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Court of Appeal File No.
Superior Court File No. CV-12-9667-00-CL

COURT OF APPEAL FOR ONTARIO

**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 IN THE MATTER OF SINO-FOREST CORPORATION**

Applicant

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

**NOTICE OF MOTION
(Motion for leave to appeal)**

August 16, 2012

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TO: THE SERVICE LIST

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THE MOVING PARTY, Ernst & Young LLP (“E&Y”), will make a motion to be heard by the Court in writing within 36 days after service of the moving party’s motion record, factum and transcripts, if any, or on the filing of the moving party’s reply factum, if any, whichever is earlier, at Osgoode Hall, 130 Queen Street West, Toronto, ON.

THE MOVING PARTY proposes that the motion be heard in writing as an opposed motion under under Rule 61.03.1(1) unless this Honourable Court orders otherwise under Rule 61.03.1(14)(b).

THE MOTION IS FOR:

1. An order granting leave to appeal to the Court of Appeal for Ontario from the order of the Ontario Superior Court of Justice made July 27, 2012 (the “Order”), that:

- (a) any claims made against the Applicant, Sino-Forest Corporation, (“SFC”) in the *Companies’ Creditors Arrangement Act* (the “CCAA”) proceedings resulting from the ownership, purchase or sale of an equity interest in SFC, are “equity claims” as defined by section 2 of the CCAA, including, without limitation, the claims by or on behalf of current or former shareholders asserted in the proceedings as listed in Schedule “A” to the Order (the “Shareholder Claims”); and
- (b) any claims for indemnification made against SFC related to or arising from the Shareholder Claims are “equity claims” as defined by section 2 of the CCAA, including, without limitation, claims for indemnification made by or on behalf of any of the other defendants to the proceedings listed on Schedule “A” to the Order;
2. An order staying the Order, pending the disposition of this leave motion and the appeal, should leave be granted;
3. An order that this leave motion be consolidated with the appeal, if leave be granted, and that they be heard together orally;
4. Costs of this motion; and
5. Such further and other relief as counsel may advise and this Honourable Court may consider just.

THE GROUNDS FOR THE MOTION ARE:

1. On March 30, 2012, SFC sought and was granted by order of the Ontario Superior Court of Justice protection from its creditors pursuant to the CCAA;
2. SFC and a number of other parties including E&Y (the moving party) are defendants in three class actions brought and currently pending in Ontario, Quebec and the Southern District of New York respectively (the "Class Actions"). The various proposed representative plaintiffs seek damages on behalf of proposed classes made up of past and present shareholders and noteholders of SFC;
3. E&Y was the auditor of SFC, *inter alia*, from 2003 to 2004 and from 2007 until it resigned on April 4, 2012. The Class Actions seek damages from SFC, E&Y and the other defendants in connection with certain alleged misrepresentations in the public disclosure of SFC;
4. On May 14, 2012, SFC sought and was granted relief in the CCAA proceedings in the form of a Claims Procedure Order, which established a procedure for the identification and determination of all claims against the Applicant SFC, its directors and officers and the subsidiaries of SFC. The Claims Procedure Order purported to establish a procedure to identify (and address any dispute in respect of) whether a claim is or is not an "equity claim" as defined in the CCAA;
5. E&Y, among other creditors, filed proofs of claim in the CCAA proceedings pursuant to the Claims Procedure Order on June 20, 2012, the claims bar date (the "Proofs of Claim"). E&Y's Proof of Claim included claims for contribution and indemnity (contractual, statutory and common law) from SFC and its directors and officers, in respect of the Class Actions and other

pending or threatened proceedings. As required under the Claims Procedure Order, E&Y's Proofs of Claim also provided detailed descriptions and support for its claims for contribution and indemnity from the subsidiaries of SFC;

6. Prior to the filing of the Proofs of Claim and in any event prior to any determination of those Proofs of Claim in accordance with the Claims Procedure Order, SFC, supported by the Monitor, brought a motion (by way of Notice of Motion dated June 8, 2012 and seeking a hearing date of June 15, 2012) for the pre-determination of whether or not the anticipated claims of shareholders and certain anticipated claims for contribution and indemnity, including the anticipated claim of E&Y, were "equity claims" within the meaning of the CCAA. The motion addressed only claims against SFC itself, and not claims against the subsidiaries of SFC, as specifically confirmed by counsel to the Applicant in oral argument;

7. The motion was ultimately heard on June 26, 2012;

8. The motion and the Order appealed from herein were and are premature;

9. There has been no determination of the nature, quality or quantity of any claims pursuant to the Claims Procedure Order or otherwise. As a result, there was a lack of any evidentiary basis for the Order made;

10. The motions judge erred by finding that the Shareholder Claims were "clearly equity claims". That finding was premature and wrong;

