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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

FACTUM OF THE APPLICANT, SINO-FOREST CORPORATION

(Motion For Plan Filing and Meeting Order, Returnable August 28, 2012)

Dated: August 25, 2012

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TO: THE SERVICE LIST

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I. OVERVIEW

1. The Applicant, Sino-Forest Corporation ("SFC"), seeks an order substantially in the form served on August 24, 2012 (the "Plan Filing and Meeting Order"), among other things: (i) accepting the filing of a draft plan of compromise and reorganization (the "Plan"); (ii) authorizing SFC to establish one class of affected creditors (the "Affected Creditors") for the purposes of considering and voting on the Plan; (iii) authorizing and directing SFC to call, hold and conduct a meeting (the "Meeting") of the Affected Creditors to consider and vote on the Plan; (iv) approving the procedures to be followed with respect to calling and conducting the Meeting and approving the materials to be delivered and utilized for the purposes of the Meeting and the manner and timing of delivery of those materials; and (v) establishing the process to set

the date for the hearing of SFC's motion seeking an Order sanctioning the Plan (the "Sanction Hearing") and approving the manner of notice of the Sanction Hearing.

2. The Applicant opposes the relief sought by the Ad Hoc Committee of Shareholders (the "Ad Hoc Committee") in the form of Order contained in their Motion Record dated August 23, 2012. Specifically, SFC opposes (i) the Ad Hoc Committee's request to have the Class Action Plaintiffs appointed as representatives of the putative class members for the purposes of these or any other receivership, bankruptcy or insolvency proceedings; and (ii) the requested Order granting members of the proposed class leave to vote on the Plan.

3. The Plan is the product of extensive negotiations between SFC and its largest creditor constituency, the Ad Hoc Noteholders (defined below). The negotiations leading up to the Plan were overseen by the Monitor, who has provided its support for the filing of the Plan and the relief sought on the within motion. In addition, there have been ongoing discussions with other stakeholders in relation to the Plan, including counsel for the Class Action Plaintiffs and the Third Party Defendants.

4. The Plan is feasible and is not doomed to fail. The classification of creditors for voting purposes is appropriate and consistent with Orders of this Honourable Court. In the circumstances, it is just and convenient to call the Meeting to allow for creditors to vote on the Plan.

II. FACTS

A. Background

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

Affidavit of W. Judson Martin, sworn August 14, 2012 (the "Martin Affidavit"), Applicant's Motion Record, Tab 2, p. 12, at para. 4

6. On March 30, 2012, at the time the CCAA proceedings were commenced, SFC announced that it had entered into a restructuring support agreement (the "Support Agreement") with certain noteholders (the "Ad Hoc Noteholders") in connection with a proposed comprehensive restructuring of SFC's ownership interest in its business operations.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 12, at para. 5

7. The parties to the Support Agreement also entered into a first amendment to the Support Agreement which reflects ongoing discussions between SFC and the Initial Consenting Noteholders as the restructuring plan has evolved and was intended to conform the Support Agreement to the Plan, including extending the timelines necessary to conclude certain matters in relation to the Plan.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 13, at para. 6

8. The Support Agreement called for SFC to pursue a plan of compromise on the terms set out therein in order to implement the agreed-upon restructuring transaction (the "Restructuring Transaction") and to simultaneously undertake a sales process as an alternative to the

Restructuring Transaction. On March 30, 2012, this Honourable Court granted an order approving the sales process procedures (the "Sales Process Order") and authorizing and directing SFC, the Monitor and SFC's financial advisor, Houlihan Lokey to do all things reasonably necessary to perform each of their obligations thereunder.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 13, at para. 7

9. On April 13, 2012, this Honourable Court made an order extending the stay of proceedings contained in the Initial Order to June 1, 2012 and on May 31, 2012, this Honourable Court further extended the stay period to September 28, 2012.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 13, at para. 8

10. On May 14, 2012, this Honourable Court issued an order implementing a process for the calling of and resolution of claims against SFC as well as its directors and officers, including indemnity claims of the directors and officers against SFC (the "Claims Procedure Order").

