

**PUBLIC**

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

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

**CRYSTALLEX INTERNATIONAL CORPORATION**

Applicant

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**FACTUM OF THE APPLICANT  
CRYSTALLEX INTERNATIONAL CORPORATION  
Re: Stay Extension and Sealing of Information  
Returnable December 12, 2022**

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December 8, 2022

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## PART 1 – OVERVIEW<sup>1</sup>

1. In this motion, the CCAA Applicant Crystallex International Corporation (“**Crystallex**”) seeks: (i) approval of the 17<sup>th</sup> DIP Credit Agreement Amendment; (ii) a 12-month extension of the Stay Period (as defined in the Initial Order) until December 12, 2023; and (ii) targeted, limited sealing of its strategic information and certain information

\_\_\_\_\_ The relief sought by the Company is unopposed, and is supported by the Monitor, Ernst & Young Inc.

2. Crystallex has been entangled in litigation for more than a decade with the government of Venezuela, seeking compensation for Venezuela's expropriation of the Company's mining rights to the Las Cristinas gold mine. The Company's sole objective for the past five years has been to maximize recovery on its only asset: an approximately U.S.\$1.4 billion arbitral award against Venezuela, rendered on April 4, 2016 in respect of the expropriation (the "**Award**").<sup>2</sup> Crystallex entered into CCAA protection in 2011 and spent five years in arbitration pursuing the Award.<sup>3</sup> It has achieved remarkable successes to date in enforcing its rights against Venezuela, which are detailed more fully in the Affidavit of Robert Fung sworn November 18, 2022 at paras. 22-45 and below. In particular, the U.S. District Court in Delaware has finally approved a sale process for shares of PDV Holding (described and defined below as the "**PDVH Shares**"), over which

Capitalized terms used throughout this Factum but not defined herein have the meanings ascribed to them in the Affidavit of Robert Fung sworn November 18, 2022. For ease of reference, an Index of Defined Terms, used both in this Factum and in the Affidavit of Robert Fung sworn November 18, 2022, is attached as **Schedule “C”**.

<sup>2</sup> Affidavit of Robert Fung sworn November 18, 2022 ("**November Fung Affidavit**"), para. 4, Motion  
Record of Crystallex International Corporation dated December 12, 2022 ("**Dec. CMR**"), Tab 2, p.15.

<sup>3</sup> November Fung Affidavit, para. 3, Dec. CMR, Tab 2, p. 15.

Crystallex holds a writ of attachment. This writ of attachment in the PDVH Shares represents an indirect interest in Venezuela's largest overseas asset, CITGO Petroleum Corporation, which is valued at over US\$8 billion.

3. Crystallex is proposing a further 12-month extension of the Stay Period to allow it to continue to progress its enforcement efforts on the basis that:

- (a) the Company continues to act in good faith;
- (b) the necessary enforcement steps in the U.S. are well defined through a sale process that is expected to play out into 2024;
- (c) it has sufficient liquidity to pursue its enforcement and collection strategy during the requested Stay Period;
- (d) there are insufficient liquid proceeds at this time to providently make distributions to creditors; and
- (e) there is limited relief, if any that the Company anticipates would be necessary during the requested extension of the Stay Period.

4. In the last 12 months, Crystallex has provided its stakeholders with regular information and updates concerning its financials and progress in the enforcement. None of the Company's stakeholders has raised issues or concerns regarding the cadence of disclosure, the level of information disclosed or other issues of concern regarding the Company's enforcement efforts. Crystallex intends to continue providing these regular information updates and reporting to its stakeholders during the requested extension of the Stay Period.

5. As part of its litigation and enforcement strategy, the Company has historically



sought to seal its strategic *and* financial information from the public record, including its cash balance and cash flows. In certain cases, the Ad Hoc Committee of beneficial holders of the \$100 million principal amount of the Company's 9.375% notes due December 2011 (the "**Ad Hoc Committee**") have opposed the sealing of the Company's financial information.

6. However, there have been developments in the U.S. enforcement proceedings over the past year that have, in Crystallex's view, reduced the risk that disclosure of financial information once presented to the Company's enforcement strategies. As a result, the Company has reduced significantly the scope of the information it is seeking to have sealed in the context of this motion (the "**December Stay Extension Motion**").

