

**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 PROPOSED PLAN OF COMPROMISE OR  
ARRANGEMENT OF SINO-FOREST CORPORATION**

**FACTUM OF THE AD HOC COMMITTEE OF PURCHASERS OF THE  
APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE  
PLAINTIFFS IN THE ONTARIO CLASS ACTION**

**(Motion Returnable August 28, 2012)**

August 24, 2012

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**Lawyers for the Ad Hoc Committee of Purchasers of the  
Applicant's Securities, including the Representative  
Plaintiffs in the Ontario Class Action**

**TO: THE ATTACHED SERVICE LIST AT SCHEDULE "D"**

## PART I – OVERVIEW

1. This is the factum of the Ad Hoc Committee of Purchasers of the Applicant's Securities, which consists of purchasers of securities of Sino-Forest Corporation ("Sino-Forest" or the "Debtor"), including the plaintiffs in two class actions commenced in Ontario and Quebec (the "Class Action Plaintiffs"). The Class Action Plaintiffs represent the interests of individuals (the "Plaintiff Class Members") with significant claims against the Debtor, and others, such as the directors and officers of the Debtor (for the purposes of these proceedings "Non-Debtors").

2. On this motion, the Debtor seeks an order (referred to in this factum as the "Meeting Order") providing for a meeting of creditors to vote on its proposed plan of compromise and restructuring dated August 14, 2012 (the "Proposed Plan"). The Class Action Plaintiffs oppose the Debtor's motion. In the Class Action Plaintiffs' submission, no vote should take place in respect of the Proposed Plan for two reasons.

3. First, the Proposed Plan, as currently drafted, compromises claims of the Plaintiff Class Members that are exempt from compromise by operation of:

- (a) s. 5.1(2) of the *Companies' Creditors Arrangement Act* (the "CCAA"), which exempts claims against directors that are based on allegations of misrepresentation or wrongful conduct; and

(b) s. 19(2) of the CCAA, which exempts fines, penalties and claims arising out of fraud, embezzlement, misappropriation or defalcation, or from obtaining property or services by false pretences or fraudulent misrepresentation.

4. Second, notwithstanding the detrimental impact that the Proposed Plan would have on the Plaintiff Class Members and other members of the proposed class actions, it denies these individuals the ability to vote on the Proposed Plan.

5. The Proposed Plan has a severe prejudicial impact on the Plaintiff Class Members because they have no serious prospect for recovery from the Debtor's assets in respect of their claims, and the Proposed Plan could eliminate their ability to have recourse to insurance that would otherwise provide coverage in respect of claims against the Debtor and its directors and officers.

6. In the Class Action Plaintiffs' submission, the shortcomings in the Proposed Plan can easily be corrected with some straightforward amendments that would leave the Plaintiff Class Members unaffected. For illustrative purposes, and to assist the restructuring effort and the Court, the Class Action Plaintiffs have included a mark-up of the Proposed Plan addressing all of their concerns, as Schedule C to this factum.<sup>1</sup> If the changes attached at Schedule C are implemented, the Class Action Plaintiffs would consent to the meeting of creditors to vote on the plan (as amended).

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<sup>1</sup> Despite an initial request on Monday, August 20, 2012 for an electronic copy of the Proposed Plan as filed, the Class Action Plaintiffs only received an electronic copy on August 24, 2012. As a result, the marked-up plan responsive to the concerns of the Class Action Plaintiffs will be provided to the court and the service list on or before Monday, August 27, 2012.

7. If, however, the Debtor insists on proceeding with a restructuring plan that materially impacts the interests of the Plaintiff Class Members, then, in order to allow the Plaintiff Class Members some say in the plan that would compromise their claims, the Class Action Plaintiffs ask that this Court make an order:

(a) directing that the Plaintiff Class Members be entitled to vote on the Proposed Plan in a voting class that is separate and apart from Sino-Forest's bondholders; and,

(b) appointing the Class Action Plaintiffs as representatives of the Plaintiff Class Members, with the power to vote on their behalf in respect of any restructuring plan.

8. Finally, insofar as the Proposed Plan and draft Meeting Order contemplate the possible amendment of the Proposed Plan by the Debtor prior to the meeting of creditors, the Class Action Plaintiffs submit that the Meeting Order should also be amended to include a come-back provision. Such a provision would preserve this Court's jurisdiction to reconsider the procedure for the meeting in light of a material amendment, where it is practicable to do so, and allow affected stakeholders to address the issue as part of the sanction hearing where it is not practicable to come back before this court prior to the meeting.

## PART II - THE FACTS

### A. The Class Actions

9. The Plaintiff Class Members are defined by reference to two class actions commenced against Sino-Forest:

(a) the action in the Ontario Superior Court of Justice, bearing (Toronto) Court File No. CV-11-431153-00CP (the "Ontario Plaintiffs" and the "Ontario Class Action", respectively); and

(b) the action in the Quebec Superior Court bearing Court File No. 200-06-000132-111 (the "Quebec Plaintiffs" and the "Quebec Class Action", respectively) (collectively referred to as the "Plaintiff Class Members" and the "Class Actions").

10. The Class Actions relate to allegations that came to light on June 2, 2011 that Sino-Forest was a fraud and a ponzi scheme and that its public disclosure contained numerous misrepresentations.<sup>2</sup> The allegations were contained in a report prepared by Muddy Waters Research (referred to in this factum as the "Muddy Waters Report").

11. The Class Actions in Ontario and Quebec were commenced in June and July 2011 (respectively), and allege misrepresentation, conspiracy and oppression on behalf of purchasers of Sino-Forest securities in the period from March 19, 2007 to June 2, 2011. The defendants in both Class Actions are Sino-Forest, certain of its current and

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<sup>2</sup> Muddy Waters Report, Exhibit "M" to Affidavit of W. Judson Martin sworn March 30, 2012 ("First Martin Affidavit"), at para. 7, Compendium of the Ad Hoc Committee of Purchasers of the Applicant's Securities, Including the Representative Plaintiffs in the Ontario Class Action, originally filed on July 24, 2012 with respect to the motion returnable July 30, 2012 ("Compendium"), Tab 1.

former directors and officers, its former auditors and the underwriters in various offerings of Sino-Forest's securities.<sup>3</sup>

12. On December 20 and 21, 2011, a motion was heard to determine which plaintiffs should have carriage over the Ontario Class Action. Justice Perell considered three potential plaintiff groups, each of whom had commenced actions in Ontario. Justice Perell, in deciding the motion, considered a number of factors, including the attributes of the representative plaintiffs, the class definition in each action, the theory of the case, the causes of action and prospects of certification. The court also considered the experience of class counsel in acting on behalf of security holders, the retainer and the legal and forensic resources available to prosecute the claim.

13. In reasons dated January 6, 2012, spanning 332 paragraphs over 52 pages, the court granted carriage of the Ontario Class Action to the Ontario Plaintiffs.<sup>4</sup> The court also ordered that no other class actions may be commenced in Ontario in respect of the subject matter of the Ontario Class Action without leave.

14. The Ontario Plaintiffs have since filed a Fresh as Amended Statement of Claim in the Ontario Class Action (the "Amended Claim").<sup>5</sup> The Amended Claim incorporates information revealed to the public for the first time by Sino-Forest's Independent Committee (described in more detail below), and information obtained through class

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<sup>3</sup> Affidavit of Daniel Bach, sworn April 11, 2012, at paras. 4-7, 37-53, 58, ("April 11, 2012 Bach Affidavit"), Compendium, Tab 2.

