

**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 BANRO CORPORATION, BANRO GROUP  
(BARBADOS) LIMITED, BANRO CONGO (BARBADOS)  
LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA  
(BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED  
AND KAMITUGA (BARBADOS) LIMITED**

(the "**Applicants**")

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**FACTUM OF THE APPLICANTS  
(Claims Procedure Order & Meeting Order)**

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**PART I - OVERVIEW**

1. This factum is filed in support of the Applicants' motion returnable February 1, 2018, for the granting of (i) an order (the "**Claims Procedure Order**") approving a procedure (the "**Claims Procedure**") for the identification and determination of certain claims against the Applicants and the identification of claims against their directors and officers; and (ii) an order (the "**Meeting Order**"), among other things, accepting the filing of a Consolidated Plan of Compromise and Reorganization in respect of the Applicants dated January 25, 2018 (the "**Plan**"), and authorizing the Applicants to hold two meetings of their Affected Creditors (the "**Creditors' Meetings**") to consider and vote on resolutions to approve the Plan.<sup>1</sup> No objections to the requested relief have been received.

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<sup>1</sup> Capitalized terms not defined herein have the meanings ascribed to such terms in the Affidavit of Rory Taylor, sworn December 21, 2017, attached without exhibits at Tab 2A of the Applicants' Motion Record

2. Banro is a Canadian public corporation and, through the Banro Group, is involved in the exploration, development and mining of gold in the Democratic Republic of Congo (“**DRC**”).<sup>2</sup> Through certain of the Non-Applicant Subsidiaries, the Banro Group owns two operating gold mines in the DRC known as the Twangiza gold mine and the Namoya gold mine, as well as certain exploration and exploitation rights in the DRC.<sup>3</sup>

3. The Applicants obtained relief under the *Companies’ Creditors Arrangement Act*<sup>4</sup> (the “**CCAA**”) pursuant to the Initial Order on December 22, 2017. The Initial Order, among other things: (i) authorized the Applicants to borrow the maximum sum of US\$20 million pursuant to the DIP Term Sheet (as may be amended); (ii) authorized the Applicants to take all steps and actions contemplated by, and to comply with their obligations under the Support Agreement; (iii) and appointed FTI Consulting Canada Inc. as the Monitor.

4. On January 18, 2018 the Applicants obtained two orders, which, among other things: (i) extended the Stay Period until March 30, 2018 and granted enhanced priority for the Charges created by the Initial Order; and (ii) approved a SISP. The SISP is currently underway with LOIs due on March 2, 2018.

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dated January 25, 2018 (the “**First Taylor Affidavit**”), the affidavit of Geoffrey Farr sworn December 22, 2017 (the “**Farr Affidavit**”), attached with exhibits at Tab 2B of the Applicants’ Motion Record, the Affidavit of Rory Taylor, sworn January 25, 2018, attached at Tab 2 of the Applicants’ Motion Record dated January 25, 2018 (the “**Third Taylor Affidavit**”), the order of the Honourable Justice Hainey of the Ontario Superior Court of Justice (Commercial List) dated December 22, 2017 (the “**Initial Order**”) attached at Tab 2C of the Applicants’ Motion Record, the Sale and Investment Solicitation Process (the “**SISP**”), the Plan, attached at Tab 2G of the Applicants’ Motion Record (an updated version of which is expected to be filed prior to the hearing), the proposed order establishing a Claims Procedure (the “**Claims Procedure Order**”), a draft version of which is attached at Tab 1A of the Applicants’ Motion Record and the proposed order authorizing the Applicants to, among other things, call, hold and conduct two Creditors’ Meetings (the “**Meeting Order**”), a draft version of which is attached at Tab 1B of the Applicants’ Motion Record.

<sup>2</sup> First Taylor Affidavit at para 4, Tab 2A of the of the Applicants’ Motion Record returnable February 1, 2018 [“**Motion Record**”], p. 114.

<sup>3</sup> First Taylor Affidavit at para 6, Tab 2A of the Motion Record, p. 114.

<sup>4</sup> *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended [“**CCAA**”].

5. The DIP Term Sheet and the Support Agreement require that the Applicants move forward to complete the Recapitalization in the event that no Successful Bid is identified as a result of the SISP. The Applicants are therefore seeking approval of the Claims Procedure Order and the Meeting Order so that they will be in a position to move forward with implementing the Recapitalization as quickly as possible if no Successful Bid is identified as a result of the SISP.

## PART II - FACTS

### BACKGROUND

6. The background facts are set out in the First Taylor Affidavit, the Farr Affidavit, the Third Taylor Affidavit and the second report to Court of the Monitor dated January 29, 2018 (the “**Second Report**”) and will not be repeated here.

