

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Padley v. SSR Mining Inc.*,
2025 BCSC 456

Date: 20250411
Docket: S241960
Registry: Vancouver

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Between:

Glenna Padley

Plaintiff

And

**SSR Mining Inc., Rodney Antal, Alison White, Bill MacNevin, Stewart Beckman,
Michael Anglin, Brian Booth, Alan Krusi, Karen Swager, Edward Dowling Jr.,
and Beverlee Park**

Defendants

- and -

Docket: S242663
Registry: Vancouver

Between:

Abdurrazag Mutat

Petitioner

And

**A.E. Michael Anglin, Rodney P. Antal, Thomas Bates, Brian R. Booth, Simon A.
Fish, Leigh Ann Fisher, Alan P. Krusi, Daniel Malchuk, Kay Priestly, Karen
Swager, Alison White, and SSR Mining Inc.**

Respondents

Before: The Honourable Justice Thomas

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.
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The Applications

[1] Glenna Padley is the plaintiff in action S241960 and petitioner in petition S242016 (collectively, unless specified otherwise, the “*Padley Action*”). She is represented by Siskinds LLP (“*Padley Counsel*”).

[2] Dr. Abdurrazag Mutat is the petitioner in petition S242663 (the “*Mutat Action*”). He is represented by KND Complex Litigation and Hammerco Lawyers LLP (collectively, “*Mutat Counsel*”).

[3] Each has brought an application seeking carriage of a proposed national class action proceeding against SSR Mining Inc. (“*SSR Mining*”) and its various directors.

[4] For reasons that follow, and subject to further details in the order at the end of this judgment, I grant the carriage motion to the *Padley Action*.

Background Facts

SSR Mining

[5] SSR Mining is a precious metals producer incorporated under British Columbia’s *Business Corporations Act*, S.B.C. 2002, c. 57 [BCBCA].

[6] SSR Mining’s common shares are publicly traded. The British Columbia Securities Commission is SSR Mining’s primary Canadian securities regulator.

[7] SSR Mining’s main asset is an open pit Çöpler Mine located in Turkey (the “*Mine*”). The Mine utilizes heap leach pads which requires piling ore onto the pads to extract gold.

[8] The Mine was constructed and operated pursuant to engineering parameters and an environmental permit.

Regulatory History and Development of the Mine

[9] A review of the regulatory history was provided in the Erzincan İliç Çöpler report dated October 17, 2024 (the “*October 2024 Report*”). This is a preliminary

report arising from a Turkish parliamentary inquiry into the incident. It provided the following information:

- a) The relevant Turkish legislation is complex: the Mining Act has been amended 27 times and the Environmental Act has been amended 13 times since 2001. The Environmental Impact Assessment Regulation has been amended 16 times since being brought into effect. In addition, the inquiry raised concerns that public bodies issuing permits did not properly manage these processes and outsource duties to private contractors.
- b) SSR Mining operated the Mine through a company called Anagold, which was 80% owned by SSR Mining. Ore was supplied to the Mine through Anagold and another company called Kartaltepe Madencilik, which hauled ore from another location to the Mine. Kartaltepe Madencilik was also 80% owned by SSR Mining.
- c) The two corporations divided the integrated plant for the Mine into two separate designs, applied through the separate corporations and conducted separate environmental processes. The October 2024 Report states that this was improper as it bypassed the legislative requirement that such enterprises be assessed in a single process in order to make a holistic assessment of the entire project.
- d) In 2014, the Mine obtained an environmental assessment which predicted a total capacity of 73 million tonnes for phases 1, 2, 3, and 4. The Mine ultimately constructed and operated phases 1 to 4 at a capacity of 58 million tonnes.
- e) In 2020, the company developed a design for a new area called phase 4B which would increase the capacity of the Mine to 64 million tonnes on the pad associated with phases 1 to 4. This received environmental approval on April 27, 2020.

- f) By October 2021, there was approximately 58 million tonnes of ore placed on the pad (phases 1 to 4B).
- g) In December 2021, a further environmental assessment decision approved the capacity of 58 million tonnes for the pad associated with phases 1 to 4; and stated capacity for the Mine would be increased to 85.3 million tonnes with the construction of phases 5 and 6.
- h) The October 2024 Report noted Anagold defended themselves by stating that they had appropriate environmental approval for the increased tonnage on pads 1 – 4b; whereas the report concluded that increased tonnage on those pads had been invalidated by the December 2021 assessment.

Slips

[10] On March 27, 2022, the ore slipped on the pad associated with phases 1 to 4B, resulting in an event similar to a landslide.

[11] On June 21, 2022, the leach solution containing cyanide spilled from a pipeline associated with the pad. This resulted in a three-month suspension of operations.

[12] On February 13, 2024, the ore slipped on the pad again. The October 2024 Report stated that there were 68 million tonnes of ore on the pad. Anagold appears to dispute this amount and utilizes an alternative methodology for calculating tonnage. The slip involved millions of tonnes of cyanide-infused ore sliding off the pad causing an environmental and human catastrophe.

