



Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Electronically issued : 09-Feb-2022  
Délivré par voie électronique : 09-Feb-2022  
Toronto

IZABELA PRZYBYLSKA

Plaintiff

- and -

GATOS SILVER, INC., STEPHEN ORR, ROGER JOHNSON, PHILIP PYLE, TETRA TECH, INC., GUILLERMO DANTE RAMÍREZ-RODRÍGUEZ, KIRA LYN JOHNSON, THE ELECTRUM GROUP LLC, ELECTRUM SILVER US LLC, ELECTRUM SILVER US II LLC, BMO NESBITT BURNS INC., GOLDMAN SACHS CANADA INC., RBC DOMINION SECURITIES INC., CANACCORD GENUITY CORP. and CIBC WORLD MARKETS INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**NOTICE OF ACTION**

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the statement of claim served with this notice of action.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this notice of action is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES,

LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$5,000.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: February 9, 2022

Issued by \_\_\_\_\_  
Local registrar

Address of court office: 393 University Avenue  
10<sup>th</sup> Floor  
Toronto, ON M5G 1E6

**TO: Gatos Silver, Inc.**  
8400 E. Crescent Parkway, Suite 600  
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United States of America

c/o Fasken Martineau DuMoulin LLP  
333 Bay Street, Suite 2400,  
Toronto, Ontario, M5H 2T6

**AND TO: Stephen Orr**  
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**AND TO: Roger Johnson**  
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**AND TO: Philip Pyle**  
c/o Fasken Martineau DuMoulin LLP  
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**AND TO: Tetra Tech, Inc.**  
3475 East Foothill Boulevard  
Pasadena, California 91107  
United States of America

**AND TO: Guillermo Dante Ramírez-Rodríguez**  
350 Indiana Street, Suite 500  
Golden, Colorado 80401  
United States of America

**AND TO: Kira Lyn Johnson**  
350 Indiana Street, Suite 500  
Golden, Colorado 80401  
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**AND TO: The Electrum Group LLC**  
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c/o Fasken Martineau DuMoulin LLP  
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**AND TO: BMO Nesbitt Burns Inc.**  
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**AND TO: Goldman Sachs Canada Inc.**  
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**AND TO: RBC Dominion Securities Inc.**  
200 Bay Street, Royal Bank Plaza  
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**AND TO: Canaccord Genuity Corp.**  
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Toronto, ON  
Canada M5J 2S1

**AND TO: CIBC World Markets Inc.**  
161 Bay St, Brookfield Place  
Toronto, Ontario M5J 2S8

## CLAIM

### DEFINITIONS

1. In this Notice of Action, in addition to the terms that are defined elsewhere herein, the following definitions apply:
  - (a) “**Gatos**” means the Defendant Gatos Silver, Inc.;
  - (b) “**Class**” or “**Class Members**” means all persons and entities, wherever they may reside or be domiciled, who acquired Gatos securities during the Class Period, other than Excluded Persons;
  - (c) “**Class Period**” means the period from October 28, 2020 until January 25, 2022 at 6:52 pm Eastern Standard Time;
  - (d) “**CLG**” means the Cerro Los Gatos mine;
  - (e) “**CPA**” means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;
  - (f) “**CSA**” means the Canadian Securities Administrators;
  - (g) “**Defendants**” means, collectively, Gatos, Orr, Johnson, Pyle, Tetra Tech, the Electrum Defendants, the Individual Authors, and the Underwriters;
  - (h) “**Electrum Defendants**” means, collectively, Electrum Group, ESUS and ESUS II;
  - (i) “**Electrum Group**” means the Defendant, The Electrum Group LLC;
  - (j) “**ESUS**” means the Defendant, Electrum Silver US LLC;
  - (k) “**ESUS II**” means the Defendant, Electrum Silver US II LLC;

- (l) “**Excluded Persons**” means the Defendants; the respective past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns of Gatos, Tetra Tech, the Electrum Defendants and the Underwriters; and the immediate family members of Orr, Johnson, Pyle and the Individual Authors;
- (m) “**First Offering**” means Gatos’s initial public offering of common shares pursuant to the First Prospectus;
- (n) “**First Prospectus**” means the Base Prep Prospectus dated October 27, 2020 and the Supplemented Prep Prospectus dated October 27, 2020;
- (o) “**Impugned Documents**” means Gatos’s:
  - (i) Impugned Prospectuses;
  - (ii) MD&A for the quarter ended September 30, 2020 (filed on SEDAR on December 8, 2020);
  - (iii) financial statements for the quarter ended September 30, 2020 (filed on SEDAR on December 8, 2020);
  - (iv) annual information form for the fiscal year ended December 31, 2020 (filed on SEDAR on March 29, 2021);
  - (v) audited financial statements for the quarter and fiscal year ended December 31, 2020 (filed on SEDAR on March 29, 2021);
  - (vi) MD&A for the quarter and fiscal year ended December 31, 2020 (filed on SEDAR on March 29, 2021);

