

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SINO-FOREST CORPORATION

**FACTUM OF THE APPLICANT,
SINO-FOREST CORPORATION**

(Motions Returnable October 9-10, 2012)

Dated: October 4, 2012

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TO: THE SERVICE LIST

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I. OVERVIEW

1. The Applicant, Sino-Forest Corporation ("SFC"), seeks an order substantially in the form served on September 28, 2012 (the "Stay Extension Order"), extending the CCAA stay until December 3, 2012. The Stay Extension Order is appropriate in the circumstances of this case and SFC has acted, and is acting, in good faith and with due diligence in pursuing its plan of compromise and restructuring (the "Plan").

2. SFC opposes the motions brought by the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the plaintiffs in the proposed Ontario class action bearing court file number CV-11-431153CP and the plaintiffs in the proposed Quebec class action bearing court file number 200-06-0001320111 (the "Class Action Plaintiffs") for an order (i) lifting the stay of proceedings for pending motions and petition in the proposed class actions; (ii) directing

the production of confidential documents for use in the proposed class actions; (iii) appointing the Class Action Plaintiffs as the representatives for the classes proposed in the proposed class actions; and (iv) granting the Class Action Plaintiffs the right to vote (if necessary) on the Plan.

3. The relief sought by the Class Action Plaintiffs cannot be granted and represents a direct assault on this CCAA proceeding and SFC's restructuring efforts designed to maximize value for all of SFC's stakeholders.

4. The Class Action Plaintiffs' requested relief to lift the stay of proceedings would completely undermine the purpose of the CCAA stay of proceedings which is at the core of CCAA proceedings in Canada. It would serve only to provide the Class Action Plaintiffs with increased leverage against SFC and other stakeholders while diverting management's attention and resources away from SFC's restructuring to the detriment of all of SFC's stakeholders.

5. The Class Action Plaintiffs' requested relief regarding the production of various documents listed in their confidential schedule A for use in the class action proceedings would force SFC to publicly disclose confidential documents to which the Class Action Plaintiffs have no legal right whatsoever.

6. Moreover, given that the Class Action Plaintiffs only became aware of the documents that they now request be publicly disclosed pursuant to a good faith effort, at least on the part of SFC, to mediate the disputes arising from the class proceedings, compelling the public disclosure of such documents would have a significant cooling effect on any future mediated resolutions in CCAA proceedings.

7. In addition, the Class Action Plaintiffs' motion for the production of these documents is itself a breach of the non-disclosure agreement that they entered into with SFC.

8. The Class Action Plaintiffs' request for representative counsel status is inappropriate given that the proposed class actions have not been certified and the Class Action Plaintiffs have no standing to purport to represent proposed classes in proposed uncertified class actions.

9. Moreover, the only individuals in the proposed classes with an actual economic interest in SFC are already fully represented by counsel in this proceeding making the Class Action Plaintiffs' requested relief unnecessary, duplicative and inefficient.

10. Finally, the Class Action Plaintiffs' requested relief for the right to vote on the Plan on behalf of shareholders and former shareholders is a collateral attack on the Equity Claims Order issued by this Honourable Court on July 27, 2012, which the Class Action Plaintiffs did not oppose.

11. Given the disparate nature of SFC's motion for the Stay Extension Order and the Class Action Plaintiffs' motions, SFC's submissions on each of the motions are addressed separately below.

II. BACKGROUND

12. On March 30, 2012, this Honourable Court made an Initial Order granting a CCAA stay of proceedings (the "CCAA Stay") against SFC and certain of its subsidiaries, and appointing FTI Consulting Canada Inc. as the Monitor in the CCAA proceedings.

13. On May 31, 2012, this Honourable Court extended the CCAA Stay to September 28, 2012 (the "May 31 Stay Extension Order"). On September 28, 2012, this Honourable Court extended the CCAA Stay to October 10, 2012 (the "September 28 Stay Extension Order").

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 7, at para. 5

III. PROPOSED EXTENSION OF THE STAY PERIOD

14. SFC is seeking to extend the CCAA Stay to December 3, 2012.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 9, at para. 14

15. The extension of the CCAA Stay through December 3, 2012 is necessary in order to provide stability to SFC's business while SFC, with the assistance of its advisors and the Monitor, works diligently on completing the steps necessary to enable the mailing of meeting materials to creditors and voting on the Plan as required by the Plan Filing and Meeting Order, issued by this Honourable Court on August 31, 2012.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 9, at para. 15

16. The updated cash forecast in the Monitor's Ninth Report demonstrates that SFC has sufficient funds to fund the proceedings through the proposed stay extension period.

