

**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**

Court File No.: CV-11-431153-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND
EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING
ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT
and ROBERT WONG**

Plaintiffs

- and -

**SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly
known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN,
KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND,
JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J.
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SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES
CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC
WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD
FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE
SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH
INCORPORATED (successor by merger to Banc of America Securities LLC)**

Defendants

Proceeding under the Class Proceedings Act, 1992

**RESPONDING FACTUM OF SFC LITIGATION TRUST
(Settlement Approval Motion Returnable May 11, 2015)**

May 5, 2015

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**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**

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND
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Plaintiffs

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Defendants

Proceeding under the Class Proceedings Act, 1992

RESPONDING FACTUM OF SFC LITIGATION TRUST
(Settlement Approval Motion, Returnable May 11, 2015)

PART I – OVERVIEW

1. The moving party, the Underwriters¹, have reached a settlement with the plaintiffs in a class action commenced in Ontario representing certain of Sino-Forest Corporation's ("SFC")

¹ The Underwriters are comprised of Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor to Bank of America Securities LLC).

former security holders. In the ordinary course, the settling parties would attend in front of Justice Perrell to seek approval of that settlement, and to obtain any releases that were agreed to between the parties and that are available to the Underwriters pursuant to the *Class Proceedings Act* in that proceeding. Absolutely nothing prevents them from doing so now or at any point in the future.

2. Instead, the Underwriters and the class action plaintiffs come to this Court within SFC's CCAA proceeding and seek, as a purported condition of their settlement, a third party release in accordance with the terms of SFC's plan of arrangement and compromise under the *Companies' Creditors Arrangement Act*² (the "**CCAA Plan**"). They seek this extraordinary relief notwithstanding that they have completely failed to comply with the express prerequisites of the CCAA Plan to be granted such a release.

3. The clear terms of the CCAA Plan are the result of extensive negotiations between commercially sophisticated parties including the Underwriters and the class action plaintiffs. In order to obtain a CCAA release against the world at large, all third party defendants, including the Underwriters, are required to obtain the approval of the Litigation Trustee and the Monitor. That is the requirement that was negotiated and agreed to by SFC and its creditors, and that is the requirement that was approved by this Court in sanctioning the CCAA Plan.

4. Not only have the Underwriters failed to obtain the consent of either the Litigation Trustee or the Monitor, but they have deliberately excluded the Litigation Trustee and the Monitor from all negotiations giving rise to the settlement they now seek to have approved. In fact, the Underwriters only advised that they had entered into a settlement agreement that

² R.S.C. 1985, c. C-36, As Amended.

purportedly "entitled" them to a CCAA release after they had executed minutes of settlement with the class action plaintiffs. Neither the Litigation Trustee nor the Monitor were consulted regarding terms for their consent to a CCAA release for the Underwriters.

5. As purported support for their decision to ignore the clear consent requirements of the release provisions under the CCAA Plan, the Underwriters and the class action plaintiffs now advance a tortured reading of the operative provisions that would render the CCAA Plan internally inconsistent and lead to an absurd result. Their position is premised upon the remarkable proposition that the release provision that provides for identical consent requirements prior to granting *any* third party release can somehow be interpreted as requiring certain third party defendants to obtain the consent of the Litigation Trustee and the Monitor while excusing the Underwriters from doing so. While excusing the Underwriters from the "burden" of negotiating for the Litigation Trustee's and the Monitor's consent to the release would undoubtedly be convenient for the Underwriters, the relief they seek is: (i) contrary to the clear wording of the CCAA Plan; (ii) inconsistent with the steps taken in connection with settlements with other named third party defendants to date (in which the Litigation Trustee's and the Monitor's consent has been sought and obtained); and (iii) wholly inconsistent with the very purpose of third party release provisions in both the CCAA Plan specifically and the CCAA generally.

6. There is no basis upon which this Honourable Court has the jurisdiction to compel the consent of the Monitor and the Litigation Trustee over their objections, nor is there any reason for this Court to do so even if it found it had the jurisdiction. The Underwriters' baseless suggestion that the Litigation Trustee is somehow acting in bad faith by fulfilling its fiduciary duties to its beneficiaries is simply absurd and demonstrates the extent to which the Underwriters

are willing to go to circumvent the requirements of the CCAA Plan that they negotiated, was overwhelmingly approved by creditors and which was sanctioned by this Court. The Litigation Trustee's exercise of discretion in declining to consent to the provision of a release in circumstances where it is contrary to the interests of the beneficiaries of the trust (SFC's true, non-subordinated creditors) cannot amount to bad faith.

7. Having failed to engage the Monitor and Litigation Trustee in meaningful negotiations and having failed to comply with the terms of the bargain they struck with SFC and its creditors, the Underwriters ought to be restricted to resolving their dispute within the class action proceeding and seeking whatever relief is available to them pursuant to the *Class Proceedings Act* in that proceeding. It is simply not open to them to come to SFC's CCAA proceeding and seek extraordinary CCAA relief pursuant to the CCAA Plan without engaging in the requisite negotiations with, and obtaining the requisite consent of, the court-appointed Monitor and the Litigation Trustee: the *de facto* proxy for the debtor and the other non-subordinated creditors of SFC.

