Court File No. CV-17-589016-00CL

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 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**")

FACTUM OF THE APPLICANTS AND THE REQUISITE CONSENTING PARTIES (Plan Sanction Order)

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(Plan Sanction Order)

PART I - OVERVIEW

1. This factum is filed in support of the Applicants'[1] motion returnable March 27, 2018, seeking this Court's sanction of the Applicants' Amended Consolidated Plan of Compromise and Reorganization dated March 9, 2018 (the "**Plan**"), pursuant to the *Companies' Creditors Arrangement Act*[2] (the "**CCAA**") and the *Canada Business Corporations Act*[3] (the "**CBCA**").

2. Since the commencement of the Applicants' CCAA Proceedings on December 22, 2017, the Applicants' path forward has been informed by the terms of the Support Agreement entered

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[1] Banro Corporation, Banro Group (Barbados) Limited, Banro Congo (Barbados) Limited, Namoya (Barbados) Limited, Lugushwa (Barbados) Limited, Twangiza (Barbados) Limited and Kamituga (Barbados) Limited (collectively, the "**Applicants**") obtained relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") by an Initial Order dated December 22, 2017 (the "**Initial Order**"). FTI Consulting Canada Inc. was appointed in the Initial Order to act as the monitor (the "**Monitor**") in these CCAA Proceedings.
[2] R.S.C. 1985, c. C-36.
[3] R.S.C. 1985, c. C-44.

into among the Applicants on one hand and Baiyin[4] and Gramercy (together being the "**Requisite Consenting Parties**") on the other (the "**Support Agreement**"). Baiyin and Gramercy are, by far, the Applicants' largest creditors.

3. The Support Agreement provided that if a Successful Bid (as defined in the SISP) could not be identified, the Applicants would proceed to take steps to implement the Recapitalization (as such term is defined in the Support Agreement).[5]

4. Despite conducting a court-approved sale and investment solicitation process (the "**SISP**"), no Successful Bid was identified.[6] As such, the Applicants moved forward to seek creditor approval of the Plan as contemplated by this Court's Order of February 1, 2018 (the "**Meeting Order**").[7]

5. At the Creditors' Meetings, the Plan was overwhelmingly approved by the Required Majorities of both classes of Affected Creditors.[8] The Plan should now be sanctioned by this Court as: (i) the Plan complies with the statutory requirements under the CCAA; (ii) nothing has been done which was not authorized by the CCAA; and (iii) the Plan is fair and reasonable.

6. The only creditor to vote against approval of the Plan was VR Global Partners, L.P. ("**VR Capital**"), a holder of approximately $19 million of the Secured Notes (the total principal amount of $197.5 million of Secured Notes is outstanding).[9] VR Capital's objection essentially is that the Plan is not fair and reasonable as Baiyin and Gramercy are to receive Class A Common Shares in Newco ("**Class A Shares**") where all other holders of Secured Notes are to receive

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[4] Capitalized terms not defined herein shall have the meanings ascribed to such terms in the Plan.
[5] Affidavit of Rory James Taylor sworn December 21, 2017 (the "**Initial Order Affidavit**") at para 17, Tab 2A of the of the Applicants' Motion Record returnable March 13, 2018 [the "**Motion Record**"], p. 95.
[6] Affidavit of Rory James Taylor sworn March 13, 2018 (the "**Sanction Order Affidavit**") at para 8, Tab 2 of the Motion Record, p. 72.
[7] Sanction Order Affidavit at para 9, Tab 2 of the Motion Record, p. 72.
[8] Sanction Order Affidavit at paras 43-44, Tab 2 of the Motion Record, pp. 84-85.
[9] Sanction Order Affidavit at para 45, Tab 2 of the Motion Record, p. 85.

Class B Common Shares in Newco ("**Class B Shares**").[10] The shares are designed to have equivalent economic rights, however, to assist in implementing certain governance provisions of Newco which were required under the Support Agreement, the Class B Shares are subject to voting restrictions.[11]

7. From a practical perspective, the actual differences between the Class A Shares and the Class B Shares are more of form than of substance given that:

(a) Baiyin and Gramercy, as the most significant creditors of the Applicants, are anticipated to collectively hold over 74% of Newco's equity. Because Baiyin and Gramercy will have effective control of Newco, the voting restriction on the Class B Shares is intended to reduce unnecessary delay, cost and expense going forward by reducing the need to call and hold shareholder meetings for all shareholders;[12]

(b) the Class B Shares will have the same economic rights as the Class A Shares in respect of all dividends, distributions and other payments made by Newco;

(c) provisions have been put in place to minimize any impact that the voting restrictions of the Class B Shares may have to ensure the same economic treatment in the event of any future transaction involving Newco;

(i) all shareholders will participate in any Exit Transaction and/or buyout by Gramercy or Baiyin;

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[10] Fourth Report of the Monitor dated March 14, 2018 (the "**Fourth Report**") at para 94.
[11] Definition of "Class B Common Share" at Schedule "A" to the Plan attached as Schedule "A" to the Sanction Order Affidavit, Tab 2J of the Motion Record, p. 523.
[12] Sanction Order Affidavit at para 22, Tab 2 of the Motion Record, p. 78.

(ii) the holders of the Class B Shares will be entitled to vote as a separate class on any amendments to Newco's articles that are materially adverse to holders of the Class B Shares;[13] and

(iii) the Class B Shares will become voting shares upon the earlier of (i) 42 months after implementation of the Plan ("**Plan Implementation**"); or (ii) the occurrence of an Exit Transaction (i.e. sale of Newco's equity, a sale of all or substantially all of Newco's assets or a public offering of Newco's equity).[14]

8. However, even if one sees the differences between the Class A Shares and Class B Shares as substantial, Courts have repeatedly sanctioned plans where different recoveries are provided to members of the same class of creditors provided it is equitable. Given the fact that Baiyin and Gramercy will control Newco, and given the significant additional contributions by Baiyin and Gramercy in the present situation, including the provision of interim financing that is being converted to exit financing (instead of being repaid at closing) as well as their agreement to defer obligations under and consensually amend the Gold Streams, the Namoya Forward I Agreement, the Twangiza Forward I Agreement and the Twangiza Forward II Agreement (collectively, the "**Forward Agreements**"),[15] it is entirely appropriate that those parties are entitled to different treatment than other creditors. This marginally different treatment for Baiyin and Gramercy is entirely equitable (and practical) in the circumstances.

9. As well, on March 6, 2018, the Applicants became aware that, in violation of the stay of proceedings created by the Initial Order (the "**Stay of Proceedings**"), a Class Action Notice of Action was filed in the United States District Court of the Southern District of New York by EMA

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[13] Sanction Order Affidavit at para 21, Tab 2 of the Motion Record, p. 77.
[14] Definition of "Class B Common Share" at Schedule "A" to the Plan attached as Schedule "A" to the Sanction Order Affidavit, Tab 2J of the Motion Record, p. 523.
[15] Sanction Order Affidavit at para 37, Tab 2 of the Motion Record, p. 83.