<sup>4</sup> April 11, 2012 Bach Affidavit at para. 7, Compendium, Tab 2; Motion Record of the Ad Hoc Committee of Purchasers of the Applicant's Securities, Including the Representative Plaintiffs in the Ontario Class Action ("Motion Record"), Tab 3.

<sup>5</sup> Motion Record, Tab 2.

counsel's own ongoing investigation and analysis, aided by various experts and investigators based in Hong Kong.<sup>6</sup>

15. The Amended Claim alleges that Sino-Forest, certain of its officers and directors, its auditors and its underwriters made material misrepresentations regarding the operations and assets of Sino-Forest. The Amended Claim seeks in excess of \$9 billion in damages and is brought on behalf of the following class:

[A]ll persons and entities, wherever they may reside who acquired Sino-Forest's Securities during the Class Period by distribution in Canada or on the Toronto Stock Exchange or other secondary market in Canada, which includes securities acquired over-the-counter, and all persons and entities who acquired Sino-Forest's Securities during the Class Period who are resident of Canada or were resident of Canada at the time of acquisition and who acquired Sino's Securities outside of Canada, except the Excluded Persons (the "Class" or "Class Members").<sup>7</sup>

16. The class period is "the period from and including March 19, 2007 to and including June 2, 2011."<sup>8</sup>

17. On March 30, 2012, the Class Action Plaintiffs entered into a settlement agreement with the defendant, Pöyry (Beijing) Consulting Company Limited (the "Pöyry Settlement") on behalf of all Plaintiff Class Members.

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<sup>6</sup> April 11, 2012 Bach Affidavit at para. 15, Compendium, Tab 2.

<sup>7</sup> April 11, 2012 Bach Affidavit at para. 16, Compendium, Tab 2. "Excluded Persons" are the defendants, their past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns, and any individual who is a member of the immediate family of an individual defendant.

<sup>8</sup> April 11, 2012 Bach Affidavit at para. 17-18, Compendium, Tab 2.



18. By order in these proceedings dated May 8, 2012, the Class Action Plaintiffs were given leave to pursue the Pöyry Settlement notwithstanding the CCAA stay of proceedings against Sino-Forest.<sup>9</sup>

19. Subsequently, on May 17, 2012, Perell J. approved a form of notice of this settlement to the class.<sup>10</sup>

20. Both the CCAA and CPA courts have authorized the Class Action Plaintiffs to take steps to implement the Pöyry Settlement and the Class Action Plaintiffs have been in communication with the class for that purpose. On September 21, 2012, Justice Perell will hear the motion to certify the class as against Pöyry and to run an opt-out for the proceeding.

#### B. The Independent Committee Reports

21. Following the release of the Muddy Waters Report, Sino-Forest struck an independent committee (“IC”) whose mandate was to “thoroughly examine and review the allegations contained in Muddy Waters’ report”.<sup>11</sup>

22. Allen Chan, then director, chief executive officer, and “Founding Chairman Emeritus” of Sino-Forest, explained the IC’s mandate, and Sino-Forest’s reaction to the Muddy Waters Report as follows:

It is important that our independent committee thoroughly address Muddy Waters’ allegations, and they will have my full support and those of the management team in doing so. However, let me say clearly that the allegations

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<sup>9</sup> Motion Record, Tab 6.

<sup>10</sup> Motion Record, Tab 8.

<sup>11</sup> April 11, 2012 Bach Affidavit at para. 73-76, Compendium, Tab 2.

contained in this report are inaccurate and unfounded. Muddy Waters' shock-jock approach is transparently self-interested and we look forward to providing our investors and other stakeholders with additional information to rebut these allegations.<sup>12</sup>

23. After many months of investigation, the IC produced three reports (the "IC Reports") at a cost of approximately \$50 million.<sup>13</sup> The IC Reports are artfully worded and seek to cast its findings in the most positive light. However, a deeper examination of the body of those reports and of their schedules (a number of which have been redacted to withhold what appears to be key information), demonstrates that the IC was unable to refute many of the allegations levelled by Muddy Waters, notwithstanding months of investigation and the \$50 million expenditure. Many tens of millions have been spent since the release of the IC Reports – also to no avail.

24. In fact, the IC Reports revealed other problems with Sino-Forest that were not included in the Muddy Waters Report, including, for instance, the fact that Sino-Forest did not have the requisite proposed plantation rights certificates (i.e. registered title) in respect of the vast majority of its purported timber assets.

25. In attempting to excuse its inability to refute many of the allegations in the Muddy Waters Report, in its reports, the IC outlined a number of challenges that it faced. These included:

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<sup>12</sup> Exhibit "H" to April 11, 2012 Bach Affidavit, Compendium, Tab 3.

<sup>13</sup> First Interim IC Report, Compendium, Tab 11; Second Interim IC Report, Compendium Tab 4; Final IC Report, Compendium Tab 12.

- (a) The Chinese legal regime for forestry, which appears to suffer from, among other things, corruption in its dealings with Sino-Forest;
- (b) Difficulty in obtaining information from non-compellable third parties; and
- (c) Corporate governance and operational weaknesses, including a lack of full cooperation from certain members of management and operational and administration systems that are generally not sophisticated having regard to the size and complexity of Sino-Forest's business in relation to North American operational and administrative practices.<sup>14</sup>

26. The IC did not, however, explain how Sino-Forest's board, senior officers, auditors and underwriters managed to perform their duties (or not) in light of these identified challenges, which appear to have existed for many years prior to release of the Muddy Waters Report.

### C. Events since the Commencement of the Class Actions

27. On August 26, 2011, the Ontario Securities Commission ("OSC") issued a temporary cease trade order prohibiting all trading in the securities of Sino-Forest in Ontario.<sup>15</sup> The order has been extended a number of times since, and is currently effective to October 15, 2012.

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<sup>14</sup> Second IC Report, Exhibit "R" to the First Martin Affidavit, Compendium, Tab 4.

<sup>15</sup> April 11, 2012 Bach Affidavit at para. 85, Compendium, Tab 2.

28. On December 12, 2011, Sino-Forest announced that it would not be filing its Q3 2011 financial results on a timely basis and that the board of directors had determined not to make a US \$9.775 million interest payment for the 2016 convertible notes that was due on December 15, 2011. Sino-Forest's press release indicates that these omissions constituted a breach of certain covenants under its senior and convertible note indentures.<sup>16</sup>

29. On January 10, 2012, Sino-Forest issued a press release stating that it was continuing its efforts to resolve the outstanding issues involving, among other things, relationships between Sino-Forest and certain of its counterparties in sales and purchases of timber. Sino-Forest "caution[ed] that the Debtor's historical financial statements and related audit reports should not be relied upon."<sup>17</sup>

30. On April 5, 2012, Sino-Forest's auditor, Ernst & Young, resigned.<sup>18</sup>

31. On April 17, 2012, Allen Chan, who had previously resigned his position as a director and chief executive officer of Sino-Forest but continued as "Founding Chairman Emeritus", resigned from the Debtor entirely. David Horsely resigned as chief financial officer.<sup>19</sup>

32. On May 9, 2012, Sino-Forest shares were delisted from the Toronto Stock Exchange.

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<sup>16</sup> Affidavit of Daniel E.H. Bach, sworn July 11, 2012 ("July 11, 2012 Bach Affidavit") at para. 8, Supplementary Compendium of the Ad Hoc Committee of Purchasers of the Applicant's Securities, Including the Representative Plaintiffs in the Ontario Class Action ("Supplementary Compendium"), Tab 2.