7. Crystallex is *not* seeking to seal the financial information filed in connection with this motion; its cash flow forecasts and variance reports are publicly available and appended to the Fortieth Report of the Monitor. Instead, Crystallex seeks to seal *only* (i) its strategic information filed in connection with this motion, and [REDACTED]

[REDACTED]  
[REDACTED] To the best of the Company's knowledge, the sealing of these two categories of information has never been challenged by the Ad Hoc Committee.

8. The Company's objective in this motion is to continue to maintain and maximize its focus on its enforcement efforts during the requested 12-month Stay Period extension, and to safeguard its litigation strategy by keeping certain information about that strategy confidential. As a result, Crystallex respectfully asks this Court to: (i) permit the 17<sup>th</sup> DIP amendment; (ii) grant Crystallex's request for a 12-month stay extension; and (iii) seal the two limited categories of information identified by Crystallex.

## PART 2 – FACTS

### A. The CCAA and U.S. Enforcement Proceedings

9. This is a unique liquidating CCAA proceeding, in which the Company's only assets are its approximately USD \$1.4 billion Award against the government of Venezuela and the proceeds Crystallex has received in respect of the Award to date.<sup>4</sup> In the more than six years since the Award was granted, Crystallex has been engaged in complex legal and geopolitical proceedings aimed at enforcing on or otherwise realizing the value of the Award, in the face of opposition from large, well-funded adversaries (competing creditors of Venezuela), two competing government regimes in Venezuela (being the Nicolas Maduro-led government and the opposition government led by Juan Guaido), as well as obstacles to enforcement created by the U.S. government.<sup>5</sup>

10. These proceedings have involved, among other efforts: (i) seeking recognition of the Award in United States courts, resulting in a judgment issued by the United States Federal Court (the "**Judgment**");<sup>6</sup> (ii) obtaining a writ of attachment for the Judgment against key assets of Venezuela situated in the United States (the "**Writ**");<sup>7</sup> (iii) negotiations directly with Venezuela (complicated by questions concerning who constitutes the legitimate government of Venezuela);<sup>8</sup> and (iv) addressing the impact of certain sanctions that have been imposed in respect of Venezuela by United States

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<sup>4</sup> November Fung Affidavit, para. 4, Dec. CMR, Tab 2, p.15.

<sup>5</sup> November Fung Affidavit, paras. 30-32, Dec. CMR, Tab 2, pp. 25-26.

<sup>6</sup> November Fung Affidavit, para. 26, Dec. CMR, Tab 2, p. 23.

<sup>7</sup> November Fung Affidavit, para. 27, Dec. CMR, Tab 2, pp. 23-24.

<sup>8</sup> November Fung Affidavit, paras. 29-30, Dec. CMR, Tab 2, pp. 25-26.

Department of Treasury's Office of Foreign Assets Control ("**OFAC**") (the branch of the government that administers and enforces sanctions) (the "**Sanctions**").<sup>9</sup>

11. The only way for Crystallex to pay its stakeholders is to successfully enforce the Award; if it cannot, the claims of all creditors will be materially compromised. The Writ attaches to Venezuela's interest in the shares of PDV Holding, Inc. (the "**PDVH Shares**"), and currently represents the best prospect for recovery to the Company's stakeholders. The PDVH Shares represent an indirect 100% ownership interest in CITGO Petroleum Corporation – a major U.S. oil company valued at over U.S.\$8 billion and Venezuela's largest overseas asset.<sup>10</sup>

12. On March 2, 2022, the U.S. District Court in Delaware (the "**Delaware Court**") finally approved (the "**Sale Process Commencement Decision**") a sale process for the sale of the PDVH Shares (the "**Sale Process**").<sup>11</sup> This is significant because OFAC has taken the position that the Sanctions prohibit the Company from executing on the PDVH Shares that are subject to the Writ without first obtaining a special license from OFAC. Crystallex submitted an application for a specific license to authorize the sale of the PDVH Shares, but that license was denied in 2021.<sup>12</sup> Moreover, Venezuela and, at times, the United States, objected to the Delaware Court setting up *any* sale process for the PDVH Shares on the basis that such a process would conflict with the Sanctions and disregard U.S. foreign policy interests.<sup>13</sup> It was therefore unknown whether the Delaware Court

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<sup>9</sup> November Fung Affidavit, para. 30, Dec. CMR, Tab 2, pp. 25-26.

<sup>10</sup> November Fung Affidavit, para. 6, Dec. CMR, Tab 2, p. 16.

<sup>11</sup> November Fung Affidavit, para. 7, Dec. CMR, Tab 2, pp. 16-17.