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 13, at para. 9

1. Claims Process

11. SFC and the Monitor have, in accordance with the Claims Procedure Order, conducted a claims process to determine the aggregate of claims against SFC and its subsidiaries (only with respect to claims related to SFC) and its officers and directors.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 14, at para. 10

12. Under the Claims Procedure Order, the Claims Bar Date was June 20, 2012. As described in further detail in the Sixth Report of the Monitor, the SFC and the Monitor are

currently in the process of reviewing, reconciling and determining the quantum and the nature of all claims against SFC.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 14, at para. 11

13. Under the Claims Procedure Order, the OSC was not required to file a proof of claim in respect of any monetary claims it intended to assert against SFC and/or its directors and officers. SFC has discussed the Plan with the OSC and its counsel and, while those discussions are ongoing, SFC understands that the OSC is prepared to inform SFC by September 13, 2012 of any monetary claims it intends to assert against SFC and/or its directors and officers, and the quantum of such claims.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 23, at para. 39

2. Termination of the Sales Process

14. Phase One of the Sales Process established a deadline of June 28, 2012 for the receipt of qualified letters of intent. After this bid deadline, SFC, Houlihan Lokey and the Monitor determined that none of the letters of intent constituted a Qualified Letter of Intent as defined in the Sales Process Order. As such, on July 10, 2012, SFC issued a press release announcing the termination of the Sale Process along with SFC's intention to proceed with the Restructuring Transaction as contemplated by the Support Agreement.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 14, at para. 11

B. Plan of Compromise and Reorganization

1. Background & Information

15. The Plan is the result of extensive arm's length negotiations between counsel to SFC, counsel to the Board and the Ad Hoc Noteholders' advisors. The Monitor and its counsel have been actively involved throughout the course of negotiations.

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

16. The proposed Plan Filing and Meeting Order provides that a supplement to the Plan providing additional details will be filed no later than seven days prior to the Meeting to vote on the Plan. Notwithstanding that certain aspects of the Plan are being finalized, the Plan Filing and Meeting Order is necessary at this time in order maximize the likelihood that the Plan can be implemented within a timeline that will preserve Sino-Forest's business as a going concern and thus the inherent value of the enterprise.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 15, at para. 16

2. Overview of the Plan

17. Those with a valid economic interest in SFC will, when considered as a whole, derive greater benefit from the continued operation of SFC as a going concern than would result from a bankruptcy or liquidation.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 15, at para. 17

18. The Plan contemplates the incorporation of a new company ("Newco"), to which SFC will transfer substantially all of its assets. Newco will own, directly or indirectly, all of SFC's Subsidiaries and SFC's interest in the Greenheart Group.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 15-16, at para. 18

3. Available Consideration for Distribution

19. In accordance with the terms of the Plan, the following are the primary "buckets" of consideration to be distributed, subject to the conditions set out below:

(a) All of the stock of Newco: Newco will become the owner of all of the stock of the six direct subsidiaries of SFC, which will result in Newco owning all of SFC's assets as well as any intercompany debts owed by the Subsidiaries to SFC. Pursuant to the Plan (and as explained further below), the shares of Newco will be held by Affected Creditors, a significant percentage of which are expected to be the current noteholders;

(b) Newco Notes: In addition to the Newco Shares, Affected Creditors will receive a pro rata share of Newco Notes (the complete details of which, as discussed below, have not yet been agreed upon); and

(c) Interests in a litigation trust (the "Litigation Trust") which will hold all claims and actions that have been or may be asserted by or on behalf of (i) SFC against any and all third parties, and (ii) the Note Indenture Trustees, the noteholders or any of their representatives against any and all persons in connection with the notes

(other than the claims being advanced in the class actions or claims that are to be released pursuant to the Plan).

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 16, at para. 19

20. The precise terms of the constating documents of Newco, the Newco Notes and the Litigation Trust Agreement will be included in a Plan supplement that will be filed in advance of the Meeting to vote on the Plan.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 16, at para. 20

4. Classification and Treatment of Claims

21. On July 27, 2012, this Honourable Court granted SFC's motion for an order (the "Equity Claims Order") declaring that any claims arising in respect of the ownership or sales of SFC's shares, and any indemnification claims made in respect of such claims (with the possible exception of indemnity claims for defence costs associated with defending shareholder claims) are "equity claims" under the CCAA and thus are subordinate to the claims of other creditors of SFC.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 17, at para. 21

22. In accordance with the Equity Claims Order, the Plan:

(a) does not provide any recovery for current shareholders and shareholder class action claimants. However, the shareholder class action claimants' ability to continue their claims against third party defendants (any defendant other than SFC, its subsidiaries and certain of SFC's directors and officers) is preserved; and

(b) provides that indemnity claims against SFC in respect of shareholder class action claims (including indemnity claims against SFC by its auditors, underwriters and directors and officers (the "Third Party Defendants")) are "equity claims" and are subordinate to the claims of other creditors. As noted above, the Equity Claims Order left open the possibility that indemnification for defence costs could potentially be non-subordinated equity claims. Accordingly, the Plan provides that such costs will be "Unresolved Claims" under the Plan.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 17, at para. 22

