was not for Good Reason in accordance with the arbitration provisions contained herein.

(j) Each of the Borrower, and Fung or Oppenheimer, as applicable, agrees to act reasonably and cooperate in good faith to have any arbitration contemplated by this Agreement completed and decided as soon as possible after Fung, Oppenheimer or the Borrower, as applicable, delivers the applicable notice requiring an arbitration pursuant to the terms hereof. Notwithstanding the immediately preceding sentence, the arbitration must be completed and decided under all circumstances within seventy-five (75) days after the date of delivery of the applicable Notice of Objection to Termination for Cause, Notice of

Objection to Disability Determination or Notice of Objection to Voluntary Termination for Good Reason. The Lender shall be entitled to receive copies of all communications between the parties and/or the arbitrators, listen to all phone calls between the parties and the arbitrators, attend the arbitration hearing, and receive copies of any rulings, judgments or arbitration awards made by the arbitrators. All parties hereto irrevocably confirm and agree that the Lender is and shall be entitled to participate fully in the entire arbitration process as a party to the arbitration, and without limitation, the Lender shall be permitted to submit written arguments to the arbitration panel in advance of the arbitration hearing, examine and cross-examine witnesses, make submissions at the arbitration hearing (itself or through its counsel), and, if permitted by the rules of the arbitration, submit post-arbitration hearing submissions. (A) The dispute will be submitted to and finally settled by arbitration administered by ADR Chambers in Toronto, Ontario in accordance with the ADR Chambers Arbitration Rules. The place of arbitration shall be the City of Toronto in the Province of Ontario. The language of the arbitration shall be English. There shall be an arbitration panel with three members, and each of the Borrower and Fung or Oppenheimer, as applicable, may nominate one panel member (who shall be either an arbitrator or an employment lawyer from a nationally recognized law firm or a recognized employment boutique law firm) within ten (10) days after delivery by Fung or Oppenheimer, as applicable, of the Notice Of Objection To Termination For Cause or the Notice of Objection to Disability Determination to the Lender and the Borrower or within ten (10) days after the delivery of the Notice of Objection to Voluntary Termination for Good Reason by the Borrower to Fung or Oppenheimer, as applicable and the Lender, and the chair of the arbitration panel will be selected by the two other panel members. In the event that one or more of the parties fails to appoint a panel member or chair within the times specified, then that appointment shall be made as provided for in the ADR Chambers Arbitration Rules. There will be no appeal right from the decision of the arbitral panel on questions of fact, law, or mixed fact and law, or the final decision (and for certainty, the applicable parties shall have no right to appeal or request leave to appeal the arbitration decision to any court or other administrative or governmental body). (B) Unless otherwise agreed by the parties or required by law (including as a result of any order or direction of the CCAA Court), the parties to the arbitration, the members of the arbitral panel, and other persons the parties reasonably direct, shall maintain the confidentiality of all documents, communications, proceedings, and awards provided, produced, or exchanged pursuant to an arbitration conducted hereunder.

(k) A ruling by the arbitral panel that Fung or Oppenheimer, as applicable, was terminated for Cause or has become Disabled or that the voluntary termination was not for "Good Reason", as applicable is referred to as the **"Arbitration Award for the Borrower"** and a ruling by the arbitral panel that Fung or Oppenheimer, as applicable, was terminated without Cause or has not become Disabled or that voluntary termination was for Good Reason, as applicable, is referred to as the **"Arbitration Award for Fung/Oppenheimer"**. In the event of an Arbitration Award for the Borrower, Fung or Oppenheimer, as the case may be, shall be required to promptly pay and shall promptly pay all costs and expenses incurred by the Lender in connection with any arbitration hereunder including without limitation all legal fees and disbursements and the amount required to be paid shall not be based on or in any way limited by any ruling by the arbitrators in that regard. In the event of an Arbitration Award for Fung/Oppenheimer, the Lender shall be required to

pay and shall promptly pay all costs and expenses incurred by Fung or Oppenheimer, as applicable, in connection with any arbitration hereunder including without limitation legal fees and disbursements, regardless of any ruling by the arbitral panel in that regard. The Borrower shall pay its own costs including legal fees in any such arbitration regardless of the outcome and the fees and costs of the arbitration panel members and the arbitration centre.

(l) The jurisdiction of the arbitration panel shall be limited to determining as applicable whether (i) the Borrower had Cause to terminate Fung's employment or Oppenheimer's consulting contract, as applicable, (ii) the Borrower had a basis upon which to determine that Fung or Oppenheimer, as applicable, was Disabled, or (iii) Fung or Oppenheimer, as applicable, voluntarily terminated his employment or consulting contract with Good Reason. For greater certainty, the arbitration panel shall have no jurisdiction to award damages of any kind in connection with the events, actions or transactions which are the subject of this Agreement or otherwise, to make an award for costs of the arbitration in favour of one or more parties, or to make any award or issue any other decision against the Borrower, Fung, Oppenheimer, or the Lender or any of the other Releasees.

(m) Each of Fung and Oppenheimer irrevocably covenants and agrees to and in favour of the Lender as follows:

(i) in the event of his voluntary termination without Good Reason or No Objection To Termination For Cause or No Objection to Disability Determination, he shall not bring, assert, commence or seek an injunction or any other type of claim, court action or any other proceeding whatsoever (including before any court, governmental body or tribunal) against the Lender and/or the Borrower to stop or reverse the transfer of the applicable Returned CVR from him to the Lender; and

(ii) in the event that he wishes to assert and/or claim that (x) his employment or consulting agreement, as applicable, was terminated without Cause, (y) his voluntary termination of employment of consulting agreement, as applicable, was made for Good Reason, or (iii) the Borrower made a Disability Determination even though Fung or Oppenheimer, as applicable, was not Disabled, then in such case, he does not and shall not have any right of action or claim or right to commence any court action or other proceeding against the Lender or any of the other Releasees (as that term is defined below) and hereby releases the Lender and all of the Releasees from and against any and all Claims (as that term is defined below) in connection with same; and

(iii) agrees that his only right of recourse in connection with or as a result of an alleged termination of employment of consulting agreement without Cause, an alleged voluntary termination of employment or consulting agreement with Good Reason or a Disability Determination alleged to have been made improperly by the Borrower and any consequences thereof whether related to this Agreement or otherwise (and including any damages suffered or incurred by him) is and shall be to commence an action against the Borrower for damages or file a proof of claim against the Borrower in the CCAA Proceeding and/or request an arbitration in accordance with the provisions hereof.

(n) In the case of No Objection to Termination for Cause or an Arbitration Award for the Borrower arising from termination for Cause or voluntary termination without Good Reason, the Lender shall have the right at any time and from time to time in its sole discretion, but without any obligation to do so, to transfer, on terms and conditions satisfactory to the Lender including the delivery or entering into of any documents or agreements as may be required by the Lender in its discretion (including without limitation an agreement to be bound by the terms of this Agreement to the same extent as each of Fung and Oppenheimer are bound hereby), any or all of such Returned CVR to induce a qualified candidate who will be at arms-length to the Lender to replace Fung or Oppenheimer, as the case may be, as an employee of or consultant or contractor to the Borrower (in each case, a **"Replacement Person"**), such Replacement Person to be satisfactory to the Lender in its discretion. For greater certainty, the Replacement Person will be an individual employed or retained by the Borrower who is approved by the Lender but the Lender shall have no obligation to use any portion of the Returned CVR for the benefit of the Replacement Person.

(o) In the case of an Arbitration Award for Fung/Oppenheimer, the applicable Transferred CVR shall continue to be owned by Fung or Oppenheimer, as applicable, and the Lender shall have no right to transfer of any of such applicable Transferred CVR to any Replacement Person. In such circumstance, Fung or Oppenheimer, as applicable, shall:

(i) have no right for his employment or consulting agreement to be reinstated by the Borrower and shall not take any action or commence any proceeding for same;

(ii) not commence any action or other proceeding against the Borrower or any other Person requiring that the Borrower reinstate such employment or consulting agreement; and

(iii) be permitted to commence an action or other proceeding against the Borrower for damages or file a proof of claim against the Borrower in the CCAA Proceeding (such right to commence such an action or proceeding or file a proof of claim not constituting or being deemed to constitute an agreement or admission by the Borrower or any other Person that the occurrence of an Arbitration Award for Fung/Oppenheimer does or should result in any damages owing by the Borrower to Fung or Oppenheimer, as the case may be).

(p) Each of Fung and Oppenheimer irrevocably covenants and agrees to and in favour of the Lender as follows: (i) in the event the Borrower makes a Disability Determination in respect of Fung or Oppenheimer, as the case may be, then in such case, he shall not bring, assert or seek an injunction or any other type of claim, court action or any other proceeding against the Lender and (ii) in the event that he wishes to assert that he is able to perform his duties for the Borrower and therefore the Disability Determination was without merit or is not proper for any reason whatsoever, then in such case, he (A) does not and shall not have any right of action or claim against the Lender and the other Releasees and hereby releases the Lender and the Releasees from and against any and all actions or claims in connection with same and (B) agrees that his only right of recourse in connection with or as a result of such Disability Determination and any consequences thereof whether related to this Agreement or otherwise (and including any damages

suffered or incurred by him) is and shall be to issue a Notice of Objection to Disability Determination and pursue such objection by way of arbitration in accordance with the foregoing provisions of this Section 6.

(q) In the event that either Fung or Oppenheimer becomes (i) deceased, or (ii) there is No Objection to Disability Determination, or (iii) there is an Arbitration Award for the Borrower arising from a Disability Determination, the Lender, in its discretion, and without any prior notice to or consent from the Borrower or Fung or Oppenheimer, as the case may be, shall have the right, at any time and from time to time but excluding in the circumstances of the Exclusion Sentence (as that term is defined below), to require that some or all of the applicable Transferred CVR held by such Person be transferred by or on behalf of the affected Person to a Replacement Person, if the Lender is of the view that the transfer of some or all of the applicable Transferred CVR is necessary to induce such Replacement Person to accept such a position with the Borrower. In such case, the Lender shall be entitled to automatically transfer any portion or all of the applicable Transferred CVR to such Replacement Person by or on behalf of the affected Person. For certainty, if such Replacement Person can be retained without some or all of the applicable Transferred CVR being transferred to the Replacement Person, in the discretion of the Lender, then in such case the applicable remaining Transferred CVR shall remain with Fung or Oppenheimer, as the case may be, or his estate, as applicable. If a Replacement Person is hired or employed by the Borrower either directly as an employee or independent contractor or through such Replacement Person's consulting company and as part of such Replacement Person's compensation, the Lender, in consultation with the Borrower (but for certainty in the Lender's sole discretion), determines in its discretion that the transfer of some or all of the applicable Transferred CVR is necessary to induce such Replacement Person to accept employment or retainer with the Borrower, as contemplated by the foregoing provisions of this Section 6(g), then in such case the delivery of a written notice by the Lender to the Replacement Person, and the legal administrator of Fung or Oppenheimer, as the case may be, and copied to the Borrower, specifying the amount of the Transferred CVR being transferred from such Disabled Person or estate to the Replacement Person, is and shall be all that is required to complete the transfer of such portion of the Transferred CVR to the Replacement Person, and without limitation no approval or consent from Fung or Oppenheimer as applicable (or his estate), the Borrower or the Monitor and no further approval or order of the CCAA Court or any other court or Governmental Authority, or any other action or documentation, is or shall be required whatsoever. If, for any reason, the portion of the Transferred CVR that was to be transferred to the Replacement Person is not so transferred or is forfeited by the Replacement Person, then such Transferred CVR shall be returned to or remain with the Person who was Disabled or the estate of the deceased. The foregoing provisions of this Section 6(q) shall not be applicable (and for certainty, the Lender shall not be permitted to transfer the Transferred CVR to a Replacement Person) in the event that either (i) all Obligations owing to the Lender under the Credit Agreement and the other Credit Documents have been paid in full to the Lender or (ii) the Borrower has received payment in full of the Arbitration Proceeds and all of such Arbitration Proceeds have been deposited into the applicable bank accounts as contemplated and required by the terms of the Credit Agreement (the "**Exclusion Sentence**"). For certainty, the Lender shall have the right at any time and from time to time in its discretion, but without any obligation to do so, require that the transfer of

some or all of the applicable Transferred CVR be made on such terms as Tenor may require including the delivery or entering into of any documents or agreements as may be required by the Lender in its discretion (including without limitation an agreement by the Replacement Person to be bound by the terms of this Agreement to the same extent as each of Fung and Oppenheimer are bound hereby, provided that (i) such documents or agreements do not impose any additional financial obligations or liabilities on the Borrower, Fung, or Oppenheimer, as the case may be, for which the Borrower, Fung, or Oppenheimer, as the case may be, is not already responsible for in accordance with the terms of this Agreement, and further provided that each of the Borrower, Fung, or Oppenheimer, as the case may be, shall still be required to execute and deliver any such document even if such document does impose any additional financial obligations or liabilities for which such party is not already responsible for in accordance with the terms of this Agreement if the Lender agrees in writing in favour of such party that the Lender will promptly reimburse such party for such obligations or liabilities after any such obligations or liabilities are incurred and such party delivers to the Lender written evidence of such obligations or liabilities having been incurred.

(r) Without limiting the generality of the other releases and indemnities contained herein, each of Fung and Oppenheimer severally

(i) covenants and agrees to file any and all required Tax returns in all applicable jurisdictions and pay any and all Tax payable by him when due in connection his receipt of and payment of any payout on account of any Transferred CVR and/or any or all of such Transferred CVR being transferred to the Lender and/or to a Replacement Person as contemplated by this Agreement,

(ii) releases each of the Releasees (as that term is defined below) from and against any and all present or future Claims (as that term is defined below) in connection with or in any way relating to his receipt of the Transferred CVR and/or any or all of such Transferred CVR being transferred to Tenor and/or a Replacement Person as contemplated by this Agreement, and

(iii) covenants and agrees to indemnify and hold harmless each of the Releasees from and against any and all present or future Claims any one or more of them may have in connection with or in any way relating to the transactions contemplated by this Agreement including without limitation the transfer by the Lender of the Transferred CVR to Fung and Oppenheimer and/or any or all of such Transferred CVR being transferred back to Tenor and/or a Replacement Person as contemplated by this Agreement. For greater certainty, nothing herein shall obligate Fung or Oppenheimer to indemnify any Releasees or any Replacement Person for any Taxes arising or becoming owing from the ownership of the Transferred CVR by Tenor or such Replacement Person or the receipt by Tenor or such Replacement Person of any Net Arbitration Proceeds.