<sup>12</sup> November Fung Affidavit, para. 37, Dec. CMR, Tab 2, pp. 27-28.

<sup>13</sup> November Fung Affidavit, para. 38, Dec. CMR, Tab 2, p. 28.

would allow a sale to proceed for the PDVH Shares absent consent from OFAC.<sup>14</sup>

13. The Sale Process Commencement Decision represents a significant victory for Crystallex as the Delaware Court found that it could take steps toward a sale of the PDVH Shares, including by adopting and implementing sale procedures notwithstanding that neither Crystallex, nor any other party, currently holds a special license from OFAC authorizing the sale or acquisition of the PDVH Shares.

**B. Treatment of Financial Information in the CCAA Proceeding**

14. Crystallex has historically been authorized by this Court to seal certain strategic and financial information, including its cash balance, its historical and future cash flow forecasts and variance reports.

15. On November 18, 2021, the Company brought a motion before this Court to (i) seal strategic information concerning its enforcement strategy (which relief was unopposed), and (ii) seal, on a temporary basis, its financial information (which relief was opposed by the Ad Hoc Committee). This Court made an order (the “**CCAA Disclosure Order**”) on the same date approving the Company’s sealing request on the following terms:

- (a) sealing the Company’s strategic information;
- (b) sealing a confidential explanatory note to the cash flows with related text in the body of the relevant reports of the Monitor (which were similar in content to the Confidential Explanatory Note defined below);
- (c) sealing, for a limited time, certain of the Company’s financial information,

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<sup>14</sup> November Fung Affidavit, para. 7, Dec. CMR, Tab 2, pp. 16-17.

including its cash balance, its historical and future cash flow forecasts and variance reports;

- (d) authorizing the rolling six-month (delayed) public disclosure of the Company's cash flow forecast and variance reports;
- (e) requiring Crystallex or the Monitor to report publicly to the Court and the Company's stakeholders no less than every six months concerning the Company's current cash balance and the balance of its debtor-in-possession loan; and
- (f) requiring the Monitor to hold quarterly meetings with the Company's stakeholders and to provide updates of public information with respect to the Company and its enforcement activities.<sup>15</sup>

16. In making the CCAA Disclosure Order, this Court found:

"There is serious risk to an important public interest if this information is publicly disclosed. Crystallex is engaged in intensive protracted enforcement efforts to seek enforcement of a huge award, all for the benefit of its stakeholders in this CCAA proceeding. The information is commercially sensitive, is related directly to these enforcement efforts and could serious compromise Crystallex's position in the pursuit of those efforts."<sup>16</sup>

17. As contemplated by the CCAA Disclosure Order, quarterly information update meetings have since been held with Crystallex, members of the Ad Hoc Committee, the Monitor, Tenor Special Situation I, LP, the debtor-in-possession lender of the Applicant, and their respective counsel. The Monitor has also publicly released the Company's cash

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<sup>15</sup> November Fung Affidavit, para. 69, Dec. CMR, Tab 2, p. 39.

<sup>16</sup> *Crystallex International Corp., Re*, 2021 CarswellOnt 17170 at para. 16 [2021 Stay Extension Endorsement].

balance and DIP balance and a summary of Crystallex's actual receipts and disbursements for the period from October 1, 2021 to March 30, 2022 in accordance with the CCAA Disclosure Order.<sup>17</sup>

18. No stakeholder or advisor has raised any concerns concerning the cadence of disclosure or the level of information provided in the period since November 2021.<sup>18</sup>

19. Crystallex has previously undertaken a strategy of sealing its financial information in the CITGO Litigation and these CCAA proceedings for two principal reasons. *First*, the information would have [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>19</sup>

*Second*, the majority of the Company's monthly expenditures are made in connection with the U.S enforcement proceedings. [REDACTED]

[REDACTED]

[REDACTED].<sup>20</sup>

20. Recent developments in the CITGO Litigation, however, have reduced the risk that disclosure of financial information once presented to the Company's enforcement strategy, including: (i) the issuance of the Sale Process Commencement Decision

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<sup>17</sup> November Fung Affidavit, para. 71, Dec. CMR, Tab 2, p. 40.

<sup>18</sup> November Fung Affidavit, para. 72, Dec. CMR, Tab 2, pp. 40-41.

<sup>19</sup> November Fung Affidavit, para. 98, Dec. CMR, Tab 2, pp. 51.