Garp Fund, L.P. and Lawrence Lepard, Individually and Behalf of all Others Similarly Situated, as plaintiffs (the "**Plaintiffs**") against Banro Corporation ("**Banro**") and John Clarke as defendants (the "**Defendants**") bearing Case No. 18-cv-01986 (the "**Lepard Action**").[16] The Plaintiffs claim damages as common shareholders of Banro for loss of their equity investment based on allegations that the Defendants made materially false and misleading statements and omissions regarding Banro's business conditions and operating environment.[17]

10. Given that the claims and causes of action set forward in the Lepard Action (the "**Causes of Action**") all relate to the purchase of Equity Interests of Banro, the form of Order requested by the Applicants declares the Causes of Action are Affected Equity Claims as against Banro.[18] In accordance with the Plan and as required by the CCAA, the form of requested Sanction Order also declares that Affected Equity Claims are to be extinguished for no consideration upon Plan Implementation.[19]

11. John Clarke, a director and the Chief Executive Officer of Banro is also named as a defendant in the Lepard Action. However, no Director/Officer Proof of Claim was received by the Claims Bar Date under the Court Approved Claims Process.[20] Because the Plaintiffs deliberately chose not to comply with this Court's Claims Procedure Order, the Causes of Action are now barred, released and extinguished as against all Directors and Officers pursuant to the Claims Procedure Order.[21]

12. In the circumstances, the Plan provides the best available outcome for creditors of the Applicants.[22] The SISP was designed to identify transactions, if any, which would see more

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[16] Sanction Order Affidavit at para 11, Tab 2 of the Motion Record, p. 72.
[17] Class Action Complaint, EMA Garp Fund, L.P. v. Banro Corporation No. 18-cv-01986 (S.D.N.Y. Mar. 6, 2018), ECF No. 1 (the "**Lepard Complaint**") at p. 2.
[18] Sanction Order at para 16, Tab 1A of the Motion Record, p. 19.
[19] Plan s. 4.4, attached as Schedule "A" to the Sanction Order Affidavit, Tab 2J of the Motion Record, p. 505.
[20] Sanction Order Affidavit at para 13(b), Tab 2 of the Motion Record, p. 73; Fourth Report at para 24.
[21] Claims Procedure Order at para 24, Tab 2F of the Motion Record, p. 320.
[22] Sanction Order Affidavit at para 15, Tab 2 of the Motion Record, p. 74.

value flow to the Applicants' stakeholders than the Recapitalization contemplated by the Plan. No such transactions were identified. The Monitor has filed a report recommending that the Plan be approved by the Court and the Sanction Order be entered.[23] As such, it is now clear that the Plan represents the best available outcome for the Applicants and their stakeholders, it has been overwhelmingly approved the Affected Creditors and it is appropriate for the Court to sanction the Plan so that the Applicants can move forward to Plan Implementation.

PART II - FACTS[24]

Background

13. Banro is a Canadian public corporation and, through the Banro Group (as defined below), is involved in the exploration, development and mining of gold in the Democratic Republic of the Congo ("**DRC**").[25] Through certain of the Applicants' direct and indirect subsidiaries (the "**Non-Applicant Subsidiaries**" and together with the Applicants, the "**Banro Group**"), 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.[26]

The CCAA Proceedings

14. The Applicants obtained relief under 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 funded by Baiyin and Gramercy; (ii) authorized the Applicants to take all steps and actions contemplated by, and

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[23] Fourth Report at paras 14, 106-109.
[24] The facts with respect to this motion are more fully set out in the Affidavit of Rory James Taylor sworn March 13, 2018 (the "**Sanction Order Affidavit**"), at Tab 2 of the Motion Record. Additional facts, including the background to and mechanics of the Plan are described in the Affidavit of Rory James Taylor, sworn January 25, 2018 (the "**Meeting Order Affidavit**"), attached as Exhibit "I" to the Sanction Order Affidavit, Third Report of the Monitor, dated February 15, 2018 (the "**Third Report**") and the Fourth Report.
[25] Initial Order Affidavit at para 6, Tab 2A of the of the Motion Record**,** p. 92.
[26] Initial Order Affidavit at para 6, Tab 2A of the Motion Record, p.92.

to comply with their obligations under the Support Agreement; and (iii) appointed FTI Consulting Canada Inc. as the Monitor.

15. On January 18, 2018, the Applicants obtained two orders, which, among other things: (i) extended the Stay of Proceedings until March 30, 2018 and granted enhanced priority for the Charges created by the Initial Order;[27] and (ii) approved the SISP.[28]

16. In order to be in a position to proceed to implement the Recapitalization through the Plan as quickly as possible, in the event that no Successful Bid was identified, on February 1, 2018 the Applicants obtained (i) the Claims Procedure Order, which, among other things, approved a procedure for the identification and determination of certain claims against the Applicants and the identification of claims against their directors and officers (the "**Claims Procedure Order**");[29] and (ii) the Meeting Order, which, among other things, accepted the filing of a Consolidated Plan of Compromise and Reorganization in respect of the Applicants dated January 25, 2018 as may be amended, and authorized the Applicants to hold the Creditors' Meetings to consider and vote on resolutions to approve the Plan.[30]

17. The Phase I Bid Deadline of noon on March 2, 2018, as defined in the SISP, passed without any LOIs being received by the Applicants.[31] As such, the Applicants, with the consent of the Monitor, proceeded to hold the Creditors' Meetings.

18. The Claims Bar Date established by the Claims Procedure Order also passed without (i) any Notices of Dispute being received in respect of the Notices of Claim issued to the 16 Listed Creditors or to the CRA; and (ii) any Director/Officer Proof of Claims being received.[32]

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[27] See Stay Extension and CCAA Charges Priority Order, Tab 2D of the Motion Record, pp. 285-287.
[28] See SISP Approval Order, Tab 2E of the Motion Record, pp. 290-306.
[29] See Claims Procedure Order, Tab 2F of the Motion Record, pp. 310-342.
[30] See Meeting Order, Tab 2G of the Motion Record, pp. 345-433.
[31] Sanction Order Affidavit at para 8, Tab 2 of the Motion Record, p. 72.
[32] Sanction Order Affidavit at para 13, Tab 2 of the Motion Record, p. 73.