### SISP

7. The SISP is currently in progress and includes the following milestones:<sup>5</sup>

|                |  |
|----------------|--|
| March 2, 2018  | Deadline for Non-Binding LOIs                                    |
| April 9, 2018  | Deadline for binding Alternative Transaction Bids (if necessary) |
| April 27, 2018 | Court approval of Alternative Transaction Bid (if applicable)    |
| April 30, 2018 | Outside Date   |

8. The SISP is designed to identify Qualified Alternative Transaction Bids that can form the basis of a Successful Bid. Qualified Alternative Transaction Bids must provide for Qualified Consideration, being: (i) cash consideration sufficient to indefeasibly repay all DIP Obligations; plus (ii) cash consideration sufficient to indefeasibly pay all Priority Claims; plus (iii) cash consideration sufficient to indefeasibly repay not less than 75% of the aggregate principal

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<sup>5</sup> Second Report of the Monitor dated January 29, 2018 at para 43 [“**Second Report**”]. See also the terms of the SISP found at Appendix B to the Second Report.

amount outstanding under the Affected Parity Lien Debt; plus (iv) cash consideration sufficient to indefeasibly repay all amounts due under the Stream Agreements or treatment of the Stream Agreements on the same terms as the Recapitalization.<sup>6</sup>

9. If no Successful Bid is identified as a result of the SISP, the DIP Term Sheet and the Support Agreement require that the Applicants move forward with the Recapitalization in accordance with a definite timeline.<sup>7</sup> Specifically, the DIP Term Sheet requires (i) the Meeting Order to have been granted by February 2, 2018; (ii) the Meeting Materials to have been mailed by February 5, 2018; (iii) the Creditors' Meetings to have been held on or before March 9, 2018; and (iv) the Sanction Order to have been granted on or before March 16, 2018.<sup>8</sup>

## **Plan**

10. If approved, sanctioned and implemented, the Plan will: (i) implement the Recapitalization, (ii) allow the Applicants to reorganize, and (iii) permit the Banro Group to continue ongoing operations.<sup>9</sup>

11. At a high level, under the Plan, on the Implementation Date (subject to the implementation steps as outlined in the Plan):

- (a) all existing Equity Interests in Banro will be cancelled without any consideration;<sup>10</sup>
- (b) holders of the Doré Loan Claim, the Namoya Forward II Claim and the Beneficial Noteholders (collectively, the Affected Secured Creditors) will be entitled to

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<sup>6</sup> First Taylor Affidavit at paras 102, 105, Tab 2A of the Motion Record, pp. 144 and 145; Third Taylor Affidavit, at para, 9, Tab 2 of the Motion Record, p. 92.

<sup>7</sup> First Taylor Affidavit at para 102, Tab 2A of the Motion Record, p. 144; Third Taylor Affidavit, at para 6, Tab 2 of the Motion Record, p. 91.

<sup>8</sup> Amended and Restated Interim Financing Term Sheet, Tab 2F of the Motion Record, p. 352. These timelines are extended if the SISP identifies the possibility of a Successful Bid.

<sup>9</sup> Third Taylor Affidavit at para 19, Tab 2 of the Motion Record, p. 99.

<sup>10</sup> s 4.4 of the Consolidated Plan of Compromise and Reorganization [the "**Plan**"], Tab 2G of the Motion Record, p. 400.

receive their proportionate share of New Equity. The New Equity is to be in a company to be incorporated pursuant to Cayman Island laws and which under the Plan, will become the new Banro Group parent. The New Equity will be subject to rights, restrictions and terms consistent with those described in the Recapitalization and the Information Circular. To effect those terms, Baiyin and Gramercy will receive Class A Common Shares (with voting rights) while other Affected Secured Creditors will receive Class B Common shares (without voting rights), however it is intended there be no distinction in the economic rights of the Common Shares;<sup>11</sup>

- (c) the Listed Creditors, being those creditors with claims that are listed on a schedule to be maintained by the Monitor in the form attached to the proposed Claims Procedure Order, will be entitled to their proportionate share of \$10,000;<sup>12</sup>
- (d) the Banro Released Parties (including the Directors and Officers), and the Third Party Released Parties will receive broad releases to the maximum extent permitted by law, with the proposed Sanction Order providing that the sole recourse for creditors with claims against Directors and Officers (other than Excluded Director/Officer Claims<sup>13</sup>) will be insurance proceeds.<sup>14</sup>

12. Under the Support Agreement, Baiyin and Gramercy (or related parties) have agreed, upon the implementation of the Plan (and as a condition to the implementation of the Plan) to amend the terms of the Interim Facility, the Gold Streams, the Namoya Forward I Agreement,

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<sup>11</sup> s 4.1 of the Plan, Tab 2G of Motion Record, p 399.