<sup>20</sup> November Fung Affidavit, para. 99, Dec. CMR, Tab 2, pp. 51-52.

authorizing the advancement of the Sale Process, and (ii) a sale procedures order (the “**Sale Procedures Order**”) issued by the Delaware Court on October 4, 2022 that, among other things, establishes procedures and an approximate timetable for the sale of the PDVH Shares.

21. The combined effect of the Sale Process Commencement Decision and the Sale Procedures Order has been to increase certainty for Crystallex regarding the trajectory of its enforcement efforts and visibility [REDACTED]

[REDACTED]<sup>21</sup> Prior to these Orders being [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>22</sup>

22. The risks that Crystallex identified a year ago [REDACTED]  
[REDACTED] the public disclosure of its cash flow projections are no longer applicable because the Sale Process provides a clear and stable path for Crystallex’s enforcement efforts.<sup>23</sup> Specifically, the Sale Process will be carried out in accordance with the timetable set out in the Sale Procedures Order and if run to its conclusion, should be completed in 2024.<sup>24</sup> It is expected that any further action in the CITGO Litigation will primarily relate to briefing for certain milestones set out in the Sale Process and any related appeals – all of which are known to Venezuela as a party to the CITGO Litigation.

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<sup>21</sup> November Fung Affidavit, para. 104, Dec. CMR, Tab 2, pp. 53-54.

<sup>22</sup> November Fung Affidavit, para. 102, Dec. CMR, Tab 2, pp. 52-53.

<sup>23</sup> November Fung Affidavit, para. 105, Dec. CMR, Tab 2, pp. 54.

<sup>24</sup> November Fung Affidavit, para. 7, Dec. CMR, Tab 2, pp. 16-17.

[REDACTED] 25

23. Following careful consideration of these developments in the CITGO Litigation, Crystallex has decided not to seek to seal the financial information filed in connection with this December Stay Extension Motion, including its cash flow forecasts and variance reports. Instead, the limited information that Crystallex seeks this Court's authority to seal is as follows:<sup>26</sup>

- (a) A single explanatory note to the cash flows in the Monitor's Reports (with related text in the body of the Reports) [REDACTED]  
[REDACTED] (the "**Confidential Explanatory Note**"), as enumerated in **Schedule "D"** hereto; and
- (b) Crystallex's strategic information concerning, among other things, its monetization and enforcement strategy, which is found in the Affidavit of Robert Fung, Monitor's Reports and Facta filed in respect of the motions before the Court (the "**Strategic Information**").

### **PART 3 – ISSUES**

24. The issues to be resolved by this Honourable Court in this Motion are:

- (a) The approval of the 17<sup>th</sup> DIP Credit Agreement Amendment;
- (b) The extension of the Stay Period (as defined in the Initial Order) until December 12, 2023; and

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<sup>25</sup> November Fung Affidavit, para. 103, Dec. CMR, Tab 2, p. 53.

<sup>26</sup> November Fung Affidavit, para 90, Dec. CMR, Tab 2, pp. 48-49.



- (c) Redaction of
  - (i) the Confidential Explanatory Note; and
  - (ii) the Strategic Information.

25. The Company respectfully submits that the Confidential Explanatory Note and the Strategic Information should be redacted in order to preserve the value of Crystallex's assets [REDACTED]; and that, in the circumstances, it is appropriate for the Court to approve both the extension of the Stay Period until December 12, 2023 and the 17<sup>th</sup> DIP Credit Agreement Amendment.

#### **PART 4 – LAW AND ARGUMENT**

##### **A. The 17<sup>th</sup> DIP Credit Agreement Amendment Should Be Approved**

26. Crystallex and the DIP Lender have agreed to enter into an agreement, subject to Court approval, to a further extension and amendment to the DIP Credit Agreement (the “**17<sup>th</sup> DIP Credit Agreement Amendment**”).<sup>27</sup> The 17<sup>th</sup> DIP Credit Agreement Amendment provides for, among other things, the extension of the Maturity Date until December 12, 2023 or the expiry of the Stay Period, if earlier.<sup>28</sup>

27. The Monitor supports the extension of the Maturity Date and the approval of the 17<sup>th</sup> DIP Credit Agreement Amendment and the Ad Hoc Committee does not oppose the amendment. The Company submits that the terms of the 17<sup>th</sup> DIP Credit Agreement Amendment are fair, reasonable, and appropriate and will allow Crystallex, with the support of the DIP Lender, to continue to monetize the Award for the benefit of Crystallex's

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<sup>27</sup> November Fung Affidavit, para. 109, Dec. CMR, Tab 2, p. 55.

