Court File No. CV-17-589016-00CL

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 BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED AND KAMITUGA (BARBADOS) LIMITED

(the "**Applicants**")

BOOK OF AUTHORITIES OF THE APPLICANTS AND THE REQUISITE CONSENTING PARTIES (Plan Sanction Order)

VOLUME II OF II

March 20, 2018

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In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as Amended

In the Matter of the Consolidated Proposal of Kitchener Frame Limited and Thyssenkrupp Budd Canada, Inc. (Applicants)

Morawetz J.

Judgment: February 3, 2012
Docket: CV-11-9298-00CL

Counsel: Edward A. Sellers, Jeremy E. Dacks for Applicants
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Deborah McPhail for Financial Services Commission of Ontario

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.i General principles

Headnote

Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — General principles

Applicants KFL and BC were inactive entities with no operating assets and no material liquid assets — Applicants had significant and mounting obligations including pension and other non-pension post-employment benefit (OPEB) obligations to their former employees and surviving spouses of such former employees or others entitled to claim through such persons — Affiliates of BC provided up to date funding for pension and OPEB obligations, however, given that KFL and BC had no active operations status quo was unsustainable — KFL and BC brought motion to sanction amended consolidated proposal — Motion was granted — Proposal was reasonable — Proposal was calculated to benefit general body of creditors — Proposal was made in good faith — Proposal contained broad release in favour of applicants and certain third parties — Release of third-parties was permitted — Release covered all affected claims, pension claims, and existing escrow fund claims — Release did not cover criminal or wilful misconduct with respect to any matters set out in s. 50(14) of Bankruptcy and Insolvency Act — Unaffected claims were specifically carved out of release — No creditors or stakeholders objected to scope of release which was fully disclosed in negotiations — There was no express prohibition in BIA against including third-party releases in proposal — Any provision of BIA which purported to limit ability of debtor to contract with its creditors had to be clear and explicit — Third-party releases were permissible under Companies' Creditors Arrangement Act (CCAA) and court should strive, where language of both statutes supported it, to give both statutes harmonious interpretation — There was no principled basis on which analysis and treatment of third-party release in BIA proposal proceeding should differ from CCAA proceeding — Released parties contributed

in tangle and realistic way to proposal — Without inclusion of releases it was unlikely that certain parties would have supported proposal — Releases benefited applicants and creditors generally — Applicants provided full and adequate disclosure of releases and their effect.

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Cases considered by *Morawetz J.*:

A. & F. Baillargeon Express Inc., Re (1993), 27 C.B.R. (3d) 36, 1993 CarswellQue 49 (C.S. Que.) — referred to

Air Canada, Re (2004), 2004 CarswellOnt 1842, 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) — referred to

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Ashley v. Marlow Group Private Portfolio Management Inc. (2006), 2006 CarswellOnt 3449, 22 C.B.R. (5th) 126, 270 D.L.R. (4th) 744 (Ont. S.C.J. [Commercial List]) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — followed

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Society of Composers, Authors & Music Publishers of Canada v. Armitage (2000), 2000 CarswellOnt 4120, 20 C.B.R. (4th) 160, 50 O.R. (3d) 688, 137 O.A.C. 74 (Ont. C.A.) — referred to

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Re) 503 W.A.C. 1, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, *(*sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — followed

Statutes considered:

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s. 5.1 [en. 1997, c. 12, s. 122] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

MOTION by applicants for court sanction of proposal under Bankruptcy and Insolvency Act which contained third-party release.

***Morawetz J.*:**

1 At the conclusion of this unopposed motion, the requested relief was granted. Counsel indicated that it would be helpful if the court could provide reasons in due course, specifically on the issue of a third-party release in the context of a proposal under Part III of the *Bankruptcy and Insolvency Act* ("*BIA*").

2 Kitchener Frame Limited ("KFL") and Thyssenkrupp Budd Canada Inc. ("Budd Canada"), and together with KFL, (the "Applicants"), brought this motion for an order (the "Sanction Order") to sanction the amended consolidated proposal involving the Applicants dated August 31, 2011 (the "Consolidated Proposal") pursuant to the provisions of the *BIA*. Relief was also sought authorizing the Applicants and Ernst & Young Inc., in its capacity as proposal trustee of each of the Applicants (the "Proposal Trustee") to take all steps necessary to implement the Consolidated Proposal in accordance with its terms.

3 The Applicants submit that the requested relief is reasonable, that it benefits the general body of the Applicants' creditors and meets all other statutory requirements. Further, the Applicants submit that the court should also consider that the voting affected creditors (the "Affected Creditors") unanimously supported the Consolidated Proposal. As such, the Applicants submit that they have met the test as set out in s. 59(2) of the *BIA* with respect to approval of the Consolidated Proposal.

4 The motion of the Applicants was supported by the Proposal Trustee. The Proposal Trustee filed its report recommending approval of the Consolidated Proposal and indicated that the Consolidated Proposal was in the best interests of the Affected Creditors.

5 KFL and Budd Canada are inactive entities with no operating assets and no material liquid assets (other than the Escrow Funds). They do have significant and mounting obligations including pension and other non-pension post-employment benefit ("OPEB") obligations to the Applicants' former employees and certain former employees of Budcan Holdings Inc. or the surviving spouses of such former employees or others who may be entitled to claim through such persons in the *BIA* proceedings, including the OPEB creditors.

6 The background facts with respect to this motion are fully set out in the affidavit of Mr. William E. Aziz, sworn on September 13, 2011.

7 Affiliates of Budd Canada have provided up to date funding to Budd Canada to enable Budd Canada to fund, on behalf of KFL, such pension and OPEB obligations. However, given that KFL and Budd Canada have no active operations, the *status quo* is unsustainable.

8 The Applicants have acknowledged that they are insolvent and, in connection with the *BIA* proposal, proceedings were commenced on July 4, 2011.

9 On July 7, 2011, Wilton-Siegel J. granted Procedural Consolidation Orders in respect of KFL and Budd Canada which authorized the procedural consolidation of the Applicants and permitted them to file a single consolidated proposal to their creditors.

10 The Orders of Wilton-Siegel J. also appointed separate representative counsel to represent the interests of the Union and Non-Union OPEB creditors and further authorized the Applicants to continue making payments to Blue Cross in respect of the OPEB Claims during the *BIA* proposal proceedings.

11 On August 2, 2011, an order was granted extending the time to file a proposal to August 19, 2011.

12 The parties proceeded to negotiate the terms of the Consolidated Proposal, which meetings involved the Applicants, the Proposal Trustee, senior members of the CAW, Union Representative Counsel and Non-Union Representative Counsel.

13 An agreement in principle was reached which essentially provided for the monetization and compromise of the OPEB claims of the OPEB creditors resulting in a one-time, lump-sum payment to each OPEB creditor term upon implementation of the Consolidated Proposal. The Consolidated Proposal also provides that the Applicants and their affiliates will forego any recoveries on account of their secured and unsecured inter-company claims, which total approximately $120 million. A condition precedent was the payment of sufficient funds to the Pension Fund Trustee such that when such funds are combined with the value of the assets held in the Pension Plans, the Pension Fund Trustee will be able to fully annuitize the Applicants' pension obligations and pay the commuted values to those creditors with pension claims who so elected so as to provide for the satisfaction of the Applicants' pension obligations in full.

14 On August 19, 2011, the Applicants filed the Consolidated Proposal. Subsequent amendments were made on August 31, 2011 in advance of the creditors' meeting to reflect certain amendments to the proposal.

15 The creditors' meeting was held on September 1, 2011 and, at the meeting, the Consolidated Proposal, as amended, was accepted by the required majority of creditors. Over 99.9% in number and over 99.8% in dollar value of the Affected Creditors' Class voted to accept the Consolidated Proposal. The Proposal Trustee noted that all creditors voted in favour of the Consolidated Proposal, with the exception of one creditor, Canada Revenue Agency (with 0.1% of the number of votes representing 0.2% of the value of the vote) who attended the meeting but abstained from voting. Therefore, the

Consolidated Proposal was unanimously approved by the Affected Creditors. The Applicants thus satisfied the required "double majority" voting threshold required by the *BIA*.

16 The issue on the motion was whether the court should sanction the Consolidated Proposal, including the substantive consolidation and releases contained therein.

17 Pursuant to s. 54(2)(d) of the *BIA*, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" voting threshold at a duly constituted meeting of creditors.

18 The *BIA* requires the proposal trustee to apply to court to sanction the proposal. At such hearing, s. 59(2) of the *BIA* requires that the court refuse to approve the proposal where its terms are not reasonable or not calculated to benefit the general body of creditors.

19 In order to satisfy s. 59(2) test, the courts have held that the following three-pronged test must be satisfied:

(a) the proposal is reasonable;

(b) the proposal is calculated to benefit the general body of creditors; and

(c) the proposal is made in good faith.

See *Mayer, Re* (1994), 25 C.B.R. (3d) 113 (Ont. Bktcy.); *Steeves, Re* (2001), 25 C.B.R. (4th) 317 (Sask. Q.B.); *Magnus One Energy Corp., Re* (2009), 53 C.B.R. (5th) 243 (Alta. Q.B.).

20 The first two factors are set out in s. 59(2) of the *BIA* while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors and the interests of the public at large in the integrity of the bankruptcy system. See *Farrell, Re* (2003), 40 C.B.R. (4th) 53 (Ont. S.C.J. [Commercial List]).

21 The courts have also accorded substantial deference to the majority vote of creditors at a meeting of creditors; see *Lofchik, Re*, [1998] O.J. No. 332 (Ont. Bktcy.). Similarly, the courts have also accorded deference to the recommendation of the proposal trustee. See *Magnus One*, *supra*.

22 With respect to the first branch of the test for sanctioning a proposal, the debtor must satisfy the court that the proposal is reasonable. The court is authorized to only approve proposals which are reasonable and calculated to benefit the general body of creditors. The court should also consider the payment terms of the proposal and whether the distributions provided for are adequate to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. For a discussion on this point, see *Lofchik*, *supra*, and *Farrell* , *supra*.

23 In this case, the Applicants submit that, if the Consolidated Proposal is sanctioned, they would be in a position to satisfy all other conditions precedent to closing on or prior to the date of the proposal ("Proposal Implementation Date").

24 With respect to the treatment of the Collective Bargaining Agreements, the Applicants and the CAW brought a joint application before the Ontario Labour Relations Board ("OLRB") on an expedited basis seeking the OLRB's consent to an early termination of the Collective Bargaining Agreements. Further, the CAW has agreed to abandon its collective bargaining rights in connection with the Collective Bargaining Agreements.

25 With respect to the terms and conditions of a Senior Secured Loan Agreement between Budd Canada and TK Finance dated as of December 22, 2010, TK Finance provided a secured creditor facility to the Applicants to fund certain working capital requirements before and during the *BIA* proposal proceedings. As a result of the approval of the Consolidated Proposal at the meeting of creditors, TK Finance agreed to provide additional credit facilities to Budd Canada such that the Applicants would be in a position to pay all amounts required to be paid by or on behalf of the Applicants in connection with the Consolidated Proposal.

26 On the issue as to whether creditors will receive greater recovery under the Consolidated Proposal than they would receive in the bankruptcy, it is noted that creditors with Pension Claims are unaffected by the Consolidated Proposal. The Consolidated Proposal provides for the satisfaction of Pension Claims in full as a condition precedent to implementation.

27 With respect to Affected Creditors, the Applicants submit that they will receive far greater recovery from distributions under the Consolidated Proposal than the Affected Creditors would receive in the event of the bankruptcies of the Applicants. (See Sanction Affidavit of Mr. Aziz at para. 61.)

28 The Proposal Trustee has stated that the Consolidated Proposal is advantageous to creditors for the reasons outlined in its Report and, in particular:

> (a) the recoveries to creditors with claims in respect of OPEBs are considerably greater under the Amended Proposal than in a bankruptcy;
>
> (b) payments under the Amended Proposal are expected in a timely manner shortly after the implementation of the Amended Proposal;
>
> (c) the timing and quantum of distributions pursuant to the Amended Proposal are certain while distributions under a bankruptcy are dependent on the results of litigation, which cannot be predicted with certainty; and
>
> (d) the Pension Plans (as described in the Proposal Trustee's Report) will be fully funded with funds from the Pension Escrow (as described in the Proposal Trustee's Report) and, if necessary, additional funding from an affiliate of the Companies if the funds in the Pension Escrow are not sufficient. In a bankruptcy, the Pension Plans may not be fully funded.

29 The Applicants take the position that the Consolidated Proposal meets the requirements of commercial morality and maintains the integrity of the bankruptcy system, in light of the superior coverage to be afforded to the Applicants' creditors under the Consolidated Proposal than in the event of bankruptcy.

30 The Applicants also submit that substantive consolidation inherent in the proposal will not prejudice any of the Affected Creditors and is appropriate in the circumstances. Although not expressly contemplated under the *BIA*, the Applicants submit that the court may look to its incidental, ancillary and auxiliary jurisdiction under s. 183 of the *BIA* and its equitable jurisdiction to grant an order for substantive consolidation. See *Ashley v. Marlow Group Private Portfolio Management Inc.* (2006), 22 C.B.R. (5th) 126 (Ont. S.C.J. [Commercial List]). In deciding whether to grant substantive consolidation, courts have held that it should not be done at the expense of, or possible prejudice of, any particular creditor. See *Ashley* , *supra*. However, counsel submits that this court should take into account practical business considerations in applying the *BIA*. See *A. & F. Baillargeon Express Inc., Re* (1993), 27 C.B.R. (3d) 36 (C.S. Que.).

31 In this case, the Applicants submit that substantive consolidation inherent in the Consolidated Proposal is appropriate in the circumstances due to, among other things, the intertwined nature of the Applicants' assets and liabilities. Each Applicant had substantially the same creditor base and known liabilities (other than certain Excluded Claims). In addition, KFL had no cash or cash equivalents and the Applicants are each dependant on the Escrow Funds and borrowings under the Restated Senior Secured Loan Agreement to fund the same underlying pension and OPEB obligations and costs relating to the Proposal Proceedings.

32 The Applicants submit that creditors in neither estate will be materially prejudiced by substantive consolidation and based on the fact that no creditor objected to the substantial consolidation, counsel submits the Consolidated Proposal ought to be approved.

33 With respect to whether the Consolidated Proposal is calculated to benefit the general body of creditors, TK Finance would be entitled to priority distributions out of the estate in a bankruptcy scenario. However, the Applicants

and their affiliates have agreed to forego recoveries under the Consolidated Proposal on account of their secured and unsecured intercompany claims in the amount of approximately $120 million, thus enhancing the level of recovery for the Affected Creditors, virtually all of whom are OPEB creditors. It is also noted that TK Finance will be contributing over $35 million to fund the Consolidated Proposal.

34 On this basis, the Applicants submit that the Consolidated Proposal is calculated to benefit the general body of creditors.

35 With respect to the requirement of the proposal being made in good faith, the debtor must satisfy the court that it has provided full disclosure to its creditors of its assets and encumbrances against such assets.

36 In this case, the Applicants and the Proposal Trustee have involved the creditors pursuant to the Representative Counsel Order, and through negotiations with the Union Representative Counsel and Non-Union Representative Counsel.

37 There is also evidence that the Applicants have widely disseminated information regarding their *BIA* proposal proceedings through the media and through postings on the Proposal Trustee's website. Information packages have also prepared by the Proposal Trustee for the creditors.

38 Finally, the Proposal Trustee has noted that the Applicants' conduct, both prior to and subsequent to the commencement of the *BIA* proposal proceedings, is not subject to censure in any respect and that the Applicants' have acted in good faith.

39 There is also evidence that the Consolidated Proposal continues requisite statutory terms. The Consolidated Proposal provides for the payment of preferred claims under s. 136(1) of the *BIA*.

40 Section 7.1 of the Consolidated Proposal contains a broad release in favour of the Applicants and in favour of certain third parties (the "Release"). In particular, the Release benefits the Proposal Trustee, Martinrea, the CAW, Union Representative Counsel, Non-Union Representative Counsel, Blue Cross, the Escrow Agent, the present and former shareholders and affiliates of the Applicants (including Thyssenkrupp USA, Inc. ("TK USA"), TK Finance, Thyssenkrupp Canada Inc. ("TK Canada") and Thyssenkrupp Budd Company), as well as their subsidiaries, directors, officers, members, partners, employees, auditors, financial advisors, legal counsel and agents of any of these parties and any person liable jointly or derivatively through any or all of the beneficiaries of the of the release (referred to individually as a "Released Party").

41 The Release covers all Affected Claims, Pension Claims and Escrow Fund Claims existing on or prior to the later of the Proposal Implementation Date and the date on which actions are taken to implement the Consolidated Proposal.

42 The Release provides that all such claims are released and waived (other than the right to enforce the Applicants' or Proposal Trustee's obligations under the Consolidated Proposal) to the full extent permitted by applicable law. However, nothing in the Consolidated Proposal releases or discharges any Released Party for any criminal or other wilful misconduct or any present or former directors of the Applicants with respect to any matters set out in s. 50(14) of the *BIA*. Unaffected Claims are specifically carved out of the Release.

43 The Applicants submit that the Release is both permissible under the *BIA* and appropriately granted in the context of the *BIA* proposal proceedings. Further, counsel submits, to the extent that the Release benefits third parties other than the Applicants, the Release is not prohibited by the *BIA* and it satisfies the criteria that has been established in granting third-party releases under the *Companies' Creditors Arrangement Act* ("*CCAA*"). Moreover, counsel submits that the scope of the Release is no broader than necessary to give effect to the purpose of the Consolidated Proposal and the contributions made by the third parties to the success of the Consolidated Proposal.

44 No creditors or stakeholders objected to the scope of the Release which was fully disclosed in the negotiations, including the fact that the inclusion of the third-party releases was required to be part of the Consolidated Proposal. Counsel advises that the scope of the Release was referred to in the materials sent by the Proposal Trustee to the Affected Creditors prior to the meeting, specifically discussed at the meeting and adopted by the unanimous vote of the voting Affected Creditors.

45 Counsel also submits that there is no provision in the *BIA* that clearly and expressly precludes the Applicants from including the Release in the Consolidated Proposal as long as the court is satisfied that the Consolidated Proposal is reasonable and for the general benefit of creditors.

46 In this respect, it seems to me, that the governing statutes should not be technically or stringently interpreted in the insolvency context but, rather, should be interpreted in a manner that is flexible rather than technical and literal, in order to deal with the numerous situations and variations which arise from time to time. Further, taking a technical approach to the interpretation of the *BIA* would defeat the purpose of the legislation. See *N.T.W. Management Group Ltd., Re* (1994), 29 C.B.R. (3d) 139 (Ont. Bktcy.); *Olympia & York Developments Ltd., Re* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd., Re* (1997), 45 C.B.R. (3d) 85 (Ont. Bktcy.).

47 Moreover, the statutes which deal with the same subject matter are to be interpreted with the presumption of harmony, coherence and consistency. See *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24 (S.C.C.). This principle militates in favour of adopting an interpretation of the *BIA* that is harmonious, to the greatest extent possible, with the interpretation that has been given to the *CCAA*.

48 Counsel points out that historically, some case law has taken the position that s. 62(3) of the *BIA* precludes a proposal from containing a release that benefits third parties. Counsel submits that this result is not supported by a plain meaning of s. 62(3) and its interaction with other key sections in the *BIA*.

49 Subsection 62(3) of the *BIA* reads as follows:

> (3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

50 Counsel submits that there are two possible interpretations of this subsection:

> (a) It prohibits third party releases — in other words, the phrase "does not release any person" is interpreted to mean "cannot release any person"; or
>
> (b) It simply states that acceptance of a proposal does not automatically release any party other than the debtor — in other words, the phrase "does not release any person" is interpreted to mean "does not release any person without more"; it is protective not prohibitive.

51 I agree with counsel's submission that the latter interpretation of s. 62(3) of the *BIA* conforms with the grammatical and ordinary sense of the words used. If Parliament had intended that only the debtor could be released, s. 62(3) would have been drafted more simply to say exactly that.

52 Counsel further submits that the narrow interpretation would be a stringent and inflexible interpretation of the *BIA*, contrary to accepted wisdom that the *BIA* should be interpreted in a flexible, purposive manner.

53 The *BIA* proposal provisions are designed to offer debtors an opportunity to carry out a going concern or value maximizing restructuring in order to avoid a bankruptcy and related liquidation and that these purposes justify taking a broad, flexible and purposive approach to the interpretation of the relevant provisions. This interpretation is supported by *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.).

54 Further, I agree with counsel's submissions that a more flexible purposive interpretation is in keeping with modern statutory principles and the need to give purposive interpretation to insolvency legislation must start from the proposition that there is no express prohibition in the *BIA* against including third-party releases in a proposal. At most, there are certain limited constraints on the scope of such releases, such as in s. 179 of the *BIA*, and the provision dealing specifically with the release of directors.

55 In the absence of an express prohibition against including third-party releases in a proposal, counsel submits that it must be presumed that such releases are permitted (subject to compliance with any limited express restrictions, such as in the case of a release of directors). By extension, counsel submits that the court is entitled to approve a proposal containing a third-party release if the court is able to satisfy itself that the proposal (including the third-party release) is reasonable and for the general benefit for creditors such that all creditors (including the minority who did not vote in favour of the proposal) can be required to forego their claims against parties other than the debtors.

56 The Applicants also submit that s. 62(3) of the *BIA* can only be properly understood when read together with other key sections of the *BIA*, particularly s. 179 which concerns the effect of an order of discharge:

> 179. An order of discharge does not release a person who at the time of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with the bankrupt, or a person who was surety or in the nature of a surety for the bankrupt.

57 The order of discharge of a bankrupt has the effect of releasing the bankrupt from all claims provable in bankruptcy (section 178(2) *BIA*). In the absence of s. 179, this release could result in the automatic release at law of certain types of claims that are identified in s. 179. For example, under guarantee law, the discharge of the principal debt results in the automatic discharge of a guarantor. Similarly, counsel points out the settlement or satisfaction of a debt by one joint obligor generally results in the automatic release of both joint obligors. Section 179 therefore serves the limited purpose of altering the result that would incur at law, indicating that the rule that the *BIA* generally is that there is no automatic release of third-party guarantors of co-obligors when a bankrupt is discharged.

58 Counsel submits that s. 62(3), which confirms that s. 179 applies to a proposal, was clearly intended to fulfil a very limited role — namely, to confirm that there is no automatic release of the specific types of co-obligors identified in s. 179 when a proposal is approved by the creditors and by the court. Counsel submits that it does not go further and preclude the creditors and the court from approving a proposal which contains the third-party release of the types of co-obligors set out in s. 179. I am in agreement with these submissions.

59 Specific considerations also apply when releasing directors of a debtor company. The *BIA* contains specific limitations on the permissible scope of such releases as set out in s. 50(14). For this reason, there is a specific section in the *BIA* proposal provisions outlining the principles governing such a release. However, counsel argues, the presence of the provisions outlining the circumstances in which a proposal can contain a release of claims against the debtor's directors does not give rise to an inference that the directors are the only third parties that can be released in a proposal. Rather, the inference is that there are considerations applicable to a release or compromise of claims against directors that do not apply generally to other third parties. Hence, it is necessary to deal with this particular type of compromise and release expressly.

60 I am also in agreement with the alternative submissions made by counsel in this area to the effect that if s. 62(3) of the *BIA* operates as a prohibition it refers only to those limitations that are expressly identified in the *BIA*, such as in s. 179 of the *BIA* and the specific limitations on the scope of releases that can benefit directors of the debtor.

61 Counsel submits that the Applicants' position regarding the proper interpretation of s. 62(3) of the *BIA* and its place in the scheme of the *BIA* is consistent with the generally accepted principle that a proposal under the *BIA* is a contract. See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.); *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.* (1976), [1978] 1 S.C.R. 230 (S.C.C.); and *Society of*

Composers, Authors & Music Publishers of Canada v. Armitage (2000), 20 C.B.R. (4th) 160 (Ont. C.A.). Consequently, counsel submits that parties are entitled to put anything into a proposal that could lawfully be incorporated into any contract (see *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List])) and that given that the prescribed majority creditors have the statutory right under the *BIA* to bind a minority, however, this principle is subject to any limitations that are contained in the express wording of the *BIA*.

62 On this point, it seems to me, that any provision of the *BIA* which purports to limit the ability of the debtor to contract with its creditors should be clear and explicit. To hold otherwise would result in severely limiting the debtor's ability to contract with its creditors, thereby the decreasing the likelihood that a viable proposal could be reached. This would manifestly defeat the purpose of the proposal provisions of the *BIA*.

63 The Applicants further submit that creditors' interests — including the interests of the minority creditors who do not vote in favour of a proposal containing a third-party release — are sufficiently protected by the overriding ability of a court to refuse to approve a proposal with an overly broad third-party release, or where the release results in the proposal failing to demonstrate that it is for the benefit of the general body of creditors. The Applicants submit that the application of the *Metcalfe* criteria to the release is a mechanism whereby this court can assure itself that these preconditions to approve the Consolidated Proposal contained in the Release have been satisfied.

64 The Applicants acknowledge that there are several cases in which courts have held that a *BIA* proposal that includes a third-party release cannot be approved by the court but submits that these cases are based on a mistaken premise, are readily distinguishable and do not reflect the modern approach to Canadian insolvency law. Further, they submit that none of these cases are binding on this court and should not be followed.

65 In *Kern Agencies Ltd., (No. 2), Re* (1931), 13 C.B.R. 11 (Sask. C.A.), the court refused to approve a proposal that contained a release of the debtor's directors, officers and employees. Counsel points out that the court's refusal was based on a provision of the predecessor to the *BIA* which specifically provided that a proposal could only be binding on creditors (as far as relates to any debts due to them from the debtor). The current *BIA* does not contain equivalent general language. This case is clearly distinguishable.

66 In *Mister C's Ltd., Re* (1995), 32 C.B.R. (3d) 242 (Ont. Bktcy.), the court refused to approve a proposal that had received creditor approval. The court cited numerous bases for its conclusion that the proposal was not reasonable or calculated to benefit the general body of creditors, one of which was the release of the principals of the debtor company. The scope of the release was only one of the issues with the proposal, which had additional significant issues (procedural irregularities, favourable terms for insiders, and inequitable treatment of creditors generally). I agree with counsel to the Applicants that this case can be distinguished.

67 *Cosmic Adventures Halifax Inc., Re* (1999), 13 C.B.R. (4th) 22 (N.S. S.C.) relies on *Kern* and furthermore the Applicants submit that the discussion of third-party releases is technically *obiter* because the proposal was amended on consent.

68 The fourth case is *C.F.G. Construction inc., Re*, 2010 CarswellQue 10226 (C.S. Que.) where the Quebec Superior Court refused to approve a proposal containing a release of two sureties of the debtor. The case was decided on alternate grounds — either that the *BIA* did not permit a release of sureties, or in any event, the release could not be justified on the facts. I agree with the Applicants that this case is distinguishable. The case deals with the release of sureties and does not stand for any broader proposition.

69 In general, the Applicants' submission on this issue is that the court should apply the decision of the Court of Appeal for Ontario in *Metcalfe*, together with the binding principle set out by the Supreme Court in *Ted Leroy Trucking*, dictating a more liberal approach to the permissibility of third-party releases in *BIA* proposals than is taken by the Quebec court in *C.F.G. Construction Inc*. I agree.

70 The object of proposals under the *BIA* is to permit the debtor to restructure its business and, where possible, avoid the social and economic costs of liquidating its assets, which is precisely the same purpose as the *CCAA*. Although there are some differences between the two regimes and the *BIA* can generally be characterized as more "rules based", the thrust of the case law and the legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible, encouraging reorganization over liquidation. See *Ted Leroy Trucking*.

71 Recent case law has indicated that, in appropriate circumstances, third-party releases can be included in a plan of compromise and arrangement that is approved under the *CCAA*. See *Metcalfe*. The *CCAA* does not contain any express provisions permitting such third-party releases apart from certain limitations that apply to the compromise of claims against directors of the debtor company. See *CCAA* s. 5.1 and *Allen-Vanguard Corp., Re*, 2011 ONSC 733 (Ont. S.C.J.).

72 Counsel submits that although the mechanisms for dealing with the release of sureties and similar claimants are somewhat different in the *BIA* and *CCAA*, the differences are not of such significance that the presence of s. 62(3) of the *BIA* should be viewed as dictating a different approach to third-party releases generally from the approach that applies under the *CCAA*. I agree with this submission.

73 I also accept that if s. 62(3) of the *BIA* is interpreted as a prohibition against including the third-party release in the *BIA* proposal, the *BIA* and the *CCAA* would be in clear disharmony on this point. An interpretation of the *BIA* which leads to a result that is different from the *CCAA* should only be adopted pursuant to clear statutory language which, in my view, is not present in the *BIA*.

74 The most recent and persuasive example of the application of such a harmonious approach to the interpretation of the *BIA* and the *CCAA* can be found in *Ted Leroy Trucking*.

75 At issue in *Ted Leroy Trucking* was how to resolve an apparent conflict between the deemed trust provisions of the *Excise Tax Act* and the provisions of the *CCAA*. The language of the *Excise Tax Act* created a deemed trust over GST amounts collected by the debtor that was stated to apply "despite any other Act of Parliament". The *CCAA* stated that the deemed trust for GST did not apply under the *CCAA*, unless the funds otherwise specified the criteria for a "true" trust. The court was required to determine which federal provision should prevail.

76 By contrast, the same issue did not arise under the *BIA*, due to the language in the *Excise Tax Act* specifically indicating that the continued existence of the deemed trust depended on the terms of the *BIA*. The *BIA* contained a similar provision to the *CCAA* indicating that the deemed trust for GST amounts would no longer apply in a *BIA* proceeding.

77 Deschamps J., on behalf of six other members of the court, with Fish J. concurring and Abella J. dissenting, held that the proper interpretation of the statutes was that the *CCAA* provision should prevail, the deemed trust under the *Excise Tax Act* would cease to exist in a *CCAA* proceeding. In resolving the conflict between the *Excise Tax Act* and the *CCAA*, Deschamps J. noted the strange asymmetry which would arise if the *BIA* and *CCAA* were not in harmony on this issue:

> Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

78 It seems to me that these principles indicate that the court should generally strive, where the language of both statutes can support it, to give both statutes a harmonious interpretation to avoid the ills that can arise from "statute-shopping". These considerations, counsel submits, militate against adopting a strained reading of s. 62(3) of the *BIA* as

a prohibition against third-party releases in a *BIA* proposal. I agree. In my opinion, there is no principled basis on which the analysis and treatment of a third-party release in a *BIA* proposal proceeding should differ from a CCAA proceeding.

79 The Applicants submit that it logically follows that the court is entitled to approve the Consolidated Proposal, including the Release, on the basis that it is reasonable and calculated to benefit the general body of creditors. Further, in keeping with the principles of harmonious interpretation of the *BIA* and the *CCAA*, the court should satisfy itself that the *Metcalfe* criteria, which apply to the approval of a third-party release under the CCAA, has been satisfied in relation to the Release.

80 In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify a third-party release are:

> (a) the parties to be released are necessary and essential to the restructuring of the debtor;
>
> (b) the claims to be released are rationally related to the purpose of the Plan (Proposal) and necessary for it;
>
> (c) the Plan (Proposal) cannot succeed without the releases;
>
> (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan (Proposal); and
>
> (e) the Plan (Proposal) will benefit not only the debtor companies but creditors generally.

81 These requirements have also been referenced in *Canwest Global Communications Corp., Re* (2010), 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) and *Angiotech Pharmaceuticals Inc., Re* (2011), 76 C.B.R. (5th) 210 (B.C. S.C. [In Chambers]).

82 No single requirement listed above is determinative and the analysis must take into account the facts particular to each claim.

83 The Applicants submit that the Release satisfies each of the *Metcalfe* criteria. Firstly, counsel submits that following the closing of the Asset Purchase Agreement in 2006, Budd Canada had no operating assets or income and relied on inter-company advances to fund the pension and OPEB requirements to be made by Budd Canada on behalf of KFL pursuant to the Asset Purchase Agreement. Such funded amounts total approximately $112.7 million in pension payments and $24.6 million in OPEB payments between the closing of the Asset Purchase Agreement and the Filing Date. In addition, TK Finance has been providing Budd Canada and KFL with the necessary funding to pay the professional and other costs associated with the *BIA* Proposal Proceedings and will continue to fund such amounts through the Proposal Implementation Date. Moreover, TK Canada and TK Finance have agreed to forego recoveries under the Consolidated Proposal on account of their existing secured and unsecured intercompany loans in the amount of approximately $120 million.

84 Counsel submits that the releases provided in respect of the Applicants' affiliates are the *quid pro quo* for the sacrifices made by such affiliates to significantly enlarge recoveries for the unsecured creditors of the Applicants, particularly the OPEB creditors and reflects that the affiliates have provided over $135 million over the last five years in respect of the pension and OPEB amounts and additional availability of approximately $49 million to allow the Applicants to discharge their obligations to their former employees and retirees. Without the Releases, counsel submits, the Applicants' affiliates would have little or no incentive to contribute funds to the Consolidated Proposal and to waive their own rights against the Applicants.

85 The Release in favour of Martinrea is fully discussed at paragraphs 121-127 of the factum. The Applicants submit that the third-party releases set out in the Consolidated Proposal are clearly rationally related, necessary and essential to the Consolidated Proposal and are not overly broad.

86 Having reviewed the submissions in detail, I am in agreement that the Released Parties are contributing in a tangible and realistic way to the Consolidated Proposal.

87 I am also satisfied that without the Applicants' commitment to include the Release in the Consolidated Proposal to protect the Released Parties, it is unlikely that certain of such parties would have been prepared to support the Consolidated Proposal. The releases provided in respect of the Applicants' affiliates are particularly significant in this regard, since the sacrifices and monetary contributions of such affiliates are the primary reason that the Applicants have been able to make the Consolidated Proposal. Further, I am also satisfied that without the Release, the Applicants would be unable to satisfy the borrowing conditions under the Amended and Restated Senior Secured Loan Agreement with respect to the Applicants having only certain permitted liabilities after the Proposal Implementation Date. The alternative for the Applicants is bankruptcy, a scenario in which their affiliates' claims aggregating approximately $120 million would significantly erode recoveries for the unsecured creditors of the Applicants.

88 I am also satisfied that the Releases benefit the Applicants and creditors generally. The primary non-affiliated Creditors of the Applicants are the OPEB Creditors and Creditors with Pension Claims, together with the CRA. The Consolidated Proposal, in my view, clearly benefits these Creditors by generating higher recoveries than could be obtained from the bankruptcies of the Applicants. Moreover, the timing of any such bankruptcy recoveries is uncertain. As noted by the Proposal Trustee, the amount that the Affected Creditors would receive in the event of the bankruptcies of the Applicants is uncertain both in terms of quantum and timing, with the Applicants' funding of OPEB Claims terminating on bankruptcy, but distributions to the OPEB Creditors and other Creditors delayed for at least a year or two but perhaps much longer.

89 The Applicants and their affiliates also benefit from the Release as an affiliate of the Applicants may become enabled to use the net operating losses (NOL) following a series of transactions that are expected to occur immediately following the Proposal Implementation Date.

90 I am also satisfied that the Applicants have provided full and adequate disclosure of the Releases and their effect. Full disclosure was made in the proposal term sheet circulated to both Representative Counsel in early August 2011. The Release was negotiated as part of the Consolidated Proposal and the scope of the Release was disclosed by the Proposal Trustee in its Report to the creditors on the terms of the Consolidated Proposal, which Report was circulated by the Proposal Trustee to the Applicants' known creditors in advance of the creditors' meeting.

91 I am satisfied that the Applicants, with the assistance of the Proposal Trustee, took appropriate steps to ensure that the Affected Creditors were aware of the existence of the release provisions prior to the creditors' meeting.

92 For the foregoing reasons, I have concluded that the Release contained in the Consolidated Proposal meets the *Metcalfe* criteria and should be approved.

93 In the result, I am satisfied that the section 59(2) *BIA* test has been met and that it is appropriate to grant the Sanction Order in the form of the draft order attached to the Motion Record. An order has been signed to give effect to the foregoing.

Motion granted.

End of Document

TAB 16

2015 ONSC 622
Ontario Superior Court of Justice

Cline Mining Corp., Re

2015 CarswellOnt 3285, 2015 ONSC 622, 23 C.B.R. (6th) 194, 252 A.C.W.S. (3d) 8

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise and Arrangement of Cline Mining Corporation, New ELK Coal Company LLC and North Central Energy Company

G.B. Morawetz R.S.J.

Heard: January 27, 2015
Judgment: January 30, 2015
Docket: CV-14-10781-00CL

Counsel: Robert J. Chadwick, Logan Willis for Applicants, Cline Mining Corporation et al.
Michael DeLellis, David Rosenblatt for FTI Consulting Canada Inc., Monitor of the Applicants
Jay Swartz for Secured Noteholders

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Insolvent mining companies (applicants) were involved in Companies' Creditors Arrangement Act proceedings — Applicants brought motion to approve plan of arrangement which involved release of certain claims and recapitalization of applicants — Motion granted — Plan was fair and reasonable in circumstances — Plan represented compromise and treated affected creditors fairly — Third party releases were rationally related to purpose of plan and were necessary for successful restructuring — Release of directors and officers was appropriate — Monitor supported applicants' position and plan had unanimous support from creditors.
Table of Authorities
Cases considered by *G.B. Morawetz R.S.J.*:
ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — referred to
Cline Mining Corp., Re (2014), 2014 CarswellOnt 18943, 2014 ONSC 6998 (Ont. S.C.J.) — considered
Sino-Forest Corp., Re (2012), 2012 ONSC 7050, 2012 CarswellOnt 15913 (Ont. S.C.J. [Commercial List]) — referred to
Sino-Forest Corp., Re (2013), 2013 ONCA 456, 2013 CarswellOnt 8896 (Ont. C.A.) — referred to

SkyLink Aviation Inc., Re (2013), 2013 ONSC 2519, 2013 CarswellOnt 7670, 3 C.B.R. (6th) 83 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — considered

s. 6(1) — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 19(2) — considered

MOTION by insolvent companies for approval or plan of arrangement and other relief.

***G.B. Morawetz R.S.J.*:**

1 Cline Mining Corporation, New Elk Coal Company LLC and North Central Energy Company (collectively, the "Applicants") seek an order (the "Sanction Order"), among other things:

> a. sanctioning the Applicants' Amended and Restated Plan of Compromise and Arrangement dated January 20, 2015 (the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"); and
>
> b. extending the stay, as defined in the Initial Order granted December 3, 2014 (the "Initial Order"), to and including April 1, 2015.

2 Counsel to the Applicants submits that the Recapitalization is the result of significant efforts by the Applicants to achieve a resolution of their financial challenges and, if implemented, the Recapitalization will maintain the Applicants as a unified corporate enterprise and result in an improved capital structure that will enable the Applicants to better withstand prolonged weakness in the global market for metallurgical coal.

3 Counsel submits that the Applicants believe that the Recapitalization achieves the best available outcome for the Applicants and their stakeholders in the circumstances and achieves results that are not attainable under any other bankruptcy, sale or debt enforcement scenario.

4 The position of the Applicants is supported by the Monitor, and by Marret, on behalf of the Secured Noteholders.

5 The Plan has the unanimous support from the creditors of the Applicants. The Plan was approved by 100% in number and 100% in value of creditors voting in each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class.

6 The background giving rise to (i) the insolvency of the Applicants; (ii) the decision to file under the CCAA; (iii) the finding made that the court had the jurisdiction under the CCAA to accept the filing; (iv) the finding of insolvency; and (v) the basis for granting the Initial Order and the Claims Procedure Order was addressed in *Cline Mining Corp., Re*, 2014 ONSC 6998 (Ont. S.C.J.) and need not be repeated.

7 The Applicants report that counsel to the WARN Act Plaintiffs in the class action proceedings (the "Class Action Counsel") submitted a class proof of claim on behalf of the 307 WARN Act Plaintiffs in the aggregate amount of U.S. $3.7 million. Class Action Counsel indicated that the WARN Act Plaintiffs were not prepared to vote in favour of the Plan dated December 3, 2014 (the "Original Plan") without an enhancement of the recovery. The Applicants report that after further discussions, agreement was reached with Class Action Counsel on the form of a resolution that provides for an

enhanced recovery for the WARN Act Plaintiffs Class of $210,000 (with $90,000 paid on the Plan implementation date) as opposed to the recovery offered in the Original Plan of $100,000 payable in eight years from the Plan implementation date.

8 As a result of reaching this resolution, the Original Plan was amended to reflect the terms of the WARN Act resolution.

9 The Applicants served the Amended Plan on the Service List on January 20, 2015.

10 The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicants.

11 Equity claimants will not receive any consideration or distributions under the Plan.

12 The Plan provides for the release of certain parties (the "Released Parties"), including:

> (i) the Applicants, the Directors and Officers and employees of contractors of the Applicants; and
>
> (ii) the Monitor, the Indenture Trustee and Marret and their respective legal counsel, the financial and legal advisors to the Applicants and other parties employed by or associated with the parties listed in sub-paragraph (ii), in each case in respect of claims that constitute or relate to, *inter alia*, any Claims, any Directors/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA Proceedings, the Chapter 15 Proceedings, the business or affairs of the Applicants or certain other related matter (collectively, the "Released Claims").

13 The Plan does not release:

> (i) the right to enforce the Applicants' obligations under the Plan;
>
> (ii) the Applicants from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA; or
>
> (iii) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

14 The Plan does not release Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the Applicants' applicable Insurance Policies.

15 The Meetings Order authorized the Applicants to convene a meeting of the Secured Noteholders, a meeting of Affected Unsecured Creditors and a meeting of WARN Act Plaintiffs to consider and vote on the Plan.

16 The Meetings were held on January 21, 2015. At the Meetings, the resolution to approve the Plan was passed unanimously in each of the three classes of creditors.

17 None of the persons with Disputed Claims voted at the Meetings, in person or by proxy. Consequently, the results of the votes taken would not change based on the inclusion or exclusion of the Disputed Claims in the voting results.

18 Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite double-majority of creditors has approved the plan. The effect of the court's approval is to bind the company and its creditors.

19 The general requirements for court approval of the CCAA Plan are well established:

> a. there must be strict compliance with all statutory requirements;

b. all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done, which is not authorized by the CCAA; and

c. the plan must be fair and reasonable.

(see *SkyLink Aviation Inc., Re*, 2013 ONSC 2519 (Ont. S.C.J. [Commercial List]))

20 Having reviewed the record and hearing submissions, I am satisfied that the foregoing test for approval has been met in this case.

21 In arriving at my conclusion that the Plan is fair and reasonable in the circumstances, I have taken into account the following:

a. the Plan represents a compromise among the Applicants and the Affected Creditors resulting from discussions among the Applicants and their creditors, with the support of the Monitor;

b. the classification of the Applicants' creditors into three voting classes was previously approved by the court and the classification was not opposed at any time;

c. the results of the Sale Process indicate that the Secured Noteholders would suffer a significant shortfall and there would be no residual value for subordinate interests;

d. the Recapitalization provides a limited recovery for unsecured creditors and the WARN Act Plaintiffs;

e. all Affected Creditors that voted on the Plan voted for its approval;

f. the Plan treats Affected Creditors fairly and provides for the same distribution among the creditors within each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class;

g. Unaffected Claims, which include, *inter alia*, government and employee priority claims, claims not permitted to be compromised pursuant to sections 19(2) and 5.1(2) of the CCAA and prior ranking secured claims, will not be affected by the Plan;

h. the treatment of Equity Claims under the Plan is consistent with the provisions of the CCAA; and

i. the Plan is supported by the Applicants (Marret, on behalf of the Secured Noteholders), the Monitor and the creditors who voted in favor of the Plan at the Meetings.

22 The CCAA permits the inclusion of third party releases in a plan of compromise or arrangement where those releases are reasonably connected to the proposed restructuring (see: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) ("*ATB Financial*"); *SkyLink*, *supra;* and *Sino-Forest Corp., Re*, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]), leave to appeal denied, 2013 ONCA 456 (Ont. C.A.)).

23 The court has the jurisdiction to sanction a plan containing third party releases where the factual circumstances indicate that the third party releases are appropriate. In this case, the record establishes that the releases were negotiated as part of the overall framework of the compromises in the Plan, and these releases facilitate a successful completion of the Plan and the Recapitalization. The releases cover parties that could have claims of indemnification or contribution against the Applicants in relation to the Recapitalization, the Plan and other related matters, whose rights against the Applicants have been discharged in the Plan.

24 I am satisfied that the releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the Applicants.

25 Further, the releases provided for in the Plan were contained in the Original Plan filed with the court on December 3, 2014 and attached to the Meetings Order. Counsel to the Applicants submits that the Applicants are not aware of any objections to the releases provided for in the Plan.

26 The Applicants also contend that the releases of the released Directors/Officers are appropriate in the circumstances, given that the released Directors and Officers, in the absence of the Plan releases, could have claims for indemnification or contribution against the Applicants and the release avoids contingent claims for such indemnification or contribution against the Applicants. Further, the releases were negotiated as part of the overall framework of compromises in the Plan. I also note that no Director/Officer Claims were asserted in the Claims Procedure.

27 The Monitor supports the Applicants' request for the sanction of the Plan, including the releases contained therein.

28 I am satisfied that in these circumstances, it is appropriate to grant the releases.

29 The Plan provides for certain alterations to the Cline Articles in order to effectuate certain corporate steps required to implement the Plan, including the consolidation of shares and the cancellation of fractional interests of the Cline Common Shares. I am satisfied that these amendments are necessary in order to effect the provisions of the Plan and that it is appropriate to grant the amendments as part of the approval of the Plan.

30 The Applicants also request an extension of the stay until April 1, 2015. This request is made pursuant to section 11.02(2) of the CCAA. The court must be satisfied that:

(i) circumstances exist that make the order appropriate; and

(ii) the applicant has acted, and is acting in good faith and with due diligence.

31 The record establishes that the Applicants have made substantial progress toward the completion of the Recapitalization, but further time is required to implement same. I am satisfied that the test pursuant to section 11.02(2) has been met and it is appropriate to extend the stay until April 1, 2015.

32 Finally, the Monitor requests approval of its activities and conduct to date and also approval of its Pre-Filing Report, the First Report dated December 16, 2014 and the Second Report together with the activities described therein. No objection was raised with respect to the Monitor's request, which is granted.

33 For the foregoing reasons, the motion is granted and an order shall issue in the form requested, approving the Plan and providing certain ancillary relief.

Motion granted.

End of Document

TAB 17

Court File No. CV-16-11281-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE REGIONAL SENIOR	)	MONDAY, THE 12TH
	)	
JUSTICE MORAWETZ	)	DAY OF SEPTEMBER, 2016

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF GUESTLOGIX INC. AND GUESTLOGIX IRELAND LIMITED

PLAN SANCTION ORDER

THIS MOTION made by GuestLogix Inc. ("**GuestLogix**") for an Order (the "**Plan Sanction Order**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), sanctioning the Plan of Compromise and Arrangement dated July 29, 2016, which is attached as Schedule "A" hereto (and as it may be further amended, varied or supplemented from time to time in accordance with the terms thereof, the "**Plan**"), was heard on September 12, 2016 at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the Affidavit of John Gillberry sworn September 7, 2016, filed, the eighth report (the "**Eighth Report**") and the ninth report (the "**Ninth Report**") of PricewaterhouseCoopers Inc., in its capacity as monitor of GuestLogix (the "**Monitor**"), filed, and on hearing the submissions of counsel for each of GuestLogix, the Monitor, the Sponsor, and such other counsel as were present and wished to be heard, no one else appearing although duly served as appears from the affidavit of service, filed.

DEFINED TERMS

1. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Plan Sanction Order shall have the meanings ascribed to such terms in the Plan or the Meeting

Order granted by this Court on August 3, 2016 (the "**Meeting Order**"), as applicable, and that any capitalized terms not otherwise defined in paragraph 19 of this Plan Sanction Order shall have the meanings ascribed to them in the Claims Procedure Order.

SERVICE, NOTICE AND MEETING

2. **THIS COURT ORDERS** that the time for service of the Notice of Motion, the Motion Record in support of this motion and the Ninth Report be and are hereby abridged and validated so that the motion is properly returnable today and service upon any interested party other than those parties served is hereby dispensed with.

3. **THIS COURT ORDERS AND DECLARES** that the Meeting was duly convened and held on September 2, 2016 in conformity with the CCAA and the Meeting Order.

SANCTION OF THE PLAN

4. **THIS COURT DECLARES** that:

   (a) the Plan has been approved by the Required Majority of Affected Unsecured Creditors, as required by the Meeting Order and in conformity with the CCAA;

   (b) the activities of GuestLogix have been in compliance with the provisions of the CCAA and the Orders of this Court granted in these CCAA proceedings (the "**Orders**");

   (c) the Court is satisfied that GuestLogix has not done or purported to do anything that is not authorized by the CCAA; and

   (d) the Plan and the transactions contemplated thereby are fair and reasonable.

5. **THIS COURT ORDERS AND DECLARES** that the Plan is hereby sanctioned and approved pursuant to section 6 of the CCAA.

PLAN IMPLEMENTATION

6. **THIS COURT ORDERS** that each of GuestLogix and the Monitor are authorized and directed to take all steps and actions, and do all things, necessary or appropriate to implement the Plan in accordance with its terms and to enter into, execute, deliver, complete, implement and consummate all of the steps, transactions, distributions, deliveries, allocations and agreements contemplated by the Plan. All payments and distributions to be made on behalf of GuestLogix to the Affected Unsecured Creditors pursuant to the Plan shall be made by the Monitor, and the Monitor shall allocate and distribute such payments in accordance with the Plan. Neither GuestLogix nor the Monitor shall incur any liability as a result of acting in accordance with the terms of the Plan and the Plan Sanction Order.

7. **THIS COURT ORDERS AND DECLARES** that, on the Plan Implementation Date, the Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby shall be deemed to be implemented, binding and effective in accordance with the provisions of the Plan, and the steps required to implement the Plan, including, without limitation, the release of all Affected Claims, Released Director/Officer Claims and Released Claims in accordance with the terms of the Plan, shall be deemed to occur and to take effect in the sequential order and at the times contemplated in the Plan, without any further act or formality, beginning at the Effective Time on the Plan Implementation Date.

8. **THIS COURT ORDERS** that TSX Trust Company, as Indenture Trustee, shall be and is hereby authorized to take all steps necessary to facilitate the implementation of the Plan in accordance with its terms, and such steps are hereby authorized, ratified and approved, including, without limitation:

   (a) the receipt of all amounts distributed from the Unsecured Creditors Distribution Pool on account of the Proven Distribution Claims of holders of the Debentures (the "**Debentureholder Distribution**");

(b) the conversion of the Debentureholder Distribution into Canadian currency at the exchange rate available to the Indenture Trustee; and

(c) the delivery of the Debentureholder Distribution, as the same may be converted into Canadian currency in accordance with (b) above, to the registered holders of the Debentures, for further distribution to beneficial holders of such Debentures as of a record date to be determined by AssetCo in consultation with the Monitor.

9. **THIS COURT ORDERS** that the Monitor is hereby authorized and directed to incorporate a new corporation ("**AssetCo**") pursuant to and in accordance with the Plan and shall hold the share of AssetCo in trust for the Affected Unsecured Creditors.

10. **THIS COURT ORDERS** that on the Plan Implementation Date, all Transferred Assets shall be transferred from GuestLogix to AssetCo together with any and all Encumbrances in respect of such Transferred Assets and any and all Affected Claims in respect of the Transferred Assets shall be fully, finally, irrevocably and forever released, waived, discharged, cancelled and barred on the Plan Implementation Date as against GuestLogix and the Directors and Officers pursuant to and in accordance with Section 5.3 of the Plan, provided that any litigation or enforcement process against GuestLogix for a non-monetary remedy in respect of any such Transferred Assets may be continued against (and in the name of) AssetCo (and, for greater certainty, not against GuestLogix). The style of cause of any such litigation or enforcement process in respect of such Transferred Assets shall be amended such that AssetCo, not GuestLogix, is the party named in the applicable litigation or enforcement process. GuestLogix, with the consent of the Monitor, shall be permitted to and shall transfer to AssetCo on or prior to the Plan Implementation Date an amount sufficient to provide for the costs associated with the liquidation and dissolution of AssetCo.

11. **THIS COURT ORDERS** that, from and after the Plan Implementation Date:

(a) AssetCo is a company to which the CCAA applies;

(b) AssetCo shall be added as an Applicant in these CCAA proceedings and any reference in any Order of this Court in respect of these CCAA proceedings to an

"Applicant" or the "Applicants" shall refer to AssetCo, *mutatis mutandis*, and for greater certainty, each of the Charges shall constitute a charge on the Property (as defined in the Initial Order) of AssetCo; and

(c) the name "GuestLogix Inc." shall be deleted from the within title of proceedings and replaced with the legal name of AssetCo.

12. **THIS COURT ORDERS** that the Monitor and the directors of AssetCo shall have no liability in connection with: (i) the incorporation of AssetCo; (ii) the holding of the share of AssetCo; (iii) any actions of AssetCo taken pursuant to, or in connection with the implementation of, the Plan; or (iv) any assignment into bankruptcy by AssetCo pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

13. **THIS COURT ORDERS** that, pursuant to section 6(2) of the CCAA, the Articles of GuestLogix shall be amended on the Plan Implementation Date in accordance with the provisions of, and as required to implement, the Plan. Any fractional Common Shares held by any holder of Common Shares immediately following the consolidation of the Common Shares referred to in section 5.5(f) of the Plan shall be cancelled without any liability, payment or other compensation in respect thereof and all Equity Interests (for greater certainty, not including any Common Shares that remain issued and outstanding immediately following the cancellation of fractional interests pursuant to section 5.5(g) of the Plan) shall be cancelled without any liability, payment or other compensation in respect thereof.

14. **THIS COURT ORDERS** that upon the satisfaction or waiver of the conditions precedent set out in Article 8 of the Plan in accordance with the terms of the Plan, as confirmed by the Company Advisors and the Sponsor Advisors in writing, and upon the Monitor being satisfied that adequate provision has been made for all Restructuring Costs, the Monitor is authorized and directed to deliver to counsel to GuestLogix and the Sponsor a certificate substantially in the form attached hereto as Schedule "B" (the "**Monitor's Certificate**") signed by the Monitor, certifying that the Plan Implementation Date has occurred and that the Plan is effective in accordance with its terms and the terms

of the Plan Sanction Order. The Monitor shall file the Monitor's Certificate with this Court as soon as practicable following the Plan Implementation Date.

15. **THIS COURT ORDERS** that, in accordance with the provisions of the Plan, each of the Charges shall be terminated, discharged and released on the Plan Implementation Date as against GuestLogix and all of its current and future assets, undertakings and properties of every nature and kind whatsoever and wherever situated, including all proceeds thereof.

16. **THIS COURT ORDERS** that upon the delivery of the Monitor's Certificate by the Monitor pursuant to paragraph 14 of this Plan Sanction Order: (i) this proceeding under the CCAA shall be and is hereby terminated in respect of GuestLogix and GuestLogix shall cease to be an Applicant in, or subject to, these CCAA proceedings; and (ii) for greater certainty, the stay of proceedings set out in paragraphs 15, 16 and 20 of the Initial Order in favour of GuestLogix and the Directors and Officers, as such stay of proceedings has been amended and extended in these CCAA proceedings, is hereby terminated.

17. **THIS COURT ORDERS** that sections 95 to 101 of the BIA and any other federal or provincial law relating to preferences, fraudulent conveyances or transfers at undervalue, shall not apply to the Plan or to any transactions and distributions implemented pursuant to the Plan.

EFFECT OF PLAN AND CCAA ORDERS

18. **THIS COURT ORDERS** that, from and after the Plan Implementation Date, the Plan shall inure to the benefit of and be binding upon GuestLogix, the Released Parties, the Affected Creditors, the Directors and Officers, any Person with a Director/Officer Claim or a Released Claim, and all other Persons and parties named or referred to in or affected by the Plan, including, without limitation, their respective heirs, administrators, executors, legal representatives, successors, and assigns.

19. **THIS COURT ORDERS** that, save and except for any Claim that the Applicants, in consultation with the Monitor, have allowed in these CCAA proceedings, without limiting the provisions of the Claims Procedure Order, any Person that did not file a

Proof of Claim or a Notice of Dispute, as applicable, by the Prefiling Claims Bar Date, the Restructuring Claims Bar Date or such other bar date provided for in the Claims Procedure Order, as applicable, whether or not such Person received direct notice of the claims process established by the Claims Procedure Order, shall be and is hereby forever barred from making any Claim or any Director/Officer Claim and shall not be entitled to any consideration under the Plan, and such Person's Claim, as applicable, shall be and is hereby forever barred and extinguished.

20. **THIS COURT ORDERS AND DECLARES** that, subject to the performance by GuestLogix of its obligations under the Plan and except as provided in the Plan, all obligations, agreements, contracts or arrangements to which GuestLogix is a party on the Plan Implementation Date shall be and remain in full force and effect, unamended, as at the Plan Implementation Date, and no Person, including any party thereto, shall on or following the Plan Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise disclaim or resiliate its obligations or the interests of GuestLogix thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy (including any right to receive any change of control, assignment or similar payment) under or in respect thereof by reason: (i) of any event that occurred prior to the Plan Implementation Date; (ii) that GuestLogix was insolvent, or that GuestLogix sought or obtained relief or took steps as part of the Plan or under the CCAA; (iii) of any default, event of default or circumstance of non-compliance arising as a result of the financial condition or insolvency of GuestLogix on or prior to the Plan Implementation Date or these CCAA proceedings; (iv) of the effect upon GuestLogix of the completion of any of the transactions approved in these CCAA proceedings or contemplated by the Plan, including, without limitation, as a result of a change of control of GuestLogix, or (v) of any compromises, settlements, restructurings, recapitalizations or reorganizations effected pursuant to the Plan, including, without limitation, the compromise of the Claim of any Person with respect to a Retained Agreement.

THE MONITOR

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA and the powers provided to the Monitor herein and in the Orders and the Plan, shall be and is hereby authorized, directed and empowered to perform its functions and fulfill its obligations under the Plan to facilitate the implementation of the Plan.

22. **THIS COURT ORDERS** that the Monitor has satisfied all of its obligations up to and including the date of this Plan Sanction Order, and that: (i) in carrying out the terms of this Plan Sanction Order and the Plan including the obligations, duties and responsibilities (if any) described in this Plan Sanction Order, the Monitor shall have all the protections given to it by the CCAA, the Orders, and as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of this Plan Sanction Order and/or the Plan and in performing its duties as Monitor in these CCAA proceedings including the obligations, duties and responsibilities (if any) described in this Plan Sanction Order, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of GuestLogix and any information provided by GuestLogix without independent investigation; (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information, or with respect to any such information disclosed to or provided by the Monitor, including with respect to reliance thereon by any Person; and (v) the distributions delivered by the Monitor pursuant to the Plan are not delivered by the Monitor in its personal or corporate capacity and are delivered without personal or corporate liability of the Monitor, and, without limiting the foregoing, the Monitor shall have no obligations or liability in connection with any withholdings or deductions that any Person may assert should or should not have been made in connection with such distributions.

23. **THIS COURT ORDERS** that upon the delivery of the Monitor's Certificate by the Monitor pursuant to paragraph 14 of this Plan Sanction Order, the Monitor shall be

discharged and released from its duties in respect of GuestLogix other than those obligations, duties and responsibilities: (i) necessary or required to give effect to the terms of the Plan and this Plan Sanction Order, (ii) in relation to the claims procedure and all matters relating thereto as set out in the Claims Procedure Order, and (iii) in connection with the completion by the Monitor of all other matters for which it is responsible in connection with the Plan or pursuant to the Orders of this Court made in these CCAA proceedings.

BOARD OF DIRECTORS OF GUESTLOGIX

24. **THIS COURT ORDERS AND DECLARES** that those persons listed on a certificate to be filed with the Court by GuestLogix on or prior to the Plan Implementation Date shall be deemed to be appointed as the board of directors of GuestLogix on the Plan Implementation Date, provided that such certificate and the Persons listed thereon shall be subject to the prior written consent of the Sponsor. Concurrently with the appointment of such directors, all directors serving immediately prior to the Plan Implementation Date shall be deemed to resign (unless they are re-appointed in accordance with this paragraph).

EFFECT, RECOGNITION AND ASSISTANCE

25. **THIS COURT ORDERS** that GuestLogix and the Monitor may apply to this Court for advice and direction with respect to any matter arising from or under the Plan or this Plan Sanction Order.

26. **THIS COURT ORDERS** that this Plan Sanction Order shall have full force and effect in all provinces and territories of Canada and abroad as against all Persons and parties against whom it may otherwise be enforced.

27. **THIS COURT REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, or in any other foreign jurisdiction, to give effect to this Plan Sanction Order and the Plan or to assist GuestLogix, the Monitor and their respective agents in carrying out the terms of this Plan Sanction Order and the Plan. All courts, tribunals, regulatory and administrative bodies

are hereby respectfully requested to make such orders and to provide such assistance to GuestLogix and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Plan Sanction Order and the Plan, to grant representative status to the Monitor in any foreign proceeding, or to assist GuestLogix or the Monitor and their respective agents in carrying out the terms of this Plan Sanction Order and the Plan.

GENERAL

28. **THIS COURT ORDERS** that this Plan Sanction Order shall be posted on the Monitor's Website at http://www.pwc.com/ca/en/services/insolvency-assignments/guestlogix.html and is only required to be served upon the parties on the Service List and those parties who appeared at the hearing of the motion for this Plan Sanction Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

SEP 14 2016

PER / PAR:

Court File No. CV-16-11281-00CL

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 GUESTLOGIX INC. AND GUESTLOGIX IRELAND LIMITED

Applicants

PLAN OF COMPROMISE AND ARRANGEMENT

pursuant to the *Companies' Creditors Arrangement Act*
concerning, affecting and involving

GUESTLOGIX INC.

July 29, 2016

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PLAN OF COMPROMISE AND ARRANGEMENT

WHEREAS GuestLogix Inc. (the "**Company**") is a debtor company under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**");

AND WHEREAS the Company obtained protection under the CCAA pursuant to the First Amended and Restated Initial Order (the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated as of February 9, 2016 (the "**Filing Date**");

AND WHEREAS the Company files this plan of compromise and arrangement with the Court pursuant to the CCAA and hereby proposes and presents this plan of compromise and arrangement to the Unsecured Creditors Class (as defined below) under and pursuant to the CCAA.

ARTICLE 1
INTERPRETATION

1.1 Definitions

In the Plan, unless otherwise stated or unless the subject matter or context otherwise requires:

"**Affected Claim**" means any Claim that is not an Unaffected Claim and, for greater certainty includes any Affected Unsecured Claim and any Equity Claim.

"**Agreed Number**" means, with respect to the New Common Shares, that number of New Common Shares to be issued to the Sponsor on the Plan Implementation Date pursuant to the Plan as agreed to by the Company and the Sponsor.

"**Affected Creditor**" means any Creditor with an Affected Claim, but only with respect to and to the extent of such Affected Claim.

"**Affected Unsecured Claim**" means any Affected Claim against the Company that is not secured by a valid security interest over assets or property of the Company and is not an Equity Claim.

"**Affected Unsecured Creditor**" means any Creditor with an Affected Unsecured Claim against the Company.

"**Applicable Law**" means any law, statute, order, decree, judgment, rule, regulation, ordinance or other pronouncement having the effect of law whether in Canada or any other country, or any domestic or foreign state, county, province, city or other political subdivision of any Governmental Entity.

"**Articles**" means the articles of the Company.

"**Articles of Reorganization**" means the articles of reorganization of the Company to be filed pursuant to section 186 of the OBCA in accordance with section 5.5 hereof.

"**Assessments**" means Claims of her Majesty the Queen in Right of Canada or of any province, territory or municipality thereof or any other taxation authority in any Canadian or foreign jurisdiction, including, without limitation, amounts that have arisen or that may arise under any notice of assessment, notice of reassessment, notice of appeal, audit, adjustment, investigation, demand or similar request from any taxation authority and for greater certainty Assessments does not include any Government Priority Claim.

"**AssetCo**" means a new corporation to be incorporated pursuant to section 5.2 hereof.

"**Business Day**" means a day, other than Saturday and Sunday, on which banks are generally open for business in Toronto, Ontario.

"**CCAA**" has the meaning ascribed thereto in the recitals.

"**CCAA Proceeding**" means the proceeding commenced by the Company pursuant to the CCAA, identified by Court File No.CV-16-11281-00CL.

"**Charges**" means, collectively, the Administration Charge (as defined in the Initial Order), the Directors' Charge, the KERP Charge (as defined in the KERP Approval Order of the Court dated March 21, 2016), the KEIP Charge (as defined in the KEIP Approval Order of the Court dated March 21, 2016), and any other charges or security interests in respect of the assets, property or undertaking of the Company ordered or created by the Court in the CCAA Proceeding.

"**Certificate of Amendment**" means the certificate of amendment to be issued pursuant to section 186 of the OBCA in respect of the Articles of Reorganization.

"**Claim**" means:

(a) any right or claim of any Person against the Company or its assets, property or undertaking, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind whatsoever in existence on the Filing Date, and any interest accrued thereon or costs payable in respect thereof, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, unknown, by guarantee, by surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessment or CRA Claim and any right or ability of any Person to advance a claim for contribution or indemnity or otherwise against the Company with respect to any matter, action, cause or chose in action, but subject to any counterclaim, set-off or right of compensation in favour of the Company which may exist, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts that existed prior to the Filing Date and any other claims that would have been claims provable in bankruptcy had the Company become bankrupt on the Filing Date, including for greater certainty any Equity Claim and any claim against the Company for indemnification by any Director or Officer in respect of a Director/Officer Claim (but excluding any such claim for indemnification that is covered by the Directors' Charge);

(b) any right or claim of any Person against the Company in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the Company to such Person arising out of (A) the restructuring, disclaimer, resiliation, termination or breach by the Company on or after the Filing Date of any contract, lease, agreement (including an employee agreement) or arrangement whether written or oral, or (B) any other action taken by or omission of the Company on or after the Filing Date and includes, without limitation, any Assessment or CRA Claim; and

(c) any right or claim of any Person against one or more of the Directors and/or Officers howsoever arising, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessment or CRA Claim and any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, for which any Director or Officer is alleged to be, by statute or otherwise by law or equity, liable to pay in his or her capacity as a Director or Officer (each a "**Director/Officer Claim**", and collectively, the "**Director/Officer Claims**").

"**Claims Bar Date**" means the Prefiling Claims Bar Date or the Restructuring Claims Bar Date, as applicable, as defined in the Claims Procedure Order.

"**Claims Procedure Order**" means the Order by the Court under the CCAA granted April 29, 2016 establishing a claims procedure in respect of the Company, as same may be further amended, restated or varied from time to time.

"**Closing Payments**" means the amounts to be paid by the Company pursuant to the Plan or the Transaction Agreement on or prior to the Plan Implementation Date and includes, without limitation, any:

(a) Claim secured by any of the Charges;

(b) Post-Filing Claims;

(c) Transition Costs;

(d) all amounts in respect of Personnel pursuant to section 4.3(2) of the Transaction Agreement, to the extent that such amounts do not constitute Affected Claims, and for greater certainty all obligations to Personnel in respect of termination and severance pay as at the Closing Time shall constitute Affected Claims;

(e) without duplication, all Employee Priority Claims; and

(f) Government Priority Claims.

"**Common Shares**" means the common shares in the capital of the Company designated as common shares in the Articles of the Company.

"**Company Advisors**" means Thornton Grout Finnigan LLP, Wildeboer Dellelce LLP and Canaccord Genuity Corp.

"**Consolidation Ratio**" means, with respect to the Common Shares, the ratio by which Common Shares outstanding on the Plan Implementation Date at the relevant time (including, for the avoidance of doubt, any Common Shares that are Existing Shares and any Common Shares that are New Common Shares issued pursuant to the Plan) are consolidated pursuant to the Plan, as agreed by the Company and the Sponsor.

"**Court**" has the meaning ascribed thereto in the recitals.

"**CRA Claim**" means any Claim of the Her Majesty the Queen in Right of Canada, the Canada Revenue Agency or any other Person relating in any manner whatsoever to any failure by the Company and/or any Director or Officer to (i) comply with the *Excise Tax Act* or any Assessment, or (ii) charge, collect or remit goods and services tax and/or harmonized sales tax in accordance with the *Excise Tax Act* or any other Applicable Law with respect to goods and services tax or harmonized sales tax, including any Claim for interest, penalties, fines, charges, return of refunds or input tax credit or other amounts of any nature whatsoever and for greater certainty CRA Claim does not include any Government Priority Claim.

"**Creditor**" means any Person having a Claim, but only with respect to and to the extent of such Claim, including the transferee or assignee of a transferred Claim that is recognized as a Person having a Claim in accordance with the Claims Procedure Order or a trustee, executor, liquidator, receiver, receiver and manager or other Person acting on behalf of or through such Person.

"**Customer Prepayments**" has the meaning ascribed to it in the Transaction Agreement.

"**Debentureholders**" means the holders of the Debentures.

"**Debenture Obligations**" means all obligations, liabilities, indebtedness of, or Claims against, the Company under, arising out of or in connection with the Indenture or the Debentures.

"**Debentures**" means the 7% extendible convertible unsecured subordinated debentures due December 31, 2019 issued pursuant to the Indenture.

"**Director/Officer Claim**" has the meaning ascribed thereto within the definition of "**Claim**" above.

"**Directors**" means all current and former directors of the Company, in such capacity, and any person deemed to be a director or former director of the Company, and "**Director**" means any one of them.

"**Directors' Advisors**" means Osler, Hoskin & Harcourt LLP.

"**Directors' Charge**" has the meaning ascribed to it in the Initial Order.

"**Distribution Date**" means the date or dates from time to time set by the Monitor to effect distributions in respect of the Proven Distribution Claims, which date or dates may be on or after the Plan Implementation Date.

"**Effective Time**" means 12:01 a.m. (Toronto Time) on the Plan Implementation Date or such other time on such date as the Company may determine.

"**Employees**" means the present and former employees of the Company.

"**Employee Priority Claims**" means the following Claims of Employees of the Company:

(a) Claims equal to the amounts that such Employees would have been entitled to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* (Canada) if the Company had become bankrupt on the Filing Date; and

(b) Claims for wages, salaries, commissions or compensation for services rendered by such Employees after the Filing Date and on or before the Court sanctions this Plan together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the Company's business during the same period.

"**Encumbrance**" means any charge, mortgage, lien, pledge, hypothec, security interest or other encumbrance whether created or arising by agreement, statute or otherwise at law, attaching to property, interests or rights and shall be construed in the widest possible terms and principles known under the law applicable to such property, interests or rights and whether or not they constitute specific or floating charges as those terms are understood under the laws of the Province of Ontario.

"**Equity Claim**" means a Claim that meets the definition of "equity claim" in section 2(1) of the CCAA and includes, without limitation, any Claim relating to the alleged failure of the Company to comply with revenue recognition or other accounting policies applicable to the Company prior to the Filing Date, including without limitation any Claim asserted in the class action lawsuit commenced in the Ontario Superior Court of Justice, bearing court file number CV-16-545118-00CP, by Morganti Legal or any Proof of Claim filed in respect of such matters.

"**Equity Claimants**" means any Person with an Equity Claim, but only in such capacity.

"**Equity Interests**" has the meaning ascribed thereto in section 2(1) of the CCAA and includes the Existing Shares, any shareholder agreement in respect of the Existing Shares, the Existing Options and any other interest in or entitlement to shares in the capital of the Company, but, for greater certainty, does not include the New Common Shares issued on the Plan Implementation Date in accordance with the Plan.

"**Existing Options**" means any options, warrants, conversion privileges, puts, calls, subscriptions, exchangeable securities, restricted share units, share purchase programs or other rights, entitlements, agreements, arrangements or commitments (pre-emptive, contingent or otherwise) obligating the Company to issue, acquire or sell shares or units in the capital of the Company or to purchase any shares, units, securities, options or warrants, or any securities or obligations of any kind convertible into or exchangeable for shares or units in the capital of the Company, in each case that are existing or issued and outstanding immediately prior to the

Effective Time, including any options to acquire shares, units or other equity securities of the Company issued under the Stock Option Plans, any warrants exercisable for common shares, units or other equity securities of the Company, any put rights exercisable against the Company in respect of any shares, units, options, warrants or other securities, and any rights, entitlements or other claims of any kind to receive any other form of consideration in respect of any prior or future exercise of any of the foregoing.

"**Existing Shareholder**" means any Person who holds, is entitled to or has any rights in or to the Existing Shares or any shares in the authorized capital of the Company immediately prior to the Effective Time, but only in such capacity, and for greater certainty does not include any Person that is issued New Common Shares on the Plan Implementation Date.

"**Existing Shares**" means all shares in the capital of the Company that are issued and outstanding immediately prior to the Effective Time and, for greater certainty, does not include any New Common Shares issued on the Plan Implementation Date.

"**Filing Date**" has the meaning ascribed thereto in the recitals.

"**Final Order**" means any order, ruling or judgment of the Court, or any other court of competent jurisdiction, (i) that is in full force and effect; (ii) that has not been reversed, modified or vacated and is not subject to any stay; and (iii) in respect of which all applicable appeal periods have expired and any appeals therefrom have been finally disposed of, leaving such order, ruling or judgment wholly operable.

"**Government Priority Claim**" means all Claims of Governmental Entities against the Company in respect of amounts that are outstanding and that are of a kind that could be subject to a demand under:

(a) subsection 224(1.2) of the Tax Act;

(b) any provision of the *Canada Pension Plan* or the *Employment Insurance Act* that refers to subsection 224(1.2) of the Tax Act and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII. I of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum:

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Tax Act; or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial

legislation establishes a "provincial pension plan" as defined in that subsection.

"**Governmental Entity**" means any government, regulatory authority, governmental department, agency, commission, bureau, official, minister, Crown corporation, court, board, tribunal or dispute settlement panel or other law, rule or regulation-making organization or entity: (a) having or purporting to have jurisdiction on behalf of any nation, province, territory or state or any other geographic or political subdivision of any of them; or (b) exercising, or entitled or purporting to exercise, any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power.

"**Indenture**" means the indenture dated December 22, 2014 between the Company and the Indenture Trustee in connection with the issuance of the Debentures.

"**Indenture Trustee**" means Equity Financial Trust Company, as trustee in respect of the Debentures under the Indenture.

"**Individual Plan Entitlement**" means, with respect to each Affected Unsecured Creditor with a Proven Distribution Claim, its entitlement to receive its respective individual portion of the Unsecured Creditors Distribution Pool, the quantum of which entitlement shall be calculated as follows at the relevant time:

(A) the Proven Distribution Claim of such Affected Unsecured Creditor

divided by

(B) the total amount of all Proven Distribution Claims and Unresolved Claims of Affected Unsecured Creditors,

multiplied by

(C) the amount of the Unsecured Creditors Distribution Pool.

"**Initial Order**" has the meaning ascribed thereto in the recitals.

"**Insurance Policy**" means any insurance policy maintained by the Company pursuant to which the Company or any Director or Officer is insured.

"**Insured Claim**" means all or that portion of a Claim arising from a cause of action for which the applicable insurer or a court of competent jurisdiction has confirmed or may hereafter confirm that the Company or a Director or Officer is insured under an Insurance Policy, to the extent that such Claim, or portion thereof, is so insured.

"**Meeting Date**" means the date on which the Meeting is held in accordance with the Meeting Order.

"**Meeting**" means the meeting of Affected Unsecured Creditors having Proven Voting Claims or Unresolved Claims called for the purpose of considering and voting on this Plan in accordance with the terms of the CCAA and the Meeting Order.

"**Meeting Order**" means the Order of the Court pursuant to the CCAA that, among other things, authorizes the Company to hold the Meeting, as such Order may be amended, restated or varied from time to time.

"**Monitor**" means PricewaterhouseCoopers Inc., in its capacity as the Court-appointed monitor of the Company in the CCAA Proceeding.

"**New Common Shares**" means the new Common Shares to be issued pursuant to section 5.3 hereof.

"**OBCA**" means the *Business Corporations Act* (Ontario), R.S.O. 1990, c. B.16, as amended.

"Officers" means all current and former officers of the Company, in such capacity, and "**Officer**" means any one of them.

"**Order**" means any order of the Court made in connection with the CCAA Proceeding.

"**Person**" means any individual, partnership, limited partnership, joint venture, trust, corporation, unincorporated organization, government or agency or instrumentality thereof, or any other corporate, executive, legislative, judicial, regulatory or administrative entity howsoever designated or constituted, including, without limitation, any present or former shareholder, supplier, customer, employee, agent, client, contractor, lender, lessor, landlord, sub-landlord, tenant, sub-tenant, licensor, licensee, partner or advisor.

"**Personnel**" has the meaning ascribed thereto in the Transaction Agreement.

"**Plan**" means this Plan of Compromise and Arrangement filed by the Company pursuant to the CCAA, as it may be amended, supplemented or restated from time to time in accordance with the its terms.

"**Plan Implementation Date**" means the Business Day on which the Plan becomes effective, which shall be the Business Day on which the Monitor delivers the certificate pursuant to section 8.4 hereof stating that the Plan Implementation Date has occurred.

"**Post-Filing Claims**" means obligations, claims or indebtedness that were incurred by the Company after the Filing Date but before the Plan Implementation Date.

"**Proof of Claim**" has the meaning ascribed thereto in the Claims Procedure Order.

"**Proven Distribution Claim**" means an Affected Unsecured Claim finally determined, settled or accepted for distribution purposes in accordance with the provisions of the Claims Procedure Order, the Meeting Order and this Plan, as applicable.

"**Proven Voting Claim**" means an Affected Unsecured Claim finally determined, settled or accepted for voting purposes in accordance with the provisions of the Claims Procedure Order, the Meeting Order and this Plan, as applicable.

"**Released Claims**" means any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, orders, including for

injunctive relief or specific performance and compliance orders, expenses, executions, Encumbrances and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature, including claims for contribution or indemnity, whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act, omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence: (i) existing or taking place on or prior to the Plan Implementation Date that constitute or are in any way relating to, arising out of or in connection with any Claims, any Director/Officer Claims and any indemnification obligations with respect thereto, any Equity Claims, the Debentures, the Indenture, the Debenture Obligations, the Equity Interests, the Stock Option Plans, the New Common Shares, the Individual Plan Entitlement, the business and affairs of the Company whenever or however conducted, the administration and/or management of the Company, the Restructuring, the Plan, the CCAA Proceeding, or any document, instrument, matter or transaction involving the Company taking place in connection with the Restructuring or the Plan; or (ii) existing or taking place on or prior to the date on which actions are taken to implement the Plan and that arise out of those actions taken to implement the Plan,

"**Released Director/Officer Claim**" means any Director/Officer Claim that is released pursuant to section 6.1.