19. On March 6, 2018, the Applicants became aware of the Lepard Action, which was commenced in violation of the Stay of Proceedings.[33] The Lepard Action is a federal securities class action, on behalf of a class consisting of all United States persons and entities who purchased publicly traded common stock of Banro from January 26, 2016 until December 22, 2017. The Lepard Action alleges that the Defendants misled investors to believe that Banro's operations in the DRC were stable and free from conflict. The Plaintiffs claim that based on alleged materially false and misleading statements by the Defendants the class members invested millions in Banro's equity. The Lepard Action is framed as alleged violations of Securities Exchange Act of 1934, 15 U.S.C § 78a, et seq. (the "**Exchange Act**")[34] and SEC Rule 10b-5.

20. On March 7, 2018, VR Capital submitted an objection to Plan sanction as required by the Meeting Order. No other objections were received.[35]

21. On March 9, 2018, the amended Plan was served on the service list in these proceedings, filed with the Court and posted on the Monitor's Website in accordance with the Meetings Order.[36] Certain amendments made to the Plan were intended to address concerns raised by VR Capital; namely, to confirm and make clear that there is no economic difference between the Class A Shares and the Class B Shares.[37]

22. On March 9, 2018, the Creditors' Meetings were held and both classes of Affected Creditors voted overwhelmingly to approve the Plan by the Required Majorities. 96.15% of the Eligible Voting Creditors in the Affected Secured Class and 96.30% of the Eligible Voting Creditors in the Affected Banro Unsecured Class with Voting Claims representing

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[33] Sanction Order Affidavit at para 11, Tab 2 of the Motion Record, p. 72.
[34] Lepard Action, p. 1 (identifying claims arising under § 10(b) and § 20(a) of the Exchange Act and SEC Rule 10b-5).
[35] Sanction Order Affidavit at para 17, Tab 2 of the Motion Record, p. 76.
[36] Sanction Order Affidavit at para 18, Tab 2 of the Motion Record, p. 76.
[37] Sanction Order Affidavit at para 20, Tab 2 of the Motion Record, p. 77.

$148,902,368.09 and $49,647,850.26 in dollar value of the Voting Claims, respectively, voted in favour of the Plan.[38]

23. VR Capital was the only Affected Creditor to vote against approval of the Plan. 23 other holders of the Secured Notes (representing approximately 18% of the total value of the Secured Notes), who are not related to Baiyin or Gramercy, voted for approval of the Plan.[39]

24. On March 12, 2018, counsel for the Applicants wrote to counsel in the Lepard Action advising that, among other things, the Sanction Motion was rescheduled for March 27, 2018 and the Applicants would specifically be requesting a declaration that the Causes of Action raised in the Lepard Action are, have been and will be forever compromised, released and discharged, cancelled and barred in all respects.[40]

The Plan

25. The key provisions of the Plan include:[41]

Equity Interests	Cancelled for no consideration
Affected Equity Claims	Compromised, released and discharged, cancelled and barred in all respects for no consideration
Affected Secured Creditors	Entitled to receive their proportionate share of Class A Shares (for Baiyin and Gramercy) and Class B Shares (for all other Affected Secured Creditors) of Newco[42]
Listed Claims	Compromised in exchange for the entitlement to a nominal distribution[43]
Interim Facility	Amended in accordance with the terms set forth in the Recapitalization,

[38] Sanction Order Affidavit at paras 42-44, Tab 2 of the Motion Record, pp. 84-85.
[39] Sanction Order Affidavit at para 45, Tab 2 of the Motion Record, p. 85.
[40] Letter to Kalberer LLP at Tab 2K of Motion Record, pp. 575-577.
[41] Plan ss. 4.4, 7.2(i)(i),7.2(e), 8.1(a),(b) attached as Schedule "A" to the Sanction Order Affidavit, Tab 2J of the Motion Record, pp. 505, 510-513; Sanction Order Affidavit at paras 16(e)(f), Tab 2 of the Motion Record, p. 75.
[42] Newco will be a company newly incorporated under the laws of the Cayman Islands that will become the ultimate parent of the Banro Group. If Newco Equityholder Information is not delivered six months following the implementation of the Plan, Newco will be entitled to cancel and will not be obligated to deliver any New Equity to the applicable Proven Affected Secured Creditor(s). See Plan section 6.2(c), Tab 2J of the Motion Record, pp.507-508.
[43] This will be their proportionate share of the Affected Banro Unsecured Pool (a total amount of $10,000). See Plan s. 4.2(a), attached as Schedule "A" to the Sanction Order Affidavit, Tab 2J of the Motion Record, p. 504.

	such that (i) it will be converted into the New Secured Facility; (ii) the DIP Lender's Charge will be discharged; and Newco will issue New Secured Facility Warrants to the DIP Lender
Gold Streams	Gold deliveries will be further deferred over 12 months once the entitlements for 200,000 ounces of production from January 1, 2018 have been delivered and ounces deferred will be entitled to additional considerations, including warrants in Newco, in accordance with the terms of the Recapitalization
Forward Agreements	Gold deliveries will be further deferred in accordance with the Recapitalization, to recommence on July 1, 2019
Directors' Charge and Administration Charge	Discharged against all property other than the Administrative Reserve
Banro Released Parties and Third Party Released Parties	Provided with releases to the full extent permitted by applicable law with the exception of any Person having or claiming any entitlement or compensation relating to a Director/Officer Claim which Person will be irrevocably limited to recovery solely from the proceeds of applicable insurance policies held by the Applicants

26. The remaining conditions precedent to the Plan Implementation include:[44] (i) the Sanction Order must be granted and the operation and effect of it must not be stayed, reversed or amended and in the event of an appeal or application for leave to appeal, final determination must be made by the appellate court; (ii) the Administrative Reserve and the Priority Claim Reserve must be funded by the Applicants; (iii) the conditions precedent set out in Article 8 of Support Agreement must be satisfied or waived; (iv) the Priority Lien Debt, Gold Streams, Shareholders Agreement and Interim Facility amendments[45] must be in form and substance acceptable to the Applicants, the Monitor and the Requisite Consenting Parties and must become effective, subject only to the Implementation of the Plan; (v) the Implementation Date must occur no later than April 30, 2018 or otherwise as agreed; and (vi) the constating

[44] Plan ss. 9.3(b)-(h) attached as Schedule "A" to the Sanction Order Affidavit, Tab 2J of the Motion Record, p. 514.
[45] This includes all related agreements and other documents necessary in connection with the amendments thereto contemplated by the Recapitalization and the implementation of the Plan.

documents of Newco and the composition of the board of Newco effective on and after the Implementation Date must be consistent with the Restructuring Term Sheet and otherwise acceptable to the Applicants and the Requisite Consenting Parties, acting reasonably.

