

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

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

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

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**FACTUM OF THE APPLICANT,**  
**SINO-FOREST CORPORATION**

**(Claims Procedure Order Motion returnable May 14, 2012)**

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Dated: May 12, 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 establishing a process for the identification and determination of claims (other than certain claims defined as Excluded Claims therein) ("Claims") against SFC and its current and former directors and officers. All capitalized terms not otherwise defined herein shall have the meanings given to them in the Claims Procedure Order.

2. In order to hold a meeting of creditors to approve a plan of compromise or arrangement (the "Plan") within the timeframe contemplated in the Support Agreement, and to establish a procedure for identifying and determining creditor Claims for voting purposes at such a meeting and, if applicable, distribution purposes under the Plan, it is necessary to expediently implement

a Claims process. Quite apart from the timeframes set out in the Support Agreement however, the simple fact is that SFC's liquidity and commercial constraints are such that it must complete this restructuring on an expedited basis if it is to have any hope of participating in the very important 2012 fourth quarter sale period in China.

3. The timeline contemplated by the Claims Procedure Order will assist SFC in satisfying the deadlines and timeframe contemplated in the Support Agreement and in achieving the commercial objective of completing a restructuring on an expedited basis for the benefit of its stakeholders and will also enable SFC to ascertain the Claims that may exist against it and its present and former directors and officers in order to allow SFC to move forward with its restructuring efforts in a timely manner for the general benefit of all of its stakeholders.

4. SFC provided a draft of the Claims Procedure Order to counsel for interested stakeholders long (more than ten days) in advance of the original May 8 date booked for this hearing, and various of the stakeholders have asserted numerous positions with respect to it. While it has not been possible to address all of the (in many case, competing and conflicting) comments raised by the multiple counsel participating in these proceedings, SFC has, with the assistance of the Monitor, had numerous discussions with counsel and has attempted to address the issues raised by them to the extent practicable and consistent with the purposes and structure of the claims process proposed by SFC and supported by the Monitor. Based on these discussions, SFC is proposing a revised form of the Order to reflect how those issues have been dealt with. A blackline to the prior version of the Order is attached to the Supplemental Report to the Monitor's Second Report. As is described below, at the time of writing, various parties still have complaints with respect to the Order. It is respectfully submitted that the remaining

complaints either do not have merit or address issues that are not necessary or appropriate to be dealt with at this time in the context of what is intended to be a relatively straight-forward call for claims, and the form of the Order proposed by SFC should be issued.

## **II. FACTS**

### **A. Background**

5. On March 30, 2012, this Honourable Court made the Initial Order granting the CCAA Stay 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 May 2, 2012 (the "May 2 Martin Affidavit"), at para. 4, Applicant's Motion Record for Motion Approving Claims Procedure Order, Tab 2, p. 7.

6. Also on March 30, 2012, this Honourable Court made the Sale Process Order approving sale process procedures in the form attached thereto and authorizing and directing SFC, the Monitor and Houlihan Lokey to do all things reasonably necessary to perform each of their obligations thereunder.

Affidavit of W. Judson Martin sworn May 2, 2012 (the "May 2 Martin Affidavit"), at para. 5, Applicant's Motion Record for Motion Approving Claims Procedure Order, Tab 2, p. 7.

7. On April 13, 2012, this Honourable Court made an order extending the CCAA Stay to June 1, 2012.

Affidavit of W. Judson Martin sworn May 2, 2012 (the "May 2 Martin Affidavit"), at para. 6, Applicant's Motion Record for Motion Approving Claims Procedure Order, Tab 2, p. 7.

**B. The Claims Procedure Order and the Plan**

8. SFC intends to file the Plan under the CCAA in accordance with the Support Agreement, which represents the culmination of extensive arm's length negotiations between SFC and an ad hoc committee of noteholders, which represents approximately 40% of SFC's bond debt.

Affidavit of W. Judson Martin sworn May 2, 2012 (the "May 2 Martin Affidavit"), at para. 7, Applicant's Motion Record for Motion Approving Claims Procedure Order, Tab 2, p. 7.