PART II – FACTS

8. Cosimo Borrelli ("**Borrelli**") is a Managing Director and founding partner of Borrelli Walsh Limited ("**Borrelli Walsh**"), a specialist restructuring, insolvency and forensic accounting firm. Pursuant to a Litigation Trust Agreement dated January 30, 2013 (the "**Trust Agreement**"), the CCAA Plan and an Order of the Ontario Superior Court of Justice

(Commercial List) dated December 10, 2012 (the "**CCAA Plan Sanction Order**"), Borrelli was appointed as the Litigation Trustee of the SFC Litigation Trust, the plaintiff in this action.³

9. SFC was an integrated forest plantation operator and forest productions company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China (the "**PRC**"). SFC's registered office was in Toronto and its principal business office is in Hong Kong.⁴

10. SFC applied to this Honourable Court and obtained an Initial Order under the CCAA on March 30, 2012, pursuant to which a stay of proceedings was granted in respect of SFC and certain of its subsidiaries.⁵

The Class Actions

11. SFC and certain of its former officers, directors and employees, along with SFC's former auditors, technical consultants and the Underwriters have been named as defendants in a number of class action lawsuits in Ontario, Saskatchewan, Quebec and New York (collectively, the "**Class Actions**").⁶

12. The plaintiffs in the Ontario Class Action (the "**Class Action Plaintiffs**"), on behalf of current and former shareholders of SFC, seek damages against SFC and the other defendants in the Ontario Class Action in the amount of \$6.5 billion for general damages, \$174.8 million in connection with a prospectus issued in June 2007, \$330 million in relation to a prospectus issued in June 2009 and \$319.2 million in relation to a prospectus issued in December 2009. The

³ Affidavit of Cosimo Borrelli, sworn April 27, 2015 (the "Borrelli Affidavit") at para. 1, Responding Motion Record of SFC Litigation Trust (the "Motion Record"), Tab 1, pp. 1-2.

⁴ Borrelli Affidavit at para. 2, Motion Record, Tab 1, p. 2.

⁵ Borrelli Affidavit at para. 3, Motion Record, Tab 1, p. 2.

⁶ Borrelli Affidavit at para. 4, Motion Record, Tab 1, pp. 2-3.

market cap for SFC during the alleged misrepresentations ranged from \$546.5 million to \$6.15 billion.⁷

13. The Class Action Plaintiffs also assert claims on behalf of certain former holders of SFC's Notes in the amounts of \$345 million for the 2013 Convertible Notes, \$460 million for the 2016 Convertible Notes, and \$600 million for the 2017 Senior Notes, for a total claim of approximately \$1.8 billion.⁸

The Underwriters' Claims are Subordinated Equity Claims

14. On June 26, 2012, SFC brought a motion in SFC's CCAA proceeding for an order directing that claims against SFC arising in connection with the ownership, purchase or sale of an equity interest in SFC and related indemnity claims were "equity claims" as defined in section 2 of the CCAA Plan (the "**Equity Claims Motion**").⁹

15. In the Equity Claims Motion, SFC argued that the claims made by or on behalf of current and former shareholders in the Class Actions, and any indemnification claims being advanced by SFC's co-defendants (including the Underwriters) arising out of same, were subordinated equity claims. The Equity Claims Motion did not purport to deal with the component of the class proceedings that relate to debt claims. The relief sought by SFC was opposed by SFC's former auditors and the Underwriters.¹⁰

16. In reasons released on July 27, 2012 (the "**Equity Claims Decision**"), this Honourable Court granted the relief sought by SFC, finding that the indemnity claims of the Underwriters

⁷ Borrelli Affidavit at para.6, Motion Record, Tab 1, p. 3.

⁸ Borrelli Affidavit at para. 7, Motion Record, Tab 1, p. 3.

⁹ Borrelli Affidavit at para. 10, Motion Record, Tab 1, p. 4.

¹⁰ Borrelli Affidavit at para. 11, Motion Record, Tab 1, p. 4.

arising from the Class Action claims being advanced by SFC's shareholders and former shareholders constituted subordinated Equity Claims as defined in the CCAA Plan.¹¹

17. The auditors and Underwriters appealed the decision to the Court of Appeal for Ontario. The appeal was heard on November 13, 2012. On November 23, 2012, the Court of Appeal dismissed the appeal.¹²

18. In accordance with the Equity Claims Decision and the Court of Appeal's dismissal of the appeal, the Class Action claims being advanced on behalf of SFC's former shareholders and the corresponding indemnification claims of the Underwriters against SFC were subordinated and were to rank behind the claims of SFC's unsecured creditors.¹³

The CCAA Plan

19. At a creditor meeting held on December 3, 2012, an overwhelming majority of SFC's affected creditors approved the CCAA Plan. In total, 99% in number and greater than 99% in value of those creditors eligible to vote, voted in favour of the CCAA Plan. The overwhelming support for the CCAA Plan was the result of exhaustive negotiations between SFC, the Monitor and the various constituent groups. The CCAA Plan was a heavily negotiated document and both the Class Action Plaintiffs' and the Underwriters' counsel had significant involvement in the negotiation of aspects of the CCAA Plan.¹⁴

20. Neither the Class Action Plaintiffs nor the Underwriters opposed the sanctioning of the CCAA Plan which represented the negotiated compromise of the various constituent groups'

¹¹ Borrelli Affidavit at para. 12, Motion Record, Tab 1, p. 5.