23. The vast majority of the Third Party Defendants' claims (other than those for defence costs and indemnity claims relating to the plaintiffs' noteholder claims, discussed below) have been classified as equity claims and are dealt with in the context of the Plan. The Plan Filing and Meeting Order provides that no Notices of Revision or Disallowance (as defined in the Claims Procedure Order) will be sent in respect of these Equity Claims and they will instead be fully addressed under the Plan Filing and Meeting Order.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 18, at para. 23

24. Current noteholders and other "Affected Creditors" with "Proven Claims" will receive a pro rata share of 92.5% of the Newco Shares, 100% of the Newco Notes and 75% of the Litigation Trust Interests. The remaining 7.5% of the Newco Shares will be granted to Consenting Noteholders (as defined in the Initial Order) who are entitled to Early Consent Consideration (as defined in the Initial Order).

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 18, at para. 24

25. The Plan provides that the claims of former noteholders against SFC, its subsidiaries and certain directors and officers will be released, and that the former noteholders will receive 25% of the Litigation Trust Interests in the event that their class action claims against the Third Party Defendants are not resolved within two years of the Plan Implementation Date.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 18, at para. 25

26. The claims of former noteholders against the Third Party Defendants who have indemnification claims against SFC will be capped at a maximum claim amount that can be asserted in respect of such indemnifiable claims. The corresponding indemnity claims of the Third Party Defendants against SFC will be similarly capped at the same number. The cap for the former noteholders' claim against the Third Party Defendants will be determined as between the Company, the Monitor, the Initial Consenting Noteholders and the class action plaintiffs (or, if necessary the Court). The contingent claims of the Third Party Defendants for indemnity from SFC in respect of any such noteholder claims shall be treated as "Unresolved Claims" for purposes of the Plan until they are finally resolved. For voting purposes, these defendants will have a vote equal to the maximum capped amount of the claims against them.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 19, at para. 26

27. The Plan specifically provides that nothing in the Plan affects or is intended to affect any claims that anyone has in respect of any insurance policies (including any rights under any directors' and officers' policy).

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 19, at para. 27

28. Holders of Unaffected Claims (as defined in the Plan) will be paid in the ordinary course from a reserve to be established under the Plan, will not be entitled to vote on the Plan and will not receive any distributions under the Plan. The Unaffected Claims include:

(a) Claims secured by the Administration Charge (i.e., advisor fees) or the Directors' Charge;

(b) Certain government priority claims relating to taxes, if any;

(c) Employee priority claims, if any;

(d) Claims of any employees, former employees, and directors or officers of SFC in respect of wages, vacation pay, bonus, termination pay, severance pay or other remuneration payable to such person by SFC; and

(e) Claims of the Note Indenture Trustees for reasonable outstanding fees and expenses; and trade payables incurred by SFC after March 30, 2012.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 19, at para. 28

5. Releases

29. The Plan specifies releases for a number of parties (the "Released Parties") including current and former directors and officers of SFC (collectively, the "Named Directors"). The indemnification of the Named Directors was negotiated as part of the negotiation of the Plan.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 19, at para. 29

30. There are, however, three main categories of claims against the Named Directors that will not be released pursuant to the Plan:

(a) claims that cannot be released pursuant to subsection 5.1(2) of the CCAA. The Plan limits recovery in respect of such claims to any available coverage under the directors' and officers' insurance policy;

(b) claims for fraud and criminal conduct; and

(c) non-monetary remedies of the OSC or any other regulatory body.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 20, at para. 30

31. Any individual current or former officer or director that is not a Named Director will not be released under the Plan, except in respect of indemnifiable Noteholder Class Action Claims in excess of the Noteholder Class Action Limit.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 20, at para. 31

32. In addition to the release of certain other individuals and other persons (such as advisors involved in the restructuring) the Plan provides for releases of all claims relating to SFC that may be made against the Subsidiaries. The Claims Procedure Order required any claimant who intended to assert a claim against a Subsidiary (relating to SFC) to so indicate on its proof of claim.