"**Released Party**" and "**Released Parties**" have the meaning ascribed thereto in section 6.1.

"**Required Majority**" means with respect to the Unsecured Creditors Class, a majority in number of Affected Unsecured Creditors with Proven Voting Claims representing at least two thirds in value of the Proven Voting Claims of Affected Unsecured Creditors, in each case who are entitled to vote at the Meeting in accordance with the Meeting Order and who are present and voting in person or by proxy on the resolution approving the Plan at the Meeting.

"**Restructuring**" means the transactions contemplated by the Plan and the Transaction Agreement.

"**Restructuring Costs**" means the administrative costs incurred in connection with the implementation and completion of the Restructuring, the Plan and the CCAA Proceeding whether payable prior to, on or after the Plan Implementation Date, including, without limitation, any amount that is reserved to address the reasonable fees and expenses of the Company Advisors, the Directors' Advisors, the Monitor and the Monitor's counsel following the Plan Implementation Date.

"**Sanction Order**" means the Order of the Court sanctioning and approving the Plan.

"**Sponsor**" means GXI Acquisition Corp.

"**Sponsor Advisors**" means Goodmans LLP.

"**Stock Option Plans**" means any options plans, stock-based compensation plans or other obligations of the Company in respect of shares, options or warrants for equity in the Company, in each case as such plans or other obligations may be amended, restated or varied from time to time in accordance with the terms thereof.

"**Tax Act**" means the *Income Tax Act* (Canada), as amended.

"**Total Proceeds**" means the aggregate amount of cash, cash equivalents and marketable securities held by the Company on the Plan Implementation Date, but excluding all Customer Prepayments.

"**Transaction Agreement**" means the agreement dated as of June 30, 2016 between the Company and the Sponsor and approved by the Court pursuant to the Transaction Approval and Vesting Order dated July 13, 2016, as such agreement may be or has been amended or modified from time to time.

"**Transferred Assets**" means all right, title and interest of the Company in and to the assets, property and undertaking listed on Schedule A hereto.

"**Transition Costs**" means, collectively, the Cure Costs, Assignment Fees and Consent Fees (each as defined in the Transaction Agreement) payable by the Company on or prior to the Plan Implementation Date pursuant to the terms of the Transaction Agreement.

"**Unaffected Claim**" means any:

(g) Claim secured by any of the Charges;

(h) Insured Claim;

(i) Claim in respect of Customer Prepayments;

(j) Post-Filing Claims;

(k) Transition Costs;

(l) Employee Priority Claims;

(m) Government Priority Claims; and

(n) Claim that is not permitted to be compromised pursuant to section 19(2) or 5.1(2) of the CCAA.

"**Unaffected Creditor**" means a Creditor who has an Unaffected Claim, but only in respect of and to the extent of such Unaffected Claim.

"**Undeliverable Distribution**" has the meaning ascribed thereto in section 4.6 hereof.

"**Unresolved Claim**" means any Affected Unsecured Claim or any Proof of Claim that is, at the relevant time, in dispute for voting and/or distribution purposes pursuant to the Claims Procedure Order.

"**Unresolved Claims Reserve**" means cash reserved from the Total Proceeds and held in one or more separate non-interest bearing accounts, in the aggregate amount sufficient to pay each holder of an Unresolved Claim the lesser of: (a) the amount of cash that such holder would have

been entitled to receive under this Plan if such Unresolved Claim had been a Proven Distribution Claim on the Plan Implementation Date; and (b) such amount as the Court may otherwise determine.

"**Unsecured Creditors Class**" means a class of Persons consisting of those Affected Unsecured Creditors having Proven Voting Claims established in accordance with Article 3 hereof.

"**Unsecured Creditors Distribution Pool**" means, collectively, the Total Proceeds, less:

(a) Restructuring Costs as determined by the Monitor; and

(b) without duplication, all amounts required to pay the Closing Payments and to discharge all Claims with respect thereto.

1.2 Certain Rules of Interpretation

For the purposes of the Plan:

(a) any reference in the Plan to a contract, instrument, release, indenture or other agreement or document being in a particular form or on particular terms and conditions means that such document shall be substantially in such form or substantially on such terms and conditions;

(b) any reference in the Plan to an Order or an existing document or exhibit filed or to be filed means such Order, document or exhibit as it may have been or may be amended, modified, or supplemented;

(c) unless otherwise specified, all references to currency are in United States dollars;

(d) the division of the Plan into "articles" and "sections" and the insertion of a table of contents are for convenience of reference only and do not affect the construction or interpretation of the Plan, nor are the descriptive headings of "articles" and "sections" intended as complete or accurate descriptions of the content thereof;

(e) the use of words in the singular or plural, or with a particular gender, including a definition, shall not limit the scope or exclude the application of any provision of the Plan or a schedule hereto to such Person (or Persons) or circumstances as the context otherwise permits;

(f) the words "includes" and "including" and similar terms of inclusion shall not, unless expressly modified by the words "only" or "solely", be construed as terms of limitation, but rather shall mean "includes but is not limited to" and "including but not limited to", so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive;

(g) unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean Eastern Time and any reference to an event

occurring on a Business Day shall mean prior to 5:00 p.m. (Toronto Time) on such Business Day;

(h) unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day;

(i) unless otherwise provided, any reference to a statute or other enactment of parliament or a legislature includes all regulations made thereunder, all amendments to or re-enactments of such statute or regulations in force from time to time, and, if applicable, any statute or regulation that supplements or supersedes such statute or regulation; and

(j) references to a specified "article" or "section" shall, unless something in the subject matter or context is inconsistent therewith, be construed as references to that specified article or section of the Plan, whereas the terms "the Plan", "hereof", "herein", "hereto", "hereunder" and similar expressions shall be deemed to refer generally to the Plan and not to any particular "article", "section" or other portion of the Plan and include any documents supplemental hereto.

1.3 Successors and Assigns

The Plan shall be binding upon and shall enure to the benefit of the heirs, administrators, executors, legal personal representatives, successors and assigns of any Person or party directly or directly named or referred to in or subject to the Plan.

1.4 Governing Law

The Plan shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. All questions as to the interpretation of or application of the Plan and all proceedings taken in connection with the Plan and its provisions shall be subject to the jurisdiction of the Court.

1.5 Schedules

The following are the Schedules to the Plan, which are incorporated by reference into the Plan and form a part of it:

Schedule A	Transferred Assets

ARTICLE 2
PURPOSE AND EFFECT OF THE PLAN

2.1 Purpose

The purpose of the Plan is:

(a) to implement a recapitalization of the Company;

(b) to provide for a settlement of, and consideration for, all Affected Claims;

(c) to effect a release and discharge of all Affected Claims and other Released Claims; and

(d) to ensure the continuation of the Company,

in the expectation that the Persons who have an economic interest in the Company will derive a greater benefit from the implementation of the Plan than they would derive from any other alternative in respect of the Company.

2.2 Persons Affected

The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Affected Claims and a recapitalization of the Company. The Plan will become effective at the Effective Time in accordance with its terms and in the sequence set forth in section 5.4 and shall be binding on and enure to the benefit of the Company, the Affected Creditors, the Released Parties and all other Persons directly or indirectly named or referred to in or subject to Plan.

2.3 Persons Not Affected

The Plan does not affect the Unaffected Creditors, subject to the express provisions hereof providing for the treatment of Insured Claims. Nothing in the Plan shall affect the Company's rights and defences, both legal and equitable, with respect to any Unaffected Claims including all rights with respect to legal and equitable defences or entitlements to set-offs or recoupments against such Unaffected Claims.

ARTICLE 3
CLASSIFICATION AND TREATMENT OF CREDITORS AND RELATED MATTERS

3.1 Claims Procedure

The procedure for determining the validity and quantum of the Affected Claims for voting and distribution purposes under the Plan shall be governed by the Claims Procedure Order, the Meeting Order, the CCAA, the Plan and any further Order of the Court.

3.2 Classification of Creditors

In accordance with the Meeting Order, there shall be one class of Creditors for the purpose of considering and voting on this Plan, being the Unsecured Creditors Class.

Equity Claimants shall not receive any consideration or distributions under this Plan and shall not be entitled to vote on this Plan at the Meeting.

3.3 Meeting

The Meeting shall be held in accordance with the Meeting Order and any further Order of the Court. The only Persons entitled to attend and vote at the Meeting are those specified in the Meeting Order.

3.4 Unaffected Claims

(a) Unaffected Claims shall not be compromised, released, discharged, cancelled or barred by the Plan.

(b) Except to the extent that an Unaffected Claim is satisfied by the payment of a Closing Payment pursuant to section 5.4(a) hereof, Unaffected Creditors will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims. Unaffected Creditors shall not be entitled to vote on the Plan at the Meeting in respect of their Unaffected Claims.

(c) Notwithstanding anything to the contrary in the Plan, Insured Claims shall not be compromised, released, discharged, cancelled or barred by the Plan, provided that from and after the Plan Implementation Date, any Person having an Insured Claim shall be irrevocably limited to recovery in respect of such Insured Claim solely from the proceeds of the applicable Insurance Policies, and Persons with any Insured Claims shall have no right to, and shall not, directly or indirectly, seek any recoveries from any Person, including the Company, the Directors or Officers or any other Released Party, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable Insurance Policies. This section 3.4(c) may be relied upon and raised or pled by the Company, a Director, an Officer or any other Released Party in defence or estoppel of or to enjoin any claim, action or proceeding brought in contravention of this section. Nothing in the Plan shall prejudice, compromise, release or otherwise affect any right or defence of any insurer in respect of an Insurance Policy or any insured in respect of an Insured Claim.

3.5 Unresolved Claims

(a) Any Affected Unsecured Creditor with an Unresolved Claim shall not be entitled to receive any distribution hereunder with respect to such Unresolved Claim unless and until such Claim becomes a Proven Distribution Claim.

(b) An Unresolved Claim shall be resolved in the manner set out in the Claims Procedure Order. Distributions pursuant to section 4.2 hereof shall be made in

respect of any Unresolved Claim that is finally determined to be a Proven Distribution Claim in accordance with the Claims Procedure Order.

(c) On the date that all Unresolved Claims have been finally resolved in accordance the Claims Procedure Order, the Monitor shall release all remaining cash, if any, from the Unresolved Claims Reserve and shall distribute such cash to the Affected Unsecured Creditors with Proven Distribution Claims in accordance with section 4.2(b) hereof.

3.6 Director/Officer Claims

All Released Director/Officer Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date. Any Director/Officer Claim that is not a Released Director/Officer Claim will not be compromised, released, discharged, cancelled and barred. For greater certainty, any Claim of a Director or Officer against the Company for indemnification or contribution in respect of any Director/Officer Claim (other than any such claim for indemnification that is covered by the Directors' Charge) shall be treated for all purposes under the Plan as an Affected Claim that is compromised, released and discharged pursuant to the Plan.

3.7 Extinguishment of Claims

On the Plan Implementation Date, in accordance with the terms and in the sequence set forth in section 5.4 and in accordance with the provisions of the Sanction Order, the treatment of Affected Claims and Released Claims, in each case as set forth herein, shall be final and binding on the Company, all Affected Creditors and any Person having a Released Claim (and their respective heirs, executors, administrators, legal personal representatives, successors and assigns), and all Affected Claims and all Released Claims shall be fully, finally, irrevocably and forever released, discharged, cancelled and barred, and the Company and the Released Parties shall thereupon have no further obligation whatsoever in respect of the Affected Claims or the Released Claims; *provided that* nothing herein releases the Company or any other Person from their obligations to make distributions in the manner and to the extent provided for in the Plan and *provided further* that such discharge and release of the Company shall be without prejudice to the right of a Creditor in respect of an Unresolved Claim to prove such Unresolved Claim in accordance with the Claims Procedure Order so that such Unresolved Claim may become a Proven Distribution Claim that is entitled to receive consideration under section 4.2 hereof.

3.8 Guarantees and Similar Covenants

No Person who has a Claim under any guarantee, surety, indemnity or similar covenant in respect of any Claim that is compromised and released under the Plan or who has any right to claim over in respect of or to be subrogated to the rights of any Person in respect of a Claim that is compromised under the Plan shall be entitled to any greater rights than the Person whose Claim is compromised under the Plan.

3.9 Set-Off

The law of set-off applies to all Claims.

ARTICLE 4
PROVISIONS REGARDING DISTRIBUTIONS AND PAYMENTS

4.1 Treatment of Creditors

For purposes of this Plan, the Affected Unsecured Creditors shall receive the treatment provided in this Article 4 and, on the Plan Implementation Date, all Affected Claims will be compromised in accordance with the terms of this Plan.

4.2 Distributions to Affected Unsecured Creditors

(a) In accordance with the steps and sequence set forth in section 5.4, under the supervision of the Monitor, each Affected Unsecured Creditor having a Proven Distribution Claim shall become entitled to its Individual Plan Entitlement on the Plan Implementation Date without any further steps or actions by the Company, such Affected Unsecured Creditor or any other Person.

(b) On the applicable Distribution Date, the Monitor shall calculate the amount of the Unsecured Creditors Distribution Pool and the Individual Plan Entitlement to be paid to each applicable Affected Unsecured Creditor with a Proven Distribution Claim. The Monitor shall also calculate the amount of Unsecured Creditors Distribution Pool that is not to be distributed as a result of Unresolved Claims that remain outstanding, if any. The Monitor shall then distribute the applicable amount by way of cheque sent by prepaid ordinary mail, or in such other manner as the Monitor may determine, to each Affected Unsecured Creditor with a Proven Distribution Claim. With respect to any portion of the Unsecured Creditors Distribution Pool that is reserved in respect of Unresolved Claims, the Monitor shall segregate such amounts and hold such amounts in the Unresolved Claims Reserve.

4.3 Modifications to Distribution Mechanics

The Company and the Monitor shall be entitled to make such additions and modifications to the process for making distributions pursuant to the Plan as the Company and the Monitor deem necessary or desirable in order to achieve the proper distribution and allocation of consideration to be distributed pursuant to the Plan, and such additions or modifications shall not require an amendment to the Plan or any further Order of the Court, provided that any addition or modification to the process for making distributions pursuant to the Plan that affects the rights or interests of the Sponsor shall require the prior consent of the Sponsor.

4.4 Cancellations of Certificates and Notes

Following completion of the steps in the sequence set forth in section 5.4, all Debentures, notes, certificates, invoices and other instruments evidencing Affected Claims, Debenture Obligations or Equity Interests will not entitle any holder thereof to any compensation or participation other than as expressly provided for in the Plan and will be cancelled and will be null and void. Notwithstanding the foregoing, if and to the extent the Indenture Trustee is required to transfer consideration issued pursuant to this Plan to the Debentureholders, then the Indenture shall

remain in effect solely for the purpose of and to the extent necessary to: (i) allow the Indenture Trustee to make such distributions to the Debentureholders on the initial Distribution Date and each subsequent Distribution Date (if applicable); and (ii) maintain all of the protections the Indenture Trustee enjoys pursuant to the Indenture, including its lien rights with respect to any distributions under the Plan, until all distributions are made to the Debentureholders hereunder. For greater certainty, any and all obligations of the Company under and with respect to the Debentures and the Indenture, including the Debenture Obligations, shall be extinguished on the Plan Implementation Date and shall not continue beyond the Plan Implementation Date.

4.5 Currency

Unless specifically provided for in the Plan, all monetary amounts referred to in the Plan shall be denominated in United States dollars and, for the purposes of distributions under the Plan, Claims shall be denominated in United States dollars and all payments and distributions provided for in the Plan shall be made in United States dollars. Any Claims denominated in a foreign currency shall be converted to United States dollars at the Bank of Canada noon exchange rate in effect at the Filing Date.

4.6 Treatment of Undeliverable Distributions

If any Affected Unsecured Creditor's distribution under this Article 4 is returned as undeliverable or remains uncashed six months after mailing (an "**Undeliverable Distribution**"), no further distributions to such Creditor shall be made unless and until the Company or the Monitor is notified by such Affected Unsecured Creditor of such Affected Unsecured Creditor's current address, at which time all such distributions shall be made to such Affected Unsecured Creditor. All claims for Undeliverable Distributions must be made on or before the date that is six months following the final Distribution Date, after which date any entitlement with respect to such Undeliverable Distribution shall be forever discharged and forever barred, without any compensation therefor, notwithstanding any federal, state or provincial laws to the contrary. At such time, any Undeliverable Distributions shall be aggregated and if the aggregate of such Undeliverable Distributions is: (i) equal to or greater than $50,000, (x) such Undeliverable Distributions shall be paid to the Affected Unsecured Creditors with Proven Distribution Claims on a *pro rata* basis, provided that the Monitor shall not be required to make a distribution to an Affected Unsecured Creditor where such distribution would be less than $50 and (y) any amount remaining after the distribution described in the previous clause (x) shall be returned to the Company; or (ii) less than $50,000, all such Undeliverable Distributions shall be returned to the Company. Nothing contained in the Plan shall require the Company or the Monitor to attempt to locate any Person to whom a distribution is payable. No interest is payable in respect of an Undeliverable Distribution. Unless otherwise expressly agreed by the Monitor and the Company in writing, any distribution under the Plan on account of the Debentures shall be deemed made when delivered to the Indenture Trustee.

4.7 Recourse for Restructuring Costs and Closing Payments

In the event that any Restructuring Costs or Closing Payments arise or are payable following the Plan Implementation Date and sufficient funds to satisfy such amounts have not been specifically reserved pursuant to the terms of this Plan, such amounts shall be payable solely from the Unsecured Creditors Distribution Pool. For greater certainty, there shall be no recourse against

the Company for any Restructuring Costs or Closing Payments from and after the Effective Time and no Person shall have any claim, right or interest against the Company or its property, assets or undertaking from and after the Effective Time with respect to Restructuring Costs or Closing Payments.

4.8 Calculations

All amounts of consideration to be received hereunder will be calculated to the nearest cent ($0.01). All calculations and determinations made by the Monitor and/or the Company and agreed to by the Monitor for the purposes of the Plan, including, without limitation, the allocation of consideration, shall be conclusive, final and binding upon the Affected Creditors and the Company.

4.9 Taxes in respect of Distributions

Notwithstanding any other provision of this Plan, each Affected Unsecured Creditor that is to receive a distribution pursuant to this Plan will have sole and exclusive responsibility for the satisfaction and payment of any tax obligation imposed by any Governmental Authority (including income and other tax obligations) on account of such distribution.

To the extent that amounts are withheld or deducted from any distributions, payments or disbursements and paid over to the applicable taxing authority in accordance with Applicable Law, such withheld or deducted amounts shall be treated for all purposes of this Plan as having been paid to such Affected Unsecured Creditor. No gross-up or other adjustment will be made to any distributions to Affected Unsecured Creditors under this Plan on account of any amounts so deducted or withheld from any distribution.

ARTICLE 5
RESTRUCTURING

5.1 Corporate Actions

The adoption, execution, delivery, implementation and consummation of all matters contemplated under the Plan involving corporate actions of the Company will occur and be effective as of the Plan Implementation Date, and shall be deemed to be authorized and approved under the Plan and by the Court, where applicable, as part of the Sanction Order, in all respects and for all purposes without any requirement of further action by shareholders, directors or officers of the Company. All necessary approvals to take actions shall be deemed to have been obtained from the directors, officers or shareholders of the Company, as applicable, including the deemed passing by any class of shareholders of any resolution or special resolution and any shareholders' agreement or agreement between a shareholder and another Person limiting in any way the right to vote shares held by such shareholder or shareholders with respect to any of the steps contemplated by the Plan shall be deemed to have no force or effect.

5.1 AssetCo

AssetCo shall be incorporated prior to the Plan Implementation Date and shall not be an affiliate of the Company. At the time that AssetCo is incorporated, AssetCo shall issue one common share to a shareholder that is not an affiliate of the Company prior to the Plan Implementation

Date, as the sole shareholder of AssetCo. The Company shall have no liability whatsoever for any liability or obligation of AssetCo.

5.2 Transfer of Transferred Assets to AssetCo

(a) On the Plan Implementation Date, immediately prior to the initiation of the sequence of steps and transactions referred to in section 5.4 hereof, all Transferred Assets shall be transferred to AssetCo together with (and, for greater certainty, not free and clear of) any and all Encumbrances in respect of such Transferred Assets. Any and all Affected Claims in respect of the Transferred Assets shall be fully, finally, irrevocably and forever released, waived, discharged, cancelled and barred on the Plan Implementation Date as against the Company, the Directors and the Officers, provided that any litigation or enforcement process against the Company for a non-monetary remedy in respect of any such Transferred Assets may be continued against (and in the name of) AssetCo (and, for greater certainty, not against the Company). The style of cause of any such litigation or enforcement process in respect of such Transferred Assets shall be amended such that AssetCo, not the Company, is the party named in the applicable litigation or enforcement process.

(b) The Company, with the consent of the Monitor, shall be permitted to transfer to AssetCo prior to the Plan Implementation Date an amount sufficient to provide for the costs associated with the liquidation and dissolution of AssetCo.

5.3 New Common Shares

On the Plan Implementation Date, in the sequence set forth in section 5.4 and under the supervision of the Monitor, the Company shall issue the Agreed Number of New Common Shares to the Sponsor in exchange for the payment by the Sponsor of the Subscription Price (as defined in the Transaction Agreement) pursuant to the terms of the Transaction Agreement.

5.4 Sequence of Plan Implementation Date Transactions

The following steps, compromises and releases to be effected in the implementation of the Plan shall occur, and be deemed to have occurred, in the following order in five minute increments (unless otherwise noted), without any further act or formality on the Plan Implementation Date beginning at the Effective Time:

(a) the Company shall pay, or cause to be paid, all Closing Payments;

(b) all Existing Options shall be cancelled and terminated without any liability, payment or other compensation in respect thereof;

(c) the Stock Option Plans shall be terminated;

(d) each Affected Unsecured Creditor with a Proven Distribution Claim shall become entitled to its Individual Plan Entitlement (as it may be adjusted based on the final determination of Unresolved Claims in the manner set forth herein) in full consideration for the irrevocable, final and full compromise, satisfaction and

release of such Affected Unsecured Creditor's Affected Unsecured Claim, and each such Affected Unsecured Creditor shall be entitled to receive a distribution from the Unsecured Creditors Distribution Pool for its Individual Plan Entitlement in accordance with this Plan on the Distribution Date;

(e) upon receipt by the Monitor of the Closing Cash Payment (as defined in the Transaction Agreement), the Company shall issue to the Sponsor the Agreed Number of New Common Shares;

(f) the Articles shall be altered to, among other things, (i) consolidate the issued and outstanding Common Shares (including, for the avoidance of doubt, Common Shares that are Existing Shares and New Common Shares issued pursuant to section 5.4(e)) on the basis of the Consolidation Ratio; and (ii) provide for such additional changes to the rights and conditions attached to the Common Shares as may be agreed to by the Company and the Sponsor;

(g) any fractional Common Shares held by any holder of Common Shares immediately following the consolidation of the Common Shares referred to in section 5.4(f) shall be cancelled without any liability, payment or other compensation in respect thereof, and the Articles shall be altered as necessary to achieve such cancellation;

(h) all Equity Interests (for greater certainty, not including any New Common Shares that remain issued and outstanding immediately following the cancellation of fractional interests in section 5.4(g)) shall be cancelled and extinguished without any liability, payment or other compensation in respect thereof and all Equity Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred without any liability, payment or other compensation in respect thereof;

(i) subject only to section 4.4 hereof, the Debentures, the Indenture and all Debenture Obligations shall be deemed to be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred;

(j) all Affected Claims remaining after the step referred to in section 5.4(i) shall be fully, finally, irrevocably and forever compromised, released, discharged cancelled and barred without any liability, payment or other compensation in respect thereof;

(k) any right of indemnity or contribution of a Director, Officer or Employee against the Company of any nature whatsoever (whether pursuant to a written contract or agreement or otherwise, and whether present or future or known or unknown) shall be fully, finally, irrevocably and forever terminated, extinguished, compromised, released, discharged, cancelled and barred without any liability, payment or other compensation in respect thereof and each Director, Officer or Employee shall be permanently barred, estopped, stayed and enjoined, on and after the Plan Implementation Date, from asserting any such right of indemnity or contribution against the Company;

(l) all current Directors shall be deemed to have resigned from the board of directors of the Company, and the Persons named on a certificate to be filed with the Court by the Company on or prior to the Plan Implementation Date shall be appointed to the board of directors of the Company; and

(m) the releases set forth in Article 6 shall become effective.

5.5 Application of Sections 95 to 101 of the *Bankruptcy and Insolvency Act*

Sections 95 to 101 of the *Bankruptcy and Insolvency Act* (Canada) shall not apply to any of the transactions implemented pursuant to this Plan.

5.6 Amendment of the Articles

The steps described in sub-sections (f), (g) and (l) of section 5.4 will be implemented pursuant to section 6(2) of the CCAA and shall constitute a valid amendment of the Articles pursuant to the OBCA, including pursuant to section 186 of the OBCA. Without limiting the generality of the foregoing, the Company shall file, prior to the Plan Implementation Date, Articles of Reorganization on terms providing that the Articles will become effective, and the Certificate of Amendment will be issued, on the Plan Implementation Date.

5.7 Issuances Free and Clear

Any issuance of any consideration pursuant to the Plan will be free and clear of any Encumbrances.

5.8 Stated Capital

For purposes of the OBCA, the aggregate stated capital of the New Common Shares issued pursuant to the Plan shall be determined by the new board of directors of the Company appointed pursuant to the Plan Sanction Order.

5.9 No Exercise of Right or Remedy

Subject to the performance by the Company of its obligations under the Plan and except as provided in the Plan, all obligations, agreements, contracts or arrangements to which the Company is a party on the Plan Implementation Date shall be and remain in full force and effect, unamended, as at the Plan Implementation Date and no Person, including any party thereto, shall on or following the Plan Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform, cancel or otherwise disclaim or resiliate its obligations or the Company's interests thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy (including any right to receive any change of control, assignment or similar payment) under or in respect thereof by reason:

(a) of any event that occurred prior to the Plan Implementation Date;

(b) that the Company is or was insolvent, or that the Company sought or obtained relief or took steps as part of the Plan or under the CCAA;

(c) of any default, event of default or circumstance of non-compliance arising as a result of the financial condition or insolvency of the Company or the CCAA Proceeding;

(d) of the effect upon the Company of the completion of any of the transactions approved in the CCAA Proceeding or contemplated by the Plan, including, without limitation, as a result of a change of control of the Company; or

(e) of any compromises, settlements, restructurings, recapitalizations or reorganizations effected pursuant to the Plan, including, without limitation, the compromise of the Claim of any Person with respect to a Retained Agreement (as defined in the Transaction Agreement).

ARTICLE 6
RELEASES

6.1 Plan Releases

On the Plan Implementation Date, in accordance with the sequence set forth in section 5.4, the Company, the Company' present and former employees and contractors, the Directors and Officers, the Company Advisors, the Directors' Advisors, the Monitor, the Monitor's counsel, the Sponsor and the Sponsor Advisors and each and every present and former shareholder, affiliate, subsidiary, director, officer, partner, employee, auditor, financial advisor, legal counsel and agent of any of the foregoing Persons referred to in this section 6.1 (each of such Persons referred to in this section 6.1, in their capacity as such, being herein referred to individually as a "**Released Party**" and all referred to collectively as "**Released Parties**") shall be released and discharged from any and all Released Claims, and all Released Claims shall be deemed to be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, all to the fullest extent permitted by Applicable Law, provided that nothing herein will waive, discharge, release, cancel or bar (a) the right to enforce the Company' obligations under the Plan, (b) the Company from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA or (c) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

6.2 Limitation on Insured Claims

Notwithstanding anything to the contrary in section 6.1 and 6.3, Insured Claims shall not be compromised, released, discharged, cancelled or barred by the Plan, provided that from and after the Plan Implementation Date, any Person having an Insured Claim shall be irrevocably limited to recovery in respect of such Insured Claim solely from the proceeds of the applicable Insurance Policies, and Persons with an Insured Claim shall have no right to, and shall not, directly or indirectly, seek any recoveries in respect thereof from the Company, any Director or Officer or any other Released Party, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable Insurance Policies.

6.3 Injunctions

All Persons are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any and all Released Claims, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any of the Released Parties; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against any of the Released Parties or their property; (iii) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or their property; or (iv) taking any actions to interfere with the implementation or consummation of the Plan; provided, however, that the foregoing shall not apply to the enforcement of any obligations under the Plan.

For greater certainty, the provisions of this section 6.3 shall apply to Insured Claims in the same manner as Released Claims, except to the extent that the rights of such Persons to pursue such Insured Claims against an insurer in respect of an Insurance Policy are expressly preserved pursuant to section 3.4(c) and section 6.2, and provided further that, notwithstanding the restrictions on making a claim that are set forth in sections 3.4(c) and 6.2, any claimant in respect of an Insured Claim that was duly filed with the Monitor by the Claims Bar Date shall be permitted to pursue the litigation in respect thereof to the extent necessary solely for the purpose of preserving such claimant's ability to pursue such Insured Claim against an insurer in respect of an Insurance Policy in the manner authorized pursuant to section 3.4(c) and section 6.2.

ARTICLE 7
COURT SANCTION

7.1 Application for Sanction Order

If the Required Majority of the Affected Unsecured Creditors in the Unsecured Creditors Class approves the Plan, the Company shall apply for the Sanction Order on or before the date required pursuant to the Transaction Agreement.

7.2 Sanction Order

Subject to Section 7.1 hereof, the Company shall seek a Sanction Order that, among other things:

(a) declares that (i) the Plan has been approved by the Required Majority of Affected Unsecured Creditors in the Unsecured Creditors Class in conformity with the CCAA; (ii) the activities of the Company have been in reasonable compliance with the provisions of the CCAA and the Orders of the Court made in this CCAA Proceeding in all respects; (iii) the Court is satisfied that the Company has not done or purported to do anything that is not authorized by the CCAA; and (iv) the Plan, the Restructuring and the transactions contemplated thereby are fair and reasonable;

(b) declares that as of the Effective Time, the Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected

thereby are approved pursuant to section 6 of the CCAA, and are binding and effective as herein set out upon and with respect to the Company, all Affected Creditors, the Directors and Officers, any Person with a Director/Officer Claim, any Person with an Equity Claim, the Released Parties and all other Persons named or referred to in or subject to Plan;

(c) declares that the steps to be taken and the compromises and releases to be effective on the Plan Implementation Date are deemed to occur and be effected in the sequential order contemplated by section 5.4 on the Plan Implementation Date, beginning at the Effective Time;

(d) declares that all obligations, agreements, contracts or arrangements to which the Company is a party on the Plan Implementation Date shall be and remain in full force and effect, unamended, as at the Plan Implementation Date and prohibits the exercise by any Person of any right or remedy that is prohibited pursuant to section 5.9;

(e) authorizes and gives effect to the transfer of the Transferred Assets to AssetCo pursuant to section 5.2;

(f) authorizes the Monitor to perform its functions and fulfil its obligations under the Plan to facilitate the implementation of the Plan;

(g) subject to payment of any amounts secured thereby, declares that each of the Charges shall be terminated, discharged and released upon a filing of the Monitor of a certificate confirming the termination of the CCAA Proceedings;

(h) declares that the Company and the Monitor may apply to the Court for advice and direction in respect of any matters arising from or under the Plan; and

(i) declares that the Persons to be appointed to the boards of directors of the Company on the Plan Implementation Date shall be the Persons named on a certificate to be filed with the Court by the Company on or prior to the Plan Implementation Date.

ARTICLE 8
CONDITIONS PRECEDENT AND IMPLEMENTATION

8.1 Conditions Precedent in Favour of the Company

The implementation of the Plan shall be conditional upon satisfaction of the following conditions prior to or at the Effective Time, each of which is for the benefit of the Company and may be waived only by the Company:

(a) the conditions precedent in favour of the Company set forth in section 7.2 of the Transaction Agreement shall have been satisfied or waived.

8.2 Conditions Precedent in Favour of the Sponsor

The implementation of the Plan shall be conditional upon satisfaction of the following conditions prior to or at the Effective Time, each of which is for the benefit of the Sponsor and may be waived only by the Sponsor:

(a) the conditions precedent in favour of the Sponsor set forth in section 7.1 of the Transaction Agreement shall have been satisfied or waived;

(b) any and all court-imposed charges on any assets, property or undertaking of the Company (including the Charges) shall have been discharged as at the Effective Time;

(c) all of the Closing Payments shall have been paid by the Company in full;

(d) the New Common Shares, when issued and delivered, shall be duly authorized, validly issued and fully paid and non-assessable and the issuance thereof shall be exempt from all prospectus and registration requirements of Applicable Laws;

(e) the terms of the New Common Shares shall be satisfactory to the Sponsor;

(f) all necessary filings in respect of the alteration of the Articles shall have been made on terms providing that they will become effective and the certificate of amendment will be issued pursuant to section 186 of the OBCA in accordance with and at the times set forth in section 5.4(f), 5.4(g) and 5.4(l); and

(g) the Sponsor shall be satisfied the Transferred Assets have been (or will be on the Plan Implementation Date) effectively transferred to AssetCo in accordance with section 5.2 hereof.

8.3 Conditions Precedent in Favour of the Company and the Sponsor

The implementation of the Plan shall be conditional upon satisfaction of the following conditions prior to or at the Effective Time, each of which is for the mutual benefit of the Company and the Sponsor and may be waived only by mutual agreement of the Company and the Sponsor:

(a) the conditions precedent in favour of the Company and the Sponsor in section 7.3 of the Transaction Agreement shall have been satisfied or waived;

(b) the Plan shall have been approved by the Required Majority of the Unsecured Creditors Class;

(c) all orders made and judgments rendered by any competent court of law, and all rulings and decrees of any competent regulatory body, agent or official in relation to the CCAA Proceeding, the Restructuring or the Plan shall be satisfactory to the Sponsor, acting reasonably, including all court orders made in relation to the Restructuring, and without limiting the generality of the foregoing:

(i) the Sanction Order shall have been made on terms acceptable to the Sponsor, acting reasonably, and it shall have become a Final Order; and

(ii) any other Order deemed necessary for the purpose of implementing the Restructuring shall have been made on terms acceptable to the Sponsor, acting reasonably, and any such Order shall have become a Final Order;

(d) all definitive agreements in respect of the Restructuring and the amended Articles, by-laws and other constating documents of the Company, and all definitive legal documentation in connection with all of the foregoing shall be in a form satisfactory to the Company and the Sponsor;

(e) all material agreements, consents and other documents relating to the Restructuring and the Plan shall be in form and in content satisfactory to the Company and the Sponsor, acting reasonably;

(f) all material filings under Applicable Laws shall have been made and any material regulatory consents or approvals that are required in connection with the Restructuring shall have been obtained and, in the case of waiting or suspensory periods, such waiting or suspensory periods shall have expired or been terminated;

(g) there shall not be in effect any preliminary or final decision, order or decree by a Governmental Entity, no application shall have been made to any Governmental Entity, and no action or investigation shall have been announced, threatened or commenced by any Governmental Entity, in consequence of or in connection with the Restructuring or the Plan that restrains, impedes or prohibits (or could reasonably be expected to restrain, impede or inhibit), the Restructuring or the Plan or any part thereof or requires or could reasonably be expected to require a variation of the Restructuring or the Plan; and

(h) all fees and expenses owing to the Company Advisors, the Directors' Advisors, the Monitor and the Monitor's counsel as of the Plan Implementation Date shall have been paid, and adequate provision shall have been made for all Restructuring Costs, including any fees and expenses of the Company Advisors, the Monitor and the Monitor's counsel, due or accruing due from and after the Plan Implementation Date.

8.4 Monitor's Certificate

Upon delivery of written notice from the Company Advisors and the Sponsor Advisors of the satisfaction or waiver of the conditions set out in sections 8.1, 8.2 and 8.3, and upon the Monitor being satisfied that adequate provision has been made for all Restructuring Costs, the Monitor shall forthwith deliver to counsel to the Company and the Sponsor a certificate stating that the Plan Implementation Date has occurred and that the Plan is effective in accordance with its terms and the terms of the Sanction Order. As soon as practicable following the Plan Implementation Date, the Monitor shall file such certificate with the Court.

ARTICLE 9
GENERAL

9.1 Binding Effect

The Plan will become effective on the Plan Implementation Date. On the Plan Implementation Date:

(a) the treatment of Affected Claims and Released Claims under the Plan shall be final and binding for all purposes and shall be binding upon and enure to the benefit of the Company, the Released Parties, all Affected Creditors, any Person having a Released Claim and all other Persons directly or indirectly named or referred to in or subject to the Plan and their respective heirs, executors, administrators and other legal representatives, successors and assigns;

(b) all Affected Claims shall be forever discharged and released;

(c) all Released Claims shall be forever discharged and released; and

(d) each Affected Creditor and each Person holding a Released Claim shall be deemed to have executed and delivered to the Company and to the Released Parties, as applicable, all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety.

9.2 Waiver of Defaults

From and after the Plan Implementation Date, all Persons shall be deemed to have waived any and all defaults of the Company then existing or previously committed by the Company, or caused by the Company, by any of the provisions in the Plan or steps or transactions contemplated in the Plan or the Restructuring, or any non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, expressed or implied, in any contract, instrument, by-law, article, credit document, indenture, note, lease, guarantee or agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Company, and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith shall be deemed to have been rescinded and of no further force or effect, provided that nothing shall be deemed to excuse the Company from performing its obligations under the Plan or be a waiver of defaults by the Company under the Plan and the related documents.

9.3 Deeming Provisions

In the Plan, the deeming provisions are not rebuttable and are conclusive and irrevocable.

9.4 Non-Consummation

Notwithstanding a prior approval given at the Meeting or the granting of the Sanction Order, at any time prior to the Effective Time, if the Transaction Agreement is terminated in accordance with its terms prior to the Plan Implementation Date, then: (a) the Plan shall be null and void in all respects, (b) any settlement or compromise embodied in the Plan and any document or

agreement executed pursuant to the Plan shall be deemed null and void, and (c) nothing contained in the Plan, and no acts taken in preparation for consummation of the Plan, shall (i) constitute or be deemed to constitute a waiver or release of any Claims by or against the Company or any other Person; (ii) prejudice in any manner the rights of the Company or any other Person in any further proceedings involving the Company; or (iii) constitute an admission of any sort by the Company or any other Person. For greater certainty, nothing in this section abrogates, derogates from or otherwise affects the terms of the Transaction Agreement.

9.5 Modification of the Plan

(a) The Company and the Sponsor reserve the right, at any time and from time to time, to amend, modify and/or supplement the Plan, provided that any such amendment, restatement, modification or supplement must be contained in a written document and (i) if made prior to or at the Meeting, is communicated to the Affected Unsecured Creditors attending the Meeting in person or by proxy by notice to the CCAA service list and the posting of the written document on the Monitor's website in respect of the CCAA Proceeding, and (ii) if made following the Meeting, is approved by the Court following notice to the Affected Creditors.

(b) Notwithstanding section 9.5(a), any amendment, restatement, modification or supplement may be made by the Company with the consent of the Sponsor and the Monitor and without further Court Order or approval, provided that it concerns a matter which, in the opinion of the Company, acting reasonably, is of an administrative nature required to better give effect to the implementation of the Plan and the Sanction Order or to cure any errors, omissions or ambiguities and is not materially adverse to the financial or economic interests of the Affected Creditors.

(c) Any amended, restated, modified or supplementary plan or plans of compromise or arrangement filed with the Court and, if required by this section, approved by the Court, shall, for all purposes, be and be deemed to constitute the Plan.

9.6 Paramountcy

From and after the Effective Time on the Plan Implementation Date, any conflict between:

(a) the Plan or any Order in the CCAA Proceeding; and

(b) the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed or implied, of any contract, mortgage, security agreement, indenture, trust indenture, note, loan agreement, by-law, article, commitment letter, agreement for sale, lease or other agreement, written or oral and any and all amendments or supplements thereto existing between one or more of the Affected Creditors and the Company as at the Plan Implementation Date or the notice of articles, articles or bylaws of the Company at the Plan Implementation Date,

will be deemed, subject to Section 9.4, to be governed by the terms, conditions and provisions of the Plan and the applicable Order, which shall take precedence and priority. Notwithstanding

anything to the contrary herein, the Plan shall not alter, modify, supersede or have paramountcy with respect to the Transaction Agreement.

9.7 Severability of Plan Provisions

If, prior to the Sanction Date, any term or provision of the Plan is held by the Court to be invalid, void or unenforceable, the Court, at the request of the Company and with the consent of the Monitor, shall have the power to either (a) sever such term or provision from the balance of the Plan and provide the Company with the option to proceed with the implementation of the balance of the Plan; (b) alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered or interpreted; or (c) cause the Company to withdraw the Plan. Provided that the Company proceed with the implementation of the Plan, then notwithstanding any such holding, alteration or interpretation, the remainder of the terms and provisions of the Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

9.8 Responsibilities of the Monitor

PricewaterhouseCoopers Inc. is acting in its capacity as Monitor in the CCAA Proceeding with respect to the Company, the CCAA Proceedings and this Plan and not in its personal or corporate capacity, and will not be responsible or liable for any obligations of the Company under the Plan or otherwise.

9.9 Different Capacities

Persons who are affected by the Plan may be affected in more than one capacity. Unless expressly provided to the contrary herein, a Person will be entitled to participate hereunder in each such capacity. Any action taken by a Person in one capacity will not affect such Person in any other capacity, unless expressly agreed by the Company and the Person in writing or unless its Claims overlap or are otherwise duplicative.

9.10 Notices

Any notice or other communication to be delivered hereunder must be in writing and reference the Plan and may, subject as hereinafter provided, be made or given by personal delivery, ordinary mail or by electronic transmission addressed to the respective parties as follows:

If to the Company:

GuestLogix Inc.
111 Peter Street, Suite 406
Toronto, Ontario M5V 2H1

Attention: John Gillberry
Email: jgillberry@guestlogix.com

with a copy to:

Thornton Grout Finnigan LLP
100 Wellington Street West, Suite 3200
Toronto, Ontario M5K 1K7

Attention: Robert Thornton and Rebecca Kennedy
Email: rthornton@tgf.ca / rkennedy@tgf.ca

If to an Affected Creditor, to the mailing address, facsimile address or email address provided on such Affected Creditor's Proof of Claim.

If to the Monitor:

PricewaterhouseCoopers Inc.
18 York Street, Suite 2600
Toronto, ON M5J 0B2

Attention: Greg Prince
Email gregory.n.prince@ca.pwc.com

with a copy to:

Norton Rose Fulbright LLP
200 Bay Street, P.O. Box 84
Toronto, ON M5J 2Z4

Attention: Evan Cobb
Email: evan.cobb@nortonrosefulbright.com

If to the Sponsor:

Stornoway Portfolio Management Inc.
30 St. Clair Avenue West
Toronto, Ontario M4V 3A1

Attention: Scott Reid
Email: sreid@stornowayportfolio.com

with a copy to:

Goodmans LLP
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

Attention: Robert J. Chadwick / Bradley Wiffen
Email: rchadwick@goodmans.ca / bwiffen@goodmans.ca

or to such other address as any party may from time to time notify the others in accordance with this section. Any such communication so given or made shall be deemed to have been given or made and to have been received on the day of delivery if delivered, or on the day of faxing or sending by other means of recorded electronic communication, provided that such day in either event is a Business Day and the communication is so delivered, faxed or sent before 5:00 p.m. (Toronto time) on such day; otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

9.11 Further Assurances

Each of the Persons directly or indirectly named or referred to in or subject to Plan will execute and deliver all such documents and instruments and do all such acts and things as may be necessary or desirable to carry out the full intent and meaning of the Plan and to give effect to the transactions contemplated herein.

DATED as of the 29th day of July, 2016.

SCHEDULE A

TRANSFERRED ASSETS

1. Any and all shares or equity interests, contingent or otherwise, owned or held by the Company in any subsidiary or affiliate, including, without limitation, all shares or equity interests owned by held by the Company in GuestLogix Asia Pacific Limited, GuestLogix Technologies Limited, GuestLogix USA Inc., and GuestLogix Ireland Limited.

2. Any and all Intercompany Claims (as defined in the Transaction Agreement) that constitute an asset of the Company in existence immediately prior to the Plan Implementation Date.

3. All Benefit Plans and Employee Plans and all assets attributed thereto, to the extent not treated as Retained Assets (as defined in the Transaction Agreement) for purposes of the Transaction Agreement.

4. Any other asset of the Company deemed to be an Excluded Asset (as defined in the Transaction Agreement) in existence immediately prior to the Plan Implementation Date.

Schedule "B"

Monitor's Certificate of Plan Implementation

Court File No. CV-16-11281-00CL

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 PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF GUESTLOGIX INC. AND GUESTLOGIX IRELAND LIMITED

CERTIFICATE OF PRICEWATERHOUSECOOPERS INC. AS THE COURT-APPOINTED MONITOR OF GUESTLOGIX INC. AND GUESTLOGIX IRELAND LIMITED

(Plan Implementation)

All capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Plan of Compromise and Arrangement concerning, affecting and involving GuestLogix Inc. ("**GuestLogix**") dated July 29, 2016 (the "**Plan**"), which is attached as Schedule "A" to the Plan Sanction Order of the Honourable Regional Senior Justice Morawetz made in these proceedings on September 12, 2016 (the "**Plan Sanction Order**"), as the Plan may be further amended, varied or supplemented from time to time in accordance with its terms.

Pursuant to Article 8.4 of the Plan and paragraph 14 of the Plan Sanction Order, PricewaterhouseCoopers Inc., in its capacity as the Court-appointed monitor of GuestLogix (the "**Monitor**"), delivers this certificate to counsel to GuestLogix (on behalf of GuestLogix) and to counsel to the Sponsor and hereby certifies, in reliance upon the written confirmation from the Company Advisors and the Sponsor Advisor and without independent investigation, that:

1. The Monitor has received written confirmation from the Company Advisors and the Sponsor Advisors that the conditions precedent set out in Article 8 of the Plan have been satisfied or waived, as applicable.

2. The Plan Implementation Date has occurred.

3. The Plan is effective in accordance with its terms and the terms of the Plan Sanction Order.

DATED at the City of Toronto, in the Province of Ontario, this _____ day of September, 2016.

PRICEWATERHOUSECOOPERS INC., in its capacity as Court-appointed Monitor of GuestLogix Inc.

By: _____

Name:

Title:

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF GUESTLOGIX INC. and GUESTLOGIX IRELAND LIMITED

Court File No.: CV-16-11281-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

PLAN SANCTION ORDER
(Returnable September 12, 2016)

Thornton Grout Finnigan LLP
Suite 3200, TD West Tower
100 Wellington Street West
P.O. Box 329, Toronto-Dominion Centre
Toronto, ON M5K 1K7

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Email: rkennedy@tgf.ca

Lawyers for the Applicants

TAB 18

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 AND ARRANGEMENT OF SINO-FOREST CORPORATION

APPLICANT

PLAN OF COMPROMISE AND REORGANIZATION

pursuant to the *Companies' Creditors Arrangement Act*
and the *Canada Business Corporations Act*
concerning, affecting and involving

SINO-FOREST CORPORATION

December 3, 2012

PLAN OF COMPROMISE AND REORGANIZATION

WHEREAS Sino-Forest Corporation ("**SFC**") is insolvent;

AND WHEREAS, on March 30, 2012 (the "**Filing Date**"), the Honourable Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granted an initial Order in respect of SFC (as such Order may be amended, restated or varied from time to time, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and the *Canada Business Corporation Act*, R.S.C. 1985, c. C-44, as amended (the "**CBCA**");

AND WHEREAS, on August 31, 2012, the Court granted a Plan Filing and Meeting Order (as such Order may be amended, restated or varied from time to time, the "**Meeting Order**") pursuant to which, among other things, SFC was authorized to file this plan of compromise and reorganization and to convene a meeting of affected creditors to consider and vote on this plan of compromise and reorganization.

NOW THEREFORE, SFC hereby proposes this plan of compromise and reorganization pursuant to the CCAA and CBCA.

ARTICLE 1
INTERPRETATION

1.1 Definitions

In the Plan, unless otherwise stated or unless the subject matter or context otherwise requires:

"**2013 Note Indenture**" means the indenture dated as of July 23, 2008, by and between SFC, the entities listed as subsidiary guarantors therein, and The Bank of New York Mellon, as trustee, as amended, modified or supplemented.

"**2014 Note Indenture**" means the indenture dated as of July 27, 2009, by and between SFC, the entities listed as subsidiary guarantors therein, and Law Debenture Trust Company of New York, as trustee, as amended, modified or supplemented.

"**2016 Note Indenture**" means the indenture dated as of December 17, 2009, by and between SFC, the entities listed as subsidiary guarantors therein, and The Bank of New York Mellon, as trustee, as amended, modified or supplemented.

"**2017 Note Indenture**" means the indenture dated as of October 21, 2010, by and between SFC, the entities listed as subsidiary guarantors therein, and Law Debenture Trust Company of New York, as trustee, as amended, modified or supplemented.

"**2013 Notes**" means the aggregate principal amount of US$345,000,000 of 5.00% Convertible Senior Notes Due 2013 issued pursuant to the 2013 Note Indenture.

"**2014 Notes**" means the aggregate principal amount of US$399,517,000 of 10.25% Guaranteed Senior Notes Due 2014 issued pursuant to the 2014 Note Indenture.

"**2016 Notes**" means the aggregate principal amount of US$460,000,000 of 4.25% Convertible Senior Notes Due 2016 issued pursuant to the 2016 Note Indenture.

"**2017 Notes**" means the aggregate principal amount of US$600,000,000 of 6.25% Guaranteed Senior Notes Due 2017 issued pursuant to the 2017 Note Indenture.

"**Accrued Interest**" means, in respect of any series of Notes, all accrued and unpaid interest on such Notes, at the regular rates provided in the applicable Note Indentures, up to and including the Filing Date.

"**Administration Charge**" has the meaning ascribed thereto in the Initial Order.

"**Administration Charge Reserve**" means the cash reserve to be established by SFC on the Plan Implementation Date in the amount of $500,000 or such other amount as agreed to by the Monitor and the Initial Consenting Noteholders, which cash reserve: (i) shall be maintained and administered by the Monitor, in trust, for the purpose of paying any amounts secured by the Administration Charge; and (ii) upon the termination of the Administration Charge pursuant to the Plan, shall stand in place of the Administration Charge as security for the payment of any amounts secured by the Administration Charge.

"**Affected Claim**" means any Claim, D&O Claim or D&O Indemnity Claim that is not: an Unaffected Claim; a Section 5.1(2) D&O Claim; a Conspiracy Claim; a Continuing Other D&O Claim; a Non-Released D&O Claim; or a Subsidiary Intercompany Claim, and "Affected Claim" includes any Class Action Indemnity Claim. For greater certainty, all of the following are Affected Claims: Affected Creditor Claims; Equity Claims; Noteholder Class Action Claims (other than the Continuing Noteholder Class Action Claims); and Class Action Indemnity Claims.

"**Affected Creditor**" means a Person with an Affected Creditor Claim, but only with respect to and to the extent of such Affected Creditor Claim.

"**Affected Creditor Claim**" means any Ordinary Affected Creditor Claim or Noteholder Claim.

"**Affected Creditors Class**" has the meaning ascribed thereto in section 3.2(a) hereof.

"**Affected Creditors Equity Sub-Pool**" means an amount of Newco Shares representing 92.5% of the Newco Equity Pool.

"**Alternative Sale Transaction**" has the meaning ascribed thereto in section 10.1 hereof.

"**Alternative Sale Transaction Consideration**" has the meaning ascribed thereto in section 10.1 hereof.

"**Applicable Law**" means any applicable law, statute, order, decree, consent decree, judgment, rule, regulation, ordinance or other pronouncement having the effect of law whether in Canada,

the United States, Hong Kong, the PRC or any other country, or any domestic or foreign state, county, province, city or other political subdivision or of any Governmental Entity.

"**Auditors**" means the former auditors of SFC that are named as defendants to the Class Actions Claims, including for greater certainty Ernst & Young LLP and BDO Limited.

"**Barbados Loans**" means the aggregate amount outstanding at the date hereof pursuant to three loans made by SFC Barbados to SFC in the amounts of US$65,997,468.10 on February 1, 2011, US$59,000,000 on June 7, 2011 and US$176,000,000 on June 7, 2011.

"**Barbados Property**" has the meaning ascribed thereto in section 6.4(j) hereof.

"**BIA**" means the *Bankruptcy and Insolvency Act*, R. S. C. 1985, c. B-3.

"**Business Day**" means a day, other than Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Toronto, Ontario.

"**Canadian Tax Act**" means the *Income Tax Act* (Canada) and the *Income Tax Regulations*, in each case as amended from time to time.

"**Causes of Action**" means any and all claims, actions, causes of action, demands, counterclaims, suits, rights, entitlements, litigation, arbitration, proceeding, hearing, complaint, debt, obligation, sums of money, accounts, covenants, damages, judgments, orders, including for injunctive relief or specific performance and compliance orders, expenses, executions, Encumbrances and other recoveries of whatever nature that any Person may be entitled to assert in law, equity or otherwise, whether known or unknown, foreseen or unforeseen, reduced to judgment or not reduced to judgment, liquidated or unliquidated, contingent or non-contingent, matured or unmatured, disputed or undisputed, secured or unsecured, assertable directly, indirectly or derivatively, existing or hereafter arising and whether pertaining to events occurring before, on or after the Filing Date.

"**CBCA**" has the meaning ascribed thereto in the recitals.

"**CCAA**" has the meaning ascribed thereto in the recitals.

"**CCAA Proceeding**" means the proceeding commenced by SFC under the CCAA on the Filing Date in the Ontario Superior Court of Justice (Commercial List) under court file number CV-12-9667-00CL.

"**Charges**" means the Administration Charge and the Directors' Charge.

"**Claim**" means any right or claim of any Person that may be asserted or made against SFC, in whole or in part, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express,

implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including any right or ability of any Person (including any Directors or Officers of SFC or any of the Subsidiaries) to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof (A) is based in whole or in part on facts prior to the Filing Date, (B) relates to a time period prior to the Filing Date, or (C) is a right or claim of any kind that would be a claim provable against SFC in bankruptcy within the meaning of the BIA had SFC become bankrupt on the Filing Date, or is an Equity Claim, a Noteholder Class Action Claim against SFC, a Class Action Indemnity Claim against SFC, a Restructuring Claim or a Lien Claim, provided, however, that "Claim" shall not include a D&O Claim or a D&O Indemnity Claim.

"**Claims Bar Date**" has the meaning ascribed thereto in the Claims Procedure Order.

"**Claims Procedure**" means the procedure established for determining the amount and status of Claims, D&O Claims and D&O Indemnity Claims, including in each case any such claims that are Unresolved Claims, pursuant to the Claims Procedure Order.

"**Claims Procedure Order**" means the Order under the CCAA of the Honourable Justice Morawetz dated May 14, 2012, establishing, among other things, a claims procedure in respect of SFC and calling for claims in respect of the Subsidiaries, as such Order may be amended, restated or varied from time to time.

"**Class Action Claims**" means, collectively, any rights or claims of any kind advanced or which may subsequently be advanced in the Class Actions or in any other similar proceeding, whether a class action proceeding or otherwise, and for greater certainty includes any Noteholder Class Action Claims.

"**Class Actions**" means, collectively, the following proceedings: (i) *Trustees of the Labourers' Pension Fund of Central and Eastern Canada et al v. Sino-Forest Corporation et al.* (Ontario Superior Court of Justice, Court File No. CV-11-431153-00CP); (ii) *Guining Liu v. Sino-Forest Corporation et al.* (Quebec Superior Court, Court File No. 200-06-000132-111); (iii) *Allan Haigh v. Sino-Forest Corporation et al.* (Saskatchewan Court of Queen's Bench, Court File No. 2288 of 2011); and (iv) *David Leapard et al. v. Allen T.Y. Chan et al.* (District Court of the Southern District of New York, Court File No. 650258/2012).

"**Class Action Court**" means, with respect to the Class Action Claims, the court of competent jurisdiction that is responsible for administering the applicable Class Action Claim.

"**Class Action Indemnity Claim**" means any right or claim of any Person that may be asserted or made in whole or in part against SFC and/or any Subsidiary for indemnity, contribution, reimbursement or otherwise from or in connection with any Class Action Claim asserted against

such Person. For greater certainty, Class Action Indemnity Claims are distinct from and do not include Class Action Claims.

"**Consent Date**" means May 15, 2012.

"**Conspiracy Claim**" means any D&O Claim alleging that the applicable Director or Officer committed the tort of civil conspiracy, as defined under Canadian common law.

"**Continuing Noteholder Class Action Claim**" means any Noteholder Class Action Claim that is: (i) a Section 5.1(2) D&O Claim; (ii) a Conspiracy Claim; (iii) a Non-Released D&O Claim; (iv) a Continuing Other D&O Claim; (v) a Noteholder Class Action Claim against one or more Third Party Defendants that is not an Indemnified Noteholder Class Action Claim; (vi) the portion of an Indemnified Noteholder Class Action Claim that is permitted to continue against the Third Party Defendants, subject to the Indemnified Noteholder Class Action Limit, pursuant to section 4.4(b)(i) hereof.

"**Continuing Other D&O Claims**" has the meaning ascribed thereto in section 4.9(b) hereof.

"**Court**" has the meaning ascribed thereto in the recitals.

"**D&O Claim**" means (i) any right or claim of any Person that may be asserted or made in whole or in part against one or more Directors or Officers of SFC that relates to a Claim for which such Directors or Officers are by law liable to pay in their capacity as Directors or Officers of SFC, or (ii) any right or claim of any Person that may be asserted or made in whole or in part against one or more Directors or Officers of SFC, in that capacity, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty and including, for greater certainty, any monetary administrative or other monetary penalty or claim for costs asserted against any Officer or Director of SFC by any Government Entity) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof, is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity from any such Directors or Officers of SFC or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof (A) is based in whole or in part on facts prior to the Filing Date, or (B) relates to a time period prior to the Filing Date.

"**D&O Indemnity Claim**" means any existing or future right of any Director or Officer of SFC against SFC that arose or arises as a result of any Person filing a D&O Proof of Claim (as

defined in the Claims Procedure Order) in respect of such Director or Officer of SFC for which such Director or Officer of SFC is entitled to be indemnified by SFC.

"**Defence Costs**" has the meaning ascribed thereto in section 4.8 hereof.

"**Director**" means, with respect to SFC or any Subsidiary, anyone who is or was, or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of such SFC Company.

"**Directors' Charge**" has the meaning ascribed thereto in the Initial Order.

"**Direct Registration Account**" means, if applicable, a direct registration account administered by the Transfer Agent in which those Persons entitled to receive Newco Shares and/or Newco Notes pursuant to the Plan will hold such Newco Shares and/or Newco Notes in registered form.

"**Direct Registration Transaction Advice**" means, if applicable, a statement delivered by the Monitor, the Trustees, the Transfer Agent or any such Person's agent to any Person entitled to receive Newco Shares or Newco Notes pursuant to the Plan on the Initial Distribution Date and each subsequent Distribution Date, as applicable, indicating the number of Newco Shares and/or Newco Notes registered in the name of or as directed by the applicable Person in a Direct Registration Account.

"**Direct Subsidiaries**" means, collectively, Sino-Panel Holdings Limited, Sino-Global Holdings Inc., Sino-Panel Corporation, Sino-Capital Global Inc., SFC Barbados, Sino-Forest Resources Inc. Sino-Wood Partners, Limited.

"**Distribution Date**" means the date or dates from time to time set in accordance with the provisions of the Plan to effect distributions in respect of the Proven Claims, excluding the Initial Distribution Date.

"**Distribution Escrow Position**" has the meaning ascribed thereto in section 5.2(d) hereof.

"**Distribution Record Date**" means the Plan Implementation Date, or such other date as SFC, the Monitor and the Initial Consenting Noteholders may agree.

"**DTC**" means The Depository Trust Company, or any successor thereof.

"**Early Consent Equity Sub-Pool**" means an amount of Newco Shares representing 7.5% of the Newco Equity Pool.

"**Early Consent Noteholder**" means any Noteholder that:

(a) (i) as confirmed by the Monitor on June 12, 2012, executed the (A) RSA, (B) a support agreement with SFC and the Direct Subsidiaries in the form of the RSA or (C) a joinder agreement in the form attached as Schedule C to the RSA; (ii) provided evidence satisfactory to the Monitor in accordance with section 2(a) of the RSA of the Notes held by such Noteholder as at the Consent Date (the "**Early Consent Notes**"), as such list of Noteholders and Notes held has been verified

and is maintained by the Monitor on a confidential basis; and (iii) continues to hold such Early Consent Notes as at the Distribution Record Date; or

(b) (i) has acquired Early Consent Notes; (ii) has signed the necessary transfer and joinder documentation as required by the RSA and has otherwise acquired such Early Consent Notes in compliance with the RSA; and (iii) continues to hold such Early Consent Notes as at the Distribution Record Date.

"**Effective Time**" means 8:00 a.m. (Toronto time) on the Plan Implementation Date or such other time on such date as SFC, the Monitor and the Initial Consenting Noteholders may agree.

"**Eligible Third Party Defendant**" means any of the Underwriters, BDO Limited and Ernst & Young (in the event that the Ernst & Young Settlement is not completed), together with any of their respective present and former affiliates, partners, associates, employees, servants, agents, contractors, directors, officers, insurers and successors, administrators, heirs and assigns, but excludes any Director or Officer and successors, administrators, heirs and assigns of any Director or Officer in their capacity as such.

"**Employee Priority Claims**" means the following Claims of employees and former employees of SFC:

(a) Claims equal to the amounts that such employees and former employees would have been qualified to receive under paragraph 136(1)(d) of the BIA if SFC had become bankrupt on the Filing Date; and

(b) Claims for wages, salaries, commissions or compensation for services rendered by them after the Filing Date and on or before the Plan Implementation Date.

"**Encumbrance**" means any security interest (whether contractual, statutory, or otherwise), hypothec, mortgage, trust or deemed trust (whether contractual, statutory, or otherwise), lien, execution, levy, charge, demand, action, liability or other claim, action, demand or liability of any kind whatsoever, whether proprietary, financial or monetary, and whether or not it has attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including: (i) any of the Charges; and (ii) any charge, security interest or claim evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system.

"**Equity Cancellation Date**" means the date that is the first Business Day at least 31 days after the Plan Implementation Date, or such other date as may be agreed to by SFC, the Monitor and the Initial Consenting Noteholders.

"**Equity Claim**" means a Claim that meets the definition of "equity claim" in section 2(1) of the CCAA and, for greater certainty, includes any of the following:

(a) any claim against SFC resulting from the ownership, purchase or sale of an equity interest in SFC, including the claims by or on behalf of current or former shareholders asserted in the Class Actions;

(b) any indemnification claim against SFC related to or arising from the claims described in sub-paragraph (a), including any such indemnification claims against SFC by or on behalf of any and all of the Third Party Defendants (other than for Defence Costs, unless any such claims for Defence Costs have been determined to be Equity Claims subsequent to the date of the Equity Claims Order); and

(c) any other claim that has been determined to be an Equity Claim pursuant to an Order of the Court.

"**Equity Claimant**" means any Person having an Equity Claim, but only with respect to and to the extent of such Equity Claim.

"**Equity Claimant Class**" has the meaning ascribed thereto in section 3.2(b).

"**Equity Claims Order**" means the Order under the CCAA of the Honourable Justice Morawetz dated July 27, 2012, in respect of Shareholder Claims and Related Indemnity Claims against SFC, as such terms are defined therein.

"**Equity Interest**" has the meaning set forth in section 2(1) of the CCAA.

"Ernst & Young" means Ernst & Young LLP (Canada), Ernst & Young Global Limited and all other member firms thereof, and all present and former affiliates, partners, associates, employees, servants, agents, contractors, directors, officers, insurers and successors, administrators, heirs and assigns of each, but excludes any Director or Officer (in their capacity as such) and successors, administrators, heirs and assigns of any Director or Officer (in their capacity as such).

"Ernst & Young Claim" means any and all demands, claims, actions, Causes of Action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, orders, including injunctive relief or specific performance and compliance orders, expenses, executions, Encumbrances and other recoveries on account of any claim, indebtedness, liability, obligation, demand or cause of action of whatever nature that any Person, including any Person who may claim contribution or indemnification against or from them and also including for greater certainty the SFC Companies, the Directors (in their capacity as such), the Officers (in their capacity as such), the Third Party Defendants, Newco, Newco II, the directors and officers of Newco and Newco II, the Noteholders or any Noteholder, any past, present or future holder of a direct or indirect equity interest in the SFC Companies, any past, present or future direct or indirect investor or security holder of the SFC Companies, any direct or indirect security holder of Newco or Newco II, the Trustees, the Transfer Agent, the Monitor, and each and every member (including members of any committee or governance council), present and former affiliate, partner, associate, employee, servant, agent, contractor, director, officer, insurer and each and every successor, administrator, heir and assign of each of any of the foregoing may or could (at any time past present or future) be entitled to assert against Ernst & Young, including any and all claims in respect of statutory liabilities of Directors (in their capacity as such), Officers (in their capacity as such) and any alleged fiduciary (in any capacity) whether known or unknown, matured or unmatured, direct or derivative, foreseen or unforeseen, suspected or unsuspected, contingent or not contingent, existing or hereafter arising, based in whole or in part

on any act or omission, transaction, dealing or other occurrence existing or taking place on, prior to or after the Ernst & Young Settlement Date relating to, arising out of or in connection with the SFC Companies, the SFC Business, any Director or Officer (in their capacity as such) and/or professional services performed by Ernst & Young or any other acts or omissions of Ernst & Young in relation to the SFC Companies, the SFC Business, any Director or Officer (in their capacity as such), including for greater certainty but not limited to any claim arising out of:

(a) all audit, tax, advisory and other professional services provided to the SFC Companies or related to the SFC Business up to the Ernst & Young Settlement Date, including for greater certainty all audit work performed, all auditors' opinions and all consents in respect of all offering of SFC securities and all regulatory compliance delivered in respect of all fiscal periods and all work related thereto up to and inclusing the Ernst & Young Settlement Date;

(b) all claims advanced or which could have been advanced in any or all of the Class Actions;

(c) all claims advanced or which could have been advanced in any or all actions commenced in all jurisdictions prior the Ernst & Young Settlement Date; or

(d) all Noteholder Claims, Litigation Trust Claims or any claim of the SFC Companies,

provided that "Ernst & Young Claim" does not include any proceedings or remedies that may be taken against Ernst & Young by the Ontario Securities Commission or by staff of the Ontario Securities Commission, and the jurisdiction of the Ontario Securities Commission and staff of the Ontario Securities Commission in relation to Ernst & Young under the Securities Act, R.S.O. 1990, c. S-5 is expressly preserved.

"**Ernst & Young Orders**" has the meaning ascribed thereto in section 11.1(a) hereof.

"Ernst & Young Release" means the release described in 11.1(b) hereof.

"Ernst & Young Settlement" means the settlement as reflected in the Minutes of Settlement executed on November 29, 2012 between Ernst & Young LLP, on behalf of itself and Ernst & Young Global Limited and all member firms thereof and the plaintiffs in Ontario Superior Court Action No. CV-11-4351153-00CP and in Quebec Superior Court No. 200-06-00132-111, and such other documents contemplated thereby.

"Ernst & Young Settlement Date" means the date that the Monitor's Ernst & Young Settlement Certificate is delivered to Ernst & Young.

"**Excluded Litigation Trust Claims**" has the meaning ascribed thereto in section 4.12(a) hereof.

"**Excluded SFC Assets**" means (i) the rights of SFC to be transferred to the Litigation Trust in accordance with section 6.4(o) hereof; (ii) any entitlement to insurance proceeds in respect of Insured Claims, Section 5.1(2) D&O Claims and/or Conspiracy Claims; (iii) any secured property of SFC that is to be returned in satisfaction of a Lien Claim pursuant to section 4.2(c)(i)

hereof; (iv) any input tax credits or other refunds received by SFC after the Effective Time; and (v) cash in the aggregate amount of (and for the purpose of): (A) the Litigation Funding Amount; (B) the Unaffected Claims Reserve; (C) the Administration Charge Reserve; (D) the Expense Reimbursement and the other payments to be made pursuant to section 6.4(d) hereof (having regard to the application of any outstanding retainers, as applicable); (E) any amounts in respect of Lien Claims to be paid in accordance with section 4.2(c)(ii) hereof; and (F) the Monitor's Post-Implementation Reserve; (vi) any office space, office furniture or other office equipment owned or leased by SFC in Canada; (vii) the SFC Escrow Co. Share; (viii) Newco Promissory Note 1; and (ix) Newco Promissory Note 2.

"Existing Shares" means all existing shares in the equity of SFC issued and outstanding immediately prior to the Effective Time and all warrants, options or other rights to acquire such shares, whether or not exercised as at the Effective Time.

"**Expense Reimbursement**" means the aggregate amount of (i) the reasonable and documented fees and expenses of the Noteholder Advisors, pursuant to their respective engagement letters with SFC, and other advisors as may be agreed to by SFC and the Initial Consenting Noteholders and (ii) the reasonable fees and expenses of the Initial Consenting Noteholders incurred in connection with the negotiation and development of the RSA and this Plan, including in each case an estimated amount for any such fees and expenses expected to be incurred in connection with the implementation of the Plan, including in the case of (ii) above, an aggregate work fee of up to $5 million (which work fee may, at the request of the Monitor, be paid by any of the Subsidiaries instead of SFC).

"**Filing Date**" has the meaning ascribed thereto in the recitals.

"**Fractional Interests**" has the meaning given in section 5.12 hereof.

"**FTI HK**" means FTI Consulting (Hong Kong) Limited.

"**Governmental Entity**" means any government, regulatory authority, governmental department, agency, commission, bureau, official, minister, Crown corporation, court, board, tribunal or dispute settlement panel or other law, rule or regulation-making organization or entity: (a) having or purporting to have jurisdiction on behalf of any nation, province, territory or state or any other geographic or political subdivision of any of them; or (b) exercising, or entitled or purporting to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power.

"Government Priority Claims" means all Claims of Governmental Entities in respect of amounts that were outstanding as of the Plan Implementation Date and that are of a kind that could be subject to a demand under:

(a) subsections 224(1.2) of the Canadian Tax Act;

(b) any provision of the *Canada Pension Plan* or the *Employment Insurance Act* (Canada) that refers to subsection 224(1.2) of the Canadian Tax Act and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or employee's premium or employer's premium as defined in the *Employment*

Insurance Act (Canada), or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Canadian Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum:

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Canadian Tax Act; or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

"**Greenheart**" means Greenheart Group Limited, a company established under the laws of Bermuda.

"**Indemnified Noteholder Class Action Claims**" has the meaning ascribed thereto in section 4.4(b)(i) hereof.

"**Indemnified Noteholder Class Action Limit**" means $150 million or such lesser amount agreed to by SFC, the Monitor, the Initial Consenting Noteholders and counsel to the Ontario Class Action Plaintiffs prior to the Plan Implementation Date or agreed to by the Initial Consenting Noteholders and counsel to the Class Action Plaintiffs after the Plan Implementation Date.

"**Initial Consenting Noteholders**" means, subject to section 12.7 hereof, the Noteholders that executed the RSA on March 30, 2012.

"**Initial Distribution Date**" means a date no more than ten (10) Business Days after the Plan Implementation Date or such other date as SFC, the Monitor and the Initial Consenting Noteholders may agree.

"**Initial Newco Shareholder**" means a Person to be determined by the Initial Consenting Noteholders prior to the Effective Time, with the consent of SFC and the Monitor, to serve as the initial sole shareholder of Newco pursuant to section 6.2(a) hereof.

"**Initial Order**" has the meaning ascribed thereto in the recitals.

"**Insurance Policies**" means, collectively, the following insurance policies, as well as any other insurance policy pursuant to which SFC or any Director or Officer is insured: ACE INA Insurance Policy Number DO024464; Chubb Insurance Company of Canada Policy Number 8209-4449; Lloyds of London, England Policy Number XTFF0420; Lloyds of London, England

Policy Number XTFF0373; and Travelers Guarantee Company of Canada Policy Number 10181108, and "**Insurance Policy**" means any one of the Insurance Policies.

"**Insured Claim**" means all or that portion of any Claim for which SFC is insured and all or that portion of any D&O Claim for which the applicable Director or Officer is insured, in each case pursuant to any of the Insurance Policies.

"**Intellectual Property**" means: (i) patents, and applications for patents, including divisional and continuation patents; (ii) registered and unregistered trade-marks, logos and other indicia of origin, pending trade-mark registration applications, and proposed use application or similar reservations of marks, and all goodwill associated therewith; (iii) registered and unregistered copyrights, including all copyright in and to computer software programs, and applications for and registration of such copyright (including all copyright in and to the SFC Companies' websites); (iv) world wide web addresses and internet domain names, applications and reservations for world wide web addresses and internet domain names, uniform resource locators and the corresponding internet sites; (v) industrial designs; and (vi) trade secrets and proprietary information not otherwise listed in (i) through (v) above, including all inventions (whether or not patentable), invention disclosures, moral and economic rights of authors and inventors (however denominated), confidential information, technical data, customer lists, corporate and business names, trade names, trade dress, brand names, know-how, formulae, methods (whether or not patentable), designs, processes, procedures, technology, business methods, source codes, object codes, computer software programs (in either source code or object code form), databases, data collections and other proprietary information or material of any type, and all derivatives, improvements and refinements thereof, howsoever recorded, or unrecorded.

"**Letter of Instruction**" means a form, to be completed by each Ordinary Affected Creditor and each Early Consent Noteholder, and that is to be delivered to the Monitor in accordance with section 5.1 hereof, which form shall set out:

(a) the registration details for the Newco Shares and, if applicable, Newco Notes to be distributed to such Ordinary Affected Creditor or Early Consent Noteholder in accordance with the Plan; and

(b) the address to which such Ordinary Affected Creditor's or Early Consent Noteholder's Direct Registration Transaction Advice or its Newco Share Certificates and Newco Note Certificates, as applicable, are to be delivered.

"**Lien Claim**" means any Proven Claim of a Person indicated as a secured creditor in Schedule "B" to the Initial Order (other than the Trustees) that is secured by a lien or encumbrance on any property of SFC, which lien is valid, perfected and enforceable pursuant to Applicable Law, provided that the Charges and any Claims in respect of Notes shall not constitute "Lien Claims".

"**Lien Claimant**" means a Person having a Lien Claim, other than any Noteholder or Trustee in respect of any Noteholder Claim.

"**Litigation Funding Amount**" means the cash amount of $1,000,000 to be advanced by SFC to the Litigation Trustee for purposes of funding the Litigation Trust on the Plan Implementation Date in accordance with section 6.4(o) hereof.

"**Litigation Funding Receivable**" has the meaning ascribed thereto in section 6.4(o) hereof.

"**Litigation Trust**" means the trust to be established on the Plan Implementation Date at the time specified in section 6.4(p) in accordance with the Litigation Trust Agreement pursuant to the laws of a jurisdiction that is acceptable to SFC and the Initial Consenting Noteholders, which trust will acquire the Litigation Trust Claims and will be funded with the Litigation Funding Amount in accordance with the Plan and the Litigation Trust Agreement.

"**Litigation Trust Agreement**" means the trust agreement dated as of the Plan Implementation Date, between SFC and the Litigation Trustee, establishing the Litigation Trust.

"**Litigation Trust Claims**" means any Causes of Action that have been or may be asserted by or on behalf of: (a) SFC against any and all third parties; or (b) the Trustees (on behalf of the Noteholders) against any and all Persons in connection with the Notes issued by SFC; provided, however, that in no event shall the Litigation Trust Claims include any (i) claim, right or cause of action against any Person that is released pursuant to Article 7 hereof or (ii) any Excluded Litigation Trust Claim. For greater certainty: (x) the claims being advanced or that are subsequently advanced in the Class Actions are not being transferred to the Litigation Trust; and (y) the claims transferred to the Litigation Trust shall not be advanced in the Class Actions.

"**Litigation Trust Interests**" means the beneficial interests in the Litigation Trust to be created on the Plan Implementation Date.

"**Litigation Trustee**" means a Person to be determined by SFC and the Initial Consenting Noteholders prior to the Effective Time, with the consent of the Monitor, to serve as trustee of the Litigation Trust pursuant to and in accordance with the terms thereof.

"**Material**" means a fact, circumstance, change, effect, matter, action, condition, event, occurrence or development that, individually or in the aggregate, is, or would reasonably be expected to be, material to the business, affairs, results of operations or financial condition of the SFC Companies (taken as a whole).

"**Material Adverse Effect**" means a fact, event, change, occurrence, circumstance or condition that, individually or together with any other event, change or occurrence, has or would reasonably be expected to have a material adverse impact on the assets, condition (financial or otherwise), business, liabilities, obligations (whether absolute, accrued, conditional or otherwise) or operations of the SFC Companies (taken as a whole); provided, however, that a Material Adverse Effect shall not include and shall be deemed to exclude the impact of any fact, event, change, occurrence, circumstance or condition resulting from or relating to: (A) changes in Applicable Laws of general applicability or interpretations thereof by courts or Governmental Entities or regulatory authorities, which changes do not have a Material disproportionate effect on the SFC Companies (taken as a whole), (B) any change in the forestry industry generally, which does not have a Material disproportionate effect on the SFC Companies (taken as a whole) (relative to other industry participants operating primarily in the PRC), (C) actions and omissions

of any of the SFC Companies required pursuant to the RSA or this Plan or taken with the prior written consent of the Initial Consenting Noteholders, (D) the effects of compliance with the RSA or this Plan, including on the operating performance of the SFC Companies, (E) the negotiation, execution, delivery, performance, consummation, potential consummation or public announcement of the RSA or this Plan or the transactions contemplated thereby or hereby, (F) any change in U.S. or Canadian interest rates or currency exchange rates unless such change has a Material disproportionate effect on the SFC Companies (taken as a whole), and (G) general political, economic or financial conditions in Canada, the United States, Hong Kong or the PRC, which changes do not have a Material disproportionate effect on the SFC Companies (taken as a whole).