Ninth Report of the Monitor, dated October 3, 2012 at paras. 25-26

17. SFC has acted and continues to act in good faith and with due diligence.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 10, at para. 17

18. No creditor will suffer any material prejudice if the CCAA Stay is extended.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 10, at para. 18

Ninth Report of the Monitor, dated October 3, 2012 at para. 29

19. SFC submits that it has satisfied the test for a stay extension order given that (a) in the circumstances of the case, the Stay Extension Order is appropriate; and (b) SFC has acted, and is acting, in good faith and with due diligence.

Companies' Creditors Arrangement Act, RSC 1985, c C-36 ("CCAA") at ss. 11.02(2)-(3)

Ninth Report of the Monitor, dated October 3, 2012 at para. 29

IV. SFC OPPOSES LIFTING THE STAY OF PROCEEDINGS

20. The Class Action Plaintiffs are moving to lift the CCAA Stay to bring motions for class action certification and for leave to proceed with statutory secondary market claims in the proposed class actions.

Notice of Motion, Motion Record of the Ad Hoc Committee of Purchasers of the Applicant's Securities (Motion regarding lift stay for the proposed Ontario and Quebec class actions), Tab 1, p. 2, at para. (b)

A. SFC Opposes Lifting the CCAA Stay against the Company and its Directors

21. The Class Action Plaintiffs' requested relief would completely undermine the purpose of the CCAA stay of proceedings which is at the core of CCAA proceedings in Canada, whereby all claimants are effectively required to put their "pens down" while the debtor makes an effort to make a proposal to its creditors to restructure its debt. The stay of proceedings is the key tool that is designed to ensure that the *status quo* is maintained during the restructuring efforts. It further prevents "manoeuvres for positioning" among creditors and prevents one creditor from

getting a "leg up" on others. The Court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring.

Canadian Airlines Corp. (Re), [2000] A.J. No. 1692 (Q.B.) at paras. 17-19, Brief of Authorities of Sino-Forest, Tab 1

Stelco Inc. (Re), [2005] O.J. No. 1171 (C.A.) at para. 36, Brief of Authorities of Sino-Forest, Tab 2

Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384 (C.A.) at 4, cited in *Stelco Inc. (Re)*, [2005] O.J. No. 4733 (C.A.) at para. 18, Brief of Authorities of Sino-Forest, Tab 3

Timminco Ltd. (Re.), 2012 ONSC 2515, at para. 15, Brief of Authorities of Sino-Forest, Tab 4

22. By its own terms, the CCAA Stay in this case expressly applies to SFC's officers and directors, which serves another key purpose of a stay of proceedings: allowing management to focus its energies on the restructuring.

See e.g., *Campeau v. Olympia & York Developments Ltd.*, [1992] O.J. No. 1946, Tab 5; *Timminco Re.*, 2012 ONSC 106 at para. 17, Brief of Authorities of Sino-Forest, Tab 6

Initial Order of Justice Morawetz dated March 30, 2012, Exhibit "B" to the Affidavit of W. Judson Martin sworn September 24, 2012 (the "September 24 Martin Affidavit"), Tab 2 of the Applicant's Motion Record (Stay Extension Motion Returnable September 28, 2012), Tab 2, p. 82 at para. 2

23. The need for management to focus its energies on the restructuring is all the more critical in this case given that there has been a significant reduction in Sino-Forest management personnel since the commencement of SFC's CCAA proceeding, arising both from attrition and from company-initiated departures.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 10, at para. 20

24. SFC's management resources are limited and are fully engaged effecting SFC's restructuring in a very tight time frame. Members of SFC's Board of Directors are also actively involved in these efforts. SFC's ability to continue forward with its restructuring in the best interests of all of SFC's stakeholders could be significantly affected if the time and efforts of its management, directors and advisors are diverted from the restructuring at this critical time.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 10, at para
21

25. There is no basis upon which the Court could conclude that allowing the Class Action Plaintiffs to pursue the class actions unabated would help to facilitate a restructuring. To the contrary, the resulting diversion of management's resources would be harmful to SFC's restructuring efforts.

26. Moreover, the Plan calls for the release of SFC and the named directors listed therein from certain claims arising from the proposed class actions. It is an ineffective use of SFC's limited resources to compel SFC and the named directors to respond to proposed motions in the class actions until it is known from which of the claims they will ultimately be released.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 9, at para. 11

27. The plaintiffs suffer no prejudice from the continued operation of the CCAA Stay. There is nothing pressing that needs to be resolved. No limitations issues arise. All that the Class Action Plaintiffs are seeking is to increase leverage against SFC and other stakeholders. That is exactly the type of maneuvering and posturing that the CCAA in general and the CCAA Stay in particular are designed to prevent.

28. In light of all of the above, SFC submits that lifting the CCAA Stay against SFC or its directors would interfere with SFC's restructuring efforts and would be detrimental to the interests of SFC's creditors when considered as a whole.