[13] At least eight employees of the Mine have been detained in connection with the incident. Criminal charges are being investigated. A Turkish parliamentary committee is also investigating the incident and preparing a report. At this time the investigations are still ongoing.

[14] Mining operations have been suspended. SSR Mining has announced that it will not restart the leach pad operations. The loss of gold production and cost of remediation will be significant.

[15] The impact of the incident has been significant on SSR Mining's shareholders, with the shares losing over a billion dollars of value.

[16] Both the *Padley* Action and the *Mutat* Action seek compensation for losses suffered by shareholders of SSR Mining.

Potential Causes of the February 13, 2024 Slip

[17] The October 2024 Report noted that:

- a) Geological, geotechnical and hydrogeological surveys would have determined the correct design parameters for slope angles, bench heights and material behaviour. However, these processes were inadequately managed, resulting in the February 13, 2024 slip.
- b) Proper design and calculations should have prevented the slip, but deviations from design principles during actual operations could have led to the disaster.
- c) It is clear that significant deficiencies existed in the surveying, design and implementation processes at the Mine, including that:
 - i. No adequate survey was conducted of the area around the site;
 - ii. The selection of the site was fundamentally flawed due to the geological, geotechnical and hydrogeological nature of the region;
 - iii. Numerous complaints were raised that the implementation processes deviated from the original design principles;
 - iv. The electronic monitoring system intended to detect potential slope failures was inadequate;

- v. The staff overseeing the managerial process lacked sufficient experience — in particular, the team responsible for monitoring and controlling geotechnical parameters — and specialized personnel necessary for the operation of the Mine were missing; and
- vi. Public bodies responsible for granting operating permits, as well as those involved in monitoring and supervision, did not properly manage these processes or take timely corrective measures, and they outsourced duties to private contractors.

[18] The October 2024 Report concluded that given the tonnage of ore present on the pad, the pad had been overloaded with ore from October 2021 until the February 13, 2024 slide; but also noted that Anagold disputes the methodology used to determine the tonnage of ore.

[19] The Union of Chambers of Turkish Engineers and Architects (the “Union”) has been conducting an investigation into the cause of the slip. Their report concluded:

As a result of capacity increases, it is very clear that it has become very difficult to ensure the stability and stability [*sic*] of the leaching pile, which has reached a huge height of more than 250 meters, consisting of approximately 34 steps, each of which is 8 meters high. The fact that these demands, which are not in accordance with engineering science and technique, were approved by the Ministry, and the implementation of the project was not followed in the aftermath, and the lack of effective and adequate supervision was one of the determining factors in the occurrence of this disaster.

No Finding of Facts

[20] I have briefly summarized these facts in a conclusory manner. I wish to emphasize that the underlying details and facts are complex and will likely be highly contested. There is a scant evidentiary record before the court, given the stage of the proceedings, the limited public information available from the third-party investigations, and the limited evidentiary record available to the parties. I have not made any findings of fact pertaining to this matter. However, given the factual dependent arguments made by Mutat Counsel, I have outlined relevant facts contained in the evidentiary record in order to assess the arguments made.

Applicable Law

[21] In this carriage motion I will apply the law as is set out in *C.K. v. BetterHelp, Inc.*, 2023 BCSC 1666, aff'd 2024 BCCA 46 [*BetterHelp BCSC*]:

[8] The ultimate question in deciding a carriage motion is which proposed action will best advance the interests of the class, provide fairness to the defendant and promote the objectives of class proceedings? Those objectives are access to justice, behaviour modification and judicial economy: *Moiseiwitsch v. Canadian National Railway Company*, 2022 BCCA 321 at para. 9 [*Moiseiwitsch BCCA*]; *Ewert v. Canada (Attorney General)*, 2014 BCSC 215 at paras. 14–15.

[9] In answering this question, I have considered the overlapping and non-exhaustive list of 17 factors set out in *Rogers v. Aphria Inc.*, 2019 ONSC 3698 at para. 17 [*Rogers*], which are:

- (1) The quality of the proposed representative plaintiffs;
- (2) Funding;
- (3) Fee and consortium agreements;
- (4) The quality of proposed class counsel;
- (5) Disqualifying conflicts of interest;
- (6) Relative priority of commencement of the action;
- (7) Preparation and readiness of the action;
- (8) Preparation and performance on carriage motion;
- (9) Case theory;
- (10) Scope of causes of action;
- (11) Selection of defendants;
- (12) Correlation of plaintiffs and defendants;
- (13) Class definition;
- (14) Class period;
- (15) Prospect of success (leave and certification);
- (16) Prospect of success against the defendants; and
- (17) Interrelationship of class actions in more than one jurisdiction.

[10] As Justice MacDonald explained in *Wong v. Marriott International Inc.*, 2020 BCSC 55 [*Wong*], courts should assess these factors in a holistic manner:

[26] The courts discourage a “tick the boxes” approach to carriage motions. The focus should be the broader goal of promoting the best interests of the class members and fairness to the defendants: [*Strohmaier v. K.S.*, 2019 BCCA 388] at para. 41 [*Strohmaier CA*]. When factors are very similar, or have only minor differences, a court

may assess them as neutral or not refer to them at all: *Strohmaier CA* at paras. 76–77. The circumstances of each case will determine how much weight should be given to each factor.

