IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0116064 B.C. Ltd. v. Alio Gold Inc.,* 2026 BCSC 1545

Date: 20260814
Docket: S194929
Registry: Vancouver

Between:

0116064 B.C. Ltd.

Plaintiff

And

Alio Gold Inc.

Defendant

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

Before: The Honourable Justice Shergill

Reasons for Judgment

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Place and Dates of Hearing:	Vancouver, B.C. June 9–13, 2025 October 27–29, 2025
Supplemental Written Submissions of the Plaintiff:	May 8 and 29, 2026
Supplemental Written Submissions of the Defendant:	May 22, 2026
Place and Date of Judgment:	Vancouver, B.C. August 14, 2026

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I. OVERVIEW

[1] This is a class proceeding brought on behalf of former shareholders of Rye Patch Gold Corp. who exchanged their shares for shares of Alio Gold Inc. pursuant to a court-approved Plan of Arrangement completed on May 25, 2018. The representative Plaintiff alleges that, in the period leading up to that transaction, Alio made misrepresentations in its public disclosures. In particular, Alio misrepresented its projected gold production for 2018, which had the effect of inflating the value of its shares, and ultimately caused the shareholders to receive less than fair value.

[2] I certified this class proceeding in Reasons indexed at 2023 BCSC 1310.

[3] This liability and damages summary trial is about whether Alio made misrepresentations or omissions in respect of its 2018 production guidance (either negligently or fraudulently) which caused loss to the class members.

[4] The alleged misrepresentations relate to information contained in two news releases and an information circular issued in March and April 2018. The Plaintiff says that through these public documents, Alio made certain guidance projections about its gold production, despite its management knowing that those projections could not be met. In addition, the Plaintiff alleges that Alio failed to make any corrective disclosure prior to the completion of the Arrangement.

[5] The Plaintiff alleges that the class members received less value under the Arrangement than they were entitled to, because of Alio's inaccurate production forecasts. The transaction at the centre of this case is a share exchange. Under the Arrangement, Rye Patch shareholders received Alio shares at a fixed exchange ratio of 0.48 Alio shares for each Rye Patch share. The Plaintiff says that this exchange ratio was premised, at least in part, on Alio's share price, and that the share price was artificially inflated by the alleged misrepresentations.

[6] Alio denies that any of its disclosures were false or misleading or that they are even actionable in law, given the forward-looking nature of the impugned statements. Further, Alio says that its production guidance had a reasonable basis at all material times. It believed the guidance would be met through ongoing

operational measures, and that no obligation to revise its guidance arose prior to August 2018. Alio further disputes that its disclosures had any impact on the negotiation of the exchange ratio or that the representative Plaintiff can establish causation or loss on a class-wide basis.

[7] The common issues for determination at this summary trial are attached as Schedule A in the Certification Decision. The common issues are ultimately directed toward answering three overarching questions.

1. Did Alio's public disclosures concerning anticipated 2018 gold production at their San Francisco Mine contain material misrepresentations or omissions, during the period leading up to the Arrangement with Rye Patch?

2. If so, were the disclosures made fraudulently or negligently?

3. If liability is established, did those misrepresentations or omissions cause Rye Patch shareholders to receive less value for their shares under the agreed share exchange ratio than they otherwise would have received, thereby causing loss to class members?

[8] Before I turn to consider these substantive issues, I will address whether this matter is suitable for summary determination.

II. SUITABILITY FOR SUMMARY TRIAL

[9] Rule 9-7(15) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, permits a party to seek judgment on an issue or generally by way of summary trial.

[10] Both parties rely on this provision and related authorities to argue that the issues raised before me are suitable for summary determination. To that end, the parties have filed an extensive evidentiary record, including affidavits, contemporaneous documentary evidence, expert reports, and detailed written submissions.

[11] Despite the parties' agreement regarding suitability, this Court must determine whether it is able to find the facts necessary to decide the issues without a conventional trial or whether it would be unjust to decide the issues on this basis: Rule 9-7(15)(a); see also *Douez v. Facebook, Inc.,* 2022 BCSC 914 at para. 43. This requires me to consider the evidentiary foundation, the nature of the issues raised, and whether there are conflicts in the evidence that cannot be resolved on the written record.

[12] The leading authorities on the suitability for summary determination are *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (B.C.C.A.) and *Gichuru v. Pallai*, 2013 BCCA 60. In *Gichuru* at paras. 30–31, the Court provided the following non-exhaustive list of factors to determine whether a summary trial would be unjust:

- the amount involved;
- the complexity of the matter;
- urgency;
- any prejudice that may arise from delay;
- the cost of taking the case forward to a conventional trial in relation to the amount involved;
- the course of the proceedings;
- the cost of the litigation;
- the time of the summary trial;
- whether credibility is a critical factor;
- whether the summary trial would create unnecessary complexity; and
- whether proceeding summarily will result in litigating in slices.

[13] I have considered all the above factors and conclude that this matter is suitable for summary determination. My reasons are as follows.

[14] First, the parties have both asked this Court to proceed summarily.

[15] Second, there is no evidence that either party would be prejudiced if this Court proceeded summarily. Indeed, there would be a benefit to both parties as it would save the cost of a conventional trial, which the parties estimate will take five weeks, instead of the eight days required for the summary trial.

[16] Third, there is no danger that proceeding summarily will result in litigating in slices. Both liability and damages are before this Court for summary determination.

[17] Fourth, while the amount claimed is large (in excess of $20 million) and the evidentiary record is voluminous, these are not insurmountable concerns. *Douez* involved a claim exceeding $830 million, tens of thousands of pages of evidentiary record, and 10 days of summary trial. In determining that the matter was nevertheless suitable for summary determination, Justice Iyer found the following:

> [47] Taken on their own, these facts might suggest that a conventional trial is essential. However, I must also bear in mind the access to justice purposes underlying the *CPA*, the fact that a class proceeding necessarily entails a multi-step litigation process, and that Facebook agrees that some issues are suitable for summary determination.
>
> [48] I consider that all of the liability common issues (issues 1, 2, 4, and the resident sub-class common issue) are amenable to summary resolution. None require consideration of voluminous or conflicting evidence. Deciding these issues now will move the litigation forward significantly and may assist in its resolution.

[18] I come to a similar conclusion in this case. The parties have addressed the challenges posed by a voluminous evidentiary record by providing their materials in a comprehensive and organized form, including preparing detailed chronologies and summaries. These have been helpful in narrowing the issues and disputed facts.

[19] Fifth, the principal disagreements between the parties concern the proper inferences to be drawn from the evidentiary record rather than resolving credibility disputes. These include matters such as whether Alio had an objectively reasonable basis for maintaining its production guidance, what was known by its management at the relevant times, and whether any alleged misrepresentations affected the share exchange ratio. While the parties disagree on these points, those disputes largely turn on the interpretation of the evidence, rather than on issues of witness credibility

requiring *viva voce* testimony. Where credibility concerns are raised (such as with the evidence of Greg McCunn), I am satisfied that I can resolve them based on the record before me.

[20] Sixth, as noted by the Court of Appeal, the issues to be determined in this case are confined to the certified common issues arising from a limited number of identified representations and a single corporate transaction: *0116064 B.C. Ltd. v. Alio Gold Inc.,* 2022 BCCA 85 at paras. 45–46.

[21] Finally, I am also satisfied that it would not be unjust to determine the issues on a summary trial basis. Access to justice is one of the underlying concerns addressed through class proceedings. A summary determination enhances access to justice. Section 12 of the *Class Proceedings Act*,[1] supports resolving issues summarily when doing so promotes the fair and expeditious determination of the proceeding.

III. LIABILITY

[22] The representative Plaintiff advances claims in fraudulent and negligent misrepresentation arising from a series of public statements made by Alio, during the period leading up to the completion of the Arrangement between Alio and Rye Patch in 2018.

[23] I will approach the liability analysis in three stages. First, I consider whether the impugned disclosures contained actionable misrepresentations or omissions. Second, I consider the Plaintiff's claim in negligent misrepresentation. Third, I consider the Plaintiff's claim in fraudulent misrepresentation.

[24] Although the causes of action are distinct, substantial portions of the factual analysis overlap. In particular, many of the parties' submissions focus on a common question, namely whether Alio had a reasonable basis for maintaining its 2018 production guidance in the period preceding completion of the Arrangement. The resolution of that issue informs much of what follows. I will therefore begin this

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[1] R.S.B.C. 1996, c. 50 [*CPA*].

section with the background facts that underlie this dispute. Before I do so, I wish to comment on the evidence tendered at this summary trial.

[25] The parties filed extensive affidavit evidence and documentary exhibits in support of their respective positions. The evidentiary record includes lengthy affidavits from current and former officers of Alio, the representative Plaintiff, a representative from Rye Patch's former lender, and expert witnesses, together with a substantial volume of contemporaneous corporate records, internal communications, public disclosure documents, and documents exchanged during the due diligence process.

[26] Notably, a number of the principal fact witnesses were not cross-examined on their affidavits. This includes Mr. McCunn, who served as Alio's Chief Executive Officer throughout the period in which the impugned representations were made and who was directly involved in the disclosure decisions at issue in this proceeding. Despite not having cross-examined Mr. McCunn, the Plaintiff urges me to reject significant portions of Mr. McCunn's evidence as lacking in credibility or reliability. In partial support of that position, the Plaintiff relies on the discovery evidence of David Ponczoch, who was produced by Alio as its representative for examination for discovery.

[27] There is no dispute that Mr. Ponczoch's discovery evidence can be relied on to challenge the evidence of another witness. However, I cannot place much weight on his evidence where it concerns events prior to 2020. Mr. Ponczoch did not become a director of Alio until 2020 and had no personal involvement in, or first-hand knowledge of, the operational and disclosure decisions that are central to this case. To the extent that his evidence concerns those matters, it is necessarily based upon his subsequent review of records and information obtained from others.

[28] By contrast, Mr. McCunn was personally involved in the relevant events. His evidence provides the only direct evidence before the Court regarding many of the internal discussions, forecasts, operational reviews, and management decisions that occurred during the relevant period. Much of that evidence is also supported by contemporaneous documents authored by, sent to, or received by Mr. McCunn.

[29] Thus, to the extent that there is a conflict between the evidence of Mr. McCunn and the evidence relied upon from Mr. Ponczoch, I generally prefer the evidence of Mr. McCunn, unless the contemporaneous documents demonstrate otherwise.

[30] In assessing Mr. McCunn’s evidence and the weight to place on it, I consider it significant that Mr. McCunn was not cross-examined on his affidavits. While the Plaintiff was under no obligation to cross-examine him, doing so would have afforded the Plaintiff an opportunity to challenge his recollection, test his explanations of the contemporaneous documents, and confront him directly with any alleged inconsistencies. No such challenge was undertaken.

[31] The Plaintiff submits that it should not be faulted for its decision to rely on Mr. Ponczoch and not to cross-examine Mr. McCunn, since it was Alio who produced Mr. Ponczoch as its representative on discovery. That submission misses the point. If the Plaintiff wished to obtain discovery evidence from Mr. McCunn rather than Mr. Ponczoch, Rule 7-2(5)(c)(ii) of the *Supreme Court Civil Rules* provides a mechanism to do that. It permits a party to seek the examination of a particular current or former officer of a corporate party. In addition, the Plaintiff could have cross-examined Mr. McCunn on his affidavits pursuant to Rule 7-5(1). There is no evidence that either course of action was pursued by the Plaintiff.

[32] The Plaintiff was entitled not to cross-examine Mr. McCunn. However, that choice affects the weight I can give to submissions that his evidence should be rejected on grounds of credibility and reliability. The decision not to cross-examine Mr. McCunn on material evidence means that he was not confronted on the alleged inconsistencies and given an opportunity to respond to the matters which are said to undermine his evidence.

[33] Accordingly, I treat Mr. McCunn's affidavits as an important source of direct evidence concerning Alio's internal decision-making during the relevant period. Where his evidence is supported by contemporaneous documents and is uncontradicted by witnesses with personal knowledge of the same events, I

generally accept it. Where concerns arise from the documentary evidence, I address those concerns in the course of my analysis.

