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

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

(MOTION RETURNABLE AUGUST 28, 2012)

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TO: SERVICE LIST ATTACHED AS SCHEDULE "C"

PART I – OVERVIEW OF REPLY

1. The Applicant and the Ad Hoc Committee of Noteholders of Sino-Forest Corporation (the "Ad Hoc Committee") make the following incorrect assertions and assumptions in their respective facta:

a. that the Applicant's proposed plan (the "Sino Plan") preserves claims against directors and officers in a manner consistent with ss. 5.1(2) and 19(2) of the *Companies' Creditors Arrangement Act* ("CCAA");

b. that because the plaintiffs' claims against the directors or third parties are "equity claims", that the plaintiffs have no economic interest in the plan that should be recognized by a right to vote on the plan as a separate class;

c. that any claim against the Applicant in respect of the ownership of notes can *only* be brought by current noteholders (many of whom presumably purchased notes following the commencement of the Class Action) and that former noteholders have no claim against the Applicant; and

d. that the Sino Plan preserves or protects claims against the company and its officers and directors that are covered by insurance ("Insured Claims").

2. The factum for the Ad Hoc Committee incorrectly characterizes the Sino Plan's effect on the plaintiffs' claims against directors. The Sino Plan severely limits these claims in a manner inconsistent with the CCAA.

3. Furthermore, the Sino Plan does not "preserve" or "protect" Insured Claims and in fact does the opposite. First, it releases most Insured Claims (thereby releasing the insurer as well) and second, it does not provide any right of assignment to a judgment creditor who would be in a position to enforce payment on any successful Insured Claims. With respect to insurance, the Sino Plan is extremely prejudicial to creditors, and would provide a windfall to the insurers.

4. None of these effects of the Sino Plan are acknowledged or described by the Applicant or the Ad Hoc Committee. The plan proposed by the Ad Hoc Committee of Purchasers of the Applicant's Securities (including the class action plaintiffs) (the "Alternative Plan") does not have such defects and appropriately addresses all of these issues.

5. The effect of the Sino Plan on the plaintiff's claims and economic interests is significant, and justifies the plaintiffs being constituted as a separate class with a vote on the plan. The Sino Plan would limit their claims against directors and their insurers, as well as claims by the Ontario Securities Commission.

6. The Applicant and the Ad Hoc Committee deny that former noteholders have any claims against the applicant on the basis of the note indenture and the rule against double proofs. Former noteholders cannot enforce the terms of the notes. Instead, they allege legally and factually distinct statutory and common law causes of action, including negligence and conspiracy, for recovery of losses on the purchase and sale of the notes. The Applicant and the Ad Hoc Committee appear to have confused the rule against double proofs with another legal principle, the rule against windfall, which operates to prevent recovering more than 100% of proven damages.

7. The plaintiffs have filed a proof of claim in respect of former noteholder claims against the Applicant. These claims have not been determined or denied. If allowed, this claim would rank as an unsecured claim and former noteholders would be entitled to vote on the proposed plan.

PART II – ISSUES AND LAW

A. INCORRECT DESCRIPTION OF THE EFFECT OF THE PROPOSED PLAN ON INSURED CLAIMS

8. The Ad Hoc Committee's factum incorrectly describes the effect of the Sino Plan on the Insured Claims.

9. The Ad Hoc Committee ignores entirely the fact that, by releasing claims against the Applicant, the Applicant's insurers are also being released. This is because the liability of the insurer to pay Insured Claims under the policies is triggered by such liability being owed by the insured. If the Plaintiff Class Members' claims against Sino-Forest are released, this in turn releases the insurer from the obligation to pay on the insured's behalf. Therefore, under the Sino Plan, the insurers will experience a windfall at the expense of the creditors.