<sup>12</sup> s 4.2 of the Plan, Tab 2G of Motion Record, p 400.

<sup>13</sup> Excluded Director/Officer Claims as defined in the Sanction Order mean such claims where the applicable Directors or Officers are judged by the express terms of a judgment rendered on a final determination on the merits to have committed criminal, fraudulent or other wilful misconduct.

<sup>14</sup> Third Taylor Affidavit at para 20, Tab 2 of the Motion Record, pp. 99-100. See also Article 8 of the Plan, Tab 2G of the Motion Record, pp. 407-409.

Twangiza Forward I Agreement and Twangiza Forward II Agreement. Among other things, subject to the terms set out in the Recapitalization, gold deliveries under the Gold Streams will be further deferred over 12 months once the entitlements for 200,000 ounces of production from January 1, 2018 have been delivered and gold deliveries under the gold forward contracts will be further deferred to recommence on July 1, 2019. In exchange for such amendments, Baiyin and Gramercy (or related parties) will be entitled to certain consideration including warrants in Newco.<sup>15</sup>

13. For the purpose of considering and voting on the Plan, the Plan provides for two classes of Affected Creditors.<sup>16</sup> With respect to the Affected Secured Creditor Class, Beneficial Noteholders and the holder of the Namoya Forward II Claim will be entitled to vote<sup>17</sup> with respect to 75% of the value of their Affected Secured Claims.<sup>18</sup> With respect to the Banro Unsecured Creditor Class, (i) those holders of Affected Secured Claims who were entitled to vote as part of the Affected Secured Creditor Class will be deemed to have voted with respect to their Affected Banro Unsecured Deficiency Claim (being 25% of their Affected Secured Claim) in the same manner as they voted as part of the affected Secured Creditor Class; and (ii) Listed Creditors will be entitled to vote.<sup>19</sup>

### **Claims Procedure Order**

14. The proposed Claims Procedure Order has been designed to (i) identify and determine claims against the Applicants that will be compromised or paid in accordance with the Plan; and (ii) identify claims against the Applicants' Directors and Officers.

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<sup>15</sup> Third Taylor Affidavit at para 20 (d)-(f), Tab 2 of the Motion Record, p. 100.

<sup>16</sup> Third Taylor Affidavit at paras 11, 22, Tab 2 of the Motion Record, pp. 94, 103. See also s 3.1 of the Plan, Tab 2G of the Motion Record, p. 398.

<sup>17</sup> As outlined in the Second Report, the holder of the Doré Loan Claim is not entitled to vote pursuant to the Meeting Order.

<sup>18</sup> Third Taylor Affidavit at para 11, Tab 2 of the Motion Record, p. 94.

<sup>19</sup> Third Taylor Affidavit at paras 11-12, 15, Tab 2 of the Motion Record, pp. 94-95.



15. The proposed Claims Procedure Order provides:<sup>20</sup>
- a) The Doré Proven Claim will be US\$10,247,120;
  - b) The Namoya Forward II Proven Claim will be US\$20 million;
  - c) The Secured Notes Proven Claim will be US\$203,506,170. Beneficial Holders of the Secured Notes will not be required to complete any proof of claim forms, however the proposed Meeting Order provides the process by which such Beneficial Holders will be entitled to vote at the Creditors' Meetings;
  - d) Listed Creditors will be delivered a Claims Package by the Monitor which will include a Notice of Claim indicating the Initial Determination of the amount of their Affected Banro Unsecured Claim as well as the Employee Priority Claim Initial Determination for any Listed Creditors who are or were an employee of Banro. If the Listed Creditor agrees with the Initial Determination and, if applicable, the Employee Priority Claim Initial Determination, no further steps need to be taken to prove such claims. If the Listed Creditor disagrees with the amounts set out in the Notice of Claim, the Listed Creditor may file a Notice of Dispute which must be received by the Monitor no later the Claims Bar Date, being 5:00 pm Toronto time on March 6, 2018. If a Notice of Dispute is received, the proposed Claims Procedure Order contains a dispute resolution process in respect of such claims.
  - e) The CRA will also receive a Claims Package when such Claims Package is mailed by the Monitor on or before February 5, 2018 indicating that the Applicants are of the view no Crown Priority Claims are owing. Should the CRA

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<sup>20</sup> The information below can be found in its entirety at paras 13-17 of the Third Taylor Affidavit, Tab 2 of the Motion Record, pp. 94-98.

disagree with that position, the CRA will have until the Claims Bar Date (being March 6, 2018) to file a Notice of Dispute. Should the CRA file a Notice of Dispute, the proposed Claims Procedure Order contains a dispute resolution process in respect of such claims.