- (vii) MD&A for the quarter ended March 31, 2021 (filed on SEDAR on May 7, 2021);
- (viii) financial statements for the quarter ended March 31, 2021 (filed on SEDAR on May 7, 2021);
- (ix) MD&A for the quarter ended June 30, 2021 (filed on SEDAR on August 9, 2021);
- (x) financial statements for the quarter ended June 30, 2021 (filed on SEDAR on August 9, 2021);
- (xi) MD&A for the quarter ended September 30, 2021 (filed on SEDAR on November 8, 2021); and
- (xii) financial statements for the quarter ended September 30, 2021 (filed on SEDAR on November 8, 2021);
- (p) **“Impugned Prospectuses”** means the First Prospectus and the Second Prospectus;
- (q) **“Individual Authors”** means the Defendants Guillermo Dante Ramírez-Rodríguez and Kira Lyn Johnson, who are employees of Tetra Tech;
- (r) **“Johnson”** means the Defendant, Roger Johnson;
- (s) **“MD&A”** means Management’s Discussion and Analysis;
- (t) **“NI 43-101”** means the CSA’s National Instrument 43-101 – *Standards of Disclosure for Mineral Projects*, as amended;
- (u) **“NYSE”** means the New York Stock Exchange;
- (v) **“OSA”** means the *Securities Act*, RSO 1990, c S.5, as amended;

- (w) “**Offerings**” means, collectively, the First Offering and the Second Offering;
- (x) “**Orr**” means the Defendant, Stephen Orr;
- (y) “**Other Canadian Securities Legislation**” means, collectively, the *Securities Act*, RSA 2000, c S-4, as amended; the *Securities Act*, RSBC 1996, c 418, as amended; *The Securities Act*, CCSM, c S50, as amended; the *Securities Act*, SNB 2004, c S-5.5, as amended; the *Securities Act*, RSNL 1990, c S-13, as amended; the *Securities Act*, SNWT 2008, c 10, as amended; the *Securities Act*, RSNS 1989, c 418, as amended; the *Securities Act*, S Nu 2008, c 12, as amended; the *Securities Act*, RSPEI 1988, c S-3.1, as amended; *The Securities Act, 1988*, SS 1988-89, c S-42.2, as amended; *Securities Act*, RSQ c V-1.1, as amended; and the *Securities Act*, SY 2007, c 16, as amended;
- (z) “**Plaintiff**” means the Plaintiff, Izabela Przybylska;
- (aa) “**Pyle**” means the Defendant, Philip Pyle;
- (bb) “**Second Offering**” means the offering of Gatos securities pursuant to the Second Prospectus;
- (cc) “**Second Prospectus**” means the Short Form Base Shelf Prospectus dated July 12, 2021 and the Prospectus Supplement dated July 15, 2021;
- (dd) “**SEDAR**” means the system for electronic document analysis and retrieval of the CSA;
- (ee) “**Tetra Tech**” means the Defendant, Tetra Tech, Inc.;
- (ff) “**Technical Report**” means the technical report titled “Los Gatos Project”, prepared by Tetra Tech with an effective date of July 1, 2020;



- (gg) “**TSX**” means the Toronto Stock Exchange; and
- (hh) “**Underwriters**” means the Defendants, BMO Nesbitt Burns Inc., Goldman Sachs Canada Inc., RBC Dominion Securities Inc., Canaccord Genuity Corp. and CIBC World Markets Inc.

## **RELIEF SOUGHT**

### 2. The Plaintiff claims:

- (a) an order granting leave to pursue this action under Part XXIII.1 of the *OSA* and the Other Canadian Securities Legislation (if necessary);
- (b) an order certifying this action as a class proceeding and appointing the Plaintiff as the representative plaintiff for the Class;
- (c) a declaration that the Impugned Documents contained one or more misrepresentations at common law and within the meaning of the *OSA* and the Other Canadian Securities Legislation (if necessary);
- (d) a declaration that the Defendants or any of them made the misrepresentations negligently;
- (e) in the alternative to damages, rescission of the transfer of Gatos’s securities pursuant to the Offerings by any individual Class Member who specifically elects such a remedy;
- (f) a declaration that Gatos is vicariously liable for the acts and/or omissions of Orr, Johnson, Pyle and, as may be applicable, its other officers, directors or employees;
- (g) a declaration that Tetra Tech is vicariously liable for the acts and/or omissions of