10. The Applicant also fails to acknowledge that as drafted, the Sino Plan will not provide a direct right of action against the insurer for any of the few claims which may survive. While section 2.4 of the Sino Plan addresses insurance, it does not alleviate the problem because it presupposes a direct right of action against the insurer. That right does not exist because (a) the claims against the insured will have been released, and (b) section 132 of the *Insurance Act* (Ontario) has been held not to apply to errors and omissions insurances where damages consist only of pure economic loss. Therefore, the Sino Plan would not provide any direct

right of action against the insurer in these circumstances, and any ability to access insurance proceeds is lost.

> *Perry v. General Security Insurance Co. of Canada,* (1984) 47 O.R. (2d) 472 (C.A.).
>
> *Insurance Act,* R.S.O. 1990, c. I.8, s. 132, Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 23.

11. The Ad Hoc Committee states that recovery of the few preserved claims against directors is "directed towards insurance", and that this is appropriate because it "preserves and protects a recovery pool" for creditors.

> Factum of the Ad Hoc Committee at paragraph 63.

12. This characterization of the Sino Plan is unfair for two reasons. First, the insurance is not "preserved" in that the limits are eroded by defence costs. Second, the insurance is not "protected" because there is no assignment of rights given to the judgment creditors (and no direct right of action under the *Insurance Act*), thereby leaving the directors and officers in a position to delay action against the insurer for payment or settlement of all claims until all of the other proceedings (such as Ontario Securities Commission proceedings) have been concluded so that there are no unrecoverable defence costs. The directors and officers are therefore in a conflict with successful judgment creditors of Insured Claims as the directors and officers will wish to use the insurance proceeds for defence costs rather than see them paid to judgment creditors.

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

a. Ensure that all claims for which there are insurance are preserved, and not released; and

b. Provide for an assignment to a successful plaintiff of the rights to enforce the terms of the insurance policy and require payment by the insurer in respect of the Insured Claims. It is appropriate to assign such rights to a successful plaintiff, who is an interested party and is in an appropriate position to assert such rights.

Fredrickson v. *Insurance Corp of British Columbia,* [1986] B.C.J. No. 366 (C.A.) per McLachlin J.A (as she then was), aff'd [1988] 1 S.C.R. 1089, Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 22.

14. The Alternative Plan proposed by the Ad Hoc Committee of Purchasers of the Applicant's Securities (including the class action plaintiffs) appropriately incorporates these elements to the benefit of judgment creditors on Insured Claims.

B. PLAINTIFFS' PRESERVED CLAIMS AGAINST DIRECTORS

15. The arguments of the Applicant and the Ad Hoc Committee fail to address the primary issues raised in opposition to the proposed plan by the plaintiffs in the Class Action. Both the Applicant and the Ad Hoc Committee fail to recognize that: (a) these claims are not claims against a "debtor" and are by definition not "equity claims"; and (b) that the Sino Plan would compromise these claims in a manner inconsistent with both s. 5.1(2) and s. 19(2) of the CCAA.

16. The Applicant and the Ad Hoc Committee both argue that the Class Action plaintiffs have no economic interest in the Sino Plan and are therefore not entitled to vote. Their

arguments do not address at all the fact that the claims of the plaintiffs against the directors are not claims against a debtor and should not be treated as "equity claims".

Factum of the Applicant, paragraphs 54-58.

Factum of the Ad Hoc Committee, paragraphs 45-50.

17. The Applicant characterizes the plaintiff's claims as follows: "this Court has already determined that any claims advanced by SFC's shareholders and indemnity claims associated therewith are "equity claims". This is overbroad. This court determined that the plaintiff's claims *against the Applicant* are "equity claims" for the purpose of these proceedings: "[i]n the result an order shall issue that the claims against SFC resulting from the ownership, purchase or sale of equity interests in SFC ... [are equity claims]." The plaintiffs agree that their claims against the Applicant are "equity claims". However, no order was sought and none given characterizing plaintiffs' claims against directors or other third parties or anyone else.

Factum of the Applicant, paragraph 55.

Re Sino-Forest Corporation, 2012 ONSC 4377, at paragraph, 96 per Morawetz J., Supplementary Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 11.

