

**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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**FACTUM OF THE UNDERWRITERS  
NAMED IN CLASS ACTIONS  
(Stay of Proceedings  
(returnable on May 8, 2012))**

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**PART I - OVERVIEW**

1. This Factum is filed by the Underwriters (as such term is defined below) in connection with the motion of Sino-Forest Corporation ("Sino-Forest") for a determination of the scope of the Stay of Proceedings (as such term is defined below), as more fully described in the Motion Record of Sino-Forest, dated April 23, 2012.
2. It is the position of the Underwriters that the Stay of Proceedings extends to the Underwriters or, alternatively, that the Stay of Proceedings should be ordered to extend to the Underwriters. As this Court recently held in the *Timminco* case, it makes no sense for class actions to be stayed as against Sino-Forest and its officers and directors but be allowed to proceed against the Underwriters and other parties. As in *Timminco*, there is no urgency or other reason to come to a different conclusion.

**PART II – THE FACTS**

**The Initial Order**

3. On March 30, 2012, Sino-Forest sought and obtained from the Ontario Superior Court of Justice an Initial Order (the "Initial Order") under the *Companies' Creditors Arrangement Act*,

R.S.C. 1985, c. C-36, as amended (the “CCAA”), which granted a stay of proceedings in respect of Sino-Forest (the “Stay of Proceedings”) and other relief under the CCAA.

### **The Class Actions**

4. Sino-Forest and certain of its officers, directors and employees, along with Sino-Forest’s current and former auditors, technical consultants and various underwriters involved in prior equity and debt offerings, have been named as defendants in eight class action lawsuits to date, and additional law firms in both the United States and Canada have announced that they are investigating Sino-Forest and certain directors and officers thereof with respect to potential additional class action lawsuits (all such class actions together with other lawsuits, actions and other similar litigation to which Sino-Forest is a party, collectively, the “Sino-Forest Actions”).

Affidavit of W. Judson Martin, sworn March 30, 2012 [Martin Affidavit] at paras. 176 and 181, Application Record of Sino-Forest, Tab 2

5. Five of the existing class action lawsuits, commenced by three separate groups of counsel, were filed in Ontario Superior Court of Justice on June 8, 2011, June 20, 2011, July 20, 2011, September 26, 2011 and November 14, 2011. A carriage motion in relation to these actions was heard on December 20 and 21, 2011, and by Order dated January 6, 2012, Justice Perell appointed Koskie Minsky LLP and Siskinds LLP as class counsel. As a result, Koskie Minsky LLP and Siskinds LLP discontinued their earliest action, and their other two actions have been consolidated and will move forward as one proceeding. The other two Ontario actions, commenced by other counsel, have been stayed. Pursuant to Justice Perell’s January 6, 2012 Order, Koskie Minsky LLP and Siskinds LLP have filed a fresh as amended Statement of Claim in the consolidated proceeding (the “Sino-Forest Class Action”).

Martin Affidavit at para. 177, Application Record of Sino-Forest, Tab 2

6. The Underwriters (namely, 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. (now known as Canaccord Genuity Corp.), 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) are among the defendants named in the Sino-Forest Class Action.

Martin Affidavit at para. 177 and Exhibit “Y”, Application Record of Sino-Forest, Tabs 2 and 2(Y)

7. The plaintiffs in the Sino-Forest Class Action claim damages against various parties in connection with alleged misrepresentations made by Sino-Forest between 2006-2011. The claims asserted by the plaintiffs involve, in part, alleged misrepresentations made by Sino-Forest in its equity and note offerings (the “Offerings”) in the primary market through prospectuses and offering memoranda. The alleged misrepresentations made by Sino-Forest in connection with the Offerings form the basis upon which general and other damages are claimed by the plaintiffs against the Underwriters.

Affidavit of Rebecca L. Wise, sworn April 23, 2012 [Wise Affidavit] at paras. 2-6, Responding Motion Record of the Underwriters, Tab 1

8. In connection with the Offerings, certain Underwriters have entered into related agreements (the “Related Agreements”) with Sino-Forest and certain of its subsidiaries (the “Sino-Forest Subsidiary Companies”) providing that Sino-Forest and, with respect to certain Offerings, the Sino-Forest Subsidiary Companies have agreed to indemnify and hold harmless the Underwriters (the “Indemnities”) in connection with an array of matters that could arise from the Offerings.

Wise Affidavit at paras. 8-10, Responding Motion Record of the Underwriters, Tab 1

9. Subsequent to the Initial Order, counsel for Sino-Forest and some of the individual defendants in the Sino-Forest Class Action, counsel for certain current and former directors of Sino-Forest in the Sino-Forest Class Action and counsel for the former CEO of Sino-Forest wrote letters to the Honourable Mr. Justice Paul M. Perell, the presiding judge in the Sino-Forest Class Action, stating, *inter alia*, that, as a result of the Stay of Proceedings, their respective clients do not intend to participate in the Sino-Forest Class Action.

