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

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

Applicant

APPLICATION UNDER THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

RESPONDING PARTY'S FACTUM
(Motion returnable April 20, 2012)

April 19, 2012

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

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

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

Applicant

APPLICATION UNDER THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

RESPONDING PARTY'S FACTUM
(Motion returnable April 20, 2012)

PART I - OVERVIEW

1. This motion is brought by a self-styled Ad Hoc Committee, including the Ontario Class Action Plaintiffs, (the "Moving Parties") to lift the stay of proceeding granted by this Court. The Moving Parties seek to lift the stay so that certain motions in *Trustees of the Labourers' Pension Fund of Central and Eastern Canada et al. v. Sino-Forest Corporation et al.* in Court File No. CV-11-431153-00CP (the "Ontario Class Action") may go ahead on May 18, 2012.

2. The Moving Parties have failed demonstrate why a lift of the stay of proceedings is necessary, not prejudicial and in the best interests of the various stakeholders.

PART II - THE FACTS

3. Following the release of a report by Muddy Waters Research on June 2, 2011, the Company, its directors and officers and certain of its advisors were served with various proposed class action claims, including four in Ontario as well as claims in Quebec, Saskatchewan and the

United States. Following a carriage motion, the proposed representative plaintiffs in the Ontario Class Action (the "Plaintiffs") were given carriage in Ontario. Siskinds LLP and Koskie Minsky LLP were appointed as counsel.

4. On March 22, 2012, the Plaintiffs sought certain relief from Justice Perell in the Class Action, including the setting of a schedule and the delivery of statements of defence. The Plaintiffs also sought to have the motion for certification under the *Class Proceedings Act, 1992*, R.O. 1992, c. 6 (the "Certification Motion"), the motion for leave pursuant to Part XXIII.1 of the *Securities Act (Ontario)*, R.S.O. 1990, c. S-5 (the "Leave Motion") and any motions to strike under Rule 21 of the *Rules of Civil Procedure* ("Rule 21 Motions") heard together.

5. The Plaintiffs sought this relief as a result of a concern that interruption and delay in the Class Action prior to certification would be prejudicial to the proposed plaintiff class.

Reference Affidavit of Daniel Bach sworn April 12, 2012 ("Bach Affidavit") at para 14, Moving Parties' Motion Record, Tab 2, page 33

Cross-examination of Daniel Bach held April 17, 2012 ("Bach Cross-Examination") at Qs 40-41, Brief of Documents of Ernst & Young LLP ("EY Brief") at Tab 1

6. In reasons dated March 26, 2012, Justice Perell set a schedule, froze the statement of claim in the proceedings for the purposes of delivering statements of defence and ordered that the Certification Motion, the Leave Motion and Rule 21 Motions be heard together in November 21, 2012, with one small carve-out.

Reference Bach Affidavit at Exhibit G, Moving Parties' Motion Record, Tab 2G

7. The schedule set by Justice Perell provides a timetable for the funding motion in respect of which the Moving Parties seek to lift the stay. It does not provide for any other motions prior to the Certification Motion and the Leave Motion. Should any party seek to bring any other motion, Justice Perell ordered (at the request of the Plaintiffs) that leave must be sought.

Reference Bach Affidavit at Exhibit G at paras. 93 and 85, Moving Parties' Motion Record, Tab 2G, pages 272 and 271

8. The Plaintiffs have not sought leave for the relief for which the lift stay is sought in respect of a proposed settlement with Pöyry (Beijing) Consulting Company Limited ("Poyry"), namely the notice and certification motions. Leave is required. The leave requirement is not perfunctory.

Reference Bach Cross-examination at Qs 63-67, EY Brief, Tab 1

9. On March 30, 2012, Sino-Forest Corporation ("Sino-Forest" or the "Company") applied for protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("*CCAA*"). In an order of this Court on the same date (the "Initial Order"), protection was granted and any present or future proceedings affecting the Company, its Business or Property were stayed. The scope of that stay is the subject of a motion before this Court returnable May 8, 2012.