18. Even if such claims were "equity claims", the economic interests of the plaintiffs as against the directors and their insurers are directly affected by the Sino Plan and support the exercise of the court's discretion to permit the plaintiffs to be constituted as a class and vote on the Sino Plan.

19. The Sino Plan preserves claims against directors for "fraud and criminal conduct", but does not preserve claims for misrepresentations or wrongful conduct of the type alleged by the plaintiffs and expressly excluded from compromise by s. 5.1(2)(b) of the CCAA.

20. For those preserved claims, the Sino Plan does not expressly preserve the plaintiffs' right to enforce a claim against the available insurance. Both facta fail to adequately describe these effects of the Sino Plan.

21. The Sino Plan should be amended to permit the plaintiffs to pursue the Applicant's insurance. In *Algoma Steel Corp.* v. *Royal Bank,* the Court of Appeal for Ontario held that the protection afforded by the CCAA is for the debtor, and that it is not intended "to insulate insurers from providing appropriate indemnification." In that case the appeal was allowed with a technical amendment that lifted the stay for the limited purpose of pursuing the debtor's insurance.

> *Cary Canada Inc. (Re),* 2006 CanLII 41289 (ON SC) at paragraph 7, citing *Algoma Steel Corp.* v. *Royal Bank*, 1992 CarswellOnt 163 (C.A.), Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 6.

22. There is no prejudice to the Applicant or the insurer if the stay is lifted for the limited purpose of continuing the claim against the Applicant, to the extent of their insurance. the insurance policies contemplate this eventuality. Article XXI of the policy provides that "[b]ankruptcy or insolvency of any Insured or of the estate of any Insured Person shall not relieve the Insurer of its obligations…under this policy."

> Insurance Policy No. DO024464, ACE INA Insurance, effective December 31, 2010 to December 31, 2011, at Article XXI.

23. The Applicant's policy also contains a term that expressly states that the Applicant waives any automatic stay to the extent of the insurance proceeds:

> "Insureds hereby waive and release any automatic stay or injunction ("Stay") to the extent such Stay may apply to the proceeds of his Policy under such Bankruptcy Law [including CCAA proceedings by definition], and agree not to oppose or object to any efforts by the Insurer or any Insured to obtain relief from the Stay applicable to the Proceeds of this Policy as a result of such Bankruptcy Law."
>
> Insurance Policy No. DO024464, ACE INA Insurance, effective December 31, 2010 to December 31, 2011 at Article XXI.

24. In addition, the Sino Plan purports to release any claim that may be brought by the Ontario Securities Commission, notwithstanding s. 19(2)(a) of the CCAA, which prohibits a compromise of such claims. The Applicant and the Ad Hoc Committee fail to explain how this provision is consistent with s. 19(2). Neither factum even mentions it.

25. In any event, the claims against all defendants far exceed any available insurance proceeds. The plaintiffs are seeking substantial personal contributions from the directors of the Applicant in addition to any available insurance proceeds. As drafted, the Sino Plan would not permit any such personal contributions.

26. Below is a chart setting out the compensation of the relevant directors from the Applicant during the class period. *Three principal directors have received over $70 million from the Applicant during the class period alone.* This chart makes clear that the defendant directors are likely to be able to make substantial personal contributions to proven claims against them. Claims against the directors should not be limit in the manner provided by the Sino Plan, especially given the context and evidence in support of the plaintiffs' claims.

DEFENDANT	NET PROCEEDS FROM SHARE SALES (1)	COMPENSATION RECEIVED FROM SINO-FOREST (2, 3)	TOTAL
Chan	$105,897	$27,300,042	$27,405,939
Martin	-	$3,017,411	$3,017,411
Poon	$22,662,253	$3,115,072	$25,777,325
Horsley	$8,216,244	$9,245,118	$17,461,362
Ardell	-	$144,860	$144,860
Bowland	-	-	
Hyde	$1,811,260	$392,460	$2,203,720
Mak	$4,867,635	$310,604	$5,178,239
Murray	$8,616,921	$240,447	$8,857,368
Wang	-	$159,159	$159,159
West	-	-	-