Wise Affidavit at paras. 15-17, Responding Motion Record of the Underwriters, Tab 1

10. If the Stay of Proceedings does not extend to the Underwriters or is not ordered to extend to the Underwriters and the Sino-Forest Class Action proceeds, then (absent any further order) the effect of the Initial Order will be as follows:

- (a) Sino-Forest and its directors and officers (the “D&Os”) will have no obligation to make production of documents;
- (b) Sino-Forest and the D&Os will not be examined for discovery;
- (c) Sino-Forest and the D&Os will not attend any pre-trial and will therefore not participate in any court or private mediation associated with the pre-trial; and
- (d) Sino-Forest and the D&Os will not give evidence at trial.

Wise Affidavit at para. 18, Responding Motion Record of the Underwriters, Tab 1

11. The principal, though not the only, defences available to a defendant in a matter such as the Sino-Forest Class Action include demonstrating: (i) there were no misrepresentations in the company’s disclosure of the kind alleged; and (ii) the defendant is not in any event liable for any misrepresentations because it was duly diligent with respect to its involvement in that disclosure. Requiring the remaining defendants (including the Underwriters) to develop either of these defences in a case where the company and its directors and senior managers are absent will prejudice the remaining defendants (including the Underwriters), based on the assumptions that the company and its directors and senior managers have evidence that bears upon these defences and would be expected to be the primary parties addressing the accuracy of disclosure. This is due to (without any further order): (a) the absence of relevant evidence with which to prove defences; and (b) the absence of ongoing indemnification from Sino-Forest.

Wise Affidavit at para. 19, Responding Motion Record of the Underwriters, Tab 1

12. Similar prejudice also may reasonably be expected to affect the defences and indemnification arrangements of the Underwriters and other non-Sino-Forest defendants in other Sino-Forest Actions.

### **PART III – LAW AND ARGUMENT**

#### **The Issues**

13. The following issues are before this Court and addressed below:

- I. Does the scope of the Stay of Proceedings extend to stay the Sino-Forest Actions in their entirety?
- II. In the event that the scope of the Stay of Proceedings does not presently extend to stay the Sino-Forest Actions in their entirety:
  - A. Does this Court have the jurisdiction to so extend the Stay of Proceedings?
  - B. In the event that this Court has the requisite jurisdiction, should this Court exercise its discretion to extend the Stay of Proceedings to stay the Sino-Forest Actions in their entirety?
- III. In the event that the scope of the Stay of Proceedings presently extends to stay the Sino-Forest Actions in their entirety, should this Court lift the Stay of Proceedings to permit the Sino-Forest Actions to continue as requested by plaintiffs' counsel in the Sino-Forest Class Action?

#### **The CCAA**

14. Before addressing the issues set out above, they should be put in the proper context with reference to the legislation under which the Initial Order and Stay of Proceedings were granted, namely the CCAA.

15. The CCAA is remedial legislation, and it is to be given a liberal interpretation to facilitate its objectives.

*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 at para. 25 (B.C.C.A.), Brief of Authorities of the Underwriters, Tab 1

*Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 at para. 11 (Ont. S.C.J.), Brief of Authorities of the Underwriters, Tab 2

16. The underlying objectives of the CCAA and the corresponding liberal interpretation it is to be given inform the law and argument discussed in Part III and strongly support a broad and robust Stay of Proceedings in the present case.

**Issue I: Scope of Stay of Proceedings**  
**Extends to Stay Sino-Forest Actions**

17. The Ontario Court of Appeal has recognized that a motion judge's interpretation of his order deserves deference, and that such motion judge is in an ideal position to assess what would be fair in the context of a CCAA case.

*Molson Canada v. O-I Canada Corp.* (2003), 43 C.B.R. (4th) 172 at para. 15 (Ont. C.A.), Brief of Authorities of the Underwriters, Tab 3

18. The Stay of Proceedings, in keeping with the liberal interpretation to be given to the CCAA and the underlying objectives of the CCAA, may be interpreted broadly by this Court, and stays of proceedings generally receive a very broad interpretation.

*Re Woodward's Ltd.* (1993), 79 B.C.L.R. (2d) 257 at para. 12 (B.C.S.C.) [*Woodward's*], Brief of Authorities of the Underwriters, Tab 4

19. Courts have recognized that principal objectives underlying the CCAA include:

- (a) to maintain the status quo for a period to provide a structured environment in which an insolvent company can continue to carry on business and retain control over its assets while the company attempts to gain the approval of its creditors for a proposed arrangement that will enable the company to remain in operation for the future benefit of the company and its creditors: *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 1984 CarswellAlta 259, 52 C.B.R. (N.S.) 109, 32