33. SFC is a holding company. The business of Sino-Forest is conducted through its Subsidiaries (which are not CCAA applicants). As such, there can be no effective restructuring of Sino-Forest's business and separation from its Canadian parent (which, from the outset, was

the objective of these proceedings) if the claims asserted against the Subsidiaries (arising out of or connected to claims against SFC) remain outstanding. Just as the claims of SFC's noteholders against the Subsidiaries are to be released under the Plan upon implementation, so are the other claims against the Subsidiaries which relate to claims asserted against SFC.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 20, at para. 32

6. Reserves

34. The Plan contemplates the establishment of five reserves: the Administration Charge Reserve, the Directors' Charge Reserve, the Unaffected Claims Reserve, the Unresolved Claims Reserve and the Monitor's Post-Implementation Reserve. The quantum of these reserves will need to be agreed to or determined by the Court prior to the implementation of the Plan. If there is any cash remaining in any of these reserves after the applicable claims allocated to each of the reserves have been resolved, initially all remaining cash will be transferred to the Monitor's Post-Implementation Reserve. The Plan provides that the Monitor may, in its discretion, release excess cash from the Monitor's Post-Implementation Reserve to Newco. Once the Monitor determines that the cash remaining in the Monitor's Post-Implementation Reserve is no longer necessary for administering SFC, the Plan contemplates that the Monitor shall transfer the remaining funds to Newco.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 21, at para. 33

7. Conditions Precedent to Implementation of the Plan

35. Section 9.1 of the Plan provides that, among other conditions precedent, (i) the Plan must be implemented by November 30, 2012 (or such later date as consented to by SFC and the Ad

Hoc Noteholders) and (ii) the Ad Hoc Noteholders must be satisfied with their diligence review prior to the Sanction Hearing.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 21, at para. 34

C. It is Imperative That the Creditors' Meeting be Held as Soon as Possible

36. It is critical that SFC be authorized to call and hold the Meeting to vote in respect of the Plan as soon as possible.

37. The Plan Filing and Meeting Order does not set a specific date for the Meeting, as it provides the Monitor with 20 days from the date of the Plan Filing and Meeting Order for delivery of the meeting materials. The Plan Filing and Meeting Order requires that the Meeting then be held within 30 days of the mailing of the meeting materials. Currently, it is anticipated that the Meeting will be held in late September or early October.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 21-22, at paras. 35-36

38. The Plan Filing and Meeting Order provides for, among other things, the:

(a) Delivery of meeting materials, including the notice of meeting and the information circular to Affected Creditors on a date selected by the Monitor within 20 days of the date of the Plan Filing and Meeting Order, as well as publication of the same on the Monitor's website within 3 business days of the date of the Plan Filing and Meeting Order;

(b) Classification of SFC's Affected Creditors in a single class of creditors for the purposes of voting and considering the Plan;

(c) Voting procedures and conduct of the Meeting and approval of materials to be delivered in connection with the Meeting;

(d) Delivery of the Monitor's report to the Court outlining the results of the vote; and

(e) Seeking approval of the Plan at the Sanction Hearing and other relief as required.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 22, at para. 37

39. A draft of the Information Circular was filed on August 15, 2012.

Affidavit of Audra Hawkins, sworn August 15, 2012, Applicant's Supplementary Motion Record, Tab 1, p. 1, at para. 2

40. As noted above, the Plan Filing and Meeting Order also calls for any claims that the OSC may have against SFC and its directors and officers that will or could give rise to a monetary liability.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 23, at para. 39

41. SFC believes the contemplated timeline is both necessary and appropriate in order to transfer ownership of the "business" on an expedited basis, which is necessary to avoid a piecemeal liquidation, a position that has been reiterated by both SFC and the Monitor repeatedly and a reality recognized by this court in its decision with respect to the Equity Claims Order.

Martin Affidavit, Applicant's Motion Record, Tab 2, p.23-24, at para. 42

42. Recent adverse developments with respect to the status of Sino-Forest's accounts receivables and the de-registration of certain of the authorized intermediaries, as described in

greater detail in the Sixth Report of the Monitor heightens the need for a timely resolution of these proceedings.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 24, at para. 43

D. The Plan Process Should not be Disrupted by the Court Ordered Mediation

43. On July 25, 2012, this Honourable Court ordered that the Ontario and Quebec class action plaintiffs, SFC, the Third Party Defendants, the Monitor, the Ad Hoc Noteholders and any insurers providing coverage for SFC or the Third Party Defendants attend a mediation to resolve the plaintiffs' claims against both SFC and the other defendants and any and all related claims (the "Mediation").

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 23, at para. 40

44. Although SFC is hopeful that a comprehensive resolution can be reached in the Mediation, the Plan is not conditional on such a successful resolution being reached. However, for the reasons described herein, a parallel track in which SFC pursues the restructuring transaction while the Mediation takes place is appropriate.