1. Compiled from insider transaction details filed on the System for Electronic Disclosure for Insiders ("SEDI").
2. Compiled from Management Information Circulars for years 2007-2010. The Management Information Circular for 2011 was not filed, and as such this chart does not include compensation received by the individual defendants from Sino-Forest in 2011.
3. Compensation includes cash, perquisites, personal benefits, and share-based compensation. The only exception is with respect to Messrs. Martin, Hyde, Mak, Murray, and Wang for the year 2007, who received 153,334, 3,334, 3,334, 3,334, and 2081 stock options that year, respectively. The Management Information Circular for 2007 did not ascribe a monetary value to those options.

27. In support of the provisions of the Sino Plan dealing with insurance, the Applicant and the Ad Hoc Committee rely on *Allen-Vangaurd Corp., Re,* Sanction Order granted December 16, 2009 Toronto CV-09-00008502CL (Ont. Sup. Ct. J.) ("*Allen Vanguard*").

Factum of the Applicant at paragraph 64.

Factum of the Ad Hoc Committee at paragraph 69.

28. The *Allen Vanguard* case has limited precedential value. The plan in that case was not contested or opposed. In that case, the directors and officers were not the subject of an Ontario Securities Commission investigation and enforcement proceeding alleging fraud. No other court has applied it or come to the same conclusion. It is of no assistance to this court.

C. TERMS OF THE NOTE INDENTURES

29. The Ad Hoc Committee relies on the terms of the note indenture for the proposition that only current noteholders (many of whom presumably purchased their notes after the commencement of the Class Action, and this did not suffer damages as a result of the Applicant's earlier misconduct) have a provable claim against the Applicant. This argument is not supported by the terms of the note indentures.

30. For example, the Ad Hoc Committee cites Article 6.05 and 6.07 of the Indenture dated October 21, 2012 associated with the notes due 2017. Article 6.05 provides only for control of the enforcement of the notes by a majority of noteholders, and Article 6.07 provides that current noteholders have a right to receive principal and interest.

Factum of the Ad Hoc Committee at paragraph 41.

31. The terms of the indenture do not preclude other claims brought in relation to the misrepresentations of the Applicant and the purchase and sale of notes. For example, Article 6.03 states in part that, where an event of default has occurred, the Trustee may pursue "any available remedy by proceeding at law or in equity to collect the payment of principal of and interest on the Notes or to enforce the performance of any provision of the Notes or the

Indenture." This term limits actions to enforcement of the notes in accordance with their terms. It does not speak to other causes of action or claims by former noteholders.

2017 Note Indenture at Article 6.03.

32. Section 6.06 of this indenture contains a term limiting actions, sometimes called a "no action" clause, but again, it is limited to actions by noteholders enforcing the terms of the notes. It states in part: a "Holder may not institute any proceeding, judicial or otherwise, with respect to the Indenture or the Notes, or for the appointment of a receiver or trustee, or for any other remedy under the Indenture or the Notes… ."

2017 Note Indenture at Article 6.06.

33. Article 6.13 further provides that noteholder rights are cumulative, stating in part that the "assertion or exercise of any right or remedy hereunder, or otherwise, will not prevent the concurrent assertion or exercise of any other right or remedy."

2017 Note Indenture at Article 6.13.

34. In summary, the terms of the indentures control the way in which current noteholders may enforce the notes. However, the terms do not speak to the rights of former noteholders. Since former noteholders by definition cannot enforce the notes, they should not be precluded from enforcing their separate legal claims against the Applicant.

35. The claims of the plaintiffs in the Class Action are non-contractual claims arising as a result of misrepresentations made by the Applicant and pursuant to statutory and common law causes of action. These claims do not rely on the terms of payment of the notes or powers under the indentures. The claims arise as a result of the Applicant's misrepresentations and

other wrongful conduct during the Class Period. These claims are legally and factually distinct from a claim to enforce the note in accordance with its terms.