27. The Sanction Order also serves as the basis for reliance on the exemption provided by Section 3(a)(10) of the *United States Securities Act of 1933*, as amended, from the registration requirements otherwise imposed by that Act.[46]

28. Section 3(a)(10) of the *United States Securities Act of 1933* provides an exemption from registration requirements for securities which are issued in exchange for *bona fide* outstanding securities where the terms and conditions of such issuance and exchange are approved at a court-hearing on the fairness of such terms and conditions. The Applicants intend to rely upon the final order in these CCAA Proceedings as the basis from exemption from registration requirements.[47]

PART III - ISSUES

29. In deciding whether it is appropriate to grant the Sanction Order in the form requested the following issues are before the Court:

(a) Has the test for sanction of the Plan under the CCAA been met?

(b) Are the Releases contemplated by the Plan appropriate?

(c) Should the Declarations requested in respect of the Causes of Action raised in the Lepard Action be granted?

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[46] Sanction Order Affidavit at para 25, Tab 2 of the Motion Record, p. 79.

[47] Canadian courts have granted final orders in a number of CBCA arrangement proceedings in which the applicants intended to rely on the final order as the basis for exemption from prospectus requirements under applicable securities laws: Essar Steel Canada Inc. et al, Court File No CV-14-10629-00CL (Ont. S.C.J.[Comm. List]), Final Order dated September 15, 2014 at recital 3; Book of Authorities of the Applicants ["**BOA**"] Tab 1; Mood Media Corporation et al., Court File No. CV-17-11809-00CL (Ont. S.C.J.[Comm. List]), Final Order dated June 20, 2017 at recital 3; BOA Tab 2; RGL Reservoir Management Inc. et al, Court File No CV-17-587401-00CL (Ont. S.C.J. [Comm. List]), Final Order dated December 14, 2017 at recital 3; BOA Tab 3.

PART IV - LAW

A. The Test for Sanction of the Plan has been Satisfied

30. The CCAA at section 6(1) provides that the Court has discretion to sanction a plan if it has achieved the requisite "double majority" vote at the meetings of creditors held under sections 4 and 5 of the CCAA.[48] There is no dispute in this case that the required creditor approval of both classes of Affected Creditors has been overwhelmingly achieved at the Creditors' Meetings which were properly called in accordance with the Meeting Order.

31. In *Re Canadian Airlines Corp.,* Justice Paperny noted that "*courts have emphasized that perfection is not required*" in assessing the fairness and reasonableness of a plan.[49] Rather, if the plan provides a compromise that is a reasonable and viable, and a better option than other alternatives available, courts can take a "big picture" perspective in applying the test of sanctioning the plan to the facts.[50] The criteria that the Applicants must satisfy when seeking a sanction of the Plan are well established:

(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 or purported to be done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.[51]

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[48] R.S.C. 1985, c. C-36 at ss. 4,5,6(1).

[49] *Re Canadian Airlines Corp*, 2000 ABQB 442 [*Canadian Airlines*] at paras 178-179, leave to appeal denied 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal to SCC refused July 13, 2001, BOA Tab 4.

[50] *Canadian Airlines* at paras 178-179, BOA Tab 4.

[51] *Canadian Airlines* at para 60 BOA Tab 4,; *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. S.C.J.) [*Sammi Atlas*] at para 2, BOA Tab 5; *Re Canwest Global Communications Corp.*, 2010 ONSC 4209 [*Canwest Global*] at para 14, BOA Tab 6; *Re Skylink Aviation*, 2013 ONSC 2519 [*Skylink*] at para 26, BOA Tab 7.

i. Compliance with all Statutory Requirements

32. Under the first branch of the test for sanctioning a CCAA plan, the Court typically considers whether: (a) the applicant comes within the definition of "debtor company" under section 2 of the CCAA; (b) the applicant or affiliated debtor companies have total claims in excess of $5 million; (c) the creditors were properly classified; (d) the notice of meeting was sent in accordance with the Court's Order; (e) the creditors' meetings were properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.[52] Each of these requirements have been satisfied in the current circumstances.

ii. No Unauthorized Steps taken by the Applicants

33. In making a determination as to whether anything has been done — or is purported to have been done — that is not authorized by the CCAA, the Court should rely on the parties, the stakeholders and the reports of the Monitor.[53] As confirmed by the Fourth Report, no unauthorized steps have been taken or have alleged to have been taken[54] in these CCAA Proceedings and this Court has been kept apprised of all of the key issues facing the Applicants throughout the restructuring.

iii. The Plan is Fair and Reasonable

34. Canadian courts have repeatedly emphasized that when considering whether a plan is fair and reasonable, the Court should consider the relative degrees of prejudice that would flow from granting or refusing to grant relief sought under the CCAA and whether the plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives

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[52] *Canadian Airlines*, at para 62, BOA Tab 4; *Canwest Global*, at para 15, BOA Tab 6.
[53] *Canadian Airlines*, at para 64, BOA Tab 4; *Canwest Global*, at para 17, BOA Tab 6.
[54] Fourth Report at para 13(c),72,106.

available.[55] The meaning of "fairness" and "reasonableness" are "necessarily shaped by the unique circumstances of each case, within the context of the CCAA".[56]

35. Where creditors have signalled their support of a plan by means of the vote, the court will be very reluctant to second-guess the business decisions made by the stakeholders as a body.[57]

36. In assessing whether a proposed plan is fair and reasonable, the Court will consider (i) whether the claims were properly classified and whether the requisite majority of creditors approved the plan; (ii) what creditors would receive on bankruptcy or liquidation as compared to the plan; (iii) alternatives available to the plan and bankruptcy; (iv) oppression of the rights of creditors; (v) unfairness to shareholders; and (vi) the public interest. [58]

Classification of Creditors and Approval

37. Affected Creditors voted as two classes on the basis of commonality of interest vis-à-vis the debtor company. The classification of creditors was approved by the Meeting Order.[59] Over 96% in number and 91% dollar value of the Eligible Voting Creditors in each of the Affected Secured Class and the Affected Banro Unsecured Class voted in favour of the Plan.[60] VR Capital was the only creditor which voted against approval of the Plan in both classes.[61]

38. Overwhelming creditor support received in the case, including from 23 noteholders other than Baiyin and Gramercy, creates an inference that the plan is fair and reasonable because the

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[55] *Canadian Airlines*, at para 3, BOA Tab 4; *Canwest Global*, at para 19, BOA Tab 6.
[56] *Canadian Airlines*, at para 94, BOA Tab 4.
[57] *Sammi Atlas*, at para 5, BOA Tab 5; *Canadian Airlines*, at para 97, BOA Tab 4; *Re AbitibiBowater Inc.*, 2010 QCCS 4450 at para 34, BOA Tab 8; *Olympia & York Developments v. Royal Trust Co.*, 1993 CarswellOnt 182 at paras 35-40. BOA Tab 9.
[58] *Canwest Global*, at para 21, BOA Tab 6.
[59] Meeting Order at para 8, Tab 2G of Motion Record, p. 348.
[60] Sanction Order Affidavit at paras 43-44, Tab 2 of the Motion Record, pp. 84-85.
[61] Sanction Order Affidavit at para 45, Tab 2 of the Motion Record, p. 85.

assenting creditors believe that their interests are treated equitably under the plan.[62] The approval of the Plan reflects the fact that it is a product of negotiation and communication among stakeholders and is a strong indicator that the Plan is fair and reasonable.[63]

Best Available Alternative

39. The Plan presented the best alternative for the Applicants in the circumstances.[64] Given that no LOIs were received under the SISP, the only other apparent alternatives available to the Applicants are (i) the enforcement of security by secured creditors of the Applicants; or (ii) liquidation of the Banro Groups' assets.