Martin Affidavit, Applicant's Motion Record, Tab 2, p. 23, at para. 41

III. LAW AND ARGUMENT

A. Low Threshold for Ordering a Meeting

45. The Court has authority to order a meeting of creditors of a debtor company pursuant to section 4 (unsecured creditors) and section 5 (secured creditors) of the CCAA:

Compromise with unsecured creditors

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> Compromise with secured creditors
>
> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> CCAA, ss. 4-5

46. At the meeting order stage, the Court does not engage in an analysis of the substantive merits of the Plan, as that is considered at the sanction order stage. Instead, the court will generally order that the meeting be held whenever the proposed Plan is "feasible". As stated by the Court of Appeal in *Nova Metal Products Inc. v. Comiskey (Trustee of)*:

> I agree that the feasibility of the plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors: Edwards, "Reorganizations under the Companies' Creditor Arrangement Act" [citation omitted]. I would not, however, impose a heavy burden on the debtor company to establish the likelihood of success from the outset. As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditor and the court very uncertain at the time the initial application is made.
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> *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.) at para. 88, Applicant's Brief of Authorities, Tab 1

47. Only in circumstances where the Plan is "doomed to fail" or where there is no hope of success (for example, where a secured creditor who has a blocking position refuses to support the Plan), will a court refuse to grant a meeting order.

> Businessmen are free to make their own views known before and ultimately at the creditors meeting. It seems to me that the Court should only decline to give preliminary approval and refuse to order a meeting if it was of the view that there was no hope the plan would be approved by the creditors, or if it was approved by the creditors, it would not, for some other reason, be approved by this court.
>
> *Re ScoZinc Ltd.*, 2009 NSSC 163 at para. 7, Applicant's Brief of Authorities, Tab 2
>
> See also, *Stelco Inc. (Re.)* (2005), 78 O.R. (3d) 254 (C.A.) ("Re Stelco Inc. (2005)") [allowing a Plan to proceed even over the opposition of those with a blocking position], Applicant's Brief of Authorities, Tab 3

B. The SFC Plan is Feasible and Has Prospects for Success

48. It is respectfully submitted that the Plan is feasible and there are reasonable prospects for success at a vote of creditors. The Plan has the support of the Ad Hoc Noteholders. The Plan contemplates a transfer of ownership of the business of SFC on an expedited basis, which is necessary to avoid a piecemeal liquidation. It allows for a timely resolution of the proceedings in circumstances where there have been adverse developments over the past weeks involving the status of Sino-Forest's accounts receivable and the deregistration of certain of the authorized intermediaries.

49. The classification of creditors into a single class of Affected Creditors (as defined in the Plan Filing and Meeting Order) is appropriate and consistent with section 22 of the CCAA in the circumstances. A plan is in essence, an offer to all creditors that must be accepted by or made binding on all creditors. In light of this and in acknowledgment of the fact that fragmentation of classes would render it excessively difficult to obtain approval of a CCAA plan, and would therefore be contrary to the purpose of the CCAA, SFC has proposed there be a single class comprised of all Affected Creditors.

> *CCAA*, s. 22

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp., 2008 CarswellOnt 2652 (S.C.J.) ("ATB Financial") at paras. 50-51, Applicant's Brief of Authorities, Tab 4

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at paras. 13-14, Applicant's Brief of Authorities, Tab 5

50. Not every difference in the nature of a debt due to a creditor or group of creditors warrants the creation of a separate class. All that is required is some commonality of interest and rights which are not so dissimilar as to make it impossible for the creditors in the class to consult with a view toward a common interest.

ATB Financial, supra at para. 52

Re Stelco Inc. (2005), supra at para. 23-24.

51. The relevant "interests" to be considered are the legal interests that the creditor holds *qua* creditor in relationship to the debtor, prior to and under the plan as well as on liquidation. The commonality of these interests is to be viewed purposively, bearing in mind the object of the CCAA. Absent bad faith, the motivations of the creditors to approve or disapprove the plan are irrelevant.

Re Stelco Inc. (2005), supra at para. 23-24.

52. Even inequality of treatment in a plan does not make it inappropriate to classify creditors with a commonality of interest as a single class. Equality of treatment, as opposed to equitable treatment, is not a necessary, nor even a desirable goal in the process of implementing a plan.

Re Keddy Motor Inns Ltd. (1992), 13 C.B.R. (3d) 245 (N.S. C.A) at para. 36, Applicant's Brief of Authorities, Tab 6

53. The classification proposed by SFC is neither prejudicial nor unfair to any of its Affected Creditors. Any such distinctions that might exist amongst SFC's Affected Creditors are not so significant as to negate the underlying commonality of interest or make a single class inappropriate. Moreover, all Affected Creditors with proven clams will be treated equally on a substantive basis pursuant to the Plan as they are entitled to receive the same consideration under the Plan. All Affected Creditors, like the Noteholders will be entitled to the same distribution, and all of the Affected Creditors will have claims against the Applicant and its subsidiaries released in exchange for the consideration under the Plan. Accordingly, the proposed classification is appropriate.