36. The Ad Hoc Committee does not cite case law in support of its interpretation of the indenture. To our knowledge, there is no Canadian case interpreting a "no action" clause against current or former noteholders in the context of a securities class proceeding alleging a wide-spread pattern of wrongful conduct resulting in an insolvency. Courts in the U.S. have, however, recognized claims of former noteholders in the context of a class proceeding and insolvency.

> *In Re Investors Funding Corporation Of New York Securities Litigation,* 9 B.R. 962; 1981 U.S. Dist. Lexis 11521, Supplementary Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 5.
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> *South Carolina National Bank* v. *Stone,* 1990 749 F.Supp. 1419, Supplementary Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 9.
>
> *In Re Saxon Securities Litigation,* 1985 WL 48177 (S.D.N.Y.) Supplementary Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 6.

37. To date, case law in Canada has focused on the claims by (current) securityholders alleging oppression in the context of mergers and takeovers. In that context, courts have sometimes permitted securityholders to bring oppression claims notwithstanding a "no action" clause, and in other cases, prohibited securityholders to bring claims on the basis of a "no action" clause. Similarly, U.S. courts have permitted securityholders to bring claims despite the presence of a "no action" clause.

> *BCE inc. (Arrangement elative à),* 2008 QCCA 935 (CanLII), Supplementary Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 1.
>
> *Casurina Limited Partnership* v. *Rio Algom Ltd.,* 2002 CanLII 9356 (ON SC), Supplementary Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 2.

Millgate Financial Corp. v. *BF Realty Holdings Ltd.*, 1994 CanLII 7544 (ON SC) Supplementary Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 7.

McMahan & Co. v. *Wherehouse Entertainment, Inc.*, 65 F.3d 1044 (2d Cir. 1995) Supplementary Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 8.

38. The circumstances of the claims against the Applicant in the Class Action and in this insolvency proceeding differ significantly from the context of oppression actions brought during a merger or takeover. In this case, there is significant evidence of improper conduct and misrepresentations by the Applicant's directors and officers over the class period. The Ontario Securities Commission has alleged fraud on behalf of the Applicant and its core directors and officers. The Royal Canadian Mounted Police have also commenced an investigation.

39. This factual matrix gives rise to claims by former noteholders for losses associated with their purchase and sale of the notes. The note indenture trustees and Ad Hoc Committee did not and cannot make these statutory and common law claims on behalf of the former noteholders, and both the trustees and the Ad Hoc Committee have decided to enforce the notes and not pursue claims against the Applicant's directors and officers.

40. In summary, the terms of the note indentures do not prohibit the plaintiffs from bringing claims on behalf of former noteholders in the Class Action. These claims are factually and legally distinct from the enforcement of the payment of principal and interest on the notes. Insofar as the plaintiffs have filed claims in respect of former noteholders of the Applicant's securities, those claims are creditor claims for the purpose of this proceeding and the plaintiffs are entitled to votes at a meeting of creditors in proportion to those claims.

D. THE RULE AGAINST DOUBLE PROOFS

41. The Applicant and the Ad Hoc Committee misapply the rule against double proofs to the claims of the plaintiffs in the Class Action. They do so in two ways.

42. First, the rule against double proofs only applies to debts of Sino-Forest and does not apply to claims made against its directors and officers or third parties. The rule against double proofs does not justify compromising or releasing claims against those defendants to the Class Action.

43. Second, the Applicant and Ad Hoc Committee improperly apply the rule to two distinct "debts" in respect of two distinct classes of creditor. Put another way, the Applicant attempts to use the rule against double proofs as a substantive defence to claims made by former noteholders while recognizing and preferring the claims of current noteholders. The rule against double proofs is intended to be applies in claims administration to determine proper recovery as between creditors. It is not a defence to a claim against a debtor.

44. The rule does not apply where there are multiple underlying claims that are sufficiently factually and legally distinct. "The existence of separate and distinct claims or liabilities is not determinative of whether or not there is a double-proof; the crucial issue is whether or not the separate claims relate in substance to the same debt."