B. SFC Also Opposes Lifting the CCAA Stay against other Third Parties

29. This Honourable Court recognized the importance of extending the CCAA Stay to third parties by granting the Third Party Stay Order on May 8, 2012, which provides:

THIS COURT ORDERS that no Proceeding (as defined in the initial order granted by this Court on March 30, 2012 (as the same may be amended from time to time, the "Initial Order")) against or in respect of the Applicant, the Business or the Property (each as defined in the Initial Order), including without limitation the Ontario Class Action and any litigation in which the Applicant and the Directors, or any of them, are defendants, shall be commenced or continued as against any other party to such Proceeding or between or amongst such other parties (cross-claims and third party claims if any), until and including the expiration of the Stay Period (as defined in the Initial Order and as the same may be extended from time to time), provided that, notwithstanding the foregoing and anything to the contrary in the Initial Order, there shall be no stay of any Proceeding against Poyry (Beijing) Consulting Co. Limited and/or any affiliate any other Poyry entity, representative or agent.

Order of Justice Morawetz dated May 8, 2012, CV-12-9667-00CL, Brief of Authorities of Sino-Forest, Tab 7, at para. 2

30. The third party stay continues to be necessary because the third party defendants in the class actions (the "Third Party Defendants") seek to be indemnified by SFC for their costs and liabilities in the class actions. Such indemnification claims are advanced by SFC's former auditors and underwriters as well as its current and former officers and directors.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 11, at para. 23

Affidavit of W. Judson Martin, sworn April 23, 2012, Exhibit "H" to the Martin Affidavit, Applicant's Motion Record, Tab 2, p. 137, at para. 1

31. For all of the reasons set out by this Honourable Court in *Timminco*, the third party stay continues to be important and it simply makes no sense for the class actions to proceed against the Third Party Defendants while they are stayed against SFC:

[I]t makes no sense to lift the stay only as against Photon and leave it in place with respect to the Timminco Entities. As counsel submits, the Timminco Entities have an interest in both the legal issues and the factual issues that may be advanced if Mr. Penneyfeather proceeds as against Photon, as any such issues as are determined in Timminco's absence may cause unfairness to Timminco. I am in agreement with counsel's submission that to make such an order would be prejudicial to Timminco's business and property. In addition, I accept the submission that it would also be unfair to Photon to require it to answer Mr. Penneyfeather's allegations in the absence of Timminco as counsel has indicated that Photon will necessarily rely on documents and information produced by Timminco as part of its own defence.

I am also in agreement with the submission that it would be wasteful of judicial resources to permit the class proceedings to proceed as against Photon but not Timminco as, in addition to the duplicative use of court time, there would be the possibility of inconsistent findings on similar or identical factual and legal issues. For these reasons, I have concluded that it is not appropriate to lift the stay as against Photon.

Timminco Ltd. (Re.) at paras. 23-24, Brief of Authorities of Sino-Forest, Tab 4

32. As in *Timminco*, SFC has an interest in the legal and factual issues that may be addressed against the Third Party Defendants, and it would be unfair to both SFC and the Third Party Defendants to have those matters determined in the absence of SFC. Likewise, it would be a waste of judicial resources to allow the class actions to proceed, given the possibility of inconsistent findings on similar or identical factual and legal issues.

V. SFC OPPOSES PRODUCTION OF SFC'S CONFIDENTIAL DOCUMENTS

33. The Class Action Plaintiffs seek the production of various documents listed in their confidential schedule A for use in the class action proceedings. SFC opposes this motion on the

grounds that: (i) the Class Action Plaintiffs have no legal right to compel the production of these documents at this time; (ii) the Class Action Plaintiffs' request for the production of these documents breaches the non-disclosure agreement that they entered into with SFC; and (iii) granting the Class Action Plaintiffs' request would have a cooling effect on mediated resolutions to disputes in CCAA proceedings.

A. Factual Background of the Plaintiffs' Motion to Compel Public Disclosure

34. Pursuant to a consent order issued by this Honourable Court on July 25, 2012, the parties to the Canadian class action proceedings participated in a two-day mediation. That mediation was conducted by the Honourable Justice Newbould, and was held at the offices of Bennett Jones LLP on September 4 and 5, 2012. The mediation did not result in a settlement, although informal settlement discussions between the parties have continued and are expected to continue.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 11, at para.
24

35. In connection with that mediation, SFC consented to certain relief sought by the Class Action Plaintiffs (the "Mediation Documents Order").