10. Although the proceedings, including the Class Action, were stayed on March 30, 2012, the Plaintiffs continue to take steps in the Class Action:

(a) On April 2, 2012, the Plaintiffs entered into a settlement agreement with the defendant Poyry (the "Poyry Settlement");

(b) The Plaintiffs delivered motion materials to approve a notice plan and certification of the action as it relates to the Poyry Settlement; and

(c) On April 18, 2012, the Plaintiffs amended and issued a Fresh as Amended Statement of Claim.

Reference Bach Cross-examination at Qs 92-100 and 193-219, EY Brief, Tab 1

Chart of Answers to Undertakings on Bach Cross-Examination at Q. 209 and 218, EY Brief, Tab 2

11. The named Plaintiffs in the Class Action represent an infintessimal number of current shareholders and noteholders of the Company. Former shareholders and noteholders, who appear to be captured by the proposed definition of the putative Class, are not stakeholders for the purposes of the *CCAA* proceeding. A significant number of the noteholders are represented by an Ad Hoc Committee of Noteholders. The Plaintiffs cannot, particularly prior to certification, be taken to speak for the current shareholders and noteholders of the Company.

Reference Bach Cross-examination at Qs 157-192, EY Brief, Tab 1

PART III - ISSUES AND THE LAW

12. This Court has granted a stay of proceedings. The Company met any burden it had on March 30, 2012. The Moving Parties seek to vary the Initial Order to seek a lift stay for the Plaintiffs' motions in the Class Action. The burden is on the Moving Parties to establish that such relief is proper. They have failed to do so.

13. In *Re. Canwest Global Communications Corp.*, Justice Pepall (as she was then) held as follows:

> As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Rela Estate (Regina) Ltd.* v. *Bricore Land Group Ltd.*. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company. [emphasis added]
>
> **Reference** *Re. Canwest Global Communications Corp.* (2009), 61 C.B.R. (5th) 200 (S.C.J.) at para. 32, Book of Authorities of the Moving Parties, Tab 2

14. The Moving Parties have not discharged this very heavy onus.

15. Justice Pepall goes on to set out the circumstances in which it may be a proper exercise of the Court's discretion to lift a previously imposed stay:

> Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Canadian Airlines Corp., Re* and Professor McLaren has added three more since then. They are:
>
> 1. When the plan is likely to fail.
>
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be dependent on any pre-existing condition of the applicant creditor).
>
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
>
> 4. The applicant 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.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

6. After the lapse of a significant time period, the insolvent is not closer to a proposal than at the commencement of the stay7 period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

Reference *Re. Canwest Global Communications Corp.* (2009), 61 C.B.R. (5th) 200 (S.C.J.) at para. 33, Book of Authorities of the Moving Parties, Tab 2

16. The Moving Parties have failed to articulate which of these factors they say are applicable on this motion, if any. The Moving Parties have not shown that any prejudice will result from the Court's refusal to lift the stay. Nor have they shown that it will not prejudice the debtor company or the position of the other creditors if the lift stay is granted.

17. The Moving Parties have also failed to establish the merits of their proposed steps. With respect to the Poyry Settlement motion, that motion is not properly before the Court in the Class Action. Leave is required. It has not been sought. On that basis alone, the step is without merit.

18. Further, the relief sought in Poyry Settlement is prejudicial to the other defendants and requires the Company to provide the Plaintiffs with documents and information, distracting it and the other defendant stakeholders from focusing on the restructuring of the Company.

19. It does not benefit to the Company or the creditors to simplify the Class Action, a proceeding that is stayed. Nor do the opt-out provisions of a paper settlement, where no putative class member is motivated to engage in the process, assist in understanding who is a stakeholder. The proposed definition of the putative Class is broader than those shareholders or noteholders who may be stakeholders in the *CCAA* process. In any event, the noteholders are already represented by an Ad Hoc Committee with significant membership.

PART IV - ORDER REQUESTED

20. An order that the Initial Order is not varied to allow the Moving Parties' motions to proceed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19TH day of April, 2012.

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