"**Meeting**" means the meeting of Affected Creditors, and any adjournment or extension thereof, that is called and conducted in accordance with the Meeting Order for the purpose of considering and voting on the Plan.

"**Meeting Order**" has the meaning ascribed thereto in the recitals.

"**Monitor**" means FTI Consulting Canada Inc., in its capacity as Court-appointed Monitor of SFC in the CCAA Proceeding.

"**Monitor's Post-Implementation Reserve**" means the cash reserve to be established by SFC on the Plan Implementation Date in the amount of $5,000,000 or such other amount as may be agreed by SFC, the Monitor and the Initial Consenting Noteholders, which cash reserve shall be maintained and administered by the Monitor for the purpose of administering SFC and the Claims Procedure, as necessary, from and after the Plan Implementation Date.

"**Monitor's Ernst & Young Settlement Certificate**" has the meaning ascribed thereto in section 11.1(a) hereof.

"**Monitor's Named Third Party Settlement Certificate**" has the meaning ascribed thereto in section 11.2(b) hereof.

"**Named Directors and Officers**" means Andrew Agnew, William E. Ardell, James Bowland, Leslie Chan, Michael Cheng, Lawrence Hon, James M.E. Hyde, Richard M. Kimel, R. John (Jack) Lawrence, Jay A. Lefton, Edmund Mak, Tom Maradin, Judson Martin, Simon Murray, James F. O'Donnell, William P. Rosenfeld, Peter Donghong Wang, Garry West and Kee Y. Wong, in their respective capacities as Directors or Officers, and "**Named Director or Officer**" means any one of them.

"**Named Third Party Defendant Settlement**" means a binding settlement between any applicable Named Third Party Defendant and one or more of: (i) counsel to the plaintiffs in any of the Class Actions; and (ii) the Litigation Trustee (on behalf of the Litigation Trust) (if after the Plan Implementation Date), provided that, in each case, such settlement must be acceptable to SFC (if on or prior to the Plan Implementation Date), the Monitor, the Initial Consenting Noteholders (if on or prior to the Plan Implementation Date) and the Litigation Trustee (if after the Plan Implementation Date), and provided further that such settlement shall not affect the

plaintiffs in the Class Actions without the consent of counsel to the Ontario Class Action Plaintiffs.

"**Named Third Party Defendant Settlement Order**" means an Order of the Court approving a Named Third Party Defendant Settlement in form and in substance satisfactory to the applicable Named Third Party Defendant, SFC (if occurring on or prior to the Plan Implementation Date), the Monitor, the Initial Consenting Noteholders (if on or prior to the Plan Implementation Date), the Litigation Trustee (if after the Plan Implementation Date) and counsel to the Ontario Class Action Plaintiffs (if the plaintiffs in any of the Class Actions are affected by the applicable Named Third Party Defendant Settlement).

"**Named Third Party Defendant Release**" means a release of any applicable Named Third Party Defendant agreed to pursuant to a Named Third Party Defendant Settlement and approved pursuant to a Named Third Party Defendant Settlement Order, provided that such release must be acceptable to SFC (if on or prior to the Plan Implementation Date), the Monitor, the Initial Consenting Noteholders (if on or prior to the Plan Implementation Date) and the Litigation Trustee (if after the Plan Implementation Date), and provided further that such release shall not affect the plaintiffs in the Class Actions without the consent of counsel to the Ontario Class Action Plaintiffs.

"**Named Third Party Defendants**" means the Third Party Defendants listed on Schedule "A" to the Plan in accordance with section 11.2(a) hereof, provided that only Eligible Third Party Defendants may become Named Third Party Defendants.

"**Newco**" means the new corporation to be incorporated pursuant to section 6.2(a) hereof under the laws of the Cayman Islands or such other jurisdiction as agreed to by SFC, the Monitor and the Initial Consenting Noteholders.

"**Newco II**" means the new corporation to be incorporated pursuant to section 6.2(b) hereof under the laws of the Cayman Islands or such other jurisdiction as agreed to by SFC, the Monitor and the Initial Consenting Noteholders.

"**Newco II Consideration**" has the meaning ascribed thereto in section 6.4(x) hereof.

"**Newco Equity Pool**" means all of the Newco Shares to be issued by Newco on the Plan Implementation Date. The number of Newco Shares to be issued on the Plan Implementation Date shall be agreed by SFC, the Monitor and the Initial Consenting Noteholders prior to the Plan Implementation Date.

"**Newco Note Certificate**" means a certificate evidencing Newco Notes.

"**Newco Notes**" means the new notes to be issued by Newco on the Plan Implementation Date in the aggregate principal amount of $300,000,000, on such terms and conditions as are satisfactory to the Initial Consenting Noteholders and SFC, acting reasonably.

"**Newco Promissory Note 1**", "**Newco Promissory Note 2**", "**Newco Promissory Note 3**" and "**Newco Promissory Notes**" have the meanings ascribed thereto in sections 6.4(k), 6.4(m), 6.4(n) and 6.4(q) hereof, respectively.

"**Newco Share Certificate**" means a certificate evidencing Newco Shares.

"**Newco Shares**" means common shares in the capital of Newco.

"**Non-Released D&O Claims**" has the meaning ascribed thereto in section 4.9(f) hereof.

"**Noteholder Advisors**" means Goodmans LLP, Hogan Lovells and Conyers, Dill & Pearman LLP in their capacity as legal advisors to the Initial Consenting Noteholders, and Moelis & Company LLC and Moelis and Company Asia Limited, in their capacity as the financial advisors to the Initial Consenting Noteholders.

"**Noteholder Claim**" means any Claim by a Noteholder (or a Trustee or other representative on the Noteholder's behalf) in respect of or in relation to the Notes owned or held by such Noteholder, including all principal and Accrued Interest payable to such Noteholder pursuant to such Notes or the Note Indentures, but for greater certainty does not include any Noteholder Class Action Claim.

"**Noteholder Class Action Claim**" means any Class Action Claim, or any part thereof, against SFC, any of the Subsidiaries, any of the Directors and Officers of SFC or the Subsidiaries, any of the Auditors, any of the Underwriters and/or any other defendant to the Class Action Claims that relates to the purchase, sale or ownership of Notes, but for greater certainty does not include a Noteholder Claim.

"**Noteholder Class Action Claimant**" means any Person having or asserting a Noteholder Class Action Claim.

"**Noteholder Class Action Representative**" means an individual to be appointed by counsel to the Ontario Class Action Plaintiffs.

"**Noteholders**" means, collectively, the beneficial owners of Notes as of the Distribution Record Date and, as the context requires, the registered holders of Notes as of the Distribution Record Date, and "**Noteholder**" means any one of the Noteholders.

"**Note Indentures**" means, collectively, the 2013 Note Indenture, the 2014 Note Indenture, the 2016 Note Indenture and the 2017 Note Indenture.

"**Notes**" means, collectively, the 2013 Notes, the 2014 Notes, the 2016 Notes and the 2017 Notes.

"**Officer**" means, with respect to SFC or any Subsidiary, anyone who is or was, or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of such SFC Company.

"**Ontario Class Action Plaintiffs**" means the plaintiffs in the Ontario class action case styled as *Trustees of the Labourers' Pension Fund of Central and Eastern Canada et al v. Sino-Forest Corporation et al.* (Ontario Superior Court of Justice, Court File No. CV-11-431153-00CP).

"**Order**" means any order of the Court made in connection with the CCAA Proceeding or this Plan.

"**Ordinary Affected Creditor**" means a Person with an Ordinary Affected Creditor Claim.

"**Ordinary Affected Creditor Claim**" means a Claim that is not: an Unaffected Claim; a Noteholder Claim; an Equity Claim; a Subsidiary Intercompany Claim; a Noteholder Class Action Claim; or a Class Action Indemnity Claim (other than a Class Action Indemnity Claim by any of the Third Party Defendants in respect of the Indemnified Noteholder Class Action Claims).

"**Other Directors and/or Officers**" means any Directors and/or Officers other than the Named Directors and Officers.

"**Permitted Continuing Retainer**" has the meaning ascribed thereto in section 6.4(d) hereof.

"**Person**" means any individual, sole proprietorship, limited or unlimited liability corporation, partnership, unincorporated association, unincorporated syndicate, unincorporated organization, body corporate, joint venture, trust, pension fund, union, Governmental Entity, and a natural person including in such person's capacity as trustee, heir, beneficiary, executor, administrator or other legal representative.

"**Plan**" means this Plan of Compromise and Reorganization (including all schedules hereto) filed by SFC pursuant to the CCAA and the CBCA, as it may be further amended, supplemented or restated from time to time in accordance with the terms hereof or an Order.

"**Plan Implementation Date**" means the Business Day on which this Plan becomes effective, which shall be the Business Day on which the Monitor has filed with the Court the certificate contemplated in section 9.2 hereof, or such other date as SFC, the Monitor and the Initial Consenting Noteholders may agree.

"**PRC**" means the People's Republic of China.

"**Proof of Claim**" means the "Proof of Claim" referred to in the Claims Procedure Order, substantially in the form attached to the Claims Procedure Order.

"**Pro-Rata**" means:

(a) with respect to any Noteholder in relation to all Noteholders, the proportion of (i) the principal amount of Notes beneficially owned by such Noteholder as of the Distribution Record Date plus the Accrued Interest owing on such Notes as of the Filing Date, in relation to (ii) the aggregate principal amount of all Notes outstanding as of the Distribution Record Date plus the aggregate of all Accrued Interest owing on all Notes as of the Filing Date;

(b) with respect to any Early Consent Noteholder in relation to all Early Consent Noteholders, the proportion of the principal amount of Early Consent Notes beneficially owned by such Early Consent Noteholder as of the Distribution

Record Date in relation to the aggregate principal amount of Early Consent Notes held by all Early Consent Noteholders as of the Distribution Record Date; and

(c) with respect to any Affected Creditor in relation to all Affected Creditors, the proportion of such Affected Creditor's Affected Creditor Claim as at any relevant time in relation to the aggregate of all Proven Claims and Unresolved Claims of Affected Creditors as at that time.

"**Proven Claim**" means an Affected Creditor Claim to the extent that such Affected Creditor Claim is finally determined and valued in accordance with the provisions of the Claims Procedure Order, the Meeting Order or any other Order, as applicable.

"**Released Claims**" means all of the rights, claims and liabilities of any kind released pursuant to Article 7 hereof.

"**Released Parties**" means, collectively, those Persons released pursuant to Article 7 hereof, but only to the extent so released, and each such Person is referred to individually as a "**Released Party**".

"**Required Majority**" means a majority in number of Affected Creditors with Proven Claims, and two-thirds in value of the Proven Claims held by such Affected Creditors, in each case who vote (in person or by proxy) on the Plan at the Meeting.

"**Remaining Post-Implementation Reserve Amount**" has the meaning ascribed thereto in section 5.7(b) hereof.

"**Restructuring Claim**" means any right or claim of any Person that may be asserted or made in whole or in part against SFC, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind arising out of the restructuring, termination, repudiation or disclaimer of any lease, contract, or other agreement or obligation on or after the Filing Date and whether such restructuring, termination, repudiation or disclaimer took place or takes place before or after the date of the Claims Procedure Order.

"**Restructuring Transaction**" means the transactions contemplated by this Plan (including any Alternative Sale Transaction that occurs pursuant to section 10.1 hereof).

"**RSA**" means the Restructuring Support Agreement executed as of March 30, 2012 by SFC, the Direct Subsidiaries and the Initial Consenting Noteholders, and subsequently executed or otherwise agreed to by the Early Consent Noteholders, as such Restructuring Support Agreement may be amended, restated and varied from time to time in accordance with its terms.

"**Sanction Date**" means the date that the Sanction Order is granted by the Court.

"**Sanction Order**" means the Order of the Court sanctioning and approving this Plan.

"**Section 5.1(2) D&O Claim**" means any D&O Claim that is not permitted to be compromised pursuant to section 5.1(2) of the CCAA, but only to the extent not so permitted, provided that

any D&O Claim that qualifies as a Non-Released D&O Claim or a Continuing Other D&O Claim shall not constitute a Section 5.1(2) D&O Claim.

"**Settlement Trust**" has the meaning ascribed thereto in section 11.1(a) hereof.

"**Settlement Trust Order**" means an order establishing the Settlement Trust in form and in substance satisfactory to Ernst & Young and counsel to the Ontario Class Action Plaintiffs, provided that such order shall also be acceptable to SFC (if occurring on or prior to the Plan Implementation Date), the Monitor and the Initial Consenting Noteholders, as applicable, to the extent, if any, that such order affects SFC, the Monitor or the Initial Consenting Noteholders, each acting reasonably.

"**Settlement Trust**" means a trust established in accordance with the terms of the Settlement Trust Order.

"**SFC**" has the meaning ascribed thereto in the recitals.

"**SFC Advisors**" means Bennett Jones LLP, Appleby Global Group, King & Wood Mallesons and Linklaters LLP, in their respective capacities as legal advisors to SFC, and Houlihan Lokey Howard & Zukin Capital, Inc., in its capacity as financial advisor to SFC.

"**SFC Assets**" means all of SFC's right, title and interest in and to all of SFC's properties, assets and rights of every kind and description (including all restricted and unrestricted cash, contracts, real property, receivables or other debts owed to SFC, Intellectual Property, SFC's corporate name and all related marks, all of SFC's ownership interests in the Subsidiaries (including all of the shares of the Direct Subsidiaries and any other Subsidiaries that are directly owned by SFC immediately prior to the Effective Time), all of SFC's ownership interest in Greenheart and its subsidiaries, all SFC Intercompany Claims, any entitlement of SFC to any insurance proceeds and a right to the Remaining Post-Implementation Reserve Amount), other than the Excluded SFC Assets.

"**SFC Barbados**" means Sino-Forest International (Barbados) Corporation, a wholly-owned subsidiary of SFC established under the laws of Barbados.

"**SFC Business**" means the business operated by the SFC Companies.

"**SFC Continuing Shareholder**" means the Litigation Trustee or such other Person as may be agreed to by the Monitor and the Initial Consenting Noteholders.

"**SFC Companies**" means, collectively, SFC and all of the Subsidiaries, and "**SFC Company**" means any of them.

"**SFC Escrow Co.**" means the company to be incorporated as a wholly-owned subsidiary of SFC pursuant to section 6.3 hereof under the laws of the Cayman Islands or such other jurisdiction as agreed to by SFC, the Monitor and the Initial Consenting Noteholders.

"**SFC Escrow Co. Share**" has the meaning ascribed thereto in section 6.3 hereof.

"**SFC Intercompany Claim**" means any amount owing to SFC by any Subsidiary or Greenheart and any claim by SFC against any Subsidiary or Greenheart.

"**Subsidiaries**" means all direct and indirect subsidiaries of SFC, other than (i) Greenheart and its direct and indirect subsidiaries and (ii) SFC Escrow Co., and "**Subsidiary**" means any one of the Subsidiaries.

"**Subsidiary Intercompany Claim**" means any Claim by any Subsidiary or Greenheart against SFC.

"**Tax**" or "**Taxes**" means any and all federal, provincial, municipal, local and foreign taxes, assessments, reassessments and other governmental charges, duties, impositions and liabilities including for greater certainty taxes based upon or measured by reference to income, gross receipts, profits, capital, transfer, land transfer, sales, goods and services, harmonized sales, use, value-added, excise, withholding, business, franchising, property, development, occupancy, employer health, payroll, employment, health, social services, education and social security taxes, all surtaxes, all customs duties and import and export taxes, all licence, franchise and registration fees and all employment insurance, health insurance and government pension plan premiums or contributions, together with all interest, penalties, fines and additions with respect to such amounts.

"**Taxing Authorities**" means any one of Her Majesty the Queen, Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, the Canada Revenue Agency, any similar revenue or taxing authority of Canada and each and every province or territory of Canada and any political subdivision thereof, any similar revenue or taxing authority of the United States, the PRC, Hong Kong or other foreign state and any political subdivision thereof, and any Canadian, United States, Hong Kong, PRC or other government, regulatory authority, government department, agency, commission, bureau, minister, court, tribunal or body or regulation-making entity exercising taxing authority or power, and "**Taxing Authority**" means any one of the Taxing Authorities.

"**Third Party Defendants**" means any defendants to the Class Action Claims (present or future) other than SFC, the Subsidiaries, the Named Directors and Officers or the Trustees.

"**Transfer Agent**" means Computershare Limited (or a subsidiary or affiliate thereof) or such other transfer agent as Newco may appoint, with the prior written consent of the Monitor and the Initial Consenting Noteholders.

"**Trustee Claims**" means any rights or claims of the Trustees against SFC under the Note Indentures for compensation, fees, expenses, disbursements or advances, including reasonable legal fees and expenses, incurred or made by or on behalf of the Trustees before or after the Plan Implementation Date in connection with the performance of their respective duties under the Note Indentures or this Plan.

"**Trustees**" means, collectively, The Bank of New York Mellon in its capacity as trustee for the 2013 Notes and the 2016 Notes, and Law Debenture Trust Company of New York in its capacity as trustee for the 2014 Notes and the 2017 Notes, and "**Trustee**" means either one of them.

"**Unaffected Claim**" means any:

(a) Claim secured by the Administration Charge;

(b) Government Priority Claim;

(c) Employee Priority Claim;

(d) Lien Claim;

(e) any other Claim of any employee, former employee, Director or Officer of SFC in respect of wages, vacation pay, bonuses, termination pay, severance pay or other remuneration payable to such Person by SFC, other than any termination pay or severance pay payable by SFC to a Person who ceased to be an employee, Director or Officer of SFC prior to the date of this Plan;

(f) Trustee Claims; and

(g) any trade payables that were incurred by SFC (i) after the Filing Date but before the Plan Implementation Date; and (ii) in compliance with the Initial Order or other Order issued in the CCAA Proceeding.

"**Unaffected Claims Reserve**" means the cash reserve to be established by SFC on the Plan Implementation Date and maintained by the Monitor, in escrow, for the purpose of paying certain Unaffected Claims in accordance with section 4.2 hereof.

"**Unaffected Creditor**" means a Person who has an Unaffected Claim, but only in respect of and to the extent of such Unaffected Claim.

"**Undeliverable Distribution**" has the meaning ascribed thereto in section 5.4.

"**Underwriters**" means any underwriters of SFC that are named as defendants in the Class Action Claims, including for greater certainty Credit Suisse Securities (Canada), Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC).

"**Unresolved Claim**" means an Affected Creditor Claim in respect of which a Proof of Claim has been filed in a proper and timely manner in accordance with the Claims Procedure Order but that, as at any applicable time, has not been finally (i) determined to be a Proven Claim or (ii) disallowed in accordance with the Claims Procedure Order, the Meeting Order or any other Order.

"**Unresolved Claims Escrow Agent**" means SFC Escrow Co. or such other Person as may be agreed by SFC, the Monitor and the Initial Consenting Noteholders.

"**Unresolved Claims Reserve**" means the reserve of Newco Shares, Newco Notes and Litigation Trust Interests, if any, to be established pursuant to sections 6.4(h)(ii) and 6.4(r) hereof in respect of Unresolved Claims as at the Plan Implementation Date, which reserve shall be held and maintained by the Unresolved Claims Escrow Agent, in escrow, for distribution in accordance with the Plan. As at the Plan Implementation Date, the Unresolved Claims Reserve will consist of that amount of Newco Shares, Newco Notes and Litigation Trust Interests as is necessary to make any potential distributions under the Plan in respect of the following Unresolved Claims: (i) Class Action Indemnity Claims in an amount up to the Indemnified Noteholder Class Action Limit; (ii) Claims in respect of Defence Costs in the amount of $30 million or such other amount as may be agreed by the Monitor and the Initial Consenting Noteholders; and (iii) other Affected Creditor Claims that have been identified by the Monitor as Unresolved Claims in an amount up to $500,000 or such other amount as may be agreed by the Monitor and the Initial Consenting Noteholders.

"**Website**" means the website maintained by the Monitor in respect of the CCAA Proceeding pursuant to the Initial Order at the following web address: http://cfcanada.fticonsulting.com/sfc.

1.2 Certain Rules of Interpretation

For the purposes of the Plan:

(a) any reference in the Plan to an Order, agreement, contract, instrument, indenture, release, exhibit or other document means such Order, agreement, contract, instrument, indenture, release, exhibit or other document as it may have been or may be validly amended, modified or supplemented;

(b) the division of the Plan into "articles" and "sections" and the insertion of a table of contents are for convenience of reference only and do not affect the construction or interpretation of the Plan, nor are the descriptive headings of "articles" and "sections" intended as complete or accurate descriptions of the content thereof;

(c) unless the context otherwise requires, words importing the singular shall include the plural and *vice versa*, and words importing any gender shall include all genders;

(d) the words "includes" and "including" and similar terms of inclusion shall not, unless expressly modified by the words "only" or "solely", be construed as terms of limitation, but rather shall mean "includes but is not limited to" and "including but not limited to", so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive;

(e) unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean local time in Toronto, Ontario and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. (Toronto time) on such Business Day;

(f) unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day;

(g) unless otherwise provided, any reference to a statute or other enactment of parliament or a legislature includes all regulations made thereunder, all amendments to or re-enactments of such statute or regulations in force from time to time, and, if applicable, any statute or regulation that supplements or supersedes such statute or regulation; and

(h) references to a specified "article" or "section" shall, unless something in the subject matter or context is inconsistent therewith, be construed as references to that specified article or section of the Plan, whereas the terms "the Plan", "hereof", "herein", "hereto", "hereunder" and similar expressions shall be deemed to refer generally to the Plan and not to any particular "article", "section" or other portion of the Plan and include any documents supplemental hereto.

1.3 Currency

For the purposes of this Plan, all amounts shall be denominated in Canadian dollars and all payments and distributions to be made in cash shall be made in Canadian dollars. Any Claims or other amounts denominated in a foreign currency shall be converted to Canadian dollars at the Reuters closing rate on the Filing Date.

1.4 Successors and Assigns

The Plan shall be binding upon and shall enure to the benefit of the heirs, administrators, executors, legal personal representatives, successors and assigns of any Person named or referred to in the Plan.

1.5 Governing Law

The Plan shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. All questions as to the interpretation of or application of the Plan and all proceedings taken in connection with the Plan and its provisions shall be subject to the jurisdiction of the Court.

1.6 Schedule "A"

Schedule "A" to the Plan is incorporated by reference into the Plan and forms part of the Plan.

ARTICLE 2
PURPOSE AND EFFECT OF THE PLAN

2.1 Purpose

The purpose of the Plan is:

(a) to effect a full, final and irrevocable compromise, release, discharge, cancellation and bar of all Affected Claims;

(b) to effect the distribution of the consideration provided for herein in respect of Proven Claims;

(c) to transfer ownership of the SFC Business to Newco and then from Newco to Newco II, in each case free and clear of all claims against SFC and certain related claims against the Subsidiaries, so as to enable the SFC Business to continue on a viable, going concern basis; and

(d) to allow Affected Creditors and Noteholder Class Action Claimants to benefit from contingent value that may be derived from litigation claims to be advanced by the Litigation Trustee.

The Plan is put forward in the expectation that the Persons with an economic interest in SFC, when considered as a whole, will derive a greater benefit from the implementation of the Plan and the continuation of the SFC Business as a going concern than would result from a bankruptcy or liquidation of SFC.

2.2 Claims Affected

The Plan provides for, among other things, the full, final and irrevocable compromise, release, discharge, cancellation and bar of Affected Claims and effectuates the restructuring of SFC. The Plan will become effective at the Effective Time on the Plan Implementation Date, other than such matters occurring on the Equity Cancellation Date (if the Equity Cancellation date does not occur on the Plan Implementation Date) which will occur and be effective on such date, and the Plan shall be binding on and enure to the benefit of SFC, the Subsidiaries, Newco, Newco II, SFC Escrow Co., any Person having an Affected Claim, the Directors and Officers of SFC and all other Persons named or referred to in, or subject to, the Plan, as and to the extent provided for in the Plan.

2.3 Unaffected Claims against SFC Not Affected

Any amounts properly owing by SFC in respect of Unaffected Claims will be satisfied in accordance with section 4.2 hereof. Consistent with the foregoing, all liabilities of the Released Parties in respect of Unaffected Claims (other than the obligation of SFC to satisfy such Unaffected Claims in accordance with section 4.2 hereof) will be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred pursuant to Article 7 hereof. Nothing in the Plan shall affect SFC's rights and defences, both legal and equitable, with respect

to any Unaffected Claims, including all rights with respect to legal and equitable defences or entitlements to set-offs or recoupments against such Unaffected Claims.

2.4 Insurance

(a) Subject to the terms of this section 2.4, nothing in this Plan shall prejudice, compromise, release, discharge, cancel, bar or otherwise affect any right, entitlement or claim of any Person against SFC or any Director or Officer, or any insurer, in respect of an Insurance Policy or the proceeds thereof.

(b) Nothing in this Plan shall prejudice, compromise, release or otherwise affect any right or defence of any such insurer in respect of any such Insurance Policy. Furthermore, nothing in this Plan shall prejudice, compromise, release or otherwise affect (i) any right of subrogation any such insurer may have against any Person, including against any Director or Officer in the event of a determination of fraud against SFC or any Director or Officer in respect of whom such a determination is specifically made, and /or (ii) the ability of such insurer to claim repayment of Defense Costs (as defined in any such policy) from SFC and/or any Director or Officer in the event that the party from whom repayment is sought is not entitled to coverage under the terms and conditions of any such Insurance Policy

(c) Notwithstanding anything herein (including section 2.4(b) and the releases and injunctions set forth in Article 7 hereof), but subject to section 2.4(d) hereof, all Insured Claims shall be deemed to remain outstanding and are not released following the Plan Implementation Date, but recovery as against SFC and the Named Directors and Officers is limited only to proceeds of Insurance Policies that are available to pay such Insured Claims, either by way of judgment or settlement. SFC and the Directors or Officers shall make all reasonable efforts to meet all obligations under the Insurance Policies. The insurers agree and acknowledge that they shall be obliged to pay any Loss payable pursuant to the terms and conditions of their respective Insurance Policies notwithstanding the releases granted to SFC and the Named Directors and Officers under this Plan, and that they shall not rely on any provisions of the Insurance Policies to argue, or otherwise assert, that such releases excuse them from, or relieve them of, the obligation to pay Loss that otherwise would be payable under the terms of the Insurance Policies. For greater certainty, the insurers agree and consent to a direct right of action against the insurers, or any of them, in favour of any plaintiff who or which has (a) negotiated a settlement of any Claim covered under any of the Insurance Policies, which settlement has been consented to in writing by the insurers or such of them as may be required or (b) obtained a final judgment against one or more of SFC and/or the Directors or Officers which such plaintiff asserts, in whole or in part, represents Loss covered under the Insurance Policies, notwithstanding that such plaintiff is not a named insured under the Insurance Policies and that neither SFC nor the Directors or Officers are parties to such action.

(d) Notwithstanding anything in this section 2.4, from and after the Plan Implementation Date, any Person having an Insured Claim shall, as against SFC and the Named Directors and Officers, be irrevocably limited to recovery solely from the proceeds of the Insurance Policies paid or payable on behalf of SFC or its Directors or Officers, and Persons with any Insured Claims shall have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from SFC, any of the Named Directors and Officers, any of the Subsidiaries, Newco or Newco II, other than enforcing such Person's rights to be paid from the proceeds of an Insurance Policy by the applicable insurer(s), and this section 2.4(d) may be relied upon and raised or pled by SFC, Newco, Newco II, any Subsidiary and any Named Director and Officer in defence or estoppel of or to enjoin any claim, action or proceeding brought in contravention of this section

2.5 Claims Procedure Order

For greater certainty, nothing in this Plan revives or restores any right or claim of any kind that is barred or extinguished pursuant to the terms of the Claims Procedure Order, provided that nothing in this Plan, the Claims Procedure Order or any other Order compromises, releases, discharges, cancels or bars any claim against any Person for fraud or criminal conduct, regardless of whether or not any such claim has been asserted to date.

ARTICLE 3
CLASSIFICATION, VOTING AND RELATED MATTERS

3.1 Claims Procedure

The procedure for determining the validity and quantum of the Affected Claims shall be governed by the Claims Procedure Order, the Meeting Order, the CCAA, the Plan and any other Order, as applicable. SFC, the Monitor and any other creditor in respect of its own Claim, shall have the right to seek the assistance of the Court in valuing any Claim, whether for voting or distribution purposes, if required, and to ascertain the result of any vote on the Plan.

3.2 Classification

(a) The Affected Creditors shall constitute a single class, the "**Affected Creditors Class**", for the purposes of considering and voting on the Plan.

(b) The Equity Claimants shall constitute a single class, separate from the Affected Creditors Class, but shall not, and shall have no right to, attend the Meeting or vote on the Plan in such capacity.

3.3 Unaffected Creditors

No Unaffected Creditor, in respect of an Unaffected Claim, shall:

(a) be entitled to vote on the Plan;

(b) be entitled to attend the Meeting; or

(c) receive any entitlements under this Plan in respect of such Unaffected Creditor's Unaffected Claims (other than its right to have its Unaffected Claim addressed in accordance with section 4.2 hereof).

3.4 Creditors' Meeting

The Meeting shall be held in accordance with the Plan, the Meeting Order and any further Order of the Court. The only Persons entitled to attend and vote on the Plan at the Meeting are those specified in the Meeting Order.

3.5 Approval by Creditors

In order to be approved, the Plan must receive the affirmative vote of the Required Majority of the Affected Creditors Class.

ARTICLE 4
DISTRIBUTIONS, PAYMENTS AND TREATMENT OF CLAIMS

4.1 Affected Creditors

All Affected Creditor Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date. Each Affected Creditor that has a Proven Claim shall be entitled to receive the following in accordance with the Plan:

(a) such Affected Creditor's Pro-Rata number of the Newco Shares to be issued by Newco from the Affected Creditors Equity Sub-Pool in accordance with the Plan;

(b) such Affected Creditor's Pro-Rata amount of the Newco Notes to be issued by Newco in accordance with the Plan; and

(c) such Affected Creditor's Pro-Rata share of the Litigation Trust Interests to be allocated to the Affected Creditors in accordance with 4.11 hereof and the terms of the Litigation Trust.

From and after the Plan Implementation Date, each Affected Creditor, in such capacity, shall have no rights as against SFC in respect of its Affected Creditor Claim.

4.2 Unaffected Creditors

Each Unaffected Claim that is finally determined as such, as to status and amount, and that is finally determined to be valid and enforceable against SFC, in each case in accordance with the Claims Procedure Order or other Order:

(a) subject to sections 4.2(b) and 4.2(c) hereof, shall be paid in full from the Unaffected Claims Reserve and limited to recovery against the Unaffected Claims Reserve, and Persons with Unaffected Claims shall have no right to, and shall not, make any claim or seek any recoveries from any Person in respect of Unaffected

Claims, other than enforcing such Person's right against SFC to be paid from the Unaffected Claims Reserve;

(b) in the case of Claims secured by the Administration Charge:

(i) if billed or invoiced to SFC prior to the Plan Implementation Date, such Claims shall be paid by SFC in accordance with section 6.4(d) hereof; and

(ii) if billed or invoiced to SFC on or after the Plan Implementation Date, such Claims shall be paid from the Administration Charge Reserve, and all such Claims shall be limited to recovery against the Administration Charge Reserve, and any Person with such Claims shall have no right to, and shall not, make any claim or seek any recoveries from any Person in respect of such Claims, other than enforcing such Person's right against the Administration Charge Reserve; and

(c) in the case of Lien Claims:

(i) at the election of the Initial Consenting Noteholders, and with the consent of the Monitor, SFC shall satisfy such Lien Claim by the return of the applicable property of SFC that is secured as collateral for such Lien Claim, and the applicable Lien Claimant shall be limited to its recovery against such secured property in respect of such Lien Claim.

(ii) if the Initial Consenting Noteholders do not elect to satisfy such Lien Claim by the return of the applicable secured property: (A) SFC shall repay the Lien Claim in full in cash on the Plan Implementation Date; and (B) the security held by the applicable Lien Claimant over the property of SFC shall be fully, finally, irrevocably and forever released, discharged, cancelled and barred; and

(iii) upon the satisfaction of a Lien Claim in accordance with sections 4.2(c)(i) or 4.2(c)(ii) hereof, such Lien Claims shall be fully, finally, irrevocably and forever released, discharged, cancelled and barred.

4.3 Early Consent Noteholders

As additional consideration for the compromise, release, discharge, cancellation and bar of the Affected Creditor Claims in respect of its Notes, each Early Consent Noteholder shall receive (in addition to the consideration it is entitled to receive in accordance with section 4.1 hereof) its Pro-Rata number of the Newco Shares to be issued by Newco from the Early Consent Equity Sub-Pool in accordance with the Plan.

4.4 Noteholder Class Action Claimants

(a) All Noteholder Class Action Claims against SFC, the Subsidiaries or the Named Directors or Officers (other than any Noteholder Class Action Claims against the Named Directors or Officers that are Section 5.1(2) D&O Claims, Conspiracy

Claims or Non-Released D&O Claims) shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred without consideration as against all said Persons on the Plan Implementation Date. Subject to section 4.4(f) hereof, Noteholder Class Action Claimants shall not receive any consideration or distributions under the Plan in respect of their Noteholder Class Action Claims. Noteholder Class Action Claimants shall not be entitled to attend or to vote on the Plan at the Meeting in respect of their Noteholder Class Action Claims.

(b) Notwithstanding anything to the contrary in section 4.4(a), Noteholder Class Action Claims as against the Third Party Defendants (x) are not compromised, discharged, released, cancelled or barred, (y) shall be permitted to continue as against the Third Party Defendants and (z) shall not be limited or restricted by this Plan in any manner as to quantum or otherwise (including any collection or recovery for such Noteholder Class Action Claims that relates to any liability of the Third Party Defendants for any alleged liability of SFC), provided that:

(i) in accordance with the releases set forth in Article 7 hereof, the collective aggregate amount of all rights and claims asserted or that may be asserted against the Third Party Defendants in respect of any such Noteholder Class Action Claims for which any such Persons in each case have a valid and enforceable Class Action Indemnity Claim against SFC (the "**Indemnified Noteholder Class Action Claims**") shall not exceed, in the aggregate, the Indemnified Noteholder Class Action Limit, and in accordance with section 7.3 hereof, all Persons shall be permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, from seeking to enforce any liability in respect of the Indemnified Noteholder Class Action Claims that exceeds the Indemnified Noteholder Class Action Limit;

(ii) subject to section 4.4(g), any Class Action Indemnity Claims against SFC by the Third Party Defendants in respect of the Indemnified Noteholder Class Action Claims shall be treated as Affected Creditor Claims against SFC, but only to the extent that any such Class Action Indemnity Claims that are determined to be properly indemnified by SFC, enforceable against SFC and are not barred or extinguished by the Claims Procedure Order, and further provided that the aggregate liability of SFC in respect of all such Class Action Indemnity Claims shall be limited to the lesser of: (A) the actual aggregate liability of the Third Party Defendants pursuant to any final judgment, settlement or other binding resolution in respect of the Indemnified Noteholder Class Action Claims; and (B) the Indemnified Noteholder Class Action Limit; and

(iii) for greater certainty, in the event that any Third Party Defendant is found to be liable for or agrees to a settlement in respect of a Noteholder Class Action Claim (other than a Noteholder Class Action Claim for fraud or criminal conduct) and such amounts are paid by or on behalf of the

applicable Third Party Defendant, then the amount of the Indemnified Noteholder Class Action Limit applicable to the remaining Third Party Defendants shall be reduced by the amount paid in respect of such Noteholder Class Action Claim, as applicable.

(c) Subject to section 7.1(o), the Claims of the Underwriters for indemnification in respect of any Noteholder Class Action Claims (other than Noteholder Class Action Claims against the Underwriters for fraud or criminal conduct) shall, for purposes of the Plan, be deemed to be valid and enforceable Class Action Indemnity Claims against SFC (as limited pursuant to section 4.4(b) hereof), provided that: (i) the Underwriters shall not be entitled to receive any distributions of any kind under the Plan in respect of such Claims; (ii) such Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date; and (iii) the amount of such Claims shall not affect the calculation of any Pro-Rata entitlements of the Affected Creditors under this Plan. For greater certainty, to the extent of any conflict with respect to the Underwriters between section 4.4(e) hereof and this section 4.4(c), this section 4.4(c) shall prevail.

(d) Subject to section 7.1(m), any and all indemnification rights and entitlements of Ernst & Young at common law and any and all indemnification agreements between Ernst & Young and SFC shall be deemed to be valid and enforceable in accordance with their terms for the purpose of determining whether the Claims of Ernst & Young for indemnification in respect of Noteholder Class Action Claims are valid and enforceable within the meaning of section 4.4(b) hereof. With respect to Claims of Ernst & Young for indemnification in respect of Noteholder Class Action Claims that are valid and enforceable: (i) Ernst & Young shall not be entitled to receive any distributions of any kind under the Plan in respect of such Claims; (ii) such Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date; and (iii) the amount of such Claims shall not affect the calculation of any Pro-Rata entitlements of the Affected Creditors under this Plan.

(e) Subject to section 7.1(n), any and all indemnification rights and entitlements of the Named Third Party Defendants at common law and any and all indemnification agreements between the Named Third Party Defendants and SFC shall be deemed to be valid and enforceable in accordance with their terms for the purpose of determining whether the Claims of the Named Third Party Defendants for indemnification in respect of Noteholder Class Action Claims are valid and enforceable within the meaning of section 4.4(b) hereof. With respect to Claims of the Named Third Party Defendants for indemnification in respect of Noteholder Class Action Claims that are valid and enforceable: (i) the Named Third Party Defendants shall not be entitled to receive any distributions of any kind under the Plan in respect of such Claims; (ii) such Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date; and (iii) the amount of such Claims shall

not affect the calculation of any Pro-Rata entitlements of the Affected Creditors under this Plan.

(f) Each Noteholder Class Action Claimant shall be entitled to receive its share of the Litigation Trust Interests to be allocated to Noteholder Class Action Claimants in accordance with the terms of the Litigation Trust and section 4.11 hereof, as such Noteholder Class Action Claimant's share is determined by the applicable Class Action Court.

(g) Nothing in this Plan impairs, affects or limits in any way the ability of SFC, the Monitor or the Initial Consenting Noteholders to seek or obtain an Order, whether before or after the Plan Implementation Date, directing that Class Action Indemnity Claims in respect of Noteholder Class Action Claims or any other Claims of the Third Party Defendants should receive the same or similar treatment as is afforded to Class Action Indemnity Claims in respect of Equity Claims under the terms of this Plan.

4.5 Equity Claimants

All Equity Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date. Equity Claimants shall not receive any consideration or distributions under the Plan and shall not be entitled to vote on the Plan at the Meeting.

4.6 Claims of the Trustees and Noteholders

For purposes of this Plan, all claims filed by the Trustees in respect of the Noteholder Claims (other than any Trustee Claims) shall be treated as provided in section 4.1 and the Trustees and the Noteholders shall have no other entitlements in respect of the guarantees and share pledges that have been provided by the Subsidiaries, or any of them, all of which shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date as against the Subsidiaries pursuant to Article 7 hereof.

4.7 Claims of the Third Party Defendants

For purposes of this Plan, all claims filed by the Third Party Defendants against SFC and/or any of its Subsidiaries shall be treated as follows:

(a) all such claims against the Subsidiaries shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date in accordance with Article 7 hereof;

(b) all such claims against SFC that are Class Action Indemnity Claims in respect of Indemnified Noteholder Class Action Claims shall be treated as set out in section 4.4(b)(ii) hereof;

(c) all such claims against SFC for indemnification of Defence Costs shall be treated in accordance with section 4.8 hereof; and

(d) all other claims shall be treated as Equity Claims.

4.8 Defence Costs

All Claims against SFC for indemnification of defence costs incurred by any Person (other than a Named Director or Officer) in connection with defending against Shareholder Claims (as defined in the Equity Claims Order), Noteholder Class Action Claims or any other claims of any kind relating to SFC or the Subsidiaries ("**Defence Costs**") shall be treated as follows:

(a) as Equity Claims to the extent they are determined to be Equity Claims under any Order; and

(b) as Affected Creditor Claims to the extent that they are not determined to be Equity Claims under any Order, provided that:

(i) if such Defence Costs were incurred in respect of a claim against the applicable Person that has been successfully defended and the Claim for such Defence Costs is otherwise valid and enforceable against SFC, the Claim for such Defence Costs shall be treated as a Proven Claim, provided that if such Claim for Defence Costs is a Class Action Indemnity Claim of a Third Party Defendant against SFC in respect of any Indemnified Noteholder Class Action Claim, such Claim for Defence Costs shall be treated in the manner set forth in section 4.4(b)(ii) hereof;

(ii) if such Defence Costs were incurred in respect of a claim against the applicable Person that has not been successfully defended or such Defence Costs are determined not to be valid and enforceable against SFC, the Claim for such Defence Costs shall be disallowed and no consideration will be payable in respect thereof under the Plan; and

(iii) until any such Claim for Defence Costs is determined to be either a Claim within section 4.8(b)(i) or a Claim within section 4.8(b)(ii), such Claim shall be treated as an Unresolved Claim,

provided that nothing in this Plan impairs, affects or limits in any way the ability of SFC, the Monitor or the Initial Consenting Noteholders to seek an Order that Claims against SFC for indemnification of any Defence Costs should receive the same or similar treatment as is afforded to Equity Claims under the terms of this Plan.

4.9 D&O Claims

(a) All D&O Claims against the Named Directors and Officers (other than Section 5.1(2) D&O Claims, Conspiracy Claims and Non-Released D&O Claims) shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred without consideration on the Plan Implementation Date.

(b) All D&O Claims against the Other Directors and/or Officers shall not be compromised, released, discharged, cancelled or barred by this Plan and shall be permitted to continue as against the applicable Other Directors and/or Officers (the "**Continuing Other D&O Claims**"), provided that any Indemnified Noteholder Class Action Claims against the Other Directors and/or Officers shall be limited as described in section 4.4(b)(i) hereof.

(c) All D&O Indemnity Claims and any other rights or claims for indemnification held by the Named Directors and Officers shall be deemed to have no value and shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred without consideration on the Plan Implementation Date.

(d) All D&O Indemnity Claims and any other rights or claims for indemnification held by the Other Directors and/or Officers shall be deemed to have no value and shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred without consideration on the Plan Implementation Date, except that: (i) any such D&O Indemnity Claims for Defence Costs shall be treated in accordance with section 4.8 hereof; and (ii) any Class Action Indemnity Claim of an Other Director and/or Officer against SFC in respect of the Indemnified Noteholder Class Action Claims shall be treated in the manner set forth in section 4.4(b)(ii) hereof.

(e) All Section 5.1(2) D&O Claims and all Conspiracy Claims shall not be compromised, released, discharged, cancelled or barred by this Plan, provided that any Section 5.1(2) D&O Claims against Named Directors and Officers and any Conspiracy Claims against Named Directors and Officers shall be limited to recovery from any insurance proceeds payable in respect of such Section 5.1(2) D&O Claims or Conspiracy Claims, as applicable, pursuant to the Insurance Policies, and Persons with any such Section 5.1(2) D&O Claims against Named Directors and Officers or Conspiracy Claims against Named Directors and Officers shall have no right to, and shall not, make any claim or seek any recoveries from any Person (including SFC, any of the Subsidiaries, Newco or Newco II), other than enforcing such Persons' rights to be paid from the proceeds of an Insurance Policy by the applicable insurer(s).

(f) All D&O Claims against the Directors and Officers of SFC or the Subsidiaries for fraud or criminal conduct shall not be compromised, discharged, released, cancelled or barred by this Plan and shall be permitted to continue as against all applicable Directors and Officers ("**Non-Released D&O Claims**").

(g) Notwithstanding anything to the contrary herein, from and after the Plan Implementation Date, a Person may only commence an action for a Non-Released D&O Claim against a Named Director or Officer if such Person has first obtained (i) the consent of the Monitor or (ii) leave of the Court on notice to the applicable Directors and Officers, SFC, the Monitor, the Initial Consenting Noteholders and any applicable insurers. For the avoidance of doubt, the foregoing requirement

for the consent of the Monitor or leave of the Court shall not apply to any Non-Released D&O Claim that is asserted against an Other Director and/or Officer.

4.10 Intercompany Claims

All SFC Intercompany Claims (other than those transferred to SFC Barbados pursuant to section 6.4(j) hereof or set-off pursuant to section 6.4(l) hereof) shall be deemed to be assigned by SFC to Newco on the Plan Implementation Date pursuant to section 6.4(m) hereof, and shall then be deemed to be assigned by Newco to Newco II pursuant to section 6.4(x) hereof. The obligations of SFC to the applicable Subsidiaries and Greenheart in respect of all Subsidiary Intercompany Claims (other than those set-off pursuant to section 6.4(l) hereof) shall be assumed by Newco on the Plan Implementation Date pursuant to 6.4(m) hereof, and then shall be assumed by Newco II pursuant to section 6.4(x) hereof. Notwithstanding anything to the contrary herein, Newco II shall be liable to the applicable Subsidiaries and Greenheart for such Subsidiary Intercompany Claims and SFC shall be released from such Subsidiary Intercompany Claims from and after the Plan Implementation Date, and the applicable Subsidiaries and Greenheart shall be liable to Newco II for such SFC Intercompany Claims from and after the Plan Implementation Date. For greater certainty, nothing in this Plan affects any rights or claims as between any of the Subsidiaries, Greenheart and Greenheart's direct and indirect subsidiaries.

4.11 Entitlement to Litigation Trust Interests

(a) The Litigation Trust Interests to be created in accordance with this Plan and the Litigation Trust shall be allocated as follows:

(i) the Affected Creditors shall be collectively entitled to 75% of such Litigation Trust Interests; and

(ii) the Noteholder Class Action Claimants shall be collectively entitled to 25% of such Litigation Trust Interests,

which allocations shall occur at the times and in the manner set forth in section 6.4 hereof and shall be recorded by the Litigation Trustee in its registry of Litigation Trust Interests.

(b) Notwithstanding anything to the contrary in section 4.11(a) hereof, if any of the Noteholder Class Action Claims against any of the Third Party Defendants are finally resolved (whether by final judgment, settlement or any other binding means of resolution) within two years of the Plan Implementation Date, then the Litigation Trust Interests to which the applicable Noteholder Class Action Claimants would otherwise have been entitled in respect of such Noteholder Class Action Claims pursuant to section 4.11(a)(ii) hereof (based on the amount of such resolved Noteholder Class Action Claims in proportion to all Noteholder Class Action Claims in existence as of the Claims Bar Date) shall be fully, finally, irrevocably and forever cancelled.

4.12 Litigation Trust Claims

(a) At any time prior to the Plan Implementation Date, SFC and the Initial Consenting Noteholders may agree to exclude one or more Causes of Action from the Litigation Trust Claims and/or to specify that any Causes of Action against a specified Person will not constitute Litigation Trust Claims ("**Excluded Litigation Trust Claims**"), in which case, any such Causes of Action shall not be transferred to the Litigation Trust on the Plan Implementation Date. Any such Excluded Litigation Trust Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date in accordance with Article 7 hereof. All Affected Creditors shall be deemed to consent to such treatment of Excluded Litigation Trust Claims pursuant to this section 4.12(a).

(b) All Causes of Action against the Underwriters by (i) SFC or (ii) the Trustees (on behalf of the Noteholders) shall be deemed to be Excluded Litigation Trust Claims that are fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date in accordance with Article 7 hereof, provided that, unless otherwise agreed by SFC and the Initial Consenting Noteholders prior to the Plan Implementation Date in accordance with section 4.12(a) hereof, any such Causes of Action for fraud or criminal conduct shall not constitute Excluded Litigation Trust Claims and shall be transferred to the Litigation Trust in accordance with section 6.4(o) hereof.

(c) At any time from and after the Plan Implementation Date, and subject to the prior consent of the Initial Consenting Noteholders and the terms of the Litigation Trust Agreement, the Litigation Trustee shall have the right to seek and obtain an order from any court of competent jurisdiction, including an Order of the Court in the CCAA or otherwise, that gives effect to any releases of any Litigation Trust Claims agreed to by the Litigation Trustee in accordance with the Litigation Trust Agreement, including a release that fully, finally, irrevocably and forever compromises, releases, discharges, cancels and bars the applicable Litigation Trust Claims as if they were Excluded Litigation Trust Claims released in accordance with Article 7 hereof. All Affected Creditors shall be deemed to consent to any such treatment of any Litigation Trust Claims pursuant to this section 4.12(b).

4.13 Multiple Affected Claims

On the Plan Implementation Date, any and all liabilities for and guarantees and indemnities of the payment or performance of any Affected Claim, Unaffected Claim, Section 5.1(2) D&O Claim, Conspiracy Claim, Continuing Other D&O Claim or Non-Released D&O Claim by any of the Subsidiaries, and any purported liability for the payment or performance of such Affected Claim, Unaffected Claim, Section 5.1(2) D&O Claim, Conspiracy Claim, Continuing Other D&O Claim or Non-Released D&O Claim by Newco or Newco II, will be deemed eliminated and cancelled, and no Person shall have any rights whatsoever to pursue or enforce any such liabilities for or guarantees or indemnities of the payment or performance of

any such Affected Claim, Unaffected Claim, Section 5.1(2) D&O Claim, Conspiracy Claim, Continuing Other D&O Claim or Non-Released D&O Claim against any Subsidiary, Newco or Newco II.

4.14 Interest

Subject to section 12.4 hereof, no holder of an Affected Claim shall be entitled to interest accruing on or after the Filing Date.

4.15 Existing Shares

Holders of Existing Shares and Equity Interests shall not receive any consideration or distributions under the Plan in respect thereof and shall not be entitled to vote on the Plan at the Meeting. Unless otherwise agreed between the Monitor, SFC and the Initial Consenting Noteholders, all Existing Shares and Equity Interests shall be fully, finally and irrevocably cancelled in accordance with and at the time specified in section 6.5 hereof.

4.16 Canadian Exempt Plans

If an Affected Creditor is a trust governed by a plan which is exempt from tax under Part I of the Canadian Tax Act (including, for example, a registered retirement savings plan), such Affected Creditor may make arrangements with Newco (if Newco so agrees) and the Litigation Trustee (if the Litigation Trustee so agrees) to have the Newco Shares, Newco Notes and Litigation Trust Interests to which it is entitled under this Plan directed to (or in the case of Litigation Trust Interests, registered in the name of) an affiliate of such Affected Creditor or the annuitant or controlling person of the governing tax-deferred plan.

ARTICLE 5
DISTRIBUTION MECHANICS

5.1 Letters of Instruction

In order to issue (i) Newco Shares and Newco Notes to Ordinary Affected Creditors and (ii) Newco Shares to Early Consent Noteholders, the following steps will be taken:

(a) with respect to Ordinary Affected Creditors with Proven Claims or Unresolved Claims:

(i) on the next Business Day following the Distribution Record Date, the Monitor shall send blank Letters of Instruction by prepaid first class mail, courier, email or facsimile to each such Ordinary Affected Creditor to the address of each such Ordinary Affected Creditor (as specified in the applicable Proof of Claim) as of the Distribution Record Date, or as evidenced by any assignment or transfer in accordance with section 5.10;

(ii) each such Ordinary Affected Creditor shall deliver to the Monitor a duly completed and executed Letter of Instruction that must be received by the Monitor on or before the date that is seven (7) Business Days after the

Distribution Record Date or such other date as the Monitor may determine; and

(iii) any such Ordinary Affected Creditor that does not return a Letter of Instruction to the Monitor in accordance with section 5.1(a)(ii) shall be deemed to have requested that such Ordinary Affected Creditor's Newco Shares and Newco Notes be registered or distributed, as applicable, in accordance with the information set out in such Ordinary Affected Creditor's Proof of Claim; and

(b) with respect to Early Consent Noteholders:

(i) on the next Business Day following the Distribution Record Date the Monitor shall send blank Letters of Instruction by prepaid first class mail, courier, email or facsimile to each Early Consent Noteholder to the address of each such Early Consent Noteholder as confirmed by the Monitor on or before the Distribution Record Date;

(ii) each Early Consent Noteholder shall deliver to the Monitor a duly completed and executed Letter of Instruction that must be received by the Monitor on or before the date that is seven (7) Business Days after the Distribution Record Date or such other date as the Monitor may determine; and

(iii) any such Early Consent Noteholder that does not return a Letter of Instruction to the Monitor in accordance with section 5.1(b)(ii) shall be deemed to have requested that such Early Consent Noteholder's Newco Shares be distributed or registered, as applicable, in accordance with information confirmed by the Monitor on or before the Distribution Record Date.

5.2 Distribution Mechanics with respect to Newco Shares and Newco Notes

(a) To effect distributions of Newco Shares and Newco Notes, the Monitor shall deliver a direction at least two (2) Business Days prior to the Initial Distribution Date to Newco or its agent, as applicable, directing Newco or its agent, as applicable, to issue on such Initial Distribution Date or subsequent Distribution Date:

(i) in respect of the Ordinary Affected Creditors with Proven Claims:

(A) the number of Newco Shares that each such Ordinary Affected Creditor is entitled to receive in accordance with section 4.1(a) hereof; and

(B) the amount of Newco Notes that each such Ordinary Affected Creditor is entitled to receive in accordance with section 4.1(b) hereof,

all of which Newco Shares and Newco Notes shall be issued to such Ordinary Affected Creditors and distributed in accordance with this Article 5;

(ii) in respect of the Ordinary Affected Creditors with Unresolved Claims:

(A) the number of Newco Shares that each such Ordinary Affected Creditor would have been entitled to receive in accordance with section 4.1(a) hereof had such Ordinary Affected Creditor's Unresolved Claim been a Proven Claim on the Plan Implementation Date; and

(B) the amount of Newco Notes that each such Ordinary Affected Creditor would have been entitled to receive in accordance with section 4.1(b) hereof had such Ordinary Affected Creditor's Unresolved Claim been a Proven Claim on the Plan Implementation Date,

all of which Newco Shares and Newco Notes shall be issued in the name of the Unresolved Claims Escrow Agent for the benefit of the Persons entitled thereto under the Plan, which Newco Shares and Newco Notes shall comprise part of the Unresolved Claims Reserve and shall be held in escrow by the Unresolved Claims Escrow Agent until released and distributed in accordance with this Article 5;

(iii) in respect of the Noteholders:

(A) the number of Newco Shares that the Trustees are collectively required to receive such that, upon distribution to the Noteholders in accordance with this Article 5, each individual Noteholder receives the number of Newco Shares to which it is entitled in accordance with section 4.1(a) hereof; and

(B) the amount of Newco Notes that the Trustees are collectively required to receive such that, upon distribution to the Noteholders in accordance with this Article 5, each individual Noteholder receives the amount of Newco Notes to which it is entitled in accordance with section 4.1(b) hereof,

all of which Newco Shares and Newco Notes shall be issued to such Noteholders and distributed in accordance with this Article 5; and

(iv) in respect of Early Consent Noteholders, the number of Newco Shares that each such Early Consent Noteholder is entitled to receive in accordance with section 4.3 hereof, all of which Newco Shares shall be issued to such Early Consent Noteholders and distributed in accordance with this Article 5.

The direction delivered by the Monitor in respect of the applicable Ordinary Affected Creditors and Early Consent Noteholders shall: (A) indicate the registration and delivery details of each applicable Ordinary Affected Creditor and Early Consent Noteholder based on the information prescribed in section 5.1; and (B) specify the number of Newco Shares and, in the case of Ordinary Affected Creditors, the amount of Newco Notes to be issued to each such Person on the applicable Distribution Date. The direction delivered by the Monitor in respect of the Noteholders shall: (C) indicate that the registration and delivery details with respect to the number of Newco Shares and amount of Newco Notes to be distributed to each Noteholder will be the same as the registration and delivery details in effect with respect to the Notes held by each Noteholder as of the Distribution Record Date; and (D) specify the number of Newco Shares and the amount of Newco Notes to be issued to each of the Trustees for purposes of satisfying the entitlements of the Noteholders set forth in sections 4.1(a) and 4.1(b) hereof. The direction delivered by the Monitor in respect of the Newco Shares and Newco Notes to be issued in the name of the Unresolved Claims Escrow Agent, for the benefit of the Persons entitled thereto under the Plan, for purposes of the Unresolved Claims Reserve shall specify the number of Newco Shares and the amount of Newco Notes to be issued in the name of the Unresolved Claims Escrow Agent for that purpose.

(b) If the registers for the Newco Shares and/or Newco Notes are maintained by the Transfer Agent in a direct registration system (without certificates), the Monitor and/or Newco and/or the Unresolved Claims Escrow Agent, as applicable, shall, on the Initial Distribution Date or any subsequent Distribution Date, as applicable:

(i) instruct the Transfer Agent to record, and the Transfer Agent shall record, in the Direct Registration Account of each applicable Ordinary Affected Creditor and each Early Consent Noteholder the number of Newco Shares and, in the case of Ordinary Affected Creditors, the amount of Newco Notes that are to be distributed to each such Person, and the Monitor and/or Newco and/or the Unresolved Claims Escrow Agent, as applicable, shall send or cause to be sent to each such Ordinary Affected Creditor and Early Consent Noteholder a Direct Registration Transaction Advice based on the delivery information as determined pursuant to section 5.1; and

(ii) with respect to the distribution of Newco Shares and/or Newco Notes to Noteholders:

(A) if the Newco Shares and/or Newco Notes are DTC eligible, the Monitor and/or Newco and/or the Unresolved Claims Escrow Agent, as applicable, shall instruct the Transfer Agent to register, and the Transfer Agent shall register, the applicable Newco Shares and/or Newco Notes in the name of DTC (or its nominee) for the benefit of the Noteholders, and the Trustees shall provide their consent to DTC to the distribution of such Newco Shares and Newco Notes to the applicable Noteholders, in the applicable

amounts, through the facilities of DTC in accordance with customary practices and procedures; and

(B) if the Newco Shares and/or Newco Notes are not DTC eligible, the Monitor and/or Newco and/or the Unresolved Claims Escrow Agent, as applicable, shall instruct the Transfer Agent to register the applicable Newco Shares and/or Newco Notes in the Direct Registration Accounts of the applicable Noteholders pursuant to the registration instructions obtained through DTC and the DTC participants (by way of a letter of transmittal process or such other process as agreed by SFC, the Monitor, the Trustees and the Initial Consenting Noteholders), and the Transfer Agent shall (A) register such Newco Shares and/or Newco Notes, in the applicable amounts, in the Direct Registration Accounts of the applicable Noteholders; and (B) send or cause to be sent to each Noteholder a Direct Registration Transaction Advice in accordance with customary practices and procedures; provided that the Transfer Agent shall not be permitted to effect the foregoing registrations without the prior written consent of the Trustees.

(c) If the registers for the Newco Shares and/or Newco Notes are not maintained by the Transfer Agent in a direct registration system, Newco shall prepare and deliver to the Monitor and/or the Unresolved Claims Escrow Agent, as applicable, and the Monitor and/or the Unresolved Claims Escrow Agent, as applicable, shall promptly thereafter, on the Initial Distribution Date or any subsequent Distribution Date, as applicable:

(i) deliver to each Ordinary Affected Creditor and each Early Consent Noteholder Newco Share Certificates and, in the case of Ordinary Affected Creditors, Newco Note Certificates representing the applicable number of Newco Shares and the applicable amount of Newco Notes that are to be distributed to each such Person; and

(ii) with respect to the distribution of Newco Shares and/or Newco Notes to Noteholders:

(A) if the Newco Shares and/or Newco Notes are DTC eligible, the Monitor and/or Newco and/or the Unresolved Claims Escrow Agent, as applicable, shall distribute to DTC (or its nominee), for the benefit of the Noteholders, Newco Share Certificates and/or Newco Note Certificates representing the aggregate of all Newco Shares and Newco Notes to be distributed to the Noteholders on such Distribution Date, and the Trustees shall provide their consent to DTC to the distribution of such Newco Shares and Newco Notes to the applicable Noteholders, in the applicable amounts, through the facilities of DTC in accordance with customary practices and procedures; and

(B) if the Newco Shares and/or Newco Notes are not DTC eligible, the Monitor and/or Newco and/or the Unresolved Claims Escrow Agent, as applicable, shall distribute to the applicable Trustees, Newco Share Certificates and/or Newco Note Certificates representing the aggregate of all Newco Shares and/or Newco Notes to be distributed to the Noteholders on such Distribution Date, and the Trustees shall make delivery of such Newco Share Certificates and Newco Note Certificates, in the applicable amounts, directly to the applicable Noteholders pursuant to the delivery instructions obtained through DTC and the DTC participants (by way of a letter of transmittal process or such other process as agreed by SFC, the Monitor, the Trustees and the Initial Consenting Noteholders), all of which shall occur in accordance with customary practices and procedures.

(d) Upon receipt of and in accordance with written instructions from the Monitor, the Trustees shall instruct DTC to and DTC shall: (i) set up an escrow position representing the respective positions of the Noteholders as of the Distribution Record Date for the purpose of making distributions on the Initial Distribution Date and any subsequent Distribution Dates (the "**Distribution Escrow Position**"); and (ii) block any further trading of the Notes, effective as of the close of business on the day immediately preceding the Plan Implementation Date, all in accordance with DTC's customary practices and procedures.

(e) The Monitor, Newco, Newco II, the Trustees, SFC, the Named Directors and Officers and the Transfer Agent shall have no liability or obligation in respect of deliveries by DTC (or its nominee) to the DTC participants or the Noteholders pursuant to this Article 5.

5.3 Allocation of Litigation Trust Interests

The Litigation Trustee shall administer the Litigation Trust Claims and the Litigation Funding Amount for the benefit of the Persons that are entitled to the Litigation Trust Interests and shall maintain a registry of such Persons as follows:

(a) with respect to Affected Creditors:

(i) the Litigation Trustee shall maintain a record of the amount of Litigation Trust Interests that each Ordinary Affected Creditor is entitled to receive in accordance with sections 4.1(c) and 4.11(a) hereof;

(ii) the Litigation Trustee shall maintain a record of the aggregate amount of all Litigation Trust Interests to which the Noteholders are collectively entitled in accordance with sections 4.1(c) and 4.11(a) hereof, and if cash is distributed from the Litigation Trust to Persons with Litigation Trust Interests, the amount of such cash that is payable to the Noteholders will be distributed through the Distribution Escrow Position (such that each

beneficial Noteholder will receive a percentage of such cash distribution that is equal to its entitlement to Litigation Trust Interests (as set forth in section 4.1(c) hereof) as a percentage of all Litigation Trust Interests); and

(iii) with respect to any Litigation Trust Interests to be allocated in respect of the Unresolved Claims Reserve, the Litigation Trustee shall record such Litigation Trust Interests in the name of the Unresolved Claims Escrow Agent, for the benefit of the Persons entitled thereto in accordance with this Plan, which shall be held by the Unresolved Claims Escrow Agent in escrow until released and distributed unless and until otherwise directed by the Monitor in accordance with this Plan;

(b) with respect to the Noteholder Class Action Claimants, the Litigation Trustee shall maintain a record of the aggregate of all Litigation Trust Interests that the Noteholder Class Action Claimants are entitled to receive pursuant to sections 4.4(f) and 4.11(a) hereof, provided that such record shall be maintained in the name of the Noteholder Class Action Representative, to be allocated to individual Noteholder Class Action Claimants in any manner ordered by the applicable Class Action Court, and provided further that if any such Litigation Trust Interests are cancelled in accordance with section 4.11(b) hereof, the Litigation Trustee shall record such cancellation in its registry of Litigation Trust Interests.

5.4 Treatment of Undeliverable Distributions

If any distribution under section 5.2 or section 5.3 of Newco Shares, Newco Notes or Litigation Trust Interests is undeliverable (that is, for greater certainty, that it cannot be properly registered or delivered to the Applicable Affected Creditor because of inadequate or incorrect registration or delivery information or otherwise) (an "**Undeliverable Distribution**"), it shall be delivered to SFC Escrow Co., which shall hold such Undeliverable Distribution in escrow and administer it in accordance with this section 5.4. No further distributions in respect of an Undeliverable Distribution shall be made unless and until SFC and the Monitor are notified by the applicable Person of its current address and/or registration information, as applicable, at which time the Monitor shall direct SFC Escrow Co. to make all such distributions to such Person, and SFC Escrow Co. shall make all such distributions to such Person. All claims for Undeliverable Distributions must be made on or before the date that is six months following the final Distribution Date, after which date the right to receive distributions under this Plan in respect of such Undeliverable Distributions shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred, without any compensation therefore, notwithstanding any federal, state or provincial laws to the contrary, at which time any such Undeliverable Distributions held by SFC Escrow Co. shall be deemed to have been gifted by the owner of the Undeliverable Distribution to Newco or the Litigation Trust, as applicable, without consideration, and, in the case of Newco Shares, Newco Notes and Litigation Trust Interests, shall be cancelled by Newco and the Litigation Trustee, as applicable. Nothing contained in the Plan shall require SFC, the Monitor, SFC Escrow Co. or any other Person to attempt to locate any owner of an Undeliverable Distribution. No interest is payable in respect of an Undeliverable Distribution. Any distribution under this Plan on account of the Notes, other than any distributions in respect of Litigation Trust Interests, shall be deemed made when delivered to

DTC or the applicable Trustee, as applicable, for subsequent distribution to the applicable Noteholders in accordance with section 5.2.

5.5 Procedure for Distributions Regarding Unresolved Claims

(a) An Affected Creditor that has asserted an Unresolved Claim will not be entitled to receive a distribution under the Plan in respect of such Unresolved Claim or any portion thereof unless and until such Unresolved Claim becomes a Proven Claim.

(b) Distributions in respect of any Unresolved Claim in existence at the Plan Implementation Date will be held in escrow by the Unresolved Claims Escrow Agent in the Unresolved Claims Reserve until settlement or final determination of the Unresolved Claim in accordance with the Claims Procedure Order, the Meeting Order or this Plan, as applicable.

(c) To the extent that Unresolved Claims become Proven Claims or are finally disallowed, the Unresolved Claims Escrow Agent shall release from escrow and deliver (or in the case of Litigation Trust Interests, cause to be registered) the following from the Unresolved Claims Reserve (on the next Distribution Date, as determined by the Monitor with the consent of SFC and the Initial Consenting Noteholders):

(i) in the case of Affected Creditors whose Unresolved Claims are ultimately determined, in whole or in part, to be Proven Claims, the Unresolved Claims Escrow Agent shall release from escrow and deliver to such Affected Creditor that number of Newco Shares, Newco Notes and Litigation Trust Interests (and any income or proceeds therefrom) that such Affected Creditor is entitled to receive in respect of its Proven Claim pursuant to section 4.1 hereof;

(ii) in the case of Affected Creditors whose Unresolved Claims are ultimately determined, in whole or in part, to be disallowed, the Unresolved Claims Escrow Agent shall release from escrow and deliver to all Affected Creditors with Proven Claims the number of Newco Shares, Newco Notes and Litigation Trust Interests (and any income or proceeds therefrom) that had been reserved in the Unresolved Claims Reserve for such Affected Creditor whose Unresolved Claims has been disallowed, Claims such that, following such delivery, all of the Affected Creditors with Proven Claims have received the amount of Newco Shares, Newco Notes and Litigation Trust Interests that they are entitled to receive pursuant to section 4.1 hereof, which delivery shall be effected in accordance with sections 5.2 and 5.3 hereof.

(d) As soon as practicable following the date that all Unresolved Claims have been finally resolved and any required distributions contemplated in section 5.5(c) have been made, the Unresolved Claims Escrow Agent shall distribute (or in the case of Litigation Trust Interests, cause to be registered) any Litigation Trust Interests,

Newco Shares and Newco Notes (and any income or proceeds therefrom), as applicable, remaining in the Unresolved Claims Reserve to the Affected Creditors with Proven Claims such that after giving effect to such distributions each such Affected Creditor has received the amount of Litigation Trust Interests, Newco Shares and Newco Notes that it is entitled to receive pursuant to section 4.1 hereof.

(e) During the time that Newco Shares, Newco Notes and/or Litigation Trust Interests are held in escrow in the Unresolved Claims Reserve, any income or proceeds received therefrom or accruing thereon shall be added to the Unresolved Claims Reserve by the Unresolved Claims Escrow Agent and no Person shall have any right to such income or proceeds until such Newco Shares, Newco Notes or Litigation Trust Interests, as applicable, are distributed (or in the case of Litigation Trust Interests, registered) in accordance with section 5.5(c) and 5.5(d) hereof, at which time the recipient thereof shall be entitled to any applicable income or proceeds therefrom.

(f) The Unresolved Claims Escrow Agent shall have no beneficial interest or right in the Unresolved Claims Reserve. The Unresolved Claims Escrow Agent shall not take any step or action with respect to the Unresolved Claims Reserve or any other matter without the consent or direction of the Monitor or the direction of the Court. The Unresolved Claims Escrow Agent shall forthwith, upon receipt of an Order of the Court or instruction of the Monitor directing the release of any Newco Shares, Newco Notes and/or Litigation Trust Interests from the Unresolved Claims Reserve, comply with any such Order or instruction.

(g) Nothing in this Plan impairs, affects or limits in any way the ability of SFC, the Monitor or the Initial Consenting Noteholders to seek or obtain an Order, whether before or after the Plan Implementation Date, directing that any Unresolved Claims should be disallowed in whole or in part or that such Unresolved Claims should receive the same or similar treatment as is afforded to Equity Claims under the terms of this Plan.

(h) Persons with Unresolved Claims shall have standing in any proceeding in respect of the determination or status of any Unresolved Claim, and Goodmans LLP (in its capacity as counsel to the Initial Consenting Noteholders) shall have standing in any such proceeding on behalf of the Initial Consenting Notheolders (in their capacity as Affected Creditors with Proven Claims).

5.6 Tax Refunds

Any input tax credits or tax refunds received by or on behalf of SFC after the Effective Time shall, immediately upon receipt thereof, be paid directly by, or on behalf of, SFC to Newco without consideration.

5.7 Final Distributions from Reserves

(a) If there is any cash remaining in: (i) the Unaffected Claims Reserve on the date that all Unaffected Claims have been finally paid or otherwise discharged and/or (ii) the Administration Charge Reserve on the date that all Claims secured by the Administration Charge have been finally paid or otherwise discharged, the Monitor shall, in each case, forthwith transfer all such remaining cash to the Monitor's Post-Implementation Reserve.

(b) The Monitor will not terminate the Monitor's Post-Implementation Reserve prior to the termination of each of the Unaffected Claims Reserve and the Administration Charge Reserve. The Monitor may, at any time, from time to time and at its sole discretion, release amounts from the Monitor's Post-Implementation Reserve to Newco. Goodmans LLP (in its capacity as counsel to the Initial Consenting Noteholders) shall be permitted to apply for an Order of the Court directing the Monitor to make distributions from the Monitor's Post-Implementation Reserve. Once the Monitor has determined that the cash remaining in the Monitor's Post-Implementation Reserve is no longer necessary for administering SFC or the Claims Procedure, the Monitor shall forthwith transfer any such remaining cash (the "**Remaining Post-Implementation Reserve Amount**") to Newco.

5.8 Other Payments and Distributions

All other payments and distributions to be made pursuant to this Plan shall be made in the manner described in this Plan, the Sanction Order or any other Order, as applicable.

5.9 Note Indentures to Remain in Effect Solely for Purpose of Distributions

Following completion of the steps in the sequence set forth in section 6.4, all debentures, indentures, notes (including the Notes), certificates, agreements, invoices and other instruments evidencing Affected Claims will not entitle any holder thereof to any compensation or participation other than as expressly provided for in the Plan and will be cancelled and will be null and void. Any and all obligations of SFC and the Subsidiaries under and with respect to the Notes, the Note Indentures and any guarantees or indemnities with respect to the Notes or the Note Indentures shall be terminated and cancelled on the Plan Implementation Date and shall not continue beyond the Plan Implementation Date. Notwithstanding the foregoing and anything to the contrary in the Plan, the Note Indentures shall remain in effect solely for the purpose of and only to the extent necessary to allow the Trustees to make distributions to Noteholders on the Initial Distribution Date and, as necessary, each subsequent Distribution Date thereafter, and to maintain all of the rights and protections afforded to the Trustees as against the Noteholders under the applicable Note Indentures, including their lien rights with respect to any distributions under this Plan, until all distributions provided for hereunder have been made to the Noteholders. The obligations of the Trustees under or in respect of this Plan shall be solely as expressly set out herein. Without limiting the generality of the releases, injunctions and other protections afforded to the Trustees under this Plan and the applicable Note Indentures, the Trustees shall have no liability whatsoever to any Person resulting from the due performance of their obligations

hereunder, except if such Trustee is adjudged by the express terms of a non-appealable judgment rendered on a final determination on the merits to have committed gross negligence or wilful misconduct in respect of such matter.

5.10 Assignment of Claims for Distribution Purposes

(a) *Assignment of Claims by Ordinary Affected Creditors*

Subject to any restrictions contained in Applicable Laws, an Ordinary Affected Creditor may transfer or assign the whole of its Affected Claim after the Meeting provided that neither SFC nor Newco nor Newco II nor the Monitor nor the Unresolved Claims Escrow Agent shall be obliged to make distributions to any such transferee or assignee or otherwise deal with such transferee or assignee as an Ordinary Affected Creditor in respect thereof unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment and such other documentation as SFC and the Monitor may reasonably require, has been received by SFC and the Monitor on or before the Plan Implementation Date, or such other date as SFC and the Monitor may agree, failing which the original transferor shall have all applicable rights as the "Ordinary Affected Creditor" with respect to such Affected Claim as if no transfer of the Affected Claim had occurred. Thereafter, such transferee or assignee shall, for all purposes in accordance with this Plan, constitute an Ordinary Affected Creditor and shall be bound by any and all notices previously given to the transferor or assignor in respect of such Claim. For greater certainty, SFC shall not recognize partial transfers or assignments of Claims.

(b) *Assignment of Notes*

Only those Noteholders who have beneficial ownership of one or more Notes as at the Distribution Record Date shall be entitled to receive a distribution under this Plan on the Initial Distribution Date or any Distribution Date. Noteholders who have beneficial ownership of Notes shall not be restricted from transferring or assigning such Notes prior to or after the Distribution Record Date (unless the Distribution Record Date is the Plan Implementation Date), provided that if such transfer or assignment occurs after the Distribution Record Date, neither SFC nor Newco nor Newco II nor the Monitor nor the Unresolved Claims Escrow Agent shall have any obligation to make distributions to any such transferee or assignee of Notes in respect of the Claims associated therewith, or otherwise deal with such transferee or assignee as an Affected Creditor in respect thereof. Noteholders who assign or acquire Notes after the Distribution Record Date shall be wholly responsible for ensuring that Plan distributions in respect of the Claims associated with such Notes are in fact delivered to the assignee, and the Trustees shall have no liability in connection therewith.

5.11 Withholding Rights

SFC, Newco, Newco II, the Monitor, the Litigation Trustee, the Unresolved Claims Escrow Agent and/or any other Person making a payment contemplated herein shall be entitled to deduct and withhold from any consideration payable to any Person such amounts as it is required to deduct and withhold with respect to such payment under the Canadian Tax Act, the United States Internal Revenue Code of 1986 or any provision of federal, provincial, territorial, state, local or foreign Tax laws, in each case, as amended. To the extent that amounts are so

withheld or deducted, such withheld or deducted amounts shall be treated for all purposes hereof as having been paid to the Person in respect of which such withholding was made, provided that such amounts are actually remitted to the appropriate Taxing Authority. To the extent that the amounts so required or permitted to be deducted or withheld from any payment to a Person exceed the cash portion of the consideration otherwise payable to that Person: (i) the payor is authorized to sell or otherwise dispose of such portion of the consideration as is necessary to provide sufficient funds to enable it to comply with such deduction or withholding requirement or entitlement, and the payor shall notify the applicable Person thereof and remit to such Person any unapplied balance of the net proceeds of such sale; or (ii) if such sale is not reasonably possible, the payor shall not be required to make such excess payment until the Person has directly satisfied any such withholding obligation and provides evidence thereof to the payor.

5.12 Fractional Interests

No fractional interests of Newco Shares or Newco Notes ("**Fractional Interests**") will be issued under this Plan. For purposes of calculating the number of Newco Shares and Newco Notes to be issued by Newco pursuant to this Plan, recipients of Newco Shares or Newco Notes will have their entitlements adjusted downwards to the nearest whole number of Newco Shares or Newco Notes, as applicable, to eliminate any such Fractional Interests and no compensation will be given for the Fractional Interest.

5.13 Further Direction of the Court

The Monitor shall, in its sole discretion, be entitled to seek further direction of the Court, including a plan implementation order, with respect to any matter relating to the implementation of the plan including with respect to the distribution mechanics and restructuring transaction as set out in Articles 5 and 6 of this Plan.

ARTICLE 6
RESTRUCTURING TRANSACTION

6.1 Corporate Actions

The adoption, execution, delivery, implementation and consummation of all matters contemplated under the Plan involving corporate action of SFC will occur and be effective as of the Plan Implementation Date, other than such matters occurring on the Equity Cancellation Date which will occur and be effective on such date, and in either case will be authorized and approved under the Plan and by the Court, where appropriate, as part of the Sanction Order, in all respects and for all purposes without any requirement of further action by shareholders, Directors or Officers of SFC. All necessary approvals to take actions shall be deemed to have been obtained from the directors or the shareholders of SFC, as applicable, including the deemed passing by any class of shareholders of any resolution or special resolution and no shareholders' agreement or agreement between a shareholder and another Person limiting in any way the right to vote shares held by such shareholder or shareholders with respect to any of the steps contemplated by the Plan shall be deemed to be effective and shall have no force and effect, provided that, subject to sections 12.6 and 12.7 hereof, where any matter expressly requires the

consent or approval of SFC, the Initial Consenting Noteholders or SFC's board of directors pursuant to this Plan, such consent or approval shall not be deemed to be given unless actually given.