7. The Borrower covenants and agrees to withhold, remit and pay when due pursuant to any applicable law any and all applicable Taxes to all applicable taxing authorities (whether within or outside of Canada) for and in respect of, among other things, all Taxes required to be withheld and remitted by the Borrower in respect of any payment on account of the Transferred CVR to each of Fung and Oppenheimer, and if applicable any Replacement Person and any other Net

Arbitration Proceeds which may now or hereafter be payable to Fung and/or Oppenheimer, and if applicable any Replacement Person (collectively and individually in this Section 7, the "**Applicable CVR**"). The Borrower covenants and agrees to comply with the following process for and in respect of the payment on account of the Applicable CVR and the withholding, remittance and payment of all Taxes in connection therewith, and each of Fung and Oppenheimer agrees with such process and withholdings, remittances and payments by the Borrower and further covenants and agrees that he will not seek to take any action or commence any action or other proceeding to interfere with, challenge or prevent such process and will cooperate with the Borrower and the Selected Accountants. The parties hereto further covenant and agree as follows:

(a) Before making a payment on account of the Applicable CVR to either Fung or Oppenheimer or, if applicable any Replacement Person (in this Section 7, individually an "**Individual**" and collectively, the "**Individuals**"), the Borrower, at its expense, shall retain KPMG, or if requested by the Borrower another internationally recognized accounting firm but only if such alternate firm is satisfactory to the Lender in its discretion failing which KPMG shall be retained or such purpose (the "**Selected Accountants**"), to commission an analysis and written opinion regarding the Taxes to be withheld, remitted and paid by the Borrower and/or the applicable Individual to applicable taxing authorities in any applicable jurisdiction for and in respect of the Applicable CVR for each applicable Individual and the applicable due dates for the payment of such Taxes, including, without limiting the foregoing, any and all employer health taxes or other payroll or similar or analogous Taxes to be paid on account of such Applicable CVR. The Borrower covenants and agrees to retain the Selected Accountants for such purpose within fifteen (15) days after the date of this Agreement.

(b) The Borrower shall cause the Selected Accountants to prepare a separate draft Accountants' Tax Report for each applicable Individual (each, an "**Accountants' Tax Report**"), and the Borrower shall promptly deliver the draft Accountants' Tax Report to each of the Lender and the applicable Individual (collectively, the "**Recipients**"), with a copy to any other Individuals, in each case promptly after the draft Accountants' Tax Report is received by the Borrower. Any deliveries of reports shall be made in accordance with Section 12 and shall be treated as confidential.

(c) The Borrower shall not make any payment to the applicable Individual or withhold and remit any amounts on account of Taxes in respect of such applicable Individual's Applicable CVR before the expiry of fifteen (15) days after the date of delivery of the draft Accountants' Tax Report to each of the Recipients (the "**Accountants Report Notice Period**"), except as contemplated by the immediately following sentence. If (i) each Recipient of the draft Accountants' Tax Report for an applicable Individual delivers written notice to the Borrower and each of the other Recipients that such Recipient does not object to the draft Accountants' Tax Report before the expiry of the Accountants Report Notice Period or (ii) none of the Recipients delivers a notice of objection to the draft Accountants' Tax Report to the Borrower and the other Recipients before the expiry of the Accountants Report Notice Period, then in such case the Borrower shall proceed to instruct the Selected Accountants to issue the final Accountants' Tax Report (in the same form as the draft), the Borrower shall promptly provide a copy of the executed Accountants' Tax Report to each of the Recipients, and the Borrower shall be permitted

to and shall proceed, after the executed Accountants' Tax Report is delivered to the Borrower, to withhold all applicable amounts on account of all applicable Taxes and remit such amounts to the applicable taxing authorities in all applicable jurisdictions in accordance with the Accountants' Tax Report. In the event that any one of the Lender or the applicable Individual has any objections to the draft Accountants' Tax Report (the "**Objector**") and delivers a notice of such objection to the Borrower and the other Recipients before the expiry of the Accountants Report Notice Period, then in such case, the Objector shall, concurrently with the delivery of the notice of objection, deliver to the Borrower and the other Recipients a detailed explanation of such objections; in such case the Borrower shall not pay any amount on account of the Applicable CVR to the applicable Individual and/or remit any payments to any taxing authorities in respect of such Applicable CVR until such time as (i) the Borrower and the Recipients accept the recommendations in the draft Accountants' Tax Report and such Accountants' Tax Report is issued or (ii) the Borrower and the Recipients otherwise agree in writing to the payment of the Applicable CVR to the applicable Individual and the amounts required to be withheld and remitted to the applicable taxing authorities in respect of such Applicable CVR, in either of which cases the Borrower shall, as applicable, after the Accountants' Tax Report is issued deliver a copy of the executed Accountants' Tax Report to each of the Recipients or after an agreement is signed in writing by the Borrower and each of the Recipients, as applicable, withhold and remit and pay all applicable amounts on account of all applicable Taxes to the applicable taxing authorities in all applicable jurisdictions in accordance with such Accountants' Tax Report or written agreement executed by the Borrower and each of the Recipients. The Borrower and the Recipients agree to meet and confer to analyze any objections of the Objector to the recommendations in the draft Accountants' Tax Report and/or meet with the Selected Accountants to assess and try to resolve any such objections. In the event that the Recipients and the Borrower do not reach an agreement regarding the recommendations in the draft Accountants' Tax Report, then in such case, the Recipients confirm and agree that the Borrower shall be permitted to direct that the Accountants' Tax Report issued and the Borrower can and shall proceed to withhold all applicable amounts on account of all applicable Tax Amounts and remit such amounts to the applicable taxing authorities in all applicable jurisdictions in accordance with the Accountants' Tax Report.

(d) For greater certainty, the Borrower is and shall at all times hereafter be permitted and entitled to deduct from amounts paid to Fung or Oppenheimer, as applicable, from any Applicable CVR, any and all amounts required to be paid by the Borrower on account or in respect of any and all applicable employer health taxes or other payroll or similar or analogous taxes on account of such Applicable CVR.

(e) The parties hereto acknowledge, confirm and agree that they do not need to comply with the foregoing terms of this Section 7 if the Lender agrees in its sole discretion that the parties shall not be required to comply with the provisions of this Section 7.

(f) Notwithstanding anything to the contrary in this Agreement, no amount shall be paid to Fung, Oppenheimer or a Replacement Person pursuant to the Transferred CVR, and neither Fung, Oppenheimer not any Replacement Person shall have any right to receive any amounts pursuant to the Transferred CVR otherwise payable, unless and until any assessment or reassessment of the Lender or Borrower by any taxing authority in respect

of any and all Taxes relating to the transfer of a Transferred CVR has been paid in full by the Borrower from the funds otherwise payable Fung, Oppenheimer, or any Replacement Person, as the case may be. For greater certainty this restriction is applicable only to assessments and reassessments received prior to the time amounts become payable pursuant to the Transferred CVR in accordance with the terms of the Credit Agreement.

8. This Agreement is not an amendment to the Credit Agreement or any other Credit Document. The Credit Agreement and the other Credit Documents are hereby confirmed by the Borrower. Without limitation, all parties hereto acknowledge and agree that all applicable conditions precedent to the advance of Supplemental Loan Tranche D must be satisfied prior to the advance of Supplemental Loan Tranche D by the Lender unless waived by the Lender in its sole discretion. For certainty, this Agreement constitutes a Credit Document (as that term is defined in the Credit Agreement).

9. Each of (a) the Borrower for itself and on behalf of each of its Subsidiaries and on behalf of its and their respective successors and assigns, (b) Fung and (c) Oppenheimer (each a "Releasor") hereby absolutely, unconditionally and irrevocably releases and forever discharges the Lender, Tenor Special Situation Fund I, LLC and each of their respective successors and assigns, and their respective present and former equity holders, investors, Affiliates, Subsidiaries, predecessors, directors, officers, principals, employees, attorneys, agents and other representatives in all capacities including as a director of the Borrower (the Lender and all such other Persons being hereinafter referred to collectively as the "**Releasees**" and individually as a "**Releasee**") and severally agrees to indemnify and hold harmless, each of the Releasees, from and against all past, present or future demands, actions, causes of action, suits, damages, costs, expenses, and any and all other claims, counterclaims, defenses, rights of set off, demands and liabilities whatsoever (individually, a "**Claim**" and collectively, "**Claims**") of every kind and nature, known or unknown, suspected or unsuspected, both at law and in equity, and whether as a result of any action, event or thing which occurred in the past or occurs in the future, which it or any of its Subsidiaries, he, or its or his respective successors, legal administrators, heirs or permitted assigns, may now or hereafter own, hold, have or claim to have or assert against the Releasees or any of them for, upon, or by reason of any circumstance, action, cause or thing whatsoever which arose or occurred prior to the date of this Agreement or which occurs after the date of this Agreement in any way relating to or in connection with:

(i) the subject matter hereof or the transactions contemplated hereby,

(ii) any action taken or omitted to be taken by the Lender hereunder,

(iii) any action taken or omitted to be taken hereunder by any one or more Releasor in connection with this Agreement or any of the transactions contemplated hereby, including (A) relating to the employment of Fung or the services of Oppenheimer or any termination of such employment or services (whether for Cause or otherwise) or any Disability Determination by the Borrower or any consequences thereof including any Transferred CVR being transferred to the Lender, and/or transferred to any Replacement Person, or

(iv) any and all Taxes, levies, duties or similar amounts required to be withheld, remitted and/or paid by the Lender, Fung or Oppenheimer under any applicable law to any taxing authority (but excluding Taxes payable on the income of the

Lender for and on account of amounts paid to the Lender or a Replacement Person on account of the Transferred CVR to the extent any of such Transferred CVR is transferred back to and retained by the Lender or transferred to a Replacement Person) in connection with any of the transactions contemplated in this Agreement including, without limitation, the delivery or transfer of, or any amounts paid on account of, any Transferred CVR to Fung and Oppenheimer and/or any or all of such Transferred CVR being transferred back to the Lender and/or a Replacement Person as contemplated by this Agreement.

Nothing herein shall release the Releasees from any obligation to pay costs awarded by an arbitrator pursuant hereto or to return any Transferred CVR in accordance with the terms of this Agreement and nothing will release any persons who are directors of the Borrower from any breach of their statutory or fiduciary duties. Neither Fung nor Oppenheimer shall have liability for the failure of the Borrower to remit any Taxes which the Borrower has withheld. Nothing in this Agreement requires any of the Releasors to indemnify any of the Releasees in respect of any claim asserted by any investor in Tenor or Tenor Special Situation Fund I, LLC in respect to any obligations or duties they may have to such investors.

10. Each of (a) Fung and (b) Oppenheimer hereby absolutely, unconditionally and irrevocably releases and forever discharges the Borrower and its successors and assigns, and its present and former equity holders, Affiliates, Subsidiaries, predecessors, directors, officers, principals, employees, attorneys, agents and other representatives (the Borrower and all such other Persons being hereinafter referred to collectively as the **"Borrower Releasees"** and individually as a **"Borrower Releasee"**) and agrees to indemnify and hold harmless each of the Releasees, from and against all past, present or future demands, actions, causes of action, suits, damages, and any and all other claims, counterclaims, defenses, rights of set off, demands and liabilities whatsoever (individually, a **"Claim"** and collectively, **"Claims"**) of every kind and nature, known or unknown, suspected or unsuspected, both at law and in equity, which it or any of its Subsidiaries, he, or its or his respective successors, legal administrators, heirs or permitted assigns, may now or hereafter own, hold, have or claim to have or assert against the Borrower Releasees or any of them for, upon, or by reason of any circumstance, action, cause or thing whatsoever which arose or occurred prior to the date of this Agreement or which occurs after the date of this Agreement and in any way relating to or in connection with any action taken or omitted to be taken by the Borrower now or in the future specifically relating to (A) any Transferred CVR transferred by the Lender to Fung or Oppenheimer hereunder being transferred back to the Lender, and/or transferred to any Replacement Person and (B) any and all Taxes, levies, duties or similar amounts required to be withheld, remitted and/or paid by the Borrower, Fung or Oppenheimer under any applicable law to any taxing authority in connection with any of the transactions contemplated in this Agreement (but excluding Taxes payable on the income of the Borrower on account or in respect of the payment to and receipt by the Borrower of the Arbitration Proceeds) including, without limitation, the delivery or transfer of, or any amounts paid on account of, any Transferred CVR and/or any or all of such Transferred CVR being transferred back to the Lender and/or a Replacement Person as contemplated by this Agreement. Nothing in this Section shall release the Borrower from its failure to remit any Taxes withheld by it.

11. None of this Agreement or any terms hereof may be amended, supplemented, waived or modified except in accordance by way of written agreement executed by each of the parties hereto.

12. All notices, requests and demands to or upon the respective parties hereto to be effective shall be in writing (including by facsimile or other direct electronic transmission including pdf email, if one is listed below), and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when delivered by hand or, in the case of facsimile or other direct electronic transmission, when sent, addressed as follows or to such other address as may be hereafter notified by the respective parties hereto:

The Borrower:

Crystallex International Corporation
8 King Street East, Suite 1201
Toronto, Ontario, M5C 1B5, Canada
Attn: Robert A. Fung
Email: rfung@crystallex.com

With a copy to:

Davies Ward Phillips & Vineberg LLP
155 Wellington St W, 40th floor
Toronto, ON M5V 3J7, Canada
Attn: Jay Swartz
Email: jswartz@dwpv.com

The Lender:

Tenor KRY Cooperatief U.A.
1180 Avenue of the Americas
Suite 1940
New York, N.Y. 10036
U.S.A.
Attn: David Kay
Email: dkay@tenor.com

With a copy to:

Cassels Brock & Blackwell LLP
Suite 2100, Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2
Attn: Ryan C. Jacobs
Email: rjacobs@casselsbrock.com

Fung:

Robert Fung
49 Edenbrook Hill
Etobicoke, Ontario M9A 4A1
Email: rfung@rogers.blackberry.net

Oppenheimer:

Marc Oppenheimer
19900 East Country Club Drive
Apt. 416
Aventura, Florida 33180-3330
Email: mjokry@gmail.com

provided that any notice, request or demand to or upon the Lender shall not be effective until received. Any notice, request or demand received by any party after 5:00 p.m. Toronto time on any Business Day or at any time on any day which is not a Business Day shall be deemed to have been received by the recipient on the next following Business Day. Any party may change its or his address for receiving notices hereunder by giving notice to the other parties.

13. No failure to exercise and no delay in exercising, on the part of the Lender, any right, remedy, power or privilege hereunder, shall operate as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. The rights, remedies, powers and privileges herein provided are cumulative and not exclusive of any rights, remedies, powers and privileges provided by law.

14. This Agreement shall be binding upon and inure to the benefit of the Borrower, the Lender, Fung and Oppenheimer, and each of their respective successors, legal administrators, heirs and permitted assigns. Notwithstanding the foregoing, none of the Borrower, Fung or Oppenheimer may sell, assign or transfer any of its or his rights or obligations under this Agreement without the prior written consent of the Lender and the Lender may withhold its consent in Lender's sole discretion, and any purported sale, transfer, or assignment of any rights or obligations hereunder without the prior written consent of the Lender shall be void and of no force or effect. For certainty, each of Fung and Oppenheimer can sell or assign his applicable Transferred CVR, or a portion thereof, but only with the prior written consent of the Lender in its discretion and on terms and conditions satisfactory to the Lender in its discretion including any agreements which the Lender may require from any one or more of the Borrower, Fung or Oppenheimer, as applicable, and the transferee or assignee. The Lender may sell, assign or transfer any of its rights or obligations under this Agreement without prior notice to or consent from the Borrower, Fung or Oppenheimer.

