File No. 38594

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

9354-9186 QUÉBEC INC. (FORMERLY BLUBERI GAMING TECHNOLOGIES INC.)

9354-9178 QUÉBEC INC. (FORMERLY BLUBERI GROUP INC.)

APPLICANTS
(Respondents)

- and -

CALLIDUS CAPITAL CORPORATION

INTERNATIONAL GAME TECHNOLOGY

DELOITTE S.E.N.C.R.L.

LUC CARIGNAN

FRANÇOIS VIGNEAULT

PHILIPPE MILLETTE

FRANCIS PROULX

FRANÇOIS PELLETIER

RESPONDENTS
(Appellants)

- and -

ERNST & YOUNG INC.

IMF BENTHAM LIMITED

BENTHAM IMF CAPITAL LIMITED

INTERVENERS
(Impleaded Parties)

(Style of cause continues next page)

RESPONSE OF THE RESPONDENTS INTERNATIONAL GAME TECHNOLOGY, DELOITTE S.E.N.C.R.L., LUC CARIGNAN, FRANÇOIS VIGNEAULT, PHILIPPE MILLETTE, FRANCIS PROULX AND FRANÇOIS PELLETIER

(Rule 27 of the *Rules of the Supreme Court of Canada*)

AND BETWEEN:

IMF BENTHAM LIMITED
BENTHAM IMF CAPITAL LIMITED

APPLICANTS
(Impleaded Parties)

- and -

CALLIDUS CAPITAL CORPORATION
INTERNATIONAL GAME TECHNOLOGY
DELOITTE S.E.N.C.R.L.
LUC CARIGNAN
FRANÇOIS VIGNEAULT
PHILIPPE MILLETTE
FRANCIS PROULX
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RESPONDENTS
(Appellants)

- and -

9354-9186 QUÉBEC INC. (FORMERLY BLUBERI GAMING TECHNOLOGIES INC.)
9354-9178 QUÉBEC INC. (FORMERLY BLUBERI GROUP INC.)

INTERVENERS
(Respondents)

- and -

ERNST & YOUNG INC.

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RESPONDENTS' FACTUM

INTRODUCTION

1. The proposed appeal is not about access to justice or the availability of litigation funding generally. It is an attempt to reverse the findings of a unanimous bench of the Quebec Court of Appeal (the "**QCA**") made in a highly fact specific and unusual context. As will be demonstrated below, the decision appealed from[1] (the "**CA Judgment**") does not impair access to justice or depart from well-established principles of insolvency law.

2. Respondents, International Gaming Technololy (IGT), Deloitte s.e.n.c.r.l ("**Deloitte**"), Luc Carignan, François Vigneault, Phillipe Millette, Francis Proulx and François Pelletier are all creditors of Applicants, 9354-9178 Québec Inc. and 9354-9186 Québec Inc. (the "**Debtors**" or collectively, "**Bluberi**") who have formed a group (the "**Creditors' Group**") to be jointly represented in the context of Bluberi's insolvency proceedings (the "**Debtors' Insolvency Proceedings**") under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("**CCAA**").

3. As part of the Debtors' Insolvency Proceedings, Bluberi disposed of all of its assets except for a litigious claim against Respondent Callidus Capital Corporation ("**Callidus**") and others. Since the sale in June 2016, the Debtors are empty shells with debts owing to their creditors ("**Creditors**") and a single remaining asset, being the aforementioned claim. The Debtors have no employees or ongoing operations such that there will be no "*reorganization*" of the Debtors as in a traditional, going concern restructuring[2] and the objective is no longer to avoid the "*social and economic losses resulting from liquidation of an insolvent company*".[3] As Bluberi will never emerge from CCAA protection, the only relevant purpose of these insolvency proceedings is the equitable distribution of the Debtors' last remaining asset to Creditors.[4]

4. The Debtors neglect to mention this reality when, relying on this Court's decision in *Century*, they suggest that the QCA erred in not taking into account "*broader public interest*"

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1 Judgment of the Court of Appeal, 2019 QCCA 171, **Bluberi's Application for Leave to Appeal (hereinafter "B.A.L.A."), vol. 1, pp. 40ff.**
2 *Century Services Inc v. Canada (Attorney General)*, 2010 SCC 60 [*Century*] at para. 60.
3 *Ibid* at para. 70.
4 *Orphan Well Association v. Grant Thornton Ltd*, 2019 SCC 5 at para. 67.

considerations.[5] In fact, the position adopted in this case by the Debtors and by Applicants IMF Bentham Limited and Bentham IMF Capital Limited (collectively, the "**Litigation Funder**"), only serves the private economic interests of the Debtors' shareholder, Mr. Gerald Duhamel (the "**Shareholder**") as well as those of the Litigation Funder itself, all to the detriment of the Creditors, including close to 100 former employees, whose claims remain unpaid since November 2015.

5. It is also quite telling that the Litigation Funder is now taking a primary role in the Debtors' Insolvency Proceedings and is seeking, through the proposed appeal, to avoid its obligation to submit its proposal to Creditors, notwithstanding that they have the primary interest in the asset which is to be realized upon pursuant to such proposal. This conduct should not be sanctioned by this Court on the purported basis of "*access to justice*" principles, which certainly cannot justify the pursuit of lengthy litigation for the benefit of the Litigation Funder and the Shareholder without the requisite approval of Creditors, and without basic disclosure of the financial terms of the proposed arrangement.

6. Ironically, the Applicants invoke access to justice when they seek to impose a strategy that would require Creditors, whose rights have been stayed for more three and a half years already, to continue to be stayed in the hope of receiving payment many years from now, if ever, and only after the Litigation Funder is reimbursed its advances plus a success fee and the Debtors' attorneys are paid contingency fees. The Applicants' position is to force Creditors to assume the risk and delays associated with the proposed scheme without any corresponding upside, as was contemplated in the Debtors' previous proposal, and in a context where they are being offered a path to immediate and substantial recovery.