¹² Borrelli Affidavit at para. 13, Motion Record, Tab 1, p. 5.

¹³ Borrelli Affidavit at para. 14, Motion Record, Tab 1, p. 5.

¹⁴ Borrelli Affidavit at para. 15, Motion Record, Tab 1, p. 5.

claims.¹⁵ The CCAA Plan was ultimately sanctioned by this Honourable Court on December 10, 2012.¹⁶

21. In December 2012, a group of subordinated equity claimants, Invesco Canada Ltd., Northwest & Ethical Investments L.P. and Comite Syndical National de Retraite Batirente Inc. ("**Invesco**") commenced a motion for leave to appeal the CCAA Plan Sanction Order. Leave to appeal was denied by the Court of Appeal of Ontario and ultimately the Supreme Court of Canada.¹⁷

The Litigation Trust Claims

22. The Litigation Trust Claims (as defined in the CCAA Plan) consist of any and all claims or causes of action which have been or may be asserted by or on behalf of (a) SFC against any and all third parties; or (b) the trustees (on behalf of the former noteholders in SFC) against any and all persons in connection with the notes issued by SFC, other than in either case (i) any claim, right or cause of action against any person that is released pursuant to Article 7 of the CCAA Plan; or (ii) any Excluded Litigation Trust Claim.¹⁸

23. Under the Trust Agreement and the CCAA Plan Sanction Order, the Litigation Trust Assets (as defined therein) of SFC were transferred to the SFC Litigation Trust. The Litigation Trust Assets included the Litigation Trust Claims (as described above), the Litigation Funding Amount (as defined therein), and any other assets acquired by the SFC Litigation Trust on or after the effective date pursuant to the Trust Agreement or the CCAA Plan.¹⁹

¹⁵ Borrelli Affidavit at para. 15, Motion Record, Tab 1, p. 6.

¹⁶ Borrelli Affidavit at para. 17, Motion Record, Tab 1, p. 6.

¹⁷ Borrelli Affidavit at para. 18, Motion Record, Tab 1, p. 6.

¹⁸ Borrelli Affidavit at para. 20, Motion Record, Tab 1, pp. 6-7.

¹⁹ Borrelli Affidavit at para. 21, Motion Record, Tab 1, p. 7.

The Proposed Underwriter Settlement

24. The Ontario Class Action plaintiffs have agreed, pending approval by this Honourable Court and pursuant to minutes of settlement dated January 26, 2015, to resolve the claims advanced against the Underwriters in the Ontario Class Action in exchange for payment of \$32,500,000. If approved, the Class Action Plaintiffs seek to allocate 69.23% of the aggregate settlement funds available for distribution (after class counsel fees and certain other amounts are deducted) to subordinated equity claim holders, with the remaining 30.769% being allocated to noteholder claimants.²⁰

25. As part of the proposed settlement, the Underwriters also seek to obtain a CCAA Plan release purportedly in accordance with the terms of the CCAA Plan.²¹

26. The CCAA Plan provides a mechanism by which "Named Third Party Defendants" in the Class Actions can take advantage of a prescribed settlement framework to obtain the benefit of a broad release of all claims under the terms of the CCAA Plan. Specifically, the CCAA Plan allows a "Named Third Party Defendant" to settle specified litigation in relation to SFC, including the Ontario Class Action, and to obtain a "Named Third Party Defendant Release" (the "CCAA Release") subject to certain conditions.²²

27. Named Third Party Defendant Release is defined at Section 1.1 of the CCAA Plan, which reads:

"Named Third Party Defendant Release" means a release of any applicable Named Third Party Defendant Agreed to pursuant to a Named Third Party

²⁰ Affidavit of Charles Wright sworn April 13, 2015 at para. 91, Plaintiffs' Motion Record (Settlement Approval), Tab 2, p. 51.

²¹ Borrelli Affidavit at para. 25, Motion Record, Tab 1, p. 8.

²² Borrelli Affidavit at para. 26, Motion Record, Tab 1, p. 8.

Settlement and approved pursuant to a Named Third Party Defendant Settlement Order, provided that such release must be **acceptable to** SFC (if on or prior to the Plan Implementation Date), the Monitor, the Initial Consenting Noteholders (if on or prior to the Plan Implementation Date) and **the Litigation Trustee (if after the Plan Implementation Date)**, and provided further that such release shall not affect the plaintiffs in the Class Actions without the consent of counsel to the Ontario Class Action Plaintiffs.²³ [emphasis added]

28. The benefit of the CCAA Release, as a third party release, does not belong to class counsel or to any of the third parties. Rather, the CCAA Release is intended to be invoked in the context of a settlement that works to the benefit of the CCAA debtor estate as a whole. Accordingly, among the pre-conditions in the CCAA Plan to obtaining a CCAA Release is a requirement that the parties obtain the consent of SFC (pre-Plan implementation), SFC's noteholders (pre-Plan implementation), the SFC Litigation Trustee (post-Plan implementation) and the Monitor.²⁴ It is worth noting that the clear wording of the provision provides that the release must *always* be acceptable to these parties. This is contrasted with the Class Action Plaintiffs' consent rights, whose consent is only needed *if* the release affects the Class Action Plaintiffs' rights.