9. The Support Agreement requires, among other things, that: (i) the Plan, and a meeting order in respect of the Plan, be filed by no later than July 16, 2012, and (ii) SFC hold a meeting seeking creditor approval of the Plan by no later than August 27, 2012.

Affidavit of W. Judson Martin sworn May 2, 2012 (the "May 2 Martin Affidavit"), at para. 8, Applicant's Motion Record for Motion Approving Claims Procedure Order, Tab 2, p. 8.

10. SFC has significant liabilities, including approximately U.S.\$1.8 billion of note Claims. In addition, a number of class action lawsuits have been commenced against SFC and certain of its officers, directors and others and it is therefore expected that significant Claims may be asserted against SFC and its directors and officers. Other defendants to such class actions (including the underwriters and E&Y) have put SFC on notice that they will be asserting substantial indemnification claims against SFC in respect of those proceedings, which claims will need to be identified and dealt with in these proceedings.

Affidavit of W. Judson Martin sworn May 2, 2012 (the "May 2 Martin Affidavit"), at para. 9, Applicant's Motion Record for Motion Approving Claims Procedure Order, Tab 2, p. 8.

11. In order to move forward with its restructuring efforts on a timely basis for the benefit of stakeholders generally, it is imperative that SFC commence a Claims process as soon as possible. Such a Claims process will enable SFC to ascertain all Claims that exist against SFC (and its directors and officers) in order to assess what impact such Claims may have with respect to its restructuring and the proposed Plan, and to have those Claims determined on a timely basis as necessary in order to enable the Plan to be filed, voted upon and implemented. Even in the event that the sale process undertaken pursuant to the Sale Process Order results in a successful sale to a third party other than the noteholders, it will still be necessary to ascertain the Claims that may exist against SFC and its directors and officers in order to determine and address such Claims in the context of SFC's CCAA proceedings as the Sale Process contemplates the implementation of any sale transaction pursuant to a CCAA plan.

Affidavit of W. Judson Martin sworn May 2, 2012 (the "May 2 Martin Affidavit"), at para. 10, Applicant's Motion Record for Motion Approving Claims Procedure Order, Tab 2, p. 8.

12. Accordingly, SFC, in consultation with the Monitor, developed the draft Claims Procedure Order that was included in SFC's filed materials, which set out procedures for the filing and determination of Claims against SFC and its current and former directors and officers.

Affidavit of W. Judson Martin sworn May 2, 2012 (the "May 2 Martin Affidavit"), at para. 11, Applicant's Motion Record for Motion Approving Claims Procedure Order, Tab 2, p. 9.

13. This draft Claims Procedure Order was circulated on April 27 to stakeholders whose counsel had requested a copy in advance of this motion and the motion itself (including the draft Order) was served on the entire service list on April 30, more than a week prior to the May 8 return date originally set for the motion. SFC received comments on the draft order from

counsel for a number of stakeholders. As a result of negotiation with such counsel, SFC, again in consultation with the Monitor, agreed to make significant changes to the original draft Claims Procedure Order and agreed to adjourn the hearing of this motion until May 14. A clean copy of the new revised Claims Procedure Order is attached to the Supplemental Report to the Monitor's Second Report.

14. Under the revised proposed Claims Procedure Order, the date by which any Claimant must file its Proof of Claim against SFC or its D&O Proof of Claim against any director or officer is still June 20, 2012 (the "Claims Bar Date"), which is more than six weeks from the date on which the Claims Procedure Order is being sought and should provide ample time for Claimants to assert any Claims.

15. The Claims process developed by SFC in consultation with the Monitor and in consideration of certain of the comments made by its stakeholders on prior drafts is designed to be provide SFC, the Monitor and the Court with a clear picture of the universe of Claims that SFC may have to address in the context of its restructuring. For example, with the exception of a small list of Excluded Claims, the draft Claims Procedure Order calls for the filing of all Claims against SFC, all Claims against any present or former directors or officers of SFC in that capacity and all Claims for indemnification asserted by any present or former directors or officers of SFC in response to Claims asserted against them. In addition, the Claims Procedure Order requires any Person who has asserted or intends to assert a right or claim against one or more Subsidiaries which is based in whole or in part on facts, underlying transactions, causes of action or events relating to a purported Claim made against SFC to so indicate on such Person's Proof of Claim.