[34] I have used a similar approach when addressing the evidence of other witnesses whose affidavits are relied upon in this proceeding.

[35] With that in mind, I turn to providing an overview of the relevant facts and circumstances underlying this dispute.

A. Background Facts

[36] The Plaintiff, 0116064 B.C. Ltd., is a privately held British Columbia company. It is a former shareholder of common shares of Rye Patch, and it is the representative Plaintiff of the class, which comprises:

> … all individuals or entities, wherever they may reside or be domiciled, excluding the defendant, whose Rye Patch Gold Corp. shares were acquired by Alio in exchange for Alio shares and cash, on or about May 25, 2018, but excludes those individuals or entities who sold their Alio shares prior to August 10, 2018 (the "Class Members"). [2]

[37] All the Class Members owned common shares in Rye Patch prior to May 25, 2018.

[38] Rye Patch was a publicly traded gold mining company listed on the TSX Venture Exchange. Rye Patch's principal operating asset was the Florida Canyon Mine in Nevada, USA. Rye Patch became a wholly owned subsidiary of Alio after Alio acquired its shares on May 25, 2018.

[39] Alio is a British Columbia gold mining company which was listed for trading on the Toronto Stock Exchange and the New York Stock Exchange.[3] During the relevant period, Alio owned an open pit gold mine in Sonora, Mexico ("San Francisco Mine") and was in the process of developing a mine in Guerrero, Mexico, called the Ana Paula Project. The San Francisco Mine was Alio's principal asset.

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[2] Certification Decision at para. 2.

[3] Following a business combination with Argonaut Gold Inc. in July 2020, Alio now operates under the parent entity's name and has been de-listed from the TSX and NYSE.

[40] In early-2018, Alio was publicly forecasting annual gold production from the San Francisco Mine of between 90,000 and 100,000 ounces for the 2018 fiscal year. Throughout the period relevant to this proceeding, Alio issued several public disclosures concerning its operations and production expectations. These include news releases issued on March 19, 2018, and April 11, 2018, and an information circular dated April 18, 2018.

[41] On March 18, 2018, Alio and Rye Patch entered into an Arrangement Agreement pursuant to which Alio would acquire all the issued and outstanding shares of Rye Patch by way of the Arrangement. Under the proposed transaction, Rye Patch shareholders would receive 0.48 common shares of Alio plus $0.001 in cash, for each Rye Patch share held.

[42] On March 19, 2018, Alio and Rye Patch announced that they intended to merge pursuant to the Arrangement Agreement. They issued a joint news release on the same date, which stated in part:

> …
>
> **Transaction Highlights**
>
> - <u>Increased asset diversification – 165,000 ounces of gold production[1] in 2018 from two open-pit, heap leach operations in the stable jurisdictions of Sonora, Mexico and Nevada, USA</u>
> - Enhanced growth profile – potential for low-capital expansion to increase expected annual gold production at Florida Canyon
> - <u>Improved cash flow generation to support development project – cash flow generation from two mines to support development of the feasibility stage Ana Paula project which is anticipated to produce 115,000 ounces of gold per year[2]</u>
> - Enhanced capital markets profile and potential re-rating – increased market capitalization of the combined company has the ability to appeal to a broader shareholder base and improve share trading liquidity
> - Strong balance sheet – combined pro forma entity has approximately $74 million in cash and equivalents[3] and $29 million in total debt[3]
>
> [Emphasis added.]
>
> …
>
> **Footnotes:**
>
> 1) Gold production estimate for 2018 is based on analyst consensus
> 2) Production estimate for the Ana Paula project from the technical report entitled "NI 43-101 Preliminary Feasibility Study, Guerrero, Mexico", dated

> May 16, 2017 which is available on Alio Gold's SEDAR profile at www.sedar.com.
> 3) Cash balance and debt outstanding as of December 31, 2017 and adjusted for subsequent events
> …
>
> ("March 19 Representations")

[43] The Plaintiff takes particular issue with the representations in the first and third bullet points of the March 19 News Release.

[44] In its April 11, 2018, news release, Alio published its actual first quarter gold production from the San Francisco Mine. Alio stated in part:

> …
>
> **Highlights**
>
> • Produced 17,624 ounces of gold in Q1 2018 at the San Francisco Mine
> • Maintained 2018 guidance of between 90,000 and 100,000 ounces of gold
> • Business combination with Rye Patch Gold supported by major shareholders, on track to close May 25, 2018
> • Appointed Markus Felderer as Vice President, Corporate Development
>
> "We anticipated the first quarter to be our lowest production quarter of the year as we implemented our dual cut-off strategy at San Francisco. With the run of mine ore only placed under leach towards the end of January, we did not see ounces draining from the pad until March," said Greg McCunn, Chief Executive Officer. "Further, we still have not yet seen the impact of increased cut-off grade to the crusher feed and the average grade fed to the crusher of 0.42 g/t gold was below expectations. As our operating processes with this relatively new strategy improve, we maintain our full-year guidance of between 90,000 and 100,000 ounces of gold at all-in sustaining costs of between $1,000 and $1,100 per ounce."
>
> …
>
> [Emphasis added.]
>
> ("April 11 Representations")

[45] The Plaintiff takes particular issue with the underlined portions of the April 11 News Release.

[46] Alio issued an information circular to its shareholders on April 18, 2018, indicating that its board was recommending the Arrangement because it believed that the combined companies would have:

> *Increased asset diversification* that may strengthen and de-risk Alio's existing asset portfolio through the addition of a second producing asset in Nevada. After the Arrangement, the Combined Company is expected to produce an approximate total of 165,000 ounces of gold in 2018 from two open-pit, heap leach operations at the San Francisco and Florida Canyon Mines based on the prior disclosure by each Company.[4]
>
> …
>
> *Improved cash flow generation to support project development* as a result of expected cash flow generation from two mines to support the costs of the feasibility stage of the Ana Paula Project, which is anticipated to produce 115,000 ounces of gold per year based on the estimates included in the technical report entitled "NI 43-101 Technical Report, Amended Preliminary Feasibility Study, Guerrero, Mexico", dated effective May 16, 2017 …[5]
>
> ***
>
> … Notable financial and operational achievements for the year include:
>
> …
>
> - Significant investment in waste stripping at the San Francisco mine, to support a planned increase in production, to 90,000 – 100,000 ounces in 2018.[6]
> - …
>
> [Emphasis added.]
>
> ("April 18 Representations")

[47] The Plaintiff is particularly concerned with the representations made in the underlined portions of the April 18 Information Circular.

[48] Rye Patch also issued an information circular to its shareholders on April 18, 2018.[7] The Rye Patch Circular referred its shareholders to:

a) an appendix which contained information concerning Alio; and

b) Alio's April 18 Information Circular.

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[4] Exhibit O of the 1st Affidavit of Curtis Hamilton made on October 11, 2019 ("Hamilton Aff. #1") at p. 198; see also p. 210 of Exhibit O (Information Circular at p. 21 which includes the additional comment: "These figures come from Alio's news release dated January 30, 2018 and Rye Patch's Preliminary Economic Assessment effective March 16, 2016 and dated January 27, 2017 …").
[5] Hamilton Aff. #1 at pp. 198, 210, Exh. O.
[6] Hamilton Aff. #1 at p.338, Exh. O, Schedule J.
[7] Incorrectly dated as April 25, 2018, in the Plaintiff's Written Submissions.

[49] On April 18, 2018, Rye Patch obtained an interim court order which, among other things:

a) provided that the Arrangement would require approval by a resolution passed by at least two-thirds of the Rye Patch shareholders present in person or by proxy at a special meeting of the Rye Patch shareholders; and

b) provided for dissent rights for Rye Patch shareholders.

[50] On May 18, 2018, more than two-thirds of the Rye Patch shareholders voted to approve a resolution in favour of the Arrangement. The Court approved the Arrangement on May 25, 2018, upon finding that the terms and conditions of the plan were fair to the Rye Patch shareholders.

[51] After the Arrangement was completed, Alio continued to operate as a public issuer.

[52] On August 10, 2018, Alio issued a news release reporting its financial and operating results for the second quarter of 2018 (“August 10 Disclosure”). In that disclosure, Alio revised its previously announced 2018 production guidance and reduced its forecasted annual gold production. Following the August 10 Disclosure, the market price of Alio's shares declined.

[53] The parties disagree about the inferences that should be drawn from the August 10 Disclosure, the reasons for the decline in share price, and whether information in the August 10 Disclosure ought to have been disclosed prior to August 10, 2018.

[54] It is against this factual backdrop that the representative Plaintiff alleges Alio made actionable misrepresentations and omissions in the period leading up to completion of the Arrangement. The Plaintiff says those alleged misrepresentations affected the value attributed to Alio shares and, consequently, the share exchange ratio under which the Class Members exchanged their Rye Patch shares.

B. Material Misrepresentations

[55] The first three common issues concern the existence and nature of the alleged misrepresentations and omissions.

[56] For ease of reference, I have reproduced below the certified common issues for consideration in this section:

> 1. Did Alio make representations which were untrue, inaccurate and/or misleading and omitted to state material facts and material changes, pertaining to Alio's projected gold production for 2018, in the following documents:
>
>   (a) Alio's March 19, 2018, news release;
>
>   (b) Alio's April 11, 2018, news release; and
>
>   (c) Alio's April 18, 2018, information circular[8]
>
>   (collectively, "Alleged Misrepresentations")?
>
> 2. Did Alio make omissions of material facts or material changes, by failing to publicly correct its prior representations pertaining to Alio's projected gold production for 2018, in the period before May 25, 2018 ("Alleged Omissions")?
>
> 3. If the answers to (1) and (2) are yes, what were the untrue, inaccurate or misleading Alleged Misrepresentations and Alleged Omissions; who made the Alleged Misrepresentations and Alleged Omissions; and when, where and how were the Alleged Misrepresentations and Alleged Omissions made?

[57] The Plaintiff argues that the Alleged Misrepresentations and Alleged Omissions arise from the public disclosures set out in the previous section.

[58] The Plaintiff's case is advanced both document by document and cumulatively. The Plaintiff says that each of the March 19 News Release, the April 11 News Release, and the April 18 Information Circular contained misleading representations or omissions. However, even if it is found that they did not, when viewed together, the disclosures conveyed a misleading picture of Alio's ability to achieve its 2018 production guidance. I have addressed the individual impact and the cumulative impact of the impugned statements separately.

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[8] This date was mistakenly referred to in the Certification Decision as April 25, 2018.

[59] It is the Plaintiff's position that Alio continued to maintain production guidance after the guidance ceased to have an objectively reasonable basis and failed to disclose information necessary to prevent its public statements from being misleading. The Defendant refutes this suggestion.

[60] I have approached the analysis in the following way in relation to each impugned statement:

a) Was there a misleading statement in the impugned document?

b) Did Alio omit a material fact from the document, the absence of which made the statements misleading?

c) Was there a material change in Alio's operations by the date of the impugned statement that Alio was required to, but did not, disclose?

[61] I begin with the legal framework that governs my analysis.

1. Legal Framework

[62] There is no dispute that Alio's production guidance constituted a forward-looking statement. As the authorities recognize, such statements carry an implied representation that they are made on a reasonable basis: *Kerr v. Danier Leather Inc.*, 2007 SCC 44 at paras. 49–51. Accordingly, the Court must assess the reasonableness of the foundation for the guidance at the time the impugned disclosures were made and determine whether subsequent events required correction or further disclosure.

[63] This proceeding is not a statutory primary market or secondary market securities claim. Rather, the *Securities Act*[9] informs the Court's assessment of the common law misrepresentation claims advanced by the Plaintiff. The certified common issues require the Court to determine whether Alio's disclosures contained material facts, material changes, and misrepresentations within the meaning of the *Securities Act*. The statutory concepts feature prominently in both the pleadings and

[9] R.S.B.C. 1996, c. 418.

the certified common issues and provide an important analytical framework for the issues before the Court.

[64] Section 1(1) of the *Securities Act* defines a "material fact" as a fact that would reasonably be expected to have a significant effect on the market price or value of a security.