6.2 Incorporation of Newco and Newco II

(a) Newco shall be incorporated prior to the Plan Implementation Date. Newco shall be authorized to issue an unlimited number of Newco Shares and shall have no restrictions on the number of its shareholders. At the time that Newco is incorporated, Newco shall issue one Newco Share to the Initial Newco Shareholder, as the sole shareholder of Newco, and the Initial Newco Shareholder shall be deemed to hold the Newco Share for the purpose of facilitating the Restructuring Transaction. For greater certainty, the Initial Newco Shareholder shall not hold such Newco Share as agent of or for the benefit of SFC, and SFC shall have no rights in relation to such Newco Share. Newco shall not carry on any business or issue any other Newco Shares or other securities until the Plan Implementation Date, and then only in accordance with section 6.4 hereof. The Initial Newco Shareholder shall be deemed to have no liability whatsoever for any matter pertaining to its status as the Initial Newco Shareholder, other than its obligations under this Plan to act as the Initial Newco Shareholder.

(b) Newco II shall be incorporated prior to the Plan Implementation Date as a wholly-owned subsidiary of Newco. The memorandum and articles of association of Newco II will be in a form customary for a wholly-owned subsidiary under the applicable jurisidiction and the initial board of directors of Newco II will consist of the same Persons appointed as the directors of Newco on or prior to the Plan Implementation Date.

6.3 Incorporation of SFC Escrow Co.

SFC Escrow Co. shall be incorporated prior to the Plan Implementation Date. SFC Escrow Co. shall be incorporated under the laws of the Cayman Islands, or such other jurisdiction as may be agreed by SFC, the Monitor and the Initial Consenting Noteholders. The sole director of SFC Escrow Co. shall be Codan Services (Cayman) Limited, or such other Person as may be agreed by SFC, the Monitor and the Initial Consenting Noteholders. At the time that SFC Escrow Co. is incorporated, SFC Escrow Co. shall issue one share (the "SFC Escrow Co. Share") to SFC, as the sole shareholder of SFC Escrow Co. and SFC shall be deemed to hold the SFC Escrow Co. Share for the purpose of facilitating the Restructuring Transaction. SFC Escrow Co. shall have no assets other than any assets that it is required to hold in escrow pursuant to the terms of this Plan, and it shall have no liabilities other than its obligations as set forth in this Plan. SFC Escrow Co. shall not carry on any business or issue any shares or other securities (other than the SFC Escrow Co. Share). The sole activity and function of SFC Escrow Co. shall be to perform the obligations of the Unresolved Claims Escrow Agent as set forth in this Plan and to administer Undeliverable Distributions as set forth in section 5.4 of this Plan. SFC Escrow Co. shall not make any sale, distribution, transfer or conveyance of any Newco Shares, Newco Notes or any other assets or property that it holds unless it is directed to do so by an Order of the Court or by a written direction from the Monitor, in which case SFC

Escrow Co. shall promptly comply with such Order of the Court or such written direction from the Monitor. SFC shall not sell, transfer or convey the SFC Escrow Co. Share nor effect or cause to be effected any liquidation, dissolution, merger or other corporate reorganization of SFC Escrow Co. unless it is directed to do so by an Order of the Court or by a written direction from the Monitor, in which case SFC shall promptly comply with such Order of the Court or such written direction from the Monitor. SFC Escrow Co. shall not exercise any voting rights (including any right to vote at a meeting of shareholders or creditors held or in any written resolution) in respect of Newco Shares or Newco Notes held in the Unresolved Claims Reserve. SFC Escrow Co. shall not be entitled to receive any compensation for the performance of its obligations under this Plan.

6.4 Plan Implementation Date Transactions

The following steps and compromises and releases to be effected shall occur, and be deemed to have occurred in the following manner and order (sequentially, each step occurring five minutes apart, except that within such order steps (a) to (f) (Cash Payments) shall occur simultaneously and steps (t) to (w) (Releases) shall occur simultaneously) without any further act or formality, on the Plan Implementation Date beginning at the Effective Time (or in such other manner or order or at such other time or times as SFC, the Monitor and the Initial Consenting Noteholders may agree):

Cash Payments and Satisfaction of Lien Claims

(a) SFC shall pay required funds to the Monitor for the purpose of funding the Unaffected Claims Reserve, and the Monitor shall hold and administer such funds in trust for the purpose of paying the Unaffected Claims pursuant to the Plan.

(b) SFC shall pay the required funds to the Monitor for the purpose of funding the Administration Charge Reserve, and the Monitor shall hold and administer such funds in trust for the purpose of paying Unaffected Claims secured by Administration Charge.

(c) SFC shall pay the required funds to the Monitor for the purpose of funding the Monitor's Post-Implementation Reserve, and the Monitor shall hold and administer such funds in trust for the purpose of administering SFC, as necessary, from and after the Plan Implementation Date.

(d) SFC shall pay to the Noteholder Advisors and the Initial Consenting Noteholders, as applicable, each such Person's respective portion of the Expense Reimbursement. SFC shall pay all fees and expenses owing to each of the SFC Advisors, the advisors to the current Board of Directors of SFC, Chandler Fraser Keating Limited and Spencer Stuart and SFC or any of the Subsidiaries shall pay all fees and expenses owing to each of Indufor Asia Pacific Limited and Stewart Murray (Singapore) Pte. Ltd. If requested by the Monitor (with the consent of the Initial Consenting Noteholders) no more than 10 days prior to the Plan Implementation Date and provided that all fees and expenses set out in all previous invoices rendered by the applicable Person to SFC have been paid, SFC

and the Subsidiaries, as applicable, shall, with respect to the final one or two invoices rendered prior to the Plan Implementation Date, pay any such fees and expenses to such Persons for all work up to and including the Plan Implementation Date (including any reasonable estimates of work to be performed on the Plan Implementation Date) first by applying any such monetary retainers currently held by such Persons and then by paying any remaining balance in cash.

(e) If requested by the Monitor (with the consent of the Initial Consenting Noteholders) prior to the Plan Implementation Date, any Person with a monetary retainer from SFC that remains outstanding following the steps and payment of all fees and expenses set out in section 6.4(d) hereof shall pay to SFC in cash the full amount of such remaining retainer, less any amount permitted by the Monitor (with the Consent of the Initial Consenting Noteholders and after prior discussion with the applicable Person as to any remaining work that may reasonably be required) to remain as a continuing monetary retainer in connection with completion of any remaining work after the Plan Implementation Date that may be requested by the Monitor, SFC or the Initial Consenting Noteholders (each such continuing monetary retainer being a "**Permitted Continuing Retainer**"). Such Persons shall have no duty or obligation to perform any further work or tasks in respect of SFC unless such Persons are satisfied that they are holding adequate retainers or other security or have received payment to compensate them for all fees and expenses in respect of such work or tasks. The obligation of such Persons to repay the remaining amounts of any monetary retainers (including the unused portions of any Permitted Continuing Retainers) and all cash received therefrom shall constitute SFC Assets.

(f) The Lien Claims shall be satisfied in accordance with section 4.2(c) hereof.

Transaction Steps

(g) All accrued and unpaid interest owing on, or in respect of, or as part of, Affected Creditor Claims (including any Accrued Interest on the Notes and any interest accruing on the Notes or any Ordinary Affected Creditor Claim after the Filing Date) shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred for no consideration, and from and after the occurrence of this step, no Person shall have any entitlement to any such accrued and unpaid interest.

(h) All of the Affected Creditors shall be deemed to assign, transfer and convey to Newco all of their Affected Creditor Claims, and from and after the occurrence of this step, Newco shall be the legal and beneficial owner of all Affected Creditor Claims. In exchange for the assignment, transfer and conveyance of the Affected Creditor Claims to Newco:

(i) with respect to Affected Creditor Claims that are Proven Claims at the Effective Time:

(A) Newco shall issue to each applicable Affected Creditor the number of Newco Shares that each such Affected Creditor is entitled to receive in accordance with section 4.1(a) hereof;

(B) Newco shall issue to each applicable Affected Creditor the amount of Newco Notes that each such Affected Creditor is entitled to receive in accordance with section 4.1(b) hereof;

(C) Newco shall issue to each of the Early Consent Noteholders the number of Newco Shares that each such Early Consent Noteholder is entitled to receive pursuant to section 4.3 hereof;

(D) such Affected Creditors shall be entitled to receive the Litigation Trust Interests to be acquired by Newco in section 6.4(q) hereof, following the establishment of the Litigation Trust;

(E) such Affected Creditors shall be entitled to receive, at the time or times contemplated in sections 5.5(c) and 5.5(d) hereof, the Newco Shares, Newco Notes and Litigation Trust Interests that are subsequently distributed to (or in the case of Litigation Trust Interests registered for the benefit of) Affected Creditors with Proven Claims pursuant to sections 5.5(c) and 5.5(d) hereof (if any),

and all such Newco Shares and Newco Notes shall be distributed in the manner described in section 5.2 hereof; and

(ii) with respect to Affected Creditor Claims that are Unresolved Claims as at the Effective Time, Newco shall issue in the name of the Unresolved Claims Escrow Agent, for the benefit of the Persons entitled thereto under the Plan, the Newco Shares and the Newco Notes that would have been distributed to the applicable Affected Creditors in respect of such Unresolved Claims if such Unresolved Claims had been Proven Claims at the Effective Time; such Newco Shares, Newco Notes and Litigation Trust Interests acquired by Newco in section 6.4(q) and assigned to and registered in the name of the Unresolved Claims Escrow Agent in accordance with section 6.4(r) shall comprise part of the Unresolved Claims Reserve and the Unresolved Claims Escrow Agent shall hold all such Newco Shares, Newco Notes and Litigation Trust Interests in escrow for the benefit of those Persons entitled to receive distributions thereof pursuant to the Plan.

(i) The initial Newco Share in the capital of Newco held by the Initial Newco Shareholder shall be redeemed and cancelled for no consideration.

(j) SFC shall be deemed to assign, transfer and convey to SFC Barbados those SFC Intercompany Claims and/or Equity Interests in one or more Direct Subsidiaries as agreed to by SFC and the Initial Consenting Noteholders prior to the Plan

Implementation Date (the "**Barbados Property**") first in full repayment of the Barbados Loans and second, to the extent the fair market value of the Barbados Property exceeds the amount owing under the Barbados Loans, as a contribution to the capital of SFC Barbados by SFC. Immediately after the time of such assignment, transfer and conveyance, the Barbados Loans shall be considered to be fully paid by SFC and no longer outstanding.

(k) SFC shall be deemed to assign, transfer and convey to Newco all shares and other Equity Interests (other than the Barbados Property) in the capital of (i) the Direct Subsidiaries and (ii) any other Subsidiaries that are directly owned by SFC immediately prior to the Effective Time, other than SFC Escrow Co. (all such shares and other equity interests being the "**Direct Subsidiary Shares**") for a purchase price equal to the fair market value of the Direct Subsidiary Shares and, in consideration therefor, Newco shall be deemed to pay to SFC consideration equal to the fair market value of the Direct Subsidiary Shares, which consideration shall be comprised of a U.S. dollar denominated demand non-interest-bearing promissory note issued to SFC by Newco having a principal amount equal to the fair market value of the Direct Subsidiary Shares (the "**Newco Promissory Note 1**"). At the time of such assignment, transfer and conveyance, all prior rights that Newco had to acquire the Direct Subsidiary Shares, under the Plan or otherwise, shall cease to be outstanding. For greater certainty, SFC shall not assign, transfer or convey the SFC Escrow Co. Share, and the SFC Escrow Co. Share shall remain the property of SFC.

(l) If the Initial Consenting Noteholders and SFC agree prior to the Plan Implementation Date, there will be a set-off of any SFC Intercompany Claim so agreed against a Subsidiary Intercompany Claim owing between SFC and the same Subsidiary. In such case, the amounts will be set-off in repayment of both claims to the extent of the lesser of the two amounts, and the excess (if any) shall continue as an SFC Intercompany Claim or a Subsidiary Intercompany Claim, as applicable.

(m) SFC shall be deemed to assign, transfer and convey to Newco all SFC Intercompany Claims (other than the SFC Intercompany Claims transferred to SFC Barbados in section 6.4(j) hereof or set-off pursuant to section 6.4(l) hereof) for a purchase price equal to the fair market value of such SFC Intercompany Claims and, in consideration therefor, Newco shall be deemed to pay SFC consideration equal to the fair market value of the SFC Intercompany Claims, which consideration shall be comprised of the following: (i) the assumption by Newco of all of SFC's obligations to the Subsidiaries in respect of Subsidiary Intercompany Claims (other than the Subsidiary Intercompany Claims set-off pursuant to section 6.4(l) hereof); and (ii) if the fair market value of the transferred SFC Intercompany Claims exceeds the fair market value of the assumed Subsidiary Intercompany Claims, Newco shall issue to SFC a U.S. dollar denominated demand non-interest-bearing promissory note having a principal amount equal to such excess (the "**Newco Promissory Note 2**").

(n) SFC shall be deemed to assign, transfer and convey to Newco all other SFC Assets (namely, all SFC Assets other than the Direct Subsidiary Shares and the SFC Intercompany Claims (which shall have already been transferred to Newco in accordance with sections 6.4(k) and 6.4(m) hereof)), for a purchase price equal to the fair market value of such other SFC Assets and, in consideration therefor, Newco shall be deemed to pay to SFC consideration equal to the fair market value of such other SFC Assets, which consideration shall be comprised of a U.S. dollar denominated demand non-interest-bearing promissory note issued to SFC by Newco having a principal amount equal to the fair market value of such other SFC Assets (the "**Newco Promissory Note 3**").

(o) SFC shall establish the Litigation Trust and SFC and the Trustees (on behalf of the Noteholders) shall be deemed to convey, transfer and assign to the Litigation Trustee all of their respective rights, title and interest in and to the Litigation Trust Claims. SFC shall advance the Litigation Funding Amount to the Litigation Trustee for use by the Litigation Trustee in prosecuting the Litigation Trust Claims in accordance with the Litigation Trust Agreement, which advance shall be deemed to create a non-interest bearing receivable from the Litigation Trustee in favour of SFC in the amount of the Litigation Funding Amount (the "**Litigation Funding Receivable**"). The Litigation Funding Amount and Litigation Trust Claims shall be managed by the Litigation Trustee in accordance with the terms and conditions of the Litigation Trust Agreement.

(p) The Litigation Trust shall be deemed to be effective from the time that it is established in section 6.4(o) hereof. Initially, all of the Litigation Trust Interests shall be held by SFC. Immediately thereafter, SFC shall assign, convey and transfer a portion of the Litigation Trust Interests to the Noteholder Class Action Claimants in accordance with the allocation set forth in section 4.11 hereof.

(q) SFC shall settle and discharge the Affected Creditor Claims by assigning Newco Promissory Note 1, Newco Promissory Note 2 and Newco Promissory Note 3 (collectively, the "**Newco Promissory Notes**"), the Litigation Funding Receivable and the remaining Litigation Trust Interests held by SFC to Newco. Such assignment shall constitute payment, by set-off, of the full principal amount of the Newco Promissory Notes and of a portion of the Affected Creditor Claims equal to the aggregate principal amount of the Newco Promissory Notes, the Litigation Trust Receivable and the fair market value of the Litigation Trust Interests so transferred (with such payment being allocated first to the Noteholder Claims and then to the Ordinary Affected Creditor Claims). As a consequence thereof:

(i) Newco shall be deemed to discharge and release SFC of and from all of SFC's obligations to Newco in respect of the Affected Creditor Claims, and all of Newco's rights against SFC of any kind in respect of the Affected Creditor Claims shall thereupon be fully, finally, irrevocably and forever compromised, released, discharged and cancelled; and

(ii) SFC shall be deemed to discharge and release Newco of and from all of Newco's obligations to SFC in respect of the Newco Promissory Notes, and the Newco Promissory Notes and all of SFC's rights against Newco in respect thereof shall thereupon be fully, finally, irrevocably and forever released, discharged and cancelled.

(r) Newco shall cause a portion of the Litigation Trust Interests it acquired in section 6.4(q) hereof to be assigned to and registered in the name of the Affected Creditors with Proven Claims as contemplated in section 6.4(h), and with respect to any Affected Creditor Claims that are Unresolved Claims as at the Effective Time, the remaining Litigation Trust Interests held by Newco that would have been allocated to the applicable Affected Creditors in respect of such Unresolved Claims if such Unresolved Claims had been Proven Claims at the Effective Time shall be assigned and registered by the Litigation Trustee to the Unresolved Claims Escrow Agent and in the name of the Unresolved Claims Escrow Agent, in escrow for the benefit of Persons entitled thereto, and such Litigation Trust Interests shall comprise part of the Unresolved Claims Reserve. The Litigation Trustee shall record entitlements to the Litigation Trust Interests in the manner set forth in section 5.3.

Cancellation of Instruments and Guarantees

(s) Subject to section 5.9 hereof, all debentures, indentures, notes, certificates, agreements, invoices, guarantees, pledges and other instruments evidencing Affected Claims, including the Notes and the Note Indentures, will not entitle any holder thereof to any compensation or participation other than as expressly provided for in the Plan and shall be cancelled and will thereupon be null and void. The Trustees shall be directed by the Court and shall be deemed to have released, discharged and cancelled any guarantees, indemnities, Encumbrances or other obligations owing by or in respect of any Subsidiary relating to the Notes or the Note Indentures.

Releases

(t) Each of Newco and Newco II shall be deemed to have no liability or obligation of any kind whatsoever for: any Claim (including, notwithstanding anything to the contrary herein, any Unaffected Claim); any Affected Claim (including any Affected Creditor Claim, Equity Claim, D&O Claim, D&O Indemnity Claim and Noteholder Class Action Claim); any Section 5.1(2) D&O Claim; any Conspiracy Claim; any Continuing Other D&O Claim; any Non-Released D&O Claim; any Class Action Claim; any Class Action Indemnity Claim; any right or claim in connection with or liability for the Notes or the Note Indentures; any guarantees, indemnities, share pledges or Encumbrances relating to the Notes or the Note Indentures; any right or claim in connection with or liability for the Existing Shares or other Equity Interests or any other securities of SFC; any rights or claims of the Third Party Defendants relating to SFC or the Subsidiaries; any right or claim in connection with or liability for the RSA, the Plan, the CCAA

Proceedings, the Restructuring Transaction, the Litigation Trust, the business and affairs of SFC and the Subsidiaries (whenever or however conducted), the administration and/or management of SFC and the Subsidiaries, or any public filings, statements, disclosures or press releases relating to SFC; any right or claim in connection with or liability for any guaranty, indemnity or claim for contribution in respect of any of the foregoing; and any Encumbrance in respect of the foregoing, provided only that Newco shall assume SFC's obligations to the applicable Subsidiaries in respect of the Subsidiary Intercompany Claims pursuant to section 6.4(l) hereof and Newco II shall assume Newco's obligations to the applicable Subsidiaries in respect of the Subsidiary Intercompany Claims pursuant to section 6.4(x) hereof.

(u) Each of the Charges shall be discharged, released and cancelled.

(v) The releases and injunctions referred to in Article 7 of the Plan shall become effective in accordance with the Plan.

(w) Any contract defaults arising as a result of the CCAA Proceedings and/or the implementation of the Plan (including, notwithstanding anything to the contrary herein, any such contract defaults in respect of the Unaffected Claims) shall be deemed to be cured.

Newco II

(x) Newco shall be deemed to assign, transfer and convey to Newco II all of Newco's right, title and interest in and to all of its properties, assets and rights of every kind and description (namely the SFC Assets acquired by Newco pursuant to the Plan) for a purchase price equal to the fair market value thereof and, in consideration therefor, Newco II shall be deemed to pay to Newco consideration equal to the fair market value of such properties, assets and rights (the "**Newco II Consideration**"). The Newco II Consideration shall be comprised of: (i) the assumption by Newco II of any and all indebtedness of Newco other than the indebtedness of Newco in respect of the Newco Notes (namely, any indebtedness of Newco in respect of the Subsidiary Intercompany Claims); and (ii) the issuance to Newco of that number of common shares in Newco II as is necessary to ensure that the value of the Newco II Consideration is equal to the fair market value of the properties, assets and rights conveyed by Newco to Newco II pursuant to this section 6.4(x).

6.5 Cancellation of Existing Shares and Equity Interests

Unless otherwise agreed between the Monitor, SFC and the Initial Consenting Noteholders, on the Equity Cancellation Date all Existing Shares and Equity Interests shall be fully, finally and irrevocably cancelled, and the following steps will be implemented pursuant to the Plan as a plan of reorganization under section 191 of the *CBCA,* to be effected by articles of reorganization to be filed by SFC, subject to the receipt of any required approvals from the

Ontario Securities Commission with respect to the trades in securities contemplated by the following:

(a) SFC will create a new class of common shares to be called Class A common shares that are equivalent to the current Existing Shares except that they carry two votes per share;

(b) SFC will amend the share conditions of the Existing Shares to provide that they are cancellable for no consideration at such time as determined by the board of directors of SFC;

(c) prior to the cancellation of the Existing Shares, SFC will issue for nominal consideration one Class A common share of SFC to the SFC Continuing Shareholder;

(d) SFC will cancel the Existing Shares for no consideration on the Equity Cancellation Date; and

(e) SFC will apply to Canadian securities regulatory authorities for SFC to cease to be a reporting issuer effective immediately before the Effective Time.

Unless otherwise agreed by SFC, the Monitor and the Initial Consenting Noteholders or as otherwise directed by Order of the Court, SFC shall maintain its corporate existence at all times from and after the Plan Implementation Date until the later of the date: (i) on which SFC Escrow Co. has completed all of its obligations as Unresolved Claims Escrow Agent under this Plan; (ii) on which SFC escrow Co. no longer holds any Undeliverable Distributions delivered to it in accordance with the section 5.4 hereof; and (iii) as determined by the Litigation Trustee.

6.6 Transfers and Vesting Free and Clear

(a) All of the SFC Assets (including for greater certainty the Direct Subsidiary Shares, the SFC Intercompany Claims and all other SFC Assets assigned, transferred and conveyed to Newco and/or Newco II pursuant to section 6.4) shall be deemed to vest absolutely in Newco or Newco II, as applicable, free and clear of and from any and all Charges, Claims (including, notwithstanding anything to the contrary herein, any Unaffected Claims), D&O Claims, D&O Indemnity Claims, Section 5.1(2) D&O Claims, Conspiracy Claims, Continuing Other D&O Claims, Non-Released D&O Claims, Affected Claims, Class Action Claims, Class Action Indemnity Claims, claims or rights of any kind in respect of the Notes or the Note Indentures, and any right or claim that is based in whole or in part on facts, underlying transactions, Causes of Action or events relating to the Restructuring Transaction, the CCAA Proceedings or any of the foregoing, and any guarantees or indemnities with respect to any of the foregoing. Any Encumbrances or claims affecting, attaching to or relating to the SFC Assets in respect of the foregoing shall be deemed to be irrevocably expunged and discharged as against the SFC Assets, and no such Encumbrances or claims shall be pursued or enforceable as against Newco or Newco II. For greater certainty,

with respect to the Subsidiaries, Greenheart and Greenheart's direct and indirect subsidiaries: (i) the vesting free and clear in Newco and/or Newco II, as applicable, and the expunging and discharging that occurs by operation of this paragraph shall only apply to SFC's ownership interests in the Subsidiaries, Greenheart and Greenheart's subsidiaries; and (ii) except as provided for in the Plan (including this section 6.6(a) and sections 4.9(g), 6.4(k), 6.4(l) and 6.4(m) hereof and Article 7 hereof) and the Sanction Order, the assets, liabilities, business and property of the Subsidiaries, Greenheart and Greenheart's direct and indirect subsidiaries shall remain unaffected by the Restructuring Transaction.

(b) Any issuance, assignment, transfer or conveyance of any securities, interests, rights or claims pursuant to the Plan, including the Newco Shares, the Newco Notes and the Affected Creditor Claims, will be free and clear of and from any and all Charges, Claims (including, notwithstanding anything to the contrary herein, any Unaffected Claims), D&O Claims, D&O Indemnity Claims, Affected Claims, Section 5.1(2) D&O Claims; Conspiracy Claims; Continuing Other D&O Claims, Non-Released D&O Claims; Class Action Claims, Class Action Indemnity Claims, claims or rights of any kind in respect of the Notes or the Note Indentures, and any right or claim that is based in whole or in part on facts, underlying transactions, Causes of Action or events relating to the Restructuring Transaction, the CCAA Proceedings or any of the foregoing, and any guarantees or indemnities with respect to any of the foregoing. For greater certainty, with respect to the Subsidiaries, Greenheart and Greenheart's direct and indirect subsidiaries: (i) the vesting free and clear in Newco and Newco II that occurs by operation of this paragraph shall only apply to SFC's direct and indirect ownership interests in the Subsidiaries, Greenheart and Greenheart's direct and indirect subsidiaries; and (ii) except as provided for in the Plan (including section 6.6(a) and sections 4.9(g), 6.4(k), 6.4(l) and 6.4(m) hereof and Article 7 hereof) and the Sanction Order, the assets, liabilities, business and property of the Subsidiaries, Greenheart and Greenheart's direct and indirect subsidiaries shall remain unaffected by the Restructuring Transaction.

ARTICLE 7
RELEASES

7.1 Plan Releases

Subject to 7.2 hereof, all of the following shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date:

(a) all Affected Claims, including all Affected Creditor Claims, Equity Claims, D&O Claims (other than Section 5.1(2) D&O Claims, Conspiracy Claims, Continuing Other D&O Claims and Non-Released D&O Claims), D&O Indemnity Claims (except as set forth in section 7.1(d) hereof) and Noteholder Class Action Claims (other than the Continuing Noteholder Class Action Claims);

(b) all Claims of the Ontario Securities Commission or any other Governmental Entity that have or could give rise to a monetary liability, including fines, awards, penalties, costs, claims for reimbursement or other claims having a monetary value;

(c) all Class Action Claims (including the Noteholder Class Action Claims) against SFC, the Subsidiaries or the Named Directors or Officers of SFC or the Subsidiaries (other than Class Action Claims that are Section 5.1(2) D&O Claims, Conspiracy Claims or Non-Released D&O Claims);

(d) all Class Action Indemnity Claims (including related D&O Indemnity Claims), other than any Class Action Indemnity Claim by the Third Party Defendants against SFC in respect of the Indemnified Noteholder Class Action Claims (including any D&O Indemnity Claim in that respect), which shall be limited to the Indemnified Noteholder Class Action Limit pursuant to the releases set out in section 7.1(f) hereof and the injunctions set out in section 7.3 hereof;

(e) any portion or amount of liability of the Third Party Defendants for the Indemnified Noteholder Class Action Claims (on a collective, aggregate basis in reference to all Indemnified Noteholder Class Action Claims together) that exceeds the Indemnified Noteholder Class Action Limit;

(f) any portion or amount of liability of the Underwriters for the Noteholder Class Action Claims (other than any Noteholder Class Action Claims against the Underwriters for fraud or criminal conduct) (on a collective, aggregate basis in reference to all such Noteholder Class Action Claims together) that exceeds the Indemnified Noteholder Class Action Limit;

(g) any portion or amount of, or liability of SFC for, any Class Action Indemnity Claims by the Third Party Defendants against SFC in respect of the Indemnified Noteholder Class Action Claims (on a collective, aggregate basis in reference to all such Class Action Indemnity Claims together) to the extent that such Class Action Indemnity Claims exceed the Indemnified Noteholder Class Action Limit;

(h) any and all Excluded Litigation Trust Claims;

(i) any and all Causes of Action against Newco, Newco II, the directors and officers of Newco, the directors and officers of Newco II, the Noteholders, members of the *ad hoc* committee of Noteholders, the Trustees, the Transfer Agent, the Monitor, FTI Consulting Canada Inc., FTI HK, counsel for the current Directors of SFC, counsel for the Monitor, counsel for the Trustees, the SFC Advisors, the Noteholder Advisors, and each and every member (including members of any committee or governance council), partner or employee of any of the foregoing, for or in connection with or in any way relating to: any Claims (including, notwithstanding anything to the contrary herein, any Unaffected Claims); Affected Claims; Section 5.1(2) D&O Claims; Conspiracy Claims; Continuing Other D&O Claims; Non-Released D&O Claims; Class Action Claims; Class

Action Indemnity Claims; any right or claim in connection with or liability for the Notes or the Note Indentures; any guarantees, indemnities, claims for contribution, share pledges or Encumbrances related to the Notes or the Note Indentures; any right or claim in connection with or liability for the Existing Shares, Equity Interests or any other securities of SFC; any rights or claims of the Third Party Defendants relating to SFC or the Subsidiaries;

(j) any and all Causes of Action against Newco, Newco II, the directors and officers of Newco, the directors and officers of Newco II, the Noteholders, members of the *ad hoc* committee of Noteholders, the Trustees, the Transfer Agent, the Monitor, FTI Consulting Canada Inc., FTI HK, the Named Directors and Officers, counsel for the current Directors of SFC, counsel for the Monitor, counsel for the Trustees, the SFC Advisors, the Noteholder Advisors, and each and every member (including members of any committee or governance council), partner or employee of any of the foregoing, based in whole or in part on any act, omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date (or, with respect to actions taken pursuant to the Plan after the Plan Implementation Date, the date of such actions) in any way relating to, arising out of, leading up to, for, or in connection with the CCAA Proceeding, RSA, the Restructuring Transaction, the Plan, any proceedings commenced with respect to or in connection with the Plan, or the transactions contemplated by the RSA and the Plan, including the creation of Newco and/or Newco II and the creation, issuance or distribution of the Newco Shares, the Newco Notes, the Litigation Trust or the Litigation Trust Interests, provided that nothing in this paragraph shall release or discharge any of the Persons listed in this paragraph from or in respect of any obligations any of them may have under or in respect of the RSA, the Plan or under or in respect of any of Newco, Newco II, the Newco Shares, the Newco Notes, the Litigation Trust or the Litigation Trust Interests, as the case may be;

(k) any and all Causes of Action against the Subsidiaries for or in connection with any Claim (including, notwithstanding anything to the contrary herein, any Unaffected Claim); any Affected Claim (including any Affected Creditor Claim, Equity Claim, D&O Claim, D&O Indemnity Claim and Noteholder Class Action Claim); any Section 5.1(2) D&O Claim; any Conspiracy Claim; any Continuing Other D&O Claim; any Non-Released D&O Claim; any Class Action Claim; any Class Action Indemnity Claim; any right or claim in connection with or liability for the Notes or the Note Indentures; any guarantees, indemnities, share pledges or Encumbrances relating to the Notes or the Note Indentures; any right or claim in connection with or liability for the Existing Shares, Equity Interests or any other securities of SFC; any rights or claims of the Third Party Defendants relating to SFC or the Subsidiaries; any right or claim in connection with or liability for the RSA, the Plan, the CCAA Proceedings, the Restructuring Transaction, the Litigation Trust, the business and affairs of SFC and the Subsidiaries (whenever or however conducted), the administration and/or management of SFC and the Subsidiaries, or any public filings, statements,

disclosures or press releases relating to SFC; any right or claim in connection with or liability for any indemnification obligation to Directors or Officers of SFC or the Subsidiaries pertaining to SFC, the Notes, the Note Indentures, the Existing Shares, the Equity Interests, any other securities of SFC or any other right, claim or liability for or in connection with the RSA, the Plan, the CCAA Proceedings, the Restructuring Transaction, the Litigation Trust, the business and affairs of SFC (whenever or however conducted), the administration and/or management of SFC, or any public filings, statements, disclosures or press releases relating to SFC; any right or claim in connection with or liability for any guaranty, indemnity or claim for contribution in respect of any of the foregoing; and any Encumbrance in respect of the foregoing;

(l) all Subsidiary Intercompany Claims as against SFC (which are assumed by Newco and then Newco II pursuant to the Plan);

(m) any entitlements of Ernst & Young to receive distributions of any kind (including Newco Shares, Newco Notes and Litigation Trust Interests) under this Plan;

(n) any entitlements of the Named Third Party Defendants to receive distributions of any kind (including Newco Shares, Newco Notes and Litigation Trust Interests) under this Plan; and

(o) any entitlements of the Underwriters to receive distributions of any kind (including Newco Shares, Newco Notes and Litigation Trust Interests) under this Plan.

7.2 Claims Not Released

Notwithstanding anything to the contrary in section 7.1 hereof, nothing in this Plan shall waive, compromise, release, discharge, cancel or bar any of the following:

(a) SFC of its obligations under the Plan and the Sanction Order;

(b) SFC from or in respect of any Unaffected Claims (provided that recourse against SFC in respect of Unaffected Claims shall be limited in the manner set out in section 4.2 hereof);

(c) any Directors or Officers of SFC or the Subsidiaries from any Non-Released D&O Claims, Conspiracy Claims or any Section 5.1(2) D&O Claims, provided that recourse against the Named Directors or Officers of SFC in respect of any Section 5.1(2) D&O Claims and any Conspiracy Claims shall be limited in the manner set out in section 4.9(e) hereof;

(d) any Other Directors and/or Officers from any Continuing Other D&O Claims, provided that recourse against the Other Directors and/or Officers in respect of the Indemnified Noteholder Class Action Claims shall be limited in the manner set out in section 4.4(b)(i) hereof;

(e) the Third Party Defendants from any claim, liability or obligation of whatever nature for or in connection with the Class Action Claims, provided that the maximum aggregate liability of the Third Party Defendants collectively in respect of the Indemnified Noteholder Class Action Claims shall be limited to the Indemnified Noteholder Class Action Limit pursuant to section 4.4(b)(i) hereof and the releases set out in sections 7.1(e) and 7.1(f) hereof and the injunctions set out in section 7.3 hereof;

(f) Newco II from any liability to the applicable Subsidiaries in respect of the Subsidiary Intercompany Claims assumed by Newco II pursuant to section 6.4(x) hereof;

(g) the Subsidiaries from any liability to Newco II in respect of the SFC Intercompany Claims conveyed to Newco II pursuant to section 6.4(x) hereof;

(h) SFC of or from any investigations by or non-monetary remedies of the Ontario Securities Commission, provided that, for greater certainty, all monetary rights, claims or remedies of the Ontario Securities Commission against SFC shall be treated as Affected Creditor Claims in the manner described in section 4.1 hereof and released pursuant to section 7.1(b) hereof;

(i) the Subsidiaries from their respective indemnification obligations (if any) to Directors or Officers of the Subsidiaries that relate to the ordinary course operations of the Subsidiaries and that have no connection with any of the matters listed in section 7.1(i) hereof;

(j) SFC or the Directors and Officers from any Insured Claims, provided that recovery for Insured Claims shall be irrevocably limited to recovery solely from the proceeds of Insurance Policies paid or payable on behalf of SFC or its Directors and Officers in the manner set forth in section 2.4 hereof;

(k) insurers from their obligations under insurance policies; and

(l) any Released Party for fraud or criminal conduct.

7.3 Injunctions

All Persons are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any and all Released Claims, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Released Parties; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties or their property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind

whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against one or more of the Released Parties; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or their property; or (v) taking any actions to interfere with the implementation or consummation of this Plan; provided, however, that the foregoing shall not apply to the enforcement of any obligations under the Plan.

7.4 Timing of Releases and Injunctions

All releases and injunctions set forth in this Article 7 shall become effective on the Plan Implementation Date at the time or times and in the manner set forth in section 6.4 hereof.

7.5 Equity Class Action Claims Against the Third Party Defendants

Notwithstanding anything to the contrary in this Plan, any Class Action Claim against the Third Party Defendants that relates to the purchase, sale or ownership of Existing Shares or Equity Interests: (a) is unaffected by this Plan; (b) is not discharged, released, cancelled or barred pursuant to this Plan; (c) shall be permitted to continue as against the Third Party Defendants; (d) shall not be limited or restricted by this Plan in any manner as to quantum or otherwise (including any collection or recovery for any such Class Action Claim that relates to any liability of the Third Party Defendants for any alleged liability of SFC); and (e) does not constitute an Equity Claim or an Affected Claim under this Plan.

ARTICLE 8
COURT SANCTION

8.1 Application for Sanction Order

If the Plan is approved by the Required Majority, SFC shall apply for the Sanction Order on or before the date set for the hearing of the Sanction Order or such later date as the Court may set.

8.2 Sanction Order

The Sanction Order shall, among other things:

(a) declare that: (i) the Plan has been approved by the Required Majority in conformity with the CCAA; (ii) the activities of SFC have been in reasonable compliance with the provisions of the CCAA and the Orders of the Court made in this CCAA Proceeding in all respects; (iii) the Court is satisfied that SFC has not done or purported to do anything that is not authorized by the CCAA; and (iv) the Plan and the transactions contemplated thereby are fair and reasonable;

(b) declare that the Plan and all associated steps, compromises, releases, discharges, cancellations, transactions, arrangements and reorganizations effected thereby are approved, binding and effective as herein set out as of the Plan Implementation Date;

(c) confirm the amount of each of the Unaffected Claims Reserve, the Administration Charge Reserve and the Monitor's Post-Implementation Reserve;

(d) declare that, on the Plan Implementation Date, all Affected Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred, subject only to the right of the applicable Persons to receive the distributions to which they are entitled pursuant to the Plan;

(e) declare that, on the Plan Implementation Date, the ability of any Person to proceed against SFC or the Subsidiaries in respect of any Released Claims shall be forever discharged and restrained, and all proceedings with respect to, in connection with or relating to any such matter shall be permanently stayed;

(f) declare that the steps to be taken, the matters that are deemed to occur and the compromises and releases to be effective on the Plan Implementation Date are deemed to occur and be effected in the sequential order contemplated by section 6.4, beginning at the Effective Time;

(g) declare that, on the Plan Implementation Date, the SFC Assets vest absolutely in Newco and that, in accordance with section 6.4(x) hereof, the SFC Assets transferred by Newco to Newco II vest absolutely in Newco II, in each case in accordance with the terms of section 6.6(a) hereof;

(h) confirm that the Court was satisfied that: (i) the hearing of the Sanction Order was open to all of the Affected Creditors and all other Persons with an interest in SFC and that such Affected Creditors and other Persons were permitted to be heard at the hearing in respect of the Sanction Order; (ii) prior to the hearing, all of the Affected Creditors and all other Persons on the service list in respect of the CCAA Proceeding were given adequate notice thereof;

(i) provide that the Court was advised prior to the hearing in respect of the Sanction Order that the Sanction Order will be relied upon by SFC and Newco as an approval of the Plan for the purpose of relying on the exemption from the registration requirements of the United States Securities Act of 1933, as amended, pursuant to Section 3(a)(10) thereof for the issuance of the Newco Shares, Newco Notes and, to the extent they may be deemed to be securities, the Litigation Trust Interests, and any other securities to be issued pursuant to the Plan;

(j) declare that all obligations, agreements or leases to which (i) SFC remains a party on the Plan Implementation Date, or (ii) Newco and/or Newco II becomes a party as a result of the conveyance of the SFC Assets to Newco and the further conveyance of the SFC Assets to Newco II on the Plan Implementation Date, shall be and remain in full force and effect, unamended, as at the Plan Implementation Date and no party to any such obligation or agreement shall on or following the Plan Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise disclaim or resiliate its obligations

thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy under or in respect of any such obligation or agreement, by reason:

(i) of any event which occurred prior to, and not continuing after, the Plan Implementation Date, or which is or continues to be suspended or waived under the Plan, which would have entitled any other party thereto to enforce those rights or remedies;

(ii) that SFC sought or obtained relief or has taken steps as part of the Plan or under the CCAA;

(iii) of any default or event of default arising as a result of the financial condition or insolvency of SFC;

(iv) of the completion of any of the transactions contemplated under the Plan, including the transfer, conveyance and assignment of the SFC Assets to Newco and the further transfer, conveyance and assignment of the SFC Assets by Newco to Newco II; or

(v) of any compromises, settlements, restructurings, recapitalizations or reorganizations effected pursuant to the Plan;

(k) stay the commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceed with to advance any Released Claims;

(l) stay as against Ernst & Young the commencing, taking, applying for or issuing or continuing any and all steps or proceedings (other than all steps or proceedings to implement the Ernst & Young Settlement) pursuant to the terms of the Order of the Honourable Justice Morawetz dated May 8, 2012 between (i) the Plan Implementation Date and (ii) the earlier of the Ernst & Young Settlement Date or such other date as may be ordered by the Court on a motion to the Court on reasonable notice to Ernst & Young;

(m) declare that in no circumstances will the Monitor have any liability for any of SFC's tax liability regardless of how or when such liability may have arisen;

(n) authorize the Monitor to perform its functions and fulfil its obligations under the Plan to facilitate the implementation of the Plan;

(o) direct and deem the Trustees to release, discharge and cancel any guarantees, indemnities, Encumbrances or other obligations owing by or in respect of any Subsidiary relating to the Notes or the Note Indentures;

(p) declare that upon completion by the Monitor of its duties in respect of SFC pursuant to the CCAA and the Orders, the Monitor may file with the Court a certificate of Plan Implementation stating that all of its duties in respect of SFC

pursuant to the CCAA and the Orders have been completed and thereupon, FTI Consulting Canada Inc. shall be deemed to be discharged from its duties as Monitor and released of all claims relating to its activities as Monitor; and

(q) declare that, on the Plan Implementation Date, each of the Charges shall be discharged, released and cancelled, and that any obligations secured thereby shall satisfied pursuant to section 4.2(b) hereof, and that from and after the Plan Implementation Date the Administration Charge Reserve shall stand in place of the Administration Charge as security for the payment of any amounts secured by the Administration Charge;

(r) declare that the Monitor may not make any payment from the Monitor's Post-Implementation Plan Reserve to any third party professional services provider (other than its counsel) that exceeds $250,000 (alone or in a series of related payments) without the prior consent of the Initial Consenting Noteholders or an Order of the Court;

(s) declare that SFC and the Monitor may apply to the Court for advice and direction in respect of any matters arising from or under the Plan;

(t) declare that, subject to the due performance of its obligations as set forth in the Plan and subject to its compliance with any written directions or instructions of the Monitor and/or directions of the Court in the manner set forth in the Plan, SFC Escrow Co. shall have no liabilities whatsoever arising from the performance of its obligations under the Plan;

(u) order and declare that all Persons with Unresolved Claims shall have standing in any proceeding in respect of the determination or status of any Unresolved Claim, and that Goodmans LLP (in its capacity as counsel to the Initial Consenting Noteholders) shall have standing in any such proceeding on behalf of the Initial Consenting Notheolders (in their capacity as Affected Creditors with Proven Claims);

(v) order and declare that, from and after the Plan Implementation Date, Newco will be permitted, in its sole discretion and on terms acceptable to Newco, to advance additional cash amounts to the Litigation Trustee from time to time for the purpose of providing additional financing to the Litigation Trust, including the provision of such additional amounts as a non-interest bearing loan to the Litigation Trust that is repayable to Newco on similar terms and conditions as the Litigation Funding Receivable;

(w) order and declare that: (i) subject to the prior consent of the Initial Consenting Noteholders, each of the Monitor and the Litigation Trustee shall have the right to seek and obtain an order from any court of competent jurisdiction, including an Order of the Court in the CCAA or otherwise, that gives effect to any releases of any Litigation Trust Claims agreed to by the Litigation Trustee in accordance with the Litigation Trust Agreement, and (ii) in accordance with this section 8.2(w), all

Affected Creditors shall be deemed to consent to any such releases in any such proceedings;

(x) order and declare that, prior to the Effective Time, SFC shall: (i) preserve or cause to be preserved copies of any documents (as such term is defined in the *Rules of Civil Procedure* (Ontario)) that are relevant to the issues raised in the Class Actions; and (ii) make arrangements acceptable to SFC, the Monitor, the Initial Consenting Noteholders, counsel to Ontario Class Action Plaintiffs, counsel to Ernst & Young, counsel to the Underwriters and counsel to the Named Third Party Defendants to provide the parties to the Class Actions with access thereto, subject to customary commercial confidentiality, privilege or other applicable restrictions, including lawyer-client privilege, work product privilege and other privileges or immunities, and to restrictions on disclosure arising from s. 16 of the *Securities Act* (Ontario) and comparable restrictions on disclosure in other relevant jurisdictions, for purposes of prosecuting and/or defending the Class Actions, as the case may be, provided that nothing in the foregoing reduces or otherwise limits the parties' rights to production and discovery in accordance with the *Rules of Civil Procedure* (Ontario) and the *Class Proceedings Act, 1992* (Ontario);

(y) order that releases and injunctions set forth in Article 7 of this Plan are effective on the Plan Implementation Date at the time or times and in the manner set forth in section 6.4 hereof;

(z) order that the Ernst & Young Release shall become effective on the Ernst & Young Settlement Date in the manner set forth in section 11.1 hereof;

(aa) order that any Named Third Party Releases shall become effective if and when the terms and conditions of sections 11.2(a), 11.2(b), 11.2(c) have been fulfilled.;

(bb) order and declare that the matters described in Article 11 hereof shall occur subject to and in accordance with the terms and conditions of Article 11; and

(cc) declare that section 95 to 101 of the BIA shall not apply to any of the transactions implemented pursuant to the Plan.

If agreed by SFC, the Monitor and the Initial Consenting Noteholders, any of the relief to be included in the Sanction Order pursuant to this section 8.2 in respect of matters relating to the Litigation Trust may instead be included in a separate Order of the Court satisfactory to SFC, the Monitor and the Initial Consenting Noteholders granted prior to the Plan Implementation Date.

ARTICLE 9
CONDITIONS PRECEDENT AND IMPLEMENTATION

9.1 Conditions Precedent to Implementation of the Plan

The implementation of the Plan shall be conditional upon satisfaction or waiver of the following conditions prior to or at the Effective Time, each of which is for the benefit of SFC

and the Initial Consenting Noteholders and may be waived only by SFC and the Initial Consenting Noteholders collectively; provided, however, that the conditions in sub-paragraphs (g), (h), (n), (o), (q), (r), (u), (z), (ff), (gg), (mm), (ll) and (nn) shall only be for the benefit of the Initial Consenting Noteholders and, if not satisfied on or prior to the Effective Time, may be waived only by the Initial Consenting Noteholders; and provided further that such conditions shall not be enforceable by SFC if any failure to satisfy such conditions results from an action, error, omission by or within the control of SFC and such conditions shall not be enforceable by the Initial Consenting Noteholders if any failure to satisfy such conditions results from an action, error, omission by or within the control of the Initial Consenting Noteholders:

Plan Approval Matters

(a) the Plan shall have been approved by the Required Majority and the Court, and in each case the Plan shall have been approved in a form consistent with the RSA or otherwise acceptable to SFC and the Initial Consenting Noteholders, each acting reasonably;

(b) the Sanction Order shall have been made and shall be in full force and effect prior to December 17, 2012 (or such later date as may be consented to by SFC and the Initial Consenting Noteholders), and all applicable appeal periods in respect thereof shall have expired and any appeals therefrom shall have been disposed of by the applicable appellate court;

(c) the Sanction Order shall be in a form consistent with the Plan or otherwise acceptable to SFC and the Initial Consenting Noteholders, each acting reasonably;

(d) all filings under Applicable Laws that are required in connection with the Restructuring Transaction shall have been made and any regulatory consents or approvals that are required in connection with the Restructuring Transaction shall have been obtained and, in the case of waiting or suspensory periods, such waiting or suspensory periods shall have expired or been terminated; without limiting the generality of the foregoing, such filings and regulatory consents or approvals include:

(i) any required filings, consents and approvals of securities regulatory authorities in Canada;

(ii) a consultation with the Executive of the Hong Kong Securities and Futures Commission that is satisfactory to SFC, the Monitor and the Initial Consenting Noteholders confirming that implementation of the Restructuring Transaction will not result in an obligation arising for Newco, its shareholders, Newco II or any Subsidiary to make a mandatory offer to acquire shares of Greenheart;

(iii) the submission by SFC and each applicable Subsidiary of a Circular 698 tax filing with all appropriate tax authorities in the PRC within the requisite time prior to the Plan Implementation Date, such filings to be in form and substance satisfactory to the Initial Consenting Noteholders; and

(iv) if notification is necessary or desirable under the *Antimonopoly Law of People's Republic of China* and its implementation rules, the submission of all antitrust filings considered necessary or prudent by the Initial Consenting Noteholders and the acceptance and (to the extent required) approval thereof by the competent Chinese authority, each such filing to be in form and substance satisfactory to the Initial Consenting Noteholders;

(e) there shall not be in effect any preliminary or final decision, order or decree by a Governmental Entity, no application shall have been made to any Governmental Entity, and no action or investigation shall have been announced, threatened or commenced by any Governmental Entity, in consequence of or in connection with the Restructuring Transaction that restrains, impedes or prohibits (or if granted could reasonably be expected to restrain, impede or prohibit) the Restructuring Transaction or any material part thereof or requires or purports to require a variation of the Restructuring Transaction, and SFC shall have provided the Initial Consenting Noteholders with a certificate signed by an officer of SFC, without personal liability on the part of such officer, certifying compliance with this Section 9.1(e) as of the Plan Implementation Date;

Newco and Newco II Matters

(f) the organization, incorporating documents, articles, by-laws and other constating documents of Newco and Newco II (including any shareholders agreement, shareholder rights plan and classes of shares (voting and non-voting)) and any affiliated or related entities formed in connection with the Restructuring Transaction or the Plan, and all definitive legal documentation in connection with all of the foregoing, shall be acceptable to the Initial Consenting Noteholders and in form and in substance reasonably satisfactory to SFC;

(g) the composition of the board of directors of Newco and Newco II and the senior management and officers of Newco and Newco II that will assume office, or that will continue in office, as applicable, on the Plan Implementation Date shall be acceptable to the Initial Consenting Noteholders;

(h) the terms of employment of the senior management and officers of Newco and Newco II shall be acceptable to the Initial Consenting Noteholders;

(i) except as expressly set out in this Plan, neither Newco nor Newco II shall have: (i) issued or authorized the issuance of any shares, notes, options, warrants or other securities of any kind, (ii) become subject to any Encumbrance with respect to its assets or property; (iii) become liable to pay any indebtedness or liability of any kind (other than as expressly set out in section 6.4 hereof); or (iv) entered into any Material agreement;

(j) any securities that are formed in connection with the Plan, including the Newco Shares and the Newco Notes, when issued and delivered pursuant to the Plan,

shall be duly authorized, validly issued and fully paid and non-assessable and the issuance and distribution thereof shall be exempt from all prospectus and registration requirements of any applicable securities, corporate or other law, statute, order, decree, consent decree, judgment, rule, regulation, ordinance, notice, policy or other pronouncement having the effect of law applicable in the provinces of Canada;

(k) Newco shall not be a reporting issuer (or equivalent) in any province of Canada or any other jurisdiction;

(l) all of the steps, terms, transactions and documents relating to the conveyance of the SFC Assets to Newco and the further conveyance of the SFC Assets by Newco to Newco II in accordance with the Plan shall be in form and in substance acceptable to SFC and the Initial Consenting Noteholders;

(m) all of the following shall be in form and in substance acceptable to the Initial Consenting Noteholders and reasonably satisfactory to SFC: (i) the Newco Shares; (ii) the Newco Notes (including the aggregate principal amount of the Newco Notes); (iii) any trust indenture or other document governing the terms of the Newco Notes; and (iv) the number of Newco Shares and Newco Notes to be issued in accordance with this Plan;

Plan Matters

(n) the Indemnified Noteholder Class Action Limit shall be acceptable to the Initial Consenting Noteholders;

(o) the aggregate amount of the Proven Claims held by Ordinary Affected Creditors shall be acceptable to the Initial Consenting Noteholders;

(p) the amount of each of the Unaffected Claims Reserve and the Administration Charge Reserve shall, in each case, be acceptable to SFC, the Monitor and the Initial Consenting Noteholders;

(q) the amount of the Monitor's Post-Implementation Reserve and the amount of any Permitted Continuing Retainers shall be acceptable to the Initial Consenting Noteholders, and the Initial Consenting Noteholders shall be satisfied that all outstanding monetary retainers held by any SFC Advisors (net of any Permitted Continuing Retainers) have been repaid to SFC on the Plan Implementation Date;

(r) **[Intentionally deleted]**;

(s) the amount of each of the following shall be acceptable to SFC, the Monitor and the Initial Consenting Noteholders: (i) the aggregate amount of Lien Claims to be satisfied by the return to the applicable Lien Claimants of the applicable secured property in accordance with section 4.2(c)(i) hereof; and (ii) the aggregate amount of Lien Claims to be repaid in cash on the Plan Implementation Date in accordance with section 4.2(c)(ii) hereof;

(t) the aggregate amount of Unaffected Claims, and the aggregate amount of the Claims listed in each subparagraph of the definition of "Unaffected Claims" shall, in each case, be acceptable to SFC, the Monitor and the Initial Consenting Noteholders;

(u) the aggregate amount of Unresolved Claims and the amount of the Unresolved Claims Reserve shall, in each case, be acceptable to the Initial Consenting Noteholders and shall be confirmed in the Sanction Order;

(v) Litigation Trust and the Litigation Trust Agreement shall be in form and in substance acceptable to SFC and the Initial Consenting Noteholders, each acting reasonably, and the Litigation Trust shall be established in a jurisdiction that is acceptable to the Initial Consenting Noteholders and SFC, each acting reasonably;

(w) SFC, the Monitor and the Initial Consenting Noteholders, each acting reasonably, shall be satisfied with the proposed use of proceeds and payments relating to all aspects of the Restructuring Transaction and the Plan, including, without limitation, any change of control payments, consent fees, transaction fees, third party fees or termination or severance payments, in the aggregate of $500,000 or more, payable by SFC or any Subsidiary to any Person (other than a Governmental Entity) in respect of or in connection with the Restructuring Transaction or the Plan, including without limitation, pursuant to any employment agreement or incentive plan of SFC or any Subsidiary;

(x) SFC, the Monitor and the Initial Consenting Noteholders, each acting reasonably, shall be satisfied with the status and composition of all liabilities, indebtedness and obligations of the Subsidiaries and all releases of the Subsidiaries provided for in the Plan and the Sanction Order shall be binding and effective as of the Plan Implementation Date;

Plan Implementation Date Matters

(y) the steps required to complete and implement the Plan shall be in form and in substance satisfactory to SFC and the Initial Consenting Noteholders;

(z) the Noteholders and the Early Consent Noteholders shall receive, on the Plan Implementation Date, all of the consideration to be distributed to them pursuant to the Plan;

(aa) all of the following shall be in form and in substance satisfactory to SFC and the Initial Consenting Noteholders: (i) all materials filed by SFC with the Court or any court of competent jurisdiction in the United States, Canada, Hong Kong, the PRC or any other jurisdiction that relates to the Restructuring Transaction; (ii) the terms of any court-imposed charges on any of the assets, property or undertaking of any of SFC, including without limitation any of the Charges; (iii) the Initial Order; (iv) the Claims Procedure Order; (v) the Meeting Order; (vi) the Sanction Order; (vii) any other Order granted in connection with the CCAA Proceeding or the Restructuring Transaction by the Court or any other court of competent

jurisdiction in Canada, the United States, Hong Kong, the PRC or any other jurisdiction; and (viii) the Plan (as it is approved by the Required Majority and the Sanction Order);

(bb) any and all court-imposed charges on any assets, property or undertaking of SFC, including the Charges, shall be discharged on the Plan Implementation Date on terms acceptable to the Initial Consenting Noteholders and SFC, each acting reasonably;

(cc) SFC shall have paid, in full, the Expense Reimbursement and all fees and costs owing to the SFC Advisors on the Plan Implementation Date, and neither Newco nor Newco II shall have any liability for any fees or expenses due to the SFC Advisors or the Noteholder Advisors either as at or following the Plan Implementation Date;

(dd) SFC or the Subsidiaries shall have paid, in full all fees owing to each of Chandler Fraser Keating Limited and Spencer Stuart on the Plan Implementation Date, and neither Newco nor Newco II shall have any liability for any fees or expenses due to either Chandler Fraser Keating Limited and Spencer Stuart as at or following the Plan Implementation Date;

(ee) SFC shall have paid all Trustee Claims that are outstanding as of the Plan Implementation Date, and the Initial Consenting Noteholders shall be satisfied that SFC has made adequate provision in the Unaffected Claims Reserve for the payment of all Trustee Claims to be incurred by the Trustees after the Plan Implementation Date in connection with the performance of their respective duties under the Note Indentures or this Plan;

(ff) there shall not exist or have occurred any Material Adverse Effect, and SFC shall have provided the Initial Consenting Noteholders with a certificate signed by an officer of the Company, without any personal liability on the part of such officer, certifying compliance with this section 9.1(ff) as of the Plan Implementation Date;

(gg) there shall have been no breach of the Noteholder Confidentiality Agreements (as defined in the RSA) by SFC or any of the Sino-Forest Representatives (as defined therein) in respect of the applicable Initial Consenting Noteholder;

(hh) the Plan Implementation Date shall have occurred no later than January 15, 2013 (or such later date as may be consented to by SFC and the Initial Consenting Noteholders);

RSA Matters

(ii) all conditions set out in sections 6 and 7 of the RSA shall have been satisfied or waived in accordance with the terms of the RSA;

(jj) the RSA shall not have been terminated;

Other Matters

(kk) the organization, incorporating documents, articles, by-laws and other constating documents of SFC Escrow Co. and all definitive legal documentation in connection with SFC Escrow Co., shall be acceptable to the Initial Consenting Noteholders and the Monitor and in form and in substance reasonably satisfactory to SFC;

(ll) except as expressly set out in this Plan, SFC Escrow Co. shall not have: (i) issued or authorized the issuance of any shares, notes, options, warrants or other securities of any kind, (ii) become subject to any Encumbrance with respect to its assets or property; (iii) acquired any assets or become liable to pay any indebtedness or liability of any kind (other than as expressly set out in this Plan); or (iv) entered into any agreement;

(mm) the Initial Consenting Noteholders shall have completed due diligence in respect of SFC and the Subsidiaries and the results of such due diligence shall be acceptable to the Initial Consenting Noteholders prior to the date for the hearing of the Sanction Order, except in respect of any new material information or events arising or discovered on or after the date of the hearing for the Sanction Order of which the Initial Consenting Noteholders were previously unaware, in respect of which the date for the Initial Consenting Noteholders to complete such due diligence shall be the Plan Implementation Date, provided that "new material information or events" for purposes of this Section 9.1(mm) shall not include any information or events disclosed prior to the date of the hearing for the Sanction Order in a press release issued by SFC, an affidavit filed with the Court by SFC or a Monitor's Report filed with the Court;

(nn) if so requested by the Initial Consenting Noteholders, the Sanction Order shall have been recognized and confirmed as binding and effective pursuant to an order of a court of competent jurisdiction in Canada and any other jurisdiction requested by the Initial Consenting Noteholders, and all applicable appeal periods in respect of any such recognition order shall have expired and any appeals therefrom shall have been disposed of by the applicable appellate court;

(oo) all press releases, disclosure documents and definitive agreements in respect of the Restructuring Transaction or the Plan shall be in form and substance satisfactory to SFC and the Initial Consenting Noteholders, each acting reasonably; and

(pp) Newco and SFC shall have entered into arrangements reasonably satisfactory to SFC and the Initial Consenting Noteholders for ongoing preservation and access to the books and records of SFC and the Subsidiaries in existence as at the Plan Implementation Date, as such access may be reasonably requested by SFC or any Director or Officer in the future in connection with any administrative or legal proceeding, in each such case at the expense of the Person making such request.

For greater certainty, nothing in Article 11 hereof is a condition precedent to the implementation of the Plan.

9.2 Monitor's Certificate of Plan Implementation

Upon delivery of written notice from SFC and Goodmans LLP (on behalf of the Initial Consenting Noteholders) of the satisfaction of the conditions set out in section 9.1, the Monitor shall deliver to Goodmans LLP and SFC a certificate stating that the Plan Implementation Date has occurred and that the Plan and the Sanction Order are effective in accordance with their respective terms. Following the Plan Implementation Date, the Monitor shall file such certificate with the Court.

ARTICLE 10
ALTERNATIVE SALE TRANSACTION

10.1 Alternative Sale Transaction

At any time prior to the Plan Implementation Date (whether prior to or after the granting of the Sanction Order), and subject to the prior written consent of the Initial Consenting Noteholders, SFC may complete a sale of all or substantially all of the SFC Assets on terms that are acceptable to the Initial Consenting Noteholders (an "**Alternative Sale Transaction**"), provided that such Alternative Sale Transaction has been approved by the Court pursuant to section 36 of the CCAA on notice to the service list. In the event that such an Alternative Sale Transaction is completed, the terms and conditions of this Plan shall continue to apply in all respects, subject to the following:

(a) The Newco Shares and Newco Notes shall not be distributed in the manner contemplated herein. Instead, the consideration paid or payable to SFC pursuant to the Alternative Sale Transaction (the "**Alternative Sale Transaction Consideration**") shall be distributed to the Persons entitled to receive Newco Shares hereunder, and such Persons shall receive the Alternative Sale Transaction Consideration in the same proportions and subject to the same terms and conditions as are applicable to the distribution of Newco Shares hereunder.

(b) All provisions in this Plan that address Newco or Newco II shall be deemed to be ineffective to the extent that they address Newco or Newco II, given that Newco and Newco II will not be required in connection with an Alternative Sale Transaction.

(c) All provisions addressing the Newco Notes shall be deemed to be ineffective to the extent such provisions address the Newco Notes, given that the Newco Notes will not be required in connection with an Alternative Sale Transaction.

(d) All provisions relating to the Newco Shares shall be deemed to address the Alternative Sale Transaction Consideration to the limited extent such provisions address the Newco Shares.

(e) SFC, with the written consent of the Monitor and the Initial Consenting Noteholders, shall be permitted to make such amendments, modifications and supplements to the terms and conditions of this Plan as are necessary to: (i) facilitate the Alternative Sale Transaction; (ii) cause the Alternative Sale Transaction Consideration to be distributed in the same proportions and subject to the same terms and conditions as are subject to the distribution of Newco Shares hereunder; and (iii) complete the Alternative Sale Transaction and distribute the Alternative Sale Transaction Proceeds in a manner that is tax efficient for SFC and the Affected Creditors with Proven Claims, provided in each case that (y) a copy of such amendments, modifications or supplements is filed with the Court and served upon the service list; and (z) the Monitor is satisfied that such amendments, modifications or supplements do not materially alter the proportionate entitlements of the Affected Creditors, as amongst themselves, to the consideration distributed pursuant to the Plan.

Except for the requirement of obtaining the prior written consent of the Initial Consenting Noteholders with respect to the matters set forth in this section 10.1 and subject to the approval of the Alternative Sale Transaction by the Court pursuant to section 36 of the CCAA (on notice to the service list), once this Plan has been approved by the Required Majority of Affected Creditors, no further meeting, vote or approval of the Affected Creditors shall be required to enable SFC to complete an Alternative Sale Transaction or to amend the Plan in the manner described in this 10.1.

ARTICLE 11
SETTLEMENT OF CLAIMS AGAINST THIRD PARTY DEFENDANTS

11.1 Ernst & Young

(a) Notwithstanding anything to the contrary herein, subject to: (i) the granting of the Sanction Order; (ii) the issuance of the Settlement Trust Order (as may be modified in a manner satisfactory to the parties to the Ernst & Young Settlement and SFC (if occurring on or prior to the Plan Implementation Date), the Monitor and the Initial Consenting Noteholders, as applicable, to the extent, if any, that such modifications affect SFC, the Monitor or the Initial Consenting Noteholders, each acting reasonably); (iii) the granting of an Order under Chapter 15 of the United States Bankruptcy Code recognizing and enforcing the Sanction Order and the Settlement Trust Order in the United States; (iv) any other order necessary to give effect to the Ernst & Young Settlement (the orders referenced in (iii) and (iv) being collectively the "**Ernst & Young Orders**"); (v) the fulfillment of all conditions precedent in the Ernst & Young Settlement and the fulfillment by the Ontario Class Action Plaintiffs of all of their obligations thereunder; and (vi) the Sanction Order, the Settlement Trust Order and all Ernst & Young Orders being final orders and not subject to further appeal or challenge, Ernst & Young shall pay the settlement amount as provided in the Ernst & Young Settlement to the trust established pursuant to the Settlement Trust Order (the "**Settlement Trust**"). Upon receipt of a certificate from Ernst & Young confirming it has paid the settlement amount to the Settlement Trust in accordance with the Ernst & Young

Settlement and the trustee of the Settlement Trust confirming receipt of such settlement amount, the Monitor shall deliver to Ernst & Young a certificate (the "**Monitor's Ernst & Young Settlement Certificate**") stating that (i) Ernst & Young has confirmed that the settlement amount has been paid to the Settlement Trust in accordance with the Ernst & Young Settlement; (ii) the trustee of the Settlement Trust has confirmed that such settlement amount has been received by the Settlement Trust; and (iii) the Ernst & Young Release is in full force and effect in accordance with the Plan. The Monitor shall thereafter file the Monitor's Ernst & Young Settlement Certificate with the Court.

(b) Notwithstanding anything to the contrary herein, upon receipt by the Settlement Trust of the settlement amount in accordance with the Ernst & Young Settlement: (i) all Ernst & Young Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied and extinguished as against Ernst & Young; (ii) section 7.3 hereof shall apply to Ernst & Young and the Ernst & Young Claims *mutatis mutandis* on the Ernst & Young Settlement Date; and (iii) none of the plaintiffs in the Class Actions shall be permitted to claim from any of the other Third Party Defendants that portion of any damages that corresponds to the liability of Ernst & Young, proven at trial or otherwise, that is the subject of the Ernst & Young Settlement.

(c) In the event that the Ernst & Young Settlement is not completed in accordance with its terms, the Ernst & Young Release and the injunctions described in section 11.1(b) shall not become effective.

11.2 Named Third Party Defendants

(a) Notwithstanding anything to the contrary in section 12.5(a) or 12.5(b) hereof, at any time prior to 10:00 a.m. (Toronto time) on December 6, 2012 or such later date as agreed in writing by the Monitor, SFC (if on or prior to the Plan Implementation Date) and the Initial Consenting Noteholders, Schedule "A" to this Plan may be amended, restated, modified or supplemented at any time and from time to time to add any Eligible Third Party Defendant as a "Named Third Party Defendant", subject in each case to the prior written consent of such Third Party Defendant, the Initial Consenting Noteholders, counsel to the Ontario Class Action Plaintiffs, the Monitor and, if occurring on or prior to the Plan Implementation Date, SFC. Any such amendment, restatement, modification and/or supplement of Schedule "A" shall be deemed to be effective automatically upon all such required consents being received. The Monitor shall: (A) provide notice to the service list of any such amendment, restatement, modification and/or supplement of Schedule "A"; (B) file a copy thereof with the Court; and (C) post an electronic copy thereof on the Website. All Affected Creditors shall be deemed to consent thereto any and no Court Approval thereof will be required.

(b) Notwithstanding anything to the contrary herein, subject to: (i) the granting of the Sanction Order; (ii) the granting of the applicable Named Third Party Defendant Settlement Order; and (iii) the satisfaction or waiver of all conditions precedent

contained in the applicable Named Third Party Defendant Settlement, the applicable Named Third Party Defendant Settlement shall be given effect in accordance with its terms. Upon receipt of a certificate (in form and in substance satisfactory to the Monitor) from each of the parties to the applicable Named Third Party Defendant Settlement confirming that all conditions precedent thereto have been satisfied or waived, and that any settlement funds have been paid and received, the Monitor shall deliver to the applicable Named Third Party Defendant a certificate (the "**Monitor's Named Third Party Settlement Certificate**") stating that (i) each of the parties to such Named Third Party Defendant Settlement has confirmed that all conditions precedent thereto have been satisfied or waived; (ii) any settlement funds have been paid and received; and (iii) immediately upon the delivery of the Monitor's Named Third Party Settlement Certificate, the applicable Named Third Party Release will be in full force and effect in accordance with the Plan. The Monitor shall thereafter file the Monitor's Named Third Party Settlement Certificate with the Court.

(c) Notwithstanding anything to the contrary herein, upon delivery of the Monitor's Named Third Party Settlement Certificate, any claims and Causes of Action shall be dealt with in accordance with the terms of the applicable Named Third Party Settlement, the Named Third Party Settlement Order and the Named Third Party Release. To the extent provided for by the terms of the applicable Named Third Party Defendant Release: (i) the applicable Causes of Action against the applicable Named Third Party Defendant shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied and extinguished as against the applicable Named Third Party Defendant; and (ii) section 7.3 hereof shall apply to the applicable Named Third Party Defendant and the applicable Causes of Action against the applicable Named Third Party Defendant *mutatis mutandis* on the effective date of the Named Third Party Defendant Settlement.

ARTICLE 12
GENERAL

12.1 Binding Effect

On the Plan Implementation Date:

(a) the Plan will become effective at the Effective Time;

(b) the Plan shall be final and binding in accordance with its terms for all purposes on all Persons named or referred to in, or subject to, the Plan and their respective heirs, executors, administrators and other legal representatives, successors and assigns;

(c) each Person named or referred to in, or subject to, the Plan will be deemed to have consented and agreed to all of the provisions of the Plan, in its entirety and shall be deemed to have executed and delivered all consents, releases, assignments and

waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety.

12.2 Waiver of Defaults

(a) From and after the Plan Implementation Date, all Persons shall be deemed to have waived any and all defaults of SFC then existing or previously committed by SFC, or caused by SFC, the commencement of the CCAA Proceedings by SFC, any matter pertaining to the CCAA Proceedings, any of the provisions in the Plan or steps contemplated in the Plan, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, expressed or implied, in any contract, instrument, credit document, indenture, note, lease, guarantee, agreement for sale or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and SFC, and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under any such agreement shall be deemed to have been rescinded and of no further force or effect, provided that nothing shall be deemed to excuse SFC from performing its obligations under the Plan or be a waiver of defaults by SFC under the Plan and the related documents.

(b) Effective on the Plan Implementation Date, any and all agreements that are assigned to Newco and/or to Newco II as part of the SFC Assets shall be and remain in full force and effect, unamended, as at the Plan Implementation Date, and no Person shall, following the Plan Implementation Date, accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations under, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand against Newco, Newco II or any Subsidiary under or in respect of any such agreement with Newco, Newco II or any Subsidiary, by reason of:

(i) any event that occurred on or prior to the Plan Implementation Date that would have entitled any Person thereto to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of SFC);

(ii) the fact that SFC commenced or completed the CCAA Proceedings;

(iii) the implementation of the Plan, or the completion of any of the steps, transactions or things contemplated by the Plan; or

(iv) any compromises, arrangements, transactions, releases, discharges or injunctions effected pursuant to the Plan or this Order.

12.3 Deeming Provisions

In the Plan, the deeming provisions are not rebuttable and are conclusive and irrevocable.

12.4 Non-Consummation

SFC reserves the right to revoke or withdraw the Plan at any time prior to the Sanction Date, with the consent of the Monitor and the Initial Consenting Noteholders. If SFC so revokes or withdraws the Plan, or if the Sanction Order is not issued or if the Plan Implementation Date does not occur, (a) the Plan shall be null and void in all respects, (b) any settlement or compromise embodied in the Plan, including the fixing or limiting to an amount certain any Claim, and any document or agreement executed pursuant to the Plan shall be deemed null and void, and (c) nothing contained in the Plan, and no acts taken in preparation for consummation of the Plan, shall (i) constitute or be deemed to constitute a waiver or release of any Claims by or against SFC or any other Person; (ii) prejudice in any manner the rights of SFC or any other Person in any further proceedings involving SFC; or (iii) constitute an admission of any sort by SFC or any other Person.

12.5 Modification of the Plan

(a) SFC may, at any time and from time to time, amend, restate, modify and/or supplement the Plan with the consent of the Monitor and the Initial Consenting Noteholders, provided that: any such amendment, restatement, modification or supplement must be contained in a written document that is filed with the Court and:

(i) if made prior to or at the Meeting: (A) the Monitor, SFC or the Chair (as defined in the Meeting Order) shall communicate the details of any such amendment, restatement, modification and/or supplement to Affected Creditors and other Persons present at the Meeting prior to any vote being taken at the Meeting; (B) SFC shall provide notice to the service list of any such amendment, restatement, modification and/or supplement and shall file a copy thereof with the Court forthwith and in any event prior to the Court hearing in respect of the Sanction Order; and (C) the Monitor shall post an electronic copy of such amendment, restatement, modification and/or supplement on the Website forthwith and in any event prior to the Court hearing in respect of the Sanction Order; and

(ii) if made following the Meeting: (A) SFC shall provide notice to the service list of any such amendment, restatement, modification and/or supplement and shall file a copy thereof with the Court; (B) the Monitor shall post an electronic copy of such amendment, restatement, modification and/or supplement on the Website; and (C) such amendment, restatement, modification and/or supplement shall require the approval of the Court following notice to the Affected Creditors and the Trustees.

(b) Notwithstanding section 12.5(a), any amendment, restatement, modification or supplement may be made by SFC: (i) if prior to the Sanction Date, with the consent of the Monitor and the Initial Consenting Noteholders; and (ii) if after the Sanction Date, with the consent of the Monitor and the Initial Consenting Noteholders and upon approval by the Court, provided in each case that it

concerns a matter that, in the opinion of SFC, acting reasonably, is of an administrative nature required to better give effect to the implementation of the Plan and the Sanction Order or to cure any errors, omissions or ambiguities and is not materially adverse to the financial or economic interests of the Affected Creditors or the Trustees.

(c) Any amended, restated, modified or supplementary plan or plans of compromise filed with the Court and, if required by this section, approved by the Court, shall, for all purposes, be and be deemed to be a part of and incorporated in the Plan.

12.6 Actions and Approvals of SFC after Plan Implementation

(a) From and after the Plan Implementation Date, and for the purpose of this Plan only:

(i) if SFC does not have the ability or the capacity pursuant to Applicable Law to provide its agreement, waiver, consent or approval to any matter requiring SFC's agreement, waiver, consent or approval under this Plan, such agreement, waiver consent or approval may be provided by the Monitor; and

(ii) if SFC does not have the ability or the capacity pursuant to Applicable Law to provide its agreement, waiver, consent or approval to any matter requiring SFC's agreement, waiver, consent or approval under this Plan, and the Monitor has been discharged pursuant to an Order, such agreement, waiver consent or approval shall be deemed not to be necessary.

12.7 Consent of the Initial Consenting Noteholders

For the purposes of this Plan, any matter requiring the agreement, waiver, consent or approval of the Initial Consenting Noteholders shall be deemed to have been agreed to, waived, consented to or approved by such Initial Consenting Noteholders if such matter is agreed to, waived, consented to or approved in writing by Goodmans LLP, provided that Goodmans LLP expressly confirms in writing (including by way of e-mail) to the applicable Person that it is providing such agreement, consent or waiver on behalf of Initial Consenting Noteholders. In addition, following the Plan Implementation Date, any matter requiring the agreement, waiver, consent or approval of the Initial Consenting Noteholders shall: (i) be deemed to have been given if agreed to, waived, consented to or approved by Initial Consenting Noteholders in their capacities as holders of Newco Shares, Newco Notes or Litigation Trust Interests (provided that they continue to hold such consideration); and (ii) with respect to any matter concerning the Litigation Trust or the Litigation Trust Claims, be deemed to be given if agreed to, waived, consented to or approved by the Litigation Trustee.

12.8 Claims Not Subject to Compromise

Nothing in this Plan, including section 2.4 hereof, shall prejudice, compromise, release, discharge, cancel, bar or otherwise affect any: (i) Non-Released D&O Claims (except to the

extent that such Non-Released D&O Claim is asserted against a Named Director or Officer, in which case section 4.9(g) applies); (ii) Section 5.1(2) D&O Claims or Conspiracy Claims (except that, in accordance with section 4.9(e) hereof, any Section 5.1(2) D&O Claims against Named Directors and Officers and any Conspiracy Claims against Named Directors and Officers shall be limited to recovery from any insurance proceeds payable in respect of such Section 5.1(2) D&O Claims or Conspiracy Claims, as applicable, pursuant to the Insurance Policies, and Persons with any such Section 5.1(2) D&O Claims against Named Directors and Officers or Conspiracy Claims against Named Directors and Officers shall have no right to, and shall not, make any claim or seek any recoveries from any Person, other than enforcing such Persons' rights to be paid from the proceeds of an Insurance Policy by the applicable insurer(s)); or (iii) any Claims that are not permitted to be compromised under section 19(2) of the *CCAA*.

12.9 Paramountcy

From and after the Effective Time on the Plan Implementation Date, any conflict between:

(a) the Plan; and

(b) the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed or implied, of any contract, mortgage, security agreement, indenture, trust indenture, note, loan agreement, commitment letter, agreement for sale, lease or other agreement, written or oral and any and all amendments or supplements thereto existing between any Person and SFC and/or the Subsidiaries as at the Plan Implementation Date,

will be deemed to be governed by the terms, conditions and provisions of the Plan and the Sanction Order, which shall take precedence and priority.

12.10 Foreign Recognition

(a) From and after the Plan Implementation Date, if requested by the Initial Consenting Noteholders or Newco, the Monitor (at the Monitor's election) or Newco (if the Monitor does not so elect) shall and is hereby authorized to seek an order of any court of competent jurisdiction recognizing the Plan and the Sanction Order and confirming the Plan and the Sanction Order as binding and effective in Canada, the United States, and any other jurisdiction so requested by the Initial Consenting Noteholders or Newco, as applicable.

(b) Without limiting the generality of section 12.10(a), as promptly as practicable, but in no event later than the third Business Day following the Plan Implementation Date, a foreign representative of SFC (as agreed by SFC, the Monitor and the Initial Consenting Noteholders) (the "**Foreign Representative**") shall commence a proceeding in a court of competent jurisdiction in the United States seeking recognition of the Plan and the Sanction Order and confirming that the Plan and the Sanction Order are binding and effective in the United States, and the Foreign Representative shall use its best efforts to obtain such recognition order.

12.11 Severability of Plan Provisions

If, prior to the Sanction Date, any term or provision of the Plan is held by the Court to be invalid, void or unenforceable, the Court, at the request of SFC and with the consent of the Monitor and the Initial Consenting Noteholders, shall have the power to either (a) sever such term or provision from the balance of the Plan and provide SFC with the option to proceed with the implementation of the balance of the Plan as of and with effect from the Plan Implementation Date, or (b) alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration or interpretation, and provided that SFC proceeds with the implementation of the Plan, the remainder of the terms and provisions of the Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

12.12 Responsibilities of the Monitor

The Monitor is acting in its capacity as Monitor in the CCAA Proceeding and the Plan with respect to SFC and will not be responsible or liable for any obligations of SFC.

12.13 Different Capacities

Persons who are affected by this Plan may be affected in more than one capacity. Unless expressly provided herein to the contrary, a Person will be entitled to participate hereunder, and will be affected hereunder, in each such capacity. Any action taken by or treatment of a Person in one capacity will not affect such Person in any other capacity, unless expressly agreed by the Person, SFC, the Monitor and the Initial Consenting Noteholders in writing, or unless the Person's Claims overlap or are otherwise duplicative.