15. This Agreement and the rights and obligations of the parties under this Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the Province of Ontario and the federal laws of Canada applicable therein and, to the extent applicable, the CCAA and the Bankruptcy Code.

16. This Agreement is solely for the benefit of the parties hereto and their respective successors, legal administrators, heirs and permitted assigns, and, except for any permitted assignee in

accordance with Section 14 above, no other Persons shall have any right, benefit, priority or interest under, or because of the existence of, this Agreement.

17. (a) Each party to this Agreement hereby irrevocably and unconditionally, but in each case subject to the agreement to submit to arbitration as contemplated by Section 6 herein:

(i) submits for itself or himself, as applicable, and its or his property in any legal action or proceeding relating to this Agreement, or for recognition and enforcement of any judgment in respect thereof, to the non-exclusive general jurisdiction of the CCAA Court and the Bankruptcy Court, provided that the Lender shall be entitled in its sole discretion to determine whether any such legal action or proceeding shall be in any state or federal court sitting in New York County, New York or any applicable court in the City of Toronto, Ontario;

(ii) consents that any such action or proceeding may be brought in such courts, and waives any objection that it may now or hereafter have to the venue of any such action or proceeding in any such court or that such action or proceeding was brought in an inconvenient court and agrees not to plead or claim the same;

(iii) agrees that service of process in any such action or proceeding may be effected by mailing a copy thereof by registered or certified mail (or any substantially similar form of mail), postage prepaid, to such party at its address set forth in Section 12 or at such other address of which any party hereto shall have notified the other parties hereto provided that in the case of notices to Oppenheimer such process shall also be emailed to him; and

(iv) agrees that nothing herein shall affect the right to effect service of process in any other manner permitted by law or shall limit the right to sue in any other jurisdiction.

(b) Each party hereto unconditionally waives trial by jury in any legal action or proceeding referred to in Section 17 and any counterclaim therein.

18. To the extent that the Lender receives Returned CVR pursuant to Section 6(b) and does not transfer all of such Returned CVR to any one or more Replacement Persons, then in such case all of such Returned CVR that is not transferred to any one or more Replacement Person (or which is transferred to a Replacement Person but is subsequently transferred to the Lender as a result of the terms of any contract or agreement with the Replacement Person) shall be and be deemed to constitute part of the Fourth Additional Compensation Amount without any further action, consent, court order or other approval required whatsoever, and shall be paid to the Lender in the same manner and at the same times as contemplated by the terms of the Credit Agreement and any other applicable Credit Documents.

19. Whenever any matter in this Agreement is required to be satisfactory to the Lender, the Lender shall (unless otherwise expressly provided) determine its satisfaction in the Lender's sole discretion.

20. The Lender has not provided any accounting, legal, Tax or other advice to the Borrower, Fung or Oppenheimer in connection with the transactions contemplated this Agreement, the Other Credit Documents, or otherwise. Each of the Borrower, Fung and Oppenheimer forever agrees

that the Lender is not and shall not be liable for any present or future loss, claim, damage, liability or expense relating to, or resulting from, any accounting, legal or Tax advice or any other advice received by the Borrower, Fung or Oppenheimer from any Person or Persons or omitted to be obtained by the Borrower, Fung or Oppenheimer. Each of Fung and Oppenheimer represents, acknowledges and confirms to and in favour of each of the Lender and the Borrower that (i) the Lender requested and directed that he receive independent legal advice and Tax advice before entering into this Agreement and (ii) he obtained such independent legal advice and Tax advice, and has read this Agreement and understands the terms and conditions contained herein including without limitation any Tax issues affecting him in connection with the transactions contemplated hereby. Each of Fung and Oppenheimer represents and warrants and agrees that he is not under any duress and is entering into this Agreement by his own choice and free will.

21. This Agreement shall become effective on the date (the "**Effective Date**") on which (i) all parties hereto shall have signed a counterpart hereof and none of such executed counterparts have been delivered or are held under any escrow conditions, (ii) the Lender has advanced the full amount of Supplemental Loan Tranche D to the Borrower and (iii) the Lender has earned the Fourth Additional Compensation Amount.

22. In the event of any litigation or dispute involving this Agreement, the Loan, any Credit Document or any matter relating thereto, the Lender shall not be responsible or liable to the Borrower, any reorganized entity of the Borrower, any of their respective Subsidiaries, Fung or Oppenheimer or any other Person for any special, indirect, consequential, incidental or punitive damages.

23. This Agreement supersedes all prior negotiations and correspondence (including without limitation emails), discussions, term sheets or other agreements, oral or written, relating to the subject matter hereof. Nothing in this Agreement shall or shall be deemed to in any way (i) affect, alter, or amend the terms of the Credit Agreement and the other Credit Documents or (ii) affect, impair or prejudice in any manner the rights and remedies of the Lender under the Credit Agreement, the other Credit Documents, at law and in equity.

24. Each of the Borrower, Fung, and Oppenheimer acknowledges that the Lender is relying on, among other things, the representations, agreements and covenants made by each of them herein in connection with the Lender's decision to advance Supplemental Loan Tranche D to the Borrower.

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

26. Unless otherwise defined herein, all capitalized words and phrases shall have the same meanings ascribed thereto in the Credit Agreement.

27. Each of the Borrower, Fung and Oppenheimer irrevocably covenant and agree to and in favour of the Lender that (i) the Lender is not now, has never been, and will never be or be deemed to be an employer of either Fung or Oppenheimer, under the *Employment Standards Act* (Ontario), any other legislation or under any common law or equity or otherwise, as a result of the parties

hereto entering into this Agreement or any of the transactions contemplated hereby and (ii) it/he will never (x) execute, deliver or file with any Governmental Authority (including any taxing authority) or any other Person any document or submission asserting that the Lender is or has been at any time an Employer of Fung or Oppenheimer or (y) assert such a position for any purpose whatsoever.

28. Each the parties hereto shall be responsible for all costs incurred by it or him and all fees of any advisors retained by it or him to provide any type of advice in connection with this Agreement, the negotiation of this Agreement, or the transactions contemplated hereby, except as may be expressly stated otherwise in this Agreement. For certainty, and notwithstanding the immediately preceding sentence, the Borrower shall be required to pay for all costs, expenses and fees incurred by the Lender in connection with this Agreement and all transactions contemplated hereby and for certainty including all legal and accounting fees and disbursements incurred by the Lender. Notwithstanding the first sentence of this Section 27, the Borrower agrees to pay the reasonable legal and accounting costs incurred by each of Fung and Oppenheimer in connection with the review and negotiation of this Agreement up to and including his execution of this Agreement, and for certainty, each of Fung and Oppenheimer shall be required to pay for all (and for certainty, none of the Borrower or the Lender shall be obligated in any manner whatsoever to pay for any) legal, accounting or other advisory fees or any other costs or expenses incurred by him after the date of his execution of this Agreement in connection with this Agreement of any of the transactions contemplated hereby, except for payment of costs in connection with an arbitration as contemplated hereby pursuant to Section 6(k) hereof.

29. The Borrower covenants and agrees to and in favour of the Lender that the Borrower shall arrange for a directors' liability coverage insurance policy to be issued in favour of the Borrower and its present and future directors, with coverage amounts, term of such policy and the term of the "tail" of such policy and all other terms and conditions of such policy to be satisfactory to the Lender in its direction and to be issued by a reputable insurer which is commonly used for such directors' liability insurance coverage and which insurer is satisfactory to the Lender in its discretion, and such coverage shall, among other things, provide insurance coverage for such directors for the failure to withhold and remit any Tax to any applicable taxing authority which the Borrower is required to remit and withhold under any applicable law, such insurance coverage to be in an amount or amounts satisfactory to the Lender in its discretion; and for certainty, the Borrower shall be required to pay for the cost and expense of all such insurance coverages and, if requested by the Lender, an insurance consultant to advise the Borrower and the Lender regarding potential insurers and insurance policy terms and coverages before any of such insurance policies are secured (collectively, the "**Directors' Insurance Coverage**"). For clarity, the requirements set out in this Section 29 are in addition to and not in substitution for any other requirements for the Borrower to maintain insurance coverages under any other Credit Documents including the Credit Agreement. The Borrower covenants and agrees that it shall cause the Directors' Insurance Coverages to be issued by the applicable insurer(s) prior to the advance of the Supplemental Loan Tranche D by the Lender, which requirement shall be and be deemed to be an additional condition precedent to the advance of the Supplemental Loan Tranche D as if this Section 29 was listed as a condition precedent in the Fourth Amendment Agreement.

30. If any provision of this Agreement is or is determined by a court of competent jurisdiction to be illegal, invalid or unenforceable, any such provisions shall be severed from this Agreement to the extent of such illegality, invalidity or unenforceability and the remaining provisions hereof or thereof shall be and remain unaffected by such provision which has been so severed as if such severed provision had never been contained herein.

31. This Agreement shall continue in full force and effect so long there are Obligations outstanding and the Credit Agreement remains in force and effect.

32. The terms and conditions of this Agreement shall not be merged by, and shall survive, the execution and delivery of the Fourth Amendment Agreement and the advance of the Supplemental Loan Tranche D by the Lender to the Borrower thereunder.

33. Each of the parties hereto shall, at its own expense, promptly execute and deliver to the Lender, or cause to be executed and delivered to the Lender on request by the Lender, all such other and further documents, agreements or confirmations as may be reasonably requested by the Lender to more fully confirm and implement and intent and purpose of this Agreement.

34. Terms defined herein in the singular have the same meaning when used in the plural, and vice-versa. When used in the context of a general statement followed by a reference to one or more specific items or matters, the term "including" shall mean "including, without limitation", and the term "includes" shall mean "includes, without limitation".

35. This Agreement, all terms and conditions contained herein, the transactions contemplated hereby and the transactions completed hereunder are and shall at all times, and for certainty after the execution of this Agreement, be confidential, and no party to this Agreement shall disclose any of the foregoing to any Person not a party hereto except (i) to their respective legal and financial advisors but only to the extent that any such advisor delivers a written agreement in favour of such party and each of the other parties hereto agreeing to maintain same as confidential, (ii) as required by a final court order of a court of competent jurisdiction which is not subject to any rights of appeal, or (iii) in connection with the motion record to be filed with the CCAA Court for approval of this Agreement subject to the redaction of this Agreement to the extent a copy of same is contained in the motion record as agreed between the parties hereto or to any stakeholders of the Borrower or their legal advisors who deliver the confidentiality undertaking prepared by the Monitor's counsel for such purpose.

[remainder of page deliberately left blank]

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

CRYSTALLEX INTERNATIONAL CORPORATION

By:_____
Title:

TENOR KRY COOPERATIEF U.A.

By:_____
Title:

_____
Witness
Name:

_____
ROBERT FUNG

_____
Witness
Name:

_____
MARC OPPENHEIMER

SCHEDULE "A-1"

FUNG EMPLOYMENT AGREEMENT

SCHEDULE "A-2"

FUNG TAX DOCUMENTS

Preliminary list of documents for each of Fung for the period commencing at the beginning of the 2008 calendar year to the present:

a) All information forms, reports, summaries, slips, etc., of any type pursuant to any Tax legislation issued by the Borrower in respect of Fung's employment with the Borrower (including T 4 forms).
b) A copy of any communications between either Fung and any taxation authority in respect of amounts paid to, or taxable benefits conferred on Fung ("Taxable Amounts") by the Borrower, or between the Borrower and a taxation authority in respect of the foregoing.
c) Copies of any Tax assessments received by Fung relating in any way to Taxable Amounts.
d) Copies of any Tax-related memoranda, reports, summaries, etc., received by the Borrower relating the services provided by Fung, or memoranda, reports, summaries, etc., received by the Borrower or Fung.

SCHEDULE "B-1"

OPPENHEIMER CONSULTING AGREEMENT

SCHEDULE "B-2"

OPPENHEIMER TAX DOCUMENTS

Preliminary list of documents for Oppenheimer for the period commencing at the beginning of the 2008 calendar year to the present:

a) All information forms, reports, summaries, slips, etc., of any type pursuant to any Tax legislation issued by the Borrower in respect of consulting services rendered by Oppenheimer to the Borrower.
b) A copy of any communications between Oppenheimer and any taxation authority in respect of amounts paid to, or taxable benefits conferred on Oppenheimer ("Taxable Amounts") by the Borrower, or between the Borrower and a taxation authority in respect of the foregoing.
c) Copies of any Tax assessments received by Oppenheimer relating in any way to Taxable Amounts.
d) Copies of any Tax-related memoranda, reports, summaries, etc., received by the Borrower relating the services provided by Oppenheimer, or memoranda, reports, summaries, etc., received by the Borrower or Oppenheimer.
e) Statutory declaration by Oppenheimer regarding the days spent in Canada regarding services to the Borrower for each calendar year.