- f) Director/Officer Claimants must file a full Director/Officer Proof of Claim with the Monitor by the Claims Bar Date. A press release announcing the process for filing Director/Officer Proofs of Claim will be issued by Banro and the required information will be posted on the Monitor's website. Any Director/Officer Claims not filed so as to be received by the Claims Bar Date will be forever barred and extinguished. No dispute resolution for Director/Officer Claims is proposed at this time.

16. The proposed Claims Procedure Order also provides general provisions for effective filing of notices with the Monitor, procedures for dealing with transfers of claims, and currency conversion.

### **Meeting Order**

17. The proposed Meeting Order is designed to permit voting on the Plan and to proceed to the Sanction Motion if a positive vote of the Required Majorities is obtained. The proposed Meeting Order, among other things:

- a) accepts the Plan for filing purposes;
- b) authorizes the Applicants to convene the meetings of two classes of Creditors comprised of (i) Affected Secured Creditors and (ii) Affected Banro Unsecured Creditors, to consider and vote on the Plan. The Creditors' Meetings will be held

at the offices of McMillan LLP, counsel to the Monitor, on March 9, 2018 at 1:30 p.m. (Toronto time) and 1:45 p.m. (Toronto time);<sup>21</sup>

- c) dispenses with any requirement for a meeting or vote by Equity Claims;
- d) provides separate notification and voting procedures for Affected Creditors (other than Beneficial Noteholders) and for Beneficial Noteholders;
- e) provides a process for amendments or modifications to be made to the Plan;
- f) outlines the procedure for conduct and voting at the Creditors' Meetings including provisions:
  - (i) establishing deadlines for receipt of Proxies from Affected Creditors (other than Beneficial Noteholders) and receipt of Voting Instructions from Beneficial Noteholders;
  - (ii) prohibiting the Doré Loan Claimant from voting in respect of the Doré Loan Claim;<sup>22</sup> and
  - (iii) deeming a vote by the Affected Secured Creditors who vote as part of the Affected Secured Class to also be a vote in respect of the Affected Banro Unsecured Deficiency Claim for the Affected Banro Unsecured Class.<sup>23</sup>
- g) requires the Monitor, no later than 3 business days prior to the Creditors' Meetings, to serve a report regarding the Plan on the service list and post a copy of such report on its website;

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<sup>21</sup> Third Taylor Affidavit at para 23, Tab 2 of the Motion Record, p. 103.

<sup>22</sup> Third Taylor Affidavit at para 30(l), Tab 2 of the Motion Record, p. 109.

<sup>23</sup> Third Taylor Affidavit at para 30(h), Tab 2 of the Motion Record, p. 108.

- h) requires the Monitor to provide a report, as soon as practicable after the Creditors' Meetings with regard to, among other things, the results of the votes;<sup>24</sup>
- i) schedules a Sanction Motion to be heard on March 16, 2018 if a positive vote of the Required Majorities is obtained;<sup>25</sup> and
- j) provides a process for the adjournment of the Creditors' Meetings and the Sanction Motion should the SISP progress to Phase II.<sup>26</sup>

### **PART III - ISSUES**

18. The key issues on this Motion are as follows:

- (a) Should the Claims Procedure Order be approved as requested?
- (b) With respect to the Meeting Order:
  - (i) Should the plan be accepted for filing?
  - (ii) Is the proposed classification of Creditors appropriate?
  - (iii) Should the Court declare that no meeting or vote of holders of Equity Claims is required?

### **PART IV - LAW**

#### **A. The Claims Procedure Order should be granted**

19. Section 11 of the CCAA gives the Court broad jurisdiction to make any order it considers appropriate in the circumstances.<sup>27</sup> Courts have frequently relied upon sections 11 and 12 of the

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<sup>24</sup> Third Taylor Affidavit at para 32, Tab 2 of the Motion Record, p. 110.

<sup>25</sup> Third Taylor Affidavit at para 33, Tab 2 of the Motion Record, p. 110.

<sup>26</sup> Third Taylor Affidavit at para 8, Tab 2 of the Motion Record, p. 92.

<sup>27</sup> CCAA s. 11.