40. In the first scenario, where shares of BGB would most likely be acquired by a credit-bid acquisition or foreclosure, secured creditors would receive an allocation of such shares, but unsecured creditors would not have any amounts available to them.[65] Further, the consent of the Requisite Consenting Parties to the amendment to the Gold Streams and the Forward Agreements would be required and DRC government approvals may also be necessary.[66]

41. In the second scenario, involving the liquidation of mining and mineral rights and licenses, mining infrastructure and mining plants and equipment, there would likely not be any significant realization of value for creditors.[67]

42. The Applicants believe that all stakeholders will benefit more from the implementation of the Plan than from any other alternative.[68]

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[62] *Canadian Airlines*, at para 97, BOA Tab 4.
[63] Sanction Order Affidavit at para 48(a),(c),Tab 2J of the Motion Record, p. 86; See, for example, *Skylink*, at para 29, BOA Tab 7.
[64] Sanction Order Affidavit at para 15,Tab 2 of the Motion Record, p. 74.
[65] Third Report at paras 93-94.
[66] Third Report at paras 94-95.
[67] Third Report at paras 96-97.
[68] Sanction Order Affidavit at para 15,Tab 2 of the Motion Record, p. 74.

No Oppression for Creditors

43. Case law makes it clear that a plan can be fair and reasonable even if it does not provide exactly the same recoveries for all creditors, as long as there is a sufficient rationale for any differences in recovery for particular creditors.[69] Creditor treatment must be equitable, however "*equitable treatment is not necessarily equal treatment.*"[70]

44. The objection of VR Capital to the Plan is centered on the different treatment between the Requisite Consenting Parties – who will receive Class A Shares and the remainder of the Affected Secured Creditors – who will receive Class B Shares.

45. The expressed intention under the Recapitalization is that the Class A Shares and the Class B Shares are to have equivalent economic rights, however, to assist in implementing certain governance provisions of Newco which were required under the Support Agreement, the Class B Shares will have voting restrictions.

46. The voting restrictions on the Class B Shares, however, are more form than substance because:

(a) both Class A Shares and Class B Shares have the same *economic* rights (rights to dividends, distributions, etc.);[71]

(b) the Requisite Consenting Parties will hold over 74% of the total outstanding common shares of Newco (both Class A and Class B combined), which holdings will provide them with effective control of Newco and the ability to carry any

[69] *Canwest Global* at paras 22-24, BOA Tab 6.
[70] *Sammi Atlas* at para 4, BOA Tab 5; see also *Re Air Canada*, 2004 CarswellOnt 469 at para 9, BOA Tab 10 and *Re Lutheran Church,* 2016 ABQB 419 at para 142, BOA Tab 11.
[71] Definition of "Class B Common Share" at Schedule "A" to the Plan attached as Schedule "A" to the Sanction Order Affidavit, Tab 2J of the Motion Record, p. 523.

shareholder vote. The calling and holding of shareholder meetings for all shareholders would cause unnecessary cost and expense;[72]

(c) provisions have been put in place to minimize any impact that the voting restrictions of the Class B Shares may have:

(i) all shareholders will participate in any Exit Transaction and/or buyout by Gramercy or Baiyin;

(ii) there is an automatic conversion of the Class B Shares to voting shares on the earlier of (i) an Exit Transaction, or (ii) the date which is 42 months from the Implementation Date. This balances the interest of all parties while providing Banro and the Requisite Consenting Parties sufficient time to identify and implement an Exit Transaction for the benefit of all shareholders without the distraction, cost and expense of shareholder meetings and votes for all matters; and

(iii) under Cayman Law the holders of the Class B Shares will be entitled to vote as a separate class on any amendments to Newco's articles that are materially adverse to holders of the Class B Shares.[73]

47. To the extent that the Class A Shares to be received by the Requisite Consenting Parties are different than the Class B Shares to be received by Affected Secured Creditors other than the Requisite Consenting Parties, given the practical fact that Baiyin and Gramercy will control Newco, and given the added value which has been and will be provided by the Requisite Consenting Parties, such differences are appropriate and entirely justified in the circumstances.

48. The Requisite Consenting Parties have provided substantial additional value to the Applicants by consensually agreeing to:

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[72] Sanction Order Affidavit at para 22, Tab 2 of the Motion Record, p. 78.
[73] Definition of "Class B Common Share" at Schedule "A" to the Plan attached as Schedule "A" to the Sanction Order Affidavit, Tab 2J of the Motion Record, p. 523.

(i) grant deferrals of and enter into amendments to the Gold Streams and Forward Agreements which provided required liquidity relief to the Applicants which the Monitor has estimated at a temporary value of over $41 million;[74] and

(ii) provide the Interim Facility that is not being repaid and that will convert to exit financing on Plan Implementation.[75]

49. Although the Requisite Consenting Parties will receive certain warrants upon Plan Implementation, such warrants are directly tied to the amendments of the Interim Facility and the Gold Streams and were disclosed to all creditors in the Circular. There is no additional consideration provided for the consensual amendments to the Forward Agreements.[76] In any event, the individual components of the Recapitalization requirements cannot be looked at separately but rather form an entire package, all of which is required under the Support Agreement.

50. Given the practical requirement that the Requisite Consenting Parties consensually agree to support the Applicants going forward and the additional funding and liquidity relief they have provided to date, any difference in treatment resulting from the Plan is entirely practical and justifiable. As Justice Blair (as he was then) found in *Re Armbro Enterprises Inc.*, it is not unfair or unreasonable for the only creditor to continue to advance funds and finance the proposed re-organization receive some additional incentive to support the Plan.[77]

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[74] Fourth Report at para 105.
[75] Sanction Order Affidavit at para 37, Tab 2 of the Motion Record, p. 83.
[76] Sanction Order Affidavit at paras 16(e),(f), Tab 2 of the Motion Record, p. 75.
[77] *Re Armbro Enterprises Inc.,* 1993 22 C.B.R. (3d) 80 (Ontario Court of Justice (General Division), in Bankruptcy at para 6, BOA Tab 12; see also *Re Uniforêt inc.,* 2003 43 C.B.R. (4th) 254 (Cour supérieure du Québec), at paras 21, 33, BOA Tab 13.