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 11, at para.
25

36. The relief sought involved the production of otherwise confidential SFC documents to the parties to the mediation for the purpose of use in that mediation and pursuant to the terms and conditions set out in non-disclosure agreements executed by each of the parties to the mediation.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 11, at para.
26

37. SFC consented to the Mediation Documents Order and made these documents available to the mediating parties, including the Class Action Plaintiffs, based upon the understanding that these confidential documents were to be used by the parties in a good faith effort to resolve the issues in the proposed class actions through a mediated settlement under the CCAA.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 12, at para.
27

38. Each of the mediating parties was required to sign a non-disclosure agreement prior to being able to access these confidential documents. The fact that the Class Action Plaintiffs' request for production is a breach of that agreement is discussed below.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 12, at para.
28

39. 18,295 documents were made available by SFC in the data room pursuant to the Mediation Documents Order. The documents contain information regarding Sino-Forest's business processes and internal workings that has not been publicly disclosed.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 12, at para.
29

40. SFC has publicly disclosed, and the Monitor has reported, that SFC has experienced difficulties with the collection of accounts receivable and in its relationships with some contracting parties. SFC is working actively, with assistance from legal counsel in Hong Kong and the People's Republic of China ("PRC"), to enforce its rights in relation to these difficulties.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 12, at para.
30

41. The information disclosed to the mediating parties included information identifying parties with which SFC has done and continues to do business in the PRC, and SFC's relationships with those parties.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 12, at para.
31

42. To avoid interference with SFC's commercial relationships, which could be prejudicial to SFC's efforts to enforce its rights and to the interests of SFC's creditors, SFC has kept confidential the identity of most of its contracting parties in the PRC. SFC does not want litigation parties sending investigators or other representatives to SFC's contracting parties, as SFC believes this could impair SFC's efforts to enforce its legal rights against those parties.

The Martin Affidavit, Applicant's Motion Record, Tab 2, p. 12, at para.
32

B. The Class Action Plaintiffs have no legal right to compel production of the documents

43. The Class Action Plaintiffs have no right to the production of the requested documents for their certification or leave motions in the proposed (and stayed) class actions, nor does their purported status as creditors in this CCAA proceeding entitle them to such production. In short, there is no legal basis upon which the Class Action Plaintiffs can compel SFC to publicly disclose its confidential documents; no basis for disclosure exists under the CCAA, the *Securities Act* (Ontario), or the *Class Proceedings Act* (Ontario).

1. No Right to Compel Disclosure Pursuant to the CCAA

44. Merely being a purported stakeholder in the CCAA proceeding does not provide the Class Action Plaintiffs with any right to compel disclosure of these documents, nor do the Class Action Plaintiffs have any right under the CCAA to the information sought.

45. Despite the lack of any requirement to provide access to the data room, SFC, on a good faith basis, consented to the Mediation Documents Order granting the Class Action Plaintiffs access to the confidential data room provided they executed a non-disclosure agreement. SFC exercised its business judgment to only allow access on this basis. SFC's exercise of its business judgment in deciding who should have access to the confidential data room was upheld in this Honourable Court's decision in this matter dated May 14, 2012, in which it refused to grant an individual noteholder, who refused to sign the non-disclosure agreement, with access to the confidential database:

There is nothing on the record to suggest the decision was made in bad faith. It seems to me that the Applicants' decision makers have exercised their business judgment in determining not to provide the information in the absence of an executed confidentiality agreement. I am reluctant, on the basis of the record before me, to interfere with this decision.

Order of Justice Morawetz dated May 14, 2012, CV-12-9667-00CL,
Brief of Authorities of Sino-Forest, Tab 8, at para. 2

46. There is absolutely nothing on the record before this Honourable Court that in any way suggests that SFC's exercise of its business judgment has been made in bad faith or that this Honourable Court should interfere with SFC's decision not to publicly disclose the documents in question.

47. The Quebec Superior Court has also found that a debtor company, through the exercise of reasonable business judgment, can restrict access to its data rooms and "lacking evidence of bad faith, the Court should be reluctant to intervene in the reasonable exercise of a debtor company's business judgment."

Abitibowater Inc. (Re), 2009 QCCS 5482 at paras. 80-81, Brief of Authorities of Sino-Forest, Tab 9

48. In *Abitibowater Inc. (Re)*, the Court held that the CCAA "should not be used to further a collateral objective that, in the end, is not in connection with the ultimate goal of the Act." Where a stakeholder sought access to documents in order to assess its claims (much as in the present case), such access was denied as it did not assist with the restructuring. In so holding, the Court held that "[t]he broader public dimension of the CCAA does not entail an unlimited and unfettered access to the non-public books, records and financial data of a debtor company".

Abitibowater Inc. (Re) at paras. 82-85, Brief of Authorities of Sino-Forest, Tab 9

49. On the present facts, the Class Action Plaintiffs cannot use the CCAA to further a collateral objective: obtaining evidence to meet their statutory burdens in the class action proceedings. The documents are being sought "not to enhance the restructuring process", but for use in other proceedings. There is no legal basis for such a disclosure order in a CCAA proceeding and, in fact, the Class Action Plaintiffs' request for such disclosure directly contravenes the existing case law on point.