> J. Honsberger & V. Dare, *Bankruptcy in Canada* (4th ed.) (Aurora: Canada Law Book, 2009) at page 401, Supplementary Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 4.

45. The Applicant argues that "if both claims were allowed, SFC would face claims of more than 100% of the amount owing on the notes." The Applicant appears to have confused the rule against double proofs with a separate legal principle, the rule against windfall.

> Factum of the Applicant at paragraph 60.

46. The windfall principle does not preclude a plaintiff from obtaining judgments in respect of the same debt or damages against multiple defendants, or against a single defendant on several different theories of liability: it only prevents recovery of more than 100% of the proven damages. The claims of the current and former holders of the Applicant's notes can be managed in such a way as to prevent recovery of more than 100% of the damages suffered by the plaintiffs. The terms of the note indentures do not preclude the former noteholders from bringing statutory or other claims against the Applicant. The trustees under the note indentures have not sought to bring any such claims, and the plaintiffs have exclusive carriage of such claims.

> *The Treaty Group Inc.* v. *Drake*, 2007 ONCA 450 (CanLII), Supplementary Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 12.

47. Further, payment of a judgment is essential to the operation of the principle against recovery of a windfall, and so it is not yet applicable and need not be applicable in the context of a restructuring or a settlement of claims against the Applicant.

> *Jameson* v. *Central Electricity Generating Board*, [2000] 1 AC 455 Supplementary Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 3.

48. In support of their position, the Applicant and the Ad Hoc Noteholders primarily rely on *Olympia & York Developments Ltd. (Re)*. The facts of that case involved a single-purpose subsidiary or "shell company" that borrowed from lenders and then immediately re-loaned the proceeds to its parent company on the same day and on identical terms. The parent company in turn guaranteed the loans of the subsidiaries to the lenders. The court found an "inseparable legal nexus" in the "legal substance" of these transactions and treated the claims of the

separate legal entities as a single claim for the purpose of examining the claims against the estate.

49. The key factors present in *Olympia & York* are not present in this case.

50. The claims of the current noteholders and the claims of the former noteholders are distinct claims owed to distinct creditor groups. Payment of one creditor claim does not in effect defease an obligation between related creditor groups. Under the proposed plan the current noteholders recover on the notes (who presumably did not suffer losses as a result of the Applicant's conduct) but the former noteholders do not recover at all.

Second, the underlying factual matrices of *Olympia & York* and this case are significantly different. In this case, there was no "mirror transaction" between closely related parties with claims against the Applicant. Sino-Forest initially solicited from security-holders on the basis of a web of misrepresentations about its business. The proceeds of the Sino-Forest note distributions were not immediately loaned again on identical terms, but were presumably used to capitalize Sino-Forest subsidiaries. It conducted a complex series of operational transactions with the proceeds from these distributions. The long-term misconduct of the defendants is based on an ongoing pattern of improper conduct involving over 100 subsidiaries. Some claims of the former noteholders are based on secondary market transactions. The conduct giving rise to the losses claimed in the Class Action is far more complex than the mirror transaction in *Olympia & York*. A determination of these interrelated claims is not and should not be precluded by the rule against double proofs. The chart below sets out the differences in the two cases.

FACTOR	OLYMPIA & YORK	SINO-FOREST
Transaction At Issue		
Subsidiary borrower	Yes	No
Subsidiary guarantor	No	Yes
Immediate "mirror" loan of proceeds to parent	Yes	No
Use of proceeds to capitalize subsidiaries or conduct operations of parent and subsidiaries	No	Yes
Use of proceeds to acquire new property	No	Yes
Non-issuing parent required to fund subsidiary payments	Yes	N/A
Non-issuing subsidiary required to guarantee parent payments	No	Yes
Borrower/issuer engaged in business following loan transaction	No	Yes
Nature of Claims		
Borrower/issuer has multiple creditors	No	Yes
Amount claimed on note/guarantee different from amount claimed by claimant	No	Yes
Existence of statutory claim against issuer	No	Yes
Existence of inter-related claims against issuer directors and officers of issuer	Not to our knowledge	Yes
Existence of inter-related claims against third parties	Not to our knowledge	Yes