C. Claimants With No Economic Interest Are Not Entitled to a Vote

54. The Plan contemplates that two categories of creditors will not be entitled to a vote: creditors who hold subordinated claims; and former noteholders whose claims are barred by the principle against double proofs.

1. Equity Claims

55. This Court has already determined that any claims advanced by SFC's shareholders and indemnity claims associated therewith are "equity claims", which are structurally subordinated under the CCAA. As there are insufficient assets to satisfy the claims of SFC's unsubordinated creditors, there is no prospect of recovery to satisfy any subordinated equity claims.

56. Sections 4, 5 22.1 and 22(1) of the CCAA themselves recognize that shareholders would not normally receive a vote in a meeting of creditors: shareholders only have the ability to vote where the Court grants leave under those sections. This is consistent with the well-established principle, reflected in section 6(8) of the CCAA and substantially adopted by this Court in this

proceeding already, that shareholders are at the bottom of the hierarchy of interests in liquidation. Ontario courts have repeatedly denied shareholders the right to vote on a plan of arrangement in CCAA proceedings on the basis that to require a vote suggests the shares have value when in fact they do not.

> *CCAA* at s. 4-5, 6(8), 22(1)
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> *Royal Oak Mines Inc., Re* [1999] O.J. No. 4848 (S.C.J.), Applicant's Brief of Authorities, Tab 7
>
> *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.) ("*Canadian Airlines*") at para. 79, Applicant's Brief of Authorities, Tab 8

57. Ontario courts have recognized that it would be unfair to creditors and other stakeholders to permit shareholders, whose interest has the lowest priority, to have any ability to block an attempted reorganization. This is because of the rule – described by one court as the "fundamental corporate principle" –that "[s]hareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full." Shareholders have no economic interest in an insolvent enterprise.

> *Blue Range Resource Corp. (Re.),* [2000] 4 W.W.R. 738 (Alta. Q.B.) at para. 29, Applicant's Brief of Authorities, Tab 9
>
> *Stelco Inc. (Re),* 2006 CanLII 1773 (Ont. S.C.J.) at paras. 15-17, Applicant's Brief of Authorities, Tab 10
>
> *Royal Bank of Canada v. Central Capital Corp.* (1996), 27 O.R. (3d) 494 (C.A.), per Weiler J.A. at p. 10, Applicant's Brief of Authorities, Tab 11
>
> *Canadian Airlines, supra* at para. 76

58. Reflecting these principles, the draft Meeting Order does not contemplate holders of Equity Claims having a vote at the Meeting.[1] It would be fundamentally unfair to SFC's creditors with an economic interest in the restructuring to allow persons with no real economic interest in the restructuring to interfere with the attempted reorganization in any way.

2. Double Proof Claims

59. The proposed Meeting Order also seeks to ensure that each dollar of debt claims receives only one dollar of votes. In particular, through the Claims Process, it has been determined that there are duplicative claims made by the Ad Hoc Noteholders and the Class Action Plaintiffs with respect to part of the Class Action Plaintiff's claims relating to the Notes.

60. The Ad Hoc Noteholders are entitled to seek on behalf of all Noteholders to recover 100 cents on the dollar, being the full amount of principal due on the Notes, plus accrued interest owing under the Notes. The Class Action Plaintiffs duplicate that claim for principal, by seeking to recover losses allegedly suffered following the sale of their notes for the then-prevailing market prices (which were less than par). If both claims were allowed, SFC would face claims for more than 100% of the amount owing on the notes. Further, if the former noteholder claims were permitted to proceed, they would be placed in direct competition with claims advanced by current noteholders, reducing their ultimate recovery.

61. In the circumstances, the rule against double proof applies so as to prevent SFC's former noteholders from voting those claims in the CCAA proceedings and, accordingly, they are not entitled to vote on the Plan as Affected Creditors.

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[1] The Equity Claims Order also left open the possibility that the indemnified Third Party Defendants' defence costs, incurred in the defence of otherwise subordinated equity claims, may also be subordinated. As such, for the purposes of the Plan, these claims will be treated as "Unresolved Claims" and will be held by the Monitor in trust.