<sup>28</sup> November Fung Affidavit, para. 109, Dec. CMR, Tab 2, p. 55.

stakeholders.<sup>29</sup>

**B. A 12-Month Stay Period is Appropriate in the Circumstances**

28. Crystallex seeks to extend the Stay Period, which expires on December 13, 2022, to December 12, 2023 (the “**Stay Extension**”) in order to permit Crystallex to focus its monetary and professional resources on pursuing enforcement of the Award.<sup>30</sup> The Company respectfully submits that an extension is appropriate in the circumstances and that the request for a 12-month extension is reasonable. The Ad Hoc Committee does not oppose the requested 12-month Stay Extension.

**(i) A Stay Extension is Appropriate**

29. Pursuant to section 11.02 of the CCAA, the Court may grant an extension of the stay of proceedings for any period that the Court considers necessary if the Court is satisfied that: (i) circumstances exist that make the order appropriate; and (ii) the applicant has acted, and is acting, in good faith and with due diligence.<sup>31</sup> Each of these criteria is clearly met in this case.

30. With respect to the first prong of the test under section 11.02, the requested Stay Extension is necessary and appropriate in the circumstances including because:<sup>32</sup>

- (a) the necessary enforcement steps in the U.S. are now well defined, pursuant to the Sale Process for the PDVH Shares, which is expected to play out into 2024;

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<sup>29</sup> The 40<sup>th</sup> Report of the Monitor dated December 6, 2022, para. 27; November Fung Affidavit, para. 113, Dec. CMR, Tab 2, pp. 56-57.

<sup>30</sup> November Fung Affidavit, para. 83, Dec. CMR, Tab 2, p. 44.

<sup>31</sup> *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36, ss. 11.02(2) to 11.02(3).

<sup>32</sup> November Fung Affidavit, paras. 8, 85(a)-(e), Dec. CMR, Tab 2, pp. 45-47.

- (b) the Company is not currently in a position to providently make distributions to stakeholders;
- (c) a 12-month Stay Extension will allow the Company to focus its attention on its enforcement efforts, all of which are taking place outside of Canada, and will reduce the costs to the Company and allow it to focus its financial and professional resources on enforcement; and
- (d) the Company has sufficient funds to meet its projected liquidity requirements throughout the requested Stay Extension.

31. With respect to the second prong of the test, as outlined in detail in Mr. Fung's November Affidavit and supported by the Monitor's 40<sup>th</sup> Report, Crystallex has acted, and continues to act, in good faith and with due diligence in the pursuit of its enforcement efforts for the benefit of the Company's stakeholders.<sup>33</sup>

32. Crystallex's stakeholders will suffer no prejudice in the circumstances because the Company proposes to continue to hold quarterly information update meetings with its stakeholders, report its cash balance and DIP Loan balance no less frequently than every six months, and request that the Monitor continue to report to the Court at six-month intervals (or more frequently to the extent that something material does occur).<sup>34</sup>

33. The Monitor has indicated its support of a Stay Extension of 12 months subject to there being "sufficient safeguards put in place for the benefit of the Applicant's stakeholders", including: (i) interim reporting on the financial position of the Applicant;

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<sup>33</sup> November Fung Affidavit, para. 87, Dec. CMR, Tab 2, p. 47; 40<sup>th</sup> Report of the Monitor dated December 6, 2022, para. 46.

<sup>34</sup> November Fung Affidavit, para. 84, Dec. CMR, Tab 2, pp. 44.

(ii) timely disclosure by the Applicant of any developments in the CCAA or U.S. enforcement proceedings or any other material matters; and (iii) confirmation of the ability of any stakeholder to return to the Court in the interim to address any issues arising during the Stay Period.<sup>35</sup> The Company has offered to report on this basis, which is entirely consistent with the reporting structure that has been in place since November 2021 pursuant to the CCAA Disclosure Order.

**(ii) An Extension of 12 Months Is Appropriate**

34. There is no “standard” length of time for which the Stay Period should or must be extended. Rather, the length of a stay extension depends on this Honourable Court’s view of what is most appropriate in the circumstances, and is therefore highly fact-specific.<sup>36</sup>

35. Granting the 12-month extension in the 2021 Stay Extension Endorsement, the Honourable Madam Justice Conway held that:

“if this stay extension motion is any indication, these motions are battlefields for all sorts of issues that are time consuming and costly. Three months intervals will only consume additional resources and detract from the company’s main focus, which is to secure recovery for stakeholders through the US enforcement proceeding.”<sup>37</sup>

36. Notably, there has been no litigation or motion practice by any of the Company’s stakeholders in the twelve months since this Court last granted a stay extension. The considerations militating in favour of a 12-month stay extension in November 2021 have equal force for the purposes of the instant Stay Extension request.