[65] A "material change" is defined in s. 1(1) the *Securities Act* as a change in the business, operations, or capital of an issuer that would reasonably be expected to have a significant effect on the market price or value of its securities; or a decision by an issuer's directors or senior management to implement a change in business, operations, or capital that would reasonably be expected to have that effect.

[66] Section 1(1) of the *Securities Act* defines a "misrepresentation" to include both an untrue statement of material fact and the omission of a material fact that is required to be stated, or that is necessary to prevent a statement from being false or misleading in the circumstances in which it was made.

[67] The distinction between material facts and material changes was addressed by the Supreme Court of Canada in *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18 and more recently in *Lundin Mining Corp. v. Markowich*, 2025 SCC 39 ("*Lundin*"). Those authorities confirm that the concepts are distinct and that the existence of a material fact does not necessarily establish the existence of a material change.

[68] Although the procedural context in *Lundin* was different, the Court's discussion is useful because the definitions of material fact and material change considered in *Lundin* are substantively similar to those found in the British Columbia *Securities Act*: *Lundin* at paras. 2, 39, 43.

[69] Materiality is assessed objectively. The question is whether the information in issue would reasonably be expected to have a significant effect on the market price or value of the issuer's securities. At the same time, *Lundin* makes clear that the determination of whether a material change has occurred remains a contextual

inquiry focused on the statutory language and the particular circumstances of the issuer: at paras. 47, 97–98. Materiality and material change are distinct concepts. Information may be material without constituting a material change.

[70] In *Lundin*, the Court considered the differences between material facts and materials changes. The following points are relevant to the analysis in this case:[10]

a) **Breadth:** A material fact is broader than a material change. Any fact can be a material fact as long as it may reasonably be expected to have a significant effect on the market price or value of the securities being issued. In contrast, a material change must be a change in the issuer's business, operations, or capital: *Lundin* at para. 50.

b) **Point in time:** A material fact is static whereas a material change is dynamic. A material fact is a snapshot of an issuer's affairs at a particular point in time, whereas a material change requires a comparison between the issuer's affairs at two points in time: *Lundin* at para. 48.

c) **Relationship to Issuer:** A material change is internal to the issuer, whereas a material fact may arise from internal or external circumstances, such as political, economic, environmental, or social developments: *Lundin* at paras. 51–52, 55.

d) **Information Type:** A material fact can be any type of reliable information as long as it may reasonably be expected to have a significant effect on the market price or value of the securities being issued. A material change requires more than just mere negotiations or internal deliberations: *Lundin* at paras. 50, 59.

e) **Disclosure Duty:** A material fact may be disclosed periodically and at regular intervals such as in annual and quarterly financial statements, annual information forms, and information and proxy circulars. A material

[10] The headings are mine; the substantive statements noted after the headings are taken from the referenced paragraphs in *Lundin*.

change must be disclosed "forthwith" by issuing and filing a "news release authorized by a senior officer disclosing the nature and substance of the change": *Lundin* at paras. 41–42.

[71] At para. 44 of *Lundin*, the Court articulated a two-step approach to determining whether a material change has occurred. This is achieved by asking the following questions:

a) Was there a change in the issuer's business, operations, or capital?

b) Was the change material such that it would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer?

[72] I now turn to the impugned statements and surrounding facts.

2. March 19 News Release

[73] The Plaintiff alleges that the March 19 News Release contained materially misleading representations concerning Alio's expected gold production for 2018.

[74] To understand this argument, it is important to consider the circumstances of both Alio and Rye Patch in the period leading up to the Arrangement, including Alio's efforts to improve the performance of the San Francisco Mine, and Rye Patch's financial and operational circumstances.

a) Background to the Arrangement

[75] In 2017, Alio and Rye Patch were independent publicly traded gold mining companies pursuing different strategic objectives. Although both companies operated in the gold mining sector, their respective circumstances were considerably different.

i. Rye Patch's Circumstances

[76] Rye Patch's principal operating asset was the Florida Canyon Mine in Nevada. Chris Adams, who was involved in Rye Patch's lending relationship with

Macquarie Bank Limited, described Rye Patch as facing significant financial challenges during the period leading up to the Arrangement. His evidence was that Rye Patch was experiencing liquidity pressures associated with the development and ramp-up of the Florida Canyon Mine. Rye Patch was exploring financing and strategic alternatives.[11]

[77] In early-2017, Alio and Rye Patch had some preliminary discussions regarding a possible merger. These did not progress and Rye Patch continued to consider a range of other options.

[78] By the end of 2017, Rye Patch was facing several challenges relating to its credit facility with Macquarie, including covenant compliance issues, funding requirement issues, and concerns regarding its future financial position. In its consolidated financial statements for the year ended December 31, 2017, Rye Patch disclosed that it had experienced delays in the ramp-up of the Florida Canyon Mine and was engaged in discussions with Macquarie concerning amendments to the credit facility. Rye Patch subsequently obtained a waiver from Macquarie on January 31, 2018. As part of that process, Rye Patch agreed that it would undertake a review of strategic alternatives, including restructuring or refinancing its debt and pursuing a corporate transaction.

[79] In January 2018, a special committee of independent directors was established to consider strategic alternatives. Against this backdrop, Rye Patch retained Capital West Partners as its financial advisor. Capital West was tasked with contacting potential candidates for a business combination or other strategic alternative. According to the Rye Patch Circular, Capital West ultimately contacted more than 40 mining and financing companies in an effort to identify refinancing alternatives, business combinations, or other transactions that could maximize shareholder value. While several parties signed confidentiality agreements and conducted preliminary reviews, no competing transaction proposal emerged.

[11] The 1st Affidavit of Chris Adams made March 26, 2025, at paras. 4–7.

ii. Alio’s Circumstances

[80] Alio's principal producing asset was the San Francisco Mine. Alio also owned the Ana Paula Project, a development-stage gold project in Guerrero, Mexico that had not yet entered production. As a result, the San Francisco Mine was Alio's main source of revenue and cash flow.

[81] Mr. McCunn explained that during 2017, Alio was focused on improving the operational performance of the San Francisco Mine and establishing a platform for future growth.

[82] At the same time, Alio was actively considering opportunities to expand and diversify its asset base. Mr. McCunn deposed that management evaluated a number of strategic alternatives, including potential business combinations with other mining companies. The evidence indicates that Alio was seeking to reduce its reliance on a single producing asset and establish a broader operating platform capable of supporting the future development of the Ana Paula Project.

[83] Alio had expressed interest in Rye Patch prior to commencement of the Capital West strategic review. In October 2017, Alio approached Rye Patch regarding a possible business combination. Although those discussions did not progress at the time, the parties entered into a confidentiality agreement on January 17, 2018.

b) The San Francisco Mine and the Revitalization Plan

[84] Alio’s San Francisco Mine had been operational since 2010. It produced approximately 95,000 ounces of gold per year between 2010–2016. In 2013, 2014, and 2016, the gold production exceeded 100,000 ounces.[12]

[85] Since approximately 2005, Alio had been using the services of Micon International Limited, a mineral industry consultant, to conduct audits of resource and reserve estimates and to prepare updated technical reports of the San Francisco Mine. These reports were used by Alio to help formulate its annual

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[12] The 2nd Affidavit of Greg McCunn made May 1, 2025 (“McCunn Aff. #2”) at para. 7.

projections for gold production at the San Francisco Mine. According to Mr. McCunn, Alio also used internal mine plans, metallurgical balance models, and inventory models to monitor guidance and production.[13]

[86] In 2017, Alio undertook a comprehensive review of the San Francisco Mine's operations. As part of that process, Micon produced a technical report which Alio referred to as it’s "Revitalization Plan".

[87] Alio publicly announced the Revitalization Plan on May 11, 2017, through a news release. The technical report which formed the foundation of the Revitalization Plan was released by Micon two weeks later.[14] I pause here to note that there are slight variations with the gold production figures set out in the May 2018 News Release compared to what is stated in the Revitalization Plan. These discrepancies are minor and I accept Mr. McCunn’s explanation for how they arose. Further, they do not detract from my view of the reliability of Mr. McCunn’s evidence on these points.[15]

[88] The Revitalization Plan contemplated significant changes to the operation of the San Francisco Mine, including a substantial waste stripping program intended to improve future access to mineralized material. According to the disclosure, implementation of the Revitalization Plan was expected to increase annual gold production in future years and improve the mine's operating performance.

[89] The Revitalization Plan projected gold production of 92,135 ounces for 2017, 104,922 ounces in 2018, and an overall average annual production of approximately 103,000 ounces of gold between 2018 and 2023.[16]

[90] Toward the end of 2017, Alio developed a life of mine (“LOM”) plan for the San Francisco Mine. This was intended to cover the long-term operational lifespan

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[13] The 1st Affidavit of Greg McCunn made April 15, 2025 (“McCunn Aff. #1”) at para. 31.
[14] McCunn Aff. #2 at para. 3.
[15] McCunn Aff. #2 at paras. 5–9.
[16] McCunn Aff. #2 at p. 32, Exh. A.

of the mine site. Alio also developed a short-term and medium-term plan to ensure that targets could be met.

[91] Alio took steps to implement aspects of the Revitalization Plan, such as waste stripping to expose additional ore and improve mining flexibility. The expectation was that these efforts would position the mine to access higher-grade material and support increased production in subsequent years.

[92] However, the actual operating results during 2017 did not fully meet the expectations reflected in the original Revitalization Plan. Mr. McCunn provided several explanations for this, such as declining gold prices, which made it cost prohibitive for Alio to invest in the crushing circuit; and changes in the mining sequence, which led to variations in tonnages and grades.

[93] According to Mr. McCunn, despite these challenges, Alio's 2017 gold production was 9% higher than planned.[17] This assertion is supported by the San Francisco Mine Review dated January 29, 2018 ("SFM Review"), which is attached to Mr. McCunn's affidavit. In the section titled "2017 Actuals vs. 2017 Budget" the SFM Review indicates that 2017 gold production was 9% higher than planned (83,558 ounces versus 76,315 ounces). However, in the section titled "2017 Actuals vs. Q3 Forecast" a chart indicates a minus 10% variance between the forecasted gold production numbers for 2017 and the actual gold produced (92,715 ounces versus 83,558 ounces).[18] The SFM Review explained the minus 10% variance in forecasted production numbers as being due to less ounces deposited on pad; less ore mined; higher dilution between the mining and processing grade; and slower recovery of ounces.

[94] Alio used the SFM Review to develop a medium-term plan for 2018, which served as the budget ("2018 Budget").[19] Mr. McCunn described the 2018 Budget as incorporating updated operational information, mine planning assumptions, drilling results, and production expectations. Even with a downward adjustment to the gold

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[17] McCunn Aff. #1 at para. 40.
[18] McCunn Aff. #1 at p. 298, Exh. D.
[19] McCunn Aff. #1 at para. 39, Exh C and Exh D.

production forecast for 2018, the SFM Review projected that Alio would still achieve just over 100,000 ounces of gold.[20]

[95] It was against this backdrop that Alio issued its January 30, 2018, production guidance.

c) Alio's Production Guidance

[96] On January 30, 2018, Alio issued a news release entitled *Alio Gold Provides 2018 Guidance for San Francisco Mine* ("January 30 Production Guidance"). In that release, Alio forecasted that gold production at the San Francisco Mine would increase from 83,558 ounces in 2017 to between 90,000 and 100,000 ounces in 2018. Alio attributed the anticipated increase in production to improvements expected from implementation of a dual cut-off strategy and significant waste stripping completed during 2017, which was expected to provide improved access to higher-grade mineralized material during 2018.[21]

[97] The January 30 Production Guidance also contained a detailed cautionary note regarding placing "undue reliance" on forward-looking statements. This included the identification of risks and other factors "which could cause actual results to differ materially from those expressed in the forward-looking statements."[22] This cautionary note appears in all of Alio's impugned news releases and other public disclosure documents relating to its production guidance.