- the Individual Authors and, as may be applicable, its other officers, directors or employees;
- (h) a declaration that the Electrum Defendants are vicariously liable for the acts and/or omissions of their respective officers, directors or employees;
  - (i) a declaration that the Underwriters are vicariously liable for the acts and/or omissions of their respective officers, directors or employees;
  - (j) damages in an amount to be determined including, if the court determines it is just and appropriate, aggregate damages;
  - (k) a monetary award, constructive trust, accounting or such other remedy as restitution for the unjust enrichment of Gatos, the Electrum Defendants and the Underwriters;
  - (l) an order directing a reference or giving such other directions as may be necessary to determine the issues, if any, not determined at the trial of the common issues;
  - (m) prejudgment and post judgment interest;
  - (n) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity plus, pursuant to section 26(9) of the *CPA*, the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes; and
  - (o) such further and other relief as this Honourable Court may deem just.

## **THE PARTIES**

### ***The Plaintiff***

2. The Plaintiff Izabela Przybylska is an individual residing in North York, Ontario. She

acquired shares of Gatos in the Second Offering pursuant to the Second Prospectus and continued to hold those shares at the end of the Class Period.

***The Class***

3. The proposed Class, on whose behalf this proceeding is brought, is comprised of all persons, wherever they may reside or be domiciled, who acquired Gatos securities during the Class Period, other than Excluded Persons.

***The Defendants***

4. Gatos is a US-based silver dominant production, development and exploration company. At all material times, it was a reporting issuer in each of the provinces of Canada, other than Québec. Its common shares were and are listed for trading on the TSX and the NYSE. Gatos's common shares began trading on the TSX and NYSE on October 28, 2020 in connection with the First Offering.
5. Orr is an individual residing in Texas, USA. At all material times during the Class Period, he was Gatos's Chief Executive Officer, and a director of Gatos.
6. Johnson is an individual residing in Colorado, USA. At all material times during the Class Period, he was Gatos's Chief Financial Officer.
7. Pyle is an individual residing in Montana, USA. At all material times during the Class Period, he was Gatos's Vice President of Exploration and Chief Geologist.
8. Tetra Tech is a global provider of consulting and engineering services. Tetra Tech prepared the Technical Report.
9. The Individual Authors were employees of Tetra Tech involved in the preparation of the Technical Report.

10. Electrum Group is a privately held natural resources investment management company based in New York City. Electrum Group is affiliated with ESUS and ESUS II.
11. The Underwriters underwrote the First Offering and the Second Offering.

#### **NATURE OF THE ACTION**

12. This class proceeding arises out of Gatos's misrepresentations relating to the mineral resources and reserves at CLG, a mine and processing facility in Chihuahua, Mexico. CLG is Gatos's principal asset and primary project.
13. Gatos released the Impugned Documents, which contained misrepresentations, including that:
  - (a) Gatos's estimates of mineral reserves and resources at CLG were reliable;
  - (b) Gatos had a reasonable basis to conclude that CLG was a high-quality and long-life asset; and
  - (c) the Technical Report had been prepared in accordance with NI 43-101 and contained all material scientific and technical information in respect of CLG that was required to be disclosed to make the Technical Report not misleading.
14. As a result of the misrepresentations, Gatos's securities traded at artificially inflated values during the Class Period.
15. In a news release issued on January 25, 2022 ("**Public Correction**"), Gatos publicly revealed the misrepresentations. The Public Correction stated:

DENVER--(BUSINESS WIRE)-- Gatos Silver, Inc. (NYSE/TSX: GATO) ("Gatos Silver" or the "Company") today provided an update on the resource and reserve estimation process following recent reconciliation work at its Cerro Los Gatos ("CLG") mine and provided strong 2022 production and cost guidance for the CLG operation.

During the Company's resource and reserve update process for the Los Gatos Joint Venture ("LGJV"), which included a detailed reconciliation of recent production performance, the Company concluded that there were errors in the technical report entitled "*Los Gatos Project, Chihuahua, Mexico*" with an effective date of July 1, 2020 (the "2020 Technical Report"), as well as indications that there is an overestimation in the existing resource model.

On a preliminary basis, the Company estimates a potential reduction of the metal content of CLG's mineral reserve ranging from 30% to 50% of the metal content remaining after depletion. Since the 2020 Technical Report, depletion is 1.3 million tonnes grading 284 g/t silver, 3.9% zinc, 2.3% lead and 0.3 g/t gold that has been processed from July 1, 2020 to December 31, 2021. At this time, the Company cannot accurately quantify the exact magnitude of the reduction, and the mineral resource and reserve estimates in the 2020 Technical Report should not be relied upon.