<sup>17</sup> July 11, 2012 Bach Affidavit at para. 31, Supplementary Compendium, Tab 2.

<sup>18</sup> April 11, 2012 Bach Affidavit at para. 83, Compendium, Tab 2.

<sup>19</sup> July 11, 2012 Bach Affidavit at para. 32, Supplementary Compendium, Tab 2.

33. On May 22, 2012, the OSC commenced enforcement proceedings against Sino-Forest, Allen Chan, David Horsley and other executives. The statement of allegations alleges that Sino-Forest and its senior executives “engaged in a complex fraudulent scheme to inflate the assets and revenue of Sino-Forest and made materially misleading statements in Sino-Forest’s public disclosure record related to its primary business.”<sup>20</sup>

34. Among other detailed allegations, the OSC alleges that:

Sino-Forest falsified the evidence of ownership for the vast majority of its timber holdings by engaging in a deceitful documentation process. This dishonest process included the fraudulent creation of deceitful Purchase Contracts and Sales Contracts, including key attachments and other supplemental documentation.

The OSC further alleges that Allen Chan and other management materially misled OSC staff during their investigation.<sup>21</sup> In addition, the OSC has stated that further enforcement proceedings against “gatekeepers” (e.g. auditors) are possible.<sup>22</sup>

35. Sino-Forest’s publicly filed statements indicate that the senior officers who are being prosecuted by the OSC profited handsomely from Sino-Forest’s activities. The following information regarding these defendants’ salary and bonus from Sino-Forest was compiled from Management Information Circulars from 2007 to 2010. Information regarding the net proceeds of these defendants’ sale of Sino-Forest’s securities was

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<sup>20</sup> July 11, 2012 Bach Affidavit at para. 34, Supplementary Compendium, Tab 2. OSC staff allege that Horsley did not comply with Ontario securities law and acted contrary to the public interest.

<sup>21</sup> July 11, 2012 Bach Affidavit at para. 34, Supplementary Compendium, Tab 2.

<sup>22</sup> See a CBC news article dated May 22, 2012, wherein the OSC’s Director of Enforcement, Tom Atkinson, notes that the OSC investigation is continuing, “including an examination of the role of the gatekeepers.” Compendium, Tab 13.

compiled from insider transaction detail reports retrieved from the System for Electronic Disclosure by Insiders.<sup>23</sup>

| <b>Director</b> | <b>Net proceeds from sale of Sino-Forest securities</b> | <b>Salary and bonuses 2007-2010</b> | <b>Total</b> |
|-----------------|---|-------------------------------------|--------------|
| Allen Chan      | \$1,047,947   | \$22,698,775                        | \$23,746,722 |
| Kai Kit Poon    | \$48,522,642  | \$3,012,162                         | \$51,573,804 |
| David Horsley   | \$5,842,303   | \$7,568,487                         | \$13,410,790 |

36. In April 2012, there were several personnel changes within Sino-Forest due in large part to the ongoing OSC investigation. As a consequence of these changes, Sino-Forest and the Monitor undertook a diligence exercise to determine the legal representatives for all Sino-Forest People's Republic of China ("PRC") companies and the location and security of various "chops", which are akin to company seals.<sup>24</sup>

37. The diligence exercise included a corporate review of the PRC Sino-Forest subsidiaries to determine the identity of the legal representatives of each company. This review showed that there was a consistent legal representative across many of the subsidiaries and that in most cases the legal representative was no longer an employee of Sino-Forest.<sup>25</sup>

<sup>23</sup> April 11, 2012 Bach Affidavit at para. 101-104, Compendium, Tab 2.

<sup>24</sup> Monitor's Sixth Report, dated August 10, 2012, para. 44, Supplementary Compendium, Tab 3.

<sup>25</sup> *Ibid* at para. 44(a).

38. Furthermore, several authorized intermediaries have been purportedly been “de-registered”, which appears to be equivalent to being wound-up or terminated. These companies represented literally hundreds of millions of dollars in receivables to Sino-Forest.<sup>26</sup>

D. These proceedings

39. These CCAA proceedings were commenced by application and Initial Order dated March 30, 2012. On that same date, the court also issued an Order authorizing Sino-Forest to conduct a sale process pursuant to sale process procedures (“SPP”).<sup>27</sup>

40. The purpose of the sale process was to determine whether any parties were willing to purchase substantially all of Sino-Forest’s business operations.<sup>28</sup>

41. Pursuant to the SPP, upon receipt of a number of non-binding letters of intent (“LOIs”), Sino-Forest, in consultation with its financial advisor and the Monitor, was required to determine whether any of the LOIs constituted “Qualified Letters of Intent”.<sup>29</sup>

42. Sino-Forest determined that none of the LOIs constituted a Qualified Letter of Intent.<sup>30</sup>

43. As a result, on July 10, 2012, Sino-Forest issued a press release announcing the termination of the SPP, and its intention to proceed with the restructuring transaction

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<sup>26</sup> *Ibid* at para. 58-61.

<sup>27</sup> Sale Process Order, Compendium, Tab 6.

<sup>28</sup> Fourth Report of the Monitor, para. 17, Compendium, Tab 7.

<sup>29</sup> *Ibid* at para. 20.

<sup>30</sup> *Ibid* at para. 23.

contemplated by the Restructuring Support Agreement, dated March 30, 2012, between Sino-Forest and certain of its noteholders.<sup>31</sup>

44. Concurrently with the SPP, the Debtor has taken steps to determine and to characterize the claims against it:

(a) On May 14, 2012, this Court issued an order providing for a call for claims against Sino-Forest and its officers and directors (the “Claims Procedure Order”).<sup>32</sup> As part of the Claims Procedure Order, the court appointed the Class Action Plaintiffs as representatives of the Plaintiff Class Members for the purpose of submitting a claim in respect of the substance of the matters set out in the Class Actions, and relieving individual Plaintiff Class Members of that responsibility.<sup>33</sup>

(b) On June 26, 2012, the Court heard a motion brought by Sino-Forest for a direction that certain claims against Sino-Forest that result from the ownership, purchase or sale of an equity interest in Sino-Forest and resulting indemnity claims are “equity claims” as defined in section 2 of the CCAA (the “Shareholder and Related Indemnity Claims”).<sup>34</sup> On July 27, 2012, the Court released its decision, finding that the Shareholder and Related Indemnity Claims against Sino-Forest are “equity claims” as defined in section 2 of the CCAA.<sup>35</sup> As a result, these claims are

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<sup>31</sup> July 10, 2012 Press Release, Compendium, Tab 8.

<sup>32</sup> Motion Record, Tab 7.

<sup>33</sup> Motion Record, Tab 7, para. 27.

<sup>34</sup> Sixth Report of the Monitor, dated August 10, 2012, at para. 26, Supplementary Compendium, Tab 3.

<sup>35</sup> Equity Claims Order, Motion Record, Tab 9.



subordinated to all other claims in accordance with the provisions of the CCAA.<sup>36</sup>

#### E. The Proposed Plan

45. On August 14, 2012, Sino-Forest filed its Plan of Compromise and Reorganization (the “Proposed Plan”) and sought an order establishing a process for holding a meeting of creditors (the “Meeting Order”).