7. The Creditors' Group, composed of unpaid trade Creditors and former employees of Bluberi, holding claims totalling more than $2,000,000, submits that the first instance decision[6] (the "**SC Judgment**"), which authorized the scheme proposed by the Applicants without Creditor approval, contains numerous reviewable errors justifying the intervention of the QCA. Moreover, the applications for leave to appeal (the "**Leave Applications**") filed by the Debtors and the Litigation

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5 Debtors' Factum, at para. 8, **B.A.L.A., vol.1, p. 41.**

6 *Arrangement relatif à 9354-9186 Québec inc (Bluberi Gaming Technologies Inc) –and Ernst & Young Inc*, 2018 QCCS 1040.

Funder raise no novel or publicly important issues that would warrant re-examining the CA Judgement.

8. The QCA correctly decided, *inter alia*, that creditor approval through a CCAA plan of compromise or arrangement (a "**Plan**") is required to implement the litigation funding arrangement at issue in this case, given the particular context and that the agreement governing the proposed litigation funding[7] (the "**LFA**") takes away the rights of Creditors. In arriving at this conclusion, the QCA considered and applied the decision of the Court of Appeal for Ontario ("**ONCA**") in *Crystallex (Re)*, [8] determining that a different result was warranted in this case. Contrary to the Applicants' submissions, the CA Judgment is compatible with the holding in *Crystallex* and does not serve to create a conflict in the jurisprudence or undermine the CCAA's consistent national application.

9. Furthermore, the QCA's comments regarding the interest of the Litigation Funder being "*akin to an equity investment*" were made in *obiter* and do not threaten the stability of contingency arrangements. These observations by the QCA were clearly not the basis for its decision and are, in any event, in line with the principles governing the characterisation of claims as well as the rule that equity interests are subordinate to the interests of creditors once a debtor becomes insolvent.

10. The Creditors' Group continues to support the filing by Callidus of its Plan[9] (the "**Callidus Plan**"). However, it is false to assert, as the Debtors do, [10] that these Creditors have been "*bought out by Callidus*". The members of the Creditors' Group are not party to any "support agreement" and have always been, and remain open to considering any alternative proposed by Callidus, the Debtors or the Litigation Funder that would further their interests, which must be the focal point of the Debtors' Insolvency Proceedings.

11. Instead of seeking to negotiate with Creditors, the Applicants apply to have this Court re-examine a detailed and reasoned decision of the QCA, thus further delaying Creditor recovery. It is respectfully submitted that Creditors have waited long enough and that no further obstacles

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7 Litigation Funding Agreement dated February 6, 2018, **B.A.L.A., vol. 4, pp. 5ff.**

8 *Re Crystallex*, 2012 ONCA 404 leave to appeal denied: 2012 CanLII 56139 (SCC) [*Crystallex*].

9 New Plan of Compromise and Arrangement dated February 12, 2018, **B.A.L.A., vol. 3, pp. 28ff.**

10 Debtors' Factum, at para. 7, **B.A.L.A., vol.1, p. 65.**

should be erected preventing them from exercising their legal rights relating to the single remaining asset of the Debtors, in accordance with the conclusions of the CA Judgment. It is therefore respectfully submitted, for the reasons set out herein and in the response of Callidus that the Leave Applications should be dismissed.

PART I – STATEMENT OF FACTS

12. While the facts of this case are generally uncontested,[11] the following provides background on the development of the LFA and the Callidus Plan as competing arrangements.

A. The competing alternatives for Creditor recovery

13. The Debtors' Insolvency Proceedings were commenced on November 12, 2015, before the Superior Court of Quebec and Ernst & Young Inc. was appointed as monitor (the "**Monitor**"). In June 2016, following a sale process, Callidus purchased substantially all of Bluberi's assets pursuant to a credit-bid transaction. The Debtors' rights in certain potential litigation against Callidus and others were excluded from the purchased assets (the "**Retained Claims**") and Callidus retained a $3,000,000 portion of its existing secured claim against the Debtors (the "**Callidus Claim**").[12]

14. On September 11, 2017, the Debtors sought the approval of a credit facility to be secured by a $20,000,000 priority charge on the Debtors' assets for the purpose of financing litigation against Callidus and others on the basis of the Retained Claims (the "**Litigation Alternative**"). On September 18, 2017, Callidus contested the Debtors' application, filed a creditor-sponsored Plan (as amended, the "**Initial Callidus Plan**") and requested that a Creditors' meeting be held to vote on such Plan.[13] Deloitte, a member of the Creditors' Group with a proven claim of nearly $500,000, supported the filing of the Initial Callidus Plan as an alternative to the Litigation Alternative but did not commit to voting in favour of such Plan. [14] The Initial Callidus Plan provided for Callidus to make a lump sum contribution totaling $2,630,000 to be distributed to Creditors in consideration of a full and final releases in respect of the Retained Claims. Under this proposed arrangement, accepted

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11 CA Judgment at para. 22, **B.A.L.A., vol. 1, p. 44.**

12 CA Judgment at paras. 28, 30-31, **B.A.L.A., vol. 1, pp. 45-46.**

13 CA Judgment at paras. 32-33, **B.A.L.A., vol. 1, p. 46.**

14 Motion for an Order for the Convening, Holding and Conduct of a Creditors' Meeting and Extension of the Stay Period, September 18, 2017 at paras. 3, 7, 9, **Respondents' Response (hereinafter "R.R."), vol. 1, p. 22.**

claims of the Debtors' former employees and those valued at less than $3,000 would be paid in full, while the other Creditors would recover an average of 31 % of their respective claims.[15]

15. On October 5, 2017, the Debtors filed their own Plan (the "**Debtors' Plan**") for the purpose of soliciting the support of Creditors for the Litigation Alternative. The Debtors' Plan expressly recognized the importance of allowing Creditors to take a position on the Litigation Alternative and provided them with an incentive for approving it in the form of a "*Creditors' Premium*", payable if the proceeds of the litigation exceeded $20,000,000.[16]