SCHEDULE "B-3"

JEWISH HOLIDAYS

Fast of Teret 10

Fast of Esther

Purim

Pessach (Passover) (for certainty, the first two days and the last two days)

Shavuot

Fast of Av 9

Rosh Hashanna

Yom Kippur

Sukkot (for certainty, the first two days and the last two days)

Shemini Atzeret and Simchat Torah

SCHEDULE B

Advisors engaged by Crystallex in connection with the "Sales Process" for sale of the shares of PDVH, pending before the United States District Court for the District of Delaware, and the principle terms of their respective engagements:

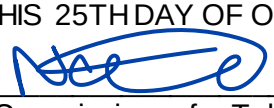
Name of Advisory Firm Assisting Crystallex	**Role**	**Fee Structure**	**Success Fee**	**CCAA Charge securing fees**
Moelis & Co.	Financial Advisor	[redacted]	No	No
Gibson, Dunn & Crutcher LLP	US legal advisor	Hourly in USD	No	No

SCHEDULE C

TERMS OF ENGAGEMENT OF INDEPENDENT ADVISOR

Independent Advisor:	Pirinate Consulting Group, LLC
Scope of Engagement:	Provide professional advisory services to Mr. Marchi, in his capacity as the "New Independent Director" and "Special Managing Director" (as those terms are defined in the DIP Credit Agreement) of the Board of Crystallex in order to assist Mr. Marchi in carrying out his duties and responsibilities as independent director of Crystallex and the applicable duties and responsibilities of the independent director as set out in section 6.15(s) of the DIP Credit Agreement.
Base Monthly Fee:	US$[redacted], payable monthly
Additional Monthly Fee:	US$[redacted], payable in addition to the Base Fee for every month where the Advisor provides in excess of [redacted] hours of service.
Expense Reimbursement:	Reimbursement of the Advisor's reasonable expenses, provided that any single expense above US$5,000 requires the written consent of Crystallex.
Expiration of Term:	On a month to month basis starting July 6, 2022, unless otherwise agreed to by the parties.
Termination:	By the Independent Director on three months written notice, which notice is not effective until, at the earliest, three months after the first day following expiration of the Term (being October 7, 2022).
Success Fee:	None
CCAA Charge:	None

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



A Commissioner for Taking Affidavits
NATALIE RENNER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORP., Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Defendant.	**PUBLIC VERSION FILED SEPTEMBER 20, 2021** Case No. 1:17-mc-00151-LPS

VENEZUELA PARTIES' RESPONSE TO OBJECTIONS TO THE SPECIAL MASTER'S PROPOSED ORDER (A) ESTABLISHING SALE AND BIDDING PROCEDURES, (B) APPROVING SPECIAL MASTER'S REPORT AND RECOMMENDATION REGARDING PROPOSED SALE PROCEDURES ORDER, (C) AFFIRMING RETENTION OF EVERCORE AS INVESTMENT BANKER BY SPECIAL MASTER AND (D) REGARDING RELATED MATTERS

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INTRODUCTION

The objections of "Crystallex" to the Special Master's Proposed Order and Bidding Procedures[1] should be seen for what they are: an effort by an opportunistic hedge fund to override controlling OFAC regulations and Delaware law in pursuit of windfall profits on the distressed foreign-country debt it has purchased for mere pennies on the dollar. Tenor Capital Management Co., L.P. and its affiliates (together, "Tenor") are a hedge fund that now owns virtually the entire Crystallex judgment, *$500 million of which has already been recovered*.[2] Tenor—through Crystallex—urges the Court to adopt sale procedures that transparently have two objectives. First, Crystallex's proposed procedures seek to stifle bidding for the PDVH stock. They do so by asking bidders to participate under the shadow of potential liability for violating OFAC regulations, invest in a process mired by the uncertainty of any sale ever closing, and submit to an onerous and biased deposit requirement. Second, Crystallex's proposed procedures seek to rig the resulting fire-sale in favor of its own $300 million credit bid. They do so by withdrawing the Special Master's authority to supervise the timing, content, and acceptability of bids so as to effectively set a reasonable floor for the sale price and prevent a grossly inadequate sale that would require rejection under Delaware law. Like the Special Master, this Court should not adopt such an approach.[3]

Contrary to "Crystallex's" assertions, this is not a case about a small Canadian gold miner fighting to recover from a duplicitous, recalcitrant foreign sovereign debtor. It is, rather, a case about a hedge fund seeking to turn a claim purchased in the Crystallex bankruptcy for a $75 million

[1] Capitalized terms used but not defined herein have the meaning ascribed to them in the Special Master's Proposed Order, D.I. 302, and as used in the Venezuela Parties' opening objections, D.I. 317.

[2] As the Court knows from previous filings, Tenor has long funded Crystallex's litigation in exchange for a large portion of any recovery Crystallex may receive. D.I. 196 at 14. Much of the additional information about Tenor reflected in this brief has recently come to the Venezuela Parties' attention as the result of a July 2021 filing in the Crystallex bankruptcy.

[3] The Supplemental Declaration of Randall J. Weisenburger (attached hereto as Exhibit A and referred to herein as "Supp. R.W. Decl.") explains in detail why Crystallex's proposals would stifle bidding and advantage its credit bid. This brief summarizes many of those points, but it does not include all the nuances and detail in the declaration.

debtor-in-possession ("DIP") loan into a massive windfall by fixing the sale process to its advantage, and depriving a nascent democratic government of the most important of limited assets currently in its possession and its central means of restoring economic and political stability to its country and paying off legacy debt from its authoritarian predecessor. Crystallex takes great pains to cast the Republic as improperly trying to delay execution on that asset, but, in truth, under U.S. sanctions laws, disposition of the PDVH shares is in the hands of President Biden—not Interim President Guaidó (or former President Maduro). The Republic thus is acting entirely properly and well within its rights by insisting on adherence to OFAC sanctions.

Accordingly, this Court should reject Crystallex's baseless insistence that the sale process must commence within 90 days—a position even the Special Master, after repeated discussions with OFAC, concluded was too aggressive and declined to endorse. Given the importance to U.S. foreign policy of preserving the CITGO entities for future use by a democratic Venezuela, the current administration, like the previous one, has blocked the sale of the PDVH shares, a contingent auction of the shares, and any concrete steps in furtherance of an auction, unless and until it gives *affirmative authority*—via an OFAC specific license—that a sale can proceed.

Crystallex's central OFAC-related argument is that this Court has previously determined that a sale process could proceed in the absence of OFAC authorization. That is false. This Court authorized the development of a sale procedure *plan* and left the question of what steps could legally proceed thereafter for future consideration. The clear answer to that question is that commencing the sale process proposed by the Special Master without an OFAC specific license is unequivocally barred by OFAC regulations at this time, and any participation by bidders, Sale Process Parties, or any third parties needed for support in a sale process now would be unlawful. Moreover, forcing the initiation of a sale on a date certain—before OFAC has issued a license or

otherwise authorized the sale process—will drive other bidders away, leaving Crystallex (*i.e.*, Tenor) as the only bidder. Other bidders will neither participate under the cloud of potential illegality nor invest the time and money in due diligence and an onerous good-faith deposit on a sale process that could drag on for years, that could result in significant liability under U.S. sanctions law, and may never close. By contrast, Tenor—through Crystallex—stands to gain considerably, with little financial risk, by lobbing in a lowball credit bid and waiting for the bidder-less sale it has engineered to result in a windfall.

Nor should the Court adopt Crystallex's proposal to deprive the Special Master of the ability to adjourn the sale if no acceptable bids emerge. Forcing the Special Master to name a winner regardless of how the sale process unfolds would allow Crystallex to capitalize on sanctions-compliance risk and the distorting effects of the massive, biased cash deposit requirement to ensure that its credit bid for less than a third of its outstanding judgment succeeds. Contrary to Crystallex's insistence (and Tenor's financial interest), such an outcome is not required. Delaware law requires that a sale be set aside for gross inadequacy, which would certainly apply to a $300 million winning bid, and the U.S. Supreme Court has made clear that the officer running an execution sale may postpone or adjourn the sale to avoid such an unjust result.

If "Crystallex's" proposed $300 million credit bid for 100% of the PDVH shares were ever approved by the Court (and OFAC), it would leave other creditors of the Republic and PDVSA empty handed. It would also empower "Crystallex" to pursue other assets of the Republic or PDVSA around the world[4] to make up the purported "balance" of its judgment—*i.e.*, hundreds of millions of dollars *on top* of already seizing control of a multi-billion dollar U.S. refiner, all to satisfy a roughly $1 billion judgment that Tenor essentially acquired for $75 million. In short, the

[4] For example, Crystallex has attached certain assets of PDVSA in the Netherlands, Curacao, and Aruba. Proceedings in the Netherlands are currently stayed.

procedures advanced by Crystallex are intended to *minimize* value and cause the sale of *as many shares as possible* to Crystallex, contrary to Delaware law and this Court's direction.

I. "Crystallex" Mischaracterizes the Context of this Litigation.

Crystallex's recitation of these proceedings casts baseless aspersions on the Guaidó government and attempts to cloak its own true identity from the Court's view. This Court should assess Crystallex's objections in light of who the real parties in interest are, what their incentives are, and which actors are truly in control.

A. Who Is the Debtor?

"Crystallex" falsely frames its adversary as a "recalcitrant judgment debtor" that has "repeatedly embraced delay tactics" and that cannot be trusted to pay its debts or engage in good-faith negotiations because of a history of "reneg[ing]" on settlement agreements. *See* D.I. 316 at 3, 5, 8, 9, 12, 13; *see also* D.I. 321. While the debtor here is a sovereign nation that survives across governments, the current (and only legally recognized) Venezuelan government led by Interim President Guaidó is unrecognizable in Crystallex's epithets.[5] The Chávez regime wronged Crystallex by expropriating its mining rights in 2011, and the Maduro regime refused to pay its debts and allegedly breached settlement agreements (though at least *$500 million was paid* pursuant to those settlements). But the Guaidó government—the entity with ultimate indirect ownership of the PDVH stock—has done nothing but properly assert its legal rights in an effort to preserve the key asset currently within its possession to help it rebuild a democratic Venezuela and raise the money necessary to satisfy the country's pre-existing obligations to all its creditors.

[5] Crystallex's efforts to inject doubt regarding the Guaidó government's status is inappropriate. D.I. 321 at 2. There has been no change in recognition of the Guaidó government by the United States between the Trump and Biden administrations. *See* U.S. Dep't of State, "U.S. Relations with Venezuela: Bilateral Relations Fact Sheet" (July 6, 2021) https://www.state.gov/u-s-relations-with-venezuela ("The United States recognizes Interim President Juan Guaido and considers the 2015 democratically-elected Venezuelan National Assembly, which he currently leads, to be the only legitimate federal institution, according to the Venezuelan Constitution.").

Because of the illegitimate Maduro regime's attempt to cling to power, Interim President Guaidó does not have access to Venezuelan crude oil or other assets located *inside* the territorial boundaries of the Republic to pay the myriad debts accumulated by Chávez and Maduro. Those assets are controlled by Maduro. The most important asset under Interim President Guaidó's indirect control is CITGO, and by extension, the shares of PDVH. The CITGO entities are therefore indispensable to the Guaidó government's ability to restore democratic and economic stability to the Republic. Allowing PDVH shares to be sold at a fire-sale for a fraction of its value would sap the Guaidó government of its economic power, deal a serious blow to its goal of repaying its predecessors' global debts (including the one now effectively held by Tenor), and undermine its legitimacy. That is why the Guaidó government—while undoubtedly participating in the Special Master process—continues to raise the arguments and defenses available to it as creditors attempt to execute their judgments against its critical asset. Far from being a deadbeat debtor, the Republic, under Interim President Guaidó's stewardship, is motivated by the need to help PDVSA protect and maintain the value of the CITGO entities to the maximum extent legally appropriate so that the Republic can build a better future for its people, while recognizing the Republic's obligations to *all* of its creditors. That is why it has strongly advocated for a process in which the sale of 100% of PDVH's shares must be the *last* resort for satisfying the outstanding judgment(s), not the *first* one. *See* D.I. 317 at 2-16.[6]

B. Who Controls the Sale of the PDVH Shares?

For all its bluster about the Guaidó government's failure to liquidate its most important

[6] For its part, PDVSA has never done anything to harm Crystallex. This Court found as much in its rulings. *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 333 F. Supp. 3d 380, 403 (D. Del. 2018) (holding that Crystallex's did not "sufficiently allege that Venezuela used PDVSA as an instrument to defraud Crystallex" and that Crystallex "has not 'show[n] that the Republic abused PDVSA's corporate form to perpetrate a fraud or injustice resulting in harm to Crystallex'").

asset, Crystallex obscures the reality that Interim President Guaidó does not control the sale of the PDVH shares. Rather, under established law, that power is currently subject to the control of the political branches of the United States government. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016) ("In furtherance of their authority over the Nation's foreign relations, Congress and the President have, time and again, as exigencies arose, exercised control over claims against foreign states and the disposition of foreign-state property in the United States.").

As the United States has explained to this Court, the Executive Branch's foreign policy towards Venezuela, as implemented via the OFAC sanctions regime, is designed to protect the CITGO entities for the benefit of the Venezuelan people by securing their future use to restore democracy, stability, and prosperity to Venezuela, which, in turn, advances U.S. national security and foreign policy interests. *See* D.I. 212 at 3-4. Moreover, the United States has stated that Crystallex's efforts to execute on the property pose a danger to the United States' policy interests. *See id.* This policy remains unchanged between the Trump and Biden administrations, and the OFAC sanctions regime ultimately prevents Crystallex and any other bidder from participating in steps to sell the attached property unless and until the Executive Branch decides to alter course.

Crystallex can complain about the Maduro regime as much as it wants, but in the United States, Interim President Guaidó speaks for the Republic, and the Executive Branch has determined that the CITGO entities should be preserved and protected for the benefit of the Venezuelan people. To that end, Crystallex (and Tenor) would be better served by seeking relief from OFAC (something that it has unsuccessfully done for many months) than by disparaging Interim President Guaidó or seeking to manipulate the judicial process with a sale procedure designed to frustrate competitive bidding and assure itself of a massive windfall. If the United States unblocks PDVSA's assets, the sale of the fewest PDVH shares needed to satisfy the judgment may proceed,

and should do so in a manner that allows PDVSA to retain as many of those shares as possible for use in rebuilding the Republic. Until such time, however, the U.S. Executive Branch is the gatekeeper of any sale of the CITGO entities—not the Republic—and the Republic is operating accordingly, as must this Court.

C. Who Is "Crystallex?"

The real party in interest seeking to sell the PDVH stock is not a distressed mining company "waiting for compensation for Venezuela's unjust acts." D.I. 316 at 8. The gold mining company wronged by the Chávez regime is no longer the true party in interest, having exchanged nearly all of its $1.2 billion arbitral award for a $75 million DIP loan from Tenor to finance this litigation. *See* D.I. 196 at 14 & n.11 (identifying Tenor and its business model of "investing in litigation against sovereign nations undergoing political turmoil"). A July 2021 filing in the Crystallex bankruptcy revealed that the terms of that loan now afford Tenor at least 88% of any net proceeds obtained by Crystallex in this litigation (in addition to repayment of its DIP loan, plus interest),[7] making clear that Tenor hopes its investment leads to its seizure of CITGO for an outrageously low credit bid. Tenor's investment appears likely to have paid off already, as Crystallex has recovered at least $500 million through settlements with Maduro that it now disparages,[8] in addition to potentially other amounts that are as yet unknown because Crystallex has withheld such

[7] Tenor is a hedge fund that has advanced approximately $75 million in DIP loan funding to Crystallex in exchange for more than 88% of Crystallex's net recovery, leaving close to nothing for Crystallex's actual shareholders. Ex. B ¶ 8(b); *see also* Ex. C ¶¶ 44–46 (describing agreement entitling two Crystallex board members to an unknown percentage of the net arbitration proceeds); Ex. D ¶ 4 (court order approving same). Tenor has held the DIP loan since 2012, during which time the loan has undergone numerous assignments between corporate affiliates incorporated and/or headquartered everywhere from Delaware to Barbados, the Cayman Islands, the Netherlands, and Luxembourg. Ex. E at 103-106. The DIP loan is currently assigned to a Cayman Islands Exempted Limited Partnership called Tenor Special Situation I, L.P. *Id.* at 103; D.I. 196 at 14 n.11; D.I. 197-1 at 14.

[8] D.I. 130 at 2. [redacted] D.I. 64-1 (under seal). The Venezuela Parties are unaware of [redacted] payment of the $425 million received in November 2018 under the 2018 amended settlement agreement.

information from the Venezuela Parties.[9]

II. "Crystallex's" Objections Are Designed to Eliminate Competitive Bidding and Maximize the Likelihood that It Obtains 100% of PDVH for its Credit Bid at a Fire-Sale Price, Which It Erroneously Argues Is Legally Permissible under OFAC Regulations and Delaware Law.