Discussion

Factors (1), (2), (5) and (12)

[22] Counsel have isolated the contentious issues. They have agreed that factors (1), (2), (5), and (12) are neutral. I will therefore limit my discussion to the remaining factors.

Factors (9), (10) and (16): case theory, scope, and prospects of success against the defendants

[23] A carriage application is an inappropriate forum for a searching assessment of the merits of the parties' competing claims: *BetterHelp BCSC* at para. 14.

[24] The degree of scrutiny with which courts should assess proposed claims on a carriage application is somewhat unclear: *Moiseiwitsch BCCA* at paras. 47–50. Courts will not consider the merits of an action, but they may appropriately consider the nature and scope of the case theories and causes of action. Courts may, to some extent, assess the efficiency and costs of the competing strategies — this may be an important factor, but not necessarily of greater importance than every other factor. The ultimate question, however, is whether the proposed strategy is reasonable and defensible: *Moiseiwitsch BCCA* at paras. 35–36, citing *Mancinelli v. Barrick Gold Corporation*, 2016 ONCA 571; *Wong* at para. 88.

Proposed Padley Action

[25] The *Padley* Action alleges a claim for misrepresentation under Part 16.1 of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418 [*BCSA*] and at common law. The basis of these allegations is that SSR Mining made public disclosures in both core and non-core documents that amounted to misrepresentations beginning on March 30, 2021 because:

- a) they concealed a specific and identifiable material risk of a large slip on the pad due to the adverse conditions of the ore pile and SSR Mining's inadequate safety and operational systems;
- b) further, or in the alternative, it was likely that there would be a large slip;
- c) further, or in the alternative, the pad was built and operated outside of the engineering parameters prescribed by its designers, including the parameters publicly disclosed to investors; and
- d) further, or in the alternative, the pad was unsafe and SSR Mining had inadequate safety systems in place.

[26] The action also alleges that the misrepresentations were revealed to investors through four public corrections:

- a) on February 13, 2024, SSR Mining disclosed that a slip on the heap leach pad had occurred, and that all operations at the Mine were suspended;
- b) on February 20, 2024, the Union released a press release stating that the main reason for the slip was the load on the piled ore, and that the capacity for the pile had been increased twice;
- c) on February 23, 2024, the Union released a second press release stating that the current structure of the pad was not in accord with accepted engineering practices; and
- d) on February 27, 2024, SSR Mining disclosed other details about the slip and the extent of the adverse impact it has, and would continue to have, on SSR Mining.

[27] The action also asserts relief from oppression under s. 227 of the *BCBCA*. It brings the oppression claim against SSR Mining and relevant individual defendants who were directors and officers of SSR Mining.

[28] The action alleges that the following reasonable expectations were breached in an oppressive and/or unfairly prejudicial manner:

- a) SSR Mining’s business and affairs would be conducted in accordance with law, including disclosure requirements under the *BCSA* and environmental and safety requirements in Turkey;
- b) SSR Mining would exercise adequate control over the Mine to ensure that it was built and operated in accord with engineering parameters; and/or
- c) the directors and officers of SSR Mining would act in accord with their obligations under s. 142 of the *BCBCA* to act honestly and in good faith with a view to the best interests of SSR Mining and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[29] Broadly speaking, the relief is focused on the impact that the misrepresentations had on the value of shares purchased from March 30, 2021 to February 27, 2024.

[30] The *Padley* petition seeks leave to assert the right of action provided by Part 16.1 of the *BCSA*. Leave pursuant to Part 16.1 requires the petitioner to establish that they have commenced the litigation in good faith and have a reasonable possibility of success.

[31] The petition also seeks leave to assert the oppression claim pursuant to s. 227 of the *BCBCA*. The section requires the petitioner to demonstrate that the operations of the company, or the conduct of its directors, had been conducted in a matter that is oppressive or unfairly prejudicial to one or more shareholders. However, the petition will be referred to the trial list (or converted to an action) if there are disputes of fact or law, unless the party requesting a trial is bound to lose: *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P.*, 2017 BCCA 247 at para 43; *Thom v. Revery Architecture Inc.* 2019 BCSC 2013 at paras. 22–24.

[32] The *Padley* notice of civil claim asserts the Part 16.1 claim and the s. 227 claim contingent on leave being granted in the petition.

Proposed Mutat Action

[33] The *Mutat* Action is an oppression claim brought solely against the specified directors of SSR Mining pursuant to s. 277 of the *BCBCA*. The allegations are as follows:

- a) the directors of SSR Mining failed at their overarching duty to exercise stewardship and oversight over mission critical aspects of SSR Mining's business and risk management such that the February 13, 2024 slip occurred when the directors allowed operations to proceed in clearly and apparently dangerous conditions, putting the company's short term profitability ahead of its long-term sustainability and corporate social responsibility;
- b) the directors, through action or inaction, took upon themselves a severe risk that the pad would experience a significant failure which would be expected to materially and adversely impact SSR Mining's business and operations. The directors did not have a contingency plan to manage and address the risk; and
- c) the conduct of the directors was, ultimately, either oppressive or unfairly prejudicial or both to the value shareholders of SSR Mining.