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<sup>35</sup> 40<sup>th</sup> Report of the Monitor dated December 6, 2022, para. 48.

<sup>36</sup> *Sunrise/Saskatoon Apartments Limited Partnership, Re*, 2017 BCSC 808 at para. 21; *Tepper Holdings Inc., Re*, 2011 NBQB 311 at para. 54; *U.S. Steel Canada Inc., Re*, 2016 ONSC 3106 at para. 15.

<sup>37</sup> *2021 Stay Extension Endorsement* at para 9.

**C. The Strategic Information and the Confidential Explanatory Note Should be Sealed**

37. The Ad Hoc Committee does not oppose Crystallex's request to seal either the Strategic Information or the Confidential Explanatory Note. Both of these categories of information have previously been sealed by Orders of this Honourable Court, and to Crystallex's knowledge, the Ad Hoc Committee has never objected to having these categories of information sealed. The DIP Lender supports such sealing.

38. In all of the circumstances, sealing is appropriate pursuant to the principles enunciated by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*<sup>38</sup> and *Sherman Estate v. Donovan*.<sup>39</sup> The test to determine if a sealing order should be granted, as established in *Sierra Club* and re-framed and amplified in *Sherman Estate*, requires that:

- (a) the disclosure of this information poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk (and reasonably alternative measures will not prevent it); and
- (c) as a matter of proportionality, the benefits of the sealing requested by Crystallex outweigh any negative effects.

**(i) The Strategic Information Satisfies the *Sierra Club/Sherman Estate* Test**

39. In both *Sierra Club* and *Sherman Estate*, the Supreme Court of Canada explicitly recognized that commercial interests, including preserving confidential information or

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<sup>38</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*].

<sup>39</sup> *Sherman Estate v. Donovan*, 2021 SCC 25 [*Sherman Estate*].

avoiding a breach of a confidentiality agreement, can constitute an "important public interest" for the purposes of the *Sierra Club/Sherman Estate* test.<sup>40</sup> Further, as noted by Justice Conway in the 2021 Stay Extension Endorsement, there is a public interest in "not placing a CCAA debtor at a tactical disadvantage in its litigation".<sup>41</sup>

40. On numerous occasions Canadian courts have confirmed that CCAA proceedings serve important public interests,<sup>42</sup> including maximizing the value of a debtor's assets and creditor recoveries.<sup>43</sup> This Court has consistently sealed confidential information in the context of a CCAA proceeding (including during the history of this proceeding) where there was a risk that disclosure of the information at issue would compromise the proceeding and undermine efforts to maximize value for stakeholders.<sup>44</sup>

41. The Strategic Information contains details of the [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].<sup>45</sup> In the 2021 Stay Extension Endorsement, this Honourable Court found that "[the strategic information] goes to the core of how the company is trying to enforce the award."<sup>46</sup>

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<sup>40</sup> *Sierra Club* at para. 55; *Sherman Estate* at paras. 41-43.

<sup>41</sup> *2021 Stay Extension Endorsement* at para. 16.

<sup>42</sup> *Re Nortel Networks*, [2009] O.J. No. 3169 at para. 29.

<sup>43</sup> *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 42; *Urbancorp Cumberland 1 GP Inc. (Re)*, 2020 ONSC 7920 [Urbancorp] at para. 24.

<sup>44</sup> *Re Danier Leather Inc.*, 2016 ONSC 1044 at paras. 82-85; *Toronto-Dominion Bank v. Hockey Academy Inc.*, 2016 ONSC 4898 at para. 35; *Urbancorp* at para. 56; *Re Lydian International Limited*, 2020 ONSC 3850 at para. 27; *Sherman Estate* at para. 82.

<sup>45</sup> November Fung Affidavit, para. 94, Dec. CMR, Tab 2, pp. 50.

<sup>46</sup> *2021 Stay Extension Endorsement* at para. 20.

42. In circumstances where the Award and proceeds of recovery to date are the Company's only asset, failure to enforce the Award would be catastrophic for all stakeholders.