Abitibowater Inc. (Re) at para. 82, Brief of Authorities of Sino-Forest, Tab 9

2. No Right to Compel Disclosure Pursuant to the Securities Act

50. The leave proceedings in Part XXIII.1 of the *Securities Act* (Ontario) do not contemplate any discovery period or disclosure rights at the leave stage of the proceedings.

Securities Act, R.S.O. 1990, c. S.5, s. 138.8

51. This is consistent with the legislative purpose of the leave proceedings, as recognized by Justice Lax:

The section was not enacted to benefit plaintiffs or to level the playing field for them in prosecuting an action under Part XXIII.1 of the Act. Rather, it was enacted to protect defendants from coercive litigation and to reduce their exposure to costly proceedings. **No onus is placed upon proposed defendants by section 138.8. Nor are they required to assist plaintiffs in securing evidence upon which to base an action under Part XXIII.1. The essence of the leave motion is that putative plaintiffs are required to demonstrate the propriety of their proposed secondary market liability claim before a defendant is required to respond.** Subsection 138.8(2) must be interpreted to reflect this underlying policy rationale and the legislature's intention in imposing a gatekeeper mechanism. [emphasis added]

Ainslie v. CV Technologies Inc. (2008), 93 O.R. (3d) 200 (Sup. Ct. J.) at para. 15, leave to appeal granted in part [2009] O.J. No. 730 (Sup. Ct. J.) but not heard, Brief of Authorities of Sino-Forest, Tab 10

52. Not only is there no statutory right to disclosure of documents for a leave proceeding, any such order would vitiate the purpose of Part XXIII.1, which should protect defendants from expending time and money prior to a finding that leave should be granted. To grant an order requiring the disclosure of documents at this stage would require the defendants "to produce evidence that may not be necessary for the leave motion and would serve no purpose other than to expose those defendants to a time-consuming and costly discovery process." This is inconsistent with the legislative scheme and object of Part XXIII.1, and would be particularly

harmful in this case where all of management's time and resources should be focused on SFC's restructuring for the benefit of all stakeholders, and not assisting the plaintiffs with establishing their statutory burden for leave.

Ainslie v. CV Technologies Inc. at para. 25, Brief of Authorities of Sino-Forest, Tab 10

3. No Right to Compel Disclosure Pursuant to the Class Proceedings Act

53. There is also no right to automatic discovery under the *Class Proceedings Act, 1992* prior to certification of a class proceeding. Rather, a party seeking such disclosure must demonstrate that this is an exceptional case for pre-certification disclosure. In particular, to obtain an order for document disclosure in a proposed class proceeding, the plaintiffs bear the onus of proving the requested documents are necessary to inform the criteria for certification. The test for certification is found in subsection 5(1) of the *Class Proceedings Act*:

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
 - (a) the pleadings or the notice of application discloses a cause of action;
 - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
 - (c) the claims or defences of the class members raise common issues;
 - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
 - (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Class Proceedings Act, 1992, S.O. 1992, c. 6. ss. 5(1)

Bartram (Litigation guardian of) v. Glaxosmithkline Inc., 2011 BCSC 1174 at paras. 11 and 21, leave to appeal refused 2011 BCCA 539, Brief of Authorities of Sino-Forest, Tab 11

Pro-Sys Consultants Ltd. v. Microsoft Corp., 2007 BCSC 1663 at paras. 21-26, Brief of Authorities of Sino-Forest, Tab 12

54. It is immaterial if the documents are relevant to the class action proceeding generally. The Supreme Court of Canada has made it clear that "the certification stage is decidedly not meant to be a test of the merits of the action" and has cited with approval that "any inquiry into the merits of the action will not be relevant on a motion for certification"; therefore, documents cannot be disclosed on the basis that they are relevant to the merits of the proceeding or the credibility of the parties. Rather, the certification stage focuses on the form of the action; therefore, requested documents must be necessary to demonstrate the certification requirements in the *Class Proceedings Act*. To go beyond this creates "a risk that a requirement to make full disclosure before certification will be so onerous it will amount to an unfair imposition on defendants and potential settlement tool in the hands of a plaintiff who may not have a certifiable class action."