[34] Relief is focused on the change in the price of shares immediately before and immediately after the February 13, 2024 slip on behalf of people who owned shares at that time. The timing of the purchase of the shares is largely irrelevant.

[35] The *Mutat* petition seeks leave to convert the petition into an action pursuant to s. 227 of the *BCBCA*. This test differs from the test for leave sought under the *BCSA* in the *Padley* Action, in that the *Mutat* Action must establish a "bona fide triable issue" which cannot be resolved on the documentary evidence. The action has not yet been filed.

Assessment of Factors (9), (10) and (16)

Pleading Issues

[36] Mutat Counsel says the misrepresentation allegations in the *Padley* Action are flawed because they contain pleadings of multiple public corrections between February 13 and 27, 2024; and include class members in that time period.

[37] He says this is flawed because no misrepresentations were made during this time period, and the investors purchasing shares would have been aware of the misrepresentations after the February 13, 2024 disclosure of the slip.

[38] Padley Counsel states that the basis for this pleading is to account for the possibility that the misrepresentations may not have been fully corrected with the initial disclosure of the slip. The misrepresentations, therefore, may have continued in part after the initial disclosure and until corrected by the three additional disclosures, with the final disclosure occurring on February 27, 2024 (the end of the class period). They note that the pleadings were designed to address the risk arising from *Baldwin v. Imperial Metals Corporation* 2020 ONSC 5616 at paras. 23–25. Although this decision was reversed on appeal, the possibility of such a finding remains: *Baldwin v. Imperial Metals Corporation* 2021 ONCA 838 at para. 61.

[39] In my view, the pleading is appropriate and addresses a contingency. It is not flawed. To the contrary, it demonstrates a carefully thought-out and crafted case theory.

Factual Issues

[40] Mutat Counsel further says the misrepresentation allegations in the *Padley* Action are flawed because they focus on the allegation that SSR Mining operated the ore pad outside of accepted engineering parameters going back to the first misrepresentation on March 30, 2021. He notes that SSR Mining has denied this allegation in their press releases. He further argues that there is no factual support for these allegations.

[41] Padley Counsel correctly points out that the October 2024 Report and the investigation by the Union provide support for the allegations that the Mine was developed and operated outside of proper engineering parameters.

[42] In my view, it is premature to determine whether the Mine was constructed and/or operated within acceptable engineering parameters. Given the lack of facts at this stage of the proceedings, I do not accept Mutat Counsel's argument that the misrepresentation allegations in the *Padley* Action are fundamentally flawed.

[43] Mutat Counsel also argues that the misrepresentation allegations in the *Padley* Action are doomed to fail, or at best, will be difficult to establish. He says the *Padley* Action alleges that, from March 30, 2021, there was an undisclosed specific and identifiable material risk of a slip. He notes that SSR Mining warned of such risks in their 2021 annual report, which stated that “[m]ining is inherently risky and subject to conditions and events beyond the Company’s control.” The document clarifies that risks of failure of engineering structures can occur which even “a combination of experience, knowledge and careful evaluation” cannot overcome.

[44] In my view, SSR Mining’s warning in their annual report amounts to a disclosure of a generic risk associated with mining. It is premature to determine if, and when, an undisclosed specific and identifiable risk of slip was present or whether the risk fell within a generic risk inherent to mining: *Dyck v. Tahoe Resources Inc.* 2021 ONSC 5712 at paras. 138–140. I do not agree with the suggestion that a disclosure of generic risks precludes an action for specific identified risks.

[45] Mutat Counsel also asserts that his cause of action will be easier to prove than the cause of action in the *Padley* Action. He notes that the October 2024 Report indicated that the ore pile exceeded the environmental permit parameters at the time of the February 13, 2024 slip, which he says is an undisputed fact. However, the October 2024 Report indicates Anagold, stated their operations were in compliance with a prior environmental approval.

[46] In my view, these factual issues invite the court to enter into an inappropriate merits assessment of the proposed actions at this stage of the proceedings. Therefore, I will not do so.

Complexity of Case Theories

[47] Mutat Counsel says that the “factual flaws” in the theory of the *Padley* Action, if not fatal, are significant because they illustrate that a long, detailed and difficult analysis of the events leading up to the February 13, 2024 slip will be required in the *Padley* Action. This would extend to scrutinizing events that predate the first alleged misrepresentation on March 30, 2021.

[48] He says, on the other hand, the theory of the *Mutat* Action is solely focused on the fact that, at the time of the February 13, 2024 slip, the ore on the pad exceeded the limits imposed by the December 2021 assessment. Thus, he argues the *Mutat* Action is much more focused than the *Padley* Action.

[49] In my view, this framing discounts the complexity of the situation. Both actions will need to establish how the February 13, 2024 slip occurred. This will likely require a review of the design, construction and operation of the pad over the period of time that the Mine was developed and received various environmental approvals. This appears to be the approach reflected in the third-party investigations that have attempted to ascertain the cause of the slip in the reports filed to date.