43. There are no reasonable alternatives to prevent the serious risk posed by the disclosure of the Strategic Information. The Company considered carefully the information that it needed to seal in order to preserve its strategic advantage in the U.S. proceedings, and has endeavoured to minimize the impact of its requested relief on the open-court principle by: (i) confining itself to targeted redactions rather than holus-bolus sealing, (ii) continuing to file public, redacted versions of its materials; and (iii) narrowing its requests for sealing relative to previous years. Moreover, any stakeholder, including any member of the Ad Hoc Committee, has access to the information sought to be sealed by signing a non-disclosure agreement.<sup>47</sup>

44. In a proportionality analysis, the benefits of sealing – which protects the interests of all stakeholders of the Company and maximizes the likelihood of the Award being successfully enforced – outweigh significantly the negative effects of the limited and targeted redactions sought.

**(ii) The Confidential Explanatory Note Satisfies the *Sierra Club/Sherman Estate* Test**

[REDACTED]

[REDACTED]

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<sup>47</sup> 2021 Stay Extension Endorsement at para. 6.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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48 *Sherman Estate* at paras. 86, 96.

49 *Sherman Estate* at para. 86.

50 *Sherman Estate* at para. 98.

51 November Fung Affidavit, paras. 91, 92, Dec. CMR, Tab 2, pp. 49.



**PART 5 – ORDER REQUESTED**

50. Crystallex respectfully requests an Order: (i) approving the 17<sup>th</sup> DIP Credit Agreement Amendment; (ii) extending the Stay Period until December 12, 2023 (with provisions requiring interim financial reporting, timely disclosure of any developments in the CCAA or U.S. enforcement proceedings or other material matters, and confirmation that any stakeholder may come back to the Court in the interim to address any issues that arise during the Stay Period); and (iii) sealing the Confidential Explanatory Notes and the Strategic Information.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of December, 2022.



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Lawyers for Crystallex International  
Corporation

## **SCHEDULE “A” LIST OF AUTHORITIES**

### **CASE LAW**

1. *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10
2. *Crystallex International Corp., Re*, 2021 CarswellOnt 17170 (S.C.J.)
3. *Re Danier Leather Inc.*, 2016 ONSC 1044
4. *Re Lydian International Limited*, 2020 ONSC 3850
5. *Re Nortel Networks*, [2009] O.J. No. 3169 (S.C.J.)
6. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
7. *Sherman Estate v. Donovan*, 2021 SCC 25
8. *Sunrise/Saskatoon Apartments Limited Partnership, Re*, 2017 BCSC 808
9. *Tepper Holdings Inc., Re*, 2011 NBQB 211
10. *Toronto-Dominion Bank v. Hockey Academy Inc.*, 2016 ONSC 4898
11. *Urbancorp Cumberland 1 GP Inc. (Re)*, 2020 ONSC 7920
12. *U.S. Steel Canada Inc, Re*, 2016 ONSC 3106

## **SCHEDULE “B”**

### **TEXT OF STATUTES, REGULATIONS & BY-LAWS**

#### **1. *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11.02**

##### **Stays, etc. – initial application**

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

##### **Stays, etc. — other than initial application**

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

##### **Burden of proof on application**

(3) The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

##### **Restriction**

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

## SCHEDULE “C” DEFINED TERMS INDEX

Term	Meaning
<b>40<sup>th</sup> Report</b>	means the fortieth report of the Monitor
<b>Ad Hoc Committee</b>	means the ad hoc committee of holders of the Company’s 9.37% senior unsecured notes
<b>Award</b>	means the US\$1.202 billion, plus interest, award rendered in favour of the Company by the World Bank’s International Centre for the Settlement of Investment Disputes against the government of Venezuela in respect of the expropriation of the Las Cristinas Gold mine
<b>CCAA Disclosure Order</b>	means an order of the Court dated November 18, 2021 extending the Stay Period, sealing certain strategic and financial information and authorizing six-month rolling disclosure of certain information
<b>CCAA Proceeding</b>	means proceeding under the <i>Companies’ Creditors Arrangement Act</i> in respect of Crystallex
<b>CITGO</b>	means CITGO Petroleum Corp., an American oil company and Venezuela’s largest overseas asset
<b>CITGO Litigation</b>	means the Company’s litigation against the Venezuela Parties in respect of the enforcement of the Writ
<b>Court</b>	means the Ontario Superior Court of Justice (Commercial List)
<b>Crystallex or the Company</b>	means Crystallex International Corporation
<b>Davies</b>	means Davies Ward Philips & Vineberg LLP, counsel for Crystallex
<b>Delaware Court</b>	means the United States District Court for the District of Delaware
<b>DIP Credit Agreement</b>	means the credit agreement dated as of April 23, 2012 between Crystallex and Tenor Special Situation Fund I, LLC, which was ultimately assigned to the DIP Lender, as amended and may be further amended from time to time