Alta. L.R. (2d) 150, [1984] 5 W.W.R. 215, 53 A.R. 39 (Q.B.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98, 1990 CarswellBC 425 (B.C. S.C.); *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.); *Milner Greenhouses Ltd. v. Saskatchewan* (2004), 2004 CarswellSask 280, [2004] 9 W.W.R. 310, 50 C.B.R. (4th) 214, 2004 SKQB 160 (Sask. Q.B.); *Re Blue Range Resource Corp.* (2000), 192 D.L.R. (4th) 281, 2000 ABCA 239, 20 C.B.R. (4th) 187, 2000 CarswellAlta 1004 (Alta. C.A.);

- (b) to permit an orderly administration of the debtor company's affairs: *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 1984 CarswellAlta 259, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, [1984] 5 W.W.R. 215, 53 A.R. 39 (Q.B.);
- (c) to permit a broad balancing of stakeholder interests in the insolvent corporation: *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 41 O.A.C. 282, 1990 CarswellOnt 139, 1 O.R. (3d) 289 (Ont. C.A.); *Re Air Canada [Greater Toronto Airport Authority re gates at new terminal (Toronto)]* (2004), 47 C.B.R. (4th) 189, 2004 CarswellOnt 870 (Ont. S.C.J. [Commercial List]); and
- (d) enabling the debtor to have some breathing room in the face of pending and potential proceedings against it, in order to give it time and uninterrupted opportunity to attempt to work out a restructuring: *Re Philip Services Corp.* (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]); *Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.* (2000), 48 O.R. (3d) 746, 19 C.B.R. (4th) 299, 7 B.L.R. (3d) 86, 2000 CarswellOnt 1770 (S.C.J. [Commercial List]). See also *Milner Greenhouses Ltd. v. Saskatchewan* (2004), 2004 CarswellSask 280, [2004] 9 W.W.R. 310, 50 C.B.R. (4th) 214, 2004 SKQB 160 (Sask. Q.B.).

20. These objectives are served by the granting of a broad stay of proceedings; a narrowly construed stay of proceedings is not consistent with achieving the objectives underlying the CCAA.



21. At all times, the Court has the authority to oversee the CCAA proceedings and – principally through application of a broadly applied stay of proceedings – to prevent chaos, unfairness or interference with the objects of the CCAA. The Court reserves the discretion to lift the stay of proceedings at any time and to the extent it deems appropriate, after orderly consideration of a request to lift the stay on notice to affected parties.

22. The point of the CCAA process is not simply to preserve the status quo but to facilitate restructuring so that the company can successfully emerge from the process and it is important to take into account the dynamics of the situation.

*Re Stelco Inc.* (2005), 15 C.B.R. (5th) 288 at para. 18 (Ont. C.A.)  
[*Stelco*], Brief of Authorities of the Underwriters, Tab 5

23. In the present case, the outstanding litigation against and involving Sino-Forest is a principal reason for Sino-Forest having sought court protection, and this litigation and the prospective resolution of the claims surrounding this litigation are central to Sino-Forest and to its restructuring. To interpret the stay of proceedings narrowly or to otherwise permit the litigation to continue in part would be wholly inconsistent with the objects of the CCAA and the circumstances facing Sino-Forest that predicated its commencing the within CCAA proceedings.

24. The Initial Order in the present case stays the rights and remedies of any persons against or in respect of, *inter alia*, Sino-Forest and its Business or Property (as such terms are defined in the Initial Order), and precludes them from commencing or continuing proceedings or enforcement processes. Paragraphs 17 and 19 of the Initial Order provide as follows:

17. THIS COURT ORDERS that until and including April 29, 2012, or such later date as this Court may order (the “Stay Period”), no proceeding or enforcement process in any court or tribunal (each, a “Proceeding”) shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant or the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

19. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation,

governmental body or agency, or any other entities (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued, except with the written consent of the Applicant and the Monitor, or leave of this Court.

25. In addition, the Initial Order precludes any noteholder, indenture trustee or security trustee in respect of notes issued by Sino-Forest from commencing or continuing proceedings or enforcement processes against or in respect of any Subsidiary Guarantors (as such term is defined in the Initial Order). Paragraphs 18 and 20 of the Initial Order provide as follows:

18. THIS COURT ORDERS that until and including the Stay Period, no Proceeding shall be commenced or continued by any noteholder, indenture trustee or security trustee (each in respect of the notes issued by the Applicant, collectively, the “Noteholders”) against or in respect of any of the Applicant’s subsidiaries listed on Schedule “A” (each a “Subsidiary Guarantor”, and collectively, the “Subsidiary Guarantors”), except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way by a Noteholder against or in respect of any Subsidiary Guarantors are hereby stayed and suspended pending further Order of this Court.

20. THIS COURT ORDERS that during the Stay Period, all rights and remedies of the Noteholders against or in respect of the Subsidiary Guarantors are hereby stayed and suspended and shall not be commenced, proceeded with or continued, except with or continued, except with the written consent of the Applicant and the Monitor, or leave of this Court.