12.14 Notices

Any notice or other communication to be delivered hereunder must be in writing and reference the Plan and may, subject as hereinafter provided, be made or given by personal delivery, ordinary mail or by facsimile or email addressed to the respective parties as follows:

(a) if to SFC or any Subsidiary:

Sino-Forest Corporation
Room 3815-29 38/F, Sun Hung Kai Centre
30 Harbour Road, Wanchai, Hong Kong

Attention: Mr. Judson Martin, Executive Vice-Chairman and Chief Executive Officer
Fax: +852-2877-0062

with a copy by email or fax (which shall not be deemed notice) to:

Bennett Jones LLP
One First Canadian Place, Suite 3400
Toronto, ON M5X 1A4

Attention: Kevin J. Zych and Raj S. Sahni
Email: zychk@bennettjones.com and sahnir@bennettjones.com
Fax: 416-863-1716

(b) if to the Initial Consenting Noteholders:

c/o Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

Attention: Robert Chadwick and Brendan O'Neill
Email: rchadwick@goodmans.ca and boneill@goodmans.ca
Fax: 416-979-1234

and with a copy by email or fax (which shall not be deemed notice) to:

Hogan Lovells International LLP
11th Floor, One Pacific Place, 88 Queensway
Hong Kong China

Attention: Neil McDonald
Email: neil.mcdonald@hoganlovells.com
Fax: 852-2219-0222

(c) if to the Monitor:

FTI Consulting Canada Inc.
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, ON M5K 1G8

Attention: Greg Watson
Email: greg.watson@fticonsulting.com
Fax: (416) 649-8101

and with a copy by email or fax (which shall not be deemed notice) to:

Gowling Lafleur Henderson LLP
1 First Canadian Place
100 King Street West, Suite 1600
Toronto, Ontario M5X 1G5

Attention: Derrick Tay
Email: derrick.tay@gowlings.com
Fax: (416) 862-7661

(d) if to Ernst & Young:

Ernst & Young LLP
Ernst & Young Tower
222 Bay Street
P.O. Box 251
Toronto, ON M5K 1J7

Attention: Doris Stamml
Email: doris.stamml@ca.ey.com
Fax: (416) 943-[TBD]

and with a copy by email or fax (which shall not be deemed notice) to:

Lenczner Slaght Royce Smith Griffin
130 Adelaide Street West, Suite 2600
Toronto, Ontario M5H 3P5

Attention: Peter Griffin
Email: pgriffin@litigate.com
Fax: (416) 865-2921

or to such other address as any party may from time to time notify the others in accordance with this section. Any such communication so given or made shall be deemed to have been given or made and to have been received on the day of delivery if delivered, or on the day of faxing or sending by other means of recorded electronic communication, provided that such day in either event is a Business Day and the communication is so delivered, faxed or sent before 5:00 p.m. (Toronto time) on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

12.15 Further Assurances

SFC, the Subsidiaries and any other Person named or referred to in the Plan will execute and deliver all such documents and instruments and do all such acts and things as may be necessary or desirable to carry out the full intent and meaning of the Plan and to give effect to the transactions contemplated herein.

DATED as of the 3rd day of December, 2012.

SCHEDULE A

NAMED THIRD PARTY DEFENDANTS

The Underwriters, together with their respective present and former affiliates, partners, associates, employees, servants, agents, contractors, directors, officers, insurers and successors, administrators, heirs and assigns, excluding any Director or Officer and successors, administrators, heirs and assigns of any Director or Officer in their capacity as such.

TAB 19

Court File No. 13-1003300-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	**TUESDAY, THE 23RD**
	)	
JUSTICE MORAWETZ	)	**DAY OF APRIL, 2013**

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 AND ARRANGEMENT OF SKYLINK AVIATION INC.

PLAN SANCTION ORDER

THIS MOTION made by SkyLink Aviation Inc. (the "**Applicant**") for an order (the "**Plan Sanction Order**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), sanctioning the plan of compromise and arrangement dated April 18, 2013, which is attached as **Schedule "A"** hereto (and as it may be further amended, varied or supplemented from time to time in accordance with the terms thereof, the "**Plan**"), was heard on April 23, 2013 at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the Affidavit of Jan Ottens sworn April 21, 2013 (the "**Ottens Affidavit**"), filed, the second report (the "**Second Report**") of Duff & Phelps Canada Restructuring Inc. in its capacity as monitor of the Applicant (the "**Monitor**"), filed, and the third report of the Monitor (the "**Third Report**"), filed, and on hearing the submissions of counsel for each of the Applicant, the Monitor, the Initial Consenting Noteholders and DIP Lenders, and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service, filed.

DEFINED TERMS

1. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Plan Sanction Order shall have the meanings ascribed to such terms in the Plan and the Meetings Order granted by this Court on March 8, 2013 (the "**Meetings Order**"), as applicable.

SERVICE, NOTICE AND MEETING

2. **THIS COURT ORDERS** that the time for service of the Notice of Motion, the Motion Record in support of this motion, the Second Report and the Third Report be and are hereby abridged and validated so that the motion is properly returnable today and service upon any interested party other than those parties served is hereby dispensed with.

3. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient notice, service and delivery of the Meetings Order and the Information Package (including, without limitation, the Plan) to all Persons upon which notice, service and delivery was required.

4. **THIS COURT ORDERS AND DECLARES** that the Meetings were duly convened and held on April 19, 2013, all in conformity with the CCAA and the Initial Order granted by this Court on March 8, 2013 (the "**Initial Order**"), the Meetings Order, and the Claims Procedure Order granted by this Court on March 8, 2013 (the "**Claims Procedure Order**", and collectively with the Initial Order and the Meetings Order, the "**Orders**").

5. **THIS COURT ORDERS AND DECLARES** that: (i) the hearing of the Plan Sanction Order was open to all of the Affected Creditors and all other Persons with an interest in the Applicant and that such Affected Creditors and all such other Persons were permitted to be heard at the hearing in respect of the Plan Sanction Order; and (ii) prior to the hearing, all of the Affected Creditors and all such other Persons on the service list in respect of the CCAA Proceedings were given notice thereof.

SANCTION OF THE PLAN

6. **THIS COURT DECLARES** that the relevant classes of Affected Creditors of the Applicant for the purpose of voting to approve the Plan are the Secured Noteholders Class and the Affected Unsecured Creditors Class.

7. **THIS COURT DECLARES** that the Plan, and all the terms and conditions thereof, and matters and transactions contemplated thereby, are fair and reasonable.

8. **THIS COURT ORDERS AND DECLARES** that the Plan has been approved by the Required Majorities of Affected Creditors in each Voting Class, as required by the Meetings Order, and in conformity with the CCAA.

9. **THIS COURT ORDERS AND DECLARES** that the activities of the Applicant have been in compliance with the provisions of the CCAA and the Orders of the Court made in the CCAA Proceedings, and the Court is satisfied that the Applicant has not done or purported to do anything that is not authorized by the CCAA.

10. **THIS COURT ORDERS** that the Plan is hereby sanctioned and approved pursuant to section 6 of the CCAA.

PLAN IMPLEMENTATION

11. **THIS COURT ORDERS AND DECLARES** that the Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby are hereby approved and shall be deemed to be implemented, binding and effective in accordance with the provisions of the Plan as of the Plan Implementation Date at the time or times and in the manner set forth in the Plan, and shall inure to the benefit of and be binding upon the Applicant, the Released Parties, the Affected Creditors, the Directors and Officers, any Person with a Director/Officer Claim or a Released Claim, and all other Persons and parties named or referred to in, affected by, or subject to the Plan, including, without limitation, their respective heirs, administrators, executors, legal representatives, successors, and assigns.

12. **THIS COURT ORDERS** that each of the Applicant and the Monitor are authorized and directed to take all steps and actions, and do all things, necessary or appropriate to implement the Plan in accordance with its terms and to enter into, execute, deliver, complete, implement and consummate all of the steps, transactions, distributions, deliveries, allocations, and agreements contemplated by the Plan, and such steps and actions are hereby authorized, ratified and approved. Neither the Applicant nor the Monitor shall incur any liability as a result of acting in accordance with the terms of the Plan and the Plan Sanction Order.

13. **THIS COURT ORDERS** that the Applicant, the Monitor, the First Lien Agent, the Secured Note Indenture Trustee, the New Second Lien Notes Indenture Trustee, CDS, the CDS Participants and any other Person required to make any distributions, deliveries or allocations or take any steps or actions related thereto pursuant to the Plan are hereby authorized and directed to complete such distributions, deliveries or allocations and to take any such related steps or actions, as the case may be, in accordance with the terms of the Plan, and such distributions, deliveries and allocations, and steps and actions related thereto, are hereby approved.

14. **THIS COURT ORDERS** that upon the satisfaction or waiver of the conditions precedent set out in section 9.1 of the Plan in accordance with the terms of the Plan, as confirmed by the Applicant and the Majority Initial Consenting Noteholders (or their respective counsel) in writing, the Monitor is authorized and directed to deliver to the Initial Consenting Noteholders and the Applicant (or their respective counsel) a certificate substantially in the form attached hereto as **Schedule "B"** (the "**Monitor's Certificate**") signed by the Monitor, certifying that the Plan Implementation Date has occurred and that the Plan is effective in accordance with its terms and the terms of the Plan Sanction Order. The Monitor shall file the Monitor's Certificate with this Court promptly following the Plan Implementation Date.

15. **THIS COURT ORDERS** that the Applicant, the Monitor and the Majority Initial Consenting Noteholders are hereby authorized and empowered to exercise all consent

and approval rights provided for in the Plan in the manner set forth in the Plan, whether prior to or after the Plan Implementation Date

16. **THIS COURT ORDERS** that the steps to be taken and the compromises and releases to be effected on the Plan Implementation Date are and shall be deemed to occur and be effected in the sequential order and at the times contemplated in section 5.4 of the Plan, without any further act or formality, on the Plan Implementation Date, beginning at the Effective Time.

17. **THIS COURT ORDERS** that the New Shareholders' Agreement shall be effective and binding on all holders of the New Common Shares and any Persons entitled to receive New Common Shares pursuant to the Plan immediately upon issuance of the New Common Shares to such Persons, with the same force and effect as if such Persons were signatories to the New Shareholders' Agreement.

18. **THIS COURT ORDERS** that, subject to the payment of any amounts secured by the Charges that remain owing on the Plan Implementation Date, if any, each of the Charges shall be terminated, discharged and released on the Plan Implementation Date.

COMPROMISE OF CLAIMS AND EFFECT OF PLAN

19. **THIS COURT ORDERS** that, pursuant to and in accordance with the terms of the Plan, on the Plan Implementation Date, any and all Affected Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred, subject only to the right of the applicable Persons to receive the distributions to which they are entitled pursuant to the Plan.

20. **THIS COURT ORDERS AND DECLARES** that on the Plan Implementation Date, pursuant to and in accordance with the Plan, the Applicant shall be forever released and discharged from any and all obligations in respect of the Affected Claims and the ability of any Person to proceed against the Applicant in respect of or relating to any Affected Claims shall be permanently and forever barred, estopped, stayed and enjoined, and all proceedings with respect to, in connection with or relating to such Affected Claims shall

be permanently stayed, subject only to the right of Affected Creditors to receive distributions pursuant to the Plan in respect of their Affected Claims.

21. **THIS COURT ORDERS** that, without limiting the provisions of the Claims Procedure Order or the Meetings Order, any Person that did not file a Proof of Claim, a Notice of Dispute or a Notice of Dispute of Revision or Disallowance, as applicable, by the Claims Bar Date or such other bar date provided for in the Claims Procedure Order, as applicable, whether or not such Affected Creditor received direct notice of the claims process established by the Claims Procedure Order, shall be and is hereby forever barred from making any Claim or any Director/Officer Claim and shall not be entitled to any distribution under the Plan, and such Person's Claim or Director/Officer Claim, as applicable, shall be and is hereby forever barred and extinguished. Nothing in the Plan extends or shall be interpreted as extending or amending the Claims Bar Date or any other bar date provided for in the Claims Procedure Order, or gives or shall be interpreted as giving any rights to any Person in respect of Claims or Director/Officer Claims that have been barred or extinguished pursuant to the Claims Procedure Order, the Plan, this Plan Sanction Order, or the Meetings Order.

22. **THIS COURT ORDERS** that, notwithstanding anything to the contrary in the Plan or paragraphs 21, 23, 24 and 34 hereof, and based on the consent of the Applicant and the Monitor, any Person having a claim that is expressly designated as an "Excluded Claim" in a settlement agreement entered into between the Applicant and such Person after the Filing Date and prior to April 19, 2013 (each a "**CCAA Settlement Agreement**") shall be permitted to file a statement of claim in respect of such Excluded Claim for the purpose of preserving such Person's rights to pursue such Excluded Claim in accordance with, and subject to, the terms, conditions and limitations of such CCAA Settlement Agreement and on the basis that there shall be no recourse whatsoever, directly or indirectly, to the Applicant or any of the SkyLink Subsidiaries or their respective assets or property in respect of such Excluded Claim.

23. **THIS COURT ORDERS** that, pursuant to and in accordance with the terms of the Plan, on the Plan Implementation Date, any and all Released Director/Officer Claims shall be

fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred, subject to sections 3.7(b) and 7.1(b) of the Plan and subject to paragraph 22 of this Plan Sanction Order.

24. **THIS COURT ORDERS AND DECLARES** that, on the Plan Implementation Date, pursuant to and in accordance with the terms of the Plan, the ability of any Person to proceed against the Released Directors/Officers in respect of or relating to any Released Directors/Officers Claims shall be permanently and forever barred, estopped, stayed and enjoined, and all proceedings with respect to, in connection with or relating to such Released Director/Officer Claims shall be permanently stayed, subject to section 7.3 of the Plan and subject to paragraph 22 of this Plan Sanction Order.

25. **THIS COURT ORDERS** that, on the Plan Implementation Date, each Affected Creditor and any person having a Released Claim shall be deemed to have consented and agreed to all of the provisions of the Plan, in its entirety, and each Affected Creditor and any Person having a Released Claim shall be deemed to have executed and delivered all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety.

26. **THIS COURT ORDERS** that, pursuant to section 6(2) of the CCAA, the Articles of the Applicant shall be amended on the Plan Implementation Date in accordance with the Articles of Reorganization.

27 **THIS COURT ORDERS** that (i) in accordance with the Articles of Reorganization, any fractional Class A Shares held by any holder of Class A Shares immediately following the consolidation of the Class A Shares referred to in section 5.4(j) of the Plan shall be cancelled without any liability, payment or other compensation in respect thereof; and (ii) all Equity Interests (for greater certainty, not including any Class A Shares that remain issued and outstanding immediately following the cancellation of fractional interests pursuant to section 5.4(k) of the Plan) and the Shareholder Agreement shall be cancelled without any liability, payment or other compensation in respect thereof.

28. **THIS COURT ORDERS AND DECLARES** that, subject to performance by the Applicant of its obligations under the Plan and except as provided in the Plan, all obligations, agreements or leases to which any of the Applicant or the SkyLink Companies is a party on the Plan Implementation Date shall be and remain in full force and effect, unamended, as at the Plan Implementation Date and no party to any such obligation or agreement shall on or following the Plan Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise disclaim or resiliate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy under or in respect of any such obligation or agreement, by reason: (i) of any event which occurred prior to the Plan Implementation Date, or which is or continues to be suspended or waived under the Plan, which would have entitled any other party thereto to enforce those rights or remedies; (ii) that the Applicant has sought or obtained relief or has taken steps in connection with the Plan or under the CCAA; (iii) of any default or event of default arising as a result of the financial condition or insolvency of the Applicant on or prior to the Plan Implementation Date; (iv) of the effect upon the Applicant of the completion of any of the transactions contemplated under the Plan; or (v) of any compromises, settlements, restructurings, recapitalizations or reorganizations effected pursuant to the Plan.

29. **THIS COURT ORDERS AND DECLARES** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any non-competition or non-solicitation agreement or obligation in respect of the Applicant that exists on the Plan Implementation Date, including for greater certainty any non-competition or non-solicitation agreement or obligation that is expressly preserved or continued pursuant to a CCAA Settlement Agreement, provided that any such agreement or obligation shall terminate or expire in accordance with the terms thereof or as otherwise agreed by the Applicant and the applicable Persons.

30. **THIS COURT ORDERS** that, on the Plan Implementation Date, following completion of the steps in the sequence set forth in section 5.4 of the Plan, all debentures, notes, certificates, agreements, invoices and other instruments evidencing Affected Claims (including, for greater certainty, the Secured Notes) shall not entitle any holder thereof to

any compensation or participation and shall be and are hereby deemed to be cancelled and shall be and are hereby deemed to be null and void.

RELEASES AND INJUNCTIONS

31. **THIS COURT ORDERS** that, subject to paragraph 32 of this Plan Sanction Order, on the Plan Implementation Date, in accordance with section 7.1 of the Plan and the sequence set forth in section 5.4 of the Plan, the Released Parties shall be released and discharged from any and all Released Claims, and all Released Claims shall be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, all to the fullest extent permitted by Applicable Law.

32. **THIS COURT ORDERS** that, notwithstanding paragraph 31 of this Plan Sanction Order, Insured Claims and Director/Officer Wages Claims shall not be compromised, released, discharged, cancelled or barred by this Plan Sanction Order or the Plan, provided that from and after the Plan Implementation Date, any Person having, or claiming any entitlement or compensation relating to, an Insured Claim or a Director/Officer Wages Claim will be irrevocably limited to recovery in respect of such Insured Claim or Director/Officer Wages Claim solely from the proceeds of the applicable Insurance Policies, and Persons with any Insured Claim or Director/Officer Wages Claims will have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from the Applicant, any Skylink Subsidiary, any Released Director/Officer or any other Released Party, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable Insurance Policies. Nothing in this Plan Sanction Order prejudices, compromises, releases or otherwise affects any right or defence of any insurer in respect of an Insurance Policy or any insured in respect of an Insured Claim or a Director/Officer Wages Claim.

33. **THIS COURT ORDERS** that on the Plan Implementation Date, all Persons shall be permanently and forever barred, estopped, stayed and enjoined with respect to any and all Released Claims, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral,

administrative or other forum) against the Released Parties; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties or their property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against one or more of the Released Parties; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or their property; or (v) taking any actions to interfere with the implementation or consummation of the Plan; provided, however, that the foregoing shall not apply to the enforcement of any obligations under the Plan.

34. **THIS COURT ORDERS** that on the Plan Implementation Date, all Persons shall be permanently and forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with in respect of any Insured Claim or Director/Officer Wages Claim, except as against the applicable insurer(s) to the extent that rights to enforce such Insured Claims and/or Director/Officer Wages Claims against such insurer(s) in respect of an Insurance Policy are expressly preserved pursuant to sections 3.5(b), 3.7(b) and/or 7.1(b) of the Plan, and provided that, notwithstanding the restrictions on making a claim that are set forth in sections 3.5(b), 3.7(b) and 7.1(b) of the Plan, any claimant in respect of an Insured Claim or a Director/Officer Wages Claim that was duly filed with the Monitor by the Claims Bar Date shall be permitted to file a statement of claim in respect thereof to the extent necessary solely for the purpose of preserving such claimant's ability to pursue such Insured Claim or Director/Officer Wages Claim against an insurer in respect of an Insurance Policy in the manner authorized pursuant to sections 3.5(b), 3.7(b) and/or

7.1(b) of the Plan. For greater certainty, nothing in this paragraph 34 restricts or limits the application of paragraph 22 of this Plan Sanction Order.

THE MONITOR

35. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA and the powers provided to the Monitor herein and in the Plan, shall be and is hereby authorized, directed and empowered to perform its functions and fulfill its obligations under the Plan to facilitate the implementation of the Plan.

36. **THIS COURT ORDERS** that (i) in carrying out the terms of this Plan Sanction Order and the Plan, the Monitor shall have all the protections given to it by the CCAA, the Initial Order, and as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of this Plan Sanction Order and/or the Plan, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of the Applicant and any information provided by the Applicant without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

37. **THIS COURT ORDERS** that upon completion by the Monitor of its duties in respect of the Applicant pursuant to the CCAA, the Plan and the Orders, the Monitor may file with the Court a certificate stating that all of its duties in respect of the Applicant pursuant to the CCAA, the Plan and the Orders have been completed and thereupon, Duff & Phelps Canada Restructuring Inc. shall be deemed to be discharged from its duties as Monitor and released of all claims relating to its activities as Monitor.

BOARD OF DIRECTORS OF SKYLINK AVIATION INC.

38. **THIS COURT ORDERS AND DECLARES** that the Persons to be appointed to the board of directors on the Plan Implementation Date are Harry Green, Rael Nurick, Andrew Hamlin and Philip Hampson or such other persons listed on a certificate filed with the Court by the Applicant prior to the Plan Implementation Date, provided that such certificate and the Persons listed thereon shall be subject to the prior written consent

of the Majority Initial Consenting Noteholders. Concurrently with the appointment of such directors, all directors serving immediately prior to the Plan Implementation Date shall be deemed to resign.

SEALING ORDER

39. **THIS COURT ORDERS** that the Confidential Appendix #1 to the Third Report be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice which sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of the Court.

EXTENSION OF THE STAY OF PROCEEDINGS

40. **THIS COURT ORDERS** that the Stay Period, as such term is defined in and used throughout the Initial Order, be and is hereby extended to and including 11:59 p.m. on May 31, 2013, and that all other terms of the Initial Order shall remain in full force and effect, unamended, except as may be required to give effect to this paragraph or otherwise provided in the Plan or this Plan Sanction Order.

EFFECT, RECOGNITION AND ASSISTANCE

41. **THIS COURT ORDERS** that the Applicant and the Monitor may apply to this Court for advice and direction with respect to any matter arising from or under the Plan or this Plan Sanction Order.

42. **THIS COURT ORDERS** that this Plan Sanction Order shall have full force and effect in all provinces and territories of Canada and abroad as against all persons and parties against whom it may otherwise be enforced.

43. **THIS COURT REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, or in any other foreign jurisdiction, to give effect to this Order or to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such

orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant or the Monitor and their respective agents in carrying out the terms of this Order.

GENERAL

44. **THIS COURT ORDERS** that this Plan Sanction Order shall be posted on the Monitor's Website at http://www.duffandphelps.com/services/restructuring/Pages/RestructuringCases.aspx and is only required to be served upon the parties on the Service List and those parties who appeared at the hearing of the motion for this Plan Sanction Order.

45. **THIS COURT ORDERS AND DECLARES** that any conflict or inconsistency between the Plan and this Plan Sanction Order shall be governed by the terms, conditions and provisions of the Plan, which shall take precedence and priority, provided that any provision of this Plan Sanction Order that expressly provides that it supersedes the provisions of the Plan or that it operates notwithstanding anything to the contrary in the Plan shall take precedence and priority over any conflicting provision in the Plan.

APR 2 3 2013

Schedule "A"

(Plan of Compromise and Arrangement)

Court File No. 13-1003300-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SKYLINK AVIATION INC.

APPLICANT

PLAN OF COMPROMISE AND ARRANGEMENT

pursuant to the *Companies' Creditors Arrangement Act*
concerning, affecting and involving

SKYLINK AVIATION INC.

APRIL 18, 2013

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PLAN OF
COMPROMISE AND ARRANGEMENT

WHEREAS SkyLink Aviation Inc. (the "**Applicant**" or "**SkyLink Aviation**") is a debtor company under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"),

AND WHEREAS the Applicant has entered into a Recapitalization Support Agreement dated March 7, 2013 (as it may be amended, restated and varied from time to time in accordance with the terms thereof, the "**Support Agreement**"), between the Applicant and certain parties (the "**Consenting Noteholders**" and each a "**Consenting Noteholder**") that are holders of, and/or investment advisors or managers with investment discretion over, the $110 million aggregate principal amount of 12.25% senior secured second lien notes due 2016 issued by SkyLink Aviation (the "**Secured Notes**"),

AND WHEREAS the Support Agreement contemplates the implementation of the Recapitalization (as defined below) pursuant to a plan of compromise and arrangement under the CCAA, which plan will provide for, among other things, the exchange of the Secured Notes for new equity and new notes in SkyLink Aviation, which is expected to result in, among other things, greater liquidity for, and the continued viability of, the Applicant;

AND WHEREAS the Applicant obtained an order (as may be amended, restated or varied from time to time, the "**Initial Order**") of the Ontario Superior Court of Justice (the "**Court**") under the CCAA dated March 8, 2013 (the "**Filing Date**");

AND WHEREAS the Applicant filed a plan of compromise and arrangement with the Court on March 8, 2013 under and pursuant to the CCAA, and the Applicant has made certain amendments thereto in accordance with the terms thereof and hereby proposes and presents this amended plan of compromise and arrangement to the Affected Unsecured Creditors Class (as defined below) and the Secured Noteholders Class (as defined below) under and pursuant to the CCAA.

ARTICLE 1
INTERPRETATION

1.1 Definitions

In the Plan, unless otherwise stated or unless the subject matter or context otherwise requires:

"**Affected Claim**" means any Claim that is not an Unaffected Claim, and, for greater certainty, includes any Equity Claim

"**Affected Creditor**" means any Creditor with an Affected Claim, but only with respect to and to the extent of such Affected Claim, including Secured Noteholders who have beneficial ownership of an Affected Claim pursuant to the Secured Notes.

"**Affected Unsecured Claims**" means all Affected Claims other than (i) the Claims comprising the Secured Noteholders Allowed Secured Claim and (ii) Equity Claims, and for the avoidance of doubt includes the Claims comprising the Secured Noteholders Allowed Unsecured Claim.

"**Affected Unsecured Creditor**" means any holder of an Affected Unsecured Claim, but only with respect to and to the extent of such Affected Unsecured Claim.

"**Affected Unsecured Creditors Class**" means the class of Affected Unsecured Creditors entitled to vote on this Plan at the Unsecured Creditors Meeting in accordance with the terms of the Meetings Order.

"**Agreed Number**" means, with respect to the New Common Shares, that number of New Common Shares to be issued on the Plan Implementation Date pursuant to the Plan as agreed to by the Applicant, the Monitor and the Majority Initial Consenting Noteholders.

"**Allowed**" means, with respect to a Claim, any Claim or any portion thereof that has been finally allowed as a Distribution Claim (as defined in the Claims Procedure Order) for purposes of receiving distributions under the Plan in accordance with the Claims Procedure Order or a Final Order of the Court.

"**Applicable Law**" means any law, statute, order, decree, consent decree, judgment, rule regulation, ordinance or other pronouncement having the effect of law whether in Canada, the United States or any other country, or any domestic or foreign state, county, province, city or other political subdivision or of any Governmental Entity.

"**Articles**" means the articles of amalgamation of SkyLink Aviation.

"**Articles of Amalgamation**" means the articles of amalgamation pursuant to the OBCA, the form and substance as agreed by the Applicant and the Majority Initial Consenting Noteholders, to effectuate the amalgamation of SkyLink Aviation and SkyLink Canadian Subsidiary.

"**Articles of Reorganization**" means the articles of reorganization pursuant to the OBCA, the form and substance as agreed by the Applicant, the Monitor and the Majority Initial Consenting Noteholders, to be filed by the Applicant on the Plan Implementation Date amending the Articles in accordance with the Plan.

"**Business Day**" means a day, other than Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Toronto, Ontario and New York, New York.

"**Canadian Tax Act**" means the *Income Tax Act* (Canada), as amended.

"**CCAA**" has the meaning ascribed thereto in the recitals.

"**CCAA Proceeding**" means the proceeding commenced by the Applicant under the CCAA on the Filing Date.

"**CDS**" means CDS Clearing and Depositary Services Inc. or any successor thereof.

"**CDS Participants**" has the meaning ascribed thereto in section 4.1(c)(A).

"**Charges**" means the Administration Charge, the Directors' Charge, the KERP Charge and the DIP Lenders' Charge, each as defined in the Initial Order.

"**Claim**" means:

(a) any right or claim of any Person against the Applicant, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind whatsoever of the Applicant in existence on the Filing Date, and costs payable in respect thereof to and including the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts which existed prior to the Filing Date and any other claims that would have been claims provable in bankruptcy had the Applicant become bankrupt on the Filing Date, including for greater certainty any Equity Claim and any claim for indemnification by any Director or Officer in respect of a Director/Officer Claim (but excluding any such claim for indemnification that is covered by the Directors' Charge (as defined in the Initial Order)), and

(b) any right or claim of any Person against the Applicant in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the Applicant to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach by the Applicant on or after the Filing Date of any contract, lease or other agreement whether written or oral,

provided that, for greater certainty, the definition of "Claim" shall not include any Director/Officer Claim.

"**Claims Bar Date**" has the meaning ascribed thereto in the Claims Procedure Order.

"**Claims Procedure Order**" means the Order under the CCAA establishing a claims procedure in respect of the Applicant, as same may be further amended, restated or varied from time to time.

"**Class A Shares**" means the common shares in the capital of SkyLink Aviation designated in the Articles as Class A Common Shares.

"**Class B Shares**" means the common shares in the capital of SkyLink Aviation designated in the Articles as Class B Common Shares.

"**Company Advisors**" means Goodmans LLP and Ernst & Young Inc.

"**Company Stock Option Plans**" means the 2008 Stock Award Plan adopted by SL Aviation Bidco Inc. (as predecessor to SkyLink Aviation) on November 6, 2008, and any other options plans or other obligations of the Applicant in respect of options or warrants for equity in SkyLink

Aviation, in each case as such plan or other obligation may be amended, restated or varied from time to time in accordance with the terms thereof

"**Consenting Noteholder**" has the meaning ascribed thereto in the recitals.

"**Consolidation Ratio**" means, with respect to the Class A Shares, the ratio by which Class A Shares outstanding on the Plan Implementation Date at the relevant time (including, for the avoidance of doubt, any Class A Shares that are Existing Shares and New Common Shares issued pursuant to the Plan) are consolidated pursuant to the Plan, as agreed by the Applicant, the Monitor and the Majority Initial Consenting Noteholders.

"**Court**" has the meaning ascribed thereto in the recitals.

"**Creditor**" means any Person having a Claim, but only with respect to and to the extent of such Claim, including the transferee or assignee of a transferred Claim that is recognized as a Creditor in accordance with the Claims Procedure Order or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person.

"**DIP Agreement**" means the debtor-in-possession credit agreement between the Applicant, as borrower, the SkyLink Guarantors, as guarantors, and the DIP Lenders, as such agreement may be modified, amended or supplemented in accordance with the terms thereof, the Initial Order or any other Order of the Court, which DIP Agreement will cease to be a debtor-in-possession credit agreement and will take effect as a new first lien credit agreement on the Plan Implementation Date in accordance with the terms hereof and thereof, and, accordingly, any reference herein to the DIP Agreement also means the New First Lien Credit Agreement, as applicable.

"**DIP Backstop**" means the commitment to fund the entire DIP Loan Amount provided by the DIP Backstop Parties subject to the terms of and in accordance with the DIP Backstop Commitment Letter.

"**DIP Backstop Commitment Letter**" means the commitment letter entered into by SkyLink Aviation and the DIP Backstop Parties pursuant to which the DIP Backstop Parties have committed to funding the entire DIP Loan Amount, subject to and in accordance with the terms thereof.

"**DIP Backstop Parties**" means those Noteholders that have executed the Support Agreement and are signatories to the DIP Backstop Commitment Letter, and "**DIP Backstop Party**" means any one of them.

"**DIP Backstop Party's Pro Rata Share**" means with respect to each DIP Backstop Party, (x) the amount of the DIP Backstop committed by such DIP Backstop Party pursuant to the DIP Backstop Commitment Letter divided by (y) the DIP Loan Amount.

"**DIP Facility**" means the interim financing facility committed by the DIP Lenders pursuant to the DIP Agreement

"**DIP Lenders**" means, collectively, the DIP Backstop Parties and the Qualifying Noteholders who become lenders of the DIP Facility under the DIP Agreement in accordance with the terms of the Initial Order, and "**DIP Lender**" means any one of them

"**DIP Loan Amount**" means US$18 million.

"**Directors**" means all current and former directors (or their estates) of the Applicant, in such capacity, and "**Director**" means any one of them

"**Director/Officer Claim**" means any right or claim of any Person against one or more of the Directors or Officers of the Applicant howsoever arising, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, including any right of contribution or indemnity, for which any Director or Officer of the Applicant is alleged to be by statute or otherwise by law liable to pay in his or her capacity as a Director or Officer.

"**Director/Officer Wages Claim**" means the Director/Officer Claims for unpaid employment remuneration delivered to the Monitor on or prior to 5:00 p.m. (Toronto Time) on March 28, 2013 in accordance with the Claims Procedure Order, which are described on Schedule "D" hereto.

"**Disputed Distribution Claim**" means an Affected Unsecured Claim (including a contingent Affected Unsecured Claim which may crystallize upon the occurrence of an event or events occurring after the Filing Date) or such portion thereof which has not been Allowed, which is validly disputed for distribution purposes in accordance with the Claims Procedure Order and which remains subject to adjudication for distribution purposes in accordance with the Claims Procedure Order.

"**Disputed Distribution Claims Reserve**" means the reserve, if any, to be established by the Applicant on the Unsecured Promissory Note Maturity Date, which shall be comprised of the Unsecured Promissory Note Proceeds that would have been paid in respect of Unsecured Promissory Note Entitlements, if such Disputed Distribution Claims had been Allowed Claims as of such date.

"**Distribution Date**" means the date or dates from time to time set in accordance with the provisions of the Plan to effect distributions in respect of the Allowed Claims, excluding the Initial Distribution Date, and in the case of distributions from Unsecured Promissory Note Proceeds, means the Unsecured Promissory Note Maturity Date or such later date from time to time in accordance with the provisions of the Plan if any Affected Unsecured Claim is a Disputed Distribution Claim on the Unsecured Promissory Note Maturity Date.

"**Effective Time**" means 12:01 a.m. (Toronto time) on the Plan Implementation Date or such other time on such date as the Applicant and the Majority Initial Consenting Noteholders may agree.

"**Employee Priority Claims**" means the following Claims of Employees and former employees of SkyLink Aviation:

(c) Claims equal to the amounts that such Employees and former employees would have been entitled to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* (Canada) if SkyLink Aviation had become bankrupt on the Filing Date; and

(d) Claims for wages, salaries, commissions or compensation for services rendered by them after the Filing Date and on or before the Plan Implementation Date together with, in the case of travelling salespersons, disbursements properly incurred by them in and about SkyLink Aviation's business during the same period.

"**Employees**" means any and all (a) employees of SkyLink Aviation who are actively at work (including full-time, part-time or temporary employees) and (b) employees of SkyLink Aviation who are on approved leaves of absence (including maternity leave, parental leave, short-term disability leave, workers' compensation and other statutory leaves), and who have not tendered notice of resignation as of the Filing Date, in each case.

"**Encumbrance**" means any charge, mortgage, lien, pledge, claim, restriction, hypothec, adverse interest, security interest or other encumbrance whether created or arising by agreement, statute or otherwise at law, attaching to property, interests or rights and shall be construed in the widest possible terms and principles known under the law applicable to such property, interests or rights and whether or not they constitute specific or floating charges as those terms are understood under the laws of the Province of Ontario.

"**Equity Claim**" means a Claim that meets the definition of "equity claim" in section 2(1) of the CCAA.

"**Equity Claimants**" means any Person with an Equity Claim or holding an Equity Interest, but only in such capacity, and for greater certainty includes the Existing Shareholders in their capacity as such.

"**Equity Interests**" has the meaning ascribed thereto in section 2(1) of the CCAA and, for greater certainty, includes the Existing Shares, the shares in the capital of the Applicant referred to in the Articles as the "Class B Common Shares", the Options and any other interest in or entitlement to shares in the capital of the Applicant but, for greater certainty, does not include the New Common Shares issued on the Plan Implementation Date in accordance with the Plan.

"**Existing Shareholder**" means any Person who holds or is entitled to the Existing Shares or any shares in the authorized capital of the Applicant immediately prior to the Effective Time, but only in such capacity, and for greater certainty does not include any Person that is issued New Common Shares on the Plan Implementation Date, in such capacity.

"**Existing Shares**" means all shares in the capital of SkyLink Aviation that are issued and outstanding immediately prior to the Effective Time.

"**Expense Reimbursement**" means the reasonable and documented fees and expenses of the Noteholder Advisors (to the extent not already satisfied by the Applicant).

"**Filing Date**" has the meaning ascribed thereto in the recitals.

"**Final Order**" means any order, ruling or judgment of the Court, or any other court of competent jurisdiction, which has not been reversed, modified or vacated, and is not subject to any stay.

"**First Lien Agent**" means Deans Knight Capital Management Ltd., in its capacity as agent of the First Lien Credit Facility.

"**First Lien Credit Agreement**" means the credit agreement dated as of March 15, 2011 between, among others, the Applicant, as borrower, and the SkyLink Guarantors, as guarantors, as amended and modified from time to time, which credit agreement was assigned to and assumed by the First Lien Agent and the First Lien Lenders pursuant to a Loan Purchase Agreement dated as of February 28, 2013.

"**First Lien Credit Facility**" means the credit facility provided pursuant to the First Lien Credit Agreement.

"**First Lien Lenders**" means the lenders pursuant to the First Lien Credit Facility, at the relevant time, in their capacity as such.

"**Fractional Interests**" has the meaning given in section 4.10 hereof.

"**Government Priority Claims**" means all Claims of Governmental Entities against the Applicant in respect of amounts that are outstanding and that are of a kind that could reasonably be subject to a demand under:

(a) subsections 224(1.2) of the Canadian Tax Act;

(b) any provision of the Canada Pension Plan or the *Employment Insurance Act* (Canada) that refers to subsection 224(1.2) of the Canadian Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or employee's premium or employer's premium as defined in the *Employment Insurance Act* (Canada), or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Canadian Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum:

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Canadian Tax Act; or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the

provincial legislation establishes a "provincial pension plan" as defined in that subsection.

"**Governmental Entity**" means any government, regulatory authority, governmental department, agency, commission, bureau, official, minister, Crown corporation, court, board, tribunal or dispute settlement panel or other law, rule or regulation-making organization or entity (a) having or purporting to have jurisdiction on behalf of any nation, province, territory or state or any other geographic or political subdivision of any of them; or (b) exercising, or entitled or purporting to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power.

"**Incentive Plan**" has the meaning ascribed thereto in section 5.4(m).

"**Information Statement**" means the information statement distributed (or to be distributed) by SkyLink Aviation concerning the Plan, the Meetings and the hearing in respect of the Sanction Order, as contemplated in the Meetings Order.

"**Initial Consenting Noteholder's Pro-Rata Share**" means with respect to each Initial Consenting Noteholder, (x) the principal amount of Secured Notes held by such Initial Consenting Noteholder as at the relevant date divided by (y) the aggregate principal amount of Secured Notes held by all of the Initial Consenting Noteholders collectively.

"**Initial Consenting Noteholders**" means those Secured Noteholders that were the original signatories to the Support Agreement (as distinct from a Support Agreement Joinder).

"**Initial Distribution Date**" means a date no more than two (2) Business Days after the Plan Implementation Date or such other date as the Applicant, the Monitor and the Majority Initial Consenting Noteholders may agree.

"**Initial Order**" has the meaning ascribed thereto in the recitals.

"**Insurance Policy**" means any insurance policy maintained by SkyLink Aviation pursuant to which SkyLink Aviation or any Director or Officer is insured.

"**Insured Claim**" means all or that portion of a Claim arising from a cause of action for which the applicable insurer has definitively and unconditionally confirmed that SkyLink Aviation is insured under an Insurance Policy, to the extent that such Claim, or portion thereof, is so insured.

"**Intercompany Claim**" means any claim by any SkyLink Company or related entity against SkyLink Aviation.

"**IPSA**" means the Interest Payment Support Agreement dated as of September 17, 2012, as amended and supplemented from time to time, among the IPSA Noteholder Participants, SkyLink Aviation and certain guarantors party to the Secured Note Indenture.

"**IPSA Noteholder Participants**" means those Secured Noteholders that executed the IPSA.

"**KERP**" means the payments to be made to certain key employees of the Applicant upon the implementation of the Plan, as described in the key employee retention plan letters attached to,

and filed with the Court together with, the confidential supplement to the Pre-Filing Report of the Monitor dated as of the Filing Date.

"**Majority Initial Consenting Noteholders**" means Initial Consenting Noteholders holding not less than a majority of the principal amount of the Notes held by all Initial Consenting Noteholders, in each case as communicated to the Applicant by counsel to the Initial Consenting Noteholders, in accordance with section 10.6 hereof.

"**Material**" means a fact, circumstance, change, effect, matter, action, condition, event, occurrence or development that, individually or in the aggregate, is, or would reasonably be expected to be, material to the business, affairs, results of operations or financial condition of the Applicant (taken as a whole).

"**Material Adverse Effect**" means a fact, event, change, occurrence or circumstance that, individually or together with any other fact, event, change, occurrence or circumstance, has, or could reasonably be expected to have, a material adverse impact on the business, assets, liabilities, capitalization, obligations (whether absolute, accrued, conditional or otherwise), condition (financial or otherwise), operations or prospects of the Applicant and its subsidiaries (taken as a whole) and shall include, without limitation, the disposition by the Applicant or any of its subsidiaries of any material asset without the prior consent of the Majority Initial Consenting Noteholders; provided, however, that a Material Adverse Effect shall not include, and shall be deemed to exclude the impact of: (A) any change in Applicable Laws of general applicability or interpretations thereof by courts or governmental or regulatory authorities, which does not disproportionately adversely affect the Applicant or its subsidiaries (taken as a whole), (B) any change in the aviation transport and logistics services industry generally, which does not disproportionately adversely affect the Applicant or its subsidiaries (taken as a whole), (C) actions and omissions of the Applicant taken with the prior written consent of the Majority Initial Consenting Noteholders or required pursuant to the Support Agreement, the Plan or any related document, (D) the public announcement of the Support Agreement, the DIP Agreement, the Plan or any related document or the transactions contemplated by thereby, (E) SkyLink Aviation entering into the DIP Agreement, (F) the CCAA Proceedings, (G) any material change in the market price or trading volume of the Secured Notes or Equity Interests (it being understood that any cause or causes of any such change may be taken into consideration when determining whether a Material Adverse Effect has occurred or could reasonably be expected to occur), (H) any act of war, armed hostilities or terrorism or any worsening thereof, which does not disproportionately adversely affect the Applicant or its subsidiaries (taken as a whole), or (I) any material failure by the Applicant to meet internal projections or forecasts or third party revenue or earnings predictions for any period (it being understood that any cause or causes of any such failure may be taken into consideration when determining whether a Material Adverse Effect has occurred or could reasonably be expected to occur).

"**Meeting Date**" means the date on which the Meetings are held in accordance with the Meetings Order

"**Meetings**" means, collectively, the Unsecured Creditors Meeting and the Secured Noteholders Meeting.

"**Meetings Order**" means the Order under the CCAA that, among other things, sets the date for the Meetings, as same may be amended, restated or varied from time to time.

"**Monitor**" means Duff & Phelps Canada Restructuring Inc., as Court-appointed Monitor in the CCAA Proceeding of the Applicant.

"**New Common Shares**" means the new Class A Shares of SkyLink Aviation to be issued pursuant to section 5.2(1) hereof.

"**New First Lien Credit Agreement**" means the DIP Agreement, which credit agreement will cease to be a debtor-in-possession credit agreement and will take effect as a new first lien credit agreement on the Plan Implementation Date in accordance with the terms hereof and thereof and, accordingly, any reference herein to the New First Lien Credit Agreement also means the DIP Agreement, as applicable.

"**New First Lien Loan**" means the secured, first lien loans in the aggregate principal amount of the New Loan Amount that are to take effect on the Plan Implementation Date in accordance with the terms hereof and the DIP Agreement.

"**New Loan Amount**" means US$18 million.

"**New Lenders**" means the DIP Lenders, all of whom will cease to be DIP Lenders on the Plan Implementation Date and will automatically become lenders pursuant to the New First Lien Loan on the Plan Implementation Date in accordance with the terms hereof and the DIP Agreement.

"**New Lender's Pro Rata Share**" means with respect to each New Lender, (x) the amount of the New Loan Amount committed (including, for greater certainty, any amount funded) by such New Lender as at the Plan Implementation Date, divided by (y) the New Loan Amount.

"**New Second Lien Notes**" means the secured, second lien notes in the aggregate principal amount of $10 million to be issued on the Plan Implementation Date pursuant to section 5.2(2) hereof, the terms of which shall be consistent with the summary of terms set forth in Schedule "A".

"**New Second Lien Notes Indenture**" means the note indenture dated as of the Plan Implementation Date among SkyLink Aviation, the guarantors party thereto and the New Second Lien Notes Indenture Trustee pursuant to which the New Second Lien Notes will be issued.

"**New Second Lien Notes Indenture Trustee**" means Computershare Trust Company of Canada or such other trustee as may be agreed to by the Applicant and the Majority Initial Consenting Noteholders, as trustee under the New Second Lien Notes Indenture.

"**New Shareholders' Agreement**" means the shareholders' agreement among SkyLink Aviation and each of the holders of the New Common Shares, which shall be declared to be effective and binding on all such Persons pursuant to the Sanction Order.

"**Noteholder Advisors**" means Bennett Jones LLP and PwC.

"**Notice of Claim**" has the meaning ascribed thereto in the Claims Procedure Order.

"**OBCA**" means the *Business Corporations Act* (Ontario), as amended.

"**Officers**" means all current and former officers (or their estates) of the Applicant, in such capacity, and "**Officer**" means any one of them.

"**Options**" means any options, warrants, conversion privileges, puts, calls, subscriptions, exchangeable securities, or other rights, entitlements, agreements, arrangements or commitments (pre-emptive, contingent or otherwise) obligating SkyLink Aviation to issue, acquire or sell shares in the capital of SkyLink Aviation or to purchase any shares, securities, options or warrants, or any securities or obligations of any kind convertible into or exchangeable for shares in the capital of SkyLink Aviation, in each case that are existing or issued and outstanding immediately prior to the Effective Time, including any options to acquire common shares of SkyLink Aviation issued under the Company Stock Option Plans, any warrants exercisable for common shares or other equity securities of SkyLink Aviation, any put rights exercisable against the Applicant in respect of any shares, options, warrants or other securities, and any rights, entitlements or other claims of any kind to receive any other form of consideration in respect of any prior or future exercise of any of the foregoing.

"**Order**" means any order of the Court made in connection with the CCAA Proceeding.

"**Person**" means any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, government or any agency, officer or instrumentality thereof or any other entity.

"**Plan**" means this Plan of Compromise and Arrangement filed by the Applicant under the CCAA, as it may be amended, supplemented or restated from time to time in accordance with the terms hereof.

"**Plan Implementation Date**" means the Business Day on which this Plan becomes effective, which shall be the Business Day on which, pursuant to section 9.2, the Applicant and Majority Initial Consenting Noteholders deliver written notice to the Monitor that the conditions set out in section 9.1 have been satisfied or waived in accordance with the terms hereof.

"**Post-Filing Trade Payables**" means trade payables that were incurred by the Applicant (a) after the Filing Date but before the Plan Implementation Date, and (b) in compliance with the Initial Order and other Orders issued in connection with the CCAA Proceeding.

"**Prior Ranking Secured Claims**" means Claims existing on both the Filing Date and the Plan Implementation Date, other than Government Priority Claims, Employee Priority Claims, and Claims secured by the Charges, that (a) have the benefit of a valid and enforceable security interest in, mortgage or charge over, lien against or other similar interest in, any of the assets that the Applicant owns or to which the Applicant is entitled, but only to the extent of the realizable value of the property subject to such security; and (b) would have ranked senior in priority to the Secured Noteholders Allowed Secured Claim if the Applicant had become bankrupt on the Filing Date.

"**Proof of Claim**" has the meaning ascribed thereto in the Claims Procedure Order.

"**PwC**" means PricewaterhouseCoopers LLP.

"**Qualifying Noteholder**" means a Secured Noteholder as of the Filing Date that (a) in the case of a Secured Noteholder resident in the United States, is a "qualified institutional buyer" within the meaning of Rule 144A under the 1933 Act; (b) in the case of a Secured Noteholder resident in a province or territory of Canada, is an "accredited investor" as such term is defined in the National Instrument 45-106 Prospectus and Registration Exemptions ("**NI 45-106**"); or (c) in the case of a Secured Noteholder resident outside of Canada or the United States, would qualify as an "accredited investor" as such term is defined in NI-45-106 as if such Secured Noteholder was resident in Canada and can demonstrate to SkyLink Aviation that it is qualified to participate as a lender in the DIP Facility in accordance with the laws of its jurisdiction of residence.

"**Recapitalization**" means the transactions contemplated by this Plan.

"**Released Claim**" has the meaning ascribed thereto in section 7.1(a).

"**Released Director/Officer Claim**" means any Director/Officer Claim that is released pursuant to section 7.1.

"**Released Directors/Officers**" means the Persons listed on Schedule "B", in their capacity as Directors and/or Officers, and "**Released Director/Officer**" means any one of them.

"**Released Party**" and "**Released Parties**" have the meaning ascribed thereto in section 7.1(a).

"**Released Shareholders**" means those holders of the Existing Shares as of the Filing Date who are listed on Schedule "C", in their capacity as holders of Existing Shares.

"**Required Majorities**" means with respect to each Voting Class, a majority in number of Affected Creditors representing at least two thirds in value of the Voting Claims of Affected Creditors, in each case who are entitled to vote at the Meetings in accordance with the Meetings Order and who are present and voting in person or by proxy on the resolution approving the Plan at the applicable Meeting.

"**Sanction Date**" means the date that the Sanction Order is made by the Court.

"**Sanction Order**" means the Order of the Court sanctioning and approving this Plan.

"**Secured Noteholder's Pro-Rata Share**" means, with respect to each Secured Noteholder, (x) the principal amount of Secured Notes held by such Secured Noteholder as at the Filing Date divided by (y) $110,000,000 (being the aggregate principal amount of all of the Secured Notes).

"**Secured Noteholders**", and each a "**Secured Noteholder**", means the holders of the Secured Notes.

"**Secured Noteholders Allowed Claim**" has the meaning ascribed thereto in the Claims Procedure Order.

"**Secured Noteholders Allowed Secured Claim**" has the meaning ascribed thereto in the Claims Procedure Order.

"**Secured Noteholders Allowed Unsecured Claim**" has the meaning ascribed thereto in the Claims Procedure Order

"**Secured Noteholders Class**" means the class of Secured Noteholders collectively holding the Secured Noteholders Allowed Secured Claim entitled to vote on this Plan at the Secured Noteholders Meeting in accordance with the terms of the Meetings Order.

"**Secured Noteholders Meeting**" means the meeting of the Secured Noteholders Class to be held on the Meeting Date for the purpose of considering and voting on the Plan pursuant to the CCAA and includes any adjournment, postponement or other rescheduling of such meeting in accordance with the Meetings Order.

"**Secured Note Indenture**" means the note indenture dated March 15, 2011 that was entered into between SkyLink Aviation, certain guarantor parties and the Secured Note Indenture Trustee in connection with the issuance of the Secured Notes, as amended by the First Supplemental Indenture dated as of October 19, 2012.

"**Secured Note Indenture Trustee**" means Computershare Trust Company of Canada, as trustee under the Secured Note Indenture.

"**Secured Note Obligations**" means all obligations, liabilities and indebtedness of SkyLink Aviation or any of the other SkyLink Companies (whether as guarantor, surety or otherwise) to the Secured Note Indenture Trustee and/or the Secured Noteholders (including, for greater certainty, in their capacity as holders of the Secured Notes and in their capacity as IPSA Noteholder Participants) under, arising out of or in connection with the Secured Notes, the IPSA, the Secured Note Indenture or the guarantees granted in connection with any of the foregoing as well as any other agreements or documents relating thereto as at the Plan Implementation Date.

"**Secured Notes**" has the meaning ascribed thereto in the recitals.

"**Shareholder Agreement**" means the shareholder agreement dated November 13, 2008 by and among SI. Aviation Bidco Inc. (as predecessor to SkyLink Aviation) and the holders of the Existing Shares, as amended and as it may be further amended from time to time.

"**SkyLink Aviation**" has the meaning ascribed thereto in the recitals.

"**SkyLink Canadian Subsidiary**" means 2273853 Ontario Inc.

"**SkyLink Companies**" means the Applicant, the SkyLink Guarantors, SkyLink Aeromanagement (Kenya) Ltd., SkyLink Aviation FZE, SkyLink Air & Logistic Support (Sudan) Co. Ltd., SkyLink Air and Logistic Service Italy Srl, CAS FZE, Aerostan Holdings Company, Aerostan Limited Liability Company and Canadian Force Logistics Augmentation Group Inc.

"**SkyLink Guarantors**" means SkyLink Canadian Subsidiary, SkyLink Air and Logistic Support (USA) Inc., SkyLink USA II and SkyLink Aviation (Wyoming) Inc.

"**SkyLink Subsidiaries**" means the SkyLink Companies other than the Applicant.

"**SkyLink USA II**" means SkyLink Air and Logistic Support (USA) II Inc.

"**Structuring Equity**" means the 5% of the New Common Shares issued and outstanding on the Plan Implementation Date to be issued to the Initial Consenting Noteholders by the Applicant pursuant to this Plan in recognition of the significant time and effort spent by the Initial Consenting Noteholders in working with the Applicant to develop, structure and facilitate the Recapitalization.

"**Support Agreement**" has the meaning ascribed thereto in the recitals.

"**Support Agreement Joinder**" means a joinder agreement in the form set out as a schedule to the Support Agreement pursuant to which a Secured Noteholder agrees to become a Consenting Noteholder and to be bound by the terms of the Support Agreement.

"**Tax**" or "**Taxes**" means any and all federal, provincial, municipal, local and foreign taxes, assessments, reassessments and other governmental charges, duties, impositions and liabilities including for greater certainty taxes based upon or measured by reference to income, gross receipts, profits, capital, transfer, land transfer, sales, goods and services, harmonized sales, use, value-added, excise, withholding, business, franchising, property, development, occupancy, employer health, payroll, employment, health, social services, education and social security taxes, all surtaxes, all customs duties and import and export taxes, all licence, franchise and registration fees and all employment insurance, health insurance and Canada, Quebec and other government pension plan premiums or contributions, together with all interest, penalties, fines and additions with respect to such amounts.

"**Taxing Authorities**" means anyone of Her Majesty the Queen, Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, the Canada Revenue Agency, any similar revenue or taxing authority of Canada and each and every province or territory of Canada and any political subdivision thereof, the United States Internal Revenue Service, any similar revenue or taxing authority of the United States and each and every state of the United States, and any Canadian, United States or other government, regulatory authority, government department, agency, commission, bureau, minister, court, tribunal or body or regulation making entity exercising taxing authority or power, and "Taxing Authority" means any one of the Taxing Authorities.

"**Unaffected Claim**" means any:

(a) Claim of the First Lien Agent and/or the First Lien Lenders in respect of the First Lien Credit Agreement or the First Lien Facility;

(b) Claim secured by any of the Charges;

(c) Insured Claim;

(d) Claim by the DIP Lenders arising under the DIP Agreement;

(e) Intercompany Claim;

(f) Post-Filing Trade Payables;

(g) Claim by an Unaffected Trade Creditor arising from an Unaffected Trade Claim,

(h) Prior Ranking Secured Claims;

(i) Claim that is not permitted to be compromised pursuant to section 19(2) of the CCAA;

(j) Employee Priority Claims; and

(k) Government Priority Claims.

"**Unaffected Creditor**" means a Creditor who has an Unaffected Claim, but only in respect of and to the extent of such Unaffected Claim.

"**Unaffected Trade Claim**" means a Claim of an Unaffected Trade Creditor that is not a Post-Filing Trade Payable and that arises out of or in connection with any contract, license, lease, agreement, obligation, arrangement or document with the Applicant related to the business of the Applicant.

"**Unaffected Trade Creditor**" means any Person that has been designated by SkyLink Aviation, with the consent of the Monitor and the Majority Initial Consenting Noteholders, as a critical supplier in accordance with the Initial Order.

"**Undeliverable Distribution**" has the meaning ascribed thereto in section 4.8 hereof.

"**Unsecured Creditor's Pro-Rata Share**" means, at the relevant time, with respect to each Affected Unsecured Creditor, (x) the Allowed Affected Unsecured Claim of such Affected Unsecured Creditor divided by (y) the total of all Allowed Affected Unsecured Claims and Disputed Distribution Claims of Affected Unsecured Creditors.

"**Unsecured Creditors Meeting**" means a meeting of Affected Unsecured Creditors to be held on the Meeting Date called for the purpose of considering and voting on the Plan pursuant to the CCAA, and includes any adjournment, postponement or other rescheduling of such meeting in accordance with the Meetings Order.

"**Unsecured Promissory Note**" means the unsecured, subordinated promissory note in the principal amount of $300,000 due and payable on the Unsecured Promissory Note Maturity Date, subject to the provisions thereof, to be issued by SkyLink Aviation on the Plan Implementation Date in favour of the Affected Unsecured Creditors with Allowed Affected Unsecured Claims and held by the Applicant, for the benefit of the beneficiaries of such promissory note, pending distribution of the Unsecured Promissory Note Proceeds, which promissory note shall accrue 2% payment-in-kind interest annually (which payment-in-kind interest shall be held by the Applicant in a segregated account for the benefit of beneficiaries of the Unsecured Promissory Note), shall be subordinated to all indebtedness and trade obligations of SkyLink Aviation and may be repaid by the Applicant at any time without penalty.

"**Unsecured Promissory Note Entitlement**" means, with respect to each Affected Unsecured Creditor with an Allowed Unsecured Claim, its entitlement to its Unsecured Creditor's Pro-Rata Share of the Unsecured Promissory Note Proceeds.

"**Unsecured Promissory Note Maturity Date**" means the earlier of the date that is 5 years following the Plan Implementation Date and the date on which the Applicant repays the Unsecured Promissory Note in accordance with its terms.

"**Unsecured Promissory Note Proceeds**" means the amount payable to the beneficiaries of the Unsecured Promissory Note on the Unsecured Promissory Note Maturity Date (including the principal amount of the Unsecured Promissory Note and the interest thereon), subject to the terms and conditions of the Unsecured Promissory Note.

"**Voting Claims**" means any Claim or portion thereof that has been finally allowed as a Voting Claim (as defined in the Claims Procedure Order) for purposes of voting at a Meeting in accordance with the Claims Procedure Order or a Final Order of the Court.

"**Voting Classes**" means the Secured Noteholders Class and the Affected Unsecured Creditors Class

"**Website**" means:

http://www.duffandphelps.com/services/restructuring/Pages/RestructuringCases.aspx.

1.2 Certain Rules of Interpretation

For the purposes of the Plan:

(a) any reference in the Plan to a contract, instrument, release, indenture, or other agreement or document being in a particular form or on particular terms and conditions means that such document shall be substantially in such form or substantially on such terms and conditions;

(b) any reference in the Plan to an Order or an existing document or exhibit filed or to be filed means such Order, document or exhibit as it may have been or may be amended, modified, or supplemented;

(c) unless otherwise specified, all references to currency are in Canadian dollars;

(d) the division of the Plan into "articles" and "sections" and the insertion of a table of contents are for convenience of reference only and do not affect the construction or interpretation of the Plan, nor are the descriptive headings of "articles" and "sections" intended as complete or accurate descriptions of the content thereof;

(e) the use of words in the singular or plural, or with a particular gender, including a definition, shall not limit the scope or exclude the application of any provision of the Plan or a schedule hereto to such Person (or Persons) or circumstances as the context otherwise permits;

(f) the words "includes" and "including" and similar terms of inclusion shall not, unless expressly modified by the words "only" or "solely", be construed as terms of limitation, but rather shall mean "includes but is not limited to" and "including

but not limited to", so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive;

(g) unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean local time in Toronto, Ontario and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. (Toronto time) on such Business Day;

(h) unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day;

(i) unless otherwise provided, any reference to a statute or other enactment of parliament or a legislature includes all regulations made thereunder, all amendments to or re-enactments of such statute or regulations in force from time to time, and, if applicable, any statute or regulation that supplements or supersedes such statute or regulation, and

(j) references to a specified "article" or "section" shall, unless something in the subject matter or context is inconsistent therewith, be construed as references to that specified article or section of the Plan, whereas the terms "the Plan", "hereof", "herein", "hereto", "hereunder" and similar expressions shall be deemed to refer generally to the Plan and not to any particular "article", "section" or other portion of the Plan and include any documents supplemental hereto.

1.3 Successors and Assigns

The Plan shall be binding upon and shall enure to the benefit of the heirs, administrators, executors, legal personal representatives, successors and assigns of any Person or party named or referred to in the Plan.

1.4 Governing Law

The Plan shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. All questions as to the interpretation of or application of the Plan and all proceedings taken in connection with the Plan and its provisions shall be subject to the jurisdiction of the Court.

1.5 Schedules

The following are the Schedules to the Plan, which are incorporated by reference into the Plan and form a part of it:

Schedule "A"	Terms of New Second Lien Notes
Schedule "B"	Released Directors/Officers
Schedule "C"	Released Shareholders

Schedule "D" Director/Officer Wages Claims

ARTICLE 2
PURPOSE AND EFFECT OF THE PLAN

2.1 Purpose

The purpose of the Plan is:

(a) to implement a recapitalization of SkyLink Aviation, which will significantly reduce its indebtedness;

(b) to provide for a settlement of, and consideration for, all Allowed Affected Claims;

(c) to effect a release and discharge of all Affected Claims and Released Claims;

(d) to provide SkyLink Aviation with essential committed financing to address its current and future liquidity needs; and

(e) to ensure the continued viability and ongoing operations of SkyLink Aviation,

in the expectation that the Persons who have an economic interest in the Applicant, when considered as a whole, will derive a greater benefit from the implementation of the Plan than would result from a bankruptcy of the Applicant.

2.2 Persons Affected

The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicant. The Plan will become effective at the Effective Time in accordance with its terms and in the sequence set forth in section 5.4 and shall be binding on and enure to the benefit of the Applicant, the Affected Creditors, the Released Parties and all other Persons named or referred to in, or subject to, the Plan.

2.3 Persons Not Affected

The Plan does not affect the Unaffected Creditors, subject to the express provisions hereof providing for the treatment of Insured Claims. Nothing in the Plan shall affect the Applicant's rights and defences, both legal and equitable, with respect to any Unaffected Claims including all rights with respect to legal and equitable defences or entitlements to set-offs or recoupments against such Unaffected Claims.

2.4 Equity Claimants

On the Plan Implementation Date, the Plan will be binding on SkyLink Aviation and all Equity Claimants. Equity Claimants shall not receive a distribution under the Plan or otherwise recover anything in respect of their Equity Claims or Equity Interests. On the Plan Implementation Date, in accordance with the steps and sequences set out in section 5.4, all Equity Interests shall be

cancelled and extinguished and all Equity Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred.

ARTICLE 3
CLASSIFICATION AND TREATMENT OF CREDITORS AND RELATED MATTERS

3.1 Claims Procedure

The procedure for determining the validity and quantum of the Affected Claims for voting and distribution purposes under the Plan shall be governed by the Claims Procedure Order, the Meetings Order, the CCAA, the Plan and any further Order of the Court.

3.2 Classification of Creditors

In accordance with the Meetings Order, the only classes of creditors for the purposes of considering and voting on the Plan will be the Secured Noteholders Class and the Affected Unsecured Creditors Class. For greater certainty, Equity Claimants shall not be entitled to vote on the Plan or to receive any distributions hereunder.

3.3 Creditors' Meetings

The Meetings shall be held in accordance with the Meetings Order and any further Order of the Court. The only Persons entitled to attend the Meetings are those specified in the Meetings Order.

3.4 Treatment of Affected Claims

An Affected Claim shall receive distributions as set forth below only to the extent that such Claim is an Allowed Affected Claim and has not been paid, released, or otherwise satisfied prior to the Plan Implementation Date.

(1) Secured Noteholders Class

In accordance with the steps and sequence set forth in section 5.4, each Secured Noteholder will, in full and final satisfaction of the Secured Noteholders Allowed Secured Claim, receive its Secured Noteholder's Pro-Rata Share of:

(a) 25% of the New Common Shares issued and outstanding on the Plan Implementation Date; and

(b) the New Second Lien Notes.

The Claims comprising the Secured Noteholders Allowed Claim and the Secured Note Obligations shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date.

(2) Affected Unsecured Creditors Class

In accordance with the steps and sequence set forth in section 5.4, and in full and final satisfaction of all Affected Unsecured Claims, each Affected Unsecured Creditor with an Allowed Affected Unsecured Claim will receive its Unsecured Promissory Note Entitlement. All Affected Unsecured Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date.

(3) Equity Claimants

In accordance with the steps and sequences set forth in section 5.4, all Equity Claims shall be fully, finally, irrevocably and forever compromised, released, discharged cancelled and barred on the Plan Implementation Date. Equity Claimants will not receive any consideration or distributions under the Plan and shall not be entitled to vote on the Plan at the Meetings in respect of their Equity Claims.

3.5 Unaffected Claims

(a) Unaffected Creditors will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are paid in full on the Plan Implementation Date in accordance with the express terms of section 5.4), and they shall not be entitled to vote on the Plan at the Meetings in respect of their Unaffected Claims.

(b) Notwithstanding anything to the contrary herein, Insured Claims shall not be compromised, released, discharged, cancelled and barred by this Plan, provided that from and after the Plan Implementation Date, any Person having an Insured Claim shall be irrevocably limited to recovery in respect of such Insured Claim solely from the proceeds of the applicable Insurance Policies, and Persons with any Insured Claims shall have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from any Person, including SkyLink Aviation, any SkyLink Subsidiary or any Released Party, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable Insurance Policies. This section 3.5(b) may be relied upon and raised or pled by SkyLink Aviation, any SkyLink Subsidiary or any Released Party in defence or estoppel of or to enjoin any claim, action or proceeding brought in contravention of this section. Nothing in this Plan shall prejudice, compromise, release or otherwise affect any right or defence of any insurer in respect of an Insurance Policy or any insured in respect of an Insured Claim.

3.6 Disputed Distribution Claims

Any Affected Unsecured Creditor with a Disputed Distribution Claim shall not be entitled to receive any distribution hereunder with respect to such Disputed Distribution Claim unless and until such Claim becomes an Allowed Affected Unsecured Claim. A Disputed Distribution Claim shall be resolved in the manner set out in the Claims Procedure Order. Distributions pursuant to section 3.4 shall be paid in respect of any Disputed Distribution Claim that is finally

determined to be an Allowed Affected Unsecured Claim in accordance with the Claims Procedure Order.

3.7 Director/Officer Claims

(a) All Released Director/Officer Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred without consideration on the Plan Implementation Date. Any Director/Officer Claim that is not a Released Director/Officer Claim will not be compromised, released, discharged, cancelled and barred. For greater certainty, any Claim of a Director or Officer for indemnification from the Applicant in respect of any Director/Officer Claim that is not otherwise covered by the Directors' Charge shall be treated for all purposes under this Plan as an Affected Unsecured Claim.

(b) Notwithstanding anything to the contrary herein, the Director/Officer Wages Claims shall not be compromised, released, discharged, cancelled or barred by this Plan, provided that from and after the Plan Implementation Date, any Person having Director/Officer Wages Claim shall be irrevocably limited to recovery in respect of such Director/Officer Wages Claim solely from the proceeds of the applicable Insurance Policies, and Persons with any Director/Officer Wages Claims shall have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from any Person, including SkyLink Aviation, any SkyLink Subsidiary, any Released Director/Officer or any other Released Party, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable Insurance Policies. This section 3.7(b) may be relied upon and raised or pled by SkyLink Aviation, any SkyLink Subsidiary, any Released Director/Officer or any other Released Party in defence or estoppel of or to enjoin any claim, action or proceeding brought in contravention of this section. Nothing in this Plan shall prejudice, compromise, release or otherwise affect any right or defence of any insurer in respect of an Insurance Policy or any insured in respect of Director/Officer Claims or Director/Officer Wages Claims.

3.8 Extinguishment of Claims

On the Plan Implementation Date in accordance with its terms and in the sequence set forth in section 5.4 and in accordance with the provisions of the Sanction Order, the treatment of Affected Claims (including Allowed Claims and Disputed Distribution Claims) and all Released Claims, in each case as set forth herein, shall be final and binding on the Applicant, all Affected Creditors (and their respective heirs, executors, administrators, legal personal representatives, successors and assigns) and any Person holding a Released Claim, and all Affected Claims and all Released Claims shall be fully, finally, irrevocably and forever released, discharged, cancelled and barred, and the Released Parties shall thereupon have no further obligation whatsoever in respect of the Affected Claims and the Released Claims, as applicable; *provided that* nothing herein releases the Applicant or any other Person from their obligations to make distributions in the manner and to the extent provided for in the Plan and *provided further* that such discharge and release of the Applicant shall be without prejudice to the right of a Creditor in respect of a Disputed Distribution Claim to prove such Disputed Distribution Claim in

accordance with the Claims Procedure Order so that such Disputed Distribution Claim may become an Allowed Unsecured Claim entitled to receive consideration under section 3.4 hereof.

3.9 Guarantees and Similar Covenants

No Person who has a Claim under any guarantee, surety, indemnity or similar covenant in respect of any Claim which is compromised and released under this Plan or who has any right to claim over in respect of or to be subrogated to the rights of any Person in respect of a Claim which is compromised under this Plan shall be entitled to any greater rights as against the Applicant than the Person whose Claim is compromised under the Plan.

3.10 Set-Off

The law of set-off applies to all Claims.

ARTICLE 4
PROVISIONS REGARDING DISTRIBUTIONS AND PAYMENTS

4.1 Distributions to Secured Noteholders

(a) This section 4.1 sets forth the distribution mechanics with respect to the New Common Shares and the New Second Lien Notes that are to be distributed to the Secured Noteholders in accordance with section 3.4(1).

(b) Upon receipt of and in accordance with written instructions from the Monitor, the Secured Note Indenture Trustee shall instruct CDS to and CDS shall: (i) establish an escrow position representing the respective positions of the Secured Noteholders as of the Plan Implementation Date for the purpose of making distributions to the Secured Noteholders on and after the Plan Implementation Date; and (ii) block any further trading in the Secured Notes, effective as of the close of business on the Business Day immediately prior to the Plan Implementation Date, all in accordance with the customary procedures of CDS.

(c) (i) The delivery of New Second Lien Notes to the Secured Noteholders will be made through the facilities of CDS to CDS Participants, who, in turn, shall make delivery of interests in such New Second Lien Notes to the beneficial holders of such Secured Notes pursuant to standing instructions and customary practices, provided that, if the New Second Lien Notes are not CDS eligible, delivery of any such New Second Lien Notes will be made to the Secured Note Indenture Trustee who, in turn, will make delivery of the applicable New Second Lien Notes to each of the Secured Noteholders through the direct registration system of Computershare (or such other transfer agent as SkyLink Aviation may appoint); and (ii) the delivery of New Common Shares to the Secured Noteholders will be made as follows:

(A) immediately following the close of business on the Business Day prior to the Plan Implementation Date, CDS shall provide the Monitor with a list showing the names and addresses of all Persons who are CDS participant holders of the Secured Notes ("**CDS**

Participants") and the principal amount of Secured Notes held by each CDS Participant as at the close of business on the Business Day prior to the Plan Implementation Date;

(B) the Monitor shall forthwith provide all such information to the Applicant; and

(C) on the Plan Implementation Date, the Applicant shall, in accordance with the information provided by the Monitor pursuant to section 4.1(c)(ii)(B), register or deliver, as applicable, to the CDS Participants, the applicable amount of New Common Shares,

provided that, subject to the consent of the Monitor and the Majority Initial Consenting Noteholders, the Applicant shall be entitled to make such modifications to the administrative process for distributing New Common Shares and New Second Lien Notes as it deems necessary in order to achieve the proper distribution and allocation of New Common Shares and New Second Lien Notes as set forth herein.

(d) The Applicant and the Monitor shall have satisfied their responsibilities in respect of the distribution of New Common Shares and New Second Lien Notes to the Secured Noteholders in accordance with section 3.4(1) once such New Common Shares and New Second Lien Notes have been delivered to CDS, the CDS Participants or the Secured Note Indenture Trustee, as applicable. The SkyLink Companies and the Monitor will have no liability or obligation in respect of deliveries from CDS, or its nominee, to CDS Participants or from CDS Participants to beneficial holders of the Secured Notes or from the Secured Note Indenture Trustee to beneficial holders of the Secured Notes.

4.2 Distribution Mechanics with Respect to the Unsecured Promissory Note

(a) The Unsecured Promissory Note shall be issued by SkyLink Aviation and shall be held by the Applicant on behalf of all Affected Unsecured Creditors with an Allowed Affected Unsecured Claim and, subject to the terms and conditions thereof, each such Affected Unsecured Creditor shall become entitled to its Unsecured Promissory Note Entitlement on the Plan Implementation Date without any further steps or actions by the Applicant, such Affected Unsecured Creditor or any other Person.

(b) From and after the Plan Implementation Date, and until all Unsecured Promissory Note Proceeds have been distributed in accordance with this Plan, the Applicant shall maintain a register of the Unsecured Promissory Note Entitlement of each applicable Affected Unsecured Creditor as well as the address and notice information set forth on such Affected Unsecured Creditor's Notice of Claim or Proof of Claim or, with respect to any Affected Unsecured Creditor that is a Secured Noteholder, the delivery details of the Secured Note Indenture Trustee. Any applicable Affected Unsecured Creditor whose address or notice information

changes shall be solely responsible for notifying the Applicant of such change. The Applicant shall also record on the register the aggregate amount of any Disputed Distribution Claims.

(c) On the Unsecured Promissory Note Maturity Date, the Applicant shall calculate the amount to be paid to each Affected Unsecured Creditor with an Allowed Unsecured Claim or the Secured Note Indenture Trustee. The Applicant shall also calculate the amount of the Unsecured Promissory Note Proceeds that are not to be distributed as a result of Disputed Distribution Claims that remain outstanding, if any. The Applicant shall then distribute to each Affected Unsecured Creditor with an Allowed Affected Unsecured Claim the applicable amount:

(i) in the case of distributions to Secured Noteholders, in the manner described in section 4.1; and

(ii) in the case of distributions to all other Affected Unsecured Creditors, by way of cheque sent by prepaid ordinary mail.

With respect to any portion of the Unsecured Promissory Note Proceeds that are reserved in respect of Disputed Distribution Claims, the Applicant shall forthwith segregate such amounts to establish the Disputed Distribution Claims Reserve.

4.3 Other Distributions

(a) The distributions to be made to: the DIP Backstop Parties pursuant to section 5.3(1), the New Lenders pursuant to section 5.3(2) and the Initial Consenting Noteholders pursuant to section 5.3(3) shall be made in accordance with this section 4.3.

(b) At least ten (10) Business Days prior to the Plan Implementation Date, the Applicant shall provide the Monitor with copies of the DIP Backstop Commitment Letter, the DIP Participation Documents (as defined in the Initial Order), if any, and the Support Agreement. Based on the foregoing, the Monitor shall forthwith (A) contact each DIP Backstop Party, New Lender and Initial Consenting Noteholder to ascertain its registration and delivery details for purposes of registering or delivering distributions to such Person, and (b) calculate the following:

(i) with respect to each DIP Backstop Party, such DIP Backstop Party's Pro-Rata Share;

(ii) with respect to each of the New Lenders, such New Lender's Pro-Rata Share; and

(iii) with respect to each of the Initial Consenting Noteholders, such Initial Consenting Noteholder's Pro-Rata Share,

and the Monitor shall provide all such information to the Applicant at least two (2) Business Days prior to the Plan Implementation Date.

(c) On the Plan Implementation Date, the Applicant shall, upon receipt of and in accordance with a written direction of the Monitor prepared based on the information received by the Monitor pursuant to section 4.3(b), register or deliver, as applicable, to the DIP Backstop Parties, the New Lenders and the Initial Consenting Noteholders, the applicable amount of New Common Shares as so directed by the Monitor.

4.4 Cancellation of Certificates and Notes

Following completion of the steps in the sequence set forth in section 5.4, all debentures, notes (including the Secured Notes and the Secured Note Obligations), certificates, agreements, invoices and other instruments evidencing Affected Claims or Equity Interests will not entitle any holder thereof to any compensation or participation other than as expressly provided for in the Plan and will be cancelled and will be null and void. Notwithstanding the foregoing, the Secured Note Indenture shall remain in effect for the purpose of and to the extent necessary to: (i) allow the Secured Note Indenture Trustee to make distributions to the Secured Noteholders on the Initial Distribution Date and each subsequent Distribution Date thereafter; and (ii) maintain all of the protections the Secured Note Indenture Trustee enjoys as against the Secured Noteholders, including its lien rights with respect to any distributions under this Plan, until all distributions are made to Secured Noteholders hereunder. For greater certainty, any and all obligations, including the Secured Note Obligations, of the Applicant and the Skylink Companies (as guarantor, surety or otherwise) under and with respect to the Secured Notes and the Secured Note Indenture shall not continue beyond the Plan Implementation Date.

4.5 Currency

Unless specifically provided for in the Plan or the Sanction Order, for the purposes of distributions under the Plan, a Claim shall be denominated in Canadian dollars and all payments and distributions to the Affected Creditors on account of their Claims shall be made in Canadian dollars. Any Claims denominated in a foreign currency shall be converted to Canadian dollars at the Bank of Canada noon exchange rate in effect at the Filing Date.

4.6 Interest

Interest shall not accrue or be paid on Affected Claims on or after the Filing Date, and no holder of an Affected Claim shall be entitled to interest accruing on or after the Filing Date.

4.7 Allocation of Distributions

All distributions made pursuant to the Plan shall be allocated first towards the repayment of the principal amount in respect of such Affected Creditor's Affected Claim and second, if any, towards the repayment of all accrued but unpaid interest in respect of such Affected Creditor's Affected Claim.