16. Prior to and following the filing of competing Plans by Callidus and the Debtors, Michaud, J.S.C. (the "**Supervising Judge**") rendered various orders recognizing the requirement of Creditor approval, which appear in the minutes from the hearings of:

(a) September 19, 2017: "*toutes les parties concèdent que les créanciers doivent avoir l'opportunité de se prononcer sur les plans d'arrangement que soumettront Callidus, les requérantes* [the Debtors] *ou toute autre partie*";[17] and

(b) October 5, 2017: "*les compagnies débitrices, tout comme Callidus, recherchent l'approbation de leur plan d'arrangement par la majorité requise des créanciers* […]" and "*les créanciers seront ultimement les bénéficiaires d'une assemblée où deux plans d'arrangement leur seront soumis pour un vote*."[18]

17. Ultimately, the Debtors withdrew their Plan before the meeting of Creditors such that only the Initial Callidus Plan was submitted for voting.[19] In its report on the Initial Callidus Plan, the Monitor concluded that it was fair and reasonable in the circumstances and recommended its approval by Creditors.[20]

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15 Amended Plan of Compromise and Arrangement dated December 5, 2017, s 2.2, **B.A.L.A., vol. 1, pp. 215-216.**

16 Debtors' Plan, Recital [H], s 4.6, Annexe "A" at paras. 33, 48, 58, **R.R., vol. 2, pp. 251, 60-61 and 69-70**; CA Judgment at para. 34, **B.A.L.A., vol. 1, p. 46.**

17 Minutes of Hearing, September 19, 2017, **R.R., vol. 1, pp. 31ff.**

18 Minutes of Hearing, October 5, 2017, **R.R., vol. 1, pp. 34ff.**

19 CA Judgment at paras. 35-36, **B.A.L.A., vol. 1, pp. 46-47.**

20 Monitor's Report on the Plan of Compromise and Arrangement Proposed by Callidus as Amended on December 5, 2017 dated December 8, 2017 at paras. 27ff, 52, **R.R., vol. 2, pp. 79ff and 84.**

18. The Debtors fail to mention these events from the fall of 2017 in their submissions, which include a detailed statement of facts,[21] notwithstanding that they are highly relevant and informed the decision of the QCA, which held that "[i]*t is incongruous that the* [Debtors] *can now bypass the judge's rationale of the original order, that their funding arrangements for the proposed litigation be submitted as part of a plan to the creditor*s."[22] Curiously, the Litigation Funder also asserts that the Supervising Judge never ordered that the Debtors' Plan be submitted to for a vote.[23]

19. The creditors' meeting held on December 15, 2017 (the "**Creditors' Meeting**") demonstrated strong support for the Initial Callidus Plan with 92 out of 100 Creditors voting in its favour, easily satisfying the majority in number required by the CCAA. However, the required majority of two-thirds in value was narrowly missed as only 59.22 % of eligible votes were cast in support. The Initial Callidus Plan would have been approved but for the vote of one Creditor, SMT Hautes Technologies ("**SMT**"), representing 36.7 % in value of the accepted claims, voting against. The Callidus Claim was not considered or voted at the Creditors' Meeting.[24]

B. The Debtors' Application and the formation of the Creditors' Group

20. On February 6, 2018, the Debtors filed a new application with a view to pursuing the Litigation Alternative (as amended, the "**Debtors' Application**"), seeking, in particular, authorization to enter into the LFA and the constitution of a $20,000,000 super-priority charge on the Retained Claims and any potential proceeds to be derived from the pursuit thereof (the "**Litigation Proceeds**") as security for the Debtors' obligations under the LFA and towards their attorneys (the "**Litigation Financing Charge**").[25] The version of the LFA disclosed to Creditors with the Debtors Application was heavily redacted such that it was impossible to evaluate the impact of the Litigation Financing Charge or the contemplated allocation of the Litigation Proceeds on Creditors.

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21 Debtors' Factum, at paras. 19 and 20**, B.A.L.A., vol. 1, p. 68.**

22 CA Judgment at para. 93, **B.A.L.A., vol. 1, p. 60.**

23 Litigation Funder's Factum, at para. 46, **IMF Bentham's Application for Leave to Appeal (hereinafter "I.A.L.A."), p. 73.**

24 CA Judgment at paras. 37, 83, **B.A.L.A., vol. 1, pp. 47 and 57-58.**

25 *Amended Application for the Issuance of an Order Extending the Stay of Proceedings and for an Order Authorizing Litigation Funding and a Litigation Financing Charge* dated February 15, 2018 at para. 1, **B.A.L.A., vol. 3, p. 81.**

21. Following the filing of the Debtors' Application, the Creditors' Group was officially formed by certain Creditors who had voted in favour of the Initial Callidus Plan. On February 10, 2018, the Creditors' Group advised Callidus that it would support the filing of a new Plan providing for an equal or superior distribution to Creditors and asked that, the legal fees incurred by the Creditors' Group be reimbursed by Callidus, in order to allow the members of the Creditors' Group to receive at least the same recovery. The Creditors' Group did not undertake to vote in favour of any new Plan and confirmed that each of its members would assess all available alternatives individually. The Creditors' Group also suggested that the Callidus' claim be amended such that all or a portion thereof could be voted on the new Plan, without affecting the recovery of the Creditors.[26]

22. On February 12, 2018, the Creditors' Group and Callidus each filed a contestation to the Debtors' Application, as well as a joint application (the "**New Plan Application**") to submit the Callidus Plan to a vote of Creditors. The offer provided for an increased contribution in the amount of $2,880,000, such that the claims of former employees and those valued at less than $3,000 would be paid in full with other Creditors recovering between 35 % and 99 % of their accepted claims.[27] The New Callidus Plan also provides for the reimbursement of the fees of the Creditors' Group, up to $50,000 and subject to implementation of that Plan.[28]

23. On February 14, 2018, the Monitor filed its fifteenth report (the "**Monitor's Fifteenth Report**"), commenting on the Debtors' Application and the New Plan Application and essentially concluding, without making a recommendation, that a solution promoting the interests of all of the Debtors' stakeholders should be implemented and that, in order to realize this objective, certain issues should be determined by the Supervising Judge on a preliminary basis, including how the fees and costs of the Monitor and its counsel would be paid.[29] The Creditors' Group understands that such costs and fees have since then been paid by the Litigation Funder.