CCAA to approve a procedure for a debtor company to solicit claims against it and its directors and officers.<sup>28</sup>

20. This Court has also approved “negative option scheduled claims processes”, similar to that proposed by the Applicants in respect of Affected Creditor Claims, wherein, using the debtor’s records, the debtor notifies creditors of the amount of their claim, and allows such creditors to dispute their claim by filing a notice of dispute.<sup>29</sup>

21. The Applicants submit that the process contemplated by the proposed Claims Procedure Order is an effective and fair process to solicit claims against the Applicants that will be affected or paid pursuant to the Plan as well as claims against the Applicants’ Directors and Officers. The Claims Procedure Order is appropriate in the circumstances and this Court should exercise its jurisdiction to approve the order sought, as:

- (a) the Applicants and the Monitor have worked collaboratively to develop the Claims Procedure Order, which gives the Monitor a significant role in the approval of Claims;
- (b) Listed Creditors will be promptly provided with their Notices of Claim when the Monitor mails such Notices of Claim on or before February 5, 2018 and will have an opportunity to dispute such Listed Claims by delivering a Notice of Dispute to the Monitor by the Claims Bar Date (being March 6, 2018);
- (c) the Notice to Director/Officer Claimants will be press released broadly to provide timely notice of the process to interested persons;

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<sup>28</sup> See for example *Re Toys “R” Us (Canada) Ltd.*, 2018 ONSC 609 [“**TRU**”] at para 8, Book of Authorities of the Applicants [“**BOA**”] Tab 1; *Re U.S. Steel Canada Inc.*, 2017 ONSC 1967 [“**U.S. Steel**”] at paras 5 and 6, BOA Tab 2.; *Re Timminco Limited*, 2014 ONSC 3393 at paras 40-43, BOA Tab 3.

<sup>29</sup> *TRU* at para 14. See also *U.S. Steel* at para 6.

- (d) the proposed Claims Bar Date, March 6, 2018, gives interested persons sufficient time (approximately one month) to evaluate their claims against the Applicants and to submit Director/Officer Proofs of Claims or a Notice of Dispute, if necessary, in accordance with the Claims Procedure Order;
- (e) the negative claims procedure being utilized in respect of Affected Secured Creditors, Listed Creditors, Employee Priority Claims and Crown Priority Claims will increase efficiency in the Claims Procedure process by reducing the volume of claims that need to approved or further adjudicated;
- (f) the Monitor will be responsible for resolving Disputed Affected Banro Unsecured Claims filed by Listed Creditors and/or Crown Priority Claims, and can refer these Disputed Affected Banro Unsecured Claims to a Claims Officer or bring a motion for the adjudication of such Claim;<sup>30</sup> and
- (g) the Monitor supports the granting of the Claims Procedure Order.<sup>31</sup>

22. For these reasons, the Applicants request that this Honourable Court grant the Claims Procedure Order as sought.

**B This Court should exercise its discretion to grant the Meeting Order**

**i. The Plan should be accepted for Filing**

23. Sections 4 and 5 of the CCAA expressly contemplate the calling of meetings of the unsecured creditors and/or secured creditors of a company to consider and vote on a plan compromising the claims of those creditors:

4. Compromise with unsecured creditors

Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary

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<sup>30</sup> Third Taylor Affidavit at paras 15-16, Tab 2 of the Motion Record, pp. 95-98

<sup>31</sup> Second Report at para 33.

way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.<sup>32</sup>

5. Compromise with secured creditors

Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.<sup>33</sup>

24. The threshold to be satisfied in order to file a plan and call a meeting of creditors is low.<sup>34</sup> The Court should only decline to give preliminary approval and refuse to order a meeting “if it was of the view that there was no hope that the plan would be approved by the creditors or, if it was approved by the creditors, it would not, for some other reason, be approved by the Court.”<sup>35</sup>

25. Sanction of a plan rests on well-established criteria:

- (a) there must be strict compliance with all statutory requirements...;
- (b) all material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the CCAA;
- (c) the plan must be fair and reasonable.<sup>36</sup>

If a plan is so flawed that it cannot meet these criteria, the Court should not exercise its discretion to order a meeting.<sup>37</sup> However an analysis of fairness and reasonableness is not

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<sup>32</sup> CCAA s. 4.

<sup>33</sup> CCAA s. 5.

<sup>34</sup> *Re Federal Gypsum Co.*, 2007 NSSC 384 [“**Federal Gypsum**”] at para 12, BOA Tab 4.

<sup>35</sup> *Re Target Canada Co.*, 2016 ONSC 316 [“**Target**”], at paras 66-71, BOA Tab 5.

<sup>36</sup> *Target* at para 70, BOA Tab 5.

<sup>37</sup> *Target* at paras 67-69, BOA Tab 5.

necessary at this stage and granting the Meeting Order should be viewed as a “procedural step” in the CCAA process.<sup>38</sup>

26. Releases in a plan of compromise are permissible and do not render a plan ineligible for sanction.<sup>39</sup> It is well established, that releases are appropriately considered in connection with the sanction of a plan of compromise rather than in connection with the meeting order.<sup>40</sup>

27. The Applicants submit that there is no basis for concluding that the Plan has no hope of success. To the contrary, as is evident from the terms of the Support Agreement, the Plan is supported by the Applicants’ key stakeholders, Baiyin and Gramercy. The Applicants submit further that the Plan complies with the statutory requirements of the CCAA and is consistent with the objectives thereof and should therefore be accepted for filing purposes.

