

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE

)

THURSDAY THE 18th DAY

JUSTICE CONWAY

)

OF NOVEMBER, 2021

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IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

CRYSTALLEX INTERNATIONAL CORPORATION

Applicant

ORDER

THIS MOTION, made by the Applicant, Crystallex International Corporation (“**Crystallex**” or the “**Company**”), proceeded by way of judicial videoconference due to the COVID-19 crisis via Zoom at Toronto, Ontario.

ON READING: (i) the Motion Record of Crystallex dated October 28, 2020; (ii) the Motion Record of Crystallex dated May 21, 2021; (iii) the Responding and Cross-Motion Record of Computershare Trust Company of Canada in its Capacity as Trustee (the “**Trustee**”) for the Holders of Crystallex 9.375% Senior Notes due December 23, 2011 (the “**Senior Notes**”) and the Ad Hoc Committee of Beneficial Owners of the Senior Notes (as specified on Schedule "A" hereto) (the “**Ad Hoc Committee**” and with the Trustee, the “**Noteholders**”) dated May 28, 2021; (iv) the Responding Motion Record of Crystallex dated July 9, 2021; (v) the Reply Motion Record of Crystallex dated July 9,

2021; (vi) the Reply Cross-Motion Record of the Noteholders dated July 19, 2021; (vii) the Supplementary Motion Record of Crystallex dated September 3, 2021, including the transcript of the cross-examination of Scott Reid held August 6, 2021 and the exhibits thereto; (viii) the Transcript Brief of the Noteholders dated September 3, 2021, including the transcript of the cross-examination of Robert Fung held August 5, 2021 and the exhibits thereto and the transcripts of the cross-examination of Scott Reid held August 6, 2021 and the exhibits thereto; (ix) the Document Brief of Crystallex dated September 28, 2021; (x) the Document Brief of the Noteholders dated October 6, 2021; (xi) the Motion Record of Crystallex dated October 25, 2021; (xii) the Responding Motion Record of the Noteholders dated October 29, 2021; (xiii) the Supplemental Affidavit of Robert Fung sworn October 28, 2021 (the **"Supplemental Fung Affidavit"**); (xiv) the Transcript Brief of the Noteholders dated November 15, 2021, including the transcript of the cross-examination of Robert Fung held November 4, 2021 and the exhibits thereto and the transcript of the cross-examination of Scott Reid held November 4, 2021 and the exhibits thereto; (xv) the Transcript Brief of Crystallex dated November 16, 2021, including the transcript of the cross-examination of Scott Reid held November 4, 2021 and the exhibits thereto; (xvi) the Joint Compendium of the Applicant and Tenor Special Situation I, LP, in its capacity as the debtor-in-possession lender of the Applicant (the **"DIP Lender"**) dated November 16, 2021; (xvii) the Compendium of the Noteholders dated November 18, 2021; (xviii) the factums of each of Crystallex, the DIP Lender and the Noteholders; and (xix) the Thirty-Fifth, Thirty-Sixth, Thirty-Seventh and Thirty-Eighth Reports (collectively, the **"Reports"**) of Ernst & Young Inc. (the **"Monitor"**).

AND ON HEARING the submissions of counsel for the Applicant, counsel for the Monitor, counsel for the DIP Lender, counsel for Robert Fung and Marc Oppenheimer, and counsel for the Noteholders:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the notice of motion and the motion record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS

2. **THIS COURT ORDERS** that unless otherwise defined in this Order, capitalized terms used in this Order shall have the meanings given to them in the October Fung Affidavit (as defined below), the CCAA Financing Order this Court granted in these proceedings on April 16, 2012 (the "**CCAA Financing Order**") or in the Credit Agreement, as applicable.

EXTENSION OF STAY PERIOD

3. **THIS COURT ORDERS** that the Stay Period (as defined in the Initial Order of the Honourable Justice Newbould made December 23, 2011) be and is hereby extended to and including November 18, 2022 (the "**Stay Extension**").

4. **THIS COURT ORDERS** that during the Stay Extension period:

- (a) the Applicant or the Monitor shall provide regular public reporting to the Court and the stakeholders of the Applicant's then-current cash balance and the DIP balance and updates of public information with respect to the

Applicant and its enforcement activities, with such reporting to occur no less frequently than every six months;

- (b) the Applicant or the Monitor shall report on a timely basis to the Court and the Applicant's stakeholders on any material changes to the business or affairs of Crystallex, which reports may be confidential or public depending on the nature of the material change (it being understood that the rights of any party to oppose any redaction or sealing are hereby reserved);
- (c) the Applicant or the Monitor shall report, on a confidential basis every six months, the then-current Cash Flow Variance for the prior six-month period and the Cash Flow Forecast for the upcoming six-month period;
- (d) the Monitor shall, on a no less than quarterly basis, hold a meeting among the Applicant, the DIP Lender, representatives of the Ad Hoc Committee and representatives of any of the Applicant's other stakeholders that indicate to the Monitor in writing that they wish to participate to provide updates of public information concerning the Applicant, including its enforcement activities; and
- (e) subject to the prior orders and endorsements of this Court including the endorsement dated June 7, 2016, any party may come back to the Court to address any issues which arise during the Stay Extension period.