[98] On February 21, 2018, Alio issued a further news release entitled *Alio Gold Provides Fourth Quarter and Full-Year 2017 Operating and Financial Results* ("February 21 News Release"). The release reported Alio's 2017 operating and financial results and reaffirmed the previously announced production guidance. Under the heading "2017 Highlights and Outlook", Alio stated that gold production at the San Francisco Mine was expected to increase to between 90,000 and 100,000 ounces in 2018.

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[20] McCunn Aff. #1 at p. 301, Exh. C.
[21] McCunn Aff. #1 at paras. 43–44.
[22] Hamilton Aff. #1 at p.137, Exh. J.

[99] In the February 21 News Release, under the sub-heading *San Francisco 2018 Guidance*, Alio announced that: "[g]old production is expected to be between 90,000 and 100,000 ounces in 2018 … the first quarter of 2018 is expected to be the lowest for the year with approximately 20% of the annual gold production expected in Q1 2018 as the ROM material was placed under leach in late January".[23]

[100] Alio's gold production numbers for February 2018 remained low.

d) The Proposed Merger

[101] On February 2, 2018, Alio presented Rye Patch with a proposal for a business acquisition. The proposed merger presented as an opportunity to combine Alio's San Francisco Mine and Ana Paula Project with Rye Patch's Florida Canyon Mine and other assets resulting in a larger and more diversified gold mining company with two producing mines.

[102] Mr. McCunn described the reciprocal due diligence process that subsequently occurred between Alio and Rye Patch. That process involved the exchange of extensive technical, operational, financial, and corporate information concerning the companies and their respective assets.[24]

[103] While the due diligence process was underway, Alio issued the February 21 News Release.

[104] On March 4, 2018, following completion of substantial due diligence, Alio delivered a revised proposal. Negotiations continued over the following days.

[105] On March 7, 2018, Rye Patch's special committee recommended their board accept Alio's proposal.

[106] On March 8, 2018, the parties executed an exclusivity agreement, and Rye Patch ceased discussions with other potential acquirors. Rye Patch's special

[23] McCunn Aff. #1 at pp. 281–282, Exh. B.
[24] McCunn Aff. #1 at paras. 78–95.

committee concluded that the Alio transaction represented the most attractive option then available to Rye Patch.

[107] On March 18, 2018, Alio and Rye Patch executed the Arrangement Agreement.

[108] On March 19, 2018, Alio and Rye Patch jointly announced the proposed Arrangement.

e) Analysis

[109] I now turn to the analysis of Common Issues 1 to 3 in relation to the March 19 News Release.

i. Was there a misleading statement in the impugned document?

[110] The first question is whether there was a misleading statement in the March 19 News Release.

[111] The Plaintiff submits that statements in the March 19 News Release regarding the production of 165,000 ounces of gold in 2018 and the anticipated cash flow generation from that, were misleading. Those statements depended upon Alio achieving its publicly stated production guidance of between 90,000 and 100,000 ounces of gold from the San Francisco Mine in 2018. According to the Plaintiff, information known to Alio by March 19, demonstrated that those production targets were unattainable. Alio therefore lacked a reasonable basis for the representations it made. I disagree with the Plaintiff’s submission.

[112] There is no dispute that the production expectations reflected in the March 19 News Release were forward-looking statements. As such, they carried an implied representation that they had a reasonable foundation. In *Kerr*, the Court recognized that a forecast may carry an implied representation of objective reasonableness, while also emphasizing that the analysis must not collapse into hindsight review of a business forecast that later proved wrong: at paras. 49, 51.

[113] The fact that Alio ultimately revised its production guidance on August 10, 2018, or that its earlier production expectations proved overly optimistic, does not establish that the production guidance lacked a reasonable basis when it was maintained in March 2018. The relevant question is whether the evidence establishes that, as of March 19, Alio lacked a reasonable basis for the production expectations embedded in its news release.

[114] In assessing that question, it is important to distinguish between a forecast that ultimately proves to be incorrect and a forecast that was unreasonable when made. A production guidance is based on assumptions, estimates, plans, and projections that may or may not ultimately materialize. Making a production guidance involves business judgment.

[115] The concept of "business judgment" arises from the business judgment rule. In *Kerr*, the Supreme Court of Canada adopted the formulation of the business judgement rule articulated by Justice Weiler in *Maple Leaf Foods Inc. v. Schneider Corp*., 1998 CanLII 5121 (O.N.C.A.), (*sub nom. Pente Investment Management Ltd. v. Schneider Corp.*) 1998 CarswellOnt 4035 at para. 36: at paras. 54–55.

[116] The business judgement rule provides that when reviewing business decisions, the role of the court is to determine whether management made a *reasonable* decision, not a perfect one. As long as management selects one of several reasonable courses of action, deference is generally accorded to the decision reached. If the decision falls within a range of reasonable alternatives, the court should not substitute its own opinion for that of management merely because subsequent events cast doubt upon the wisdom of the decision: *Kerr* at para. 54.

[117] At the same time, *Kerr* emphasizes that the business judgment rule does not diminish or qualify an issuer's legal disclosure obligations. It remains the role of the legislature and the courts, not management, to determine what disclosure is required by law. However, where the issue is whether a forecast or production guidance had a reasonable basis when made, the court must be careful not to improperly substitute its own assessment of future operational performance for that of management, provided management's assessment was grounded in a reasonable

evidentiary foundation and fell within a range of reasonable outcomes: *Kerr* at paras. 54–55.

[118] The evidence satisfies me that Alio had a reasonable foundation for maintaining its production guidance as of March 19, 2018. The guidance did not arise suddenly in connection with the proposed Arrangement. Rather, it was the product of a planning process that had developed over many months and included the Revitalization Plan; the LOM planning process; the January 2018 SFM Review; the 2018 Budget; as well as internal mine planning, drilling data, metallurgical modelling, and operational forecasting.

[119] It is also notable that the March 19 News Release did not present the 165,000 ounces figure as a new standalone production forecast prepared solely for that release. The release identified the combined production estimate as based on analyst consensus.

[120] Operational information available to Alio by March 19, 2018, was not uniformly positive. January and February production had fallen below management's original expectations. However, just because Alio had disappointing short-term production results does not mean that its annual guidance had ceased to have a reasonable basis.

[121] Management attributed the weaker first quarter performance largely to implementation of the dual cut-off strategy, the timing of ore placement on leach pads, and the expected lag before ounces were recovered. Management also continued to believe that access to higher-grade ore and the operational benefits expected from the 2017 waste stripping program would be realized later in the year. That belief was supported by prior technical work, the Revitalization Plan, the 2018 Budget, ongoing operational analysis, and measures directed at production performance and dilution.

[122] Alio was also taking steps to address production issues as they arose, including through short interval control measures directed at production performance

and dilution. [25] There is no evidence that those measures had failed by March 19 or that management had concluded they could not support the annual production guidance.

[123] The reasonableness of management's guidance is further underscored by a March 12, 2018, Due Diligence Report on the San Francisco Mine which was prepared for Rye Patch by SRK Consulting (U.S.), Inc. It is evident that SRK was aware of the challenges that Alio had been experiencing with poor gold production results. [26] Nevertheless, in its report, SRK comments positively about a number of initiatives that Alio was working on "to improve the mining operation". These included "changes to blasting to improve fragmentation and a dispatch system to improve mine productivity." The SRK Report also notes that while initial results on this work "are encouraging" the work has only been going on for one month.[27]

[124] The Plaintiff places considerable reliance on a March 8, 2018, email exchange involving Mr. McCunn and Alio's Director of Project Development, Matt Westwood. In that exchange, Mr. McCunn wrote:

> The data is great, but I'm starting to panic about production – if we can't get 8,000 ounces this month its going to be a bad miss on guidance…..[28]

[125] The Plaintiff argues that this email shows that only 11 days before the March 19 Representations, Alio's CEO no longer believed that the annual guidance was achievable. This is refuted by Mr. McCunn's affidavit evidence, in which he explains that this was an "offhand comment" and that while he was worried about Alio's poor first quarter (Q1) performance, he did not have any concerns about Alio's ability to achieve the annual guidance because "Alio expected the gold would be extracted later in the year and annual guidance would not be impacted."[29] Mr. McCunn was

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[25] McCunn Aff. #1 at paras. 20, 22, 29, 118.
[26] McCunn Aff. #1 at p. 670, Exh. PP.
[27] McCunn Aff. #1 at p. 687, Exh. PP.
[28] Exhibit H of the 3rd Affidavit of Curtis Hamilton made January 16, 2025 ("Hamilton Aff. #3") at p. 108.
[29] McCunn Aff.#1 at para. 127.

not challenged on this evidence, and I find that the words of the email can be fairly read to support his assertion.

[126] In my view, the March 8 email exchange indicates that the management team was concerned about productivity and exploring measures to improve production performance. Mr. McCunn's comment was made while seeking additional technical information concerning leach performance and ounce recovery. Mr. Westwood’s response did not suggest that annual guidance was unattainable or should be withdrawn. Rather, it identified operational steps that could improve recovery rates and support production.

[127] The Plaintiff also relies on a March 15, 2018, email in which Mr. McCunn expressed concerns about whether the Q2 forecast was achievable: [30]

> ... I need some help deciphering our Q2 forecast. Q1 has been brutal, but we are showing 25,000 ounces in Q2. <u>Before I step on a landmine in the market, I would like some outside comfort that the forecast is achievable.</u> If you aren't available, I'm going to send a mining engineer from Golder to review if [*sic*] for me. We've missed three quarters in a row now ...
>
> [Emphasis added]

[128] In response, an email was sent to mine managers asking them to “re-verify the monthly gold production that is calculated from the leach recovery and the timing projections, especially for the substantial increases in Q2”.[31] The mine managers were also asked to check a list of “fundamental issues” to ensure reasonableness of the forecasted numbers. The Plaintiff argues that the Defendant has not provided any direct evidence that this re-verification actually occurred. In my view, that evidence is not necessary. The surrounding emails provide sufficient basis to infer that the re-verification did occur and that it supported the updated Q2 forecast and management’s confidence that the annual guidance would be met.

[129] I find that Alio did not make an untrue representation or misleading statement in the March 19 News Release. The evidence supports a finding that as of that date,

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[30] McCunn Aff. #1, p. 851, Exh. JJJ; McCunn Aff. #1 at para. 131.
[31] McCunn Aff. #1, p. 876, Exh. LLL.

Alio still had a reasonable basis for the guidance; management had not concluded guidance was unattainable; and the annual forecasts remained supported by the technical and operational work done to that point.

ii. Did Alio omit a material fact?

[130] The second question is whether Alio omitted a material fact in the March 19 News Release.

[131] I accept that the expected weak Q1 production was a material fact that Alio was required to disclose on a periodic basis. I am also satisfied that Alio complied with its disclosure obligation when Alio issued the February 21 News Release. Once that disclosure was made, there was no need for Alio to disclose this information again in the March 19 News Release.

[132] To that end, the March 19 News Release must be read as a whole and in its proper context. The release was issued to announce the proposed Arrangement Agreement and to describe the anticipated benefits of combining Alio and Rye Patch. The impugned statement contained in the March 19 News Release referred to expected production by the combined entity. It expressly stated that the 2018 production estimate was based on analyst consensus. The release also contained a cautionary note concerning forward-looking statements and warned readers not to place undue reliance upon them.

[133] Further, by the time of the March 19 News Release, Alio had publicly disclosed its actual 2017 production results. It had also disclosed that first quarter 2018 production was expected to be the lowest quarter of the year. The market was therefore not being presented with an unqualified picture of operational success.

[134] After having regard to all the evidence in this case, I am unable to conclude that Alio omitted any material facts in the March 19 News Release.

iii. Was there a material change in Alio's operations by the date of the impugned statement that Alio was required to, but did not, disclose?

[135] I now turn to whether there was a material change in Alio's operations by March 19, 2018, that Alio failed to disclose.

[136] The Plaintiff argues that there was a change to the objective basis for the guidance and that the change was material because it would reasonably be expected to have a significant effect on the market price or value of Alio's securities. Thus, Alio was obliged to disclose this change on March 19 and Alio was obliged to, but failed to, correct the guidance when the objective basis for it had changed. I cannot accede to these arguments.