Unfairness to Shareholders

51. When evaluating the Plan's fairness and reasonableness to shareholders, one must take into account the deficits that the Affected Creditors will suffer as a result of the Recapitalization. Unfortunately as Affected Creditors not being repaid in full, the CCAA requires extinguishment for no consideration.[78]

Public Interest

52. The Plan will allow the Applicants to continue to operate the business as a going concern. Moreover, preventing a bankruptcy of the Applicants preserves jobs and provides for ongoing work for the 1,450 individuals employed by the Banro Group.[79]

B. The Releases are Fair and Reasonable

53. As detailed in the Sanction Affidavit,[80] Article 8 of the Plan provides releases (the "**Releases**") for two groups of parties: (i) the Banro Released Parties (including the Directors and Officers); and (ii) the Third Party Released Parties (including the Requisite Consenting Parties and the Monitor) (collectively, the "**Released Parties**").

54. It is accepted that Canadian courts have jurisdiction to sanction plans containing releases in favour of third parties if the release was negotiated in favour of a third party as part of the "compromise" or "arrangement" where the release reasonably relates to the proposed restructuring and is not overly broad.[81] There must be a reasonable connection between the

[78] See CCAA s. 6(8), R.S.C. c. C-36.
[79] As at November 28, 2017 the Banro Group employed approximately 1,450 employees in total. See Initial Order Affidavit at para 60, Tab 2A of the Motion Record, p. 110.
[80] Sanction Order Affidavit at paras 26-39, Tab 2 of the Motion Record, pp. 79-83.
[81] *Re Metcalfe &Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, [*Metcalfe*] at para 61, BOA Tab 14; *Canwest* at paras 28-30, BOA Tab 6, *Re Kitchener Frame Ltd.*, 2012 ONSC 234 [*Kitchener Frame*] at para 85, BOA Tab 15.

third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.[82]

55. In considering whether to approve releases in favour of third parties, the Court will take into account the particular circumstances of the case and the objectives of the CCAA.[83] While no single factor will be determinative,[84] the courts have considered the following factors:[85]

(a) *whether the parties to be released from claims were necessary and essential to the restructuring of the debtor*: the Releases were critical components of the decision-making process for the Directors', Officers' and Requisite Consenting Parties' participation in the CCAA Proceedings and support for the Plan;[86]

(b) *whether the claims to be released were rationally connected to the purpose of the plan and necessary for it*: the Applicants would not have brought forward the Plan and the Requisite Consenting Parties would not have supported Plan absent the inclusion of the Releases;

(c) *whether the plan could succeed without the releases*: the support of the Requisite Consenting Parties in terms of (i) voting in support of the Plan; (ii) consensually agreeing to amend the Gold Streams and the Forwards; and (iii) providing Interim Financing that will be converted to exit financing on Plan Implementation is essential to the Plan's viability. Without such support, the Plan would not succeed and the Applicants would likely have had no option but to proceed with a liquidation which would not have provided the same benefits to the Applicants' stakeholders;[87]

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[82] *Metcalfe*, at para 70, BOA Tab 14.
[83] *Skylink*, at para 30, BOA Tab 7.
[84] *Kitchener Frame*, at para 82, BOA Tab 15.
[85] *Metcalfe*, at para 71, BOA Tab 14; *Re Cline Mining Corp.*, 2015 ONSC 622 at paras 22-28, BOA Tab 16; *Kitchener Frame*, at para 80, BOA Tab 15.
[86] Sanction Order Affidavit at paras 30-34,39 Tab 2 of the Motion Record, pp. 81-83.
[87] Sanction Order Affidavit at paras 34, 48(b) Tab 2 of the Motion Record, pp. 82, 86.

(d) *whether the parties being released were contributing to the plan*: the Released Parties made significant contributions to the recapitalization of the Banro Group, both prior to and throughout the CCAA Proceedings.[88] The exhaustive efforts of the Special Committee and the other Directors and Officers of the Banro Group along with the Requisite Consenting Parties resulted in the negotiation of the Support Agreement, the SISP, the DIP Term Sheet and the Plan, all of which formed the foundation for the Recapitalization through the CCAA Proceedings;[89]

(e) *whether the release benefitted the debtors as well as the creditors generally*: the actions of the Released Parties, including the Directors and Officers as well as the Requisite Consenting Parties were and are critical to the recoveries of all Affected Creditors and stakeholders largely, including the Applicants' employees by negotiating for their continued employment in Canada and the DRC upon implementation of the Plan;[90] and

(f) *whether the creditors voting on the plan had knowledge of the nature and effect of the releases*: the Releases apply to the extent permitted by law. The release in favour of the Directors and Officers is compliant with section 5.1(2) of the CCAA, which mandates certain exceptions to the compromise of claims against directors set out under section 5.1(1) of the CCAA.[91] Further, the channeling of director and officer indemnification through insurance policies has been granted by this Court in a number of cases, such as *Re Guestlogix Inc., Re Sino-Forest Corp. and Re Skylink Aviation.*[92] Full disclosure of the Releases was made to Affected

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[88] Sanction Order Affidavit at paras 30,37-38 Tab 2 of the Motion Record, pp. 81,83; Fourth Report at para 56.
[89] Sanction Order Affidavit at paras 31,37 Tab 2 of the Motion Record, pp. 81,83.
[90] Sanction Order Affidavit at paras 33-34,37-38 Tab 2 of the Motion Record, pp. 82-83.
[91] R.S.C. 1985, c. C-3; Sanction Order Affidavit at para 28, Tab 2 of the Motion Record, p. 80.
[92] See *In the Matter of a Proposed Plan of Compromise or Arrangement of Guestlogix Inc. and Guestlogix Ireland Limited*, Plan Sanction Order of the Honourable Justice Morawetz dated September 12, 2016, Court File No. CV-16-11281-00CL at ss. 6.1-6.3, BOA Tab 17; *In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation*, Plan of Compromise and Reorganization dated December 3, 2012, Court File No.

Creditors in the Meeting Order Affidavit[93], the Monitor's Reports[94], the Information Circular and in the Plan.[95]

C. The Declarations requested in respect of the claims and causes of action raised in the Lepard Action are appropriate

56. The proposed form of Sanction Order contains provisions which, if granted, would declare that with respect to the Lepard Action (i) the Causes of Action as against Banro are Affected Equity Claims, and therefore are extinguished on Plan Implementation for no consideration; and (ii) the Causes of Action as against any Directors or Officers are barred, extinguished and released as no Director/Officer Proof of Claim was received by the Claims Bar Date.