51. The distinct nature of the legal claims of the plaintiffs in the Class Action was recognized by the court that awarded carriage of the claim. In addressing arguments about conflicts between shareholder and noteholder members of the class, one of which was that the "no action" clause prevented noteholders from joining the class, the court held that "there is no conflict between bondholders and the shareholders seek[ing] to prove they were deceived into purchasing or holding on to their Sino-Forest securities." The court held that any

differences between shareholders, former noteholders and current noteholders "can be addressed now or later by constituting the bondholders as a subclass and by the court's supervisory role in approving settlement ..." and that "if there are bondholders that wish only to pursue their debt claims or who wish not to pursue any claim against Sino-Forest", they may opt out of the proceeding, assuming it is certified.

> *Smith* v. *Sino-Forest Corporation,* 2012 ONSC 24 at paragraphs 258-262, per Perell J., Supplementary Book of Authorities of the Ad Hoc Committee of Purchasers of the Applicant's Securities at Tab 10.

52. The Applicant argues that former noteholders (with statutory and common law rights) cannot be asserted in insolvency proceedings where current noteholders seek to enforce the terms of the notes. The Applicant cites no authority for this argument. The Applicant argues that current noteholders purchased their notes with the "reasonable expectation" that former noteholders would not enforce their rights. Again, the Applicant cites no authority for this proposition. It is equally plausible that current noteholders, many of whom presumably purchased their notes at steep discounts and following the commencement of the Class Action, would reasonably have expected former noteholders to seek to recover their losses.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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SCHEDULE "A" - LIST OF AUTHORITIES

1. *Algoma Steel Corp.* v. *Royal Bank*, 1992 CarswellOnt 163 (C.A.).
2. *BCE inc. (Arrangement elative à),* 2008 QCCA 935 (CanLII).
3. *Casurina Limited Partnership* v. *Rio Algom Ltd.,* 2002 CanLII 9356 (ON SC).
4. *Fredrickson* v. *Insurance Corp of British Columbia,* [1986] B.C.J. No. 366 (C.A.).
5. *Jameson* v. *Central Electricity Generating Board*, [2000] 1 AC 455.
6. Honsberger, J. & V. Dare, *Bankruptcy in Canada* (4th ed.) (Aurora: Canada Law Book, 2009).
7. *In Re Investors Funding Corporation Of New York Securities Litigation,* 9 B.R. 962; 1981 U.S. Dist. Lexis 11521.
8. *In Re Saxon Securities Litigation,* 1985 WL 48177 (S.D.N.Y.).
9. *Millgate Financial Corp.* v. *BF Realty Holdings Ltd.,* 1994 CanLII 7544 (ON SC).
10. *McMahan & Co.* v. *Wherehouse Entertainment, Inc.,* 65 F.3d 1044 (2d Cir. 1995).
11. *Perry* v. *General Security Insurance Co. of Canada*, (1984) 47 O.R. (2d) 472 (C.A.).
12. *South Carolina National Bank* v. *Stone,* 749 F.Supp. 1419.
13. *Smith* v. *Sino-Forest Corporation,* 2012 ONSC 24.
14. *Re Sino-Forest Corporation,* 2012 ONSC 4377.
15. *The Treaty Group Inc.* v. *Drake*, 2007 ONCA 450 (CanLII).

SCHEDULE "B" – RELEVANT STATUTORY PROVISIONS

Insurance Act, R.S.O. 1990, c. I.8.

132. (1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

Exception

(2) This section does not apply to motor vehicle liability policies. R.S.O. 1990, c. I.8, s. 132.

SCHEDULE "C" – SERVICE LIST

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

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ONTARIO
SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)
Proceeding commenced at Toronto

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

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