46. The features of the Proposed Plan and Meeting Order that are of concern to the Class Action Plaintiffs are as follows:

(a) The Proposed Plan would compromise claims of the Plaintiff Class Members falling within the scope of s.5.1(2) of the CCAA by limiting them to available insurance proceeds.<sup>37</sup>

(b) Although the Proposed Plan does not release claims for fraud and criminal conduct, it fails to track the relevant limitations on release of liability reflected in subsection 19(2)(a), (c) and (d) of the CCAA and, worse, contains provisions that specifically contemplate the release of “all Claims of the OSC that have or could give rise to a monetary liability, including

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<sup>36</sup> On August 16, 2012, Ernst & Young LLP (Sino-Forest’s former auditors), the Underwriters and BDO Limited each served notices of motion for leave to appeal the Order to the Ontario Court of Appeal. Sino-Forest has advised the Monitor that it intends to oppose the motions for leave to appeal. The Monitor has declared its support of Sino-Forest’s position. See: Seventh Report of the Monitor, dated August 17, 2012, at para. 18, Supplementary Compendium, Tab 4.

<sup>37</sup> See article 4.9(f) of the Proposed Plan.

finances, awards, penalties, costs, claims for reimbursement or other claims have a monetary value".<sup>38</sup>

(c) The Proposed Plan would release the Plaintiff Class Members' claims against the Debtor, and, in doing so, could eliminate the Plaintiff Class Members' recourse to insurance available to pay their claims. The liability of the insurer to pay insured claims is triggered by such liability being owed by the insured. If the Plaintiff Class Members' claims against the debtor are released, this in turn releases the insurer from the obligation to pay on the Debtor's behalf. While section 2.4 of the Proposed Plan addresses insurance, it does not alleviate the problem because it presupposes a direct right of action against the insurer which does not exist because (a) the claims against the Debtor have been released and (b) section 132 of the *Insurance Act* has been held not to apply to errors and omissions insurances where damages consist only of pure economic loss. Therefore, the Proposed Plan would not provide any direct right of action against the insurer in these circumstances, and any ability to access insurance proceeds is lost.

An acceptable Plan should preserve the rights to obtain recovery from insurance proceeds by doing the following:

- (i) Ensure that all claims for which there are insurance are preserved, and not released; and

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<sup>38</sup> See article 7.2(b) of the Proposed Plan.

- (ii) Provide for an assignment to a successful plaintiff of the debtor's rights to enforce the terms of the insurance policy and require payment by the insurer in respect of the insured claims. It is appropriate to assign such rights to a successful plaintiff, who is an interested party and is in an appropriate position to assert such rights.<sup>39</sup>

This proposed Plan does neither, and is unacceptable.

- (d) Although the Proposed Plan would affect the Plaintiff Class Members in the manner described above, the Proposed Plan and related draft Meeting Order denies them the ability to vote.

- (e) The Meeting Order contemplates the amendment of the Proposed Plan prior to the meeting of creditors, but does not expressly preserve the court's jurisdiction to revisit the procedure for the meeting in that event.

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<sup>39</sup> *Fredrickson v. Insurance Corp of British Columbia* [1986] B.C.J. No. 366 (C.A.) per McLachlin J.A (as she then was), aff'd by the SCC [1988] 1 S.C.R. 1089, 49 D.L.R. (4th) 160, Book of Authorities, Tab 22.

### PART III - ISSUES AND THE LAW

47. The Class Action Plaintiffs submit that there are three issues to be addressed on this motion:

- (a) *First, should a meeting be directed to consider the Proposed Plan?* The Class Action Plaintiffs submit that a meeting should not be directed because the Proposed Plan cannot be sanctioned by this court in its current form.
- (b) Second, if Sino-Forest remains intent on filing a restructuring plan that affects the interests of the Plaintiff Class Members:
  - (i) *Should the Plaintiff Class Members be entitled to vote on the Proposed Plan?* The Class Action Plaintiffs submit that they should.
  - (ii) *If so, should the Plaintiff Class Members be separately classified for the purpose of voting on the Proposed Plan?* The Class Action Plaintiffs submit that they should.
  - (iii) *Should the Class Action Plaintiffs be appointed to represent the Plaintiff Class Members?* The Class Action Plaintiffs submit that they should be so appointed.

*(c) Third, should the Meeting Order contain a come-back provision preserving this Court's jurisdiction to reconsider the meeting procedure in the event that the Debtor exercises its discretion to amend the Proposed Plan prior to the meeting, or, where it is not practicable to return before this Court prior to the meeting, to address any issues raised by the amendment as part of the sanction hearing? The Class Action Plaintiffs submits that it should.*

A. A meeting should not be directed

48. The Class Action Plaintiffs submit that a meeting should not be directed to vote on the Proposed Plan because it is not capable of being sanctioned as currently drafted. In particular, as explained below, the Proposed Plan, as currently drafted:

(a) compromises claims that are exempt from compromise by operation of ss. 5.1(2) and 19(2) of the CCAA; and

(b) denies the Plaintiff Class Members the ability to vote on the Proposed Plan, even though the Proposed Plan:

(i) compromises the Plaintiff Class Members' claims against the Debtor's directors and officers; and,

(ii) arguably, compromises the Plaintiff Class Members' ability to have recourse to insurance held by the Debtor in respect of claims against it and against its directors and officers.

***The current Proposed Plan is contrary to section 5.1(2) of the CCAA***

49. The Proposed Plan ignores the limitations that the CCAA places on the compromise of claims against directors.

50. Put simply, the release of the claims against the directors of Sino-Forest contained in the Proposed Plan is overly broad: it compromises claims against directors where s. 5.1(2) of the CCAA expressly prohibits compromise.

51. Subsection 5.1(1) of the CCAA is the provision that allows a plan to provide for the compromise of specific kinds of claims against directors, namely claims which

arose before the commencement of proceedings under this *Act* and that relate to the obligations of the Debtor where the directors are by law liable in their capacity as directors for the payment of such obligations.<sup>40</sup>

52. However, the ability to compromise claims against directors is expressly limited by s. 5.1(2), which provides in part:

5.1 (2) A provision for the compromise of claims against directors may not include claims that ...

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors. [Emphasis added]

53. These provisions have been broadly interpreted:

(a) the reference to misrepresentation has been held to include claims for negligent misrepresentation;<sup>41</sup>

<sup>40</sup> *Companies' Creditors Arrangement Act* R.S.C., 1985, c. C-36, s. 5.1(1).

<sup>41</sup> CCAA, s. 5.1(2)(b); *NBD Bank, Canada v. Dofasco Inc*, 1999 CarswellOnt 4077, 181 D.L.R. (4th) 37,

(b) the reference to “wrongful conduct”<sup>42</sup> has been interpreted to mean “conduct which would be tortious (or akin thereto) as well as any conduct which was illegal;”<sup>43</sup> and,

(c) the reference to “oppressive conduct” has been interpreted in light of principles developed under the oppression remedy under the *Canada Business Corporations Act*.<sup>44</sup>

54. This limitation on the scope of a CCAA plan is consistent with the fundamental principle that the CCAA should not become a shield for bad corporate governance. As noted by the Court of Appeal for Ontario:

... it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.<sup>45</sup>

The principle articulated by the Court of Appeal for Ontario has particular resonance in this case.