29. The CCAA Releases contemplated by and granted pursuant to the CCAA Plan are immeasurably broader than the releases ordinarily available to parties to a class proceeding (including the Underwriters) under the *Class Proceedings Act*, where parties negotiate bar orders to protect against limited future claims by co-defendants seeking contribution and indemnity. By contrast, the CCAA Release is not confined to the settlement of claims advanced by the Class Action Plaintiffs (and any corresponding claims for contribution and indemnity or other claims arising therefrom), but would extend to *any* claim that *any* person could have against the party.

²³ CCAA Plan, Exhibit M to the Borrelli Affidavit at section 1.1, Motion Record, Tab 1(M), p. 594.

²⁴ Borrelli Affidavit at para. 27, Motion Record, Tab 1, pp. 8-9.

In short, it is a total release of all possible claims that could ever arise out of the SFC matter. Additionally, and importantly, unlike a release provided pursuant to a class action settlement, there is no "opting-out" from a CCAA release.²⁵

30. The broad scope of the CCAA Release therefore offers a significant benefit to the Underwriters, which is reflected in the consideration the Underwriters propose to pay in connection with the settlement (\$32,500,000) if it is approved by this Honourable Court. It represents not just a settlement with the plaintiffs but with the world at large.²⁶

The Underwriters and Class Action Plaintiffs Failed to Consult the SFC Litigation Trust

31. Despite having engaged with counsel to the SFC Litigation Trust on the matter previously (in connection with other settlements) and despite the clear language of the CCAA Plan, the Underwriters and Class Action Plaintiffs made the deliberate decision to exclude the Litigation Trustee and the Monitor from all settlement discussions and negotiations. They only advised counsel for the Litigation Trust of the intention to seek a CCAA Release *after* minutes of settlement had already been executed.²⁷

32. Immediately upon learning of the settlement, counsel to the Litigation Trustee expressly reminded counsel to the Underwriters that the Class Action Plaintiffs had been put on notice on several occasions (dating back to 2013) that they could not offer a CCAA Release without the prior consent of the Litigation Trustee and the Monitor.²⁸ This position was reiterated on several occasions following the Underwriters disclosure, including during an attendance before Justice Morawetz on January 29, 2015. In doing so, the Litigation Trustee's counsel also repeatedly

²⁵ Borrelli Affidavit at para. 28, Motion Record, Tab 1, p. 9.

²⁶ Borrelli Affidavit at para. 29, Motion Record, Tab 1, p. 9.

²⁷ Borrelli Affidavit at paras. 30-32, Motion Record, Tab 1, pp. 9-10.

²⁸ Borrelli Affidavit at para. 31, Motion Record, Tab 1, p. 10.

indicated that it was prepared to engage in without prejudice discussions with the Underwriters and Class Action Plaintiffs with a view to negotiating the terms upon which it would consent to a CCAA Release, absent which, the parties would be required to negotiate a bar order pursuant to the *Class Proceedings Act*, in the ordinary course.²⁹

33. Notwithstanding their knowledge of the consent requirements and the fact that the Class Action Plaintiffs had in fact previously complied with the consent requirements in connection with a settlement reached with David Horsley (SFC's former CFO), in which a CCAA Release was provided, the Class Action Plaintiffs and the Underwriters refused to engage the Litigation Trustee in any meaningful discussions.³⁰ Rather, the Underwriters and Class Action Plaintiffs, collectively representing only one of three parties contractually obligated under the CCAA Plan to consent to a CCAA Release prior to Court approval, opted to conduct all of their negotiations in private. In doing so, they intentionally excluded from any discussions the two most important parties to the agreement (if it was to include a CCAA Release), the Litigation Trustee, as the proxy to the debtor and other creditors of SFC, and the Monitor, the court-appointed officer, from any discussions.³¹

The Relief Sought Fails to Benefit the True Creditors of SFC

34. As a result of its exclusion from all negotiations, the Litigation Trustee was unfairly stripped of any opportunity to seek consideration for the beneficiaries of the SFC Litigation Trust (SFC's non-subordinated creditors), including non-monetary forms of consideration, such as the

²⁹ Borrelli Affidavit at paras. 35-38, Motion Record, Tab 1, pp. 11-12.

³⁰ Borrelli Affidavit at paras. 32-33, Motion Record, Tab 1, p. 10.

³¹ Borrelli Affidavit at para. 32, Motion Record, Tab 1, p. 10.

type of cooperation provisions obtained in the settlement with Horsley, and obtained in favour of the Class Action Plaintiffs in the proposed settlement with the Underwriters.³²

35. Accordingly, the value of the CCAA Release, a mechanism created solely as a result of SFC's reorganization, will be enjoyed solely by the beneficiaries of the Class Action, the majority of whom are former equity holders and whose claims are thus subordinated to those of the beneficiaries of the SFC Litigation Trust. In light of the fiduciary duties owed by the Litigation Trustee to the beneficiaries of the SFC Litigation Trust, in the absence of any corresponding value to the beneficiaries of the SFC Litigation Trust, the Litigation Trustee cannot, reasonably or in good faith, consent to giving the Underwriters value in the form of a CCAA Release for absolutely nothing in return.