62. The rule against double proof prevents two claimants from making two claims in one estate in respect of one debt. It prevents payment of more than one dividend on the same debt which would violate the general principle of insolvency law that creditors of the same class are to rank pari passu. As stated in an older English case:

> There can be no double proof against the estate; and the rule against double proof has regard to the substance of the transaction, not the form. It may well be that technically there are two separate liabilities of the debtor arising out of the transaction. One is to the bank for the money he owed. The other, which is a separate liability arising out of the contract of guarantee, is the debtor's liability to indemnify the sureties in respect of their liability to the principal creditor. Technically they are two separate liabilities, but in substance they are the same; and in respect of that liability there could not be a double proof against the estate. The creditor could not prove for the amount of the debt and the surety bring in a proof for part of the same amount.
>
> *In re Melton; Milk v. Towers,* [1918] 1 Ch. 37, as cited in *Cuchuran v. Dubitz,* [1945] 3 W.W.R. 541 (Alta. Dist. Ct.) at para. 11, Applicants Brief of Authorities, Tab 12

63. The purpose of the rule against double proof was explained as follows by Oliver L.J.:

> The purpose of the rule is, of course, to ensure pari passu distribution of the assets comprised in the estate of an insolvent in pro rata discharge of his liabilities. The payment of more than one dividend in respect of what is in substance the same debt would give the relevant proving creditors a share of the available assets larger than the share properly attributable to the debt in question.
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> *Barclays Bank Ltd. v. TOSG Trust Fund Ltd.*, [1984] 1 All ER 628 at p. 653, Applicant's Brief of Authorities, Tab 13

64. The rule against double proof has been adopted throughout Canada.

> *Deco Electric Ltd. v. Republic Building Systems Alberta Ltd.* (1983), 45 A.R. 325 (Q.B.) at para. 41, Applicant's Brief of Authorities, Tab 14; *Re Coughlin & Co.,* [1923] 1 D.L.R. 632 (Man. K.B.) at paras. 6-7, Applicant's Brief of Authorities, Tab 15; *Isabelle Estate (Trustee of) v. Royal Bank of Canada,* 2008 NBCA 69 at para. 46, Applicant's Brief of Authorities, Tab 16; *Maple City Ford Sales (1986) Ltd. (Re)* (1998), 39 O.R. (3d) 702 (Gen. Div.), Applicant's Brief of Authorities, Tab 17; *Labarre (Syndic de),* [2004] Q.J. No. 13895 (Sup. Ct.) at para. 22, Applicant's Brief of Authorities, Tab 18; *Riddler (Re)* (1991), 3 C.B.R. (3d) 273

(B.C. S.C.), Applicant's Brief of Authorities, Tab 19; *Olympia & York Developments Ltd. (Re)* (1998), 3 C.B.R. (4th) 304 (Ont. Gen. Div.) (overturned (1998), 4 C.B.R. (4th) 189 (Ont. Gen. Div.), but this general principle was not questioned) at para. 10: "The rule against double proof developed from the law of suretyship and, in its fundamental form, holds that a guarantor's claim against the principal debtor for indemnity is the same debt as that of the unpaid principal creditor and that to allow both to claim in the estate of the principal debtor would result in the payment of two dividends on the same debt and accordingly, contravene the central tenet of all bankruptcy law, that is, equality among creditors of the same class.", Applicant's Brief of Authorities, Tab 20.

65. Claims by former noteholders cannot be asserted in insolvency proceedings in competition with the claims of current noteholders who purchased their notes with the reasonable expectation that they were acquiring the right to claim against SFC the full amount owing under the notes without interference or competition from the sellers of such notes. Accordingly, any such claims, are not entitled to vote on (or receive distributions) as Affected Creditors under the Plan.

D. The Plan is Consistent with Section 5.1(2)

66. The Plan is consistent with section 5.1(2) of the CCAA. While the Plan provides for Releases of certain "Named Directors and Officers", consistent with other CCAA plans approved by this Honourable Court, contrary to the argument advanced by the Ad Hoc Committee, the provisions of the Plan at Article 4.9, 7.1 and 7.2 do not *compromise* claims advanced against SFC's directors.

Re MuscleTech Research and Development Inc. (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J.) Applicant's Brief of Authorities, Tab 21

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 45 C.B.R. (5th) 163 (Ont. C.A.); lv to app. ref'd (2008), 257 O.A.C. 400 Applicant's Brief of Authorities, Tab 22

Canwest Global Communications Corp. Re (2010), 70 C.B.R. (5th) 1 (Ont. S.C.J.) Applicant's Brief of Authorities, Tab 23

67. The Plan (as described at clearly at section 7.1(b)) does not release any claims in respect of fraud, criminal misconduct or non-monetary remedies of the OSC or any other regulatory body and as such, does not seek to improperly immunize the officers and directors.