As the Venezuela Parties have consistently said, *e.g.*, D.I. 125 at 2-3, Crystallex's goal is and always has been to make off with CITGO for pennies on the dollar. Crystallex's counsel admitted this in May 2017, stating that "[t]he prize here is Citgo and we are getting closer to it." D.I. 125-2 at 3; *accord* D.I. 204 at 7 ("Crystallex's incentive is to minimize the valuation of PDVH so that Crystallex can buy the entire company by credit bidding its judgment (or perhaps as little as $300 million of its judgment), claiming the 'prize' it has long sought in these proceedings[.]"). Crystallex's recently filed objections make its (*i.e.*, Tenor's) strategy undeniable: its substantive proposals are transparently designed to maximize the likelihood that its $300 million credit bid for 100% of the PDVH shares is the only bid.

Specifically, Crystallex is seeking to engineer a fire sale that results in Tenor effectively owning CITGO by amending (or supporting) key provisions of the Proposed Order that will suppress, if not eliminate, competitive bidding and, in turn, increase the likelihood that Crystallex's credit bid (for less than a *third* of its outstanding judgment) wins. Such an outcome would flagrantly disregard this Court's directive and Delaware law's requirement that the sale process maximize value and ensure that "as many, but only as many, shares of PDVH as are necessary to satisfy the judgment of Crystallex" are sold. D.I. 234 at 36; *accord* 8 Del. C. § 324(a).

First, Crystallex asks the Court to order the sale to begin on a date certain, without OFAC approval, despite the fact that doing so would expressly violate OFAC sanctions and, as a result,

[9] *See* D.I. 326; D.I. 337 at 8 (ordering Crystallex to divulge withheld information).

drive away bidders, as well as any other third-party participants needed to support such a sale, all of whom are likely to be unwilling to risk liability for the uncertain benefits of participation in such a process. Second, uncertainty surrounding whether OFAC will *ever* authorize closure of such a sale will further depress—if not eliminate—competitive bidding, leaving Crystallex's no-risk credit bid to stand alone. Third, Crystallex would eliminate the Special Master's ability to postpone or adjourn a sale that fails to achieve the directives of this Court and Delaware law, thereby placing its value-destroying credit bid on a glide path to success when other bidders stay home in light of express sanctions liability and the uncertainty that OFAC will ever authorize a sale, as well as in light of the distorting effect of the massive, biased cash deposit requirement. Finally, Crystallex's arguments in support of these recommendations ignore legal principles governing any sale proceeding: (1) that a grossly inadequate sale—such as a $300 million credit bid for 100% of PDVH—must be set aside under Delaware law, and (2) that sale proceedings can and should be postponed or adjourned if the sale is hurtling toward an unjust result. This Court should not allow Crystallex to ignore binding federal regulations and use the judicial system to loot a foreign sovereign's U.S.-based petroleum company by putting its paltry credit bid on the fast-track to an auction win that cannot survive judicial review.

A. "Crystallex's" Proposal to Commence the Special Master's Proposed Process in 90 Days Is Clearly Barred by OFAC Regulations, and This Court Has Never Held Otherwise.

Crystallex requests that the Court impose "a firm deadline to commence the sale" regardless of whether OFAC issues a license or definitive guidance authorizing a sale, arguing that "[t]here is no reason to impose such a condition on the Court's power to conduct a process to enforce its judgment." D.I. 316 at 8-9. Respectfully, there is a fundamental and inescapable legal reason *to* impose such a condition: OFAC regulations explicitly provide that "the enforcement of

any lien, judgment, arbitral award, decree, or other order through execution, garnishment, or other judicial process purporting to transfer or otherwise alter or affect property or interests in property blocked pursuant to [the Venezuelan sanctions regime] is prohibited unless authorized pursuant to a specific license issued by OFAC." 31 C.F.R. § 591.407. OFAC has further clarified that applicable regulations preclude U.S. persons from participating in "an auction or other sale, including a contingent auction or other sale, *or taking other concrete steps in furtherance of an auction or sale*" of blocked property. OFAC FAQ 809 (emphasis added).

As ConocoPhillips explained, "[t]he Supreme Court has repeatedly recognized that it is the political branches that are supreme with respect to the attachment of property of foreign sovereigns." D.I. 319 at 4 ("'In pursuit of foreign policy objectives, the political branches have regulated specific foreign-state assets by, inter alia, blocking them or governing their availability for attachment. Such measures have never been rejected as invasions upon the Article III judicial power.'" (quoting *Bank Markazi*, 136 S. Ct. at 1328 (citations omitted)). Indeed, the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.* ("IEEPA"), gives the President of the United States the power to "block" or even "nullify" or "void" Crystallex's attachment and to settle and terminate the claims of creditors of the Republic pending in United States courts. *See* 50 U.S.C. § 1702(a)(1)(B); *Dames & Moore v. Regan*, 453 U.S. 654, 674, 686 (1981); *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 699 F.2d 657, 660, 664 (3d Cir. 1983).

Here, the President of the United States has exercised his powers to block the PDVH shares in support of the Guaidó government's efforts to restore democracy and financial stability to the Republic. *See* D.I. 212 at 3-4. Contrary to Crystallex's suggestions, OFAC is under no legal obligation to act promptly upon Crystallex's discretionary license request. Moreover, in her letter to the Court, OFAC Director Gacki stated that "any auction or sale of PDVH's shares at this time

would undermine current U.S. foreign policy on Venezuela" and that "these factors will weigh heavily in OFAC's license determination and could prove to be dispositive in adjudicating this license application." D.I. 212-2 at 2. In reserving judgment on Crystallex's application, and thereby leaving the shares of PDVH blocked as a matter of law, OFAC is exercising the precise powers Congress delegated to the Executive in IEEPA. *See* 50 U.S.C. § 1702(a)(1)(B). Thus, unless and until the Executive Branch changes its position, there is nothing the Court legally can or should do. The requirement to obtain a license is—to use Crystallex's words—precisely "a condition on the Court's power to conduct a process to enforce its judgment." D.I. 316 at 8-9.

Crystallex falsely contends that this Court "previously rejected a materially identical limitation of the sales procedure proposed by the Venezuela Parties." D.I. 316 at 9 (citing D.I. 234 at 32-33). All the Court previously authorized was the design and establishment of sale procedures and the appointment of a special master to propose a sale plan, *not* execution of the steps of any such plan. *See* D.I. 277 ¶ 2. Whether or not the design of a sale process required an OFAC license—as the Venezuela Parties have argued in their pending appeal—the steps to prepare for and conduct a contingent auction clearly constitute "concrete steps in furtherance of an auction or sale" prohibited under the sanctions regime without a specific license. *See* OFAC FAQ 809.

As the Venezuela Parties explained in their opening objections, the sale procedures are "act[s]" that have the "purpose" or "effect" of "creat[ing], surrender[ing], releas[ing], convey[ing], transfer[ring], or alter[ing], directly or indirectly," a present or contingent "right, remedy, power, privilege, or interest with respect to" blocked property, contrary to OFAC regulations. *See* D.I. 317 at 15 (citing 31 C.F.R. § 591.310). In addition, many of the steps, including initial marketing and bidding, involve conduct explicitly identified by 31 C.F.R. § 591.310 as constituting prohibited "acts" or "transactions," including:

- The "appointment of" the Special Master and his Advisors as "agent[s]" to "market the PDVH Shares" and conduct a sale, P.O. ¶ D;

- The "fulfillment of a condition" required to validly sell the shares by providing statutorily required notice to potential bidders in the form of advertisements and outreach under the Marketing Process, *see id.* ¶¶ E, F;

- The "execution[] or delivery of . . . agreement[s]" by each bidder to the Special Master, *see* B.P. at 8 ("Each bid must include an agreement executed by the Potential Bidder" and delivered to the Special Master);

- The "making . . . of" an "agreement" with the Stalking Horse Bidder "for the sale of . . . PDVH Shares," *see* P.O. ¶ 18;

- The "making of . . . payment[s]" by bidders submitting deposits, B.P. at 7;

- The "making" of an escrow "agreement" with each Potential Bidder, B.P. at 12; and

- The "setting off" of an "obligation or credit" by providing a "credit" to the Stalking Horse Bidder during the second round of bidding, P.O. ¶ 19.

Tellingly, Crystallex does not even attempt to justify launching and conducting the sale process under the plain text of the regulations, let alone the FAQs authoritatively construing them.[10]

Crystallex also mistakenly suggests that the Court can order the sale process to launch based on OFAC's purported "silence," D.I. 316 at 10, or a stray comment by a government attorney that "the United States hasn't taken the position that Your Honor is blocked from moving forward," Sept. 17, 2020 Tr., D.I. 226 at 105:1-6; *see* D.I. 316 at 11 (quoting D.I. 234 at 34). Both suggestions are meritless.

First, OFAC has not been silent. It informed this Court that it is considering Crystallex's application for a license "permitting [this Court] to pursue all activities necessary and ordinarily incident to organizing and conducting a judicial sale of the shares.'" D.I. 212-2 at 1 (quoting

[10] Elsewhere, Crystallex has argued that the sale process is authorized by the general license contained in 31 C.F.R. § 591.509, which authorizes "transactions that are for the conduct of the official business of the United States Government." But 31 C.F.R. § 591.407 specifically prohibits "the enforcement of any lien, judgment, arbitral award, decree, or other order through execution, garnishment, or other judicial process purporting to transfer or otherwise alter or affect [blocked] property or interests in" blocked property "notwithstanding" any general licenses.

pending application). Again, Director Gacki wrote that OFAC may deny Crystallex's application. *Id.* at 2. Director Gacki also stated that moving forward "would not in any way facilitate OFAC's license adjudication process" and that OFAC may issue a "license subject to certain conditions, or even…bifurcate the license request and sequence the authorization of actions in the future." *Id.*[11]

The United States' position is that, "[s]hould these assets be advertised for public auction at this time, the Venezuelan people would seriously question the interim government's ability to protect the nation's assets, thereby weakening it and U.S. policy in Venezuela today." D.I. 212 at 11. Notwithstanding Crystallex's efforts to undermine U.S. policy in its filings before the Court, the government's position with respect to Venezuela has not changed. OFAC has stated it is fully informed that Crystallex is requesting authorization for the Court to "organiz[e] and conduc[t] a judicial sale of the shares," D.I. 212-2 at 1, but it has not yet decided whether to grant that authorization, nor is OFAC required to grant such a request as a matter of law.

Nor would it be appropriate for the Court to set a launch date to force "OFAC to raise any concerns." D.I. 316 at 14. However much it may frustrate Tenor's efforts to capture its desired windfall, OFAC alone has been granted the legal power to *un*block the property in question, and the Executive need not tailor its discretionary licensing regime to accommodate the interests of creditors. Especially in the foreign-affairs context, a federal court should not authorize a sale process that would violate OFAC regulations as a means of pressuring the Executive Branch to adjudicate what is indisputably a discretionary application (especially when it has already made its current position on that application clear); rather, a federal court is required to respect the Executive Branch's views, and the onus is on Crystallex to obtain a specific license for the sale process to commence or a clear statement from OFAC that a license is unnecessary. *See, e.g.*,

[11] Crystallex's assertions that OFAC is more likely to act if these proceedings progress, D.I. 316 at 10, are directly contrary to OFAC's submission.

United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (explaining "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

Second, contrary to Crystallex's incomplete recounting, the attorney for the United States did not state that, "as far as prefatory steps are concerned, the Court 'can do whatever it wants.'" D.I. 316 at 11 (selectively quoting D.I. 226 at 105:6-7). Instead, reading the colloquy in full, the attorney was simply explaining the dichotomy drawn in the FAQs: while *courts* may hear litigation against blocked persons and issue certain orders in connection with those proceedings without themselves violating the sanctions regime, *private parties* can be held liable if they carry out—or cause to be carried out on their behalf—concrete steps in furtherance of a court-ordered sale.[12] The attorney did not say that the Court can or should grant relief or authorize or order conduct prohibited by valid Executive Orders and regulations. The United States certainly has not stated that Crystallex can evade the sanctions regime by asking the Court to appoint a marshal or special master to prepare for and hold an illegal sale on Crystallex and Tenor's behalf.[13]

Indeed, the FAQs, like the OFAC regulations, state that even certain actions taken *by a Court or its personnel* (whether marshal or master) require a license, including seizing, levying upon, attaching, and selling blocked assets. *See* FAQ 808; 31 C.F.R. § 591.310 (defining "transfer"

[12] *See* D.I. 226 at 105:1-11 ("I think OFAC has tried to draw a distinction in FAQs 808 and 809 between…whether it is imposing limitation on what Your Honor can do and what Crystallex can do. So the United States hasn't taken the position that Your Honor is blocked from moving forward. You know, the Court can do whatever it wants. *However*,…the Executive Orders and the OFAC regulations and the FAQs cited in Director Gacki's letter make clear that Crystallex might well be in violation of OFAC regulations if it takes these proposed steps."); FAQ 808 (while "a U.S. court, or its personnel," do not require a specific license "to hear…U.S. legal proceedings against a person designated or blocked pursuant to OFAC's Venezuela sanctions program," a specific license "*is* required for…the enforcement of any lien, judgment, or other order through execution, garnishment, or other judicial process purporting to transfer or otherwise alter or affect property or interests in [blocked] property"); FAQ 809 (parties who have attached blocked property "must obtain a specific license … [before] conducting an auction or other sale…or taking other concrete steps in furtherance of an auction or sale." (internal citation omitted)) (emphases added).

[13] It is "unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under [the IEEPA]." 50 U.S.C. § 1705(a). Violators may be subject to significant civil and criminal penalties. *Id.* § 1705(b)-(c).

to include "the issuance, docketing, or filing of, or levy of or under, any judgment, decree, attachment, injunction, execution, or other judicial or administrative process or order, or the service of any garnishment"). The regulations further state that, without a license, any "execution, garnishment, *or other judicial process* is null and void with respect to any property and interests in [blocked] property." 31 C.F.R. § 591.202 (emphasis added).

Crystallex's argument that OFAC approval is similar to antitrust clearance or CFIUS approval is also meritless. D.I. 316 at 11-12. Unlike in those regulatory regimes, a sale process *itself*—not just its outcome—is unlawful under OFAC's regime. Moreover, antitrust and CFIUS approvals are driven by well-established rules, guidelines, timelines, and case law, which sophisticated companies and their counsel navigate regularly and can structure such that both parties bear the risk of disapproval. Supp. R.W. Decl. ¶ 12. In contrast, OFAC approval is highly discretionary and based on the Executive Branch's determinations regarding American foreign policy and national security. *Id.* ¶ 13.

While Crystallex and Tenor appear unconcerned about incurring liability for participating in an unlawful sale, initiating a sale process under the specter of illegality will inevitably discourage other bidders and all but ensure that the only bid is the "Crystallex" credit bid. *Id.* ¶ 5 ("[I]f the risk of legal action against a bidder for unlawfully participating in a process is perceived to be present, that will further discourage bidders from participating . . . . [F]ull participation from responsible potential bidders, such as ConocoPhillips, will not occur if the legality of their participation is in question."). ConocoPhillips agrees. D.I. 319 at 4 ("[A]ny sale process that occurs without OFAC's express blessing will undoubtedly fail to attract full participation from potential bidders."). The Court should not authorize a sale process that would put participants in legal jeopardy—and all the more so given the chilling effect that will have on bidding.