11. The motions judge erred by finding that “the inescapable conclusion is that the Related Indemnity Claims (as defined in the Order) are being used to recover an equity investment” and are therefore “equity claims”. That finding was premature and wrong;
12. The motions judge erred in concluding that E&Y’s claim was “in respect of an equity interest” as defined in the CCAA. E&Y was not and is not an equity holder in SFC. It does not assert a claim to assets of SFC as an equity holder nor does it assert any rights accorded to an equity holder;
13. The motions judge erred in failing to conclude that the actual and contingent losses in respect of which E&Y asserts a claim against SFC do not arise from a "claim" by equity holders being made against the Applicant, SFC, but arise from claims made directly against E&Y. Such claims are not captured by the definition of “equity claim”;
14. The motions judge erred in concluding that a finding that E&Y’s claims against SFC do not constitute "equity claims" would be inconsistent with the principles of the CCAA. The definition of "equity claim" in section 2 of the CCAA and the policy and principles behind it are to preclude shareholders of an insolvent company to participate, on a *pari passu* basis, with general creditors of the debtor company. E&Y is not a shareholder of SFC and is not in the same position as SFC’s shareholders. E&Y, as auditor of SFC, did not accept the same risks (and rewards) as SFC’s shareholders;
15. The motions judge erred in concluding that to consider E&Y’s claim as a general unsecured claim (and not an "equity claim") would put the shareholders in a position to achieve creditor status through their claim against E&Y. Any recovery by SFC’s shareholders against

E&Y is wholly independent of any recovery by E&Y against SFC for contribution and indemnity. It is E&Y that will not recover its losses if its claim for indemnity is denied, not the shareholders;

16. The motions judge erred in finding that the enactment of section 2(e) of the CCAA is not consistent with preceding case law. Such case law refused to subordinate the claims of auditors to other unsecured claims while subordinating claims of shareholders;

17. The motions judge erred in failing to conclude that the words "contribution or indemnity in respect of a claim" used in section 2(e) of the CCAA are meant to apply to claims arising from an indemnity granted in favour of shareholders of a company and not to claims arising from an indemnity granted in favour of an independent third party, including E&Y as auditor;

18. The motions judge erred in failing to acknowledge that a significant portion of E&Y's claim is not an indemnity claim but rather a claim for breach of contract and/or inducing breach of contract and/or a claim based upon fraudulent and/or negligent misrepresentation;

19. The motions judge erred in failing to conclude that the claims of E&Y against SFC are general unsecured claims;

The Test for Leave to Appeal is Met

20. There is good reason to doubt the correctness of the Order appealed. The proposed appeal involves matters of such importance that leave to appeal should be granted;

21. The proposed appeal is of profound significance to insolvency proceedings in general, to this CCAA proceeding in particular, and to the attendant risks borne by third party auditors (and

other independent third parties) with contractual, statutory or other claims for contribution and indemnity from applicants under the CCAA;

22. The relevant provisions of the CCAA came into force in 2009 and have not been interpreted by any appellate court in Canada. The pre-amendment jurisprudence is conflicting on the very matter at issue in the proposed appeal;

23. The appeal is of profound significance to this proceeding. The CCAA provides that holders of equity claims cannot vote on a Plan of Arrangement, nor participate in any distribution to creditors until all other categories of creditors have been paid in full. Classifying E&Y's claim as an equity claim subordinates that claim to the claims of all creditors, both secured and unsecured. There is no expectation that holders of "equity claims" will recover anything in this CCAA process. The matter at issue in the appeal is of critical importance to E&Y and the other third party claimants;

24. The matter at issue is also relevant and significant to the risk-shifting to third party auditors, which results from the decision of the learned judge, an effect well outside the policy underlying the statutory amendments to, and the purpose of, the CCAA;

25. The appeal is *prima facie* meritorious and is not frivolous;

26. The appeal will not unduly hinder the progress of the proceeding. E&Y is committed to having this appeal heard as soon as possible;

The Test for a Stay of Proceedings is Met

27. This Court has the power to stay the Order pending the outcome of this leave motion and the appeal, should leave be granted;

28. A stay is necessary. The Applicant has brought a motion, served on August 14, 2012, to have the Plan of Arrangement and Reorganization approved on August 28, 2012. The Plan of Arrangement and Reorganization subordinates the indemnity claims of E&Y to the claims of other creditors, based on the Order;

29. Unless the stay is granted, E&Y will be prejudiced and will suffer irreparable harm. The balance of convenience favours the granting of a short stay until the leave motion and proposed appeal can be determined;

30. E&Y asks that this motion for leave to appeal be heard as soon as possible by this Court and that the motion for leave be consolidated and heard together with the appeal, orally.

31. E&Y relies upon:

- (a) sections 2, 13 and 14 of the CCAA;
- (b) sections 106 and 134 of the *Courts of Justice Act*;
- (c) Rules 2, 3, 37, 61 and 63 of the *Rules of Civil Procedure*; and
- (d) such further and other grounds as counsel may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE
HEARING OF THE MOTION:**

1. The records filed on the motion before the Superior Court of Justice and such other evidence as counsel may advise; and
2. Such other evidence as counsel may advise and this Honourable Court may permit.

August 16, 2012

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