4.8 Treatment of Undeliverable Distributions

If any Affected Creditor's distribution under this Article 4 is returned as undeliverable (an "**Undeliverable Distribution**"), no further distributions to such Affected Creditor shall be made unless and until the Applicant is notified by such Affected Creditor of such Affected Creditor's current address, at which time all such distributions shall be made to such Affected Creditor. All claims for Undeliverable Distributions in respect of Allowed Claims must be made on or before the date that is six months following the final Distribution Date, after which date any entitlement with respect to such Undeliverable Distribution shall be forever discharged and forever barred, without any compensation therefor, notwithstanding any federal, state or provincial laws to the contrary, at which time any such Undeliverable Distributions in relation to the Allowed Claim shall be returned to SkyLink Aviation. Nothing contained in the Plan shall require the Applicant to attempt to locate any holder of an Allowed Claim. No interest is payable in respect of an Undeliverable Distribution. Any distribution under this Plan on account of the Secured Notes shall be deemed made when delivered to CDS, the CDS Participants or the Secured Note Indenture Trustee, as applicable, for subsequent distribution to Secured Noteholders in accordance with this Article 4

4.9 Withholding Rights

SkyLink Aviation, CDS, the Secured Note Indenture Trustee and/or the Monitor shall be entitled to deduct and withhold from any consideration payable to any Person such amounts as SkyLink Aviation, CDS, the Secured Note Indenture Trustee and/or the Monitor is required to deduct and withhold with respect to such payment under the Canadian Tax Act, or other Applicable Laws, or entitled to withhold under section 116 of the Canadian Tax Act or corresponding provision of provincial or territorial law. To the extent that amounts are so withheld or deducted, such withheld or deducted amounts shall be treated for all purposes hereof as having been paid to the Person in respect of which such withholding was made, provided that such amounts are actually remitted to the appropriate Taxing Authority. SkyLink Aviation, CDS, the Secured Note Indenture Trustee and/or the Monitor are hereby authorized to sell or otherwise dispose of such portion of the consideration as is necessary to provide sufficient funds to SkyLink Aviation, CDS, the Secured Note Indenture Trustee and/or the Monitor, as the case may be, to enable it to comply with such deduction or withholding requirement or entitlement, and SkyLink Aviation, CDS, the Secured Note Indenture Trustee and/or the Monitor, shall notify the Person thereof and remit to such Person any unapplied balance of the net proceeds of such sale.

4.10 Fractional Interests

No fractional interests of New Common Shares or New Second Lien Notes ("**Fractional Interests**") will be issued under this Plan Recipients of New Common Shares and New Second Lien Notes will have their entitlements adjusted downwards to the nearest whole number of New Common Shares or New Second Lien Notes, as applicable, to eliminate any such Fractional Interests and no compensation will be given for the Fractional Interest.

4.11 Calculations

All amounts of consideration to be received hereunder will be calculated to the nearest cent ($0.01). All calculations and determination made by the Monitor and/or SkyLink Aviation and

agreed to by the Monitor for the purposes of and in accordance with the Plan, including, without limitation, the allocation of consideration, shall be conclusive, final and binding upon the Affected Creditors and the Applicant.

ARTICLE 5
RECAPITALIZATION

5.1 Corporate Actions

The adoption, execution, delivery, implementation and consummation of all matters contemplated under the Plan involving corporate action of the Applicant will occur and be effective as of the Plan Implementation Date, and will be authorized and approved under the Plan and by the Court, where appropriate, as part of the Sanction Order, in all respects and for all purposes without any requirement of further action by shareholders, directors or officers of the Applicant. All necessary approvals to take actions shall be deemed to have been obtained from the directors or the shareholders of the Applicant, as applicable, including the deemed passing by any class of shareholders of any resolution or special resolution and no shareholders' agreement or agreement between a shareholder and another Person limiting in any way the right to vote shares held by such shareholder or shareholders with respect to any of the steps contemplated by the Plan shall be deemed to be effective and shall have no force and effect.

5.2 Issuance of New Common Shares, New Second Lien Notes and the Unsecured Promissory Note

(1) New Common Shares

On the Plan Implementation Date, SkyLink Aviation shall issue the Agreed Number of New Common Shares, and such New Common Shares shall be allocated and distributed in the manner set forth in this Plan.

(2) Issuance of New Second Lien Notes

On the Plan Implementation Date, SkyLink Aviation shall issue the New Second Lien Notes pursuant to the New Second Lien Indenture, and such New Second Lien Notes shall be allocated and distributed in the manner set forth in this Plan.

(3) Unsecured Promissory Note

On the Plan Implementation Date, SkyLink Aviation shall issue the Unsecured Promissory Note and the Unsecured Promissory Note Entitlement shall be allocated in the manner set forth in this Plan.

5.3 DIP Backstop and New First Credit Facility

(1) DIP Backstop

On the Plan Implementation Date, in accordance with the steps and sequence set out in Section 5.4, each DIP Backstop Party shall receive its DIP Backstop Party's Pro Rata Share of 10% of the New Common Shares issued and outstanding on the Plan Implementation Date.

(2) New First Lien Credit Facility

On the Plan Implementation Date, in accordance with the steps and sequence set out in Section 5.4, the DIP Facility shall be converted into the New First Lien Loan in accordance with the DIP Agreement and each New Lender shall receive its New Lender's Pro-Rata Share of 60% of the New Common Shares issued and outstanding on the Plan Implementation Date.

(3) Structuring Equity

On the Plan Implementation Date, in accordance with the steps and sequence set out in Section 5.4, each Initial Consenting Noteholder shall receive its Initial Consenting Noteholder's Pro-Rata Share of 5% of the New Common Shares issued and outstanding on the Plan Implementation Date in respect of the Structuring Equity.

5.4 Plan Implementation Date Transactions

The following steps and compromises and releases to be effected in the implementation of the Plan shall occur, and be deemed to have occurred in the following order in five minute increments (unless otherwise noted), without any further act or formality on the Plan Implementation Date beginning at the Effective Time

(a) all Options shall be cancelled and terminated without any liability, payment or other compensation in respect thereof;

(b) the Company Stock Option Plans shall be terminated;

(c) the Applicant shall borrow such amounts from the DIP Facility as are necessary to repay in full all amounts owing in respect of the First Lien Credit Facility, and the Applicant shall thereupon pay all such amounts to the First Lien Agent in full and final satisfaction of the First Lien Credit Facility;

(d) the First Lien Credit Agreement and the First Lien Credit Facility shall be deemed to be terminated and the Applicant and the SkyLink Companies shall be fully, finally, irrevocably and forever released from any and all claims, liabilities or obligations of any kind to the First Lien Agent or the First Lien Lenders in respect of the First Lien Credit Agreement and the First Lien Credit Facility;

(e) SkyLink Aviation shall issue to each Secured Noteholder its Secured Noteholder's Pro-Rata Share of the New Common Shares and New Second Lien Secured Notes to be issued to it in accordance with section 3.4(1) in full consideration for the irrevocable, final and full compromise and satisfaction of the Secured Noteholders Allowed Secured Claim;

(f) simultaneously with step 5.4(e), the DIP Facility shall be deemed to be converted into the New First Lien Loans in accordance with the DIP Agreement and SkyLink Aviation shall issue to each New Lender its New Lender's Pro Rata Share of the New Common Shares to be issued to it in accordance with section 5.3(2);

(g) simultaneously with step 5.4(e), SkyLink Aviation shall issue to each DIP Backstop Party its DIP Backstop Party's Pro-Rata Share of New Common Shares to be issued to it in accordance with section 5.3(1);

(h) simultaneously with step 5.4(e), each Affected Unsecured Creditor with an Allowed Affected Unsecured Claim shall become entitled to its Unsecured Promissory Note Entitlement in accordance with section 3.4(2) (as such Unsecured Promissory Note Entitlement may be adjusted based on the final determination of Disputed Distribution Claims in the manner set forth herein) in full consideration for the irrevocable, final and full compromise and satisfaction of such Affected Unsecured Creditor's Affected Unsecured Claim;

(i) simultaneously with step 5.4(e), SkyLink Aviation shall issue to each of the Initial Consenting Noteholders its Initial Consenting Noteholder's Pro-Rata Share of the New Common Shares to be issued to it on account of the Structuring Equity in accordance with section 5.3(3);

(j) the Articles shall be amended, pursuant to the Articles of Reorganization, to, among other things, (i) consolidate the issued and outstanding Class A Shares (including, for the avoidance of doubt, Class A Shares that are Existing Shares and New Common Shares issued pursuant to the preceding paragraphs of this Section 5.4) on the basis of the Consolidation Ratio; (ii) eliminate the Class B Shares; and (iii) provide for such additional changes to the rights and conditions attached to the Class A Shares as may be agreed to by the Applicant, the Monitor and the Majority Initial Consenting Noteholders;

(k) pursuant to the Articles of Reorganization, any fractional Class A Shares held by any holder of Class A Shares immediately following the consolidation of the Class A Shares referred to in section 5.4(j) shall be cancelled without any liability, payment or other compensation in respect thereof;

(l) all Equity Interests (for greater certainty, not including any Class A Shares that remain issued and outstanding immediately following the cancellation of fractional interests in section 5.4(k)) and the Shareholder Agreement shall be cancelled without any liability, payment or other compensation in respect thereof;

(m) a number of New Common Shares representing up to 10% of the number of New Common Shares issued and outstanding immediately following step 5.4(k) shall be reserved for issuance by the Applicant after the Plan Implementation Date to directors, officers and employees of the Applicant pursuant to equity-based compensation arrangements to be determined at the discretion of the new board of directors of SkyLink Aviation appointed pursuant to the Sanction Order (the "**Incentive Plan**"), provided that, for greater certainty, the New Common Shares reserved in respect of such Incentive Plan will, if granted, dilute the New Common Shares to be issued to the Secured Noteholders, the New Lenders, the DIP Backstop Parties and the Initial Consenting Noteholders on the Plan Implementation Date in accordance with this Plan;

(n) SkyLink Aviation shall pay in cash all fees and expenses incurred by the Secured Note Indenture Trustee, including its reasonable legal fees, in connection with the performance of its duties under the Secured Note Indenture or this Plan;

(o) all of the Secured Notes and the Secured Note Indenture and all Secured Note Obligations shall be deemed to be fully, finally, irrevocably and forever compromised, released, discharged cancelled and barred;

(p) SkyLink Aviation shall make all distributions to KERP participants in accordance with the terms of the KERP;

(q) SkyLink Aviation shall pay to each of the Noteholder Advisors such Noteholder Advisor's pro rata share of the Expense Reimbursement;

(r) each of the Charges shall be terminated, discharged and released;

(s) the releases set forth in Article 7 shall become effective; and

(t) the stated capital account in respect of the issued and outstanding shares in the capital of SkyLink Canadian Subsidiary shall be reduced to $1.00 with no payment thereon.

The steps described in sub-sections (j), (k) and (t) of this section 5.4 will be implemented pursuant to section 6(2) of the CCAA as if such steps were implemented pursuant to a plan of reorganization under section 186 of the OBCA.

5.5 Issuances Free and Clear

Any issuance of any securities or other consideration pursuant to the Plan will be free and clear of any Encumbrances

5.6 Stated Capital

The aggregate stated capital for purposes of the OBCA for the New Common Shares issued pursuant to this Plan will be as determined by the new board of directors of SkyLink Aviation appointed pursuant to the Sanction Order.

5.7 Post-Plan Implementation Date Amalgamation

On the Business Day following the Plan Implementation Date or a later date to be agreed between the Applicant and the Majority Initial Consenting Noteholders, the Articles of Amalgamation will be filed such that SkyLink Aviation will be amalgamated with SkyLink Canadian Subsidiary pursuant to the OBCA.

ARTICLE 6
PROCEDURE FOR DISTRIBUTIONS REGARDING DISPUTED DISTRIBUTION CLAIMS

6.1 No Distribution Pending Allowance

An Affected Unsecured Creditor holding a Disputed Distribution Claim will not be entitled to receive a distribution under the Plan in respect of such Disputed Distribution Claim or any portion thereof unless and until, and then only to the extent that, such Disputed Distribution Claim becomes an Allowed Unsecured Claim.

6.2 Distributions After Disputed Distribution Claims Resolved

(a) Distributions from Unsecured Promissory Note Proceeds in relation to a Disputed Distribution Claim of an Affected Unsecured Creditor in existence at the Unsecured Promissory Note Maturity Date will be held by the Applicant, in a segregated account constituting the Disputed Distribution Claims Reserve, for the benefit of the Affected Unsecured Creditors with Allowed Affected Unsecured Creditor Claims until the final determination of the Disputed Distribution Claim in accordance with the Claims Procedure Order and this Plan.

(b) To the extent that any Disputed Distribution Claim becomes an Allowed Affected Unsecured Claim in accordance with this Plan, the Applicant shall distribute (on the next Distribution Date) to the holder of such Allowed Affected Unsecured Claim, an amount from the Disputed Distribution Claims Reserve equal to the Unsecured Promissory Note Entitlement that such Affected Unsecured Creditor would have been entitled to receive in respect of its Allowed Affected Unsecured Claim on the Unsecured Promissory Note Distribution Date had such Disputed Distribution Claim been an Allowed Affected Unsecured Claim on such date.

(c) On the date that all Disputed Distribution Claims have been finally resolved in accordance with the Claims Procedure Order and any required distributions contemplated in paragraph 6.2(b) have been made, if (i) the aggregate value of Unsecured Promissory Note Proceeds remaining in the Disputed Distribution Claims Reserve is less than $10,000, the Applicant shall release to SkyLink Aviation any proceeds held in the Disputed Distribution Claims Reserve and such proceeds shall be returned to SkyLink Aviation; or (ii) the aggregate value of Unsecured Promissory Note Proceeds remaining in the Disputed Distribution Claims Reserve is greater than or equal to $10,000, the Applicant shall distribute such proceeds to the Affected Unsecured Creditors with Allowed Affected Unsecured Claims such that after giving effect to such distributions each such Affected Unsecured Creditor has received its applicable Unsecured Creditor's Pro-Rata Share of such proceeds.

ARTICLE 7
RELEASES

7.1 Plan Releases

(a) On the Plan Implementation Date, in accordance with the sequence set forth in section 5.4,(i) the Applicant, the Applicant's employees, auditors, financial advisors, legal counsel and agents, the Released Shareholders, the Released Directors/Officers, the SkyLink Subsidiaries and the directors and officers of any SkyLink Subsidiary, and each and every auditor, financial advisor and legal counsel of the foregoing Persons (in each case, in that capacity only) and (ii) the Monitor, the Monitor's counsel the Secured Note Indenture Trustee, the Consenting Noteholders, the DIP Lenders, the Company Advisors, the Noteholder Advisors and each and every present and former shareholder, affiliate, subsidiary, director, officer, member (including members of any committee or governance council), partner, employee, auditor, financial advisor, legal counsel and agent of any of the foregoing Persons (in each case, in that capacity only) (each of the Persons named in (i) or (ii) of this section 7.1(a), in their capacity as such, being herein referred to individually as a "**Released Party**" and all referred to collectively as "**Released Parties**") shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, orders, including for injunctive relief or specific performance and compliance orders, expenses, executions, Encumbrances and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature, including claims for contribution or indemnity which any Creditor or other Person may be entitled to assert (including any and all of the foregoing in respect of the payment and receipt of proceeds and statutory or common law liabilities of Directors or Officers, current or former directors or officers of the SkyLink Subsidiaries, members or employees of the Applicant and any alleged fiduciary or other duty (in any capacity whatsoever)), whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act, omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan, that are in any way relating to, arising out of or in connection with the Secured Notes and related guarantees, the Secured Note Indenture, the Secured Note Obligations, the IPSA, the Support Agreement, any Support Agreement Joinder, the DIP Backstop Commitment Letter, the DIP Agreement, the DIP Facility, the First Lien Facility, the Equity Interests, the Company Stock Option Plans, the New First Lien Loans, the New Common Shares, the New Second Lien Notes, the Unsecured Promissory Note, any Claims, any Director/Officer Claims, the business and affairs of the Applicant whenever or however conducted, the administration and/or management of the Applicant, the Recapitalization, the Plan, the CCAA Proceeding or any matter or transaction involving any of the SkyLink Companies taking place in connection with the Recapitalization or the Plan (referred to collectively as the "**Released**

Claims"), and all Released Claims shall be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, all to the fullest extent permitted by Applicable Law; provided that nothing herein will release or discharge (w) the right to enforce the Applicant's obligations under the Plan, (x) any Released Party if the Released Party is determined by a Final Order of a court of competent jurisdiction to have committed fraud or wilful misconduct, (y) the Applicant from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA, or (z) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

(b) Notwithstanding anything to the contrary in section 7.1(a), Insured Claims and Director/Officer Wages Claims shall not be compromised, released, discharged, cancelled and barred by this Plan, provided that from and after the Plan Implementation Date, any Person having an Insured Claim or a Director/Officer Wages Claim shall be irrevocably limited to recovery in respect of such Insured Claim or Director/Officer Wages Claim solely from the proceeds of the applicable Insurance Policies, and Persons with any Insured Claim or Director/Officer Wages Claims shall have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from SkyLink Aviation, any SkyLink Subsidiary, any Released Director/Officer or any other Released Party, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable Insurance Policies.

7.2 [Intentionally Deleted]

7.3 Injunctions

All Persons are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any and all Released Claims, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Released Parties; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties or their property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against one or more of the Released Parties; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or their property; or (v) taking any actions to interfere with the implementation or consummation of this Plan; provided, however, that the foregoing shall not apply to the enforcement of any obligations under the Plan. For greater certainty, the provisions of this section 7.3 shall apply to Insured Claims and Director/Officer Wages Claims in the same manner as Released Claims, except to the extent that the rights of

such Persons to enforce such Insured Claims and/or Director/Officer Wages Claims against an insurer in respect of an Insurance Policy are expressly preserved pursuant to section 3.5(b), section 3.7(b) and/or section 7.1(b), and provided further that, notwithstanding the restrictions on making a claim that are set forth in sections 3.5(b), 3.7(b) and 7.1(b), any claimant in respect of an Insured Claim or a Director/Officer Wages Claim that was duly filed with the Monitor by the Claims Bar Date shall be permitted to file a statement of claim in respect thereof to the extent necessary solely for the purpose of preserving such claimant's ability to pursue such Insured Claim or Director/Officer Wages Claim against an insurer in respect of an Insurance Policy in the manner authorized pursuant to section 3.5(b), section 3.7(b) and/or section 7.1(b).

ARTICLE 8
COURT SANCTION

8.1 Application for Sanction Order

If the Required Majorities of the Affected Creditors in each Voting Class approves the Plan, the Applicant shall apply for the Sanction Order on or before the date set for the hearing of the Sanction Order or such later date as the Court may set. The Sanction Order shall not become effective until the Plan Implementation Date.

8.2 Sanction Order

The Sanction Order shall, among other things:

(a) declare that (i) the Plan has been approved by the Required Majorities of Affected Creditors in each Voting Class in conformity with the CCAA; (ii) the activities of the Applicant have been in reasonable compliance with the provisions of the CCAA and the Orders of the Court made in this CCAA Proceeding in all respects; (iii) the Court is satisfied that the Applicant has not done or purported to do anything that is not authorized by the CCAA; and (iv) the Plan and the transactions contemplated thereby are fair and reasonable;

(b) declare that as of the Effective Time, the Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby are approved, binding and effective as herein set out upon and with respect to the Applicant, all Affected Creditors, the Directors and Officers, any Person with a Director/Officer Claim, the Released Parties and all other Persons named or referred to in, or subject to, the Plan;

(c) declare that the steps to be taken and the compromises and releases to be effective on the Plan Implementation Date are deemed to occur and be effected in the sequential order contemplated by section 5.4 on the Plan Implementation Date, beginning at the Effective Time;

(d) declare that the New Shareholders' Agreement shall be effective and binding on all holders of the New Common Shares and any Person entitled to receive New Common Shares pursuant to the Plan immediately upon issuance of the New

Common Shares to such Person, with the same force and effect as if such Persons were signatories to the New Shareholders' Agreement;

(e) compromise, discharge and release the Applicant from any and all Affected Claims of any nature in accordance with the Plan, and declare that the ability of any Person to proceed against the Applicant in respect of or relating to any Affected Claims shall be forever discharged and restrained, and all proceedings with respect to, in connection with or relating to such Affected Claims be permanently stayed, subject only to the right of Affected Creditors to receive distributions pursuant to the Plan in respect of their Affected Claims;

(f) subject to section 3.7(b) and section 7.1(b), compromise, discharge and release the Released Directors/Officers from any and all Released Director/Officer Claims of any nature in accordance with the Plan, and declare that the ability of any Person to proceed against the Released Directors/Officers in respect of or relating to any Released Directors/Officers Claims shall be forever discharged and restrained, and all proceedings with respect to, in connection with or relating to such Released Director/Officer Claims be permanently stayed;

(g) declare that, subject to performance by the Applicant of its obligations under the Plan and except as provided in the Plan, all obligations, agreements or leases to which any of the Applicant or SkyLink Companies is a party on the Plan Implementation Date shall be and remain in full force and effect, unamended, as at the Plan Implementation Date and no party to any such obligation or agreement shall on or following the Plan Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise disclaim or resiliate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy under or in respect of any such obligation or agreement, by reason:

(i) of any event which occurred prior to, and not continuing after, the Plan Implementation Date, or which is or continues to be suspended or waived under the Plan, which would have entitled any other party thereto to enforce those rights or remedies;

(ii) that the Applicant has sought or obtained relief or has taken steps as part of the Plan or under the CCAA;

(iii) of any default or event of default arising as a result of the financial condition or insolvency of the Applicant;

(iv) of the effect upon the Applicant of the completion of any of the transactions contemplated under the Plan; or

(v) of any compromises, settlements, restructurings, recapitalizations or reorganizations effected pursuant to the Plan,

and declare that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any non-competition agreement or obligation, provided that such agreement shall terminate or expire in accordance with the terms thereof or as otherwise agreed by the Applicant and the applicable Persons;

(h) bar, stop, stay and enjoin the commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any Released Party in respect of all Claims and any matter which is released pursuant to Article 7 hereof;

(i) bar, stop, stay and enjoin the commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with in respect of any Insured Claim or Director/Officer Wages Claim, except as against the applicable insurer(s) to the extent that rights to enforce such Insured Claims and/or Director/Officer Wages Claims against such insurer(s) in respect of an Insurance Policy are expressly preserved pursuant to section 3.5(b), section 3.7(b) and/or section 7.1(b), and provided that, notwithstanding the restrictions on making a claim that are set forth in sections 3.5(b), 3.7(b) and 7.1(b), any claimant in respect of an Insured Claim or a Director/Officer Wages Claim that was duly filed with the Monitor by the Claims Bar Date shall be permitted to file a statement of claim in respect thereof to the extent necessary solely for the purpose of preserving such claimant's ability to pursue such Insured Claim or Director/Officer Wages Claim against an insurer in respect of an Insurance Policy in the manner authorized pursuant to section 3.5(b), section 3.7(b) and/or section 7.1(b);

(j) authorize the Monitor to perform its functions and fulfil its obligations under the Plan to facilitate the implementation of the Plan;

(k) declare that upon completion by the Monitor of its duties in respect of the Applicant pursuant to the CCAA and the Orders, the Monitor may file with the Court a certificate stating that all of its duties in respect of the Applicant pursuant to the CCAA and the Orders have been completed and thereupon, Duff & Phelps Canada Restructuring Inc. shall be deemed to be discharged from its duties as Monitor of the Applicant and released of all claims relating to its activities as Monitor;

(l) subject to payment of any amounts secured thereby, declare that each of the Charges shall be terminated, discharged and released;

(m) declare that the Applicant and the Monitor may apply to the Court for advice and direction in respect of any matters arising from or under the Plan; and

(n) declare the Persons to be appointed to the board of directors of SkyLink Aviation on the Plan Implementation Date shall be the Persons on a certificate to be filed with the Court by SkyLink Aviation prior to the Plan Implementation Date, provided that such certificate and the Persons listed thereon shall be subject to the prior consent of the Majority Initial Consenting Noteholders.

ARTICLE 9
CONDITIONS PRECEDENT AND IMPLEMENTATION

9.1 Conditions Precedent to Implementation of the Plan

The implementation of the Plan shall be conditional upon satisfaction of the following conditions prior to or at the Effective Time, each of which is for the benefit of the Consenting Noteholders and may be waived by the Majority Initial Consenting Noteholders; provided, however, that the conditions in sub-paragraphs (a), (c), (d), (e), (g), (h), (i), (j) (as applicable), (l), (m) (as applicable), (n), (q), (r) and (r) shall also be for the benefit of the Applicant and, if not satisfied on or prior to the Effective Time, can only be waived by both the Applicant and Majority Initial Consenting Noteholders (provided that such conditions shall not be enforceable by the Applicant or the Majority Initial Consenting Noteholders if any failure to satisfy such conditions results from an action, error, omission by or within the control of the party seeking enforcement):

(a) all definitive agreements in respect of the Recapitalization and the new (or amended) articles, by-laws and other constating documents, and all definitive legal documentation in connection with all of the foregoing shall be in a form agreed to in advance by the Applicant and the Majority Initial Consenting Noteholders;

(b) the steps required to complete the Recapitalization shall be in form and in substance satisfactory to the Majority Initial Consenting Noteholders and shall not result in material adverse tax consequences for the Consenting Noteholders, which Consenting Noteholders shall, in each case, act reasonably;

(c) New Second Lien Notes Indenture governing the New Second Lien Notes, together with all guarantees and security agreements contemplated thereunder, shall have been entered into and become effective, subject only to the implementation of the Plan, and all required filings related to the security as contemplated in the security agreements shall have been made;

(d) the New First Lien Credit Agreement, together with all guarantees, intercreditor agreements and security agreements contemplated thereunder, shall have become effective;

(e) the terms of the New Common Shares shall be satisfactory to the Applicant and the Majority Initial Consenting Noteholders;

(f) all of the following shall be in form and in substance reasonably satisfactory to the Majority Initial Consenting Noteholders: (i) all materials filed by the Applicant with the Court that relate to the Recapitalization, (ii) the Initial Order,

as such Order may be amended or restated; (iii) the Meetings Order; (iv) the Claims Procedure Order; (v) the Sanction Order; and (vi) any other order granted in connection with the Recapitalization by the Court;

(g) any and all court-imposed charges on any assets, property or undertaking of the Applicant shall have been discharged as at the Effective Time on terms acceptable to the Majority Initial Consenting Noteholders and the Applicant, acting reasonably;

(h) all Material filings under Applicable Laws shall have been made and any Material regulatory consents or approvals that are required in connection with the Recapitalization shall have been obtained and, in the case of waiting or suspensory periods, such waiting or suspensory periods shall have expired or been terminated;

(i) there shall not be in effect any preliminary or final decision, order or decree by a Governmental Entity, no application shall have been made to any Governmental Entity, and no action or investigation shall have been announced, threatened or commenced by any Governmental Entity, in consequence of or in connection with the Recapitalization that restrains, impedes or prohibits (or if granted could reasonably be expected to restrain, impede or inhibit), the Recapitalization or any part thereof or requires or purports to require a variation of the Recapitalization,

(j) the representations and warranties of the Applicant and the Consenting Noteholders set forth in the Support Agreement shall be true and correct in all material respects in accordance with the terms of the Support Agreement,

(k) there shall not exist or have occurred any Material Adverse Effect;

(l) all securities of the Applicant, when issued and delivered, shall be duly authorized, validly issued and fully paid and non-assessable and the issuance thereof shall be exempt from all prospectus and registration requirements of Applicable Laws;

(m) all conditions set out in the Support Agreement shall have been satisfied or waived by the applicable parties pursuant to the terms of the Support Agreement;

(n) the Support Agreement shall not have been terminated;

(o) the Applicant's counsel shall have rendered customary opinions concerning the issuance of the new securities to be issued under the Plan,

(p) the Articles of Reorganization shall have been filed on terms providing that they will become effective in accordance with and at the times of section 5.4(j), 5.4(k), 5.4(l);

(q) all fees and expenses owing to the Company Advisors and the Noteholder Advisors shall have been paid as of the Plan Implementation Date, and SkyLink Aviation and the Majority Initial Consenting Noteholders shall be satisfied that

adequate provision has been made for any fees and expenses due or accruing due to the Company Advisors and the Majority Initial Consenting Noteholders from and after the Plan Implementation Date; and

(r) the Sanction Order shall have been made and shall have become a Final Order.

9.2 Monitor's Certificate

Upon delivery of written notice from the Applicant and Majority Initial Consenting Noteholders of the satisfaction or waiver of the conditions set out in section 9.1, the Monitor shall forthwith deliver to Bennett Jones LLP and the Applicant a certificate stating that the Plan Implementation Date has occurred and that the Plan is effective in accordance with its terms and the terms of the Sanction Order. As soon as practicable following the Plan Implementation Date, the Monitor shall file such certificate with the Court.

ARTICLE 10
GENERAL

10.1 Binding Effect

The Plan will become effective on the Plan Implementation Date. On the Plan Implementation Date:

(a) the treatment of Affected Claims and Released Claims under the Plan shall be final and binding for all purposes and shall be binding upon and enure to the benefit of the Applicant, all Affected Creditors, any Person having a Released Claim and all other Persons named or referred to in, or subject to, the Plan and their respective heirs, executors, administrators and other legal representatives, successors and assigns;

(b) all Affected Claims shall be forever discharged and released, excepting only the obligations in the manner and to the extent provided for in the Plan;

(c) all Released Claims shall be forever discharged and released;

(d) each Affected Creditor and each Person holding a Released Claim shall be deemed to have consented and agreed to all of the provisions of the Plan, in its entirety; and

(e) each Affected Creditor and each Person holding a Released Claim shall be deemed to have executed and delivered to the Applicant and to the Directors and Officers, as applicable, all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety.

10.2 Waiver of Defaults

From and after the Plan Implementation Date, all Persons shall be deemed to have waived any and all defaults of the Applicant then existing or previously committed by the Applicant, or caused by the Applicant, by any of the provisions in the Plan or steps contemplated in the Plan,

or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, expressed or implied, in any contract, instrument, credit document, indenture, note, lease, guarantee, agreement for sale or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Applicant and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under any such agreement shall be deemed to have been rescinded and of no further force or effect, provided that nothing shall be deemed to excuse the Applicant from performing its obligations under the Plan or be a waiver of defaults by the Applicant under the Plan and the related documents.

10.3 Deeming Provisions

In the Plan, the deeming provisions are not rebuttable and are conclusive and irrevocable.

10.4 Non-Consummation

Subject to the terms of the Support Agreement, the Applicant reserves the right to revoke or withdraw the Plan at any time prior to the Sanction Date. If the Applicant revokes or withdraws the Plan, or if the Sanction Order is not issued or if the Plan Implementation Date does not occur, (a) the Plan shall be null and void in all respects, (b) any settlement or compromise embodied in the Plan, including the fixing or limiting to an amount certain any Claim, any document or agreement executed pursuant to the Plan shall be deemed null and void, and (c) nothing contained in the Plan, and no acts taken in preparation for consummation of the Plan, shall (i) constitute or be deemed to constitute a waiver or release of any Claims by or against the Applicant or any other Person, (ii) prejudice in any manner the rights of the Applicant or any other Person in any further proceedings involving the Applicant; or (iii) constitute an admission of any sort by the Applicant or any other Person.

10.5 Modification of the Plan

(a) The Applicant reserves the right, at any time and from time to time, to amend, restate, modify and/or supplement the Plan, but only with the consent of the Majority Initial Consenting Noteholders, provided that any such amendment, restatement, modification or supplement must be contained in a written document which is filed with the Court and (i) if made prior to or at the Meetings, communicated to the Affected Creditors; and (ii) if made following the Meetings, approved by the Court following notice to the Affected Creditors.

(b) Notwithstanding section 10.5(a), any amendment, restatement, modification or supplement may be made by the Applicant with the consent of the Monitor and the Majority Initial Consenting Noteholders, without further Court Order or approval, provided that it concerns a matter which, in the opinion of the Applicant, acting reasonably, is of an administrative nature required to better give effect to the implementation of the Plan and the Sanction Order or to cure any errors, omissions or ambiguities and is not materially adverse to the financial or economic interests of the Affected Creditors.

(c) Any amended, restated, modified or supplementary plan or plans of compromise filed with the Court and, if required by this section, approved by the Court, shall, for all purposes, be and be deemed to be a part of and incorporated in the Plan.

10.6 Majority Initial Consenting Noteholders

For the purposes of this Plan, the Applicant shall be entitled to rely on written confirmation from Bennett Jones LLP that the Majority Initial Consenting Noteholders have agreed to, waived, consented to or approved a particular matter. Bennett Jones LLP shall be entitled to rely on a communication in any form acceptable to Bennett Jones LLP, in its sole discretion, from any Initial Consenting Noteholder for the purpose of determining whether such Initial Consenting Noteholder has agreed to, waived, consented to or approved a particular matter, and the principal amount of Notes held by such Initial Consenting Noteholder.

10.7 Paramountcy

From and after the Effective Time on the Plan Implementation Date, any conflict between:

(a) the Plan or the Sanction Order; and

(b) the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed or implied, of any contract, mortgage, security agreement, indenture, trust indenture, note, loan agreement, commitment letter, agreement for sale, lease or other agreement, written or oral and any and all amendments or supplements thereto existing between one or more of the Affected Creditors and the Applicant as at the Plan Implementation Date and the notice of articles, articles or bylaws of the Applicant at the Plan Implementation Date,

will be deemed to be governed by the terms, conditions and provisions of the Plan and the Sanction Order, which shall take precedence and priority, provided that any settlement agreement executed by the Applicant and any Person asserting a Claim or a Director/Officer Claim that was entered into from and after the Filing Date shall be read and interpreted in a manner that assumes that such settlement agreement is intended to operate congruously with, and not in conflict with, the Plan.

10.8 Severability of Plan Provisions

If, prior to the Sanction Date, any term or provision of the Plan is held by the Court to be invalid, void or unenforceable, the Court, at the request of the Applicant and with the consent of the Monitor and the Majority Initial Consenting Noteholders, shall have the power to either (a) sever such term or provision from the balance of the Plan and provide the Applicant with the option to proceed with the implementation of the balance of the Plan as of and with effect from the Plan Implementation Date, or (b) alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration or interpretation, and provided that the Applicant proceeds with the implementation of the Plan, the

remainder of the terms and provisions of the Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

10.9 Responsibilities of the Monitor

The Monitor is acting in its capacity as Monitor in the CCAA Proceeding and the Plan with respect to the Applicant and will not be responsible or liable for any obligations of the Applicant.

10.10 Different Capacities

Persons who are affected by this Plan may be affected in more than one capacity. Unless expressly provided herein to the contrary, a Person will be entitled to participate hereunder in each such capacity. Any action taken by a Person in one capacity will not affect such Person in any other capacity, unless expressly agreed by the Applicant and the Person in writing or unless its Claims overlap or are otherwise duplicative.

10.11 Notices

Any notice or other communication to be delivered hereunder must be in writing and reference the Plan and may, subject as hereinafter provided, be made or given by personal delivery, ordinary mail or by facsimile or email addressed to the respective parties as follows

If to the Applicant:

c/o SkyLink Aviation Inc.
1027 Yonge Street,
Toronto, ON, Canada
M4W 2K9

Attention: David Miller, General Counsel
Fax: (416) 924-9006
Email: dmiller@skylinkaviation.com

with a copy to:

Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

Attention: Robert Chadwick/ Logan Willis
Fax: (416) 979-1234
Email: rchadwick@goodmans.ca/lwillis@goodmans.ca

If to the Consenting Noteholders represented by Bennett Jones LLP:

c/o Bennett Jones LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

Attention	S. Richard Orzy /Sean Zweig
Fax:	(416) 863-1716
Email:	orzyr@bennettjones.com/zweigs@bennettjones.com

If to an Affected Creditor (other than a Consenting Noteholder represented by Bennett Jones LLP), to the mailing address, facsimile address or email address provided on such Affected Creditor's Notice of Claim or Proof of Claim;

If to the Monitor:

Duff & Phelps Canada Restructuring Inc.

333 Bay Street
14th Floor
Toronto, Ontario M5H 2R2

Attention:	Robert Kofman/David Sieradzki
Fax:	(647) 497-9490/(647) 497-9470
Email	bobby.kofman@duffandphelps.com / david.sieradzki@duffandphelps.com

with a copy to:

Lax O'Sullivan Scott Lisus LLP

Attention:	Matthew Gottlieb
Fax:	(416) 598-3730
Email:	mgottlieb@counsel-toronto.com

or to such other address as any party may from time to time notify the others in accordance with this section. Any such communication so given or made shall be deemed to have been given or made and to have been received on the day of delivery if delivered, or on the day of faxing or sending by other means of recorded electronic communication, provided that such day in either event is a Business Day and the communication is so delivered, faxed or sent before 5:00 p.m. (Toronto time) on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

10.12 Further Assurances

Each of the Persons named or referred to in, or subject to, the Plan will execute and deliver all such documents and instruments and do all such acts and things as may be necessary or desirable to carry out the full intent and meaning of the Plan and to give effect to the transactions contemplated herein.

DATED as of the 18th day of April, 2013.

'6150187

SCHEDULE A

SUMMARY OF TERMS OF NEW SECOND LIEN NOTES

- $10 million aggregate principal amount
- 5 year term
- 12.25% annual interest rate
- Each individual note will represent a principal amount of $1000
- The governing trust indenture will be substantially similar to the Secured Note Indenture, with certain exceptions, including:
  - PIK toggle feature pursuant to which, at the Applicant's option, interest may be paid in kind rather than in cash in the first 2 years
  - Optional redemptions at the following amounts:
    2013 – 109.188%
    2014 – 106.125%
    2015 103.063%
    2016 and thereafter – 100.000%

SCHEDULE B

RELEASED DIRECTORS/OFFICERS

Jan Ottens
David Miller
Eitan Dehtiar
Mark Thielmann
Harry Green
Peter Scala
Mark Massad
Tom White
Rosalyn Samtleben
Matthew Constantino
Samuel Hines
Rob Semmara
Brenna Haysom
Kenneth Taylor
Stephen Arbib
Walter Arbib
Surjit Babra
Harjit Kalsi

SCHEDULE C

RELEASED SHAREHOLDERS

SL Aviation Group, S.a r.l
AlpInvest Partners SI. B.V.
Apollo Management VII, L.P.
Sandton SkyLink Acquisition, LLC
WSA (2008) Holdings Inc.
WSA (2008) Transactions Inc.
SSB (2008) Transactions Inc.

SCHEDULE D

DIRECTOR/OFFICER WAGES CLAIMS

1. Director/Officer Claim by Olavo Valaderes in the amount of $1,413,700 for alleged unpaid remuneration consisting of (a) $1,200,000 in respect of certain options issued by SkyLink Aviation, (b) $150,000 for a bonus allegedly payable for the year ended December 31, 2012 and (c) $63,700 for alleged unpaid vacation pay.

2. Director/Officer Claim by Vito Murriello in the amount of $3,379,726 for alleged unpaid remuneration consisting of (a) $3,000,000 in respect of certain options issued by SkyLink Aviation and (b) $379,726 for alleged unpaid vacation pay.

3. Director/Officer Claim by Jan Ottens in the amount of $1,568,233.56 for alleged unpaid remuneration consisting of (a) $288,832, representing the alleged unpaid balance owing in respect a signing bonus and (b) $1,279,401 in respect of certain options issued by SkyLink Aviation.

4. Director/Officer Claim by Stephen Arbib in the amount of $600,000 for alleged unpaid remuneration consisting of $600,000 in respect of certain options issued by SkyLink Aviation.

Schedule "B"

Monitor's Certificate of Plan Implementation

Court File No. 13-1003300-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 AND ARRANGEMENT OF SKYLINK AVIATION INC.

CERTIFICATE OF DUFF & PHELPS CANADA RESTRUCTURING INC. AS THE COURT-APPOINTED MONITOR OF SKYLINK AVIATION INC.

(Plan Implementation)

All capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Plan of Compromise and Arrangement concerning, affecting and involving Skylink Aviation Inc. (the "**Applicant**") dated April 18, 2013 (the "**Plan**"), which is attached as Schedule "A" to the Plan Sanction Order of the Honourable Justice Morawetz made in these proceedings on the ● day of April, 2013 (the "**Plan Sanction Order**"), as the Plan may be further amended, varied or supplemented from time to time in accordance with its terms.

Pursuant to section 9.2 of the Plan and paragraph 14 of the Plan Sanction Order, Duff & Phelps Canada Restructuring Inc. in its capacity as the Court-appointed monitor of the Applicant (the "**Monitor**") delivers this certificate to counsel to the Initial Consenting Noteholders (on behalf of the Initial Consenting Noteholders) and counsel to the Applicant (on behalf of the Applicant) and hereby certifies that:

1. The Monitor has received written confirmation from the Applicant and the Majority Initial Consenting Noteholders (or their respective counsel) that the conditions precedent set out in section 9.1 of the Plan have been satisfied or waived, as applicable.

2. Pursuant to the terms of the Plan, the Plan Implementation Date has occurred.

3. The Plan is effective in accordance with its terms.

4. This Certificate will be filed with the Court.

DATED at the City of Toronto, in the Province of Ontario, this ● day of ●, 2013.

DUFF & PHELPS CANADA RESTRUCTURING INC.,
in its capacity as Court-appointed Monitor of SkyLink Aviation Inc.

By:

_____

Name:

Title:

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 AND ARRANGEMENT OF SKYLINK AVIATION INC.

Court File No.: 13-1003300-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

PLAN SANCTION ORDER
(returnable April 23, 2013)

Goodmans LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Robert J. Chadwick (LSUC# 35165K)
Logan Willis (LSUC# 53894K)

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for the Applicant

TAB 20

2010 ONSC 6229
Ontario Superior Court of Justice [Commercial List]

Nelson Financial Group Ltd., Re

2010 CarswellOnt 8655, 2010 ONSC 6229, 195 A.C.W.S. (3d) 319, 71 C.B.R. (5th) 153, 75 B.L.R. (4th) 302

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON FINANCIAL GROUP LTD.

Pepall J.

Judgment: November 16, 2010
Docket: 10-8630-00CL

Counsel: Richard B. Jones, Douglas Turner, Q.C. for Noteholders / Moving Party
J.H. Grout, S. Aggarwal for Monitor
Pamela Foy for Ontario Securities Commission
Frank Lamie for Nelson Financial Group Ltd.
Robert Benjamin Mills, Harold Van Winssen for Respondents, Clifford Styles, Jackie Styles, Play Investments Ltd.
Michael Beardsley, Respondent for himself
Clifford Holland, Respondent for himself
Arnold Bolliger, Respondent for himself
John McVey, Respondent for himself
Joan Frederick, Respondent for herself
Rakesh Sharma, Respondent for himself
Larry Debono, Respondent for himself
Keith McClear, Respondent for himself

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.a General principles
III.3.a.iii Whether creditor of corporation
Headnote
Business associations --- Specific matters of corporate organization — Shareholders — General principles — Whether creditor of corporation
N Ltd. raised funds by issuing promissory notes bearing 12 percent annual return and issued preference shares with typical annual dividend of 10 percent — Funds were then lent out at much higher interest rates — N Ltd. sought protection of Companies' Creditors Arrangement Act — Preferred shareholders alleged, inter alia, theft, fraud, misrepresentation, breach of trust, excessive dividend payments, conversion of notes into preferred shares while N Ltd. was insolvent, oppression, and breach of fiduciary duties against N Ltd. — Promissory note holders brought motion to have all claims of preferred shareholders against N Ltd. classified as equity claims within meaning of Act; and requesting

that unsecured creditors be entitled to be paid in full before preferred shareholders and other relief — Motion granted, subject to two possible exceptions — Claims of preferred shareholders fell within ambit of s. 2 of Act, were governed by ss. 6(8) and 22.1 of Act, and therefore did not constitute claims provable for purposes of statute — Preferred shareholders were not creditors of N Ltd. — Shares were treated as equity in N Ltd.'s financial statements and in its books and records — Substance of arrangement between preferred shareholders and N Ltd. was relationship based on equity, not debt — Pursuant to ss. 6(8) and 22.1, equity claims are rendered subordinate to those of creditors — Types of claims advanced by preferred shareholders were captured by language of recent amendments to Act — Factual record on two possible exceptions was incomplete — Monitor to investigate both scenarios — Claims procedure to be amended.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

N Ltd. raised funds by issuing promissory notes bearing 12 percent annual return and issued preference shares with typical annual dividend of 10 percent — Funds were then lent out at much higher interest rates — N Ltd. sought protection of Companies' Creditors Arrangement Act — Preferred shareholders alleged, inter alia, theft, fraud, misrepresentation, breach of trust, excessive dividend payments, conversion of notes into preferred shares while N Ltd. was insolvent, oppression, and breach of fiduciary duties against N Ltd. — Promissory note holders brought motion to have all claims of preferred shareholders against N Ltd. classified as equity claims within meaning of Act; and requesting that unsecured creditors be entitled to be paid in full before preferred shareholders and other relief — Motion granted, subject to two possible exceptions — Claims of preferred shareholders fell within ambit of s. 2 of Act, were governed by ss. 6(8) and 22.1 of Act, and therefore did not constitute claims provable for purposes of statute — Preferred shareholders were not creditors of N Ltd. — Shares were treated as equity in N Ltd.'s financial statements and in its books and records — Substance of arrangement between preferred shareholders and N Ltd. was relationship based on equity, not debt — Pursuant to ss. 6(8) and 22.1, equity claims are rendered subordinate to those of creditors — Types of claims advanced by preferred shareholders were captured by language of recent amendments to Act — Factual record on two possible exceptions was incomplete — Monitor to investigate both scenarios — Claims procedure to be amended.

Table of Authorities

Cases considered by *Pepall J.*:

Blue Range Resource Corp., Re (2000), 2000 CarswellAlta 12, 259 A.R. 30, 76 Alta. L.R. (3d) 338, [2000] 4 W.W.R. 738, 2000 ABQB 4, 15 C.B.R. (4th) 169 (Alta. Q.B.) — considered

Central Capital Corp., Re (1996), 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, (sub nom. *Royal Bank v. Central Capital Corp.*) 88 O.A.C. 161, 1996 CarswellOnt 316, 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88 (Ont. C.A.) — followed

EarthFirst Canada Inc., Re (2009), 2009 ABQB 316, 2009 CarswellAlta 1069, 56 C.B.R. (5th) 102 (Alta. Q.B.) — considered

I. Waxman & Sons Ltd., Re (2008), 89 O.R. (3d) 427, 39 E.T.R. (3d) 49, 44 B.L.R. (4th) 295, 2008 CarswellOnt 1245, 40 C.B.R. (5th) 307, 64 C.C.E.L. (3d) 233 (Ont. S.C.J. [Commercial List]) — considered

Matter of Stirling Homex Corp. (1978), 579 F.2d 206 (U.S. 2nd Cir. N.Y.) — considered

National Bank of Canada v. Merit Energy Ltd. (2001), 2001 ABQB 583, 2001 CarswellAlta 913, 28 C.B.R. (4th) 228, [2001] 10 W.W.R. 305, 95 Alta. L.R. (3d) 166, 294 A.R. 15 (Alta. Q.B.) — considered

National Bank of Canada v. Merit Energy Ltd. (2002), 2002 ABCA 5, 2002 CarswellAlta 23, [2002] 3 W.W.R. 215, 96 Alta. L.R. (3d) 1, 299 A.R. 200, 266 W.A.C. 200 (Alta. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 2 — considered

s. 2 "creditor" — considered

s. 121(1) — considered

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

s. 23(3) — referred to

s. 248 — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2 — referred to

s. 2(1) "claim" — considered

s. 2(1) "equity claim" — considered

s. 2(1) "equity interest" — considered

s. 6(8) — considered

s. 22.1 [en. 2007, c. 36, s. 71] — considered
Securities Act, R.S.O. 1990, c. S.5
Generally — referred to

MOTION by promissory note holders to determine whether certain claims of preferred shareholders constitute equity claims for purposes of *Companies' Creditors Arrangement Act*.

***Pepall J.*:**

1 This motion addresses the legal characterization of claims of holders of preferred shares in the capital stock of the applicant, Nelson Financial Group Ltd. ("Nelson"). The issue before me is to determine whether such claims constitute equity claims for the purposes of sections 6(8) and 22.1 of the *Companies' Creditors Arrangement Act* ("*CCAA*").

Background Facts

2 Nelson was incorporated pursuant to the *Business Corporations Act* of Ontario in September, 1990. Nelson raised money from investors and then used those funds to extend credit to customers in vendor assisted financing programmes. It raised money in two ways. It issued promissory notes bearing a rate of return of 12% per annum and also issued preference shares typically with an annual dividend of 10%. [1] The funds were then lent out at significantly higher rates of interest.

3 The Monitor reported that Nelson placed ads in selected publications. The ads outlined the nature of the various investment options. Term sheets for the promissory notes or the preferred shares were then provided to the investors by Nelson together with an outline of the proposed tax treatment for the investment. No funds have been raised from investors since January 29, 2010.

(a) Noteholders

4 As of the date of the *CCAA* filing on March 23, 2010, Nelson had issued 685 promissory notes in the aggregate principal amount of $36,583,422.89. The notes are held by approximately 321 people.

(b) Preferred Shareholders

5 Nelson was authorized to issue two classes of common shares and 2,800,000 Series A preferred shares and 2,000,000 Series B preferred shares, each with a stated capital of $25.00. The president and sole director of Nelson, Marc Boutet, is the owner of all of the issued and outstanding common shares. By July 31, 2007, Nelson had issued to investors 176,675 Series A preferred shares for an aggregate consideration of $4,416,925. During the subsequent fiscal year ended July 31, 2008, Nelson issued a further 172,545 Series A preferred shares and 27,080 Series B preferred shares. These shares were issued for an aggregate consideration of $4,672,383 net of share issue costs.

6 The preferred shares are non-voting and take priority over the common shares. The company's articles of amendment provide that the preferred shareholders are entitled to receive fixed preferential cumulative cash dividends at the rate of 10% per annum. Nelson had the unilateral right to redeem the shares on payment of the purchase price plus accrued dividends. At least one investor negotiated a right of redemption. Two redemption requests were outstanding as of the *CCAA* filing date.

7 As of the *CCAA* filing date of March 23, 2010, Nelson had issued and outstanding 585,916.6 Series A and Series B preferred shares with an aggregate stated capital of $14,647,914. The preferred shares are held by approximately 82 people. As of the date of filing of these *CCAA* proceedings, there were approximately $53,632 of declared but unpaid dividends outstanding with respect to the preferred shares and $73,652.51 of accumulated dividends.

8 Investors subscribing for preferred shares entered into subscription agreements described as term sheets. These were executed by the investor and by Nelson. Nelson issued share certificates to the investors and maintained a share register recording the name of each preferred shareholder and the number of shares held by each shareholder.

9 As reported by the Monitor, notwithstanding that Nelson issued two different series of preferred shares, the principal terms of the term sheets signed by the investors were almost identical and generally provided as follows:

- the issuer was Nelson;
- the par value was fixed at $25.00;
- the purpose was to finance Nelson's business operations;
- the dividend was 10% per annum, payable monthly, commencing one month after the investment was made;
- preferred shareholders were eligible for a dividend tax credit;
- Nelson issued annual T-3 slips on account of dividend income to the preferred shareholders;
- the preferred shares were non-voting (except where voting as a class was required), redeemable at the option of Nelson and ranked ahead of common shares; and
- dividends were cumulative and no dividends were to be paid on common shares if preferred share dividends were in arrears.

10 In addition, the Series B term sheet provided that the monthly dividend could be reinvested pursuant to a Dividend Reinvestment Plan ("DRIP").

11 The preferred shareholders were entered on the share register and received share certificates. They were treated as equity in the company's financial statements. Dividends were received by the preferred shareholders and they took the benefit of the advantageous tax treatment.

(c) Insolvency

12 Mr. Boutet knew that Nelson was insolvent since at least its financial year ended July 31, 2007. Nelson did not provide financial statements to any of the preferred shareholders prior to, or subsequent to, the making of the investment.

(d) Ontario Securities Commission

13 On May 12, 2010, the Ontario Securities Commission ("OSC") issued a Notice of Hearing and Statement of Allegations alleging that Nelson and its affiliate, Nelson Investment Group Ltd., and various officers and directors of those corporations committed breaches of the *Ontario Securities Act* in the course of selling preferred shares. The

allegations include noncompliance with the prospectus requirements, the sale of shares in reliance upon exemptions that were inapplicable, the sale of shares to persons who were not accredited investors, and fraudulent and negligent misrepresentations made in the course of the sale of shares. The OSC hearing has been scheduled for the end of February, 2011.

(e) Legal Opinion

14 Based on the Monitor's review, the preferred shareholders were documented as equity on Nelson's books and records and financial statements. Pursuant to court order, the Monitor retained Stikeman Elliott LLP as independent counsel to provide an opinion on the characterization of the claims and potential claims of the preferred shareholders. The opinion concluded that the claims were equity claims. The Monitor posted the opinion on its website and also advised the preferred shareholders of the opinion and conclusions by letter. The opinion was not to constitute evidence, issue estoppel or res judicata with respect to any matters of fact or law referred to therein. The opinion, at least in part, informed Nelson's position which was supported by the Monitor, that independent counsel for the preferred shareholders was unwarranted in the circumstances.

(f) Development of Plan

15 The Monitor reported in its Eighth Report that a plan is in the process of being developed and that preferred shareholders would have their existing preference shares cancelled and would then be able to claim a tax loss on their investment or be given a new form of preference shares with rights to be determined.

Motion

16 The holders of promissory notes are represented by Representative Counsel appointed pursuant to my order of June 15, 2010. Representative Counsel wishes to have some clarity as to the characterization of the preferred shareholders' claims. Accordingly, Representative Counsel has brought a motion for an order that all claims and potential claims of the preferred shareholders against Nelson be classified as equity claims within the meaning of the *CCAA*. In addition, Representative Counsel requests that the unsecured creditors, which include the noteholders, be entitled to be paid in full before any claim of a preferred shareholder and that the preferred shareholders form a separate class that is not entitled to vote at any meeting of creditors. Nelson and the Monitor support the position of Representative Counsel. The OSC is unopposed.

17 On the return of the motion, some preferred shareholders were represented by counsel from Templeman Menninga LLP and some were self-represented. It was agreed that the letters and affidavits of preferred shareholders that were filed with the court would constitute their evidence. Oral submissions were made by legal counsel and by approximately eight individuals. They had many complaints. Their allegations against Nelson and Mr. Boutet range from theft, fraud, misrepresentation including promises that their funds would be secured, operation of a Ponzi scheme, breach of trust, dividend payments to some that exceeded the rate set forth in Nelson's articles, conversion of notes into preferred shares at a time when Nelson was insolvent, non-disclosure, absence of a prospectus or offering memorandum disclosure, oppression, violation of section 23(3) of the *OBCA* and of the *Securities Act* such that the issuance of the preferred shares was a nullity, and breach of fiduciary duties.

18 The stories described by the investors are most unfortunate. Many are seniors and pensioners who have invested their savings with Nelson. Some investors had notes that were rolled over and replaced with preference shares. Mr. McVey alleges that he made an original promissory note investment which was then converted arbitrarily and without his knowledge into preference shares. He alleges that the documents effecting the conversion did not contain his authentic signature.

19 Mr. Styles states that he and his company invested approximately $4.5 million in Nelson. He states that Mr. Boutet persuaded him to convert his promissory notes into preference shares by promising a 13.75% dividend rate, assuring him that the obligation of Nelson to repay would be treated the same or better than the promissory notes, and that they would

have the same or a priority position to the promissory notes. He then received dividends at the 13.75% rate contrary to the 10% rate found in the company's articles. In addition, at the time of the conversion, Nelson was insolvent.

20 In brief, Mr. Styles submits that:

> (a) the investment transactions were void because there was no prospectus contrary to the provisions of the *Securities Act* and the Styles were not accredited investors; the preferred shares were issued contrary to section 23(3) of the *OBCA* in that Nelson was insolvent at the relevant time and as such, the issuance was a nullity; and the conduct of the company and its principal was oppressive contrary to section 248 of the *OBCA*; and that
>
> (b) the Styles' claim is in respect of an undisputed agreement relating to the conversion of their promissory notes into preferred shares which agreement is enforceable separate and apart from any claim relating to the preferred shares.

The Issue

21 Are any of the claims advanced by the preferred shareholders equity claims within section 2 of the *CCAA* such that they are to be placed in a separate class and are subordinated to the full recovery of all other creditors?

The Law

22 The relevant provisions of the *CCAA* are as follows.

Section 2 of the *CCAA* states:

> In this Act,
>
> "Claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;
>
> "Equity Claim" means a claim that is in respect of an equity interest, including a claim for, among others,
>
> > (a) a dividend or similar payment,
> >
> > (b) a return of capital,
> >
> > (c) a redemption or retraction obligation,
> >
> > (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
> >
> > (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);"
>
> "Equity Interest" means
>
> > (a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and
> >
> > (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

Section 6(8) states:

> 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.

Section 22.1 states:

> Despite subsection 22(1) creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

23 Section 2 of the *Bankruptcy and Insolvency Act* ("*BIA*") which is referenced in section 2 of the *CCAA* provides that a claim provable includes any claim or liability provable in proceedings under the Act by a creditor. Creditor is then defined as a person having a claim provable as a claim under the Act.

24 Section 121(1) of the *BIA* describes claims provable. It states:

> 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.

25 Historically, the claims and rights of shareholders were not treated as provable claims and ranked after creditors of an insolvent corporation in a liquidation. As noted by Laskin J.A. in *Central Capital Corp., Re*[2], on the insolvency of a company, the claims of creditors have always ranked ahead of the claims of shareholders for the return of their capital. This principle is premised on the notion that shareholders are understood to be higher risk participants who have chosen to tie their investment to the fortunes of the corporation. In contrast, creditors choose a lower level of exposure, the assumption being that they will rank ahead of shareholders in an insolvency. Put differently, amongst other things, equity investors bear the risk relating to the integrity and character of management.

26 This treatment also has been held to encompass fraudulent misrepresentation claims advanced by a shareholder seeking to recover his investment: *Blue Range Resource Corp., Re*[3] In that case, Romaine J. held that the alleged loss derived from and was inextricably intertwined with the shareholder interest. Similarly, in the United States, the Second Circuit Court of Appeal in *Matter of Stirling Homex Corp.*[4] concluded that shareholders, including those who had allegedly been defrauded, were subordinate to the general creditors when the company was insolvent. The Court stated that "the real party against which [the shareholders] are seeking relief is the body of general creditors of their corporation. Whatever relief may be granted to them in this case will reduce the percentage which the general creditors will ultimately realize upon their claims." *National Bank of Canada v. Merit Energy Ltd.*[5] and *EarthFirst Canada Inc., Re*[6] both treated claims relating to agreements that were collateral to equity claims as equity claims. These cases dealt with separate indemnification agreements and the issuance of flow through shares. The separate agreements and the ensuing claims were treated as part of one integrated transaction in respect of an equity interest. The case law has also recognized the complications and delay that would ensue if *CCAA* proceedings were mired in shareholder claims.

27 The amendments to the *CCAA* came into force on September 18, 2009. It is clear that the amendments incorporated the historical treatment of equity claims. The language of section 2 is clear and broad. Equity claim means a claim in respect of an equity interest and includes, amongst other things, a claim for rescission of a purchase or sale of an equity interest. Pursuant to sections 6(8) and 22.1, equity claims are rendered subordinate to those of creditors.

28 The Nelson filing took place after the amendments and therefore the new provisions apply to this case. Therefore, if the claims of the preferred shareholders are properly characterized as equity claims, the relief requested by Representative Counsel in his notice of motion should be granted.

29 Guidance on the appropriate approach to the issue of characterization was provided by the Ontario Court of Appeal in *Central Capital Corp., Re*[7] . Central Capital was insolvent and sought protection pursuant to the provisions of the *CCAA*. The appellants held preferred shares of Central Capital. The shares each contained a right of retraction, that is, a right to require Central Capital to redeem the shares on a fixed date and for a fixed price. One shareholder exercised his right of retraction and the other shareholder did not but both filed proofs of claim in the *CCAA* proceedings. In considering whether the two shareholders had provable debt claims, Laskin J.A. considered the substance of the relationship between the company and the shareholders. If the governing instrument contained features of both debt and equity, that is, it was hybrid in character, the court must determine the substance of the relationship between the company and the holder of the certificate. The Court examined the parties' intentions.

30 In *Central Capital*, Laskin J.A. looked to the share purchase agreements, the conditions attaching to the shares, the articles of incorporation and the treatment given to the shares in the company's financial statements to ascertain the parties' intentions and determined that the claims were equity and not debt claims.

31 In this case, there are characteristics that are suggestive of a debt claim and of an equity claim. That said, in my view, the preferred shareholders are, as their description implies, shareholders of Nelson and not creditors. In this regard, I note the following.

(a) Investors were given the option of investing in promissory notes or preference shares and opted to invest in shares. Had they taken promissory notes, they obviously would have been creditors. The preference shares carried many attractions including income tax advantages.

(b) The investors had the right to receive dividends, a well recognized right of a shareholder.

(c) The preference share conditions provided that on a liquidation, dissolution or winding up, the preferred shareholders ranked ahead of common shareholders. As in *Central Capital Corp.*, it is implicit that they therefore would rank behind creditors.

(d) Although I acknowledge that the preferred shareholders did not receive copies of the financial statements, nonetheless, the shares were treated as equity in Nelson's financial statements and in its books and records.

32 The substance of the arrangement between the preferred shareholders and Nelson was a relationship based on equity and not debt. Having said that, as I observed in *I. Waxman & Sons Ltd., Re*[8] , there is support in the case law for the proposition that equity may become debt. For instance, in that case, I held that a judgment obtained at the suit of a shareholder constituted debt. An analysis of the nature of the claims is therefore required. If the claims fall within the parameters of section 2 of the *CCAA*, clearly they are to be treated as equity claims and not as debt claims.

33 In this case, in essence the claims of the preferred shareholders are for one or a combination of the following:

(a) declared but unpaid dividends;

(b) unperformed requests for redemption;

(c) compensatory damages for the loss resulting in the purchased preferred shares now being worthless and claimed to have been caused by the negligent or fraudulent misrepresentation of Nelson or of persons for whom Nelson is legally responsible; and

(d) payment of the amounts due upon the rescission or annulment of the purchase or subscription for preferred shares.

34 In my view, all of these claims fall within the ambit of section 2, are governed by sections 6(8) and 22.1 of the *CCAA*, and therefore do not constitute a claim provable for the purposes of the statute. The language of section 2 is clear

and unambiguous and equity claims include "a claim that is in respect of an equity interest" and a claim for a dividend or similar payment and a claim for rescission. This encompasses the claims of all of the preferred shareholders including the Styles whose claim largely amounts to a request for rescission or is in respect of an equity interest. The case of *National Bank of Canada v Merit Energy Ltd.*[9] is applicable in regard to the latter. In substance, the Styles' claim is for an equity obligation. At a minimum, it is a claim in respect of an equity interest as described in section 2 of the CCAA. Parliament's intention is clear and the types of claims advanced in this case by the preferred shareholders are captured by the language of the amended statute. While some, and most notably Professor Janis Sarra[10], advocated a statutory amendment that provided for some judicial flexibility in cases involving damages arising from egregious conduct on the part of a debtor corporation and its officers, Parliament opted not to include such a provision. Sections 6(8) and 22.1 allow for little if any flexibility. That said, they do provide for greater certainty in the appropriate treatment to be accorded equity claims.

35 There are two possible exceptions. Mr. McVey claims that his promissory note should never have been converted into preference shares, the conversion was unauthorized and that the signatures on the term sheets are not his own. If Mr. McVey's evidence is accepted, his claim would be qua creditor and not preferred shareholder. Secondly, it is possible that monthly dividends that may have been lent to Nelson by Larry Debono constitute debt claims. The factual record on these two possible exceptions is incomplete. The Monitor is to investigate both scenarios, consider a resolution of same, and report back to the court on notice to any affected parties.

36 Additionally, the claims procedure will have to be amended. The Monitor should consider an appropriate approach and make a recommendation to the court to accommodate the needs of the stakeholders. The relief requested in the notice of motion is therefore granted subject to the two aforesaid possible exceptions.

Motion granted.

Footnotes

1 The Monitor is aware of six preferred shareholders with dividends that ranged from 10.5% to 13.75% per annum.

2 (1996), 38 C.B.R. (3d) 1 (Ont. C.A.).

3 (2000), 15 C.B.R. (4th) 169 (Alta. Q.B.).

4 (1978), 579 F.2d 206 (U.S. 2nd Cir. N.Y.).

5 2001 CarswellAlta 913 (Alta. Q.B.), aff'd 2002 CarswellAlta 23 (Alta. C.A.).

6 2009 CarswellAlta 1069 (Alta. Q.B.).

7 Supra, note 2.

8 2008 CarswellOnt 1245 (Ont. S.C.J. [Commercial List]).

9 Supra, note 5.

10 "From Subordination to Parity: An International Comparison of Equity Securities Law Claims in Insolvency Proceedings" (2007) 16 Int. Insolv. Re., 181.

TAB 21

2012 ONCA 816
Ontario Court of Appeal

Sino-Forest Corp., Re

2012 CarswellOnt 14701, 2012 ONCA 816, 114 O.R. (3d) 304,
225 A.C.W.S. (3d) 601, 299 O.A.C. 107, 98 C.B.R. (5th) 20

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

S.T. Goudge, Alexandra Hoy, S.E. Pepall JJ.A.

Heard: November 13, 2012
Judgment: November 23, 2012
Docket: C56115, C56118, C56125

Proceedings: affirming *Sino-Forest Corp., Re* (2012), 92 C.B.R. (5th) 99, 2012 CarswellOnt 9430, 2012 ONSC 4377 (Ont. S.C.J. [Commercial List])

Counsel: Peter H. Griffin, Peter J. Osborne, Shara Roy for Appellant, Ernst & Young LLP
Sheila Block, David Bish for Appellants, Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC
Kenneth Dekker for Appellant, BDO Limited
Robert W. Staley, Derek J. Bell, Jonathan Bell for Respondent, Sino-Forest Corporation
Benjamin Zarnett, Robert Chadwick, Julie Rosenthal for Respondent, Ad Hoc Committee of Noteholders
Clifton Prophet for Monitor, FTI Consulting Canada Inc.
Kirk M. Baert, A. Dimitri Lascaris, Massimo Starnino for Respondent, Ad Hoc Committee of Purchasers
Emily Cole for Respondent, Allen Chan
Erin Pleet for Respondent, David Horsley
David Gadsden for Respondent, Pöyry (Beijing)
Larry Lowenstein, Edward A. Sellers for Respondent, Board of Directors

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
In class actions, shareholders alleged that corporation misrepresented assets and financial situation, and that auditors and underwriters failed to detect misrepresentations — Corporation obtained protection under Companies' Creditors Arrangements Act (CCAA) — As yet uncertified class actions were stayed — Supervising judge granted claims procedure order — Auditors and underwriters filed individual proofs of claims against corporation for contribution and indemnity for any amounts they were ordered to pay under class actions — Corporation applied successfully for order that auditors'

and underwriters' claims were equity claims under CCAA — Auditors and underwriters appealed — Appeal dismissed — Claims for contribution and indemnity were equity claims under s. 2(1)(e) of CCAA — Parliament intended that monetary loss suffered by shareholder not diminish assets available to general creditors — "Equity claim" was not confined by its definition, or by definition of "claim", to claim advanced by holder of equity interest — Parliament could have but did not include language restricting claims for contribution or indemnity to those made by shareholders — Logic of s. 2(1)(a) to (e) supported notion that s. 2(1)(e) referred to claims for contribution or indemnity not by shareholders, but by others — Definition of "equity claim" was sufficiently clear to alter pre-existing common law — If shareholder sued auditors and underwriters for loss, and they claimed contribution or indemnity against debtor, assets available to general creditors would be diminished by amount of claims for contribution and indemnity.

Table of Authorities

Cases considered:

Blue Range Resource Corp., Re (2000), 2000 CarswellAlta 12, 259 A.R. 30, 76 Alta. L.R. (3d) 338, [2000] 4 W.W.R. 738, 2000 ABQB 4, 15 C.B.R. (4th) 169 (Alta. Q.B.) — referred to

CanadianOxy Chemicals Ltd. v. Canada (Attorney General) (1999), 1999 CarswellBC 776, 1999 CarswellBC 777, 171 D.L.R. (4th) 733, 29 C.E.L.R. (N.S.) 1, 23 C.R. (5th) 259, 122 B.C.A.C. 1, 200 W.A.C. 1, 133 C.C.C. (3d) 426, [1999] 1 S.C.R. 743 (S.C.C.) — considered

Central Capital Corp., Re (1996), 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, (sub nom. *Royal Bank v. Central Capital Corp.*) 88 O.A.C. 161, 1996 CarswellOnt 316, 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88 (Ont. C.A.) — referred to

EarthFirst Canada Inc., Re (2009), 2009 ABQB 316, 2009 CarswellAlta 1069, 56 C.B.R. (5th) 102 (Alta. Q.B.) — referred to

Goodyear Tire & Rubber Co. of Canada Ltd. v. T. Eaton Co. (1956), 28 C.P.R. 25, 56 D.T.C. 1060, 4 D.L.R. (2d) 1, 16 Fox Pat. C. 91, 1956 CarswellNat 247, [1956] S.C.R. 610 (S.C.C.) — referred to

Markevich v. Canada (2003), 223 D.L.R. (4th) 17, [2003] 2 C.T.C. 83, [2003] 1 S.C.R. 94, (sub nom. *Markevich v. Minister of National Revenue*) 239 F.T.R. 159 (note), (sub nom. *Markevich v. Minister of National Revenue*) 300 N.R. 321, (sub nom. *R. v. Markevich*) 2003 D.T.C. 5185, 2003 CarswellNat 446, 2003 CarswellNat 447, 2003 SCC 9 (S.C.C.) — considered

National Bank of Canada v. Merit Energy Ltd. (2001), 2001 ABQB 583, 2001 CarswellAlta 913, 28 C.B.R. (4th) 228, [2001] 10 W.W.R. 305, 95 Alta. L.R. (3d) 166, 294 A.R. 15 (Alta. Q.B.) — considered

National Bank of Canada v. Merit Energy Ltd. (2002), 2002 ABCA 5, 2002 CarswellAlta 23, [2002] 3 W.W.R. 215, 96 Alta. L.R. (3d) 1, 299 A.R. 200, 266 W.A.C. 200 (Alta. C.A.) — referred to

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Nelson Financial Group Ltd., Re (2010), 71 C.B.R. (5th) 153, 75 B.L.R. (4th) 302, 2010 ONSC 6229, 2010 CarswellOnt 8655 (Ont. S.C.J. [Commercial List]) — referred to

Nowegijick v. R. (1983), (sub nom. *Nowegijick v. Canada*) [1983] 1 S.C.R. 29, 1983 CarswellNat 520, 83 D.T.C. 5041, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 144 D.L.R. (3d) 193, 1983 CarswellNat 123 (S.C.C.) — considered

Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324 (2003), 2003 CarswellOnt 3500, 2003 CarswellOnt 3501, 2003 SCC 42, (sub nom. *Social Services Administration Board (Parry Sound) v. Ontario Public Service Employees Union, Local 324*) 308 N.R. 271, (sub nom. *Social Services Administration Board (Parry Sound District) v. Ontario Public Service Employees Union, Local 324*) 177 O.A.C. 235, 47 C.H.R.R. D/182, (sub nom. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*) [2003] 2 S.C.R. 157, 31 C.C.E.L. (3d) 1, 67 O.R. (3d) 256, 2003 C.L.L.C. 220-062, (sub nom. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*) 230 D.L.R. (4th) 257, 7 Admin. L.R. (4th) 177 (S.C.C.) — referred to

R. v. Proulx (2000), 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, [2000] 4 W.W.R. 21, 49 M.V.R. (3d) 163, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 140 C.C.C. (3d) 449, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) — considered

Return on Innovation Capital Ltd. v. Gandi Innovations Ltd. (2011), 2011 CarswellOnt 8590, 2011 ONSC 5018, 83 C.B.R. (5th) 123 (Ont. S.C.J. [Commercial List]) — referred to

Return on Innovation Capital Ltd. v. Gandi Innovations Ltd. (2012), 2012 ONCA 10, 2012 CarswellOnt 103, 90 C.B.R. (5th) 141 (Ont. C.A.) — referred to

Stelco Inc., Re (2006), 2006 CarswellOnt 406, 17 C.B.R. (5th) 78, 14 B.L.R. (4th) 260 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 2 "claim provable in bankruptcy" — considered

s. 121(1) — considered

Bankruptcy Code, 11 U.S.C.

s. 502(e)(1)(B) — referred to

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

Generally — referred to

s. 2(1) "claim" — considered

s. 2(1) "equity claim" — considered

s. 2(1) "equity claim" (a)-(d) — referred to

s. 2(1) "equity claim" (a)-(e) — referred to

s. 2(1) "equity claim" (d) — considered

s. 2(1) "equity claim" (e) — considered

s. 2(1) "equity interest" — considered

s. 6(8) — considered

s. 22.1 [en. 2007, c. 36, s. 71] — referred to

Negligence Act, R.S.O. 1990, c. N.1

Generally — referred to

s. 2 — considered

Securities Act, 1988, S.S. 1988-89, c. S-42.2

s. 137(1) — referred to

s. 137(9) — referred to

Securities Act, R.S.A. 2000, c. S-4

s. 203(1) — referred to

s. 203(10) — referred to

Securities Act, R.S.B.C. 1996, c. 418

s. 131(1) — referred to

s. 131(11) — referred to

Securities Act, R.S.M. 1988, c. S50

s. 141(1) — referred to

s. 141(11) — referred to
Securities Act, S.N.B. 2004, c. S-5.5
s. 149(1) — referred to

s. 149(9) — referred to
Securities Act, R.S.N. 1990, c. S-13
s. 130(1) — referred to

s. 130(8) — referred to
Securities Act, S.N.W.T. 2008, c. 10
s. 111(1) — referred to

s. 111(12) — referred to
Securities Act, R.S.N.S. 1989, c. 418
s. 137(1) — referred to

s. 137(8) — referred to
Securities Act, S.Nu. 2008, c. 12
s. 111(1) — referred to

s. 111(12) — referred to
Securities Act, R.S.O. 1990, c. S.5
s. 130(1) — referred to

s. 130(8) — referred to
Securities Act, R.S.P.E.I. 1988, c. S-3
s. 111(1) — referred to

s. 111(12) — referred to
Securities Act, S.Y. 2007, c. 16
s. 111(1) — referred to

s. 111(13) — referred to
Valeurs mobilières, Loi sur les, L.R.Q., c. V-1.1
art. 218 — referred to

art. 219 — referred to

art. 221 — referred to

Words and phrases considered:

equity claim

This appeal considers the definition of "equity claim" in s. 2(1) of the CCAA [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36]. More particularly, the central issue is whether claims by auditors and underwriters against the respondent debtor . . . for contribution and indemnity fall within that definition. The claims arise out of proposed shareholder class actions for misrepresentation.

. . . . .

We agree with the supervising judge that the definition of equity claim focuses on the nature of the claim, and not the identity of the claimant. In our view, the appellants' claims for contribution and indemnity are clearly equity claims.

. . . . .

"Equity claim" is not confined by its definition, or by the definition of "claim", to a claim advanced by the holder of an equity interest. Parliament could have, but did not, include language in paragraph (e) restricting claims for contribution or indemnity to those made by shareholders.

APPEAL by auditors and underwriters from judgment reported at *Sino-Forest Corp., Re* (2012), 92 C.B.R. (5th) 99, 2012 CarswellOnt 9430, 2012 ONSC 4377 (Ont. S.C.J. [Commercial List]) granting application by corporation for order that auditors' and underwriters' claims were equity claims under statute.

***Per curiam*:**

I Overview

1 In 2009, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA"), was amended to expressly provide that general creditors are to be paid in full before an equity claim is paid.

2 This appeal considers the definition of "equity claim" in s. 2(1) of the CCAA. More particularly, the central issue is whether claims by auditors and underwriters against the respondent debtor, Sino-Forest Corporation ("Sino-Forest"), for contribution and indemnity fall within that definition. The claims arise out of proposed shareholder class actions for misrepresentation.

3 The appellants argue that the supervising judge erred in concluding that the claims at issue are equity claims within the meaning of the CCAA and in determining the issue before the claims procedure established in Sino-Forest's CCAA proceeding had been completed.

4 For the reasons that follow, we conclude that the supervising judge did not err and accordingly dismiss this appeal.

II The Background

(a) The Parties

5 Sino-Forest is a Canadian public holding company that holds the shares of numerous subsidiaries, which in turn own, directly or indirectly, forestry assets located principally in the People's Republic of China. Its common shares are listed on the Toronto Stock Exchange. Sino-Forest also issued approximately $1.8 billion of unsecured notes, in four series. Trading in Sino-Forest shares ceased on August 26, 2011, as a result of a cease-trade order made by the Ontario Securities Commission.

6 The appellant underwriters [1] provided underwriting services in connection with three separate Sino-Forest equity offerings in June 2007, June 2009 and December 2009, and four separate Sino-Forest note offerings in July 2008, June 2009, December 2009 and October 2010. Certain underwriters entered into agreements with Sino-Forest in which Sino-Forest agreed to indemnify the underwriters in connection with an array of matters that could arise from their participation in these offerings.

7 The appellant BDO Limited ("BDO") is a Hong Kong-based accounting firm that served as Sino-Forest's auditor between 2005 and August 2007 and audited its annual financial statements for the years ended December 31, 2005 and December 31, 2006.

8 The engagement agreements governing BDO's audits of Sino-Forest provided that the company's management bore the primary responsibility for preparing its financial statements in accordance with Generally Accepted Accounting Principles ("GAAP") and implementing internal controls to prevent and detect fraud and error in relation to its financial reporting.

9 BDO's Audit Report for 2006 was incorporated by reference into a June 2007 prospectus issued by Sino-Forest regarding the offering of its shares to the public. This use by Sino-Forest was governed by an engagement agreement dated May 23, 2007, in which Sino-Forest agreed to indemnify BDO in respect of any claims by the underwriters or any third party that arose as a result of the further steps taken by BDO in relation to the issuance of the June 2007 prospectus.

10 The appellant Ernst & Young LLP ("E&Y") served as Sino-Forest's auditor for the years 2007 to 2012 and delivered Auditors' Reports with respect to the consolidated financial statements of Sino-Forest for fiscal years ended December 31, 2007 to 2010, inclusive. In each year for which it prepared a report, E&Y entered into an audit engagement letter with Sino-Forest in which Sino-Forest undertook to prepare its financial statements in accordance with GAAP, design and implement internal controls to prevent and detect fraud and error, and provide E&Y with its complete financial records and related information. Some of these letters contained an indemnity in favour of E&Y.