[50] Both *Mutat* and *Padley* Actions have additional, separate, informational requirements that will have to be established. In a very general way:

- a) The *Padley* Action requires proof of misrepresentations of the risk in publications specified and dating back to March 30, 2021, (and subsequent corrections of the errors). These misrepresentations have been identified in the pleadings.
- b) The *Mutat* Action requires establishing the requisite knowledge of the directors and a breach of a duty owed to shareholders at the time of the

February 13, 2024 slip. This will require an analysis of what the directors knew about the safety of the Mine and compliance with environmental permits on February 13, 2024; and will also require an analysis of whether the Mine was in compliance with the environmental permits.

All of which will require an investigation into:

- a) how the Mine was developed and how the permits were obtained;
- b) the complex environmental approval process that appears to incorporate two corporate entities utilizing independent environmental approval and/or processes for the mine;
- c) the involvement of public bodies and officials and subcontracted private parties in the approval, monitoring and supervision processes; and
- d) what various parties state of knowledge was with respect to compliance with environmental requirements and safety.

[51] In my view, at this stage of the proceedings, one cannot say that the theory of either case, and the additional information that will be required by both, proposes a simpler factual matrix.

Limitations on Statutory Misrepresentation Action

[52] Mutat Counsel says that the *Padley* Action is a “conventional securities misrepresentation claim” which has a number of advantages under the legislation in formulating a class action. However, these advantages are minimized because the critical misrepresentations alleged arise from non-core documents. These misrepresentations are subject to the limitations contained in the *BCSA*, which:

- a) requires proof of the requisite state of mind pursuant to s. 140.4(1); and
- b) contains statutory “liability limit” on recovery pursuant to ss. 140.1 and 140.7.

[53] In my view, it is premature to determine which of the alleged misrepresentations are “critical”. The *Padley* Action pleads a number of misrepresentations arising from core documents. Given the complex and progressive development of the Mine over time, in my view, it is appropriate to identify and plead misrepresentations dating back to March 20, 2021 at this stage of the proceedings. It is premature to discount the applicability of alleged misrepresentation arising from core documents.

Problems with the Oppression Action

[54] Mutat Counsel argues that the oppression action in the *Padley* Action is flawed and improper because:

- a) it incorporates the misrepresentation action into the allegations. See *Bruner v. MGX Minerals Inc.* 2019 BCSC 11 at paras. 69–77;
- b) the allegation that the pad was operated in non-compliance with engineering standards has been denied by SSR Mining in several press releases; and
- c) the allegations of misconduct outside of misrepresentations are not specified at paras. 42–47 of the *Padley* petition.

[55] I see little merit to these positions. The second issue refers to factual issues that I have already determined are inappropriate to resolve in this hearing. Third issue takes an inappropriately restrictive view of the pleadings. In my view, as pointed out by Padley Counsel, sufficient particulars have been pled against individual directors, for this stage of the proceedings.

[56] With respect to the first issue; joint claims of misrepresentation and oppression have been certified in other proceedings such as *Abdula v. Canadian Solar*, 2015 ONSC 53 and *Rooney v. Arcelormittal S.A.*, 2013 ONSC 6062. In my view, this represents an appropriate secondary pleading to include and pursue at this stage of the proceeding.

Novel or New Cause of Action

[57] Padley Counsel says the *Mutat* Action consists of a novel application of “Caremark duties” — the standard for director oversight duties stemming from *In re Caremark International Inc. Derivative Litigation*, 698 A. 2d 959 (Del. Ch. 1996) [*Caremark*] — to seek recovery using an oppression remedy solely focused on the directors, independent of SSR Mining. This raises three relevant issues for this analysis.

[58] The first is that the oppression claim may fail because it is derivative in nature and must be advanced as a derivative action: *Pasnak v. Chura*, 2004 BCCA 221 at para. 5; *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.*, 2016 BCCA 258 at para. 72; *Khela v. Phoenix Homes Limited*, 2015 BCCA 202 at para. 45; *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, 2016 BCCA 193 at para. 179. As was noted in *Rea v. Wildeboer*, 2015 ONCA 373:

[34] The oppression remedy is not available -- as the appellants contend -- simply because a complainant asserts a "reasonable expectation" (for example, that directors will conduct themselves with honesty and probity and in the best interests of the corporation) and the evidence supports that the reasonable expectation has been violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard". The impugned conduct must be "oppressive" of or "unfairly prejudicial" to, or "unfairly disregard" *the interests of the complainant*. *OBCA*, s. 248(2). No such conduct is pled here.

[35] That the harm must impact the interests of the complainant personally -- giving rise to a personal action -- and not simply the complainant's interests as a part of the collectivity of stakeholders as a whole -- is consistent with the reforms put in place to attenuate the rigours of the rule in *Foss v. Harbottle*. The legislative response was to create *two* remedies, with two different rationales and two separate statutory foundations, not just one: a corporate remedy, and a personal or individual remedy.