B. Uncertainty Surrounding Whether OFAC Will Ever Allow a Sale to Close, Compounded by the Onerous Deposit Requirement on Non-Credit Bidders, Significantly Increases the Likelihood that Crystallex's Credit Bid Will Win.

Even setting aside the illegality of proceeding at all, for reasons explained in detail by the Venezuela Parties, ConocoPhillips, and the Special Master's financial advisor, starting the process under a cloud of uncertainty as to whether any sale will be permitted to close is guaranteed to do one thing—depress and chill bidding. D.I. 317 at 14; D.I. 319 at 2-4; Hiltz Decl. ¶ 18 (OFAC uncertainty will "materially chill bidding"); *accord* Rpt. at 2. As Mr. Weisenburger has explained, uncertainty regarding "whether the time and money spent in participating in a process will result in a transaction that will be permitted to close" and "how long it could take to obtain such approval will depress, chill, and/or eliminate participation by some would-be bidders and cause others to submit greatly discounted bids to account for such uncertainty." D.I. 317-1 ¶ 18; *see also id.* ¶¶ 19, 21. Moreover, in light of the opacity of OFAC's decision-making process, "[b]idders who tried to participate in Crystallex's date-certain version of the Special Master's process could not assess the likelihood or path to regulatory approval from OFAC," leading them to sit out the sale process or steeply discount their bids. Supp. R.W. Decl. ¶ 13. "Only a credit bidder, whose recovery is subject to OFAC's uncertain approval under every possible circumstance, would be unaffected by such regulatory uncertainty and thus be able to submit a no-risk (lowball) bid." *Id.* ¶ 14. Finally, as OFAC uncertainty increases, the risk to any non-credit bidder of tying up a large good-faith deposit for an unknown period of time (for a bid that may never be authorized to win) will further discourage participation by anyone other than a credit bidder, whose deposit requirement is *de minimis* under the Proposed Order. D.I. 317 at 6-7, 12; D.I. 317-1 ¶¶ 35-38; D.I. 319 at 3 (ConocoPhillips agreeing).

As described by Mr. Weisenburger:

> Crystallex is in a unique position because it has essentially nothing to lose by participating in the sale process it urges and everything to gain by suppressing any competition for the PDVH shares. Unlike every other bidder, Crystallex does not need to invest significant sums in due diligence—and, in fact, has already committed to submitting a $300 million credit bid *without* having conducted due diligence—because it is effectively putting up no money to buy the stock. Unlike every other bidder, Crystallex does not have to put up a large security deposit for its credit bid which could be on the order of hundreds of millions of dollars. Unlike every other bidder, Crystallex does not need to worry about whether there will ever be OFAC approval, because it will have invested nothing in the process and will not have tied up a huge sum in a security deposit for an indefinite time awaiting OFAC approval that may never come. . . . In contrast, OFAC uncertainty makes non-credit bidders' participation in a sale process a high-stakes gamble. . . . [S]uch bidders must invest time and money conducting due diligence, and, in the Special Master's proposal, posting a very large good-faith deposit, all of which may be for naught if OFAC does not grant approval.. . . . [C]ommitting the resources necessary for due diligence and a good-faith deposit without authorization from OFAC would require a bidder to accept the risk that its bid could be suspended in regulatory limbo for an unknown amount of time, perhaps even years. . . . The value of the PDVH shares could change during that unknown length of time, whether because of specific events affecting the shares (or CITGO more generally) or industry-wide market forces. Likewise, a bidder's own financial circumstances could materially change, causing a bid to be unsustainable by the time OFAC takes action (if it ever does).

Supp. R.W. Decl. ¶¶ 6-9.[14]

Unlike all other bidders, Crystallex and Tenor would simply be unaffected by the uncertainty about whether OFAC will allow a final sale to close. As a result, under Crystallex's date-certain approach to the sale process, "Crystallex would be the only logical bidder because there are no costs to its risks, whereas other bidders have too much to lose if OFAC authorization never occurs or is significantly delayed. Thus, running an uncompetitive process due to OFAC uncertainty is highly likely to result in Crystallex as the only, and therefore the winning, bidder." Supp. R.W. Decl. ¶ 15. Accordingly, "[i]n order to have any hope of fostering competitive bidding

[14] *Accord* D.I. 319 at 4-5 (ConocoPhillips stating that a credit bidder "needs no due diligence and is taking on no risk because its 'investment' has already been made, and it is largely excused from the cash deposit requirement by the proposed Sale Procedures Order. A sale in those circumstances will have a significantly increased likelihood of attracting a bid from only the essentially risk-free credit bidder").

and conducting a sale that maximizes value and minimizes the number of shares sold, there must be clear OFAC authorization from the outset—not equivocal guidance like the Special Master's proposal contemplates, and certainly not the potential *absence* of further OFAC action altogether, as Crystallex proposes." *Id.*

C. "Crystallex's" Insistence that the Special Master Complete a Sale that Lacks Competitive Bidding or Reasonable Bids Assures that Its Credit Bid Would Likely Win.

Crystallex also asks that the Court strike the Special Master's ability to decline to recommend a Successful Bid if all bids are inadequate, D.I. 316 at 14-17, with the clear goal of "forc[ing] a fundamentally flawed process to completion, rather than providing a means for the process to be paused, reconsidered, or adjourned if it was failing to meet the Court's directives," Supp. R.W. Decl. ¶ 20. In a sale process mired by OFAC uncertainty (as well as explicit sanctions liability) and defined by a concomitant lack of participation by competitive bidders, Crystallex's lowball $300 million credit bid would be the only bid standing—a bid that Crystallex insists the Special Master should be forced to accept. Crystallex does not attempt to hide its purpose in making this recommendation, stating that the process should be amended to eliminate the Special Master's "discretion to end the process without completing the sale," which will "ensure the sale proceeds to completion as there will be at least one bid for the PDVH Shares, *Crystallex's [$300 million] credit bid*." D.I. 316 at 14-15 (emphasis added).

Consistent with applicable law, this Court has confirmed that any sale process should maximize value and result in the sale of as few shares as necessary to satisfy Crystallex's judgment. *E.g.*, D.I. 234 at 36; D.I. 277 ¶ 2. To attain those goals, "[a]ny reasonable sale process would provide room for the Special Master—or whoever runs the sale process—to exercise reasonable judgment to stop the process if no reasonable, value-maximizing outcome is in sight." Supp. R.W.

Decl. ¶ 20. Yet Crystallex—and, through it, Tenor—is advocating for a sale process that permits it "to take advantage of every uncertainty and risk in the regulatory environment, maximizing the likelihood that no credible third-party bids will be submitted because Crystallex's credit bid will be the only one that can be justified from a risk-assessment standpoint." *Id.* ¶ 15. If the Special Master has no power to stop such a gambit, the sale will undoubtedly fail to adhere to the Court's directives.

Moreover, even if the Court rejects Crystallex's request to launch the sale in the face of bid-discouraging OFAC uncertainty and sanctions liability, the Special Master's authority to adjourn the sale if no reasonable bid emerges "provides a signal to would-be bidders that a lowball bid—whether a credit bid or otherwise—that does not approach a reasonable value will not be the winner, because the Special Master will reject it. In this way, a provision for recommending no winner helps increase the floor of the bids to *at least* a reasonable value or something approaching it that the Special Master would actually recommend to the Court for approval. Without this protection, any auction could devolve into a situation where a single lowball bid is submitted and each bidder tries to top the low bid by offering small, incremental topping bids, with no bidder actually endeavoring to pay a reasonable, value-maximizing price for the lowest number of shares necessary to satisfy the outstanding judgment(s)." *Id.* ¶ 22.

D. "Crystallex's" Objections Are Contrary to Law.

Taken together, it is clear that Crystallex is trying to rig the process. The provisions it supports and the positions it advocates all but ensure that "Crystallex's" bargain-basement credit bid would win, leaving Tenor as the contingent owner of the Republic's multi-billion dollar strategic asset, which is central to the Republic's ability (and the United States' interest) to restore economic prosperity in a democratized Venezuela *and* address its obligations to all of its creditors.

Crystallex seeks to justify such proposals in part by arguing that a sale process must start immediately and, once it begins, must inexorably march to its conclusion, resulting in a sale that is approved by the Court. It objects to any role for the Special Master to assess the adequacy of a bid before declaring it the winner and brushes aside any possibility for justifiable delay pending OFAC authorization or cancellation of the auction for lack of adequate bids. *E.g.*, D.I. 316 at 15 (objecting to Special Master's "broad discretion as to when and if the auction occurs and whether to present any bid to the Court for approval"). Both arguments ignore the law.

1. "Crystallex" Erroneously Argues that Any Sale Price Is Permissible

Crystallex incorrectly questions the legal justification for the Special Master to decline to present *any* bid to the Court for approval if none is satisfactory. In Delaware execution sales, an auction result may be set aside for a number of reasons, including if the price is "grossly inadequate." *Burge v. Fid. Bond & Mortg. Co.*, 648 A.2d 414, 419 (Del. 1994). As one guideline, "gross inadequacy" can arise "[i]f the fair market value of the property is over twice the sales price" (called the "50% test"). *Id.*[15] An analysis of the fairness of the sale is thus built into Delaware law, which demonstrates that *taking reasonable steps* to maximize value is an indispensable requirement. *Cf.* 8 Del. C. § 324(a) (permitting sale of only "[s]o many of the shares…as shall be sufficient to satisfy the debt"). Accordingly, it makes sense for the Special Master to assess the adequacy of the Successful Bid to determine whether to present it to the Court. While the Special Master failed to conduct a valuation here, *no* party has argued that the PDVH shares are worth only $600 million—the threshold for a $300 million credit bid to clear the 50% test.

[15] The 50% test "is not the sole touchstone of acceptability." *Burge*, 648 A.2d at 419. "Court approval of a disputed sheriff's sale depends on the particular circumstances of the case" and can include "factors other than price," such as defects in the procedure, neglect of duty, or misconduct. *Id.* (internal quotation marks omitted). The myriad "defect[s]…in the process or mode of conducting the sale" that the Venezuela Parties have identified in their opening Objections, and the Special Master's "neglect of duty" to conduct a valuation and retain a disinterested financial advisor, are thus separate and additional grounds on which the Venezuela Parties may move to set aside any sale resulting from the proposed process. *See id.*

Crystallex ignores this authority. It argues that "'a fair and proper price' for property subject to a forced sale is 'the price in fact received at the [judicial] sale, so long as all the requirements of the State's . . . law have been complied with,'" D.I. 316 at 16 (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994)). Crystallex also cites snippets, D.I. 316 at 17-18, of this Court's oral ruling from March 16, 2021, in which the Court stated in full: "Delaware law does not guarantee that the maximum price be the result. It does require us to take reasonable steps to try to get the maximum price under the circumstances under which the sale is being conducted, and we will do that." D.I. 256 at 92:2-6. The "circumstances" the Court described include *not only* the fact that this is a forced sale, *see* D.I. 316 at 17-18, but also Delaware law,[16] which requires more than a rubber-stamp approval of any sale price that results from a sale. Affording the Special Master the discretion to prevent gross inadequacy is thus appropriate.

2. "Crystallex" Erroneously States that the Special Master and the Court Cannot Delay a Sale for Good Cause

Crystallex is also wrong to suggest that there is no basis in law to delay the sale process while awaiting clarity from OFAC, an improvement in market conditions, or the resolution of other contingencies and/or for the Special Master to suspend the sale proceedings without recommending a winner if bidding is inadequate. *See* D.I. 316 at 9-12 (objecting to OFAC-related delay); *id.* at 14 (arguing that there is no legal basis "for calling off an execution sale simply because the auctioneer does not approve of the bids received"); *id.* at 15 (objecting to Special Master's "discretion as to when and if the auction occurs and whether to present any bid to the Court for approval"). As the Supreme Court has explained, a person carrying out a judicial sale

> is not bound to obey the directions of the attorney of the creditor to make an unreasonable sale of the property of the debtor, if he sees that the *time selected, or other attending*

[16] Even Crystallex's citation to *BFP* acknowledges that a forced sale's outcome must abide by "the requirements of the State's . . . law," which here *includes* the rulings in *Burge*.

> *circumstances,* will be likely to *produce great sacrifice of the property*; but he may in such a case, if he thinks proper, *postpone the sale*, especially if it appears that the creditor will not sustain any considerable injury by the delay.

Blossom v. Milwaukee & C.R. Co., 70 U.S. 196, 209 (1865) (emphases added); *accord* 50A C.J.S. Judicial Sales § 33. Indeed, such officer of the court "has a right to exercise a reasonable discretion *to adjourn such a sale*, and all that can be required of him is, that he should have proper qualifications, use due diligence in ascertaining the circumstances, and act in good faith, and with an honest intention to perform his duty." *Blossom*, 70 U.S. at 209 (emphasis added). "Unreasonable directions of the [creditor's attorney] are not obligatory and should not be followed, as if the solicitor should direct the property to be *struck off at great sacrifice when but a single bidder attended the sale*." *Id.* (emphasis added).[17]

Here, the Special Master faces a creditor that insists on a sale despite OFAC regulations rendering participation in the bidding *illegal* and that, in any event, mire in uncertainty the ability of any sale to actually close. Such conditions will of course chill bidding at "great sacrifice of the property." *See id.* Thus, even apart from the fact that OFAC regulations independently require the delay, postponing any sale until OFAC licenses one is squarely within *Blossom*'s guidance.[18] While Crystallex argues that it (*i.e.*, Tenor) should not be required to "bear the risk of any further delays," D.I. 316 at 17, charging forward with a sale would expose not only the Venezuela Parties to the risk of a grossly inadequate sale price, but also *any bidder* who might participate to the risk of running afoul of OFAC sanctions (and the criminal penalties that can flow therefrom). It would

[17] The Court, of course, likewise has similar power to review and control a sale to ensure its fairness. *E.g.*, *Burge*, 648 A.2d at 420 ("Judicial review of a contested sheriff's sale implicates the court's inherent equitable power to control the execution process and functions to protect the affected parties from injury or injustice.").

[18] For the avoidance of doubt, the Venezuela Parties believe the discretion afforded to the Special Master in the Proposed Order regarding when OFAC has sufficiently signaled the sale's legality is insufficient. D.I. 317 at 13-16. Instead, as described above, no sale should proceed at all until OFAC has *clearly* authorized the sale. In any event, postponing a sale until such time is appropriate under *Blossom* and to maximize value under Delaware law.

also imperil the United States' foreign policy and national security interests, as reflected in the Government's Statement of Interest. On the ledger of risk, Tenor comes up short.[19]

Moreover, the Special Master's authority to "adjourn" the sale if no bid is sufficient—a power Crystallex opposes—flows from his inherent authority to avoid the "great sacrifice" to the PDVH shares that would accompany a fire sale. *See Blossom*, 70 U.S. at 209. The *Blossom* decision is especially apt here, where Crystallex aims to collect 100% of the PDVH shares through its credit bid—to the significant detriment of both the Venezuela Parties and other creditors—as "a single bidder" that ultimately "attend[s] the sale." *See id.* Withdrawing the Special Master's authority to recommend no winner would complicate his ability to "perform his duty," *id.*, including the avoidance of a grossly inadequate price under Delaware law.