**ii The Classification of the Affected Creditors is appropriate**

28. As described above, if the Meeting Order is granted, the Affected Creditors will be classified into two classes for the purposes of voting on the Plan: (i) the Affected Secured Class; and (ii) the Affected Banro Unsecured Class.<sup>41</sup>

29. Section 22(1) of the CCAA provides that:

22(1) Company may establish classes

A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.<sup>42</sup>

30. Section 22(2) of the CCAA sets out the factors that are to be taken into account regarding the inclusion of creditors into the same class. Creditors may be included in the same

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<sup>38</sup> *Re Jaguar Mining Inc.*, 2014 ONSC 494, at para 48, BOA Tab 6.

<sup>39</sup> *Target* at paras 50-51, BOA Tab 5.

<sup>40</sup> *Target* at paras 50-51, BOA Tab 5.

<sup>41</sup> Third Taylor Affidavit at para 22, Tab 2 of the Motion Record, p. 103. See also s 3.1 of the Plan, Tab 2G of the Motion Record, p. 398.

<sup>42</sup> CCAA s. 22(1).



class if their interests are sufficiently similar to give them a commonality of interest, taking into account, among other things (i) the nature of the debts, liabilities or obligations giving rise to their claims and any security in respect of their claims, (ii) the remedies available to those creditors in the absence of the compromise or arrangement and (iii) the extent to which those creditors would recover their claims by exercising those remedies.<sup>43</sup>

31. These criteria, which were added as part of the 2009 amendments to the CCAA, codify factors considered in case law pre-dating these amendments.<sup>44</sup> In *Canadian Airlines, Paperny J.*, as she then was, summarized the principles applicable to the classification of creditors as follows:

In summary, the cases establish the following principles applicable to assessing commonality of interest:

1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
2. The interests to be considered are the legal interests the creditor holds qua creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;
3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible;
4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans;
5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant; and
6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.<sup>45</sup>

32. Classification is a fact-specific determination that must be evaluated in the unique circumstances of every case. The exercise must be approached with the flexible and remedial jurisdiction of the CCAA in mind.<sup>46</sup>

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<sup>43</sup> CCAA s. 22(2).

<sup>44</sup> *Re SemCanada Crude Co.*, 2009 ABQB 490 at paras 17-18 & 44-45 [***SemCanada***], BOA Tab 7.

<sup>45</sup> *Re Canadian Airlines Corp.*, [2000] A.J. No. 1693 [***Canadian Airlines***] at para 31, BOA Tab 8.

33. “Commonality of interest” does not mean “identity of interest”.<sup>47</sup> “Commonality of interest” is based on the principle that a class consists of those persons whose interests are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.<sup>48</sup>

34. The Affected Secured Class is comprised of (i) the holders of the Doré Loan Proven Claim, (ii) the holders of the Namoya Forward II Proven Claim, and (iii) the Beneficial Holders of the Secured Notes.<sup>49</sup>

35. Within the Affected Secured Class, certain holders (being Baiyin and Gramercy related parties) will receive different consideration than other Affected Secured Creditors. Specifically, Baiyin and Gramercy will receive Class A Common Shares (being voting common shares) of Newco and all others Affected Secured Creditors will receive Class B Common Shares (being non-voting common shares) of Newco. The rights, restrictions and terms of such shares are outlined in the Restructuring Term Sheet and the Information Circular.<sup>50</sup>

36. The Applicants submit that the Affected Secured Creditors are appropriately included in the same class for the following reasons:

- (a) pursuant to the Plan and the Collateral Trust Agreement, each Affected Secured Creditor is a holder of Parity Lien Debt. By operation of the Collateral Trust Agreement, the security held by these Creditors has been pooled together, and

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<sup>46</sup> *Canadian Airlines* at para 18, BOA Tab 8.

<sup>47</sup> *Canadian Airlines* at para 20, citing *Re Norcen Energy Resources Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.) at p. 29, BOA Tab 8.

<sup>48</sup> *Canadian Airlines* at para 17, citing *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B.573 (Eng. C.A.) at p. 583, BOA Tab 8.

<sup>49</sup> Second Report at para 38.