Affidavit of W. Judson Martin sworn May 2, 2012 (the "May 2 Martin Affidavit"), at para. 12, Applicant's Motion Record for Motion Approving Claims Procedure Order, Tab 2, p. 9.

### **III. LAW AND ARGUMENT**

16. At the time of writing, various parties still have complaints regarding the Order. Of the remaining issues that relate to SFC, and reserving the right to supplement (both by way of supplemental factum and orally) the Applicant makes the following submissions:

#### **A. Excluded Claims**

17. Another complaint made to the form of Order sought by SFC is that the definition of "Excluded Claims" should include claims against directors and officers that are not, pursuant to section 5.1(2) of the CCAA, permitted to be compromised under a CCAA Plan.

18. The Claims Procedure Order also calls for section 5.1(2) claims for the simple reason that the determination of whether a claim falls under section 5.1(2)) should not be made by the claimant in advance; rather it should be made through the claims determination process and if there is a dispute, by the Court.

19. It is clearly not in the interests of SFC or its stakeholders for the Plan process to evolve towards an ostensibly consensual resolution, only to later find certain creditors have laid in the weeds to assert (properly or improperly) a claim that it believes to be an "Excluded Claim". It is necessary as part of any CCAA Plan for SFC that there be certainty as to what claims exist against SFC (including claims against SFC's Directors and Officers for which such Directors and Officers may be able to seek indemnification) and the status of those Claims (including whether or not such claims can be compromised under the CCAA and will participate in any Plan). In

addition, it may be the case that insurance may exist to answer such excluded claims even if they might not be capable of compromise pursuant to section 5.1(2), and therefore it is in the interests of all parties to have such claims identified today.

### **B. Provisions Dealing with SFC's Subsidiaries**

20. Another complaint with the proposed Claims Procedure Order is that it requires a Person asserting a claim against SFC to indicate whether it also asserts such claim against any of SFC's subsidiaries.

21. The Court clearly has the judicial discretion to call for claims against non-applicants. This has been done on several occasions in the past.

*See Re. Hollinger Inc., 4322525 Canada inc. and Sugra Limited, Non-Applicant Claims Order dated August 27, 2008*

*Re. Muscletech Research and Development Inc., Order re: Call for (I) Claims against the Applicants and (II) Product Liability Claims against the Subject Parties, Schedule D*

*Re. Canwest Global Communications Corp., Claims Procedure Order, Schedule C*

22. There are a number of reasons to identify claims at the Subsidiary level. As set out in Judson Martin's initial affidavit, the overwhelming majority of SFC's value is located at the Subsidiary level and the Subsidiaries are to be conveyed pursuant to the Plan to be formulated pursuant to the Support Agreement. As such, it is important to run a claims process that will clearly identify the nature and quantum of the asserted liabilities that may exist as against the Subsidiaries to be conveyed pursuant to the Plan.

Affidavit of W. Judson Martin sworn March 30, 2012, para. 95, Applicant's Motion Record for Motion Approving Claims Procedure Order, Tab 2(A), p. 36.

23. To that end, pursuant to the Claims Procedure Order, Claimants must simply indicate whether they have any Subsidiary Claims. Providing this information in no way predetermines or prejudices the rights of any Claimant vis-a-vis any alleged Subsidiary Claim, but provides information that is important to SFC's Plan and restructuring. Should it ever be proposed that Subsidiary Claims ought to be affected in any way in these proceedings, all parties will still have all of their rights to object to any such treatment. The purpose of requiring identification of SFC related claims against Subsidiaries is, at this stage at least, purely an information gathering consideration, albeit a very important one. Any subsequent treatment of the results of this information will be left for another day and, to the extent of disagreement, determination by this Court.