[59] The second is that although *Caremark* type claims have been litigated in the U.S., the *Caremark* decision itself famously characterized them as “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment”: *Caremark* at 967. No authority has been provided where a similar claim using an oppression remedy solely focused on directors has been judicially approved in Canada. In this sense, I agree with Padley Counsel, this is a somewhat novel cause of action.

[60] The third is that the *Mutat* Action relates only to the conduct of the directors, although a claim is made that SSR Mining is vicariously liable for the directors' conduct. The issue of vicarious liability in this situation may become a complex issue that, in and of itself, poses a recovery risk. In addition, there is also the risk that liability may be allocated partially to SSR Mining, raising a further recovery risk even if liability can be established against the directors: *Wilson v. Alharayeri*, 2017 SCC 39 at para. 52.

[61] Padley Counsel says that proceeding with such an uncertain cause of action when established causes exist raises an unnecessary risk of recovery.

[62] Mutat Counsel argues against this characterization by the Padley Counsel. He says that this characterization:

- a) erroneously overstates the difficulty of successfully bringing *Caremark* claims as recent U.S. cases indicate a loosening of the clearly high threshold of misconduct, and there has been an increase in success of such claims surviving applications to strike; and
- b) ignores and mischaracterizes the fact that an existing Canadian precedent exists for these claims in the Trevali Mining Corporation matter — referring, generally, to decisions indexed at 2022 BCSC 2442, 2023 BCSC 1943, and 2024 BCSC 2252 (referred collectively as “Trevail Matters”) — in which he has filed pleadings of a similar *Caremark* claim in conjunction with alleged misrepresentation actions.

[63] In my view, the Trevali Matters are neither an authoritative nor persuasive precedent. Although pleadings have been filed which assert a *Caremark*-type claim, the pleadings were filed within the context of a judicially managed bankruptcy proceeding on which the *Caremark* aspect of the pleadings have not been tested or judicially commented upon. The only discussion of the *Caremark* aspect of the Trevali Matters referred to was an online blog post authored by one of the Mutat Counsel.

[64] In comparing the *Caremark* claims advanced by Dr. Mutat to the *Padley* Action, it is clear that an established jurisprudential roadmap exists for the misrepresentation action. There is no Canadian jurisprudence guiding the *Caremark* theory at the heart of the *Mutat* Action outside of the fact that it is brought as an oppression claim.

[65] Mutat Counsel points out, what they say, is a new shift in the *Caremark* cases in the U.S. which now renders erroneous the proposition that *Caremark* claims are “possibly the most difficult theory in corporation law.” For this position, they rely on an online post, “2024 Caremark Developments: Has the Court’s Approach Shifted?” posted on the website of Harvard Law School Forum on Corporate Governance. However, this post emphasizes that it is only in narrow and extreme circumstances in which *Caremark* based claims may survive preliminary motions to dismiss:

However, in the past few years, the *Caremark* cases brought by the plaintiffs’ bar have been met with increased receptivity, and the court has found in several cases, at the pleading stage, that it was reasonably conceivable (the Delaware standard to survive a motion to dismiss) that directors or officers may have breached their *Caremark* duties. Notably, in the most recent *Caremark* cases, decided in late 2023 and early 2024—*Walgreens*, *Skechers*, *ProAssurance* and *Segway* (discussed below)—the court has re-emphasized a very high bar to success on *Caremark* claims.

[...]

The court has reiterated the narrow circumstances in which *Caremark* would apply and expressly discouraged the bringing of *Caremark* claims absent extreme circumstances.

[66] In my view, the relevant jurisprudence from the U.S. indicates that bringing a *Caremark* claim in Canada remains a novel cause of action that will be difficult, and likely to face significant legal hurdles in comparison to a misrepresentation action.

Conclusions

[67] Both the *Padley* Action and the *Mutat* Action present well thought out case theories and scopes of actions. Given the undeveloped jurisprudence in Canada surrounding *Caremark* claims the *Padley* Action presents a greater likelihood of success against the defendants. In my view, given the jurisprudential basis underlying the misrepresentation allegations in comparison to the *Caremark* claim, it

would be imprudent to proceed without a claim in misrepresentation against the defendants.

[68] In my view, these factors strongly favour the *Padley* Action.

Factor (17): Interrelationship of Class Actions in more than one Jurisdiction

[69] Two related proposed class actions were commenced in Ontario. The focus of both claims was a misrepresentation claim pursuant to the Ontario equivalent of Part 16.1 of the *BCSA*. The claims differed over what the courts characterized as “preliminary bouts” or “side shows” under the common law and provincial statutes. Carriage was granted to the *Liang* action in *Liang v. SSR Mining Inc.* 2024 ONSC 4432.

[70] The main difference between the *Liang* action and the *Padley* Action, is that the *Padley* Action includes a claim of oppression brought by shareholders, which must be brought within B.C. The *Mutat* Action, on the other hand, lacks any claims for misrepresentations and relies solely on a *Caremark* action brought as a claim of oppression on behalf of shareholders, which must also be brought within this province.