57. The Lepard Action was commenced in the violation of the Stay of Proceedings. Mr. Lepard, one of the named Plaintiffs in the Lepard Action had written directly to the Honourable Justice Hainey on December, 23, 2017 and was therefore fully aware of these CCAA Proceedings.[96] Both the Monitor and the Applicants' counsel responded to Mr. Lepard in early January, 2018.[97] That correspondence clearly advised Mr. Lepard of the existence of the Initial Order and the Stay of Proceedings as well as the process to follow to be added to service list and participate in the CCAA Proceedings.

58. The Lepard Action is based entirely on losses suffered by persons holding common shares of Banro. The Causes of Action include that the Defendants' deliberately and unlawfully

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CV-12-9667-00CL at ss 4.9(e)-(f), BOA Tab 18; *In the Matter of a Plan of Compromise or Arrangement of Skylink Aviation Inc.*, Plan Sanction Order of the Honourable Justice Morawetz dated April 23, 2013, Court File No. 13-1003300-CL at para 23 and Schedule "A" (Plan of Compromise and Arrangement) ss. 3.7(b),7.1(b), BOA Tab 19.

[93] Meeting Order Affidavit at paras 17, 20(h),(i),(j), Tab 2I of the Motion Record, pp. 480-484.

[94] Second Report of the Monitor dated January 29, 2018 at paras 51-52; Third Report at paras 45-46; Fourth Report at paras 55-57.

[95] Plan s. 8.1(a),(b) attached as Schedule "A" to the Sanction Order Affidavit, Tab 2J of the Motion Record, pp. 512-513.

[96] Attachments to Letter to Kalberer LLP at Tab 2K of Motion Record, pp. 578-581.

[97] Attachments to Letter to Kalberer LLP at Tab 2K of Motion Record, pp. 582-608.

misled investors to believe that Banro's operations in the DRC were stable and free from conflict. The Plaintiffs claim that based on alleged materially false and misleading statements by the Defendants the class members invested millions in Banro's equity.

The Causes of Action are Affected Equity Claims

59. Under the Plan, Affected Equity Claims are defined to include all Equity Claims other than any Intercompany Claims that may be Equity Claims.[98] The definition of Equity Claim in the Plan refers back to the definition of Equity Claim under the CCAA which "*means a claim in respect of an equity interest including a claim for, among others...monetary loss resulting from the ownership, purchase or sale of an equity interest…*"[99]

60. As Justice Pepall (as she then was) held in *Re Nelson Financial Group Ltd.*, claims by shareholders including claims based on allegations of theft, fraud, negligent misrepresentation, fraudulent misrepresentation, breach of trust, non-disclosure[100] are Equity Claims.[101] Courts have consistently held that this wide reading of Equity Claims is appropriate.[102]

61. The Causes of Action set out in the Lepard Action all relate to the purchase of common shares of Banro. As such, the Causes of Action are clearly Affected Equity Claims.

62. Pursuant to section 6(8) of the CCAA, the Plan is required to extinguish all Affected Equity Claims without consideration, as, in this case, Affected Creditors are not being paid in full, but are rather taking a substantial compromise.

63. This is also consistent with section 19(2)(d) of the CCAA which provides restrictions on a Plan compromising "any debt or liability resulting from *obtaining property or services by false*

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[98] Plan s. 4.4, attached as Schedule "A" to the Sanction Order Affidavit, Tab 2J of the Motion Record, p. 505.
[99] CCAA s. 2(1), R.S.C. 1985, c. C-36.
[100] *Re Nelson Financial Group Ltd.*, 2010 ONSC 6229 at para 17, BOA Tab 20 [*Nelson Financial*].
[101] *Nelson Financial*, 2010 ONSC 6229 at para 34, BOA Tab 20.
[102] *Re Sino-Forest Corp.*, 2012 ONCA 816 at para 24, BOA Tab 21; *Re Sino-Forest Corp.*, 2012 ONSC 4377 at paras 14,16,81, 84, BOA Tab 22*; Return on Innovation Capital Ltd. v Gandi Innovations Ltd.*, 2011 ONSC 5018 at paras 57,61, BOA Tab 23.

pretences or fraudulent misrepresentation, <u>other than a debt or liability of the company that arises from an equity claim</u>".[103]

64. The result under the Plan therefore, as required by the CCAA, is that the Causes of Action are fully and finally released, barred and extinguished for no consideration as against Banro. This is also consistent with what would happen if Banro were a debtor in a proceeding under chapter 11 of the United States Bankruptcy Code (the "**Bankruptcy Code**").

65. Section 510(b) of the Bankruptcy Code provides that:

> "a claim for damages arising from the purchase or sale of a security of the debtor or of an affiliate of the debtor . . . shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claims has the same priority as common stock."[104]

66. Therefore, under the Bankruptcy Code, like the CCAA, claims arising from the purchase or sale of equity securities are general unsecured claims that are subordinated and receive the same treatment as the underlying equity securities. Specifically, U.S. bankruptcy courts have ruled that section 510(b) of the Bankruptcy Code mandates the subordination of securities fraud claims arising from the purchase of equity securities of a debtor.[105]

<u>The Causes of Action have been Barred as against the Directors and Officers</u>

67. The Claims Procedure Order at paragraph 24 provided:

> 24. THIS COURT ORDERS that any Director/Officer Claimant that fails to file a Director/Officer Proof of Claim such that it is received by the Monitor on or before the Claims Bar Date, shall be and is hereby forever barred, estopped and enjoined from asserting or enforcing any Director/Officer Claim against any of the Directors and/or Officers of the Applicants, and all such Director/Officer Claims shall be forever extinguished.[106]

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[103] CCAA s. 19(2)(d), R.S.C. 1985, c. C-44.
[104] 11 U.S.C. § 510(b).
[105] *See, e.g., In re WorldCom, Inc.*, 329 B.R. 10, 17 (Bankr. S.D.N.Y. 2005), BOA Tab 24 (subordinating claim for damages relating to fraudulent conduct that caused claimant to purchase and retain debtors' equity securities); *In re Granite Partners, L.P*, 208 B.R. 332, 335, 342 (Bankr. S.D.N.Y. 1997), BOA Tab 25 (subordinating securities fraud claims relating to the purchase and retention of the debtors' equity securities).
[106] Claims Procedure Order at para 24, Tab 2F of Motion Record, p. 320.

68. Notice of the Claims Bar Date was provided by the issuance of a press release as required by paragraph 22 of the Claims Procedure Order.[107] Lepard, who was aware of these CCAA Proceedings, deliberately decided not to file a Director/Officer Proof of Claim prior to the Claims Bar Date. As such, the Causes of Action set out in the Lepard Action as against all of the Directors and Officers, including John Clarke, who is named as a Defendant, have been barred, estopped and forever extinguished.