36. In any event, the Underwriters and Class Action Plaintiffs are, like ordinary litigants, free to settle their dispute in the forum in which it is being heard, the class action proceeding. To the extent the Underwriters insist upon obtaining a CCAA Release, they should be required to provide consideration for the value of that release to SFC's non-subordinated creditors, the beneficiaries of the SFC Litigation Trust. The Class Action Plaintiffs are trying to usurp the CCAA Plan by unfairly and improperly purporting to settle their claims by handing out CCAA Releases in a manner that expressly violates the framework negotiated and approved by 99% of SFC's creditors.

³² Minutes of Settlement with David Horsley, Exhibit "L" of the Borrelli Affidavit at para. 23, Motion Record, Tab 1(L), p. 488.

The Monitor has Not Consented to the Provision of a CCAA Release

37. The Monitor has been similarly excluded from the negotiation process. In withholding its consent in its capacity as one of the gatekeepers of CCAA Releases under the CCAA Plan, the Monitor has stated its position as follows:

it appears to be common ground for all parties that the provisions of the Plan require that the consent of the Litigation Trust be given for the Underwriter's Settlement to enjoy the benefits of the third party release provided under the CCAA Plan.³³

PART III – LAW AND ARGUMENT

The Availability of Third Party Releases in the CCAA

38. The statutory scheme created by the CCAA is intended to facilitate compromises or arrangements between a debtor company and its creditors.³⁴ The CCAA's statutory regime merely creates a framework for the resolution of insolvencies, leaving the shape and details of the deals struck by negotiators to be worked out within that framework.³⁵

39. As part of that process, courts will, in certain circumstances and where a stringent test is met, approve a compromise that includes third party releases. Where third party releases meet that test and are approved, they are generally provided as part of a *quid pro quo* intended to compensate participants in the market for contributions made in the restructuring. They are only

³³ Borrelli Affidavit at para. 40, Motion Record, Tab 1, p. 13.

³⁴ *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para. 50, Brief of Authorities of the Respondent, SFC Litigation Trust ("Book of Authorities"), Tab 1.

³⁵ *Supra* note 34 at para. 61, Book of Authorities, Tab 1.

available where they can be demonstrated to be reasonably connected to the proposed restructuring.³⁶

40. Third party releases have been granted to parties in the course of CCAA proceedings, in circumstances where the debtor held no known claims against that third party, provided they were otherwise rationally connected to the overall purpose of the plan.³⁷ They have never been granted (as the Underwriters now seek) over the objection of the debtor, the majority of its creditors and the court-appointed Monitor.

The Third Party Releases Negotiated in the CCAA Plan

41. The terms of the CCAA Plan, including the CCAA Release provisions, arose as a result of "hard-bargaining among the parties" on the heels of this Court's decision (which was upheld on appeal) in the contested Equity Claims Motion, in which this Court confirmed that the majority of the claims held by the Underwriters and Class Action Plaintiffs were subordinated equity claims. The suggestion made by the Underwriters that the CCAA Release consent provisions were a throw away term of the CCAA Plan, or represent a "mere formality" is entirely baseless. SFC agreed, in exchange for the Underwriters' agreement not to oppose the CCAA Plan (which opposition would not have been, in any event, fatal to the CCAA Plan), to include a framework for the provision of third party releases in the CCAA Plan, and to release certain claims held by the Litigation Trustee.

42. In order to effect that agreement, SFC, the Class Action Plaintiffs and the Named Third Party Defendants, including the Underwriters, represented by sophisticated commercial counsel,

³⁶ *Supra* note 34 at paras. 30-32, 43, 70, 72, Book of Authorities, Tab 1.

³⁷ *Canwest Global Communications Corp.(Re)*, 2010 ONSC 4209 at para. 30, Book of Authorities, Tab 2.

agreed upon the specific wording in the definition of Named Third Party Defendant Release in Section 1.1 of the CCAA Plan, including the language requiring the Litigation Trustee's and the Monitor's consent.

The Clear Language of the CCAA Plan Requires the Litigation Trustee's Consent

43. In order to arrive at the outcome sought by the Underwriters and Class Action Plaintiffs, this Honourable Court would be required to find one of two things: (a) that the Litigation Trustee and the Monitor do not hold any consent rights with respect to the provision of a CCAA Release because of the purportedly different meaning of the words acceptable and consent; or (b) that the Litigation Trustee's and the Monitor's consent rights are limited (despite no express language to that effect) and only apply where the SFC Litigation Trust or the Monitor has a direct claim against the recipient of the CCAA Release. Neither of these findings is supported by the clear wording of the Plan.

44. A CCAA Plan is to be interpreted as a contract. The primary objective of contractual interpretation requires the reader to give effect to the intentions of the parties at the time the contract was formed, and to construe the contract as a whole, giving effect to all of its provisions.³⁸

45. The interpretation advanced by the Underwriters and Class Action Plaintiffs improperly attempts to read in a restraint that, based on the clear wording of the definition of Named Third Party Defendant Release, was only intended to apply to the Class Action Plaintiffs. Although the Underwriters and Class Action Plaintiffs purport to suggest that the word "consent" implies

³⁸*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 47, 57-58, Book of Authorities, Tab 3; *Bhasin v. Hrynew*, 2014 SCC 71 at para. 45, Book of Authorities, Tab 4.

greater rights than "acceptable", a plain reading of the provision demonstrates that in fact the parties intended the opposite to be true. The *only* restraint contained in the definition of Named Third Party Defendant Release is applicable to the Class Action Plaintiffs, who are only entitled to consent rights *if* the CCAA Release directly affects their rights. In contrast, the release must be acceptable to the Litigation Trustee and the Monitor in *all* circumstances, regardless of whether or not their rights are affected. If the Underwriters' and Class Action Plaintiffs' interpretation of "acceptable" were correct, the language "such release shall not affect the plaintiffs in the Class Actions without the consent of counsel to the Ontario Class Action Plaintiffs" would be unnecessary and redundant. Instead, the Class Action Plaintiffs would simply have been included in the prior list as a party to whom the release must be acceptable (as according to the Underwriters' tortured interpretation, only if a party has a claim against the potential releasee is the requirement that the release be "acceptable" to be given any effect).