[137] Applying the two-step approach described in *Lundin*, the Plaintiff must first establish that there was a change in Alio's business, operations, or capital, and must then establish that the change would reasonably be expected to have a significant effect on the market price or value of Alio's securities: *Lundin* at para. 44. If the Plaintiff can show both of these things, then the question turns to whether Alio failed to disclose this material change. The Plaintiff has failed to establish any of these components.

[138] First, the evidence does not establish that, by March 19, there had been a change in Alio's business, operations, or capital. Alio had not altered its mining strategy, abandoned the dual cut-off approach, revised its annual production guidance, suspended any significant aspect of the mine's operations, or adopted a different production plan.

[139] The Plaintiff argues that *Lundin* stands for the proposition that when assessing whether a change in business has occurred, the court should adopt a more flexible approach. Since the purpose of a material change disclosure is to address the existence of information asymmetry between the market and the issuer, the Plaintiff submits that the focus of the court's analysis should be on whether

information asymmetry continued to exist due to the issuer's failure to make a disclosure.

[140] I do not accept that submission. *Lundin* clearly sets out a two-step approach. If the Court intended the focus of that analysis to be on the presence of information asymmetry it would have incorporated that factor into the approach.

[141] Second, although Alio was experiencing production shortfalls, including failing to meet its monthly targets, the Plaintiff has not established that these shortfalls amounted to a material change. The Plaintiff argues that a failure to meet its targets affected Alio's ability to meet guidance and to generate capital, amounting to a material change that would reasonably be expected to have a significant effect on the market price or the value of Alio's securities.

[142] However, the evidence does not establish that the shortfalls had, by March 19, displaced the foundation for the annual guidance or that Alio had concluded that the guidance could no longer be achieved. Management believed that they would still be able to meet their annual guidance despite a slow start to the year.

[143] In *Kerr* at para. 47, the Court held that disappointing intra-quarterly results did not themselves constitute a material change:

> It almost goes without saying that poor intra-quarterly results may *reflect* a material change in business operations. A company that has, for example, restructured its operations may experience poor intra-quarterly results because of this restructuring, but it is the restructuring and not the results themselves that would amount to a material change and thus trigger the disclosure obligation. Additionally, poor intra-quarterly results may motivate a company to implement a change in its business, operations or capital in an effort to improve performance. Again, though, the disclosure obligation would be triggered by the change in the business, operations or capital, and not by the results themselves.

[144] The same distinction is important here. The fact that production results were disappointing prior to the March 19 News Release does not, without more, establish that there had been a material change in Alio's business, operations, or capital.

[145] The Plaintiff attempts to distinguish this case from *Kerr* by arguing that Alio made multiple representations maintaining production guidance, whereas in *Kerr*, the forecast was a singular representation in the company prospectus. The distinction raised by the Plaintiff does not materially affect the application of *Kerr* to the case at bar.

[146] The Plaintiff's position ultimately rests on the proposition that, because certain internal information reflected operational challenges at the San Francisco Mine, Alio was required to abandon its production guidance before announcing the Arrangement Agreement. I do not accept that proposition. The contemporaneous record demonstrates that management was aware of the challenges, had a strategy to address them, sought assurance that the production guidance remained reasonable, and continued to evaluate operational data as it became available.

[147] The Plaintiff's analysis also relies heavily on hindsight. Much of the force of the Plaintiff's argument derives from what is now known to have occurred after March 19 and, ultimately, after the August 10 Disclosure. The issue before the Court, however, is whether the March 19 Representations were misleading when they were made. On the evidence before me, they were not.

[148] I therefore answer Common Issue 1 and Common Issue 2 in the negative insofar as they relate to the March 19 News Release. The Plaintiff has failed to establish that the March 19 News Release contained representations that were untrue, inaccurate, or misleading, or that Alio omitted material facts or material changes necessary to prevent the statements made from being misleading. The Plaintiff has also not established that, as of March 19, Alio was required to publicly correct its prior representations concerning anticipated 2018 production.

[149] In light of my answers to Common Issues (1) and (2), it is unnecessary to provide the particulars contemplated by Common Issue 3, in relation to the March 19 News Release.

3. April 11 News Release

[150] I now turn to the April 11 News Release.

a) Surrounding Circumstances

[151] Between March 19 and April 11, 2018, Alio continued to receive operational data concerning the performance of the San Francisco Mine. In particular, management received additional information regarding gold production, leach pad performance, anticipated ounce recovery, and the implementation of the dual cut-off strategy.

[152] The first quarter of 2018 concluded on March 31, 2018, at which point management was in a position to assess actual production results for the quarter.

[153] By early-April, Alio management understood that:

a) Q1 production was weak;

b) the guidance challenge was real; and

c) achieving annual guidance would require stronger subsequent quarters.

[154] On April 11, 2018, Alio publicly disclosed its first quarter production results. In doing so, Alio advised the market that: (a) the San Francisco Mine had produced 17,624 ounces of gold during the first quarter; (b) management had anticipated that the first quarter would be the weakest production quarter of the year because of the implementation of the dual cut-off strategy; and (c) Alio nevertheless continued to maintain its previously announced guidance of between 90,000 and 100,000 ounces of gold for 2018.

[155] The Plaintiff submits that these representations were false because, by April 11, Alio possessed information demonstrating that its production guidance was no longer achievable. The Plaintiff relies on, among other things, the production shortfalls experienced during the first quarter of 2018, internal forecasts and communications, and contemporaneous operational reporting.

[156] In particular, the Plaintiff relies upon a series of internal emails exchanged in late March and early-April 2018.

[157] In his email of March 23, 2018, Mr. McCunn appears to be suggesting that Alio consider changing its production measurement methodology, by including in-circuit carbon inventory in the measurement, to try to get the numbers above the minimum target of 18,000 ounces.

[158] The matter is discussed more fully during an April 6–9, 2018, email exchange.

[159] On April 9, 2018, Alio's Executive Vice President and CFO, Colette Rustad, prepared two versions of a press release – with and without the in-circuit carbon inventory being incorporated. She stated that it was "not [our] collective preference" to include the in-circuit carbon inventory because of the timing and the "pending Rye-Patch transaction".[32]

[160] Another executive, Lynette Gould, agreed with Ms. Rustad's approach, and wrote:

> … I don't think we should include the in-circuit inventory. From a market perspective given this is a low quarter it will seem unusual that all of a sudden we decide to include this metric and looks like we are just trying to boost our numbers.

[161] Mr. Westwood expressed the view that it may not be necessary to "mention the change of production measurement point" because: (a) of the small impact that it would have in the overall annual production numbers (700 ounces over a year's production of 90,000 to 100,000); and (b) that it was "just a[n] immaterial technical alignment to a practice that is widespread and commonly accepted".

[162] Ms. Gould disagreed, and noted the importance of distinguishing between quarterly figures and year-end figures when considering whether the impact would be material:

> I would think we would have to mention it, while I agree on a full year basis its not material from a quarter basis it would be. We said 20% of our production would come in the first quarter which equates to 19koz if we take the halfway point, 18k if we expect to achieve the low-end of guidance. We are below the low-end and by adding those 700 oz we would take us over the low-end which is a material difference if we were already over the low-end I wouldn't have considered it material.

[32] Hamilton Aff. #3 at p. 482, Exh. V.

[163] Mr. Westwood came around to Ms. Gould and Ms. Rustad's way of thinking, and ultimately Alio decided not to change the production measurement methodology.

[164] The Plaintiff also relies on emails between Mr. McCunn and Paul Hosford.

[165] On April 4, 2018, Mr. McCunn stated the following in an email to Mr. Hosford:

> … Ideally if there is an adjustment needed to guidance we would like to make it with the production news release next Tuesday. We were hoping that you would have it finalized this week.
>
> If that is not feasible then we will just have to keep working on the plan and modify guidance when we have better clarity.…

[166] On April 5, 2018, Mr. Hosford wrote to Mr. McCunn:

> We're just getting to understand what's driving the discrepancies to date and to understand what that means for the current mine plan and forecast. If we stay with the current mine plan, the forecast will very likely be lower. If we consider rejigging the mine plan to try make up the production, that will take some time to run to ground.[33]

[167] Mr. McCunn responded on the same day:

> … I understand and support the rejigging! I think given where we are at, we will stay silent on guidance next week and let's do the work required to get on top of this and make a viable plan.

[168] The Plaintiff argues that if management, by its own admission, needed to make a "viable plan" on April 5, then it did not have a reasonable basis to maintain confidence in the guidance of 90,000 to 100,000 ounces.

[169] Finally, on April 10, 2018, Mr. McCunn wrote to Alio's directors and stated in part, the following: [34]

> …
>
> Generally San Francisco is continuing to struggle to get higher grade ore to the crusher. We had a full technical delegation down at site last week and Paul Hosford is leading the charge on getting a profitable business plan together for the next 12 months (our Q2 2018 forecast 3+9). We will review this plan with the board on May 8th. The flash report for March for San Francisco that supports the production release is also attached.

[33] Hamilton Aff. #3 at p. 124, Exh. L.
[34] Hamilton Aff. #3 at p. 524, Exh. BB.

…

[170] The email acknowledged that the San Francisco Mine continued to struggle to deliver higher-grade ore to the crusher and that management was undertaking further work on its 3+9 forecast and business plan.[35]

[171] The Plaintiff submits that these emails, viewed together with the weak first quarter production results, demonstrate that Alio knew that its previously disclosed production guidance could no longer be achieved. Consequently, the Plaintiff argues that the decision to maintain guidance rendered the April 11 Representations misleading.

b) Analysis

[172] I now turn to the analysis of Common Issues 1 to 3 in relation to the April 11 News Release.

i. Was there a misleading statement in the impugned document?

[173] The first question is whether there was a misleading statement in the April 11 News Release concerning Alio's projected gold production for 2018.

[174] I accept that Alio management had significant concerns by early-April. The email exchanges show that management was questioning aspects of the existing mine plan, considering whether revisions were required, and assessing whether guidance should ultimately be revised.

[175] The Plaintiff argues that the emails reveal an effort to mislead the public about Alio's production results. I do not agree with that characterization.

[176] The internal discussion, regarding incorporating in-circuit carbon inventory into Alio's production measurement methodology, reveals that the issue was openly

[35] Mr. McCunn explains that the 3+9 forecast is "a twelve-month rolling annual plan, with three months of detailed mine planning, metallurgical accounting and inventory modelling and nine months of more high level planning" which is used for medium term integration planning: McCunn Aff. #1 at para. 37.

debated, investor-perception concerns were identified, and management considered how the change might be viewed by the market and by Rye Patch.

[177] When viewed as a whole, the discussion indicates that Alio management openly discussed a different reporting methodology and then rejected it because they did not want to report results that could be seen as misleading.

[178] Even if the emails about in-circuit carbon inventory are taken at their highest for the Plaintiff, they do not establish that Alio actually reported inflated production figures. The proposal to report in-circuit carbon inventory was ultimately rejected. The production result disclosed in the April 11 News Release was reported using the existing methodology.

[179] The April 4–5 email exchange between Mr. McCunn and Mr. Hosford also does not support the Plaintiff's position. The April 4–5 emails show that Alio management was actively considering whether to revise the guidance, had not yet concluded that a revision was necessary, was awaiting further information, and was assessing whether a revised mine plan could support the forecast. At best, they show that management had serious concerns about the viability of the plan to address the shortfalls and needed time to consider how to address them.

[180] Mr. McCunn's April 10, 2018, email to the board is consistent with that reading. Read as a whole, the email does not demonstrate that management had concluded annual guidance was unattainable. To the contrary, Mr. McCunn advised the board that management remained confident that the Q2 forecast was achievable and that they were continuing to review operational challenges. In my view, the email is evidence that senior management still believed the operational issues could be addressed to maintain production guidance.

[181] Furthermore, I disagree with the Plaintiff that the absence of a finalized 3+9 plan by early-April establishes that guidance lacked a reasonable basis. The evidence shows ongoing planning, investigation, and forecasting, including forecasts that remained within guidance.