68. The Plan provides that recovery in respect of claims advanced against the Named Directors and Officers will be capped at available insurance proceeds. In doing so, it does not compromise claims contrary to section 5.1(2) of the CCAA. Claims in respect of fraud or criminal conduct are not similarly capped, nor is there any limitation contained within the Plan in respect of recovery for claims against the Other Directors and Officers (as defined in the Plan).

69. Similar arrangements, in which a plan of arrangement directed claims to the debtor's insurance coverage have been approved by the court in Ontario.

> *Allen-Vanguard Corp., Re*, Sanction Order, December 16, 2009 Toronto CV-09-00008502-00CL, (Ont. Sup. Ct. J) at para. 27; Applicant's Brief of Authorities, Tab 24

70. Moreover, any concerns with respect to the releases in favour of the Named Directors and Officers under the Plan are premature and are more appropriately dealt with at the Sanction Hearing. In the circumstances, the Applicant should be permitted to present the Plan to SFC's creditors for consideration at the Meeting.

IV. RELIEF SOUGHT

71. SFC respectively requests an Order substantially in the form of the draft Order attached to its August 28, 2012 Motion Record:

(a) Accepting the filing of the Plan;

(b) Authorizing SFC to establish one class of Affected Creditors for the purpose of considering and voting on the Plan;

(c) Authorizing and directing SFC to call, hold and conduct a meeting of Affected Creditors to consider and vote on the Plan;

(d) Approving the procedures to be followed with respect to calling and conducting the Meeting and approving the materials to be delivered and utilized for the purposes of the Meeting and the manner and timing of delivery of those materials; and

(e) Establishing the process to set the date for the hearing of SFC's Sanction Hearing and approving the manner of notice of Sanction Hearing.

72. SFC also seeks an Order dismissing the relief sought on the Ad Hoc Committee's Cross Motion dated August 23, 2012.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Bennett Jones LLP per DJS

BENNETT JONES LLP

Lawyers for the Applicant

SCHEDULE "A" – AUTHORITIES CITED
Jurisprudence

1. *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.).

2. *Re ScoZinc Ltd.*, 2009 NSSC 163.

3. *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 307 (Ont. C.A.).

4. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 2652 (S.C.J.), lv to app. ref'd (2008), 257 O.A.C. 400.

5. *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.).

6. *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A).

7. *Royal Oak Mines Inc., Re* [1999] O.J. No. 4848 (S.C.J.).

8. *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.).

9. *Blue Range Resource Corp. (Re.),* [2000] 4 W.W.R. 738 (Alta. Q.B).

10. *Stelco Inc. (Re),* 2006 CanLII 1773 (Ont. S.C.J.).

11. *Royal Bank of Canada v. Central Capital Corp.* (1996), 27 O.R. (3d) 494 (C.A.).

12. *In re Melton; Milk v. Towers,* [1918] 1 Ch. 37, as cited in *Cuchuran v. Dubitz,* [1945] 3 W.W.R. 541 (Alta. Dist. Ct.).

13. *Barclays Bank Ltd. v. TOSG Trust Fund Ltd.*, [1984] 1 All ER 628.

14. *Deco Electric Ltd. v. Republic Building Systems Alberta Ltd.* (1983), 45 A.R. 325 (Q.B.).

15. *Re Coughlin & Co.*, [1923] 1 D.L.R. 632 (Man. K.B.).

16. *Isabelle Estate (Trustee of) v. Royal Bank of Canada,* 2008 NBCA 69.

17. *Maple City Ford Sales (1986) Ltd. (Re)* (1998), 39 O.R. (3d) 702 (Gen. Div.).

18. *Labarre (Syndic de),* [2004] Q.J. No. 13895 (Sup. Ct.).

19. *Riddler (Re)* (1991), 3 C.B.R. (3d) 273 (B.C. S.C.).

20. *Olympia & York Developments Ltd. (Re)* (1998), 3 C.B.R. (4^{th}) 304 (Ont. Gen. Div.).

21. *Re MuscleTech Research and Development Inc.* (2006), 25 C.B.R. (5^{th}) 231

22. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.)

23. *Canwest Global Communications Corp. Re* (2010), 70 C.B.R. (5th) 1 (Ont. Sup. Ct. J.

24. *Allen-Vanguard Corp., Re*, Sanction Order granted December 16, 2009 Toronto CV-09-00008502-00CL, (Ont. Sup. Ct. J)

SCHEDULE "B" – STATUTORY REFERENCES

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

Compromise with unsecured creditors

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Compromise with secured creditors

5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Payment — equity claims

6 (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

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.

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

Claims provable

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any

obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Contingent and unliquidated claims

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Debts payable at a future time

(3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

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