C. The judgments of the courts below

24. Following a one-day hearing on February 16, 2018, at which no witnesses testified, the Supervising Judge granted the Debtors' Application, dismissed the New Plan Application and

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26 Letter from M[e] Perreault to M[e] Benoit dated February 10, 2018, **R.R., vol. 1, pp. 148ff.**
27 CA Judgement at paras. 50-51, **B.A.L.A., vol. 1, pp. 49-50.**
28 Callidus Plan at para. 4.7, **B.A.L.A., vol. 3, p. 45.**
29 Monitor's Fifteenth Report dated February 14, 2018 at paras. 81-90, **R.R., vol. 2, pp. 165-167.**

ordered minimal additional disclosure of the terms of the LFA to Creditors. The Creditors' Group respectfully submits that the Supervising Judge committed various clear errors that justified the intervention of the QCA including his determinations that:

(a) the LFA could be authorized without a Plan because Creditors' rights were not being taken away and the Litigation Alternative was the only path to creditor recovery (paras. 69, 72-73, and 91); and

(b) Callidus had conducted itself in a manner that was "*contrary to the purpose of the CCAA*" and its vote on the Callidus Plan would serve an "*improper purpose*" as well as give rise to a "*substantial injustice*" (paras. 38-48, and 55-56).

25. After having granted leave to appeal the SC Judgment,[30] the QCA allowed the appeal on February 4, 2019. In a detailed and well-supported opinion written by Schrager, J.A., the QCA concluded unanimously that:

(a) the scheme contemplated in the LFA is an arrangement under the CCAA that alters creditor rights and thus requires Creditor approval through the filing of a Plan (paras. 87-89); and

(b) Callidus, as a Creditor and plan sponsor, is entitled to vote on the Callidus Plan in the same class as other unsecured Creditors (paras. 74 and 76).

26. The QCA also noted, *in obiter*, that it agreed that the LFA was "*akin to an equity investment*" because of the contingent nature of the stipulated repayment terms.[31]

27. The Creditors' Group was advised in the fall of 2018 that an action had been filed against Callidus and others on the basis of the Retained Claims in which damages of approximately $228 million are being claimed from Callidus and others by the Debtors as well as by the Shareholder and entities controlled by him. The inclusion of these plaintiffs confirms that the LFA and the Litigation Financing Charge serve to benefit the Litigation Funder and the Shareholder, which, in and of itself, should necessitate the approval of the scheme by Creditors, whose rights are being affected.

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30 *Callidus Capital Corporation c. 9354-9186 Québec inc*, 2018 QCCA 632.

31 CA Judgment at para. 90, **B.A.L.A., vol. 1, pp. 59-60.**

28. On May 1, 2019, the QCA granted a stay of execution of the CA Judgment pending the decision of this Court on the Leave Applications.[32]

PART II – QUESTIONS IN ISSUE

29. To complement the questions identified in Callidus' response, the Creditors' Group submits that the proposed appeal raises the following questions:

(a) Does the QCA's finding that the LFA is an arrangement under the CCAA give rise to an issue of public importance justifying an appeal to this Court?

(b) Does the QCA's comment in *obiter* that the LFA is "*akin to an equity investment*" give rise to an issue of public importance justifying an appeal to this Court?

PART III – ARGUMENT

A. The QCA's finding that the LFA is an arrangement under the CCAA does not give rise to an issue of public or national or importance

30. It is respectfully submitted that there is no basis for this Court to revisit the findings of the QCA, including that the LFA was an arrangement within the meaning of the CCAA. In arriving at this conclusion, the QCA considered the particular facts and circumstances of this case, including that:

(a) the Debtors have no remaining commercial operations that would warrant the provision of interim financing (paras. 78 and 87);

(b) the Debtors prepared a Plan to be presented to Creditors for approval, which contemplated financing for the Litigation Alternative (para. 78);

(c) no Creditor approval for the Litigation Alternative could be inferred from the fact that the Initial Callidus Plan did not meet the statutory majorities when 92 out of 100 Creditors voted in favour (para. 83);

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[32] *Arrangement relatif à 9354-9186 Québec inc (Bluberi Gaming Technologies Inc)*, 2019 QCCA 766.

(d) the decision in *Crystallex* is distinguishable given that, in the present case, there are competing alternatives for recovery and Creditors' rights are being taken away (paras. 82, 87 and 88);

(e) in *Crystallex* it was only the actual advances made by the litigation funder and interest accrued on same that benefitted from a priority whereas the success fee ranked subsequent to the ordinary claims (para. 90); and

(f) the implementation of the LFA could serve to prioritize the interests of the Shareholder over those of Creditors (para. 94).

31. The QCA's characterization of the LFA as an arrangement was informed by well-established legal principles and there is simply no merit to the Debtors' suggestion that the CA Judgment "*threatens to destabilize the practice of insolvency law*"[33]. The QCA considered the applicable precedents, including *Crystallex*, and correctly applied them.

i. The CA Judgment and *Crystallex* are coherent

32. Respectfully, the Litigation Funder is wrong in asserting that as a result of the CA Judgment, "*the reasoning of the Ontario and Quebec courts of appeal as to what constitutes a plan of arrangement are fundamentally irreconcilable*."[34] While these two courts arrived at different results in cases involving litigation funding, their holdings are compatible and together establish a framework for determining when litigation funding requires the approval of creditors through a Plan and when it does not. Both the QCA and the ONCA are in full agreement that an insolvency scheme is an arrangement if it results in the rights of creditors being taken away or compromised.