[182] The Plaintiff's grievance is with management's decision to continue believing that production issues could be addressed. While that judgment ultimately proved to be wrong, it was not outside the range of reasonable judgments available at the time.

[183] The following comments at para. 55 of *Kerr* are particularly apt in this case:

> … If, contrary to my view, a disclosure obligation had arisen as the appellants contend, management would have been required to disclose the fourth quarter slump in sales but management could have announced with confidence that in its business judgment the forecast would nevertheless be met by the company's financial year end. Potential investors would have the current facts and might accept or not management's business judgment about the future outcome …

[184] This is what occurred here. Alio management disclosed the disappointing results in the first quarter but maintained that the forecast would nevertheless be met by the financial year-end. Armed with this information, and the cautionary note concerning forward-looking statements, it was up to potential investors or Rye Patch shareholders to decide whether they were willing to accept management's business judgment about that future outcome.

[185] The internal emails do not establish an intention to mislead the market. More importantly, they do not materially advance the Plaintiff's argument that guidance lacked a reasonable basis.

[186] After considering all the evidence before me, I am of the view that the Plaintiff has failed to establish that the April 11 Representations were untrue or misleading when made.

ii. Did Alio omit a material fact?

[187] I also do not agree that Alio omitted a material fact from the April 11 News Release concerning projected 2018 gold production.

[188] The April 11 News Release expressly disclosed the very fact upon which much of the Plaintiff's claim rests: namely, that first quarter production was only 17,624 ounces. It also disclosed that Q1 was expected to be the weakest quarter of

the year, that implementation of the dual cut-off strategy had affected production, and that the average grade fed to the crusher was below expectations.

[189] The Plaintiff has not identified a further material fact whose omission made the April 11 Representations misleading. To the extent that the Plaintiff says Alio should have disclosed internal debates, concerns, and unresolved operational issues, I do not accept that submission. Internal discussions and competing views within management need not be disclosed merely because they occur. The question is whether the undisclosed information was necessary to make the statements made not misleading. In this case, that was not necessary.

[190] I conclude that Alio did not omit a material fact from the April 11 News Release.

iii. Was there a material change that Alio was required to disclose?

[191] The final question is whether, by April 11, 2018, a material change had occurred which Alio was required to disclose. For many of the same reasons set out in the analysis related to the March 19 News Release, I conclude that there was not.

[192] Although management was actively evaluating whether changes to the mine plan were required, the evidence does not establish that any material change had actually occurred by April 11.

[193] As *Lundin* explains, a material change generally requires more than ongoing internal deliberations and management discussions: at para. 59. Likewise, as *Kerr* demonstrates, disappointing interim results do not themselves constitute a material change: at para. 47.

[194] The Plaintiff asserts that management should have reduced guidance once the 2018 Q1 results were in. Even if I was to agree with this proposition, in the absence of a management view that the guidance could not be met, what revised guidance could reasonably have been provided at that time? Management was still of the view that its production guidance was achievable. There is insufficient basis to

conclude that this judgment was unreasonable or outside the range of reasonable options.

[195] As with the March 19 Representations, much of the Plaintiff's argument depends upon hindsight. The fact that Alio ultimately revised its guidance on August 10, 2018, does not establish that management lacked a reasonable basis for maintaining that guidance on April 11, 2018.

[196] I conclude that the Plaintiff has failed to establish the existence of a material change requiring disclosure as of April 11. Accordingly, I answer Common Issue 1 and Common Issue 2 in the negative insofar as they relate to the April 11 News Release.

[197] In light of those conclusions, it is unnecessary to provide the particulars contemplated by Common Issue 3, in relation to the April 11 News Release.

4. April 18 Information Circular

[198] I now turn to the April 18 Information Circular.

a) Surrounding Circumstances

[199] Following the April 11 News Release, management continued to review operational performance at the San Francisco Mine and to monitor the mine's ability to achieve its production objectives for 2018. Internal discussions concerning production forecasts and future operational performance also continued during this period.

[200] By mid-April 2018, management had identified two principal issues. First, the ore being mined was of a lower grade than anticipated. Management attributed this to mining at the perimeter of the ore body rather than its higher-grade core, together with dilution issues that it believed were improving through changes to blasting and loading practices. Management expected these grade issues to improve in Q2 as mining advanced into the heart of the ore body. Second, fewer tonnes of ore were mined, crushed, and placed on the leach pads than anticipated, which management

attributed largely to maintenance on the jaw crusher during March. Management expected that issue to improve once the maintenance work was completed.[36]

[201] These conclusions were reflected in the March 2018 Operations Report (“March 2018 Report”) released to the board in mid-April.

[202] The March 2018 Report also recorded that dilution had improved following increased operational oversight, and that Alio had implemented additional mitigation measures, including an infill drilling program to improve confidence in the block model; continued review of blasting and loading practices; and ongoing efforts to optimize costs. At the same time, work on an updated second quarter forecast remained ongoing and had not yet been finalized.

[203] Based on the information then available, Alio's mid-April forecast projected annual 2018 production of approximately 95,865 ounces of gold. This remained within the company's publicly disclosed guidance range of 90,000 to 100,000 ounces.

[204] On April 18, 2018, Alio issued its information circular. By this stage, the parties had entered into the Arrangement Agreement, reciprocal due diligence had been completed, and preparations were underway for the shareholder approval process. Rye Patch's special committee had previously recommended the proposed transaction, and the Rye Patch board had approved it.

[205] The April 18 Information Circular was prepared in connection with the proposed Arrangement and was intended to provide shareholders with information concerning Alio, the proposed transaction, and the anticipated benefits of the combined company. It incorporated many of the themes previously communicated in the March 19 News Release, including expected production, anticipated cash flow generation, and the proposed strategic benefits of combining Alio and Rye Patch.

[36] McCunn Aff. #1 at paras.150–151.

[206] The Plaintiff alleges that the April 18 Representations were misleading for substantially the same reasons advanced in relation to the March 19 and April 11 News Releases.

b) Analysis

[207] I will now address Common Issues 1 to 3 in relation to the April 18 Information Circular.

i. Was there a misleading statement in the impugned document?

[208] The first question is whether there was a misleading statement in the April 18 Information Circular concerning Alio's projected gold production for 2018.

[209] The Plaintiff argues that by April 18, Alio knew or ought to have known that there was no reasonable basis for continuing to represent that the combined company was expected to produce approximately 165,000 ounces of gold in 2018, or that significant waste stripping at the San Francisco Mine would support a planned increase in production to 90,000 to 100,000 ounces. By April 18, Alio knew the first quarter production result, knew that production at the San Francisco Mine had fallen below budget, and knew that management was continuing to assess the mine plan and the 3+9 forecast. The Plaintiff submits that, in these circumstances, the April18 Information Circular conveyed a misleading picture of Alio's production prospects and the benefits of the Arrangement. I disagree with the Plaintiff.

[210] I accept that the April 18 Information Circular must be assessed carefully because it was issued in connection with a shareholder vote on the proposed Arrangement. It was not merely a routine operational disclosure: it formed part of the information provided to shareholders in connection with a significant corporate transaction.

[211] However, I am not satisfied that the April 18 Information Circular contained a misleading statement concerning Alio's projected 2018 gold production. By April 18, the market (which includes Rye Patch shareholders and management) had already been informed of the low first quarter production results and had been told that Alio

nevertheless maintained its annual production guidance. The April 18 Representations must be read against that existing disclosure record.

[212] I also consider it significant that, by mid-April 2018, Alio's internal review had identified explanations for the first quarter shortfall. Management also expected improvement.

[213] The March 2018 Report recorded that production was below budget, but it also recorded management's view that under-reconciliation in March was expected to reverse in the second quarter when mining moved into the higher-grade central portions of Phase 5. The March 2018 Report further noted that recoveries were trending toward budgeted rates and that dilution had improved following increased operational oversight. Nevertheless, management's forecast still projected annual production of roughly 95,865 ounces, which was within guidance.

[214] The evidence therefore does not establish that, by April 18, Alio management had concluded that annual guidance was unattainable.

[215] It is important to note that a forecast is not transformed into a misrepresentation merely because the forecast is not ultimately achieved: *PD Management Ltd. v. Chemposite Inc*., 2006 BCCA 489 at paras. 13–14, citing *MacMillan v. Kaiser*, 2003 BCSC 672; *Kerr* at paras. 50–51.

[216] The Plaintiff submits that the work on the updated forecast shows that Alio had no reliable plan in place when the April 18 Information Circular was issued. I disagree with that characterization. The fact that management was refining the forecast and continuing to review the mine plan does not establish that the existing guidance lacked a reasonable basis. As the evidence indicates, mine plans and production forecasts are routinely reviewed and updated as new operational information becomes available. The question is not whether further planning work remained to be done, but whether the evidence establishes that management no longer had a reasonable basis for maintaining the guidance.

[217] The evidence available by mid-April, supports the conclusion that management still had a reasonable basis for maintaining guidance when the April 18 Information Circular was issued. It was informed by Alio's own internal reviews and relied on the substantial expertise of Alio's board, management, and technical team, which included Qualified Persons as defined by National Instrument 43-101, *Standards of Disclosure for Mineral Projects* ("NI 43-101"), who conducted ongoing assessments of Alio's anticipated gold production until the Arrangement completed.

[218] While the April 18 Representations can be characterized as being optimistic, the evidence does not establish that they were misleading when made. I accept that at this point, Alio faced real operational challenges and that management was concerned about those challenges. I do not accept that those concerns had displaced the foundation for the production guidance or rendered the April 18 Information Circular misleading.

[219] I therefore conclude that the Plaintiff has failed to establish that the April 18 Representations were untrue, inaccurate, or misleading when made.

ii. Did Alio omit a material fact?

[220] The next question is whether Alio omitted material facts from the April 18 Information Circular concerning projected 2018 production.

[221] I agree that the April 18 Information Circular was an important disclosure document that requires careful treatment. However, I am not satisfied that Alio omitted a material fact whose absence made the April 18 Representations misleading.

[222] The Plaintiff again seems to suggest that Alio should have disclosed the internal concerns reflected in the April emails and operational reports. I do not accept that submission. The adverse facts at the centre of the Plaintiff's theory were not concealed in their essential form. What remained undisclosed were internal discussions about how management was assessing those issues and whether further planning work would support the guidance. Those internal deliberations did not render the April 18 Representations misleading, particularly because Alio had

already disclosed their low Q1 results and the contemporaneous annual forecast remained within guidance.

[223] I therefore conclude that Alio did not omit a material fact from the April 18 Information Circular the absence of which made it misleading.

iii. Was there a material change in Alio's operations by the date of the impugned statement that Alio was required to, but did not, disclose?

[224] The final question is whether, by April 18, 2018, there was a material change in Alio's business, operations, or capital that Alio was required to disclose. Applying the two-step approach described in *Lundin*, I am not satisfied that the Plaintiff has established either component.

[225] The fact that management was working on a revised or updated plan does not, by itself, constitute a material change.

[226] The evidence establishes that Alio was confronting operational challenges. It does not establish that, by April 18, there had been a change in Alio's business, operations, or capital of the kind contemplated by the *Securities Act*. Nor does it establish that any such change would reasonably be expected to have a significant effect on the market price or value of Alio's securities.

[227] I therefore conclude that the Plaintiff has failed to establish the existence of a material change requiring disclosure as of April 18, 2018.

[228] Accordingly, I answer Common Issue 1 and Common Issue 2 in the negative insofar as they relate to the April 18 Information Circular.

[229] In light of these conclusions, it is unnecessary to provide the particulars contemplated by Common Issue 3, in relation to the April 18 Information Circular.

5. Events Between April 18 and May 25, 2018

[230] Common Issue 2 requires me to consider whether Alio failed to publicly correct its prior representations concerning projected 2018 production, in the period between April 18 and May 25, 2018, when the Arrangement completed.

[231] The evidence establishes that Alio continued to monitor production performance at the San Francisco Mine after April 18. Management remained concerned about production results and continued to assess the mine plan, the 3+9 forecast, and mitigation measures directed at grade, dilution, crusher performance, and reconciliation issues. However, there is no indication that during this period, Alio concluded that its annual production guidance was no longer achievable.