Hollick v. Toronto (City), 2001 SCC 68 at para. 16, Brief of Authorities of Sino-Forest, Tab 13

Price v. Panasonic Canada Inc., [2001] O.J. No. 5244 (Sup. Ct. J.) at paras. 9-13 & 15, Brief of Authorities of Sino-Forest, Tab 14

Matthews v. Servier Canada Inc. (1999), 65 B.C.L.R. (3d) 348 (S.C.) at para. 6, as cited in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2007 BCSC 1663 at para. 23 and *Bartram (Litigation Guardian of) v. Glaxosmithkline Inc.*, 2011 BCSC 1174 at para. 11, leave to appeal refused 2011 BCCA 539, Brief of Authorities of Sino-Forest, Tab 15

55. As there is no automatic right to pre-certification document disclosure, the Class Action Plaintiffs must demonstrate the exceptional circumstances requiring such an order in the class action proceedings even if they were not stayed, which of course they are. The Class Action Plaintiffs must minimally demonstrate that the documents are necessary to the certification criteria, not the merits of the proceeding or even the credibility of the defendants.

56. On the present facts, the Class Action Plaintiffs have not met this onus as the documents requested do not in any way inform the certification requirements in subsection 5(1) of the *Class Proceedings Act*.

C. CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

57. Not only have the Class Action Plaintiffs failed to establish any legal basis to compel the public disclosure of these confidential documents, they are in breach of the Confidentiality, Non-Disclosure and Non-Use Agreement (the "Agreement") that they signed prior to gaining access to the data room in which these confidential documents are located.

58. A commercial contract is to be interpreted:

- (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
- (b) by determining the intention of the parties in accordance with the language they have used in the written documents and based upon the "cardinal presumption" that they have intended what they have said;
- (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract but without reference to the subjective intention of the parties; and
- (d) to the extent there is any ambiguity in the contract, in a fashion that accords with good business sense, and that avoids a commercial absurdity.

Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust (2007),
85 O.R. (3d) 254 (C.A.) at para. 24, Brief of Authorities of Sino-Forest,
Tab 16

59. In order to gain access to the dataroom, the plaintiffs were required to execute the Agreement, which provides that the Class Action Plaintiffs shall not, directly or indirectly, "use the Information for any purpose other than the Permitted Use".

Sample Non-Disclosure Agreement, Exhibit "K" to the Martin Affidavit,
Applicant's Motion Record, Tab 2, p. 163 at para. 9(a)

60. The "Permitted Use" is "solely in connection with the CCAA Proceedings and the Claims filed by [the Class Action Plaintiffs] or on their behalf in the CCAA Proceedings."

Sample Non-Disclosure Agreement, Exhibit "K" to the Martin Affidavit,
Applicant's Motion Record, Tab 2, p. 162 at para. 4

61. The "Information" "means all information in whatever form...that has or hereafter comes into the knowledge or possession of the Recipient..." pursuant to the Agreement. The existence of the confidential documents requested by the Class Action Plaintiffs is information that came into the knowledge of the Recipient (the Class Action Plaintiffs) pursuant to the Agreement. Therefore, it constitutes "Information" and can only be used in connection with the CCAA Proceedings.

Sample Non-Disclosure Agreement, Exhibit "K" to the Martin Affidavit,
Applicant's Motion Record, Tab 2, p. 161 at para. 1

62. A reading of the Agreement as a whole demonstrates that the attempt to use this "Information" to compel production of these confidential documents for use in the proposed class actions (which are separate proceedings from these CCAA proceedings) violates the

Agreement, as the knowledge of the existence of those documents falls within the scope of "Information" and therefore can only be used in connection with the CCAA Proceedings.

63. It was the clear intent of the parties executing the Agreement to prevent any use of these documents outside of the CCAA proceedings. The Class Action Plaintiffs would not even have known about the existence of the documents but for the Agreement; therefore, it would completely negate the purpose of the Agreement, and result in a commercial absurdity, to allow the Class Action Plaintiffs to now compel production of these confidential documents for use outside of the CCAA proceedings.

64. The Class Action Plaintiffs rely upon the provision that the Agreement does not constitute "a waiver or restriction of any rights at law to separately compel production or disclosure of any information as part of any legal proceeding or the use of such information so separately compelled or disclosed as permitted by the rules of civil procedure or applicable law." However, this provision in no way allows the Class Action Plaintiffs to use knowledge acquired solely as a result of the Agreement to compel that production or disclosure. It would be commercially absurd to include a provision allowing the Class Action Plaintiffs to compel disclosure of documents they would not have even known about but for the Agreement. Rather, this provision clearly preserves the Class Action Plaintiffs' pre-existing rights to compel production or disclosure of information acquired outside of the context of the Agreement; it does not create a new right to compel disclosure of information received pursuant to the Agreement.

65. The Class Action Plaintiffs' requested relief breaches the Agreement and on that basis alone, should be denied.

D. PUBLIC POLICY CONSIDERATIONS

66. In addition to the absence of any right for disclosure of the confidential documents, and in addition to the fact that the Class Action Plaintiffs are in breach of the Agreement, the cooling effect that the order sought by the Class Action Plaintiffs would have on future mediations and settlement discussions in the CCAA context must also be considered.