[71] Mutat Counsel stated that they did not bring a misrepresentation claim because, in their view, the claim was not “sustainable” or even “viable.” However, if they are wrong, the *Mutat* Action is “complementary” to the remaining Ontario action, as opposed to the *Padley* Action which is largely duplicative. Mutat Counsel argued in oral submissions that this creates an advantage of certifying the *Mutat* Action, in that class members would have a “fall back” action of misrepresentation in Ontario if the *Mutat* Action was ultimately unsuccessful. His written arguments states that granting carriage to the *Mutat* Action would “create[] one additional case theory and avenue for recovery for the class,” thus “maximiz[ing] the value to the proposed class.” In oral argument he proposed that the Ontario action would “proceed together”, with the *Mutat* Action.

[72] Padley Counsel notes there is a strong current in the jurisprudence to avoid a multiplicity of proceedings whenever possible. Should the *Padley* Action be granted carriage, he says, the issue of multiple actions will be resolved through agreement by counsel, or if not, at the certification hearing in either Ontario or B.C., or pursuant to the Canadian Judicial Protocol for the Management of Multi-jurisdictional Class Actions and Provisions of Class Action Notice adopted through this court's Practice Directive 55.

[73] Padley Counsel argues that *Mutat* Action's strategy is less favourable as it is based on pursuing two parallel national proceedings that raise different causes of actions arising from the same subject matter. This will not only complicate the prosecution of the action, but also raises potential problems associated with the prosecution of a multiplicity of proceedings which may be inconsistent with the foundational principles of behaviour modification and judicial economy: *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819 at paras. 231–257.

[74] Furthermore, Mutat Counsel's position, in my view, will effectively have the court decide at this stage in the proceedings that the misrepresentation claims should proceed in the *Liang* action rather than in the *Padley* Action. This issue should be resolved pursuant to the existing legislative mechanisms, either at a certification hearing or pursuant to Practice Directive 55. These mechanisms should not be circumvented by indirectly awarding carriage of the misrepresentation claims to the *Liang* Action in Ontario upon an application by a third party that, in this case, would be Dr. Mutat, who may not have a valid misrepresentation claim (as his stocks were purchased prior to the misrepresentations).

Conclusions

[75] I am not in a position to assess relative merits of proceeding with the *Liang* Action in Ontario or the *Padley* Action in B.C. I have not had a full argument on the scope of the pleadings in the *Liang* Action and how they compare to the cause of action in the *Padley* Action. I agree with Padley Counsel that it would be premature,

and would do a disservice to the proposed class, to make this assessment at this stage.

[76] In my view, allowing the *Mutat* Action to proceed in parallel with the *Liang* Action raises a greater likelihood of the problems and delays associated with a multiplicity of proceedings, including: fairness to the defendants; conservation of judicial resources; and the risk of conflicting decisions from courts across Canada, than the *Padley* Action.

[77] The benefits of the *Mutat* Action on a class wide scale are somewhat limited given my determination that prosecuting the action will be difficult and face significant legal hurdles in comparison to a misrepresentation action. Having said that, I am aware that the *Mutat* Action contains potential class members, including Dr. Mutat, that may not have recourse in the misrepresentation actions.

[78] In my view this factor favours the *Padley* Action.

Factor (15): Prospects of Success (Leave and Certification)

[79] Mutat Counsel argues that the prospects of success at a leave application and certification strongly favour their action because:

- a) their leave application requires them to simply raise a “*bona fide*” triable issue, whereas the *Padley* Action requires establishing that the action is not “bound to lose” should it proceed to trial. Given the factual concerns raised about the validity of the misrepresentation claims in the *Padley* Action it will be difficult for Padley Counsel to obtain leave; and
- b) the strength of *Mutat* Action case theory and complimentary nature of *Mutat* Action to the *Liang* Action strongly favour the *Mutat* Action.

[80] Although the *Mutat* Action faces a slightly lower legal test to obtain leave in comparison to the *Padley* Action; in my view this is not a significant factor. As noted earlier, I am not satisfied that the *Padley* Action faces significant factual hurdles in

comparison to the *Mutat* Action at this stage of the proceedings or at the leave stage of the proceedings, as argued by *Mutat* Counsel.

[81] In my view the superior case theory contained in the *Padley* Action, combined with my concerns about the *Mutat* Action proceeding in parallel with the *Liang* Action issues favour the *Padley* Action at certification.

Factor (3): Fee Agreement

[82] The fee agreement between Dr. Mutat and his counsel erroneously provides for a fee of the higher of four times the multiplier on the value of time spent prosecuting the action or a 30% contingency fee. Counsel has acknowledged that the agreement should be the lower of these two amounts.

[83] Given this correction, and the fact that counsel fees are ultimately subject to approval of the court, in my view, the fee agreements are a neutral factor.

Factor (4): Quality of Proposed Counsel

[84] Both counsel are experienced in class action matters. *Padley* Counsel has particular experience in securities-based class actions. *Mutat* Counsel had, at one time, worked under the supervision of *Padley* Counsel. In my view, given the experiences of both counsel, this is a neutral factor.

Factor (6): Relative Priority of Commencement of the Action

[85] The *Mutat* petition was filed 29 days after the *Padley* notice of civil claim and 27 days after the *Padley* petition. The slip precipitating the actions occurred on February 13, 2024.