5. **THIS COURT ORDERS** that during the Stay Extension period and any future stay extension period, the Applicant shall, subject to further order of the Court, make public its six-month Cash Flow Variances (on the same line item basis as Appendix

D to the Thirty-Eighth Report and without redactions) on the date that is six months after the end of the relevant reporting period in the Cash Flow Variance by causing them to be posted on the Monitor's Website. By way of illustration of the foregoing, the Cash Flow Variance at Appendix D to the Thirty-Eighth Report will be made publicly available without redactions on the Monitor's Website on March 30, 2022.

CONFIDENTIALITY

6. **THIS COURT ORDERS** that, subject to paragraphs 5 and 9 hereof, as applicable, the following information (the "**Confidential Materials**") shall be sealed and filed under a protective order and not form any part of the public record in this proceeding except as otherwise provided herein:

- (a) Confidential Motion Record of Crystallex dated October 28, 2020, including the Affidavit of Robert Fung sworn October 28, 2020;
- (b) Confidential Motion Record of the Applicant dated May 21, 2021, including the Affidavit of Robert Fung sworn May 21, 2021;
- (c) Confidential Reply Motion Record of the Applicant dated July 9, 2021 including the Affidavit of Robert Fung sworn July 9, 2021;
- (d) Confidential Responding Motion Record of the Applicant dated July 9, 2021 and the Affidavit of Robert Fung dated July 9, 2021;
- (e) Confidential Reply Cross-Motion Record of the Noteholders dated July 19, 2021;

- (f) Confidential Supplementary Motion Record of the Applicant dated September 3, 2021;
- (g) Confidential Document Brief of the Noteholders dated October 6, 2021;
- (h) Confidential Motion Record of the Applicant dated October 25, 2021 including the Affidavit of Robert Fung dated October 25, 2021 (the “**October Fung Affidavit**”);
- (i) Confidential version of the Thirty-Seventh and Thirty-Eighth Reports of the Monitor;
- (j) Confidential Transcripts of the Cross-Examination of Robert Fung held on August 5, 2021 and November 4, 2021 and the Confidential Transcript and Exhibit Briefs of the Noteholders dated September 3, 2021 and November 15, 2021, respectively;
- (k) Confidential Transcript and Exhibit Brief of the Cross-Examination of Scott Reid held on November 4, 2021;
- (l) Confidential Joint Compendium of the DIP Lender and the Applicant dated November 16, 2021;
- (m) Confidential Compendium of the Noteholders dated November 18, 2021;
- (n) Confidential versions of the facts of the Applicant, DIP Lender and Noteholders served in connection with this Motion;

- (o) Portions of the explanatory notes to the cash flows in the Reports (with related text in the body of the Reports), as outlined in Schedule "D" in the Confidential Factum of the Applicant dated November 10, 2021;
- (p) The following cash flow information:
 - (i) the line item details in the Company's Cash Flow Forecast for the period from April 2021 to November 2021 contained in Confidential Appendix C to the Thirty-Sixth Report; and
 - (ii) Confidential Appendix E to the Thirty-Eighth Report containing the Cash Flow Forecast for the period October 1, 2021 to November 30, 2022; and
- (q) Confidential Appendix D to the Thirty-Eighth Report containing the Cash Flow Variance for the period April 1, 2021 to September 30, 2021, until March 30, 2022.

7. **THIS COURT ORDERS** that the Confidential Materials shall not be copied or disseminated beyond counsel except as authorized by the Applicant or by further order of this Court.

8. **THIS COURT ORDERS** that the Cash Flow Forecasts and Cash Flow Variances shall be made available to any of the Company's stakeholders upon the signing of a confidentiality agreement on terms acceptable to the Company, or such other terms or conditions as the Court considers appropriate upon a motion on proper notice to all parties in interest that is in compliance with the terms of the endorsement of this Court dated June 7, 2016. For the avoidance of doubt, nothing in this paragraph 8 shall limit or supersede the Noteholders' and the Company's other stakeholders' rights under paragraph 9 of the Approval Order of this Court dated December 18, 2014.