55. Nonetheless, the directors of the Debtor, acting in their own self interest, are promulgating a CCAA plan that is blatantly contrary to s. 5.1(2) of the CCAA. The Proposed Plan would compromise all claims against the Debtor’s directors other than claims for fraud or criminal conduct. The relevant articles of the Proposed Plan are

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127 O.A.C. 338 at para. 54, Book of Authorities, Tab 1.

<sup>42</sup> CCAA, s. 5.1(2)(b).

<sup>43</sup> *BlueStar Battery Systems International Corp., Re*, 2000 CarswellOnt 4837 at para 14 (S.C.J.), Book of Authorities, Tab 2.

<sup>44</sup> R.S.C., 1985, c. C-44; *BlueStar Battery Systems International Corp., Re*, 2000 CarswellOnt 4837 at para 14 (S.C.J.), Book of Authorities, Tab 2.

<sup>45</sup> *NBD Bank, Canada v. Dofasco Inc.* 1999 CarswellOnt 4077, 181 D.L.R. (4th) 37, 127 O.A.C. 338 at para. 54, Book of Authorities, Tab 1.

found at article 7.1 (a sweeping general release that relieves directors “fully, finally, irrevocably and forever” from numerous liabilities), article 7.2 (a specific plan release that wipes out numerous claims against directors on the Plan Implementation Date), and article 4.9 (which extinguishes D&O claims and indemnity claims).

56. Under article 7.2, upon the Plan Implementation Date, “all Class Action Claims (including the Noteholder Class Action Claims) against SFC; the Subsidiaries or the Named Directors and Officers of SFC or the Subsidiaries (other than the Class Action Claims that are Insured Claims,<sup>46</sup> Retained D&O Claims<sup>47</sup> or Non-Released D&O Claims)” are fully and finally compromised. In other words, only a small group of claims considered “Non-Released D&O Claims” are not limited in recovery to insurance proceeds.

57. “Non-Released D&O Claims” is defined in article 4.9(f) in very narrow terms:

All D&O Claims against the Directors and Officers of SFC or the Subsidiaries for fraud or criminal conduct shall not be compromised, discharged, released, cancelled or barred by this Proposed Plan and shall be permitted to continue as against all applicable Directors and Officers (“Non-Released D&O Claims”).<sup>48</sup>

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<sup>46</sup> “Insured Claim” means all or that portion of a Claim for which SFC is insured.

<sup>47</sup> “Retained D&O Claim” means all or that portion of a D&O Claim for which a Director or Officer is insured provided that any D&O Claim that qualifies as a Non-Released D&O Claim or a Continuing Other D&O Claim shall not constitute a Retained D&O Claim.

<sup>48</sup> 4.9(f), emphasis added.



58. It is typical for a plan of compromise or arrangement to refer specifically to the statutory limits on these compromises.<sup>49</sup> However, the Proposed Plan contains no carve-out in respect of the claims described above.

59. Thus, under the Proposed Plan, the only claims against directors that remain unaffected are claims for “fraud or criminal conduct”. Other claims falling within the scope of s. 5.1(2) of the CCAA, including claims for misrepresentation and other wrongful or oppressive conduct, are limited to available insurance. This is neither what the statute says nor what it intends.

***The current Proposed Plan is contrary to s. 19(2) of the CCAA***

60. The Proposed Plan is also inconsistent with subsection 19(2)(a), (c) and (d), which restrict a debtor’s ability to deal with particular kinds of claims in an arrangement or compromise. Sections 19(2) (a), (c) and (d) state:

19(2): A compromise or arrangement in respect of a debtor Debtor may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim’s compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence; ...

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<sup>49</sup> See e.g. *Nortel Networks Corporation (Re)*, 2010 ONSC 1708 at para 6, *Minds Eye Entertainment Ltd. v. Royal Bank*, 2004 CarswellSask 50 at para 15, 2004 SKQB 8; *Canadian Airlines Corp. (Re)*, 2000 ABQB 442 at para. 90, Book of Authorities, Tabs 3, 4 and 5, respectively.

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim.<sup>50</sup>

61. To the contrary, notwithstanding subsection 19(2)(a) of the CCAA, article 7.2(b) of the Proposed Plan expressly eliminates the financial consequences of the current OSC enforcement proceedings, releasing

all Claims of the Ontario Securities Commission that have or could give rise to a monetary liability, including fines, awards, penalties, costs, claims for reimbursement or other claims have a monetary value,<sup>51</sup>

62. Similarly, contrary to subsection 19(2)(c) and (d) of the CCAA, the Proposed Plan, while preserving claims for fraud or criminal conduct, fails to preserve claims related to “embezzlement, misappropriation or defalcation while acting in a fiduciary capacity,”<sup>52</sup> or claims against the directors and officers related to obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim.

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<sup>50</sup> CCAA s. 19(2).

<sup>51</sup> See article 7.2(b) of the Proposed Plan.

<sup>52</sup> CCAA, s. 19(2)(c).

***The current Proposed Plan affects the Plaintiff Class Members' claims against the Debtor and Non-Debtors without giving them a vote***

63. Even the equity claim provisions of the CCAA reserve the discretion of the court to permit equity claimants to vote on a CCAA plan. The circumstances in which the court would exercise that discretion are not articulated in the statute and have yet to be judicially considered. However, inasmuch as the basic premise of those provisions is that shareholders are unaffected by a restructuring in that they have no legitimate expectation of recovery from an insolvent corporation, one would expect that shareholders would be given the right to vote where the Plan actually does affect their economic interests.

64. The ways in which the Proposed Plan purports to affect the Plaintiff Class Members are numerous. As discussed above, the Proposed Plan includes sweeping releases of claims against directors at article 4.9, and releases of claims against officers at article 4.9. These claims are against Non-Debtors and therefore do not fall within the definition of equity claims. However, even if they were equity claims, Plaintiff Class Members should be entitled to vote because their interest in their claims against these Non-Debtors is independent from payment of the Debtors' creditors in full.

65. In addition, the Proposed Plan could eliminate the Plaintiff Class Members' ability to have recourse to the insurance providing coverage for their claims against the Debtor, and its directors and officers. As a result of the purported release of the Plaintiff Class Members' claims against the Debtor and its directors and officers set out in the Proposed Plan, there will be no claim to which the insurance coverage would apply and

the Debtor's insurers will enjoy a windfall at the expense of the Plaintiff Class Members.

66. Article 2.4 of the Proposed Plan permits claims against an insurer to proceed. This language is insufficient to permit recovery of insurance proceeds. The Plaintiff Class Members do not have claims against the insurers and the insurers will not pay out insurance proceeds unless there are claims against the insureds.<sup>53</sup> Otherwise, as a result of the release of the Plaintiff Class Members' claims against the Debtor and its directors and officers, there will be no claim to which the insurance coverage would apply and the Debtor's insurers will enjoy a windfall.<sup>54</sup>

67. In *Algoma Steel*, the Court of Appeal for Ontario held that the protection afforded by the CCAA is for the debtor—not to insulate insurers from providing appropriate

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<sup>53</sup> See e.g. *Perry v. General Security Insurance Co. of Canada*, (1984) 47 O.R. (2d) 472, 11 D.L.R. (4th) 516 (C.A.), where the Court of Appeal for Ontario considered whether the clients and judgment creditors of a negligent solicitor had a cause of action against the negligent solicitor's insurers. The Court held that they did not.