To the extent Crystallex's arguments against an OFAC-based delay can reasonably be assumed to also apply to the Venezuela Parties' proposal that the Court forego an auction while alternative, value-maximizing transactions are explored, the Court should rest assured of its authority. As the Court and the Special Master have authority to postpone the sale based on "attending circumstances" to avoid "great sacrifice of the property," *id.*, such authority necessarily extends to merely delaying a sale that would otherwise destroy value (because of uncertainty surrounding OFAC's approval of the ultimate sale, OFAC's guidance that participation in such a sale is illegal, current market conditions, pending contingencies about alleged debtors' claims, and the process's inherent flaws encouraging a 100% sale of PDVH shares at a steep discount) to allow the parties and the Special Master time to consider alternative methods of satisfying the judgment that would mitigate the likely harm of the proposed process.

[19] The Supreme Court states that delaying a sale is especially appropriate where "the creditor will not sustain any considerable injury by the delay." *Blossom*, 70 U.S. at 209. While an assessment of the creditor's harm is clearly not a *requirement* under *Blossom*, any harm suffered by Crystallex, is addressed by its ability to seek post-judgment interest and its prime position as the first creditor to obtain an attachment. *See* Supp. R.W. Decl. ¶ 17.

Moreover, given the unprecedented size and complexity of the sale, 8 Del. C. § 324's requirement that the fewest number of shares necessary be sold, and Delaware's requirement to take reasonable steps to maximize value, the weight of Delaware corporate law supports exploring alternative ways of satisfying the judgment. Considering alternative means to reach these results is consistent with Delaware courts' focus on finding equitable solutions and not elevating form over substance. *Cf. Gatz v. Ponsoldt*, 925 A.2d 1265, 1280 (Del. 2007) ("It is the very nature of equity to look beyond form to the substance of an arrangement."); *id.* at 1281 ("[T]ransactional creativity[] should not affect how the law views the substance of what truly occurred.").[20]

III. The Parties and ConocoPhillips Agree on Many Objections.

While this litigation has often been marked with sharp disagreements on the issues, the Parties and ConocoPhillips' objections actually reflect *agreement* on many points. The Court should credit the Parties' and ConocoPhillips' collectively held positions on these issues. For example, Crystallex and the Venezuela Parties agree that, contrary to the view of the Special Master, if an auction were to occur, the winning bid should be the one that buys the fewest amount of shares in consideration for a sale price that will satisfy the judgment(s), not one that maximizes either the sale price or the implied equity value.[21] D.I. 316 at 20 n.7; D.I. 317 at 11. None of the parties materially disagrees with the timeline proposed by the Special Master once the sale process

[20] Crystallex also expressly *agreed* to language in this Court's May 27, 2021 Order directing the Special Master to "devise a plan for the sale of shares of PDVH as necessary to satisfy the outstanding judgment of Crystallex and the judgment of any other judgment creditor added to the Sale by the Court and/or devise *such other transaction* as would satisfy such outstanding judgment(s) while maximizing the sale price of any assets to be sold." D.I. 277 ¶ 2 (emphasis added). *See* D.I. 260, 260.1, 262 (Special Master's proposed order containing such language (D.I. 260.1), to which all parties agreed as relevant here (D.I. 260), and Crystallex's objections (D.I. 262) not referencing the relevant language); *accord* D.I. 265, 265.1, 268 (same).

[21] The Venezuela Parties maintain that this rule could be departed from if PDVSA opts for a different bid sufficient to satisfy the judgment(s). D.I. 317 at 11.

is launched.[22] And all three parties agree that the proposed Evercore Agreement is deeply flawed and should not be entered.[23] D.I. 316 at 20-25; D.I. 317 at 16-20; D.I. 319 at 8-13.

ConocoPhillips and the Venezuela Parties agree on at least nine additional points: (1) No process can, or should, begin without an OFAC license or explicit authorization, D.I. 317 at 14-16; D.I. 319 at 2-5; (2) The Court should not issue a show-cause order to the Government, D.I. 317 at 21; D.I. 319 at 3-4; (3) If a credit bidder is selected as the Stalking Horse Bidder, it should not receive a break-up fee, D.I. 317 at 11; D.I. 319 at 14; (4) The 10% good-faith deposit requirement will chill bidding and give Crystallex an improper advantage, D.I. 317 at 6, 12; D.I. 319 at 14-15; (5) The Special Master should have conducted a valuation, D.I. 317 at 2-5, 9; *see* D.I. 319 at 7; (6) Restricting communications among the Sale Process Parties is improper, D.I. 317 at 23; D.I. 319 at 15-16; (7) Disclosure of Highly Confidential Information to potential bidders is improper, D.I. 317 at 21-22; D.I. 319 at 16; (8) Evercore should not be paid before the Sale Process Parties are reimbursed, D.I. 317 at 20; D.I. 319 at 5-6; and (9) The Special Master's Advisors are unnecessary for settlement discussions, D.I. 317 at 10; D.I. 319 at 13-14.

Conclusion

For the foregoing reasons, and those in the Venezuela Parties' opening objections, the Court should not enter the Proposed Order as drafted and should revise it consistent with the legal and equitable arguments presented by the Venezuela Parties.

[22] While Crystallex requests a firm launch date, D.I. 316 at Ex. A at B.P. at 2, it agrees with the 90-day window to negotiate a settlement, *see* D.I. 316 at 8-9, 12-13, 14, Ex. A at B.P. at 2, and does not propose any material changes to the Special Master's proposed timeline, D.I. 316 at Ex. A at B.P. at 2-3.

[23] All agree there should be no "Upfront Fee" and that it would be improper for any success fee to be based on total enterprise value. D.I. 316 at 22-25; D.I. 317 at 19-20; D.I. 319 at 10-13. The Venezuela Parties agree with Crystallex that *if* Evercore is retained on a contingency fee basis, such fee should be based on the cash actually raised, D.I. 316 at 24-25; D.I. 317 at 19, but the Venezuela Parties maintain their position that *any* contingency fee creates a conflict of interest incompatible with Rule 53, 28 U.S.C. § 455, and OFAC sanctions, D.I. 317 at 16-20.

September 10, 2021

Respectfully submitted,

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

A Commissioner for Taking Affidavits
NATALIE RENNER

Public letter to Juan Guaidó, to the Delegate Commission of the National Assembly and to the Attorney Enrique Sánchez Falcón

By **Carlos Ramirez Lopez** - September 23, 2021 1:00 am

The recent pronouncement of the United States Department of the Treasury extended the protection to our oil company CITGO for a few more months but at the same time warned that during the first half of 2022 that policy would be evaluated, this implies that between January and June of next year it could allow its judicial execution through the auction sentenced in favor of the firm Crystallex and others, as well as the owners of the ill-fated PDVSA 2020 Bond. In other words, we are facing the imminent risk of losing our “jewel in the crown”.

With due respect, I address you in warning and claim for the passivity in which you incur with the inertia that you have been showing for the defense of that important Venezuelan asset because all you do is wait for the renewal of that temporary protection measure of the North American government that at some point could end because the creditors maintain a permanent and strong pressure from a high-ranking lobby.

For the record then.
As it will be recalled, the Venezuelan oil company CITGO based in the United States and currently administered by the interim government continues to hang by a thread, over it there is the serious danger of the execution of large debts bequeathed by the government of Nicolás Maduro such as those referred to PDVSA 2020 Bond and those corresponding to the judgments of the ICSID arbitration tribunal in favor of the firms Crystallex, ConocoPhillips, Owens Illinois and others.
The last renewal of the aforementioned prohibition was issued a few days ago, on September 15, 2021, when before the reiteration of the requests to auction CITGO made by the creditors, the government of Joe Biden denied it and renewed said protection measure for a few more months, but then they added that this would be until the first half of 2022 when they would re-evaluate it, this means that from January of next year it will be determined again if it maintains the protection or if it lifts it, in the latter case it would remain CITGO in the judicial auction process for the payment of the fraudulent ICSID judgments, the fraudulent 2020 bonds and also at the mercy of other lawsuits such as those concerning Bond 2034 and other Bonds issued by PDVSA under the concept of "cross default".

It should be remembered that CITGO, which is a registered company independently of others, is being called to respond not for its debts, but for those of PDVSA, this thanks to a legal thesis called "Alter ego" that was invoked by Dr. José Ignacio Hernández to title of expert hired by the plaintiff Crystallex in the trial against PDVSA before the Delaware District Court in April 2017, file 1: 15-cv-01082-LPS. In said lawsuit, Dr. Hernández ruled that PDVSA's debts could be collected from CITGO by virtue of the thesis known as “Alter ego” and this was accepted by the aforementioned court, which ordered CITGO to be seized.

By ironies of life, that same Dr. Hernández was later hired by the National Assembly as a special attorney for the interim government and he had to defend Venezuela from his own thesis, now he had to maintain the opposite: that CITGO was not responsible for the obligations PDVSA because they are two different companies and each with its own legal personality. Of course, the judge who previously believed the former did not believe the latter and condemned CITGO to answer for PDVSA's debts.

This attorney, Hernández, now on this side of the curb, hired some important North American law firms to oppose Crystallex's claims, an activity in which a few million dollars were uselessly invested. Dr. Hernández also sponsored the despicable thesis that the National Assembly paid "under protest" 70.1 million dollars in interest to the holders of the illegal PDVSA 2020 Bond that previously the same National Assembly had repudiated as illegal, this thanks to the suspicious argument of Dr. Hernández that it was necessary to buy time to attack him legally, which was never done, was a simple excuse to disguise that crime that should not go unpunished. A whole sea of contradictions in a stormy whirlpool of money bleeding Venezuela to death.

The truth is that these episodes have been a disaster for the country and in the face of which we remain defenseless only praying to providence that the United States government continue to protect us with its monthly prohibitive measures against the embargo while the hidden bondholders on the one hand and on the other, the companies Crystallex, ConocoPhillips, Owens Illinois and others are on the lookout, employing great resources of political influence to stop such measures and allow them to finish CITGO

WHAT COULD BE DONE AND HAS NOT BEEN DONE
Regarding the PDVSA 2020 Bond that put 50.1% of CITGO as collateral, it is absolutely illegal because it was issued without the approval of the National Assembly as it ruled by means of a Agreement. I have proposed that 1) its nullity should be demanded and in view of the objection of the aforementioned interest payment, it can be answered that this is an absolute nullity, not validated since its issuance (of the bond) was made in violation of express constitutional regulations referring to the joint intervention of the executive and legislative branches 2) file a complaint with the United States Attorney General to open a criminal investigation regarding said bond, which was just another manifestation of the looting carried out by the regime. That idea has fallen on deaf ears.

So if, for reasons of political convenience, the payment of that instrument had to be negotiated, but armed with those instruments: demand for nullity and criminal complaint.

THE NULLITY OF THE ICSID JUDGMENT HAS BEEN DEMANDED
but only so that the judgment of the Third Circuit would not be accepted, which by authorizing the auction in favor of Crystallex broke the efforts to make an orderly payment to all creditors. This action was rejected by the Supreme Court on May 18, 2020.

I never understood why the then attorney Hernández was not willing to attack the validity of the ICSID award, the reason for the lack of legal representation of the defendant Venezuela in said process being so clear and failing that he wasted a lot of money paying that crowd of lawyers in that process. useless action before the Supreme Court ..

TO CANCEL THE CRYSTALLEX ATTACK

The Maduro government made an agreement with Crystallex before the judge of the Superior Court of Ontario, Toronto, Glenn Hainey who on November 15, 2017 gave him his confidentiality approval and the terms of which have been revealed just a few days ago (last 15 of this same month of September) revelation that has been produced by the judge of the District of Delaware, Leonard Stark, who takes the case of the demand for enforcement of the ICSID judgment and ordered the seizure measure about CITGO. This judge ignored the confidential nature that had been given to the agreement between the company and the regime and ordered its publication as it was considered to be of interest to the process.

The disclosure of the aforementioned secret agreement provides an extraordinary element to demand not only the nullity of the execution process but also constitutes a criminal act, a fraud, since Crystallex is pursuing the full payment of a debt that was paid almost in full, since the amount received was $ 1,347,195,942 million that were delivered in bonds in 2018 but were accounted for as $ 319,579,394 million in the total debt for the claim, that is, more than BILLION DOLLARS were distributed among them, which is the difference between the face value of those bonds and the value that they gave in the transaction in the file. Crystallex did not clarify having received that partial payment, it sued as if it had not received anything with which it intends to recover the entire fraudulent ICSID judgment, it is the last straw.

PRISON IS WHAT THEY DESERVE

This revelation from just a few days ago provides us with a powerful instrument to seek the nullity of the process and to take the conspirators to jail because the court has been deceived into using it in a robbery.

I FILED THREE CLAIMS

There are reasons and modes for CITGO's defense, I have exposed them in several articles that have been published, and given your inertia to implement real means of defense, I prepared three amparo claims requesting the nullity of the aforementioned ICSID Awards and which I filed before the Constitutional Chamber of the Supreme Court exile, that has already passed more than a year, it was on August 3, 2020, but there are still no sentences, this perhaps due to the abandonment in which they have incurred with respect to said court and its magistrates to who have not even sought their recognition before the same authorities of other countries that have recognized you,Nor have they adequately defended them so that they pay their salaries in the 4 years that they have been in office, so they have hardly had to make a living doing things other than their ministry.

The aforementioned lawsuits contain the petition to declare 1) Nullity of the ICSID Arbitral Awards in the cases of Crystallex, ConocoPhillips and Owens Illinois 2) Request for precautionary measure ordering the suspension of the execution of the respective Awards. 3) Notification to the Delaware Court of said decision. 4) Requirement to the current attorney Enrique Sánchez Falcón to judicially process the suspension of executions against CITGO.

The basis of these claims is that in those proceedings before ICSID, the defendant Venezuela did not have a legitimate defense, since that was in charge of a lawyer who was not approved by the National Assembly as attorney, which is an indispensable constitutional requirement.

Separately and in order not to make this letter too long, I will publish the complaint that I filed on the Crystallex case in case it were the case that you, Mr. Guaidó, or the deputies who are members of the Delegate Commission, or the attorney Dr. Sánchez Falcón would like to do something about it. . Remember the responsibility that in these cases falls on your shoulders.

Respectfully,
Carlos Ramírez López

Carlos Ramirez Lopez

Carta pública a Juan Guaidó, a la Comisión Delegada de la Asamblea Nacional y al Procurador Enrique Sánchez Falcón

Por **Carlos Ramírez López** - 23 de septiembre de 2021 1:00 am

El reciente pronunciamiento del Departamento del Tesoro de Estados Unidos extendió por unos meses mas la protección a nuestra empresa petrolera CITGO pero a la vez advirtió que durante la primera mitad del 2022 se evaluaría esa política, esto implica que entre enero y junio del próximo año podría permitir su ejecución judicial mediante el remate sentenciado a favor de la firma Crystallex y otras, así como también de los propietarios del malhadado Bono PDVSA 2020. Es decir, que estamos ante el riesgo inminente de perder a nuestra "joya de la corona".