67. Disclosure of the confidential documents in this case would discourage parties to enter into a mediation or settlement discussions in future CCAA proceedings. Courts have recognized that there is a strong public interest in the settlement of disputes and the avoidance of litigation, and that parties should be free to engage in negotiations and mediation without fear that their "offers of peace" will be used against them if the negotiations fail. It is a principle of public policy that parties should be encouraged to settle their disputes without resort to litigation and should not be discouraged by having information in the mediation used against them.

IPEX Inc. v. AT Plastics Inc., 2011 ONSC 4734 at paras. 29-31, Brief of Authorities of Sino-Forest, Tab 17

Hollinger Inc. (Re), 2011 ONCA 579 at paras. 18-19, leave to appeal refused [2011] S.C.C.A. No. 473, Brief of Authorities of Sino-Forest, Tab 18

68. In the context of a court-ordered mediation, there is also a public policy goal of encouraging settlement discussions. As the Ontario Court of Appeal explained: "The failure to protect confidentiality could profoundly prejudice the effectiveness of mandatory mediation. It is difficult to see how anyone would agree to be open and frank in discussions designed to effect settlement – discussions they have no choice about participating in – when there is no protection for the confidentiality of the process."

Rogacki v. Belz (2003), 67 O.R. (3d) 330 (C.A.) at paras. 36-38 per Abella J., concurring, Brief of Authorities of Sino-Forest, Tab 19

69. On the present facts, the disclosure of the documents to the Class Action Plaintiffs pursuant to the Mediation Documents Order and in accordance with the Agreement was an "offer of peace" made in a good faith attempt at a mediated settlement. To allow the Class Action Plaintiffs to use this act against SFC in a separate proceeding for which it was not intended would go against the public interest in encouraging settlements and would hinder the effectiveness of mediation, as parties would be hesitant to engage in settlement discussions where confidentiality is not protected. Future companies in CCAA proceedings would be less likely to cooperate in disclosure for the purpose of settlements if such disclosure could so easily be used against them in other proceedings, or where confidential documents could ultimately be publicly disclosed as a result of their participation in the mediation.

70. The Class Action Plaintiffs' want for these confidential documents when they have no statutory or other right to obtain them cannot outweigh the public interest in encouraging mediations and settlements, and the potential cooling effect on future mediations and settlement discussions in the CCAA context.

VI. A REPRESENTATIVE ORDER FOR THE CLASS ACTION PLAINTIFFS IS INAPPROPRIATE AT THIS TIME

71. The Class Action Plaintiffs have also brought a motion seeking the appointment of the Class Action Plaintiffs as the representatives for the classes proposed in the proposed class actions and granting the Class Action Plaintiffs the right to vote (if necessary) on the Plan.

72. The Class Action Plaintiffs' motion for representative status is inappropriate given that the class actions have not been certified and the Class Action Plaintiffs have no authority to purport to represent all of the proposed members in the proposed class actions in this CCAA proceeding. In *Muscletech Research & Development Inc. (Re)*, this Honourable Court made it clear that class counsel for proposed and as of yet uncertified class actions have no special standing in CCAA proceedings that would entitle them to representative counsel status.

Muscletech Research & Development Inc., (Re) (2006), 25 C.B.R. (5th)
218 (Ont. Sup. Ct. J.), Brief of Authorities of Sino-Forest, Tab 20

73. While the Claims Procedure Order issued on May 14, 2012 entitled the Class Action Plaintiffs to file one proof of claim for each of the Ontario and Quebec class actions, it was clear that it did not do so at the exclusion of individuals' rights to file individual claims, which it should be noted, were received by the Monitor. While the making of such a representative claim was helpful to preserve all rights, it was not done at the exclusion of individuals' rights to submit their own claims, and the Class Action Plaintiffs have no standing to now seek a representative order to represent proposed class members of the proposed class actions.

74. This Honourable Court has held that in determining whether to appoint representative counsel, consideration must be given to both time and cost efficiency, and there is no need for duplicative representative counsel.

Nortel Networks Corp. (Re) [2009] O.J. No. 2166 (Sup. Ct. J.) at para. 53, Brief
of Authorities of Sino-Forest, Tab 21

75. On the present facts, there is absolutely no need for the Class Action Plaintiffs to serve as representative counsel. The interests of SFC's noteholders are already fully represented by Goodmans LLP, and SFC's shareholders and former shareholders have no standing as a matter of

law to vote on the Plan or participate in the distribution of SFC's assets. Accordingly, the only creditors with an actual economic interest in SFC within the proposed class (of an as yet, uncertified class action) which the Class Action Plaintiffs seek to represent are already fully represented by counsel in this proceeding.