11 The respondent Ad Hoc Committee of Noteholders consists of noteholders owning approximately one-half of Sino-Forest's total noteholder debt. [2] They are creditors who have debt claims against Sino-Forest; they are not equity claimants.

12 Sino-Forest has insufficient assets to satisfy all the claims against it. To the extent that the appellants' claims are accepted and are treated as debt claims rather than equity claims, the noteholders' recovery will be diminished.

(b) The Class Actions

13 In 2011 and January of 2012, proposed class actions were commenced in Ontario, Quebec, Saskatchewan and New York State against, amongst others, Sino-Forest, certain of its officers, directors and employees, BDO, E&Y and the underwriters. Sino-Forest is sued in all actions. [3]

14 The proposed representative plaintiffs in the class actions are shareholders of Sino-Forest. They allege that: Sino-Forest repeatedly misrepresented its assets and financial situation and its compliance with GAAP in its public disclosure; the appellant auditors and underwriters failed to detect these misrepresentations; and the appellant auditors misrepresented that their audit reports were prepared in accordance with generally accepted auditing standards ("GAAS"). The representative plaintiffs claim that these misrepresentations artificially inflated the price of Sino-Forest's shares and that proposed class members suffered damages when the shares fell after the truth was revealed in 2011.

15 The representative plaintiffs in the Ontario class action seek approximately $9.2 billion in damages. The Quebec, Saskatchewan and New York class actions do not specify the quantum of damages sought.

16 To date, none of the proposed class actions has been certified.

(c) CCAA Protection and Proofs of Claim

17 On March 30, 2012, Sino-Forest sought protection pursuant to the provisions of the CCAA. Morawetz J. granted the initial order which, among other things, appointed FTI Consulting Canada Inc. as the Monitor and stayed the class actions as against Sino-Forest. Since that time, Morawetz J. has been the supervising judge of the CCAA proceedings. The initial stay of the class actions was extended and broadened by order dated May 8, 2012.

18 On May 14, 2012, the supervising judge granted an unopposed claims procedure order which established a procedure to file and determine claims against Sino-Forest.

19 Thereafter, all of the appellants filed individual proofs of claim against Sino-Forest seeking contribution and indemnity for, among other things, any amounts that they are ordered to pay as damages to the plaintiffs in the class actions. Their proofs of claim advance several different legal bases for Sino-Forest's alleged obligation of contribution and indemnity, including breach of contract, contractual terms of indemnity, negligent and fraudulent misrepresentation in tort, and the provisions of the *Negligence Act*, R.S.O. 1990, c. N.1.

(d) Order under Appeal

20 Sino-Forest then applied for an order that the following claims are equity claims under the CCAA: claims against Sino-Forest arising from the ownership, purchase or sale of an equity interest in the company, including shareholder claims ("Shareholder Claims"); and any indemnification claims against Sino-Forest related to or arising from the Shareholder Claims, including the appellants' claims for contribution or indemnity ("Related Indemnity Claims").

21 The motion was supported by the Ad Hoc Committee of Noteholders.

22 On July 27, 2012, the supervising judge granted the order sought by Sino-Forest and released a comprehensive endorsement.

23 He concluded that it was not premature to determine the equity claims issue. It had been clear from the outset of Sino-Forest's CCAA proceedings that this issue would have to be decided and that the expected proceeds arising from any sales process would be insufficient to satisfy the claims of creditors. Furthermore, the issue could be determined independently of the claims procedure and without prejudice being suffered by any party.

24 He also concluded that both the Shareholder Claims and the Related Indemnity Claims should be characterized as equity claims. In summary, he reasoned that:

- The characterization of claims for indemnity turns on the characterization of the underlying primary claims. The Shareholder Claims are clearly equity claims and they led to and underlie the Related Indemnity Claims;

- The plain language of the CCAA, which focuses on the nature of the claim rather than the identity of the claimant, dictates that both Shareholder Claims and Related Indemnity Claims constitute equity claims;

- The definition of "equity claim" added to the CCAA in 2009 broadened the scope of equity claims established by pre-amendment jurisprudence;

- This holding is consistent with the analysis in *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 5018, 83 C.B.R. (5th) 123 (Ont. S.C.J. [Commercial List]), which dealt with contractual indemnification claims of officers and directors. Leave to appeal was denied by this court, 2012 ONCA 10, 90 C.B.R. (5th) 141 (Ont. C.A.); and

- "It would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the underwriters, through a claim for indemnification, to be treated as creditors when the underlying actions of shareholders cannot achieve the same status" (para. 82). To hold otherwise would run counter to the scheme established by the CCAA and would permit an indirect remedy to the shareholders when a direct remedy is unavailable.

25 The supervising judge did not characterize the full amount of the claims of the auditors and underwriters as equity claims. He excluded the claims for defence costs on the basis that while it was arguable that they constituted claims for indemnity, they were not necessarily in respect of an equity claim. That determination is not appealed.

III Interpretation of "Equity Claim"

(a) Relevant Statutory Provisions

26 As part of a broad reform of Canadian insolvency legislation, various amendments to the CCAA were proclaimed in force as of September 18, 2009.

27 They included the addition of s. 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.

Section 22.1, which provides that creditors with equity claims may not vote at any meeting unless the court orders otherwise, was also added.

28 Related definitions of "claim", "equity claim", and "equity interest" were added to s. 2(1) of the CCAA:

> In this Act,
>
> . . . . .
>
> "claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;
>
> . . . . .
>
> "equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (a) a dividend or similar payment,
>
> (b) a return of capital,
>
> (c) a redemption or retraction obligation,
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); [Emphasis added.]
>
> "equity interest" means
>
> (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
>
> (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

29 Section 2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") defines a "claim provable in bankruptcy". Section 121 of the BIA in turn specifies that claims provable in bankruptcy are those to which the bankrupt is subject.

> 2. "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;
>
> 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. [Emphasis added.]

(b) The Legal Framework Before the 2009 Amendments

30 Even before the 2009 amendments to the CCAA codified the treatment of equity claims, the courts subordinated shareholder equity claims to general creditors' claims in an insolvency. As the supervising judge described:

> [23] Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise.
>
> [24] The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential.
>
> [25] As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement. [Citations omitted.] [4]

(c) The Appellants' Submissions

31 The appellants essentially advance three arguments.

32 First, they argue that on a plain reading of s. 2(1), their claims are excluded. They focus on the opening words of the definition of "equity claim" and argue that their claims against Sino-Forest are not claims that are "in respect of an equity interest" because they do not have an equity interest in Sino-Forest. Their relationships with Sino-Forest were purely contractual and they were arm's-length creditors, not shareholders with the risks and rewards attendant to that position. The policy rationale behind ranking shareholders below creditors is not furthered by characterizing the appellants' claims as equity claims. They were service providers with a contractual right to an indemnity from Sino-Forest.

33 Second, the appellants focus on the term "claim" in paragraph (e) of the definition of "equity claim", and argue that the claims in respect of which they seek contribution and indemnity are the shareholders' claims against them in court proceedings for damages, which are not "claims" against Sino-Forest provable within the meaning of the BIA, and, therefore, not "claims" within s. 2(1). They submit that the supervising judge erred in focusing on the characterization of the underlying primary claims.

34 Third, the appellants submit that the definition of "equity claim" is not sufficiently clear to have changed the existing law. It is assumed that the legislature does not intend to change the common law without "expressing its intentions to do so with irresistible clearness": *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157 (S.C.C.), at para. 39, citing *Goodyear Tire & Rubber Co. of Canada Ltd. v. T. Eaton Co.*, [1956] S.C.R. 610 (S.C.C.), at p. 614. The appellants argue that the supervising judge's interpretation of "equity claim" dramatically alters the common law as reflected in *National Bank of Canada v. Merit Energy Ltd.*, 2001 ABQB 583, 294 A.R. 15 (Alta. Q.B.) , aff'd 2002 ABCA 5, 299 A.R. 200 (Alta. C.A.). There the court determined that in an insolvency, claims of auditors and underwriters for indemnification are not to be treated in the same manner as claims by shareholders. Furthermore, the Senate debates that preceded the enactment of the amendments did not specifically comment on the effect of the amendments on claims by auditors and underwriters. The amendments should be interpreted as codifying the pre-existing common law as reflected in *National Bank of Canada v. Merit Energy Ltd.*

35 The appellants argue that the decision of *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* is distinguishable because it dealt with the characterization of claims for damages by an equity investor against officers and directors, and it predated the 2009 amendments. In any event, this court confirmed that its decision denying leave to appeal should not be read as a judicial precedent for the interpretation of the meaning of "equity claim" in s. 2(1) of the CCAA.

(d) Analysis

(i) Introduction

36 The exercise before this court is one of statutory interpretation. We are therefore guided by the following oft-cited principle from Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), at p. 87:

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

37 We agree with the supervising judge that the definition of equity claim focuses on the nature of the claim, and not the identity of the claimant. In our view, the appellants' claims for contribution and indemnity are clearly equity claims.

38 The appellants' arguments do not give effect to the expansive language adopted by Parliament in defining "equity claim" and read in language not incorporated by Parliament. Their interpretation would render paragraph (e) of the definition meaningless and defies the logic of the section.

(ii) The expansive language used

39 The definition incorporates two expansive terms.

40 First, Parliament employed the phrase "*in respect of*" twice in defining equity claim: in the opening portion of the definition, it refers to an equity claim as a "claim that is *in respect of* an equity interest", and in paragraph (e) it refers to "contribution or indemnity *in respect of* a claim referred to in any of paragraphs (a) to (d)" (emphasis added).

41 The Supreme Court of Canada has repeatedly held that the words "in respect of" are "of the widest possible scope", conveying some link or connection between two related subjects. In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 (S.C.C.), at para. 16, citing *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.), at p. 39, the Supreme Court held as follows:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added in *CanadianOxy*.]

That court also stated as follows in *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94 (S.C.C.), at para. 26:

> The words "in respect of" have been held by this Court to be words of the broadest scope that convey some link between two subject matters. [Citations omitted.]

42 It is conceded that the Shareholder Claims against Sino-Forest are claims for "a monetary loss resulting from the ownership, purchase or sale of an equity interest", within the meaning of paragraph (d) of the definition of "equity claim". There is an obvious link between the appellants' claims against Sino-Forest for contribution and indemnity and the shareholders' claims against Sino-Forest. The legal proceedings brought by the shareholders asserted their claims against Sino-Forest together with their claims against the appellants, which gave rise to these claims for contribution and indemnity. The causes of action asserted depend largely on common facts and seek recovery of the same loss.

43 The appellants' claims for contribution or indemnity against Sino-Forest are therefore clearly connected to or "in respect of" a claim referred to in paragraph (d), namely the shareholders' claims against Sino-Forest. They are claims in respect of equity claims by shareholders and are provable in bankruptcy against Sino-Forest.

44 Second, Parliament also defined equity claim as "including a claim for, among others", the claims described in paragraphs (a) to (e). The Supreme Court has held that this phrase "including" indicates that the preceding words - "a claim that is in respect of an equity interest" - should be given an expansive interpretation, and include matters which

might not otherwise be within the meaning of the term, as stated in *National Bank of Greece (Canada) c. Katsikonouris*, [1990] 2 S.C.R. 1029 (S.C.C.), at p. 1041:

> [T]hese words are terms of extension, designed to enlarge the meaning of preceding words, and not to limit them.
>
> ... [T]he natural inference is that the drafter will provide a specific illustration of a subset of a given category of things in order to make it clear that that category extends to things that might otherwise be expected to fall outside it.

45 Accordingly, the appellants' claims, which clearly fall within paragraph (e), are included within the meaning of the phrase a "claim that is in respect of an equity interest".

(iii) What Parliament did not say

46 "Equity claim" is not confined by its definition, or by the definition of "claim", to a claim advanced by the holder of an equity interest. Parliament could have, but did not, include language in paragraph (e) restricting claims for contribution or indemnity to those made by shareholders.

(iv) An interpretation that avoids surplusage

47 A claim for contribution arises when the claimant for contribution has been sued. Section 2 of the *Negligence Act* provides that a tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort. The securities legislation of the various provinces provides that an issuer, its underwriters, and, if they consented to the disclosure of information in the prospectus, its auditors, among others, are jointly and severally liable for a misrepresentation in the prospectus, and provides for rights of contribution. [5]

48 Counsel for the appellants were unable to provide a satisfactory example of when a holder of an equity interest in a debtor company would seek contribution under paragraph (e) against the debtor in respect of a claim referred to in any of paragraphs (a) to (d). In our view, this indicates that paragraph (e) was drafted with claims for contribution or indemnity by non-shareholders rather than shareholders in mind.

49 If the appellants' interpretation prevailed, and only a person with an equity interest could assert such a claim, paragraph (e) would be rendered meaningless, and as Lamer C.J. wrote in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61 (S.C.C.), at para. 28:

> It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.

(v) The scheme and logic of the section

50 Moreover, looking at s. 2(1) as a whole, it would appear that the remedies available to shareholders are all addressed by ss. 2(1)(a) to (d). The logic of ss. 2(1)(a) to (e) therefore also supports the notion that paragraph (e) refers to claims for contribution or indemnity not by shareholders, but by others.

(vi) The legislative history of the 2009 amendments

51 The appellants and the respondents each argue that the legislative history of the amendments supports their respective interpretation of the term "equity claim". We have carefully considered the legislative history. The limited commentary is brief and imprecise. The clause by clause analysis of Bill C-12 comments that "[a]n equity claim is defined to include any claim that is related to an equity interest". [6] While, as the appellants submit, there was no specific reference to the position of auditors and underwriters, the desirability of greater conformity with United States insolvency law to avoid forum shopping by debtors was highlighted in 2003, some four years before the definition of "equity claim" was included in Bill C-12.

52 In this instance the legislative history ultimately provided very little insight into the intended meaning of the amendments. We have been guided by the plain words used by Parliament in reaching our conclusion.

(vii) Intent to change the common law

53 In our view the definition of "equity claim" is sufficiently clear to alter the pre-existing common law. *National Bank of Canada v. Merit Energy Ltd.*, an Alberta decision, was the single case referred to by the appellants that addressed the treatment of auditors' and underwriters' claims for contribution and indemnity in an insolvency before the definition was enacted. As the supervising judge noted, in a more recent decision, *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, the courts of this province adopted a more expansive approach, holding that contractual indemnification claims of directors and officers were equity claims.

54 We are not persuaded that the practical effect of the change to the law implemented by the enactment of the definition of "equity claim" is as dramatic as the appellants suggest. The operations of many auditors and underwriters extend to the United States, where contingent claims for reimbursement or contribution by entities "liable with the debtor" are disallowed pursuant to § 502(e)(1)(B) of the U.S. Bankruptcy Code, 11 U.S.C.S. [7]

(viii) The purpose of the legislation

55 The supervising judge indicated that if the claims of auditors and underwriters for contribution and indemnity were not included within the meaning of "equity claim", the CCAA would permit an indirect remedy to the shareholders when a direct remedy is not available. We would express this concept differently.

56 In our view, in enacting s. 6(8) of the CCAA, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest *not* diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be diminished by the amount of the claims for contribution and indemnity.

IV Prematurity

57 We are not persuaded that the supervising judge erred by determining that the appellants' claims were equity claims before the claims procedure established in Sino-Forest's CCAA proceeding had been completed.

58 The supervising judge noted at para. 7 of his endorsement that from the outset, Sino-Forest, supported by the Monitor, had taken the position that it was important that these proceedings be completed as soon as possible. The need to address the characterization of the appellants' claims had also been clear from the outset. The appellants have not identified any prejudice that arises from the determination of the issue at this stage. There was no additional information that the appellants have identified that was not before the supervising judge. The Monitor, a court-appointed officer, supported the motion procedure. The supervising judge was well positioned to determine whether the procedure proposed was premature and, in our view, there is no basis on which to interfere with the exercise of his discretion.

V Summary

59 In conclusion, we agree with the supervising judge that the appellants' claims for contribution or indemnity are equity claims within s. 2(1)(e) of the CCAA.

60 We reach this conclusion because of what we have said about the expansive language used by Parliament, the language Parliament did not use, the avoidance of surplusage, the logic of the section, and what, from the foregoing, we conclude is the purpose of the 2009 amendments as they relate to these proceedings.

61 We see no basis to interfere with the supervising judge's decision to consider whether the appellants' claims were equity claims before the completion of the claims procedure.

VI Disposition

62 This appeal is accordingly dismissed. As agreed, there will be no costs.

Appeal dismissed.

Footnotes

1 Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC.

2 Noteholders holding in excess of $1.296 billion, or 72%, of Sino-Forest's approximately $1.8 billion in noteholders' debt have executed written support agreements in favour of the Sino-Forest CCAA plan as of March 30, 2012. These include noteholders represented by the Ad Hoc Committee of Noteholders.

3 None of the appellants are sued in Saskatchewan and all are sued in Ontario. E&Y is also sued in Quebec and New York and the appellant underwriters are also sued in New York.

4 The supervising judge cited the following cases as authority for these propositions: *Blue Range Resource Corp., Re*, 2000 ABQB 4, 259 A.R. 30 (Alta. Q.B.); *Stelco Inc., Re* (2006), 17 C.B.R. (5th) 78 (Ont. S.C.J. [Commercial List]); *Central Capital Corp. (Re)* (1996), 27 O.R. (3d) 494 (Ont. C.A.); *Nelson Financial Group Ltd., Re*, 2010 ONSC 6229, 71 C.B.R. (5th) 153 (Ont. S.C.J. [Commercial List]); *EarthFirst Canada Inc., Re*, 2009 ABQB 316, 56 C.B.R. (5th) 102 (Alta. Q.B.).

5 *Securities Act*, R.S.O. 1990, c. S.5, s. 130(1), (8); *Securities Act*, R.S.A. 2000, c. S-4, s. 203(1), (10); *Securities Act*, R.S.B.C. 1996, c. 418, s. 131(1), (11); *The Securities Act*, C.C.S.M. c. S50, s. 141(1), (11); *Securities Act*, S.N.B. 2004, c. S-5.5, s. 149(1), (9); *Securities Act*, R.S.N.L. 1990, c. S-13, s. 130(1), (8); *Securities Act*, R.S.N.S. 1989, c. 418, s. 137(1), (8); *Securities Act*, S.Nu. 2009, c. 12, s. 111(1), (12); *Securities Act*, S.N.W.T. 2008, c. 10, s. 111(1), (12); *Securities Act*, R.S.P.E.I. 1988, c. S-3.1, s. 111(1), (12); *Securities Act*, R.S.Q. c. V-1.1, ss. 218, 219, 221; *The Securities Act, 1988*, S.S. 1988-89, c. S-42.2, s. 137(1), (9); *Securities Act*, S.Y. 2007, c. 16, s. 111(1), (13).

6 We understand that this analysis was before the Standing Senate Committee on Banking, Trade and Commerce in 2007.

7 The United States Bankruptcy Court for the District of Delaware in *In Re: Mid-American Waste Systems, Inc.* 228 B.R. 816 (1999), indicated that this provision applies to underwriters' claims, and reflects the policy rationale that such stakeholders are in a better position to evaluate the risks associated with the issuance of stock than are general creditors.

TAB 22

2012 ONSC 4377
Ontario Superior Court of Justice [Commercial List]

Sino-Forest Corp., Re

2012 CarswellOnt 9430, 2012 ONSC 4377, 218 A.C.W.S. (3d) 489, 92 C.B.R. (5th) 99

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)

Morawetz J.

Heard: June 26, 2012
Judgment: July 27, 2012
Docket: CV-12-9667-00CL

Counsel: Robert W. Staley, Jonathan Bell for Applicant
Jennifer Stam for Monitor
Kenneth Dekker for BDO Limited
Peter Griffin, Peter Osborne for Ernst & Young LLP
Benjamin Zarnett, Robert Chadwick, Brendan O'Neill for Ad Hoc Committee of Noteholders
James Grout for Ontario Securities Commission
Emily Cole, Joseph Marin for Allen Chan
Simon Bieber for David Horsley
David Bish, John Fabello, Adam Slavens for Underwriters Named in the Class Action
Max Starnino, Kirk Baert for Ontario Plaintiffs
Larry Lowenstein for Board of Directors

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Applicant SFC was granted stay under Companies' Creditors Arrangement Act (CCAA) in March 2012 and on same date sales process order was granted — June 20, 2012 was established as claims bar date — SFC support of 72 per cent of noteholders for intended to plan of compromise or arrangement — Class actions had been commenced against SFC in both Ontario, Quebec, Saskatchewan, and New York State for damages resulting to purchase of shares in SFC at inflated prices — Applicant brought application for declaration that claims against it which resulted from ownership, purchase, or sale of equity interest in SFC, and related indemnity claims, were equity claims as defined in s. 2 of CCAA — Application granted — Basis for differentiation flowed from fundamentally different nature of debt and equity investments; shareholders had unlimited upside potential when purchasing shares, while creditors had no corresponding upside potential — Claims advanced in shareholder claims were clearly equity claims — Shareholder claims underlay related indemnity claims — Plain language in definition of equity claim in CCAA did not focus on identity of claimant, rather, it focused on nature of claim — It would be totally inconsistent to arrive at conclusion that would enable either auditors or underwriters, through claim for indemnification, to be treated as creditors when underlying actions of shareholders could not achieve same status.

2012 ONSC 4377, 2012 CarswellOnt 9430, 218 A.C.W.S. (3d) 489, 92 C.B.R. (5th) 99

Table of Authorities

Cases considered by *Morawetz J.*:

Blue Range Resource Corp., Re (2000), 2000 CarswellAlta 12, 259 A.R. 30, 76 Alta. L.R. (3d) 338, [2000] 4 W.W.R. 738, 2000 ABQB 4, 15 C.B.R. (4th) 169 (Alta. Q.B.) — referred to

Central Capital Corp., Re (1996), 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, (sub nom. *Royal Bank v. Central Capital Corp.*) 88 O.A.C. 161, 1996 CarswellOnt 316, 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88 (Ont. C.A.) — referred to

EarthFirst Canada Inc., Re (2009), 2009 ABQB 316, 2009 CarswellAlta 1069, 56 C.B.R. (5th) 102 (Alta. Q.B.) — referred to

Nelson Financial Group Ltd., Re (2010), 71 C.B.R. (5th) 153, 75 B.L.R. (4th) 302, 2010 ONSC 6229, 2010 CarswellOnt 8655 (Ont. S.C.J. [Commercial List]) — referred to

Return on Innovation Capital Ltd. v. Gandi Innovations Ltd. (2011), 2011 CarswellOnt 8590, 2011 ONSC 5018, 83 C.B.R. (5th) 123 (Ont. S.C.J. [Commercial List]) — followed

Return on Innovation Capital Ltd. v. Gandi Innovations Ltd. (2012), 2012 ONCA 10, 2012 CarswellOnt 103, 90 C.B.R. (5th) 141 (Ont. C.A.) — referred to

Stelco Inc., Re (2006), 2006 CarswellOnt 407, 17 C.B.R. (5th) 95 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

s. 510(b) — referred to

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

Generally — referred to

s. 2(1) — considered

s. 2(1) "equity claim" — considered

s. 2(1) "equity claim" (d) — considered

s. 2(1) "equity claim" (e) — considered

s. 2(1) "equity interest" — considered

s. 2(1) "equity interest" (a) — referred to

s. 6(8) — referred to

s. 22(1) — referred to

Securities Act, R.S.O. 1990, c. S.5

Generally — referred to

APPLICATION by insolvent company for declaration that certain claims against it were equity claims pursuant to Companies' Creditors Arrangement Act.

***Morawetz J.*:**

Overview

1 Sino-Forest Corporation ("SFC" or the "Applicant") seeks an order directing that claims against SFC, which result from the ownership, purchase or sale of an equity interest in SFC, are "equity claims" as defined in section 2 of the *Companies' Creditors Arrangement Act* ("CCAA") including, without limitation: (i) the claims by or on behalf of current or former shareholders asserted in the proceedings listed in Schedule "A" (collectively, the "Shareholder Claims"); and (ii) any indemnification claims against SFC related to or arising from the Shareholder Claims, including, without limitation, those by or on behalf of any of the other defendants to the proceedings listed in Schedule "A" (the "Related Indemnity Claims").

2 SFC takes the position that the Shareholder Claims are "equity claims" as defined in the CCAA as they are claims in respect of a monetary loss resulting from the ownership, purchase or sale of an equity interest in SFC and, therefore, come within the definition. SFC also takes the position that the Related Indemnity Claims are "equity claims" as defined in the CCAA as they are claims for contribution or indemnity in respect of a claim that is an equity claim and, therefore, also come within the definition.

3 On March 30, 2012, the court granted the Initial Order providing for the CCAA stay against SFC and certain of its subsidiaries. FTI Consulting Canada Inc. was appointed as Monitor.

4 On the same day, the Sales Process Order was granted, approving Sales Process procedures and authorizing and directing SFC, the Monitor and Houlihan Lokey to carry out the Sales Process.

5 On May 14, 2012, the court issued a Claims Procedure Order, which established June 20, 2012 as the Claims Bar Date.

6 The stay of proceedings has since been extended to September 28, 2012.

7 Since the outset of the proceedings, SFC has taken the position that it is important for these proceedings to be completed as soon as possible in order to, among other things, (i) enable the business operated in the Peoples Republic of China ("PRC") to be separated from SFC and put under new ownership; (ii) enable the restructured business to participate in the Q4 sales season in the PRC market; and (iii) maintain the confidence of stakeholders in the PRC (including local and national governmental bodies, PRC lenders and other stakeholders) that the business in the PRC can be successfully separated from SFC and operate in the ordinary course in the near future.

8 SFC has negotiated a Support Agreement with the Ad Hoc Committee of Noteholders and intends to file a plan of compromise or arrangement (the "Plan") under the CCAA by no later than August 27, 2012, based on the deadline set out in the Support Agreement and what they submit is the commercial reality that SFC must complete its restructuring as soon as possible.

9 Noteholders holding in excess of $1.296 billion, or approximately 72% of the approximately $1.8 billion of SFC's noteholders' debt, have executed written support agreements to support the SFC CCAA Plan as of March 30, 2012.

Shareholder Claims Asserted Against SFC

(i) Ontario

10 By Fresh as Amended Statement of Claim dated April 26, 2012 (the "Ontario Statement of Claim"), the Trustees of the Labourers' Pension Fund of Central and Eastern Canada and other plaintiffs asserted various claims in a class proceeding (the "Ontario Class Proceedings") against SFC, certain of its current and former officers and directors, Ernst & Young LLP ("E&Y"), BDO Limited ("BDO"), Poyry (Beijing) Consulting Company Limited ("Poyry") and SFC's underwriters (collectively, the "Underwriters").

11 Section 1(m) of the Ontario Statement of Claim defines "class" and "class members" as:

> All persons and entities, wherever they may reside who acquired Sino's Securities during the Class Period by distribution in Canada or on the Toronto Stock Exchange or other secondary market in Canada, which securities include those acquired over the counter, and all persons and entities who acquired Sino's Securities during the Class Period who are resident of Canada or were resident of Canada at the time of acquisition and who acquired Sino's Securities outside of Canada, except the Excluded Persons.

12 The term "Securities" is defined as "Sino's common shares, notes and other securities, as defined in the OSA". The term "Class Period" is defined as the period from and including March 19, 2007 up to and including June 2, 2011.

13 The Ontario Class Proceedings seek damages in the amount of approximately $9.2 billion against SFC and the other defendants.

14 The thrust of the complaint in the Ontario Class Proceedings is that the class members are alleged to have purchased securities at "inflated prices during the Class Period" and that absent the alleged misconduct, sales of such securities "would have occurred at prices that reflected the true value" of the securities. It is further alleged that "the price of Sino's Securities was directly affected during the Class Period by the issuance of the Impugned Documents".

(ii) Quebec

15 By action filed in Quebec on June 9, 2011, Guining Liu commenced an action (the "Quebec Class Proceedings") against SFC, certain of its current and former officers and directors, E&Y and Poyry. The Quebec Class Proceedings do not name BDO or the Underwriters as defendants. The Quebec Class Proceedings also do not specify the quantum of damages sought, but rather reference "damages in an amount equal to the losses that it and the other members of the group suffered as a result of purchasing or acquiring securities of Sino at inflated prices during the Class Period".

16 The complaints in the Quebec Class Proceedings centre on the effect of alleged misrepresentations on the share price. The duty allegedly owed to the class members is said to be based in "law and other provisions of the *Securities Act*", to ensure the prompt dissemination of truthful, complete and accurate statements regarding SFC's business and affairs and to correct any previously-issued materially inaccurate statements.

(iii) Saskatchewan

17 By Statement of Claim dated December 1, 2011 (the "Saskatchewan Statement of Claim"), Mr. Allan Haigh commenced an action (the "Saskatchewan Class Proceedings") against SFC, Allen Chan and David Horsley.

18 The Saskatchewan Statement of Claim does not specify the quantum of damages sought, but instead states in more general terms that the plaintiff seeks "aggravated and compensatory damages against the defendants in an amount to be determined at trial".

19 The Saskatchewan Class Proceedings focus on the effect of the alleged wrongful acts upon the trading price of SFC's securities:

> The price of Sino's securities was directly affected during the Class Period by the issuance of the Impugned Documents. The defendants were aware at all material times that the effect of Sino's disclosure documents upon the price of its Sino's [sic] securities.

(iv) New York

20 By Verified Class Action Complaint dated January 27, 2012, (the "New York Complaint"), Mr. David Leapard and IMF Finance SA commenced a class proceeding against SFC, Mr. Allen Chan, Mr. David Horsley, Mr. Kai Kit Poon, a subset of the Underwriters, E&Y, and Ernst & Young Global Limited (the "New York Class Proceedings").

21 SFC contends that the New York Class Proceedings focus on the effect of the alleged wrongful acts upon the trading price of SFC's securities.

22 The plaintiffs in the various class actions have named parties other than SFC as defendants, notably, the Underwriters and the auditors, E&Y, and BDO, as summarized in the table below. The positions of those parties are detailed later in these reasons.

	Ontario	**Quebec**	**Saskatchewan**	**New York**
E&Y LLP	X	X	-	X
E&Y Global	-	-	-	X

BDO	X	-	-	-
Poyry	X	X	-	-
Underwriters	11	-	-	2

Legal Framework

23 Even before the 2009 amendments to the CCAA dealing with equity claims, courts recognized that there is a fundamental difference between shareholder equity claims as they relate to an insolvent entity versus creditor claims. Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise: *Blue Range Resource Corp., Re*, [2000] 4 W.W.R. 738 (Alta. Q.B.) [*Blue Range Resources*]; *Stelco Inc., Re* [2006 CarswellOnt 407 (Ont. S.C.J. [Commercial List])], (2006) CanLII 1773 [*Stelco*]; *Central Capital Corp., Re* (1996), 27 O.R. (3d) 494 (Ont. C.A.).

24 The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential: *Nelson Financial Group Ltd., Re*, 2010 ONSC 6229 (Ont. S.C.J. [Commercial List]) [*Nelson Financial*].

25 As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement: *Blue Range Resource Corp., Re*, *supra*; *Stelco Inc., Re*, *supra*; *EarthFirst Canada Inc., Re* (2009), 56 C.B.R. (5th) 102 (Alta. Q.B.) [*EarthFirst Canada*]; and *Nelson Financial*, *supra*.

26 In 2009, significant amendments were made to the CCAA. Specific amendments were made with the intention of clarifying that equity claims are subordinated to other claims.

27 The 2009 amendments define an "equity claim" and an "equity interest". Section 2 of the CCAA includes the following definitions:

> "Equity Claim" means a claim that is in respect of an equity interest, including a claim for, among others, (...)
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);
>
> "Equity Interest" means
>
> (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt,

28 Section 6(8) of the CCAA prohibits a distribution to equity claimants prior to payment in full of all non-equity claims.

29 Section 22(1) of the CCAA provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise.

Position of Ernst & Young

30 E&Y opposes the relief sought, at least as against E&Y, since the E&Y proof of claim evidence demonstrates in its view that E&Y's claim:

> (a) is not an equity claim;

(b) does not derive from or depend upon an equity claim (in whole or in part);

(c) represents discreet and independent causes of action as against SFC and its directors and officers arising from E&Y's direct contractual relationship with such parties (or certain of such parties) and/or the tortious conduct of SFC and/or its directors and officers for which they are in law responsible to E&Y; and

(d) can succeed independently of whether or not the claims of the plaintiffs in the class actions succeed.

31 In its factum, counsel to E&Y acknowledges that during the periods relevant to the Class Action Proceedings, E&Y was retained as SFC's auditor and acted as such from 2007 until it resigned on April 5, 2012.

32 On June 2, 2011, Muddy Waters LLC ("Muddy Waters") issued a report which purported to reveal fraud at SFC. In the wake of that report, SFC's share price plummeted and Muddy Waters profited from its short position.

33 E&Y was served with a multitude of class action claims in numerous jurisdictions.

34 The plaintiffs in the Ontario Class Proceedings claim damages in the aggregate, as against all defendants, of $9.2 billion on behalf of resident and non-resident shareholders and noteholders. The causes of action alleged are both statutory, under the *Securities Act (Ontario)* and at common law, in negligence and negligent misrepresentation.

35 In its factum, counsel to E&Y acknowledges that the central claim in the class actions is that SFC made a series of misrepresentations in respect of its timber assets. The claims against E&Y and the other third party defendants are that they failed to detect these misrepresentations and note in particular that E&Y's audit did not comply with Canadian generally accepted accounting standards. Similar claims are advanced in Quebec and the U.S.

36 Counsel to E&Y notes that on May 14, 2012 the court granted a Claims Procedure Order which, among other things, requires proofs of claim to be filed no later than June 20, 2012. E&Y takes issue with the fact that this motion was then brought notwithstanding that proofs of claim and D&O proofs of claim had not yet been filed.

37 E&Y has filed with the Monitor, in accordance with the Claims Procedure Order, a proof of claim against SFC and a proof of claim against the directors and officers of SFC.

38 E&Y takes the position that it has contractual claims of indemnification against SFC and its subsidiaries and has statutory and common law claims of contribution and/or indemnity against SFC and its subsidiaries for all relevant years. E&Y contends that it has stand-alone claims for breach of contract and negligent and/or fraudulent misrepresentation against the company and its directors and officers.

39 Counsel submits that E&Y's claims against Sino-Forest and the SFC subsidiaries are:

(a) creditor claims;

(b) derived from E&Y retainers by and/or on behalf of Sino-Forest and the SFC subsidiaries and E&Y's relationship with such parties, all of which are wholly independent and conceptually different from the claims advanced by the class action plaintiffs;

(c) claims that include the cost of defending and responding to various proceedings, both pre- and post-filing; and

(d) not equity claims in the sense contemplated by the CCAA. E&Y's submission is that equity holders of Sino-Forest have not advanced, and could not advance, any claims against SFC's subsidiaries.

40 Counsel further contends that E&Y's claim is distinct from any and all potential and actual claims by the plaintiffs in the class actions against Sino-Forest and that E&Y's claim for contribution and/or indemnity is not based on the claims

against Sino-Forest advanced in the class actions but rather only in part on those claims, as any success of the plaintiffs in the class actions against E&Y would not necessarily lead to success against Sino-Forest, and vice versa. Counsel contends that E&Y has a distinct claim against Sino-Forest independent of that of the plaintiffs in the class actions. The success of E&Y's claims against Sino-Forest and the SFC subsidiaries, and the success of the claims advanced by the class action plaintiffs, are not co-dependent. Consequently, counsel contends that E&Y's claim is that of an unsecured creditor.

41 From a policy standpoint, counsel to E&Y contends that the nature of the relationship between a shareholder, who may be in a position to assert an equity claim (in addition to other claims) is fundamentally different from the relationship existing between a corporation and its auditors.

Position of BDO Limited

42 BDO was auditor of Sino-Forest Corporation between 2005 and 2007, when it was replaced by E&Y.

43 BDO has a filed a proof of claim against Sino-Forest pursuant to the Claims Procedure Order.

44 BDO's claim against Sino-Forest is primarily for breach of contract.

45 BDO takes the position that its indemnity claims, similar to those advanced by E&Y and the Underwriters, are not equity claims within the meaning of s. 2 of the CCAA.

46 BDO adopts the submissions of E&Y which, for the purposes of this endorsement, are not repeated.

Position of the Underwriters

47 The Underwriters take the position that the court should not decide the equity claims motion at this time because it is premature or, alternatively, if the court decides the equity claims motion, the equity claims order should not be granted because the Related Indemnity Claims are not "equity claims" as defined in s. 2 of the CCAA.

48 The Underwriters are among the defendants named in some of the class actions. In connection with the offerings, certain Underwriters entered into agreements with Sino-Forest and certain of its subsidiaries providing that Sino-Forest and, with respect to certain offerings, the Sino-Forest subsidiary companies, agree to indemnify and hold harmless the Underwriters in connection with an array of matters that could arise from the offerings.

49 The Underwriters raise the following issues:

(i) Should this court decide the equity claims motion at this time?

(ii) If this court decides the equity claims motion at this time, should the equity claims order be granted?

50 On the first issue, counsel to the Underwriters takes the position that the issue is not yet ripe for determination.

51 Counsel submits that, by seeking the equity claims order at this time, Sino-Forest is attempting to pre-empt the Claims Procedure Order, which already provides a process for the determination of claims. Until such time as the claims procedure in respect of the Related Indemnity Claims is completed, and those claims are determined pursuant to that process, counsel contends the subject of the equity claims motion raises a merely hypothetical question as the court is being asked to determine the proper interpretation of s. 2 of the CCAA before it has the benefit of an actual claim in dispute before it.

52 Counsel further contends that by asking the court to render judgment on the proper interpretation of s. 2 of the CCAA in the hypothetical, Sino-Forest has put the court in a position where its judgment will not be made in the context of particular facts or with a full and complete evidentiary record.

53 Even if the court determines that it can decide this motion at this time, the Underwriters submit that the relief requested should not be granted.

Position of the Applicant

54 The Applicant submits that the amendments to the CCAA relating to equity claims closely parallel existing U.S. law on the subject and that Canadian courts have looked to U.S. courts for guidance on the issue of equity claims as the subordination of equity claims has long been codified there: see e.g. *Blue Range Resources*, *supra*, and *Nelson Financial*, *supra*.

55 The Applicant takes the position that based on the plain language of the CCAA, the Shareholder Claims are "equity claims" as defined in s. 2 as they are claims in respect of a "monetary loss resulting from the ownership, purchase or sale of an equity interest".

56 The Applicant also submits the following:

> (a) the Ontario, Quebec, Saskatchewan and New York Class Actions (collectively, the "Class Actions") all advance claims on behalf of shareholders.
>
> (b) the Class Actions also allege wrongful conduct that affected the trading price of the shares, in that the alleged misrepresentation "artificially inflated" the share price; and
>
> (c) the Class Actions seek damages relating to the trading price of SFC shares and, as such, allege a "monetary loss" that resulted from the ownership, purchase or sale of shares, as defined in s. 2 of the CCAA.

57 Counsel further submits that, as the Shareholder Claims are "equity claims", they are expressly subordinated to creditor claims and are prohibited from voting on the plan of arrangement.

58 Counsel to the Applicant also submits that the definition of "equity claims" in s. 2 of the CCAA expressly includes indemnity claims that relate to other equity claims. As such, the Related Indemnity Claims are equity claims within the meaning of s. 2.

59 Counsel further submits that there is no distinction in the CCAA between the source of any claim for contribution or indemnity; whether by statute, common law, contractual or otherwise. Further, and to the contrary, counsel submits that the legal characterization of a contribution or indemnity claim depends solely on the characterization of the primary claim upon which contribution or indemnity is sought.

60 Counsel points out that in *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 5018 (Ont. S.C.J. [Commercial List]), leave to appeal denied, 2012 ONCA 10 (Ont. C.A.) [*Return on Innovation*] this court characterized the contractual indemnification claims of directors and officers in respect of an equity claim as "equity claims".

61 Counsel also submits that guidance on the treatment of underwriter and auditor indemnification claims can be obtained from the U.S. experience. In the U.S., courts have held that the indemnification claims of underwriters for liability or defence costs constitute equity claims that are subordinated to the claims of general creditors. Counsel submits that insofar as the primary source of liability is characterized as an equity claim, so too is any claim for contribution and indemnity based on that equity claim.

62 In this case, counsel contends, the Related Indemnity Claims are clearly claims for "contribution and indemnity" based on the Shareholder Claims.

Position of the Ad Hoc Noteholders

63 Counsel to the Ad Hoc Noteholders submits that the Shareholder Claims are "equity claims" as they are claims in respect of an equity interest and are claims for "a monetary loss resulting from the ownership, purchase or sale of an equity interest" per subsection (d) of the definition of "equity claims" in the CCAA.

64 Counsel further submits that the Related Indemnity Claims are also "equity claims" as they fall within the "clear and unambiguous" language used in the definition of "equity claim" in the CCAA. Subsection (e) of the definition refers expressly and without qualification to claims for "contribution or indemnity" in respect of claims such as the Shareholder Claims.

65 Counsel further submits that had the legislature intended to qualify the reference to "contribution or indemnity" in order to exempt the claims of certain parties, it could have done so, but it did not.

66 Counsel also submits that, if the plain language of subsection (e) is not upheld, shareholders of SFC could potentially create claims to receive indirectly what they could not receive directly (*i.e.*, payment in respect of equity claims through the Related Indemnity Claims) — a result that could not have been intended by the legislature as it would be inconsistent with the purposes of the CCAA.

67 Counsel to the Ad Hoc Noteholders also submits that, before the CCAA amendments in 2009 (the "CCAA Amendments"), courts subordinated claims on the basis of:

> (a) the general expectations of creditors and shareholders with respect to priority and assumption of risks; and
>
> (b) the equitable principles and considerations set out in certain U.S. cases: see e.g. *Blue Range Resource Corp., Re*, *supra*.

68 Counsel further submits that, before the CCAA Amendments took effect, courts had expanded the types of claims characterized as equity claims; first to claims for damages of defrauded shareholders and then to contractual indemnity claims of shareholders: see *Blue Range Resources*, *supra* and *EarthFirst Canada*, *supra*.

69 Counsel for the Ad Hoc Noteholders also submits that indemnity claims of underwriters have been treated as equity claims in the United States, pursuant to section 510(b) of the U.S. Bankruptcy Code. This submission is detailed at paragraphs 20-25 of their factum which reads as follows:

> 20. The desire to more closely align the Canadian approach to equity claims with the U.S. approach was among the considerations that gave rise to the codification of the treatment of equity claims. Canadian courts have also looked to the U.S. law for guidance on the issue of equity claims where codification of the subordination of equity claims has been long-standing.
>
> Janis Sarra at p. 209, Ad Hoc Committee's Book of Authorities, Tab 10.
>
> Report of the Standing Senate Committee on Banking, Trade and Commerce, "Debtors and Creditors Sharing the Burden: A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement act*" (2003) at 158, [...]
>
> *Blue Range* [*Resources*] at paras. 41-57 [...]
>
> 21. Pursuant to § 510(b) of the *U.S. Bankruptcy Code*, all creditors must be paid in full before shareholders are entitled to receive any distribution. § 510(b) of the *U.S. Bankruptcy Code* and the relevant portion of § 502, which is referenced in § 510(b), provide as follows:
>
> § 510. Subordination

(b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

§ 502. Allowance of claims or interests

(e) (1) Notwithstanding subsections (a), (b) and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that

. . .

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

. . .

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

22. U.S. appellate courts have interpreted the statutory language in § 510(b) broadly to subordinate the claims of shareholders that have a nexus or causal relationship to the purchase or sale of securities, including damages arising from alleged illegality in the sale or purchase of securities or from corporate misconduct whether predicated on pre or post-issuance conduct.

Re Telegroup Inc. (2002), 281 F. 3d 133 (3rd Cir. U.S. Court of Appeals)

[...]

American Broadcasting Systems Inc. v. Nugent, U.S. Court of Appeals for the Ninth Circuit, Case Number 98-17133 (24 January 2001) [...]

23. Further, U.S. courts have held that indemnification claims of underwriters against the corporation for liability or defence costs when shareholders or former shareholders have sued underwriters constitute equity claims in the insolvency of the corporation that are subordinated to the claims of general creditors based on: (a) the plain language of § 510(b), which references claims for "reimbursement or contribution" and (b) risk allocation as between general creditors and those parties that play a role in the purchase and sale of securities that give rise to the shareholder claims (i.e., directors, officers and underwriters).

In re Mid-American Waste Sys., 228 B.R. 816, 1999 Bankr. LEXIS 27 (Bankr. D. Del. 1999) [*Mid-American*] [...]

In re Jacom Computer Servs., 280 B.R. 570, 2002 Bankr. LEXIS 758 (Bankr. S.D.N.Y. 2002) [...]

24. In *Mid-American*, the Court stated the following with respect to the "plain language" of § 510(b), its origins and the inclusion of "reimbursement or contribution" claims in that section:

... I find that the plain language of § 510(b), its legislative history, and applicable case law clearly show that § 510(b) intends to subordinate the indemnification claims of officers, directors, and underwriters for both liability

> *and expenses incurred in connection with the pursuit of claims for rescission or damages by purchasers or sellers of the debtor's securities*. The meaning of amended § 510(b), specifically the language "for reimbursement or contribution ... on account of [a claim arising from rescission or damages arising from the purchase or sale of a security]," can be discerned by a plain reading of its language.
>
> ... it is readily apparent that the rationale for section 510(b) is not limited to preventing shareholder claimants from improving their position vis-a-vis general creditors; *Congress also made the decision to subordinate based on risk allocation. Consequently, when Congress amended § 510(b) to add reimbursement and contribution claims, it was not radically departing from an equityholder claimant treatment provision, as NatWest suggests; it simply added to the subordination treatment new classes of persons and entities involved with the securities transactions giving rise to the rescission and damage claims*. The 1984 amendment to § 510(b) is a logical extension of one of the rationales for the original section — *because Congress intended the holders of securities law claims to be subordinated, why not also subordinate claims of other parties (e.g., officers and directors and underwriters) who play a role in the purchase and sale transactions which give rise to the securities law claims?* As I view it, in 1984 Congress made a legislative judgment that claims emanating from tainted securities law transactions should not have the same priority as the claims of general creditors of the estate.
>
> [emphasis added]
>
> [...]

25. Further, the U.S. courts have held that the degree of culpability of the respective parties is a non-issue in the disallowance of claims for indemnification of underwriters; the equities are meant to benefit the debtor's direct creditors, not secondarily liable creditors with contingent claims.

> *In re Drexel Burnham Lambert Group*, 1992 Bankr. LEXIS 2023 (Bankr. S.D.N.Y. 1992) [...]

70 Counsel submits that there is no principled basis for treating indemnification claims of auditors differently than those of underwriters.

Analysis

Is it Premature to Determine the Issue?

71 The class action litigation was commenced prior to the CCAA Proceedings. It is clear that the claims of shareholders as set out in the class action claims against SFC are "equity claims" within the meaning of the CCAA.

72 In my view, this issue is not premature for determination, as is submitted by the Underwriters.

73 The Class Action Proceedings preceded the CCAA Proceedings. It has been clear since the outset of the CCAA Proceedings that this issue — namely, whether the claims of E&Y, BDO and the Underwriters as against SFC, would be considered "equity claims" — would have to be determined.

74 It has also been clear from the outset of the CCAA Proceedings, that a Sales Process would be undertaken and the expected proceeds arising from the Sales Process would generate proceeds insufficient to satisfy the claims of creditors.

75 The Claims Procedure is in place but, it seems to me that the issue that has been placed before the court on this motion can be determined independently of the Claims Procedure. I do not accept that any party can be said to be prejudiced if this threshold issue is determined at this time. The threshold issue does not depend upon a determination of quantification of any claim. Rather, its effect will be to establish whether the claims of E&Y, BDO and the Underwriters will be subordinated pursuant to the provisions of the CCAA. This is independent from a determination as to the validity of any claim and the quantification thereof.

Should the Equity Claims Order be Granted?

76 I am in agreement with the submission of counsel for the Ad Hoc Noteholders to the effect that the characterization of claims for indemnity turns on the characterization of the underlying primary claims.

77 In my view, the claims advanced in the Shareholder Claims are clearly equity claims. The Shareholder Claims underlie the Related Indemnity Claims.

78 In my view, the CCAA Amendments have codified the treatment of claims addressed in pre-amendment cases and have further broadened the scope of equity claims.

79 The plain language in the definition of "equity claim" does not focus on the identity of the claimant. Rather, it focuses on the nature of the claim. In this case, it seems clear that the Shareholder Claims led to the Related Indemnity Claims. Put another way, the inescapable conclusion is that the Related Indemnity Claims are being used to recover an equity investment.

80 The plain language of the CCAA dictates the outcome, namely, that the Shareholder Claims and the Related Indemnity Claims constitute "equity claims" within the meaning of the CCAA. This conclusion is consistent with the trend towards an expansive interpretation of the definition of "equity claims" to achieve the purpose of the CCAA.

81 In *Return on Innovation*, Newbould J. characterized the contractual indemnification claims of directors and officers as "equity claims". The Court of Appeal denied leave to appeal. The analysis in *Return on Innovation* leads to the conclusion that the Related Indemnity Claims are also equity claims under the CCAA.

82 It would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the Underwriters, through a claim for indemnification, to be treated as creditors when the underlying actions of the shareholders cannot achieve the same status. To hold otherwise would indeed provide an indirect remedy where a direct remedy is not available.

83 Further, on the issue of whether the claims of E&Y, BDO and the Underwriters fall within the definition of equity claims, there are, in my view, two aspects of these claims and it is necessary to keep them conceptually separate.

84 The first and most significant aspect of the claims of E&Y, BDO and the Underwriters constitutes an "equity claim" within the meaning of the CCAA. Simply put, but for the Class Action Proceedings, it is inconceivable that claims of this magnitude would have been launched by E&Y, BDO and the Underwriters as against SFC. The class action plaintiffs have launched their actions against SFC, the auditors and the Underwriters. In turn, E&Y, BDO and the Underwriters have launched actions against SFC and its subsidiaries. The claims of the shareholders are clearly "equity claims" and a plain reading of s. 2(1)(e) of the CCAA leads to the same conclusion with respect to the claims of E&Y, BDO and the Underwriters. To hold otherwise, would, as stated above, lead to a result that is inconsistent with the principles of the CCAA. It would potentially put the shareholders in a position to achieve creditor status through their claim against E&Y, BDO and the Underwriters even though a direct claim against SFC would rank as an "equity claim".

85 I also recognize that the legal construction of the claims of the auditors and the Underwriters as against SFC is different than the claims of the shareholders against SFC. However, that distinction is not, in my view, reflected in the language of the CCAA which makes no distinction based on the status of the party but rather focuses on the substance of the claim.

86 Critical to my analysis of this issue is the statutory language and the fact that the CCAA Amendments came into force after the cases relied upon by the Underwriters and the auditors.

87 It has been argued that the amendments did nothing more than codify pre-existing common law. In many respects, I accept this submission. However, I am unable to accept this submission when considering s. 2(1) of the CCAA, which

provides clear and specific language directing that "equity claim" means a claim that is in respect of an equity interest, including a claim for, among other things, "(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)".

88 Given that a shareholder claim falls within s. 2(1)(d), the plain words of subsections (d) and (e) lead to the conclusions that I have set out above.

89 I fail to see how the very clear words of subsection (e) can be seen to be a codification of existing law. To arrive at the conclusion put forth by E&Y, BDO and the Underwriters would require me to ignore the specific words that Parliament has recently enacted.

90 I cannot agree with the position put forth by the Underwriters or by the auditors on this point. The plain wording of the statute has persuaded me that it does not matter whether an indemnity claim is seeking no more than allocation of fault and contribution at common law, or whether there is a free-standing contribution and indemnity claim based on contracts.

91 However, that is not to say that the full amount of the claim by the auditors and Underwriters can be characterized, at this time, as an "equity claim".

92 The second aspect to the claims of the auditors and underwriters can be illustrated by the following hypothetical: if the claim of the shareholders does not succeed against the class action defendants, E&Y, BDO and the Underwriters will not be liable to the class action plaintiffs. However, these parties may be in a position to demonstrate that they do have a claim against SFC for the costs of defending those actions, which claim does not arise as a result of "contribution or indemnity in respect of an equity claim".

93 It could very well be that each of E&Y, BDO and the Underwriters have expended significant amounts in defending the claims brought by the class action plaintiffs which, in turn, could give rise to contractual claims as against SFC. If there is no successful equity claim brought by the class action plaintiffs, it is arguable that any claim of E&Y, BDO and the Underwriters may legitimately be characterized as a claim for contribution or indemnity but not necessarily in respect of an equity claim. If so, there is no principled basis for subordinating this portion of the claim. At this point in time, the quantification of such a claim cannot be determined. This must be determined in accordance with the Claims Procedure.

94 However, it must be recognized that, by far the most significant part of the claim, is an "equity claim".

95 In arriving at this determination, I have taken into account the arguments set forth by E&Y, BDO and the Underwriters. My conclusions recognize the separate aspects of the Related Indemnity Claims as submitted by counsel to the Underwriters at paragraph 40 of their factum which reads:

> ...it must be recognized that there are, in fact, at least two different kinds of Related Indemnity Claims:
>
> (a) indemnity claims against SFC in respect of Shareholder Claims against the auditors and the Underwriters; and
>
> (b) indemnity claims against SFC in respect of the defence costs of the auditors and the Underwriters in connection with defending themselves against Shareholder Claims.

Disposition

96 In the result, an order shall issue that the claims against SFC resulting from the ownership, purchase or sale of equity interests in SFC, including, without limitation, the claims by or on behalf of current or former shareholders asserted in the proceedings listed in Schedule "A" are "equity claims" as defined in s. 2 of the CCAA, being claims in respect of monetary losses resulting from the ownership, purchase or sale of an equity interest. It is noted that counsel for the class action plaintiffs did not contest this issue.

97 In addition, an order shall also issue that any indemnification claim against SFC related to or arising from the Shareholders Claims, including, without limitation, by or on behalf of any of the other defendants to the proceedings listed in Schedule "A" are "equity claims" under the CCAA, being claims for contribution or indemnity in respect of a claim that is an equity claim. However, I feel it is premature to determine whether this order extends to the aspect of the Related Indemnity Claims that corresponds to the defence costs of the Underwriters and the auditors in connection with defending themselves against the Shareholder Claims.

98 A direction shall also issue that these orders are made without prejudice to SFC's rights to apply for a similar order with respect to (i) any claims in the statement of claim that are in respect of securities other than shares and (ii) any indemnification claims against SFC related thereto.

Schedule "A" — Shareholder Claims

1. *Trustees of the Labourers' Pension Fund of Central and Eastern Canada et al. v. Sino-Forest Corporation et al.* (Ontario Superior Court of Justice, Court File No. CV-11-431153-00CP)

2. *Guining Liu v. Sino-Forest Corporation et al.* (Quebec Superior Court, Court File No.: 200-06-000132-111)

3. *Allan Haigh v. Sino-Forest Corporation et al.* (Saskatchewan Court of Queen's Bench, Court File No. 2288 of 2011)

4. *David Leapard et al. v. Allen T.Y. Chan et al.* (District court of the Southern District of New York, Court File No. 650258/2012)

Application granted.

TAB 23

Most Negative Treatment: Check subsequent history and related treatments.

2011 ONSC 5018
Ontario Superior Court of Justice [Commercial List]

Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.

2011 CarswellOnt 8590, 2011 ONSC 5018, 206 A.C.W.S. (3d) 464, 83 C.B.R. (5th) 123

Return on Innovation Capital Ltd. as agent for Roi Fund Inc, Roi Sceptre Canadian Retirement Fund, Roi Global Retirement Fund and Roi High Yield Private Placement Fund and Any Other Fund Managed By Roi from time to time (Applicants) and Gandi Innovations Limited, Gandi Innovations Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co and Gandi Special Holdings LLC. (Respondents)

Newbould J.

Heard: August 18, 2011
Judgment: August 25, 2011 *
Docket: 09-CL-8172

Counsel: Harvey Chaiton, Maya Poliak for Monitor, BDO Canada Limited
Mathew Halpin, Evan Cobb for TA Associates Inc.
Christopher J. Cosgriffe for Harry Gandy, James Gandy, Trent Garmoe

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.6 Restricted and postponed claims
X.6.b Officers, directors, and stockholders
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.e Duty to manage
III.1.e.iii Indemnification by corporation
Headnote
Business associations --- Specific matters of corporate organization — Directors and officers — Duty to manage — Indemnification by corporation
GG was group of companies under protection pursuant to Companies' Creditors Arrangement Act — GH LLC was parent of other companies in GG — Creditors were officers and board members of GH LLC — T Inc. invested in GG by way of debt and equity — T Inc. brought arbitration proceedings against creditors for recovery of its investment in GG — Creditors filed proof of claim against GG based on indemnity provisions — Creditors claimed they were entitled to indemnification by GG in respect of any damages award made against them in arbitration — Creditors disputed monitor's disallowance of indemnity claims — Monitor brought motion for advice and directions relating to creditors' indemnity claims — Motion was granted — Only indemnity given in favour of creditors was by GH LLC — GH LLC

provided indemnity for board members and officers in its corporate documentation — Creditors were officers and board members of GH LLC — G Ltd. provided indemnity for directors and officers in its corporate documentation, but only one creditor was found to be director and officer — That creditor would not receive any payment from G Ltd. based on agreement subordinating his claims against G Ltd. to claims of T Inc., and amounts owing to T Inc. — Other companies in GG did not provide indemnity to creditors in corporate documentation or agreement — GG did not acknowledge liability to indemnify creditors — Monitor did not knowingly approve payment of creditors' defence costs of arbitration.
Bankruptcy and insolvency --- Priorities of claims — Restricted and postponed claims — Officers, directors, and stockholders
Equity claims — GG was group of companies under protection pursuant to Companies' Creditors Arrangement Act (CCAA) — GH LLC was parent of other companies in GG — Creditors were officers and board members of GH LLC — T Inc. invested in GG by way of debt and equity — T Inc. brought arbitration proceedings against creditors for recovery of its investment in GG — Creditors filed proof of claim against GG based on indemnity provisions — Creditors claimed they were entitled to indemnification by GG in respect of any damages award made against them in arbitration — Creditors disputed monitor's disallowance of indemnity claims — Monitor brought motion for advice and directions relating to creditors' indemnity claims — Motion was granted — Creditors' claims, as equity claims, were not to be paid until all other claims were paid in full, pursuant to s. 6(8) of CCAA — T Inc.'s claims in arbitration were equity claims, so creditors' claims for indemnity against those claims in CCAA process were also equity claims — T Inc. brought claims against creditors for breach of contract, fraud, rescission, negligent misrepresentation, breach of fiduciary duty, for purpose of recovering its investment made in GH LLC — Fact that T Inc.'s claim was based on those causes of action did not make it any less of claim in equity because T Inc. was seeking return of its equity investment.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Equity claims — GG was group of companies under protection pursuant to Companies' Creditors Arrangement Act (CCAA) — GH LLC was parent of other companies in GG — Creditors were officers and board members of GH LLC — T Inc. invested in GG by way of debt and equity — T Inc. brought arbitration proceedings against creditors for recovery of its investment in GG — Creditors filed proof of claim against GG based on indemnity provisions — Creditors claimed they were entitled to indemnification by GG in respect of any damages award made against them in arbitration — Creditors disputed monitor's disallowance of indemnity claims — Monitor brought motion for advice and directions relating to creditors' indemnity claims — Motion was granted — Creditors' claims, as equity claims, were not to be paid until all other claims were paid in full, pursuant to s. 6(8) of CCAA — T Inc.'s claims in arbitration were equity claims, so creditors' claims for indemnity against those claims in CCAA process were also equity claims — T Inc. brought claims against creditors for breach of contract, fraud, rescission, negligent misrepresentation, breach of fiduciary duty, for purpose of recovering its investment made in GH LLC — Fact that T Inc.'s claim was based on those causes of action did not make it any less of claim in equity because T Inc. was seeking return of its equity investment.

Table of Authorities

Cases considered by *Newbould J.*:

Nelson Financial Group Ltd., Re (2010), 71 C.B.R. (5th) 153, 75 B.L.R. (4th) 302, 2010 ONSC 6229, 2010 CarswellOnt 8655 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

Generally — referred to

s. 2(1) "equity claim" — referred to

s. 6(8) — considered

MOTION by monitor for advice and directions in connection with indemnity claims made by creditors.

***Newbould J.*:**

1 This is a motion brought by BDO Canada Limited in its capacity as the Court-appointed Monitor of Gandi Innovations Limited, Gandi Innovations Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co, and

Gandi Special Holdings LLC (the "Gandi Group") for advice and directions, and particularly to determine preliminary issues in connection with the indemnity claims made by Hary Gandy, James Gandy and Trent Garmoe (the "Claimants") against all of the Gandi Group.

2 The Gandi Group is under CCAA protection. The Monitor was appointed in the Initial Order on May 8, 2009.

3 The business and assets of the Gandi Group have been sold with court approval. The proceeds from the sale are being held by the Monitor for eventual distribution to unsecured creditors pursuant to a plan of compromise and arrangement.

Arbitration proceedings and indemnity claims

4 Gandi Innovations Holdings LLC ("Gandi Holdings") was incorporated pursuant to the laws of the State of Delaware on August 24, 2007. On September 12, 2007, the Gandi Group re-organized their business structure so that Gandi Holdings became the direct or indirect parent of the other various entities comprising the Gandi Group.

5 TA Associates Inc. is a general partner for a number of TA partners. In conjunction with the reorganization of Gandi Holdings, it advanced approximately US $75 million on September 12, 2007 by way of debt and equity to the Gandi Group. The advance consisted of:

> (i) an equity investment in the amount of US $50 million made pursuant to the terms of a Membership Interest Purchase Agreement in respect of Gandi Holdings dated as of September 12, 2007 made between, among others, Gandi Holdings, TA Associates and the Claimants in their personal capacities; and
>
> (ii) an unsecured loan in the amount of US $25 million which amount was guaranteed by other members of the Gandi Group.

6 In January 2009, TA Associates commenced an arbitration proceeding against the Claimants. In the arbitration TA Associates claim damages against the Claimants in an amount of US $75 million with interest, being the total amount of TA Associates' investment in the Gandi Group. The arbitration has not yet been heard on its merits.

7 On December 20, 2010, the Monitor received proofs of claim of Hary Gandy and James Gandy against the Gandi Group in the approximate amount of $76 million and a proof of claim of Trent Garmoe against the Gandi Group in an approximate amount of $88 million. The Claimants assert an entitlement to indemnification by the Gandi Group in respect of any award of damages which may be made against them in the arbitration together with all legal fees incurred by the Claimants in defending the arbitration.

8 The proofs of claim filed by the Claimants rely on indemnity provisions set out in the Amended and Restated Limited Liability Company Agreement of Gandi Holdings and a separate Indemnification Agreement made by Gandi Holdings entered into in connection with the Membership Agreement made at the time of the TA Associates investment with Gandi Holdings. Gandi Holdings is the only Gandi entity that is a party to these indemnity agreements.

9 On March 11, 2011 the Monitor disallowed the indemnity claims and advised the Claimants that based on the evidence filed in support of the indemnity claims, any indemnity claim would be solely against Gandi Holdings.

10 The Claimants have served notices of dispute and have provided to the Monitor a memorandum of articles of Association of Gandi Canada which provides an indemnity in favour of directors and officers of Gandi Canada in certain circumstances.

11 There is also an indemnity of Gandi Innovations Hold Co ("Gandi Hold Co"). At the relevant times James Gandy was the sole director of the company.

12 There has been an extensive search for corporate documents. The Monitor made inquiries of Jaffe Raitt Heuer & Weiss Inc., former corporate counsel of the Gandi Group, and learned that all of corporate governance documents of the

Gandi Group, at Hary Gandy's request, had been sent to Stikeman Elliot LLP, insolvency counsel for the Gandi Group, following the CCAA filing date. Counsel for the Monitor attended at the offices of Stikeman Elliott and reviewed the corporate governance documents in its possession.

13 In addition the Monitor contacted counsel for Agfa, the purchaser of the assets of the Gandi Group, to inquire if it has in its possession copies of the Gandi Group's corporate governance records. The Monitor was advised by counsel for Agfa that Agfa was not able to find any corporate governance documents of the Gandi Group entities.

14 The Monitor also reviewed the books and records of the Gandi Group in storage. In addition, the Monitor advised the Claimants that should they wish to undertake a review of the Gandi Group's records in storage, the Claimants were invited to contact the Monitor and arrange for such review. The review was arranged and conducted by the Claimants on June 3, 2011.

15 It is a fact that there are not in existence documents that support the Claimants all being entitled to indemnities from each corporate entity in the Gaudi Group.

Issues

16 Whether the Claimants will ever be with held liable in the arbitration is not yet known. However, whether the Claimants have rights to indemnification against all of the Gandi Group or against only Gandi Holdings and Gandi Hold Co will assist the Monitor in determining whether to proceed with a consolidated plan of arrangement or file an alternative plan excluding Gandi Holdings and/or Gandi Hold Co which would enable the Monitor to make a meaningful distribution to unsecured creditors prior to the completion of the arbitration.

17 There is another preliminary issue. In the arbitration, TA Associates seeks to recover against the Claimants their equity investment of US $50 million, for which the Claimants in turn have sought indemnification from the Gandi Group. The Monitor seeks a preliminary determination as to whether these claims for indemnification relating to the claim by TA Associates for its equity investment constitute "equity claims" under the CCAA. A determination of this issue will assist the Monitor in determining the maximum amount which can be claimed by the Claimants and may facilitate an earlier distribution of funds available to unsecured creditors.

Discussion

(a) Indemnity agreements

18 An Amended and Restated Limited Liability Company Agreement of Gandi Holdings dated September 12, 2007 provides for an indemnity by Gandi Holdings in section 6.8(a) for board members and officers. There is no dispute that the Claimants were officers and board members of Gandi Holdings. It also contains in section 7.6 an indemnity for Members as follows:

> (a) Without limitation of any other provision of this Agreement executed in connection herewith, the Company agrees to defend, indemnify and hold each Member, its affiliates and their respective direct and indirect partners (including partners of partners and stockholders and members of partners), members, stockholders, directors, officers, employees and agents and each person who controls any of them...

19 Superwide Limited Partnership is a Member and the Claimants are partners of Superwide. Thus the Claimants are indemnified by Gandi Holdings by that provision as well.

20 There is a form on indemnity agreement made between Gandi Holdings and indemnitees. The form in the record is an unsigned copy dated September 11, 2007. Neither the monitor nor any of the parties have been able to locate any of these agreements signed in favour of the Claimants. Hary Gandi, who swore an affidavit for the Claimants, said that a copy of this agreement was signed between Gandi Holdings and each of the Claimants on September 12, 2007. It contains the following:

> WHEREAS, the Company desires to provide Indemnitee with specific contractual assurance of Indemnitee's rights to full indemnification against litigation risks and related expenses (regardless, among other things, of any amendment to or revocation of the Company's LLC Agreement or any change in the ownership of the Company or the composition of its Board of Managers) ...
>
> . . .
>
> 3. Agreement to indemnify... if Indemnitee was or is a party or is threatened to be made a party to any Proceeding by reason of Indemnitee's Corporate Status, Indemnitee shall be indemnified by the Company against all Expenses and Liabilities incurred ...."

21 Assuming that this form of indemnity agreement was signed by Gandi Holdings and the Claimants, they would be covered by it.

22 The Claimants contend that each of the corporate entities in the Gandi Group signed an indemnity in favour of each of them. This is based on a statement in the affidavit of Hary Gandy that Gandi Holdings and the other CCAA Respondents provided additional indemnities to him, James Gandy and Trent Garmoe dated September 12, 2007. He attached to his affidavit a form of the indemnification agreement to be signed by Gandi Holdings. No affidavit was filed from James Gandy or Trent Garmoe.

23 There is no form of indemnity agreement in existence which names an indemnifier other than Gandi Holdings.

24 The date of September 12, 2007, said to be the date that all of the entities in the Gandi Group signed indemnities in favour of each of the claimants, was the date of the investment by TA Associates in which it purchased a membership interest in Gandi Holdings only. Representatives of TA Associates received identical indemnities from Gandi Holdings. There is no evidence that any indemnities from any of the other Gandi Group entities were made at that time. To the contrary, the Membership Interest Purchase Agreement under which TA Associates purchased its membership interest in Gandi Holdings contained as a condition to closing a requirement that Gandi Holdings sign an indemnification agreement. The indemnification was only to be given by Gandi Holdings. There was no requirement for an indemnity to be given by any other entity in the Gandi Group,.

25 I do not accept the bald statement of Hary Gandy that all of the entities in the Gandi Group gave indemnities at the time. The only indemnities that were given were by Gaudi Holdings.

(b) Memorandum and articles of Gandi Hold Co

26 In the course of its investigation, the Monitor did locate an indemnity granted by Gandi Hold Co in its Memorandum and Articles in favour of its directors and officers. Those articles contain an indemnity in the same terms as the indemnity in the Gandi Innovations Limited articles, as discussed below. As the Monitor does not seek a determination regarding indemnities given by Gandi Hold Co, I need not discuss whether one or more of the Claimants is entitled to be indemnified by these articles.

(c) Articles of Association of Gandi Innovations Limited (Gandi Canada)

27 The articles of this company contain an indemnity as follows:

> Every director or officer, former director or officer, or person who acts or acted at the Company's request, as a director or officer of the Company, a body corporate, partnership or other association of which the Company is or was a shareholder, partner, member or creditor and the heirs and legal representatives of such person, in absence of any dishonesty on the part of such persons shall be indemnified by the Company...in respect of any claim made against such person ... by reason of being or having been a director or officer of the Company. [emphasis added]

28 The corporate records sent to the Monitor by the corporate solicitors who incorporated the company name James Gandy as the president, treasurer and secretary and as the sole director. Hary Gandy stated at the outset of his affidavit filed on behalf of the claimants that he was the president and chief executive officer and chairman of the board of the companies that made up the Gandi Group. There are no corporate records that support that assertion and on his cross-examination he acknowledged he had no documents, including board resolutions, contracts or appointment letters to show that he was ever a director or officer of Gandi Innovations Limited. He said that he was directing the business of all of the entities. On his cross-examination, he said that as far as he was concerned, James Handy and Trent Garmoe were directors and officers of the company.

29 James Gandy did not file any affidavit to say that he was not the president, treasurer and secretary of the company, as shown in the corporate records. Trent Garmoe did not file any affidavit. I think it fair to draw an adverse inference that their evidence would not have been helpful to their case.

30 The affidavit of Bruce Johnston filed on behalf of TA Associates states that Hary Gandy and Trent Garmoe were not directors or officers of Gandi Innovations Limited and that a document printed from the Nova Scotia Registry of Joint Stock Companies which was included in the closing documents for TA Associates' investment showed that James Gandy was the only director and officer of Gandi Innovations Limited.

31 There has been an extensive search for corporate documents but none have been found that would support Hary Gundy or Trent Garmoe as being an officer or director of Gandi Innovations Limited.

32 It is argued that the indemnity in the articles of Gandi Innovations Limited is in favour not only of officers and directors, but also "persons who acted at the Company's request as a director or officer of the Company", and that Hary Gandy and Trent Garmoe acted as directors and officers at the Company's request. There is certainly no documentary evidence of that. Presumably the request would have had to come from James Gandy, who is the sole officer and director according to the corporate records. There is no evidence from any of the Claimants that any request was made to Hary Gandy or Trent Garmoe to act as an officer or director of Gandi Innovations Limited, which one would have expected if the assertion was to be made.

33 It is also argued that the board of managers (the Delaware concept of a board of directors) of Gandi Holdings operated the subsidiaries as if they were officers and directors of the subsidiaries. Again, there is no documentary evidence of that and no evidence from any of the Claimants to support the assertion. While Hary Gandy may have operated the business in a functional sense, that does not mean that he was acting as an officer or director of any subsidiary in the corporate sense. This is not mere semantics. TA Associates made a large investment, and one of the corporate documents provided on closing was the Nova Scotia Registry of Joint Stock Companies that showed only James Gandy as an officer and director. If all of the Claimants are entitled to be indemnified by Gandi Innovations Limited, it will impact the claim of TA Associates in the CCAA proceedings.

34 In the circumstances, I find that the only person entitled to indemnification from Gandi Innovations Limited is James Gandy.

35 However, in connection with the financing provided by TA Associates, James Gandy executed a Subordination Agreement dated as of September, 12, 2007 under which he agreed that any liability or obligations of Gandi Canada to him, present or in the future, would be deferred, postponed and subordinated in all respects to the repayment in full by Gandi Innovations of all indebtedness, liabilities and obligations owing to TA Associates in connection with the purchase by TA Associates of US $25million in notes. Until that obligation to pay the notes in full with interest has been fulfilled, any claim by James Gandy under the indemnity from Gandi Innovations Limited is subordinated to the claim of TA Associates.

36 The debt claim of TA Associates of $46,733,145 has been accepted by the Monitor. Assuming that the purchase price on the sale of the assets to Agfa is received in full, the monitor expects a distribution to unsecured creditors of

approximately 27% of the value of their claims. In such circumstances, James Gundy will have no right to receive any payment from Gandi Innovations Limited in respect of his indemnity claim.

(d) Other Gaudi Group entities

37 It was asserted by the Claimants that because the Gandi companies operated essentially as one integrated company, it should be inferred that the constating documents of the other entities in the Gandi Group contained the same indemnity as contained in the bylaws of Gandi Innovations Limited and Gandi Hold Co. I do not agree.

38 Gandi Innovations LLC is a Texas company. Its Amended and Restated Operating Agreement contains the types of things normally contained in a general bylaw of an Ontario corporation. It contains no provision for indemnities. It was argued that as no articles were obtained from Texas, it could be assumed that the articles contained an indemnity provision similar to that contained in the bylaws of Gandi Innovations Limited and Gandi Hold Co. I asked counsel to obtain whatever documentation was available in Texas, and subsequently the Monitor received from its US counsel, Vinson & Elkins LLP, a copy of articles of organization for Gandi Innovations LLC dated August 2, 2004. There is nothing in these articles dealing with indemnities. Vinson & Elkins LLP advised that these articles, together with amending articles already in the possession of the Monitor, are the only corporate governance documents on file with the State of Texas.

39 Gandi Special Holdings LLC is a Delaware corporation. The Limited Liability Company Agreement of Gandi Special Holdings LLC, like the Texas company, contains the types of things normally contained in a general bylaw of an Ontario corporation. It contains no provision for indemnities. Following the hearing, the Monitor obtained through Vinson & Elkins LLP a Delaware Certificate of Formation of Gandi Special Holdings LLC. This document contains no provision for indemnities. A certificate of the Secretary of State of Delaware confirms that there were no other relevant documents on file and this was confirmed by Vinson & Elkins LLP.

40 I find that there is no indemnity in favour of the Claimants in the corporate documentation of Gandi Innovations LLC and Gandi Special Holdings LLC.

41 It is also argued on behalf of the Claimants that the Gandi Group have acknowledged an obligation to indemnify the Claimants and it is said that this arises from a meeting of the board of Gandi Holdings. It is argued that the Gandi Group through the Monitor is thus estopped from denying an indemnity for all of the Gandi Group companies. A document said to be minutes of a meeting of the board of managers of Gandi Holdings held on March 4, 2009 is relied on. That document contains the following paragraph:

> The next item on the agenda was the indemnification of the officers. It was generally agreed that all parties would follow the Purchase Agreement between Gandi Innovations and TA Resources dated September 12, 2007: Counsel for TA had previously expressed the opinion that indemnification was not allowed under the purchase agreement. Counsel for James Gandy, Hary Gandy and Trent Garmoe together with the Corporate Counsel, Matthew Murphy had previously expressed verbal opinions that the indemnification of the officers was permitted under the Purchase Agreement. Lydia Garay, as the only member not involved in the dispute between TA and the key holders, voted to follow the advice of Corporate Counsel, Matthew Murphy. To avoid any misunderstanding, Corporate Counsel would be requested to express that opinion in writing.

42 I do not see this paragraph in the informal minutes as assisting the Claimants. It is a meeting of the board of Gandi Holdings. It says that it was generally agreed that all parties would follow the purchase agreement between Gandi Holdings and TA resources dated September 12, 2007. That purchase agreement provides for an indemnity by only Gandi Holdings. Assuming that the minutes reflect a desire of some board members to indemnify officers of subsidiary corporations, and assuming that the Claimants thought they were officers of all of the subsidiary corporations, it is quite clear from the paragraph that there was a difference of view. The minute states that counsel for TA Associates had previously expressed the opinion that indemnification was not allowed under the purchase agreement and that counsel

for the Claimants together with corporate counsel, Matthew Murphy, expressed the opposite opinion. The minute states that Lydia Garay, the only member not involved in the dispute between TA Associates and the key holders, voted to follow the advice of Corporate Counsel Terry Murphy and to avoid any misunderstanding, corporate counsel would be requested to express that opinion in writing.

43 The affidavit of Bruce Johnston on behalf of TA Associates, who attended that meeting of the board of managers of Gandi Holdings swears that the Claimants voted to place Lydia Garay, a longtime employee and officer of Gandi Holdings, on the board despite a verbal agreement that he had with the Claimants to leave that board seat vacant and to work with him to appoint an outside independent board member. He stated Ms. Garay was completely reliant on the Gandy family for her job security and compensation.

44 Mr. Johnston also states in his affidavit that the indemnification of the Claimants was discussed and that he and Mr. Taylor took the position that indemnification was not permitted. He said the Claimants took the position that indemnification was permitted, despite the language of the purchase agreement, and took the position that corporate counsel for Gandi Holdings had previously given a verbal opinion that indemnification was permitted under the purchase agreement. After hearing that, and during the meeting, Mr. Johnston sent an e-mail to Mr. Murphy who two minutes later responded that he had not advised on the question of an indemnity under the purchase agreement. Mr. Johnson states that he then read that e-mail at the meeting. I accept his evidence on this.