33. As recognized by the QCA,[35] the court in *Crystallex* confirmed the supervising judge's determination that the litigation funding at issue was not an arrangement because "*it did not compromise the terms of* [the creditors'] *indebtedness or take away any of their legal rights*."[36] This

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33 Debtors' Factum, at para. 57, **B.A.L.A., vol. 1, p. 82.**

34 Litigation Funder's Factum, at para. 35, **I.A.L.A., p. 70**. The Debtors make similar assertions in their Factum at paras. 57-58, **B.A.L.A., vol. 1, p. 82.**

35 CA Judgment at para. 81, **B.A.L.A., vol. 1, p. 57.**

36 *Crystallex CA* at para. 93.

conclusion is not surprising given that under the terms of the litigation funding in *Crystallex,* creditors' rights were adequately protected. For instance, the litigation funder in that case was granted a charge priming the unsecured creditors' claims only for the amounts it actually advanced, plus 10 % interest.[37] All other amounts that the funder could recover, representing 35 % of the litigation proceeds, were subject to the repayment in full of the unsecured creditors plus interest of up to 15 % per annum.[38] Moreover, a charge was granted in favour of the unsecured creditors over the assets of the debtor, which ensured that all pre-filing unsecured claims were paid in full before the litigation funder obtained any part of its success fee:

> THIS COURT ORDERS that notwithstanding any provision in the Initial Order, from and after the date hereof, the priorities of the Directors' Charge, the Administration Charge, the DIP Charge, the Prefiling Unsecured Creditors' Charge, the MIP Charge (as defined in the MIP Approval Order of Mr. Justice Newbould dated as of the date hereof) and the Lender Additional Compensation Charge, as among them, shall be as follows: […]
>
> (b) Second — the DIP Charge; […]
>
> (e) Fifth — the Prefiling Unsecured Creditors' Charge; and
>
> (f) Sixth — on a *pari passu* basis, the MIP Charge and the Lender Additional Compensation Charge, [39]

34. In stark contrast to the circumstances that prevailed in *Crystallex*, where the prior charge only pertained to the actual "*interim financing obligations*"[40] and not the success fee and where there was no alternative path to creditor recovery, Creditors' rights are being taken away under the LFA. While it is impossible to assess with precision the proposed scheme's financial impact on Creditors, given that several of its material terms are entirely or importantly redacted,[41] it appears that there are multiple scenarios in which the Litigation Funder could obtain its success fee and the Debtors'

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37 *Re Crystallex International Corporation*, 2012 ONSC 2125 at para. 23 (e) [*Crystallex SC*]

38 *Crystallex SC*, at paras. 23 (f), 82 (b). In the Monitor's Fifteenth Report, the Monitor cited *Crystallex* as a precedent without mentioning that the litigation funder's 35% success fee was only payable after the claims of creditors were paid in full.

39 *CCAA* Financing Order, *Re Crystallex International Corporation* (16 April 2012) Toronto CV-11-9532-00CL (Ont. S.C.J.) [Crystallex Financing Order] at para. 17, **R.R., vol. 2, p. 116.**

40 In accordance with s. 11.2 CCAA providing that the court has regard to the cash-flow statement in determining the amount of the interim financing.

41 LFA, s. 3.1, "Bentham Return", s. 3.2, "Lawyer's Return", s. 3.3 "Payment Waterfall", **B.A.L.A., vol. 4, pp. 7-8.**

attorneys could obtain their contingency fees before the Creditors receive any payment.[42] Moreover, unlike under the Debtors' Plan, which included a "*Creditors' Premium*", the LFA does not provide for any return for the risk the Creditors are being forced to take on through the contemplated litigation, which, as recognized by the Monitor and the QCA, will be a protracted and uncertain path to recovery.[43] In fact, the Litigation Funder is entitled to terminate the LFA at any time and effectively abandon the Litigation Alternative without even obtaining the approval of the Creditors or the Monitor.[44]

35. Given these features of the LFA, the QCA determined that the proposed litigation funding was an arrangement based on the principles articulated in *Crystallex*:

> […] [T]he scheme proposed by the Respondents with the LFA would qualify as an arrangement, since it allows the Respondents to decide with Bentham whether to accept any settlement of the litigation. The scheme sets the stage for "alteration of creditors' rights" as the reasons of the Court of Appeal in *Crystallex* would have it. They could very well receive nothing in a settlement where the funds generated were only sufficient to pay the lawyers and Bentham.
>
> Sophistry aside, rather than being paid on normal contractual or commercial terms, the creditors are told to await the outcome of the prosecution of a litigious claim for the debtors to obtain cash to perhaps pay something at some future date. I think their legal rights are "taken away" or "compromised".[45]

36. The QCA also correctly determined that it was not required to arrive at the same result as the *Crystallex* court because of a fundamental factual distinction: in the present case there is an immediately available alternative for substantial Creditor recovery through the offer provided for in the Callidus Plan.[46]

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42 LFA, s. 5.1, **B.A.L.A., vol. 4, p. 9**; Debtors' Application at paras. 78-79, **B.A.L.A., vol. 2, p. 199.**

43 Monitor's Fifteenth Report at para. 87, **R.R., vol. 1, p. 166**; CA Judgement at paras. 88 and 96, **B.A.L.A., vol. 1, pp. 59 and 61.**

44 LFA, Exhibit A, s. 10, **B.A.L.A., vol. 4, pp. 34-35.**

45 CA Judgment at paras. 87-88, **B.A.L.A., vol. 1, pp. 58-59** [emphasis added]. See also, paras. 90, 92 and 94, **B.A.L.A., vol. 1, pp. 59-60.**

46 CA Judgment at paras. 80-91, **B.A.L.A., vol. 1, pp. 57-60.**

37. Furthermore and as recognized by the QCA,[47] Creditor recovery could also be obtained in a bankruptcy of the Debtors. Indeed, Callidus has already agreed to make an offer of $2,000,000 in exchange for a full and final release in respect of the Retained Claims.[48] The trustee in bankruptcy would be empowered to accept such an offer, with the permission of inspectors appointed by a simple majority of Creditors, notwithstanding any potential opposition from SMT, the Creditor who voted against the Initial Callidus Plan. The Litigation Financing Charge authorized by the Supervising Judge would have prevented such recovery whereas the creditors in *Crystallex* were protected by the "*Prefiling Unsecured Creditors' Charge*", which survived bankruptcy.[49]