9. **THIS COURT ORDERS** that, subject to the endorsement of this court dated June 7, 2016, any party may apply to the Court on proper notice to all parties in interest to seek to vary the provisions in paragraphs 6 and 7 of this Order and nothing in this Order shall be deemed to prejudice their rights to bring a motion to seek such variation or to vary the finding that the Confidential Materials are confidential, provided that for certainty, a moving party shall have the onus on such motion(s) to justify any variation(s) sought.

PUBLICLY AVAILABLE MATERIALS

10. **THIS COURT ORDERS** that the public, redacted versions of the materials listed in paragraph 6 shall remain public in these proceedings and be filed with the Court and uploaded to CaseLines.

CROSS-MOTION

11. **THIS COURT ORDERS** that the Cross-Motion of the Noteholders to unseal the compensation amounts transferred by the DIP Lender to Robert Fung and Marc Oppenheimer in the Net Arbitration Proceeds Transfer Agreement approved and sealed by Order of this Court dated December 18, 2014 is dismissed.

EXTENSION AND AMENDMENT OF THE DIP CREDIT AGREEMENT

12. **THIS COURT ORDERS** that the Applicant is hereby authorized and empowered to enter into an amendment to the credit agreement dated as of April 23, 2012 between the Applicant and Tenor Special Situation Fund I, LLC ("**Tenor**"), which was assigned by Tenor to Tenor KRY Cooperatief U.A. ("**Tenor KRY**") on such date, subsequently assigned by Tenor KRY to Luxembourg Investment Company 31 S.a.r.l. ("**Tenor Luxco**") and ultimately assigned to the DIP Lender, as previously amended by

the first credit agreement amending and confirming agreement dated May 15, 2012, the second amendment agreement dated June 5, 2013, the third credit agreement amendment agreement dated as of April 16, 2014, the fourth credit amendment agreement dated March 12, 2015, the fifth extension amendment agreement dated as of December 31, 2016, the sixth extension and amendment agreement dated as of June 30, 2017, the seventh credit agreement amendment dated as of December 27, 2017, the eighth credit agreement amendment dated as of February 28, 2018, the ninth credit agreement amendment dated as of May 9, 2018, the tenth credit agreement amendment dated as of October 31, 2018, the eleventh credit agreement amendment dated as of May 6, 2019, the twelfth credit agreement amendment dated as of November 6, 2019, the thirteenth credit agreement amendment dated October 28, 2020 and effective as of May 6, 2020, the fourteenth credit agreement amendment dated April 14, 2021 and effective as of November 6, 2020, the fifteenth credit agreement amendment dated October 21, 2021, 2021 and effective as of May 7, 2021 (collectively, the "**Credit Agreement**"), pursuant to and substantially in the form of the sixteenth credit agreement amendment between the DIP Lender and the Applicant (the "**Sixteenth Credit Agreement Amendment**") attached as Exhibit "A" to the Supplemental Fung Affidavit, and all other documents contemplated or required by the DIP Lender in connection with the Sixteenth Credit Agreement Amendment.

13. **THIS COURT ORDERS** that the provisions and terms of the Sixteenth Credit Agreement Amendment, the Credit Agreement as amended by the Sixteenth Credit Agreement Amendment, and the other Credit Documents (including the Security Documents) are proper, fair and reasonable, and are hereby approved, and the Applicant

is hereby authorized and directed to pay and perform all of its principal indebtedness, interest, expenses, fees, liabilities and other compensation and obligations to the DIP Lender under and pursuant to the Credit Agreement, as amended by the Sixteenth Credit Agreement Amendment, and the other Credit Documents, as and when the same become due and are to be performed.

14. **THIS COURT ORDERS** that the DIP Lender is entitled, in accordance with the provisions of the DIP Credit Agreement as amended by the Sixteenth Credit Agreement Amendment, to all fees, interest, compensation and other amounts paid or payable under the Credit Agreement, as amended by the Sixteenth Credit Agreement Amendment.

15. **THIS COURT ORDERS** that:

- (a) the DIP Charge shall secure all Obligations outstanding from time to time under the Credit Agreement, as amended by the Sixteenth Credit Agreement Amendment, or under any other Credit Document except for any obligation of the Applicant to pay Lender Additional Compensation, the Additional Principal Compensation Amount, the Second Additional Principal Compensation Amount, the Third Additional Principal Compensation Amount or the Fourth Additional Principal Compensation Amount to the DIP Lender;
- (b) the Lender Additional Compensation Charge shall secure the obligation of the Applicant to pay to the DIP Lender the Lender Additional Compensation, the Additional Principal Compensation Amount, the Second Additional

Principal Compensation Amount, the Third Additional Principal Compensation Amount and the Fourth Additional Principal Compensation Amount in accordance with the Credit Agreement, as amended by the Sixteenth Credit Agreement Amendment; and

- (c) the DIP Charge and the Lender Additional Compensation Charge shall continue to have the priority set out in paragraph 17 of the CCAA Financing Order.