45 Whether or not Ms. Garay was a disinterested or proper member of the board of management of Gandi Holdings, the minute states that she voted to follow the advice of corporate counsel. At the next board meeting on May 4, 2009, Ms. Garay said that she had sought the written opinion of corporate counsel but had not received it. To date no opinion from Mr. Murphy has surfaced. On the face of those minutes from March 4, 2009, there has been no approval of any indemnities in favour of the Claimants for other corporations. I cannot find on the evidence that there was any agreement that the Claimants would be indemnified by subsidiary corporations, nor is there any evidence that any subsidiary corporation ever enacted any documentation of any kind to provide such indemnities. The opposite is the case, as has been discussed.

46 Finally, the Claimants allege that the Gandi Group has previously acknowledged their liability to indemnify the Claimants for any damage, award or legal costs incurred by the following actions:

> (i) certain Gandi entities made payments of defence costs in connection with the arbitration both pre-and post the CCAA filing; and
>
> (ii) the Monitor allegedly approved payment of post-filing defence costs.

47 Until the sale of the Gandi Group to Agfa was completed, this CCAA proceeding was a debtor in possession restructuring with the business and affairs of the Gandi Group being managed by their officers and directors, specifically Hary Gundy and Trent Garmoe. Payments of legal fees to Langley and Banack Inc., U.S. lawyers for the Gandi Group and the Claimants, were made by or on authorization of Trent Garmoe.

48 Pursuant to the terms of the Initial Order, the Monitor was required to approve all expenditures over $10,000 before payment was made. The Monitor approved payment of legal fees to counsel for the Gandi Group on the general understanding that such fees were incurred by the Gandi Group in connection with the Gandi Group's insolvency proceeding and for general corporate work for the Gandi Group.

49 I accept the statement of the Monitor that it did not knowingly approve the payment of the Claimants' defence costs in connection with the arbitration.

50 Subsequent to the completion of the sale to Agfa, the Monitor learned that a nominal amount of the legal fees approved by the Monitor was subsequently allocated to cover the costs of the arbitration. I accept the statement of the

Monitor that it had no input, knowledge or control over such allocation, and had it been consulted, would have been opposed to such allocation as it did not involve any member of the Gandi Group.

51 In the circumstances there is no basis for the assertion that the Monitor is somehow estopped by reason of the payment of legal fees from denying that there are other indemnities in favour of the Claimants.

(e) Are the Claimants claims debt or equity claims?

52 This involves the application of provisions of the CCAA to the claims asserted by TA Associates in the arbitration.

53 Section 6(8) of the CCAA provides:

> 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.

54 In s. 2(1) of the CCAA, equity claims are defined as follows:

> "equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (a) a dividend or similar payment,
>
> (b) a return of capital,
>
> (c) a redemption or retraction obligation,
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

55 This definition of equity claim came into force on September 18, 2009. Although this provision does not apply to the Gandi Group's CCAA proceedings which commenced shortly prior to the legislative amendments, courts have noted that the amendments codified existing case law relating to the treatment of equity claims in insolvency proceedings. In *Nelson Financial Group Ltd., Re* (2010), 75 B.L.R. (4th) 302 (Ont. S.C.J. [Commercial List]), Pepall J. stated:

> The amendments to the CCAA came into force on September 18, 2009. It is clear that the amendments incorporated the historical treatment of equity claims. The language of section 2 is clear and broad. Equity claim means a claim in respect of an equity interest and includes, amongst other things, a claim for rescission of a purchase or sale of an equity interest. Pursuant to sections 6(8) and 22.1, equity claims are rendered subordinate to those of creditors.

56 If the claims in the arbitration commenced by TA Associates against the Claimants are equity claims, the claims by the Claimants in the CCAA process for contribution or indemnity in respect of those claims would be equity claims. The Claimants contend that the claims in the arbitration are not equity claims.

57 The claims in the arbitration by TA Associates against the creditors include claims for various breaches of contract, fraud, rescission, or in the alternative, recissory damages, negligent misrepresentation, breach of fiduciary duty and tortious interference with advantageous business relationships and prospective economic advantage.

58 In the arbitration TA Associates seeks to recover the investment that it made in Gandi Holdings, including the US $25 million debt secured by promissory notes and the US $50 million equity investment made by way of a membership subscription in Gandi Holdings.

59 The Claimants assert that the claim for US $50 million by TA Associates cannot be an equity claim because it is based on breaches of contract, torts and equity. I do not see that as being the deciding factor. TA Associates seeks the

return of its US $50 million equity investment because of various wrongdoings alleged against the Claimants and the fact that the claim is based on these causes of action does not make it any less a claim in equity. The legal tools that are used is not the important thing. It is the fact that they are being used to recover an equity investment that is important.

60 In *Nelson Financial Group Ltd., Re*, *supra*, at Peppall J. stated that historically, the claims and rights of shareholders were not treated as provable claims and ranked after creditors of an insolvent corporation in a liquidation. She also stated:

> This treatment also has been held to encompass fraudulent misrepresentation claims advanced by a shareholder seeking to recover his investment: *Re Blue Range Resource Corp*. In that case, Romaine J. held that the alleged loss derived from and was inextricably intertwined with the shareholder interest. Similarly, in the United States, the Second Circuit Court of Appeal in *Re Stirling Homex Corp*. concluded that shareholders, including those who had allegedly been defrauded, were subordinate to the general creditors when the company was insolvent.

61 As the amendments to the CCAA incorporated the historical treatment of equity claims, in my view the claims of TA Associates in the arbitration to be compensated for the loss of its equity interest of US $50 million is to be treated as an equity claim and that the claims of the Claimants for indemnity against that claim is also to be treated as an equity claim in this CCAA proceeding.

Order

62 An order in the form of a declaration shall go in accordance with these reasons.

Order accordingly.

Footnotes

* Additional reasons at *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* (2011), 2011 CarswellOnt 14401, 2011 ONSC 7465 (Ont. S.C.J. [Commercial List]).

TAB 24

members would be $30, entitling each claimant to a distribution of about $4.50 (figures which Barr and Lackowski do not dispute; although Cirak argues that some consumers made repeated purchases of Twinlabs steroid hormones totaling a few hundred dollars each). Presumably, each claimant would have to show some proof of purchase, such as the product bottle.[6] Because the Debtor ceased marketing these products in 2003, many purchasers would no longer have such proof. Those who did might well find the prospect of someday recovering $4.50 not worth the trouble of searching for the old bottle or store receipt and filing a proof of claim. Claims of class members would likely be few and small. The only real beneficiaries of applying Rule 23 would be the lawyers representing the class. *Cf. Woodward,* 205 B.R. at 376–77. The Court has discretion under Rule 9014 to find that the likely total benefit to class members would not justify the cost to the estate of defending a class action under Rule 23.

Accordingly, for each and all of the foregoing reasons, the Court issued its Orders of July 20, 2005 expunging all remaining consumer class claims.

6. Theoretically, the Court could allow claims on the basis of an affidavit swearing from memory that the claimant had purchased a Twinlabs ephedra product. Sometimes, however, memory must be presumed unreliable. The *Lackowski* action, for example, is limited to a Twinlabs product called Metaboli*ft,* which was marketed in competition with Metaboli*fe,* the most widely distributed ephedra product made not by Twinlabs but by an unrelated competitor. Yet another ephedra product called Metab–O–Lite was simultaneously marketed by a third unrelated company.

In re WORLDCOM, INC., et al., Reorganized Debtors.

No. 02 B 13533(AJG).

United States Bankruptcy Court, S.D. New York.

May 26, 2005.

Background: Chapter 11 debtors objected to proof of claim filed by investor.

Holdings: On debtors' motion for summary judgment, the Bankruptcy Court, Adlai S. Hardin, Jr., J., held that:

(1) the section of the Bankruptcy Code subordinating claims for damages arising from purchase or sale of securities applied to the "colossal" fraud allegedly perpetrated by debtors against this investor as well as to smaller frauds perpetrated against smaller investors;

(2) the discharge exception for securities fraud claims applies only to individual debtors, not to corporate debtors; and

(3) the Code's subordination provision applied to investor's claim, even if its damages were based on investor having retained its stock because of debtors' failure to disclose the fraud.

Motion granted, objection sustained, and claim subordinated.

1. Bankruptcy ⇐2969

Section of the Bankruptcy Code subordinating claims for damages arising from purchase or sale of securities does not discriminate between great frauds, which caused major damages to large and sophisticated investors, and petty swindles

involving little companies which caused small investors to lose small amounts or, perhaps, their pensions or life savings; instead, the statute applies evenhandedly to swindles both great and small leading to claims for rescission or damages by investors both great and small. Bankr.Code, 11 U.S.C.A. § 510(b).

2. Bankruptcy ⚿3343.1

Discharge exception for securities fraud claims is applicable only to individual debtors and has no application to corporate debtors. Bankr.Code, 11 U.S.C.A. § 523(a)(19).

3. Bankruptcy ⚿2969

Section of the Bankruptcy Code subordinating claims for damages arising from purchase or sale of securities applies on its face and by its plain language to claims that may be said to arise from a purchase or sale of securities; Congress did not provide that subordination of claims should depend upon any factual findings or legal analysis based upon the "nature, scope and extent of reasonable risk" to which any particular purchasers of stock subscribed, or thought they subscribed, when they purchased their stock. Bankr.Code, 11 U.S.C.A. § 510(b).

4. Bankruptcy ⚿2969

So long as the nature of the damage or harm complained of by a shareholder can be said to result as a consequence of his having purchased or sold shares of stock or other securities of the debtor, the claimant falls within the scope of the section of the Bankruptcy Code subordinating claims for damages arising from purchase or sale of securities, and it is not up to the courts to decide that certain types of damage or harm were not contemplated by Congress or should otherwise not be included within the scope of the statute. Bankr.Code, 11 U.S.C.A. § 510(b).

5. Bankruptcy ⚿2969

From the perspective of the section of the Bankruptcy Code subordinating claims for damages arising from purchase or sale of securities, it makes no difference whether the stockholder's loss in the value of his stock was caused by a pre-purchase fraud which induced his purchase, or a post-purchase fraud, embezzlement, looting, or other corporate misconduct which undermined the value of his stock; in either case, the stockholder's loss represented by diminution in or destruction of the value of his stock ultimately constitutes a claim for damages derived from his ownership of stock and, therefore, "arising" from his purchase of the stock, whether the stockholder retained his stock or sold it. Bankr.Code, 11 U.S.C.A. § 510(b).

Weil, Gotshal & Manges LLP, by Adam P. Strochak, New York City, for Reorganized Debtors.

Edwards & Angell LLP, by Selinda A. Melnik, New York City, for Merck Finck & Co.

MEMORANDUM OPINION RESOLVING OBJECTION TO CLAIM OF MERCK FINCK & CO.

ADLAI S. HARDIN, JR., Bankruptcy Judge.

Before the Court is reorganized debtors' motion for summary judgment on debtors' Fourteenth Omnibus Objection to certain claims. This opinion grants the motion and sustains the debtors' objection to the claim of Merck Finck & Co. ("Merck").

Jurisdiction

This Court has jurisdiction over this proceeding under 28 U.S.C. §§ 1334(a) and

157(a) and the standing order of referral to Bankruptcy Judges signed by Acting Chief Judge Robert J. Ward on July 10, 1984. This is a core proceeding under 28 U.S.C. § 157(b).

Background

On July 21, 2002 and November 8, 2002, WorldCom, Inc. and certain of its direct and indirect subsidiaries (collectively, the "debtors" or "WorldCom") filed petitions under Chapter 11 of the Bankruptcy Code. The debtors' Chapter 11 cases were consolidated for procedural purposes and jointly administered. On October 31, 2003 the Court confirmed the debtors' Modified Second Amended Plan (the "Plan").

Most of the objections contained in the Fourteenth Omnibus Objection have been resolved. The objection dealt with in this Opinion was argued at a hearing on May 11, 2005.

Discussion

As stated in Merck's July 14, 2003 Objection to the debtors' Fourteenth Omnibus Objection:

> 5. Merck holds in excess of 130,000 shares of WorldCom stock purchased prior to the disclosures of WorldCom's fraudulent acts, accounting manipulations and financial reporting irregularities. Through the financial reporting, accounting manipulations, misrepresentations and malfeasance of WorldCom and its agents, Merck was fraudulently induced to purchase and retain holdings in WorldCom, causing Merck damages of at least $850,000 and potentially in excess of $6 million, for which claim Merck timely filed a Proof of Claim which is the subject of the Debtors' [Fourteenth Omnibus Objection].[1]

The Fourteenth Omnibus Objection, as to Merck, is based on Section 510(b) of the Bankruptcy Code, 11 U.S.C. § 510(b), which provides as follows:

> (b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

The debtors assert that the Merck claim falls squarely within Section 510(b) and must be subordinated to the priority of common stock, which receives nothing under the Plan.

[1] Merck argues that "Merck's Claim for damages occasioned by the Debtors' massive fraud should not be subordinated pursuant to Bankruptcy Code section 510(b)" and that "section 510(b) simply should not be applicable" because "WorldCom engaged in a measure of fraudulent and tortious conduct through which Merck was harmed that is wholly disproportionate to any conceivably contemplated by the risk-allocation/risk-purchase theories and analyses articulated by Professors John J. Slain and Homer Kripke and others upon which Congress predicated the Bankruptcy Code's 'absolute priority' rule and the subordination of securities-related claims through Bankruptcy Code section 510(b)." (Merck's July 14, 2003 Objection ¶¶ 6, 7 at

1. The damages of "potentially in excess of $6 million" is unexplained in the record before the Court.

pp. 3–4, footnotes omitted) Amplifying on this argument, Merck continues:

> 19. This is not a situation where the purchaser of stock in a company undertook "normal" expected investor risk and "lost" and now yells foul in an attempt to slip past the absolute priority rule and gain equanimity [sic] of treatment with general unsecured creditors. Merck undertook "normal" risk—it did not undertake risk of fraud of the "colossal" magnitude that WorldCom perpetrated, nor did it take the risk that neither "big four" independent auditors nor the United States Government watchdogs would uncover such fraud or prevent communication to the public of the resultant massive and destructive misinformation. . . .

(*Id.* at 7–8)

The statute, however, does not discriminate between great frauds like WorldCom, which caused major damages to large and sophisticated investors like Merck, and petty swindles involving little companies which cause small investors to lose small amounts (or, perhaps, their pensions or life savings). The statute applies evenhandedly to swindles both great and small leading to claims for rescission or damages by investors both great and small. In the unlikely event that "colossal" frauds ought to be treated in a manner different from ordinary frauds, it will be for Congress to so provide, not the courts.

Merck also relies on the Sarbanes–Oxley Act, asserting that "[a]s part of Sarbanes–Oxley, section 523(a)(19) was added to the Bankruptcy Code specifically to '[a]mend the Bankruptcy Code to make judgments and settlements based upon securities law violation **nondischargeable, protecting victims' ability to recover their losses**' " (*id.* at ¶ 10 at 4, quoting from legislative history, emphasis added by counsel for Merck).

[2] The simple answer to this contention is that Section 523(a)(19) is applicable only to individual debtors. It has no application to corporate debtors such as WorldCom.

Recognizing this, Merck suggests that "it is arguable that Congress intended that nondischargeability of securities fraud claims in bankruptcy apply to both individual and corporate debtors and that the Sarbanes–Oxley drafters did not recognize that the dischargeability provisions of section 523(a) apply only in bankruptcy proceedings respecting individual persons." (*Id.* ¶ 12 at 5) This appears to pay undue disrespect to the Sarbanes–Oxley drafters. But if the drafters were indeed as confused as Merck suggests, it will be for Congress to change the statute, not this Court.

In its Objection dated July 23, 2004 to the debtors' motion for summary judgment, Merck posits that there are "issues of fact" precluding summary judgment, which Merck identifies as follows at page 6 of the 2004 Objection:

> (a) The nature, scope and extent of reasonable risk to which purchasers of stock subscribe when they purchase equity securities in a public company predicated upon public disclosures prepared by prominent accountancy firms and submitted to and disseminated through the United States Securities and Exchange Commission;
>
> (b) The nature, scope and extent of actual harm to which Merck Finck was subjected after purchasing the equity securities of WorldCom;
>
> (c) Whether the nature, scope and extent of actual harm to which Merck Finck was subjected after purchasing the equity securities of WorldCom was beyond the nature, scope and extent of

reasonable risk described in paragraph 3(a) hereinabove; and

(d) The nature and extent of damage suffered by Merck Finck through the acts and omissions, defalcations and intent of WorldCom.

[3] The "nature, scope and extent of reasonable risk to which purchasers of stock subscribe" (paragraphs (a) and (c)) does not give rise to any triable issue of fact for two reasons. First, it is tautological to say that the purchaser of stock in a corporate enterprise "subscribes" to whatever good fortune or fatal vicissitudes may bring to the venture to produce success or utter failure. Obviously, the sophisticated and intelligent persons and firms who invested in WorldCom, Enron, Global Crossing and the whole litany of corporate fiascos of recent years never imagined that their investments would be subjected to the kinds of risks that brought these and many other companies into bankruptcy in recent years. But the plain fact is that all of these debacles happened, and when Merck and other investors purchased their stock, that is exactly what they "subscribed" to, just like all the other disappointed investors in this or any other era of capitalism. The second reason that the question of investor risk does not give rise to a triable issue of fact is that nothing in the statute calls for such an inquiry. The statute applies on its face and by its plain language to claims that may be said to arise from a purchase or sale of securities. Congress did not provide in Section 510(b) that subordination of claims should depend upon any factual findings or legal analysis based upon the "nature, scope and extent of reasonable risk" to which any particular purchasers of stock subscribed, or thought they subscribed, when they purchased their stock. It is not for the courts to discriminate among investors based on factual criteria such as risk which Congress did not prescribe.

[4, 5] The same may be said with respect to the purported issues of fact relating to the "actual harm" or the "damage" suffered by Merck (paragraphs (b) and (d)). So long as the nature of the damage or harm complained of by a shareholder can be said to result as a consequence of his having purchased or sold shares of stock or other securities of the debtor, the claimant falls within the scope of Section 510(b), and it is not up to the courts to decide that certain types of damage or harm were not contemplated by Congress or should otherwise not be included within the scope of the statute.[2] In this case the harm or damage sustained by Merck is the total loss in value of its WorldCom stock and, as such, arises from its purchase of that stock. The damage and harm sustained by Merck, whether proximately caused by fraud in the inducement of its purchase, or the retention of its ownership, or misappropriation or other malfeasance of management, arises from and is based upon Merck's purchase and ownership of WorldCom stock and as such is squarely within the scope of Section 510(b).

At the oral hearing on May 11, 2005, counsel for Merck argued for the first time

2. Obviously, owners of securities of a debtor may also hold a variety of claims against the debtor not derived from their purchase or sale of the debtor's securities. For example: (i) a stockholder who is injured by a vehicle owned and operated by the debtor may have a tort claim which is quite unrelated to his ownership of stock; (ii) a debenture holder may have a claim against the debtor for breach of contract to supply widgets which is entirely independent of his status as a debenture holder; (iii) a stockholder may have a claim against the debtor for money loaned to the corporation which is independent of his ownership of stock. But no claim unrelated to Merck's ownership of WorldCom stock is alleged.

that Merck's claim for damages against WorldCom was not based on either a purchase or a sale of WorldCom stock but, rather, was based upon Merck's having *retained* its WorldCom stock because of WorldCom's failure to disclose the colossal fraud. Counsel argued that Merck's claim for damages arises not "from the purchase or sale" of the stock but from Merck's having been fraudulently induced to *retain* the stock instead of selling it before disclosure of the fraud, after which the stock price plummeted, eventually to zero.[3] Since no purchase or sale was involved, Merck argues, Section 510(b) does not apply.

The purported distinction between a stockholder damage claim in respect of the purchase or sale of a security, on the one hand, and a damage claim in respect of retention of the security, on the other, is entirely illusory and must be rejected as a matter of law. Assuming, *arguendo* (and contrary to Merck's July 14, 2003 Objection at ¶ 5, quoted above), that Merck was not "fraudulently induced to purchase" its WorldCom stock, that the colossal fraud post-dated Merck's purchase of WorldCom stock, and that Merck did not sell and still retains its WorldCom stock, the nature of the damages suffered by Merck is functionally indistinguishable from the nature of the damages sustained by the shareholder who sold his stock or who was induced by fraud to purchase his stock. Stated differently, Merck's claim (if any) against the corporation arises from the fact of it having purchased stock, whether before or after the colossal fraud, and whether Merck ultimately sold its stock and thereby realized a loss or retained the stock until it became valueless, in which case it suffered exactly the same loss as that of the stockholder who sold his stock, differing only in the quantum of the loss actually sustained. From the perspective of Section 510(b), it makes no difference whether the stockholder's loss in the value of his stock was caused by a pre-purchase fraud which induced his purchase, or a post-purchase fraud, embezzlement, looting, or other corporate misconduct which undermined the value of his stock. In

3. It is difficult to imagine what kind of a claim, if any, a WorldCom stockholder such as Merck might have *against WorldCom itself* if the stockholder was *not* induced to purchase his stock by fraud of the corporate entity. Once a security holder has purchased his security, his investment is at risk of whatever may befall the corporation thereafter, including economic recession or depression, business reverses due to competition, technological obsolescence, acts of God or terrorism, gross financial or operational mismanagement, and misappropriation or other wrongdoing by management. If a corporation experiences problems after an investor buys stock in the corporation, the fact that management may cause the corporation to publish statements and reports that hide its problems (resulting in a fraud-inflated stock price) does not in and of itself harm the existing investor—indeed, the investor will benefit by the fraud if he innocently sells his stock before public disclosure of the fraud. The harm to the existing stockholder lies in the problems themselves, for which the stockholder has no claim against the corporation itself (although the corporation may have claims against officers, directors or others who caused the problems, which the stockholder may be able to assert derivatively on behalf of the corporation). Public disclosure of the problems cannot help the existing stockholder to avoid loss due to existing problems, since the "efficient market" will promptly cause the market price of the security in question to reflect the negative information disclosed. Disclosure to the stockholder could enable him to avoid loss on his stock only if he received inside information of the undisclosed problems and could thereby sell out at the fraud-inflated price before public disclosure, in violation of securities laws. But the issue of whether Merck has any claim against WorldCom at all is academic in the context of this contested matter, since the outcome is the same whatever may be the nature and validity of Merck's claim.

either case, the stockholder's loss represented by diminution in or destruction of the value of his stock ultimately constitutes a claim for damages derived from his ownership of stock and therefore "arising" from his purchase of the stock, whether the stockholder retained his stock or sold it.

Upon the foregoing analysis, Section 510(b) does not appear ambiguous to this Court in the context of this dispute. Nevertheless, some courts "have viewed this language as ambiguous* and have tended to adopt a broad meaning of the term 'arising from.' ** " ***COLLIER ON BANKRUPTCY*** ¶ 510.04[1][3] at 510–13–510–14 (15th Ed. Rev.Rel. 87—9/03) (citing * *Allen v. Geneva Steel Co.* (*In re Geneva Steel Co.*), 281 F.3d 1173 (10th Cir.2002); *In re Granite Partners, L.P.,* 208 B.R. 332, 339 (Bankr.S.D.N.Y.1997) and * * *Allen v. Geneva Steel Co.* (*In re Geneva Steel Co.*), 281 F.3d 1173 (10th Cir.2002); *Baroda Hill Inv., Inc. v. Telegroup, Inc.* (*In re Telegroup, Inc.*), 281 F.3d 133 (3d Cir. 2002); *Frankum v. Int'l Wireless Communications Holdings, Inc.* (*In re Int'l Wireless Communications Holdings, Inc.*), 279 B.R. 463 (D.Del.2002), *aff'g In re Int'l Wireless Communications Holdings, Inc.,* 257 B.R. 739 *(Bankr.D.Del.2002); In re NAL Fin. Group, Inc.,* 237 B.R. 225 (Bankr.S.D.Fla.1999)). In this Court's view, the better reasoned decisions have found that "retention" claims fall within the ambit of Section 510(b). *See, e.g., In re Granite Partners,* 208 B.R. at 338, which addressed "whether a claim that post-investment fraud induced an investor to hold on to and not sell his investment is a claim 'arising from the purchase or sale' of a security of the debtor." Although the court concluded that the phrase "arising from the purchase or sale" is ambiguous, it held that both components of the retention claim, *i.e.,* (1) the continuing concealment element and (2) the "charges that the debtors misrepresented their performance through the use of managers' marks, and issued false operating reports which induced the [claimants] to hold on to their investments," arose from a purchase or sale of the debtors' securities within the meaning of Section 510(b). *Id.* at 342. The *Granite Partners* court reasoned in part that:

> The charge of continuing concealment cannot exist independent of the initial fraudulent sale, *i.e.,* without fraud in the inducement, there cannot be a wrongful concealment.... Since the rescission claims indisputably come within section 510(b), interference with the rescission claims should not create a new and different claim, of greater priority, that shares *pari passu* with the other unsecured creditors.
>
> * * * * * *
>
> [The claimant] charges that the debtors misrepresented their performance through the use of managers' marks, and issued false operating reports which induced the [claimant] to hold on to their investments. Unlike the continuing concealment claim, the investor need not assert that he is a defrauded purchaser. Nevertheless, section 510(b) also subordinates this claim. First, from the creditors' point of view, it does not matter whether the investors initially buy or subsequently hold on to their investments as a result of fraud. In either case, the enterprise's balance sheet looks the same, and the creditors continue to rely on the equity cushion of the investment.
>
> Second, a fraudulent retention claim involves a risk that only the investors should shoulder. In essence, the claim involves the wrongful manipulation of the information needed to make an investment decision. The [claimant's]

charge that the debtors' [sic] wrongfully deprived them of the opportunity to profit from their investment (or minimize their losses) by supplying misinformation which affected their decision to sell. Just as the opportunity to sell or hold belongs exclusively to the investors, the risk of illegal deprivation of that opportunity should too. In this regard, there is no good reason to distinguish between allocating the risks of fraud in the purchase of a security and post-investment fraud that adversely affects the ability to sell (or hold) the investment; both are investment risks that the investors have assumed. *Id.* at 342.

To the same effect, *see In re Geneva Steel Co.*, 281 F.3d 1173 in which a claimant alleged that "company fraud caused him to retain his debt securities" (*id.* at 1175) and in an accompanying letter stated "that he had retained his notes, much to his detriment, because company officials remained silent in the face of growing financial difficulties." *Id.* "Essentially following the reasoning in *Granite Partners*, the court held that post-investment fraud that causes an investor to hold rather than sell his securities 'arises' from the 'purchase or sale' of those securities." *Id.* at 1179–1183.[4]

To summarize, the debtors' objection in the Fourteenth Omnibus Objection to Merck's claim for damages based upon the allegation that it "was fraudulently induced to purchase and retain holdings in WorldCom, causing Merck damages of at least $850,000 . . ." is unarguably within the scope of Section 510(b) of the Bankruptcy Code. In accordance with that provision, Merck's damage claim must be subordinated.

Debtors' counsel will submit an appropriate order.

In re Mark Allen KOVLER and Elyse Hope Kovler, Debtors.

Bettijaine Gentry and Gentry Promotions, Inc., Plaintiffs,

v.

Mark Allen Kovler and Elyse Hope Kovler, Defendants.

Bankruptcy No. 98–20635(ASH). Adversary No. 98–5227 (ASH).

United States Bankruptcy Court, S.D. New York.

July 22, 2005.

Nathan Horowitz, White Plains, NY, for Debtor.

4. Neither *Limited Partners Committee of Amarex, Inc. v. Official Trade Creditors' Committee of Amarex, Inc.* (*In re Amarex, Inc.*), 78 B.R. 605 (W.D.Okla.1987) nor *In re Angeles Corp.*, 177 B.R. 920 (Bankr.C.D.Cal.1995), *aff'd without op.*, 199 B.R. 220 (9th Cir. BAP 1996), as relied on by Merck Finck, involved mere retention claims (*i.e.*, alleged fraud of management that induced the security holder to refrain from selling his security) by holders of securities in the respective debtors. *Amarex* involved claims by limited partners not against the limited partnerships in which they held securities, but against Amarex, Inc., the general partner and manager of the limited partnerships, for damages for alleged mismanagement of the partnerships, breach of contract, breach of fiduciary duty, negligence and common law fraud. Similarly, *Angeles* involved tort claims by limited partners against the debtor Angeles Corp. for harm to the limited partnerships in which the claimants held securities. Neither of these cases addresses the type of claims here involved by a stockholder of the debtor against the debtor. Furthermore, the Tenth Circuit in *In re Geneva Steel*, 281 F.3d at 1181–82, has rejected the holding in *Amarex*.

TAB 25

tion, in this setting, whether illegal acts are discovered by the Trustee or by the government itself.

After *in camera* review of the documents produced by the Dabah Wives, known and unknown to the Trustee, I find that to turn them over to the Trustee would be testimonial. Thus they satisfy the first prong of the Act of Production analysis.

B. Incriminating Nature of the Documents

[20–23] The second prong of the Act of Production test requires a determination of whether the subpoenaed documents are potentially incriminating.[13] *United States v. Doe,* 465 U.S. 605, 612–13, 104 S.Ct. 1237, 1242, 79 L.Ed.2d 552 (1984) (quoting *Fisher v. United States,* 425 U.S. 391, 410, 96 S.Ct. 1569, 1580–81, 48 L.Ed.2d 39 (1976)). The summoned documents need not prove a crime in its entirety, but need tend only show a link in the chain of evidence. *See Hoffman v. United States,* 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). The Fifth Amendment "protects a witness from providing oral or written testimony that would furnish a link in the chain of evidence needed from criminal prosecution and attaches even if that risk is remote, for it is the possibility, rather than the likelihood, of prosecution that controls." *In re ICS Cybernetics, Inc.,* 107 B.R. 821, 827 (Bankr.N.D.N.Y.1989). However, "[t]he Fifth Amendment does not protect against all compelled testimony, but only against that which is self-incriminatory." *In re Grand Jury Subpoena Duces Tecum Dated November 13, 1984,* 616 F.Supp. at 1162.

Having inspected the subpoenaed documents, I them to be potentially incriminating. Accordingly, I must find that the Dabah Wives have satisfied the second prong of the test.

(b) The United States attorney thereupon shall inquire into the facts and report thereon to the judge, and if it appears that any such offense has been committed, shall without delay, present the matter to the grand jury, unless upon inquiry and examination he decides that the ends of public justice do not require investigation or prosecution, in which case he shall report the facts to the Attorney General for his direction.

18 U.S.C. § 3057.

CONCLUSION

The Dabah wives have timely and appropriately raised their Fifth Amendment privilege against self-incrimination. They will not be compelled to turn over any of the subpoenaed documents to the Trustee.

SETTLE ORDER.

In re GRANITE PARTNERS, L.P., Granite Corporation, and Quartz Hedge Fund, Debtors.

Bankruptcy Nos. 94 B 41683(SMB), 94 B 41684(SMB), and 94 B 41685(SMB).

United States Bankruptcy Court, S.D. New York.

May 14, 1997.

Trustee moved to subordinate investors' fraudulent inducement and fraudulent retention claims against Chapter 11 debtors. The Bankruptcy Court, Stuart M. Bernstein, J., held that: (1) investors' fraudulent maintenance claim alleging that debtors continued postinvestment to conceal their initial fraud which had induced investors to make investments was required to be subordinated; and (2) investors' fraudulent retention claim alleging that debtors misrepresented their performance inducing investors to hold on to their investments was required to be subordinated.

Motion granted.

13. The Fifth Amendment privilege against self-incrimination "is designed to protect testimony of a party or non-party witness which might later tend to subject that person to criminal prosecution. The criminal prosecution does not have to be probable or imminent and the witness 'need only show a reasonable probability that his answer will be used against him.' " *In re Endres,* 103 B.R. 49, 53 (Bankr.N.D.N.Y.1989) (internal citations omitted).

1. Statutes ⇐190

Statute clear and unambiguous on its face should be enforced according to its terms.

2. Statutes ⇐181(1)

When ambiguity exists in statute, court must attempt to discern legislature's intent.

3. Bankruptcy ⇐2969

Bankruptcy Code section mandating subordination of damage claims arising from purchase or sale of security of debtor was ambiguous as statute could either require that injury on which claim is based flow from actual purchase or sale or that purchase or sale must be part of causal link although injury may flow from subsequent event. Bankr.Code, 11 U.S.C.A. § 510(b).

4. Statutes ⇐223.1

In determining legislature's intent with regard to ambiguous statute, court may look to similar language in unrelated statutes that apply to similar persons, things, or relationships.

5. Statutes ⇐236

Court must construe remedial statute broadly to effectuate legislature's purpose.

6. Bankruptcy ⇐2969

Investors' fraudulent maintenance claim which alleged that Chapter 11 debtors continued postinvestment to conceal their initial fraud which had induced investors to make investments in debtors arose from purchase or sale of securities within meaning of Bankruptcy Code section mandating subordination of damage claims arising from purchase or sale of security of debtor. Bankr.Code, 11 U.S.C.A. § 510(b).

7. Bankruptcy ⇐2969

Investors' fraudulent retention claim which alleged that Chapter 11 debtors misrepresented their performance inducing investors to hold on to their investments arose from purchase or sale of securities within meaning of Bankruptcy Code section mandating subordination of damage claims arising from purchase or sale of security of debtor. Bankr.Code, 11 U.S.C.A. § 510(b).

Willkie Farr & Gallagher, New York City (Benito Romano, John R. Oller, of counsel), for Chapter 11 Trustee.

Berlack, Israels & Liberman, L.L.P., New York City (Steven E. Greenbaum, Edward S. Weisfelner, of counsel), for Unofficial Investors' Committee.

Gold Bennett & Cera, L.L.P., San Francisco, CA (Solomon B. Cera, Susan D. Resley, of counsel), Bernstein Litowitz Berger & Grossmann, L.L.P., New York City (Jeffrey A. Klafter, Robert S. Gans, of counsel), for Primavera Familienstiftung and Hubert Looser.

Cleary Gottlieb Steen & Hamilton, New York City (Thomas J. Moloney, Mitchell A. Lowenthal, Robin A. Henry, Carmine D. Boccuzzi, Jr., of counsel), for Kidder Peabody & Co., Inc.

Morgan, Lewis & Bockius, L.L.P., New York City (Gary G. Staab, Catherine A. Ludden, Gerald M. Freedman, of counsel), for Donaldson, Lufkin & Jenrette Securities Corporation.

MEMORANDUM DECISION AND ORDER SUBORDINATING INVESTORS' CLAIMS UNDER 11 U.S.C. § 510(b)

STUART M. BERNSTEIN, Bankruptcy Judge.

Section 510(b) of the Bankruptcy Code mandates subordination of damage claims "arising from the purchase or sale" of a security of the debtor.[1] Many of the debtors' shareholders and limited partners filed damage claims in these cases charging a variety of wrongs covering an extended period of

1. Section 510(b) provides as follows:
(b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

time. Some have alleged that the debtor's post investment fraud induced them to hold on to their interests rather than sell them. The issue that the Court must decide under section 510(b) is whether this post-investment fraud gives rise to the type of claim that must be subordinated. For the reasons stated below, the Court concludes that it does.

BACKGROUND

The background to these three cases is described in this Court's decision in *Goldin v. Primavera Familienstiftung (In re Granite Partners, L.P.)*, 194 B.R. 318 (Bankr. S.D.N.Y.1996) (*"Granite"*), and District Judge Robert W. Sweet's opinions in *Primavera Familienstiftung v. Askin*, No. 95 Civ. 8905, 1996 WL 494904 (Aug. 30, 1996) (*"Primavera"*), and *ABF Capital Management v. Askin Capital Management, L.P.*, 957 F.Supp. 1308 (1997) (*"ABF Capital"*). Briefly, the debtors invested in collateralized mortgage obligations created and sold, *inter alia*, by Kidder, Peabody & Co., Inc. ("Kidder"), Donaldson, Lufkin & Jenrette Securities Corp. ("DLJ") and Bear Stearns & Co., Incorporated ("Bear Stearns") (collectively, the "Brokers"). Approximately 130 entities purchased interests in the debtors, either as shareholders in Granite Corporation or Quartz Hedge Fund, or as limited partners in Granite Partners, L.P. The funds collapsed in late March and early April 1994, and the debtors filed their chapter 11 cases on April 7, 1994.

A. The Proofs of Claim

Seventy four investors filed proofs of claim (or interest) in these cases. The chapter 11 trustee, Harrison J. Goldin (the "Trustee"), objects to the claims, or alternatively, seeks to subordinate them under section 510(b), contending that they arise from the purchase or sale of a security in one or more of the debtors. Kidder and DLJ have joined in the latter request. The members of the unofficial investors committee ("UIC") [2], Primavera Familienstiftung ("Primavera") and Hubert Looser oppose the Trustee's motion.[3] The opponents acknowledge that any damage claims arising from a fraudulent inducement to invest in the debtors must be subordinated under section 510(b). They also contend, however, that they were duped into holding on to their investments as a result of the debtor's post-investment fraud. These fraudulent retention or maintenance claims, they argue, are independent torts, do not arise from the purchase or sale of the debtor's security, and hence, should share *pari passu* with the other, general unsecured claims.

Before answering the question, I must first consider who, among the many claimants, has asserted the type of post-investment fraud claim at issue. At the outset, and except for the UIC, Primavera and Looser, all of the other investors have either defaulted on the motion, or withdrawn their objections. Most of the claims assert fraud in some conclusory fashion. Some claimants filed only the official claim form; others annexed brief explanatory statements or documents, or both, but even these still allege fraud in the inducement.[4] None purport to assert a fraudulent retention claim.

B. The District Court Complaints

Primavera and the UIC have also filed district court complaints in which they allege

2. The UIC represent approximately 50% of the investors that filed claims. The committee itself has no independent standing, but for convenience, this decision refers simply to the UIC even though the reference to each of its members may be more accurate.

3. Additional investors, John G. Polk, Lionel N. Sterling and Whitehead Institute for Biomedical Research, also filed objections to the motions. These objections have since been withdrawn.

4. For example, Primavera filed a proof of claim in the Granite Corp. case in the amount of $1 million, and Looser filed a proof of claim in the Quartz case in the amount of $1.4 million. Both claimants attached nearly identical addenda stating that the "Debtor ... through ACM, Askin and Bradshaw–Mack, made false representations of material fact to Claimant's agent ... with the intent to deceive Claimant, which representations were relied upon by Claimant in his decision to invest in the Debtor ... and Claimant has been damaged thereby.... " (Trustee's *Motion to Expunge and Disallow, and/or to Subordinate and Classify Investor Claims*, dated Dec. 16, 1996); Ex. B–9 (Primavera Proof of Claim, dated Jan. 3, 1995); Ex. D–6 (Hubert Looser Proof of Claim, dated Jan. 3, 1995).

wrongdoing by the debtors or the debtors' insiders. Assuming that the debtors are liable under the doctrine of *respondeat superior* for any fraud or other wrong committed by their insiders, I will consider these allegations as amplifying the proofs of claim filed by the plaintiffs in those cases.

1. The Primavera Complaint

In its third amended complaint, dated November 8, 1996 ("Third Am. Compl."), Primavera charges federal securities fraud and common law fraud against the Brokers and the debtors' insiders.[5] Primavera did not name the debtors as parties because of the automatic stay, but the complaint includes a section devoted exclusively to their liability, and aptly titled, "Liability of the Granite Funds." The allegations in this section are limited to claims of fraudulent inducement. The section alleges misrepresentations in the "private placement memoranda and other marketing materials" relating to the debtors' investment strategy, (Third Am. Compl. ¶¶ 27–28), the use of sophisticated computer models, (id. at ¶ 29), and the leverage ratios and hedging strategy. (*Id.* at ¶ 30.) Primavera avers that it (and the members of the uncertified class it purports to represent) relied on these misrepresentations, (*id.* at ¶ 32), but does not say how. Nevertheless, the alleged misrepresentations relate to the marketing of the securities, and do not allege any post-investment fraud (other than the failure to perform in accordance with the pre-investment misrepresentations). Accordingly, the part of the complaint that Primavera expressly devoted to an exposition of the debtors' liability alleges only inducement claims.

Parsing the allegations asserted against the debtors' insiders leads to the same conclusion. In the first claim, based on section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act") and Rule 10b–5 promulgated thereunder,[6] Primavera alleges that the defendants made misrepresentations "to induce the plaintiff and the members of the class to purchase securities issued by the Granite Funds." (Third Am. Compl. at ¶ 117.) Further, "[h]ad the plaintiff and the members of the class known of the material adverse information not disclosed by the defendants', or been aware of the truth, they would not have purchased the Granite Funds securities." (*Id.* at ¶ 121.) These are fraudulent inducement, and not fraudulent retention, claims. Similarly, in its third claim based on common law fraud, Primavera alleges that the debtors' insiders made material misrepresentations with the intent of *inducing* the plaintiffs and members of the class to purchase securities issued by the debtors. (*Id.* at ¶ 132) (emphasis added.) As is apparent from a cursory reading of the Primavera complaint, the allegations against the debtors and their insiders raise pure inducement claims, and hence, must be subordinated pursuant to 510(b).

2. The UIC Compliant

This leaves the UIC, whose complaint in *ABF Capital* has already been the subject of a thorough decision by Judge Sweet. The complaint alleges, *inter alia*, that David Askin and Askin Capital Management, L.P. ("ACM"), two of the debtors' insiders,[7] continually issued false statements between September 1991 and March 1994, and that the plaintiffs relied on these false statements in purchasing and *retaining* their interests. *ABF Capital*, 957 F.Supp. at 1315–16. In particular, ACM, aided and abetted by the Brokers, used artificially-inflated performance results in reports sent to the investors. *Id.* at 1316.

The Brokers moved to dismiss the UIC's aiding and abetting claim. In their motion,

5. Primavera's second amended complaint, which was the subject of the Granite decision, was dismissed by District Judge Sweet with leave to replead some of the fraud claims. *See Primavera*, 1996 WL 494904, at *22.

6. Primavera could not allege a fraudulent retention claim under section 10(b) of the 1934 Act or Rule 10b–5. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737–38, 95 S.Ct. 1917, 1926–27, 44 L.Ed.2d 539 (1975). I am considering its securities fraud claims only on the possibility that Primavera alleges claims which, although not cognizable as securities fraud claims, may nonetheless state claims for fraudulent retention under state law.

7. ACM was also the debtors' investment advisor.

they sought to separate the fraudulent inducement and fraudulent maintenance claims, and argued that the latter were legally insufficient. Judge Sweet first broke the fraudulent maintenance claims down into two separate components: (1) ongoing misrepresentations of the debtors' performance and (2) concealment of the debtors' investment practices which prevented the plaintiffs from withdrawing their investments. *Id.* at 1328–29. He then assumed, without deciding, that the distinction between the inducement and maintenance claims was a valid one, *id.*, and proceeded to evaluate the motion.

First, Judge Sweet ruled that the misrepresentations regarding the debtors' performance stated a fraudulent maintenance claim. The plaintiffs alleged that the debtors' insiders, aided and abetted by the brokers, passed inflated marks on to the plaintiffs, and in reliance upon the false statements regarding performance, the plaintiffs retained their interests in the debtors. *Id.* Second, the allegations of a continuing concealment of the inducing fraud also stated a fraudulent maintenance claim:

> Moreover, the fraudulent maintenance claim is not predicated exclusively on the existence of post-investment statements, but on ACM's failure to disclose the falsity of the statements that initially induced the Plaintiffs' investments. ACM, which had a direct relationship with the Plaintiffs, clearly has an affirmative duty to disclose such information, and its failure to do so constitutes a primary fraud upon which an aiding and abetting claim can be based. Thus the primary fraudulent maintenance claim is adequately pleaded.

Id. The question for this Court is whether 11 U.S.C. § 510(b) mandates the subordination of either or both of the UIC's fraudulent maintenance claims.

DISCUSSION

A. Introduction

Any discussion of section 510(b) must begin with the 1973 law review article authored by Professors John J. Slain and Homer Kripke, entitled The *Interface Between Securities Regulation and Bankruptcy—Allocating the Risk of Illegal Securities Issuance Between Securityholders and the Issuer's Creditors,* 48 N.Y.U. L.Rev. 261 (1973) ("Slain & Kripke"). The article reviewed the state of the law, and, focusing on stockholders' rescission claims, opined that they should be subordinated to the payment of unsecured claims. Their conclusion flowed from an analysis based upon the allocation of two different types of risk: (1) the risk of the debtor's insolvency and (2) the risk of illegality in the issuance of the debtor's securities. *Id.* at 286.

According to Professors Slain and Kripke, both investors and creditors accept the risk of enterprise insolvency but to a different degree. *Id.* This stems from their dissimilar expectations. Even if the business prospers, the creditor anticipates no more than the repayment of his fixed debt. Further, the shareholder's investment provides an equity cushion for the repayment of the claim. *Id.* The investors, on the other hand, share the profits to the exclusion of the creditors. The shareholder's enhanced risk of insolvency represents the flipside of his unique right to participate in the profits. The allocation of the risk, as between the investor and the creditor, is reflected in the absolute priority rule, and should not be reallocated. *Id.* at 286–87.

In contrast, investors alone bear the risk of illegality in the issuance of securities. Moreover, no basis exists to shift any portion to creditors who are not offered the stock. *Id.* at 288. The authors analogized the situation to the principal debtor who defrauds its surety. While the surety has rights against the principal debtor, it may not withdraw from its undertaking, and thereby shift the risk of the principal debtor's fraud to creditors who relied on the undertaking. *Id.* For the same reason, a shareholder's fraud claim cannot be treated equally with the claims of general creditors. This improperly reallocates this risk to the latter class that has' relied on the equity cushion in extending credit to the debtor. *See Id.*[8]

8. Two months after the publication of the article, the Commission on the Bankruptcy Laws of the

There is a danger in reading Slain & Kripke too restrictively. It is true that the authors' analysis dealt exclusively with claims arising from fraud in the issuance of securities. They did not, however, intend to restrict their opinions regarding subordination to fraudulent issuance claims. Instead, their larger concern was the investor's claim against the issuer *based upon the loss of his investment:*

> We are only incidentally concerned with the precise predicate of a disaffected stockholder's efforts to recapture his investment from the corporation. For present purposes it suffices to say that when the basis of the stockholder's disaffection is either the issuer's failure to comply with registration requirements or the issuer's material misrepresentations, one or more state or federal claims may be made. Our purpose is to consider the impact of such claims on the distribution of the corporation's assets in bankruptcy and the development of a plan of reorganization under Chapter X.

Slain & Kripke at 267.

B. The Pre-Code Cases

The Slain & Kripke analysis figured in the post–1973 cases decided under the former bankruptcy act. In the seminal case, *In re Stirling Homex Corp.*, 579 F.2d 206 (2d Cir. 1978), *cert. denied*, 439 U.S. 1074, 99 S.Ct. 847, 59 L.Ed.2d 40 (1979), shareholders of the debtor appealed a lower court ruling that had subordinated their federal securities and other fraud claims relating to the acquisition of their interests. The Second Circuit framed the issue as "whether persons who were allegedly induced by fraud to purchase Homex stock should be allowed, in a reorganization proceeding, to assert claims in such a way as to achieve parity with ordinary unsecured tort and contract claimants." *Id.* at 211.

The Court assumed, for purpose of analysis, that the defrauded stockholders were creditors within the meaning of the Bankruptcy Act. *Id.* at 212. Nevertheless, equitable principles required subordination of their claims. "Where the debtor corporation is insolvent and is about to undergo complete liquidation, the equities favor the conventional general creditors rather than the allegedly defrauded stockholders." *Id.* at 213. Those who extend credit do so in reliance upon the equity cushion provided by the shareholders' investment and the absolute priority rule. *Id.* at 213–14. When the corporation is solvent, the relative priorities between creditors and shareholders are without significance. But

> [w]hen a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion.

Id. at 213 (quoting *Newton Nat'l Bank v. Newbegin*, 74 F. 135, 140 (8th Cir.1896)).

The Court turned for additional support to the Slain & Kripke analysis of risk allocation. Thus, while both creditors and investors assume the risk of insolvency, "only the investors should be forced to bear the risk of illegality in the issuance of the stock." 579 F.2d at 214. The subordination of the defrauded investor flows from the absolute priority rule. It reflects the different degree to which each class assumes the risk of insolvency, as well as the shareholders unique chance to share in the profit that accompanies business prosperity. *Id.* The Court also found newly enacted section 510(b), and its legislative history, to be persuasive. *Id.* at 214–15.

United States (the "Commission") issued its report and proposals. See Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 93–137, 93d Cong., 1st Sess., Pts. I & II (1973) ("Bankruptcy Commission Report"). Proposed section 4–406(a)(1) subordinated "any claim for rescission of the purchase of securities issued by the debtor corporation or for damages resulting from the purchase or sale of such securities." Bankruptcy Commission Report, Pt. II, at 115. According to the explanatory note following the section, the provision was intended to reach claims by holders of the debtor's securities that were based on "federal and state securities legislation, rules pursuant thereto, and similar laws," but would not affect any other claim (*e.g.*, a wage claim) which the investor also held. *Id.* at 116. The report does not explain the reason for the proposal other than that the Commission recommended it, *id.*, Pt. I, at 22, and does not mention the Slain & Kripke article.

Three subsequent Ninth Circuit cases decided under the former Bankruptcy Act relied on the Slain & Kripke risk analysis, the adoption of section 510(b) and the *Stirling* decision in reaching the same conclusion regarding the subordination of defrauded shareholder claims. *See In re Holiday Mart, Inc.*, 715 F.2d 430 (9th Cir.1983); *Falcon Capital Corp. Shareholders v. Osborne (In re THC Fin. Corp.)*, 679 F.2d 784 (9th Cir.1982); *Kelce v. U.S. Fin. Inc. (In re U.S. Fin. Inc.)*, 648 F.2d 515 (9th Cir.1980), *cert denied*, 451 U.S. 970, 101 S.Ct. 2046, 68 L.Ed.2d 348 (1981). *In re THC Fin. Corp.* involved claims of post-investment fraudulent conduct, and merits discussion. There, shareholders of Falcon Capital Corporation ("FCC") became shareholders of The Hawaii Corporation ("THC") through a merger. Under the merger agreement, the FCC shareholders became entitled to 400,000 shares of THC stock in exchange for their FCC stock. They received 100,000 shares immediately; the remaining 300,000 was placed in escrow. Their right to receive the escrowed shares depended on FCC achieving a certain level of earnings. *In re THC Fin. Corp.*, 679 F.2d at 785.

The shareholders never received the additional 300,000 shares. As a result, they filed fraud claims in the subsequent bankruptcy of THC Financial Corporation ("THCF"), THC's wholly-owned subsidiary. The shareholders contended that after the merger, THC and THCF conspired to suppress FCC's earnings and prevent them from receiving their additional shares. *Id.* The shareholders conceded that any claim against THC for fraud in the issuance of the stock would have to be subordinated. *Id.* at 786. They sought to distinguish their fraud claim, characterizing it as one against the issuer's subsidiary for an independent tort. *Id.*

The Ninth Circuit rejected the distinction, concluding that "the policy considerations that led us to subordinate the stockholder's claim in *U.S. Financial* apply with equal force." *Id.* The shareholders in both cases bargained for equity-type profits and equity-type risks when they purchased the stock, including the risk of fraud. *Id.* Without subordination, the THC shareholders would stand in front of the THC creditors in the line for THC's asset, the equity in THCF. *Id.* Further, although the shareholders characterized their claim as one for "interference with contractual relations," "inducement of breach of contract" and/or "conspiracy to defraud", their claim is essentially that of defrauded shareholders, and not victims of an independent tort. *Id.* at 787.

The Court reached this conclusion reasoning that the post merger conduct did not give rise to a separate tort, and related back to THC's fraud in the issuance of the stock. First, the shareholders' amended proof of claim stated that THCF and THC acted pursuant to a *continuing* scheme devised before and executed after the merger. *Id.* at 787 n. 5. Second, the fraudulent misrepresentations of THC and subsequent conduct of THCF did riot create two separate causes of action. *Id.* But even if they did, the absolute priority rule still required subordination of the claims against THCF. *Id.* at 787.

C. The Bankruptcy Code

In the present matter, the Trustee, Kidder and DLJ seek to subordinate the investors' fraudulent retention claims under section § 10(b). In particular, the parties dispute whether a claim that post-investment fraud induced an investor to hold on to and not sell his investment is a claim "arising from the purchase or sale" of a security of the debtor. As always, "[t]hough we may not end with the words in construing a disputed statute, one certainly begins there." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L.Rev. 527, 535 (1947).

[1, 2] The first principle of statutory construction is that a statute clear and unambiguous on its face should be enforced according to its terms. 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.02, at 5 (5th ed.1992 rev.) (*"Sutherland"*); *see Patterson v. Shumate*, 504 U.S. 753, 759, 112 S.Ct. 2242, 2247, 119 L.Ed.2d 519 (1992) (court must enforce a statute according to its terms); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989) (plain meaning conclusive except on rare occasions where it produces "a result demonstrably at odds with

the intentions of its drafters") (quoting *Griffin v. Oceanic Contractors, Inc.* 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982)); *Maritime Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.),* 920 F.2d 183, 185 (2d Cir.1990) (same). "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." 2A *Sutherland* § 45.02, at 6; *accord United States v. Iron Mountain Mines, Inc.*, 812 F.Supp. 1528, 1557 (E.D.Cal.1992). Where ambiguity does exist, a court must attempt to discern the legislature's intent. 2A *Sutherland* § 45.05, at 22–23; *see Patterson v. Shumate*, 504 U.S. at 761, 112 S.Ct. at 2248.

[3] Initially, the phrase "arising from the purchase or sale" is ambiguous, at least with respect to fraudulent maintenance claims. Something "arises" from a source when it originates from that source. *Webster's New International Dictionary* 117 (unabridged ed.1976); *Black's Law Dictionary* 108 (6th ed.1990). The phrase "arising from" signifies some causal connection. *Cf. Black's Law Dictionary* 108 (defining "arises out of"). A literal reading implies that the injury must flow from the actual purchase or sale; a broader reading suggests that the purchase or sale must be part of the causal link although the injury may flow from a subsequent event. Since the fraudulent maintenance claim cannot exist without the initial purchase, the purchase is a causal link. Reasonably well-informed persons could interpret section 510(b) in either sense, and hence, the section is ambiguous.

The legislative history provides some guidance to its meaning. In enacting section 510(b), Congress ascribed to the Slain & Kripke theory of allocating the risks of insolvency and the unlawful issuance of securities. H. Rep. 95–595, at 195 (1977).[9] The creditor relies on the equity cushion created by the investment, and does not share with ownership the potential benefit of profit. *Id.* Thus, "[t]he bill generally adopts the Slain/Kripke position," and "subordinates in priority of distribution rescission claims to all claims that are senior to the claim or interest on which the rescission claims are based." *Id.* at 196.

While these statements are helpful, they are not dispositive. Neither Congress, in enacting section 510(b), nor Slain and Kripke limited themselves to rescission claims. As noted, section 510(b) also subordinates claims for damages arising from the purchase or sale of the debtor's securities. Moreover, while Slain and Kripke focused on the unlawful issuance of securities and rescission claims, they were concerned with the broader issue of the "disaffected stockholder's efforts to recapture his investment from the corporation." Slain & Kripke at 267.

D. Other Federal Statutes

[4] In searching for Congress's intent, a court may also look to similar language in unrelated statutes that apply to similar persons, things or relationships. 2B *Sutherland* § 53.03, at 233. The use of similar language strongly indicates that the two statutes should be interpreted *pari passu*, particularly where they share the same raison d'etre. *Northcross v. Board of Educ.*, 412 U.S. 427, 428, 93 S.Ct. 2201, 2202, 37 L.Ed.2d 48 (1973). In this regard, consideration of the recent RICO amendment, enacted as part the 1995 Private Securities Litigation Reform Act, is appropriate. Section 1964(c) of Title 18, as amended, now provides as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue ... except that no person may rely upon *any conduct that would have been actionable as fraud in the purchase or sale of securities* to establish a violation of section 1962....

(Emphasis added.) The legislative history spells out Congress's purpose in unambiguous terms. It sought to eliminate fraud in the purchase or sale of securities as a predicate act for civil RICO actions (as well as related claims of wire and mail fraud) S.Rep. No. 104–98, 1995 WL 372783, at 39–40 (1995); H.R.Rep. No. 104–369, 1995 WL 709276, at 102–03 (1995); *accord Rowe v. Marietta Corp.*, 955 F.Supp. 836, 844 (W.D.Tenn.1997) (Congress intended to remove, as predicate

9. The relevant provision in the House bill, H.R. 8200, is proposed section 510(a)(2).

RICO acts, conduct otherwise actionable as fraud in the purchase or sale of securities).

The RICO amendment is highly instructive in construing section 510(b). In *ABF Capital*, the defendants moved to dismiss the UIC's RICO claims, contending that all of the investors' fraud claims (including the fraudulent maintenance claims) were barred by the RICO amendments, *i.e.*, that they were based upon "conduct that would have been actionable as fraud in the purchase or sale of securities." The plaintiff investors conceded that the amendment, if applicable, barred their RICO claims. *ABF Capital*, 957 F.Supp. at 1319–20. Further, Judge Sweet specifically ruled that the bar extended to the fraudulent maintenance claims "since the RICO amendments prohibit the bringing as a RICO claim of any conduct actionable as fraud in the purchase or sale of securities." *Id.*

While conceding that their fraudulent maintenance claims are based on conduct that would be actionable as fraud in the purchase or sale of a security, the UIC nevertheless contend that they do not arise from the purchase and sale of the debtors' securities within the meaning of section 510(b). They offer two reasons for the distinction. First, Judge Sweet's conclusion, they maintain, is "pure dicta." *Supplemental Brief of the Unofficial Investors' Committee Concerning Bankruptcy Code Section 510(b)*, dated Apr. 9, 1997, at 2 ("UIC Supp. Br."). Second, stark differences between the RICO amendment and section 510(b) concerning language, motive and legislative intent mean they should not be construed in an identical manner. *Id.* at 2–3.

The UIC's first point ignores their own argument. If Judge Sweet's conclusion is dicta, this is only because the UIC *conceded* that the RICO amendments, if applicable, barred all of their claims, and instead, argued that the amendment should not be applied retroactively.[10] But more to the point, the UIC ultimately agrees with Judge Sweet's analysis and his conclusion:

> In short, Congress gave every indication of its intent to eliminate all forms of securities-related fraud—whether related to an "inducement" or a "retention," whether arising under federal securities law or common law—as viable sources of RICO treble damages.

Id. at 11; *see also id.* at 8.

This brings us to the UIC's second point: even though the RICO amendment and section 510(b) use similar language, that language should be interpreted differently. No rule of logic or statutory interpretation supports this argument. Conduct which is actionable as fraud gives rise to a claim for damages. Indeed, although the UIC attempts to distinguish the two—RICO proscribes "actionable conduct" while section 510(b) addresses "claims" (*UIC Supp. Br.* at 8)—the UIC rely on the debtors' post-investment fraudulent conduct as the basis for their fraudulent maintenance claims. The conduct and the ensuing claim are the same side of the same coin.

10. It is far from clear that Judge Sweet's ruling regarding the fraudulent maintenance claim is dicta. According to the UIC, the members never asserted that their fraudulent maintenance claim could' support RICO liability. *UIC Supp. Br.* at 4. In fact, shortly before Judge Sweet's January 1997 decision, they implied that they held no such claim. When the Trustee objected to the allowance of all of the investors' claims, counsel for the UIC opposed the Trustee's discovery. They argued that the investors' claims were subordinated under section 510(b), and whether they held allowed claims was "relevant only to the investors' ability to pursue the equitable subordination, pursuant to Section 510(c), of other creditors' claims." Letter from Edward S. Weisfelner, Esq. to Hon. Stuart M. Bernstein 3 (Sept. 18, 1996) (annexed to *Reply Memorandum of the Trustee in Further Support of Motion to Expunge and Disallow, and/or to Subordinate and Classify Investor Claims*, dated Jan. 27, 1997, Ex. B)

The UIC's position obviously "evolved," and Judge Sweet considered the fraudulent maintenance claim at some length throughout the *ABF Capital* opinion. Thus, if, as the UIC imply, they limited their concession (regarding the reach of the RICO amendment) to the inducement claim, Judge Sweet had to consider whether the allegations of post-investment fraud described conduct "actionable as fraud in the purchase or sale of securities" before deciding if the RICO amendments also barred the fraudulent maintenance claim. *See Rowe v. Marietta Corp.*, 955 F.Supp. at 844.

The UIC suggests that the more relevant statutory analogy is to section 10(b) of the 1934 Act, and Rule 10b–5 promulgated thereunder. Section 10(b) and Rule 10b–5 proscribe fraud "in connection with" the purchase or sale of securities. The Supreme Court has held that Rule 10b–5 is limited to actual purchasers and sellers, and does not confer rights on a shareholder who decided not to sell due to "an unduly rosy representation or a failure to disclose unfavorable material." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737–38, 95 S.Ct. 1917, 1926, 44 L.Ed.2d 539 (1975); *accord Freschi v. Grand Coal Venture*, 551 F.Supp. 1220, 1227 (S.D.N.Y.1982).

The parties have engaged in a lively debate regarding whether "in connection with," as used in section 10(b) and Rule 10b–5, is broader than "arising from," as used in section 510(b). I am not so linguistically adept that I can agree that one is plainly broader than the other, if indeed, they are not actually synonymous. Further, it is not entirely clear that the portion of the UIC's fraudulent maintenance claim based upon a continuing concealment fails to state a claim under section 10(b) and Rule 10b–5. The substance of the concealment claim is that the UIC members held on to their investments because the debtors failed to disclose the inducing fraud. In other words, they retained their securities based upon the same misrepresentations that induced them to make the purchase. Where the same fraud induces both the purchase and the retention of the security, the purchaser may sue under section 10(b) and Rule 10b–5. *Marbury Management, Inc. v. Kohn*, 629 F.2d 705, 710 (2d Cir.), *cert. denied*, 449 U.S. 1011, 101 S.Ct. 566, 66 L.Ed.2d 469 (1980); *Kaufman v. Chase Manhattan Bank, N. A.*, 581 F.Supp. 350, 354 (S.D.N.Y.1984).

[5] In any event, the RICO amendment provides the better analogy. Section 510(b) and the RICO amendment are both remedial statutes designed to close loopholes. Section 510(b) prevents a shareholder from converting his interest into a claim and sharing *pari passu* with other unsecured creditors. The RICO amendment was intended to block a securities fraud plaintiff from resorting to RICO and its Draconian remedies. See S.Rep. No. 104–98, 1995 WL 372783, at 39–40; H.R.Rep. No. 104–369, 1995 WL 709276, at 102–03. A court must construe a remedial statute broadly to effectuate Congress' purpose. *See Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967) (remedial statutes should be liberally construed); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir.1996) (same).

While Rule 10b–5 was also intended to close a loophole, *Blue Chip Stamps v. Manor*, 421 U.S. at 766, 95 S.Ct. at 1939–40 (Blackmun, J., dissenting), it did this by creating rather than restricting an existing right. Courts should be reluctant to imply a cause of action significantly broader than Congress chose to apply. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 574, 99 S.Ct. 2479, 2488, 61 L.Ed.2d 82 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S.Ct. 242, 247, 62 L.Ed.2d 146 (1979) (" [I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."). In *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356 (1952), the Second Circuit Court of Appeals reviewed the history of section 10(b) and Rule 10b–5, juxtaposed it against other federal securities laws that created a private right of action, and concluded that they extended only to the actual, defrauded purchaser or seller. *Id.* at 464. The Supreme Court reaffirmed the *Birnbaum* rule in *Blue Chip Stamps*, observing that it barred a claim by one who held on to his shares as a result of fraud. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. at 737–38, 95 S.Ct. at 1926–27. The Supreme Court buttressed its reaffirmation of the *Birnbaum* rule with an extended analysis of the history of section 10(b), Rule 10b–5 and other relevant statutes, and a concern about the effect on securities litigation of expanding section 10(b) and Rule 10b–5 to reach those who neither purchased nor sold. The pedigree and purpose of these antifraud provisions, as well as the effect that a broad interpretation would have on litigation, differs markedly from section 510(b) of the Bankruptcy Code, and justifies a narrower

reading. Accordingly, the interpretation of the "in connection with" language that appears in section 10(b) and Rule 10b–5 does not provide persuasive authority for limiting section 510(b)'s like language in a like manner.

E. The UIC's Claims

While the two components of the UIC's fraudulent maintenance claims require separate consideration, I conclude that both arise from a purchase or sale of the debtors' securities within the meaning of section 510(b), and must be subordinated. This conclusion not only flows from Judge Sweet's interpretation of similar language in the RICO amendment, but also advances the policy choice that Congress made in enacting section 510(b). Further, a contrary ruling would eviscerate the absolute priority rule, and shift to creditors the investment risk assumed by the UIC.

[6] The claim that the debtors continued to conceal their initial, inducing fraud involves the more straightforward analysis, and also disposes of the threshold argument that post-investment conduct cannot give rise to a section 510(b) claim. *See, e.g., In re THC Financial Corp.*, 679 F.2d at 787 n. 5 (subordinating claims arising from a "continuing plan and scheme devised prior to the merger and effectuated subsequent thereto") (decided under the former Bankruptcy Act); *In re Lenco, Inc.*, 116 B.R. 141, 144 (Bankr. E.D.Mo.1990) (subordinating claims "based on the same set of operative facts and based on a continuing plan or scheme."). The charge of continuing concealment cannot exist independent of the initial fraudulent sale, *i.e.*, without fraud in the inducement, there cannot be a wrongful concealment. Further, absent subordination, the UIC can avoid section 510(b)'s mandate simply by ignoring the purchase and claiming that the debtors concealed their prior misrepresentations the day after the sale. In addition, the alleged continuing concealment and ongoing misrepresentations deprived the UIC of the chance to assert their rescission claims. *ABF Capital*, 957 F.Supp. at 1325–26. Since the rescission claims indisputably come within section 510(b), interference with the rescission claims should not create a new and different claim, of greater priority, that shares *pari passu* with the other unsecured creditors.

[7] The second component of the fraudulent retention claim arguably raises a more difficult question. The UIC charges that the debtors misrepresented their performance through the use of managers' marks, and issued false operating reports which induced the UIC to hold on to their investments. Unlike the continuing concealment claim, the investor need not assert that he is a defrauded purchaser. Nevertheless, section 510(b) also subordinates this claim. First, from the creditors' point of view, it does not matter whether the investors initially buy or subsequently hold on to their investments as a result of fraud. In either case, the enterprise's balance sheet looks the same, and the creditors continue to rely on the equity cushion of the investment.

Second, a fraudulent retention claim involves a risk that only the investors should shoulder. In essence, the claim involves the wrongful manipulation of the information needed to make an investment decision. The UIC charge that the debtors' wrongfully deprived them of the opportunity to profit from their investment (or minimize their losses) by supplying misinformation which affected their decision to sell. Just as the opportunity to sell or hold belongs exclusively to the investors, the risk of illegal deprivation of that opportunity should too. In this regard, there is no good reason to distinguish between allocating the risks of fraud in the purchase of a security and post-investment fraud that adversely affects the ability to sell (or hold) the investment; both are investment risks that the investors have assumed.[11]

Finally, the two cases upon which the UIC rely are distinguishable, and in any event, not persuasive. In In *re Amarex, Inc.*, 78 B.R. 605 (W.D.Okla.1987), *rev'g*, 53 B.R. 888 (Bankr.W.D.Okla.1985), the debtor, Amarex,

11. Moreover, the contrary conclusion can lead to an anomalous result. By holding on to their investment in the face of post-investment misinformation, the UIC purport to assert a non-section 510(b) claim. If, instead, a member sold his interest to a third party who relied on the same misinformation, the buyer would hold only a subordinated claim.

was a general partner in Amarex Private Drilling Programs, Ltd., 1978 through 1982 (the "Partnerships"), which it operated and through which it conducted much of its business. *Id.* at 606, 609.[12] Approximately 720 limited partners filed proofs of claim in the *Amarex* case [13] charging (1) violations of federal securities laws in connection with the issuance and sale of the Partnership units, and (2) subsequent mismanagement of the Partnerships resulting from breach of contract, breach of fiduciary duty, negligence and common law fraud. *Id.*[14] In addition, thirteen limited partners commenced a class action lawsuit against Amarex's officers, directors and auditors. The plaintiffs alleged federal securities law violations in connection with the issuance and sale of the Partnership units (corresponding to the first type of claim) and common law fraud (corresponding to the second). *Id.* at 607.

The bankruptcy court subordinated all of the claims under 510(b), adopting a "but for" test. The limited partners had asserted that the common law claims should not be subordinated because they were not claims relating to the purchase or sale of a security. The bankruptcy court disagreed, stating that "[t]hese plaintiffs would have no claims against the debtor but for their purchase of the securities, and had the purchase not occurred they would not have the pendent common law claims." *In re Amarex,* 53 B.R. at 891. The bankruptcy court also pointed to the pre-Code case law which explained that the rule underlying what became section 510(b) resulted from the allocation of risk between the shareholders and the creditors. *Id.* at 891. Accordingly, "[i]f the holders possess their claims because they assumed a risk in seeking a profit those claims are subordinate to claims of persons who sought simple payment of credit extended to the debtor." *Id.*

On appeal, the district court reversed. The limited partners conceded that their federal securities law claims had to be subordinated under section 510(b), but argued that Amarex's post-investment wrongdoing, as operator and general partner of the Partnerships, was not subject to subordination.[15] 78 B.R. at 609. The district court agreed. After considering the Bankruptcy Commission Report and the legislative history to the Bankruptcy Code, the district court concluded that "Section 510(b) reveals a Congressional desire to shift to the shareholders the risk of fraud in the issuance and sale of the security—no more." *Id.* at 609–10. Consequently, section 510(b) does not encompass claims based upon conduct by the issuer of the security that occurred after this event. *Id.* at 610.

The second case, *In re Angeles Corp.,* 177 B.R. 920 (Bankr.C.D.Cal.1995), *aff'd without op.,* 199 B.R. 220 (B.A.P. 9th Cir.1996) is factually similar to *Amarex.* There, the debtor managed sixteen non-debtor limited partnerships, but was not a general partner in any of them. *Id.* at 922. Several limited partners filed claims charging the debtor with acts of mismanagement, misconduct, fraud, breach of fiduciary duty and other wrongful conduct in relation to its management of the partnerships. *Id.* Initially, the court overruled the creditors' committee's objection that, under California law, the limited partners lacked standing to pursue these

12. The Partnerships filed their own chapter 11 cases more than one year after the Amarex filing.

13. The claims were filed before the Partnerships filed their own cases.

14. It appears that the limited partners also asserted direct contract claims against Amarex. These relate to Amarex's failure to advance interest payments due on the production and subscription loans of the limited partners and its liability to the limited partners under the various partnership agreements. *Id.* at 606.

15. Neither the bankruptcy court nor the district court discussed why section 510(b) was applicable. The securities at issue—the limited partnership interests—were presumably issued by the Partnerships, not Amarex. Thus, section 510(b) would apply to claims filed in the Amarex case—as these claims clearly were based on the date that they were filed—only if the Partnerships were affiliates of Amarex. This would hold true if Amarex operated the Partnerships' businesses or properties under a lease or operating agreement. 11 U.S.C. § 101(2)(C). The district court decision states that Amarex operated the Partnerships, and this may imply the existence of such agreements, but neither decision discusses the issue or contains any relevant findings.

claims. Although the court acknowledged the general rule that such claims belong to the partnership and not the partners, id. at 925, the court announced an exception that permits one partner to sue another partner guilty of a tort, such as conversion of partnership assets. *Id.*[16]

The court next addressed the question of subordination under 510(b).[17] Relying on the district court opinion in *Amarex*, the court held that the claims alleging fraud, mismanagement or breach of fiduciary duty were not claims "arising from the purchase or sale" of the limited partnership interest because they were based on wrongful conduct that occurred subsequent to the purchase of the security. Hence, they could not be subordinated under 510(b). *Id.* at 926–27.

I do not share the UIC's view that either of these cases is particularly compelling. First, neither court had the benefit of Judge Sweet's analysis of the 1995 RICO amendment or its application to the very complaint now before me. Second, I disagree with *Amarex* to the extent it implies, and *a fortiori*, with *Angeles* which holds, that a derivative injury to an entity can give rise to an investor's claim that is not subject to subordination under section 510(b).[18] Claims of mismanagement, waste and breach of fiduciary duty describe conduct which harms an entity directly, and its investors and creditors derivatively. *Granite*, 194 B.R. at 327–28. The investors and creditors suffer an indirect injury because the wrongful conduct erodes the entity's assets, making it less likely that it will be able to pay creditors and distribute profits to investors.

This is simply another way of describing insolvency. Yet under the absolute priority rule, the creditors stand ahead of the investors on the receiving line; the enterprise cannot distribute profits until it satisfies its creditors' claims. Twenty years ago, in *Stirling Homex*, 579 F.2d at 213, the Second Circuit counseled suspicion—with good reason—whenever an investor in an insolvent entity attempts to step up to the level of creditor. When an investor seeks *pari passu* treatment with the other creditors, he disregards the absolute priority rule, and attempts to establish a contrary principle that threatens to swallow up this fundamental rule of bankruptcy law. In this case, he also disregards the purposes of section 510(b).

CONCLUSION

The Trustee's motion to subordinate the investors' fraudulent inducement and fraudulent retention claims is granted. The parties shall contact chambers to schedule a conference to discuss any remaining issues raised

16. The courts conclusion appears to be incorrect. In support of the exception to the general rule, the court cited two general partnership cases, *Prince v. Harting*, 177 Cal.App.2d 720, 735–36, 2 Cal.Rptr. 545, 554–55 (Cal.Dist.Ct.App.1960) and *Laughlin v. Haberfelde*, 72 Cal.App.2d 780, 788–89, 165 P.2d 544 (Cal.Dist.Ct.App.1946). Under section 21 of the Uniform Partnership Act, in effect in California since 1929, one general partner can compel another to account for wrongful conduct. The exception to the general rule is not quite what the bankruptcy court stated it to be. Rather, as the cited authorities explain, California permits a general partner to sue another *at law*, for conversion or breach of fiduciary duty, without first compelling an accounting. *Accord Cobin v. Rice*, 823 F.Supp. 1419, 1428 (N.D.Ind. 1993) (discussing California law).

The exception had nothing to do with the matter before the *Angeles* court. The claimants were limited partners in limited partnerships. Under California law, any action for mismanagement of the partnership or breach of fiduciary duty by a third party must be brought directly by the partnership, or derivatively by the limited partners. *See* Cal. Corp.Code § 15702 (West 1997).

17. The *Angeles* decision does not explain why section 510(b) might be applicable to the limited partners' claims against the debtor. As with the *Amarex* case, the affiliated status may arise from an agreement between the debtor and the partnerships under which the debtor operated their businesses or properties.

18. In addition, the *Amarex* district court apparently read section 510(b) as limited to the "issuance and sale" of the security. The statute does not contain any such restriction, and is not limited to issuance-related claims. *In re Lenco, Inc.*, 116 B.R. 141, 144 (Bankr.E.D.Mo.1990). One who buys an outstanding share of stock on the open market from a third party, based upon false statements uttered by the issuer, holds a subordinated federal securities fraud claim in the issuer's bankruptcy. Although the investor never deals with the issuer, and does not allege fraud in connection with the issuance of the security, his claim would nonetheless fall within section 510(b).

by the Trustee's motion, and their disposition.

SO ORDERED.

In re Stephen H. ROSEN, Debtor.

Civil Action No. 95–2426(AJL).

United States District Court,
D. New Jersey.

March 24, 1997.

Chapter 13 debtor moved to cram down residence mortgage to its fair market value, and mortgagee moved for relief from automatic stay. The Bankruptcy Court denied debtor's motion and granted mortgagee's motion, and debtor appealed. The District Court, Lechner, J., held that: (1) Chapter 13 debtor could not cram down residence mortgage to its fair market value, on theory that "rents and profits" language in mortgage gave mortgagee a security interest in collateral other than debtor's principal residence; (2) language in Chapter 13 debtor's residence mortgage, purporting to grant mortgagee a security interest in escrowed funds which debtor had paid for real property taxes and hazard insurance, did not grant mortgagee an interest in any additional property "of debtor" beyond debtor's principal residence; and (3) decision to grant mortgagee's motion for relief from stay was not abuse of discretion.

Affirmed.

1. Bankruptcy ⇐3708(9)

Chapter 13 debtor could not cram down residence mortgage to its fair market value, on theory that "rents and profits" language in mortgage gave mortgagee a security interest in collateral other than debtor's principal residence and precluded mortgagee from invoking statutory protection against modification of rights of creditor whose claim is secured only by interest in debtor's principal residence; rents and profits would not exist but for mortgage property, and language in question did not, as practical matter, increase security available to mortgagee. Bankr. Code, 11 U.S.C.A. § 1322(b)(2); N.J.S.A. 46:3–16.

2. Bankruptcy ⇐3708(9)

Chapter 13 debtor could not cram down residence mortgage to its fair market value, on theory that "fixtures" language in mortgage gave mortgagee a security interest in collateral other than debtor's principal residence and precluded mortgagee from invoking statutory protection against modification of rights of creditor whose claim is secured only by interest in debtor's principal residence; because fixtures are, by definition, so connected to realty as to lose their independent interest, reference to fixtures did not increase mortgagee's security. Bankr.Code, 11 U.S.C.A. § 1322(b)(2); N.J.S.A. 46:3–16.

3. Bankruptcy ⇐3708(9)

Language in Chapter 13 debtor's residence mortgage, purporting to grant mortgagee a security interest in escrowed funds which debtor had paid for real property taxes and hazard insurance, did not grant mortgagee an interest in any additional property "of debtor" beyond debtor's principal residence, so as to permit modification of mortgagee's rights by plan which purported to pay it only the allowed amount of its secured claim; debtor lost any property interest in funds in question once they were placed in escrow account. Bankr.Code, 11 U.S.C.A. § 1322(b)(2).

4. Bankruptcy ⇐2422.5(1)

Determination as to whether "cause" exists for relief from automatic stay is appropriately made on case-by-case basis. Bankr. Code, 11 U.S.C.A. § 362(d).

5. Bankruptcy ⇐2422.5(1), 3784

Bankruptcy court has discretion to determine whether to lift automatic stay, and its exercise of such discretion is reviewable under "abuse of discretion" standard. Bankr. Code, 11 U.S.C.A. § 362(d).

Court File No. CV-17-589016-00CL

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 BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED AND KAMITUGA (BARBADOS) LIMITED

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES THE APPLICANTS AND THE REQUISITE CONSENTING PARTIES
(Plan Sanction Order)
VOLUME II OF II

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