38. In *Crystallex*, the rights of the creditors were not taken away and, as highlighted by the QCA, the debtor was scheduled to file a plan of arrangement within two months of the hearing before the Court of Appeal.[50] Given the "*Prefiling Unsecured Creditors' Charge*" ranked ahead of the litigation funder's charge in that case, the creditors remained in control of what they would be willing to accept in a plan of arrangement and could negotiate accordingly. If the terms were not satisfactory to the required majority, the creditors could always petition the debtor into bankruptcy and be the primary beneficiaries of the litigation (or arbitration) proceeds, ahead of the success fee of the litigation funder.

39. In *Re Calpine*,[51] cited in *Crystallex*[52] and by the Litigation Funder,[53] the supervising judge approved a global settlement agreement concluded in a complex cross-border insolvency without requiring the approval of a Plan. The settlement agreement granted certainty of a return to the debtors, for the benefit of the creditors, as opposed to the Litigation Alternative in our case. In denying leave to appeal, the Alberta Court of Appeal confirmed that whether a restructuring initiative constitutes an arrangement "*will be dependent upon the factual circumstances of each case*" and affirmed the following holding of the court below:

> The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in

47 CA Judgment at para. 94, **B.A.L.A., vol. 1, pp. 60-61.**
48 Letter from M[e] Benoit to M[e] Perreault dated April 19, 2018, **R.R., vol. 2, pp. 96-97.**
49 *Crystallex Financing Order* at para. 21, **R.R., vol. 2, pp. 117-118.**
50 CA Judgment at para. 81, **B.A.L.A., vol. 1, p. 57.**
51 *Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2007 ABQB 504 [*Calpine SC*].
52 Crystallex at para. 44 (ii).
53 Litigation Funder's Factum, at para. 37, **I.A.L.A., p. 71.**

> which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.[54]

40. In both *Calpine* and *Crystallex*, all the affected creditors were likely or guaranteed to be paid in full. As noted by the QCA, this is clearly not the case under the LFA.[55]

41. In the face of these numerous and important differences between the facts of *Crystallex* and those of the instant case, the QCA exercised its role as a correcting court in allowing the appeal and rectifying the SC Judgment which failed to address them. In so doing, the QCA came to a different conclusion than the ONCA as to whether the particular litigation funding scheme at issue was an arrangement, requiring creditor approval. As Chief Justice Laskin put it, dissenting in *Harrison v. Carswell*:

> What is important, […] is not whether we have a previous decision involving a "brown horse" by which to judge a pending appeal involving a "brown horse", but rather what were the principles and, indeed the facts, upon which the previous case, now urged as conclusive, was decided.[56]

42. Contrary to the Litigation Funder's submission,[57] the effect of the CA Judgment is not that litigation funding will always be interim financing in Ontario and an arrangement in Quebec. In either province, CCAA courts will be called upon to examine the particular features of a proposed litigation funding scheme to determine whether it is in fact, an arrangement. The rule in *Crystallex*, as reiterated in the CA Judgment, is clear: where creditors' rights are taken away or compromised, the proposed scheme is an arrangement.

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54 *Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2007 ABCA 266 at para. 31 [*Calpine CA*] [emphasis added].

55 CA Judgment at paras. 87 and 94, **B.A.L.A., vol. 1, pp. 58-59 and 60-61.**

56 *Harrison v. Carswell*, [1976] 2 SCR 200, 1975 CanLII 160 (SCC) at 206. See also Henri Brun, *Droit constitutionnel*, 6th ed., (Cowansville: Éditions Yvon Blais, 2014) at paras. I.65 to I.67, **R.R., vol. 2, pp. 125-126.**

57 Litigation Funder's Factum, at para. 40, **I.A.L.A., pp. 71-72.**

43. This is entirely consistent with one of the CCAA's recognized purposes, namely "*to protect the interests of creditors"*[58] and is in line with the flexible nature of CCAA proceedings and the broad discretion afforded to the courts to realize the legislation's remedial objectives. The mere fact that the QCA disagreed with the Supervising Judge's assessment of the LFA does not indicate the existence of jurisprudential conflict or justify a re-assessment by this Court.

ii. The CA Judgment is in line with well-established principles of Canadian insolvency law

44. The Debtors incorrectly contend that the QCA's construction of arrangement could have "*sweeping consequences*" for sales of assets and interim financing, even beyond the realm of litigation funding.[59] Respectfully, the QCA's broad interpretation of a CCAA arrangement is completely in line with Canadian insolvency jurisprudence and practice.

45. In the landmark decision of *Metcalfe*,[60] the ONCA considered the term "arrangement" and held that it "*is broader than 'compromise' and would appear to include <u>any scheme for reorganizing the affairs of the debtor</u>*."[61] The ONCA went on to note that that the breadth and vagueness of these terms, as part of the skeletal legislative scheme of the CCAA, served to promote flexibility in CCAA proceedings and endorsed the broad construction adopted by courts in the United Kingdom as well as the following holding:

> It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. <u>To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning</u>.[62]

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58 *Lehndorff General Partner Ltd. (Re)*, [1993] OJ No 14 (SCJ) at para. 7, **R.R., vol. 2, p. 103.**

59 Debtors' Factum, at para. 61, **B.A.L.A., vol. 1, p. 83.**

60 Metcalfe & Mansfield Alternative Investments II Corp., (Re) , 2008 ONCA 587, application for leave to appeal denied: 2008 CanLII 46997 (SCC) [*Metcalfe*]

61 *Metcalfe* at para. 60 [emphasis added]

62 *T & N Ltd & Ors, Re Companies Act, 1985* [2006] EWHC 1447 (Ch) at para. 53. [emphasis added] Cited in *Metcalfe* at para. 66.