46. Moreover, the Underwriters' and Class Action Plaintiffs' reading would lead to the absurd result that the Monitor and Litigation Trustee would have more limited consent rights with respect to the granting of CCAA Releases than the Class Action Plaintiffs, who represent a constituency primarily composed of subordinated equity claimants. The arguments advanced by the Underwriters and Class Action Plaintiffs in this regard demonstrate a clear misunderstanding of the purpose of third party releases provided under the CCAA generally and the CCAA Plan specifically.

47. A plain reading of the definition of Named Third Party Defendant Release clearly demonstrates that the provision is intended to apply to all Third Party Defendants in exactly the same manner. The interpretation advanced by the Underwriters improperly and arbitrarily seeks to read in differential treatment for the Underwriters alone, despite the clear absence of any

language to that effect. The fact that the Litigation Trustee is barred from asserting certain claims against the Underwriters is irrelevant to any consideration of whether its consent is required to obtain a CCAA Release, particularly given the Monitor, who is unlikely to hold any claims against the Underwriters, is also subject to the same language.

48. If the intention of the parties was to limit the Litigation Trustee's consent rights only to circumstances in which the SFC Litigation Trust had a direct financial interest in the settlement or existing claim against the settling creditor, the parties would surely have included clear language to that effect. The parties included no such language whatsoever in the release provisions despite doing so in a number of other provisions. The Underwriters, a defined term in the CCAA Plan, carefully negotiated express language in the CCAA Plan to limit the nature of claims the Litigation Trustee could advance against them (unlike the other Named Third Party Defendants at Section 4.12 (b) of the Plan:

All Causes of Action against the Underwriters by (i) SFC or (ii) the Trustees (on behalf of the Noteholders) shall be deemed to be Excluded Litigation Trust Claims that are fully, finally, irrevocably and forever compromised, released, discharged, cancelled, and barred on the Plan Implementation Date in accordance with Article 7 hereof, provided that, unless otherwise agreed by SFC and the Initial Consenting Noteholders prior to the Plan Implementation Date in accordance with section 4.12(a) hereof, any such Causes of Action for fraud or criminal conduct shall not constitute Excluded Litigation Trust Claims and shall be transferred to the Litigation Trust in accordance with section 6.4(o) hereof.³⁹

49. The Underwriters also negotiated express language at Section 7 of the CCAA Plan to secure additional release rights, over and above the rights granted to the other Named Third Party Defendants, as follows:

³⁹ CCAA Plan, Exhibit M to the Borrelli Affidavit at para. 4.12, Motion Record, Tab 1(M), p. 614.

Subject to 7.2 hereof, all of the following shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date:

(f) any portion or amount of liability of the Underwriters for the Noteholder Class Action Claims (other than any Noteholder Class Action Claims against the Underwriters for fraud or criminal conduct) (on a collective, aggregate basis in reference to all such Noteholder Class Action Claims together) that exceeds the Indemnified Noteholder Class Action Limit.⁴⁰

50. Similar language is conspicuously absent in respect of the scope of the consent rights in relation to the CCAA Release. When the parties intended to treat the Underwriters differently than the other Named Third Party Defendants, they did so expressly, and could easily have done so, either by drafting an express carve-out for the Underwriters or by referring to the Litigation Trustee along with the Class Action Plaintiffs as a party whose consent would only be required where its rights are affected by the granting of a CCAA Release.⁴¹ Having failed to include such language, the Underwriters and the Class Action Plaintiffs cannot now circumvent the plain meaning of the CCAA Plan simply to avoid a result they dislike.

51. A review of the language of the CCAA Plan as a whole also evidences that where the parties intended to constrain unfettered discretion, as the Underwriters and Class Action Plaintiffs claim applies to the CCAA Release provisions, they did so expressly through the use of specific language. For example:

(a) section 9.1(a) of the CCAA Plan states:

...the Plan shall have been approved by the Requisite Majority and the Court, and in each case the Plan shall have been approved in a form consistent with the RSA or otherwise acceptable to SFC and the Initial Consenting Noteholders, **each acting reasonably**.⁴² [emphasis added]

⁴⁰ CCAA Plan, Exhibit M to the Borrelli Affidavit at para. 7, Motion Record, Tab 1(M), pp. 636-637.

⁴¹ *Fraser Papers Inc. (Re)*, 2012 ONSC 4882 (Ont. Sup. Ct. J.) at para. 66, Book of Authorities, Tab 5.

⁴² CCAA Plan, Exhibit M to the Borrelli Affidavit at para. 9.1(a), Motion Record, Tab 1(M), p. 645.