The Company is working with independent engineering consultants to better understand the magnitude of the overestimation, including conducting a detailed reconciliation of production to previous models and reserve calculation estimates, as well as creating a new Life of Mine ("LOM") plan. The Company is working expeditiously to complete this reconciliation. Given the complex nature of the reconciliation, Gatos Silver anticipates that it will complete its work in the second half of 2022.

The Company has identified that CLG's geological structures and mineral veins are more complex than previously modeled, with the size and orientation of the mineral veins more variable than expected. The Company has been successful in mining these veins through 2021. Gatos Silver expects continued strong performance in 2022. While the reconciliation work is ongoing, the Company continues to take steps to strengthen its technical capability and capacity, as well as enhance existing review processes.

[...]

The expected LOM reduction resulting from the reconciliation may be offset by future resource and reserve additions from ongoing exploration programs, continued optimization and cost reduction efforts. Exploration in the Los Gatos District will also be a major focus in 2022 with multiple new targets planned to be drilled.

[...]

### **Other Impacts**

If it is determined the 2020 Technical Report materially overestimated resources and reserves, it could constitute an event of default under the Company's credit facility, and the Company would intend to seek a waiver from its lender. The Company has \$13 million outstanding under its credit facility as of December 31, 2021, and believes it has sufficient liquidity to manage the process.

The Company is also reviewing the potential financial statement impact of a

revision in its mineral resources and reserves. It has commenced an impairment analysis to determine if the potential resource and reserve reduction could lead to an impairment charge in current or prior periods. In addition, any change in CLG's LOM could impact depreciation and amortization expense either prospectively or in prior periods. If the Company determines that any of these changes should have been reflected in prior periods, the Company may be required to restate its financial statements for those periods. No determination has been made that a restatement is necessary.

16. The Public Correction revealed there were material misrepresentations regarding the mineral resources and reserves at CLG. Specifically, the Public Correction revealed that Gatos's estimates of mineral resources and reserves at CLG were not reliable, Gatos did not have a reasonable basis to conclude that CLG was a high-quality and long-life asset, and the Technical Report could not be relied upon.
17. On January 25, 2022, the closing price for Gatos common shares on the TSX was C\$12.84. On January 26, following the Public Correction, the closing price for Gatos common shares on the TSX was C\$4.03, representing a decline of approximately 69%.

## **RIGHTS OF ACTION**

### **Section 130 of the OSA**

18. During the Class Period, Gatos offered securities to the public by way of the Offerings. The Impugned Prospectuses for the Offerings were required to provide full, true and plain disclosure of all material facts relating to the securities issued pursuant to those Impugned Prospectuses and in the distributions to which they related.
19. In the First Offering, Gatos issued and sold 21,430,000 common shares on October 30, 2020 at a price of US\$7 per share. On November 10, 2020, Gatos issued and sold an additional 3,214,500 common shares at a price of US\$7 per share, pursuant to the exercise in full of the underwriters' over-allotment option.

20. On behalf of the Class Members who acquired Gatos securities in the First Offering, the Plaintiff will plead the right of action in section 130 of the *OSA* and, if necessary, the analogous provisions of the Other Canadian Securities Legislation (except for the *Securities Act*, RSQ c V-1.1) against Gatos, Orr, Johnson, Pyle, Electrum Group, ESUS, the Underwriters, the Individual Authors, and Tetra Tech.
21. In the Second Offering, Gatos issued and sold 8,930,000 common shares on July 19, 2021 at a price of US\$14 per share. On August 18, 2021, Gatos issued and sold an additional 286,962 common shares at a price of US\$14 per share, pursuant to the exercise of the over-allotment option.
22. In the Second Offering, ESUS and ESUS II sold 2,500,000 common shares of Gatos on July 19, 2021 at a price of US\$14 per share. On August 18, 2021, ESUS and ESUS II sold an additional 80,337 common shares of Gatos at a price of US\$14 per share, pursuant to the exercise of the over-allotment option. These entities received gross proceeds of US\$35 million in connection with the Second Offering.
23. On behalf of the Class Members who acquired Gatos securities in the Second Offering, the Plaintiff will plead the right of action in section 130 of the *OSA* and, if necessary, the analogous provisions of the Other Canadian Securities Legislation (except for the *Securities Act*, RSQ c V-1.1) against Gatos, Orr, Johnson, Pyle, the Electrum Defendants, the Underwriters, the Individual Authors, and Tetra Tech.