<sup>54</sup> Article 2.4 of the Plan appears to be intended to avoid this draconian result, but it is inadequate to achieve this objective. The current draft of section 2.4 provides:

Nothing in this Proposed Plan shall prejudice, compromise, release, discharge, cancel, bar or otherwise affect any right, entitlement or claim of any Person against any insurer in respect of an insurance policy or the proceeds thereof. Similarly, nothing in this Proposed Plan shall prejudice, compromise, release or otherwise affect any right or defence of any such insurer in respect of any such insurance policy, provided that any right or entitlement of any insurer to seek indemnification from SFC or any Subsidiary (if such a right or entitlement should be found to exist at all) shall be subject to the terms of the Claims Procedure Order, including paragraph 17 thereof, and shall be treated as a Released Claim that is fully, finally, irrevocably and forever released, discharged, cancelled and barred as provided for in this Proposed Plan. [emphasis added]

Unfortunately, this provision is inadequate for at least two reasons. First, it only maintains claims against the insurer – not claims against Sino-Forest for which insurance proceeds may be available. Second, it does not provide a mechanism by which the Plaintiff Class Members can collect the insurance directly from the insurer. In the Class Action Plaintiffs' view, a better approach would be to: (a) preserve the Plaintiff Class Members' claims against Sino-Forest while making it clear that recourse in respect of those claims is limited to available insurance proceeds; AND, (b) assign the proceeds of the insurance directly to the Plaintiff Class Members and any other beneficiaries of the insurance.

indemnification.<sup>55</sup> In that case, as here, the debtor company suffered no prejudice if a claimant was permitted to seek recovery from the debtor's insurance proceeds. The court in *Algoma Steel* allowed the appeal and granted leave to proceed with a "technical amendment" which would lift the stay against the debtor for the limited purpose of accessing the debtor's insurance policy.

68. Although the Class Action Plaintiffs accept that their insured claims against the Debtor are equity claims, they submit that they should be permitted to vote those claims because of their interest in the insurance proceeds. It is well established in Canadian law that where a policy of insurance provides for payment on behalf of the insured, the proceeds of insurance are not an asset of the insolvent debtor to be distributed rateably among its creditors; rather, the insurance is payable to and for the benefit of the tort victim.<sup>56</sup> Accordingly, the Plaintiff Class Members should be entitled to vote on any CCAA plan that may impact their recourse to insurance coverage available for their claims.

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<sup>55</sup> *Algoma Steel Corp. v. Royal Bank*, 1992 CarswellOnt 163 (C.A.), Book of Authorities, Tab 6.

<sup>56</sup> In *Re Major*, 1984 CarswellBC 588 (S.C.), at para. 22, Wood J. held that to permit the estate of a bankrupt to receive the proceeds of a professional liability insurance policy would result in an injustice to the applicants for whose benefits one would have expected that the insurance policy was intended. Book of Authorities, Tab 7.

More recently, in *Superline Fuels Inc. v. Buchanan*, 2007 NSCA 68, [2007] S.C.C.A. No. 410 (leave to appeal refused) at paras. 24, 64-65, the Nova Scotia Court of Appeal upheld a lower court decision that a discharge order in bankruptcy does not operate to discharge the right of a third party to insurance, and that "the denial of such an opportunity ... would be unfair and unjust, ... it is the injured party, not the insured, who has the proprietary interest ... in the insurance proceeds." Oland J.A. noted that this outcome would not affect the orderly distribution of the debtor's property among its creditors, and that policy reasons also support that outcome, as the liability insurer could garner a windfall if the claim was not allowed to continue. Book of Authorities, Tab 8.

The Nova Scotia Court of Appeal's reasoning was followed in *Genge v. Parrill*, 2007 NLCA 77, [2008] S.C.C.A. No. 65 (leave to appeal refused). Book of Authorities, Tab 9.

69. In simple terms, the Plaintiff Class Members have legitimate, bona fide claims against Sino-Forest and its directors and officers for which they could receive compensation through Sino-Forest's insurance and, possibly, by recourse to the assets of individual directors and officers. To deny the Plaintiff Class Members a voice in a plan that threatens to compromise their claims to insurance proceeds and third party assets would be contrary to public policy and manifestly unjust, and, where necessary, should trigger the use of the court's discretion to permit the Plaintiff Class Members to vote.

B. The Plaintiff Class Members Should Vote Separately, and be Represented

70. As described above, the Class Action Plaintiffs submit that if a vote is to proceed on the Proposed Plan or any CCAA plan affecting the interests of the Plaintiff Class Members, then the Plaintiff Class Members should be given the right to vote. In that event, two issues arise as to how they should vote. Specifically:

(a) *Should they be separately classified?* The Class Action Plaintiffs say that they should.

(b) *Should a representation order be made authorizing the Class Action Plaintiffs to represent the Plaintiff Class Members in these proceedings, including the right to vote on a Plan on their behalf?* The Class Action Plaintiffs say that such an order should be made.

### ***Plaintiff Class Members Should Vote Separately***

71. The Proposed Plan stipulates that the Equity Claimants (including the Plaintiff Class Members, in their role vis-à-vis the Debtor) are to be classified separately in their own group, and that the current Noteholders are to form their own distinct voting group.

72. The Class Action Plaintiffs submit that where the proposed class members are called upon to vote on the Debtor's CCAA plan, the separation as between the Plaintiff Class Members and the Noteholders that is currently contemplated in the Proposed Plan is correct and should be maintained. That is, the Plaintiff Class Members should vote in their own class, separate and apart from the Noteholders.

73. As the Court of Appeal for Ontario found in *Stelco Inc., Re*, the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a "commonality of interest" (or a "common interest") between creditors of the same class.<sup>57</sup> In other words, creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest.<sup>58</sup>

74. Classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process, there can be no fixed rules that must apply in all cases.<sup>59</sup>

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<sup>57</sup> *Stelco Inc., Re* (2005) 78 OR (3d) 241 (C.A.); at para. 21, Book of Authorities, Tab 10.

<sup>58</sup> Section 22(2) of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36

<sup>59</sup> *Stelco Inc., Re*, (2005) 78 OR (3d) 241 (C.A.) at para. 22, Book of Authorities, Tab 10.

75. Pursuant to section 22(2) of the CCAA a court is to consider the following factors when determining whether there is a commonality of interest:

the nature of the debts, liabilities or obligations giving rise to their claims;

the nature and rank of any security in respect of their claims;

the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

76. The factors set out in s. 22(2) of the CCAA do not change in any material way the factors that have been identified in the case law.<sup>60</sup>

77. Central to the classification test is the desire to protect against injustice,<sup>61</sup> and minimize prejudice to creditors.<sup>62</sup> In this way, fairness and reasonableness – the two keynote concepts underscoring the philosophy and workings of the CCAA – drive the analysis. As the courts have made clear, fairness is the quintessential expression of the court's equitable jurisdiction. Although the jurisdiction is statutory, the broad

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<sup>60</sup> *SemCanada Crude Company (Re)* (2009) 57 CBR (5th) 205 (AltaQB) at para. 45, Book of Authorities, Tab 11. Note that the factors or principles to be considered when dealing with the commonality of interest test were summarized by the court in *Re Canadian Airlines Corp.* 2000 CanLII 28185 (AB QB), (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Book of Authorities, Tab 21, and cited with approval by the Ontario Court of Appeal in *Re Stelco Inc.* (2005) 78 OR (3d) 241 (C.A.), Book of Authorities, Tab 10, as follows: 1) Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test; 2) The interests to be considered are the legal interests that a creditor holds *qua* creditor in relationship to the debtor company prior to and under the Proposed Plan as well as on liquidation; 3) The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible; 4) In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable Proposed Plans; 5) Absent bad faith, the motivations of creditors to approve or disapprove of the Proposed Plan are irrelevant; 6) The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the Proposed Plan in a similar manner.