26. The terms “Business” and “Property” are each defined broadly in the Initial Order. Paragraph 5 of the Initial Order provides, in part, as follows:

5. THIS COURT ORDERS that the Applicant shall remain in possession and control of its current and future assets, undertakings and properties of very nature and kind whatsoever, and wherever situate including all proceeds thereof (the “Property”). Subject to further Order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the “Business”) and Property ...

27. The provisions of the Initial Order excerpted above demonstrate that the Stay of Proceedings was conceived on a sufficiently broad basis to stay the Sino-Forest Actions in their entirety as opposed to only claims made in the Sino-Forest Actions against Sino-Forest, itself, and there is no language in the Initial Order that necessarily limits the scope of the Stay of Proceedings in this respect.

28. Pursuant to the Initial Order, the Stay of Proceedings precludes, *inter alia*, the commencement or continuation of any proceeding or enforcement process in any court or tribunal against or in respect of Sino-Forest, *or affecting the Business or the Property (emphasis added)*. This language is supportive of the scope of the Stay of Proceedings extending beyond Sino-Forest, itself, to include proceedings affecting the Business or Property of Sino-Forest, which is a much broader concept. Moreover, in the event that the Sino-Forest Actions, including the Sino-Forest Class Action, are stayed only with respect to claims made against Sino-Forest, the Sino-Forest Actions may still reasonably be expected to affect Sino-Forest, the Business or Property in some manner, such as findings of fact that may prejudice Sino-Forest in future actions.

29. It is respectfully submitted that, based on the objectives and interpretation to be given to the CCAA, the relevant provisions of the Initial Order and the deference accorded to this Court in interpreting its own orders, the Court can and should confirm that the scope of the Stay of Proceedings extends to stay the Sino-Forest Actions, including the Sino-Forest Class Action, in their entirety.

**Issue II A: Jurisdiction to Extend Stay of Proceedings to Stay Sino-Forest Actions**

30. In the event that the scope of the Stay of Proceedings as presently constituted does not extend to stay the Sino-Forest Actions in their entirety, this Court has the jurisdiction to so extend the Stay of Proceedings. Section 11 of the CCAA provides as follows:

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.

CCAA, Section 11, Schedule “B”

31. With respect to stays of proceedings, in particular, the CCAA provides courts with considerable discretion. Section 11.02(1) of the CCAA provides as follows:

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

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

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

CCAA, section 11.02(1), Schedule “B”

32. Courts are provided with considerable power and discretion by the CCAA that extends to Section 11 of the CCAA, which provides courts with broad jurisdiction to impose terms and conditions on the granting of orders in respect of stays of proceedings, as courts may make such orders “on any terms that [they] may impose”.

*Stelco* at para. 18, Brief of Authorities of the Underwriters, Tab 5

33. Courts regularly exercise such power and discretion in granting broad stays of proceedings in circumstances where such relief is warranted. For example, in the CCAA case in respect of T. Eaton Company Limited et al. (“Eaton’s”) (Court File No. RE7483/97) (the “Eaton’s Case”), the Court ordered, *inter alia*, that other tenants in commercial properties in which Eaton’s was a tenant were stayed from exercising their rights under their leases against the landlords of such commercial properties. In the CCAA case in respect of MuscleTech Research

and Development Inc. et al. (Court File No. 06-CL-6241) (the “MuscleTech Case”), the Court ordered, *inter alia*, that the stay of proceedings extended to stay certain product liability and class action litigation, including the claims asserted against non-applicant solvent defendants party thereto.

Order of Houlden J. made February 27, 1997 in the Eaton’s Case (Ont. Gen. Div.) at para. 9, Brief of Authorities of the Underwriters, Tab 6

Order of Farley J. made January 18, 2006 in the MuscleTech Case (Ont. S.C.J.) at para. 6, Brief of Authorities of the Underwriters, Tab 7

34. It is respectfully submitted that, based on the power and discretion provided to courts pursuant to the CCAA, this Court has the requisite jurisdiction to extend the Stay of Proceedings to stay the Sino-Forest Actions in their entirety.

**Issue II B: Alternatively, the Stay of Proceedings Should be Extended to Stay Sino-Forest Actions**

35. The stay of proceedings is the primary means used to achieve the CCAA’s objectives, preserving the status quo and holding debtors at bay while giving the debtor company breathing room to develop a restructuring plan. That restraining power extends to conduct that could seriously impair the debtor’s ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

*Re Canadian Airlines* (2000), 19 C.B.R. (4th) 1 at paras. 13 and 17-19 (Alta. Q.B.) [*Canadian Airlines*], Brief of Authorities of the Underwriters, Tab 8

36. In *Campeau*, the Court held that it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern.

*Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 [*Campeau*] at paras. 17-20 (Ont. Gen. Div.), Brief of Authorities of the Underwriters, Tab 9

37. The stay ordered under the CCAA is also designed to ensure that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs and develop a plan. During the stay period, the CCAA is intended to prevent maneuvers for positioning among the creditors of the company.