<sup>50</sup> Third Taylor Affidavit, at para 20(b), Tab 2 of the Motion Record p. 99.

these Creditors have the same priority ranking and enforcement rights with respect to their security;<sup>51</sup>

- (b) there are no significant distinctions between the legal interests of the Affected Secured Creditors that warrant the creations of separate classes; and
- (c) the fact that creditors within the same class may receive a different distributions does not necessitate a separate class.<sup>52</sup> As noted by the court in *Lutheran Church*, equitable treatment of creditors is not necessarily equal treatment.<sup>53</sup> Instead, the appropriate inquiry is whether the creditors have a common interest.<sup>54</sup>

37. The Affected Banro Unsecured Class is comprised of (i) holders of Affected Banro Unsecured Deficiency Claims; and (ii) the Listed Creditors.<sup>55</sup> The Applicants submit that each of these Creditors have Claims in the nature of unsecured claims and shares a commonality of interest.

38. The Applicants submit that the Affected Banro Unsecured Creditors are appropriately included in the same class for the following reasons:

- a) Where a secured creditor's security has no value, it may be properly classified as an unsecured creditor because it is, notwithstanding its security interest, an unsecured creditor.<sup>56</sup> Here, the Plan will only go forward if no Successful Bid is identified as a result of the SISP. As a Successful Bid must provide only for

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<sup>51</sup> First Taylor Affidavit at para 38, Tab 2A of the Motion Record, p. 123.

<sup>52</sup> *Re Canwest Global Communication Corp.*, 2010 ONSC 4209 at para 22, BOA Tab 11; *SemCanada* at paras 17-18 & 44-45, BOA Tab 7.

<sup>53</sup> *Re Lutheran Church Canada*, 2016 ABQB 419 at paras 151-156, BOA Tab 10.

<sup>54</sup> *Canadian Airlines* at para 17, BOA Tab 8.

<sup>55</sup> Second Report at para 39. See also definition of "Affected Banro Unsecured Class" at Schedule A to the Plan, Tab 2G of the Motion Record, p. 416.

<sup>56</sup> *Federal Gypsum* at para 22, BOA Tab 4; *Re Campeau Corp.*, 1991 CarswellOnt 155 at paras 7,13-17, 20, BOA Tab 11.

Qualified Consideration, which includes, among other things, a 75% recovery to the Affected Secured Creditors, it is logical to assume that the Affected Secured Creditors are under secured by at least 25% in the event no Successful Bid is identified. Accordingly, the inclusion of the Affected Banro Unsecured Deficiency Claims as part of the Affected Banro Unsecured Class is appropriate in the circumstances.<sup>57</sup>

- b) the Listed Creditors are unsecured creditors of the Applicants, with legal interests, rights and remedies similar to those held by the holders of Affected Banro Unsecured Deficiency Claims. There are no significant distinctions between the legal interests of the Affected Banro Unsecured Creditors that warrant the creations of separate classes;
- c) in the absence of the Plan, the members of the Affected Banro Unsecured Class share common remedies to pursue their Claims against the Applicants;

39. In light of the above descriptions of the Affected Secured Class and the Affected Banro Unsecured Class, the Applicants submit that the classification of Creditors in the Plan is appropriate.

**ii No meeting or vote of holders of Equity Claims is required or appropriate**

40. As noted above, sections 4 and 5 of the CCAA provide that only if the Court determines, should a meeting of the shareholders of the Company be called to vote on a plan. Section 22.1 of the CCAA specifically provides that creditors having equity claims are to be in the same class and are not to vote at a meeting unless the Court provides otherwise.

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<sup>57</sup> Third Taylor Affidavit at para 9, Tab 2 of the Motion Record, p. 92.

41. The Court should only permit a meeting of shareholders and accompanying vote if value is to flow to equity claims.<sup>58</sup> Pursuant to section 6(8) of the CCAA, no plan may be sanctioned by the Court unless all claims that are not equity claims are paid in full before equity claims are to be paid.

42. In the Applicants' case, Affected Secured Claims and Affected Unsecured Banro Claims are being compromised, not paid in full.<sup>59</sup> As such, in accordance with the CCAA, the Plan provides that Equity Claims are to be extinguished for no consideration, and no shareholder vote is necessary or appropriate.<sup>60</sup>

43. Banro, as a reporting issuer in each of the provinces of Canada other than Quebec, is subject to applicable securities laws of such provinces. The securities regulatory authorities in certain provinces (including Ontario) have adopted Multilateral Instrument 61-101 ("**MI 61-101**"). MI 61-101 provides that for "related party transactions" or "business combinations" as defined in MI 61-101, certain enhanced disclosure and voting protections for minority equity holders are required.<sup>61</sup>

44. Although the Plan may be a "related party transaction" or "business combination" for the purposes of MI 61-101, as no Equity Claims at all are entitled to vote for purposes of the CCAA, it would be inappropriate and unfair to require a vote of minority shareholders. The Applicants are therefore requesting, as part of the Meeting Order, a provision specifically noting that despite the provisions of MI 61-101 no vote of shareholders is required.

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<sup>58</sup> *Re Sino-Forest Corp.*, 2012 ONCA 816 at para 30, BOA Tab 12.