46. Consequently, the QCA's rejection of a restrictive definition of what constitutes an arrangement[63] is no more than a reiteration of a long-standing principle.

47. Contrary to the position adopted by the Litigation Funder,[64] there is nothing controversial about the QCA's statement that an "*arrangement or proposal <u>can</u> encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them*"[65] and no merit to the submissions that the CA Judgment would somehow alter the requirements for approving sales of assets in CCAA Proceedings, which are expressly provided for at section 36 of the statute. Indeed, since *Metcalfe* was decided in 2008, countless sales of assets have been authorized by Courts under section 36 CCAA.

48. The Applicants' suggestion[66] that the CA Judgment would call into question a CCAA court's power to approve interim financing generally is equally unfounded. Like in the case of sales of assets, the CCAA court is expressly empowered under the statute to grant a super priority charge on a debtor's assets to secure interim financing, provided the criteria of section 11.2 CCAA are satisfied, including the consideration of the cash flow statements of the debtors (as opposed to a return on investment). Nothing in the CA Judgment stands for the proposition that creditor approval is required as a general condition to granting interim financing under the CCAA.

49. Rather, the QCA's reversal of the Supervising Judge's decision to grant the Litigation Financing Charge stemmed from its determination that, in the particular circumstances of this case, the funding contemplated under the LFA was not interim financing at all but rather an indissociable part of an arrangement developed for the purpose of realizing on the Retained Claims for the benefit of Creditors.[67] In support of this conclusion, the QCA correctly noted and cited recent appellate authority to the effect that interim financing under the CCAA is geared towards allowing the debtor to protect its going concern value while it attempts to devise a

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63 CA Judgement, at paras. 85,87, **B.A.L.A., vol. 1, pp. 58-59.**
64 Litigation Funder's Factum, at paras. 36, 40, **I.A.L.A., pp. 70 and 71-72.**
65 CA Judgment at para. 85 [emphasis added], **B.A.L.A., vol. 1, p. 58.**
66 Litigation Funder's Factum, at paras. 26, 47, **I.A.L.A., pp. 67 and 73**; Debtors' Factum, at para. 61, **B.A.L.A., vol. 1, p. 83.**
67 CA Judgment at para. 78, **B.A.L.A., vol. 1, p. 56.**

compromise or arrangement that will be acceptable to its creditors.[68] Indeed, this Court has recognized that even prior to its codification, super priority interim financing could be authorized on the basis of the CCAA court's inherent jurisdiction "*when necessary for the continuation of the debtor's business during the reorganization.*"[69]

50. The QCA's comments on the nature of interim financing are based on well-settled principles of insolvency law and its determination that the impugned funding could not be authorized pursuant to section 11.2 CCAA was rightly informed by the facts of this case, including that the Debtors are empty shells, but for the Retained Claims, and that financing for the Litigation Alternative was already contemplated as part of the arrangement provided for in the Debtors' Plan.[70] The QCA's holding in no way undermines the general availability of interim financing in the province of Quebec, as suggested by the Litigation Funder.[71] It is therefore respectfully submitted that there is no issue of public or national importance warranting the intervention of this Court.

iii. There is no basis to disturb the justified intervention of the QCA

51. The Litigation Funder incorrectly asserts that the QCA failed to accord deference to the findings of the Supervising Judge or to properly articulate the standard of review.[72] The latter assertion is unfounded given that the QCA clearly addressed the standard of review in its reasons and identified, specifically, the legal and factual errors as well as the instances of unreasonable exercise of discretion that justified its intervention.[73]

52. Regarding the issue of deference, it is respectfully submitted that it is not this Court's function to conduct a *de novo* analysis of the SC judgment and that the QCA's determinations,

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68 CA Judgment at para. 77, **B.A.L.A., vol. 1, p. 56** citing *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36.

69 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para. 62. See also the reasons of Gascon, J.S.C (as he then was) in *Mecachrome International inc. (Plan de transaction ou arrangement de)*, 2009 QCCS 1575 at paras. 29-30.

70 CA Judgment at para. 78, **B.A.L.A., vol. 1, p. 56**; As noted at para. A.16 of this Factum, the Supervising Judge also issued orders recognizing that the Debtors' Plan should be submitted to Creditors.

71 Litigation Funder's Factum, at para. 47, **I.A.L.A., pp. 73.**

72 Litigation Funder's Factum, at para. 44, **I.A.L.A., pp. 72-73.**

73 CA Judgment at paras. 21, 48, 59, 68, 76, 78, 96, **B.A.L.A., vol. 1, pp. 15, 22, 25, 29, 31-32 and 35.**

made in the particular context of this case and with respect to the specific litigation funding scheme at issue, should not be disturbed:

> The onus is on the appellants to demonstrate an error in the court of appeal's decision; this Court's role is not to conduct a *de novo* analysis of the trial judge's decision. Where the first court of appeal has justifiably intervened in the trial judgment and disagreed with the trial judge, this Court will intervene only if its own disagreement stems from "a clear satisfaction that an error has occurred in the first appellate court's assessment of the facts" (*St-Jean*, at paras. 38-39 and 46).[74]

53. In *Re Calpine*, cited by the Litigation Funder,[75] the Alberta Court of Appeal held that the determination as to whether a restructuring initiative constitutes an arrangement under the CCAA is one of fact, or of mixed fact and law, that should not be disturbed in the absence of a palpable and overriding error.[76] Moreover, the court held that "[t]*he standard of review plays a significant, if not decisive, role in the outcome of this application for leave to appeal*."[77] The same reasoning should be applied to the Leave Applications.

54. As noted above,[78] the QCA's characterization of the LFA as an arrangement was informed by an analysis of the facts of this case including the nature of the Debtors' Insolvency Proceedings, the steps taken in connection with the Debtors' Plan, the terms of the LFA and its effects on Creditors, the implications for other stakeholders, including the Shareholder, and the availability of a viable alternative to the Litigation Alternative which had received strong creditor support. In such circumstances, it is respectfully submitted that the QCA considered and correctly applied the governing legal principles and there is no clear basis for re-examining its decision to correct the SC Judgment.