*Woodward's* at para. 12, Brief of Authorities of the Underwriters, Tab 4

*Re Pacific National Lease Holding Corp.* (1992), 72 B.C.L.R. (2d) 368 at paras. 24-25 (B.C.C.A.), Brief of Authorities of the Underwriters, Tab 10

*Canadian Airlines* at paras. 17-19, Brief of Authorities of the Underwriters, Tab 8

38. In *Campeau*, the debtor company and a third party were defendants in separate litigation that shared a complex factual situation. On motions to lift the stay of proceedings against the debtor company and extend the stay of proceedings to the third party defendant, the Court decided to continue the stay of proceedings in respect of the debtor company, and imposed a stay of proceedings in respect of the litigation against the third party. The Court held that:

While there may not be great prejudice to [the third party defendant] if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged ...

*Campeau* at paras. 23 and 25, Brief of Authorities of the Underwriters, Tab 9

39. The Court's rationale in *Campeau* is even more pertinent in the present case, where the Underwriters and Sino-Forest are defendants in the same litigation, and is illustrative of the tendency of courts to consider the interests of parties other than the debtor company and creditors when deciding issues concerning stays of proceedings.

*Canadian Airlines* at para. 17, Brief of Authorities of the Underwriters, Tab 8

*Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 at para. 23 (B.C.S.C.), Brief of Authorities of the Underwriters, Tab 11

40. The imposition of stays of proceedings in respect of third parties is warranted in appropriate circumstances, as evidenced by the *Campeau*, Eaton's Case and MuscleTech Case examples. As discussed below, circumstances presently exist that make it appropriate for such a stay in these proceedings.

***Considerations Germane to CCAA Process***

41. A primary purpose of Sino-Forest's filing under the CCAA was to preserve Sino-Forest's business as a going concern and thus the inherent value of the enterprise. An essential element in accomplishing this purpose is the imposition of a stay of proceedings with sufficient scope to protect Sino-Forest and its Business or Property. A stay of proceedings with insufficient scope will leave Sino-Forest's business vulnerable and could potentially jeopardize its restructuring under the CCAA.

Martin Affidavit at para. 22, Application Record of Sino-Forest,  
Tab 2

42. Courts have recognized that litigation involving a debtor company may impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. The Sino-Forest Actions, including the Sino-Forest Class Action, are complex and have required, and may reasonably be expected to continue to require, significant resources to be expended by the directors, officers and employees of Sino-Forest. The diversion of such resources has affected Sino-Forest's ability to conduct its operations in the normal course of business. Sino-Forest's timber and trading businesses have effectively been frozen and have ground to a halt.

*Campeau* at para. 17, Brief of Authorities of the Underwriters, Tab  
9

Martin Affidavit at para. 183, Application Record of Sino-Forest,  
Tab 2

43. In addition, Sino-Forest has and will continue to incur a substantial amount of fees and expenses in connection with the Sino-Forest Actions. Further, pursuant to indemnification

agreements between Sino-Forest and its directors and certain officers as well as with auditors, underwriters and other parties, including the Related Agreements and Indemnities in the case of the Sino-Forest Class Action, Sino-Forest is obligated to indemnify such individuals for additional legal and other expenses pursuant to such proceedings. The aggregate of such fees and expenses is substantial and has had an extremely negative effect on Sino-Forest's operating results. If the litigation continues, it will have the effect of increasing the quantum of claims against Sino-Forest.

Martin Affidavit at para. 190, Application Record of Sino-Forest, Tab 2

Wise Affidavit at paras. 8-10, Responding Motion Record of the Underwriters named in Class Actions, Tab 1

***Considerations Germane to Underwriters***

44. As discussed above, the impact on the Underwriters and other defendants in any Sino-Forest Actions in which they are named as defendants, including the Sino-Forest Class Action, of permitting such actions to proceed would be significant and prejudicial to their ability to make a full answer and defence to allegations made against them. The absence of ongoing indemnification of the Underwriters by Sino-Forest would also be prejudicial to the Underwriters.

45. In the case of the Sino-Forest Class Action, in particular, in the event that the Stay of Proceedings does not extend to the Underwriters and the Sino-Forest Class Action proceeds, then (absent any further order) the effect of the Initial Order, by precluding the effective participation of Sino-Forest and the D&Os in the Sino-Forest Class Action, may be to limit certain of the likely principal defenses of the remaining defendants in the Sino-Forest Class Action, as described above, resulting in prejudice to such defendants, including the Underwriters. For example, without the participation of Sino-Forest and the D&Os, evidence that would ordinarily be available to the defendants and obtainable through the discovery process, would not be available to the Underwriters, with ramifications for establishing certain defences and disadvantaging the Underwriters in the Sino-Forest Class Action.