[232] On May 8, 2018, Alio's board considered the 2018 guidance. Based on the information then available, including the existing second quarter forecast, the mitigation efforts undertaken to date, and management's continued monitoring and assessment, Alio determined that no change to guidance was required.

[233] On May 9, 2018, Alio issued a news release reporting its first quarter results and again maintained its 2018 guidance. The scientific and technical information in that disclosure relating to the San Francisco Mine was reviewed and approved by a Qualified Person under NI 43-101. This does not make the guidance immune from scrutiny, but it is relevant to whether the Plaintiff has shown that Alio lacked a reasonable basis for maintaining guidance during this period.

[234] The Plaintiff relies on the fact that April and May production continued to fall below budget. I accept that those results were disappointing and that they increased the challenge associated with meeting annual guidance. However, for the reasons already discussed, disappointing interim results do not, without more, establish either that guidance had become misleading or that a material change had occurred. The Plaintiff has not established that, between April 18 and May 25, Alio made any changes to its business or operations at the San Francisco Mine that required disclosure.

[235] I am therefore not satisfied that Alio omitted a material fact or material change between April 18 and May 25, 2018, that required public correction of its prior representations concerning anticipated 2018 production. Common Issue 2 is answered in the negative for the period between April 18 and May 25, 2018.

6. Cumulative Impact

[236] Having considered each impugned disclosure individually and the period up to completion of the Arrangement, I now turn to the Plaintiff's cumulative submission.

[237] The Plaintiff argues that even if the impugned representations are not misleading on their own, they become so when viewed cumulatively. Together, they are said to have conveyed a misleading picture of Alio's ability to achieve its production guidance. I do not agree with that assertion.

[238] The cumulative record shows that Alio was experiencing operational challenges, that management was concerned about those challenges, and that there were internal discussions about whether the existing mine plan and forecast would support annual guidance. However, the same record also shows that management was investigating the causes of the shortfall, identifying operational explanations, implementing mitigation measures, and that they continued to believe that the production shortfall could be addressed.

[239] I accept that management's confidence may have diminished as poor results continued. However, the evidence does not establish that the confidence disappeared or that the guidance had ceased to be reasonably attainable. Alio had already anticipated a weak first quarter and its focus remained on assessing whether the plan was sufficiently robust to meet year-end guidance.

[240] The Plaintiff's cumulative argument also does not overcome the fact that Alio disclosed the most important adverse production information before the Arrangement was completed. The market was told first quarter production was expected to be the lowest quarter of the year. It was then told on April 11, 2018, that actual first quarter production was 17,624 ounces, and that management nevertheless maintained annual guidance.

[241] I am not satisfied that the accumulation of internal concerns amounted to a material change. Before May 25, 2018, Alio was continuing to investigate, refine, and implement its existing operational strategy, it was not changing its business or operations.

[242] The Plaintiff's theory effectively imposes a duty to update the guidance whenever management received adverse information. *Kerr* rejects such a broad duty: at para. 51. Management was entitled to continue assessing the information and exercising its judgment unless and until the circumstances gave rise to a disclosure obligation.

[243] I also do not accept that the cautionary language in the disclosures is irrelevant. Cautionary language cannot cure a statement that is otherwise false or misleading. However, the presence of cautionary language forms part of the context in which the forward-looking statements were made. The disclosures advised readers that actual results could differ materially from projected results and identified the production and operational uncertainty that exists, and which later materialized.

[244] The fact that Alio ultimately revised its guidance on August 10, 2018, does not alter my conclusion. In fact, it reinforces it.

[245] Much of the force of the Plaintiff's cumulative argument derives from events that occurred after the Arrangement completed. The Plaintiff effectively reasons backwards from the August 10 Disclosure and the subsequent market reaction and invites the Court to conclude that management must have known months earlier that the guidance lacked a reasonable basis. In my view, that approach overlooks the significantly different operational and financial circumstances that existed by August 2018.

[246] The August 10 Disclosure cannot be viewed as a simple correction of information that management already possessed during the period of the Alleged Misrepresentations.

[247] The evidence establishes that the August 2018 reduction in guidance and the decision to temporarily suspend spending on the Ana Paula Project followed approval of a new interim mine plan on August 8, 2018, several months after the Arrangement had completed. By that time, Alio had assumed control of Rye Patch's operations and was confronting operational challenges at the Florida Canyon Mine that were not fully understood before closing. Alio was also dealing with declining gold prices, a substantial cash injection into the Florida Canyon Mine, and financing constraints arising under its renegotiated credit arrangements. These post-closing developments were part of the factors that led to the revised guidance and suspension of work on the Ana Paula Project. There is no evidence that these later developments were known, or reasonably knowable, when the March 19 News Release, the April 11 News Release, or the April 18 Information Circular were issued.

[248] Accordingly, viewing the impugned disclosures both individually and cumulatively, I conclude that the Plaintiff has not established that Alio made representations concerning projected 2018 gold production that were untrue, inaccurate, or misleading, or that Alio omitted material facts or material changes necessary to prevent those statements from being misleading.

[249] I therefore answer Common Issue 1 in the negative. I also answer Common Issue 2 in the negative. In light of those answers, it is unnecessary to provide the particulars contemplated by Common Issue 3.

C. Negligent Misrepresentation

[250] Given my conclusion that the Plaintiff has not established actionable misrepresentations or omissions, it is unnecessary to address the remaining elements of fraudulent or negligent misrepresentation.

[251] However, in the event I am wrong in my conclusions on Common Issues 1–3, I will address the Plaintiff’s fraudulent and negligent misrepresentation claims, in the alternative. I will begin with the negligent misrepresentation claim first because it is the lower-threshold claim.

[252] The following elements must be established to prove a claim for negligent misrepresentation:

a) there must be a duty of care based on a "special relationship" between the parties;

b) the representation in question must be untrue, inaccurate, or misleading;

c) the representor must have acted negligently in making the misrepresentation;

d) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and

e) the reliance must have been detrimental to the representee in the sense that damages resulted.

> (*Dhami v. Bath*, 2014 BCSC 751 at para. 76, citing *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110, 1993 CanLII 146 (S.C.C.) and *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, 1997 CanLII 345 (S.C.C.)).

[253] Issues of reliance, causation, and loss are common to both negligent and fraudulent misrepresentation. However, fraudulent misrepresentation requires the additional elements of knowledge of falsity or recklessness, and fraudulent intention: *Wang v. Shao*, 2018 BCSC 377 at para. 196, citing *Hamilton v. Callaway*, 2016 BCCA 189 at para. 25 and *Van Beek v. Dodd*, 2010 BCSC 1639 at para. 42, rev'd on other grounds 2019 BCCA 130, leave to appeal to SCC ref'd, 38704 (14 November 2019).

[254] For the purposes of my alternative analysis, I will assume the following:

a) that Common Issues (1) and (2) have been answered in the affirmative; and

b) that Alio management owed a duty of care to Class Members (Common Issue 11).

[255] On the duty of care issue, I note that this matter is far from straightforward. The Defendant argues that the Plaintiff does not rely on an established category for asserting that there was a duty of care owed to the Class members. Rather the Plaintiff asks the Court to impose a new duty based on the application of the *Anns/Cooper* test. It would be inappropriate for me to resolve this issue given my findings on Common Issues (1) and (2). Consequently, while I have assumed that this duty of care has been established, I have done so without deciding the issue and only for the purposes of this alternative analysis.

[256] I turn then to considering the remaining elements of negligent misrepresentation.

1. Negligence

[257] The Plaintiff submits that Alio acted negligently by maintaining its production guidance at a time when, according to the Plaintiff, there was no longer an objectively reasonable basis for doing so. This argument fails on a number of grounds.

[258] First, the Plaintiff has failed to establish the applicable standard of care. The Plaintiff's negligence theory rests upon the proposition that a reasonably prudent mining company faced with the operational circumstances confronting Alio in the spring of 2018, would have revised or withdrawn its production guidance by March or April 2018.

[259] Decisions concerning production forecasting, mine planning, operational mitigation measures, and annual production guidance (amongst other things), are matters involving specialized mining and technical judgment. To establish the standard of care applicable to a reasonably prudent mining company in Alio’s circumstances, the Plaintiff needed to tender expert evidence addressing these issues. No such expert evidence was provided. Nor did the Plaintiff adduce expert evidence establishing that Alio's conduct departed from accepted industry practice in preparing, maintaining, reviewing, or revising production guidance.

[260] Second, even assuming that such expert evidence was not necessary, the record before me does not show that Alio's conduct fell below the standard of care of a reasonably prudent mining company. For the reasons already discussed in connection with Common Issues 1–3, the evidence establishes that Alio’s management personnel were continually reviewing production data, investigating the causes of production shortfalls, implementing mitigation measures, revising forecasts, and assessing whether annual guidance remained achievable. Management's decisions were informed by ongoing operational reviews, updated forecasts, technical analysis, and information provided by qualified mining personnel.

[261] The Plaintiff’s negligence theory depends substantially on the proposition that, because first quarter results were weak and internal communications reflected concern, a reasonably careful issuer would necessarily have withdrawn or revised guidance. I do not agree. A reasonably careful issuer must assess the information available to it at the time, including both adverse results and management’s operational basis for believing that the results may improve. The internal emails establish that management undertook those reviews and concluded that the guidance should be maintained. On the evidence before me, Alio’s decision to maintain guidance did not fall outside the range of reasonable conduct.

[262] Thus, the Plaintiff’s claim for negligent misrepresentation cannot succeed because it has failed to demonstrate that the Defendant breached the applicable standard of care.

[263] In any event, even if I were wrong on that point, the Plaintiff’s negligent misrepresentation claim would still fail on the issues of reliance, causation, and loss.

2. Reasonable Reliance

[264] Reasonable reliance poses an additional difficulty for the Plaintiff’s negligent misrepresentation claim.

[265] I accept that individual reliance need not be proven in the manner required in ordinary secondary market securities cases. However, the Plaintiff must still

establish a causal link between the Alleged Misrepresentations and the loss alleged on a class-wide basis.

[266] The difficulty is that the Plaintiff has not established the common causal link between the Alleged Misrepresentations, the approval or maintenance of the share exchange ratio, and the loss alleged.

[267] I reject the Plaintiff's submission that the conduct of Rye Patch management and the information it possessed is not relevant to the analysis on reasonable reliance.

[268] This was not a conventional case in which an investor purchased securities in the secondary market after reading a public disclosure. The alleged loss arises from a negotiated Arrangement between two public mining companies. The share exchange ratio was negotiated before the March 19 News Release was issued. The transaction was reviewed by Rye Patch management, its special committee, legal advisors, Capital West, and the board. Rye Patch had access to an independent mining consultant (SRK Consulting), who conducted site visits and authored a report for Rye Patch. Rye Patch also had access to substantial non-public information concerning Alio through reciprocal due diligence, including weekly and monthly operating reports that reflected actual gold production at the San Francisco Mine.

[269] In those circumstances, it is difficult to understand how Class Members could have reasonably relied on the impugned public statements in the manner alleged. Class Members were not operating in an informational vacuum. They had access to substantial non-public information and the Rye Patch board, and special committee were advised by professionals and were assessing the transaction in light of it's own financial and operational circumstances.

[270] The Plaintiff's reliance theory therefore requires the Court to conclude that Rye Patch, its board, its special committee, its advisors, and ultimately its shareholders accepted Alio's public production guidance at face value in evaluating the transaction. The evidentiary record does not support that conclusion.

[271] Nor has the Plaintiff established that Capital West relied on the impugned production guidance in a manner that affected its fairness opinion. The opinion does not identify Alio's 2018 production guidance as a determinative assumption, and the Plaintiff did not adduce direct evidence from Capital West establishing that the opinion would have changed had different disclosure been made.[37]

[272] The same difficulty arises in relation to the Rye Patch board, special committee, and Class Members. The Plaintiff has not proven that those decision makers relied upon the impugned representations in a manner that was reasonable, material, and causative of the decision to recommend or proceed with the Arrangement.