<sup>61</sup> *San Francisco Gifts Ltd. v. Oxford Properties Group Inc.* (2004) 5 CBR (5th) 300 (AltaCA) at para. 10, Book of Authorities, Tab 12.

<sup>62</sup> *Ontario v. Canadian Airlines Corporation*, 2001 ABQB 983 (CanLII), [2001] A.J. No. 1457, at para. 36, Book of Authorities, Tab 13.



discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity. Reasonableness is what lends objectivity to the process.<sup>63</sup>

78. In the Class Action Plaintiffs' view, the current Noteholders are in an entirely different position from Plaintiff Class Members. They do not share a "commonality of interest". For example, the Plaintiff Class Members are not contractually bound to support the Proposed Plan; the nature of the amounts owed is different; the priority of claims against Sino-Forest's assets and property are different; the enforcement remedies are different; and, the risks are different.

79. Pursuant to the Restructuring Support Agreement (the "RSA") between Sino-Forest and 72% of the Noteholders, the Noteholders are obligated to vote in favour of the Proposed Plan.<sup>64</sup> As such, there can be no meaningful consultation between these Noteholders and the Plaintiff Class Members.

80. The essential trade-off reflected in the RSA is that if the Noteholders support Sino-Forest's restructuring, Sino-Forest will ensure that the Noteholders' interests are protected in the Proposed Plan through a transfer of Sino-Forest's assets to a NewCo owned by the Noteholders. This *quid pro quo* arrangement between Sino-Forest and the Noteholders stemming from the Restructuring Support Agreement puts the Noteholders in a completely different situation vis-à-vis Sino-Forest than the Plaintiff Class Members. The Plaintiff Class Members' have no recourse to Sino-Forest's assets or to NewCo even if they wanted it; their recourse is to the insurance proceeds

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<sup>63</sup> *Ontario v. Canadian Airlines Corporation*, 2001 ABQB 983 (CanLII), [2001] A.J. No. 1457, at para. 38, Book of Authorities, Tab 13, quoting from *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.), Book of Authorities, Tab 14.

<sup>64</sup> See s. 4(b) of the RSA, Supplementary Compendium, Tab 1.

discussed above, and their claims against Non-Debtors. As a result, the Plaintiff Class Members are in a unique position in relation to Sino-Forest, and do not share a commonality of interest with the Noteholder voting group.

81. Further, the nature of the amounts owed by Sino-Forest to these two groups is entirely different. The Plaintiff Class Members allege that Sino-Forest is liable for numerous tort law claims, which is entirely different from the debt obligation Sino-Forest may owe to the Noteholders.

82. As well, the Class Action Plaintiffs believe that, in the unique circumstances of this case, their risks and reward matrix is readily quantifiable by reference to established legal and accounting principles, and available insurance pools. The Noteholder's ability to realize on Sino-Forest's inventory of assets (whatever they may be) represents a different risk.

83. Consequently, the Noteholders and Plaintiff Class Members should remain in the separate classes proposed by Sino-Forest in its Proposed Plan, and as contemplated by the CCAA with respect to Equity Claimants.<sup>65</sup>

***A Representation Order Should be Made***

84. As well, the Class Action Plaintiffs should be appointed as representatives of the Plaintiff Class Members in these proceedings, with the ability to vote on their behalf on any CCAA plan presented by the Debtor that materially affects their interests. The Class

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<sup>65</sup> See article 3.2 of the Proposed Plan.

Action Plaintiffs do not seek any funding from the Debtor's estate for their professional fees in connection with the proposed representation.

85. A representation order in this case will ensure an orderly and fair process toward resolving outstanding claims against the Debtor, and would avoid:

- (a) the logistical difficulties associated with the Debtor having to contact potentially tens of thousands of class members prior to a meeting of creditors and to facilitate their participation on a meeting;
- (b) the consequent delay and unfairness that will occur if shareholders who have been depending upon the Class Action Plaintiffs to represent their interests in these proceedings (including by virtue of prior orders of this court) are suddenly called upon to become engaged in this process and come to grips with a set of very complex issues; and,
- (c) the potential that Plaintiff Class Members will mistakenly ignore or misunderstand notice of the meeting based upon their established expectation that their interests are being represented by the Class Action Plaintiffs.

86. A representation order would also be consistent with the order of Justice Perell made January 6, 2012, granting carriage of the Ontario Class Action to the Ontario Plaintiffs and the *sui generis* obligations already imposed on the Ontario Plaintiffs to act in the interests of the Plaintiff Class Members.<sup>66</sup> The counsel to the Ontario Plaintiffs

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<sup>66</sup> *Fantl v. Transamerica Life Canada*, 2009 ONCA 377, at para. 29 and 38, Book of Authorities, Tab 15.

have had repeated contact with the potential class members, most recently with respect to the filing of claims and the Pöyry settlement. It is logical to maintain this consistency in representation.

87. The court's jurisdiction to appoint representatives in CCAA proceedings can be found in s. 11 of the CCAA and rule 10.01 of the *Rules of Civil Procedure*.<sup>67</sup>

88. Courts will grant a representation order where it is fair and convenient to do so, particularly where it will serve the objectives of the CCAA, which include ensuring an orderly and fair process to resolve outstanding claims against the debtor Debtor.<sup>68</sup>

89. In *Canwest Publishing*, Justice Pepall (as she then was) set out a list of relevant factors considered by courts in granting representation orders in CCAA proceedings.

These factors include:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under CCAA protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the Estate;

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<sup>67</sup> CCAA, *supra*, s. 11; *Rules of Civil Procedure*, *supra*, r. 10.01; *Nortel Networks Corp., Re* (2009), 53 C.B.R. (5<sup>th</sup>) 196 (Ont. S.C.J.) at paras. 10, 12, Book of Authorities at Tab 16; *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 (S.C.J.) at para. 7, Book of Authorities at Tab 17; *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 1328 at para. 20 [*Canwest Publishing*], Book of Authorities, Tab 18.

<sup>68</sup> *Canwest Publishing*, *supra* at para. 24, Book of Authorities, Tab 18; *Nortel Networks (S.C.J.)*, (2009), 53 C.B.R. (5<sup>th</sup>) 196 (Ont. S.C.J.) at para. 13, Book of Authorities, Tab 16; *Canwest Global Communications Corp., Re*, 2009 Carswell Ont 9398 (S.C.J.) at paras 14-15, Book of Authorities at Tab 19.

- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- the position of other stakeholders and the Monitor.<sup>69</sup>

90. The Plaintiff Class Members are precisely the type of group for which a representation order is appropriate.

*i) Vulnerability*

91. The class definition in the Ontario Class Action encompasses a large number of individual investors from around the world who have, effectively, already been represented by the Ontario Plaintiffs. Many class members have limited abilities to pursue individual claims in complex CCAA proceedings. Moreover, given the dispatch of the CCAA proceeding, many investors (some of whom are located around the world) are at risk of having their rights affected by a process before they are able to mount an intervention.