46. On the other hand, in the event that the scope of the Stay of Proceedings extends to stay the Sino-Forest Class Action, the defendants in the Sino-Forest Class Action will remain on a more equal footing with one another and the prejudice that could result from the non-participation of certain defendants and the continued participation of others can be avoided. The interests of justice are not served by the non-participation of Sino-Forest and the D&Os in the Sino-Forest Class Action and the resulting dearth of evidence from these parties available to the Underwriters and the absence of ongoing indemnification from Sino-Forest.

47. The impact on the Underwriters of the continuation of other Sino-Forest Actions, would be substantially similar.

**Issue III: Stay of Proceedings Should Not be Lifted**

48. It is respectfully submitted that, in the event that the scope of the Stay of Proceedings presently extends to stay the Sino-Forest Actions in their entirety, this Court should not lift the Stay of Proceedings to permit the Sino-Forest Actions, including the Sino-Forest Class Action, to continue. In this respect, the Underwriters are supportive of the arguments advanced by Ernst & Young LLP in its factum filed in connection with this motion.

49. There is no express statutory test under the CCAA to guide courts in lifting a stay of proceedings to permit a creditor to proceed; but there are recognized situations in which courts will lift a stay. The court will lift the stay when the moving party would be significantly prejudiced by a refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors, and where it is in the interests of justice to do so.

R.H. McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy* looseleaf (Aurora: Canada Law Book, 2009) at 3.3400 to 3.3570 [McLaren], Brief of Authorities of the Underwriters, Tab 12

*Canadian Airlines* at para. 20, Brief of Authorities of the Underwriters, Tab 8

50. In determining whether a stay should be lifted, a court will balance a number of interests, taking into account not only the relative prejudice to the moving party, the debtor company and

the creditors, but also the interests of the other stakeholders or constituents involved in the process.

*Canadian Airlines* at para. 38, Brief of Authorities of the Underwriters, Tab 8

51. Lifting a stay of proceedings is a discretionary decision, though the party seeking such an order faces a very heavy onus. In considering whether to grant a lift stay, the court should consider whether there are sound reasons for lifting the stay consistent with the objectives of the CCAA, including considering the balance of convenience, relative prejudice to the parties and where relevant, the merits of the proposed action.

*Re Canwest Global Communications Corp.* (2009), 61 C.B.R. (5th) 200 at para. 32 (Ont. S.C.J.) [*Canwest*], Brief of Authorities of the Underwriters, Tab 13

*Re NFC Acquisition GP Inc.*, 2012 ONSC 1244 at para. 11 (Ont. S.C.J.) [*NFC Acquisition*], Brief of Authorities of the Underwriters, Tab 14

52. Courts regularly deny applications to lift stays of proceedings, particularly where the creditor or other stakeholder seeks to have their claims adjudicated in class proceedings or would gain an advantage over other creditors generally in the CCAA proceedings. Except in circumstances where it can be clearly demonstrated that the claim can be dealt with more expeditiously than through a claims process, such motions are usually dismissed.

*Re Canadian Red Cross Society* (1999), 12 C.B.R. (4th) 194 (Ont. S.C.J.), Brief of Authorities of the Underwriters, Tab 15

*Re Air Canada* (2004), 47 C.B.R. (4th) 177 (Ont. S.C.J.), Brief of Authorities of the Underwriters, Tab 16

53. This Court recently held in the *Timminco* case that it makes no sense to permit a class action to be stayed as against debtor companies but be allowed to proceed against the remaining defendants. This Court found that to order otherwise would be prejudicial to the debtor companies' business and property, unfair to the remaining defendants and wasteful of judicial resources. As in *Timminco*, there is no urgency or other reason to come to a different conclusion in the present case.

*Re Timminco Limited*, 2012 ONSC 2515 at paras. 23-24(Ont. S.C.J.), Brief of Authorities of the Underwriters, Tab 17

54. The following circumstances, set out first by Professor R.H. McLaren and adopted by this Court on a number of occasions, have been identified as instances in which lifting a stay of proceedings may be appropriate:

- (a) When the plan is likely to fail.
- (b) The moving party shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the moving party).
- (c) The moving party shows necessity for payment (where the moving party's financial problems are created by the order or where the failure to pay the moving party would cause it to close and thus jeopardize the debtor's company's existence).
- (d) The moving party would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
- (e) It is necessary to permit the moving party to take steps to protect a right which could be lost by the passing of time.
- (f) After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
- (g) There is a real risk that a moving party's loan will become unsecured during the stay period.
- (h) It is necessary to allow the moving party to perfect a right that existed prior to the commencement of the stay period.
- (i) It is in the interests of justice to do so.

*McLaren* at 3.3400 to 3.3570, Brief of Authorities of the Underwriters, Tab 12

*Canwest* at para. 33, Brief of Authorities of the Underwriters,  
Tab 13

*NFC Acquisition*, at para. 11, Brief of Authorities of the  
Underwriters Named in Class Actions, Tab 14

***Plan Not Likely to Fail***

55. Sino-Forest only filed under the CCAA on March 30, 2012. To date, a plan of arrangement or compromise has not yet been presented to creditors, though Sino-Forest may reasonably be expected to present one in due course. As such, there is no evidence to suggest that such a plan is likely to fail.