(b) Section 9.1 (c) of the CCAA Plan states:

...the Sanction Order shall be in a form consistent with the Plan or otherwise acceptable to SFC and the Initial Consenting Noteholders, **each acting reasonably.**⁴³ [emphasis added]

(c) Section 9.1 (f) of the CCAA Plan states:

The organization, incorporating documents...and all definitive legal documentation in connection with all of the foregoing, shall be acceptable to the Initial Consenting Noteholders and in a form and in substance reasonably satisfactory to SFC.⁴⁴

No Basis to Interfere with the Litigation Trustee's Exercise of Discretion

52. Even if one were to accept that the tortured interpretation of "acceptable" advanced by the Underwriters and the Class Action Plaintiffs empowers the Court to review the appropriateness of the Litigation Trustee's withholding of consent to the CCAA Release, there is no basis for this Court to interfere with the Litigation Trustee's exercise of discretion. Moreover, the Underwriters and Class Action Plaintiffs have failed to identify any basis on which consent can be mandated.

53. Once approved and sanctioned by the Court, the CCAA Plan formed a contract binding on all creditors, which, having been negotiated by commercially sophisticated parties, should not be interfered with lightly.⁴⁵ Although the CCAA affords discretion to courts to advance the purpose of the CCAA, courts are not entitled to exercise that discretion to rewrite the terms of the CCAA Plan once it is approved by the majority of creditors and sanctioned by the court, or to imply a term that was not in contemplation of the parties. Rather, the Court is prohibited from

⁴³ CCAA Plan, Exhibit M to the Borrelli Affidavit at para. 9.1(c), Motion Record, Tab 1(M), p. 646.

⁴⁴ CCAA Plan, Exhibit M to the Borrelli Affidavit at para. 9.1(f), Motion Record, Tab 1(M), p. 647.

⁴⁵ *Supra* note 34 at paras. 62-63, Book of Authorities, Tab 1.

amending the terms of the CCAA Plan, absent exceptional circumstances.⁴⁶ Where such an exercise of jurisdiction is warranted, it must be exercised sparingly, even where the amendment is merely technical.⁴⁷ Amendments are not permitted where, as here, the amendments would prejudice the interests of the company or creditors.⁴⁸ The Underwriters and Class Action Plaintiffs request that this Court re-write the terms of the CCAA Plan to prefer the rights of largely subordinated equity claimants over those of the debtor, its major creditors and the Monitor (a court-appointed officer). Such a result would cause clear prejudice to the beneficiaries of the SFC Litigation Trust.

54. The use of the word "acceptable" in the definition of Named Third Party Defendant Release connotes a qualitative, evaluative inquiry and confers a subjective determination on the Litigation Trustee.⁴⁹ Parties from whom consent is required generally hold an absolute right to grant or withhold consent and courts will generally not impose an obligation to consent based upon the court's own subjective view of reasonableness in the circumstances.⁵⁰

55. The law of contract recognizes the freedom of contracting parties to pursue individual self-interest, recognizing that a party to a contract may sometimes cause loss to another in the legitimate pursuit of economic self-interest. A party to a contract has no general duty to subordinate his or her interest to that of another party, and courts have cautioned against using

⁴⁶ *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, 2000 ABCA 238 at para. 30, Book of Authorities, Tab 6; *Hodgson v. Traders Realty Co.*, 1982 CarswellOnt 3364 at paras. 7-8, Book of Authorities, Tab 7; *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449 at para. 7, Book of Authorities, Tab 8.

⁴⁷ *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449 at para. 7, Book of Authorities, Tab 8.

⁴⁸ *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, 2000 ABCA 238 at para. 30, Book of Authorities, Tab 6; *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449 at para. 7, Book of Authorities, Tab 8.

⁴⁹ *Johnston (Re)*, (1982), 43 C.B.R. (NS) 39 (Ont. Sup. Ct. J.) at para. 17, Book of Authorities, Tab 9; *Collingwood Family Restaurant*, [2004] O.E.S.A.D. No. 1199 at paras. 2, 5, Book of Authorities, Tab 10; *Monsanto Canada Inc. v. Canada (Minister of Agriculture) F.C.A.*, [1988] F.C.J. No. 303 at para. 12, Book of Authorities, Tab 11.

⁵⁰ *P. & G. Cleaners Ltd. v. Johnson*, 1995 CarswellMan 187 (QB) at paras. 21, 26-27, Book of Authorities, Tab 12.

the principle of good faith as a pretext for scrutinizing the motives of contracting parties.⁵¹ Good faith performance of a contract does not engage duties of loyalty to the other party, nor does it create a duty to put the interests of the other contracting party first.⁵²

56. The Class Action Plaintiffs attempt to characterize the Litigation Trustee's objections as a pure monetary "shakedown". This fails to recognize that the only duty owed by the Litigation Trustee is a fiduciary duty to maximize the recovery to its beneficiaries. The decision of the Litigation Trustee to withhold its consent to the granting of value to the Underwriters and Class Action Plaintiffs, in the form of a CCAA Release, in return for no consideration for its beneficiaries is reasonable. The CCAA Release has commercial value, as evidenced by the Underwriters' assertions that, absent the provision of a CCAA Release, they will abandon the proposed settlement. In fact, it is absurd to suggest that the Litigation Trustee can be found to be acting in anything but good faith by advancing the interests of its beneficiaries (SFC's non-subordinated, true creditors) to whom it owes a fiduciary duty and the "utmost duty of loyalty", over those of the Underwriters and Class Action Plaintiffs (who propose to distribute 69.23% of aggregate proceeds to subordinated equity claimants).⁵³

57. The Underwriters' characterization likewise fails to recognize that by excluding the Litigation Trustee from its negotiations, the Underwriters and Class Action Plaintiffs have stripped the Litigation Trustee from any ability to negotiate for *other* forms of non-monetary relief, such as the cooperation provisions the Class Action Plaintiffs bargained for with the Underwriters. By intentionally excluding the Litigation Trustee from negotiations, the Class Action Plaintiffs secured rights for themselves in their ongoing litigation against other parties to

⁵¹ *Bhasin v. Hrynew*, 2014 SCC 71 at para. 86, Book of Authorities, Tab 4.