B. The QCA's comment in *obiter* that the LFA is "*akin to an equity investment*" does not give rise to an issue of public importance.

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74 *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 34 [emphasis added]. See also, *St-Jean v. Mercier*, 2002 SCC 15 at paras. 37-39, 46.

75 Litigation Funder's Factum, at paras. 42-43, **I.A.L.A., p. 72.**

76 *Calpine CA* at para. 15.

77 *Ibid.*

78 See para. A.30 of this Factum.

55. The Litigation Funder takes issue with, and dedicates a significant portion of its submissions to the QCA's comment that "*the LFA is akin to an equity investment*."[79] This statement was certainly not the basis for the QCA's decision and is *obiter dictum*.[80] As this incidental comment was not dispositive of the appeal, it is respectfully submitted that it should have no bearing on this Court's assessment of the Leave Applications.[81]

56. In any event, this observation by the QCA was correct and in line with the applicable legal principles. As admitted by the Litigation Funder, the LFA provides for funding that does not bear interest and is to be reimbursed exclusively from the Litigation Proceeds.[82] This financing cannot be characterized as debt, according to the definition retained in recent decisions[83] as, in particular, there is no requirement to repay the principal with interest. To the contrary, the Litigation Funder's claims under the LFA resemble claims for the "*return of capital*"[84] and are part of a scheme similar to one which American commentators have described as "*equity based financing*" in that "*the plaintiff is essentially selling a portion of his or her recovery to the funder*."[85] Even the Debtors have indicated that the financing is in the nature of equity asserting that the Litigation Funder will be "*entitled to a <u>return on its investment</u> only if the litigation is successful*."[86]

57. The QCA's determination that the LFA served to unduly subordinate the claims of Creditors was also well founded. Canadian insolvency legislation expressly provides for the subordination of "*equity claims*"[87] and it is a well settled principle that "*equity will take a back seat in terms of any recovery where there are outstanding debt claims.*"[88] The QCA was correct in considering the

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79 Litigation Funder's Factum, at para. 4 and 51, **I.A.L.A., pp. 61 and 74-75.**

80 Henri Brun. *Droit constitutionnel*, 6th ed., (Cowansville: Éditions Yvon Blais, 2014) at paras. I.62 to I. 67, **R.R., vol. 2, pp. 125-126.**

81 See for example: *Purgal c. Montreal (City of),* 2012 QCCA 1908 at para. 6; *Touri c. Multi-Marques inc.,* 2012 QCCA 2252 at para. 28.

82 Litigation Funder's Factum, at paras. 16, 17, 52, **I.A.L.A., pp. 65 and 75.**

83 *U.S. Steel Canada Inc. (Re),* 2016 ONSC 569 at para. 183; *Tudor Sales Ltd. (Re),* 2017 BCSC 119 at para. 36.

84 CCAA, s. 2 definition of "*equity claim*" which is cited at paragraph 56 of the Litigation Funder's Factum, **I.A.L.A., p. 76.**

85 Ronen Avraham & Abraham Wickelgren "Third-Party Litigation funding – A Signaling Model" (2014) 63 DePaul L Rev 233 at 237-238.

86 Debtors' Application, at para. 48 [emphasis added], **B.A.L.A., vol. 1, p. 79.**

87 CCAA, ss. 2, 6 (8), 22.1; BIA, ss. 2, 54 (2) (d), 60 (1.7), 140.1.

88 *Bul River Mineral Corporation (Re),* 2014 BCSC 1732 at para. 101. See also *U.S. Steel Canada Inc. (Re),* 2016 ONCA 662 at para. 96.

contingent nature of the Litigation Funder's repayment rights as an additional justification for characterizing the LFA as an arrangement and in distinguishing the instant case from *Crystallex* where only the lender's claim for repayment of principal plus interest ranked senior to the claims of creditors.[89] The Litigation Funder is therefore incorrect in asserting that the QCA's comments on this issue run counter to "*established principles of corporate and insolvency law*".[90]

58. The Litigation Funder argues that the CA Judgment will ultimately serve to jeopardize the availability of litigation funding and contingency arrangements.[91] Respectfully, all the CA Judgment did was restore compliance with the fundamental requirement of Creditor consent to insolvency arrangements,[92] which was disregarded by the Supervising Judge. To the extent that making litigation funding more readily available in the insolvency context will provide the access to justice sought by the Applicants, the solution is simple: obtain the approval of creditors, whose interests must be prioritized in insolvency proceedings, or ensure such interests are fully protected.

59. Creditors are prejudiced by the scheme contemplated in the LFA and the QCA's intervention was warranted based on the facts, consistent with *Crystallex* and well-settled insolvency principles and did not serve to undermine access to justice or litigation funding in Canada. As the CA Judgment is well founded and the proposed appeal raises no issue of public importance, the Leave Applications should be dismissed.

PART IV – COSTS

60. The Creditors' Group seeks costs against the Applicants.

PART V – ORDER SOUGHT

61. The Creditors' Group request that this Court dismiss the Leave Applications.

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89 CA Judgment at para. 90, **B.A.L.A., vol. 1, p. 35** and para. A.33 of this Factum.
90 Litigation Funder's Factum, at para. 24, **I.A.L.A., pp. 66-67.**
91 Litigation Funder's Factum, at para. 4, 54, **I.A.L.A., pp. 61 and 75.**
92 Judgement at para. 69, 94, **B.A.L.A., vol. 1, pp. 29 and 35**. See also *Bédard Louis inc. c. Teac Canada Ltd.*, 1991 CanLII 3533 (QC CA) at para. 9; *Meublerie André Viger inc. c. Groupe Cantrex inc.*, 1992 CanLII 2899 (QC CA) at para. 39-40.

Montréal, May 28, 2019

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PART VI –TABLE OF AUTHORITIES

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