**Negligence *simpliciter***

24. On behalf of the Class Members who acquired Gatos securities in the First Offering, the Plaintiff will plead a claim for negligence *simpliciter* against Gatos, Orr, Johnson, Pyle,

Electrum Group, ESUS, the Underwriters, the Individual Authors, and Tetra Tech.

25. On behalf of the Class Members who acquired Gatos securities in the Second Offering, the Plaintiff will plead a claim for negligence *simpliciter* against Gatos, Orr, Johnson, Pyle, the Electrum Defendants, the Underwriters, the Individual Authors, and Tetra Tech.
26. But for the negligence of the relevant Defendants, the Offerings would not have taken place or, alternatively, the Gatos common shares would have been sold in the Offerings at a materially lower price.

### **Unjust Enrichment**

27. On behalf of the Class Members who acquired Gatos securities in the First Offering, the Plaintiff will plead a claim for unjust enrichment against Gatos and the Underwriters.
28. On behalf of the Class Members who acquired Gatos securities in the Second Offering, the Plaintiff will plead a claim for unjust enrichment against Gatos, ESUS, ESUS II and the Underwriters.
29. These Defendants were enriched through the Offerings, and the Plaintiff and Class Members suffered a corresponding deprivation. There is no juristic reason for their benefit and the relevant Class Members' corresponding deprivation.

### **Part XXIII.1 of the OSA**

30. On behalf of the Class Members who acquired Gatos securities in the secondary market, the Plaintiff will plead the right of action under Part XXIII.1 of the *OSA* and analogous provisions of the Other Canadian Securities Legislation against Gatos, Orr, Johnson, Pyle, the Electrum Defendants, and Tetra Tech.
31. These Class Members acquired Gatos securities following the release of one or more of the



- Impugned Documents, each of which contained a misrepresentation, and prior to the public correction as described above.
32. Gatos is a responsible issuer within the meaning of Part XXIII.1 of the *OSA* and the analogous provisions of the Other Canadian Securities Legislation.
  33. Orr is a director and officer of Gatos within the meaning of the *OSA* and the Other Canadian Securities Legislation. Orr authorized, permitted or acquiesced in the release of the Impugned Documents.
  34. Johnson is an officer of Gatos within the meaning of the *OSA* and the Other Canadian Securities Legislation. Johnson authorized, permitted or acquiesced in the release of the Impugned Documents.
  35. Pyle is an officer of Gatos within the meaning of the *OSA* and the Other Canadian Securities Legislation. Pyle authorized, permitted or acquiesced in the release of the Impugned Documents. Pyle is also liable as an expert within the meaning of the *OSA* and the Other Canadian Securities Legislation.
  36. Tetra Tech is an expert within the meaning of the *OSA* and the Other Canadian Securities Legislation. It is liable for misrepresentations in the Impugned Documents that include, summarize or quote from a report, statement or opinion made by Tetra Tech that contain misrepresentations.
  37. Each of the Electrum Defendants is an influential person within the meaning of the *OSA* and the Other Canadian Securities Legislation. Each of the Electrum Defendants knowingly influenced Gatos to release the Impugned Documents.

### **Negligent Misrepresentation**

38. On behalf of the Class Members who acquired Gatos securities in the secondary market, the Plaintiff will plead a claim for negligent misrepresentation against Gatos, Orr, Johnson, Pyle, the Electrum Defendants, and Tetra Tech.
39. The Plaintiff will plead that these Defendants' misrepresentations relating to CLG give rise to damages for negligent misrepresentation because:
- (a) these Defendants owed the Plaintiff and Class Members a duty to scrupulously disclose all material facts relating to CLG, which duty was informed by their obligations under the *OSA* and the Other Canadian Securities Legislation;
  - (b) these Defendants breached their duty and did not disclose all of the material facts relating to CLG;
  - (c) the Plaintiff and Class Members relied on these Defendants' statements concerning CLG; and
  - (d) the Plaintiff and Class Members were damaged by the misrepresentations.

### **OTHER**

40. This action has a real and substantial connection with Ontario because, among other things:
- (a) Gatos is a reporting issuer in Ontario;
  - (b) The securities of Gatos trade on the TSX, which is located in Toronto; and
  - (c) The Plaintiff and other Class Members resident in Ontario acquired Gatos shares and suffered damage in Ontario.
41. The Plaintiff pleads and relies on the *Courts of Justice Act*, RSO 1990, c C-43, the *CPA*,

the *OSA*, and the Other Canadian Securities Legislation, all as amended.

February 9, 2022

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*Lawyers for the Plaintiff*

PRZYBYLSKA v GATOS SILVER, INC., et al.

Court File No:

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

**NOTICE OF ACTION**

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