***No Hardship to Plaintiffs***

56. Effective March 6, 2012, the plaintiffs and defendants in the Sino-Forest Class Action entered into a tolling agreement (the “Tolling Agreement”). Accordingly, the continued operation of the Stay of Proceedings in respect of the Sino-Forest Class Action, in particular, has not resulted in hardship to the plaintiffs. It is open to the plaintiffs and defendants in other Sino-Forest Actions to negotiate similar arrangements, if the circumstances warrant such an arrangement.

***No Necessity of Payment***

57. There is no necessity for payment in the present case. Any losses sustained by the plaintiffs in the Sino-Forest Actions, including the Sino-Forest Class Action, were not as a result of the Initial Order or Stay of Proceedings, and pre-existed Sino-Forest’s filing under the CCAA. The Sino-Forest Class Action, in particular, was not near its conclusion at the time of Sino-Forest’s filing under the CCAA, and judgment and awards were not imminent.

***Prejudice to Plaintiffs, Sino-Forest and Creditors***

58. As a result of, *inter alia*, the Tolling Agreement, the continued operation of the Stay of Proceedings in respect of the Sino-Forest Class Action is not prejudicial to the plaintiffs, and it is open to the plaintiffs and defendants in other Sino-Forest Actions to negotiate similar arrangements, if the circumstances warrant such an arrangement. To the extent there is any prejudice to the plaintiffs in the present case, the prejudice that would be suffered by Sino-Forest

and its other creditors as a result of the lifting of the Stay of Proceedings would be significant and would outweigh any such prejudice to the plaintiffs. As discussed in greater detail in section II B of Part III of this Factum, the prejudice arising from the threat to the stabilization of Sino-Forest's business while it remains under CCAA protection that would be caused by permitting the Sino-Forest Actions to proceed would be significant and hinder the efforts of Sino-Forest to negotiate an acceptable restructuring plan with its creditors.

59. In addition, in determining whether stays of proceedings should be lifted, courts examine the interests of the other stakeholders or constituents involved in the process. Stakeholders other than creditors and the plaintiffs, such as employees and suppliers, typically have the most to gain by the emergence of a debtor company from a CCAA process. Any damage to Sino-Forest's business caused by permitting the Sino-Forest Actions to continue will have a negative effect on these stakeholders and the CCAA process, itself.

60. As discussed in greater detail in section II B of Part III of this Factum, the impact on the Underwriters and other defendants in the Sino-Forest Actions of lifting the Stay of Proceedings to permit the Sino-Forest Actions to proceed would also be significant and prejudicial to their ability to make a full answer and defence in such litigation, and the Sino-Forest Class Action in particular. Such prejudice also outweighs any prejudice that would be suffered by the plaintiffs in the Sino-Forest Actions by leaving the Stay of Proceedings in place.

#### ***Passing of Time***

61. It is not necessary to lift the Stay of Proceedings in order to permit the plaintiffs in the Sino-Forest Actions, including the Sino-Forest Class Action, to take steps to protect a right which could be lost by the passing of time. The present case is not an instance where a creditor's security or priority is in jeopardy if, for example, not perfected properly.

#### ***No Lapse of Significant Time Period***

62. Sino-Forest filed under the CCAA on March 30, 2012 and the Stay of Proceedings only commenced on that date. The intervening period of time has not been significant and it is premature to consider the lapse of time in the present case at this time.

***No Risk to Creditor's Loan***

63. The plaintiffs in the Sino-Forest Actions, including the Sino-Forest Class Action, do not have loans at risk of becoming unsecured as a result of the Stay of Proceedings.

***Not Necessary to Perfect a Right***

64. In the present case, it is not necessary to permit the plaintiffs in the Sino-Forest Actions, including the Sino-Forest Class Action, to perfect a right that existed prior to the commencement of the Stay of Proceedings.

***Interests of Justice***

65. The interests of justice militate heavily in favour of denying a lift stay in the present case and include interests germane to: (1) the CCAA process in respect of Sino-Forest and; (2) the Underwriters, which are discussed, in turn, below.

***Interests Germane to CCAA Process***

66. The objectives of the CCAA are best served by permitting Sino-Forest to restructure its business and negotiate with creditors without having to simultaneously defend the Sino-Forest Actions or allowing them to impact Sino-Forest's Business or Property. Lifting the Stay of Proceedings will do nothing to contribute to the emergence of Sino-Forest as a viable economic entity. As discussed in greater detail in section II B of Part III of this Factum, the Sino-Forest Actions, including the Sino-Forest Class Action, represent a significant threat to the successful preservation of Sino-Forest's business, and contributed to the urgency and necessity of Sino-Forest's filing under the CCAA in the first instance. Accordingly, in the present case, the maintenance of the Stay of Proceedings will result in the alignment of the objectives of the CCAA, the Stay of Proceedings and Sino-Forest's restructuring.