### **C. Equity Claims**

24. A further complaint made by certain stakeholders is that the Claims Procedure Order should include some mechanism for determination of whether such claim is an "equity claim" as defined in section 2 (1) of the CCAA

25. The issue of whether or not a particular claim may constitute an Equity Claim is just one of many issues that may need to be determined in respect of such Claim (including, for example, the quantum and validity of the Claim, whether or not the Claim is secured, whether the Claim gives rise to any related D&O indemnity claims, etc.). It would therefore not make sense to isolate the particular feature of whether or not a Claim is an Equity Claim as part of the Proof of Claim form. However, in recognition of the fact that whether or not a Claim is an Equity Claim is one of the issues that will have to be determined, the Monitor has proposed the following

endorsement that reflects that the determination of whether something is an "Equity Claim" would be part of the process of reviewing claims:

The Monitor has advised that as part of this claims procedure, in addition to revising or disallowing the quantum or any other aspect of any Claim, D&O Claim or D&O Indemnity Claim, where it concludes a Claim, D&O Claim or D&O Indemnity Claim is an Equity Claim, it will also revise or disallow such claims on that basis pursuant to the Claims Procedure Order.

26. It is submitted that this adequately addresses the issue identified raised by certain of the parties.

#### **D. Procedure for Determining Priorities**

27. A further complaint regarding the Claims Procedure Order is that there is "no clear procedure for determining priorities", and that such priority issues have to be resolved prior to classification, voting and distribution.

28. The determination of priorities of claims is an issue for subsequent determination, not for the claims identification stage in a claims procedure order. It is premature and beyond the scope of a typical claims procedure order to attempt to prejudge issues relating to the priority of claims. These issues (including priority of claims, classification for voting and distribution purposes, etc.) are anticipated to be dealt with in any proposed Plan and nothing in the Claims Procedure Order prejudices any Person's ability regarding issues relating thereto at the appropriate time.

### **E. Claims by Noteholders**

29. A further complaint as it relates to the claims bar, is that it "should apply only to claims based on contractual liability documented by the notes, and expressly not include claims for damages related to the loss in value of the notes."

30. The procedure in place in the Claims Procedure Order is consistent with prior orders of this Honourable Court, and is designed to ensure that, through the claims process, the debt claims made do not exceed the debt that actually exists under the Notes. The standard procedure employed where Notes are involved is to allow the Trustee to file a proof of claim on behalf of all Noteholders, rather than having a raft of claims by beneficial Noteholders. This is also necessary as the Notes are held by a few registered holders (i.e. DTC, CDS and Euroclear) and there would be a time-consuming process required to identify and confirm the holdings of individual beneficial noteholders. For these reasons, the language in the Claims Procedure Order replicates exact or similar provisions approved by this Court in the past with respect to filing of Proofs of Claim by indenture trustees rather than beneficial noteholders.

*Nortel Networks Corporation (Re)* (Claims Procedure Order dated July 30, 2009), para. 13

*Canwest Publishing Inc. (Re.)* (Claims Procedure Order dated April 12, 2010), paras. 18, 23

*Strategic Resource Acquisition Corporation (Re.)* (Claims Procedure Order dated May 12, 2009), para. 13

### **F. Other Issues**

31. Insofar as any of the parties are maintaining their position on any of the other residual issues, these issues will be addressed in oral argument.

**IV. RELIEF SOUGHT**

32. SFC requests that this Court grant relief by making an order substantially in the form of the Claims Procedure Order attached to a supplemental report to be issued by the Monitor.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to be 'AJL', written over a horizontal line.

BENNETT JONES LLP

Lawyers for Sino-Forest Corporation

**SCHEDULE "A" – AUTHORITIES CITED**

1. *Hollinger Inc., 4322323 Canada Inc. and Sugra Limited (Re)* (27 August 2008), Toronto 07-CL-7120 (S.C.J.) (unreported)
2. *Muscletech Research and Development Inc. (Re)* (3 March 2006), Toronto 06-CL-6241 (S.C.J.) (unreported)
3. *Canwest Global Communications Corp. (Re)* (14 October 2009), Toronto CV-09-8396-00CL (S.C.J.) (unreported)
4. *Nortel Networks Corp. (Re)*, [2009] O.J. No. 3280 (S.C.J.)
5. *Canwest Publishing Inc. (Re)* (12 April 2010), Toronto CV-10-8533-00CL (S.C.J.) (unreported)
6. *Strategic Resource Acquisition Corporation (Re)* (12 May 2009), Toronto 09-7953-00CL (S.C.J.) (unreported)

**SCHEDULE B – STATUTORY REFERENCES**



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

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Proceedings commenced in Toronto

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