Order of Justice Morawetz, dated July 27, 2012, Exhibit "E" to the September 24 Martin Affidavit, Tab 2 of the Applicant's Motion Record (Stay Extension Motion Returnable September 28, 2012), Tab 2, p. 137

76. The Class Action Plaintiffs' motion seeking voting rights on behalf of SFC's current and former shareholders is nothing more than a collateral attack on this Honourable Court's Equity Claims Order which properly held that the claims of SFC's shareholders and former shareholders are subordinated to the claims of SFC's other creditors. The Class Action Plaintiffs have not sought leave to appeal the Equity Claims Order.

Order of Justice Morawetz, dated July 27, 2012, Exhibit "E" to the September 24 Martin Affidavit, Tab 2 of the Applicant's Motion Record (Stay Extension Motion Returnable September 28, 2012), Tab 2, p. 137

VII. RELIEF SOUGHT

77. SFC respectfully requests the Stay Extension Order extending the CCAA Stay until December 3, 2012.

78. SFC respectfully requests that the Class Action Plaintiffs' motions be dismissed in their entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



BENNETT JONES LLP
 Lawyers for the Applicant

SCHEDULE "A" – AUTHORITIES CITED
Jurisprudence

1. *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1692 (Q.B.)
2. *Stelco Inc. (Re)*, [2005] O.J. No. 1171 (C.A.)
3. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384 (C.A.),
Stelco Inc. (Re), [2005] O.J. No. 4733 (C.A.)
4. *Timminco Ltd. (Re.)*, 2012 ONSC 2515
5. *Campeau v. Olympia & York Developments Ltd.*, [1992] O.J. No. 1946
6. *Timminco Re.*, 2012 ONSC 106
7. Order of Justice Morawetz dated May 8, 2012, CV-12-9667-00CL
8. Order of Justice Morawetz dated May 14, 2012, CV-12-9667-00CL
9. *Abitibowater Inc. (Re)*, 2009 QCCS 5482.
10. *Ainslie v. CV Technologies Inc.* (2008) 93 O.R. (3d) 200 (Sup. Ct. J.)
11. *Bartram (Litigation guardian of) v. Glaxosmithkline Inc.*, 2011 BCSC 1174
12. *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2007 BCSC 1663
13. *Hollick v. Toronto (City)*, 2001 SCC 68
14. *Price v. Panasonic Canada Inc.*, [2001] O.J. No. 5244 (Sup. Ct. J.)
15. *Matthews v. Servier Canada Inc.* (1999), 65 B.C.L.R. (3d) 348 (S.C.)
16. *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (C.A.)

17. *IPEX Inc. v. AT Plastics Inc.*, 2011 ONSC 4734
18. *Hollinger Inc. (Re)*, 2011 ONCA 579
19. *Rogacki v. Belz* (2003), 67 O.R. (3d) 330 (C.A.)
20. *Muscletech Research & Development Inc., (Re)* (2006), 25 C.B.R. (5th) 218 (Ont. Sup. Ct. J.)
21. *Nortel Networks Corp. (Re)* [2009] O.J. No. 2166 (Sup. Ct. J.)

SCHEDULE "B" – STATUTORY REFERENCES

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Securities Act, R.S.O. 1990, c. S.5

Leave to proceed

138.8 (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

(a) the action is being brought in good faith; and

(b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 17.

Same

(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely. 2002, c. 22, s. 185.

Same

(3) The maker of such an affidavit may be examined on it in accordance with the rules of court. 2002, c. 22, s. 185.

Copies to be sent to the Commission

(4) A copy of the application for leave to proceed and any affidavits and factums filed with the court shall be sent to the Commission when filed. 2009, c. 34, Sched. S, s. 6 (1).

Requirement to provide notice

(5) The plaintiff shall provide the Commission with notice in writing of the date on which the application for leave is scheduled to proceed, at the same time such notice is given to each defendant. 2009, c. 34, Sched. S, s. 6 (2).

Same, appeal of leave decision

(6) If any party appeals the decision of the court with respect to whether leave to commence an action under section 138.3 is granted,

(a) each party to the appeal shall provide a copy of its factum to the Commission when it is filed; and

(b) the appellant shall provide the Commission with notice in writing of the date on which the appeal is scheduled to be heard, at the same time such notice is given to each respondent. 2009, c. 34, Sched. S, s. 6 (2); 2010, c. 1, Sched. 26, s. 7.

Class Proceedings Act, 1992, S.O. 1992, c. 6

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

**IN THE MATTER OF THE COMPANIES CREDITORS' ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE
MATTER OF A PLAN OR COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION**

Court File No. CV-12-9667-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced in Toronto

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