<sup>59</sup> Ss. 4.1 and 4.2 of the Plan, Tab 2G of the Motion Record, pp. 399-400.

<sup>60</sup> S. 4.4 of the Plan, Tab 2G of the Motion Record, p. 400.

<sup>61</sup> See Part 1 – Section 1.1, definitions of "Business Combination", "Collateral Benefit", "Connected Transaction", "Minority Approval" "Related Party", "Related Party Transaction", Part 4, Part 5 and Part 8 of the Multilateral Instrument 61-101: *Protection of Minority Security Holders in Special Transactions*, BOA Tab 13.

45. The Meeting Order as a whole provides for adequate notice to Affected Creditors for voting and solicitation purposes. The provisions of the Meeting Order, including those regarding voting and conduct at the Creditors' Meetings, are fair and appropriate in the circumstances and, as recommended by the Monitor, the Court should exercise its discretion under sections 4 and 5 of the CCAA to approve such Meeting Order.

**PART V - RELIEF SOUGHT**

46. The Applicants request that this Court grant the proposed Claims Procedure Order and the proposed Meeting Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of January, 2018.**

*Cassels Brock & Blackwell LLP*

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Cassels Brock & Blackwell LLP

Lawyers for the Applicants

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Re Toys "R" Us (Canada) Ltd.*, 2018 ONSC 609 (Ont. SCJ [Comm List]).
2. *Re U.S. Steel Canada Inc.*, 2017 ONSC 1967.
3. *Re Timminco Limited*, 2014 ONSC 3393.
4. *Re Federal Gypsum Co.*, 2007 NSSC 384.
5. *Re Target Canada Co.*, 2016 ONSC 316.
6. *Re Jaguar Mining Inc.*, 2014 ONSC 494 (Ont. SCJ [Comm List]).
7. *Re SemCanada Crude Co.*, 2009 ABQB 490.
8. *Re Canadian Airlines Corp.*, [2000] A.J. No. 1693.
9. *Re Canwest Global Communication Corp.*, 2010 ONSC 4209.
10. *Re Lutheran Church Canada*, 2016 ABQB 419.
11. *Re Campeau Corp.*, 1991 CarswellOnt 155
12. *Re Sino-Forest Corp.*, 2012 ONCA 816.
13. Multilateral Instrument 61-101: *Protection of Minority Security Holders in Special Transactions*.

**SCHEDULE "B"**  
**RELEVANT STATUTES**

**Companies' Creditors Arrangement Act, RSC 1985, c C-36**

*Definitions*

**2 (1)** In this Act,

**equity claim** means a claim that is in respect of an equity interest, including a claim for, among others,

- (a) a dividend or similar payment,
- (b) a return of capital,
- (c) a redemption or retraction obligation,
- (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
- (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);  
(*réclamation relative à des capitaux propres*)

**equity interest** means

- (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
- (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

*Compromise with unsecured creditors*

**4** Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

*Compromise with secured creditors*

**5** Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

*Compromises to be sanctioned by court*

**6 (1)** If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under



sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

- (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
- (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

*Court may order amendment*

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

*Restriction — certain Crown claims*

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

- (a) subsection 224(1.2) of the *Income Tax Act*,
- (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or
- (c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
  - (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
  - (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a **provincial pension plan** as defined in that subsection.

*Restriction — default of remittance to Crown*

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

*Restriction — employees, etc.*

(5) The court may sanction a compromise or an arrangement only if

**(a)** the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

**(i)** amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

**(ii)** wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

**(b)** the court is satisfied that the company can and will make the payments as required under paragraph (a).

*Restriction — pension plan*

**(6)** If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

**(a)** the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

**(i)** an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

**(ii)** if the prescribed pension plan is regulated by an Act of Parliament,

**(A)** an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

**(B)** an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

**(C)** an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

**(iii)** in the case of any other prescribed pension plan,

**(A)** an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

**(B)** an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

**(C)** an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

**(b)** the court is satisfied that the company can and will make the payments as required under paragraph (a).

*Non-application of subsection (6)*

**(7)** Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

*Payment — equity claims*

**(8)** No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

*General power of court*

**11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

*Fixing deadlines*

**12** The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

*Company may establish classes*

**22 (1)** A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

*Factors*

**(2)** For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

**(a)** the nature of the debts, liabilities or obligations giving rise to their claims;

**(b)** the nature and rank of any security in respect of their claims;

**(c)** the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

**(d)** any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

*Related creditors*

**(3)** A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

*Class — creditors having equity claims*

**22.1** Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

**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 BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED AND KAMITUGA (BARBADOS) LIMITED**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE APPLICANTS  
(Claims Procedure Order & Meeting Order)**

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