<b>DIP Lender</b>	means Tenor Special Situation I, LP
<b>DIP Order</b>	means the order of the Court dated April 16, 2012 approving the DIP loan to the Company and (i) a charge on the property of Crystallex to secure all principal and interest obligations under the DIP Credit Agreement and related documents and (ii) the Lender Additional Compensation Charge.
<b>Initial Order</b>	means the order of the Court dated December 23, 2011 granting Crystallex protection under the <i>Companies' Creditors Arrangement Act</i>
<b>Judgment</b>	means the judgment issued by the Delaware Court on March 25, 2017 recognizing the Award in the United States
<b>Lender Additional Compensation Charge</b>	means the charge on the Company's property to secure certain contingent value rights earned by the DIP Lender under the DIP Credit Agreement, as approved pursuant to the DIP Order
<b>Monitor</b>	Ernst & Young Inc., the court-appointed monitor of Crystallex
<b>OFAC</b>	means the United States Department of Treasury's Office of Foreign Assets Control, the branch of the U.S. government that administers and enforces sanctions
<b>PDVH</b>	means PDV Holding, Inc., the U.S. subsidiary of PDVSA and the indirect owner of the shares in CITGO
<b>PDVH Shares</b>	means the shares of PDV Holding, Inc., which represent an indirect interest in CITGO
<b>PDVSA</b>	means Petroleos de Venezuela, S.A., Venezuela's national oil company and the parent company of PDVH
<b>Sale Procedures Order</b>	means the operative sales procedure order issued by the Delaware Court dated October 7, 2022 establishing the operative procedures to be followed in conducting the Sale Process, including establishing a timetable for the Sale Process
<b>Sale Process</b>	means the process for the sale of the PDVH Shares

**Sale Process  
Commencement  
Decision**

means the order and opinion issued by the Delaware Court dated March 2, 2022 authorizing the commencement of the Sale Process in the absence of an OFAC license

**Sanctions**

means the sanctions imposed by the United States on Venezuela's economy and government, including sanctions that OFAC contends prohibit Crystallex from realizing on the PDVH Shares

**Seventeenth Credit  
Agreement Amendment**

means the agreement concerning terms of a further extension and amendment to the DIP Credit Agreement.

**Writ**

means the writ of attachment attaching PDVSA's interest in the PDVH Shares

**SCHEDULE “D”**  
**Proposed Redactions** [REDACTED]

**Fortieth Report of the Monitor**

Location	Text
Para. 29	<p>The balance of the Applicant’s cash and cash equivalents as at September 30, 2022 was approximately \$81.4 million, which was \$11.6 million higher than forecast. The favourable variance is primarily due to lower than forecast Arbitration and CCAA costs. [REDACTED] [REDACTED] [REDACTED] [REDACTED] were outstanding as at September 30, 2022.</p>
Para. 32	<p>The 2022-2023 Cash Flow Projection contains Management’s Assumption that the Applicant will not receive any payments from Venezuela during the Period. In addition, Management assumes that the Applicant will not make any payments in respect of the DIP Credit Agreement even if the DIP Credit Agreement matures during the Period. [REDACTED] [REDACTED] [REDACTED]. The Applicant projects that it will have the ability to sustain its operations through the Proposed Stay Period to advance all necessary strategic initiatives related to asset preservation and enforcement strategies in connection with the Award.</p>
Para. 40	<p>The Applicant is also seeking to seal the explanatory note to the Applicant’s cash flows (and related text in the body of the Fortieth Report and any other materials that may be filed in connection with this motion) related to the [REDACTED] [REDACTED] [REDACTED]</p>
Appendix D Explanatory Note 4	<p>Arbitration and CCAA Costs relate to the legal services for pursuing and enforcing the Applicant’s Award against Venezuela. In addition, Arbitration and CCAA Costs also relate to professional fees of the Applicant’s tax accountant, the Monitor and counsel to the Monitor, the Applicant and the DIP Lender. [REDACTED] [REDACTED] [REDACTED]</p>

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

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

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT**  
**CRYSTALLEX INTERNATIONAL CORPORATION**  
**RE: STAY EXTENSION AND SEALING OF**  
**INFORMATION**

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