69. The Directors and Officers in moving forward towards Plan Implementation are relying on the fact that no Director/Officer Proofs of Claim were filed by the Claims Bar Date as the Plan also impacts their claims as against the Applicants.

E. Conclusion

70. The Monitor is of the view that the Plan as a whole is fair and reasonable.[108] Moreover, the Affected Creditors voting on the Plan overwhelmingly support the Plan. Accordingly, the Applicants submit that this Court should approve the clear decision of the Affected Creditors and sanction the Plan.

PART V - RELIEF SOUGHT

71. The Applicants and the Requisite Consenting Parties request that this Court grant the proposed Sanction Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of March, 2018.

Cassels Brock & Blackwell LLP

Cassels Brock & Blackwell LLP

Lawyers for the Applicants

McCarthy Tétrault LLP

Lawyers for *Baiyin International Investment Ltd./Baiyin Nonferrous Group Company, Limited*

Goodmans LLP

Lawyers for Gramercy Funds Management LLC

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[107] Press Release dated February 1, 2018, Tab 2H of Motion Record at pp. 456-459.
[108] Fourth Report at para 13(d).

SCHEDULE "A"
LIST OF AUTHORITIES

1. Essar Steel Canada Inc. et al, Court File No CV-14-10629-00CL (Ont. S.C.J.[Comm. List]), Final Order dated September 15, 2014.
2. Mood Media Corporation et al., Court File No. CV-17-11809-00CL (Ont. S.C.J.[Comm. List]), Final Order dated June 20, 2017.
3. RGL Reservoir Management Inc. et al, Court File No CV-17-587401-00CL (Ont. S.C.J. [Comm. List]), Final Order dated December 14, 2017.
4. *Re Canadian Airlines Corp.*, 2000 ABQB 442, leave to appeal denied 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal to SCC refused July 12, 2001.
5. *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. S.C.J.).
6. *Re Canwest Global Communications Corp.*, 2010 ONSC 4209.
7. *Re Skylink Aviation*, 2013 ONSC 2519.
8. *Re AbitibiBowater Inc.*, 2010 QCCS 4450.
9. *Olympia & York Developments v. Royal Trust Co.*, 1993 CarswellOnt 182.
10. *Re Air Canada*, 2004 CarswellOnt 469.
11. *Re Lutheran Church,* 2016 ABQB 419.
12. *Re Armbro Enterprises Inc.,* 1993 22 C.B.R. (3d) 80 (Ontario Court of Justice (General Division), in Bankruptcy.
13. *Re Uniforêt inc.,* 2003 43 C.B.R. (4th) 254 (Cour supérieure du Québec).
14. *Re Metcalfe &Mansfield Alternative Investments II Corp.*, 2008 ONCA 587.
15. *Re Kitchener Frame Ltd.*, 2012 ONSC 234.
16. *Re Cline Mining Corp.*, 2015 ONSC 622.
17. *In the Matter of a Proposed Plan of Compromise or Arrangement of Guestlogix Inc. and Guestlogix Ireland Limited*, Plan Sanction Order of the Honourable Justice Morawetz dated September 12, 2016, Court File No. CV-16-11281-00CL.
18. *In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation*, Plan of Compromise and Reorganization dated December 3, 2012, Court File No. CV-12-9667-00CL.
19. *In the Matter of a Plan of Compromise or Arrangement of Skylink Aviation Inc.*, Plan Sanction Order of the Honourable Justice Morawetz dated April 23, 2013, Court File No. 13-1003300-CL.
20. *Re Nelson Financial Group Ltd.*, 2010 ONSC 6229.
21. *Re Sino-Forest Corp.*, 2012 ONCA 816.
22. *Re Sino-Forest Corp.*, 2012 ONSC 4377.

23. *Return on Innovation Capital Ltd. v Gandi Innovations Ltd.*, 2011 ONSC 5018.

24. *In re WorldCom, Inc.*, 329 B.R. 10, 17 (Bankr. S.D.N.Y. 2005).

25. *In re Granite Partners, L.P.*, 208 B.R. 332, 335, 342 (Bankr. S.D.N.Y. 1997).

SCHEDULE "B"
RELEVANT STATUTES

COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

Definitions

2 (1) In this Act...

...debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

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.

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

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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.

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Claims

Claims that may be dealt with by a compromise or arrangement

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and
(ii) if the company filed a notice of intention under section 50.4 of the Bankruptcy and Insolvency Act or commenced proceedings under this Act with the consent of inspectors referred to in

section 116 of the Bankruptcy and Insolvency Act, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;
(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;
(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or
(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

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Act to be applied conjointly with other Acts

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

CANADA BUSINESS CORPORATIONS ACT

R.S.C. 1985, c. C-44, as amended

Definition of *arrangement*
192 (1) In this section, ***arrangement*** includes
(a) an amendment to the articles of a corporation;
(b) an amalgamation of two or more corporations;
(c) an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to this Act;
(d) a division of the business carried on by a corporation; **(e)** a transfer of all or substantially all the property of a corporation to another body corporate in exchange for property, money or securities of the body corporate;
(f) an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate;

(f.1) a going-private transaction or a squeeze-out transaction in relation to a corporation;
(g) a liquidation and dissolution of a corporation; and
(h) any combination of the foregoing.

Where corporation insolvent

(2) For the purposes of this section, a corporation is insolvent
(a) where it is unable to pay its liabilities as they become due; or
(b) where the realizable value of the assets of the corporation are less than the aggregate of its liabilities and stated capital of all classes.

Application to court for approval of arrangement

(3) Where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.

Powers of court

(4) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
(a) an order determining the notice to be given to any interested person or dispensing with notice to any person other than the Director;
(b) an order appointing counsel, at the expense of the corporation, to represent the interests of the shareholders;
(c) an order requiring a corporation to call, hold and conduct a meeting of holders of securities or options or rights to acquire securities in such manner as the court directs;
(d) an order permitting a shareholder to dissent under section 190; and
(e) an order approving an arrangement as proposed by the corporation or as amended in any manner the court may direct.

Notice to Director

(5) An applicant for any interim or final order under this section shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

Articles of arrangement

(6) After an order referred to in paragraph (4)(e) has been made, articles of arrangement in the form that the Director fixes shall be sent to the Director together with the documents required by sections 19 and 113, if applicable.

Certificate of arrangement

(7) On receipt of articles of arrangement, the Director shall issue a certificate of arrangement in accordance with section 262.

Effect of certificate

(8) An arrangement becomes effective on the date shown in the certificate of arrangement.

Court File No. CV-17-589016-00CL

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 AND THE REQUISITE CONSENTING PARTIES
(Plan Sanction Order)

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