[273] Rye Patch's financial and operational circumstances are also relevant. They bear on whether different disclosure would have affected the transaction, the share exchange ratio, shareholder approval, or the value obtained by the Class Members. The evidence demonstrates that Rye Patch was experiencing liquidity pressures and was actively exploring financing and strategic alternatives during the period leading up to the Arrangement. The Plaintiff has not established that different disclosure concerning Alio's production guidance would have altered the strategic options realistically available to Rye Patch.

[274] I therefore conclude that the Plaintiff has not established reasonable reliance.

3. Causation

[275] The Plaintiff's negligent misrepresentation claim also fails on causation. The Plaintiff must establish that reliance on the Alleged Misrepresentation caused the harm complained of. This requires proof that the Alleged Misrepresentations affected the share exchange ratio or caused Class Members to receive less value than they otherwise would have received.

[276] I accept that, in principle, a misrepresentation affecting the value of shares used as consideration in a share exchange transaction could be capable of causing

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[37] Hamilton Aff. #1 at pp. 486–489.

loss. However, the Plaintiff must establish that the Alleged Misrepresentation in fact caused the loss claimed. It is not sufficient to show only that the Alleged Misrepresentations existed and that Alio's share price later declined following the August 10 Disclosure.

[277] The Plaintiff has not established that causal link. The share exchange ratio was negotiated and agreed upon before the March 19 News Release was issued. The Plaintiff has not established that the March 19 Representations caused the share exchange ratio to be fixed at 0.48 Alio shares for each Rye Patch share. Nor has it established that the April 11 News Release or April 18 Information Circular caused that ratio to remain unchanged.

[278] The broader commercial context in which the Arrangement occurred is also relevant. Alio and Rye Patch did not pursue the Arrangement solely because of Alio's 2018 production guidance. The transaction was driven by a range of strategic, financial, and operational considerations. For Alio, the Arrangement provided an opportunity to diversify beyond the San Francisco Mine and acquire a second producing asset. For Rye Patch, it provided access to a larger and better-capitalized company at a time when Rye Patch was experiencing liquidity pressures and exploring strategic alternatives.

[279] In these circumstances, I am not satisfied that different disclosure concerning Alio's projected 2018 production would have caused the Arrangement to proceed on materially different terms. The evidence does not establish that Rye Patch had a realistic alternative transaction available that would have produced greater value for its shareholders, or that different disclosure would have caused Alio to agree to a different share exchange ratio.

[280] The Plaintiff's causation theory also depends, in part, on the proposition that the Capital West fairness opinion was tainted by the Alleged Misrepresentations. I have already addressed the weakness of this argument. For the reasons already given, the fact that Capital West reviewed Alio's public disclosure record does not, without more, establish that the Alleged Misrepresentations impacted the conclusion of the fairness opinion or that they affected the share exchange ratio.

[281] In assessing causation, it is also important to distinguish between the decline in Alio’s share price following the August 10 Disclosure and the question of whether Class Members suffered loss because of the share exchange ratio agreed to in March 2018. The August 10 Disclosure may provide evidence that the market reacted negatively when Alio revised its guidance and suspended work on the Ana Paula Project. However, that market reaction does not, by itself, prove that the exchange ratio under the Arrangement Agreement would have been different several months earlier.

[282] The Plaintiff must establish several links in the causal chain to succeed: that the statements inflated Alio’s share price; that this affected the share exchange ratio; that different disclosure would have led to different terms or a rejection of the transaction; and that any resulting loss can be measured by reference to the market’s reaction to the August 10 Disclosure. Such evidence is lacking.

4. Loss

[283] I turn to the question of loss. The Plaintiff's theory of loss is that Alio's production guidance artificially inflated the value of Alio shares and thereby caused Rye Patch shareholders to receive less value under the 0.48 exchange ratio than they otherwise would have received. This theory assumes the existence of a counterfactual share exchange ratio that would have been negotiated had different disclosure been made. The evidentiary record does not establish what that ratio would have been, whether the parties would have been able to come to an agreement on this different ratio, or whether the Arrangement would have proceeded on different terms.

[284] The Plaintiff's damages theory also depends heavily on the decline in Alio’s share price following the August 10 Disclosure. By August 10, 2018, however, the market had considerably more information than was available in March, April, or May of 2018.

[285] The evidence establishes, at most, a possibility that the Arrangement might have proceeded differently had different information been disclosed. That is insufficient to prove loss.

[286] The Plaintiff has not established, on a balance of probabilities, breach of the standard of care, reasonable reliance, causation, or loss. The negligent misrepresentation claim therefore fails.

[287] Accordingly, even if Alio owed a duty of care and even if one or more of the impugned statements were negligently made, I would conclude that the Plaintiff has failed to establish negligent misrepresentation.

D. Fraudulent Misrepresentation

[288] Given my conclusions regarding negligent misrepresentation, it is unnecessary to address fraudulent misrepresentation in detail.

[289] For the reasons already given, I find that the Plaintiff has not established reasonable reliance, causation, or loss. Those findings are also fatal to the fraudulent misrepresentation claim.

[290] In any event, fraudulent misrepresentation requires proof of the additional elements of knowledge of falsity (or recklessness) and fraudulent intent: *Wang* at para. 196; *Carom v. Bre-X Minerals Ltd*., [1999] OJ No. 1662 (QL) at para. 71, 1999 CanLII 14794 (O.N.D.C.). The Plaintiff has not established either element.

[291] Given my finding that Alio’s management believed that guidance remained achievable, the evidence does not support an inference that Alio intended to deceive Class Members.

[292] The Plaintiff submits that Alio was motivated to maintain guidance to complete the Arrangement and preserve confidence in its share price. I accept that Alio wished to complete the Arrangement. That does not establish a fraudulent intent. A commercial motive does not, without more, establish an intention to deceive.

[293] The contemporaneous record is not consistent with a fraudulent intention. The in-circuit carbon inventory proposal was debated and rejected. The March and April 2018 email exchanges do not establish that management had abandoned its belief in the guidance while publicly maintaining the opposite position. Instead, they show that management was concerned about the poor production results, investigating their cause, and scrutinizing the annual guidance numbers to ensure that they remained well founded.

[294] I also consider it significant that Alio disclosed information that was adverse to its own interests. The February 21 News Release informed the market that the first quarter was expected to be the weakest quarter of the year. The April 11 News Release disclosed the disappointing first quarter production result and acknowledged that production performance had been affected by operational issues. These disclosures are more consistent with a belief that the guidance remained achievable than with a deliberate effort to conceal adverse information.

[295] Even though management’s belief that guidance remained achievable ultimately proved mistaken, a mistaken belief is not equivalent to an intention to deceive. Accordingly, even if it is assumed that the impugned statements were misleading, the Plaintiff has not established that Alio knew the statements were untrue, inaccurate, or misleading when made, or that Alio was reckless as to their truth.

[296] If it was necessary to decide the issue, I would conclude that the Plaintiff has failed to establish fraudulent misrepresentation.

IV. DAMAGES

[297] Given my conclusions on liability, it is unnecessary to determine damages. I have found that the Plaintiff has not established that Alio made actionable misrepresentations or omissions in the March 19 News Release, the April 11 News Release, or the April 18 Information Circular. I have also concluded, in the alternative, that the Plaintiff has not established the essential elements of negligent or fraudulent misrepresentation.

[298] In those circumstances, no issue of compensatory damages arises. It is therefore unnecessary to resolve the competing expert evidence concerning the quantification of loss or to determine whether damages could be assessed on an aggregate basis.

[299] It is also unnecessary to determine the Plaintiff's claim for punitive damages, first because they were not certified as a common issue, and second, because the underlying claims have not been proven. However, even if it was necessary to resolve that question, I am not satisfied that an award of punitive damages would be appropriate on the evidence before me. The type of deliberate, malicious, high-handed, or reprehensible misconduct that would justify an award of punitive damages, is absent in this case. Thus, even if liability had otherwise been established, I would not have awarded punitive damages.

V. ANSWERS TO THE COMMON ISSUES

[300] **Common Issue 1**: Alio did not make representations that were untrue, inaccurate and/or misleading, and Alio did not omit to state material facts and material changes, pertaining to Alio’s projected gold production for 2018, in Alio’s March 19, 2018, news release, April 11, 2018, news release, and April 18, 2018, information circular.

[301] **Common Issue 2:** Alio did not make an omission of material facts or material changes, by failing to publicly correct its prior representations pertaining to Alio’s projected gold production for 2018, in the period before May 25, 2018.

[302] **Common Issue 3:** Common Issue 3 is moot as the answer to Common Issues (1) and (2) is no.

[303] **Common Issue 4:** Common Issue 4 is moot as the answer to Common Issues (1) and (2) is no. However, in the alternative, I would find that Alio did not make the Alleged Misrepresentations and Alleged Omissions fraudulently.

[304] **Common Issue 5:** Common Issue 5 is moot. However, in the alternative, I would find that Alio did not make the Alleged Misrepresentations and Alleged

Omissions intending to induce Class Members to rely upon them to vote in favour of the Plan of Arrangement, or to not vote to oppose the Plan of Arrangement, and to ultimately tender their Rye Patch shares for Alio shares in the Plan of Arrangement.

[305] **Common Issue 6:** Common Issue 6 is moot. However, in the alternative, I would find that Rye Patch management did not recommend to its shareholders to approve the Plan of Arrangement and accept the shares at the ratio negotiated based on the Alleged Misrepresentations or Alleged Omissions.

[306] **Common Issue 7:** Common Issue 7 is moot as the answer to Common Issues (1), (2), and (6) is no. However, in the alternative, I would find that the shareholders who participated in the Plan of Arrangement cannot be said to have been induced to do so by the Alleged Misrepresentations or Alleged Omissions.

[307] **Common Issue 8:** Common Issue 8 is moot. However, in the alternative, I would find that but for the Alleged Misrepresentations and/or Alleged Omissions, the transaction pursuant to the Arrangement Agreement would have nonetheless occurred at the same share exchange ratio as the one that was negotiated under the Plan of Arrangement.

[308] **Common Issue 9:** Common Issue 9 is moot. However, in the alternative, I would find that the Plaintiff has failed to establish that the Class Members suffered a loss, damage and expense, including, *inter alia*, that the Alio shares used to purchase the Class Members were overvalued as a result of the Alleged Misrepresentations and Alleged Omissions.

[309] **Common Issue 10:** Common Issue 10 is moot as the answer to Common Issues (1) and (2) is no.

[310] **Common Issue 11:** Common Issue 11 is moot.

[311] **Common Issue 12:** Common Issue 12 is moot.

[312] **Common Issue 13:** Common Issue 13 is moot as the answer to Common Issues (1) and (2) is no. However, in the alternative, I would find that the Plaintiff has

failed to establish that Alio breached any applicable standard of care in making the Alleged Misrepresentations and/or Alleged Omissions.

[313] **Common Issue 14:** Common Issue 14 is moot. However, in the alternative, I would find that the management of Rye Patch did not reasonably rely on the Alleged Misrepresentations or Alleged Omissions in agreeing to the exchange of shares ratio in the Arrangement Agreement.

[314] **Common Issue 15:** Common Issue 15 is moot. However, in the alternative, I would find that Rye Patch management did not recommend to its shareholders to approve the Plan of Arrangement and accept the shares at the ratio negotiated based on the Alleged Misrepresentations or Alleged Omissions.

[315] **Common Issue 16:** Common Issue 16 is moot as the answer to Common Issues (1), (2), (14) and (15) is no. However, in the alternative, I would find that it cannot be said that the shareholders who voted in favour of the Plan of Arrangement and/or those who abstained from voting in favour of the Plan of Arrangement but nevertheless still tendered their shares, reasonably relied on the Alleged Misrepresentations and/or Alleged Omissions.

[316] **Common Issues 17 to 21:** Common Issues 17–21 are moot as the answer to Common Issues (1) and (2) is no.

VI. ORDER MADE

[317] The action is dismissed.

“Shergill J.”