[86] I note the comments of Justice Ker in *Morel v. Koninklijke Philips N.V.*, 2023 BCSC 625:

[72] In some respects, first to file vs. a more deliberative approach can be a double-edged sword. In *Ewert*, Blok J. found the relative priority of the commencement of the action went to the “first to file” firm – which filed 11 days before the competing law firm. However, Blok J. noted at para. 43 that in general, “first to file” should not be given much weight. This is particularly true where the filings are relatively close in time. Justice Blok further

explained that he declined to give it much weight because giving it weight “might encourage law firms to engage in an unseemly rush or ‘unedifying scramble’ to the court registry”: *Ewert* at para. 43.

[87] In my view, this is a factor that weighs minimally in favour of the *Padley* Action.

Factor (7): Preparation and Readiness of the Action

[88] Both counsel’s teams have conducted considerable research and demonstrated a high level of commitment to their actions.

[89] With respect to the preparation and readiness of their respective cases, Mutat Counsel argues that his petition is complete and ripe for hearing; whereas the *Padley* petition is incomplete, does not fully set out their positions or affidavit material, and is therefore not ready to be heard.

[90] Padley Counsel notes that, given the evolving nature of the publicly available information about the cause of the February 13, 2024 slip, they expect to provide supplemental evidence and finalize their petition shortly, and hope to be able to complete their application for certification within 3–4 months of the carriage decision.

[91] Certification hearings can create an incentive for counsel to rush matters forward in order to gain an advantage at a carriage hearing to the potential detriment of the overall action.

[92] In this case, Dr. Mutat’s petition is full and complete. The position taken by Padley Counsel in preparing their petition material is prudent. They have refrained from prejudicing their position by rushing forward with finalized materials.

[93] In my view, this factor favours the *Mutat* Action.

Factor (8): Preparation and Performance on Carriage Motion

[94] Both counsel were well-prepared and had detailed written materials supporting their applications. I commend all counsel and their teams for their ability

to clearly articulate complex legal issues in an understandable and persuasive manner.

[95] In my view, Padley Counsel took a more focused approach to the arguments whereas Mutat Counsel took a broader more scatter gun approach. The approach taken by each counsel is a reflection of the realities of their case, the manner in which arguments are created and presented, and personal style. In my view, both counsel were effective and I assess this as a neutral factor.

Factor (11): Selection of the Defendants

[96] The *Mutat* Action names the directors of SSR Mining at the time of the February 13, 2024 slip.

[97] The *Padley* Action asserts claims against the directors of SSR Mining throughout the period of misrepresentations, from March 2021 to February 2024.

[98] Mutat Counsel characterizes this as a shotgun approach to naming parties to the litigation, which should be discouraged in that it may further complicate and prolong what will be a lengthy and complicated litigation: *Budd v. Gentra Inc.*, 1998 CanLII 5811 (O.N.C.A.) at para. 50; *Badesha v. Cronos Group*, 2021 ONSC 4346 at para. 98.

[99] Padley Counsel states that the defendants have been selected with a view to naming the persons responsible for the alleged wrongs, and to maximize recovery and ensure that appropriate evidence is available through discovery.

[100] In my view, the ultimate question is not whether “less is more” or “more is better,” but whether the proposed strategy is reasonable and defensible. In my view, the defendants named in both actions are consistent with a reasonable and defensible strategy.

[101] I find the selection of defendants to be a neutral factor, particularly at this stage of the proceedings.

Factors (13) and (14): Class Definition and Class Period

[102] *Mutat* Action has a clearly defined class period.

[103] *Padley* Action's class definition and period includes class members that purchased shares after the February 13, 2024 slip to account for the allegation that the misrepresentations may not have been fully corrected until February 27, 2024.

[104] *Mutat* Counsel argues that including this class period is inappropriate. I have already addressed this argument and concluded that, in my view, the pleading appropriately addressed a possible contingency and demonstrated a carefully thought out and crafted case theory.

[105] In my view, the class definition and period in both actions are reasonable and defensible. I find class definition and class period to be neutral factors.

Holistic Assessment

[106] In my view factors (9), (10), (16) and (17) are the most important factors affecting the determination of carriage. In this case, the other factors, when considered as a whole, tend to balance out and pale in comparison to factors (9), (10), (16) and (17).

[107] When I consider all of the factors, within the context of the submissions of both counsel and the material filed on the hearing of the carriage motions, I am satisfied it is in the best interests of the putative class, while being fair to the defendants and promoting the objectives of class proceedings, to grant carriage of this action to the *Padley* Action.

Disposition

[108] I order the *Mutat* Action stayed until the certification application in the *Padley* Action is decided.

[109] I order the commencement of further class proceedings in the Province of British Columbia against SSR Mining seeking to advance the same claims as those

advanced in this action are prohibited without leave of the Court until the certification application in the *Padley* Action is decided.

[110] If certification is not granted in the *Padley* Action, or if the *Padley* Action is discontinued, dismissed or withdrawn, the stay of the *Mutat* Action and the prohibition against the commencement of further class proceedings in the Province of British Columbia shall both be lifted.

“Thomas J.”