16. **THIS COURT ORDERS** that the Credit Agreement, the Sixteenth Credit Agreement Amendment, the other Credit Documents, the DIP Charge and the Lender Additional Compensation Charge, any advances made in good faith by the DIP Lender under the Credit Agreement, as amended by the Sixteenth Credit Agreement Amendment, and the Applicant's agreement to pay (and the payment of) Lender Additional Compensation, the Additional Principal Compensation Amount, the Second Additional Principal Compensation Amount, the Third Additional Principal Compensation Amount and the Fourth Additional Principal Compensation Amount to the DIP Lender are fair, reasonable and appropriate and shall not be rendered invalid or unenforceable and the rights and remedies of the DIP Lender shall not otherwise be limited or impaired in any way by: (1) the pendency of these proceedings and the declarations of insolvency made herein; (2) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (3) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (4) the provisions of any federal or provincial statutes or any common law; or (5) any negative covenants, prohibitions or other similar provisions

with respect to borrowings, incurring debt or the creation of encumbrances contained in any existing agreement (an "**Agreement**") which binds the Applicant and, notwithstanding any provision to the contrary in any Agreement:

- (a) none of the execution, delivery or performance of the Credit Agreement, the Sixteenth Credit Agreement Amendment or the other Credit Documents shall create nor be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;
- (b) the Applicant shall not have any liability to any Person (as defined by the Initial Order) whatsoever as a result of any breach of any Agreement caused by or resulting from the execution, delivery or performance of the Credit Agreement, the Sixteenth Credit Agreement Amendment or the other Credit Documents; and
- (c) the payments made by the Applicant pursuant to this Order, the Credit Agreement, as amended by the Sixteenth Credit Agreement Amendment, or the other Credit Documents, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law including common law.

17. **THIS COURT ORDERS** that each of the CCAA Financing Order and the Additional CCAA Financing Order issued by this Court in these proceedings on June 5, 2013, the Second Additional CCAA Financing Order issued by this Court in these proceedings on April 14, 2014, and the Approval Order issued by this Court in these

proceedings on December 18, 2014 (collectively, the "**Additional CCAA Financing Orders**") shall continue in full force and effect and that all protections and other provisions of the CCAA Financing Order and the Additional CCAA Financing Orders, as applicable, shall apply *mutatis mutandis* to all principal amounts, interest thereon, the Lender Additional Compensation, the Additional Principal Compensation Amount, the Second Additional Principal Compensation Amount, the Third Additional Principal Compensation Amount and the Fourth Additional Principal Compensation Amount and all other amounts owing to the DIP Lender under the Credit Agreement, as amended by the Sixteenth Credit Agreement Amendment, and the other Credit Documents and to all charges and other security therefor.

TOLLING

18. **THIS COURT ORDERS** that by agreement of the Applicant, the Trustee and the DIP Lender, the tolling of limitation periods provided for in paragraph 26 of the Stay Extension and Standstill Order of this Court dated June 5, 2013 (the "**Standstill Order**") shall continue until the date that is thirty (30) days following the expiration of the Stay Extension, provided that any limitation period applicable to a Claim (as defined in the Standstill Order) released pursuant to paragraph 29 of the Standstill Order shall not be tolled.

GENERAL

19. **THIS COURT HEREBY REQUESTS** the aid and recognition of any Court, Tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, including the United States Bankruptcy Court for the District of Delaware (the "**Bankruptcy Court**"), to give effect to this Order and to assist the Applicant, the Monitor

and their respective agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make orders and to provide such assistance to the Applicant and to the Monitor, as an Officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Applicant in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

20. **THIS COURT ORDERS** that each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, including the Bankruptcy Court, for the recognition of this Order and for assistance in carrying out the terms of this Order.

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A handwritten signature in blue ink, appearing to read "Conway J.", is written over a horizontal line.

SCHEDULE “A”

BENEFICIAL OWNERS OF SENIOR NOTES PART OF AD HOC COMMITTEE

1. QVT Fund LP
2. Quintessence Fund L.P.
3. QVT Family Office Fund LP
4. Greywolf Loan Participation LLC
5. Ravensource Fund
6. Stornoway Recovery Fund LP

IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

Crystallex International Corporation

Applicant

Commercial List File No: CV-11-9532-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

Proceeding commenced at Toronto

ORDER

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