*ii) Benefit to the Debtor*

92. The Debtor receives at least three benefits if this Court makes a representation order. First, Sino-Forest will avoid the delay inherent in having Plaintiff Class Members represent themselves in these proceedings. Second, Sino-Forest can have greater confidence when reaching a compromise that affected interests have been adequately represented. Representative counsel will interact with Plaintiff Class Members and will represent their interests to Sino-Forest. Third, the Class Action Plaintiffs are not

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<sup>69</sup> *Canwest Publishing, supra* at para. 21, Book of Authorities at Tab 18.

seeking funding for their involvement in the CCAA proceeding, unlike other stakeholders in the process, and so the cost of interaction with individual Plaintiff Class Members should be substantially reduced.

*iii) Social Benefit*

93. The representation order will provide a social benefit by assisting Plaintiff Class Members, by fielding their concerns, by providing them with information about the CCAA process and by representing their interests to other stakeholders in the process.

94. The objectives of the CPA include access to justice, judicial economy and behaviour modification. All three of these important societal objectives would be furthered by a representation order.

95. The objectives of the CCAA include promoting efficient markets and balancing the interests of various stakeholders. These are important societal objectives that would be upheld through a representation order in this proceeding. A representation order would benefit society at large by giving voice to thousands of investors who had faith in Canada's efficient market and were, with the CCAA filing and now with the filing of the Proposed Plan, suddenly at risk of having severely limited recourse.

*iv) Facilitation of the administration of justice and efficiency in these proceedings*

96. The representation order will streamline and introduce efficiency to the process by having a common voice represent the group of class members. It will avoid a multiplicity of legal retainers, which will be a benefit to Sino-Forest, its creditors and all participants in the process.

97. Further, the suitability of Siskinds LLP and Koskie Minsky LLP as representative counsel has been scrutinized in detail by Justice Perell. His Honour found the firms to be well-established and noted that the lead lawyers had considerable experience and proficiency in class actions and securities litigation.<sup>70</sup> Justice Perell's decision can provide comfort to this court that these firms are also suitable representatives for this group in the CCAA proceedings.

v) *Conclusion*

98. In summary, the appointment of representatives and representative counsel for the Plaintiff Class Members will ensure that their interests are protected, while at the same time ensuring an efficient and orderly process.

C. The Meetings Order should contain a Come-back Provision

99. The Proposed Plan contemplates the possibility of amendments being made prior to or at the Meeting.<sup>71</sup>

100. The Meeting Order should contain a come-back provision preserving this court's jurisdiction to reconsider the procedure for the meeting in the event that such amendments are made, where practicable, or to address the issue as part of the sanction hearing.

101. CCAA courts have an ongoing supervisory jurisdiction,<sup>72</sup> which ought to be exercised to ensure that the objectives of the statute are met. In this case, providing

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<sup>70</sup> Motion Record, Tab 3.

<sup>71</sup> See 10.5 of the Proposed Plan.

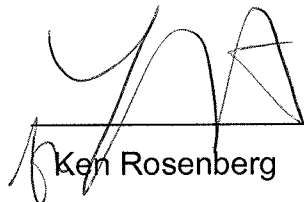
parties with an opportunity to give submissions on any amendments to the Plan prior to a meeting is fair and reasonable and should be so ordered.


**PART V - ORDER REQUESTED**

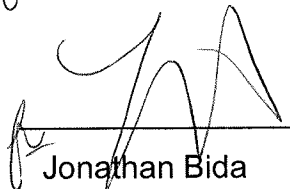
102. The Plaintiff Class Members therefore request the relief set out in their Notice of Motion dated August 23, 2012.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

August 24, 2012

  
\_\_\_\_\_  
Ken Rosenberg

  
\_\_\_\_\_  
Kirk Baert

  
\_\_\_\_\_  
Jonathan Bida

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<sup>72</sup> *Canadian Red Cross Society (Re)*, (2008) O.J. No. 4114 (S.C.J.), para. 26, Book of Authorities, Tab 20.



## SCHEDULE "A" - AUTHORITIES

1. *NBD Bank, Canada v. Dofasco Inc*, 1999 CarswellOnt 4077, 181 D.L.R. (4th) 37, 127 O.A.C. 338
2. *BlueStar Battery Systems International Corp., Re*, 2000 CarswellOnt 4837
3. *Nortel Networks Corporation (Re)*, 2010 ONSC 1708
4. *Minds Eye Entertainment Ltd. v. Royal Bank*, 2004 CarswellSask 50, 2004 SKQB 8
5. *Canadian Airlines Corp. (Re)*, 2000 ABQB 442
6. *Algoma Steel Corp. v. Royal Bank*, 1992 CarswellOnt 163 (C.A.)
7. *Re Major*, 1984 CarswellBC 588 (S.C.)
8. *Superline Fuels Inc. v. Buchanan*, 2007 NSCA 68, [2007] S.C.C.A. No. 410 (leave to appeal refused)
9. *Genge v. Parrill*, 2007 NLCA 77, [2008] S.C.C.A. No. 65 (leave to appeal refused)
10. *Stelco Inc., Re* (2005) 78 O.R. (3d) 241 (C.A)
11. *SemCanada Crude Company (Re)* (2009) 57 C.B.R. (5th) 205 (Alta.Q.B.)
12. *San Francisco Gifts Ltd. v. Oxford Properties Group Inc.* (2004) 5 C.B.R. (5th) 300 (Alta.C.A.)
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## **SCHEDULE "B" - STATUTES**

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

#### **Claims against directors — compromise**

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that

- (a) relate to contractual rights of one or more creditors; or
- (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

...

#### **General power of court**

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

...

## **CLAIMS**

#### **Claims that may be dealt with by a compromise or arrangement**

19. (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

- (a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
  - (i) the day on which proceedings commenced under this Act, and
  - (ii) if the company filed a notice of intention under section 50.4 of the Bankruptcy and Insolvency Act or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

### **Exception**

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

- (a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;
- (b) any award of damages by a court in civil proceedings in respect of
  - (i) bodily harm intentionally inflicted, or sexual assault, or
  - (ii) wrongful death resulting from an act referred to in subparagraph (i);
- (c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;
- (d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or
- (e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d)

...

## **CLASSES OF CREDITORS**

### **Company may establish classes**

22. (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

### **Factors**

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

- (a) the nature of the debts, liabilities or obligations giving rise to their claims;
- (b) the nature and rank of any security in respect of their claims;

- (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
- (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

***Rules of Civil Procedure, R.R.O. 1990, Reg. 194.***

**REPRESENTATION OF AN INTERESTED PERSON WHO CANNOT BE ASCERTAINED**

**Proceedings in which Order may be Made**

- 10.01 (1) In a proceeding concerning,
- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
  - (b) the determination of a question arising in the administration of an estate or trust;
  - (c) the approval of a sale, purchase, settlement or other transaction;
  - (d) the approval of an arrangement under the Variation of Trusts Act;
  - (e) the administration of the estate of a deceased person; or
  - (f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served., r. 10.01 (1).

**SCHEDULE "C" –  
BLACKLINED PROPOSED PLAN OF COMPROMISE AND  
REORGANIZATION**

[to be provided to the Court and the Service List on or before August 27, 2012]

**SCHEDULE "D" – SERVICE LIST**

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

***COURT OF APPEAL FOR ONTARIO***

**IN THE MATTER OF THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

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

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

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THE APPLICANT'S SECURITIES, INCLUDING THE  
REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS  
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**(Motion Returnable August 28, 2012)**

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