67. In addition, permitting the Sino-Forest Actions to continue will provide the plaintiffs with a second forum to pursue their claims against Sino-Forest and others that is not available to Sino-Forest's creditors and could alter the post-filing positioning of creditors and providing the plaintiffs with an advantage over other creditors. The cost to the plaintiffs in the Sino-Forest Actions and other creditors of maintaining the Stay of Proceedings is only the continuation of the

status quo that predates Sino-Forest's filing under the CCAA. However, as Courts have found previously, successful restructurings under the CCAA benefit society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders.

**Interests Germane to CCAA Process**

68. When the relative prejudice between the plaintiffs and Underwriters is weighed, it is evident that the prejudice suffered by the Underwriters as a result of permitting the Sino-Forest Actions to proceed would be greater than the prejudice to the plaintiffs if the Sino-Forest Actions are stayed in their entirety.

69. As discussed in greater detail in section II B of Part III of this Factum, the impact on the Underwriters and other defendants in the Sino-Forest Actions, in particular, of lifting the Stay of Proceedings to permit the Sino-Forest Class Action to proceed would be significant and prejudicial to their ability to make a full answer and defence to the Sino-Forest Class Action. The absence of ongoing indemnification of the Underwriters by Sino-Forest would also be prejudicial to the Underwriters.

70. The interests of justice are not served by the non-participation of Sino-Forest and the D&Os in the Sino-Forest Actions and the resulting dearth of evidence from these parties available to the Underwriters and the absence of ongoing indemnification from Sino-Forest. A result in which the Underwriters are left to defend the Sino-Forest Actions without the participation of Sino-Forest and the D&Os would disadvantage the Underwriters in the Sino-Forest Actions relative to a result in which the Underwriters and other defendants remain on a more equal footing with one another.

**PART IV - RELIEF REQUESTED**

71. This Factum is filed by the Underwriters in connection with the motion of Sino-Forest for a determination of the scope of the Stay of Proceedings.

72. It is respectfully submitted that when the principles outlined above are applied in the present case: (1) the scope of the Stay of Proceedings extends to stay the Sino-Forest Actions, including the Sino-Forest Class Action, in their entirety; (2) in the event that the Stay of

Proceedings does not so extend, this Court has the requisite jurisdiction to exercise its discretion to so extend the Stay of Proceedings; and (3) in the event that the scope of the Stay of Proceedings extends to stay the Sino-Forest Actions in their entirety, the Stay of Proceedings should not be lifted to permit the Sino-Forest Actions to continue.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

John Fabello per AMS

John Fabello

David Bish per AMS

David Bish

Andrew Gray per AMS

Andrew Gray

Lawyers for the Underwriters  
named in Class Actions



## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.)
2. *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J.)
3. *Molson Canada v. O-I Canada Corp.* (2003), 43 C.B.R. (4th) 172 (Ont. C.A.)
4. *Re Woodward's Ltd.* (1993), 79 B.C.L.R. (2d) 257 (B.C.S.C.)
5. *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 288 (Ont. C.A.)
6. Order of Houlden J. made February 27, 1997 in the CCAA case in respect of T. Eaton Company Limited et al. (Court File No. RE7483/97) (Ont. Gen. Div.)
7. Order of Farley J. made January 18, 2006 in the CCAA case in respect of MuscleTech Research and Development Inc. et al. (Court File No. 06-CL-6241) (Ont. S.C.J.)
8. *Re Canadian Airlines* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.)
9. *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.)
10. *Re Pacific National Lease Holding Corp.* (1992), 72 B.C.L.R. (2d) 368 (B.C.C.A.)
11. *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.)
12. R.H. McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy* looseleaf (Aurora: Canada Law Book, 2009)
13. *Re Canwest Global Communications Corp.* (2009), 61 C.B.R. (5th) 200 (Ont. S.C.J.)
14. *Re NFC Acquisition GP Inc.*, 2012 ONSC 1244 (Ont. S.C.J.)
15. *Re Canadian Red Cross Society* (1999), 12 C.B.R. (4th) 194 (Ont. S.C.J.)
16. *Re Air Canada* (2004), 47 C.B.R. (4th) 177 (Ont. S.C.J.)
17. *Re Timminco Limited*, 2012 ONSC 2515 (Ont. S.C.J.)

## SCHEDULE “B”

### *COMPANIES’ CREDITORS ARRANGEMENT ACT*

#### ***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.

#### ***Stays, etc. – initial application***

**11.02** (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

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

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
(Commercial List)

Proceeding commenced at Toronto

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**FACTUM OF THE UNDERWRITERS**  
**NAMED IN CLASS ACTIONS**  
(Stay of Proceedings  
(returnable on May 8, 2012))

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