Con el debido respeto me dirijo a ustedes en advertencia y reclamo por la pasividad en la que incurren con la inercia que vienen mostrando para la defensa de ese importante activo venezolano pues lo único que hacen es esperar por la renovación de esa medida de protección temporal del gobierno norteamericano que en algún momento pudiera terminar pues las acreedoras mantienen para ello una permanente y fuerte presión de lobby de alto rango.

Que quede constancia pues.
Como se recordará, la empresa petrolera venezolana CITGO radicada en Estados Unidos y actualmente administrada por el gobierno interino sigue pendiendo de un hilo, sobre ella hay el grave peligro de la ejecución de grandes deudas legadas por el gobierno de Nicolás Maduro como son las referidas al Bono PDVSA 2020 y las correspondientes a las sentencias del tribunal de arbitraje CIADI en favor de las firmas Crystallex, ConocoPhillips , Owens Illinois y otras. La última renovación de la citada prohibición fue emitida hace unos pocos días, el pasado 15 de septiembre 2021, cuando ante la reiteración de las peticiones de rematar CITGO formuladas por los acreedores, el gobierno de Joe Biden lo negó y renovó dicha medida de protección por unos meses mas, pero seguidamente agregaron que eso sería hasta la primera mitad del 2022 cuando lo re evaluarían, esto significa que a partir de enero del próximo año se volverá a determinar si mantiene la protección o si la levanta, en este último caso quedaría CITGO en proceso de remate judicial para el pago de las fraudulentas sentencias del CIADI, de los fraudulentos bonos 2020 y también a merced de otras demandas como por ejemplo lo concerniente al Bono 2034 y otros Bonos emitidos por PDVSA bajo el concepto de "incumplimiento cruzado".

Cabe recordar que CITGO que es una empresa registrada independientemente de otras está siendo llamado a responder no por deudas suyas, sino por las de PDVSA, esto gracias a una tesis jurídica denominada "Alter ego" que fue invocada por el Dr. José Ignacio Hernández a título de experto contratado por la demandante Crystallex en el juicio contra PDVSA por ante la corte de Distrito de Delaware en abril de 2017 expediente 1:15-cv-01082-LPS. En dicho juicio el Dr. Hernández dictaminó que las deudas de PDVSA podrían serle cobradas a CITGO en virtud de la tesis conocida como "Alter ego" y así lo aceptó el referido tribunal por lo que ordenó el embargo de CITGO.

Por ironías de la vida, ese mismo Dr. Hernández después fue contratado por la Asamblea Nacional como Procurador especial del gobierno interino y le tocó defender a Venezuela de su propia tesis, ahora tenía que sostener lo contrario: que CITGO no era responsable de las obligaciones de PDVSA porque son dos compañías diferentes y cada una con su propia personalidad jurídica. Por supuesto, el juez que antes le creyó lo primero después no le creyó lo segundo y condenó a CITGO a responder por las deudas de PDVSA.

Este procurador Hernández ahora de este lado de la acera contrató a unos importantes bufetes norteamericanos para que se opusieran a las pretensiones de Crystallex, actividad en la cual se invirtieron inútilmente algunos millones de dólares. También el Dr. Hernández patrocinó la deleznable tesis de que la Asamblea Nacional pagara "bajo protesto" 70,1 millones de dólares por concepto de intereses a los tenedores del ilegal Bono PDVSA 2020 que antes la misma Asamblea Nacional había repudiado por ilícito, esto gracias al sospechoso argumento del Dr. Hernández de que había que ganar tiempo para atacarlo legalmente lo cual nunca se hizo, fue una simple excusa para disimular ese

crimen que no debe quedar impune. Todo un mar de contradicciones en un tempestuoso remolino de dinero desangrando a Venezuela.

Lo cierto es que estos episodios han sido un desastre para el país y ante lo cual seguimos indefensos solo rogando a la providencia que el gobierno de Estados Unidos nos siga protegiendo con sus mensuales medidas prohibitivas al embargo mientras los ocultos tenedores de bonos por un lado y por el otro las empresas Crystallex, ConocoPhillips, Owens Illinois y otras se mantienen al acecho empleando grandes recursos de influencias políticas para que cesen dichas medidas y se les permita rematar CITGO

LO QUE SE PUDO HACER Y NO SE HA HECHO

En cuanto al Bono PDVSA 2020 que puso como garantía el 50,1 % de CITGO es absolutamente ilegal por cuanto se emitió sin contar con la aprobación de la Asamblea Nacional como ésta misma lo dictaminó mediante un Acuerdo. He planteado que se debiera 1) demandar su nulidad y ante la objeción del antes citado pago de intereses se puede contestar que esa es una nulidad absoluta, no convalidable puesto que su emisión (del bono) se hizo con violación a expresa normativa constitucional referida a la intervención conjunta de los poderes ejecutivo y legislativo 2) interponer una denuncia ante el Fiscal General de Estados Unidos para que abriera una investigación criminal respecto a dicho bono que solo fue otra manifestación del saqueo ejecutado por el régimen. Esa idea ha caído en oídos sordos.

De manera que si por razones de conveniencia política hubiese de negociar el pago de ese instrumento que se haga pero armados de esos instrumentos: demanda de nulidad y denuncia penal.

SE HA DEBIDO DEMANDAR LA NULIDAD DE LA SENTENCIA CIADI

Respecto a las sentencias del CIADI en favor de las empresas Crystallex, ConocoPhillips y Owens Illinois he estado clamando porque se demande su nulidad debido a que se trató de procesos donde Venezuela no tuvo defensa legítima pues quien la ejerció a título de Procurador fue un abogado nombrado inconstitucionalmente por Maduro sin la necesaria aprobación de la Asamblea Nacional, pero lamentablemente eso no lo han hecho, en vez de esto el entonces procurador Jose Ignacio Hernández lo que hizo fue contratar a varios bufetes norteamericanos para demandar una acción denominada Writ of Certiorary por ante la Corte Suprema pero no para la anulación del fallo de CIADI, sino solamente para que no se aceptara la sentencia del Tercer Circuito que al autorizar el remate a favor de Crystallex rompía los esfuerzos para hacer un pago ordenado a todos los acreedores. Esta acción fue rechazada por la Corte Suprema el 18 de mayo de 2020.

Nunca entendí porqué el entonces procurador Hernández no se dispuso a atacar la validez del laudo del CIADI siendo tan claro el motivo de falta de representación legal de la demandada Venezuela en dicho proceso y en su defecto dilapidó mucho dinero pagando a ese tropel de abogados en esa inútil acción ante la Corte Suprema..

PARA HACER ANULAR EL ATAQUE DE CRYSTALLEX

El gobierno de Maduro hizo un acuerdo con Crystallex ante el juez de la Corte Superior de Ontario, Toronto, Glenn Hainey quien el 15 de noviembre de 2017 le impartió su aprobación en grado de confidencialidad y cuyos términos se han revelado apenas hace unos días (el pasado 15 de este mismo mes de septiembre) revelación que se ha producido por el juez del Distrito de Delaware, Leonard Stark, quien lleva el caso de la demanda de ejecución del fallo CIADI y ordenó la medida de embargo sobre CITGO. Este juez pasó por encima del carácter confidencial que le habían dado al convenio entre la empresa y el régimen y ordenó su publicación por considerarlo de interés para el proceso.

La revelación del citado convenio secreto aporta un elemento extraordinario para demandar no solo la nulidad del proceso de ejecución si no que configura un hecho delictivo, un fraude, puesto que Crystallex está persiguiendo el pago total de una deuda que fue pagada casi en su totalidad, pues el monto recibido fue de $1.347.195.942 millones que se le entregaron en bonos en 2018 pero fueron contabilizados como $319.579.394 millones en la deuda total por la demanda, o sea que se repartieron entre ellos mas de MIL MILLONES DE DÓLARES que es la diferencia entre el valor nominal de esos bonos y el valor que le dieron en la transacción en el expediente. Crystallex no aclaró haber recibido ese pago parcial, demandó como si no hubiera recibido nada con lo cual pretende volver a cobrar la totalidad del fraudulento fallo CIADI, es el colmo de los colmos.

CÄRCEL ES LO QUE MERECEN

Esta revelación de hace apenas unos días nos aporta un poderoso instrumento para buscar la nulidad del proceso y para llevar a la cárcel a los complotados pues se ha engañado al tribunal para utilizarlo en un robo.

INTERPUSE TRES DEMANDAS

Existen razones y modos para la defensa de CITGO, las he expuesto en varios artículos que se han publicado, y dada la inercia de ustedes para implementar medios reales de defensa elaboré tres demandas de amparo pidiendo la nulidad de los citados Laudos del CIADI y las cuales interpuse por ante la Sala Constitucional del TSJ exilio, de eso ya ha transcurrido mas de un año, fue el 3 de agosto 2020, pero aún no hay sentencias, esto quizás por el abandono en que han incurrido respecto a dicho tribunal y sus magistrados a quienes ni han procurado su reconocimiento por ante las mismas autoridades de otros países que a ustedes les han reconocido, ni les han defendido debidamente para que les paguen sus salarios en los 4 años que llevan en funciones por lo que ellos a duras penas han tenido que procurarse el sustento haciendo otras cosas distintas a su ministerio.

Las mencionadas demandas contienen el petitorio para que se declare 1) Nulidad de los Laudos Arbitrales del CIADI en los casos de Crystallex, ConocoPhillips y Owens Illinois 2) Solicitud de medida cautelar ordenando la suspensión de la ejecución de los respectivos Laudos. 3) Notificación a la Corte de Delaware de dicha decisión. 4) Exigencia al actual procurador Enrique Sánchez Falcón de tramitar judicialmente la suspensión de ejecuciones contra CITGO.

La base de estas demandas consiste en que en aquellos procesos ante el CIADI la demandada Venezuela no tuvo defensa legítima pues eso estuvo a cargo de un abogado a quien la Asamblea Nacional no aprobó como procurador lo cual es requisito constitucional indispensable.

Por separado y para no hacer muy larga esta carta publicaré la demanda que interpuse sobre el caso Crystallex por si fuese el caso que usted señor Guaidó, o los diputados integrantes de la Comisión Delegada, o el procurador Dr. Sánchez Falcón quisieran hacer algo al respecto. Recuerden la responsabilidad que en estos casos recae sobre sus hombros.

Respetuosamente,
Carlos Ramírez López

Carlos Ramírez López

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

A Commissioner for Taking Affidavits
NATALIE RENNER

https://efectococuyo.com/politica/procurador-gobierno-interino-activos-exterior-riesgo/

Interim government attorney warns that assets abroad are at risk

POLITICS · SEPTEMBER 28, 2021 14:13

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How do you value this information?

The attorney appointed by the interim government, **Enrique Sánchez Falcón** , warned that the National Assembly, elected for the period 2015-2020, "has not met its obligations to provide the approval of the **economic resources** for the payment of the **lawyers** required for the protection of **assets** abroad ".

The official made the warning in the session called by the **Legislative Delegate Commission,** this Tuesday, September 28.

According to Sánchez, this situation puts assets like **Citgo** at risk . The lawyer recalled that the trial is underway in which the nullity of the **PDVSA 2020 bond** is discussed , signed by the government of Nicolás Maduro without authorization from the Legislature, which pledges **51% of the shares** of the PDVSA subsidiary.

For the Republic to be able to defend itself in this judicial process, the approval of **$ 70,000** is required for the representation of the lawyers at the appeal hearing.

Sánchez also referred to the award issued by the International Center for Settlement of Investment Disputes (ICSID) in which he orders Venezuela to pay the multinational Conoco Phillips **$ 8.5 billion** for an expropriation of assets in 2007. Currently this arbitration is in in the “suspended execution phase” due to the request for annulment made by the Republic.

The prosecutor warned that PDVSA's **creditors** point to funds and assets that are in **Portugal, England** and other countries, since “the assets of the Republic are protected in the United States by the Ofac, but outside this country the creditors could, in few weeks, begin to try to execute assets of decentralized entities ”.

“There is a group of cases in which, due to lack of financial availability, it has not been possible to assign lawyers while the plaintiffs' lawyers have already requested to suppress procedures and procedural lapses and to pass at once to pass **convictions** arguing that the Republic He has not shown any sign of wanting to appear. This works in a serious way against the Venezuelan State, ”he said.

Sánchez asked the Delegate to approve a budget for **40 million dollars** to defend assets valued at 24 billion dollars.

https://efectococuyo.com/politica/procurador-gobierno-interino-activos-exterior-riesgo/

Procurador del gobierno interino advierte que activos en el exterior están en riesgo

POLÍTICA · 28 SEPTIEMBRE, 2021 14:13

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¿Cómo valoras esta información?

El procurador designado por el gobierno interino, **Enrique Sánchez Falcón**, alertó que la Asamblea Nacional, electa para el periodo 2015-2020, "no ha atendido sus obligaciones de proveer la aprobación de los **recursos económicos** para el pago de los **abogados** requeridos para la protección de los **activos** en el exterior".

El funcionario hizo la advertencia en la sesión convocada por la **Comisión Delegada Legislativa,** este martes 28 de septiembre.

De acuerdo con Sánchez, esta situación pone en riesgo a activos como **Citgo**. El abogado recordó que está en curso el juicio en el que se discute la nulidad del **bono Pdvsa 2020**, firmado por el gobierno de Nicolás Maduro sin autorización del Legislativo, que pone en garantía **51 % de las acciones** de la filial de Pdvsa.

Para que la República pueda defenderse en este proceso judicial, se requiere la aprobación de **70 mil dólares** para la representación de los abogados en la audiencia de apelación.

Sánchez también se refirió al laudo que emitió el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (Ciadi) en el que ordena a Venezuela pagar a la trasnacional Conoco Phillips **8.500 millones de dólares** por una expropiación de activos en 2007. Actualmente este arbitraje se encuentra en "fase de ejecución suspendida" por la solicitud de nulidad que hizo la República.

El procurador advirtió que los **acreedores** de Pdvsa apuntan a fondos y activos que están en **Portugal, en Inglaterra** y otros países, pues "los activos de la República están protegidos en Estados Unidos por la Ofac, pero fuera de este país los acreedores podrían, en pocas semanas, comenzar a intentar ejecutar activos de entes descentralizados".

"Existe un grupo de casos en los que por falta de disponibilidad financiera no se ha podido asignar abogados mientras que los abogados de los accionantes ya han solicitado suprimir trámites y lapsos procesales y que se pase de una vez a dictar **sentencias condenatorias** argumentando que la República no ha dado muestras de querer comparecer. Esto obra de manera grave contra el Estado venezolano", manifestó.

Sánchez pidió a la Delegada la aprobación de un presupuesto por **40 millones de dólares** para defender activos valorados en 24 mil millones de dólares.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36 AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **CRYSTALLEX INTERNATIONAL CORPORATION**

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

MOTION RECORD OF
CRYSTALLEX INTERNATIONAL CORPORATION
RE: AMENDED PROTECTIVE MOTION

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