⁵² *Bhasin v. Hrynew*, 2014 SCC 71 at para. 65, Book of Authorities, Tab 4.

⁵³ *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 28, Book of Authorities, Tab 13.

the detriment of the SFC Litigation Trust, whose beneficiaries ultimately may be unfairly disadvantaged as a result.

58. By insisting on implementation of the contractual terms set out in the CCAA Plan, the Litigation Trustee is not trying to deprive the Underwriters of any rights, as they suggest. The Underwriters and Class Action Plaintiffs fail to appreciate that the Underwriters have absolutely no right to a CCAA Release whatsoever. In the ordinary course, anyone who wishes to sue them is free to do so. If the Underwriters seek to avail themselves of the extraordinary relief that is a CCAA Release against the world, they need to obtain all of the requisite consents that serve as the gatekeepers to the provision of such releases. Until they do so, they do not have any right to anything in this proceeding. Both the Class Action Plaintiffs' and Underwriters' position on this motion, and their conduct regarding this entire settlement for that matter, is premised on the wholly incorrect presumption that it is somehow open to those two third parties to bargain for CCAA Releases amongst themselves.

59. In the absence of an explicit reasonableness standard, this Honourable Court does not have any jurisdiction to interfere with the Monitor or the Litigation Trustee's decision to withhold consent. Neither the Underwriters nor the Class Action Plaintiffs have cited any case that actually stands for the proposition that a Court can override consent rights that were provided for in a CCAA plan. That is because no such case exists.

60. In fact, all three of the cases the Underwriters cite as purported authority that this Court can mandate consent are cases dealing with the assignment of leases in the context of CCAA proceedings, and thus are entirely inapplicable to the question before the court on this motion. Cases that interpret CCAA provisions that provide that certain third party landlord consent rights

can be overridden (either to give the debtor breathing room to bring a plan to creditors or to maximize value for all creditors) are in no way analogous to overriding consent rights in the actual approved and sanctioned plan that is the culmination of the entire CCAA process.

61. The Underwriters have failed to identify any provision of the CCAA or decision of any court under which the court has discretion to mandate consent provided for under the terms of a CCAA plan, because there is none. Such a proposition is wholly inconsistent with the purpose of the CCAA which is that the process culminates with the debtor and its creditors negotiating a plan that will govern their rights going forward.

62. In any event, this Honourable Court ought not to interfere with the terms of a CCAA Plan negotiated by commercially sophisticated parties in a manner that undermines the consent rights afforded to the Litigation Trustee and the Monitor therein on the basis of the Underwriters' and Class Action Plaintiffs' bald threats that absent the ability to obtain a CCAA Release, the settlement will fall apart.

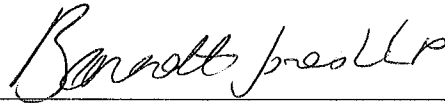
PART IV – ORDER REQUESTED

63. For all of the reasons set out above, the plaintiff seeks an Order:

- (a) dismissing the Underwriters' motion and requiring the Underwriters and Class Action Plaintiffs to comply with the consent requirements articulated in the definition of Named Third Party Defendant Release prior to seeking approval from this Honourable Court of a third party release;
- (b) the Litigation Trustee's costs of the motion; and
- (c) such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Date: May 5, 2015



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SCHEDULE “A”

1. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587
2. *Canwest Global Communications (Re)*, 2010 ONSC 4209
3. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53
4. *Bhasin v. Hrynew*, 2014 SCC 71
5. *Fraser Papers Inc. (Re)*, 2012 ONSC 4882
6. *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, 2000 ABCA 238
7. *Hodgson v. Traders Realty Co.*, 1982 CarswellOnt 3364 (Ont. Supreme Court, High Court of Justice)
8. *Algoma Steel Corp. v. Royal Bank (1992)*, 8 O.R. (3d) 449 (CA)
9. *Johnston (Re)*, (1982), 43 C.B.R. (NS) 39 (Ont. Sup. Ct. J.)
10. *Collingwood Family Restaurant*, [2004] O.E.S.A.D. No. 1199
11. *Monsanto Canada Inc. v. Canada (Minister of Agriculture) F.C.A.*, [1988] F.C.J. No. 303
12. *P. & G. Cleaners Ltd. v. Johnson*, 1995 CarswellMan 187 (QB)
13. *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377

SCHEDULE "B"

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA et al v. SINO-FOREST CORPORATION et al.

CV-11-431153-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**FACTUM OF THE SFC LITIGATION
TRUST
(Motion Returnable May 11, 2015)**

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